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tutional. While the Fourth Circuit may attempt to limit the impact of *Hart* as precedent, its holding will not be easily limited to the facts. The court noted: "We think that a sentence of life imprisonment, the most severe punishment available under West Virginia law, is unnecessary to accomplish the legislative purpose to protect society from an individual who has committed three wholly nonviolent crimes over a period of twenty years."[74] In light of the court's decision in *Hart*, it would seem advisable for every defendant incarcerated under the West Virginia recidivist statute to consider challenging his life sentence if it is based upon convictions for nonviolent crimes.

It is suggested that in response to the Fourth Circuit's decision in *Hart* the West Virginia legislature should act to prevent constitutionally suspect application of its recidivist statute. This could be accomplished by revising the statute to provide for either judicial evaluation of the underlying offenses prior to imposition of the life sentence or a less severe mandatory sentence. Until the statute is revised, West Virginia trial courts will be faced with the dilemma of either following legislative intent and applying the mandatory sentence required by the statute, or following the apparent dictates of the *Hart* decision and considering whether the mandatory sentence would be excessive and disproportionate in light of the offenses underlying the recidivist statute's application.

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THE RATIONAL BASIS FOR GUILTY PLEAS AND THE RESTRICTIVE SCOPE OF DIRECT CONSEQUENCES

Unless a waiver of constitutional rights is made voluntarily and intelligently,[1] the waiver will be deemed to violate due process.[2] Accordingly, since a defendant who pleads guilty in a criminal case[3]

[74] *Id.* at 141. In the same vein the court noted, "Life imprisonment is the penultimate punishment. Tradition, custom, and common sense reserve it for those violent persons who are dangerous to others." *Id.*

[1] Brady v. United States, 397 U.S. 742 (1970). In *Brady* the Supreme Court stated: "Waiver 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." *Id.* at 748.

[2] Boykin v. Alabama, 395 U.S. 238, 243 n.5 (1969).

[3] Although the scope of the voluntary and intelligent standard for guilty pleas

simultaneously waives several constitutional rights,[4] a guilty plea cannot be accepted as valid by a court unless the court has first determined that the defendant pleaded voluntarily and intelligently.[5] Unfortunately, what constitutes a "voluntary and intelligent" waiver of the constitutionally guaranteed due process safeguards[6] has not been clearly delineated by the courts.[7] In its recent decision, *Cuthrell v. Director, Patuxent Institution*,[8] the Fourth Circuit was primarily concerned with the proper scope of this due process requirement. More particularly, the court was faced with the determination of the extent to which a defendant must be apprised of the potential consequences of a conviction in order for the "voluntary and intelligent" requirement to be satisfied.

The requisite amount of knowledge which a defendant must possess in entering a guilty plea has not been precisely determined. The Supreme Court stated in *Kercheval v. United States*[9] that a guilty

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applies to all criminal cases, the focus of this comment is on felony cases as these are the cases which are usually the subject of additional consequences.

[4]In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court included the following as constitutional rights waived by a guilty plea: privilege against compulsory self-incrimination, right to trial by jury, right to confront one's accusers. *Id.* at 243 n.5.

[5]In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court held that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242.

[6]*See* U.S. CONST. amend. VI which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

[7]The Supreme Court itself has used a different standard for determining the admissibility of a confession into evidence than it has for determining the validity of a guilty plea. In Bram v. United States, 168 U.S. 532 (1897), the Court held that a confession was admissible only if made freely and voluntarily and not "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight." *Id.* at 542-43. Were this standard also applied to guilty pleas, all guilty pleas resulting from the widely-used practice of plea bargaining would be held invalid, for they are undoubtedly obtained by direct or implied promises. Instead, the Court has used a standard that is focused primarily on the rationality and intelligence of a guilty plea. *See* Brady v. United States, 397 U.S. 742 (1970), in which the Court recognized this focus: "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious . . . ." *Id.* at 752. In order for a guilty plea to be voluntarily made, then, it must be a rational decision in view of all the relevant circumstances surrounding it. *Id.* at 748.

[8]475 F.2d 1364 (4th Cir. 1973).

