NEXO

The Official Newsletter of **The Julian Samora Research Institute**
The Midwest's Premier Latino Research Center

Vol. XV, No. 2 Spring 2012

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¿QUÉ PUEDEN HACER? INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN A POST-PADILLA WORLD

*by Patrick O'Brien**

Guillermo, a legal permanent resident of the United States, works on the west side of the state of Michigan as an agricultural laborer. Each day, he rises at 5 a.m. and drives his pick-up truck to a nearby asparagus farm. Guillermo picks asparagus each day for twelve hours and then returns to a rented room in Holland, Michigan. On some weekends, Guillermo and a few other workers go to a local bar to relax and watch *Pachuca*, the professional soccer team from their hometown in the Mexican state of *Hidalgo*. Guillermo

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**Patrick O'Brien has dual bachelors and master degrees from the University of Notre Dame and spent two years teaching secondary Spanish in Phoenix, Arizona. He currently is a second year law student at Michigan State University College of Law.*

THE TURN TOWARD INCARCERATION IN THE U.S. AND MICHIGAN

by Rubén Martinez

For persons born after the mid-1970s, the ideology of neoliberalism has been the dominant set of political beliefs that has been woven into their consciousness. Indeed, with neoliberal ideas promoted through use of a range of seemingly unrelated social, political and economic issues to mobilize public sentiments, most U.S. citizens have been unaware of the ideology that has shaped the public policy agenda for the past four decades. Unbeknownst to most citizens, "anti-stances" on issues such as communism, big government, abortion,

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The Attack on Ethnic Studies Undermines the American Curriculum

by Rubén O. Martinez

The nation's radical right-wing political movement has attacked Ethnic Studies by passing legislation (HB 2281) in Arizona that has led to the elimination of Mexican American Studies (MAS) at the Tucson School District on the grounds that its classes violate state law which prohibits classes that "promote racial resentment," "advocate ethnic solidarity," and "were designed primarily for one ethnic group." In Texas an effort was made to exclude Mexican Americans from the state's social science curriculum by revising the standards. More efforts to whitewash the curriculum are likely to be set in motion in other states if the movement gains momentum.

Driven by ideology, and in the wake of some of the harshest anti-immigration laws in the nation, opponents of Mexican American Studies ignored the results of the Cambian Learning, Inc. curriculum audit (commissioned by the Arizona Department of Education) which found that the Mexican American Studies Department in the Tucson Unified School District had a positive measurable impact on students who took MAS courses, that courses were not designed for a particular group of students, and that no evidence existed that they promoted resentment toward any race or class of people or that courses violated the law.

As is usually the case with ideologically-driven initiatives, proponents are not always aware of the full range of effects of their actions. In this matter, they have provided the opportunity in the public discourse to challenge the dominant American Curriculum, which is found across the nation's schools, as one which promotes racism by contributing to a sense of superiority among White students and a sense of invisibility and inferiority among minority students. Indeed, the American Curriculum is the type of "Ethnic Studies" that violates at least two of the clauses of the infamous Arizona HB 2281, which prohibits classes that "Promote resentment toward a race or class of people," and "Are designed primarily for pupils of a particular ethnic group." One could argue that while it does not promote ethnic solidarity but racial solidarity, it is actually more insidious.

An unintended consequence of the attack on Ethnic Studies and Mexican American Studies is that it holds the promise of leading to the development of a national curriculum that is inclusive of all groups and not based on singing the praises of one ethnic group, White Americans, or Americans. Getting to an inclusive curriculum requires that we recognize "Americans" as one of many ethnic groups that comprise the citizenry of the United States. Too often Americans believe that the "ethnics" are the "others" and that they are not ethnic themselves – this is an ideological view that not only is inaccurate but which limits their understanding of intergroup relations. Historically, Americans have conflated citizenship with being American. They also have used the label "American" as a tool to promote the exclusion of "ethnic others" as un-American, thereby monopolizing and reserving the status of "true citizens" and "patriots" for themselves.

The fact of the matter is that one can be a citizen of the United States, believe in and uphold its democratic values and principles, and promote and protect its national security without being a member of the ethnic group "Americans." In other words, one can be Chicano, Puertorriqueño, or White River Apache, speak a language in addition to English, adhere to the customs and norms of one's culture, and be a citizen of and uphold the United States of America without being American. What matters is that one is a citizen, understands and believes in the principles of representative democracy and the Constitution of the United States, and defends them. Given their ideological sense of identity, this view may be difficult for many Americans to comprehend and, most certainly, to accept. Getting to a non-racial society, however, requires they get beyond their self-righteousness and their sense of racial superiority. It also requires challenging the racial nature of the American Curriculum as a manifestation of institutional racism and transforming it into a truly inclusive national curriculum in which Americans are but one among many ethnic groups who have contributed and continue to contribute to the democratic nation that is the United States.

NEXO
MICHIGAN STATE UNIVERSITY

NEXO is the official newsletter of the Julian Samora Research Institute (JSRI) at Michigan State University (MSU) in East Lansing, Michigan.

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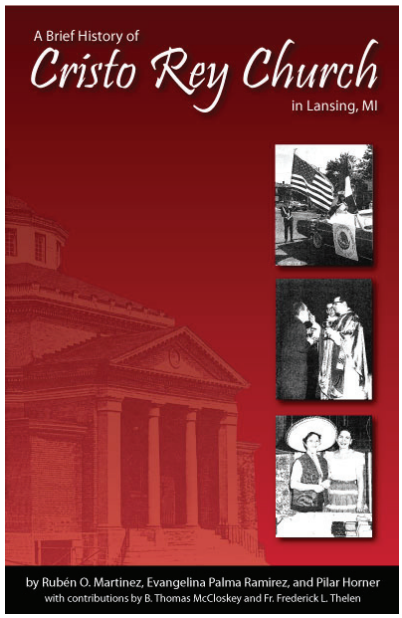
As the struggle over curricula in our nation's schools unfolds, the possibility of moving beyond the myopic and self-serving curriculum of one ethnic group is before us today. It holds the promise of integrating the histories and contributions of the many ethnic groups that will make the United States a nation greater than it is today. Among other things, those histories will not only address the injustices that Americans have committed against other ethnic groups, they will promote a sense of higher possibility as a nation united in diversity rather than a nation divided by White Superiority, which is promoted by right-wing radicals who wish to suppress our histories. They already have banned some books they believe convey dangerous ideas. What will they do next, burn all the books that have been written on our histories and put us in jail for writing, reading and teaching about our past as Chicanos, Native Americans, African Americans, Puerto Ricans, or Japanese Americans? A representative democracy does not fear the free exchange of ideas, rather it benefits from such a process. What it should fear are authoritarian approaches that seek to impose limiting and distorted perspectives that undermine the principles and values of democracy itself.

The path upon which these right-wing extremists have embarked will deepen the social divide in this nation, and that divide will continue to create intergroup tensions and problems. Ironically, their actions may bring about the very thing they claim to want to prevent. The Soviet Union fell during our lifetime, let not right-wing extremism lead this great nation down that same path.

Rubén O. Martinez
Director, Julian Samora Research Institute

Book Release



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A Brief History of Cristo Rey Church in Lansing, MI

By Rubén O. Martinez, Evangelina Palma Ramirez, and Pilar Horner
With contributions by B. Thomas McCloskey and Fr. Frederick L. Thelen

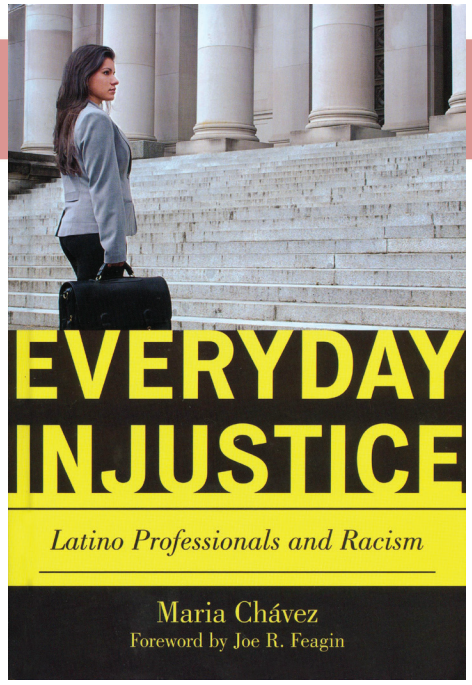
A Brief History of Cristo Rey Church highlights the challenges and dynamics of establishing a church for the Spanish-speaking community in Lansing, Michigan.

This unique book artfully takes the reader through five decades of Cristo Rey Church's growth and transformation showing the evolution of a community bound together in faith, political action, and service. Richly illustrated with original photographs and illuminated by first-hand oral histories from early church members.

"Cristo Rey Church has been one of the most important organizational mainstays of the Latino community in the greater Lansing area since its inception in 1961. It has not only been a spiritual haven, it has been an organizational vehicle that has nurtured Latino leadership, promoted the key social justice concerns of the day, and nurtured a sense of community. Today, Cristo Rey Church continues to be an important site of worship, belonging, and community for its parishioners. Members of the church believe that Cristo Rey's significance is vital to the Lansing area and to the families and individuals the church serves. "

Price: $10/100 pages

Book Review



Everyday Injustice: Latino Professionals and Racism

By Maria Chávez, Rowman & Littlefield Publishers, Inc., New York, 2011

Reviewed by Joseph Guzman, Julian Samora Research Institute

In her book, *Everyday Discrimination*, Maria Chávez presents an innovative study that details in a very personal and credible way the challenges and travails experienced by Latino lawyers in the state of Washington. Her study combines surveys and interviews of Latino lawyers, along with comparison group data, to address an ambitious dual objective. In addition to detailing the sometimes subtle, but always painful, experiences that Latino lawyers must endure, it is Chávez's hope that by reading about the everyday encounters of these Latino professionals with discrimination, Whites may gain a better understanding and appreciation of Latinos, thereby reducing discrimination.

The study effectively presents numerous personal vignettes to illustrate the sorts of everyday incidents Latino lawyers in the state of Washington experience. The discussion inevitably uses Washington state lawyers as a proxy for Latino professionals and, by extension, for the broader Latino community. The rationale behind this focus on professionals being that if even the most educated and employable Latinos are experiencing difficulties with bias, then those who are less advantaged must be put upon by discrimination in a greater way. This particular approach is not often the focus of discrimination studies and, to the degree that roadmaps for the future must involve the Latino professional class, it is vitally important that they be empowered through knowledge and analysis.

Chávez's examination of study results identifies several interesting effects. One is that Latino professionals often find themselves spending proportionately more time on charitable-volunteer-civic activities than their counterparts and correspondingly less time on the dimensions considered more important for promotion. Another, is the "assumption of incompetence" that vexes many Latinos seeking academic and career advancement. As these insightful observations are not at all unique to the legal profession, they help to justify the proxy value of considering lawyers' experiences as valid for supporting broader conclusions.

Chávez also devotes a chapter to the particular problems of Latina lawyers, detailing experiences with harassment, marginalization and professional isolation, along with their significant participation in civic life. Despite challenges, both Latina and Latino lawyers are as satisfied with their careers, and sometimes more so, than their non-Latino counterparts.

