

Collateral Consequences

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For many people convicted of crime, the greatest effect will not be imprisonment, but being marked as a criminal and subjected to collateral consequences. Consequences can include loss of civil rights, public benefits, and ineligibility for employment, licenses, and permits. The United States, the 50 states, and their agencies and subdivisions impose collateral consequences—often applicable for life—based on convictions from any jurisdiction. Collateral consequences are so numerous and scattered as to be virtually uncountable. In recent years, the American Law Institute, American Bar Association, and Uniform Law Commission all have proposed reforms. Collateral consequences should be: (1) collected and published, so that defendants, lawyers, judges and policymakers can know what they are; (2) incorporated into counseling, plea bargaining, sentencing and other aspects of the criminal process; (3) subject to relief so that individuals can pursue law-abiding lives, and regain equal status; and (4) limited to those that evidence shows reasonably promote public safety.

INTRODUCTION

It is common knowledge that criminal conviction can lead to traditional forms of punishment: incarceration, monetary fine, and supervision following or in lieu of incarceration. Less well understood, however, is that people with criminal convictions face a network of additional legal effects, known as collateral consequences.

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Collateral consequences affect many areas of life. Some criminal convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office; a non-citizen may be deported or become ineligible to naturalize. A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver's license. Criminal convictions affect employment; laws prohibit hiring of people with convictions as peace officers or in the health-care industry. A criminal conviction can also make a person ineligible for a license or permit necessary to be employed or to do business, or cause forfeiture of a pension. Criminal convictions can also affect family relations, such as the ability to have custody or visitation of one's child. While a criminal conviction can have serious non-legal effects, such as stigma or shame, the focus of this chapter is on legal mandates.¹

Collateral consequences are a growing problem. First, increasing numbers of Americans are subject to them. While about 2 million people are in U.S. prisons and jails, more than 70 million Americans have criminal records. Considerations of fairness and of protection of public safety make it essential to encourage people with convictions to be self-supporting, productive members of society.

Second, collateral consequences are increasing, yet invisible. Collateral consequences are imposed by federal, state, and local governments and their subsidiary agencies, sometimes transparently but often as a matter of informal policy that requires digging to discover. Collateral consequences should be collected and made available in every jurisdiction.

Third, collateral consequences, the most significant part of the criminal justice system for many people, have generally not been considered punishment, and therefore are not subject to provisions of the Constitution regulating criminal proceedings. For example, because they are "regulatory" and not punitive, new collateral consequences may be imposed on people convicted long before. Generally, clients are not entitled by the U.S. Constitution to know what collateral consequences will apply before deciding whether to plead guilty or go to trial; judges are not required to consider them in imposing sentence. Judges and prosecutors should consider collateral consequences in their charging and sentencing decisions, and defense attorneys should counsel their clients about them.

1. This is not to say that "informal" collateral consequences are unimportant. See generally Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013).

Fourth, criminal records have become more visible because of public and private databases available to anyone who cares to look. Accordingly, a criminal record is increasingly difficult to escape. At the same time, the legal effects of a conviction are hard to eliminate. Some collateral consequences, by their terms, apply only for a specified period, others are in effect for life. Although all jurisdictions have some method of eliminating the effects of the conviction, such as pardon,² sealing, or expungement, often relief is practically unavailable, or is restricted to a narrow class of convictions or offenders.

Jurisdictions, equipped with comprehensive collections of collateral consequences, should ensure they are structured to promote public safety both by protecting the public from harmful individuals, and by leaving room for people with convictions to lead law-abiding lives. Evaluation should be based on empirical analysis, not intuition. Where appropriate, they should be limited to particular crimes, applied on a case-by-case basis, or for a limited period of time, rather than across the board for life. Jurisdictions should clarify the application of ambiguous collateral consequences. In addition, jurisdictions should make available relief mechanisms, so that individuals may regain particular rights when consistent with public safety, and, on a showing of rehabilitation, may shed the effects of their convictions entirely.

I. EXISTING LAW AND POLICY

The United States is in an era of mass conviction. Many distinguished commentators use a different term: “mass incarceration.”³ Since 1970, and even more profoundly since 1980, the increase in the rate of imprisonment and the absolute number of people in prison has been called “unprecedented in the

2. See generally Mark Osler, “Clemency,” in the present Volume.

3. See, e.g., Todd R. Clear & James Austin, “Mass Incarceration,” in the present Volume; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023 (2010); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration since 1950*, 2010 U. CHI. LEGAL F. 165; Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587 (2011); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010) (book review).

history of liberal democracy.”⁴ In 1980, more than 500,000 Americans were confined to prisons and jails; in 2015, there were over 2.1 million.⁵

Yet, the focus on “mass incarceration”⁶ obscures the reality that prison is not the default tool of the criminal justice system. There are approximately 1 million new state felony convictions in a typical year,⁷ and many more misdemeanor convictions.⁸ In addition, there are approximately 80,000 federal convictions annually.⁹ Most defendants convicted of felonies are not sentenced to state prison—about 60% receive probation only or probation with jail.¹⁰ Even more

4. Jude McCulloch & Phil Scraton, *Introduction to THE VIOLENCE OF INCARCERATION* 1, 14 (Phil Scraton & Jude McCulloch eds., 2009).

5. LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 1 tbl.1 (2011); PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 2010, at 2 tbl.1 (2011); DANIELLE KAEBLE & LAUREN GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 2 tbl.1 (2016); *see also* ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISONERS IN 1994, at 2 (1995).

6. While the phrase “mass incarceration” does not capture the full impact of collateral consequences, this observation is not meant to imply that scholars using the phrase are unaware of the collateral consequences of criminal conviction, or have not paid enough attention to them in their scholarship. The observation is about the limits of the term, not about the work of those who use it.

7. *E.g.*, SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009).

8. *See generally* Alexandra Natapoff, “Misdemeanors,” in Volume 1 of the present Report. Systematic misdemeanor statistics are not readily available, but it is clear that misdemeanor convictions are more common than felony convictions. *See* KAMALA D. HARRIS, CAL. DEP’T OF JUSTICE, CRIME IN CALIFORNIA 2015, at 16 (2016) (reporting 1.158 million arrests in California in 2015, of which 314,748 were for felonies and the remainder for misdemeanors or status offenses); NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012) (reporting that misdemeanors comprised a majority of the criminal caseload in a 2010 study of 17 states); LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 12 tbl.5a (2010) (reporting that public defenders surveyed were assigned a total of 378,400 felony and 575,770 misdemeanor cases in 2007); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 n.25 (2012) (estimating 10.5 million nontraffic misdemeanors annually (citing NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURT 11 (2009))).

9. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES tbl.5.1 (2010) (reporting 82,823 federal convictions in the year ending September 30, 2008, of which 75,832 were felonies).

10. ROSENMERKEL ET AL., *supra* note 7, at 4 tbl.1.2.

misdemeanor convictions do not result in incarceration.¹¹ While sentence length has increased, the average term is less than five years.¹² Accordingly, it is likely that the vast majority even of those convicted of felonies and sentenced to prison will spend most of their lives in free society.

Those convicted but not incarcerated are typically on probation or parole.¹³ About 7 million people were on probation or parole at some point during 2015,¹⁴ more than three times the number in prison or jail.¹⁵ At the broadest level, approximately 75 million adults have a criminal record, although some records involve arrests not leading to conviction.¹⁶ Accordingly, the size of the offender population is not just the 2 million in custody; it also includes the more than 7 million in the control of the criminal justice system who are not in custody, plus the tens of millions with a record.

Not being incarcerated does not mean that a person with a conviction has escaped legal consequences.¹⁷ In the words of the Supreme Court, “[a] felon

11. However, even those not incarcerated can be caught up in the system because of the obligation to pay fines, costs, and assessments. *See generally* ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175 (2014).

12. State prison sentences averaged fifty-nine months. ROSENMERKEL ET AL., *supra* note 7, at 6 tbl.1.3. Federal sentences averaged just over five years. FEDERAL JUSTICE STATISTICS, 2008, *supra* note 9, tbl.5.2.

13. *See generally* Michael Tonry, “Community Punishments,” in the present Volume.

14. DANIELLE KAEBLE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2015, at 3 tbl.1, 4 fig.4, 5 fig.5 (2017). This figure includes 4.71 million on probation or parole at year-end 2014, plus 1.9 million probation entries, and 475,200 parole entries. *Id.*

15. *Id.*

16. MADELINE NEIGHLY & MAURICE Emsellem, *WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 2* (2013) (noting that the FBI “maintains criminal history records on more than 75 million individuals”); *see also* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T L. PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27 n.2 (2011).

17. *See* MARGARET COLGATE LOVE, JENNY ROBERTS, & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* (2016); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 70 (2006); *see also* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Theresa A. Miller eds., 2005); NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME, A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION* (May 2014); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999).

customarily suffers the loss of substantial rights.”¹⁸ Every conviction implies a permanent change, because these disabilities will “carry through life.”¹⁹ For citizens, a prominent collateral consequence is the loss of civil rights:²⁰ “A convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, be subject to impeachment when testifying as a witness, be disqualified from serving as a juror,”²¹ and lose the right to keep and bear arms.²² For non-citizens, conviction may result in deportation.²³

Collateral consequences are sometimes triggered by specific offenses; others apply to “felonies” or vague categories like crimes of moral turpitude. Some apply automatically, while others authorize a regulator to act on a case-by-case basis. Some apply for a specified term, others apply for life.

The effects of the loss of status are particularly profound given the many areas of life now subject to governmental regulation. Conviction potentially affects many aspects of family relations, including, for example, the ability to adopt, be a foster parent, or to retain custody of children.²⁴ Conviction can

18. *Estep v. United States*, 327 U.S. 114, 122 (1946); *see also Daniels v. United States*, 532 U.S. 374, 379 (2001) (“States impose a wide range of disabilities on those who have been convicted of crimes, even after their release.”).

19. *Fiswick v. United States*, 329 U.S. 211, 222 (1946); *see also Parker v. Ellis*, 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (“Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”).

20. Margaret Love, *50-State Comparison, Loss and Restoration of Civil Rights & Firearm Privileges*, COLLATERAL CONSEQUENCES RESOURCE CTR. (May 2017), <http://ccresourcecenter.org/resources-2/restoration-of-rights/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/> (last visited June 13, 2017); *see generally* LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY* (2004) (discussing the legal barriers facing individuals following a criminal conviction).

21. *North Carolina v. Rice*, 404 U.S. 244, 247 n.1 (1971); *see also* PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* (2013); MANZA & UGGEN, *supra* note 17; Alec C. Ewald, “*Civil Death*”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045.

22. LOVE, *supra* note 17, §§ 2:29–37; *see also* *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons”). *See generally* Franklin E. Zimring, “Firearms and Violence,” in Volume 1 of the present Report.

23. LOVE, *supra* note 17, §§ 2:47–61; *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”). For discussions of the nature of deportation, *see* Jennifer M. Chacón, “Criminalizing Immigration,” in Volume 1 of the present Report; Christopher N. Lasch, “*Crimmigration*” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131 (2014); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008).

24. Phillip M. Genty, *Family-Related Consequences*, in LOVE, *supra* note 17, §§ 2:25–28.

make one ineligible for public employment, such as in the military and law enforcement.²⁵ It can preclude private employment, including working in regulated industries,²⁶ with government contractors, or in fields requiring a security clearance.

Conviction can also restrict one's ability to hold a government contract, to obtain government licenses and permits,²⁷ to live in public housing²⁸ or receive other benefits, or to collect a vested public pension.²⁹ Those convicted of certain crimes may lose the right to drive a car.³⁰ Persons convicted of sex offenses often must register, may be excluded from living in particular areas, and are subject to post-incarceration civil commitment.³¹ Criminal records are increasingly available to all branches of the government and all segments of

25. See, e.g., 10 U.S.C. § 504 (2016) (restricting enlistment of people with convictions) (discussed in LOVE, *supra* note 17, § 2:7); FLA. STAT. ANN. § 943.13(4) (2017) (prohibiting employment as law enforcement officer of those convicted of felonies and certain misdemeanors).

26. For example, the court in *DiCola v. FDA* upheld lifetime debarment from the pharmaceutical industry based on a criminal conviction:

The permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation. That judgment may proceed from a skeptical view of the malleability of individual men and women; or from a greater concern with the cost of an error visited upon the public than with the cost of an error felt only by the excluded felon; or more likely from the cumulative force of both sentiments.

77 F.3d 504, 507-08 (D.C. Cir. 1996).

27. LOVE, *supra* note 17, §§ 2:8–16. The Supreme Court upheld a prohibition on licensing people convicted of crime:

It is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character, it is not laying down an arbitrary or fanciful rule, one having no relation to the subject-matter, but is only appealing to a well-recognized fact of human experience.

