

ERADICATING ASSEMBLY-LINE JUSTICE: AN OPPORTUNITY LOST BY THE REVISED AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS

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I. INTRODUCTION

Every day in criminal courts across the country, thousands of people enter guilty pleas within hours of their arrest at their initial appearance or arraignment before a judge.¹ The practice is so rampant that it has spawned its own phrase—“meet ‘em, greet ‘em, and plead ‘em”²—that derisively, but accurately, captures the routine. And while in

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1. While “arraignment” means different things in different jurisdictions, I am referring to situations where someone is arrested and held in custody until his or her initial appearance before a judge. In *County of Riverside v. McLaughlin*, the Supreme Court held that the accused in that situation must be brought before a judge within forty-eight hours of arrest. 500 U.S. 44, 56 (1991). New York’s Court of Appeals held that the New York State Constitution requires arraignment within twenty-four hours of arrest. See *People ex rel Maxian v. Brown*, 570 N.E.2d 223, 225 (N.Y. 1991) (per curiam).

2. See, e.g., James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 205 n.156 (2012) (“[C]ommentators have noted a tendency . . . for underresourced defense to plead too many cases – a phenomenon deemed ‘meet ‘em, greet ‘em, and plead ‘em.’” (quoting Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1793 (2001))); Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 679 (2011) (“The literature is replete with accounts of attorneys who ‘meet ‘em and plead ‘em,’ i.e., advise their clients to plead guilty minutes after first meeting them in lock-up.” (citing Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 181-82 (2009))); see also ROBERT C. BORUCHOWITZ, MALIA BRINK, & MAUREEN DIMINO, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 31 (2009), <https://www.nacdl.org/reports/misdemeanor> (“In many jurisdictions, cases are resolved at the first court hearing, with minimal or no preparation by the defense. . . . This process is known as meet-and-plead or plea at arraignment/first appearance.”); Richard Klein, *Judicial Misconduct in Criminal Cases: It’s Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195, 203 (2006) (“[I]t is common for defense counsel in our large urban courts to offer a guilty plea on behalf

many jurisdictions these are uncounseled pleas as defendants waive their right to counsel or are simply not provided attorneys,³ in New York City, where every person accused is provided with defense counsel, there were still about 62,000 arraignment guilty pleas entered in 2015.⁴

To be sure, the majority of arraignment pleas stem from misdemeanor charges. In 1972, the Supreme Court in *Argersinger v. Hamlin*⁵ extended the *Gideon*⁶ right to counsel in felony cases to any case where the accused faced the possibility of incarceration (practically speaking, to misdemeanors).⁷ The Court decried the “assembly-line” nature of misdemeanor practice⁸ and quoted a 1967 report by the President’s Commission on Law Enforcement and Administration of Justice:

An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. . . . Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. . . .

As Dean Edward Barrett recently observed: “Suddenly it becomes clear that for most defendants in the criminal process, there is scant concern for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way.[”]⁹

Clearly, the Court thought that establishing the right to a lawyer in misdemeanor cases would have an impact on the processing system. Unfortunately, the creation of the right has not cured the problem. Even with lawyers present, and forty-five years after *Argersinger*’s

of their client within minutes of having first met the defendant.”).

3. See, e.g., Robert C. Boruchowitz, *Fifty Years After Gideon: It Is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 SEATTLE J. FOR SOC. JUST. 891, 898 (2013) (“In many courts, there are no defenders at first court appearances, and often even when they are present many defendants still proceed without counsel.”). The indefensible practice of unrepresented defendants pleading guilty at initial appearance is beyond the scope of this Article.

4. See N.Y.C. CRIMINAL JUSTICE AGENCY, ANNUAL REPORT 2015, at 17 Exhibit 9 (2016), <http://www.nycja.org/library.php>.

5. 407 U.S. 25 (1972).

6. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

7. *Argersinger*, 407 U.S. at 32-33, 40.

8. *Id.* at 36 (“There is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly-line justice.’”).

9. *Id.* at 34-35 (quoting PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967)).

pronouncement, arraignment guilty pleas remain the single most prominent and visible manifestation of assembly-line justice.¹⁰

In New York City, like most urban courts, the accused is most often poor, male, and Black or Latino.¹¹ After he's arrested, he's booked, or processed at the precinct and, *inter alia*, questioned, photographed, fingerprinted, searched, and held in a cell with numerous others enduring the same process and facing a similar fate. Several hours later, he is brought to court where he is placed in another holding cell waiting to meet his government-appointed lawyer.

Approximately twenty hours have gone by since his arrest. He likely has not been able to speak with his family. He has not slept, has had at best very little to eat or drink, has not showered, brushed his teeth, or even been able to wash his hands and splash water on his face. Perhaps he has had access to a functioning toilet in one of the holding cells. Eventually, his lawyer will speak briefly with him in a booth with a plexiglass partition that prohibits even a perfunctory handshake and renders it virtually impossible to see anything more than the outline of each other's face.

Soon thereafter, his case is called. The judge knows nothing about the case except for the minimal factual recitation in the complaint, the accused's criminal history, and some basic information relative to community ties regarding bail. The prosecutor assigned to arraignments is unlikely to even be the same one who typed up the template charges based on a brief interview (seldom conducted face-to-face) with the arresting officer. At this critical moment in time, none of the institutional players have engaged in any kind of factual or legal investigation of the charges, or know much of anything about the defendant, the arresting officer, or any potential victim or witnesses. And yet, the majority of misdemeanor cases will end then and there.¹²

While all institutional players play significant roles in and bear responsibility for the blight of meet, greet, and plead, this Article focuses on defense counsel. Is defense counsel providing constitutionally required effective assistance pursuant to the Sixth Amendment,¹³

10. See N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 4, at 17.

11. For example, the race or ethnicity of murder, rape, robbery, and shooting suspects is overwhelmingly Black or Latino. See PREETI CHAUHAN ET AL., TRACKING ENFORCEMENT RATES IN NEW YORK CITY 2003–2014, at 51–57 (2015), http://www.jjay.cuny.edu/sites/default/files/News/Enforcement_Rate_Report.pdf.

12. See N.Y.C. CRIMINAL JUSTICE AGENCY, *supra* note 4, at 17.

13. The Sixth Amendment states as follows: "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The right to counsel incorporates the right to the effective assistance of counsel. See *McMann v. Richardson*,

and is defense counsel adhering to the standards of professional behavior outlined in the American Bar Association's ("ABA") Standards for Criminal Justice?¹⁴

While a full discussion of the constitutionality of the defense attorney's arraignment plea advice is beyond the scope of this Article, it must be noted that the Supreme Court is beginning to analyze the requirements of effective assistance with respect to counseling clients about guilty pleas. In *Padilla v. Kentucky*,¹⁵ the Court addressed a claim of ineffective assistance of counsel in the context of the defense attorney's advice regarding a guilty plea and potential deportation. Broadly stated, *Padilla* requires that defense counsel provide adequate advice about the immigration consequences of a guilty plea.¹⁶ Notably, the Court did not carve out an exception if the lawyer practices in a high-volume criminal court, if the charges are comparatively minor, or if the moment in time is at the accused's initial arraignment or appearance before a judge.

Can a defense attorney provide constitutionally adequate immigration advice after only having just met her client? At that moment in time, can a lawyer actually know her client's immigration status and the immigration consequences of a plea offer? "[I]n many cases, the accused is unaware, uncertain, or even wrong about his present immigration situation."¹⁷

Defense counsel can seldom be sure after an initial interview that she has an accurate picture of her client's immigration situation. Virtually every text and article written about the initial interview in criminal cases, especially when it involves a free government-appointed attorney, highlights the inherent distrust between client and lawyer.¹⁸ It

397 U.S. 759, 771 (1970) (stating that "defendants facing felony chargers are entitled to the effective assistance of competent counsel" and "defendants cannot be left to the mercies of incompetent counsel").

14. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION (AM. BAR ASS'N 2015).

15. 559 U.S. 356 (2010).

16. *See id.* at 367-68.

17. Steven Zeidman, Gideon: *Looking Backward, Looking Forward, Looking in the Mirror*, 11 SEATTLE J. FOR SOC. JUST. 933, 947 (2013).

18. *See, e.g.*, Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 890-91 (1996) (describing factors related to client distrust of institutional indigent criminal defense attorneys); *see also* Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 74 (1986) ("[D]efendants often do not trust defense counsel, particularly when the attorneys are public defenders or court appointees."); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 667 (1986) ("The defender needs to win

takes time before someone charged with a crime will divulge sensitive and potentially harmful information. Trust must be earned and developed; it cannot happen in the typical five- or ten-minute pre-arraignment interview.

