2019

Incorporating Collateral Consequences into Criminal Procedure

Paul T. Crane
University of Richmond - School of Law, pcrane@richmond.edu

INCORPORATING COLLATERAL CONSEQUENCES INTO CRIMINAL PROCEDURE

Paul T. Crane[*]

A curious relationship currently exists between collateral consequences and criminal procedures. It is now widely accepted that collateral consequences are an integral component of the American criminal justice system. Such consequences shape the contours of many criminal cases, influencing what charges are brought by the government, the content of plea negotiations, the sentences imposed by trial judges, and the impact of criminal convictions on defendants. Yet, when it comes to the allocation of criminal procedures, collateral consequences continue to be treated as if they are external to the criminal justice process. Specifically, a conviction's collateral consequences, no matter how severe, are typically treated as irrelevant when determining whether a defendant is entitled to a particular procedural protection.

This Article examines that paradoxical relationship and, after identifying a previously overlooked reason for its existence, provides a framework for incorporating collateral consequences into criminal procedure. Heavily influenced by concerns of practicality and feasibility, the proposed methodology establishes a theoretically coherent path forward that requires only modest adjustments to existing doctrines. After setting forth the three-step framework, the Article applies its insights to the two most hallowed rights in our criminal justice system: the constitutional right to counsel and the constitutional right to a jury trial.

---

* Assistant Professor of Law, University of Richmond School of Law. For helpful comments and suggestions, I am grateful to Barbara Armacost, Sara Beale, Jeffrey Bellin, Josh Bowers, Jud Campbell, Hank Chambers, Erin Collins, Chris Cotropia, John Douglass, Jessica Erickson, Kimberly Ferzan, Brandon Garrett, Jim Gibson, Chiara Giorgetti, Russell Gold, Ben Grunwald, Rachel Harmon, Hayes Holderness, Eisha Jain, David Jaros, Joseph Kennedy, Corinna Lain, Nadia Nasser-Ghodsi, Lauren Ouziel, Michael Pollack, Jack Preis, Noah Sachs, Daniel Schaffa, Andy Spalding, Allison Tait, Kevin Walsh, Ronald Wright, and participants at the 2018 Mid-Atlantic Junior Faculty Forum, the 2018 Neighborhood Criminal Justice Roundtable at the University of Richmond School of Law, the New Scholar Workshop at the 2018 Southeastern Association of Law Schools Annual Conference, and the Young Legal Scholars Panel at the 2019 Federalist Society Annual Faculty Conference.

TABLE OF CONTENTS

I. INTRODUCTION

Collateral consequences of conviction have recently received extensive attention from the legal profession[1] and legal academy.[2] And rightly so. Collateral consequences—which include sanctions like removal from the United States,[3] sex offender registration,[4] firearm prohibitions,[5] and disqualifications from public benefits[6]—are frequently the most important result of a criminal conviction. Collateral consequences impact, often deeply, the lives of millions of criminal defendants each year.[7] Such collateral consequences also shape the contours of many criminal cases, influencing what charges are brought by the government, the content of plea negotiations between prosecutors and defense counsel, and sentences imposed by

1. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 359 (2010); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010); STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-1.1–1.2 (AM. BAR ASS'N 3d ed. 2004).

2. *See, e.g.*, Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 718–19 (2002); Gabriel J. Chin, *What Are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 155 (2012); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 624–25 (2006) [hereinafter Pinard, *An Integrated Perspective*]; Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214 (2010) [hereinafter Pinard, *Reflections and Perspectives*]; Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 672 (2008).

3. Chin, *supra* note 2.

4. Pinard, *Reflections and Perspectives*, *supra* note 2.

5. Chin, *supra* note 2, at 159–60.

6. *Id.* at 155.

7. Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty Plea Process*, 95 IOWA L. REV. 119, 126–128 (2009).

trial judges.[8] In short, collateral consequences are an integral component of the American criminal justice system.

But collateral consequences remain on the outside of the criminal justice process in one critical respect: a conviction's collateral consequences, no matter how severe, are typically treated as irrelevant when determining whether a defendant is entitled to a particular procedural protection. Several important procedural entitlements are allocated only to some criminal defendants. For example, only some criminal defendants receive the right to counsel, the right to a jury trial, the right to a preliminary hearing, the right to a grand jury, or the right to heightened levels of discovery.[9] And the determination of whether a defendant receives any one of these protections is based solely on a single sanction—imprisonment.[10] In other words, when it comes to deciding how to distribute procedural entitlements to criminal defendants, potential collateral consequences of conviction are rarely, if ever, considered. In this respect, collateral consequences continue to be treated as if they are external to the criminal justice process—an approach that not only blinks reality but also has the pernicious effect of depriving defendants facing severe sanctions from procedures designed to increase accuracy and fairness.

The persistence of this paradox—that collateral consequences are integral to the criminal justice system but are peripheral to the allocation of procedural entitlements—presents something of a puzzle. If collateral consequences have been widely recognized as critically important to those processed through the criminal justice system and to those processing the system, why do such consequences continue to remain unaccounted for when distributing procedural entitlements to criminal defendants? This question, and the relationship between collateral consequences and procedural entitlements more generally, has received sparingly little attention from the academy. While the impact collateral consequences have on criminal defendants post-conviction has received thorough scrutiny from scholars,[11] the potential impact of collateral consequences on the front-end of the criminal justice process—namely, how collateral

8. *See infra* Subpart III.B.

9. Many criminal defendants do not receive most or even any of these procedural protections. For more, see *infra* Part II.

10. Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 808 (2016).

11. *See, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154–55 (1999); Pinard, *An Integrated Perspective*, *supra* note 2; Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

consequences intersect with procedural entitlements—has been largely overlooked.[12]

This Article's first contribution is identifying a thus far underappreciated reason for why courts and legislatures have failed to incorporate collateral consequences into the allocation of criminal procedures: incorporating collateral consequences requires courts and legislatures to engage in difficult line-drawing decisions given the various incommensurability issues raised by collateral consequences, thereby discouraging them from undertaking the project in the first place.

