The Right of the Alien to Be Informed of Deportation Consequences before Entering a Plea of Guilty Or Nolo Contendere

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THE RIGHT OF THE ALIEN TO BE INFORMED OF DEPORTATION CONSEQUENCES BEFORE ENTERING A PLEA OF GUILTY OR NOLO CONTENDERE

The Immigration and Nationality Act provides for deportation of aliens convicted of specified crimes. Frequently, alien defendants offer guilty pleas unaware—or misinformed—that they thereby subject themselves to potential deportation. Traditionally, courts have not had to inform defendants of deportation consequences. Deportation, however, can be devastating to the alien and his family. This Comment suggests that a plea is not fully voluntary if offered unaware of such serious implications. Courts should be required to inform alien defendants of deportation consequences before accepting pleas of guilty.

INTRODUCTION

Alien residents of the United States encounter two separate modes of punishment when convicted of certain crimes. They, as all citizens, are first subject to the criminal sentence meted out by the criminal justice system. In addition, they then become vulnerable to the myriad consequences that arise from various specified convictions, chief of which for the alien is deportation. Given the enormous consequences for the alien and his family that result from such convictions, it is anomalous to the American judicial system that the alien, his attorney, and even the court frequently are unaware of the resultant and often inevitable deportation proceeding that arises from the alien’s conviction.

3. For example, upon conviction of a crime involving moral turpitude, such as petty theft or simple fraud, an alien can be subject to near imminent deportation, even though the actual sentence is slight, or even suspended.
The alien's plea to a criminal charge assumes critical dimensions for three primary reasons. First, a plea of guilty or nolo contendere is itself a conviction. Second, an overwhelming number of convictions arise not from actual trial proceedings, but from offered and accepted pleas of guilty. Third, aliens commonly offer pleas of guilty without any awareness that they are thereby subjecting themselves to possible deportation.

Studies have estimated that as many as ninety-five percent of all criminal cases result in guilty pleas, a substantial number of which are induced by plea bargains or discussions. Moreover, defendants frequently plead guilty while believing in or maintaining their innocence. The evidence against an accused can be so considerable that the offer of a lesser charge or the likelihood of a reduced or suspended sentence appears to be in his best interest. The United States Supreme Court, in North Carolina v. Alford, has held that

5. Boykin v. Alabama, 395 U.S. 238, 242 (1969). "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." See infra note 134 (plea of nolo contendere tantamount to conviction).

The question of guilt or innocence is not contested in the overwhelming majority of criminal cases. A recent estimate is that guilty pleas account for 90 percent of all convictions; and perhaps as high as 95 percent of misdemeanor convictions.

A substantial percentage of guilty pleas are the product of negotiations between prosecutor and defense counsel or the accused.

Id.
9. President's Comm'n supra note 8, at 11. "The most troublesome problem is the possibility that an innocent defendant may plead guilty because of the fear that he will be sentenced more harshly if he is convicted after trial or that he will be subjected to damaging publicity of a repugnant charge."
10. Fed. R. Crim. P. 11(e)(1)(A)-(C) provides that the government, in exchange for a plea of guilty or nolo contendere, can (1) move for dismissal of other charges; (2) make a recommendation or agree not to oppose the defendant's request for a particular sentence; or (3) agree that a specific sentence is the appropriate disposition of a given case.

The serious consequences of involuntary deportation... clearly [demonstrate] how the threat of deportation could be abused during plea negotiations. It can readily be imagined that some resident aliens might prefer to avoid even the risk of deportation rather than stand trial for crimes of which they believe them-
it is not a denial of due process for a defendant to offer a plea of guilty while maintaining his innocence. The Court, however, has not yet specifically addressed the unique problem faced by aliens who offer pleas of guilty or nolo contendere in ignorance of potential deportation consequences resulting from their plea.

Conduct Leading to Deportation

The United States Immigration and Nationality Act specifies nineteen grounds for deporting aliens. For purposes of this Comment, several are especially relevant since convictions for conduct in these delineated areas may cause the alien to be susceptible to later deportation proceedings with sometimes certain deportation consequences. These areas include crimes involving moral turpitude, crimes relating to narcotic drugs, crimes involving the illegal entry or the smuggling of aliens into the United States, crimes connected with prostitution, and certain weapons violations.

When deportation does follow from a violation of one of the enumerated grounds, the ramifications for the alien can be severe, if not devastating. Justice Black, for example, emphasized that the alien "loses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country." An illustrative case is Garcia-Gonzalez v. Immigration and Naturalization Service. The defendant, a self-supporting Mexican woman, had lived in the United States for nearly fifty years, having come to America when she was only nine years old. She pleaded guilty to a charge of unlawful possession of heroin and was sentenced to three years probation, six months incarceration and a fine of $1,000, an inconsequential penalty in light of the ensuing deportation order.

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14. Id. at § 1251(a)(11).
15. Id. at § 1251(a)(2), (13).
16. Id. at § 1251(a)(12).
17. Id. at § 1251(a)(14).
19. 344 F.2d 804 (9th Cir.), cert. denied, 382 U.S. 840 (1965).
20. Id. at 805. The deportation order was upheld even though section 1203.4 of the California Penal Code allowed her to withdraw her guilty plea upon completion of the probation sentence, and provided for dismissal of the accusation and release from all penalties and disabilities resulting from the offense. Id. at 806. See also United States ex rel. Klonis v. Davis, 13 F.2d 630 (2d Cir. 1926), in which an alien was deported to Poland after spending the greater part of his life in the United States, even though he
Focus of Comment

Given the frequency of guilty pleas and the often harsh resulting consequences, several concerns unique to the alien defendant emerge. First, how should courts treat those instances when the alien, unaware of potential deportation consequences, offers a plea of guilty or nolo contendere? Second, how should courts approach those cases in which the alien has been misadvised or misinformed by his counsel regarding the deportation consequences of his plea? Five basic factors are involved in dealing with these two questions of increasing national concern: (1) the common law understanding of what constitutes a voluntary plea, (2) the requisites of a voluntary plea under the constitutional safeguard of due process, (3) the effect of direct and indirect consequences upon the voluntariness of the plea, (4) the possible manifest injustice in not allowing withdrawal of the plea, and (5) the constitutional entitlement to effective assistance of counsel. Unfortunately, American jurisdictions disagree as to the appropriate approach to take when confronted by an alien facing criminal charges. Moreover, considerable lack of consensus exists regarding the very nature of these factors themselves. This Comment will examine whether the alien's plea made without full information is truly voluntary, as well as the factors involved in allowing withdrawal of the plea when offered by an uninformed or misinformed defendant alien.

VOLUNTARINESS OF THE PLEA

Rule 11

In *Kercheval v. United States*, the United States Supreme Court posited the oft-cited standard for the voluntariness of the guilty plea. The Court explained: "[O]ut of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." However, the Court provided the lower courts neither specific guidelines regarding what advice was required nor of what consequences the defendant needed an understanding. In *McCarthy v. United States*, the Court pronounced its endorsement of the requirements of Federal Rules of Criminal

had no friends in that country and could not speak the language.

22. Id. at 223. See also *Brady v. United States*, 397 U.S. 742, 748 (1970): "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. . . . Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." (Footnotes omitted).
Procedure Rule 11, as they existed under the 1966 amendment, which compelled the trial judge to personally address the defendant in ascertaining whether he understood the consequences of the plea. However, it was not until Boykin v. Alabama24 that the Court gave constitutional dimensions to the minimum information a defendant had to be given before his plea could be accepted by a state trial court. Explaining that courts must exercise the greatest care to assure that the accused has a full understanding of the plea’s implications and consequences,25 the Boykin Court enumerated three basic constitutional rights waived by offering a plea of guilty: first is the privilege against self-incrimination; second, the right to trial by jury; and third, the right to confront one’s accusers.26 The requirement of Boykin that a defendant must be apprised that a plea of guilty waives these rights was subsequently codified by the 1975 amendment to the Federal Rules of Criminal Procedure, Rule 11(c).27

Rule 11(c) thus delineates the minimum advice a court must provide the defendant before accepting his plea. This minimum does not encompass, however, collateral consequences such as deportation. Indeed, the Advisory Notes to Rule 11 directly reject imposing a duty upon the trial courts to inform defendants of collateral consequences. Citing parole eligibility as an example, the Advisory Committee commented that it would be unrealistic to expect a judge to have a basis for advice regarding such collateral consequences of a guilty plea in a given case.28 The Committee did, however, recognize the

25. Id. at 243-44.
26. Id. at 243.
27. Advisory Notes, supra note 6, commenting on Rule 11(c), state: “The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirement of Boykin v. Alabama which held that a defendant must be apprised of the fact he relinquishes certain constitutional rights by pleading guilty.” (Citation omitted).

