

ESSAY

THE COLLATERAL CONSEQUENCES OF *PADILLA*
V. KENTUCKY: IS FORGIVENESS NOW
CONSTITUTIONALLY REQUIRED?

MARGARET COLGATE LOVE[†]

People who commit a crime and are brought before a court to be sentenced expect to face a prison term or at least probation, and perhaps a fine. They may expect to experience a degree of social opprobrium, the so-called “stigma of conviction.” They surely understand that having a criminal record is not career-enhancing. But they also probably think that at some point they will be able to pay their debt to society and return to its good graces. They are reinforced in their belief in the possibility of redemption by periodic reminders from our elected leaders: President George W. Bush called America “the land of second chance,”¹ and President Obama famously called to congratulate the Philadelphia Eagles for letting Michael Vick walk directly from prison back into the team’s starting lineup.²

But the reality for people of ordinary abilities is very different. For them, the so-called “collateral” consequences of conviction are numerous, severe, and very hard to mitigate. Moreover, because convic-

[†] Law Office of Margaret Love. Chair, Drafting Committee of the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, 2001–2004. Email: margaretlove@pardonlaw.com.

¹ George W. Bush, President of the U.S., State of the Union Address (Jan. 20, 2004), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2004_presidential_documents&docid=pd26ja04_txt-10.pdf.

² Michael D. Shear, *Obama Is Glad That Vick Has Second Chance*, NYTIMES.COM, THE CAUCUS BLOG (Dec. 28, 2010, 12:59 PM), <http://thecaucus.blogs.nytimes.com/2010/12/28/obama-glad-michael-vick-has-second-chance/>.

tion-based disqualifications are generally imposed by statute or regulation rather than by a judge in open court, criminal defendants usually have no idea what is in store for them. While conventionally labeled as “civil,” collateral consequences are increasingly understood and experienced as criminal punishment, and never-ending punishment at that. In *Padilla v. Kentucky*, the Supreme Court suggested that these disproportionate, rigid, and largely secret penalties have constitutional limits.³ At one level, *Padilla* is about a lawyer’s duty to warn a client considering a guilty plea about the likelihood of deportation. At another, *Padilla* sends a shot across the bow of a justice system whose effects are increasingly felt in contexts over which courts have no control. *Padilla* gives new force to an argument that criminal offenders are entitled to a chance at forgiveness.

I. CIVIL DEATH, THEN AND NOW

From colonial times, American law has recognized that a criminal conviction carries with it a permanent debasement of legal status. The idea that criminals should be marked and segregated from the rest of society “derived from the ancient Greek concept of ‘infamy,’ or the penalty of ‘outlawry’ among the Germanic tribes.”⁴ Conviction led to “‘civil death’ in the Middle Ages and to exile by ‘transportation’ during the Enlightenment.”⁵ Chief Justice Earl Warren once observed that “[c]onviction 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.”⁶ It is this semi-outlaw status more than any prison term or fine that is frequently a criminal defendant’s most serious punishment, stripping him of any defense against the most unreasonable and mean-spirited discrimination.

³ 130 S. Ct. 1473, 1478 (2010) (holding that “constitutionally competent counsel would have advised [the defendant] that his conviction for drug distribution made him subject to automatic deportation”).

⁴ AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS cmt. at 7 n.1 (3d ed. 2004) (quoting Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 350-51 (1968)). The commentary to the ABA Standards notes, “Given the number of people who have been convicted at one time or another, collateral consequences have become one of the most significant methods of assigning legal status in America.” *Id.* at 9.

⁵ *Id.* at 7 n.1.

⁶ *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting).