[9]274 U.S. 220 (1927). *Kercheval* is generally recognized as the authority for the notion that comprehension of the consequences of a guilty plea is a requirement of constitutional due process. It should be noted that this decision antedates widespread recognition that due process requirements extend to and limit the states. These requirements were placed upon the states in Boykin v. Alabama, 395 U.S. 238 (1969),

plea should not be accepted unless the defendant had a "full understanding of the consequences."[10] In light of the Court's failure to particularize the meaning and scope of the term "consequences," the lower federal courts have interpreted the ambit of that term in a restrictive manner, requiring that a defendant only be informed of the "direct consequences"[11] of his guilty plea. The term "direct consequences," even in its broadest sense, describes solely those consequences of which a defendant must be aware if his guilty plea to a particular charge is to be accepted as valid. Thus, federal courts have not considered it necessary to inform the defendant of possible or "collateral" consequences.[12]

Collateral consequences are those which do not relate directly to the charge to which the defendant pleads guilty.[13] There is no uniform test by which the circuits distinguish direct consequences from those that are deemed collateral; however, the test used by the Fourth Circuit in *Cuthrell* is one which has been adopted by the majority of the circuits.[14] This test turns on "whether the result represents a definite, immediate and largely automatic effect on the range of defendant's punishment."[15] At present, all the circuits consider the fol-

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which fastened upon the states the rigid requirements of Rule 11 of the Federal Rules of Criminal Procedure. 395 U.S. 238, 245 (Harlan, J., dissenting).

[10]Kercheval v. United States, 274 U.S. 220, 223 (1927).

[11]In Bailey v. MacDougall, 392 F.2d 155 (4th Cir.), *cert. denied*, 373 U.S. 847 (1968), the court stated that in determining whether the defendant understood the consequences of his plea, the determination was limited to the direct consequences. *Id.* at 159.

[12]*Id.* at n.10. *See also* United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) (not necessary to inform a defendant of collateral consequences).

Collateral consequences include *inter alia*: deportation (United States v. Parrino, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954)); recidivist statutes (United States v. Cariola, 323 F.2d 180 (3d Cir. 1963)); defective delinquent acts (Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971)); sexual deviates acts (Butler v. Burke, 360 F.2d 118 (7th Cir. 1966)); loss of an occupational license (State v. Payne, 24 Wis. 2d 603, 129 N.W.2d 250 (1964)); loss of the right to vote (Meaton v. United States, 328 F.2d 379 (5th Cir. 1964)); loss of good time credit (Hutchison v. United States, 450 F.2d 930 (10th Cir. 1971)); loss of right to hold public office (United States v. Cariola, 323 F.2d 180 (3d Cir. 1963)); undesirable discharge from the armed services (Redwine v. Zuckert, 317 F.2d 336 (D.C. Cir. 1963)); and loss of passport (Meaton v. United States, 328 F.2d 379 (5th Cir. 1964)).

[13]Bailey v. MacDougall, 392 F.2d 155, 159 n.10 (4th Cir.), *cert. denied*, 393 U.S. 844 (1968).

[14]However, the test used by the District of Columbia Circuit in United States v. Briscoe, 432 F.2d 1351, 1353-54 (D.C. Cir. 1970), measured the severity of the consequence and the likelihood of its being included in the judgment of whether or not to plead guilty.

[15]475 F.2d 1364, 1366 (4th Cir. 1973).

lowing as within the purview of direct consequences: the maximum sentence which is possible and the minimum sentence which is mandatory,[16] concurrent and consecutive sentence possibilities,[17] and the existence of special sentencing possibilities which would have an effect on defendant's penalty.[18] Additionally, all but two circuits include parole ineligibility within the category of direct consequences.[19]

Although the sheer speculativeness of most collateral consequences militates against requiring courts to include them within the scope of direct consequences, there are some of sufficient severity to merit inclusion. Whether "automatic"[20] or not, consequences which

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[16]Jones v. United States, 440 F.2d 466 (2d Cir. 1971); Tucker v. United States, 409 F.2d 1291 (5th Cir. 1969).

[17]Tibbs v. United States, 459 F.2d 292 (9th Cir. 1972).

