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Why Do Bad Things Happen to Good People? An Examination of Collateral Consequences and Their Role in Sentencing

John B. Riordan

NOTE

WHY DO BAD THINGS HAPPEN TO GOOD PEOPLE? AN EXAMINATION OF COLLATERAL CONSEQUENCES AND THEIR ROLE IN SENTENCING

John B. Riordan[†]

ABSTRACT

As everyone knows, when a person is convicted of a crime, that person is sentenced by the court. Sentencing can range from a simple fine, to community service, to incarceration. What many people do not know, however, is that sentences imposed by courts are not the only consequences of conviction. Indeed, even for those wrongdoings that people may commonly describe as "mild," a plethora of "extra" or "collateral" consequences attach at the time of conviction. These collateral consequences, and their purpose, are the subject of this Note.

The main concern with collateral consequences is their place in the sentencing process. Should courts consider these ancillary penalties when forming a sentence that is supposed to be proportional to the crime? The Eastern District of New York answered this question with a resounding "yes" in *United States v. Nesbeth*. In that case, the court was to render a judgment and sentence on a first-time offender who was caught importing cocaine. After reviewing the defendant's history and character, the facts and circumstances surrounding the case, and a list of collateral consequences that would follow the defendant forever, the court imposed a sentence far lower than usual. In justifying its decision to step outside of the sentencing guidelines, the court noted the myriad of collateral consequences that would "supplement" the official sentence.

The Second, Fourth, and Eighth Circuits have followed the example of the *Nesbeth* court and have concluded that justice cannot be served without considering collateral consequences during sentencing. Other circuits, however, have disagreed with their sister courts. The First, Sixth, Seventh,

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† J.D. Candidate, 2019, Liberty University School of Law. I would like to first and foremost thank God for giving me the strength and determination to accomplish things (like this Note) that I never thought I could. I would also like to thank my family and my wife for supporting me through thick and thin, even when I have no time to acknowledge that support. I would like to thank the Law Review staff for their time and commitment in helping make this Note possible. Lastly, I would like to thank the reader for taking the time to read this Note.

Tenth, and Eleventh Circuits firmly hold that the consideration of collateral consequences is not appropriate for judicial sentencing. These circuits are concerned that considering some of these consequences would lead to courts sentencing defendants who have more to lose more lightly than those who have less to lose.

The *Nesbeth* decision was a step in the right direction; however, it did not resolve the issue correctly. There are several proposed solutions to this collateral consequences issue. The most obvious is the approach taken by the courts, like the one in *Nestbeth*, that have decided to consider these consequences. Those courts simply consider all consequences of conviction and attempt to sentence appropriately. However, while justice is the goal, this method results in the consideration of some consequences that are not justiciable, and is, therefore, not the answer.

The American Law Institute has also proposed a solution. While its approach is close to correct, this method complicates things too much and results in the equivalent of tying the courts' hands during sentencing.

As is the case with many legal issues, the only true solution lies in the hands of the Legislature. Considering the Legislature is partially to blame for the creation of many of these collateral consequences, it is only appropriate that this branch also be the one to fix the problem. First, a line of demarcation must be drawn between the different kinds of collateral consequences. Second, the Legislature should grant authority to the courts to consider only the appropriate consequences. Lastly, the courts should evaluate all of the appropriate collateral consequences during sentencing in order to impose a truly proportional sentence that will serve the ends of justice.

I. INTRODUCTION

Collateral consequences have existed for as long as justice has. In *United States v. Nesbeth*,[1] the court identified the issues surrounding collateral consequences and a circuit split concerning these issues. The court evaluated its options and held that in order to serve the ends of justice and form a just sentence, it must take these consequences into consideration during sentencing. While many courts agree with this conclusion, just as many find that consideration of collateral consequences is a slippery slope that leads to discrimination and injustice.

This Note proposes that while the *Nesbeth* court was on the right track, it did not answer the collateral consequences question quite right. Section II

1. United States v. Nesbeth, 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

of this Note discusses the history of collateral consequences and how courts on each side of the circuit split have handled them. Section III of this Note analyzes the different kinds of collateral consequences and several different solutions that have been proposed by legal institutions. Lastly, Section IV of this Note proposes the ultimate solution to the issue of collateral consequences and contemplates what courts should do in the meantime.

II. BACKGROUND

During sentencing reform in the 1980s, Congress highlighted "four basic purposes of sentencing: punishment, deterrence, incapacitation, and rehabilitation."[2] However, in a manner that can only be described as counterintuitive, the American penal system today is actively thwarting these purposes. Successful reintegration of ex-offenders is being prevented by "'[m]yriad laws, rules, and regulations.'"[3] These laws, rules, and regulations are often referred to as "collateral consequences"[4] and attach, in different form and number, to nearly everyone with a criminal record.

In his *Nesbeth* opinion, Judge Block went as far as to compare the effect of these collateral consequences to "'civil death'—or 'the loss of rights . . . by a person who has been outlawed or convicted of a serious crime.'"[5] Indeed, civil death is not a new concept. The dangers and gravity of this status has been known for centuries.[6] Early Colonial laws only applied these devastating consequences to a small handful of felonies.[7] However, as America grew, so did the penal system. With this growth came an influx of new crimes, each of which now holds its own treasure trove of collateral consequences that can wreak havoc on a convicted person's life.[8]

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2. Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 997 (2013) (citing 18 U.S.C. § 3553(a)(2) (2012)).

3. United States v. Nesbeth, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016) (quoting MICHELLE ALEXANDER, THE NEW JIM CROW 142 (2010)).

4. Margaret Colgate Love, Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code, 2015 WIS. L. REV. 247, 258 (2015).

5. *Nesbeth*, 188 F. Supp. 3d at 180-81 (quoting *Civil Death*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

6. Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT (May 10, 2016), http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

7. *Id.*

8. Id.

Collateral consequences can result in devastating effects for a convicted person, but still many courts refuse to consider them when sentencing.[9] Courts' hesitancy to consider these consequences during sentencing is likely the result of these "penalties" or "regulations" being considered legislative or regulatory rather than punitive.[10] Therefore, because these collateral consequences are imposed by law rather than included in a judicial sentence, they have been considered by some courts as not "subject to constitutional limitation."[11]

Courts that have chosen to consider collateral consequences, like the court in *Nesbeth*, see past labels like "penalty" and "regulation." Instead, these courts see that the effects of these consequences *are* punitive, and, therefore, they should, to some extent, be considered when sentencing. *Nesbeth* is not the first case where collateral consequences were taken into consideration when sentencing.[12] However, it is perhaps the first case to focus almost solely on the effect and applicability of collateral consequences. To truly understand the impact of this case, it is necessary to briefly open the history books to observe the evolution of the American penal system.

A. The Very Beginning, A Very Good Place to Start

During the development of the English and Irish prison systems in the 1850s, the ultimate goal of incarceration was clear: successful reintegration into society.[13] As a matter of fact, reintegration was so central to these early models that if a prisoner could not find a job when his sentence was nearing completion, the prison managers would aid him in finding one.[14] Both the English and Irish models worked on a "mark" system whereby prisoners' good behavior and progress in education and learning a trade could secure them an early release.[15] In the Irish system, the last stage of incarceration involved living in an "intermediate" prison in which prisoners would dress in ordinary clothing, live in a community, and have minimal supervision.[16] This unique and effective prison model resulted in low recidivism rates and

9. *Nesbeth*, 188 F. Supp. 3d at 180.