Fifty years ago, the phenomenon that Dean Nora Demleitner has described as “internal exile”⁷ had a limited impact on American society: conviction was comparatively rare, criminal records were hard to access, and official forgiveness was relatively easy to obtain. The reformers of that bygone era thought permanent branding inhumane and inefficient, presidents and governors still considered pardoning a part of their job, and the Model Penal Code reflected the new fascination with judicial restoration of rights through vacatur and expungement.⁸ The systemic balance of rule and discretion of which Professor Wechsler spoke was definitely tilted toward the latter,⁹ and punishment theory was rooted in the possibility of redemption. In 1967, the President’s Crime Commission called for the wholesale reform of “the . . . system of disabilities and disqualifications that has grown up” because it interfered with rehabilitative efforts that were the goal of criminal sentencing.¹⁰ In 1981, the American Bar Association (ABA) confidently predicted that “collateral consequences” were on their way to extinction: “As the number of disabilities diminishes and their imposition becomes more rationally based and more restricted in coverage, the need for expungement and nullification statutes decreases.”¹¹ How wrong that prediction was.

The modern era of escalating prison populations that began in the mid-1980s saw a retreat from the forgiving spirit of the earlier period. Retribution replaced rehabilitation as the goal of corrections. Collateral penalties were promulgated indiscriminately by legislatures and administrative agencies, mandating exclusion of people with a

⁷ Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 153 (1999).

⁸ Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 764-70 (2011).

⁹ See Frank J. Remington, *The Federal Sentencing Guidelines as a Criminal Code: Why the Model Penal Code Approach is Preferable*, 7 FED. SENT’G. REP. 116, 116 (1994) (reporting on a colloquy between Herbert Wechsler and Jerome Michael at a 1951 meeting of the American Law Institute convened to consider preparing a model penal code).

¹⁰ THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. JUSTICE, TASK FORCE REPORT: CORRECTIONS 88 (1967); see also *id.* at 90-91; NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, UNIFORM LAW COMMISSIONERS’ MODEL SENTENCING AND CORRECTIONS ACT §§ 4-1005 (1978) (defining unlawful discrimination in relation to collateral consequences of conviction); NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS 592-93 (1973) (suggesting that states repeal legislation depriving convicted individuals of civil rights or other attributes of citizenship).

¹¹ See AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS § 23-8.2 cmt. at 143 (2d ed. 1983).

criminal record from a wide range of benefits and opportunities.¹² At the present time, a minor drug conviction can make a person ineligible for welfare benefits, public housing, a driver's license, student loans, insurance, voting, government employment, and hundreds of different types of jobs requiring a license—including, of course, admission to the bar. It can also lead to mandatory deportation for a noncitizen and to loss of pension benefits for a public employee.¹³ Repeat offenses—even minor ones that do not result in prison time—can result in designation as a “career criminal” and harsh recidivist sentences.¹⁴ An eighteen-year-old caught having sex with his fifteen-year-old girlfriend may be required by law to register for life as a sex offender, to leave school, and to move out of his parents' home if it happens to be located within half a mile of a place where children

¹² Collateral consequences have been inventoried in a variety of states and at the federal level. See, e.g., KATE ADAMSON ET AL., LAW, CRIMINAL JUSTICE & SEC. PROGRAM, UNIV. OF ARIZONA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION IN ARIZONA (2005), available at www.reentry.net/public2/library/attachment.139610; CMTY. REENTRY PROGRAM, PUB. DEFENDER SERV. FOR D.C., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004), available at <http://www.courts.state.tx.us/pdf/ConsequencesToCriminalConvictionsDC.pdf>; DEFENDER ASS'N OF PHILA. COLLATERAL CONSEQUENCES PROJECT, COLLATERAL CONSEQUENCES FOR PENNSYLVANIA ADULT DEFENDANTS BY CRIMINAL STATUTE (2011), available at http://attorneycapone.com/Collateral%20Consequences/PA%20Adult%20Collateral%20Consequences%20Index_10.13.11.pdf; REENTRY OF EX-OFFENDERS CLINIC, UNIV. OF MD. SCH. OF LAW, A REPORT ON COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND (2007), available at http://www.sentencingproject.org/doc/publications/cc_report2007.pdf; KELLY POFF SALZMANN & MARGARET COLGATE LOVE, AM. BAR ASS'N COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009), available at <http://www.abanet.org/cecs/internalexile.pdf>; MCGREGOR SMYTH, THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE (2010), available at <http://www.reentry.net/ny/search/item.76898>; Kimberly R. Mossone & Cara A. Roecker, *Ohio Collateral Consequences Project: Executive Summary*, 36 U. TOL. L. REV. 611 (2005); *Manu-als & Overviews*, MICH. REENTRY L. WIKI, http://reentry.mplp.org/reentry/index.php/Manuals_%26_Overviews:_Collateral_Consequences_in_Michigan (last visited Nov. 15, 2011). The Court Security Act of 2007 included a provision requiring the National Institute of Justice to undertake a fifty-state survey of all collateral consequences. See Pub. L. 110-177, § 510, 121 Stat. 2534, 2543-44. The ABA later won a contract to do the actual compilation work, and that project is currently under way.

