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Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions

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COLLATERAL CONSEQUENCES AND CRIMINAL JUSTICE: FUTURE POLICY AND CONSTITUTIONAL DIRECTIONS

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National policy with respect to collateral consequences is receiving more attention than it has in decades. This article outlines and explains some of the reasons for the new focus. The legal system is beginning to recognize that for many people convicted of crime, the greatest effect is not imprisonment, but being marked as a criminal and subjected to legal disabilities. Consequences can include loss of civil rights, loss of public benefits, and ineligibility for employment, licenses, and permits. The United States, the 50 states, and their agencies and subdivisions impose collateral consequences—often applicable for life—based on convictions from any jurisdiction. However, because they were deemed “civil,” collateral consequences have been created and imposed with few constitutional limitations.

In recent years, the American Law Institute, American Bar Association, and Uniform Law Commission all have proposed reforms, which are now being seriously considered in a number of jurisdictions. Meanwhile, scholars have advanced, and courts have sometimes accepted, an argument that they previously rejected, namely that collateral consequences can be of constitutional magnitude. As courts take collateral consequences more

* Edward L. Barrett Jr. Chair & Martin Luther King Jr. Professor of Law, UC Davis School of Law; founding board member, Collateral Consequences Resource Center (<http://ccresourcecenter.org/> [<https://perma.cc/4TMY-AJMZ>]); Reporter, ABA STANDARDS FOR CRIMINAL JUSTICE ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (2004), and UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010). Thanks to Margy Love for comments, to the editors of the *Marquette Law Review* for expert editing, and to Dean Joseph Kearney and the faculty of the Marquette Law School for the opportunity to present a version of this paper as the Barrock Lecture. It draws on Gabriel J. Chin, *Collateral Consequences*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 371 (Erik Luna ed., 2017), <http://academyforjustice.org/volume4/> [<https://perma.cc/9EVM-834T>] [hereinafter 4 REFORMING CRIMINAL JUSTICE]; Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011) [hereinafter Chin, *Making Padilla Practical*]; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) [hereinafter Chin, *The New Civil Death*]; and Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports after Padilla v. Kentucky*, 31 ST. LOUIS U. PUB. L. REV. 61 (2011).

seriously, legislatures have begun to reduce the numbers of collateral consequences and provide legal mechanisms for the relief of those that remain.

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I. INTRODUCTION

After decades of obscurity, collateral consequences seem to be moving into the spotlight of the United States legal system.¹ Everyone knows that a conviction may result in imprisonment, fine, probation, or parole. Until

1. The mainstreaming of collateral consequences may be symbolized by the fact that John Oliver dedicated the November 8, 2015, episode of his HBO show *Last Week Tonight* to the issue of prisoner reentry and addressed a number of collateral consequences. LastWeekTonight, *Prisoner Re-entry: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Nov. 8, 2015), <https://www.youtube.com/watch?v=gJtYRxB5G2k> [https://perma.cc/J4SL-FVNQ].

relatively recently, even among lawyers, few understood that people with criminal convictions face a network of additional legal effects, known as collateral consequences.² This was unfortunate, because collateral consequences affect many areas of life, often more significantly than traditional forms of punishment. Some criminal convictions can lead to loss of civil status; a citizen may lose the right to vote, serve on a jury, or hold office; a non-citizen may be deported or become ineligible to naturalize.³ A conviction may make a person ineligible for public benefits, such as the ability to live in public housing or hold a driver's license.⁴ Criminal convictions affect employment; laws prohibit hiring of people with convictions as peace officers or as employees for the health-care industry.⁵ A criminal conviction can also make a person ineligible for a license or permit necessary to be employed or to do business; it can cause the forfeiture of a pension.⁶ Criminal convictions can also affect family relations, such as the ability to have custody of or visitation with one's child.⁷ While criminal convictions have serious nonlegal effects, such as stigma or shame, the focus of this article is on legal mandates.⁸

In the last half of the twentieth century, courts invalidated few, if any, collateral consequences, ruling that they were civil regulatory measures which were tested against deferential standards of review associated with other economic regulations and were not subject to the restraints imposed by the Bill of Rights on criminal punishment.⁹ However, starting in the new millennium, courts and important actors began to notice collateral consequences and think about how they can be integrated into the legal system. In 2004, the American Bar Association (ABA) promulgated ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons.¹⁰

2. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103–04 (2013).

3. Chin, *The New Civil Death*, *supra* note *, at 1800.

4. *Id.* at 1801, 1827; *see also* Gwen Rubenstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37, at 43–44 (Marc Mauer & Meda Chesney-Lind eds., 2002).

5. Chin, *The New Civil Death*, *supra* note *, at 1800; *see also* DiCola v. FDA, 77 F.3d 504, 507 (D.C. Cir. 1996).

6. Chin, *The New Civil Death*, *supra* note *, at 1801.

7. *Id.* at 1800.

8. This is not to say that “informal” collateral consequences are unimportant. *See* Logan, *supra* note 2, at 1104–05.

9. *State v. Meadows*, No. A13–1023, 2014 WL 3396238, at *5 (Minn. Ct. App. July 14, 2014).

10. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (AM. BAR ASS'N 2004) [hereinafter ABA CRIMINAL JUSTICE STANDARD].

The Uniform Law Commission (ULC) promulgated the Uniform Collateral Consequences of Conviction Act in 2009, and the American Law Institute (ALI) amended the Model Penal Code sentencing provisions to address collateral consequences in 2017.¹¹ As a result, jurisdictions imposing collateral consequences have a wealth of carefully considered policy recommendations and statutory models to improve their laws.

The courts have also been active. In 2010, the Supreme Court issued its landmark decision in *Padilla v. Kentucky*,¹² overruling scores of lower court cases to hold that counsel had an obligation to advise noncitizen clients about the possibility of deportation following a conviction.¹³ More recently (in 2017), the Court, per Justice Anthony Kennedy, offered a broader suggestion of doubt about the network of collateral consequences. In the course of an opinion invalidating a prohibition on sex offenders accessing the internet, the Court stated: “Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.”¹⁴ Similarly, state courts and lower federal courts have found that particular collateral consequences violate state and federal constitutional guarantees.¹⁵ State legislatures have also responded, with many of them increasing access to relief methods or otherwise relieving collateral consequences.¹⁶

Part II of this article outlines the policy problem of collateral consequences in a nation with tens of millions of members with criminal records. Part III describes the reforms proposed by the ABA, ULC, and ALI. Part IV proposes that a steady stream of court decisions have been chipping away at the functional immunity collateral consequences previously enjoyed. In addition, scholars have developed arguments that the federal Constitution or the

11. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (amended 2010) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2011), http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf [<https://perma.cc/DT68-KA5N>] [hereinafter UCCCA]; MODEL PENAL CODE: SENTENCING § 6x (AM. LAW INST., Proposed Final Draft, approved 2017).

12. 559 U.S. 356 (2010).

13. *Id.* at 374.

14. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737–38 (2017).

15. *Doe v. Cooper*, 842 F.3d 833, 838 (4th Cir. 2016); *Does v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017); *Commonwealth v. Muniz*, 164 A.3d 1189, 1223 (Pa. 2017), *cert. denied*, 138 S.Ct. 925 (2018).

16. See COLLATERAL CONSEQUENCES RES. CTR., FOUR YEARS OF SECOND CHANCE REFORMS, 2013–2016: RESTORATION OF RIGHTS & RELIEF FROM COLLATERAL CONSEQUENCES 1 (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf> [<https://perma.cc/V4ZS-WBWN>].

constitutions of the states require more searching review, portending a continuing flow of legal challenges.