Hawker v. New York, 170 U.S. 189, 196 (1898).

28. LOVE, *supra* note 17, § 2:17; Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U.L. REV. 1123, 1126 (2016); Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs,"* 5 U.C. IRVINE L. REV. 783 (2015).

29. LOVE, *supra* note 17, §§ 2:19–21; see, e.g., *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012).

30. LOVE, *supra* note 17, § 2:23; 23 U.S.C. § 159 (requiring states to suspend driver's licenses of people convicted of drug crimes, or else lose federal highway funds).

31. LOVE, *supra* note 17, §§ 2:38–46; see also Wayne A. Logan, "Sex Offender Registration and Notification," in the present Volume; WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA (2009).

the public through computer databases, thus making collateral consequences susceptible to ready enforcement,³² although some states provide for limiting access to conviction records.³³

In spite of the prevalence of collateral consequences—or perhaps because of it—federal constitutional law regulates them minimally. The Supreme Court has held that occupational ineligibility,³⁴ deportation,³⁵ and sex-offender registration,³⁶ and civil commitment,³⁷ are not subject to the prohibitions on ex post facto laws, although some specific registration regimes have been held so restrictive as to constitute punishment,³⁸ or to require individualized determinations.³⁹ The Court has also said that people with convictions may be disenfranchised⁴⁰ and denied the right to possess firearms.⁴¹ Many courts have held that collateral consequences are not punishment, and thus are not covered by the Eighth Amendment prohibition on cruel and unusual punishments⁴² or the Fifth Amendment prohibition against double jeopardy.⁴³

32. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 179–80 (2007). For a discussion of law enforcement use of databases, see Christopher Slobogin, “Policing, Databases, and Surveillance,” in Volume 2 of the present Report.

33. Margaret Colgate Love, *Restrictions on Access to Criminal Records: A National Survey*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Mar. 9, 2017), <http://ccresourcecenter.org/2017/03/09/restrictions-on-access-to-criminal-records-a-national-survey/#more-11938> (last visited June 13, 2017).

34. *Hawker v. New York*, 170 U.S. 189, 190 (1898).

35. *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“[W]hatever might have been said at an earlier date for applying the ex post facto Clause, it has been the unbroken rule of this Court that it has no application to deportation.”)

36. *Smith v. Doe*, 538 U.S. 84 (2003).

37. *Kansas v. Hendricks*, 521 U.S. 346 (1997).

38. LOVE, *supra* note 17, § 2:43.

39. *In re J.B.*, 107 A.3d 1 (Pa. 2014).

40. *Richardson v. Ramirez*, 418 U.S. 24 (1974).

41. *See supra* note 22.

42. *See, e.g., Byrne v. Sec’y U.S. Dep’t of Homeland Sec.*, 618 F. App’x 143, 146–47 (3d Cir. 2015); *People v. Rizzo*, 61 N.E.3d 92, 104 (Ill. 2016); *State v. Meadows*, No. A13-1023, 2014 WL 3396238, at *5 (Minn. Ct. App. July 14, 2014).

43. *See, e.g., Crook v. Galaviz*, No. EP-14-CV-193-KC, 2015 WL 502305, at *9 (W.D. Tex. Feb. 5, 2015), *aff’d*, 616 F. App’x 747 (5th Cir. 2015); *Roberson v. Dir.*, TDCJ-CID, No. 6:08CV324, 2008 WL 5412383, at *4 (E.D. Tex. Dec. 29, 2008); *Urciuolo v. Commonwealth*, 684 A.2d 1094, 1096 (Pa. Commw. Ct. 1996).

While scholars have criticized collateral consequences as disproportionately falling on people of color,⁴⁴ courts hold that people with convictions are not a suspect class under equal protection doctrine, so legislation disadvantaging them is permissible if it passes lenient rational-basis review.⁴⁵ Lower courts occasionally find particular restrictions irrational,⁴⁶ and Sandra Mayson, among other scholars, has argued that a more searching standard should apply.⁴⁷ However, under the approach of most courts, saving money will almost always be a satisfactory reason for denying benefits;⁴⁸ denial of licensure or employment is justified to protect public safety,⁴⁹ or to promote public confidence in government⁵⁰ or a regulated industry.⁵¹

44. See, e.g., Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2003); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010). Other chapters in this Report discuss at length the problems of race in the criminal justice system. See, e.g., David A. Harris, “Racial Profiling,” in the Volume 2 of present Report; Devon W. Carbado, “Race and the Fourth Amendment,” in Volume 2 of the present Report; Paul Butler, “Race and Adjudication,” in Volume 3 of the present Report; Cassia Spohn, “Race and Sentencing Disparity,” in the present Volume.

45. *Talley v. Lane*, 13 F.3d 1031, 1034–35 (7th Cir. 1994).

46. *Barletta v. Rilling*, 973 F. Supp. 2d 132, 135 (D. Conn. 2013) (finding “categorical disqualification of all persons who have ever been convicted of a felony” for precious metals trading license “is unconstitutional”).

47. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 352 (2015) (“Legislatures have deemed [people with convictions] appropriate subjects for restrictive regulation, and courts, exercising rational basis review, have deferred. This is not the inevitable state of the law.”) (emphasis in original); see also Miriam J. Aukerman, *The Somewhat Suspect Class: Towards A Constitutional Framework For Evaluating Occupational Restrictions Affecting People With Criminal Records*, 7 J.L. SOCIETY 18 (2005).

48. *Houston v. Williams*, 547 F.3d 1357, 1363–64 (11th Cir. 2008) (“[T]he conservation of funds constitutes a rational basis on which to deny assistance to convicted felons and sex offenders.”).

49. *Rinehart v. Louisiana Dep’t of Corr.*, 29 F.3d 624 (5th Cir. 1994) (employment prohibition “rationally relates to maintaining security and safety”).

50. *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014) (“Illinois’s stated interest in barring felons from elective office is to ensure ‘public confidence in the honesty and integrity of those serving in state and local offices.’ Parker does not dispute the legitimacy of this interest, nor has he argued that the statute does not rationally further it.”) (quoting *People v. Hofer*, 843 N.E.2d 460, 464 (Ill. Ct. App. 2006)).