Chávez overlays much of her analysis with academic constructs of the "white racial frame" to explain the institutional persistence of discrimination even when individuals may not actively seek to support it. However, it may be that any group seeking to maintain power would avail themselves of the same, or even more onerous, institutional controls. Whether or not the reader is ready to accept those assertions, Chávez's thoughtful and innovative exposition of an important topic – namely, that discrimination persists in unique ways for Latino lawyers in Washington state – makes *Everyday Discrimination* a worthwhile read.

New JSRI Staff Member

Patti Lyons recently joined the Julian Samora Research Institute (JSRI) in the capacity of Administrative Assistant. She is a graduate of Cleary University with a major in Business Administration and a minor in marketing. She previously worked for a large church in Ann Arbor as financial administrator, working with the Stewardship and Finance Board on budgets, fundraising, and will bequests. She is an advocate for children, having started a small 501(c)(3) non-profit organization which mentored young children in the art of photography. She also started the Grass Lake Regional Chamber of Commerce and served as its third president. As president she worked with the Jackson County Farmfest organization to create a Fall Harvest Festival for their farming community. She is very excited to be working at JSRI and enjoys working with the faculty, staff, students, alumni and affiliates, and providing support on research proposals, projects, and symposia.

Summit on Improving Latino Educational Achievement in Michigan

by Pilar Horner, Julian Samora Research Institute

On December 9, 2011, Latino and Latino-focused leaders and community-based representatives gathered at the Kellogg Conference Center on the Michigan State University campus for an all-day Statewide Summit on Latino Education. This event was a step forward following the 2010 summit on Latino/a issues in Michigan. Despite the challenging weather conditions, over 90 people gathered for a day of information, networking, and advocacy. The event was organized by MI ALMA and the Julian Samora Research Institute and sponsored by MI AT&T. Welcoming and opening remarks were made by Jon Peterson (External Affairs Director for MI AT&T), The Honorable Harvey Santana (MI District 10), Rick Garcia (MI ALMA), and Rubén Martinez (JSRI).

Michael Radke, Director of Field Services, Michigan Department of Education (MDE) spoke on how to accelerate student achievement, including how schools could help improve Latino/a outcomes. He called upon state and school leaders to focus on teaching and learning and to establish a culture and climate of learning for children. Parent engagement also was highlighted as an important factor in school outcomes. Finally, he encouraged the use of and pointed out how online resources could bolster parent involvement.

Promoting Latino Parental involvement in education was a theme that carried throughout the day. Several speakers, including Drs. Rubén Martinez (JSRI), Ethriam Cash Brammer, and Raul Ysasi (GVSU), spoke to the challenges and opportunities that come with improving Latino student outcomes, including improving parental expectations, strengthening home/school communications, promoting engagement by school leaders, and finding invested community partners.

Marissa Zamudio, Early Childhood Investment Corporation, presented on the importance of providing a stimulating environment for infants and toddlers and how it impacts the development of their brains. In particular, she highlighted the utility of investing in the development of children to stimulate brain growth. After providing some demographic features of the Latino population in Michigan she concluded with an overview of the Great Start Program.

Kyle Caldwell, Director of the Michigan Nonprofit Association, and Art Reyes, Michigan Voice, spoke on how civic engagement is a vital aspect of the active participation of Latino communities. Civic engagement leads to community connections and increases educational achievement. For example, improving Latino voter turnout is a strategy to build power and influence at the state level. This important tool can be used for organzing and advocacy of Latino educational needs.

Arnold Fege, from the Washington DC-based Public Education Network, focused on how civic engagement in public education must move from rhetoric to reality. His talk addressed department of education approaches to achieve educational goals and expressed apprehension about these strategies being tied to student evaluation and teacher performance because of the variability across schools in terms of resources and the diversity of students. In addition, Fege pointed out how the tax-based system of funding public education results in quality of education disparities between wealthy and economically disadvantaged neighborhoods. Highlighting the unacceptable education gap, Fege urged participants to take more actions to change the funding structure for public schools and to demand that department of education initiatives rise to the level of the established goals.

The day ended with table discussions among community participants on how to improve the education system through civic engagement. All were invited to discuss at their tables, and come up with some concrete steps to improve educational outcomes for Latinos/as in the state of Michigan.

Dr. Rubén Martinez being interviewed by local News 10 anchor David Andrews.

Arnold Fege, Director of Public Engagement and Advocacy at the Public Education Network, delivers keynote address.

Lansing School District employees Linda Sanchez Gazella and Sergio Keck participate in the symposium.

Viewing "Harvest of Loneliness," a Documentary

by Rubén O. Martinez, Julian Samora Research Institute

On October 28, 2011 over 80 persons showed up for the viewing of the documentary titled "Harvest of Loneliness." The documentary provides a historical overview of the Bracero Program, the guest worker program established in 1942 by the U.S. and Mexico to meet labor needs in the U.S. during WWII, particularly in agriculture. Initially established for 5 years, the program was repeatedly extended until 1964, when it formally ended. By the time it ended, over four million Mexicans had been admitted into the U.S. as guest workers.

The documentary uses oral history interviews to tell the story of the braceros and their experiences. This approach puts faces on those exploited by the program, which was invisible to the majority of Americans during its day and which has remained so ever since. The documentary was produced and directed by Gilbert G. Gonzalez, a historian with Chicano-Latino Studies at the University of California at Irvine, Vivian Price, Coordinator of Labor Studies at CSU-Dominguez Hills, and Adrian Salina, a Mexican filmmaker and artist who resides in Los Angeles.

The experiences of braceros (men who work with their arms) involved humiliation, exploitation, and hardship. Treated like cattle, they were physically inspected en masse to ensure they were able-bodied and then dusted with DDT powder. One bracero recalled the process as one in which they were treated like horses that were on the way to market. Henry Anderson, a scholar of the Bracero Program in California, recalls observing the inspection process and finding it "unspeakably appalling…" and thinking of it as what might have been "a slave market." Anderson lost an NIH grant award for writing sensitive reports on the Bracero Program, although the ostensible reason given was that Anderson had deviated from the terms of the grant.

While the American media and newscasters (including Chet Huntley, a well-known television newscaster in the 1950s and 1960s) presented the Bracero Program as a great opportunity for Mexican workers, the reality was one of incredible exploitation and hardship, with many experiencing hunger, overcrowded housing, and extreme poverty. Despite contracts assuring hygienic housing, medical and sanitary services, and agreed upon wages (not less than 30 cents an hour), the program failed to deliver on the terms of the contracts. Braceros recall housing units that got so unbearably hot they had to sleep outside, workers who became ill and never received medical services, and charges to their pay that left them with net earnings of pennies at the end of the pay period. The lack of adequate pay meant that they were unable to send funds home to their families, who also suffered from the exploitation occurring north of the border.

The most salient memories of the braceros are experiences of humiliation and degradation, being treated like slaves and like animals, and the many hardships they were forced to endure in being transported, in the housing provided, and in suffering illnesses without medical services. For many, the experiences were the worst in their entire lives. To add further insult to injury, the Rural Savings Fund established by the mandatory 10 percent withholding for those participants in the early years of the program never materialized for many of them. This led to a class action settlement in 2008 with the Mexican Government by ex-braceros living in the U.S.

Following the viewing of the documentary, a panel comprised of Rachael Moreno, Isaias Solis, and Rubén Martinez provided comments on the Bracero Program and engaged members of the viewing audience in a discussion of the issues highlighted in the documentary. Many students in the session expressed shock at the treatment and abysmal conditions experienced by the guest workers despite the sponsorship by the U.S. Government.

...continued from front page

picks his friends up in his truck in the evening and drops them off late at night. One Saturday night, Guillermo has just finished dropping off the last of his friends when he is pulled over by a police officer. The police officer suspects that Guillermo has been drinking, so he requests that Guillermo exit the vehicle so the officer can administer a sobriety test.

The officer also glances at the truck and notices a small duffel bag in the truck bed. The officer requests that Guillermo open the bag so he can see the contents. Guillermo complies with the officer's requests, knowing that the friend he has just dropped off had left this bag in the truck. Upon opening the duffel, the officer notices a white, powdery substance in clear plastic bags. The officer immediately arrests Guillermo and takes him to jail.

Guillermo is assigned a public defender who has over fifty open cases, not counting Guillermo's. Despite Guillermo's insistence that the duffel bag and cocaine were not his, the public defender convinces Guillermo to take the state's plea deal and plead guilty to possession of cocaine in exchange for a lighter prison sentence. Guillermo does not think to ask his attorney about any immigration consequences to the plea deal and the public defender does not consider the risk of deportation. In fact, the public defender tells Guillermo that because he is a legal permanent resident, a possession of cocaine charge will not render any "collateral consequences," such as deportation. It takes Guillermo a month in jail to realize that he will be deported back to El Salvador once his sentence is over. Does Guillermo have a legal recourse? More importantly, could a better education, institution, or rule have better prepared the public defender's legal advice or strategy?

This article analyzes the Supreme Court's 2010 decision in *Padilla v. Kentucky*, whereby the Supreme Court considered legal questions similar to the ones faced by Guillermo above. It includes a discussion on the Court's application of the ineffective legal counsel framework developed by the *Padilla* Court and two subsequent judicial decisions by the Seventh and Third Circuits which applied the *Padilla* framework. Finally, an analysis of the subsequent decisions by the Seventh and Third Circuit will determine whether the Supreme Court in *Padilla* intended its decision to constitute a "new rule" or whether its decision would apply retroactively to Sixth Amendment ineffective assistance of counsel claims. This article contends that the Supreme Court in *Padilla* likely intended to apply its decision retroactively. However, regardless of this contention, changes at the local, state, and federal level are needed to ensure that the Sixth Amendment rights of those with immigration statuses are protected regardless of *Padilla's* interpretation.

The Padilla v. Kentucky Decision

Jose Padilla, a native of Honduras, had resided in the United States for over forty (40) years as a lawful permanent resident. During his time in the United States, Mr. Padilla was a member of the armed forces and served in Vietnam. At trial in Kentucky, Mr. Padilla was charged with "trafficking in more than five pounds of marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor/trailer without a weight and distance tax number" (*Padilla v. Kentucky*, 2010). The tendered plea bargain allowed Mr. Padilla to plead guilty to the drug charges and, in exchange, the State would drop the remaining charge. Mr. Padilla would receive a sentence of ten years in jail, with the first five years spent in jail and the remaining years spent on probation. At the advice of his counsel, Mr. Padilla took the State's plea offer, relying upon the assuring words of his counsel that Mr. Padilla "did not have to worry about immigration status since he had been in the country so long" (*Padilla v. Kentucky*, 2010). However, Mr. Padilla's acceptance of the State's plea rendered him immediately deportable under 8 U.S.C.A. § 1227 (a)(2)(B)(i), which states:

> *"Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable" (Immigration and Nationality Act, 1996).*

As a consequence of his conviction under the above federal statute, Mr. Padilla faced almost certain deportation after his five years of incarceration (legal permanent residents are subject to immigration statutes until they become legal citizens).