The article concludes by predicting that the combination of institutional support for policy change, along with the threat of imposition by constitutional law, will speed the process of reform and bring collateral consequences into the criminal justice system for purposes. Instead of being invisible, collateral consequences will be consciously limited to those that are necessary, will be part of defense counsel's duties with respect to plea bargaining and client counselling, and will be taken into account at sentencing.

II. THE PROBLEM OF COLLATERAL CONSEQUENCES

A. *Mass Conviction*

The United States is in an era of mass conviction. Many distinguished commentators use a different term: "mass incarceration."¹⁷ Since 1970, and even more profoundly since 1980, the increase in the rate of imprisonment and the absolute number of people in prison has been called "unprecedented in the history of liberal democracy."¹⁸ In 1980, more than 500,000 Americans were confined to prisons and jails; in 2015, there were over 2.1 million.¹⁹

17. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (rev. ed. 2010); TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007); Todd R. Clear & James Austin, *Mass Incarceration*, in 4 *REFORMING CRIMINAL JUSTICE*, *supra* note *, at 55; MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 *HARV. C.R.-C.L. L. REV.* 477 (2009); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 *CALIF. L. REV.* 1023 (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271 (2004); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 *U. CHI. LEGAL F.* 165; Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 *HOW. L.J.* 587 (2011); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 *MICH. L. REV.* 993 (2010) (reviewing PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009)).

18. Jude McCulloch & Phil Scraton, *The Violence of Incarceration: An Introduction*, in *THE VIOLENCE OF INCARCERATION* 1, 14 (Phil Scraton & Jude McCulloch eds., 2009).

19. DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, *NCJ 250374, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015*, at 2 tbl.1 (2016); see also ALLEN J. BECK & DARRELL K. GILLIARD, U.S. DEP'T OF JUSTICE, *NCJ 151654, PRISONERS IN 1994*, at 2 (1995).

Yet, the focus on “mass incarceration”²⁰ obscures the reality that prison is not the default tool of the criminal justice system. There are approximately one million new state felony convictions in a typical year²¹ and many more misdemeanor convictions.²² In addition, there are approximately 80,000 federal convictions annually.²³ Most defendants convicted of felonies are not sentenced to state prison—about 60% receive probation only or probation with jail.²⁴ Even more misdemeanor convictions do not result in incarceration.²⁵ While sentence length has increased, the average term is less than five years.²⁶ Accordingly, it is likely that the vast majority of even those convicted of felonies and sentenced to prison will spend most of their lives in free society.

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

21. *E.g.*, SEAN ROSENMERKEL ET AL., U.S. DEP’T OF JUSTICE, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 tbl.1 (2009).

22. *See* KAMALA D. HARRIS, CAL. DEP’T OF JUSTICE, CRIME IN CALIFORNIA 2015, at 16 (2016) (reporting 1.158 million arrests in California in 2015, of which 314,748 were for felonies and the remainder for misdemeanors or status offenses); COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012) (reporting that misdemeanors comprised a majority of the criminal caseload in a 2010 study of seventeen states); LYNN LANGTON & DONALD J. FAROLE, JR., U.S. DEP’T OF JUSTICE, NCJ 228538, PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 12 tbl.5a (2010) (reporting that public defenders surveyed were assigned a total of 378,400 felony and 575,770 misdemeanor cases in 2007); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 n.25 (2012) (estimating 10.5 million nontraffic misdemeanors annually (citing NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 11 (2009))). *See generally* Alexandra Natapoff, *Misdemeanors*, in 1 REFORMING CRIMINAL JUSTICE: INTRODUCTION AND CRIMINALIZATION 71 (Erik Luna ed., 2017), <http://academyforjustice.org/volume1/> [<https://perma.cc/PMJ3-N95K>]. Systematic misdemeanor statistics are not readily available, but it is clear that misdemeanor convictions are more common than felony convictions.

23. *See* U.S. DEP’T OF JUSTICE, NCJ 231822, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES tbl.5.1 (2010) (reporting 82,823 federal convictions in the year ending September 30, 2008, of which 75,832 were felonies).

24. ROSENMERKEL ET AL., *supra* note 21, at 4 tbl.1.2.

25. Natapoff, *supra* note 22, at 82–84. However, even those not incarcerated can be caught up in the system because of the obligation to pay fines, costs, and assessments. *See generally* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1176–77, 1185 (2014).

26. State prison sentences averaged fifty-nine months. ROSENMERKEL ET AL., *supra* note 21, at 6 tbl.1.3. Federal sentences averaged just over five years. U.S. DEP’T OF JUSTICE, *supra* note 23, at tbl.5.2.

Those convicted but not incarcerated are typically on probation or parole.²⁷ About 7 million people were on probation or parole at some point during 2015,²⁸ more than three times the number in prison or jail.²⁹ At the broadest level, approximately 75 million adults have a criminal record, although some records involve arrests not leading to conviction.³⁰ Accordingly, the size of the offender population is not just the 2 million in custody; it also includes the more than 7 million in the control of the criminal justice system who are not in custody, plus the tens of millions with a record.

Not being incarcerated does not mean that a person with a conviction has escaped legal consequences.³¹ In the words of the Supreme Court, “[a] felon customarily suffers the loss of substantial rights.”³² Every conviction implies a permanent change, because these disabilities will “carry through life.”³³ For

27. See generally Michael Tonry, *Community Punishments*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note *, at 187.

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

29. See *id.*; see also KAEBLE & GLAZE, *supra* note 19.

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

31. See generally MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE (2016); JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 71 (2006); CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Theresa A. Miller eds., 2005); NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME, A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION 12, 22 (2014); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005). See also INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 4; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999).

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

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

citizens, a prominent collateral consequence is the loss of civil rights:³⁴ “A convicted criminal may be disenfranchised, . . . lose the right to hold federal or state office, . . . be barred from entering certain professions, . . . be subject to impeachment when testifying as a witness, . . . be disqualified from serving as a juror,”³⁵ and lose the right to keep and bear arms.³⁶ For non-citizens, conviction may result in deportation.³⁷

Collateral consequences are sometimes triggered by specific offenses;³⁸ others apply to “felonies” or vague categories like crimes of moral turpitude.³⁹ Some apply automatically, while others authorize a regulator to act on a case-by-case basis.⁴⁰ Some apply for a specified term, others apply for life.⁴¹

The effects of the loss of status are particularly profound given the many areas of life now subject to governmental regulation. Conviction potentially affects many aspects of family relations, including, for example, the ability to adopt, be a foster parent, or retain custody of children.⁴² Conviction can make one ineligible for public employment, such as in the military and law

34. *50 State Comparison: Loss and Restoration of Civil Rights & Firearm Rights*, RESTORATION OF RIGHTS PROJECT, <http://ccresourcecenter.org/resources-2/restoration-of-rights/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/> [<https://perma.cc/2RN9-QV8N>] (last updated Aug. 2018). See generally LEGAL ACTION CTR., *AFTER PRISON: ROADBLOCKS TO REENTRY* (2004) (discussing the legal barriers facing individuals following a criminal conviction).

35. *North Carolina v. Rice*, 404 U.S. 244, 247 n.1 (1971); see also PIPPA HOLLOWAY, *LIVING IN INFAMY: FELON DISFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP* (2014); MANZA & UGGEN, *supra* note 31, at 71; Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1045–46.

36. *LOVE ET AL.*, *supra* note 31, §§ 2:29–37; see also *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.”); Franklin E. Zimring, *Firearms and Violence*, in 1 *REFORMING CRIMINAL JUSTICE*, *supra* note 22, at 167, 178–79.