More specifically, several significant conceptual and practical questions arise once one looks beyond imprisonment when deciding how to allocate procedural protections across defendants. For example, should all potential collateral consequences be considered, or only some? What about collateral consequences that are imposed by another sovereign—like federal collateral consequences that flow from a state conviction? What about collateral consequences that are ultimately imposed at the discretion of an administrative body—like ineligibility for certain public welfare benefits or other forms of financial assistance? What about collateral consequences that do not uniformly apply to all defendants—like immigration consequences that apply only to noncitizens? And what makes a potential collateral consequence, or constellation of consequences, sufficiently severe so as to warrant heightened procedural protections?

The few courts to have considered some of these important questions have struggled to produce coherent, let alone consistent, answers. Courts have not only reached conflicting results,[13] but those

12. To the extent there has been a discussion about collateral consequences and procedural rights, the focus has been on what advice defense counsel must provide their clients. *See, e.g.*, Chin & Holmes, *supra* note 2; Roberts, *supra* note 7, at 148–49; Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 678 (2011); Chin, *supra* note 2, at 156–58; Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 719–20 (2011). This scholarly focus on advice by defense counsel is unsurprising given the Supreme Court's decision in *Padilla v. Kentucky* (2010), which now requires counsel to advise defendants on potential immigration consequences prior to pleading guilty. *See* Padilla v. Kentucky, 559 U.S. 356, 359–60 (2010).

13. For example, a recent division of authority involves whether a defendant subject to removal from the United States upon conviction is constitutionally entitled to a jury trial. The District of Columbia Court of Appeals, for instance, recently became the first court to hold that a defendant facing deportation does have the right to demand a jury trial. *See* Bado v. United States, 186 A.3d 1243, 1246–47 (D.C. 2018). The New York Court of Appeals soon followed suit, also holding that a defendant facing deportation is entitled a jury trial under the Sixth Amendment. *See* People v. Suazo, 118 N.E.3d 168, 172 (N.Y. 2018). In reaching these conclusions, the D.C. and New York high courts diverged from courts like the Nevada Supreme Court, which held that defendants facing deportation upon conviction do not have a constitutional right to a jury trial. *See* Amezcua v. Eighth Judicial Dist. Court, 319 P.3d 602, 605 (Nev. 2014).

courts that arrive at the same conclusion often give competing rationales for their respective decisions.[14] And no court has sought to establish a comprehensive approach to incorporating collateral consequences, instead focusing on the specific consequence and particular procedure before them in a given case.

The academy also has largely eschewed the enterprise of incorporating collateral consequences into criminal procedure, and the few scholars and commentators to have examined the intersection of collateral consequences and criminal procedures have done so in fairly limited ways. Some scholars, for example, have focused on a single collateral consequence (immigration) and single procedural entitlement (right to counsel).[15] Others have argued for the universal

---

In the context of whether a defendant facing the threat of sex offender registration is entitled to a jury trial, all but one court to consider the issue has said "no." *See, e.g.*, Ivy v. United States, No. 5:08-CR-00021-TBR, 2010 WL 1257729, at *4 (W.D. Ky. Mar. 26, 2010); Rauch v. United States, No. 1:07-CV-0730 WMW, 2007 WL 2900181, at *3–4 (E.D. Cal. Sept. 28, 2007); Thomas v. United States, 942 A.2d 1180, 1186 (D.C. 2008); People v. Danthuluri, 923 N.Y.S.2d 814, 816 (N.Y. App. Term 2011). *But see* Fushek v. State, 183 P.3d 536, 540, 543–44 (Ariz. 2008) (holding that a defendant facing sex offender registration is entitled to a jury trial under state constitution because that collateral consequence (1) "ar[o]se directly from statutory Arizona law"; (2) is "severe"; and (3) applies "uniformly to all persons convicted of a particular offense").

In the context of firearm prohibitions, courts have similarly rejected arguments for heightened procedures with regularity. *See, e.g.*, United States v. Chavez, 204 F.3d 1305, 1314 (11th Cir. 2000) ("We hold that the prohibition of firearm possession by persons convicted of a misdemeanor crime of domestic violence is not so serious as to entitle them to a jury trial for a presumptively petty offense."); United States v. Jardee, No. 4:09-mj-091, 2010 WL 565242, at *4 (D.N.D. Feb. 12, 2010); United States v. Combs, No. 8:05CR271, 2005 WL 3262983, at *3 (D. Neb. Dec. 1, 2005); *Amezcua*, 319 P.3d at 605. *But see* United States v. Smith, 151 F. Supp. 2d 1316, 1318 (N.D. Okla. 2001) (finding that a lifetime ban on firearm possession warrants affording the defendant a right to a jury trial).

14. *Compare Amezcua*, 319 P.3d at 605 (rejecting claim that the threat of deportation entitled a defendant to a jury trial because it arises out of federal law, not Nevada law), *with* Fretes-Zarate v. United States, 40 A.3d 374, 378–79 (D.C. 2012) (rejecting claim that the threat of deportation entitled defendant to a jury trial because that collateral penalty was not one "the trial judge had the authority to impose" and was a "hypothetical penalt[y] that could arise only in separate civil and administrative proceedings").

15. A thoughtful piece on this score is Alice Clapman's *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011). In that article, Clapman argues that "*Padilla* has implications beyond the scope of a defense attorney's obligations to his client, and specifically that it supports a re-examination of the now-classical rule that defendants who do not face incarceration have no right to counsel, at least to the extent of expanding that rule to include deportation." *Id.* at 617–18. Notably, Clapman's article only examines whether the right to counsel should be expanded for defendants facing potential immigration consequences. She does not explore other procedural entitlements or other collateral consequences.

expansion of the right to counsel given the increased prevalence of collateral consequences generally.[16] But none have charted a comprehensive course for incorporating collateral consequences into criminal procedure.