Nearly two years after the acceptance of the plea bargain, Mr. Padilla filed a motion for post-conviction relief, alleging deficient assistance of counsel. Mr. Padilla based his motion upon the uninformed advice of his counsel and alleged that he would have gone to trial had he not relied upon the deficient advice of his attorney. Ultimately, the Supreme Court of Kentucky rejected Mr. Padilla's argument, holding that deportation was a collateral matter and as such, "counsel's failure to advise Appellee

of such collateral issues or his act of advising Appellee incorrectly provides no basis for relief" (*Padilla v. Kentucky*, 2010). The U.S. Supreme Court granted *certiorari* in 2009, accepting to decide whether, "as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country" (*Padilla v. Kentucky*, 2011). In other words, the Supreme Court accepted to review the case to determine whether deportation, an otherwise collateral consequence of a conviction or a guilty plea, could serve as the basis of a Sixth Amendment ineffective assistance of counsel claim.

Ultimately, the U.S. Supreme Court's decision in *Padilla* declassified deportation as a collateral matter. Justice Stevens' opinion traced the genesis of American immigration law, focusing on the Immigration and Nationality Act's 1996 revisions which "eliminated the Attorney General's authority to grant discretionary relief from deportation" (*Padilla v. Kentucky*, 2010 quoting 110 Stat. 3009-596). Justice Stevens noted that this lack of judicial discretion virtually assured a noncitizen defendant of deportation if the noncitizen committed a removable offense. Because of the statute's rigidity, the Court, while not explicitly holding that a collateral matter could serve as the basis of a Sixth Amendment ineffective assistance of counsel claim, held that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel" (*Padilla v. Kentucky*, 2010).

After determining the validity of Mr. Padilla's basis for his ineffective assistance of counsel claim, the Court turned to whether the claim passed the two-part *Strickland v. Washington* test (first, establish that counsel's performance fell below an objective standard of reasonableness, and second, that had the counsel performed adequately, the outcome would have been different). The *Padilla* Court first defined "reasonableness," as "necessarily linked to the practice and expectations of the legal community" (*Padilla v. Kentucky*, 2010). These practices and expectations are evaluated by the "prevailing professional norms" of the legal community (*Padilla v. Kentucky*, 2010). Based upon these norms, the Court determined that Mr. Padilla's claim satisfied the first prong of the *Strickland* test by proving Mr. Padilla's representation fell below the reasonableness standard. In determining that counsel's actions fell below a standard of reasonableness, the Court focused on three items: the gravity of deportation, the ease of reading the pertinent immigration statutes, and counsel's false assurances. The Court first noted that the consequence of deportation often outweighs the direct consequences of the crime (such as jail time). Because of the gravity in consequence, the Court also noted that a reasonable attorney should have consulted the relevant immigration statute. Without consultation to the removal statute, counsel should never have told Mr. Padilla that he would not face deportation. Consequently, the Court determined that Mr. Padilla's claim successfully demonstrated the unreasonable nature of counsel's actions. In the opinion, Justice Stevens noted that "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation" (*Padilla v. Kentucky*, 2010). The Court did not address the second prong of the *Strickland* test, but instead left the prejudice decision up to the Supreme Court of Kentucky.

While *Padilla v. Kentucky* employed the *Strickland* test in its rationale, the Court went a step further by blurring the line between direct and collateral consequences to guilty pleas. The Kentucky Supreme Court originally noted in *Padilla* that an ineffective assistance of counsel claim, rooted in a collateral matter (collateral matters are those matters that do not fit within the sentencing authority of the state trial court), rests "outside the scope of representation required by the Sixth Amendment" (*Padilla v. Kentucky*, 2010 quoting *Com. v. Kentucky*, 2008). Justice Stevens did not specifically address whether collateral consequences of guilty pleas fell within the auspices of the Sixth Amendment. However, he did note that "[w]e, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionality" (*Padilla v. Kentucky*, 2010). Justice Stevens' words thereby allowed a collateral matter, such as deportation, to fall under judicial review.

A. United States v. Orocio (*Padilla* Retroactively Applied)

The issue concerning the precedent set by *Padilla* was addressed by *United States v. Orocio* on June 29, 2011. The facts in *Orocio* mirror many of the facts of *Padilla* in that the plaintiff, Gerald Orocio, was arrested and later

charged in federal court with drug trafficking on October 3, 2003. Orocio was assigned a public defender, to whom Orocio disclosed that he was a legal permanent resident of the United States. Orocio later retained private counsel in the year 2004. Prior to trial, the government offered Mr. Orocio a plea deal whereby Mr. Orocio was charged with controlled substance possession instead of drug trafficking and "would receive a sentence of time served plus a two-year period of supervised release" (*United States v. Orocio*, 2011). Counsel did not inform Mr. Orocio of the immigration consequences before Mr. Orocio decided to accept the plea agreement on October 7, 2004.

After successful completion of the two-year supervised release, removal proceedings were initiated against Mr. Orocio due to a violation of 8 U.S.C.A. § 1227 (a)(2)(B)(i). Mr. Orocio decided to file a petition for a *writ of error coram nobis*, which "is available to 'persons not held in custody [to] attack a conviction for fundamental defects, such as ineffective assistance of counsel" (*United States v. Orocio*, 2011). In his petition, Mr. Orocio contended that his attorney was deficient for two reasons: failing to fully investigate his eligibility for a federal "first offense" dispensation and failing to advise Mr. Orocio of the adverse immigration consequences of his plea (*United States v. Orocio*, 2011). After the federal District Court denied Mr. Orocio's petition, Mr. Orocio appealed to the Court of Appeals for the Third Circuit to determine whether Mr. Orocio was "entitled, retroactively, to the benefit of that ruling [the *Padilla* decision]" (*United States v. Orocio*, 2011).

The Court of Appeals for the Third Circuit held that the proper reading of *Padilla* allowed for retroactive review of ineffective assistance of counsel claims if immigration status was a collateral consequence. Judge Pollak explained the Court's rationale, stating that "[t]he application of *Strickland* to the *Padilla* scenario is not so removed from the broader outlines of precedent as to constitute a 'new rule,' for the Court had long required effective assistance of counsel on all 'important decisions'" (*United States v. Orocio*, 2011 quoting *Strickland v. Washington*, 1984). Moreover, in responding to the contention that *Padilla* "clearly broke new ground" by mandating attorneys inform their clients of collateral immigration consequences the Third Circuit stated further: the *Padilla* "Court straightforwardly applied the *Strickland* rule –and the norms of the legal profession that insist upon adequate warning to criminal defendants of immigration consequences - to the facts of Jose Padilla's case" (*United States v. Orocio*, 2011). After explaining its understanding of *Padilla*'s precedential effect, the Court found substantial evidence that Petitioner Orocio satisfied the two-pronged *Strickland* test. Therefore, the Court vacated the lower court's ruling and remanded the case to allow the lower court's application of the *Padilla* framework.

The opinion of the Court in *Orocio* will likely reverberate throughout the other Circuits for its decision to apply *Padilla* retroactively. Notable in *Orocio* is the fact that the Court looked past the words of the *Padilla* Court. *Padilla's* conflicting language, such as "we *now* hold that counsel must inform her client whether his plea carries a risk of deportation" (*Padilla v. Kentucky,* 2010), [emphasis added] due to "our longstanding Sixth Amendment precedents" (*Padilla v. Kentucky,* 2010) implies that its holding constitutes a "new rule." However, the *Padilla* Court also addressed the "floodgate" argument in its attempt to assuage fears that its decision could open up a litany of retroactive ineffective assistance of counsel claims. After all, an appellant's conviction would have to satisfy these following conditions to even qualify for relief:

(1) Post-1996;
(2) of a non-citizen;
(3) Who was convicted of a deportable offense;
(4) And can prove that he or she was not advised of potential immigration consequences;
(5) Who now faces immigration/adverse consequences;
(6) Who can meet the procedural requirements for their choice of remedy;
(7) And is willing to give up the benefits of his or her plea agreement in attempting to get a better deal (Cartier, 2010, p. 63).

Therefore, the Court in *Orocio* transcended *Padilla's* schizophrenic language and looked at *Padilla's* plain intent and legislative history. Justice Pollak wrote that "because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule'" (*Padilla v. Kentucky*, 2010). Consequently, "Mr. Orocio is . . . entitled to the benefit of its holding" (*Padilla v. Kentucky*, 2010).

B. United States v. Chaidez (*Padilla* Not Retroactively Applied)

The Court of Appeals for the Seventh Circuit reached a different conclusion concerning *Padilla's* retroactive application. The facts of *Chaidez v. United States* (2011) parallel those of both *Orocio* and *Padilla*. In *Chaidez*, the petitioner Roselva Chaidez was a lawful permanent resident from Mexico indicted on three counts of mail fraud in excess of $10,000 on June of 2003. At the urging of her counsel, she pled guilty to two of the three counts of mail fraud and was sentenced to four years' probation. Chaidez's guilty plea rendered her deportable under INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii), which reads:

(2) Criminal offenses
. . .
(A) General crimes
(iii) Aggravated felony

Any alien who is convicted of an aggravated felony is deportable.

Chaidez's plea to the two counts of mail fraud in excess of $10,000 constituted an "aggravated felony" for the purposes of the Immigration and Nationality Act. Under INA 101(a)(43)(M)(i); 8 U.S.C. § 1101(a)(43)(M)(i), an aggravated felon means:

(M) an offense that-
(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000;

Removal proceedings against Chaidez were initiated in 2009 and Chaidez's *writ of coram nobis* (order to lower court to consider facts not on trial record that may have influenced the outcome) was filed in January of 2010. Interpreting the recent *Padilla* decision to apply retroactively, the federal judge granted Chaidez's petition. This decision was short-lived, however, as the case was later appealed to the Court of Appeals for the Seventh Circuit.

The Court of Appeals for the Seventh Circuit's decision parted ways with the lower court, and consequently, the Third Circuit, by stating that *Padilla* announced a "new rule" and accordingly could not be applied retroactively. The Seventh Circuit relied on several factors in this determination, first citing the lack of unanimity in the opinions of the various districts and circuits as evidence of a "new rule." If lower courts split on the issue, Judge Flaum concluded, "the Court has concluded that the outcome of the case was susceptible to reasonable debate" (*Chaidez v. United States*, 2011). This lack of unanimity and the debate surrounding the retroactive nature of *Padilla* "convince[d]" the Seventh Circuit that "*Padilla* announced a new rule" (*Chaidez v. United States*, 2011).

The Court justified its "lack of unanimity" argument by also noting the opinions of the nine justices in the *Padilla* decision. Specifically, the Seventh Circuit noted that the concurrence of Justices Alito and Chief Justice Roberts (who did not write the opinion of the court) left "no doubt" that the two "considered *Padilla* to be groundbreaking" rather than an extension of the *Strickland* standard (*Chaidez v. United States*, 2011). Moreover, the Seventh Circuit noted that Justices Scalia and Thomas authored a dissent criticizing the *Padilla* decision as one "not dictated by precedent" (*Chaidez v. United States*, 2011). This array of opinion, in the eyes of the Court, justified the Court's understanding of *Padilla* as establishing a "new rule" as opposed to a modification or extension of *Strickland*.