37. *LOVE ET AL.*, *supra* note 31, §§ 2:47–61; see also *Mahler v. Eby*, 264 U.S. 32, 39 (1924) (“It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.”). For discussions of the nature of deportation, see Jennifer M. Chacón, *Criminalizing Immigration*, in 1 *REFORMING CRIMINAL JUSTICE*, *supra* note 22, at 205, 207; Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2074 (2017); Christopher N. Lasch, “Crimmigration” and the Right to Counsel at the Border Between Civil and Criminal Proceedings, 99 IOWA L. REV. 2131, 2132 (2014); Peter L. Markowitz, *Straddling the Civil–Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.–C.L. L. REV. 289, 350 (2008).

38. See, e.g., Joann Sahl, *Can We Forgive Those Who Batter? Proposing an End to the Collateral Consequences of Civil Domestic Violence Cases*, 100 MARQ. L. REV. 527 (2016).

39. See *Hawker v. New York*, 170 U.S. 189, 191–92 n.1, 197 (1898).

40. Demleitner, *supra* note 31, at 154.

41. *Id.*

42. Philip M. Genty, *Family-Related Consequences*, in *LOVE ET AL.*, *supra* note 31, §§ 2:25–28.

enforcement.⁴³ A criminal record can preclude private employment in a regulated industry,⁴⁴ with certain government contractors, or in positions requiring security clearances.⁴⁵

Conviction can also restrict one's ability to hold a government contract, to obtain government licenses and permits,⁴⁶ to live in public housing,⁴⁷ to receive other benefits, or to collect a vested public pension.⁴⁸ Those convicted of certain crimes may lose the right to drive a car.⁴⁹ Persons convicted of sex offenses often must register, may be excluded from living in particular areas,

43. See, e.g., 10 U.S.C. § 504 (2012) (restricting enlistment of people with convictions) (discussed in LOVE ET AL., *supra* note 31, § 2:7); FLA. STAT. ANN. § 943.13(4) (West 2017) (prohibiting employment as law enforcement officer of those convicted of felonies and certain misdemeanors).

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

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

77 F.3d 504, 507–08 (D.C. Cir. 1996).

45. Chin, *The New Civil Death*, *supra* note *, at 1800.

46. *Id.* at 1801; LOVE ET AL., *supra* note 31, §§ 2:8–16. The Supreme Court upheld a prohibition on licensing people convicted of crime:

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

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

47. LOVE ET AL., *supra* note 31, § 2:17; Ann Cammett, *Confronting Race and Collateral Consequences in Public Housing*, 39 SEATTLE U. L. REV. 1123, 1124 (2016); Lahny R. Silva, *Collateral Damage: A Public Housing Consequence of the "War on Drugs,"* 5 U.C. IRVINE L. REV. 783, 785 (2015).

48. LOVE ET AL., *supra* note 31, §§ 2:19–21; see, e.g., *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012).

49. LOVE ET AL., *supra* note 31, § 2:23; see also 23 U.S.C. § 159 (2012) (requiring states to suspend driver's licenses of people convicted of drug crimes, or else lose federal highway funds).

and can be subject to post-incarceration civil commitment.⁵⁰ Criminal records are increasingly available to all branches of the government and all segments of the public through computer databases, thus making collateral consequences susceptible to ready enforcement,⁵¹ although some states provide for limited access to conviction records.⁵²

At the same time, the legal effects of a conviction are hard to eliminate. Some collateral consequences, by their terms, apply only for a specified period, while others are in effect for life. Although all jurisdictions have some method of eliminating the effects of the conviction, such as pardon, sealing, or expungement,⁵³ often relief is practically unavailable or is restricted to a narrow class of convictions or offenders.⁵⁴

B. *The Late Twentieth Century Judicial View: Collateral Consequences are Non-Criminal*

In spite of the prevalence of collateral consequences—or perhaps because of it—federal constitutional law regulates them minimally. The Supreme Court has held that occupational ineligibility,⁵⁵ deportation,⁵⁶ sex-offender

50. LOVE ET AL., *supra* note 31, §§ 2:38–46; *see also* WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 49–51 (2009); Wayne A. Logan, *Sex Offender Registration and Notification*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note *, at 397, 403.

51. *See* Christopher Slobogin, *Policing, Databases, and Surveillance*, in 2 REFORMING CRIMINAL JUSTICE: POLICING 209, 210, 213 (Erik Luna ed., 2017), <http://academyforjustice.org/volume2/> [<https://perma.cc/8XTW-HMFZ>]; Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 15–16 (2016). *See generally* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015). Even juvenile records are available to the public in some states. Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 365 (2018).

52. Margaret Love, *Restrictions on Access to Criminal Records: A National Survey*, COLLATERAL CONSEQUENCES RES. CTR. (Mar. 9, 2017), <http://ccresourcecenter.org/2017/03/09/restrictions-on-access-to-criminal-records-a-national-survey/#more-11938> [<https://perma.cc/N7GN-BCGB>].

53. *Id.*; *see also* 50 *State Comparison: Judicial Expungement, Sealing, and Set-aside*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/> [<https://perma.cc/MTJ8-JUCT>] (last updated Aug. 2018).

54. Love, *supra* note 52.

55. *Hawker v. New York*, 170 U.S. 189, 190, 197 (1898).

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

registration,⁵⁷ and civil commitment⁵⁸ are not subject to the prohibitions on ex post facto laws, although some specific registration regimes have been held so restrictive as to constitute punishment⁵⁹ or require individualized determinations.⁶⁰ The Court has also ruled that people with convictions may be disenfranchised⁶¹ and denied the right to possess firearms.⁶² Many courts have held that collateral consequences are not punishment and thus are not covered by the Eighth Amendment prohibition on cruel and unusual punishments⁶³ or the Fifth Amendment prohibition against double jeopardy.⁶⁴

While scholars have criticized collateral consequences as disproportionately falling on people of color,⁶⁵ courts hold that people with convictions are not a suspect class under the equal protection doctrine, so legislation disadvantaging them is permissible if it passes lenient rational-basis review.⁶⁶ Lower courts occasionally find particular restrictions irrational;⁶⁷ however, under the approach of most courts, saving money will almost always be a satisfactory reason for denying benefits,⁶⁸ denial of licensure or

57. *Smith v. Doe*, 538 U.S. 84, 104–06 (2003).

58. *Kansas v. Hendricks*, 521 U.S. 346, 369 (1997).

59. *LOVE ET AL.*, *supra* note 31, § 2:43.

60. *In re J.B.*, 107 A.3d 1, 19 (Pa. 2014).

61. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

62. *See supra* note 36.

63. *See, e.g.*, *Byrne v. Sec’y U.S. Dep’t of Homeland Sec.*, 618 F. App’x 143, 146–47 (3d Cir. 2015); *People v. Rizzo*, 2016 IL 118599, ¶ 43; *State v. Meadows*, No. A13–1023, 2014 WL 3396238, at *5 (Minn. Ct. App. July 14, 2014).

64. *See, e.g.*, *Crook v. Galaviz*, No. EP–14–CV–193–KC, 2015 WL 502305, at *9 (W.D. Tex. Feb. 5, 2015), *aff’d*, 616 F. App’x 747 (5th Cir. 2015); *Roberson v. Dir.*, TDCJ-CID, No. 6:08cv324, 2008 WL 5412383, at *4 (E.D. Tex. Dec. 29, 2008); *Urciuolo v. Commonwealth*, 684 A.2d 1094, 1096 (Pa. Commw. Ct. 1996).