¹³ See *infra* text accompanying notes 29-31.

¹⁴ See, e.g., 18 U.S.C. § 924(e) (2006) (imposing a fifteen-year sentence for unlawful possession of a firearm by an individual with three prior convictions for violent felonies or serious drug offenses); see also UNITED STATES SENTENCING GUIDELINES MANUAL § 4B1.1 (2011) (setting guidelines for “Career Offender[s]”). See generally WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 49-84 (2009) (explaining regime of registration and notification requirements applicable to sex offenses).

congregate, such as a school or even a bus stop.¹⁵ These are not penalties over which a court has any control.

Beyond the legal barriers facing a convicted person, there is social stigma that even misdemeanants can experience on a continuing basis. For example, a recent study of online job advertisements posted on Craigslist in five major cities noted widespread use of blanket policies excluding anyone with any type of conviction from consideration for entry-level jobs, such as warehouse workers, delivery drivers, and sales clerks.¹⁶ People of means are not exempt from this chill, as government procurement officials and private insurance companies steer clear of businesses that employ people with a criminal record.¹⁷ Political candidates do not even want their campaign contributions.¹⁸ Law firms and human resource consultants counsel their clients (“just to be safe”) against hiring anyone whose background includes any adverse encounter with the law.¹⁹

As collateral penalties have proliferated in legal codes and administrative rules, the mechanisms for overcoming them have atrophied. Governors no longer regard pardoning as part of their job, and judicial expungement and sealing are no longer reliable remedies in light of modern technology. The status imposed by conviction has become increasingly public, and background checks increasingly routine, even for volunteer jobs in the community. After the terrorist attacks of September 11, an entire industry devoted to “backgrounding” sprang up almost overnight, operating essentially without regulation.²⁰ (It is now surprisingly easy to delve anonymously into someone’s past: a Google name search may bring up an unsolicited offer from a private screening company to do a criminal background check on a neighbor,

¹⁵ See generally LOGAN, *supra* note 14, at 49-84.

¹⁶ See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1, 13-18 (2011), available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

¹⁷ See, e.g., SALZMANN & LOVE, *supra* note 12, at 33-37 (listing federal statutes and regulations debarbing people with a conviction from various federal programs and contracting opportunities); see also 30 ILL. COMP. STAT. ANN. 500/50-10.5 (West 2010) (prohibiting the government from contracting with companies that employ people convicted within the past five years of particular crimes). Most states have substantially similar laws.

¹⁸ Information originated from author’s personal communications with clients.

¹⁹ Information also originated from author’s personal communications with clients.

²⁰ See RODRIGUEZ & EMSELLEM, *supra* note 16, at 1.

coworker, or teacher for as little as fifteen dollars.²¹) Some state courts—including those in Pennsylvania—now make their records freely available online.²²

And of course more and more people are caught up in the dragnet of the criminal justice system. A recent study by the National Employment Law Project (NELP) estimated that there are now as many as sixty-five million Americans with a criminal record,²³ and Justice Department statistics suggest that NELP's number is conservative.²⁴ Most do not go to prison, but all face a modern civil death, in law and in fact. That people of color are disproportionately branded and ostracized is particular cause for alarm.²⁵ If we still like to imagine our country as the "land of second chance," and rejoice at Michael Vick's redemption, as a practical matter our laws and attitudes all point in the opposite direction.