Rule 11(c) requires the trial court to inform the defendant of, and ascertain that he understands, five specific points before accepting a plea of guilty or nolo contendere: (1) the nature of the charge and the maximum and minimum penalty possible, (2) the right of the defendant to be represented by counsel, who, if necessary, may be appointed by the court, (3) the right of a defendant to plead not guilty, the right to a trial by jury, and the right to confront and cross-examine witnesses against him, (4) the waiver of the right to a trial if the defendant so pleads, and (5) the right of the court to question the accused, and the possibility that the answers to any court questions may be used against him in prosecution for perjury or false statement. Section (d) requires the court to ascertain that the plea is voluntary; section (f) compels the court, before accepting a plea of guilty, to be satisfied that there is a factual basis for the plea; and section (g) requires a verbatim record of the court’s advice and inquiry. Fed. R. Crim. P. 11(c), (d), (f), (g).
28. Id.
critical nature of some collateral consequences and added that what was required to conform to Boykin "is left to future case-law development."³⁸

More problematic is section (d) of Rule 11, which requires the accused's plea to be fully voluntary. The language of the rule is vague and has generated much discussion regarding the requisites of a voluntary plea. Brady v. United States³⁹ formulated the presently well-accepted standard among the federal courts as to the parameters of voluntariness: a plea is voluntary if the defendant is "fully aware of the direct consequences."⁴¹ On this basis, a trial court must advise the accused of all direct consequences, but has no such obligation to inform of collateral consequences. This, of course, does not resolve the problem, for no concise formulation exists concerning what constitutes a "direct consequence" and what constitutes a "collateral consequence."

Collateral consequences, of which a defendant need not be apprised to offer a valid plea, have variously included suspension from

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The more fundamental point is that advice to the defendant at the time of his plea, in terms of its length and character, should be stated in a way which will be most meaningful to the defendant. Boykin mentions but three constitutional rights, but there are a great many more which are waived by a plea of guilty. . . . It is to be doubted that a litany of all these rights would be meaningful to the typical defendant. In the view of the Advisory Committee it is not desirable to mandate a judge to go through a long ritual which tends to get automatic and routine. Rather, within the limits allowed by the law, a judge should be given flexibility to accomplish the objective of the rule, namely, that of ensuring that the defendant is making an informed plea. In almost all cases, defendants are represented by counsel who should share with the judge the responsibility for informing the defendant of the consequences of his action. In the event that a judge, in an individual case, fails to inform a defendant on an important consequence of his plea, there is opportunity to raise the issue in the court of appeals. There is nothing in the rule, as proposed, which prevents the judge from adding other advice in appropriate cases. Indeed, the advisory note states: 'What is required, in this respect, to conform to Boykin is left to future case-law development.' (Emphasis added).


31. The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Court of Appeals for the Fifth Circuit: [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats . . . misrepresentations . . . or perhaps promises that are by their nature improper as having no relationship to the prosecutor's business.

Id. at 755 (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957), rev'd, 246 F.2d 571 (5th Cir. 1957), rev'd per curiam on confession of error, 356 U.S. 26 (1958)).
one’s position as a firefighter,\textsuperscript{32} commitment to a mental institution,\textsuperscript{33} possible imposition of consecutive sentences,\textsuperscript{34} loss of the right to vote and to obtain a passport to travel abroad,\textsuperscript{35} loss of voting rights in another state,\textsuperscript{36} possible undesirable discharge from military service,\textsuperscript{37} sentence enhancements,\textsuperscript{38} and loss of good time credits.\textsuperscript{39}

\textit{The Federal Standard: United States v. Parrino}

Since 1954, \textit{United States v. Parrino}\textsuperscript{40} has been the controlling case on the right of aliens to be informed of possible deportation consequences arising from a conviction. From this case emerged two elemental principles that have had an enormous impact on the fate and lives of aliens: First, defendants need not be apprised of collateral consequences, such as deportation. Second, misadvice or misinformation by defense counsel regarding such consequences does not constitute an injustice such as would require a post-conviction withdrawal of the plea.\textsuperscript{41}

In \textit{Parrino}, the defendant pleaded guilty to a charge of conspiracy to kidnap in reliance on the assurance of his counsel, a former Commissioner of Immigration, that his plea would not subject him to deportation. Following his conviction, however, a deportation proceeding was initiated against him. Consequently, he filed a post-sentence motion under Rule 32(d) of the Federal Rules of Criminal Procedure to vacate the judgment and withdraw his earlier plea. The \textit{Parrino} court rejected this claim, stating that a defendant’s mere surprise at the severity of the sentence imposed after the plea does not present a manifest injustice that requires a court to vacate the judgment and to allow the defendant to withdraw the guilty plea.\textsuperscript{42} Moreover, in this instance, the nature of the surprise was not the

\begin{itemize}
  \item \textsuperscript{32} United States v. Crowley, 529 F.2d 1066 (3d Cir. 1976), \textit{cert. denied}, 425 U.S. 995 (1976).
  \item \textsuperscript{33} Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364 (4th Cir. 1973), \textit{cert. denied}, 414 U.S. 1005 (1973).
  \item \textsuperscript{34} United States v. Vermeulen, 436 F.2d 72 (2d Cir. 1970), \textit{cert. denied}, 402 U.S. 911 (1971).
  \item \textsuperscript{35} Meaton v. United States, 328 F.2d 379 (5th Cir. 1964), \textit{cert. denied}, 380 U.S. 916 (1965).
  \item \textsuperscript{36} United States v. Cariola, 323 F.2d 180 (3d Cir. 1963).
  \item \textsuperscript{37} Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963).
  \item \textsuperscript{38} United States v. Garrett, 680 F.2d 64 (9th Cir. 1982).
  \item \textsuperscript{39} Hutchison v. United States, 450 F.2d 930 (10th Cir. 1971).
  \item \textsuperscript{40} 212 F.2d 919 (2d Cir. 1954), \textit{cert. denied}, 348 U.S. 840 (1954).
  \item \textsuperscript{41} \textit{Id.} at 921-22. See \textit{infra} note 77 for the text of Federal Rule of Criminal Procedure 32(d) and discussion of the withdrawal of a guilty plea.
  \item \textsuperscript{42} \textit{Id.}
\end{itemize}
severity of the sentence directly flowing from the judgment of the trial court, but a collateral consequence of the judgment—deportation. This reasoning assumes the alien’s plea to be voluntary, even though he relied on the erroneous advice of his attorney, a presumed expert on immigration matters, that his plea would not result in deportation. The court, in rejecting both severity and surprise as factors to be considered, based its conclusion on the “collateralness” of a deportation proceeding. Indeed, the majority did not even discuss the issue of voluntariness. Nevertheless, Parrino has been controlling for the past thirty years.

Judge Frank, in his noted dissent, argued that the classification “collateral consequence” was rather arbitrarily employed. His position was that while deportation was not technically a criminal punishment, it may nevertheless be more devastating upon the defendant than the actual sentence: “For all practical purposes, the court sentenced him to serve (a) two years in jail and (b) the rest of his life in exile.” The Judge even averred that Rule 32(d) might apply to such instances of deportation, even though such a penalty was not imposed directly by the judge in the criminal proceeding. This fact should not preclude, according to Frank, the existence of a “manifest injustice.”