65. *See, e.g.*, Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 254 (2002); Bernice B. Donald, *Effectively Addressing Collateral Consequences of Criminal Convictions on Individuals and Communities*, CRIM. JUST., Winter 2016, at 1, 1; George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899–1900 (1999); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470–71 (2010); *see also* Cassia Spohn, *Race and Sentencing Disparity*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note *, at 169, 169–71.

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

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

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

employment is justified to protect public safety⁶⁹ or to promote public confidence in government⁷⁰ or a regulated industry.⁷¹

In the criminal context, most courts hold that a judge accepting a guilty plea must warn of the direct consequences, but not of collateral consequences.⁷² Similarly, while the Sixth Amendment requires defense counsel to offer competent representation, most courts hold that counsel need not advise of collateral consequences.⁷³

There are two exceptions. First, affirmative misadvice, even about a collateral consequence, may be incompetent even if there was no obligation to offer correct advice in the first place.⁷⁴

The second major exception is the collateral consequence of deportation. By statute or court rule, many jurisdictions required advice of the possibility of

69. *Rinehart v. Louisiana Dep't of Corrs.*, No. 93-5624, 1994 WL 395054, at *1 (5th Cir. July 7, 1994) (stating that an employment prohibition “rationally relates to maintaining security and safety”).

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

71. *See DiCola v. FDA*, 77 F.3d 504, 507 (D.C. Cir. 1996).

72. *State v. Fisher*, 877 N.W.2d 676, 682–83 (Iowa 2016) (“To adhere to the requirements of the Fourteenth Amendment a sentencing court must insure the defendant understands the direct consequences of the plea including the possible maximum sentence, as well as any mandatory minimum punishment. However, the court is not required to inform the defendant of all indirect and collateral consequences of a guilty plea.”) (quoting *State v. Carney*, 584 N.W.2d 907, 908 (Iowa 1998) (per curiam) (internal quotation marks omitted)); *People v. Washington*, 37 N.Y.S.3d 867, 870 (Sup. Ct. 2016) (“[C]riminal courts are in no position to advise defendants of all of the ramifications of a guilty plea that are personal to each defendant. Accordingly, the courts have drawn a distinction between consequences of which the defendant must be advised, those which are direct, and those of which the defendant need not be advised, collateral consequences.”) (quoting *People v. Ford*, 657 N.E.2d 265, 267 (N.Y. 1995)) (internal quotation marks omitted); *see also Jenia I. Turner, Plea Bargaining, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 73, 77–78* (Erik Luna ed., 2017), <http://academyforjustice.org/volume3/> [<https://perma.cc/4NCQ-X4ES>].

73. *State v. LeMere*, 2016 WI 41, ¶ 69, 368 Wis. 2d 624, 662, 879 N.W.2d 580, 598–99; *see also* Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1142, 1160 (2015). *See generally* Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901 (2017).

74. *State v. Ellis-Strong*, 899 N.W.2d 531, 538–39 (Minn. Ct. App. 2017); *People v. Dodds*, 2014 IL App (1st) 122268, ¶¶ 38–39; *see also United States v. Castro-Taveras*, 841 F.3d 34, 51 (1st Cir. 2016).

deportation.⁷⁵ In *Padilla v. Kentucky*,⁷⁶ the Supreme Court held that effective assistance of counsel entitled clients pleading guilty to a warning of the possibility of deportation.⁷⁷ Lower courts are now working out the question of whether defense counsel must advise of other serious collateral consequences, such as sex-offender registration or incarceration.⁷⁸

While collateral consequences can be mitigated through pardon and other forms of legal relief,⁷⁹ pardon was a much more realistic hope for convicted persons in the past than it is now.⁸⁰ Finally, while historically disabilities applied only in the jurisdiction of conviction,⁸¹ a conviction in one jurisdiction now often has effects nationwide.⁸² Often a jurisdiction will impose a disability without regard to whether the jurisdiction of conviction does so.⁸³

75. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 708 (2002).

76. 559 U.S. 356 (2010). The Supreme Court has recognized the significance of collateral consequences in the context of habeas corpus petitions; the existence of collateral consequences can prevent mootness where a defendant has been released from custody. *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985).

77. *Padilla*, 559 U.S. at 374.

78. LOVE ET AL., *supra* note 31, § 4.7. See, e.g., *People v. Hughes*, 2012 IL 112817, ¶ 60.

79. See LOVE ET AL., *supra* note 31, Ch. 7 & App'x A-10 to A-63; *50 State Comparison: Characteristics of Pardon Authorities*, RESTORATION OF RIGHTS PROJECT, <http://ccresourcecenter.org/resources-2/restoration-of-rights/50-state-comparisoncharacteristics-of-pardon-authorities/> [<https://perma.cc/5US7-DFC6>] (last updated June 2018). The Collateral Consequences Resource Center maintains a comprehensive, updated list of all legal mechanisms for relief of collateral consequences. *State-Specific Resources*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/resources-2/state-specific-resources/> [<https://perma.cc/5BHE-4SJK>] (last visited Feb. 10, 2018).

80. See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1181–82 (2010) (“[I]n most years between 1900 and 1936, more than half of the thousands of petitions filed were sent forward to the White House with a favorable official recommendation. At the White House, the president usually approved cases recommended favorably . . . and sometimes was more inclined to leniency.”); *id.* at 1192 (noting that during the administrations of Presidents Kennedy through Carter, pardon grant rates ranged from 30–40%); see also LOVE ET AL., *supra* note 31, at App'x A-6 (discussing pardon practices in the states). See generally Mark Osler, *Clemency*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note *, at 419, 429.

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

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

83. In *Logan v. United States*, 552 U.S. 23, 26 (2007), for example, a defendant with three state battery convictions was prohibited from possessing firearms under federal law; the law in the state of conviction imposed no such prohibition. See also HAW. REV. STAT. § 846E-1 (2016) (defining “[s]exual offense” to include “any federal, military, or out-of-state conviction for any offense that

Ironically, collateral consequences are more important for relatively less serious crimes.⁸⁴ If a person is sentenced to 25 years imprisonment at hard labor, it likely matters little that she will be ineligible to become a licensed accountant upon release. Someone convicted of bank fraud cannot expect to remain in or return to work in a financial institution whether or not she goes to prison. But a person sentenced to unsupervised probation and a \$250 fine for a minor offense suffers a catastrophic loss if she loses her job or is unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative. This is particularly so if no one told her about it in advance or considered possible alternative plea bargains that could have avoided the catastrophic consequences. If the requirements of due process are to be established by looking at the private and governmental interests at stake, and the risk of an erroneous deprivation,⁸⁵ there is a strong argument that the balance has been drawn in the wrong place.

III. THE ORGANIZED BAR RESPONDS: REFORM OF COLLATERAL CONSEQUENCES

Historically, collateral consequences of criminal conviction were not particularly important to the legal system because the penalty for felony was death.⁸⁶ Conviction of felony resulted in a single major collateral consequence, civil death, which wrapped up an individual's legal life as the state prepared to end his natural life.⁸⁷ As prison terms replaced automatic capital punishment, and therefore most people convicted of crimes ultimately reentered free society, civil death came to be regarded as too harsh.⁸⁸ In the mid-twentieth century, it

under the laws of this State would be a sexual offense"); Jeffrey B. Kuck, Annotation, *Elections: Effect of Conviction Under Federal Law, or Law of Another State or Country, on Right to Vote or Hold Public Office*, 39 A.L.R.3d 303, 305, 313–14 (1971).

84. See, e.g., Brandon Buskey & Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 FORDHAM L. REV. 2299, 2313 (2017); Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 758, 763 (2017); Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 171–72 (2017).

85. *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

86. Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 347, 351 (1968); 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, 1714, 1733 (2003). See generally Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)*, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 542 (1968).