10. Love, *supra* note 4, at 258.

11. *Id.*

12. *See, e.g.*, United States v. Thavaraja, 740 F.3d 253, 262-63 (2d Cir. 2014) (holding that the lower court did not err by considering deportation as a collateral consequence of conviction, when crafting the defendant's sentence).

13. Doherty, *supra* note 2, at 974-76.

14. *Id.* at 982.

15. *Id.* at 972-73.

16. *Id.* at 972.

nearly seamless reintegration.[17] However, the most important aspect of these early models was their understanding and consideration of collateral consequences.

In Ireland, when a prisoner obtained employment and was released, the only post-sentence consequence was a duty to report monthly to local law enforcement.[18] The English system considered collateral consequences even more seriously, releasing prisoners unsupervised and with no attachments from their incarceration.[19] "To impose police supervision over a poor wretch struggling to find employment is the way to add to his difficulties and throw him back into crime instead of keeping him out of it."[20] The stance taken by these early models was that nothing should come between a former prisoner and his ability to reintegrate into society.

Observing these models, the American penal system chose to adopt similar principles of incarceration when developing its own system. Incorporating many of the English and Irish principles, new prisons were opened with great success, and by 1901 twelve states had opened prisons based on this new model.[21] Unfortunately, by 1940, the Department of Justice reported that this system was failing because, with growing rates of incarceration, the prisons were becoming too difficult to run.[22] It was at this time the penal system started to change, and by 1974, it was determined that "'rehabilitative efforts . . . have had no appreciable effect on recidivism.'"[23]

It is not that keeping recidivism rates low is no longer a goal of the justice system. As a matter of fact, all ninety-three judicial districts allow for a form of pretrial diversion program.[24] Pretrial diversion programs allow

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17. See id.

18. *Id.* at 974-75.

19. Doherty, *supra* note 2, at 974.

20. Id. (quoting Joshua Jebb, Explanations Showing the Difficulties Which Would Attend the Introduction into England of the Probationary Stages of Discipline and Supervision of the Police, &c., Which Have Been Adopted in Ireland, TRANSACTIONS OF THE NAT'L ASS'N FOR THE PROMOTION OF SOC. SCI. 402, 411, 414 (George W. Hastings ed., 1863)).

21. Doherty, *supra* note 2, at 982.

22. *Id.* at 983.

23. *Id.* at 994 (quoting Robert Martinson, *What Works?—Questions and Answers About Prision Reform*, 35 PUB. INT. 22 (1974)).

24. Josev Brewer, *The Work in the United States Attorney's Offices Across the Sequential Intercept Model*, 12 LIBERTY U. L. REV. (forthcoming May 2018). In his article, Brewer explains that in some jurisdictions, special pretrial diversion courts decide admission to the program. *Id.* In the District of South Carolina, the court looks specifically at certain collateral matters such as education, employment, and contact with a pretrial officer; still, these considerations may not come into play during sentencing. *Id.*

prosecutors, in some cases, to help potential convicts stay out of the official prosecution and sentencing processes altogether.[25] Participants who successfully complete the program may avoid ever being charged.[26] Unfortunately, these programs still do not address collateral consequences. First, not all individuals are eligible for the diversion program. Also, even those individuals who are eligible receive no aid at trial if they fail the program. Therefore, even though these programs represent an effort to meet the ends of justice, they do not directly address one of the biggest oversights that still exists.

Today, while rehabilitation and reintegration are still some of the stated purposes of sentencing,[27] as many as "50,000 federal and state statutes and regulations . . . impose penalties, disabilities, or disadvantages on convicted felons."[28] These statutes and regulations often make successful reintegration nearly impossible and yet, many courts have still refused to take them into consideration when crafting sentences. The court in *Nesbeth* did not follow that trend; instead, it chose to consider these devastating consequences in order to craft a more just sentence.

B. All About United States v. Nesbeth

The defendant in *Nesbeth* was convicted of importation and possession of cocaine.[29] Prior to this conviction, the defendant had never been convicted of a crime and otherwise led a law-abiding life.[30] Furthermore, the Eastern District of New York noted that although the defendant had grown up in lower-income circumstances, she had never used drugs herself and likely was just a courier for her boyfriend.[31] At the time of conviction, the defendant was a 20-year-old college student studying education.[32] Additionally, the defendant had supported herself as a nail technician at a children's spa, worked as a counselor to children in lower-income areas,

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25. Id.

26. *Id.* (citing USAM § 9-22.010 (2011)).

27. *See* 18 U.S.C. § 3553(a)(2)(D) (2012) ("The court, in determining the particular sentence to be imposed, shall consider—the need for the sentence imposed—to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .").

28. United States v. Nesbeth, 188 F. Supp. 3d 179, 184 (E.D.N.Y 2016).

29. *Id.* at 180.

30. *Id.* at 189.

31. *Id.* at 189-90.

32. *Id.* at 189. Due to the conviction, the defendant changed her major to sociology. *Id.* at 190.

and held seasonal employment on a parks maintenance crew.[33] In all, the court highlighted that this conviction was "completely out of character."[34]

At the time the *Nesbeth* decision was made, there was already jurisprudence governing how to come to a sentencing decision. When reviewing the defendant's personal information, the court must engage in a "multi-step process through which . . . [it] assesses the seriousness of [the] defendant's current offense and past crimes to . . . determine the defendant's applicable sentencing range . . . ."[35] All of this information is then put into a "pre-sentencing report" ("PSR") which contains "guidelines" that help the sentencing court determine what the proper sentence should be.[36] After the Court's decision in *United States v. Booker*, these guidelines were rendered only advisory, albeit still necessary to at least consider when sentencing.[37] In *United States v. Gall*,[38] the Court laid out a three-step process for courts to follow when crafting a sentence.[39] First, the sentencing court must figure out the proper guidelines range; second, the court must give both parties a chance to argue for what sentence they believe is appropriate; lastly, the sentencing court must consider all of the 18 U.S.C. § 3553(a) factors to determine what sentence is appropriate.[40] These factors go directly towards Congress' intent to address the goals of sentencing, and are as follows:

> The court, in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect of the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .[41]

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33. *Nesbeth*, 188 F. Supp. 3d at 189.
34. *Id.* (internal quotations omitted).
35. United States v. Pauley, 511 F.3d 468, 471 (4th Cir. 2007).
36. *See, e.g.*, *Nesbeth*, 188 F. Supp. 3d at 188-89.
37. *Pauley*, 511 F.3d at 472 (citing United States v. Booker, 543 U.S. 220 (2005)).
38. Gall v. United States, 552 U.S. 38 (2007).
39. *Pauley*, 511 F.3d at 473.
40. *Id.* (citing Gall v. United States, 552 U.S. 38, 49-50 (2007)).
41. 18 U.S.C. § 3553(a) (2012).

The last step of the sentencing process is where the conflict arises. Generally, it has been held that, in considering the § 3553(a) factors, courts have broad discretion.[42] Additionally, in determining what falls under the § 3553(a) factor "the nature and circumstances of the offense and the history and characteristics of the defendant," courts are not limited and may consider "background, character, and conduct."[43] If, however, the court does choose to deviate far from the guidelines and § 3553(a) factors, it must justify such deviation.[44] This was the issue in *Nesbeth*. There, the court decided to deviate from the guidelines and the enumerated sentencing factors to instead put great weight on the collateral consequences of the conviction.