The majority in Parrino conceded that deportation can have a severe impact on the defendant’s life and family, but it drew a distinction between the criminal proceeding and the separate civil proceeding initiated under the Immigration and Nationality Act. The Parrino majority insisted that notwithstanding the harsh inflexibility of the Act, it could not let sympathy encroach into the field of the criminal process. Judge Frank responded that when a rule such as Rule 32(d) suggests in plain words to avoid “manifest injustice,” courts should embrace the opportunity and “not extend earlier decisions to escape it.”

Judge Frank’s second objection to the majority decision in Parrino was its failure to recognize a manifest injustice when the defendant entered his plea under misinformation provided him by his attorney. The majority held that surprise resulting from the defendant’s own attorney did not constitute manifest injustice absent any clear show-

43. Id.
44. Id. at 924 (Frank, J., dissenting). “It has been said that (what my colleagues term) ‘collateral consequences,’ if of importance, constitute such injustice. My colleagues dispose of those statements as dicta. I am not sure of the propriety of that characterization.” Id. (footnote omitted).
45. Id.
46. Id.
47. Id. at 922.
48. Id.
49. Id. at 926 (Frank, J., dissenting).
ing of unprofessional conduct. Judge Frank took exception to this position, asserting that courts have reversed convictions when a defendant's counsel has been incompetent and when that incompetence has seriously prejudiced the defendant. In the Parrino circumstance, Judge Frank regarded the defense counsel, who might easily have checked the appropriate statutes regarding deportation, as "egregiously derelict in the discharge of his duty to his client." Professor Moore concurs in this position and notes that "the vigorous dissent of Judge Frank more likely reflects the present attitude of the federal judiciary." As is subsequently discussed in this paper, Judge Frank's views are currently embraced in many state and federal court opinions, as well as in legal commentary.

51. 212 F.2d at 925 (Frank, J., dissenting).
52. Id.
53. 212 F.2d at 926. See also Legomsky, supra note 50 at 136-37.
54. 8A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 32.07[3], (2d ed. 1983). Addressing the question of misinformation provided a defendant by his attorney, Professor Moore writes:

[T]here is some confusion whether misrepresentations or misstatements of defense counsel including a plea, not chargeable to the court or prosecution, may justify withdrawal (though not serious enough to constitute ineffective assistance of counsel under the Sixth Amendment). Since a determination of voluntariness involves a subjective inquiry into the defendant's state of mind, the better rule would permit withdrawal in the case of defense counsel's misrepresentations, provided defendant reasonably relied upon them.

55. The small number of legal commentators that have dealt with deportation as a consequence of the guilty plea invariably distinguish the seriousness of deportation from lesser collateral consequences. See, e.g., Note, Withdrawal of Guilty Pleas in the Federal Courts, 55 COLUM. L. REV. 366, 376 (1955): "A rarely litigated, though frequent, problem arises when counsel fails to warn the defendant of collateral consequences of conviction such as loss of civil rights . . . and, perhaps more seriously, deportation or expatriation." (Footnotes omitted). The same article takes issue with the Parrino decision, noting that "[n]either the court nor [sic] the dissent saw a constitutional issue in the case, but it seems that perhaps counsel was so incompetent that his client was denied the constitutionally guaranteed minimum due process." Id. at 377 (footnotes omitted). With regard to the burden of warning the defendant of collateral consequences, the same writer states, "This argument, however, is less persuasive where serious consequences, like deportation or expatriation, are involved." Id. at 378. Another author states:

Collateral consequences, on the other hand, need not be understood for the entry of a voluntary plea. . . . The non-necessity of inquiry regarding a defendant's
Adherence to Parrino Among Federal Courts

The Parrino position has been followed steadfastly in several circuits. For example, in the Second Circuit this is demonstrated most notably by United States v. Santelises and Michel v. United States. Michel, following Parrino, considered it unrealistic to compel a trial court judge to compile a list of possible consequences or to anticipate the multifarious contingencies which may affect one's civil liberties. The Michel court, however, made no distinction between the deprivation of one's various societal benefits and the loss of the right to remain in the United States, but rather classified both as peripheral contingencies.

The Seventh Circuit, in an older case, not only held that the court is not obligated to inform a defendant of possible deportation arising from a guilty plea, but also found the alien defendant's contention to the contrary "remarkable." The Third Circuit, while not dealing directly with the question of deportation, has similarly referred to deportation as a collateral consequence. Relying on Parrino, the court remarked that it would be impractical to compel a trial judge to inform an accused of such collateral eventualities. Also, the Fourth Circuit, in its most recent decision in this area, has followed Parrino and Michel in calling deportation a civil consequence which is entirely collateral to the conviction. The court stressed defense counsel's responsibility to inform the defendant of indirect and collateral consequences. The court did not, however, address the ques-

appreciation for the collateral consequences of his plea seems well settled. What constitutes a 'collateral' consequence remains obscure. For example, parole eligibility is now characterized as a direct consequence, although once classified as a collateral consequence about which a defendant need not be informed. Other collateral consequences, deportation conspicuously, have chimerical characteristics of 'directness' which may eventually lead to a similar shift in classification.


56. 476 F.2d 787 (2d Cir. 1973).
57. 507 F.2d 461 (2d Cir. 1974).
58. Id. at 466.
60. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1956).
61. Id. The facts of this case are arguably distinguishable from those involving deportation. Here, the defendant learned only after sixteen years that he would be deprived of the right to vote when he moved to a different jurisdiction. One can understand, under these circumstances, the court's rationale for exclaiming that "unsolicited advice concerning the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required." Id. Deportation, though, is hardly a peripheral contingency nor does it require clairvoyance or superhuman foresight to envisage such a possibility. See infra note 99.
tion of what the remedy should be, if any, when the attorney fails to so inform his client.

Because the entire question of the voluntariness of the plea appears to depend on whether a consequence is characterized as direct or collateral, the Fourth Circuit's attempt to define what constitutes a direct consequence is instructive. In *Cuthrell v. Director, Patuxent Institution*, 68 the court stated that the distinction "turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." 64 The *Cuthrell* court, however, made no attempt to reconcile its rejection of deportation as a collateral consequence with its own definition, for, as demonstrated, section 1251(a) of the Immigration and Nationality Act provides for what is often tantamount to definite, automatic and immediate deportation in a number of circumstances. 65 If the "largely automatic effect" or certainty were determining factors in characterizing a consequence as direct, courts would necessarily have to reclassify deportation—as well as other "so-called" collateral consequences—as direct consequences. The confusion in ascertaining what comprises a direct consequence is vividly reflected by the *Michel* court's explicit rejection of the *Cuthrell* court's definition. Although not referring to *Cuthrell* specifically, the Second Circuit indicated it did not think the distinction between a direct and a collateral consequence should depend upon the certainty with which the sanction is meted out to the defendant. 66

63. 475 F.2d 1364 (4th Cir. 1973), *cert. denied*, 414 U.S. 1005 (1973). Though *Cuthrell* did not involve a deportation, the court noted that the failure to inform an accused of potential deportation consequences is merely a collateral factor which does not render the plea invalid.

64. *Id.* at 1366.

65. *See supra* notes 13-17 and accompanying text.

66. 507 F.2d at 466. The court probably took this position because the defendant had claimed that his deportation was, in fact, a direct consequence, not collateral. The government, in refuting this argument, responded that it was not a direct consequence because (1) deportation required a separate civil proceeding, and (2) deportation was not automatic because 8 U.S.C. § 1254(a)(2) provided that an alien could apply for "non-priority status" on the basis of humanitarian factors which might thus result in suspension of deportation. Because 8 U.S.C. § 1254(a)(2) requires that the alien have lived in the United States for a period of at least ten years following the deportable act, this eventuality suggested by the government is rather limited. It is not, therefore, surprising that the court in *Michel* rejected the "certainty" of the sanction criterion; deportation in such instances is a near certainty. It should be noted that what the government referred to as "non-priority status" is an entirely different remedy from 8 U.S.C. § 1254(a)(2), and it, also, provides only limited relief. *See, e.g.*, Hollander, *supra* note 4, at 65: "It [deferred or nonpriority status] is a little used and little known remedy which is generally handled as an internal matter within the INS." *See generally* Wildes, *The Nonpriority Program of the Immigration and Naturalization Services Goes Public: The Litiga-
The question of deportation was one of first impression in *Fruchtman v. Kenton*, a Ninth Circuit case. Attempting to provide some guidelines, the *Fruchtman* court reasoned that a consequence was direct if the actual sentence emanated from the court which had accepted the plea originally. Conversely, a collateral consequence was one originating under a different agency, beyond the control and responsibility of the trial court judge. Accordingly, the Ninth Circuit held deportation a collateral consequence of which the trial court has no obligation to inform an accused. Applying this standard, neither the severity nor the certainty of the consequence would be essential components affecting the voluntariness of the guilty plea. This fact poignantly illustrates the danger in placing too great an emphasis on the formal rubric under which specific consequences should fall, and too little on the effect these consequences have upon the voluntariness of the plea, which is, ultimately, the issue at hand.