51. See *supra* note 26.

In the criminal context, most courts hold that a judge accepting a guilty plea must warn of the direct consequences, but not of collateral consequences.⁵² Similarly, while the Sixth Amendment requires defense counsel to offer competent representation, most courts hold that counsel need not advise of collateral consequences.⁵³

There are two exceptions. First, affirmative misadvice, even about a collateral consequence, may be incompetent even if there was no obligation to offer correct advice.⁵⁴ The second major exception is the collateral consequence of deportation. By statute or court rule, many jurisdictions required advice of the possibility of deportation. In *Padilla v. Kentucky*,⁵⁵ the Supreme Court held that effective assistance of counsel entitled clients pleading guilty to a warning of the possibility of deportation. Lower courts are now working out the question of whether defense counsel must advise of other serious collateral consequences, such as sex-offender registration or incarceration.⁵⁶

52. *State v. Fisher*, 877 N.W.2d 676, 682–83 (Iowa 2016) (“To adhere to the requirements of the Fourteenth Amendment a sentencing court must insure the defendant understands the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment. However, the court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea.”) (quoting *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998) (per curiam)); *People v. Washington*, 37 N.Y.S.3d 867, 870 (Sup. Ct. 2016) (“[C]riminal courts are in no position to advise defendants of all of the ramifications of a guilty plea that are personal to each defendant. ‘Accordingly, the courts have drawn a distinction between consequences of which the defendant must be advised, those which are direct,’ and those of which the defendant need not be advised, collateral consequences.”) (quoting *People v. Ford*, 657 N.E.2d 265 (N.Y. 1995)). See generally Jenia I. Turner, “Plea Bargaining,” in Volume 3 of the present Report.

53. *State v. LeMere*, 879 N.W.2d 580, 598 (Wis. 2016); see generally Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139 (2015). For a discussion of the problems of indigent representation, see Eve Bresnake Primus, “Defense Counsel and Public Defense,” in Volume 3 of the present Report.

54. *People v. Dodds*, 7 N.E.3d 83, 98 (Ill. App. Ct. 2014); see also *United States v. Castro-Taveras*, 841 F.3d 34, 51 (1st Cir. 2016).

55. 559 U.S. 356 (2010). The Supreme Court has recognized the significance of collateral consequences in the context of habeas corpus petitions; the existence of collateral consequences can prevent mootness where a defendant has been released from custody. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985).

56. LOVE, *supra* note 17, § 4.7. See generally Wayne A. Logan, “Sex Offender Registration and Notification,” in the present Volume.

While collateral consequences can be mitigated through pardon and other forms of legal relief,⁵⁷ pardon was a much more realistic hope for convicted persons in the past than it is now.⁵⁸ Finally, while historically disabilities applied only in the jurisdiction of conviction,⁵⁹ a conviction in one jurisdiction now often has effects nationwide.⁶⁰ Often a jurisdiction will impose a disability without regard to whether the jurisdiction of conviction does so.⁶¹

II. ANALYSIS AND ASSESSMENT

Historically, collateral consequences of criminal conviction were not particularly important to the legal system because the penalty for felony was

57. See LOVE, *supra* note 17, Ch. 7 & App'x A-10 to A-63; Margaret Love, *50-State Comparison Characteristics of Pardon Authorities*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Mar. 2016), <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncharacteristics-of-pardon-authorities/> (last visited June 13, 2017). The Collateral Consequences Resource Center maintains a comprehensive, updated list of all legal mechanisms for relief of collateral consequences. *State-Specific Resources*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/resources-2/state-specific-resources/> (last visited June 13, 2017).

58. See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1181–82 (2010) (“[I]n most years between 1900 and 1936, more than half of the thousands of petitions filed were sent forward to the White House with a favorable official recommendation. At the White House, the president usually approved cases recommended favorably ... and sometimes was more inclined to leniency.”); *id.* at 1195 (noting that during the administrations of Presidents Kennedy through Carter, pardon grant rates ranged from 30–40%); see also LOVE, *supra* note 17, at App'x A-6 (discussing pardon practices in the states). See generally Mark Osler, “Clemency,” in the present Volume.

59. See *Huntington v. Attrill*, 146 U.S. 657, 673 (1892) (“And personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person ... are doubtless strictly penal, and therefore have no extraterritorial operation.”)

60. See, e.g., FLA. STAT. ANN. § 790.23(1)(e) (2009) (denying firearms rights to those convicted in other states).

61. In *Logan v. United States*, 552 U.S. 23 (2007), for example, a defendant with three state battery convictions was prohibited from possessing firearms under federal law; the law in the state of conviction imposed no such prohibition. See also HAW. REV. STAT. § 846E-1 (2016) (defining “sexual offense” to include “any federal, military, or out-of-state conviction for any offense that under the laws of this State would be a sexual offense”); Jeffrey B. Kuck, Annotation, *Elections: Effect of Conviction under Federal Law, or Law of Another State or Country, on Right to Vote or hold Public Office*, 39 A.L.R.3d 303 (1971).

death.⁶² Conviction of felony resulted in a single major collateral consequence, civil death, which wrapped up an individual's legal life as the state prepared to end his natural life.⁶³ As prison terms replaced automatic capital punishment, and therefore most people convicted of crimes ultimately reentered free society, civil death came to be regarded as too harsh. In the mid-20th century, it appeared that collateral consequences might fade away as civil death had. But the rise of mass conviction, along with the general increase of government regulation in society, created a system of collateral consequences.

Congress and state legislatures have made imposing collateral consequences a central function of the criminal justice system. The criminal justice system has its own special punishments—prisons and jails—but then links the status of convicted persons to the full, general apparatus of the regulatory state. It is as if there is a title of the U.S. Code, and the code of every state, regulating “convicted persons” in the same way as states and the federal government regulate “environmental law” or “securities.”

The law governing convicted persons is of inferior quality for several structural reasons. Anyone can go to the code of any state and find the title “Securities Law,” but laws governing convicted persons are scattered throughout codes and regulations. If for some reason securities law were scattered in the same way as are collateral consequences—if some provisions of securities law were in the “Contracts” title, other parts in the “Criminal Code,” and some under “Corporations”—market forces would likely lead to some trade association or publishing house hiring capable lawyers to comb the laws and produce a compendium containing all relevant provisions.⁶⁴

Collection of laws is valuable for several reasons. First, with every piece of law related to securities at hand, it becomes possible to consider the merits of the system of securities regulation as a whole, and possible improvements. Second, individual clients will have a reasonable expectation that their lawyers will be able to give advice with knowledge of the relevant law.

62. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347 (1968); Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)*, 50 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 542 (1968); Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2003). For a discussion of the death penalty, see Carol S. Steiker & Jordan M. Steiker, “Capital Punishment,” in the present Volume.