[18]Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963). *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, APPROVED DRAFT § 1.4 (1968), which suggests:

> The Court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and
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> (a) determining that he understands the nature of the charge;
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> (b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and
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> (i) of the maximum possible sentence on the charge, including *that possible from consecutive sentences*;
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> (ii) of the mandatory minimum sentence if any, on the charge, and
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> (iii) *when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of any offense*, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment (emphasis added).

[19]The following cases hold that parole ineligibility is included within direct consequences:

> Moody v. United States, 469 F.2d 705 (8th Cir. 1972); Paige v. United States, 443 F.2d 781 (4th Cir. 1971); United States v. Smith, 440 F.2d 521 (7th Cir. 1971); Bye v. United States, 435 F.2d 177 (2d Cir. 1970); Harris v. United States, 426 F.2d 99 (6th Cir. 1970); Jenkins v. United States, 420 F.2d 433 (10th Cir. 1970); Berry v. United States, 412 F.2d 189 (3d Cir. 1969); Durant v. United States, 410 F.2d 689 (1st Cir. 1969); Munich v. United States, 337 F.2d 356 (9th Cir. 1964).

The Fifth Circuit and the District of Columbia Circuit do not include parole ineligibility as a direct consequence. United States v. Farias, 459 F.2d 738, 740 (5th Cir. 1972).

[20]See note 15 *supra*.

impose grave penalties and which are likely to be applied are necessary considerations in the formulation of an intelligent and rational trial strategy. There are two consequences which demonstrate this dual criterion of severity of the consequence coupled with probability of its application: indeterminate sentencing under defective delinquent acts and deportation. While there is some speculativeness as to the applicability of these consequences to a particular defendant, their exclusion from the direct consequences category has caused seemingly inequitable results.[21]

In *Cuthrell*, the Fourth Circuit Court of Appeals held that indeterminate sentencing to Patuxent Institution,[22] a therapeutic institution for defective delinquents,[23] was not a direct consequence of a guilty

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[21]*See* Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364 (4th Cir. 1972) (indeterminate commitment); United States v. Parrino, 212 F.2d 919 (2d Cir,), *cert. denied*, 348 U.S. 840 (1954) (deportation).

[22]Patuxent Institution was established to house and care for individuals who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidence a propensity toward criminal activity, and who are found to have either such intellectual deficiency or emotional unbalance as to demonstrate an actual danger to society. Tippett v. Maryland, 436 F.2d 1153 (4th Cir. 1971).

The Patuxent Institution was created in response to the failings of the penal system of Maryland. It is a facility which combines both therapeutic treatment with incarceration. Although the orientation of Patuxent is meant to be that of a therapeutic institution rather than a prison, nonetheless Patuxent has many semblances to a prison atmosphere. Physically it is a complex of buildings inside a tall fence topped with barbed wire and a tower manned by armed guards. As in *Cuthrell*, an offender who has been convicted and regularly sentenced for a crime that falls within several broad categories is recommended for a defective delinquent hearing. Upon conviction at the hearing, he is committed to Patuxent for an indeterminate period without either maximum or minimum limits. *See* Address by Brian Crowley, M.D., Potomac Foundation for Mental Health, Bethesda, Maryland, *Maryland's Defective Delinquent Law—Nightmarish Prelude to 1984. See also* Boslow & Kohlmeyer, *The Maryland Defective Delinquent Law—An Eight Year Followup*, 120 AM. J. PSYCH. 2 (1963); MD. ANN. CODE art. 31B, § 6 (1967).

[23]MD. ANN. CODE art. 31B § 5 (1971 Repl. vol.) provides in part:

> For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity . . .

It is further provided that "a criminal defendant may not be referred to Patuxent Institution for examination unless he has been convicted and sentenced for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) a felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) physical force or violence; (B) disparity of age between an adult and a minor, or (C) a sexual act of uncontrolled and/or repetitive nature; or (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State." *Id.* at § 6.

plea. The petitioner, Cuthrell, had been convicted on a plea of guilty to an assault charge by the Criminal Court of Baltimore City. After being sentenced to five years imprisonment, he was ordered by the presiding judge to Patuxent to undergo an evaluation to determine whether he was a defective delinquent and therefore subject to the Maryland Defective Delinquent Act.[24] Following an evaluation, it was recommended that Cuthrell be confined at Patuxent, and after a civil hearing he was committed there for an indeterminate period. The transcript of the trial at which the defendant pleaded guilty revealed that at no time did the court or his court-appointed lawyer advise Cuthrell of the possibility that he might be committed to Patuxent.