In a previous work, I argued that collateral consequences should be accounted for when allocating criminal procedural entitlements and gave several reasons why that should happen, but left for another day the difficult question of *how* to incorporate collateral consequences into criminal procedure.[17] This Article now tackles that important question and, in so doing, explains how courts and legislatures can incorporate collateral consequences into the allocation of criminal procedural entitlements.

This Article's core contribution is providing a framework for incorporating collateral consequences into criminal procedures—a framework that is theoretically coherent, practically feasible, and requires only modest adjustments to existing doctrines. My methodology also alleviates concerns about incommensurability and establishes a path forward that aligns the allocation of procedural entitlements with the fact that collateral consequences are often the most significant sanction of a criminal case. Put simply, the current distribution of procedural entitlements is based on an outdated model, where imprisonment is treated as the only significant sanction imposed upon conviction. That antiquated approach—and the harmful effects it creates—should be cast aside, and this Article provides a roadmap for doing so.

This Article proceeds as follows. Part II details the curious relationship that currently exists between collateral consequences and criminal procedures and explains why collateral consequences continue to remain unaccounted for in the distribution of procedural entitlements.

Other scholars have similarly focused solely on immigration when considering the potential expansion of procedural protections. *See, e.g.*, Orrie A. Levy, *Due Process and the Post-*Padilla *Landscape: Balancing the Severity of Deportation as a Collateral Consequence with a Court's Traditionally Narrow Obligation in Accepting a Plea*, 11 CARDOZO PUB. L. POL'Y & ETHICS J. 41 (2012) (examining whether, after *Padilla v. Kentucky*, trial courts should inform a defendant of potential immigration consequences before accepting a guilty plea).

16. *See, e.g.*, John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.–C.L. L. REV. 1, 34 (2013); Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 189 (2009). But these articles do not attempt to incorporate collateral consequences into criminal procedure; they instead seek to dramatically expand one procedural entitlement (the right to counsel) in part because of the rise of collateral consequences of conviction.

17. *See* Crane, *supra* note 10, at 829–31 (describing the salutary effects incorporation of collateral consequences would have on the criminal justice system). In fact, I explicitly left unanswered several key questions about incorporation that this Article now takes up. *See id.* at 832–33.

Part III, which represents the heart of the Article, sets forth a three-step framework for incorporating collateral consequences into criminal procedure. The first step is ascertaining the theory of allocation underlying the right at issue. Under my approach, each procedural entitlement is examined individually—it is a right-by-right inquiry. And the first step is identifying not only the line dividing those defendants who receive a particular right from those who do not but also the rationale for that dividing line. That rationale will then inform how collateral consequences can be incorporated in a way that is consistent within and across existing doctrines.

The second step is determining which collateral consequences are eligible for potentially triggering the right at issue. As explained in more detail below, not every collateral consequence should be considered for each entitlement. Rather, some collateral consequences should be excluded from consideration for a given right based on the allocation theory developed in step one. In order to facilitate this step, I categorize collateral consequences along three different dimensions: whether the consequence is automatically imposed upon conviction, whether it is imposed by the same sovereign prosecuting the offense, and whether it applies uniformly to all defendants charged with a particular offense.[18] By untangling the complexities of collateral consequences in this way, courts and legislatures will now have a handy guide for determining which collateral consequences should be considered and which should be excluded at step three.

The third and final step is deciding whether an eligible collateral consequence is sufficiently severe to trigger the procedural entitlement at issue. The main contribution here is the development of a rubric for assessing the relative severity of collateral consequences in terms of functional equivalent of prison time.[19] Because existing doctrines distribute procedural entitlements based on the metric of imprisonment, I offer a way for grading collateral consequences consistent with that metric, thereby easing concerns about incommensurability and slippery slopes.

After setting forth my proposed framework, I then apply its insights to the two most hallowed rights in our criminal justice system: the constitutional right to counsel (Part IV) and the constitutional right to a jury trial (Part V). These applications demonstrate how my methodology for incorporating collateral consequences can be applied in practice, providing courts and legislatures with a model for the incorporation of other rights that are distributed unevenly across defendants, such as the right to a preliminary hearing, to a grand jury, and to heightened discovery from the government.

18. *See infra* Subpart IV.B.
19. *See infra* Subpart IV.C.

II. THE CURRENT RELATIONSHIP BETWEEN COLLATERAL CONSEQUENCES AND CRIMINAL PROCEDURES

This Part details the curious relationship that currently exists between collateral consequences and procedural entitlements. Subpart A provides some basic background about collateral consequences—what they are and how they are triggered by criminal convictions. For ease of exposition, this Article focuses on four leading collateral consequences: immigration consequences, sex offender registration and notification requirements, firearm prohibitions, and disqualifications from public benefits.

Subpart B describes how collateral consequences are deeply enmeshed in the criminal justice system, including the ways in which they impact and influence defendants, defense attorneys, prosecutors, and judges. It also explains that, despite the degree to which collateral consequences are intertwined with the criminal justice system, they are not integrated into the determination of which procedural entitlements a defendant receives.

Subpart C then posits that a primary reason why courts and legislatures have thus far declined to consider collateral consequences when allocating procedural entitlements is because of the line-drawing difficulties and incommensurability issues raised by the prospect of incorporating collateral consequences into criminal procedure—the precise complications this Article seeks to ameliorate.

A. Understanding Collateral Consequences

The legal consequences that flow from a criminal conviction are typically divided into two groups: direct and collateral.[20] Direct consequences are those sanctions that fall "within the sentencing authority of the state [or federal] trial court."[21] They include the

20. *See* Roberts, *supra* note 2, at 678. Criminal convictions also have significant nonlegal consequences, including adverse effects on private employment prospects and various forms of social stigma. *See* John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1049–54 (2009). *See generally* Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103 (2013) (describing the growing concern over collateral consequences to criminal convictions); Pinard, *An Integrated Perspective*, *supra* note 2 at 624–25 n.1 (2006) (listing many sources that address this issue); Travis, *supra* note 11 (describing the various negative impacts of collateral consequences on multiple types of offenders). Although the term "collateral consequences" has occasionally been used to refer to nonlegal consequences, my use of the phrase is limited to a conviction's *legally*-imposed consequences. *See* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 1:8 (2016).