87. See generally Chin, *The New Civil Death*, *supra* note * (describing historical punishment of "civil death" which followed felony conviction).

88. *Id.* at 1797.

appeared that collateral consequences might fade away as civil death had.⁸⁹ But the rise of mass conviction, along with the general increase of government regulation in society, created a system of collateral consequences.⁹⁰

In their creation and administration, collateral consequences were not part of a rational, systematic, careful policy.⁹¹ But there is, of course, a substantial public interest in public safety, which includes the idea that people with convictions who have the capacity to live law-abiding lives should be encouraged to do so.⁹² Starting in the early years of the twenty-first century, the organized bar responded. The ABA Criminal Justice Standards were promulgated in 2004,⁹³ the Uniform Law Commission's Uniform Collateral Consequences of Conviction Act in 2010,⁹⁴ and the American Law Institute's revised sentencing provisions in 2017.⁹⁵

A. Collection of Collateral Consequences.

Their basic approaches to the issue shared important similarities. The ABA, ULC, and ALI agreed that a critical first step in managing collateral consequences is collecting, publishing, and updating a compendium cataloging all collateral consequences.⁹⁶ Congress and state legislatures have made imposing collateral consequences a central function of the criminal justice system; it is as if there is a title of the U.S. Code, and the code of every state, regulating “convicted persons” in the same way as states and the federal government regulate “environmental law” or “securities.” Unfortunately, laws governing convicted persons are scattered throughout codes and regulations,

89. *Id.* at 1798.

90. *Id.* at 1791.

91. See Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 HARV. L. & POL’Y REV. 123, 156–71, 179 (2016).

92. Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1318 (2017).

93. ABA CRIMINAL JUSTICE STANDARD, *supra* note 10.

94. UCCCA, *supra* note 11; see also Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 759 (2011).

95. In 2017, the American Law Institute approved revisions of the sentencing articles of the Model Penal Code that make imposition of collateral consequences, and relief from them, part of the sentencing process. See MODEL PENAL CODE: SENTENCING, *supra* note 11; see also Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 250–51.

96. UCCCA, *supra* note 11, § 4; MODEL PENAL CODE: SENTENCING, *supra* note 11, § 6x.02(1); ABA CRIMINAL JUSTICE STANDARD, *supra* note 10, Standard 19-2.1.

and individuals charged with crimes generally cannot hire lawyers to comb the laws and produce a compendium containing all relevant provisions.⁹⁷

Congress agreed that a compilation was a necessary beginning and provided for the funding of the creation of a compendium in the Court Security Improvement Act of 2007.⁹⁸ The National Inventory of Collateral Consequences of Conviction,⁹⁹ initially compiled by the ABA and now maintained by the Council of State Governments, is an important development, although it is not complete or completely accurate.

In addition, in some jurisdictions, public defenders or others have created state guides to collateral consequences.¹⁰⁰ Often, these guides do not list all collateral consequences applicable to every crime.¹⁰¹ Instead, they selectively identify the most serious and common collateral consequences, collateral consequences applicable to the most common offenses, and collateral consequences most important to the population typically in the criminal justice system, that is, those who are relatively less affluent.¹⁰² There should be such guides in every state; again, they should be regularly updated and made available to all lawyers and judges.¹⁰³

B. *Collateral Consequences In the Plea and Sentence Process*

In spite of the importance of collateral consequences to individuals, before *Padilla v. Kentucky*,¹⁰⁴ most courts held that counsel and the court had no duty to advise the client about the collateral consequences resulting from the conviction.¹⁰⁵ *Padilla*'s holding that counsel did have a duty to advise about the possibility of deportation was important and may portend extensions to other collateral consequences, perhaps under state constitutional

97. Chin, *Making Padilla Practical*, *supra* note *, at 684–85.

98. Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543–44 (2008).

99. *National Inventory of the Collateral Consequences of Conviction*, JUSTICE CTR.: THE COUNCIL OF STATE GOV'TS, <https://niccc.csgjusticecenter.org> [<https://perma.cc/AJ5Y-PZHV>] (last visited Oct. 2, 2018).

100. See *Compilations & Inventories*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/compilations-inventories-of-collateral-consequences/> [<https://perma.cc/9A7L-UE85>] (last visited Feb. 10, 2018).

101. See Chin, *Making Padilla Practical*, *supra* note *, at 687.

102. *Id.* at 689–90.

103. *Id.* at 687, 690–91.

104. 559 U.S. 356 (2010).

105. See Chin & Holmes, *supra* note 75, at 699.

interpretations. Nevertheless, some courts continue to hold that counsel's responsibility does not extend to collateral consequences beyond deportation.¹⁰⁶

The UCCCA,¹⁰⁷ ABA Standards,¹⁰⁸ and Model Penal Code¹⁰⁹ all recognize the importance of counselling clients about collateral consequences generally. This section explains why the client's interests cannot be served without attention to collateral consequences.

1. Plea bargaining and charging negotiations

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

informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.¹¹⁰

106. See *State v. LeMere*, 2016 WI 41, ¶ 69, 368 Wis. 2d 624, 662, 879 N.W.2d 580, 598–99; *Johnson*, *supra* note 73, at 941; *Murray*, *supra* note 74, at 1142.

107. UCCCA, *supra* note 11, § 5 (requiring notice before guilty plea); *id.* § 6 (requiring notice at sentencing and upon release).

108. ABA CRIMINAL JUSTICE STANDARD, *supra* note 10, Standard 19-2.3(a) (requiring notice before a plea of guilty); *id.* Standard 19-2.4(b) (requiring notice at sentencing).

109. MODEL PENAL CODE: SENTENCING, *supra* note 11, § 6x.04(1) (requiring notice at sentencing).

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

While *Padilla* addressed deportation, other significant consequences, such as loss of professional licenses,¹¹¹ forfeitures,¹¹² and even loss of civil rights,¹¹³ can also be bargained over.

Because the subjects of plea agreements are not limited to traditional criminal punishment, it would be arbitrary to minimize defense counsel's responsibilities. An effective lawyer can use collateral consequences to mitigate other aspects of the sentence, or as the Court suggested in *Padilla*, bargain toward a conviction with less onerous collateral consequences. Prosecutors' offices often consider collateral consequences in their decisions.¹¹⁴

Competent private criminal practitioners, and public defenders in offices recognizing the impact of collateral consequences, use collateral consequences in their negotiations.¹¹⁵ This may mean obtaining diversion or pleading to a crime that avoids a serious collateral consequence, agreeing to a penalty that is reduced in light of a serious collateral consequence, or of course, obtaining nothing at all from a prosecutor who considers a plea offer and charge fair and just as is. But there is no reason that large numbers of clients should act in ignorance of the legal consequences of their decisions, or that their attorneys should categorically forgo a consideration which, in some cases, would have led to a better plea agreement.

2. Sentencing

Under most systems, a judge can impose a sentence from among a range of possibilities. Sometimes discretion is limited by guidelines or mandatory

111. *Ex parte* Reed, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, *4 (Tex. Crim. App. Jan. 14, 2009) (discussing plea bargain involving surrender of peace officer's license); *In re* Meyers, 562 N.Y.S.2d 502, 502-03 (App. Div. 1990) (discussing resignation from bar as part of plea bargain).

112. *Libretti v. Wyoming Attorney Gen.*, 60 F. App'x 194, 195 (10th Cir. 2003) (discussing forfeiture of property as part of plea agreement).

113. *City of Baldwin v. Barrett*, 458 S.E.2d 619, 621 (Ga. 1995) (discussing a loss of the right to hold public office).

114. Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 250, 266-67 (2016); see also Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 775-76 (2016); Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1200 (2016); Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213, 215, 237 (2016).

115. Caprice R. Jenerson, *Considering Collateral Consequences in Your Representation*, CHAMPION, Nov. 2016, at 47, 47-48 ("The National Association of Criminal Defense Lawyers (NACDL) proposes that the avoidance and mitigation of collateral consequences are integral parts of the representation of an accused person.").

minimum sentence provisions,¹¹⁶ but it is rare that conviction inexorably leads to a single lawful penalty.¹¹⁷ Judges choose among lawful sentences by examining statutory factors¹¹⁸ and general principles of sentencing, which are broad.¹¹⁹ Because courts can consider almost everything when exercising their sentencing discretion, they have always had the power to take into consideration that the defendant would be subject to collateral consequences.

There is some evidence that collateral consequences are moving toward becoming a more formal sentencing factor.¹²⁰ The ABA Standards for Criminal Justice provide: “The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence.”¹²¹ The commentary explains that “the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”¹²² The Model Penal Code also brings collateral consequences into the sentencing process.¹²³

In a highly publicized 2016 decision, *United States v. Nesbeth*,¹²⁴ Senior Judge Frederic Block of the U.S. District Court for the Eastern District of New York considered collateral consequences in imposing a sentence:

I have imposed a one-year term of probation. In fixing this term, I have also considered the collateral consequences Ms. Nesbeth would have faced with a longer term of probation, such as the curtailment of her right to vote and the inability to visit her father and grandmother in Jamaica because of the loss of her passport during her probationary term.¹²⁵

116. See, e.g., Douglas A. Berman, *Sentencing Guidelines*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note *, at 95, 97, 99; Erik Luna, *Mandatory Minimums*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note * at 117, 119.

117. See Chin, *The New Civil Death*, *supra* note *, at 1790–91 (“For many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.”).

118. See, e.g., ARIZ. REV. STAT. ANN. § 13-701(D) (West 2010).

119. *Williams v. New York*, 337 U.S. 241, 244–45, 247 (1949); see also Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 162 (2016).

120. For state and federal drug offenses, collateral consequences are at issue in every sentencing. A little-known federal statute, 21 U.S.C. § 862 (2012), allows sentencing judges to deny federal benefits to those convicted of possession or distribution offenses.

121. ABA CRIMINAL JUSTICE STANDARD, *supra* note 10, Standard 19-2.4(a).

122. *Id.* Standard 19-2.4 cmt. at 29.

123. MODEL PENAL CODE: SENTENCING, *supra* note 11, §§ 6x.02(2), 6x.04.

124. 188 F. Supp. 3d 179 (E.D.N.Y. 2016).

125. *Id.* at 194–95.

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

C. Relief From Collateral Consequences

The ABA,¹²⁶ the Model Penal Code,¹²⁷ and the UCCCA¹²⁸ all contemplate means of relieving individual collateral consequences to facilitate rehabilitation, reentry, and self-support. For example, if all people convicted of felonies may be excluded from public housing, some mechanism should be available for a nonviolent offender to live in public housing so long as there is a realistic basis to believe that it will facilitate self-support and presents no unreasonable risk to public safety. In addition, all of the groups contemplate broader relief if rehabilitation is indicated by the passage of time, completion of the sentence, and the individual's record.¹²⁹

The law of most jurisdictions has always provided for executive, legislative, or judicial relief.¹³⁰ There is evidence that relief improves employment outcomes.¹³¹ The federal system has no established relief measure other than a

126. ABA CRIMINAL JUSTICE STANDARD, *supra* note 10, Standard 19-2.5(a) (waiver of individual consequence); *id.* Standard 19-2.5(c) (relieving all collateral consequences).

127. MODEL PENAL CODE: SENTENCING, *supra* note 11, § 6x.04(2) (“Order of Relief”); *id.* § 6x.06 (“Certificate of Restoration of Rights”).

128. UCCCA, *supra* note 11, § 10 (“Order of Limited Relief”).

129. UCCCA, *supra* note 11, § 11 (“Certificate of Restoration of Rights”); MODEL PENAL CODE: SENTENCING, *supra* note 11, § 6x.06 (“Certificate of Restoration of Rights”); ABA CRIMINAL JUSTICE STANDARD, *supra* note 10, Standard 19-2.5(c) (relieving all collateral consequences); *see also* Wayne A. Logan, *Database Infamia: Exit from the Sex Offender Registries*, 2015 WIS. L. REV. 219, 245 (proposing that “law reform efforts should be channeled toward enhancing opportunities for exit, based on law-abidingness, risk of sexual reoffense, and other relevant considerations”).

130. *Restoration of Rights—National Resources*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/resources-2/restoration-of-rights/> [https://perma.cc/K24N-QPPK] (last visited Feb. 10, 2018).

131. *See* Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL’Y REV. INTER ALIA 11, 22 (2016); *see also* Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 46 (2018) (suggesting that relief mechanisms improve employment outcomes). *But cf.* Lucy Gubernick, Note, *Erasing the Mark of Cain—An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 FORDHAM URB. L.J. 1153, 1200 (2017) (while “the findings drawn from the assessments of ban-the-box laws have been extremely positive . . . [n]o evaluation was working with baseline data to demonstrate the climate of ex-offender hiring locally . . . and few measured changes over time, so it is impossible to determine from the research alone the impact of the legislation”).

presidential pardon, a matter that has proved frustrating for some federal courts.¹³²

D. Eliminating Unnecessary Collateral Consequences

Collateral consequences have developed piecemeal, not systematically.¹³³ Because of the limited judicial review, legislatures have not had to articulate the reasons for their enactment or evaluate their effectiveness or costs.¹³⁴ It seems that collateral consequences are sometimes imposed casually, without full consideration of how they fit into a system of punishment, reentry, employment, and protection of the public.¹³⁵

Bar organizations agree that jurisdictions should refine collateral consequences and eliminate ones that are unnecessary. The Model Penal Code proposes that disenfranchisement be prohibited, or limited to the period of imprisonment, and that jury disqualification be limited to periods of correctional control.¹³⁶ The ABA proposes that convicted persons not be disenfranchised, except during confinement,¹³⁷ and should not be ineligible “to participate in government programs providing necessities of life”¹³⁸ or for “governmental benefits relevant to successful reentry into society, such as educational and job training programs.”¹³⁹

Jurisdictions, equipped with comprehensive collections of collateral consequences, should ensure they are structured to promote public safety, both by protecting the public from harmful individuals and by leaving room for people with convictions to lead law-abiding lives. The connection between the consequence and the reduction of the risk has often been based not on evidence, but, rather, on intuition or assumptions based on perceived logic.¹⁴⁰

132. For example, in the Eastern District of New York, then-Judge John Gleason concluded that there was no available mechanism to help these worthy applicants. He expunged the conviction of one applicant and issued a certificate of rehabilitation to another. *Doe v. United States*, 110 F. Supp. 3d 448, 457–58 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016); *see also Doe v. United States*, 168 F. Supp. 3d 427, 429 (E.D.N.Y. 2016).

133. *See Chin, Making Padilla Practical*, *supra* note *, at 676.

134. *See Chin, The New Civil Death*, *supra* note *, at 1807–11.

135. *Id.* at 1831.

136. MODEL PENAL CODE: SENTENCING, *supra* note 11, § 6x.03.

137. ABA CRIMINAL JUSTICE STANDARD, *supra* note 10, Standard 19-2.6(a).

138. *Id.* Standard 19-2.6(e).

139. *Id.* Standard 19-2.6(f).