²¹ According to a survey published in 2010 by the Society of Human Resources Management, ninety-two percent of their polled members perform criminal background checks on some or all job candidates, while seventy-three percent perform checks on all job candidates. See SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), available at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx>. The recent filing of numerous national class actions against both criminal background screeners and employers under the Fair Credit Reporting Act underscores the breadth of noncompliance with the law. See, e.g., *Williams v. Staffing Solutions Se., Inc.*, No. 10-0956 (N.D. Ill. filed Feb. 11, 2010) (alleging a failure to provide pre-adverse action notice or an opportunity to dispute accuracy); *Henderson v. HireRight Solutions, Inc.*, No. 10-0443 (N.D. Okla. filed Feb. 1, 2010) (alleging the reporting of expunged convictions); *Ryals v. HireRight Solutions*, No. 09-0625 (E.D. Va. filed Oct. 5, 2009) (alleging a failure to comply with notice requirements); *Hunter v. First Transit, Inc.*, No. 09-6178 (N.D. Ill. filed Oct. 5, 2009) (alleging a failure to provide pre-adverse action notice or an opportunity to dispute accuracy); *Joshaway v. First Student Inc.*, No. 09-2244 (C.D. Ill. Oct. 5, 2009) (alleging a failure to provide pre-adverse action notice or an opportunity to dispute accuracy).

²² See, e.g., *Common Pleas Court Docket Sheets*, PENNSYLVANIA'S UNIFIED JUS. SYS., <http://ujsportal.pacourts.us/DocketSheets/CP.aspx> (last visited Nov. 15, 2011).

²³ RODRIGUEZ & EMSELLEM, *supra* note 16, at 3.

²⁴ According to the U.S. Department of Justice, more than ninety-two million individuals were in the files of the state criminal history repositories on December 31, 2008 (though an individual may have records in more than one State). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008, at 2, 12 tbl.1 (2009), available at <http://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>.

²⁵ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLAL. REV. 1895 (1999).

II. IS FORGIVENESS CONSTITUTIONALLY REQUIRED?

There are the beginnings of resistance to a regime of exclusionary laws and policies, as policymakers understand that degraded status and lost opportunities exact a high price in public safety and taxpayer burden, quite apart from considerations of fair play for the individuals affected. When people returning from prison are barred from jobs and housing, they are more likely to slip back into a life of crime.²⁶ It is the goal of so-called reentry programs to see that this does not happen. When people continue to experience discrimination decades after their rehabilitation is secure, others observing them may reasonably ask what the point is in trying.

The Supreme Court has been an unexpected change agent, giving lawyers and judges new reason to concern themselves with how collateral sanctions are imposed and how they might be avoided. In its groundbreaking *Padilla* decision, the Court held that a criminal defense lawyer was constitutionally required to advise his noncitizen client considering a guilty plea that he was almost certain to be deported as a result. Characterized by the concurring Justices as a “major upheaval in Sixth Amendment law,”²⁷ *Padilla*’s rationale is hard to confine to deportation consequences alone, but potentially extends to other status-generated penalties that are sufficiently important to a criminal defendant to influence his willingness to plead guilty. Lower courts have already extended *Padilla*’s pre-plea notice requirements to registration and supervision applicable to sex offenders.²⁸ The Pennsylvania Supreme Court is presently considering whether a retired

²⁶ See, e.g., Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 605 (1997) (“The more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.”); Eric H. Holder, Jr., Attorney Gen. of the U.S., Address at the European Offenders Employment Forum (Oct. 8, 2010), available at <http://www.justice.gov/iso/opa/ag/speeches/2010/ag-speech-101008.html> (“If having a job is central to successful reentry, then it is no wonder that half of all released prisoners will be reincarcerated within three years.”).