21. *Padilla*, 559 U.S. at 364. Commentators have similarly emphasized the role and authority of the sentencing court when attempting to delineate the realm of collateral consequences. *See* LOVE ET AL., *supra* note 20 ("[W]e endorse 'collateral consequences' as a generally serviceable (if not entirely precise) term to describe the range of legal penalties and disabilities that flow from a criminal conviction over and above the sentence imposed by the court.").

punishments most often associated with criminal convictions—sanctions such as imprisonment, fines, and probation.[22] A collateral consequence, by contrast, is any sanction or disability imposed by law as a result of a criminal conviction that is in addition to the conviction's direct consequences.[23] In other words, collateral consequences "are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court."[24]

While there are scores of various collateral consequences that might flow from a criminal conviction,[25] this Article, for ease of explication, focuses on four types of collateral consequences: (1) immigration consequences; (2) sanctions imposed on sex offenders; (3) firearm prohibitions; and (4) disqualification from various public benefits, such as public housing, food assistance, and other forms of financial aid. I focus on these four categories for several reasons. To begin, each of these consequences can have a significant impact on a defendant—and when imposed is often the most important result of a criminal conviction.[26] In addition, each of these consequences applies to a large number of individuals every year; these are not consequences suffered by a trivial few.[27] Finally, each of these consequences can flow from a conviction for a misdemeanor offense. A defendant charged and convicted of a misdemeanor receives fewer procedural entitlements than his or her felony counterpart,[28] and under existing law that procedural disparity persists even if the misdemeanor defendant faces one of these significant collateral consequences. Each of these four types of consequences will be discussed in turn.

1. Immigration Consequences

The laws governing deportation were largely overhauled in the 1990s.[29] Among other things, Congress "increased the number of

22. Roberts, *supra* note 2, at 680.

23. *See, e.g.*, Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510(d), 121 Stat. 2534, 2544 (2008); UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2(1)–(2) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

24. Pinard, *An Integrated Perspective*, *supra* note 2, at 634.

25. *See National Inventory of Collateral Consequences of Conviction*, JUST. CTR: THE COUNCIL OF ST. GOV'TS, https://niccc.csgjusticecenter.org/ (last visited Feb. 6, 2019).

26. *See, e.g.*, *Padilla*, 559 U.S. at 364 ("[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants . . . .").

27. Crane, *supra* note 10, at 785, 790–93.

28. *Id.* at 802.

29. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5050. Congress first made certain

crimes triggering deportation."[30] Most relevant here, Congress significantly expanded the number of misdemeanor offenses that render a noncitizen deportable.[31] For example, Congress made a conviction for any offense "relating to a controlled substance" (subject to one narrow exception involving minor marijuana possession) grounds for deportation.[32] Congress likewise made a wide swath of offenses involving domestic violence and child abuse, including misdemeanor offenses under state law, grounds for deportation.[33] As a result, a large number of "misdemeanors—a category of crimes where those convicted often serve no jail time—can lead to removal,"[34] meaning many "noncitizens are subject to the severe penalty of deportation even for convictions for minor crimes."[35]

While a criminal conviction for a qualifying offense renders the noncitizen defendant deportable, the process of removal—and whether the defendant is in fact removed—takes place outside the criminal justice system.[36] Removal proceedings, which are civil in nature, are initiated at the discretion of the Department of Homeland Security, and the removal proceeding is overseen by an immigration judge appointed by the Attorney General.[37] The immigration judge determines whether the defendant has violated a provision of the immigration laws and, if so, whether he or she should be ordered

---

criminal convictions a basis for deportation in 1917. *See Padilla*, 559 U.S. at 361 (describing the enactment of The Immigration Act of 1917).

30. *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1444 n.93 (2005); *see also* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722–25 (2009) (exemplifying specific examples of crimes that result in deportation).

31. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1758–63 (2012); Clapman, *supra* note 15, at 591; Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 560–61 (2013). Congress also eliminated most statutory forms of relief and abolished a sentencing court's ability to prevent deportation through a procedure known as a "judicial recommendation against deportation." *Padilla*, 559 U.S. at 361–64; *see also* Mikos, *supra* note 30 ("These amendments . . . eliminated most statutory means of relief.").

32. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (2012); *see also Padilla*, 559 U.S. at 368; Cade, *supra* note 28, at 1760.

33. *See* 8 U.S.C. § 1227(a)(2)(E)(i).

34. Lee, *supra* note 31, at 561.

35. LOVE ET AL., *supra* note 20, § 2:47 n.6. Indeed, many removals are in fact based on misdemeanor convictions. *See, e.g.*, Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen*, 101 GEO. L.J. 1, 14 (2012).

36. *Padilla*, 559 U.S. at 365 (explaining that "removal proceedings are civil in nature").