In *Nesbeth*, the Probation Department issued a PSR which recommended a sentence of twenty-four months and three years of supervised release.[45] However, the PSR contained no reference to any collateral consequences.[46] The court took issue with this and concluded that collateral consequences must be considered in order to craft a sentence that is "sufficient[] but not greater than necessary" to meet the ends of sentencing.[47] After requesting and receiving a list of all applicable collateral consequences,[48] the court highlighted that as a result of a felony conviction, the defendant would be ineligible for tuition assistance for the remainder of her college career.[49] Furthermore, a substantial number of statutory impairments would permanently attach to the defendant.[50] The court also noted that this conviction would likely result in a strain on important family relationships and may result in prejudice when seeking certain employment.[51]

After considering all of these factors, the court sentenced the defendant to one year of probation with some additional conditions, including a six-month period of house arrest.[52] In forming this sentence, the court reasoned

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42. United States v. Thavaraja, 740 F.3d 253, 259 (2d Cir. 2014) (citing United States v. Cavera, 550 F.3d 180 (2d Cir. 2008)).

43. United States v. Morgan, 635 Fed. App'x 423, 444 (10th Cir. 2015) (quoting United States v. Pinson, 542 F.3d 822, 836 (10th Cir. 2008)).

44. *Pauley*, 511 F.3d at 473.

45. United States v. Nesbeth, 188 F. Supp. 3d 179, 189 (E.D.N.Y. 2016).

46. *Id.* at 188.

47. *Id.* at 194 (citing 18 U.S.C. § 3553(a) (2012)).

48. *Id.* at 188.

49. *Id.* at 190.

50. *Id.* at 190-93.

51. *Nesbeth*, 188 F. Supp. 3d at 190-93.

52. *Id.* at 194-96.

that the collateral consequences were sufficient punishment and that incarceration would be unnecessary to meet the ends of sentencing according to § 3553(a).[53]

C. *Right Down the Middle: What the Circuits are Saying About Collateral Consequences*

Nesbeth is not representative of the majority rule. While it is true that courts have discretion to step outside of the § 3553(a) factors, courts have generally construed this discretion as permitting consideration of the defendant's history or personal life, not subsequent collateral consequences.[54] In 2003, the Supreme Court asserted that statutory collateral consequences should not be considered in sentencing as they represent only "civil disabilities" and not punishment.[55] However, this opinion did little to conclusively resolve the question of which collateral consequences should be considered in sentencing. Meanwhile, courts have been growing increasingly more uncomfortable with turning a blind eye to these collateral consequences.[56] At the same time, because they are often a creature of legislation, many courts continue to consider these consequences "none of their business."[57] This split was mentioned in *Nesbeth*[58] and should be thoroughly analyzed before an attempt is made to truly resolve the issue of collateral consequences.

At the risk of oversimplification, the two stances that circuits have taken in this matter can be boiled down to the following conclusions: (1) some circuits say collateral consequences must be considered and (2) others say they simply cannot.

Representing the latter, the First, Sixth, Seventh, Tenth, and Eleventh Circuits have identified several cases in which sentences were reduced after consideration was given to what the courts refer to as "impermissible" factors.[59] In each of these cases the sentencing decision was reversed on

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53. *Id.* at 194.

54. *See* United States v. Pauley, 511 F.3d 468, 474 (4th Cir. 2007); *see also* United States v. Stall, 581 F.3d 276, 289 (6th Cir. 2009) (holding that while family ties are not usually relevant to sentencing, they may be considered relevant if they have some connection to other permissible considerations under 18 U.S.C. § 3553(a)).

55. Love, *supra* note 4, at 258-59 (citing Smith v. Doe, 538 U.S. 84 (2003).

56. *Id.* at 259.

57. *Id.* at 260.

58. *Nesbeth*, 188 F. Supp. 3d at 186-88.

59. United States v. Morgan, 635 Fed. App'x 423, 444-46 (10th Cir. 2015) (citing United States v. Stall, 581 F.3d 276, 286 (6th Cir. 2009); United States v. Musgrave, 761 F.3d 602, 604

appeal.[60] These circuits hold that § 3553(a) requires that the court fashion a sentence that reflects the seriousness of the *offense* alone, not the seriousness of the collateral consequences suffered by the defendant.[61]

On the other side of the split, the Second, Fourth, and Eighth Circuits have chosen instead to align themselves with the reasoning of the *Nesbeth* court and consider collateral consequences.[62] These circuits hold that judicial discretion can safeguard against any harmful results identified by the other circuits. It is the opinion of these courts that sentencing cannot be just unless the collateral consequences of conviction are taken into consideration.

So, which side got it right? Would considering collateral consequences lead to overburdening the courts and possibly discrimination? Are convicted persons being sentenced with much more than what a judge imposes on them? These questions have yet to be conclusively answered, although the circuits have each presented their own solutions.

1. One Holding to Rule Them All: How the Tenth Circuit in *United States v. Morgan* Represented the Stance of the First, Sixth, Seventh, and Eleventh Circuits

The court in *United States v. Morgan* was tasked with reviewing the sentence imposed on the defendant by the lower court.[63] The defendant was a practicing attorney who was elected to the Oklahoma State Senate in 1996.[64] It was while the defendant served on the senate, as chairman of the appropriations committee, that the bribery that ultimately led to his conviction and sentencing took place.[65]

In 2005 and 2006, members of the Oklahoma Assisted Living Association ("OKALA") started to become unhappy with the Oklahoma Department of Health's practice of transferring residents from OKALA facilities to nursing homes.[66] One such member, Crosby, an OKALA facility owner, decided to take action at this time and hired a lobbyist in an attempt to sway the state

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(6th Cir. 2014); United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013); United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999)).

60. *Morgan*, 635 Fed. App'x at 444-47.

61. *Id.* at 445.

62. *E.g.*, United States v. Thavaraja, 740 F.3d 253 (2d Cir. 2014).

63. United States v. Morgan, 635 Fed. App'x 423, 425 (10th Cir. 2015).

64. Id.

65. *Id.*

66. Id.

senate.[67] During a meeting between the lobbyist, Crosby, and the defendant, the defendant told Crosby, "This is the way it works. You pay me a $1,000 a month retainer."[68] In exchange for these payments, the defendant eventually took action in the senate to limit the interaction the department of health had with OKALA facilities.[69]

The defendant was indicted on sixty-three counts of bribery and fraud ranging over several years and involving several different schemes.[70] However, after a two-week trial, the defendant was only convicted of a single count of bribery in connection with Crosby.[71] Although the defendant was only convicted on a single count, due to the nature and circumstances surrounding that single count, the lower court was given a PSR with a recommended sentencing range of 188 to 235 months.[72] Fortunately for the defendant, that was a recommendation the sentencing court did not intend to follow.