The most recent decision holding against a defendant’s right to be advised of potential deportation is a Fifth Circuit case, *Garcia-Trigo v. United States*. The facts of the case are significant because of the severity of the “civil” consequences. On Friday, September 5, 1980, Fidel Garcia-Trigo was arrested by the United States Border Patrol while driving a vehicle in which several other aliens were passengers. On the following Monday, September 8, he was told he was to be charged only with the petty offense of “unlawfully entering the United States by wading the river,” in violation of 8 U.S.C. § 1325, rather than the more serious offense of transporting undocumented aliens, which the officials had initially considered at the time of the defendant’s arrest. Garcia-Trigo pleaded guilty to this lesser offense and was sentenced to sixty days in jail. The day after he entered his plea of guilty, his wife informed the Border Patrol that her husband was not an undocumented alien, but rather an authorized permanent resident who had lived in the United States for ten years. Nevertheless, he was subject to deportation under 8 U.S.C. § 1251(a)(2) which provides for deportation of any alien who enters the United States without inspection.

After serving his two month sentence, Garcia-Trigo sought to have
his conviction vacated by way of a Writ of Error Coram Nobis, asserting that the court had not strictly complied with the mandates of Rule 11. He specifically claimed that the nature of the offense had not been explained to him and that he had not been told of the consequences of his guilty plea. The record indicated, however, that the court had explained to him the dictates of Rule 11, translating them into Spanish. The court rejected his arguments, asserting that collateral attacks must show that one's fundamental rights were violated and also that there existed some present or prospective adverse effect. The court found that the defendant's rights were not violated, nor, presumably, did separation from his spouse constitute the requisite adverse effect. The court concluded that there had been neither a complete miscarriage of justice nor a result inconsistent with the rudimentary demands of fair procedure such as is required for collateral relief. It held that Garcia-Trigo's rights were not seriously prejudiced and that "the possible effect that his conviction of this petty offense may have upon his immigration status is a collateral 'consequence' that need not have been the subject of an explanation to appellant at the time of arraignment and guilty plea."
Withdrawal of the Plea: Rule 32(d) and 28 U.S.C. § 2255

Although Parrino and its progeny held defendants need not be informed of deportation consequences prior to offering a plea, this stance has been recently challenged in several federal circuits. The greatest signs of erosion appear, however, not within the requirement of Rule 11 itself (although concerns are evident here also), but from the application of Rule 32(d) and 28 U.S.C. § 2255, which allow for withdrawal of pleas and vacating of judgments, respectively.\(^7\)

7. Rule 32(d) of the Federal Rules of Criminal Procedure provides: "A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." (Emphasis added).

Professor Wright notes that there is little difference between these two remedies:

There is considerable overlap between a post-sentence motion to withdraw a plea of guilty for manifest injustice under Rule 32(d) and a motion to vacate a sentence under 28 U.S.C. § 2255. Motions under the statute have been treated as if they were under the rule, and the standard for relief is usually treated as being the same. Although there are cases that suggest that relief might be available under the rule when it would not be granted under the statute, there is no indication that there is any actual difference in results.


The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in its preliminary draft, concurred with Wright's observation: "Indeed, it may more generally be said that the results in § 2255 and 32(d) guilty plea cases have been for the most part the same. Relief has often been granted or recognized as available via either of these routes for essentially the same reasons . . . ." The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure (October, 1981), reprinted in 91 F.R.D. 289, 354 (1982). The Committee proposed the following amendment to Rule 32(d):

PLEA WITHDRAWAL . . . If a motion . . . for withdrawal of a plea of guilty or . . . nolo contendere . . . is made . . . before sentence is imposed, . . . imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason . . . At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255. Id. at 348-49. (Ellipses represent Committee's proposed deletions from present rule).

The amendment would eliminate the "manifest injustice" standard and make applicable the standard that was formulated in Hill v. United States, 368 U.S. 424 (1962), 91 F.R.D. at 353. Accordingly, the standard for post-standard withdrawal of the guilty plea would be, under Hill, if it is "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with rudimentary demands of fair procedure." Id. at 354 (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

The standard for withdrawing a plea before sentence is imposed would be, by this amendment, if it is "fair and just," which generally is the standard applied today. Professor Wright notes:

All agree that withdrawal of a guilty plea, even before sentencing, is not an absolute right, but there is some disagreement on the standard to be applied at that stage. Many cases teach that leave to withdraw should be freely granted if it is before sentencing. This is often qualified, however, by saying that there must be a 'fair and just' reason for withdrawing the plea.
In a 1976 First Circuit case, *Cordero v. United States*, the defendant sought to withdraw his guilty plea, claiming he did not know deportation would follow, and that his attorney had told him he was not guilty of the federal offense. The court regarded the standard for withdrawing a pre-sentence plea to be whether there existed a fair and just reason, and whether the trial court had abused its discretion in denying the withdrawal under that standard. Deportation, the court concluded, presented a close question and it thus expressed a willingness to consider two factors: First, there was here no indication that the defendant was simply testing the weight of his potential judgment; and second, there was a lack of evidence that the government had been prejudiced by reliance on the earlier plea. The First Circuit, in line with the *Parrino*, *Michel*, and *Fruchtman* courts, still denoted deportation a collateral consequence, the potential of which the court had no obligation to inform an accused, but, it stressed, grounds might nevertheless be present which would constitute a fair and just reason for withdrawing the plea. Accordingly, the *Cordero* court acknowledged that a trial court, in its discretion, could properly grant leave to withdraw the plea when, as here, the defendant was unaware of the ensuing deportation possibility. At the same time, this court was cautious not to mandate a withdrawal, recognizing that in so doing, it would necessarily be adding a requirement to the judicial proceeding—namely, warning defendants of possible deportation—thereby diluting the effect of Rule 11.

The most significant departure from *Parrino* has occurred in the District of Columbia Circuit, a change that has evolved perceptibly over the past thirteen years. In a case often cited by other circuits, *United States v. Sambro*, both the defendant and his attorney drew erroneous conclusions concerning the potential consequences of deportation. The *Sambro* court followed *Parrino* and held that possible ancillary or consequential results flowing from a conviction on a guilty plea did not require a later withdrawal of that plea. The defendant’s erroneous conclusions about the effect probation would have on deportation did not alter the voluntariness of his plea. Im-

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Wright, *supra* at 198-99 (footnotes omitted).
78. 533 F.2d 723 (1st Cir. 1976).
79. *Id.* at 725-26.
80. *Id.* See *infra* note 155.
81. 454 F.2d 918 (D.C. Cir. 1971).
82. *Id.* at 920.
83. *Id.* at 921. The *Sambro* majority considered it important that the defendant and his counsel were aware of deportation consequences prior to making the plea, but
important, however, because it presents a position recently embraced by this same circuit,\textsuperscript{84} is the vigorous dissent by Judge Bazelon. He considered the denial of the defendant's motion to withdraw his guilty plea a clear abuse of discretion. Emphasizing the American criminal justice system's dependence on guilty pleas, which largely come from plea bargains, the judge commented:

So long as we depend on a system that encourages defendants to waive their constitutional rights, we have an obligation at least to ensure that defendants do not waive their rights through ignorance, without full understanding of the consequences. Surely poor, uneducated, or inexperienced people are entitled to at least as much protection in negotiating pleas to criminal charges, when liberty is at stake, as they are in negotiating ordinary commercial transactions.\textsuperscript{85}