Finally, the Court attacked the arguments of the Third Circuit, indicating that "[t]he fact that *Padilla* is an extension of *Strickland* says nothing about whether it was new or not" (*Chaidez v. United States*, 2011). The Court cited *Butler v. McKellar* (1990) which stated "the fact that a court says that its decision is within the 'logical compass' of an earlier decision, or indeed that it is 'controlled' by a prior decision, is not conclusive for purposes of deciding whether the current decision is a 'new rule'" (*Butler v. McKellar*,1990). According to the Court, therefore, the fact that *Padilla* extended *Strickland* is not controlling as to whether a new rule was established by the Supreme Court. Moreover, the Court noted the nuances of *Padilla,* which distinguished the case from *Strickland*. Specifically, the Court pointed to the *Padilla* Court's distinction between "truly clear" deportation consequences and "unclear or uncertain" deportation consequences. According to the Court, this distinction "cannot . . . be characterized as having been dictated by precedent" (*Chaidez v. United States*, 2011). Accordingly, the Seventh Circuit held that *Padilla* announced a "new rule" and as such, could not be applied retroactively to Petitioner Chaidez's *writ of coram nobis*.

Notwithstanding the Court's rationale, Justice Williams penned a dissent which mirrored the Third Circuit's interpretation and application of *Padilla*. Justice Williams first noted that *Padilla v. Kentucky* "simply clarified that a violation of these norms [of *effective* attorney conduct] amounts to deficient performance under *Strickland v. Washington*" (*Chaidez v. United States*, 2011). Justifying his assertion, Justice Williams addressed the arguments of the majority; specifically, the argument that the concurrence and dissent in *Padilla* compelled the Seventh Circuit to view the *Padilla* decision as a new rule. Justice Williams wrote:

> *"The existence of concurring and dissenting views does not alter the fact that the prevailing professional norms at the time of Chaidez's plea required a lawyer to advise her client of the immigration consequences of a guilty plea. Even in light of dissenting views, 'Strickland did not freeze into place the objective standards of attorney performance prevailing in 1984, never to change again'" (Chaidez v. United States, 2011).*

Justice Williams' words imply that *Strickland* contemplated a fluid understanding of professional norms that would adjust with the changing times. Therefore, the majority's argument missed the point completely.

Moreover, Justice Williams noted that the Supreme Court in *Padilla* specifically mentioned that it had never differentiated between a direct or collateral consequence of an immigration plea. Therefore, any argument that points to unanimity among the lower courts regarding immigration pleas as "collateral" is meaningless because the Supreme Court itself never differentiated between these consequences. And finally, Justice Williams read into the *Padilla* court a desire or "intent" to apply its decision retroactively. Justice Williams chastised the majority by pointing to the plain language of

the *Padilla* decision. He noted:

> *"My colleagues downplay the plain language in Padilla that itself signals anticipated retroactive application. The majority in Padilla specifically stated that its decision will not 'open the floodgates' to challenges of convictions and further stated that '[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as a result of plea bargains" (Chaidez v. United States, 2011).*

Here, Justice Williams' words mirror the language of the Third Circuit in his emphasis on the "floodgates argument."

C. The Third Circuit's Interpretation of Padilla is Correct

Upon closer analysis, the Third Circuit's interpretation in *United States v. Orocio* of *Padilla v. Kentucky* is the correct interpretation. Justice Williams' dissent in *United States v. Chaidez* goes a long way toward explaining why the Third Circuit is correct. First, Justice Williams' emphasis on the *intent* of the Supreme Court in *Padilla* is notable. Why would the Supreme Court's majority address the "floodgate" argument in its rationale if it did not *intend* for its decision to apply retroactively? This floodgate argument forecasts the question of retroactivity and its language should leave little question as to the Court's intent.

Moreover, an argument, in support of a "new rule" interpretation highlighting the fact *Padilla* allowed a collateral matter to serve as the basis for a Sixth Amendment defective counsel claim, misses the point. The distinction between "collateral" and "direct" consequences to guilty pleas was addressed by the *Padilla* Court. Justice Stevens noted in the *Padilla* opinion that "[w]e, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionality" (*Padilla v. Kentucky*, 2012). Justice Stevens' words support the inference that a distinction between consequences is not given much weight in the Supreme Court. Therefore, an argument emphasizing *Padilla's* entertainment of a "collateral" matter is not a strong contention.

Finally, from an equitable standpoint, public policy favors a retroactive application of *Padilla*. There would likely be very few petitioners seeking retroactive review of their cases for numerous reasons. Rachel A. Cartier, in justifying the interpretation of *Padilla's* retroactive ability, enunciated the high burden of adjudicating a retroactive Sixth Amendment deficient counsel claim (Cartier, 2008, p. 63). This high burden excludes a high number of potential petitioners. The Supreme Court's language in *Padilla* strengthens this equitable argument. The Supreme Court did not believe its decision would cause a "floodgate" of new litigation. Therefore, it is important that the few petitioners who qualify under *Padilla* have their day in court.

What Does this Split Mean for Ineffective Assistance of Counsel Claims, Rooted Out of "Collateral" Immigration Consequences, Going Forward?

The first, and perhaps the most obvious, symptom of the dual interpretation of *Padilla v. Kentucky* is the redressability of Petitioners' claims of ineffective assistance of counsel. Should courts decide to follow the Third Circuit's application of *Padilla*, deficient counsel claims stemming from an uninformed plea or unjust conviction pre-*Padilla* will likely be heard. Conversely, those claims will not be heard if the courts choose to adhere to the Seventh Circuit's application of *Padilla*. Either application will pose important consequences on any forthcoming ineffective assistance of counsel claims. Ultimately, the Supreme Court will have to decide the applicability of its decision in *Padilla* to pre-*Padilla* claims.

Assuming the Supreme Court adopts the Third Circuit's adaptation of *Padilla*, petitioners could bring ineffective assistance of counsel claims as far back as 1996. However, there is likely a plethora of these claims from petitioners who no longer reside in the United States (as they have already been deported through government-initiated removal proceedings). Therefore, the application of the Third Circuit's understanding of *Padilla* could pose a logistical nightmare. Rosenbloom (2010) argues that it is highly unlikely that any deported individual outside of the United States could return for judicial proceedings. Rosenbloom is correct in her assertion. A removed individual would only have two recourses in returning to the United States for an adjudication of his or her claim: a non-immigrant visa or a visa waiver. However, to even apply for a non-immigrant visa, the removed individual would have to wait ten years. According to INA § 212(a); 8 U.S.C.A. § 1182:

> Any alien not described in clause (i) who has been ordered removed under section 240 or any other provision of the law or departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

Since INA § 240; 8 U.S.C.A. § 1229 (mentioned in the quotation above) concerns removal proceedings initiated by the U.S. government, virtually all removed individuals with deficient counsel claims would fall under its authority. Therefore, any application for a nonimmigrant visa would have to wait ten years. This wait would make an adjudication of any deficient counsel claim virtually impossible for a removed individual.

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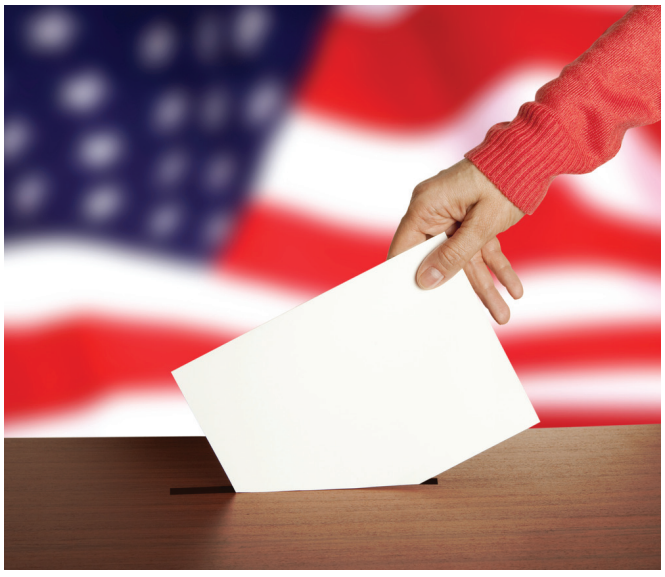
Latinos and the 2012 Presidential Election

by Rubén O. Martinez

The 2012 presidential election promises to be a turning point in the history of this nation. Since the late 1970s this country has been on a neoliberal and neoconservative course that has altered the power hierarchy in society at large, particularly between workers and the owners of capital, and the dominant group and minority groups. The social democratic state of the mid-20th century has been replaced with a neoliberal state that provides increasingly limited support for the Public Good. In the process the political center has been moved to the right, leaving former centrists vulnerable to accusations by neoliberals and neoconservatives of being socialists and communists. All of this has occurred concurrently with a major demographic shift in which Latinos became the second largest ethnic subgroup in the country. Additionally, 2010 was the year in which more babies of color than White babies were born, and as a result White Americans are projected to become a numeric (not a social) minority by 2050, at which time Latinos are projected to comprise nearly one third of the overall population. As these demographic shifts continue to occur, the electoral influence of Latinos will continue to increase – barring, of course, disenfranchising policies by the dominant group.



The political pendulum began swinging toward the center with the election of Democrats in the 2006 midterm election, and it continued to move in that direction with the election of Barack Obama in 2008. The midterm election of 2010, however, saw the American electorate re-install Republicans in state legislatures, in governorships, and the U.S. House of representatives to a level that had not occurred since 1946. However, the overreach of Republicans in the past two years, particularly in attacking public sector unions and women's issues, especially abortion and use of contraceptives, may be contributing to a waning confidence among many voters who supported them in 2010. This is particularly the case with regard to Latinos, against whom Republicans have taken strident steps on key issues, including rejecting the DREAM Act, enacting repressive anti-immigrant legislation in many states (Arizona, Alabama, Georgia, Indiana, etc.) which have led to racial profiling, supporting increased deportations of Latino immigrants, and eliminating Mexican American Studies in Tucson, Arizona, to mention a few. They have also proposed in public discourses eliminating birthright citizenship, which directly attacks the citizenship of children born in the U.S. to undocumented immigrants.

Importantly, a basic social principle holds that solidarity among members of a group increases in the face of external threat. Moreover, that solidarity is likely to convert into some form of social action to protect the interests of that group. The nativistic actions of neoconservatives represent this principle, as they perceive a threat to their culture and status by the growing numbers of Latinos. By the same token, the policy attacks on Latinos have led to defensive responses, including the 2006 mega demonstrations against the repressive legislation proposed by Republicans in the U.S. House of Representatives. One of the chants for those marches, which shocked the nation in terms of their size, was "Today we march, tomorrow we vote!"