In addition, as the Court noted in *Padilla*, immigration law is fluid, complex, and constantly changing.¹⁹ It is imprudent for defense counsel to assume up-to-date knowledge of immigration law at any given moment, and she should demand time to speak with experts, research the law, and take whatever steps are necessary to ensure that she is fully aware of the consequences of any plea. Given the Court's explicit reference to, and reliance on, ethical standards at the root of its holding in *Padilla*,²⁰ it is significant that the ABA Standards for Criminal Justice: Pleas of Guilty call for careful, time-consuming consideration of plea offers.²¹ Standard 14-1.3(a) provides that "[a] defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant's interests."²² Post-*Padilla*, it seems that every request for additional time made at the accused's arraignment is presumptively "reasonable," if not compulsory.

The Supreme Court, in the companion cases of *Lafler v. Cooper*²³ and *Missouri v. Frye*,²⁴ again signaled constitutional concerns about the nature and quality of defense counsel's advice to her client concerning guilty pleas.²⁵ The Court for the first time explicitly acknowledged that guilty pleas are the primary method of resolving criminal cases and applied the effective assistance standard to plea bargaining.²⁶ Justice Scalia in his dissent predicted a flurry of plea bargaining litigation as courts are confronted with questions about the nature and quality of counsel's advice, how much fact and legal investigation preceded the advice, how much time the accused was given to consider the

over the trust and confidence of the defendant, but the hurried attorney anxiously wishing to conclude the interview so that he can go to the next court and see other defendants, is not likely to invite and encourage his client's trust." (footnote omitted)).

19. See *Padilla*, 559 U.S. at 360-64, 369.

20. *Id.* at 366-68.

21. See STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.3(a) & cmt. at 25 (AM. BAR ASS'N 1999).

22. *Id.* Standard 14-1.3(a).

23. 566 U.S. 156 (2012).

24. 566 U.S. 134 (2012).

25. *Lafler*, 566 U.S. at 169; *Frye*, 566 U.S. at 143.

26. *Lafler*, 566 U.S. at 170 ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

advice, etcetera.²⁷ Subsequent cases will surely demand more from defense counsel than a brief initial interview before advising a client to plead guilty.

If post-*Padilla*, *Lafler*, and *Frye*, arraignment guilty pleas are of questionable constitutional validity, it is imperative that such pleas be condemned by the Standards of professional behavior. While it is sad but true that a defense attorney's conduct could be constitutional and yet in violation of the Standards, it must never be the case that conduct could be unconstitutional yet consistent with the Standards.

Further, the ABA Standards for Criminal Justice are becoming more directly relevant when courts consider whether counsel provided constitutionally required effective assistance. After many years of minimizing the impact of the Standards when analyzing whether an attorney's performance met constitutional muster,²⁸ the Supreme Court now seems more inclined to take the Standards into active consideration and almost imbue them with constitutional heft.²⁹ In *Frye*, after deciding

27. *Id.* at 175-76 (Scalia, J., dissenting).

28. *See, e.g.*, *Moran v. Burbine*, 475 U.S. 412, 427-28 (1986) (“[O]ur interpretive duties go well beyond deferring . . . to the subconstitutional recommendations of even so esteemed a body as the American Bar Association.”); *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Prevailing norms of practice as reflected in the American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides.”).

29. There are many examples of cases where the Court cited the ABA Standards in support of its holding. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524-25 (2003) (“Counsel’s decision not to expand their investigation . . . fell short of the professional standards that prevailed in Maryland in 1989.”); *INS v. St. Cyr*, 533 U.S. 289, 322-23, 323 n.50 (2001) (noting that “competent defense counsel, following the advice of numerous practice guides, would have advised” the defendant about the immigration consequences of his guilty plea). Former Chief Justice Warren Burger, one of the architects of the ABA Standards, believed the Standards had a place in the Court’s constitutional analyses. *See* Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 253 (1974) (“[T]he Justices of the Supreme Court and hundreds of other judges . . . consult the Standards and make use of them whenever they are relevant.”). Several scholars suggest that the Court is increasingly incorporating the standards into constitutional questions. *See, e.g.*, Anthony O’Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 418 n.40 (2013) (“In addition to fleshing out the meaning of constitutional principles in subsequent cases, the Supreme Court may also invite nonjudicial institutions to help give meaning to constitutional principles through their own regulatory processes. For example, in the Court’s recent ineffective assistance of counsel jurisprudence, it has announced with ever-increasing clarity that it will look to ‘codified standards of professional practice,’ including American Bar Association Guidelines, in determining whether a defense attorney’s performance falls below a constitutionally acceptable baseline.” (quoting *Frye*, 566 U.S. at 145)); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 97 (2007) (arguing that “the Court has given teeth to the test for ineffective assistance” by beginning to use ABA Standards “as a means to measure a lawyer’s performance in death penalty cases”); Roberts, *supra* note 2, at 161 (“Although professional standards on their own may not adequately affect defense-counsel behavior, such standards are also woven into the constitutional landscape.”).

that the requirements of effective assistance also applied to counsel's plea bargaining performance, the Court trenchantly observed the following: "The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question."³⁰ While the Court decided to kick this "difficult question" down the road, it specifically noted that the ABA Standards should serve as "important guides."³¹

As courts look to the ABA Standards to define the parameters of effective assistance in the plea bargaining context, it is essential that the Standards take every occasion to finally, clearly, directly and unequivocally condemn meet, greet, and plead.

This Article examines the latest incarnation of the ABA Standards for the Defense Function adopted in 2015³² and its impact on meet, greet, and plead. Revising the Standards is an onerous task.³³ The last update of the Defense Function Standards was in 1993.³⁴ That reality highlights the need to get it right; it will likely be many years before the Standards are revisited. The revisions presented an opportunity, if not a necessity, to make clear that defense counsel should not recommend to a client that he accept a guilty plea at arraignment, and that counsel should advise a client more affirmatively to reject any guilty plea offered at arraignment.³⁵ In the final analysis, the new Standards send mixed messages and are a lost opportunity to finally rid the criminal justice system of the very symbol of assembly-line justice.

30. *Frye*, 566 U.S. at 143-45.

31. *Id.* at 145 ("This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however.")

32. See generally STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION (AM. BAR ASS'N 2015).

33. See Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10, 14-15.

34. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION (AM. BAR ASS'N 1993, amended 2015).

35. At the outset, it is important to distinguish between first appearances where client and counsel have had adequate time to meet and talk, versus the typical situation involving an indigent defendant and a public defender who likely just met for the first time minutes before the actual first appearance in front of a judge. Arraignment pleas are, obviously, much less of a problem in situations where client and lawyer have had ample time to talk (in addition, the lawyer in those situations very often has had time to conduct at least a preliminary factual and legal investigation)—those scenarios cannot rightly be characterized as "meet, greet and plead." See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 2, at 30-31.

II. THE ABA DEFENSE FUNCTION STANDARDS

There are more than forty Standards with numerous sections and subsections in the Defense Function Standards, and many of them implicate guilty pleas at arraignments.³⁶ But ultimately there is one carefully tucked away key sentence regarding guilty pleas at arraignments. While the previous incarnation of the Standards seemed to address and frown upon defense counsel recommending a guilty plea at any time without having first engaged in fact and legal investigation, the new Standards finally refer specifically to guilty pleas at “first appearance,” as well as to counsel’s affirmative duty to “advise against” those pleas.³⁷

Standard 4-6.1 (Duty to Explore Disposition Without Trial) provides in section (b) as follows:

In every criminal matter, defense counsel should consider the individual circumstances of the case and of the client, and should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed. Such study should include discussion with the client and an analysis of relevant law, the prosecution’s evidence, and potential dispositions and relevant collateral consequences. Defense counsel should advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client’s best interest.³⁸

The new Standard 4-6.1(b) contains the very first explicit reference to guilty pleas at arraignment or “first appearance,” and, as a result, takes on heightened significance.³⁹ It begins by considering when it is appropriate for counsel to recommend to a client that he accept a guilty plea offer, and dictates that counsel should not so recommend unless and until she has completed appropriate investigation and study of the case.⁴⁰ While the word “appropriate” seems to qualify the nature of the

36. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.1 to 4-9.6 (AM. BAR ASS’N 2015).

37. *Id.* Standard 4-6.1(b).

38. *Id.*

39. Compare *id.*, with STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-6.2(b) (AM. BAR ASS’N 1993, amended 2015). In fact, given the significance and prevalence of the practice of meet, greet, and plead, it might have been best addressed in a separate and aptly titled Standard.

40. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-6.1(b) (AM. BAR ASS’N 2015).

investigation and study, it does not eliminate the need for such pre-advice efforts.

Although the Standard states plainly that counsel “should not recommend” a guilty plea unless she has concluded appropriate pre-advice lawyering tasks, and does not include qualifiers such as “absent rare and unusual circumstances,”⁴¹ it is noteworthy that the 1993 version of this section began by stating in no uncertain terms, that “[u]nder no circumstances” should counsel recommend acceptance of a guilty plea offer unless such advice was preceded by appropriate investigation and study of the case.⁴² The use of “under no circumstances” suggested that any recommendation to accept a plea must be preceded by some degree of investigation and study. By deleting such a strong and unequivocal admonition, the new Standard sends a less powerful message to defense counsel.