The lower court began the sentencing process correctly by considering the guidelines.[73] After an initial glance, however, the sentencing judge began chiseling away at the recommendation after reviewing several factors. First, the judge noted that the sentencing guideline incorporated too much of the information associated with the other counts the defendant was charged with but never convicted.[74] From there, the sentencing judge continued striking down the recommendation based on the "goals" of sentencing and the collateral consequences that would be suffered by the defendant.[75] Specifically, the judge began by noting that the court had received 482 letters in support of the defendant and his character.[76] In observing these letters the judge noted, "I don't think that I would know 482 people to even ask for a letter, much less get a positive one from all of them back."[77] After considering the content and meaning of the letters, the judge mentioned several other factors that he believed should come into play during this phase of sentencing. In response to the prosecution's prayer for

67. *Id.*
68. *Id.* at 426.
69. United States v. Morgan, 635 Fed. App'x 423, 426-27 (10th Cir. 2015).
70. *Id.* at 427-28.
71. *Id.* at 428.
72. *Id.* at 439.
73. *Id.* at 440.
74. *Id.* at 439-40.
75. *Morgan*, 635 Fed. App'x at 440-41.
76. *Id.* at 441.
77. *Id.*

incarceration, the judge commented to the defendant, "I am personally of the opinion that the publicity that has followed this case from the beginning, the results to you both in your health, your financial health, the fact that you will almost certainly lose your license to practice law, I think all of these are factors that would surely deter anyone else considering the same conduct."

After summarizing his considerations, the judge finally sentenced the defendant to five years of probation, 104 hours of community service, and forfeiture of $12,000 in bribery money.[78] With that, the defendant had managed to go from the possibility of prison for nearly twenty years to only five years of probation and a small dent in his wallet.

Upon appeal, the Tenth Circuit began by explaining the correct procedure for sentencing.[79] In so doing, the court laid out a two-step analysis to evaluate what the court referred to as "procedural reasonableness" and "substantive reasonableness."[80] While these distinctions do aid the court in coming to a conclusion, they contribute little to the analysis of this Note. Suffice it to say, the main concern mentioned by the Tenth Circuit was that if a sentencing court makes a large variance from the guideline range, such variance must be supported by a significant justification—a justification that, in this case, the Tenth Circuit failed to find.[81] After reviewing some of the initial reasoning the sentencing court gave for a downgraded sentence, the Tenth Circuit turned its attention to the collateral consequences that were used to form the lenient sentence.[82] Without delay the court found that the sentencing court had "erred in determining [the defendant] was adequately punished" by the aforementioned collateral consequences.[83] The Tenth Circuit held these consequences as impermissible considerations, not because they did not exist, but because they had nothing to do with sentencing and would lead to unjust results.

The "unjust results" that the Tenth Circuit looked to avoid are often referred to as "middle class sentencing." Middle class sentencing occurs when a court impermissibly relies upon factors related to a defendant's

78. *Id.* at 440.

79. *Id.* at 442.

80. *Id.*

81. *Morgan*, 635 Fed. App'x. at 442 (quoting Gall v. United States, 552 U.S. 38, 50 (2007)).

82. *Id.* at 444.

83. *Id.*

social or economic standings.[84] Here, the Tenth Circuit found that while generally there is no limitation on consideration of such factors as the history, character, and conduct of the defendant, "'[i]t is impermissible for a court to impose a lighter sentence on white-collar defendants . . . because . . . [they] suffer greater reputational harm or have more to lose by conviction.'"[85] If courts consider *all* collateral consequences, the result may be unfair discrimination to those with less-fortunate backgrounds. Due to its concern with middle class sentencing, the Tenth Circuit, in *Morgan*, decided that none of the collateral consequences originally observed by the sentencing court should be considered because "[t]hey impermissibly favor criminals, like [the defendant], with privileged backgrounds."[86]

The Tenth Circuit also identified several other circuits that, like itself, had held in opposition of considering collateral consequences when sentencing. Specifically, the Tenth Circuit "agree[d] with the reasoning of the Sixth, Seventh, and Eleventh Circuits. By considering publicity, loss of law license, and deterioration of physical and financial health as punishment, the court impermissibly focused on the collateral consequences of Morgan's prosecution and conviction."[87] The court cited to several cases in which sentences were reduced after consideration was given to factors such as education and vocational skills, a requirement to register as a sex offender, years of litigation, loss of licenses, and generally leading a life with a felony conviction looming above them.[88] In each of these cases, the sentencing decision was reversed on appeal due to consideration of impermissible factors.[89] The Tenth Circuit agreed with these other circuits in finding that § 3553(a) requires that the court fashion a sentence that reflects the seriousness of the *offense*, not the seriousness of the collateral

84. United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999). However, even after explaining the pitfalls of middle class sentencing, the court in *Stefonek* went on to conclude, "We do not know whether the district judge would have departed downward on the basis of extraordinary family circumstances alone." *Id.* This tends to insinuate that if the lower court had reduced the sentence on the basis of those circumstances, the sentence would have been affirmed. Perhaps the Seventh Circuit is still on the fence when it comes to collateral consequences and sentencing.

85. United States v. Morgan, 635 Fed. App'x 423, 444 (10th Cir. 2015) (quoting United States v. Prosperi, 686 F.3d 32, 47 (1st Cir. 2012)).

86. *Id.* at 446.

87. *Id.* at 445.

88. *Id.* at 444-46 (citing United States v. Stall, 581 F.3d 276, 286 (6th Cir. 2009); United States v. Musgrave, 761 F.3d 602, 604 (6th Cir. 2014); United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013); United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999)).

89. *Morgan*, 635 Fed. App'x at 444-46.

consequences suffered by the defendant.[90] The court concluded that because "[n]one of these collateral consequences are properly included in [the defendant's] sentence," they are out of the court's hands and should not be considered.[91]

Unfortunately, in an attempt to avoid the harmful results of middle class sentencing, the Tenth Circuit—along with all the other circuits it cited—failed to discern which collateral consequences truly were impermissible, and which should be considered because of their objectivity. This determination is a vital step in forming a just sentence. Conversely, while these circuits' wholesale disregard for collateral consequences may be incorrect, the circuits on the other side of this issue may also overcorrect.

2. The Second, Fourth, and Eighth Circuits: A New Hope

Other circuits are not as concerned with the pitfalls identified by the courts in opposition to the consideration of collateral consequences. Relying instead on judicial discretion, the courts in these circuits hold that sentencing can only be fair if all of the consequences of conviction are evaluated. The Second, Fourth, and Eighth Circuits align themselves with the *Nesbeth* court in finding that the consideration of collateral consequences is appropriate.

a. *United States v. Thavaraja*

In *United States v. Thavaraja*, the defendant was a Sri Lanka native, born and raised during a civil war.[92] After moving to England as a refugee, obtaining his bachelor's degree, and teaching there for a short time, the defendant moved back to Sri Lanka.[93] It was at this time that he became involved in a minority political group seeking to establish an independent government.[94] Though the sentencing judge would later describe this group as "no direct threat to the United States," officially, the group was categorized as a terrorist organization.[95] While he was involved with the group, the defendant procured twenty million dollars' worth of military weapons and engaged in several forms of illegal bribery.[96]

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90. *Id.* at 445.

91. *Id.* at 446.

92. United States v. Thavaraja, 740 F.3d 253, 256 (2d Cir. 2014).

93. Id.

94. *Id.* at 255. This political group was known as the LTTE and, while it stood for legitimate causes such as an end to the oppression of the Sri Lankan people, it perpetuated its mission through violence and war. *Id.*

95. *Id.* at 257.

96. *Id.* at 256.