While Latinos have lower voter registration and turnout rates than White Americans and African Americans, their rates have been steadily increasing over the past four presidential elections. In 1996 their voter turnout rate was 43.9%; in 2000 it was 45.1%; in 2004 it

was 47.2%, and in 2008 it was 49.9%. With the policy threats that prevail today, it is reasonable to assume that their rate will exceed 50% in 2012, and that it may increase by more than the 2% by which it has been increasing across the last four presidential elections. And, their vote is likely to have an impact in 2012. This is most notably apparent in the coveted swing states of which several have sizeable Latino populations (depending on the specific list, it could include California, Colorado, Nevada, New Mexico and Florida).

Moreover, even in states like Michigan where Latinos comprise only 2% of the electorate, their votes could influence the outcome, especially if the election is close overall. Traditionally, Latino voters have been affiliated with the Democratic Party, with President Clinton receiving 72% of the Latino vote in 1996. President George W. Bush was the first Republican candidate to receive 40% of the Latino vote. This occurred in 2004, and he was more open to a constructive approach to immigration issues. Since then, given the hostile environment that the Republican Party has generated since the last presidential election, Latino support for Republican candidates has surely deteriorated.

As the presidential election nears, Republican candidates will have to temper their views on issues of primary concern to Latino voters if they want to regain their support. For example, according to Latino Decisions, a majority in each of the major subgroups (Mexican Americans, Puerto Ricans, Cuban Americans, and foreign-born Latinos) that comprise the overall Latino category strongly support the DREAM Act (69%, 52%, 58%, and 70%, respectively). When one adds those who "somewhat support" the DREAM Act, more than three-fourths of each group support this proposed legislation.

Additionally, assaults on bilingual education, bilingual ballots, and other programs and practices that support persons with bicultural backgrounds continue to work against Republican candidates among Latino voters. An important feature of being Latino is being bilingual and bicultural, and forced assimilation tactics are likely to increase the perception of threat among Latinos. It is doubtful, however, that Republican candidates can temper their views on such issues or that they can effectively court Latino voters. Neoconservatives have become so ideological that, as true believers, they seem incapable of approaching the issues in a rational and constructive manner. Ideologically, they are convinced their views best serve the country, and winning political power is vital in order to impose those views on the rest of the nation.

This approach is completely at odds with that of Latinos, who continue to remain grounded in the practical affairs of everyday life. For example, while the global economy requires a mobile labor force, neoconservatives seek to close off the nation's borders without seeking a constructive approach to transnational labor issues. Instead, they insist on building a wall on the southern border without a clear sense of how such actions would impact market forces. This approach is out of step with the demands of a global economy, which is upon us whether we like it or not, and is similar to supporting a slave economy in the face of the rise of industrial capitalism.

Many Latinos, on the other hand, have transnational labor experiences and recognize the importance of labor force mobility and the issues associated with them. Moreover, many are developing global identities that emphasize global citizenship and human rights, a process that is unfolding as the global economy continues to take hold. The rise of transnational identities engenders perspectives that go beyond the nation-state and that recognize the interdependency and interconnectedness of the lives of individuals across the globe. Such a perspective is important for current and future international relations.

As Latinos go to the polls on November 6, 2012 their concerns about the jobs and the economy, education, social security and elder care will be the same as those of other citizens, but their historical backgrounds will link them to views about the DREAM Act, immigration reform, bilingual education, and bilingual ballots that will differ from many dominant group citizens, who despite their emphasis on individualism continue to push group interests inside the voting booth. Latinos voters will vote for those candidates whose views are closer to their own views and in doing so they will help determine whether or not the pendulum continues moving toward the center of the political spectrum.

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Similarly, the visa waiver program under INA § 217; 8 U.S.C.A. § 1187 represents another unlikely solution for an immigrant seeking an adjudication of his or her Sixth Amendment deficient counsel claim. The visa waiver program allows nonimmigrant visitors from countries to waive the nonimmigrant visa requirements of INA § 212(a); 8 U.S.C.A. § 1187 as long as they are seeking entry as a tourist for 90 days or less and come from a country with a low nonimmigrant visa refusal rate (see INA § 217; 8 U.S.C.A. § 1187). Therefore, removed individuals from countries such as Mexico, Guatemala, and other countries with large nonimmigrant visa refusal numbers are virtually excluded for the purposes of the visa waiver program. Moreover, the removed individual may be barred by other provisions prohibiting those with previous visa violations from applying to the program. Under INA 217(a)(6) and (7); 8 U.S.C.A. § 1187, these individuals must meet these requirements to qualify for the visa waiver program:

> (6) Not a safety threat
> The alien has been determined not to represent a threat to the welfare, health, safety, or security of the United States.
>
> (7) No previous violation
> If the alien previously was admitted without a visa under this section, the alien must not have failed to comply with the conditions of any previous admission as such a nonimmigrant.

Depending upon the interpretation of clause six above, a United States consulate could easily determine that a deported individual would pose a safety threat to the United States based upon his or her contested plea or conviction. Moreover, any removed individual who entered the United States without documentation is effectively barred from relief under clause seven.

Rosenbloom indicates in her writing that a removed individual could seek humanitarian parole into the United States under the auspices of INA § 212(d)(5)(A); 8 U.S.C.A. § 1182(d)(5)(A), which grants authority on a case-by-case basis for "urgent reasons" or a "significant public benefit" (2010, p.339-40). However, it is highly likely that this type of parole would be granted only in rare instances. Therefore, Rosenbloom concludes that the adjudication of any deficient counsel claims with immigration consequences would have to proceed with the petitioner remaining in his or her homeland.

Assuming the Supreme Court adopts the Seventh Circuit's Interpretation of *Padilla*, individuals could only bring deficient counsel claims under the Sixth Amendment if their initial case was adjudicated after the Supreme Court's decision in *Padilla v. Kentucky*. Applying this rule to the hypothetical situation described in the introduction, if Guillermo wanted to bring a deficient counsel claim against his public defender, the initial case must have been adjudicated prior to March 31, 2010. Otherwise, Guillermo cannot bring a deficient counsel claim rooted out of consequences to immigration status.

Regardless of the Split in the Circuits, What Must Federal, State, and Local Government Do as a Whole to Ensure Compliance with *Padilla*, Regardless of Whether It is a New Rule or Not?

Ultimately, the Supreme Court of the United States will determine the proper application of *Padilla v. Kentucky*. As previously discussed, this Note suggests that the proper approach was that enunciated by the Third Circuit in *United States v. Orocio*, in which the court held that *Padilla* should apply retroactively. Until that time, there are tangible steps that can be taken with federal statute, state courts, and local attorneys to prevent deficient counsel claims or to remedy existing claims.

A. Federal Level Remedies to Ineffective Assistance of Counsel Claim with Immigration Consequences

1. Expand INA 212(a) to include a category of exception for those who are returning to adjudicate an ineffective assistance of counsel claim with immigration consequences.

As stated above, INA 212(a); 8 U.S.C.A. § 1182 lists the classes of aliens ineligible for visas or admission. Clauses (6) and (7) of the statute allow the issuance of visas if the criteria are met of not posing a safety threat and there are no previous violations (see above).

Because of these restrictive clauses, Congress should insert a provision allowing entrance to the United States for those returning to adjudicate their ineffective assistance of counsel claims on a temporary visa. Rosenbloom (2010) gives a prime example of the necessity of such an exception. She writes that with every plea or conviction, there is always a chance that the judgment against an individual could be vacated. Moreover, there is no guarantee that the prosecutor would re-prosecute the case against the removed individual after the vacated judgment. Therefore, a removed individual could potentially have a legally protected right to remain in the United States. However, under INA 212(a), that individual is unable to re-enter the United States due to his or her previous removal. INA 212(a) would prohibit re-entry because he or she had been removed after valid removal proceedings. To prevent the situation that Rosenbloom posits, it is imperative for Congress to pass a provision that would relax an

alien's ineligibility for a nonimmigrant visa when a Sixth Amendment deficient counsel claim is pending.

2. Expand the parole rule under INA § 212(d)(5)(A) to include the adjudication of ineffective assistance of counsel claims as a "significant public interest."

Congress should expand the parole rule under INA § 212(d)(5)(A) to streamline the ability of individuals to return to the United States and adjudicate their deficient counsel claims. As stated in INA § 212(d)(5)(A):

> The Attorney General may, except as provided in subparagraph (B) or in section 1184 (f) of this title, in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

For removed individuals outside of the United States, it is extremely difficult to qualify for parole under the statute's "humanitarian" or "significant public benefit" language. While this statute allows those detained *in* the United States to be "witnesses in proceedings being, or to be, conducted by judicial, administrative, or legislative bodies," [Rosenbloom, 2010: 339; n. 66 quoting 8.C.F.R. § 212.5(b)(4)], there is a lack of a tangible recourse for those *outside* of the United States. Therefore, it is important within the context of ineffective assistance of counsel claims that declaratory language be inserted in the INA § 212(d)(5)(A) statute. This language should say something to the effect that individuals outside of the United States are allowed parole if they have a pending Sixth Amendment ineffective assistance of counsel claim pertaining to immigration matters.

3. Suspend the "low-immigrant refusal" clause to those who seek to adjudicate their ineffective assistance of counsel claims a chance to seek a visa waiver under INA § 217.

Finally, qualifying language should be inserted in INA § 217; 8 U.S.C.A. § 1187 that eases the country restrictions on the visa waiver program. The statute limits the qualification of non-immigrants to the visa waiver program only if they meet the following qualifications:

> 2) Qualifications
> Except as provided in subsection (f), a country may not be designated as a program country unless the following requirements are met:
>
> (A) Low nonimmigrant visa refusal rate--Either--
>
> (i) the average number of refusals of nonimmigrant visitor visas for nationals of that country during--
>
> (I) the two previous full fiscal years was less than 2.0 percent of the total number of non-immigrant visitor visas for nationals of that country which were granted or refused during those years; and
>
> (II) either of such two previous full fiscal years was less than 2.5 percent of the total number of nonimmigrant visitor visas for nationals of that country which were granted or refused during that year; or
>
> (ii) such refusal rate for nationals of that country during the previous full fiscal year was less than 3.0 percent (INA § 217(c)(2)(A) (2010); 8 U.S.C.A. § 1187 (c)(2)(A)).

Countries such as Mexico and Guatemala, with a substantially higher rate of visa refusals to the United States each year, are not countries that the United States has allowed to participate in the visa waiver program.

Including those countries would better serve the cause of justice and allow nationals of that country the ability to adjudicate their ineffective assistance of counsel claims.

B. *State Level Remedies to Ineffective Assistance of Counsel Claim with Immigration Consequences*

Post-*Padilla*, state courts will have to now determine whether attorneys have rendered effective assistance of counsel as it pertains to immigration matters (Garcia Hernandez, 2010: 304). Because most immigration matters are decided by immigration judges, the Board of Immigration Appeals (BIA), and federal judges, state courts have little experience adjudicating immigration matters. Thus, determining whether an attorney has rendered effective counsel concerning immigration matters is even more difficult. Garcia Hernandez (2010) offers several concrete steps that state courts can take to cure their deficiencies in immigration law. For example, state courts can hire clerks versed in the relevant immigration statutes. Moreover, Courts should expand their legal research capabilities to include immigration law (Garcia Hernandez, 2010: 329-30). State courts should also actively seek out public defenders and court translators to serve those who do not speak English. Because local judges hear so many cases, judges should have their finger on the cultural and linguistic pulse of the community. Therefore, if a city has a large Spanish-speaking population, steps should be taken to reduce any language barrier between the courts and the people.