Cuthrell collaterally attacked his conviction, alleging that his ignorance of eligibility for indeterminate sentencing to Patuxent rendered his guilty plea involuntary and therefore constitutionally invalid. The trial court upheld the conviction, and the Court of Special Appeals affirmed on the basis that commitment to Patuxent was not a direct consequence of which the defendant should have been informed before entering his plea. Cuthrell then filed a petition for a writ of habeas corpus in the Maryland District Court. The petition was denied and appeal was subsequently taken to the Fourth Circuit. The Fourth Circuit rejected Cuthrell's appeal on two grounds. First, the court concluded that the petitioner's commitment to Patuxent did not automatically or immediately result from his plea.[25] Second, the court held that commitment to Patuxent did not constitute punishment.[26]

Weaknesses exist in each of the court's conclusions. In applying the "automaticness" test, the court reasoned that Cuthrell's conviction merely placed him in a class subject to evaluation by trained experts whose judgment could be contested in a civil proceeding.[27] Since commitment depended on an intervening occurrence—a subsequent, independent civil trial—the court held that Cuthrell's confinement was not an automatic result of his guilty plea. Yet empirical evidence indicates that a high percentage of defendants convicted and recommended for evaluation at Patuxent are ultimately committed indeterminately: two-thirds of all those evaluated are recommended for commitment to the institution,[28] and only one-fifth of

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[24] *Id.*

[25] 475 F.2d at 1366.

[26] *Id.* at 1367.

[27] *See* Director, Patuxent Institution v. Daniels, 243 Md. 16, 43, 221 A.2d 397, 413 (1966), which discusses in detail the procedures used under the Maryland Defective Delinquent Act. *See also* Sas v. Maryland, 295 F. Supp. 389 (D. Md. 1969).

[28] Referral to Patuxent for examination, findings and report does not automatically

those recommended prevail at a subsequent civil trial.[29] Fifty-four per cent of those initially evaluated are committed to Patuxent for an indeterminate period.

The second basis for the court's opinion in *Cuthrell*, distinguishing between punishment and treatment, was based on reasoning which was strongly criticized by the Supreme Court in *Jackson v. Indiana*.[30] In *Jackson*, the Court stated that there "are substantial doubts about whether the rationale . . . that care or treatment will aid the accused . . . is empirically valid given the state of most of our mental institutions."[31] Whether or not confinement at Patuxent may fairly be characterized as treatment, it does constitute both substantial deprivation of freedom and subjection to conditions not dissimilar to those which prevail in prison.[32] In another Supreme Court case, *McNeil v. Director, Patuxent Institution*,[33] Mr. Justice Douglas commented that a person is deprived of his liberty whenever he is held against his will regardless of the name of the institution or its purpose.[34] Moreover, the director of Patuxent conceded in 1963 that Patuxent served a confinement as well as a treatment purpose. This confinement function may result in a life sentence behind bars for the defective delinquent, as was noted by Mr. Justice Douglas in *Murel v. Baltimore City Criminal Court*:[35] "Should a defective delinquent not receive treatment, or should treatment prove inadequate to return him to society, the inmate might well remain in Patuxent for the remainder of his life."[36] Thus, if the committed patients do not convince the Patuxent authorities that they have responded favorably to therapeutic treatment and no longer pose a danger to society, they remain incarcerated,[37] often for a period longer than that

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result in a staff finding of defective delinquency. "Over twenty-five per cent of those examined are reported as not being defective delinquents." Sas v. Maryland, 295 F. Supp. 389, 416 (D. Md. 1969).

[29]425 F.2d at 1367.

[30]406 U.S. 715 (1972).

[31]*Id.* at 735.