Upon being captured, the defendant was extradited to the United States for prosecution, where, after six years of incarceration, he was convicted of war crimes.[97] The sentencing court was given a guideline range of 360 months to life; however, due to max-sentence restrictions, that recommendation was capped at 240 months.[98] Despite these recommendations, however, the sentencing court, looking to the "full range of circumstances presented," imposed a sentence of only "108 months on [one] charge and 60 months on [another] (to run concurrently)."[99]

The prosecutors argued that the sentencing court evaluated certain impermissible considerations such as the defendant's imminent deportation.[100] The Second Circuit was not persuaded by this argument and, instead, found that all of the sentencing court's considerations were proper.[101] In fact, the court found that "a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."[102] The court found that considerations of the defendant's time served, family situation, and likely deportation were all permissible considerations necessary to arriving at a sentence that is "sufficient, but not greater than necessary" to serve the ends of justice.[103] In concluding, the Second Circuit found that the sentencing court had imposed a sentence that "reflects thoughtful and principled consideration by a conscientious district judge of all the factors relevant to an individualized determination of a fair and just sentence."[104]

The Second Circuit, in *Thavaraja*, recognized the impact of collateral consequences and their impact on a convicted person's life. Because of that, the court decided that it was appropriate to consider these consequences when forming a sentence. In this way, the Second Circuit aligned itself with the reasoning of the *Nesbeth* court.

b. *United States v. Pauley*

The Fourth Circuit was faced with a similar scenario when the lower sentencing court reduced a sentence after considering several collateral

97. *Id.* at 256-58.
98. *Thavaraja*, 740 F.3d at 257.
99. *Id.* at 258
100. *Id.* at 262.
101. *Id.*
102. *Id.* (citing Witte v. United States, 515 U.S. 389, 398 (1995)).
103. *Id.* at 262-63.
104. *Thavaraja*, 740 F.3d at 263.

consequences. In *United States v. Pauley*, the defendant was an art teacher at a high school when he was approached by an underage student to purchase lude photographs the student had taken of herself.[105] The defendant agreed to this transaction and the two continued this relationship for over a year.[106] Eventually, an investigation was conducted, and the images given by the underage student were found.[107] The defendant was arrested and charged with possession of child pornography.[108]

At trial, a PSR was generated, proposing a suggested sentencing range of 97 to 121 months' incarceration.[109] However, like the court in *Thavaraja*, the sentencing court did not adhere to this recommendation. The sentencing court imposed a downward variance sentence of only forty-two month's imprisonment, naming several factors that were influential in the large divergence.[110] Among these factors, the lower court considered that the defendant was a "model citizen and a good father" and would "los[e] his teaching certificate and his state pension."[111] On appeal, the prosecution argued that these factors were not relevant and led to an "unreasonable" sentence variation.[112] The Fourth Circuit disagreed.

In reviewing the sentence, the court found that the consideration of factors such as the defendant's family life was consistent with § 3553's "history and characteristics" factor.[113] Further, the court did not find error in the sentencing court's consideration of the fact that the defendant would lose his teaching certificate and state pension.[114] In fact, the Fourth Circuit found that consideration of factors such as these reflects "the need for 'just punishment' and 'adequate deterrence.'"[115] The court concluded that the sentence met the ends of justice and affirmed the lower court's decision.[116]

The conviction of the circuits on this side of the split is that "[i]t is difficult to see how a court can properly calibrate a 'just punishment' if it

105. United States v. Pauley, 511 F.3d 468, 469 (4th Cir. 2007).

106. *Id.* at 469-70.

107. *Id.*

108. *Id.* at 470.

109. *Id.*

110. *Id.*

111. *Pauley*, 511 F.3d at 470.

112. *Id.* at 471.

113. *Id.* at 474.

114. *Id.* at 474-75

115. *Id.* (quoting 18 U.S.C. § 3553(a)(2)(B)).

116. *Id.* at 475-76.

does not consider the collateral effects of a particular sentence."[117] The courts in *Nesbeth*, *Thavaraja*, and *Pauley* are not alone in this conviction.[118] More and more courts are recognizing the importance of collateral consequences in forming a just sentence. Unfortunately, while this recognition does result in more just sentencing *most* of the time, courts' approaches to considering these consequences is not ideal.

Much like how the circuits in opposition to the consideration of collateral consequences fell to one extreme by refusing to consider any form of them, the circuits in support of such consideration fell to the opposite extreme. Because they have recognized how collateral consequences affect individuals even after their sentence is served, these courts allow virtually any consideration to influence their sentencing decisions. Such consequences could range from statutory provisions that limit a convicted person's right to vote to social changes, such as the convicted person being excluded from family or community events.

The court in *Nesbeth*, along with the courts in the Second, Fourth, and Eighth Circuits, took a step in the right direction. They recognized that while sentences may be just, standing alone, when all of the collateral consequences of conviction are considered, the result is often essentially "over-sentencing." However, although the court in *Nesbeth* was trying to bring about the most just result, the manner in which they went about doing so is not the ultimate solution to this issue.

III. TOO HOT, TOO COLD, AND JUST RIGHT: WHAT *NESBETH*, AND OTHER DECISIONS, GOT RIGHT AND WHAT THEY GOT WRONG

The *Nesbeth* decision represents a step towards a more just method of sentencing. However, all of the courts that have addressed collateral consequences have failed to parse out the real issue. Because of this, they could not prescribe the best solution or approach. In order to truly understand collateral consequences and their role in sentencing, a court must first identify the different categories of collateral consequences. While the courts in the above decisions seemed to have lumped all of the consequences together (either rejecting them or embracing them), that is not the correct approach. Because of this confusion, decisions on both sides

117. United States v. Nesbeth, 188 F. Supp. 3d 179, 187 (E.D.N.Y. 2016) (quoting United States v. Stewart, 590 F.3d 93 (2d Cir. 2009)).

118. *See, e.g.*, United States v. Anderson, 533 F.3d 623, 633 (8th Cir. 2008) (choosing to consider the defendant's "loss of . . . reputation and his company" when sentencing).

of the circuit split have been *partially* correct.[119] After identifying the different kinds of collateral consequences, one must select a solution that appropriately incorporates these consequences into sentencing. This second step is vital to ensure that the sentence is adjusted in conjunction with collateral consequences, but not unreasonably so.[120] Finally, one must ensure the sentencing purposes of § 3553(a) are still being met.

A. One of These Things Is Not Like the Other: Identifying Different Forms of Collateral Consequences

In crafting the defendant's sentence in *Nesbeth*, the court considered several collateral consequences.[121] Some of these consequences were statutory and attached to the defendant as a matter of law. Two such consequences were, (1) being barred from obtaining employment in an FDIC-insured bank for ten years and (2) being permanently prevented from owning a firearm.[122] Other consequences considered by the court were not attached as a matter of law. The court highlighted that because child care services conduct background checks, the defendant's conviction *may* be grounds for her being denied employment.[123] Clearly these consequences are different in nature. While the former attaches as a matter of law, the latter may or may not attach as a result of conviction. However, the court failed to recognize the distinction in *Nesbeth*, choosing instead to bundle all of these into the category of "collateral consequences."

This is not an uncommon occurrence. All of the courts discussed in this Note failed to distinguish different collateral consequences as well. This should not be the case. Each kind of collateral consequence is fundamentally different and deserves its own analysis. This Note proposes that there should be two categories of collateral consequences: legislative and civil.