Finally, state courts should have their finger on the pulse of the changing and fluid nature of immigration law. The director of the United States Immigration Services frequently publishes immigration bulletins. These bulletins guide the actions of the Immigration and Customs Enforcement Agents and their treatment of certain undocumented individuals or legal permanent residents of the United States. Understanding these new guidelines is imperative for rendering effective immigration advice.

C. *What can attorneys do to better represent their clients?*

The concurrence of Justice Alito in *Padilla v. Kentucky* is not conducive to effective assistance of counsel by local attorneys. Justice Alito wrote in his concurrence that:

> *"In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney" (Padilla v. Kentucky, 2010).*

If Justice Alito's words were binding, attorneys would likely tell their clients that *any* plea or conviction could bring adverse immigration consequences. While this advisement may alleviate some issues, a statement such as this one would likely become "white noise" and simply ignored. Because the majority did not adopt Justice Alito's concurrence, it is clear an attorney must do more than merely "advise the defendant" that a plea bargain "may" have immigration consequences. In reaching its determination that a failure to advise a client of adverse immigration consequences constituted deficient counsel, the majority of the Court in *Padilla* consistently relied on the gravity of deportation, the ease of reading the pertinent immigration statutes, and counsel's false assurances (*Padilla v. Kentucky*, 2010). Justice Alito's concurrence only addresses the third prong (false assurances), which would not put any onus on an attorney to read or become versed in any immigration statute; nor would the concurrence eliminate the potential for deportation. It is clear that the majority expected more out of attorneys.

Therefore, it is imperative that attorneys take the proper steps in educating themselves on immigration issues and have resources at their disposal to properly advise their clients. Defense attorneys should periodically enroll in continuing education classes to understand the rudiments of immigration law. Moreover, a centralized hotline or immigration resource center would also serve attorneys well. Finally, attorneys who defend clients with "collateral" immigration issues should not hesitate to refer their client to other attorneys. For example, if there is an extreme language barrier between client and attorney, it would make sense for the attorney to refer that client to an attorney who spoke the target language. Attorneys could arrange a *quid pro quo* arrangement, whereby a referral to one attorney would be reciprocated by the receiving attorney. Above all, *Padilla* requires that attorneys take the steps necessary to comply with each person's Sixth Amendment rights under the Constitution.

Conclusion

Guillermo's future legal predicament is dependent upon several factors that are out of his control: the date of his arrest, his attorney, the lower court's interpretation of *Padilla*, and his country of residence. Guillermo may prevail in his claim of deficient counsel but it is also just as likely that he will fail. From Guillermo's situation, the federal government, state courts, and most importantly, attorneys, must adapt and work to eradicate the precarious crossroads of immigration and criminal law. There are certainly no easy answers to the legal issues facing Guillermo and countless other undocumented immigrants and legal permanent residents. However, there are concrete solutions that can help alleviate these situations and strengthen the justice system.

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contraception, affirmative action, taxation, gay marriage, labor unions, and crime were used to promote neoliberal policy agendas – in which radical individualism, free market fundamentalism, and vague notions of liberty and freedom prevail. Today, poverty and inequality are larger and more deeply rooted problems in the U.S. than they have been since the Great Depression.

While there are many contradictions among the issues promoted by neoliberals, emphasis on single-issue politics (campaigning on a single policy area or idea) and their framing in terms of what is "American" and "un-American" have proven successful in mobilizing different political factions across several seemingly unconnected policy fronts. In this context, an emphasis on punishing "criminals" has resulted in increases in the number of people in jails and prisons, and simultaneous increases in the expenditure of public funds to accomplish this end result. Racial/ethnic minorities are disproportionately impacted by neoliberal policies, with African American and Latino youth, in particular, becoming the groups that overwhelmingly power profit-making in the nation's private detention centers and prisons.

Incarceration Rates

Civil instability and increases in drug use and drug-related crimes during the 1960s and 1970s resulted in a perceived crisis in the United States that led to a mass incarceration movement characterized by a "get tough on crime" emphasis. This "rage to punish" was supported by groups that opposed the Civil Rights Movement and the Great Society programs of President Johnson's administration. These groups included The New Right, the Moral Majority, conservative organizations such as the National Rifle Association, and neoliberal and conservative law-and-order politicians. The long-term result has been not only mass incarceration, but also the privatization of prisons and willingness by some to relinquish civil and legal rights for the sake of public safety and security.

The total crime rate in 1960 was 1,887.2 per 100,000, climbed to a peak of 5,950 per 100,000 in 1980, and then declined to 2,442 by 2010. During the same period, the number of persons incarcerated in the nation's jails and prisons increased from 213,142 in 1960, increased to 501,886 in 1980 and 2,284,913 in 2009, reflecting an increase of 355% since 1980. Between 1990 and 2009, the number of Latinos in the nation's jails increased from 58,100 to 124,000, reflecting an increase of 113%; Blacks increased from 172,300 to 300,500, reflecting an increase of 74%, and Whites increased from 169, 600 to 326,400, reflecting an increase of 92%. The number of juveniles (treated as adults) held in jail increased from 2,201 in 1990 to 7,218 in 2009, reflecting an increase of 228%. Overall, the United States is the nation with the largest number of incarcerated persons in the world; with an incarceration rate (738 per 100,000) four times greater than the world average rate (166 per 100,000).

The rates in the U.S. are driven in large part by the disproportionate incarceration of racial and ethnic minorities, with Blacks six times as likely to be incarcerated as Whites, and Latinos twice as likely. In particular, it is racial and ethnic minority men who are most likely to be incarcerated. In 2008, 1 in 15 Black men ages 18 and older were incarcerated compared to 1 in 36 Latino men and 1 in 106 White men in the same age group. While there was a minor decrease in the number of incarcerated persons from 2009 and 2010, the numbers remain exceptionally high by historical standards.

Crime rates, however, do not account for the high incarceration rates in this country. Instead, the overreliance on incarceration is due to several factors, including the fear of crime promoted by images of "street disorder" by the mass media, misdirected laws and policies, mandatory sentencing, and political opportunism. As expected, the increase in prisoners was attended by dramatic increases in the expenditure of public funds. The estimated cost for corrections in this country in 2008, with the majority of it going to the incarceration of prisoners, was $75 billion, with operating and capital costs more than four times that figure.

With the majority of prisoners being held in state prisons, states bear most of the costs of incarceration. Per capita costs for incarceration vary considerably across states, with corrections constituting an increasing percentage of a state's general fund dollars over the past 30 years. In 2005, the average annual per capita cost to imprison a person in a state prison ranged from $13,000 in Louisiana to $45,000 in Rhode Island. In 2010, the average cost of keeping a person imprisoned in federal prison was $28,284.

But there are several other unaccounted costs that follow high rates of incarceration. These include the negative impacts on the children of prisoners, the flagrant misuse of public funds, the waste of lives, and the negative impact of incarceration on employment and earnings of those who have been incarcerated. In short, as Justice Anthony M. Kennedy has stated, "Our resources are misspent, our punishments too severe, our sentences too long." This is particularly the case when it comes to non-violent, drug-related crimes.

Covert Racism, the War on Drugs and Criminal Justice

The rise of Ronald Reagan to the presidency was attended not only by an emphasis on neoliberal activities such as

deregulation of the economy and cuts to social programs, but also by the War on Drugs and by movement away from the rehabilitation of criminals toward a punitive model of criminal justice. This movement was infused with the perspective that crime and criminals can best be controlled by harsh and authoritarian measures. Moreover, it was fueled by Whites' racist reactions to the Civil Rights Movement and to their perceived loss of privilege that resulted from the changing racial hierarchy. This perceived loss of privilege predisposed many to be led, albeit unknowingly, down the neoliberal path even when it was to the detriment of most Americans in terms of job and income stability.

The shift from overt racism to covert racism in the 1980s meant that the dominant group had to find indirect ways to restore its privileged position in society. That is, covert racism meant that the dominant group utilized mechanisms that would hide its ultimate goal, pursuing its interests in ways that would not expose the racist undertones that characterized its aims. As was the case with the rise of neoliberalism, the pursuit of covert racism was based on emotions and symbolism. The pursuit of covert racism included the use of coded terms and actions such as the "war on drugs," the disenfranchisement of felons and its disproportionate impact on minority communities, and the use of felony drug convictions as the justification for the exclusion of persons from a multitude of government programs, including financial aid for a college education. These punitive and exclusionary Federal policies disproportionately impact poor and vulnerable communities. As a result, exemption laws by states are required for some individuals to become eligible to receive government benefits and services.

Underlying the punitive measures imposed by the neoliberal movement is a radical view of individualism in which individuals are to be set free from dependency on the state and become responsible for their own actions and well-being. Framed as "smashing the entitlement mentality," this libertarian or anarchic view of individualism was supported by the rise of Christian fundamentalism, both of which deny the structural basis of inequality in society. As such, the War on Drugs is justified both on the basis of neo-liberal and religious views, with individuals held responsible for their own well being and transgressions. Moreover, within the War on Drugs, crime became a code word for race, with racial minorities, particularly Black males, viewed by the dominant group as criminal-prone persons to be dealt with through harsh punitive measures when convicted of a crime. Indeed, during the 1990s the view that crime is a Black phenomenon became increasingly widespread among Americans. Since then, with the increases in the number of Mexican, Latin American and South American immigrants, crime has become increasingly identified with Latinos, especially Latino immigrants, who comprise an increasing proportion of the prison populations. The result is that Latinos are the fastest growing group being imprisoned.

For example, the criminalization of immigration offenses resulted in Latinos becoming the majority (50.4%) of all federal felony offenders sentenced to serve time in federal prisons during the period from October 1, 2010 to September 30, 2011. Of the 38,331 Latino offenders who were sentenced during this period, 22,432 or 58.5% were sentenced for immigration offenses. With the size of the total federal prison population projected to increase by 18% from 201,227 in 2010 to 247,714 in 2018, undocumented immigrants will contribute substantially to that growth.

In 2005, the Bush Administration implemented Operation Streamline, a "zero tolerance" border enforcement program that prosecutes even non-violent, first-time undocumented border crossers for misdemeanors punishable by up to six months in prison. Operation Streamline's fast-track processes, with group hearings and sentencings conducted in Spanish, have been called into question by those who are concerned not only about the criminalization of the undocumented but also the constitutionality of the proceedings relative to the rights of the accused. The first time that immigrants are caught present in this country illegally they

are charged with a misdemeanor crime and deported, but those who re-enter illegally are charged with a felony. Since many of those deported have families with children here in the United States, they are likely to re-enter illegally to try to care for them. The result is that they are likely to attempt to join their families despite the risks posed by a powerful anti-immigrant climate in which White male youths have beaten immigrants to death and police racially profile immigrants on the basis of stereotypes about Latinos.