[32]See note 22 *supra*. *See* Boslow & Kohlmeyer, *The Maryland Defective Delinquent Act—An Eight Year Followup*, 120 AM. J. PSYCH. 2 (1963). *See* Washington Post, November 10, 1973, § B at 1, col. 8.

[33]407 U.S. 245 (1972).

[34]*Id.* at 257.

[35]407 U.S. 355 (1972).

[36]*Id.* at 357, 358 (Douglas, J., dissenting).

[37]This possibility was viewed as a positive factor by the Maryland District Court in Sas v. Maryland, 295 F. Supp. 389 (D. Md. 1969):

> [W]hile from an administrative standpoint an argument can be made that extended terms for the protection of the public should be sentences to the prison system . . . the great weight of professional

of their original criminal sentence. A recent statistical analysis determined that 151 of the 348 inmates then committed remained at Patuxent for a period longer than their original sentences.[38] Some inmates have been found incurable, which means that they never will be released from Patuxent.[39] Although the Maryland Defective Delinquent Act is based upon modern views and methods of rehabilitation rather than punishment,[40] the resulting confinement is a grave consequence and therefore exclusion of the Act from the direct consequence category should not be justified simply by noting its treatment function.

Not only does this second basis for the Fourth Circuit's opinion in *Cuthrell* seem unreasonable, but it also appears to conflict with its earlier decision in *Pilkington v. United States*.[41] In *Pilkington*, the district court failed to advise the criminal defendant, who had pleaded guilty to a charge of theft,[42] that he was subject to the Federal Youth Corrections Act (FYCA)[43] under which he could be sentenced

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> testimony placed it [the indeterminate sentence] as a "plus" factor; it is "an incentive because it does place in large neon bright letters the fact that you have to work on this thing or you are going to be here for a very long period of time. In Patuxent it becomes very clear to the patients that they have to really convince the staff that they have changed, it is not enough to behave oneself."

Id. at 417-18.

[38]Schreiber, *Indeterminate Therapeutic Incarceration of Dangerous Criminals: Perspectives and Problems*, 56 VA. L. REV. 602, 606 (1970).

[39]Sas v. Maryland, 295 F. Supp. 389, 416 (D. Md. 1969) stated: "All committed inmates are 'treatable,' but not necessarily curable."

[40]See note 22 *supra*.

[41]315 F.2d 204 (4th Cir. 1963).

[42]Pilkington was charged with stealing from a United States Naval Bank under 18 U.S.C. § 661 (1970) which provides:

> Whoever, within the special maritime and territorial jurisdiction of the United States, takes and carries away, with intent to steal or purloin, any personal property of another shall be punished as follows:
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> If the property taken is of a value exceeding $100, or is taken from the person of another, by a fine of not more than $5,000, or imprisonment for not more than five years, or both; in all other cases, by a fine of not more than $1,000 or by imprisonment not more than one year, or both.
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> If the property stolen consists of any evidence of debt, or other written instrument, the amount of money due thereon, or secured to be paid thereby and remaining unsatisfied, or which in any contingency might be collected thereon, or the value of the property the title to which is shown thereby, or the sum which might be recovered in the absence there of, shall be the value of the property stolen.

[43]18 U.S.C. § 5010 (1970), which provides in part:

> (a) If the court is of the opinion that the youth offender does not

to a potential maximum confinement of six years. Instead, the court informed him that the maximum sentence possible was five years. After Pilkington pleaded guilty, the court determined to sentence him under the FYCA rather than under the theft statute. In the opinion reversing the district court, Judge Sobeloff used reasoning seemingly appropriate for *Cuthrell*:

> [T]he point made is that the defendant was permitted to plead guilty under a misapprehension as to the penalties to which the plea subjected him. Rule 11, Fed.R.Crim.P., requires the judge to leave no room for such misapprehension. However looked at, the deprivation of liberty for a possible

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need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in Section 5017 (c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

It is further provided in part under 18 U.S.C. § 5017 (1970):

(c) A youth offender committed under section 5010 (b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

(d) A youth offender committed under section 5010(c) of this chapter shall be released conditionally under supervision not later than two years before the expiration of the term imposed by the court. He may be discharged unconditionally at the expiration of not less than one year from the date of his conditional release. He shall be discharged unconditionally on or before the expiration of the maximum sentence imposed, computed uninterruptedly from the date of conviction.