37. LOVE ET AL., *supra* note 20, §2:48 ("DHS is in charge of immigration benefits such as work visas and gaining citizenship, the enforcement of immigration laws, and border security among other matters.").

removed from the United States.[38] In so doing, the immigration judge may consider various forms of discretionary relief—but only if such relief is available under federal law.[39] Most noncitizens convicted of a criminal offense rendering them deportable are ineligible for such discretionary relief.[40] Accordingly, as the Supreme Court summarized in *Padilla v. Kentucky*,[41] "[u]nder contemporary law, if a non-citizen has committed a removable offense . . . his removal is practically inevitable."[42]

Immigration law is famously complex, and I do not mean to skirt some of those complexities with my brief discussion here.[43] Rather, for purposes of this Article, the bottom line when it comes to immigration consequences is straightforward: many minor offenses, including offenses where the defendant faces little or no jail time, can render a noncitizen deportable from the United States upon his or her conviction. And, under existing law, his or her eventual removal from the United States, through a civil process distinct from the criminal justice system, will often be "practically inevitable" after a conviction for a deportable offense.[44]

2. Sex Offender Registration and Notification Requirements

Another type of significant collateral consequence is that imposed on convicted sex offenders. All fifty states, the District of Columbia, and the federal government have laws requiring convicted sex offenders to "register with the police upon release from prison" and laws establishing community notification systems, such as ones through the Internet, about registered sex offenders.[45] And, critically

38. *See* 8 U.S.C. § 1229a(c)(1)(A) (2012) ("At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.").

39. *See* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 616 (2005).

40. *Padilla*, 559 U.S. at 364.

41. 559 U.S. 356 (2010).

42. *Id.* at 363–64.

43. For more in-depth treatment of the immigration consequences of criminal convictions, see the sources collected by Love and her coauthors. LOVE ET AL., *supra* note 20, §§ 2:47–2:59.

44. *Padilla*, 599 U.S. at 363–64.

45. Travis, *supra* note 11, at 22; *see* Kevin G. Buckler & Lawrence F. Travis III, *Reanalyzing the Prevalence and Social Context of Collateral Consequence Statutes*, 31 J. CRIM. JUST. 435, 443 (2003); Lori McPherson, *The Sex Offender Registration and Notification Act (SORNA) at 10 Years: History, Implementation, and the Future*, 64 DRAKE L. REV. 741, 747 n.16 (2016). Much like immigration, the 1990s was a defining period for sex offender registration and notification requirements. In 1986, only four states had laws requiring certain sex offenders to register; by 1998, all jurisdictions had such laws. Buckler & Travis, *supra* note 45, at 443; Travis, *supra* note 11, at 21–22; *see also* LOVE ET AL., *supra* note 20, §2:39 ("While registration and community notification laws, often known eponymously by the names of child victims sparking their enactment, originated

for purposes of this Article, the vast majority of jurisdictions include some misdemeanors in their lists of registerable offenses.[46] In addition, sex offender registration and notification requirements typically apply automatically upon conviction of a registerable offense, as defined by the pertinent jurisdiction.[47] Registration and notification periods range from fifteen years to life, depending on the jurisdiction and qualifying offense.[48]

The Sex Offender Registration and Notification Act ("SORNA") is the guiding federal legislation for sex offender registration and notification laws.[49] SORNA is not mandatory on the states, but there are substantial penalties for noncompliance.[50] SORNA sets minimum standards for sex offender registration and notification laws adopted by the states, and thus provides a representative example of the types of requirements imposed on convicted sex offenders across the country. For example, pursuant to SORNA, a sex offender must provide his or her name, Social Security number, license plate numbers, descriptions of his or her vehicles, and the address of his or her residence to the registering jurisdiction.[51] Offenders must also provide the name and address of any place he or she is employed or is enrolled as a student,[52] and he or she must provide information about

---

only in the early- to mid-1990s, they today affect hundreds of thousands of individuals nationwide.").

46. *See* King, *supra* note 16, at 28; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 298–99 (2011); *see also, e.g.*, N.Y. CORRECT. LAW § 168-a (McKinney 2011) (listing five misdemeanors as registerable offenses).

47. *See* Abril R. Bedarf, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 889 (1995).

48. *See, e.g.*, Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1087 (2012) ("Today, a tier I offender [the least serious offender] generally must register for a minimum of fifteen years or, often, twenty years. Additionally, many more crimes today have been assigned lifetime registration or recast to require lifetime registration."). Pursuant to SORNA, offenders are sorted into tiers based on the offense of conviction. Tier I offenders have a full registration period of fifteen years. Tier II and III offenders have a full registration period of twenty-five years and life, respectively. The registration periods can be reduced for Tier II and Tier III offenders. 42 U.S.C. § 16915(a) (2012).

49. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587. For a detailed explanation of the history of sex offender registration laws, see generally McPherson, *supra* note 45 (discussing the ramifications of the Sex Offender Registration and Notification Act).

50. 42 U.S.C. § 16912(a)–(b). States that have not implemented SORNA provisions within the specified timetable forfeit ten percent of the funds normally allocated to them under the Omnibus Crime Control and Safe Streets Act of 1968. However, noncompliance is excused if the state acted in good faith to implement the program. 42 U.S.C. § 16925(a) ("[A] jurisdiction that fails . . . to substantially implement this subchapter shall not receive ten percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction . . . .").

51. *Id.* § 16914(a).

52. *Id.*

any travel outside of the United States.[53] Offenders must also regularly update this information if any changes occur,[54] and he or she must also appear in person for a new photograph and to verify information every three months to one year, depending on their classification status.[55]

As for the "notification" aspect of sex offender laws, much of the information collected during the registration process is made publicly available via the Internet.[56] For example, a website run by the federal government allows users to enter a zip code or geographical region and obtain "relevant information," which includes the offender's name, addresses of his or her residence and employment, a physical description, offenses, and a photograph.[57] Each state has its own similar website and notification methods, containing similar and sometimes more detailed information about registered sex offenders.[58]

Conviction for a registerable sex offense also triggers related consequences involving residential restrictions, such as prohibitions on living within a certain distance of a school or any place where children may congregate, and restrictions on potential employment.[59] "[S]everal dozen states," moreover, "have started using global

53. *Information Required for Notice of International Travel*, OFF. OF SEX OFFENDER, SENT'G, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, https://smart.gov/international_travel.htm (last visited Feb. 6, 2019); *see* LOVE ET AL., *supra* note 20, § 2:39 ("Registrants must provide authorities with a considerable of amount of information. . . .").

54. 42 U.S.C. § 16913(c) (2012) (requiring a registrant to update their information within three days of a change of name, address, employment, or student status, and requires the person to appear in at least one of the jurisdictions).