The new Standard 4-6.1 for the first time addresses when it is appropriate for counsel to affirmatively advise a client to reject a guilty plea offer at first appearance.⁴³ What is the substantive difference between not recommending a guilty plea and advising against a guilty plea? Clearly, the drafters believed it was insufficient to provide solely that lawyers should not recommend guilty pleas unless and until they had completed appropriate investigation. It seems the new language was meant to address the all too common reality of lawyers justifying countless first appearance guilty pleas by saying, in effect, “I didn’t recommend it—he wanted to cop out and get it over with.” The new Standard instructs lawyers that their counseling responsibilities are not satisfied by simply not recommending acceptance of a guilty plea offer; their duties include specifically advising the client to reject a plea.⁴⁴

While the Standard states plainly that counsel “should advise against a guilty plea at the first appearance,” and does not use any qualifiers such as “in most cases,” it provides that the direction for counsel to advise against a quick guilty plea can be overridden if “a speedy disposition is clearly in the client’s best interest.”⁴⁵ The Standard now gives with one hand and takes with the other—it is all too easy to imagine attorneys acceding to arraignment pleas and claiming,

41. *See id.*

42. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standard 4-6.1(b) (AM. BAR ASS’N 1993, amended 2015).

43. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-6.1(b) (AM. BAR ASS’N 2015).

44. *Id.*

45. *Id.*

repeatedly, that it was “clearly in the client’s best interest.”⁴⁶ That is all too facile an explanation for conduct that seems to run against the current stream of effective assistance of counsel jurisprudence as well as many of the Defense Function Standards themselves.

The phrase “clearly in the client’s best interest” is vague and potentially vast. What exactly are those words meant to capture? How clear must it be? How should a lawyer assess what is in her client’s best interests, having just met her client, having just read the charges, and not yet having engaged in any investigation and meaningful study of the case?

This Standard most specifically presents a lost opportunity for the ABA Standards to clearly and boldly confront assembly-line justice by stating simply and eloquently, “[d]efense counsel should advise against a guilty plea at the first appearance.”⁴⁷ The use of the word “should” as opposed to “must” provides sufficient space for defense counsel in rare circumstances to choose not to advise the client to reject a plea offer.

It is crucial to keep in mind that the Standard addresses defense counsel’s advising responsibility—ultimately it is, of course, the client’s decision whether to accept or reject a plea offer.⁴⁸ The Standards should encourage defense counsel to take appropriate steps on behalf of each client to provide and promote individualized and effective representation as opposed to assembly-line justice. Despite the apparent intent of this newly edited Standard, it will, I expect, be honored in the breach—arraignment pleas will remain vast and common and yet in arguable compliance with the Standard.

Many other Defense Function Standards directly or indirectly implicate guilty pleas at first appearance or arraignment, and as a result there is no clear guidance for practicing criminal defense lawyers.⁴⁹ What follows in chronological fashion are comments on various other recently revised Defense Function Standards, with a focus on how the Standard affects guilty pleas at arraignment.

46. *See id.*

47. *Id.*

48. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.” (first citing *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1 (1997) (Burger, C. J., concurring); and then citing STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTIONS 4-5.2, 21-2.2 (AM. BAR ASS’N 1993, amended 2015)).

49. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION STANDARDS 4-6.1 to 4-6.4 (AM. BAR ASS’N 2015).

A. General Standards

1. Standard 4-1.1: The Scope and Function of These Standards

Section (b) of this very first Defense Function Standard specifies that the Standards are “intended to provide guidance” and are “aspirational or describe ‘best practices,’” but that they “may be relevant in judicial evaluation of constitutional claims regarding the right to counsel.”⁵⁰

Section (c) builds on the Standards “are aspirational” theme by declaring that “the words ‘should’ or ‘should not’ are used . . . rather than mandatory phrases such as ‘shall’ or ‘shall not,’ to describe the conduct of lawyers that is expected or recommended.”⁵¹

While the Standards do not create substantive rights for the accused,⁵² and the Supreme Court has said on many occasions that the Standards are “guides” in the ineffective assistance of counsel context,⁵³ why should this Standard set the bar so low? Why shouldn’t the Standards do more than merely “provide guidance,” and if the Standards are aspirational and meant to capture “best practices,” then why start off by so purposefully and clearly limiting their impact?

Section (d) instructs defense counsel to consult other ABA Criminal Justice Standards “for more detailed consideration of the performance of criminal defense counsel in specific areas.”⁵⁴

Most relevant here are the Pleas of Guilty Standards,⁵⁵ last revised in 1999, an obvious and necessary place to look when analyzing the ethical responsibilities of counsel taking guilty pleas at arraignment or initial appearance.⁵⁶

2. Standard 4-1.2: Functions and Duties of Defense Counsel

Section (b) of Standard 4-1.2 specifies that among the “primary duties” defense counsel owe to their clients is the duty “to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation.”⁵⁷

50. *See id.* Standard 4-1.1(b).

51. *See id.* Standard 4-1.1(c).

52. *See id.* Standard 4-1.1(b).

53. *See, e.g.,* Strickland v. Washington, 466 U.S. 668, 688 (1984).

54. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.1(d).

55. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (AM. BAR ASS’N 1999).

56. *See infra* Part III.

57. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.2(b).

How do arraignment guilty pleas comport with this standard? On the contrary, pleas entered at the client's first appearance, after defense counsel met her client briefly for the first time moments before, reflect little concern for constitutional rights. Basic constitutional questions concerning the legality of the seizure, search, and arrest are left unexamined, as are any inquiries about any interrogation or identification procedures. It is telling that the New York City Police Department's rampant stop-and-frisk practices were condemned as unconstitutional by a federal judge;⁵⁸ the practice was barely examined in New York City's criminal courts.⁵⁹

While the new Standard calls for "high-quality" representation, could not even the aspirational bar be set higher? It is true that commentators and even a Supreme Court Justice have opined that defendants do not have a right to a "Cadillac" defense.⁶⁰ The Standards, however, should aim for excellence. Contrast the call for "high-quality" with the language used in Standard 4-1.2(g) that counsel in death penalty cases should make "extraordinary efforts on behalf of the accused."⁶¹ The ABA Standards should urge "extraordinary efforts" in all cases.

Section (c) provides that defense counsel "should know and abide by the standards of professional conduct."⁶²

How then can any Standard in any way permit arraignment guilty pleas, which, as will be discussed below,⁶³ are contrary to numerous Standards?

3. Standard 4-1.3: Continuing Duties of Defense Counsel

Section (h) of Standard 4-1.3 explicitly states that defense counsel has an ongoing "duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction."⁶⁴

58. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658-67 (S.D.N.Y. 2013).

59. See generally Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 ALB. L. REV. 1187 (2012/2013).

60. See Debra Cassens Weiss, *Kagan Says Poor Defendants Are Entitled to a 'Ford Taurus' Defense*, A.B.A. J. (Mar. 19, 2013, 12:00 PM), http://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense.

61. Compare STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.2(b) (instructing defense counsel to provide "high-quality legal representation"), with *id.* Standard 4-1.2(g) (instructing defense counsel in capital cases to "make extraordinary efforts on behalf of the accused").

62. *Id.* Standard 4-1.2(c).

63. See *infra* Part II.A.3-F.

64. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.3(h).

In addition to the ever present potential immigration consequences of a guilty plea, there are vast other disastrous effects that attach to a conviction—a guilty plea can result in eviction, inability to obtain loans, sex offender and domestic violence registration, and loss of myriad licenses, “parental rights, public benefits, and employment opportunities.”⁶⁵ The awesome and time-consuming duty to consider the full range of potential consequences cannot be effectively carried out in time before an arraignment plea.⁶⁶

4. Standard 4-1.5 Duty to Preserve the Record

Standard 4-1.5 states: “At every stage of representation, defense counsel should take steps necessary to make a clear and complete record for potential review.”⁶⁷

The intent and purpose of this new Standard is clear, but arraignment pleas serve instead to insulate and shield cases from any meaningful review.

B. Access to Defense Counsel

1. Standard 4-2.3: Right to Counsel at First and Subsequent Judicial Appearances

Standard 4-2.3 provides the following: “A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance.”⁶⁸

It is indeed critical that defense counsel be made available in person to the accused for consultation at or before any appearance before a judicial officer, including the first appearance.⁶⁹ However, the larger question is what will those lawyers actually do? Providing counsel is “a

65. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1789, 1791 (2012).

66. *But see id.* at 1827 (“[C]ourts have held that neither the court nor counsel had a duty to advise clients of collateral consequences at the time of a plea.”). Nevertheless, it is not unusual to find cases where defense counsel was deemed to be ineffective for failing to provide adequate advice about the impact of a guilty plea on matters like sex offender registration, *Taylor v. State*, 698 S.E.2d 384, 385, 388 (Ga. Ct. App. 2010), or parole eligibility, *Pridham v. Commonwealth*, No. 2008-CA-002190-MR, 2010 WL 4668961, at *1-2 (Ky. Ct. App. Nov. 19, 2010).

67. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-1.5.

68. *Id.* Standard 4-2.3.

69. See, e.g., Robert Patrick, *Public Defender Rules Are Set to Change. Lawyers Say It’s Unethical to Represent Some with So Little Time to Prepare*, ST. LOUIS POST-DISPATCH, July 3, 2005, at E1 (discussing potential consequences associated with “pleading people out”).

necessary but not sufficient step.”⁷⁰ If the lawyers provided at initial appearance simply enter guilty pleas, then they are little more than window-dressing.⁷¹ Hence, there is a critical need for the Standards to speak loudly, clearly, and uniformly against arraignment pleas.

C. Lawyer-Client Relationship

1. Standard 4-3.1: Establishing and Maintaining an Effective Client Relationship

Section (a) of Standard 4-3.1 urges that “[i]mmediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client.”⁷²

The use of the word “work” in the context of endeavoring to establish the critical relationship between lawyer and client is tacit recognition that developing such relationships, especially when counsel is publicly appointed versus privately retained, takes time and effort. The commentary to the comparable 1993 Standard refers to the need for “early and frequent discussions” to help build that relationship “for which defense counsel should strive.”⁷³ Arraignment guilty pleas, typically entered after brief client interviews, are hardly consistent with this essential goal.

2. Standard 4-3.3: Interviewing the Client

Section (a) of Standard 4-3.3 provides that “[i]n the initial meeting with a client, defense counsel should begin the process of establishing an effective attorney-client relationship.”⁷⁴

As noted in the commentary to Standard 4-3.1 above, an “effective attorney-client relationship” does indeed require time.⁷⁵ That relationship typically cannot be, and is not, developed at the initial

70. Andrew Karmen, *Poverty, Crime, and Criminal Justice*, in *FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW* 25, 44 (William C. Heffernan & John Kleinig eds., 2000).

71. Lisa C. Wood et al., *Meet-and-Plead: The Inevitable Consequence of Crushing Public Defender Workloads*, 42 *LITIG.* 20, 23-24 (2015).

72. *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION* Standard 4-3.1(a).

73. *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION* Standard 4-3.1 cmt. at 148-49 (AM. BAR ASS’N 1993, amended 2015).

74. *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION* Standard 4-3.3(a) (AM. BAR ASS’N 2015).

75. *See* *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION* Standard 4-3.1 cmt. at 148-49 (AM. BAR ASS’N 1993, amended 2015).

meeting, especially one that lasts only a few minutes in the moments before the client's arraignment.⁷⁶ The full text of section (a) describes several important matters (for example, the client's objectives, evidentiary matters, and confidentiality) that lawyers should discuss with their clients.⁷⁷ These necessary conversations require, as contemplated by section (b), multiple interviews.⁷⁸

Section (b) states that "[c]ounsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once."⁷⁹

Here is where the Standards first capitulate to meet, greet, and plead. Use of the phrase "simple and routine cases"⁸⁰ provides an opening for the meet, greet, and plead train to run through. With the growth of collateral consequences, as reflected in the numerous references to collateral consequences in these very Standards,⁸¹ there are virtually no "simple and routine cases." "[H]igh-quality" representation mandates that counsel interview all of his or her clients as often as possible, certainly "more than once."⁸² The permission to hold just one interview is especially troubling given the laundry list of important items spelled out in sections (c)(i)–(viii) that defense counsel should review with his or her client.⁸³

Sections (c)(i)–(viii) provide a detailed list of all the matters defense counsel should discuss with the client "[a]s early as practicable in the representation."⁸⁴ Section (c)(i) provides that defense counsel should "determine in depth the client's view of the facts and other relevant facts known to the client,"⁸⁵ and section (c)(viii) specifies the need to discuss "relevant collateral consequences resulting from the current situation as well as from possible resolutions of the matter."⁸⁶

The list of matters to be discussed "[a]s early as practicable" is significantly more detailed than the 1993 version of the Standard,

76. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.3(a)-(b) (AM. BAR ASS'N 2015).

77. *Id.* Standard 4-3.3(a).

78. See *infra* notes 79-83 and accompanying text.

79. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.3(b).

80. *Id.* Standard 4-3.3(b).

81. See, e.g., *id.* Standards 4-1.3(h), 4-1.12(b), 4-3.3(c)(viii), 4-5.4, 4-6.1(b), 4-6.2(c), 4-6.3(e), 4-8.3(b), (h).

82. See *id.* Standards 4-1.2(b), 4-3.3(b).

83. *Id.* Standard 4-3.3(c)(i)–(viii).

84. *Id.* Standard 4-3.3(c).

85. *Id.* Standard 4-3.3(c)(i).

86. *Id.* Standard 4-3.3(c)(viii).

thereby reflecting a more thorough understanding of all that must be achieved in the client interview.⁸⁷ Of particular significance is the direction that defense counsel should “determine in depth the client’s view of the facts” and discuss “relevant collateral consequences resulting from the current situation.”⁸⁸ It seems apparent that this thoughtful and appropriate approach to the interview is at odds with one quick interview that results in an even quicker guilty plea.

3. Standard 4-3.7: Prompt and Thorough Actions to Protect the Client

Section (b) of Standard 4-3.7 provides as follows:

Defense counsel should promptly seek to obtain and review all information relevant to the criminal matter, including but not limited to requesting materials from the prosecution. Defense counsel should, when relevant, take prompt steps to ensure that the government’s physical evidence is preserved at least until the defense can examine or evaluate it.⁸⁹

Section (c) provides the following: “Defense counsel should work diligently to develop, in consultation with the client, an investigative and legal defense strategy, including a theory of the case. As the matter progresses, counsel should refine or alter the theory of the case as necessary, and similarly adjust the investigative or defense strategy.”⁹⁰

Section (f) states: “For each matter, defense counsel should consider what procedural and investigative steps to take and motions to file, and not simply follow rote procedures learned from prior matters.”⁹¹

Once again, the list of “prompt and thorough” actions that defense counsel should take reveals all that is required for the effective defense of a criminal charge, and does not seem to contemplate, or even imagine, an immediate guilty plea.

Section (f)’s call for defense lawyers to refrain from a “rote” approach to lawyering speaks directly to the assembly-line nature of

87. Compare *id.* Standard 4-3.3(c) (instructing defense counsel to discuss, inter alia, relevant facts, length of proceedings, sources of information, the client’s wishes, legal options, potential outcomes, costs and benefits, and collateral consequences), with STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.2 (AM. BAR ASS’N 1993, amended 2015) (instructing defense counsel to discuss relevant facts).

88. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.3(c)(i), (viii) (AM. BAR ASS’N 2015).

89. *Id.* Standard 4-3.7(b).

90. *Id.*

91. *Id.* Standard 4-3.7(f).

much of criminal defense practice,⁹² particularly the automatic assumption that a case is readily disposable by a guilty plea. An early study of public defenders found that most defined their task as defending guilty clients, such that “[t]he situation is construed as ‘standard,’ and, therefore, pre-established organizational routines can be executed.”⁹³ One scholar described the way that public defenders quickly classify cases into various “normal crimes” and resolve those cases according to standard operating procedures.⁹⁴ These routines and standard operating procedures include a quick assessment of the going rate of a misdemeanor case that in turn leads to ready acceptance of a plea offer that conforms to that expectation.⁹⁵

4. Standard 4-3.9: Duty to Keep Client Informed and Advised About the Representation

Section (a) of Standard 4-3.9 provides that “[d]efense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer’s services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.”⁹⁶

Put simply, this Standard recognizes what should be obvious—clients can only “meaningfully participate” if they receive sufficiently detailed information from their lawyers.⁹⁷ The commentary to the comparable 1993 Standard refers to “anxious” clients, the difficulty in establishing a relationship of trust and confidence, and the necessity and benefits of making sure that clients are fully informed about all aspects of their cases.⁹⁸

92. *Id.*

93. Dennis R. Eckart & Robert V. Stover, *Public Defenders and Routinized Criminal Defense Procedures*, 51 J. URB. L. 665, 677 (1974).

94. David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 260, 264-70 (1965).

95. See Zeidman, *supra* note 18, at 913-14, 914 n.253 (“For most institutional defenders, learning what a case is ‘worth’ is a critical step toward developing competence. New cases are compared with prior ones to determine whether a proposed offer approximates the norm and is therefore acceptable.”).

96. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.9(a).

97. *Id.*

98. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.8 cmt. at 177 (AM. BAR ASS’N 1993, amended 2015).