> period of six years is a greater penalty than a sentence for a lesser period. Applying the euphemism "treatment" to the discipline during confinement does not alter the arithmetic, and is immaterial for present purposes.[14]

The court then urged district judges to explain the sentencing possibilities of the Act before accepting guilty pleas from youthful defendants.[15] While recognizing the inconvenience that the practice might entail, Judge Sobeloff nonetheless concluded that the defendant who pleads in ignorance of those sentencing possibilities does not plead voluntarily and should be permitted to withdraw his plea. In other words, the court concluded that the defendant lacked the requisite knowledge to enter an intelligent plea.

No logical basis seems to exist for the Fourth Circuit's inconsistent results in *Pilkington* and *Cuthrell*. Although in *Pilkington* the court emphasized that sentencing under the FYCA flows directly from the criminal trial, the statute is dependent upon the trial judge's discretion,[16] and therefore is not "automatic." While commitment to Patuxent is not automatic, it follows as a practical matter in a majority of cases in which the defendant is referred to Patuxent for evaluation.[17] Furthermore, the consequences in *Cuthrell*, though perhaps less automatic, were considerably more severe than those in *Pilkington*. The effect of the judge's failure to inform the defendant in *Pilkington* of the FYCA was the possibility of an additional year of confinement; in *Cuthrell*, the effect could conceivably amount to confinement for a lifetime. Finally, while the Fourth Circuit in *Pilkington* swept aside the distinction between punishment and treatment, it supported its holding in *Cuthrell* on this distinction. A defendant should have knowledge of the grave consequences which are likely to result from his plea if he is to make a rational decision as to whether or not to plead guilty. In *Pilkington*, the Fourth Circuit responded to this need, but in *Cuthrell* they buried this consideration beneath the rationales of "automaticness" and treatment.

The injustice of considering indeterminate commitment under a defective delinquent act as merely a collateral consequence of a guilty plea can be analogized to the injustice of deeming another consequence of conviction, deportation, a collateral consequence. Deportation is another severe consequence of conviction which most courts

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[14]315 F.2d at 208.

[15]*Id.*

[16]18 U.S.C. § 5010(a) (1970) contains the discretionary language, "If the court is of the opinion . . . ." See note 43 *supra*.

[17]See text accompanying notes 27-29 *supra*.

have excluded from the requisite knowledge a defendant must have when pleading. Yet, Mr. Justice Brandeis has equated deportation to "[the] loss of both property and life; or of all that makes life worth living."[48] A case which demonstrates both the present position of the majority of the circuit courts and the inherent injustice of this position is *United States v. Parrino*.[49] There, the defendant was deported, as a result of his plea of guilty to a criminal charge of income tax evasion. Parrino had consulted a lawyer who advised him that he would not be subject to deportation. On this advice Parrino pleaded guilty.[50] After deportation proceedings were instituted, Parrino petitioned to withdraw his plea under Rule 32(d) of the Federal Rules of Criminal Procedure.[51] This motion was denied even though a supporting affidavit by his lawyer was submitted. The Second Circuit, affirming the denial, asserted that Parrino's claim was not based upon "the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely, deportability."[52] Judge Frank wrote a vigorous dissent:

> Judicial sensibilities ought not to be markedly different from those of the layman. I think, if he understood this case, it would severely shock the sense of justice—or injustice—of the ordinary citizen to learn that this court
> (a) denies this defendant the chance he asks to go to trial so that he may prove, if he can, his innocence, and
> (b) permits him to be deported because of his lawyer's astonishing ignorance. I believe that such a shock plainly manifests injustice.[53]

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[48]Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). *See* Jordan v. De George, 341 U.S. 223 (1951), where the Supreme Court, in a case challenging the validity of a deportation order, commented: "The Court has stated that 'deportation is a drastic measure and at times the equivalent of banishment or exile . . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.' " *Id.* at 231.

[49]212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954).