²⁷ *Padilla v. Kentucky*, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring).

²⁸ See Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. (forthcoming 2011) (manuscript at 18-20), available at <http://ssrn.com/abstract=1883809> (citing *State v. Fonville*, No. 294554, 2011 Mich. App. LEXIS 140, at *36-37 (Mich. Ct. App. Jan. 25, 2011); In re C.P.H., No. A-0936-08T4, 2010 N.J. Super. Unpub. LEXIS 1721, at *16 (N.J. Super. Ct. App. Div. 2010); *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010)).

public school teacher should be allowed to withdraw his plea to a misdemeanor that cost him his pension.²⁹

Padilla has had a seismic effect on criminal practice. Competent defenders are now expected to advise their clients about collateral penalties and incorporate them into negotiations with prosecutors over the disposition of criminal charges. Judicious prosecutors are taking steps to protect against post-conviction challenges based on consequences of which no one was aware, and are more open to alternative dispositions that do not result in a conviction record. Courts can no longer declare collateral consequences to be “civil” and therefore “none of our business” just because they do not control their imposition.

The *Padilla* decision suggests that forgiveness has a constitutional dimension. In finding a constitutional obligation to warn, the Court emphasized that deportation is a “virtually inevitable” consequence of a guilty plea since Congress has eliminated judicial and administrative mechanisms for discretionary relief.³⁰ It is likely that if Mr. Padilla’s banishment had not been such a foregone conclusion, the Court would not have considered it so important that he be given a chance to avoid it. Even before *Padilla*, the supreme courts of Maine and Massachusetts refused to give retroactive effect to “punitive” lifetime sex offender registration requirements, finding the unavailability of waiver constitutionally relevant under the ex post facto and due process clauses.³¹ Where a consequence is found to be punitive and there

²⁹ Commonwealth v. Abraham, 996 A.2d 1090, 1091 (Pa. Super. July 23, 2010) (holding that defense counsel’s performance was deficient for failing to inform client that plea would forfeit pension), *appeal granted*, 9 A.3d 1133 (Pa. 2010).

³⁰ 130 S. Ct. at 1478.

³¹ See State v. Letalien, 985 A.2d 4, 26 (Me. 2009) (“The retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws . . . is punitive . . .”); Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 309 (Mass. 2008) (“[T]he retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe’s conviction, violates his right to due process under the Massachusetts Constitution.”). The *Padilla* Court pointed out, respecting pre-1996 immigration law, that “‘preserving the possibility of’ discretionary relief from deportation . . . ‘would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.’” *Padilla*, 130 S. Ct. at 1483 (quoting INS v. St. Cyr, 533 U.S. 289, 323 (2001)). The Court also noted that the Sixth Amendment had been held applicable to requests for relief from deportation under the JRAD—judicial recommendation against deportation—authority that existed prior to 1990, on the theory that seeking relief from deportation was “part of the sentencing” process. See *id.* at 1480 (citing Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).

is no possibility of forgiveness, even the “cruel and unusual punishment” clause of the Eighth Amendment may be implicated.³²

Competent lawyers therefore need to know not only what collateral sanctions will apply to their clients upon conviction, but also how to avoid or mitigate them, including at sentencing itself. Prosecutors and judges need this information too, in order to understand their own obligations to core principles of proportionality and fairness—principles that must now be understood to apply not just to the court-imposed sentence, but also to collateral penalties affecting significant private interests that otherwise will last a lifetime. Fairness is a particularly relevant concern where such penalties bear little or no relationship to the underlying criminal conduct, or where the passage of time has attenuated any relationship that might once have existed.

Categorical status-generated sanctions that admit of no exceptions and last a lifetime look and feel a lot like punishment. This is particularly the case when any relationship between the past crime and the present punishment has become attenuated. Empirical research by the dean of American criminologists, Alfred Blumstein, has established that there is a point in time at which an individual who has remained crime-free is no more likely to reoffend than someone in “a reasonable comparison group,” so that “we can be confident that redemption has occurred” and that the person ought to be “released from bearing the mark of crime.”³³ It is something of an embarrassment that the law, supposedly the manifestation of society’s most enlightened values, should lag behind cold science in recognizing the virtues of forgiveness.