D. Investigation and Preparation

1. Standard 4-4.1: Duty to Investigate and Engage Investigators

Section (a) of Standard 4-4.1 states that “[d]efense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.”⁹⁹

There is no exception for arraignment guilty pleas and that is as it must be—counsel has a duty to investigate in all cases, no matter how seemingly routine. The 1993 commentary refers appropriately to investigation as “essential.”¹⁰⁰ Even the Supreme Court has recognized the indispensable nature of investigation.¹⁰¹

Section (b) pointedly makes clear that “[t]he duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.”¹⁰²

As if speaking directly to the practice of arraignment guilty pleas, this section mandates that counsel must engage in investigation even if the client wishes to plead guilty and even if the client opposes investigation, two of the most common rationales offered by defense attorneys for entering guilty pleas at arraignments.¹⁰³

Section (c) states:

Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties. Although investigation will vary depending on the circumstances, it should always be shaped by what is in the client’s best interests, after consultation with the client. Defense counsel’s investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation.¹⁰⁴

99. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-4.1(a) (AM. BAR ASS’N 2015).

100. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-4.2 cmt. at 183 (AM. BAR ASS’N 1993, amended 2015).

101. *See Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

102. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-4.1(b) (AM. BAR ASS’N 2015).

103. *See id.*

104. *Id.* Standard 4-4.1(c).

Again, there is no exception for arraignment guilty pleas. While the nature of the investigation will necessarily “vary,” the obligation to investigate is manifest.

E. Control and Direction of Litigation

1. Standard 4-5.1: Advising the Client

Section (b) of Standard 4-5.1 dictates:

Defense counsel should keep the client reasonably and regularly informed about the status of the case. Before significant decision-points, and at other times if requested, defense counsel should advise the client with candor concerning all aspects of the case, including an assessment of possible strategies and likely as well as possible outcomes. Such advisement should take place after counsel is as fully informed as is reasonably possible in the time available about the relevant facts and law. Counsel should act diligently and, unless time does not permit, advise the client of what more needs to be done or considered before final decisions are made.¹⁰⁵

This section speaks deliberately and directly to the lawyer’s role as advisor. It begins by making clear that the lawyer should advise the client about “all aspects of the case” before any significant decisions must be made, and that this advice should occur only after counsel has become “fully informed” about the relevant facts and law.¹⁰⁶ It is hard to imagine otherwise.

And yet, inexplicably, the section takes pains to limit this basic and crucial component of a lawyer’s job by providing that counsel’s obligation to become fully informed about the relevant facts and law may be dispensed with due to time constraints, and that, similarly, counsel’s duty to advise about “what more needs to be done or considered before final decisions are made” can be ignored if “time does not permit.”¹⁰⁷ By limiting the lawyer’s most basic advising functions with vague notions of time constraints, this Standard seems to expressly permit, if not condone, the hurried guilty pleas taken at arraignments.

Section (e) states that “[d]efense counsel should provide the client with advice sufficiently in advance of decisions to allow the client to

105. *Id.* Standard 4-5.1(b).

106. *Id.*

107. *Id.*

consider available options, and avoid unnecessarily rushing the accused into decisions.”¹⁰⁸

This section, in contrast to section (b), recognizes what should be abundantly obvious—the accused should be provided with advice well before having to make significant decisions so as to avoid hurried and ill-considered decision-making.¹⁰⁹ Arraignment guilty pleas are the very embodiment of the rushed decisions expressly disfavored by this section.

2. Standard 4-5.4: Consideration of Collateral Consequences

Section (a) of Standard 4-5.4 provides the following:

Defense counsel should identify, and advise the client of, collateral consequences that may arise from charge, plea or conviction. Counsel should investigate consequences under applicable federal, state, and local laws, and seek assistance from others with greater knowledge in specialized areas in order to be adequately informed as to the existence and details of relevant collateral consequences. Such advice should be provided sufficiently in advance that it may be fairly considered in a decision to pursue trial, plea, or other dispositions.¹¹⁰

This Standard, as with Standard 4-5.1(e) above, appropriately recognizes that advice must be given “sufficiently in advance” so that decisions, like the decision whether to accept or reject a plea offer, can be “fairly considered.”¹¹¹ The contrast with the quick and dirty arraignment plea is obvious.

3. Standard 4-5.5: Special Attention to Immigration Status and Consequences

Section (b) of Standard 4-5.5 provides the following: “If defense counsel determines that a client may not be a United States citizen, counsel should investigate and identify particular immigration consequences that might follow possible criminal dispositions. Consultation or association with an immigration law expert or knowledgeable advocate is advisable in these circumstances.”¹¹²

Section (c) further provides the following:

After determining the client’s immigration status and potential adverse consequences from the criminal proceedings, including removal,

108. *Id.* Standard 4-5.1(e).

109. *Compare id.* Standard 4-5.1(b), *with id.* Standard 4-5.1(e).

110. *Id.* Standard 4-5.4(a).

111. *Compare id.*, *with id.* Standard 4-5.1(e).

112. *Id.* Standard 4-5.5(b).

exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, counsel should advise the client of all such potential consequences and determine with the client the best course of action for the client's interests and how to pursue it.¹¹³

As with Standard 4-5.4, counsel cannot measure up to this Standard when resolving cases via arraignment guilty pleas.

F. Disposition Without Trial

1. Standard 4-6.2: Negotiated Disposition Discussions

Section (d) of Standard 4-6.2 states the following: "Defense counsel should not recommend to a defendant acceptance of a disposition without appropriate investigation. Before accepting or advising a disposition, defense counsel should request that the prosecution disclose any information that tends to negate guilt, mitigates the offense or is likely to reduce punishment."¹¹⁴

As with Standard 4-6.1, counsel is admonished not to recommend acceptance of a guilty plea unless having engaged in appropriate investigation, including seeking any and all exculpatory information from the prosecution.¹¹⁵ Given that the prosecution at first appearance may well be unaware of the existence of any such information, this Standard also does not contemplate speedy guilty pleas.

III. THE ABA PLEAS OF GUILTY STANDARDS

The ABA Standards for Criminal Justice include a separate volume devoted specifically to guilty pleas, aptly named the "Pleas of Guilty" Standards.¹¹⁶ Although these Standards have not been revised in nearly twenty years,¹¹⁷ any study of the ethics of guilty pleas at arraignments must include an examination of that volume and whether the Standards therein are consistent with the newly revised Defense Function Standards.

113. *Id.* Standard 4-5.5(c).

114. *Id.* Standard 4-5.5(d).

115. *Compare id.* Standard 4-6.1, with *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (regarding the prosecution's obligation to provide evidence favorable to the accused that is material to guilt or punishment).

116. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (AM. BAR ASS'N 1999).

117. Given the Supreme Court's recent attention to plea bargaining, it behooves the ABA to reevaluate and revise these Standards.

What follows is a chronological analysis of the Pleas of Guilty Standards as they apply to meet, greet, and plead, and how they relate to the revised Defense Function Standards.¹¹⁸ Unlike the extant Defense Function Standards, the current edition of the Pleas of Guilty Standards includes an overall introduction and the history and commentary relative to each specific standard.¹¹⁹

A. Introduction to the Standards

The Pleas of Guilty Standards includes the following introduction:

In the twenty years since these standards were last considered, the context in which guilty pleas are negotiated and entered has changed in important ways. . . . [T]he collateral consequences of convictions, including guilty pleas, have increased dramatically. . . . This has diminished the significance of the distinction between pleading guilty to a felony or a misdemeanor, as the latter may also carry significant future consequences for the defendant.¹²⁰

This language highlights the explosion of collateral consequences and recognizes that the potential harm is not limited to “serious” charges. This speaks squarely to the rampant pleas at arraignments to so-called “lesser” offenses, and calls into question the language in Defense Function Standard 4-3.3(b) regarding “simple and routine cases.”¹²¹

Moreover, “[a]s the direct and collateral consequences of guilty pleas have increased, practices in this area have likewise changed and evolved. . . . The importance of defense counsel’s role in advising his or her client has grown—as has the difficulty of fulfilling that task”¹²²

As the potential devastating impact of a guilty plea has expanded, counsel’s advice-giving function has never been more important or more difficult. Fulfilling this vital function requires more than one, brief initial client interview.

118. See *infra* Parts III–IV.

119. Compare STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION, with STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY intro. As of this writing, the corresponding introduction, history, and commentary for the Defense Function Standards are still being drafted. See *Defense Function*, A.B.A., https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition-TableofContents.html (last visited Nov. 15, 2017).

120. See STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY intro. at xi.

121. Compare *id.* intro. at xi–xii, with STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.3(b).

122. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY intro. at xi.

The introduction also considers the impact of guilty pleas on the public's perception of the legitimacy of the criminal justice system:

[T]he broad reliance of the criminal justice system on guilty pleas as a means of resolving cases has increased the importance of such resolutions. Guilty pleas also continue to have a significant effect in shaping public perceptions of the criminal justice system. Given the dominance of this mode of conviction, public confidence in the fair and effective administration of justice requires that the plea process itself be viewed as legitimate.¹²³

Over the course of many years, through agencies like the former United States Information Agency, I have had the opportunity to guide foreign dignitaries on tours of the New York City criminal courts. In every case, after observing a few hours of arraignments and numerous swiftly entered guilty pleas, there were abundant questions raised about due process, right to counsel, and jury trials. Locally, I have escorted corporate law members of the Bar Association through the criminal court and they voiced similar concerns. There is ample and obvious evidence that the practice of meet, greet, and plead most certainly does not engender public confidence in the fair administration of justice, quite to the contrary.