Judge Bazelon recognized that courts have distinguished, for purposes of Rule 11, between direct and collateral consequences and that deportation might be appropriately classified as collateral.\textsuperscript{86} He asserted, however, that it was a close question whether a plea could be voluntary within the meaning of Rule 11 if the defendant did not understand the deportation consequences of his plea.\textsuperscript{87} Consequently, even if no specific advisement were required because of deportation's collateralness, a court should still grant withdrawal of the plea under Rule 32(d) if the "interest of justice so required."\textsuperscript{88} Agreeing with Judge Frank and Professor Moore, Judge Bazelon considered defense counsel's misinformation to his client regarding deportation consequences to present just such an interest of justice requiring withdrawal of the guilty plea.\textsuperscript{89}

A year earlier, in \textit{United States v. Briscoe},\textsuperscript{90} the same circuit addressed the question of misadvice by government counsel, but in that discussion, the \textit{Briscoe} court created the strong inference that misinformation by defense counsel could subject the guilty plea to a collateral attack as well.\textsuperscript{91} Citing the drastic measures involved in deportation, the \textit{Briscoe} court concluded that considerations of such severe consequences may rightfully be included in one's decision to

\textsuperscript{84} See \textit{United States v. Russell}, 686 F.2d 35 (D.C. Cir. 1982).
\textsuperscript{85} 454 F.2d at 925 (Bazelon, J., dissenting).
\textsuperscript{86} \textit{Id.} at 925-26.
\textsuperscript{87} \textit{Id.} at 925.
\textsuperscript{88} \textit{See id.} at 925-26.
\textsuperscript{89} \textit{Id.} at 926-27.
\textsuperscript{90} 432 F.2d 1351 (D.C. Cir. 1970).
\textsuperscript{91} In \textit{Briscoe v. United States}, 391 F.2d 984, 988 n.2 (D.C. Cir. 1968) (\textit{Briscoe I}), the court noted, without deciding, that a mistake attributable to defense counsel might provide for a plea's withdrawal on the basis that the defendant had been denied his constitutional right to effective assistance of counsel.
plead guilty.\textsuperscript{92} The court held that a plea offered by a defendant misled regarding deportation consequences may in appropriate circumstances be subject to attack.\textsuperscript{93} Concurring with both Judge Frank and Professor Moore—a fact Judge Bazelon noted in his \textit{Sambro} dissent\textsuperscript{94}—the \textit{Briscoe} court expressly rejected the \textit{Parrino} decision: "Insofar as a contrary view may be inferred from \textit{United States v. Parrino} on the ground that deportability is only a 'collateral consequence' of conviction, we agree with Professor Moore: 'the vigorous dissent of Judge Frank [in \textit{Parrino}] more likely reflects the present attitude of the federal judiciary.'"\textsuperscript{95}

\textbf{DRAMATIC SHIFT FROM THE PARRINO TRADITION: \textit{United States v. Russell}}

The Bazelon dissent in \textit{Sambro} and the \textit{Briscoe} discussion provide a backdrop for \textit{United States v. Russell},\textsuperscript{96} the most recent federal case dealing with deportation as a collateral issue. It also represents the most decided shift to date away from the \textit{Parrino}-based holdings. The defendant in this case pleaded guilty to two misdemeanor counts in response to the government's agreement to drop two felony charges. He was subsequently sentenced to concurrent one-year jail terms and three years probation, with all but one month of incarceration being suspended.\textsuperscript{97} One month after sentencing, the Immigration and Naturalization Service initiated deportation proceedings against him under 8 U.S.C. § 1251(a)(11).\textsuperscript{98} The defendant immediately moved to have his sentence vacated and to withdraw his guilty plea under Rule 32(d). He argued that he had not understood the consequences of his plea, namely, that he would be subject to depor-
tation based on the misdemeanor convictions.

The Russell court pointed out that American jurists are sharply divided in their views concerning the penal nature of deportation.99 The court also noted that similar tensions exist regarding the classification of deportation as a direct or collateral consequence.100 The D.C. Circuit conceded that well-established Rule 11 principles do not require a court to inform a defendant of possible deportation. But, it added, decisions guided by Rule 11 have improperly influenced the application of Rule 32(d), which should be employed to withdraw a plea in the interest of justice, even if the plea is validly offered under the formal requirement of Rule 11.101

The court, in Russell, identified several considerations that should guide district courts in their exercise of discretion in applying Rule 32(d).102 The first is whether the defendant is attacking the earlier plea on its merits, that is, whether the defendant is actually asserting

99. 686 F.2d at 38. See, e.g., Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment."); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (Deportation "is not a punishment."); Contra Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) ("[D]eportation is a drastic sanction, one which can destroy lives and disrupt families."); Galvan v. Press, 347 U.S. 522, 531 (1954) (Deportation is "close to punishment."); Jordan v. De George, 341 U.S. 223, 231 (1951) (Deportation is a "drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty."); Fong Tan v. Phelan, 333 U.S. 6, 10 (1948) (Deportation is a "penalty."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Deportation is the equivalent to the "loss of property and life; or all that makes life worth living."); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment; and that oftentimes most severe and cruel."); United States ex rel. Brancato v. Lehmann, 239 F.2d 663, 666 (6th Cir. 1956) ("[A]lthough it is not penal in character . . . . deportation is a drastic measure at times the equivalent of banishment or exile . . . . "). Perhaps the most poignant description comes from Judge Learned Hand, who in United States ex rel. Klonis v. Davis, 13 F.2d 630, 630-31 (2d Cir. 1926) wrote:

However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. Such, indeed, it would be to any one, but to one already proved to be incapable of honest living, a helpless waif in a strange land, it will be utter destruction. That our reasonable efforts to rid ourselves of unassimilable immigrants should in execution be attended by such a cruel and barbarous result would be a national reproach.

100. 686 F.2d at 38-39.

101. Id. at 39. Interestingly, the Russell court need not have addressed this question, for it was able to resolve the case by finding a core violation of Rule 11 itself, which requires that a defendant's plea be voluntary and not the product of misrepresentation by the prosecution. In Russell, the prosecutor had explained to the court that the defendant would not be subject to deportation if he pleaded guilty to the misdemeanor. Id. at 41. Nevertheless, the Russell court chose to address specifically the interrelationship of Rule 11 to Rule 32(d) and the issue of manifest injustice as it relates to deportation consequences. Id. at 40-41. See also Brady v. United States, 397 U.S. 742, 755 (1969) (misrepresentation included as a factor invalidating the voluntariness of a guilty plea); case cited supra note 31.

102. 686 F.2d at 40-41.

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his innocence or a mere formal technicality of the rule's application. The second is whether a withdrawal of the plea and a subsequent trial would prejudice the government's case; for example, key government witnesses may no longer be available. Third is whether the government had any role in contributing to the defendant's misunderstanding of the consequences. While this final point repeats the already mandated non-misrepresentation on the part of the prosecution, further discussion by the Russell court reveals a willingness to designate as a "manifest injustice" even an accused's simple unawareness of the deportation consequences of his plea.\textsuperscript{103}

Additionally, the Russell court suggested that lower courts, in considering withdrawal of pleas under Rule 32(d), should be sensitive to the possibility that the defendant has not received effective assistance of counsel.\textsuperscript{104} In contrast to Parrino and its progeny, the Russell court questioned whether a defendant who enters a plea of guilty is actually "voluntarily" waiving his right to trial by jury. Such a defendant has a compelling reason to stand trial when all the consequences of his plea are known; a plea is voluntary only when such defendants know the "pandects under which they plead."\textsuperscript{105} "Pandects" thus supplants the traditional classification of "direct" and "collateral" and includes, for this circuit at least, the consequence of deportation.