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119. As will be discussed in the next subsection, there are some collateral consequences that *should* be considered 100 percent of the time and others that should almost *never* be considered. Because of this, when the circuits on one side of the split say that certain considerations are "impermissible," they are partially correct. Likewise, on the other side of the split, when the circuits say that all collateral consequences must be considered, they too are partially right. The only way to resolve these decisions is to dissect exactly what is appropriate for consideration and what is not.

120. *See* United States v. Booker, 543 U.S. 220 (2005) (emphasizing the importance of adhering to sentencing guidelines, only varying for good cause).

121. United States v. Nesbeth, 188 F. Supp. 3d 179, 190-93 (E.D.N.Y. 2016).

122. *Id.* at 191 (citing 49 C.F.R. § 1544.229 (2016); 18 U.S.C. § 922 (2016)).

123. *Id.* at 190-91.

1. Legislative Consequences

Legislative consequences are sometimes referred to as "mandatory" because they attach to a defendant after conviction automatically by ways of statutory sanction or some other regulation.[124] Sentencing courts have no discretion over these legislative consequences and historically have not considered them when sentencing.[125] However, these are just the consequences that must be considered. They are not a part of the court's sentence but still impose penalties on the defendant that sometimes last forever.[126] In Virginia alone, the commission of *any* felony results in the application of over four-hundred different collateral consequences.[127] These include consequences such as ineligibility to participate in some Medicaid services;[128] revocation of certain types of insurances;[129] and even denial of certain professional certifications.[130]

Because these consequences are a result of legislation, many courts view them as regulatory only, ignoring entirely their punitive nature. Therefore, sentences imposed by courts in such jurisdictions represent only the beginning of a convicted individual's true punishment. The courts that do realize the impact of these consequences understand that they cannot impose a sentence that is "sufficient, but not greater than necessary" according to § 3553(a)[131] without first considering post-sentence consequences.

Another reason legislative consequences should be considered is because they are objective. While speculation about the social or economic status of a defendant after conviction can often times lead to discrimination, legislative consequences attach after conviction regardless of social or

124. Love, *supra* note 4, at 259.

125. *Id.*

126. *See Federal Statutes Imposing Collateral Consequences Upon Conviction*, JUSTICE.GOV (October 14, 2017, 9:39 PM), https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf; *see also*, The Council of State Governments, *National Inventory of the Collateral Consequences of Conviction*, JUST. CTR. THE COUNCIL OF ST. GOV'T (October 14, 2017 9:34 p.m.), https://niccc.csgjusticecenter.org/description/.

127. The Council of State Governments, *Virginia*, JUST. CTR. THE COUNCIL OF ST. GOV'T (January 10, 2018, 4:58 PM), https://niccc.csgjusticecenter.org/search/?jurisdiction=47.

128. The Council of State Governments, *Consequence Details*, JUST. CTR. THE COUNCIL OF ST. GOV'T (January 10, 2018, 4:58 PM), https://niccc.csgjusticecenter.org/consequences/154858/.

129. Id.

130. Id.

131. 18 U.S.C. § 3553(a) (2012).

economic status.[132] A court considering these consequences would not have to fear the pitfall of middle class sentencing. Additionally, while consideration of legislative consequences would require more work of sentencing judges, accessing and assessing these consequences would not be unreasonable. The court in *Nesbeth* simply asked the probation department to compile a list of the applicable consequences.[133] Alternatively, courts could utilize the numerous collateral consequences databases created by both governmental and non-governmental entities.[134] These databases make it simple and easy to view all applicable consequences according to state and offense.[135]

However, although these legislative consequences are truly punitive in nature and always objective, they are somehow still not regularly considered when forming sentences. This was not the case with the court in *Nesbeth*. There, the court made the right decision in having the Probation Department compile a list of the applicable legislative consequences so that the court could better shape the sentence. These legislative consequences were not the only ones considered by the court in *Nesbeth*.

2. Civil Consequences

While legislative consequences should always be considered when sentencing, civil consequences should be considered sparingly, if at all.[136] While these are the kinds of consequences that are often felt the most and garner the most attention in both the public and private eye, courts' consideration of these would more often than not result in distortion of justice.[137] This is because civil consequences generally look to a defendant's social or economic condition. It is easy to see how consideration of such subjective factors could result in inconsistent sentencing.

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132. *Nesbeth*, 188 F. Supp. 3d at 184-85.

133. *Id.* at 188.

134. *See Federal Statutes Imposing Collateral Consequences Upon Conviction*, JUSTICE.GOV (October 14, 2017, 9:39 PM), https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf; *see also*, The Council of State Governments, *National Inventory of the Collateral Consequences of Conviction*, JUST. CTR. THE COUNCIL OF ST. GOV'T (October 14, 2017, 9:34 PM), https://niccc.csgjusticecenter.org/description/.

135. *Id.*

136. The author of this Note uses the term "civil consequences" to describe a very broad, often ambiguous category of consequences.

137. *See* Shaila Dewan, *The Collateral Victims of Criminal Justice*, N.Y. TIMES (October 14, 2017, 9:43 PM), https://www.nytimes.com/2015/09/06/sunday-review/the-collateral-victims-of-criminal-justice.html (showing how the public often views collateral consequences).

In *Nesbeth*, the court identified several consequences that would fall into the "civil" category. Specifically, the court relied quite heavily on the fact that the defendant *may* not be selected for work in her chosen field: education.[138] While this consequence may very well be the result of the defendant's conviction, it is far from absolute. At best, the court could only speculate as to what effect the conviction would have on the defendant's employment opportunities.[139] In choosing to consider this consequence, the *Nesbeth* court could have easily fallen prey to the dangers of middle class sentencing.[140]

Consider a hypothetical. Imagine that instead of a poor young college student whose dream was to teach children (such as the defendant in *Nesbeth*), the defendant was a law student just about to obtain her J.D. At the time she was charged with drug distribution and possession, this law student had job offers from three of the country's largest firms. Surely, the consequence of losing those three high-paying firm positions would be greater than the loss of being able to teach in a small school, right? Looking at the two scenarios from a purely financial aspect, the law student has much more to lose than the potential school teacher. This is the problem with considering civil consequences. Unlike legislative consequences, civil ones tend to favor those who have more to lose. It is hard for a court to be objective and impartial when considering such factors.

Civil consequences are not always impermissible, however. As mentioned previously, sentencing courts have broad discretion over what factors to consider under §3553(a).[141] This discretion was not granted in error. In considering which factors are relevant to a specific defendant, courts should use their judicial experience to conclude what civil consequences would fit within or meet the purposes of §3553(a). For instance, §3553 specifically requires courts to consider the "history and characteristics of each defendant."[142] This requirement clearly shows that there is a strong element of subjectivity to sentencing. It is when a sentence is lessened or unreasonably changed because of civil consequences that such considerations may be abused. Instead, if a court considered certain

138. *Nesbeth*, 188 F. Supp. 3d at 190.

139. *Id.*

140. *See also* United States v. Anderson, 533 F.3d 623, 633 (8th Cir. 2008) (choosing to consider the defendant's "loss of . . . reputation and his company" when sentencing).

141. *See* United States v. Booker, 543 U.S. 220, 264 (2005).

142. 18 U.S.C. § 3553 (2012).

subjective factors and made "sideways"[143] adjustments in sentencing, justice could still be served and middle class sentencing avoided. In this way, some civil consequences that are not specifically enumerated in § 3553(a) may be considered without being discriminatory.