1. Development of the Third Edition Standards

This "Edition seeks to clarify the roles, and responsibilities, of the . . . defense attorney In addition, the proposed Standards include refinements of the role of . . . defense counsel . . ." ¹²⁴

This language makes clear that one of the explicitly stated purposes of this edition of the Pleas of Guilty Standards was to clarify and refine counsel's role specifically with respect to guilty pleas.¹²⁵

2. Philosophy of the Guilty Plea Standards

The philosophy underlying the Guilty Plea Standards includes the following: "The procedures for negotiation of plea agreements, and for the acceptance of guilty . . . pleas, should be designed to ensure that the defendant is provided with the information and legal advice necessary to make an informed and voluntary plea."¹²⁶

123. *Id.* intro. at xii.

124. *Id.* intro. at xiii.

125. *See id.*

126. *Id.*

It is hard to seriously argue that arraignment pleas are informed and voluntary and based on anything beyond the bare minimum of legal advice and information. Further, “[t]he objective of the [Guilty Plea Standards] is . . . to formulate procedures that will maximize the fairness of the process and the likelihood that the defendant has entered such a plea knowingly and voluntarily, fully understanding the consequences.”¹²⁷

Taken together, the philosophy and objective of the Pleas of Guilty Standards reflect noble and critical goals ensuring that any guilty plea is based on information and legal advice sufficient to maximize the fairness of the process such that any guilty plea is informed, voluntary, knowing, and with full understanding of all the consequences. To fulfill these goals, counsel should not recommend, but should actively advise against entering, a guilty plea at arraignments.

B. Black-Letter Pleas of Guilty Standards: Receiving and Acting upon the Plea

1. Standard 14-1.3: Aid of Counsel; Time for Deliberation

Section (a) of Standard 14-1.3 states “[a] defendant should not be called upon to plead until . . . counsel has been appointed A defendant with counsel should not be required to enter a plea if counsel makes a reasonable request for additional time to represent the defendant’s interests.”¹²⁸

The commentary for Standard 14-1.3(a) provides the following:

Such a provision, similarly, is necessary as a constitutional and practical matter. Just as a defendant is denied the effective assistance of counsel guaranteed by the Sixth Amendment if counsel is not afforded an adequate opportunity to prepare for trial, a violation of the Sixth Amendment may also occur where a defendant is called upon to plead but his or her counsel has not had sufficient chance to engage in plea discussions with the prosecuting attorney. Moreover, it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plead. Instead, a reasonable interval should elapse between assignment of counsel and the pleading stage. Allowing for such “additional time” will permit plea discussions to go forward, where appropriate, and will also provide the time necessary

127. *Id.* intro. at xvi.

128. *Id.* Standard 14-1.3(a).

for legal and factual investigation and for client-counsel discussions as to what plea would be most appropriate.¹²⁹

As elucidated in the commentary, this Standard, without specifically referencing arraignment pleas, seems to speak directly to the issues they raise. It calls, clearly and simply, for time—time for defense counsel to adequately represent his or her client’s interests.¹³⁰ By stating that “it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plead,” the commentary calls out and disapproves the exact type of “negotiations” that characterize arraignments.¹³¹ It is particularly noteworthy that there is a direct reference to the constitutional right to effective assistance to highlight the importance of time.¹³² The commentary presents a stark contrast to Defense Function Standard 4-5.1 that capitulates to and accepts time constraints on counsel’s ability to investigate and to advise.¹³³

2. Standard 14-1.4: Defendant To Be Advised

This Standard provides a lengthy laundry list of all the “advice” the court must give to the defendant before accepting a plea.¹³⁴ It obviously presupposes that defense counsel has informed and discussed with her client all the listed items (for example, nature and elements of the offense; maximum possible sentence; the many constitutional rights the defendant is waiving by pleading guilty; and potential collateral consequences).

The commentary provides as follows:

Ordinarily, the primary burden to ensure that the defendant is aware of any collateral consequences that may apply in his or her case must fall on the defense counsel. A new provision outlining this responsibility has also been included in Standard 14-3.2, governing the duties of defense counsel. It is also appropriate that the court take a role in this area, however, because of the number and extent of such collateral effects, which may be critical considerations to an individual defendant in deciding whether to enter a plea. In some cases, the collateral

129. *Id.* Standard 14-1.3(a) cmt. at 27 (footnotes omitted) (first citing *Powell v. Alabama*, 287 U.S. 45, 71 (1932); then citing *State v. Borchert*, 934 P.2d 170 (Mont. 1997); and then citing *In re Hawley*, 433 P.2d 919 (Cal. 1967)).

130. *See id.* Standard 14-1.3(a) cmt. at 26.

131. *Id.* Standard 14-1.3(a) cmt. at 27.

132. *See id.*

133. *Compare id.*, with STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-5.1 (AM. BAR ASS’N 2015).

134. *See* STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.4 (AM. BAR ASS’N 1999).

consequences may be far disproportionate to the direct effects of the conviction itself.¹³⁵

The clear message from the Standard and corresponding commentary is that defense counsel must devote considerable time and attention to client interviews in order to effectively counsel her clients about the myriad consequences that may flow from a plea.

C. *Plea Discussions and Plea Agreements*

Standard 14-3.2, Responsibilities of Defense Counsel section (b) provides the following:

To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.¹³⁶

Section (f) states, “To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”¹³⁷

1. History of Standard 14-3.2

“Subsection (b) has been amended to include language making clear that defense counsel ‘should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.’”¹³⁸

The fact that this Standard was specifically amended to “mak[e] clear” that counsel should not recommend acceptance of a plea “unless appropriate investigation and study of the case has been completed” speaks volumes about the obligation of counsel to engage in adequate investigation prior to providing advice.¹³⁹

In addition, “[n]ew subsection (f) is included, concerning defense counsel’s duty, to the extent possible, to advise the client in advance of

135. *Id.* Standard 14-1.4 cmt. at 59-60.

136. *Id.* Standard 14-3.2(b).

137. *Id.* Standard 14-3.2(f).

138. *Id.* Standard 14-3.2 hist. at 117.

139. *Id.*

the entry of any guilty plea concerning the ‘possible collateral consequences that might ensue from the entry of the contemplated guilty plea.’”¹⁴⁰

Here is one of the few places where the Pleas of Guilty Standards send conflicting messages. Use of the phrase “to the extent possible” in regard to counsel’s advice concerning potential collateral consequences is confusing, troubling, and inconsistent with the emphasis in the commentary to Standard 14-1.3(a) on making sure counsel has the time she needs to adequately advise her clients.¹⁴¹

2. Commentary of Standard 14-3.2

The commentary of Standard 14-3.2 provides the purpose of this Standard:

Standard 14-3.2 addresses the responsibilities of defense counsel in connection with the process of negotiating and entering a plea of guilty This is a critical standard because the system relies, at heart, on a defense counsel to ensure that a defendant’s guilty plea is truly knowing and voluntary and is entered in his or her best interests.¹⁴²

Recognizing the central role guilty pleas play in the criminal justice system, the commentary highlights that it is “critical” for defense counsel to guarantee that her clients’ guilty pleas are truly knowing and voluntary.¹⁴³ That, by definition, presupposes that all advice given is based on factual and legal investigation, and that the client has had sufficient time to weigh all options. However, the commentary acknowledges the following:

This standard is not, of course, intended to be a comprehensive list of all of defense counsel’s duties to the client, which are set out fully in the ABA Standards on the Defense Function and which should be read in conjunction with these standards. Rather, they are intended more narrowly, to address the particular duties that defense counsel has in connection with the negotiation and entry of guilty pleas, and advising the client in connection therewith.¹⁴⁴

140. *Id.*

141. *Compare id.* Standard 14-1.3 cmt. at 27, *with id.* Standard 14-3.2(f).

142. *Id.* Standard 14-3.2 cmt. at 117.

143. *Id.*

144. *Id.* Standard 14-3.2 cmt. at 118.

Since we are instructed that the Pleas of Guilty Standards should be read “in conjunction” with the Defense Function Standards,¹⁴⁵ it is imperative that the Standards are not in conflict. The Pleas of Guilty Standards more explicitly disapprove arraignment pleas. The Defense Function Standards should follow suit.

The Pleas of Guilty Standards provide that “[t]he obligations reflected in . . . Standard 14-3.2(b) . . . concern[] defense counsel’s duty to provide effective assistance of counsel to the defendant.”¹⁴⁶

By using “effective assistance” language, the commentary signals that these obligations are constitutional, as well as ethical.

The commentary also suggests the following:

By necessity, defense counsel is charged with the primary responsibility to ensure that the defendant fully understands the plea that is being offered, including all terms of the sentence that could be imposed and other ramifications of that plea.