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

64. Alternatively, perhaps securities law was scattered in the past, and political forces resulted in creation of securities codes.

However, “as Robert F. Kennedy said long ago, the poor person accused of a crime has no lobby.”⁶⁵ Nor, of course, can the poor person hire lawyers to do extensive research. Without understanding the legal landscape, it is much more difficult to evaluate whether collateral consequences as a whole are fair and promote public safety both by keeping convicted persons from situations where they might present special dangers, or whether they frustrate public safety by denying some of them a reasonable opportunity to lead law-abiding lives and not recidivate.⁶⁶ In addition, it is unreasonable to expect individual lawyers and judges to perform Herculean research tasks in individual cases.

Another problem results from collateral consequences’ lack of transparency. Laws are normally passed to be obeyed. If collateral consequences are not actually made known to convicted persons, and to the people in the legal system who advise and supervise them, it is less likely that they will be carried out. The invisible, sometimes nearly secret, nature of collateral consequences has resulted in a criminal justice system that is arbitrary, unpredictable, costly, unfair, and in some ways counterproductive.

The ABA Criminal Justice Standards,⁶⁷ Uniform Law Commission’s Uniform Collateral Consequences of Conviction Act,⁶⁸ and the American Law Institute’s revised sentencing provisions⁶⁹ agree that the critical first step in managing collateral consequences is collecting, publishing and updating

65. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1877 (1994).

66. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871 (2015) (arguing that the proliferation of collateral consequences interferes with rehabilitation); see also Danielle R. Jones, *When the Fallout of A Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237 (2015).

67. ABA STANDARDS FOR CRIMINAL JUSTICE ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (2004) [hereinafter ABA CRIMINAL JUSTICE STANDARD], http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_toc.html (last visited June 13, 2017).

68. See UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) [hereinafter UCCCA], <http://www.uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (last visited June 13, 2017); Margaret Colgate Love, *Paying their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011).

69. In 2017, the American Law Institute approved revisions of the sentencing articles of the Model Penal Code that make imposition of collateral consequences, and relief from them, part of the sentencing process. See MODEL PENAL CODE: SENTENCING § 6X (Am. Law Inst., Proposed Final Draft, approved May 24, 2017) [hereinafter MPC]; see also Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247 (2015).

a compendium.⁷⁰ The National Inventory of Collateral Consequences of Conviction,⁷¹ initially compiled by the ABA and now maintained by the Council of State Governments, is an important development, although it is not complete or completely accurate.

In some jurisdictions, public defenders or others have created state guides to collateral consequences.⁷² Often, these guides do not list all collateral consequences applicable to every crime. Instead, they selectively identify the most serious and common collateral consequences, collateral consequences applicable to the most common offenses, and collateral consequences most important to the population typically in the criminal justice system, that is, those who are relatively less affluent. There should be such guides in every state; again, they should be regularly updated and made available to all lawyers and judges.⁷³

A. IMPLICATIONS FOR INDIVIDUAL CRIMINAL CASES

In spite of the importance of collateral consequences to individuals, before *Padilla v. Kentucky*,⁷⁴ most courts held that counsel and the court had no duty to advise the client about the collateral consequences resulting from the conviction.⁷⁵ *Padilla's* holding that counsel did have a duty to advise about the possibility of deportation was important, and may portend extensions to other collateral consequences, perhaps under state constitutional interpretations. Nevertheless, some courts continue to hold that counsel's responsibility does not extend to collateral consequences beyond deportation.⁷⁶

The UCCCA,⁷⁷ ABA Standards⁷⁸ and Model Penal Code⁷⁹ all recognize the importance of counselling clients about collateral consequences generally. This

70. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.1; UCCCA, *supra* note 68, § 4; MPC, *supra* note 69, § 6x.02(1).

71. *National Inventory of the Collateral Consequences of Conviction*, COUNCIL OF ST. GOV'T JUST. CTR., <https://niccc.csjjusticecenter.org> (last visited June 13, 2017).

72. *See Compilations and Inventories*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/compilations-inventories-of-collateral-consequences/> (last visited June 13, 2017).

73. *See* Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 47 HOWARD L.J. 675 (2011).

74. 559 U.S. 356 (2010).

75. Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

76. *See supra* note 53.

77. UCCCA, *supra* note 68, § 5 (requiring notice before guilty plea); *id.* § 6 (requiring notice at sentencing and upon release).

78. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.3(a) (requiring notice before a plea of guilty); *id.* § 19-2.4(b) (notice at sentencing).

79. MPC, *supra* note 69, § 6x.04(1) (requiring notice at sentencing).

section explains why the client's interests cannot be served without attention to collateral consequences.

1. Plea bargaining and charging negotiations

Counsel can help the client in plea bargaining through knowledge of collateral consequences. In *Padilla*, the Supreme Court noted that:

informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.⁸⁰

While *Padilla* addressed deportation, other significant consequences, such as loss of professional licenses,⁸¹ forfeitures,⁸² and even loss of civil rights,⁸³ can also be bargained over.

Because the subjects of plea agreements are not limited to traditional criminal punishment, it would be arbitrary to minimize defense counsel's responsibilities. An effective lawyer can use collateral consequences to mitigate

80. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

81. *Ex parte Reed*, 2009 WL 97260 (Tex. Crim. App. 2009) (discussing plea bargain involving surrender of peace officer's license); *Matter of Meyers*, 562 N.Y.S.2d 502 (App. Div. 1990) (resignation from bar as part of plea bargain).

82. *Libretti v. Wyoming Att'y Gen.*, 60 F. App'x 194 (10th Cir. 2003) (forfeiture of property as part of plea agreement).

83. *City of Baldwin v. Barrett*, 458 S.E.2d 619 (Ga. 1995) (right to hold public office).

other aspects of the sentence, or as the Court suggested in *Padilla*, bargain toward a conviction with less onerous collateral consequences. Prosecutors' offices often consider collateral consequences in their decisions.⁸⁴

Competent private criminal practitioners, and public defenders in offices recognizing the impact of collateral consequences, use collateral consequences in their negotiations. This may mean obtaining diversion or pleading to a crime that avoids a serious collateral consequence, agreeing to a penalty that is reduced in light of a serious collateral consequence, or of course, obtaining nothing at all from a prosecutor who considers a plea offer and charge fair and just as is. But there is no reason that large numbers of clients should act in ignorance of the legal consequences of their decisions, or that their attorneys should categorically forgo a consideration which, in some cases, would have led to a better plea agreement.