[50]It is doubtful whether an argument as to effectiveness of counsel could have changed the result. *See* McMann v. Richardson, 397 U.S. 759 (1970).

[51]FED. R. CRIM. P. 32(d) provides:

> A motion to withdraw a plea of guilty or of *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.

[52]212 F.2d at 921.

[53]*Id.* at 922, 926-27 (Frank, J., dissenting). 8A J. MOORE, FEDERAL PRACTICE, 32.07 [36] at 32-106 (Cipes ed. 1969) predicts that Judge Frank's dissent likely reflects the

While the majority of the circuits still adhere to the position that deportation is not a direct consequence of a guilty plea, the trend is now toward a change in this approach. In *United States v. Briscoe*,[54] the District of Columbia Circuit stated that Judge Frank's dissent more likely reflects the present attitude of the federal judiciary and "[c]alculations of the likelihood of deportation may thus rightly be included in the judgment as to whether an accused should plead guilty . . . ."[55] Although dictum, this statement nonetheless reflects the importance with which some federal courts view a defendant's awareness of severe though not automatic consequences of his guilty plea in determining its voluntariness.

The Supreme Court has stated that the acceptance of guilty pleas "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."[56] Courts have not responded to this suggestion and have instead limited the scope of direct consequences. Underlying the limitations thus imposed are basic policy determinations rooted in administrative needs that dictate narrow interpretation of the direct consequence category. The Third Circuit, in *United States v. Cariola*,[57] forcefully explained why these policy decisions cause appellate judges to refrain from requiring their trial brethren to advise the defendant of collateral consequences:

> To hold that no valid sentence of conviction can be entered under a plea of guilty unless the defendant is first apprised of all collateral legal consequences of the conviction would result in a mass exodus from the federal penitentiaries. . . .
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> . . . .
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> Any such requirement would impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws.[58]

In spite of the court's language in *Cariola*, it is doubtful whether the result of requiring that a defendant be advised of important collateral consequences would be to free convicted prisoners. It should be noted that the failure of a trial judge to apprise defendants of requisite consequences does not immunize defendants from further prosecu-

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coming attitude of the Federal judiciary. *See* United States v. Briscoe, 432 F.2d 1351, 1353-54 (D.C. Cir. 1970).

[54]432 F.2d 1351 (D.C. Cir. 1970).

[55]*Id.* at 1354.

[56]Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

[57]323 F.2d 180 (3d Cir. 1963).

tion, but only requires that their pleas be vacated[58] and allows them a trial on the merits. Furthermore, any decision requiring defendants to be advised of important consequences could be applied prospectively only. In *Linkletter v. Walker*,[59] the Supreme Court, in deciding not to apply the exclusionary rule of *Mapp v. Ohio*[60] retroactively, announced its criterion for retroactive application: "[I]n each of the three areas in which we have applied our rule retrospectively the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process."[61] Under this criterion there would be no justification for a retrospective application of a decision that incorporated previously-excluded consequences within the category of information that the defendant must have in order to make an intelligent guilty plea. Therefore, to expand the ambit of direct consequences would not cause a "mass exodus" from the prisons.

Although expanding the scope of direct consequences to include severe collateral consequences would increase the burden of the trial judge, knowledge of such consequences may be vital to a rational waiver of trial. Courts are rightly concerned with administrative economy, but such a concern should not be paramount in their decisions. It is far more important that they justly apply the strictures of criminal procedure.

The criminal justice system is based upon a traditional commitment to the trial process, with all of the protections it affords the defendant.[62] However, the system has come increasingly to depend upon guilty pleas, which are largely the product of plea bargains.[63] In order for a defendant to assess the bargain properly, he should have knowledge of the ramifications of each alternative, especially the consequences which are of such gravity that they would likely affect his decision. There should be a reassessment of the present position of the law, and a framework developed that will enable a defendant to exercise more informed judgment when deciding whether to plead guilty.

One possibility would be to create a uniform test, which would measure the severity of the consequence together with the likelihood of its imposition. However, in many instances there would be substantial difficulties in requiring a judge to anticipate the likelihood and assess the severity of a consequence; both of which are often

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[58]*Id.* at 186.