III. REINVENTING FORGIVENESS IN UNFORGIVING TIMES

If forgiveness for those convicted of crime is desirable as public policy and perhaps in some cases even constitutionally required, it remains to consider how it can best be packaged for a modern audience. One approach is grounded in rules, and takes the form of durational limits on collateral penalties that may be triggered by the satisfaction of conditions. The best example of this is the automatic

³² While no court has invalidated a collateral consequence under the Eighth Amendment, this relief is at least theoretically available where a consequence is found to be constitutional punishment. *Cf. Abraham*, 996 A. 2d at 1094 (holding that “the pension forfeiture is akin to a fine and is punitive in nature” under ex post facto and due process case law).

³³ Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 328, 332 (2009).

restoration of basic civil rights that occurs in most states upon discharge from sentence. Debarment from government contracts or program participation is typical for a time certain, as are restrictions on driver's licenses. Federal law restricts licensure as a mortgage originator for seven years after conviction of most crimes—though fraud results in permanent disqualification that can only be relieved by a pardon. Durational limits embody a categorical legislative approach to sanctioning, just like mandatory minimum sentences. Such mechanical class-wide dispensations are conceptually quite different from true mercy, which in its essence depends upon individual desert.

Pardon exemplifies the other approach to official forgiveness, one that depends upon the exercise of discretion in favor of an individual as opposed to a class. The power to forgive through the granting of a pardon was included in the federal Constitution, and in the constitutions of every state, not as a perk of office but as an indispensable and beneficent power of government. In the *Federalist Papers*, Hamilton spoke of the “necessary severity” of the criminal code that requires “an easy access to exceptions in favor of unfortunate guilt,” lest justice “wear a countenance too sanguinary and cruel.”³⁴ He argued that “[h]umanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.”³⁵ James Iredell, speaking in support of the pardon power in the North Carolina Ratifying Convention, noted that “an inflexible adherence” to a general law “might frequently be the cause of very great injustice.”³⁶

As the Framers hoped and expected, pardon functioned as a fully operational component of state and federal justice systems from the earliest days of the Republic, moderating mandatory prison sentences, restoring rights, and attesting to an individual's rehabilitation.³⁷ Even after the introduction of parole in the early nineteenth century, pardon was venerated as a “patriarch” in a comprehensive 1939 Justice Department study of prison release mechanisms.³⁸ Until the mid-1980s, the routine availability of pardon after sentence meant that a

³⁴ THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁵ *Id.*

³⁶ James Iredell, Address in the North Carolina Ratifying Convention (July 28, 1788), reprinted in THE DEBATE ON THE CONSTITUTION, PART TWO 875 (Bernard Bailyn ed., 1993).

³⁷ Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1175-78 (2010).

³⁸ U.S. DEP'T OF JUSTICE, 3 THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 295 (1939).

convicted person could look forward to a full and early reintegration into free society—with the same benefits and opportunities available to any other member of the general public—free of unwarranted collateral penalties and the stigma of conviction.

In the 1960s, as described earlier, judicial relief mechanisms like expungement and set-aside came into vogue as more reliable yet still respectable substitutes for pardon, to relieve less serious offenders of the need to report crimes in their past. In addition, administrative and licensing agencies played a role in relieving certain types of disqualifications in the context of character and fitness inquiries.

Over the past thirty years, the old routes to official forgiveness have become impassable. Pardon is neglected by politicians, disrespected by criminal justice professionals, and dismissed as cronyism by a cynical public. Benjamin Button–like, Hamilton’s “benign prerogative” has regressed from patriarch to unruly stepchild, and denied privileges at the same table with the grown-up powers of government. Justice Anthony Kennedy urged “reinvigorat[ion]” of the pardon power in a 2003 speech to the ABA, opining that a “people confident in its laws and institutions should not be ashamed of mercy.”³⁹ It does not appear that any occupant of the White House or Justice Department, then or now, paid him any mind.