2. Pre-sentence reports

Collateral consequences should be brought into the sentencing process because of their impact on a defendant's potential sentence and ability to successfully complete supervised release or probation.⁸⁵ The pre-sentence report (PSR), the critical document in developing facts for the judge to use in sentencing, does not ordinarily list collateral consequences to which a defendant will be subject. There is some overlap between collateral consequences and information generated as part of the sentencing process—for example, the collateral consequence of firearms ineligibility⁸⁶ is also a probation and supervised-release condition,⁸⁷ and defendants generally are informed of these conditions. But there is typically no systematic effort to canvass the restrictions to which a convicted person is subject as part of the sentencing process.

The defendant's future financial and employment prospects are important to know before sentencing. In the federal system, Federal Rule of Criminal Procedure 32 requires a PSR to contain information about "the defendant's financial condition."⁸⁸ Financial condition is important because of the

84. Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016); see also Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016); Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213 (2016).

85. Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports after Padilla v. Kentucky*, 31 ST. LOUIS U. PUB. L. REV. 61 (2011).

86. 18 U.S.C. § 922(g).

87. 18 U.S.C. § 3563(b)(8).

88. FED. R. CRIM. P. 32(D)(2)(A)(ii).

sentencing goal of “the need to provide restitution to any victims of the offense”⁸⁹ and because the amount of a fine depends on “the defendant’s income, earning capacity and financial resources.”⁹⁰ A conviction may dramatically change the kinds of employment that are lawfully available. It makes little sense to calculate earning potential based on employment settings which are legally prohibited, or based on the retention or acquisition of licenses or permits for which a client is no longer eligible.

The importance of the client’s financial status does not end at sentencing. In addition to, or in lieu of, incarceration, most people convicted of felonies will be under the supervision of the criminal justice system in some form: Most people convicted in federal court serve either probation instead of prison or supervised release after prison. Standard conditions of probation and supervised release include that a person pay restitution,⁹¹ “work regularly at a lawful occupation,”⁹² and “support the defendant’s dependents and meet other family responsibilities.”⁹³ Non-compliance is a ground for a return to prison. Thus, even if the client can pay any restitution and fine in full at sentencing, the client will ordinarily be subject to ongoing financial responsibilities; this also suggests that prosecutors and judges must understand defendants’ future occupational situation at the time of sentencing.

In addition to payment of financial obligations, probation and supervised release require the defendant to be generally law-abiding. It is a condition of both that “[t]he defendant shall not commit another federal, state or local offense.”⁹⁴ When the violations are of *malum in se* (inherently wrong) criminal prohibitions, a person should not be heard to complain that she did not know, for example, that it was illegal to rob banks.⁹⁵ But the legal restrictions on those convicted of crime are often little-known even to lawyers and judges. It is in everyone’s interests for the collateral consequences imposed by law to be known to all parties.

89. 18 U.S.C. § 3553(a)(7).

90. 18 U.S.C. § 3572(a)(1); *see also* 18 U.S.C. § 3572(b) (providing that “a fine or other monetary penalty” should be imposed “only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.”). *See generally* Beth A. Colgan, “Fines, Fees, and Forfeitures,” in the present Volume.

91. U.S. SENTENCING GUIDELINES MANUAL § 5B1.3(a)(6) (U.S. SENTENCING COMM’N 2016); *Id.* § 5D1.3(a)(6).

92. *Id.* § 5B1.3(c)(5); *Id.* § 5D1.3(c)(5).

93. *Id.* § 5B1.3(c)(4); *Id.* § 5D1.3(c)(4).

94. *Id.* § 5B1.3(a)(1); *Id.* § 5D1.3(a)(1).

95. *United States v. Ortuno-Higareda*, 450 F.3d 406 (9th Cir. 2006) (citing several cases), *vacated en banc*, 479 F.3d 1153 (9th Cir. 2007).

3. Sentencing

Under most systems, judges can impose a range of sentences. Sometimes discretion is limited by guidelines, or mandatory minimum sentence provisions,⁹⁶ but it is rare that conviction inexorably leads to a single lawful penalty. Judges choose among lawful sentences by examining statutory factors,⁹⁷ and general principles of sentencing, which are broad.⁹⁸ Because courts can consider almost everything when exercising their sentencing discretion, they have always had the power to take into consideration that the defendant would be subject to collateral consequences.

There is some evidence that collateral consequences are moving toward becoming a more formal sentencing factor.⁹⁹ The ABA Standards for Criminal Justice provide: “The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”¹⁰⁰ The commentary explains that “the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.” The Model Penal Code also brings collateral consequences into the sentencing process.¹⁰¹

In a highly publicized 2016 decision, *United States v. Nesbeth*, Senior U.S. District Judge Frederic Block considered collateral consequences in imposing a sentence:

I have imposed a one-year term of probation. In fixing this term, I have also considered the collateral consequences Ms. Nesbeth would have faced with a longer term of probation, such as the curtailment of her right to vote and the inability to visit her father and grandmother in Jamaica because of the loss of her passport during her probationary term.¹⁰²

96. See, e.g., Douglas A. Berman, “Sentencing Guidelines,” in the present Volume; Erik Luna, “Mandatory Minimums,” in the present Volume.

97. See, e.g., ARIZ. REV. STAT. § 13-701(D).

98. *Williams v. New York*, 337 U.S. 241 (1949); see also Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U.L. REV. 161 (2016).

99. For state and federal drug distribution offenses, collateral consequences are at issue in every sentencing. A little-known federal statute, 21 U.S.C. § 862, allows sentencing judges to deny federal benefits to those convicted of possession or distribution offenses.

100. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.4(a).

101. MPC, *supra* note 69, §§ 6x.02(2), 6x.04.

102. *United States v. Nesbeth*, 188 F. Supp. 3d 179, 194–95 (E.D.N.Y. 2016).

Because courts consider other personal circumstances when imposing a sentence, it is hard to see why they should categorically ignore collateral consequences provided by law.