[59]*Cf.* Santobello v. New York, 404 U.S. 257 (1971).

[60]381 U.S. 618 (1965).

[61]367 U.S. 643 (1961).

[62]381 U.S. at 639 (footnote omitted).

[63]See note 4 *supra*.

highly subjective determinations. Perhaps a more workable system, but one that still would afford defendants adequate knowledge, would be to include the severest of consequences, notably indeterminate sentencing and deportation, in the definition of direct consequences. Such inclusion would put the defendant on notice that conviction might result in consequences more severe than a prison term or fine. It should be noted that the above practice parallels the current procedures, where the judge informs the defendant of the maximum sentence possible and the minimum sentence which is mandatory, but does not inform the defendant of the precise sentence which he will impose after the defendant's conviction. Furthermore, once a defendant has the knowledge necessary to form an intelligent decision, he "assumes the risk of ordinary error in his assessment of the law and facts of his case" upon which he bases his choice.[64] By incorporating severe consequences, whether "automatic" or not, into the due process requirement of a knowing and voluntary guilty plea, the federal courts could effectively lessen the growing number of petitions for writs of habeas corpus since a number of such petitions are claims of involuntary guilty pleas.[65] At the same time the vital interests of the defendant would be safeguarded.

In view of the anomalous results inherent in the current approach of the division of consequences[66] and the frequency of plea disposition of criminal cases, the circuits should respond to the need for further improvements. At present there are varied and slow responses to the need for expansion of direct consequences. One such response is the trend toward including deportation noted by the District of Columbia

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[61]*See* Judge Bazelon's dissent in United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971), in which he states:

> Our criminal justice system has come increasingly to depend on guilty pleas, which are largely the product of plea bargains. It is said that the system would break down if every defendant demanded his constitutional right to a trial. To avoid that breakdown, we tolerate a system which substitutes low-visibility negotiations for the adversary process. 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 [this] much protection in negotiating pleas to criminal charges, when liberty is at stake . . . ."

454 F.2d 918, 924 at 925 (Bazelon, J., dissenting).

[64]United States v. Myers, 451 F.2d 402, 405 (9th Cir. 1972).

[65]*See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY, 139 (1967).

[66]See note 21 *supra*.

Circuit in *United States v. Briscoe*.[68] Additionally, the courts have shifted noticeably in their views concerning parole ineligibility. Until recently, parole ineligibility was considered a collateral consequence: "[N]oneligibility for parole is not a 'consequence' of a plea of guilty . . . rather, it is a consequence of the withholding of legislative grace."[69] Presently, all but the Fifth Circuit and the District of Columbia Circuit[70] include parole ineligibility as a direct consequence of which the defendant must be aware when pleading: "The reason for the conclusion is that the right to parole has become so engrafted on the criminal sentence that such right is assumed by the average defendant."[71] These trends do not remedy the present inconsistencies among the circuits. What is needed is a uniform standard that will require defendants to be informed of the severest of consequences to which their plea is likely to subject them.

Fifty years ago the Supreme Court ruled in *Kercheval v. United States*[72] that a defendant's plea was not valid unless made with "full understanding of the consequences." In 1970, the Court stated that the defendant's plea was valid if made "with sufficient awareness of the relevant circumstances and likely consequences."[73] The Court has not elaborated on its meaning of the term "consequences" and has left the interpretation to the circuits. Permitting a circuit by circuit interpretation, however, has not created a viable solution and the need exists for a uniform practice which would relieve the anomaly present in the current approach. In *Cuthrell*, the Fourth Circuit missed an opportunity to propose an alternative procedure which might have initiated a better and more equitable position.

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[68]432 F.2d 1351 (D.C. Cir. 1970).

[69]Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967), *quoting* Smith v. United States, 324 F.2d 436, 441 (D.C. Cir. 1963).

[70]United States v. Farias, 459 F.2d 738, 740 (5th Cir. 1972).

[71]475 F.2d at 1366. *See also* Moody v. United States, 469 F.2d 705, 708 (8th Cir. 1972).

[72]274 U.S. 220 (1927).

[73]Brady v. United States, 397 U.S. 742, 748 (1970).