At the same time, relief premised on concealment has become increasingly unreliable and unpopular with advances in technology and a public appetite for full disclosure. Busy criminal courts resist efforts to give them more business, especially business that is not directly related to disposition of the charges. For example, courts in New York have since the 1970s had the power to relieve legal disabilities at sentencing, but their lack of interest was the occasion for an embarrassing legislative scolding in August 2011.⁴⁰ Administrative boards have become almost as reluctant as governors and presidents to exercise their power to forgive, lest they make a career-ending mistake. Systemic efforts to compensate for a failure of forgiveness, like “ban-the-

³⁹ Justice Anthony M. Kennedy, Associate Justice, Supreme Court of the U.S., Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *in* 16 FED. SENT’G REP. 126, 128 (2003).

⁴⁰ See N.Y. CORRECT. LAW § 702(1) (McKinney 2011). The memorandum accompanying this change in the law states that certificates are a “powerful tool . . . to promote and encourage successful reintegration after a conviction,” but notes that they are “underutilized” and that “only a tiny fraction” of those eligible actually hold them. Summary and Justifications of Bill A07597A, 2011 Assemb., Reg. Sess. (N.Y. 2011), available at <http://www.communityalternatives.org/pdf/2011-amend-Corr-L-702.pdf>.

box” legislation or limits on pre-employment inquiries, simply kick the moment of truth down the road.

The general failure of official forgiveness in the criminal justice system calls for innovative thinking. If the pardon power cannot be reinvigorated, as Justice Kennedy urged, perhaps it can be reinvented.

It happened that just two days after Justice Kennedy delivered his now-iconic speech to the ABA, that organization adopted a set of standards that proposed a new template for limiting and rationalizing the collateral consequences of conviction.⁴¹ Borrowing the framework proposed some forty years earlier in the Model Penal Code, the ABA Standards on Collateral Sanctions and Discretionary Disqualification proposed that forgiveness should be an important responsibility of the court that imposes punishment.⁴² Limited relief from sanctions that frustrate reentry should be available as early as sentencing, with a fuller pardon-like forgiveness available after a more sustained period of good conduct. Six years later, the Uniform Law Commission adopted the two-tiered relief scheme of the ABA Standards, with additional protections against negligence liability for anyone willing to take a risk on a person deemed rehabilitated.⁴³ The idea of the relief provisions of the Uniform Collateral Consequences of Conviction Act (UCCCA) is to remove mandatory legal barriers and allow a decisionmaker to consider an individual fairly on the merits. Like the ABA Standards, the UCCCA also requires that all conviction-related disabilities and disqualifications be collected in one place, and that courts warn defendants about them before accepting a guilty plea and at sentencing.⁴⁴

The ABA Standards and the UCCCA recognize that two things will lessen the need for a back-end pardoning mechanism: (1) greater transparency in the process by which collateral penalties are adopted and imposed in the first instance; and (2) more rational and enforceable standards for considering past criminal conduct in allocating benefits and opportunities. The fuller integration of collateral sanctions into plea negotiations and sentencing hastened by the *Padilla*

⁴¹ See ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 4, at § 19-2.5.

⁴² *Id.* cmt. at 33-34 & n.40 (discussing the judicial restoration provisions of the 1962 Model Penal Code); see also 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, 1727-33 (2003) (discussing section 306.6 of the Model Penal Code as a model for section 19-2.5 of the ABA standards).

⁴³ See UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 14 (2010), available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.pdf.