B. ELIMINATING UNNECESSARY COLLATERAL CONSEQUENCES

Jurisdictions should refine collateral consequences, and eliminate ones that are unnecessary. The Model Penal Code proposes that disenfranchisement be prohibited, or limited to the period of imprisonment, and that jury disqualification be limited to periods of correctional control.¹⁰³ The ABA proposes that convicted persons not be disenfranchised, except during confinement,¹⁰⁴ should not be ineligible “to participate in government programs providing necessities of life,”¹⁰⁵ or for “governmental benefits relevant to successful reentry into society, such as educational and job training programs.”¹⁰⁶

Collateral consequences have developed piecemeal. Because of the limited judicial review, legislatures have not had to articulate the reasons for their enactment or evaluate their effectiveness or costs. It seems that collateral consequences are sometimes imposed casually, without full consideration of how they fit into a system of punishment, reentry, and employment.

Legislatures impose collateral consequences to promote public safety and reduce risk, to deprive a perceived wrongdoer of a no-longer-deserved benefit, or both. Although they are not supposed to be imposed for purposes of punishment, one suspects that retribution is in the mind of some supporters.¹⁰⁷ The connection between the consequence and the reduction of the risk has often not been based on evidence, but, rather, on intuition or assumptions based on perceived logic.¹⁰⁸ To the extent that the issue is framed as a matter of

103. MPC, *supra* note 69, § 6x.03.

104. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.6(a).

105. *Id.* § 19-2.6(e).

106. *Id.* § 19-2.6(f).

107. See generally Jeffrie G. Murphy, “Retribution,” in the present Volume.

108. See, e.g., Ira Mark Ellman & Tara Ellman, “Frightening and High”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 499 (2015) (discussing *McKune v. Lile*, 536 U.S. 24, 34 (2002), which held that risk of recidivism is “frightening and high”; “the evidence for [Justice Kennedy’s influential] claim that offenders have high re-offense rates (and the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons”).

personal opinion or plausible speculation, one person's judgment that there are too many collateral consequences is entitled to no more weight than another's opinion that there are too few.

Increasingly, however, risk can be measured and evaluated.¹⁰⁹ A number of studies show that the risk of reoffending diminishes with time since criminal involvement.¹¹⁰ There is also evidence that a provisionally hired employee who clears a state-mandated criminal background check has a reduced likelihood of future arrest; that is, not imposing the collateral consequence has a positive public-safety effect.¹¹¹ In addition, a recent study suggests that the disqualifications imposed by statutes do not match up to the decisions that would be reached based on use of empirical data about criminal records and reoffending.¹¹² It may well be that individuals can get a fairer shake, and public safety can be better protected, if decision-makers consider empirically reliable factors such as the time since criminal involvement, and evidence of law-abiding behavior, rather than using categorical bars based on conviction of particular crimes.

Jurisdictions should restrict triggering offenses to those that evidence shows present the particular danger to be avoided, rather than applying collateral consequences to "all felonies" or "all crimes." Where it appears that the risk diminishes with time, collateral consequences should apply for specified terms, not permanently. In many cases it will be appropriate to disqualify on a case-by-case basis, looking at the relevant facts and circumstances, not across the board. Again, jurisdictions should identify the cases presenting unreasonably elevated risks to public safety, but without undermining public safety by excluding lower-risk individuals from lawful employment.

109. See generally John Monahan, "Risk Assessment in Sentencing," in the present Volume.

110. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 328 (2009); Shawn D. Bushway, Paul Nieuwebeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27 (2011); Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistence and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71 (2012).

111. Megan Denver, Garima Siwach & Shawn D. Bushway, *A New Look at the Employment and Recidivism Relationship through the Lens of a Criminal Background Check*, 55 CRIMINOLOGY 174 (2017); Megan Denver, *Evaluating the Impact of "Old" Criminal Conviction Decision Guidelines on Subsequent Employment and Arrest Outcomes*, 54 J. RES. CRIME & DELINQUENCY 379 (2016).

112. Garima Siwach, Shawn D. Bushway & Megan Kurlychek, *Legal Mandates in Criminal Background Checks: An Evaluation of Disparate Impact in New York State* (June 14, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2986384 (last visited June 14, 2017).

C. RELIEF

Most jurisdictions provide for executive, legislative or judicial relief.¹¹³ There is evidence that relief improves employment outcomes.¹¹⁴ The federal system has no established relief measure other than a presidential pardon, a matter that has proved frustrating for some federal courts.¹¹⁵

There are several technical problems. One is the effect of out-of-state convictions in a highly mobile country. Jurisdictions commonly impose collateral consequences based on convictions from other states. However, it is not always clear what effect jurisdictions give to out-of-jurisdiction relief.¹¹⁶ Therefore, a person convicted in one state who never loses, or has regained, civil rights may lose them upon relocation to another state. In addition to making clear whether out-of-state convictions trigger particular consequences, state law should specify the effect of out-of-state expungement, sealing, or other relief.¹¹⁷ Also, states should make existing in-state relief mechanisms available to residents with out-of-state convictions.¹¹⁸

The ABA,¹¹⁹ Model Penal Code,¹²⁰ and UCCCA¹²¹ all contemplate means of relieving individual collateral consequences to facilitate rehabilitation, reentry, and self-support. For example, if all people convicted of felonies may be excluded from public housing, some mechanism should be available for a nonviolent offender to live in public housing if there is a realistic basis to believe that it will facilitate self-support and presents no unreasonable risk to public safety.

113. *Restoration of Rights*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/resources-2/restoration-of-rights/> (last visited June 13, 2017).

114. Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief As Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. INTER ALIA 11 (2016); see also Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM L. & CRIMINOLOGY (forthcoming 2017) (suggesting that relief mechanisms improve employment outcomes).

115. For example, in the Eastern District of New York, then-Judge John Gleason concluded that there was no available mechanism to help these worthy applicants. He expunged the conviction of one applicant and issued a certificate of rehabilitation to another. *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016); see also *Doe v. United States*, 168 F. Supp. 3d 427 (E.D.N.Y. 2016).

116. Wayne A. Logan, "When Mercy Seasons Justice": *Interstate Recognition of Ex-Offender Rights*, 49 U.C. DAVIS L. REV. 1 (2015).

117. UCCCA, *supra* note 68, § 9 sets out some alternatives.

118. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.5(b); MPC, *supra* note 69, § 6x.05.

119. ABA CRIMINAL JUSTICE STANDARD, *supra* note 67, § 19-2.5(a) (waiver of individual consequence); *id.* § 19-2.5(c) (relieving all collateral consequences).