55. *Id.* § 16916. The periods are as follows: every year for Tier I offenders, six months for Tier II offenders, and every three months for Tier III offenders. SORNA also requires states to implement a criminal penalty for offenders who fail to comply with the registration requirements. 42 U.S.C. § 16913(e). In addition, an offender who "knowingly fails to register or update a registration as required" can be charged with a federal offense that authorizes up to ten years of imprisonment. 18 U.S.C. § 2250(a)(3) (2012).

56. *See* 34 U.S.C. § 20921 (2012) (requiring the attorney general to maintain a national database of all sex offenders); National Sex Offender Search, NSOPW, https://www.nsopw.gov/en/search/ (last visited Feb. 6, 2019).

57. *See* National Sex Offender Search, *supra* note 56.

58. *See, e.g.*, Pennsylvania Sex Offender Search, MEGAN'S L. WEBSITE, https://www.pameganslaw.state.pa.us/ (last visited Feb. 6, 2019) (allowing users to search for registered sex offenders in Pennsylvania and providing their name, address, height, weight, race, birth year, identifying marks, and offense committed).

59. LOVE ET AL., *supra* note 20, § 2:43; *see also* Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 6–7, 13–14 (2006) (noting that at least eighteen states restrict registered sex offenders from living within a certain distance of schools, usually between 500 and 2,000 feet).

positioning satellite (GPS) or other tracking technology to monitor sex offenders after their release from confinement."[60]

In sum, a defendant convicted of a qualifying sex offense, including a qualifying misdemeanor offense, will automatically upon conviction be subjected to a suite of significant collateral consequences involving registration requirements, community notification, residential and employment restrictions, and potential government monitoring by GPS.

3. Firearm Prohibitions

Congress first forbade the possession of firearms by certain criminal offenders in 1938,[61] and eventually prohibited all felons from possessing a firearm in 1968.[62] It did not limit the ability of misdemeanants to possess firearms, however, until 1996.[63] Congress made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to purchase or possess a firearm that has travelled in interstate commerce.[64] In addition to the federal ban, fifteen states and the District of Columbia currently prohibit the possession of firearms by persons convicted of misdemeanor domestic violence offenses.[65] Firearm prohibitions

60. LOVE ET AL., *supra* note 20, § 2:44 ("While most laws are limited in their application to probation and parole periods, several subject sex offenders to lifetime electronic monitoring and require reimbursement of monitoring costs."); *see also* Carpenter & Beverlin, *supra* note 48, at 1098–99 (noting that GPS monitoring is a recent addition to registration schemes that allows law enforcement to track sex offenders after release from confinement).

61. *See* Federal Firearms Act, Pub. L. No. 75-785, 52 Stat. 1250 (1938); Conrad Kahn, *Challenging the Federal Prohibition on Gun Possession by Nonviolent Felons*, 55 S. TEX. L. REV. 113, 113–14 (2013).

62. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197; Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213; *see also* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?* 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009).

63. *See* Mikos, *supra* note 30, at 1457 n.153 (discussing Congress's desire to prevent gun possession by misdemeanor domestic violence offenders).

64. Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 658, 110 Stat. 3009, 3009-371 (1996) (codified at 18 U.S.C. § 922(g)(9)); *see also* 18 U.S.C. § 921(a)(33)(A)(i) (2012) (defining a "misdemeanor crime of domestic violence" to include state and federal misdemeanor offenses).

> Under federal law, the definition of a 'misdemeanor crime of domestic violence' is complex. A qualifying conviction must involve an offense that "is a misdemeanor under Federal, State, or Tribal law" and that "has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim."

LOVE ET AL., *supra* note 20, § 2:30 (quoting 18 U.S.C. § 921(a)(33)(A)).

65. *See Domestic Violence & Firearms*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, http://smartgunlaws.org/domestic-violence-firearms-policy-summary/

typically apply automatically and immediately upon conviction of a qualifying offense; there is no separate administrative process required to implement this collateral consequence of conviction.[66]

4. Disqualification from Public Benefits

Criminal convictions can preclude a defendant from accessing a wide range of public benefits. As Brian Murray has summarized, "[c]onvictions can lead to ineligibility for unemployment benefits, loss of retirement benefits for public officials, and disqualification from welfare, cash assistance, and medical assistance. They also can result in forcible eviction from public housing, and the inability to live with someone, related or unrelated, who is seeking child custody."[67] These consequences can be imposed under state or federal law, and many can be triggered by a misdemeanor conviction.[68]

For example, with respect to public housing benefits, the landlord or relevant public housing agency can terminate a person's lease for

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the immediate vicinity of the premises, or any drug-related criminal activity on or near such premises, engaged in by a tenant of any unit, any member of the tenant's household, or any guest or other person under the tenant's control.[69]

(last visited Feb. 6, 2019). Several states have enacted bans where a misdemeanor offense triggers a period of prohibition on firearm possession. *See, e.g.*, MINN. STAT. ANN. § 624.713 (West 2016) (prohibition for three years in cases of crimes of violence or where a person has been convicted at the "gross misdemeanor level"); N.Y. PENAL LAW § 265.02(5) (McKinney 2013) (prohibition, for five years, on possessing a firearm outside the home or place of business after conviction of a class A misdemeanor).

66. AM. BAR ASS'N, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 6–7 (2018), https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf.

67. Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1153–54 (2015); *see also* LOVE ET AL., *supra* note 20, §2:18 ("Conviction can lead to loss of welfare benefits under both state and federal law. The most common programs affected by conviction are the federally funded but state-administered Temporary Assistance to Needy Families (TANF) and the Supplemental Nutrition Assistance Program (SNAP). TANF provides temporary financial assistance to pregnant women and to families with children. TANF funds can assist recipients in paying for housing, food, and utilities. SNAP, also known as the food stamp program, provides subsidies to low-income individuals and families to purchase food.").