Of course, civil consequences can be dangerous to consider for the same reasons legislative consequences are prudent to consider. First, unlike legislative consequences, civil consequences are almost always subjective. Therefore, consideration of civil consequences can much more easily result in middle class sentencing than the consideration of legislative ones. Further, accessing and assessing appropriate civil consequences is much more difficult and nuanced than with legislative ones. While there are databases and probation offices to aid a court in reviewing all applicable legislative consequences, there are no such tools to access civil consequences. Because of this, when a court attempts to consider these subjective consequences, what was intended as a well-meaning consideration may in fact be non-justiciable speculation.

Due to their punitive nature, objectivity, and ease of review, legislative consequences should always be considered by courts when crafting sentences. This will ensure that a defendant is not over-sentenced by consequences that do not even relate to his offense. Conversely, civil consequences should be considered only when absolutely appropriate. Other than the factors enumerated in §3553(a), courts should be conservative when considering other post-conviction consequences. Specifically, when determining whether a consequence is appropriate to consider, courts should stay clear of consequences relating to a defendant's social or economic standing. In this way, courts will be able to tailor a sentence and accomplish the goals of sentencing according to § 3553(a) while avoiding the pitfalls of middle class sentencing.

B. There Can Only Be One: Examining the Different Ways to Consider Collateral Consequences

Now that the different categories of collateral consequences have been separated, this section will examine the different methods of incorporating

143. The term "sideways adjustment" refers to a sentencing court changing not the severity, but the nature of a punishment. For instance, if, after the considerations of reasonable civil consequences, a judge was to determine that a recommended custodial sentence would result in inequitable consequences to the convict, the judge could impose a higher non-custodial sentence instead. By increasing the non-custodial punishment, a judge may balance and equate the non-custodial sentence to the custodial one and, while changing the *nature* of the punishment, maintain the *severity* of the penalty.

these consequences into sentencing. Four methods will be considered: first, the courts' "take the wheel" approach; second, the American Bar Association's approach; third, the Uniform Law Commission's approach; lastly, the Model Penal Code's approach.

1. The Courts' "Take the Wheel" Approach

This approach does not require a lengthy discussion as the perfect example of its application was given in *Nesbeth*. As discussed above, courts are growing uncomfortable with the way collateral consequences essentially create a collateral sentence over which they have no control.[144] However, because courts are well-versed with the distinction between their function and the Legislature's, they are hesitant to make a ruling that renders void a statute or regulation. Instead, they are forced to compromise their sentence. In *Nesbeth*, after considering all of the legislative consequences imposed on the defendant, instead of choosing to limit those consequences, the court decided to impose a sentence far outside the guidelines.[145]

The problem with this approach is that courts are limiting themselves and the carefully constructed sentencing system. While collateral consequences should be considered, they should not be allowed to impair this system. However, because courts have no control as to which legislative penalties apply, they are forced to instead use the power they do have. The result of the courts' approach is a distortion in well-established methods of sentence construction rather than a change in legislative consequences that may not even be appropriate in the first place. While results like the one in *Nesbeth* may represent a more justice-driven approach to sentencing, the manner in which the court went about considering collateral consequences is flawed. That being said, it may have been the only choice it had.

2. The American Bar Association's Approach

In 2003, the American Bar Association ("ABA") proposed a solution to the issue of collateral consequences. In its proposal, the ABA suggested that courts have the power to grant relief from collateral consequences upon request of the convicted party.[146] The proposal also required courts, according to "generally applicable principles of [sentencing]," to "ensure that the totality of the penalty is not unduly severe."[147] Other than these

144. Love, *supra* note 4, at 259.

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

146. Love, *supra* note 4, at 261-62.

147. *Id.* at 262 (quoting Am. Bar Ass'n, ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons 9, Standard 19-2.4 (3d ed. 2003)).

standards, the ABA proposal contained little else to guide courts in their consideration of collateral consequences.

Besides the general lack of specificity the ABA offered in their proposal, their solution had a few other problems that rendered it sub-optimal. First, the proposal did not establish a standard by which courts could review collateral consequences at sentencing.[148] Instead, the proposal merely suggests that consequences could be considered during or after sentencing. Also, the proposal does not address civil consequences at all. Therefore, under this standard, courts are once again left without guidance as to whether to consider civil consequences. In effect, the ABA's proposal created a way by which convicted persons could submit a motion of sorts to the sentencing court to consider granting relief from a legislative consequence. This is not the ideal solution because certain collateral consequences should always be part of a court's considerations *at sentencing*, regardless of any action by the convicted party.

3. The Uniform Law Commission's Approach

The Uniform Law Commission's ("ULC") approach was a bit more defined than the ABA's. The ULC permitted a defendant to petition the sentencing court, at sentencing or before sentencing, for relief from specific legislative consequences.[149] Upon petition, the court could review the collateral consequences complained of and grant relief after a finding that such relief would "materially assist the individual in obtaining or maintaining employment, education, housing, public benefits, or occupational licensing."[150]

This approach resolved the timing issue that was present in the ABA's approach. However, other problems with this approach preclude it from being the ultimate solution. One such problem is the test proposed for courts to use. In essence, this proposal requires courts to conduct a form of rational relation test between the collateral consequence and the convicted person's job, education, living situation, or other subjective needs. While this does offer relief where relief may be needed, it is not the appropriate test. This is because under this standard, courts are asked to relate the consequence with a needed benefit, instead of relating the consequence with the crime committed. By conflating these considerations, the ULC may

148. Love, *supra* note 4, at 262.

149. *Id.* (citing UNIF. COLLATERAL CONSEQUENCES OF CONVICTION Act §10(a) (2010)).

150. *Id.* at 263 (quoting Unif. Collateral Consequences of Conviction Act §10(b)(1)-(2) (2010)).

actually be granting more relief than necessary to meet the ends of justice.[151] Additionally, like the ABA approach, the ULC approach provides no guidance for the consideration of civil consequences. Therefore, the ULC approach is not the ultimate solution.

4. The Model Penal Code's Approach

In a proposal approved by the American Law Institute in 2014, the Model Penal Code ("MPC") outlines its approach to how courts should handle collateral consequences.[152] According to this proposal, courts would first be made aware of all of the applicable legislative consequences by their jurisdiction's sentencing commission.[153] Then the court would have authority over which penalties or regulations applied and which were not necessary.[154] In deciding which legislative consequences should apply and which should not, the MPC correctly proposes a kind of rational relation test.[155] Unlike the test proposed by the ULC, the MPC test instructs courts to only authorize legislative consequences that are closely related to the crime committed.

At this point, it appears the MPC has formed the most justice-driven solution to this issue. Unlike the other approaches,[156] courts would be made aware of all applicable legislative consequences at the beginning of sentencing and would be able to consider them at that time. Furthermore, under this approach, only the appropriate legislative consequences would be considered. However, there are still cracks in this proposal.

Under this approach, legislative consequences become "as much a part of the court's sentencing function as a fine or prison term."[157] This should not be the case. The mandatory penalties that attach at conviction were enacted by the Legislature. These were put in place to be in addition to and separate from sentences crafted by courts. However, because of their punitive nature,

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151. This concept is fairly confusing. Because of this, it will be discussed at greater length in the next section of this Note.

152. Love, *supra* note 4, at 265. This approach also contains proposals of how courts should approach granting relief from collateral consequences after sentencing. *Id.* at 266-70. However, for the purposes of this Note, only the proposal as to how courts should consider collateral consequences at sentencing will be discussed.