120. MPC, *supra* note 69, § 6x.04(2) ("Order of Relief"); *id.* § 6x.06 ("Certificate of Restoration of Rights").

121. UCCCA, *supra* note 68, §10 ("Order of Limited Relief").

In addition, they all contemplate broader relief if rehabilitation is indicated by the passage of time, completion of the sentence, and the individual's record.¹²²

There is a debate between relief involving “forgiving or forgetting,”¹²³ that is, between relief that evidences rehabilitation, such as a Certificate of Rehabilitation, or Good Conduct, and relief designed to conceal the fact that the conviction ever occurred, such as expungement. There is some question as to whether public convictions can ever successfully be expunged.¹²⁴ If criminal-record information remains publicly available, states should consider making the obtaining of relief, whatever it is, admissible as evidence of due care by employers who hire the beneficiary.¹²⁵

D. OTHER STRUCTURAL REFORMS

Collection of collateral consequences will make it possible to evaluate them as a whole to determine whether they might be reformed to better serve their purposes. One useful project would be technical clarification. Many collateral-consequence statutes are loosely drafted or otherwise ambiguous. Among ambiguities appearing in codes are:

1. Whether a statute creates a mandatory bar or authorizes case-by-case evaluation.
2. What the triggering offenses are.
3. Whether the disability applies to out-of-state convictions.
4. Whether the disability is permanent.

Ideally, triggering offenses would be described precisely by citation to specific statutes rather than in vague terms like “moral turpitude.”¹²⁶ Section 7(b) of the UCCCA provides that if a provision is ambiguous, it is construed as discretionary not mandatory.

122. ABA CRIMINAL JUSTICE STANDARD 19-2.5(c) (relieving all collateral consequences); MPC, *supra* note 69, § 6x.06 (“Certificate of Restoration of Rights”); UCCCA, *supra* note 68, § 11 (“Certificate of Restoration of Rights”); see also Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219.

123. Eli Hager, *Forgiving v. Forgetting*, MARSHALL PROJECT (Mar. 17, 2015), <https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting#.c3xb62HZP> (last visited June 13, 2017).

124. See, e.g., Logan Danielle Wayne, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253 (2012).

125. UCCCA, *supra* note 68, § 14 provides that issuance of a certificate is admissible to show due care. MPC, *supra* note 69, § 6x.06(5) provides that prior convictions are inadmissible if they have been the subject of a Certificate of Restoration of Rights.

126. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 UTAH L. REV. 1001.

Another issue is which governmental actors have authority to create collateral consequences. Local entities create collateral consequences;¹²⁷ states might conclude that collateral consequences are important enough that they should be created only by the state legislature.¹²⁸ Given the difficulty of finding collateral consequences in local ordinances or unpublished agency rules, lower levels of government could be denied the power to create them, or required to file them in a central public depository as a prerequisite to validity. Alternatively, lower levels of government could be restricted to discretionary collateral consequences, the application of which would be evaluated on a case-by-case basis, rather than across the board.

Jurisdictions could consider restricting collateral consequences to felony convictions. The Supreme Court has recognized that “[a] wide range of civil disabilities may result from misdemeanor convictions.”¹²⁹ As the work of Jenny Roberts,¹³⁰ J.D. King,¹³¹ and Alexandra Natapoff¹³² has shown, even misdemeanor convictions can subject a defendant to a wide range of consequences. Yet, some of the protections of the system are relaxed for misdemeanors on the mistaken belief that they are categorically less serious than felonies.¹³³

This leads to something of an irony: Collateral consequences are more important for relatively less serious crimes. If a person is sentenced to 25 years imprisonment at hard labor, it likely matters little that she will be ineligible to get a license as a chiropractor when she is released. Someone convicted of securities fraud cannot expect to remain in or return to work in a financial institution whether or not he goes to prison. But a person sentenced to unsupervised

127. Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1 (2014).

128. UCCCA, *supra* note 68, § 7(a) restricts creation of collateral consequences to statutes, ordinances, and agency rules published in the state’s administrative code.

129. *Argersinger v. Hamlin*, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring) (listing such civil disabilities as forfeiture of public office, disqualification from licensed professions, and loss of pension rights); *see also* *Hopper v. State*, 957 N.E.2d 613, 625 (Ind. 2011) (Rucker, J., dissenting) (“Uncounseled pro se defendants may very well plead guilty even to certain misdemeanor offenses that carry devastating collateral consequences ranging from deportation, to eviction from public housing, to barriers in employment.”).

130. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Courts*, 45 U.C. DAVIS L. REV. 277 (2012).

131. John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013).

132. Natapoff, *supra* note 8.

133. *State v. Young*, 863 N.W.2d 249, 253 (Iowa 2015).

probation and a \$250 fine for a minor offense, suffers a catastrophic loss if she loses her job or is unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative.

Fairness warrants more time and attention being paid to the defense and disposition of misdemeanor offenses. However, those considerations would diminish if the collateral consequences did as well.

RECOMMENDATIONS

1. **Collateral consequences should be rationalized and reformed to promote public safety, fairness in individual cases, and a more effective overall criminal justice system.** Collateral consequences should be integrated into the criminal justice policy process in general, and into the process of disposition of each case.
2. **An agency should collect and publish the collateral consequences applicable in each jurisdiction** so legislators, judges, lawyers, and other individuals can learn the legal implications of a conviction under the law of that jurisdiction. The National Inventory of Collateral Consequences of Conviction will be a useful foundation.
3. **Public defenders, state bar associations or probation departments should identify collateral consequences of the most common crimes of conviction, and other common or significant consequences,** and use that information to create a document which lawyers and probation officers can use to counsel clients.
4. **Defense attorneys should inform clients of collateral consequences and consider them in advising clients about possible courses of action.** Judges should inform defendants of applicable collateral consequences at plea and sentencing.
5. **Prosecutors should take collateral consequences into account in charging and plea bargaining.** Pre-sentence reports should contain collateral consequences, and judges should consider them in sentencing.
6. **The U.S. Supreme Court and state supreme courts should consider or reconsider whether collateral consequences are subject to constitutional restraints on punishment,** and, alternatively, they must be reasonably and not excessive in light of their regulatory purposes.
7. **Congress and state legislatures should develop mechanisms to relieve individual collateral consequences to facilitate an individual's employment and rehabilitation.** Congress and state legislatures should

also allow, upon a showing of rehabilitation and law-abiding behavior, an individual to have a conviction vacated or set aside to reflect that they have repaid their debt to society and regained equal status.

8. **In addition, Congress and state legislatures should consider, based on empirical evidence of risk and of the public-safety benefits of employment, whether particular collateral consequences are unnecessary,** should be restricted to specific offenses, imposed only for determinate periods of time, or only on a case-by-case basis.