68. *See, e.g.*, 55 PA. CODE § 1109.92(c)(1) (2015) (providing that persons convicted of a first-degree felony forfeit their right to public medical benefits for any period of incarceration).

69. 42 U.S.C. § 1437f(d)(1)(B)(iii) (2012). For the purposes of this Section, drug-related criminal activity refers to "the illegal manufacture, sale,

With respect to medical assistance (e.g., Medicare), a person can be denied access to medical benefit programs for any "criminal offense consisting of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" or for any "criminal offense consisting of a misdemeanor relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance."[70]

The loss of such public benefits does not typically apply automatically after a pertinent criminal conviction, but rather depends on the implementation and discretion of some public administrative body—such as a public housing authority or relevant health care agency.[71]

B. The Curious Relationship Between Collateral Consequences and Criminal Procedural Entitlements

1. The Relevance of Collateral Consequences to Criminal Justice

Collateral consequences are an integral part of the American criminal justice system. As explained above, criminal convictions can trigger numerous and significant collateral consequences. But that is just the tip of the iceberg when it comes to the impact collateral consequences have on the criminal justice system. Collateral consequences affect many parties to the criminal justice process—defendants most of all, but also defense attorneys, prosecutors, and judges. Collateral consequences also influence many aspects of the criminal justice process, including charging decisions, plea bargaining, and sentencing.

---

distribution, use, or possession with intent to manufacture, sell, distribute, or use a controlled substance." 42 U.S.C. § 1437f(f)(5).

70. 42 U.S.C. §§ 1320a-7(a)(4), (b)(1) (2012).

71. *See, e.g.*, LOVE ET AL., *supra* note 20, §§ 2:17–2:18. A similar set of collateral consequences relate to occupational and professional licenses. A panoply of state and federal laws prohibits persons with certain qualifying convictions, including convictions for some misdemeanor offenses, from being employed in a wide variety of fields—everything from barbers to bank tellers. Similarly,

> [v]arious occupations with [state] licensing boards are given broad discretion to refuse licenses to an applicant with a felony or misdemeanor conviction. These same boards are often required by law to consider convictions and sometimes are prohibited from issuing a license to individuals with certain convictions, irrespective of that individual's rehabilitation post-conviction or the underlying facts in the case.

Murray, *supra* note 67, at 1150–51 (citations omitted). Some of the prohibitions are mandatory; some are discretionary. But the bottom line is the same: a conviction, including conviction for a misdemeanor offense, can result in the defendant being prohibited from his or her occupational field.

With respect to defendants, collateral consequences are typically the most important result of a criminal conviction.[72] This is because collateral consequences of conviction "are frequently more punitive and long-lasting than court-imposed sanctions like a prison term or fine."[73] And this will be true for most defendants processed through the criminal justice system: "[F]or most people convicted of crimes, collateral consequences will generate the most significant effects."[74] This reality—that collateral consequences are usually the most important part of any criminal conviction—has a ripple effect on nearly every other corner of the criminal justice process.

For example, as a wide and still burgeoning literature recognizes, a primary role and responsibility of a defense attorney is to advise his or her client about collateral consequences and assist that client in navigating such consequences.[75] "[C]ompetent defense lawyers must now be informed about the range of collateral consequences potentially affecting their clients, be prepared to bargain with the prosecutor about them, seek to shape the disposition of the case around them, and advise the client about how to mitigate them after judgment."[76] Indeed, "[c]onsideration of the full range of [collateral]

72. *See* Chin, *supra* note 2, at 152, 154 ("[C]ollateral consequences, not fine or imprisonment, are the most significant consequences in criminal cases."); *see also* Chin & Holmes, *supra* note 2, at 700 ("The real work of the conviction is performed by the collateral consequences."); Robert M. A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS U. PUB. L. REV. 129, 132 (2011) ("The civil consequences of a criminal conviction are often far greater than any consequence imposed by a judge at sentencing.").

73. LOVE ET AL., *supra* note 20, § 1:2; Chin & Holmes, *supra* note 2, at 699–700 (observing that, in most criminal cases, "[t]he collateral consequences are a far more meaningful result of such a conviction" and that "traditional sanctions such as fine or imprisonment are comparatively insignificant"); Crane, *supra* note 10, at 779 ("Although incarceration terms for low-level convictions typically top out at a couple of months—and rarely more than a few years—several key collateral consequences last for decades or even life.").

74. Chin, *supra* note 2, at 154.

75. *See, e.g.*, McGregor Smyth, *Holistic Is Not A Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 497 (2005) [hereinafter Smyth, *Not a Bad Word*] (explaining that defense attorneys are required to inform their clients about the effects of "hidden sanctions" and collateral consequences before accepting a guilty plea); *see also* Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1072–76, 1078, 1080 (2004) (arguing that the "holistic approach" to defense representation has overlooked collateral consequences and it must incorporate collateral consequences in order to truly be effective); McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in a Post-*Padilla *World . . . Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 141–42, 144 (2011) [hereinafter Smyth, *"Collateral" No More*] (noting that the Supreme Court has recognized the importance of defense counsel informing their clients of potential collateral consequences when deciding on accepting a plea).

76. LOVE ET AL., *supra* note 20, § 1:15; *see, e.g.*, Chin, *supra* note 14, at 689 ("The only stable principle is that counsel must strive to advise about all

consequences for clients and their families should be a critical part of defense inquiry and strategy at *every stage of representation*, from the first client meeting to sentencing."[77]

Collateral consequences also have a significant influence on prosecutors, particularly in relatively low-level cases (that is, cases involving misdemeanors and low-grade felonies). In some such cases prosecutors will charge particular offenses with the specific and primary aim of imposing a collateral consequence that is triggered by that offense.[78] In other cases, prosecutors will charge particular offenses (or decline to charge particular offenses) in order to avoid triggering specific collateral consequences they believe would be an unjust or unnecessary sanction.[79] But the bottom line in both contexts is the same: prosecutors often consider collateral consequences when deciding what charges, if any, to file in a particular case.