140. *See, e.g., Ira Mark Ellman & Tara Ellman, “Frightening and High”: The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 CONST. COMMENT. 495, 497, 499 (2015) (discussing *McKune v. Lile*, 536 U.S. 24, 34 (2002), which held that risk of recidivism is “frightening and high”; “the evidence for [Justice Kennedy’s influential] claim that offenders have high re-offense rates (and

Increasingly, however, risk can be measured and evaluated.¹⁴¹ A number of studies show that the risk of reoffending diminishes with time since criminal involvement.¹⁴² There is also evidence that a provisionally hired employee who clears a state-mandated criminal background check has a reduced likelihood of future arrest; that is, not imposing the collateral consequence has a positive public-safety effect.¹⁴³ In addition, a recent study suggests that the disqualifications imposed by statutes do not match up to the decisions that would be reached based on use of empirical data about criminal records and reoffending.¹⁴⁴ It may well be that individuals can get a fairer shake, and public safety can be better protected, if decision makers consider empirically reliable factors such as the time since criminal involvement and evidence of law-abiding behavior, rather than using categorical bars based on conviction of particular crimes.

IV. THE SPUR OF LITIGATION AND THE LEGISLATIVE RESPONSE

Legislatures and courts make the laws, not civic groups, no matter how distinguished that group may be. Nevertheless, the problems identified by the ABA, ALI and ULC have also been recognized by courts. Clearly the most important judicial decision was the Supreme Court's 2010 ruling in *Padilla v. Kentucky*, holding that counsel had an obligation to advise noncitizen clients about the possibility of deportation following a conviction.¹⁴⁵ More recently,

the effectiveness of counseling programs in reducing it) was just the unsupported assertion of someone without research expertise who made his living selling such counseling programs to prisons").

141. See generally John Monahan, *Risk Assessment in Sentencing*, in 4 REFORMING CRIMINAL JUSTICE, *supra* note *, at 77.

142. Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 328–29 (2009); Shawn D. Bushway, Paul Nieuwebeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 52 (2011); Megan C. Kurlychek, Shawn D. Bushway & Robert Brame, *Long-Term Crime Desistence and Recidivism Patterns—Evidence from the Essex County Convicted Felon Study*, 50 CRIMINOLOGY 71, 96 (2012).

143. Megan Denver, Garima Siwach & Shawn D. Bushway, *A New Look at the Employment and Recidivism Relationship Through the Lens of a Criminal Background Check*, 55 CRIMINOLOGY 174, 196 (2017); see also Megan Denver, *Evaluating the Impact of "Old" Criminal Conviction Decision Guidelines on Subsequent Employment and Arrest Outcomes*, 54 J. RES. CRIME & DELINQ. 379, 380 (2017).

144. Garima Siwach, Shawn D. Bushway & Megan Kurlychek, *Legal Mandates in Criminal Background Checks: An Evaluation of Disparate Impact in New York State*, 2–3 (June 14, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2986384 [<https://perma.cc/LPM8-L8DN>].

145. 559 U.S. 356, 374 (2010).

in *Packingham v. North Carolina*,¹⁴⁶ a decision invalidating a prohibition on sex offenders accessing the internet, the Court observed: “Of importance, the troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system is also not an issue before the Court.”¹⁴⁷

Padilla involved deportation, arguably a special case because of the seriousness of the consequence, and *Packingham* was dicta, an aside. Yet, since *Padilla* there has been a stream of lower court cases invalidating collateral consequences or their retroactive application. In addition, scholars of collateral consequences have hammered away at doctrines insulating collateral consequences from ordinary restraints on criminal law or constitutional review.

A. Due Process Notice

A number of cases bring collateral consequences into the due process notice regime surrounding plea bargains. Thus, collateral consequences are treated like prison or other traditional elements of the sentence rather than something completely distinct from the criminal case. For example, the Illinois Supreme Court held that defense counsel has a duty to advise a person pleading guilty that civil commitment may be a consequence.¹⁴⁸ The Michigan Supreme Court held that a person pleading guilty was entitled to rely on the fact that the offense did not require registration, and therefore registration could not retroactively be

146. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

147. *Id.* at 1737. In another notable recent decision, Justice Gorsuch was skeptical of the idea that civil sanctions should be systematically subject to more lenient constitutional review than criminal ones:

[I]f the severity of the consequences counts when deciding the standard of review, shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring in part and concurring in the judgment).

148. *People v. Hughes*, 2012 IL 112817, ¶ 60 (“Consequently, we hold that defense counsel has a minimal duty to advise a defendant who pleads guilty to a triggering offense subject to the provision of the Sexually Violent Persons Commitment Act that he will be evaluated for and may risk involuntary commitment after completing his prison term.”).

imposed upon him.¹⁴⁹ In another vein, the Fourth Circuit held that a North Carolina statutory prohibition on sex offender presence in places where children gather was unconstitutionally vague and overbroad.¹⁵⁰

B. *Ex Post Facto*

Another group of cases holds that sex offender restrictions were sufficiently punitive that they constitute *ex post facto* laws.¹⁵¹ As the Sixth Circuit recently stated:

SORA [Sex Offender Registration Act] brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.¹⁵²

C. *New Constitutional Arguments*

In addition to cases, there is also a body of legal scholarship trying to generate more cases, arguing that in various ways constitutional doctrine should scrutinize collateral consequences more closely.

1. Proportionality

One line of scholarly criticism of collateral consequences has argued that a more searching standard of review should apply to collateral consequences.¹⁵³

149. *People v. Temelkoski*, 905 N.W.2d 593, 594 (Mich. 2018) (“Because defendant pleaded guilty on the basis of the inducement provided in HYTA as effective in 1994 (i.e., before SORA’s effective date), was assigned to HYTA training by the trial judge, and successfully completed his HYTA training, retroactive application of SORA deprived defendant of the benefits under HYTA to which he was entitled and therefore violated his constitutional right to due process.”).

150. *Doe v. Cooper*, 842 F.3d 833, 838 (4th Cir. 2016). See generally Maurice Chammah, *Making the Case Against Banishing Sex Offenders*, THE MARSHALL PROJECT (Oct. 5, 2016), <https://www.themarshallproject.org/2016/10/05/making-the-case-against-banishing-sex-offenders#.Ua2JIXziP> [<https://perma.cc/8XED-78FZ>].

151. *Does v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017). See also *Commonwealth v. Muniz*, 164 A.3d 1189, 1222–23 (Pa. 2017) (finding statute *ex post facto* and citing cases from Alaska, Indiana, and Maryland), *cert. denied*, 138 S. Ct. 925 (2018).

152. *Snyder*, 834 F.3d at 705.

153. See Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 301 (2015).

Sandra Mayson has argued that collateral consequences should not be regarded as punishment, but instead as preventative risk regulation.¹⁵⁴ However, given the presumption of liberty and moral agency, the reasonableness of the regulations should be tested:

[R]eview would require the government to show, at the least, that the conviction classification was substantially related to an important government interest. The core benefit would be to strip CCs of the presumption of constitutionality and require the defending government to explain the need, in context, for classifying people for disparate treatment on the basis of past conviction alone. This approach would expose the tradeoffs between risk and liberty that CCs make and the judgments behind them, and provide some oversight. It would allow courts to both recognize CCs as an alarming form of risk regulation and also engage in case-by-case adjudication. It would function as a rough requirement of “proportionality” between the harm to be avoided and the burden imposed.¹⁵⁵

On this approach, broad bans, unlimited in time, would be likely to fail, while targeted, tailored restrictions would be likely to survive.¹⁵⁶

2. Civil Death

I have argued that the susceptibility of convicted persons to lifetime restriction of their rights amounts to a revival of the ancient punishment of civil death.¹⁵⁷ Civil death was understood to be a punishment historically.¹⁵⁸ As a result, all persons charged with and pleading guilty to a felony or misdemeanor must be informed by counsel and the court that their rights with respect to employment, public benefits, licensing, family relationships, and all other areas subject to legal regulation, perhaps including liberty itself, will always thereafter be contingent.¹⁵⁹

154. *Id.*

155. *Id.* at 359.