It is not only illegal Spanish-speaking immigrants who are filling up the nation's prisons, but also native-born Latinos. With Latinos having eclipsed Blacks as the largest ethnic minority group, they have now become the major source of perceived group threat to the dominant group, and the primary target of the racially-driven system of social control. As such, they already are within the orbit of the exclusionary dynamics of the War on Drugs campaign that began three decades ago and which has devastated Black families and communities. In 2010, for example, 4,276 or 44% of the 10,376 Latinos (including foreign citizens) sentenced to federal prison were sentenced under a mandatory minimum penalty for drug offenses.

Federal benefits that may be denied to convicted drug offenders include cash assistance provided to needy families through TANF, food assistance payments through the Food Stamp Program, financial aid for postsecondary education through federal Pell Grants, Stafford Loans, work-study assistance and postsecondary education loans, public housing through Federally assisted housing programs, and federal licenses, and procurement contracts, among others. While some benefits are not permanently denied, one denial unduly and negatively impacts the lives of people who have served their sentences for the crimes committed. In other words, they continue to pay their debt to society even as they are marked by the stigma of "ex-con" and are denied the safety net supports that might help them avoid recidivism.

What could justify the denial of program benefits? If lengthy mandatory prison sentences did not serve as a deterrent, the possible denial of federal program benefits after incarceration also did not deter individuals from committing drug crimes. Thus, it makes more sense to view the denial of benefits as a neoliberal policy intended to reduce the number of individuals on social programs provided by the Federal Government. To achieve this aim, the proponents of the neoliberal movement began with the most vulnerable, the poor. The aim was and is to reduce spending on social programs by the Federal Government. Legitimized as empowering the poor through personal responsibility and work opportunity, the public largely supported such neoliberal policies under the rhetoric that individuals on public welfare rolls were deadbeats or lazy. While caseloads dropped significantly following passage of the Personal Responsibility and Work Reconciliation Act of 1996, which was intended to move the poor off welfare rolls and into jobs, the second objective of that legislation simply did not materialize. Indeed, the employment growth trend has been slowing since 1975, with a precipitous decline occurring during the Great Recession.

In addition to the denial of benefits to persons with certain drug convictions, the rights of institutionalized persons were also limited. In 1980 the Civil Rights of Institutionalized Persons Act (CRIPA) was passed by the U.S. Congress to address widespread infringements on the rights of institutionalized persons. Among other things, CRIPA gave the Attorney General the authority to investigate institutional conditions and file lawsuits to remedy a pattern or practice depriving residents of their constitutional rights. It also provided that prisoners exhaust administrative grievance procedures prior to filing a claim in federal court, and thereby sought to limit the number of prisoner lawsuits. The number of lawsuits by prisoners, however, continued unabated.

The Prison Litigation Reform Act (PLRA) of 1995 was signed into law by President Clinton in 1996. Among other things, the PLRA limited judicially-imposed relief for prisoners, including judicial involvement in consent decrees. In addition, prisoners could not allege that they had suffered emotional injury during incarceration without first showing that physical injury had also occurred. Judicial screenings of prisoner suits were required and suits were to be dismissed if the court found the complaint frivolous, malicious, or failing to state a claim for which relief could be granted. In short, not only were prisoners' rights curbed, but the costs of maintaining "acceptable" prison conditions were also curbed.

Incarceration in the State of Michigan

The movement against the supposed moral breakdown of society impacted each and every state, and Michigan was no exception. In terms of criminal justice, the war on drugs began in 1978 with Governor William Milliken signing into law some of the nation's toughest mandatory minimum sentences for drug offenses. Intending to put drug dealers at the top of the distribution chain in prison for several

years, Michigan's prisons instead filled up with drug users at or near the bottom of the distribution chain. Recognizing his mistake, Ex-Governor Milliken later led the effort to repeal the mandatory minimum sentencing laws for drug offenses, with a bipartisan legislature repealing them near the close of 2002. Other states followed Michigan in enacting and repealing mandatory minimum sentencing laws for drug offenses, but many still have such laws.

In Michigan, the 24 years during which these laws were in effect resulted in enormous increases in the number of incarcerated persons. Moreover, as the neoliberal movement in the state gained steam, most notably with the election of John Engler in 1990, the impact became more widespread as libertarian values took hold and steps were taken to reduce social programs and to privatize government services.

Between 1982 and 1998, the number of annual commitments of men to Michigan's prisons increased from approximately 5,900 to 9,623, reflecting an increase of approximately 163%. For White men, commitments increased from approximately 2,600 to 4,493, and for non-White men the numbers increased from approximately 3,300 to 5,130, reflecting increases of 137% and 180%, respectively. Of these commitments, approximately 19% were for drug-related offenses. Annual commitments for non-White men peaked in 1989 at approximately 7,200, while those for White men peaked in 1992 at approximately 4,800. In1998, the total annual commitments including women was 10,431, with non-Whites comprising 52.6% and Whites comprising 47.4%.

Despite the decline in annual commitments, due to mandatory and longer sentences, the prison population in Michigan increased from 15,082 in 1982 to 45,879 in 1998, reflecting a growth of 204%. Between 1998 and 2010, the prison population in Michigan peaked at 51,515 in 2006, falling to 44,113 in 2010, reflecting a decrease of 14%. For nearly a quarter of a century then, the prisoner population in Michigan trended upward. By the time that Governor Milliken realized that desired changes in the social realm are not linear, and that unanticipated negative outcomes are more likely than not when it comes to social engineering, thousands of individuals and their families were greatly impacted by the turn toward punishment and away from rehabilitation.

Implementation of neoliberal policies did not occur without their negative impacts going unnoticed. Much like the explosion in homelessness engendered by the Reagan Administration's policies, the imprisonment of the mentally ill in Michigan was the direct result of the closing of publicly operated psychiatric hospitals. As the fervor to punish criminals intensified, increasingly more legislation was passed at national and state levels that disempowered the judiciary with regard to sentencing and consent decrees. Mandatory sentences eliminated the discretion that judges had when it came to sentencing those convicted of a crime. Consent decrees, mutual agreements between prisoners and state officials in which the former agree to drop a pending lawsuit and the latter agree to correct prison conditions without admitting to having violated prisoners' constitutional rights, were monitored for compliance by the courts.

Michigan became active in similar prison reform efforts. For example, the Michigan Juvenile Justice Reform Act of 1997 gave prosecutors complete discretion in deciding whether youthful offenders of violent crimes would be tried in an adult or a juvenile court. An amendment to the law required that youth ages fourteen through sixteen, when convicted of serious offenses as adults, receive mandatory sentences. Figures for 1997 show that minority youth in Michigan were over-represented in residential facilities, including public and private prisons. In Kent County at the turn of the century, 100% of the juveniles tried in adult courts were minorities.

In 1998, the new Michigan Sentencing Guidelines were enacted by the Michigan Legislature. Under the new guidelines, persons convicted of certain offenses have to serve their entire minimum sentences. In other words, minimum sentences cannot be reduced for good behavior. The results of these guidelines are increases in the prison population and in operational costs.

A problematic feature of Michigan's Department of Corrections (MDOC) was revealed in the case of Everett Perry, an African American hired in 1988 as an Administrative Law Examiner (ALE). Perry, the first African American hired as an ALE by MDOC, was fired in 1995 for failing to meet performance expectations. Perry worked in MDOC's Office of Policy and Hearings as a hearing officer and decision maker with regard to major misconduct disciplinary hearings in Michigan's state prisons. Perry filed a lawsuit for wrongful termination in which he argued that hearing officers at MDOC were expected to find prisoners guilty at a 90% rate, particularly when involved in conflicts with prison correction

officers. In other words, there was an informal practice of privileging the testimony of guards, and ALEs were expected to meet the expectation set by supervisors. Perry's conviction rate dropped to 83% and he became the target of a workplace campaign in which he was accused of favoring prisoners over guards. Despite being subjected to pressure by supervisors and guards, Perry continued to rule according to his conscience as a fair and independent fact finder.

When prisoners heard about the "quota system" they filed a class action suit (*Heit v Van Ochten*) alleging that they were subjected to unconstitutional hearing practices and procedures. Specifically, they alleged that MDOC kept statistical records of wins and losses before hearing officers and used disciplinary threats against hearing officers to achieve the desired conviction rate in prisoner misconduct cases. After several years of litigation, the MDOC settled both the Perry and the Heit cases. Among other things, MDOC agreed to immediately discontinue the use of wins and losses statistics relative to a hearing officer's findings of not guilty in prisoner misconduct hearings, abandon the informal practices of threatening personnel action against hearing officers in connection with the non-guilty findings in prisoner disciplinary hearings, and forbid guards and other staff from communicating with the hearing division personnel regarding the disposition of prisoner disciplinary hearings.

While the MDOC maintained that it did not have a quota system or required hearing officers to privilege the testimony of guards over that of prisoners, the judge in the U.S. Court of Appeals for the Sixth Circuit held that "overwhelming evidence suggests that there was, at the very least, a strong expectation that the not guilty/dismissal rate should not rise above 10%" and that "[i]f hearing officers focus on finding 90% of the defendants before them guilty, as the evidence adduced thus far suggests, they cannot possibly be impartial…" and individuals are thereby subjected to arbitrary action.

Neoliberal Policies, Poverty and Disconnected Youth

One of the consequences of cutting social programs and deregulating the economy is the increase in social inequality, which places youth and families at risk of poverty and diminished opportunities. Despite the economic growth that has occurred over the past four decades, the relative position of Latinos and Blacks has not improved much. Table 1 presents the poverty rates for individuals by race/ethnicity and the nation by decade from 1973 to 2010. Among Whites, the poverty rate in 1973 was 7.5%, increased to 9.1% in 1980, decreased to 8.8% in 1990, decreased again to 7.4% in 2000, and then increased to 9.9% in 2010. Among Latinos, the rate in 1973 was 21.9%, increased to 25.7% in 1980, increased again to 28.1% in 1990, then decreased to 22.7% in 2000, and then up again in 2010 to 26.6%. Among Blacks, the rate was 31.4% in 1973, increased to 32.5% in 1980, then down 31.5% in 1990, and again down to 22.5% in 2000, and up to 27.4% in 2010. Overall, the poverty rate increased from 11.1% in 1973 to 15.1% in 2010; Whites consistently had lower poverty rates, and the gap between Latinos and Blacks closed by 2000 and has remained relatively similar since then.

Table 1. Poverty Rates of Individuals by Race/Ethnicity and Decade, 1973-2010

	Year/Decade				
Race/Ethnicity	1973	1980	1990	2000	2010
Non-Hispanic Whites	7.5%	9.1%	8.8%	7.4%	9.9%
Latinos	21.9%	25.7%	28.1%	22.7%	26.6%
Blacks	31.4%	32.5%	31.9%	22.5%	27.4%
National Rates	11.1%	13.0%	13.5%	11.3%	15.1%

Source: DeNavas-Walt, Carmen, Bernadette D. Proctor, and Jessica C. Smith. (2011). Income, Poverty, and Health Insurance Coverage in the United States: 2010. Current Population Reports, P60-239. Washington, DC: U.S. Census Bureau, U.S. Government Printing Office.