The Russell court went even one step further in its dictum. Accepting the uniqueness of deportation among the consequences of convictions, it questioned classifying deportation as a collateral consequence, saying:

It is extremely troublesome that deportation has never been considered a direct consequence of guilty pleas of the sort that must be brought to the defendant's attention before his plea may be considered voluntary under Rule 11. Aliens form a discrete, easily recognized class of defendants. They are deported by the same branch of government that brings criminal charges against them, and in many cases their deportation is a more direct and automatic consequence of conviction than any other sanction. District courts need to remember that although they are not required to explain the possibility of deportation to alien defendants before accepting a plea under

\textsuperscript{103} \textit{Id.} at 40. "Finally, although deportation is not a 'direct' consequence of a plea for purposes of Rule 11, it is difficult to imagine a collateral consequence that would be more compelling for purposes of showing the 'manifest injustice' required by Rule 32(d)." \textit{Id.}

\textsuperscript{104} \textit{Id.} at 40 n.6.

\textsuperscript{105} \textit{Id.} at 42. \textit{See also} C. Whitehead, Criminal Procedure: An Analysis of Constitutional Cases and Concepts 410 (1980) ("Under the federal rule the judge is not required to inform a defendant about these matters, but for a plea to be intelligently given in any meaningful sense, it seems that all significant collateral consequences of the plea should be mentioned.") (Emphasis added).
Rule 11, nothing prohibits them from doing so. The distribution of justice to alien defendants can only be enhanced if the trial courts make sure such defendants know the pandects under which they plead.  

Further Federal Erosion—Attorney Misinformation

Recent erosion of the Parrino tradition has also occurred in the Fourth Circuit. In Strader v. Garrison, the defendant was misinformed by his attorney about the effect of a guilty plea upon his parole eligibility date. Although parole is a collateral consequence, the court considered defense counsel’s failure to apprise his client accurately of this eventuality to be a violation of his constitutional right, and it expressly rebuffed the Sambro and Parrino holdings for having ignored the constitutional issues involved. The court stated: “We regard those cases [Sambro and Parrino] as aberrations. In neither case was the problem approached in terms of the constitutional entitlement to the effective assistance of counsel.” Strader required the judgment of conviction to be vacated, when it was shown, as here, that the guilty plea would never have been tendered had the defendant been properly advised by his attorney. When ignorance and misadvice by an accused’s counsel improvidently lead him to enter a plea of guilty, the appropriate remedy is withdrawal of the plea. The Strader court also pointed out that the Second Circuit itself came to the same conclusion in Hill v. Ternullo, notwithstanding and without reference to Parrino, when it noted that the defense counsel was so ineffective as to amount to a denial of the constitutional right to counsel.

STATE EXPANSION OF ALIEN’S DUE PROCESS RIGHTS

Recent Statutory Trend

The status of the alien’s right to be informed of possible deportation consequences is even more divergent among the states than it is at the federal level. Strong evidence is appearing to indicate a trend has begun on the state level to require warning defendants of possible deportation before courts accept guilty pleas. Since 1977 four states have enacted statutes—strikingly similar in wording—requiring the alien defendant to be advised of deportation consequences by trial courts. These states are California (1977), Massachusetts

106. Id. at 41-42 (emphasis added).
107. 611 F.2d 61 (4th Cir. 1979).
108. Id. at 64 (emphasis added).
109. Id. at 65.
110. Id.
112. 611 F.2d at 64.
Typical of the four is section 1016.5(a) of the California Penal Code, which reads:

Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law . . . the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. 117

As the text of the statute indicates, the court is required to establish in the record that such a warning has been given to the defendant. Absent this record, the defendant is to be presumed not to have received the required advisement. 118

Three of these four statutes—California, Massachusetts and Connecticut—go further than Rule 11 by explicitly providing for a remedy if the defendant is not given the warning by the court. California, for example, requires that when the defendant is not afforded this warning and demonstrates that the conviction of the offense to which he pleaded guilty or nolo contendere may have the consequence of deportation, exclusion, or denial of naturalization, the court shall, on his motion, vacate the judgment and permit the defendant to withdraw the guilty plea and to enter one of not guilty. 119

116. Conn. Legis. Serv. § 82-177 (West 1982).
118. Cal. Penal Code § 1016.5(b) (Deering 1983). A statement of legislative intent is included in the statute. The statement is important for its understanding and appreciation of the alien defendant's unique plight. It postulates that deportation is serious in nature, and that many aliens do, in fact, offer guilty pleas fully unaware of the dire consequences of deportation. Subsection (d) of section 1016.5 of the California Penal Code provides in pertinent part:

The Legislature finds and declares that in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States. Therefore, it is the intent of the Legislature in enacting this section to promote fairness to such accused individuals by requiring in such cases that acceptance of a guilty plea or plea of nolo contendere be preceded by an appropriate warning of the special consequences for such a defendant which may result from the plea. Cal. Penal Code § 1016.5(d) (Deering 1983).

None of these statutes requires the defendant to make a claim of innocence prior to withdrawing the guilty plea. In addition, each of the three aforementioned statutes is drafted to avoid the danger of opening a floodgate of post-sentence appeals or collateral attacks. Although the statutes require the warning be given to each defendant, a remedy is available solely to those defendants who would actually be affected by one of the enumerated consequences. In practical terms, other non-alien defendants would have no basis for an attack if the court were technically remiss in offering the required advice.

The California case of People v. Gloria demonstrates this safeguard of judicial efficiency. Here, the defendant pleaded guilty and then sought to have the judgment vacated because the court had not informed him of the consequences under Penal Code section 1016.5. The court ruled that this provision did not apply to such a defendant because he was not subject to deportation. In contrast, in People v. Guzman, the defendant had not been appropriately advised of the possible deportation consequences. Though the government maintained the defendant failed to establish he would not have pleaded guilty had he been aware of the consequences, it was held a court cannot assume a defendant would or would not admit the truth of the allegations were he properly advised of the consequences. In this instance, there was no evidence that the defendant had been given the required warning and it was clear he was deportable as a consequence of his conviction. The defendant, therefore, was allowed to withdraw his guilty plea and enter one of not guilty.

**Legal Dilemmas Avoided by Statutory Provisions**

These state statutes provide significant safeguards to aliens who, as the California Legislature noted, frequently are unaware of deportation consequences of their plea. Judge Bazelon, in his Sambro dissent, similarly urged protection of this group who, through igno-
rance of the laws and without fully understanding the consequences of their actions, waive their rights; such typically poor and uneducated people, he urged, are entitled to protection. Moreover, providing such critical information to this discrete class of persons requires, at best, a mere few minutes of the court’s time.

Other reasons exist, however, that warrant such statutory safeguards. For example in North Carolina v. Alford, the Court candidly conceded that it sometimes lies in one’s best interest to plead guilty while asserting innocence, and that a court’s acceptance of such a plea does not violate the defendant’s right of due process guaranteed by the Constitution. The likelihood of a suspended sentence might induce an alien to plead guilty or nolo contendere, especially if he or she is unaware of deportation eventualities. The possibility thus arises that an alien—though innocent of any wrongdoing—may be banished from his home for life as the result of a plea, the ramifications of which he possessed little or no understanding. Such eventualities must create serious misgivings about the voluntariness of a plea so offered.

Exacerbating the entire dilemma for the alien, federal deportation statute 8 U.S.C. § 1251(a)(4), predicated upon “moral turpitude,” does not indicate precisely what constitutes moral turpitude, leaving the possibility of a guilty plea being entered by an innocent person relying on the security of a known outcome. This possibility is present whether the mistake concerns ‘collateral’ or ‘direct’ consequences. When the accused can prove that his counsel made conclusive statements to him about material consequences, it is reasonable to infer that these assertions were the cause of the plea. Hence, if it develops that the lawyer was wrong, withdrawal should be allowed.