156. *Id.* at 359–60; see also Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 19–20 (2005).

157. See Chin, *The New Civil Death*, *supra* note *.

158. *Id.* at 1816–19.

159. *Id.* at 1826–30. This article has been considered by courts. See, e.g., *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (“Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the ‘civil death’ of discrimination by employers, landlords, and whoever else conducts a background check.” (quoting Chin, *The New Civil Death*, *supra* note *, at 1805)); *United States v. Brank*, 2018 WL 732704, at *2 (9th Cir. Feb. 6, 2018) (Reinhardt, J., concurring in part and dissenting in part) (“We must interpret criminal statutes (and

3. Grand Jury Consideration of Misdemeanors

I also argue in a recent paper¹⁶⁰ that what makes a crime “infamous” for purposes of the grand jury clause of the Fifth Amendment is the crime’s effect on reputation, as measured by such things as collateral consequences.¹⁶¹ Accordingly, if this argument is correct, stigmatizing misdemeanors charged in federal court, such as those involving drugs, sex offenses, or loss of civil rights, licenses, or permits, can only be prosecuted based on a grand jury indictment.

4. Attacking the Distinction between “Collateral Consequences” and Punishment

A number of scholars have begun to question the distinction between direct punishments and collateral consequences, calling into question the entire regime of special treatment for collateral consequences. Joshua Kaiser contends that the distinctions “have developed largely through circular logic, tautology, mis-citation of precedent, and bald assertion without any supporting facts or arguments,” and as a result, we have “formalistic definitional rules that are difficult to apply and nonsensical when compared with commonsense understandings of ‘direct’ and ‘punishment.’”¹⁶²

D. *The Legislative Response*

Subjection of new collateral consequences to *ex post facto* limitations, and even holding that a state or federal constitutional provision requires notice of

similar civil statutes, such as immigration laws) narrowly, because we recognize their especially weighty consequences for individuals’ lives. Our jurisprudence must take into account both the severity of criminal penalties themselves and the web of collateral consequences that attend a criminal conviction—the potential for loss of voting rights; restrictions on movement; difficulty in obtaining employment, apartment leases, and admission to professional organizations; and, in many cases, the possibility of deportation to a place that is not now and may never have been home—with all the anguish and hardship that attends the prospect of permanent separation from family, and the anxiety of not knowing at what moment this expulsion might occur.”) (citing Chin, *The New Civil Death*, *supra* note *, at 1799–1803).

160. Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911 (2018).

161. *Id.* at 1914–15.

162. Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between “Direct Punishment” and “Collateral Consequences”*, 59 HOW. L.J. 341, 343 (2016); *see also, e.g.*, Raff Donelson, *Cruel and Unusual What? Toward A Unified Definition of Punishment*, 9 WASH. U. JUR. REV. 1, 33 (2016); Zachary Hoskins, *Ex-Offender Restrictions*, 31 J. APPLIED PHIL. 33, 33 (2014); John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC’Y REV. 36, 39 (2018) (“While many [collateral consequences] are directly targeted at promoting public safety, many others have a tenuous connection to public safety and appear to be more punitive in nature than remedial.”).

collateral consequences, by no means completely resolves the problem. As important as those changes may be in individual cases, they are incremental with respect to the system as a whole and to the tens of millions of people validly subject to existing collateral consequences. Even constitutional limitations do not prevent imposition of collateral consequences once the limits have been satisfied.¹⁶³ Courts have no authority to rewrite or invalidate otherwise constitutional laws in the name of good policy.¹⁶⁴ Courts work at the margins, at best trimming collateral consequences to the extent that they are unconstitutional, or interpreting laws to avoid constitutional doubts.¹⁶⁵

Nevertheless, the court decisions represent an important signal in at least two dimensions. First, if some collateral consequences are brought into the criminal justice system—say, by requiring notice of deportation or of sex offender incarceration—it requires little additional time or effort to mention other important consequences. Many lawyers are likely to include warning and counseling as part of their practice even in the absence of a legal requirement, whether as a matter of good practice, for fear that the legal requirement may be coming, or both.¹⁶⁶

In addition, court decisions have the potential to signal that legislation is needed (just as legislation may signal to courts that problems worthy of attention to doctrine may exist). Legislatures seem to share the same concerns about collateral consequences as courts. Legislation mitigating collateral consequences is increasing in the states.¹⁶⁷ The Collateral Consequences Resource Center has issued two major reports on state laws dealing with restoration of rights. The center's 2016 report, covering 2013–2016, concluded that “[s]ince 2013, almost every state has taken at least some steps to chip away at the negative effects of a criminal record on an individual’s ability to earn a

163. See Chin, *The New Civil Death*, *supra* note *, at 1810–11.

164. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1949 (2016); *United States v. Rutherford*, 442 U.S. 544, 555 (1979) (“Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”).

165. See *People v. Temelkoski*, 905 N.W.2d 593, 594 (Mich. 2018); see also *Doe v. Cooper*, 842 F.3d 833, 838 (4th Cir. 2016); *Does v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 55 (2017); *Commonwealth v. Muniz*, 164 A.3d 1189, 1222 (Pa. 2017) (finding statute *ex post facto* and citing cases from Alaska, Indiana, and Maryland), *cert. denied*, 138 S. Ct. 925 (2018).

166. See Chin, *Making Padilla Practical*, *supra* note *, at 688–90; see also Jenerson, *supra* note 115, at 48 (“[C]ounsel bears a professional and ethical responsibility to advocate for the client during the adversarial process and investigate the impact of collateral consequences, inform the client and the court, and mitigate and/or avoid those consequences in plea bargaining and sentencing when possible”).

167. See Corda, *supra* note 52, at 20.

living, access housing, education and public benefits, and otherwise fully participate in civil society.”¹⁶⁸ The center’s 2017 report noted that “[t]he national trend toward expanding opportunities for restoration of rights and status after conviction . . . has accelerated in 2017.”¹⁶⁹

V. CONCLUSION

Collateral consequences have proliferated in state and federal law, creating a vast network of restrictions on people with convictions. For many people convicted of crime, the collateral consequences will present the greatest burden. For decades, the legal system largely ignored collateral consequences. For the most part, legislatures generated them on an ad hoc basis, courts treated them as outside the criminal justice system, and the organized bar paid them little attention. There is no reason to hope that creation of, imposition of, enforcement, of and relief from collateral consequences will become a considered and crafted feature of the legal system. If so, society will benefit from improved public safety, avoidance of unnecessary recidivism, and reintegration of people with convictions into the community.

If the United States is at a golden moment with respect to collateral consequences, where important participants in the legal system agree that reform is desirable, nevertheless we are just at the beginning of that moment. It will take years until collateral consequences are trimmed to those that are effective and necessary, relief is regularly available to the deserving, and those willing to work hard can move beyond their criminal records. For the first time in some time, however, those things seem like possibilities rather than fantasies.

168. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 16, at 1.

169. COLLATERAL CONSEQUENCES RES. CTR., SECOND CHANCE REFORMS IN 2017: ROUNDUP OF NEW EXPUNGEMENT AND RESTORATION LAWS 1 (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf> [<https://perma.cc/NPP6-U7NJ>]; see also Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361, 369 (2016).