Table 2 presents the median and mean incomes by race/ethnicity by decade from 1972 to 2009. The mean is generally higher than the median indicating that income is upwardly skewed; that is, the upper half has greater income than the lower half of the distribution. Throughout the decades, Whites have had higher median and mean incomes than Latinos and Blacks. The two minority groups experienced a decline in the

Table 2. Median and Mean Income by Race/Ethnicity by Decade, 1972-2010*

	Year/Decade									
	1972		1980		1990		2000		2010	
Race/Ethnicity	**Median**	**Mean**	**Median**	**Mean**	**Median**	**Mean**	**Median**	**Mean**	**Median**	**Mean**
Non-Hispanic Whites	48,091	55,282	47,904	55,930	51,661	64,321	57,764	77,305	54,620	74,439
Latinos	35,781	41,127	34,391	42,006	36,111	45,236	41,994	55,681	37,759	51,540
Blacks	27,676	34,961	27,117	35,194	30,202	40,128	37,562	49,601	32,068	44,780
National Rates	45,196	52,602	44,616	53,064	48,423	60,487	53,164	72,339	49,445	67,530

Source: DeNavas-Walt, Carmen, Bernadette D. Proctor, and Jessica C. Smith. (2011). Income, Poverty, and Health Insurance Coverage in the United States: 2010. Current Population Reports, P60-239. Washington, DC: U.S. Census Bureau, U.S. Government Printing Office.

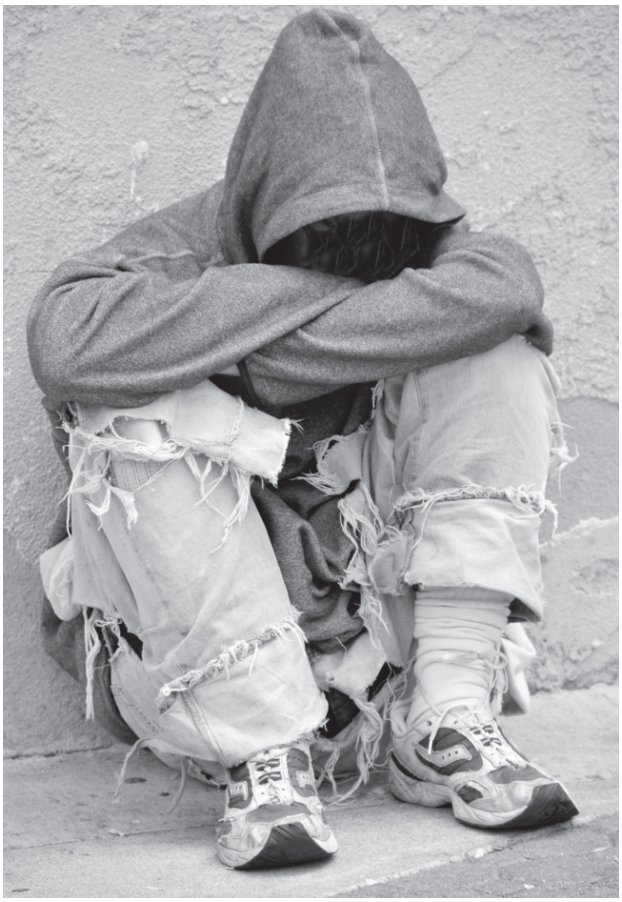
median income between 1972 and 1980, indicating that they were hit harder by the recession of the mid-1970s, and that inequality increased within those population groups over time. Although income increased for all groups from 1980 to 2000, Latinos and Blacks stayed below the 1972 average income for Whites throughout the decades, except in 2000 when Latinos exceeded that figure by $399. All groups experienced a decline in median and mean income from 2000 to 2010. In particular, the median income declined by 5% for Whites between 2000 and 2010, while those of Latinos and Blacks declined by 10% and 15%, respectively. Moreover, the ratio of the average income for Latinos and Blacks relative to Whites declined from .74 and .63, respectively, in 1972 to .70 and .61 in 2010. Finally, it is important to note that the gap between the median and mean incomes for each group increased between 1972 and 2010, with that for Whites being 2.6 times greater, that for Latinos 2.6 times greater, and that for Blacks 1.7 times greater. In each case, the gap indicates that that upper half of the distribution experienced greater income increases and that income inequality increased for all groups over the past four decades.

Perhaps even more devastating to the Latino and Black communities has been the increase in wealth gaps brought about by the Great Recession. The Pew Research Center recently reported that the wealth of White households ($113,149) is 18 times greater than that of Latino households ($6,325) and 20 times that of Black households ($5,677). Those ratios have been increasing since 1995. It also reported that the Great Recession took a greater toll on the wealth of minority households, with inflation-adjusted median wealth falling by 66% in Latino households and 53% in Black households.

Michigan has not been exempt from the impact of the economic policies of the past several decades. For instance, between the late 1970s and the late 1990s, the average income of the top five percent income earners increased by 50%, while that of the bottom fifth decreased by 8.1%. Michigan was one of 18 states in which the bottom fifth grew poorer and the top fifth grew richer. During the same period, the average income of the middle fifth increased by 4.8%. In the late 1990s, the ratio of the average income of the top fifth was 9.5 times that of the average income of the bottom fifth, increasing from 6.6 at the close of the 1970s. The ratio of the average income for the top fifth to that of the middle fifth was 2.6 in the late 1990s, up from 2.1 in the late 1970s. The share of income held by the middle fifth declined from 18.9% in the late 1970s to 17.0% in the late 1990s, while that of the top fifth increased from 35.7% to 42.2% during the same period.

The decline in wealth in Michigan, as in other states, is tied to home prices, and although Michigan did not experience significant price increases during the bubble period, it has suffered sharp losses (34%) since 2006, placing it among the top five states (Arizona, California, Florida, Nevada) which experienced the greatest losses in home prices. In terms of home values, in 2005 the median net worth of Latino-owned homes in Michigan was $213,150, but by 2009 their median net worth had dropped to $59,999, reflecting a decrease of 72%. Black-owned homes had a median net worth of $142,832, and by 2009 they had dropped by 72% to $40,000. White-owned homes had a median net worth of $207,656 in 2005, and by 2009 they had dropped by 52% to $100,000.

In 2005, Latino households in those same five states had a net worth greater than four times that of Latinos in other states. However, by 2009, the net worth of Latino households had equalized across regions. In 2005, the median net worth of Latino households in Michigan was $51,464, but by 2009 it had dropped precipitously to $6,375, reflecting a decrease of 88%. For Blacks, the median net worth of households in 2005 was $19,446, and in 2009 it was $4,633, reflecting a decrease of 76%. For Whites, the median net worth of households in 2005 was $205,232, and in 2009 it was $115,724, reflecting a decrease of 44%.



Moreover, differences in educational attainment compound the problem, as education gaps between Whites and Latinos and Blacks are widening. The education gap is exacerbated by a widening gap between the rich and the poor, and comes at a time when the nation's

education systems are floundering and the cost of a college education is increasing as states continue to reduce their financial support to public higher education institutions. It is widely documented that Latinos have relatively low educational attainment levels and one of the highest dropout rates. With strong relationships existing among education, income, race/ethnicity and imprisonment, it is important to consider the challenge of addressing the educational needs of Latinos.

In order to address the educational needs of Latinos, processes of marginalization in schools must be transformed into processes of inclusion and integration. However, inclusion must occur in terms of diversity principles and not the colorblind and assimilation views of the dominant culture. The latter already has failed miserably in educating Latinos, and the lives of young people cannot be put at risk because adults don't want to adapt to a rapidly changing demographic environment. The marginalization of young people leads to disconnected youth, those young people between the ages of 16 and 24 who are neither enrolled in education programs nor employed. These young people are at risk of ending up in prison, especially when so many barriers confront them in their daily lives.

Of Michigan's nearly 10 million persons, approximately 1.3 million are young persons between the ages of 16 and 24. Of these, 910,526 are White, 214,822 are Black, 69,333 are Latinos, and 74,051 are of Other races/ethnicities. Of the 1.3 million, approximately 272,131 (21.4%) are disconnected youth, with 166,114 Whites (rate of 18.2%), 75,323 Blacks (rate of 35.1%), 16,642 Latinos (rate of 24.0%), and 14,052 Other races/ethnicities (rate of 23.4%). These are older teens and young adults who are not connected to our educational institutions or the labor force.

For the 107,579 youth in Detroit, the disconnected youth rates are as follows: 34.0% of Whites (2,096); 40.0% of Blacks (36,526); 30.0% of Latinos (2,042); 30.0% of Other races/ethnicities (786). In Grand Rapids, the rates for the 31,602 youth are as follows: 11.0% of Whites (2,036); 45.1% of Blacks (2,893); 21.5% of Latinos (1,073); 34.0% of Other races/ethnicities (420). In Lansing, the Capital City of Michigan, the rates for the 16,400 disconnected youths are: 21.8% of Whites (1,821); 32.1% of Blacks (1,387); 29.9% of Hispanics (787); and 35.0% of Other races/ethnicities (286). Table 3 presents the rates for disconnected youth by race/ethnicity and gender for selected sites.

Rates vary by group and gender across the cities and the state. In the instances where females have higher rates than males, they most likely reflect the greater challenges of finding employment that women face. What is clear is that young people of color are more likely to be disconnected youth than are Whites. It is these young people who are especially at risk in a context of neoliberal policies in which they are to be blamed and held responsible for the decisions they make and the actions they take in their lives. Yet, such a perspective only makes sense if the reality of their lives was not imbued by structured inequalities.

Conclusion

The strategy of cutting taxes, downsizing government, privatizing government services, and deregulating the economy was done under the banner of such slogans as "reinventing government," "strengthening families," "individual liberty," "freedom," and so on. Whether or not the implementation of such policies has promoted the Public Good and the General Welfare remains a politically contested issue. What is certain is that inequality has increased over the past four decades, that the numbers of persons in prison have increased sharply, and that young persons of color have been placed at risk of being channeled into the prison pipeline, especially as poverty continues to grow, the education system continues to fail them, and the ideology of radical individualism continues to deny the existence of structured inequalities in society.

Table 3. Percent Disconnected Youth Rates by Race/Ethnicity, Gender for Selected Sites, 2008-2010*

	White		Black		Latino		Total	
City/State	**Male**	**Female**	**Male**	**Female**	**Male**	**Female**	**Male**	**Female**
Detroit	25.5	40.3	44.1	36.1	19.0	40.4	23.3	23.2
Grand Rapids	11.2	10.8	39.3	51.5	9.6	33.9	24.3	26.2
Lansing	23.8	19.8	37.5	26.4	31.0	28.7	37.1	21.8
Michigan	20.0	16.4	39.2	30.9	20.2	28.1	19.8	18.0

**These figures are averages from the American Community Survey, 2008-2010*

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- **Amigos/Amigas Circle** ~ $5,000
- **Aficionados/Aficionadas Circle** ~ $2,500

If you need additional information on giving to JSRI, including planned giving, please contact:

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