Given the importance of this decision for the defendant and the defendant’s family, and the serious and lasting collateral consequences that may flow from the conviction, defense counsel is, in effect, acting as a fiduciary for the client. The obligation to communicate with a criminal client in this situation is not simply a formal one that may be satisfied in each particular case by giving a client a rote checklist of factors worth considering in deciding whether to plead guilty. In evaluating the information necessary to provide meaningful advice prior to a plea, individualized consideration should be given to such factors as the particular circumstances of the defendant, the particular offense(s) at issue, the level and quality of the defendant’s education and cognition, the client’s familiarity with the legal system, and the like. This presupposes that counsel has a duty to conduct a sufficient investigation to understand the unique issues that confront each client and the client’s particular concerns. Such inquiries may be difficult when the defendant’s English language skills are poor, and counsel may require the assistance of a translator both to ask the necessary questions and to convey the requisite information for a fully informed guilty plea.¹⁴⁷

This language leaves little doubt that the Standard presupposes that counsel engage in personalized and thorough factual and legal investigation prior to giving plea advice.

145. *Id.*

146. *Id.* Standard 14-3.2(a) cmt. at 118-19.

147. *Id.* Standard 14-3.2(a) cmt. at 120.

Standard 14-3.2(b) concerns defense counsel's duty adequately to "advise" the defendant concerning the plea decision. As part of the third edition, this provision has been expanded explicitly to include the duty of defense counsel to conduct "appropriate investigation and study" of the case before recommending acceptance of a plea offer. This advice should, of course, include discussion of any affirmative defenses that may be available to the defendant.¹⁴⁸

The commentary highlights, as did the history, that this Standard was "expanded explicitly" to address counsel's duty "to conduct 'appropriate investigation and study' of the case before recommending acceptance of a plea offer."¹⁴⁹ The point that investigation is a precondition to providing advice could not be more clearly made.

As a matter of constitutional law, a plea is not deemed voluntary and intelligent "if the advice given by defense counsel on which the defendant relied in entering the plea falls below the level of reasonable competence such that the defendant does not receive effective assistance of counsel."¹⁵⁰

Once again, the intentional reference to constitutional requirements in the context of ethical duties is particularly noteworthy:

It should be emphasized that this Standard requires counsel to do more than the constitutional minimum; it mandates that a defendant should be informed fully by defense counsel and provided with a realistic appraisal of the value of any concessions offered by the prosecutor.¹⁵¹

To the extent one engages in a constitutional versus ethical analysis, the commentary makes clear that the Standard sets a higher bar:

Equally important, Standard 14-3.2(b) recognizes defense counsel's duty to investigate the case before recommending acceptance of a guilty plea. It provides that defense counsel "should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed." In most cases, an "appropriate" investigation will include not only an analysis of controlling law and the evidence likely to be introduced at trial, but also consideration of any applicable discovery rules, and a determination whether it would

148. *Id.* Standard 14-3.2(b) cmt. at 120.

149. *Id.* Standard 14-3.2 hist. at 116-17, cmt. at 120.

150. *Id.* Standard 14-3.2(b) cmt. at 120-21.

151. *Id.* Standard 14-3.2(b) cmt. at 122.

be preferable to seek particular items of discovery before negotiating a plea.

....

Defense counsel's duty to conduct an "appropriate investigation" thus includes the duty to be familiar with, and enforce the defendant's rights under, any discovery rules that may apply in the jurisdiction. Defense counsel should use these avenues, among others, to conduct an appropriate investigation of the case before advising the defendant concerning a possible guilty plea. In conducting such an investigation, it is defense counsel's responsibility to investigate not only the facts concerning the offense, but also facts that go to the defendant's potential sentence, including his or her prior record.

While defense counsel generally has a duty to seek crucial items of discovery before plea negotiations are completed, there may be some cases in which defense counsel legitimately determines that a better plea agreement may be available if the defendant enters a plea at a point in time before all of his or her discovery rights may apply. Thus, an "appropriate" investigation may be quite limited in certain cases—for example, where a highly favorable pre-indictment plea is offered, and the pleas offered after indictment are likely to carry significantly more severe sentences.¹⁵²

These three paragraphs spell out in greater detail the types of factual and legal investigations envisioned as conditions precedent before defense counsel should recommend that her client accept a guilty plea offer.¹⁵³ Unlike the new Defense Function Standard 4-6.1(b), the Pleas of Guilty Standard 14-3.2, history, and commentary are silent on the question of when a lawyer should affirmatively advise a client to reject a guilty plea offer.¹⁵⁴

While the commentary acknowledges that in "some" cases "'appropriate' investigation may be 'quite limited,'" the example used refers to a situation where investigation via discovery is not fully completed.¹⁵⁵ That is a far cry from situations where counsel enters a guilty plea after only having met her clients for a few minutes prior to the plea. The commentary also notes that,

Standard 14-3.2(f) . . . requires defense counsel, "sufficiently in advance of the entry of any plea," to determine and advise the

152. *Id.* Standard 14-3.2(b) cmt. at 123.

153. *See id.*

154. *Compare* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 5-6.1(b) (AM. BAR ASS'N 2015), *with* STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 cmt. at 116-32.

155. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 cmt. at 123.

defendant as to “the possible collateral consequences that might ensue from entry of the contemplated plea.” While the standards always required defense counsel to advise his or her client concerning other considerations “deemed important by defense counsel or the defendant” (Standard 14-3.2(b)), the number and significance of potential collateral consequences has grown to such an extent that it is important to have a separate standard that addresses this obligation.

....

Given the ever-increasing host of collateral consequences that may flow from a plea of guilty . . . it may be very difficult for defense counsel to fully brief every client on every likely effect of a plea in all circumstances. Courts do not require such an expansive debriefing in order to validate a guilty plea. This Standard, however, strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction.¹⁵⁶

The specific inclusion of obligations regarding collateral consequences reflects a recognition of all that is required before defense counsel is in a position to offer ethical, and constitutionally effective, advice. The commentary recognizes that although it might be hard to fully brief every client on every likely effect, the Standard strives to set a high bar.

IV. ON THE GROUND DEVELOPMENTS

Some Public Defender offices, courts, and state bar ethics committees are taking matters into their own hands.

In 2005, Howard Finkelstein, the Public Defender in Broward County, Florida, prohibited his lawyers from advising clients to plead guilty at arraignment, emphasizing that plea advice had to be preceded by “meaningful contact” between lawyer and client.¹⁵⁷

Similarly, in St. Louis, Missouri, the Public Defender called representation of certain misdemeanor defendants “unethical, unprofessional and unconstitutional,” and decided his office would no longer automatically represent defendants at their initial court appearance on misdemeanor charges.¹⁵⁸ In particular, he decried the lack

156. *Id.* Standard 14-3.2(f) cmt. at 125-26.

157. See Dan Christensen, *Broward PD Says No to Instant Plea Deals*, DAILY BUS. REV., June 6, 2005, at 1; see also Geri L. Dreiling, *‘Meet-and-Greet Pleas’ Not Good Enough*, A.B.A. J. EREPORT, June 24, 2005.

158. Patrick, *supra* note 74 (quoting St. Louis District Defender Eric Affholter).

of discovery, investigation, and time for meaningful consultation with the client before plea offers were made and accepted.¹⁵⁹

In 2013, the Public Defender in Florida filed motions seeking to be relieved of the obligation to represent indigent defendants in non-capital felony cases.¹⁶⁰ The crux of the motion alleged that excessive caseloads prevented staff attorneys from meeting their legal and ethical obligations to their clients.¹⁶¹ The court ruled in the Public Defender's favor and remanded the case for further proceedings:

Witnesses from the Public Defender's office described "meet and greet pleas" as being routine procedure. The assistant public defender meets the defendant for the first time at arraignment during a few minutes in the courtroom or hallway and knows nothing about the case except for the arrest form provided by the state attorney, yet is expected to counsel the defendant about the State's plea offer. In this regard, the public defenders serve "as mere conduits for plea offers."¹⁶²

A recent ethical opinion from the Pennsylvania Bar Association also expressly rejected "meet and greet" pleas.¹⁶³ That opinion addressed the ethics of an "early accountability" plea program that compelled defense attorneys to recommend guilty pleas to their clients before they had received any discovery or done any investigation.¹⁶⁴ The opinion states that the program forced defense lawyers to violate rules of professional conduct, particularly the obligation to investigate the facts, examine the evidence, and explore possible defense and mitigation.¹⁶⁵ That is precisely the issue with guilty pleas at the accused's initial appearance. Just as the Pennsylvania State Bar found the practice to be an ethical violation, so too should the American Bar Association.

V. CONCLUSION

To be sure, many arraignment pleas are to reduced charges and noncriminal violations/offenses, but in the current era of massive

159. *See id.*

160. Pub. Def. v. State, 115 So. 3d 261, 265 (Fla. 2013).

161. *Id.*

162. *Id.* at 278. The characterization of arraignment guilty pleas as "routine procedures" flies directly in the face of ABA Defense Function Standard 4-3.7(f) that urges defense counsel to avoid "simply follow[ing] rote procedures." *Compare id.*, with STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-3.7(f) (AM. BAR ASS'N 2015).