126. 400 U.S. 25 (1970). See also Brady v. United States, 397 U.S. 742 (1970) in which the court stated: We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.
Id. at 751. See also United States v. Bucio-Reyes, No. 80-3744, slip op. (6th Cir. June 11, 1981), cert. denied, 454 U.S. 941 (1981) (the Court refused to reconsider the alien’s conviction which was based on a nolo contendere plea, although the defendant had asserted his innocence while offering the plea).
127. See supra note 9.
129. 8 U.S.C. § 1251(a)(4) (1976). For a compilation of what has been construed as a crime of moral turpitude, see 1A C. GORDON & H. ROSENFIELD, IMMIGRATION
ing considerable ambiguity as to which crimes may lead to deportation. An alien might conceivably plead guilty to a crime either he, or his attorney, felt was not one of moral turpitude, only later to learn that it had been so construed. In addition, whether a violation constitutes moral turpitude is solely a federal question, not to be determined by state interpretation. Consequently, one must look to how specific crimes have been defined in federal cases. This presents a difficult task for the attorney. It is not, therefore, surprising that alien defendants, as well as defense counsel—and even judges themselves—are frequently unaware of the deportation consequences that may arise from a guilty plea. It seems unfair to hold the alien to such strict degrees of punishment when the legal system he encounters is fraught with such ambiguous complexities. Statutes, such as those implemented by the aforementioned states, eliminate the disturbing problems that arise from these gray areas of the legal system.

An additional complication faced by the alien is the nolo contendere plea. This plea is not regarded as an express admission of guilt, but as a consent by the defendant to be punished as if he were guilty; it is a prayer for leniency. For deportation purposes, however, the plea of nolo contendere is the equivalent of a guilty plea.

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130. See Hollander, supra note 4, 48-49.
131. Id.
132. See Legomsky, supra note 50, at 105-06: It is an anomaly of American immigration law that the sentencing judge—in federal and state courts alike—frequently makes the real decision on whether an alien convict is to be deported. Because the anomaly is largely unrecognized, this decision is often made unwittingly, without regard to whether such a sanction is desirable in the individual case. Professor Legomsky also points out that deportation law itself possesses anomalies that are sometimes surprising, if not startling. For example, he notes, possession of one "joint of marijuana" may lead to deportation, whereas a conviction for first degree murder may not. Id. at 62 n.6. Bastone relates an equally troubling hypothetical situation: Under § 1251(a)(4) a non-citizen defendant convicted of a brutal rape-kidnapping may not incur the collateral consequences of vulnerability to deportation . . . [while] another non-citizen defendant, after pleading nolo contendere and being only minimally fined following each of two unsuccessful and unpremeditated attempts at shoplifting items of marginal value, could be the subject of deportation proceedings, notwithstanding long-term residence and otherwise exemplary conduct in the community. Bastone, supra note 4 at 19.
133. North Carolina v. Alford, 400 U.S. 25, 36 n.8 (1970). Troublesome, too, is that while Rule 11(f) of the Federal Rules of Criminal Procedure requires the court to satisfy itself that there is a factual basis for the guilty plea, it makes no such demand for the acceptance of the plea of nolo contendere. 134. "It is settled that a plea of nolo contendere, when accepted by the court, becomes for all practical purposes the full equivalent of a plea of guilty . . . ." In re Fortis, 14 I. & N. Dec. 576, 577 (1974). See also Rubis-Rubio v. INS: While it may be true . . . that a guilty judgment following a nolo contendere plea cannot be used as an admission in a subsequent action, it has been held
Difficulties can thus arise in this area depending on how a particular state employs the plea. California, for example, provides that guilty and nolo contendere pleas have the same legal effect in regard to felonies, but when the charge is a non-felony, the plea cannot be used against the defendant as an admission in any civil suit. This can present a portentous conflict between jurisdictions, because an alien defendant, as well as his counsel, might be induced to offer a nolo contendere plea to a charge of some non-felony, in reliance on the state statute ensuring no civil ramifications, such as deportation. Nevertheless, the alien may be subject to a deportation proceeding, because 8 U.S.C. § 1251(a) becomes effective by virtue of a conviction, regardless of whether it stems from a plea of guilty or nolo contendere. Again, the recent state statutes avoid this problem by requiring the defendant charged with any crime to be notified of potential deportation consequences whether offering a plea of guilty or nolo contendere. The alien defendant is safeguarded from any federal contingency, known or unknown.

Expansion of Aliens' Due Process Rights by State Case Law

In addition to the growing legislative trend among states to provide alien defendants greater safeguards from the hazards of unexpected deportation, recent state case law also reflects a trend in granting withdrawals of guilty pleas when the consequences of deportation were not known at the time the plea was offered. Parrino, however, is still followed in some jurisdictions, and is relied on especially in those cases where deportation is not the actual consequence at issue. In a 1972 Indiana case, for example, the defendant

that the conviction may be noticed for purposes of deportation where the fact of the conviction is itself the only thing that is relevant.
380 F.2d 29, 29-30 (9th Cir. 1967), cert. denied, 389 U.S. 944 (1976); Farrington v. King, 128 F.2d 785, 786 (8th Cir. 1942). (Though the defendant alleged that he accompanied his plea of nolo contendere with an explanation that he was innocent of the charge, the court held that the “plea of nolo contendere was, for all practical purposes, the full equivalent of a plea of guilty”). See supra note 5 (guilty plea is a conviction).
136. See supra note 134 (nolo contendere as the equivalent of conviction for deportation purposes).
137. See People v. Thomas, 42 Ill. 2d 122, 242 N.E.2d 177 (1968) (addressing specifically the failure of a judge to inform the defendant that his conviction would deprive him of the right to vote and hold public office); Reponte v. State, 57 Hawaii 354, 556 P.2d 577 (1976) (defendant unaware at the time of his plea that he would thereby lose the right to hunt or hold a gun).
pleaded guilty to possession of marijuana and was sentenced to five days in jail and fined $300. Although the trial court judge himself admitted that he was unaware that deportation would follow the defendant's conviction, the court ruled that a trial judge has neither an obligation to determine that a defendant is an alien nor to advise him of the effect of his plea regarding deportation.

One of the strongest positions taken among the states (along with an equally forceful dissent) is *Tafoya v. State.* In deciding whether to allow the defendant to withdraw his guilty plea because of his unawareness of the deportation consequences at the time the plea was made, the Alaska court in this case followed *Parrino,* holding deportation to be merely a collateral consequence. The defendant's ignorance of this consequence did not render his plea void. The court also addressed the question of whether the defense attorney's failure to inform the accused of the potential deportation constituted a deprivation of effective counsel such as is guaranteed by the Constitution. In contrast to a similar and more recent Pennsylvania decision, the Alaska court agreed with the majority of the federal circuits that the failure of counsel to inform the accused of possible deportation did not constitute a denial of the right to effective assistance of counsel. The applicable standard in determining whether the defendant has had effective counsel, the court asserted, was whether the counsel was so incompetent as to make the trial a mockery and a farce. Only then would the defendant be entitled to a new trial.

Judge Rabinowitz, agreeing with Judge Frank, strongly dissented on two major issues: First, he rebutted the view that deportation was "only" a collateral consequence; and second, he expressed satisfaction that under the circumstances of this case, the "manifest injustice" criterion of Rule 32(d) had been met. He felt the defendant Tafoya would not have pled guilty to the charge of rape had counsel advised him that he was deportable by virtue of his plea. If judges themselves are unaware of deportation consequences, it is not surprising that attorneys, not to mention their clients, are also frequently unaware. On the one hand this supports the position that judges can't be accountable to foresee such remote consequences—at least from their perspective; on the other hand, it demonstrates the necessity of compelling dissemination of such critical information. The resolution must center around the quintessential issue of the voluntariness of the alien defendant's plea.

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140. 152 Ind. App. at 379, 283 N.E.2d at 798.
142. *Id.* at 250-51.
144. 500 P.2d at 252.
145. *Id.* at 251.
146. *Id.* at 254 (Rabinowitz, J., dissenting). Alaska's Criminal Rule 32(d) is identical to Rule 32(d) of the Federal Rules of Criminal Procedure. *Id.* at 253 n.3.
147. *Id.* at 255.
posited what the District of Columbia Circuit later pronounced in *Russell* and what state court decisions have recently held, namely, that though a court’s failure to advise a defendant of deportation consequences does not technically violate Rule 11, there need be no violation of this rule to invoke Rule 32(d).