⁴⁴ *Id.* § 6.

decision will in time lead away from the punitive model of collateral penalties that has developed over the past three decades. A federally funded effort now under way to compile collateral penalties indicates that there are hundreds of such penalties in every state's statutes and administrative codes, a revelation that may result in some soul-searching and retrenching. If courts must ensure that defendants are informed about applicable collateral sanctions before they accept a guilty plea, excessive severity may disrupt the system of resolving criminal cases on which the government has come to depend. When prosecutors find it harder to craft acceptable plea offers because of collateral penalties, when defendants are willing to risk going to trial to avoid them, and when judges are moved to set pleas aside because the agreed-upon deal later seems unfair, the system of collateral consequences that traps so many in a degraded social status is likely to develop ways of making exceptions. As Stephanos Bibas has argued respecting the impact of the *Padilla* decision on the procedural aspects of the plea process,⁴⁵ substantively too the move toward a consumer protection model now seems inevitable. The result will be a fairer, safer, and more efficient justice system.

The dismantling of a regime of mandatory collateral penalties will not be fully effective to address the problem of discrimination based upon conviction as long as there are no clear and enforceable standards to guide discretionary decisionmaking. Employers otherwise willing to recognize redemption frequently hesitate to take a chance on someone with a criminal record, even knowing that a past conviction is a poor predictor of future criminality, deterred as much by negative public attitudes as by any genuine risk of harm. The legal system owes them some greater degree of support. Conviction should be grounds for adverse action only if the underlying conduct is directly and substantially related to the benefit or opportunity at issue. The law ought also provide some insulation against negligence claims, as through reliance on an official certification of good conduct. Finally, government officials with access to a bully pulpit can lead a campaign to influence public attitudes toward people with criminal convictions who have made genuine efforts to reform.

⁴⁵ Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153 (2011) (arguing that *Padilla* may prompt the extension of consumer protection principles to plea bargains).

CONCLUSION

The collateral penalties that result from a criminal conviction have multiplied in the past thirty years with little evident attention to their broader effect on the community. There is not a jurisdiction in the country where all of these penalties have been inventoried, and only a few that have an effective way of curtailing or mitigating their effect. Many years after conviction, these penalties frequently serve only as irrational punishment, not reasonable regulation. Even when the law does not pose an absolute bar to some benefit or opportunity, decisionmakers tend to be reluctant to take a chance on someone with a record.

For the one in four adult Americans who have some sort of criminal record, *Padilla v. Kentucky* came at an opportune time. Though its holding focused narrowly on a defense lawyer's obligation to warn the client about the immigration consequences of a guilty plea, *Padilla's* broader systemic effects on the justice system cannot be underestimated. In particular, *Padilla* has forced attention to the way in which collateral penalties have created a large new class that is unprotected by the law and permanently relegated to the margins of society. Unless we as a society are comfortable living with a growing class of "internal exiles" who have no way to pay their debt to society and return to its good graces—with the attendant public safety risks and moral dilemmas—we should be looking for a more effective way of giving convicted individuals a fair chance to become fully productive members of society. That is why, so many years later, Hamilton's observation about the conspiracy of humanity and good policy still rings true.

Jack Chin has argued, in an article that will be published as part of this Symposium, that the only way to save "modern civil death" from constitutional infirmity is to insist upon a case-by-case imposition of collateral penalties. But the problem is not simply that these penalties are unavoidable; it is also that, if imposed, they cannot be mitigated. Legislatures are likely too fond of nondiscretionary punishments to do away with categorical penalties entirely, but case-by-case forgiveness could be made available, whether directed to a specific penalty or in the form of a more general pardon. If chief executives were more willing to use their constitutional pardon power to make what Hamilton described as "exceptions in favor of unfortunate guilt,"⁴⁶ and if legislatures were more willing to trust courts or administrative agencies to "dispense[] the mercy of the government,"⁴⁷ it would not be

⁴⁶ THE FEDERALIST NO. 74, *supra* note 34, at 447.

⁴⁷ *Id.* at 448.

hard for us lawyers to construct a comprehensive and functional way of regulating access to the opportunities and benefits that may be necessarily lost—at least temporarily—by virtue of committing a crime. If we can construct and implement an airtight and inexorable system of punishments, we ought also to be able to make the law forgiving.

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