163. *See* Pa. Bar Ass'n, Inquiry No. 2014-026 (2014); *see also* Samson Habte, *Plea Program Altered After Ethics Opinion But Critics' Constitutional Challenge Looms*, 95 CRIM. L. REP. (BNA) 650-51 (2004).

164. Pa. Bar Ass'n, Inquiry No. 2014-026, at 1-2, 4-6.

165. *Id.* at 4-6.

collateral consequences, even these types of pleas have drastic consequences for the accused and merit more time and attention than typically afforded as part of an arraignment disposition.¹⁶⁶ It is well-documented that misdemeanor and even non-criminal offenses can lead to deportation, eviction, inability to obtain loans or licenses, etcetera.¹⁶⁷

And no doubt many defense attorneys say that their clients often insist upon accepting a plea offer because they can't miss work to come back to court or have family obligations that lead to the same result.¹⁶⁸ However, eschewing meet, greet, and plead dispositions does not mean that the accused must come back to court over and over—there is no impediment to the accused accepting a plea on the very next court date, a time by which he's been able to get some rest, shower, eat, and talk with family and friends before making this decision. Otherwise, the “clearly in the client's best interest” proviso in the new Standard will easily swallow the “rule” against arraignment guilty pleas.¹⁶⁹

Of course, arraignment pleas are part of a larger conversation about criminal justice. While I have focused my attention on defense counsel's role, it is also the case that judges and prosecutors need to rethink their power and prominent roles vis-à-vis pleas at arraignments. Prosecutors should abstain from “one time only” plea offers so as not to, in effect, cause defense counsel to violate her ethical obligations (and provide ineffective assistance).¹⁷⁰ As is written in the Introduction to the Pleas of Guilty Standards, “while it is not unconstitutional for prosecutors to seek to induce defendants to plead guilty, these standards recognize that defendants should have a right to go to trial, and as a matter of sound criminal justice policy, should not be unduly pressured to forego that right.”¹⁷¹

Similarly, judges should avoid tying plea decisions to bail determinations¹⁷² and strictly adhere to the practices and policies spelled

166. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 2, at 34.

167. *Id.*

168. See *id.* at 32.

169. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION & DEFENSE FUNCTION Standard 4-6.1(b) (AM. BAR ASS'N 2015).

170. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 2, at 8 (stating that prosecutors often exert pressure in the form of “one time only” offers to induce defendants to enter guilty pleas at their initial court appearance); Jane Campbell Moriarty & Marisa Main, “Waiving” Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation, 38 HASTINGS CONST. L.Q. 1029, 1041 (2011).

171. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY intro. at xv (AM. BAR ASS'N 1999).

172. Klein, *supra* note 2, at 211-12 (stating that many judges use the threat of bail to coerce defendants into pleading guilty at their initial court appearance).

out in detail in the ABA Standards for Criminal Justice: Pretrial Release.¹⁷³ As urged in the Pleas of Guilty Standards, “prosecutors and judges should keep in mind that the defendant always has a right to plead not guilty and to choose to go to trial. Neither should seek to compromise or threaten that right.”¹⁷⁴

Ideally, state laws or administrative rules would be such that pleas were not jurisdictionally permissible at arraignment. In fact, that is the case in many jurisdictions across the country—there are no guilty pleas at arraignment and those court systems function as well, if not better, than courts that do permit, or even encourage, arraignment pleas.

While there are many parts to the arraignment plea discussion, the immediate issue is to define defense counsel’s proper role in the Standards. But even as I focus for now on defense counsel, it is important to note that ending the practice of arraignment pleas will inevitably lead to more facts, details, and insights about the charges—everyone would be better served. Defense counsel will be able to meet their ethical and constitutional duties, prosecutors will be able to learn which cases are more or less serious and substantiated, and judges will have more information from which to make decisions. And, of course, the accused will have the opportunity to carefully and thoughtfully consider his or her options.

It is also the case that seemingly “simple” or “routine” cases often are actually factually and legally complicated and merit careful attention. In New York, we have seen the ways that early guilty pleas masked ongoing constitutional problems with disorderly conduct,¹⁷⁵ trespass,¹⁷⁶ and marijuana arrests,¹⁷⁷ not to mention the ways that Equal Protection and Fourth Amendment stop-and-frisk violations¹⁷⁸ were shielded from view amid rampant guilty pleas entered in hurried, hushed tones.

Many people familiar with the criminal court contend that arraignment pleas are no big deal; that concerns about meet, greet, and

173. STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE (AM. BAR ASS’N 2007).

174. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY intro. at xvi.

175. See *People v. Jones*, 878 N.E.2d 1016, 1017-19 (N.Y. 2007); Nicholas Confessore, *A Times Square Pedestrian Is Giving No Ground*, N.Y. TIMES, Oct. 18, 2007, at B1.

176. See J. David Goodman, *Police Patrols in Projects Draw Scrutiny*, N.Y. TIMES, Dec. 16, 2014, at A1; Cara Buckley, *Lawsuit Takes Aim at Trespassing Arrests in New York Public Housing*, N.Y. TIMES (Jan. 29, 2010), <http://www.nytimes.com/2010/01/26/nyregion/30housing.html>.

177. See Elizabeth A. Harris, *Police Memo on Marijuana Warns Against Some Arrests*, N.Y. TIMES, Sept. 24, 2011, at A15; Brendan Cheney, *Marijuana Arrests in City Increased in 2016, with Large Racial Disparities*, POLITICO (Feb. 6, 2017, 5:31 AM), <http://www.politico.com/states/new-york/city-hall/story/2017/02/marijuana-arrests-in-nyc-increase-in-2016-still-large-racial-disparities-109306>.

178. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 658-64 (S.D.N.Y. 2013).

plead make mountains out of mole hills. These institutional players argue that the charges that result in arraignment guilty pleas are minor and routine so that in-depth interviews and factual and legal investigations are not required.¹⁷⁹ That attitude is cavalier as well as reckless. With the explosion of collateral consequences there are precious few “safe” guilty pleas. Even a guilty plea to a something like a non-criminal marijuana offense can result in the loss of federal student loans.¹⁸⁰ Many seemingly minor violations can lead to deportation, and countless others impact licenses and government benefits.

Even guilty pleas that seem to be safe today may become disastrous tomorrow—just consider the recent changes in immigration deportation enforcement.

Court administrators argue that arraignment pleas are a necessary evil; that the system would collapse under the weight of all the cases that now would enter the courts.¹⁸¹ But similar resource arguments were made against providing counsel in *Gideon*¹⁸² and again when the right to counsel was extended in *Argersinger*.¹⁸³ The constitutional right to the effective assistance of counsel should not give way to concerns about resources. *Gideon* and *Argersinger* provide the right to counsel.¹⁸⁴ The critical question addressed by the Standards, and likely to be addressed with renewed vigor by the Supreme Court in light of *Padilla*, *Lafler*, and *Frye*, is “what are those lawyers actually doing with respect to guilty pleas, especially guilty pleas at initial appearance?”

Ultimately, meet, greet, and plead is a reflection of American criminal justice writ large. Much has been written about the ways the criminal justice system works to keep under foot those communities that are already subordinated.¹⁸⁵ It is hard to imagine a system of rapid guilty pleas inflicted on anyone other than people of color. Contrast the time and attention paid to all kinds of white collar prosecutions in federal court no matter how complicated or serious the facts and charges. To the people involved in those cases, the notion of a guilty plea entered

179. Sean C. Gallagher, *A Judge's Comments*, 42 LITIG. 21, 21, 23 (2015).

180. See 20 U.S.C. § 1091(r)(1) (2012).

181. See Gallagher, *supra* note 179, at 21, 23.

182. See Brief for Respondent at 50, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

183. See *Argersinger v. Hamlin*, 407 U.S. 25, 36-37, 37 n.7 (1972).

184. *Id.* at 36-37; *Gideon*, 371 U.S. at 339-40.

185. See MICHELLE ALEXANDER, *THE NEW JIM CROW* 188 (2012); DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 21-22 (1999); BRYAN STEVENSON, *JUST MERCY* 300 (2015); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 300-01 (2014); SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 137 (6th ed. 2016).

without benefit of thorough investigation, advice, and time to weigh alternatives is inconceivable.

Perhaps the best way to think about the issue is what would you expect if a loved one were arrested for a relatively minor charge? I am sure you would expect, if not demand, that he or she were given adequate time to ensure there was fully informed advice and ample time to consider all the options.

Meet, greet, and plead is a very visible and ingrained stain on the criminal justice system. The Standards missed a chance to help remove it.¹⁸⁶

186. There is still some hope. The as yet unfinished commentary is a chance to illuminate the black letter language of the Standards.