The two most recent state decisions dealing with notification to aliens of the consequences of their pleas reflect the reasoning of the *Russell* court and mark a dramatic turn from the *Parrino* holdings. In *Commonwealth v. Wellington*, the Pennsylvania court conceded that a trial judge has no obligation to advise a defendant of the collateral consequences, and thus on this basis a plea could not be withdrawn. However, when defense counsel fails to advise the accused of such a consequence, a plea is not knowingly and intelligently offered. Describing deportation as a significant consequence of certain convictions, this court explained, “Counsel’s ineffectiveness in failing to advise a defendant before a guilty plea of the significant legal consequences may therefore require that the plea be withdrawn.”

This holding does not compel a trial court itself to inform an accused of the deportation consequences; rather, it considers this to be the obligation of defendant’s counsel. Lack of such information, this Pennsylvania court asserts, affects the voluntariness of the alien’s plea, as well as denies him the constitutionally guaranteed effective assistance of counsel. Consequently, breach of this duty by defense counsel requires the guilty plea to be withdrawn. The practical effect of this holding, then, logically suggests that a guilty plea offered by a defendant alien unaware of deportation consequences—albeit as a result of his own counsel’s ineffectiveness—is

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148. Judge Rabinowitz asserted: While there may be considerable overlap, the concept of ‘manifest injustice’ under Rule 32(d) permits the judge greater latitude than the requirements of constitutional ‘due process.’ The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done. *Id.* at 255 n.7 (quoting *Pilkington v. United States*, 315 F.2d 204, 209 (4th Cir. 1963)) (footnotes omitted).


150. *Id.* at 224.

151. *Id.* at 225.

152. The Wellington court stated: Consequently, we now hold that counsel has a duty to an alien client to inquire and advise her of the possible deportation consequences of a contemplated plea. Because counsel’s failure to undertake such actions could have no reasonable basis designed to effectuate appellant’s interests he was ineffective, and appellant must be permitted to withdraw her guilty plea. *Id.* (citations omitted).
rendered invalid because involuntarily made.

In a 1981 Florida case, Edwards v. State,153 the court took this same position. Here the defendant claimed his plea of guilty was involuntary because (1) the trial judge had failed to inform him of possible deportation, and (2) his attorney had failed to advise him of such consequences. Relying on Fruchtman and Michel, the Florida court here, too, held that the trial court is not required to advise the defendant of federal consequences before accepting a guilty plea. However, a court could not accept a plea that is not offered voluntarily and knowingly, "that is, upon advice which enables the accused to make an informed, intelligent, and conscious choice to plead guilty or not."154 The court in Edwards emphasized that for a waiver of constitutional rights to be acceptable, the plea must be made with an awareness of the relevant circumstances and likely result.155 It then concluded that "ignorance of the potential consequences of deportation cannot, in our view, make for an intelligent waiver."156 This view comports fully with the mandates of Kercheval157 and Boykin158 that a defendant be made aware of the implications and

154. Id. at 599.
155. Id. The Edwards dissent accurately pointed out that by requiring counsel to advise the client of deportation possibilities, it, in effect, places the burden back upon the court to be satisfied that the defendant has been so advised, since if the defense attorney is remiss in his obligation, the judgment becomes subject to appeal or collateral attack. The point is well taken. Judicial efficiency speaks in favor of a rule requiring the court to inform the defendant of such consequences prior to accepting the plea, for as courts increasingly allow withdrawal of pleas under Rule 32(d), the frequency of collateral attacks necessarily increases. In California, for example, prior to the legislative enactment requiring courts to advise defendant aliens of deportation consequences, the state supreme court held the lack of defendant's awareness of potential deportation to be grounds for withdrawing the earlier plea. In People v. Giron, the California Supreme Court held that a court could grant a motion to withdraw a plea when justice would be promoted: "[W]here an extrinsic fact operated so as to cause an over-reaching of the free will and judgment of the accused so as to deny him a trial on the merits . . . . the court may, even after judgment, permit him to withdraw the plea and stand trial." 11 Cal. 3d 793, 797 n.5, 523 P.2d 636, 639, n.5, 114 Cal. Rptr. 596, 599 n.5 (1974) (quoting People v. Savin, 37 Cal. App. 2d 105, 108, 98 P.2d 773, 774 (1940)). The Giron court also recognized that ignorance about deportation consequences was a constriction of the defendant's voluntary plea, saying, "As a general rule, a plea of guilty may be withdrawn for mistake, ignorance or inadvertence or any other factor over-reaching the defendant's free and clear judgment." Id. at 797, 523 P.2d at 639, 114 Cal. Rptr. at 599. See also People v. Wiedersperg, 44 Cal. App. 3d 550, 118 Cal. Rptr. 755 (1975) (withdrawal of the plea granted because both counsel and court were unaware of the deportation potentiality); but cf. People v. Flores, 38 Cal. App. 3d 484, 113 Cal. Rptr. 272 (1974) (no abuse of discretion); People v. Martinez, 154 Cal. App. 2d 233, 316 P.2d 14 (1957) (due process met, defendant fully represented by counsel, court had no responsibility to see that accused received sound advice from his attorney).

156. 393 So. 2d at 599. "While we may not impose upon the trial court the obligation to advise the accused of this consequence because 'collateral,' its 'collateralness' is immaterial in measuring the effective assistance of counsel." Id.
157. See supra text accompanying note 21 and note 22.
158. See supra text accompanying note 25.
consequences of his guilty plea, thereby facilitating the constitutionally guaranteed voluntariness of that plea.

CONCLUSION

The standard to be applied in the United States to alien defendants who offer pleas of guilty or _nolo contendere_ while unaware of possible deportation consequences is unsettled. While some disagreement exists as to its nature, it is mere rhetoric to deny the penal aspect of deportation. All, in fact, do agree that the ultimate consequences of deportation are often considerably more severe than the actual punishment meted out by the trial court. Deportation can and does have a most devastating impact not only on the alien himself, but also on spouses, children, relatives, friends, and on other ancillary benefits such as employment, property, responsibilities, and contract benefits and obligations. Indeed, possibly the most traumatic impact is the deprivation of what to the alien has become home and fatherland.

The major objection to providing the alien defendant with notice regarding possible deportation appears to be the fear of burdening trial courts by requiring them to inform defendants of numerous and often unforeseeable collateral consequences. There is, of course, considerable merit to these fears, for the entire gamut of collateral consequences is certainly not ascertainable. Deportation, however, is not only ascertainable, it is a common and predictable eventuality, singular in import among the various collateral consequences. In the words of Judge Learned Hand, it would be a “national reproach” not to make this distinction.

Requiring courts to advise alien defendants of possible deportation would not impinge on judicial efficiency; rather it would enhance it by reducing the number of potential collateral attacks. The United States Supreme Court in _McCarthy v. United States_ emphasized this by remarking: “Thus the more meticulously the Rule [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous

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159. Joseph v. Esperdy, 267 F. Supp. 492, 494 (S.D.N.Y. 1966) reflects this in summation: “[I]t seems onerous and absurd to expect a judge to explain to each and every defendant who pleads guilty the full range of collateral consequences of his plea, and indeed, to anticipate what those collateral consequences are.” The _Cariola_ court in United States v. Cariola, 323 F.2d 180, 182 (3d Cir. 1963), echoes a similar fear when it decried placing burdensome demands on the trial courts requiring clairvoyance of a superhuman kind. See supra note 61.

160. See supra note 99.
post-conviction attacks on the constitutional validity of guilty pleas.”

In reality, very little court time is required to advise a defendant of the pertinent consequences of his plea. The McCarthy Court stressed: “It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.”

The recently enacted statutes by California, Oregon, Massachusetts and Connecticut, as well as the increasing number of judicial decisions, both state and federal, reflect a growing willingness to extend to the alien defendant a due process that is more appropriate to his unique plight. From the standpoint of fairness and justice this is a commendable and necessary trend. Both judicial efficiency and the special circumstances presented by the alien defendant call for a national standard for determining the voluntariness of entering a plea of guilty or nolo contendere—one that is not enmeshed in the definitional confusion of directness and collateralness. Courts should be required to make the relatively simple effort of assuring themselves that the alien understands that deportation may result from his plea, thereby mooting the controversy surrounding the nebulous concepts of manifest injustice and effective assistance of counsel. Only then can an alien’s plea be regarded as voluntary.

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163. 394 U.S. at 472.