153. *Id.* at 265.

154. *Id.* at 266.

155. *Id.* at 276.

156. *Id.* at 260-64 (discussing the Uniform Law Commission's approach that allows courts to grant relief from legislative consequences only after the defendant has petitioned the court to do so).

157. *Id.* at 272.

these penalties should require some judicial evaluation before they attach to a convicted person. The MPC proposal has two problems stemming from this mixing of the powers. First, if these legislative consequences become part of the sentence itself, the Judiciary takes away at least some of the function of the Legislature. Second, the well-established judicial sentencing system loses part of its usefulness. These legislative consequences should not serve as punishment imposed by a court. Rather, these penalties should be imposed as a matter of law while being governed by the sentencing courts to ensure only the appropriate ones are imposed. Therefore, the MPC approach fails to determine exactly how it is appropriate for courts to consider collateral consequences.

IV. THE SOLUTION

In his dissenting opinion in *Padilla v. Kentucky*, Justice Scalia explained the issue with courts taking the wheel from the Legislature. He explained that the "[L]egislat[ure] . . . could solve the problems . . . in a more precise and targeted fashion."[158] This is especially applicable here. Specifically, in regards to legislative collateral consequences, courts may not influence their applicability or severity. Because of this, courts are varying severely from sentencing guidelines in order to offset the effects of such legislative penalties. As discussed earlier, even if courts did have the authority to choose which legislative consequences applied, there is still a problem with considering these penalties as part of the sentence. A permanent solution requires legislative action.

The Legislature should give the courts discretion (much like that granted by the MPC) over which legislative consequences apply. However, this legislation should specify that these penalties are still imposed as a matter of law and not as a judicial sentence. In this way, the separation of powers is maintained while ensuring that individuals are not being over-sentenced. By allowing the Legislature to maintain control over these statutes and regulations, the courts will remain safe from criticism and the Legislature will be able to perfect some of its already proven legislation.

If the Legislature were to give courts this discretion, the ball would once again be in the Judiciary's court. In determining which penalties,

158. Padilla v. Kentucky, 559 U.S. 356, 392 (2010) (Scalia, J., dissenting); *see also* United States v. Nesbeth, 188 F. Supp. 3d 179, 198 ("While consideration of the collateral consequences . . . should be part of a sentencing judge's calculus in arriving at a just punishment, it does nothing, of course, to mitigate the fact that those consequences will still attach. It is for Congress and the states' legislatures to determine whether the plethora of post-sentence punishments imposed upon felons is truly warranted . . . .").

regulations, or sanctions to apply, courts could use the established considerations of fairness and policy they use to determine appropriate sentences.[159] The MPC proposed the correct test to be used by courts in determining which legislative consequences should apply and which should not. This Note also proposes that a simple rational basis test should be used by courts in determining which legislative consequences should be allowed or disallowed.

For instance, if a person opens another person's mail, he is guilty of the federal offense of obstruction of correspondence.[160] Because that is a felony, the guilty party would no longer be able to own a firearm in many states. If a court were granted discretion by the legislature to conduct a rational relation test under circumstances like these, it could be determined that there is no rational relation between the (likely) non-violent crime of obstruction of correspondence and the right to own a firearm. Therefore, that collateral consequence could be rendered inapplicable by the sentencing court. Conversely, if the court were to review a legislative consequence that held that the felon could no longer find employment at a postal office, it would likely be determined that there is a strong rational relation between the consequence and the crime.

Using this rational relation test results in a different result than the test proposed by the ULC. Consider another example, instead applying the ULC test. A party is convicted of a violent crime felony. As in the case of obstruction of correspondence, this party may no longer own a firearm in many states. However, this party previously worked as a private body guard; a job that required the usage of a firearm. Under the ULC test, a court might find that, because the legislative consequence detrimentally affects the party's ability to maintain his employment, that legislative consequence should not apply. However, that result does not serve one of the most fundamental goals of justice: incapacitation. A person convicted of a violent felony could very well not be trusted with an instrument that could be used to cause further violent harm. Under the correct rational relation test, this distortion would not occur.

Of course, the rational relation test proposed above should not be the only analysis conducted by sentencing courts. In order to keep a clear line between the court's sentence and the legislative consequences, courts should strive to determine the legislative intent of each applicable statute or

159. For instance, courts could use 18 U.S.C. § 3553(a) to help establish the purpose of each legislative consequence.

160. 18 U.S.C. § 1702 (1994).

regulation. In so doing, the courts could accomplish both the goals of sentencing and of the legislation.

As for civil consequences, sentencing courts should consider them sparingly and cautiously. This Note proposes that a test similar to the one proposed by the ULC may be more appropriately applied to civil consequences. While comparing legislative consequences to a convicted person's employment, education, or other personal benefits may be inappropriate, it may be just the right test for civil consequences. If courts, in their judicial discretion, conducted a rational relation test between civil consequences and their effect on an individual's "employment, education, housing, public benefits, or occupational licensing," the result would be less speculative than the courts' current approach. Overall, however, civil consequences are the real culprits in middle class sentencing, and as such they should be considered largely non-justiciable.

Unfortunately, legislative action like what is needed here does not happen overnight. Especially considering the recentness of the unrest in the justice system, it may be quite a while before the Legislature takes notice of this pressing issue. So, what should be done in the mean time? Should collateral consequences continue to haunt ex-offenders well after they have completed their sentence? This Note proposes that they should not. The *Nesbeth* court did not take the ideal approach in addressing this issue. However, considering the current state of case law and stagnant character of legislative consequences, perhaps their approach was the most appropriate at the time. After considering the civil and legislative collateral consequences, along with the factors and sentencing goals under § 3553(a), the *Nesbeth* court did the only thing they had the power to do: shape the sentence. It is true that the court may have considered some impermissible civil consequences; however, in the end, the court, in its judicial experience, took a "means to an end" approach that brought about a just sentence.

V. CONCLUSION

Sentencing courts have a responsibility to serve justice when delivering a sentence. According to history and § 3553(a), the goals of sentencing are punishment, deterrence, incapacitation, rehabilitation, and reintegration. Collateral consequences frustrate these purposes by making it nearly impossible for ex-offenders to truly be rehabilitated and reintegrate into society. With ex-offenders facing a range of stigmas and disabilities as the result of a criminal conviction every day, it is no wonder courts see so many familiar faces being led through their halls.

In order to serve the purposes of justice, courts must consider collateral consequences in the sentencing stage. What consequences are appropriate

to be considered must be evaluated to determine that discrimination is avoided while tailor-made sentences are imposed. Additionally, the manner in which these consequences are permitted to influence sentencing should be carefully controlled. The best way to ensure offenders are not being over sentenced is for the Legislature to grant the sentencing courts some discretion over which legislative consequences should be imposed and which are unnecessary to serve the goals of sentencing and of the legislation.

In the end, *U.S. v. Nesbeth* represents a clear step in the right direction. The court may not have figured out the perfect path to take, but it used what powers it had to ensure a just sentence was delivered. Collateral consequences represent just another speed bump on the road to perfecting the greatest justice system in the world. If courts, like the one in *Nesbeth*, continue to take such care in guaranteeing that fairness and justice guide their decisions, there should be no doubt that the issue of collateral consequences and their role in sentencing will someday be just another American success story.