Collateral consequences likewise influence plea bargaining between prosecutors and defense counsel.[80] Professional standards of

important and applicable collateral consequences. The advice must then be both comprehensive and specific; it must focus on the important consequences without failing to warn about all of them—it must simultaneously be thick and thin.").

77. Smyth, *"Collateral" No More*, *supra* note 75, at 156 (emphasis added).

78. *See generally* Crane, *supra* note 10, at 778–79 (explaining that attaching collateral consequences to misdemeanor offenses provide prosecutors with incentives to charge "borderline" crimes as misdemeanors rather than felonies); *see also* Chin & Holmes, *supra* note 2, at 699 ("[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process."); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REv. 1126, 1187 (2013) (discussing how "immigration consequences are [often] an express prosecutorial goal of the conviction" in Maricopa County, Arizona).

79. Academic literature is full of such anecdotes and hypotheticals. *See, e.g.*, Catherine A. Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, 30 N.Y.U. REV. L. & SOC. CHANGE 621, 622 (2006) (arguing that prosecutors must consider the impact of collateral consequences such as "Civil Asset Forfeiture Programs," and only pursue them when it would ensure justice is achieved); Smyth, *Not a Bad Word*, *supra* note 75, at 494–96 (showing that when individuals charged with minor crimes would be subject to disproportionately harsh collateral consequences, prosecutors have allowed pleas for lesser offenses); *see also* LOVE ET AL., *supra* note 20, §§ 8:3, 8:7. These types of charging decisions are especially pronounced in discussions involving deportation. *See, e.g.*, Lee, *supra* note 31, at 579 (noting instances when prosecutors have been willing to charge crimes as misdemeanors instead of felonies when the collateral consequences of the felony could result in the defendant being deported).

80. *See* LOVE ET AL., *supra* note 20, § 8:6 ("Integrating collateral consequences into plea bargaining is consistent with constitutional, ethical, and professional standards."); *see also* Altman, *supra* note 35, at 23 ("There are various ways in which the prosecution and defense may shape a plea agreement to achieve one or more of these immigration-related goals.").

conduct for both prosecutors[81] and defense attorneys[82] recommend that collateral consequences be considered when negotiating and shaping plea bargains. And the reasoning underneath such ethical standards is obvious: "Without considering collateral consequences, lawyers cannot effectively advise their clients about the risks and benefits of pleading guilty, and cannot effectively negotiate the terms of guilty pleas."[83] Because "collateral consequences in many instances are what is really at stake" in a criminal case, it should come as no surprise that potential collateral consequences are often a—if not *the*—focal point of negotiations over a criminal case's disposition.[84]

In the context of sentencing, collateral consequences may also be considered by judges and can influence the ultimate sentence they impose on the defendant. Indeed, considering collateral consequences "at sentencing is consistent with the idea—expressed not only in sentencing theory but also in many jurisdictions' statutory directives—that sentences must be proportionate to the offense and consistent with general fairness principles."[85] Accordingly, various standards and codes of conduct, such as the American Bar Association's ("ABA") Criminal Justice Standards, direct courts to consider "applicable collateral sanctions in determining an offender's overall sentence."[86] And many courts have explicitly reached the same conclusion. The United States Court of Appeals for the Second Circuit, for example, has held that district judges must consider collateral consequences during sentencing, observing that it "is difficult to see how a court can properly calibrate a 'just punishment' [one of the sentencing factors under 18 U.S.C. §3553(a)[87]] if it does not consider the collateral effects of a particular sentence."[88]

---

81. LOVE ET AL., *supra* note 20, § 8:7 ("Consideration of collateral consequences is recommended in professional standards for prosecutors.").

82. *Id.* § 8:6 ("A variety of professional standards recommend that defense counsel bargain about collateral consequences that are significant to a client's interests, since plea discussions may be a criminal defendant's first and only opportunity to avoid collateral consequences.").

83. Chin & Holmes, *supra* note 2, at 736.

84. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT, Prefatory Note at 4 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

85. LOVE ET AL., *supra* note 20, § 8:19.

86. STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSON § 19-2.4(a) (AM. BAR ASS'N, 3d ed. 2004).

87. 18 U.S.C. § 3553(a) (2012).

88. United States v. Stewart, 590 F.3d 93, 141 (2d Cir. 2009). *But see* United States v. Morgan, 635 F. App'x. 423, 446 (10th Cir. 2015) (identifying circuit split on whether federal district courts should consider collateral consequences when sentencing under 18 U.S.C. § 3553(a)).

For one prominent example of a district judge imposing a sentence deeply influenced by the collateral consequences a defendant faced, see United States v. Nesbeth, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016) ("Chevelle Nesbeth was convicted by a jury of importation of cocaine and possession of cocaine with intent

In sum, collateral consequences are inextricably intertwined with most aspects of the criminal justice system. They can, and often do, substantially impact defendants, defense attorneys, prosecutors, and judges. And because collateral consequences are such an important part of many criminal cases, they can, and often do, significantly affect charging decisions, plea negotiations, and a case's ultimate disposition.

2. The Current Irrelevance of Collateral Consequences to Criminal Procedure

While collateral consequences may be integral to many aspects of the criminal justice process, one place they have not been integrated is the distribution of criminal procedural entitlements. In fact, given how enmeshed collateral consequences are in the criminal justice system, they play a surprisingly small role in the allocation of procedural entitlements to criminal defendants.

To begin, it is important to recognize that not all criminal defendants receive the same fleet of procedural protections when facing criminal prosecution.[89] Indeed, the vast majority of criminal defendants receive something less than a jurisdiction's most protective bundle of procedural rights.[90] For example, only some defendants receive the right to counsel,[91] only some defendants have a right to a preliminary hearing or grand jury,[92] only some defendants

---

to distribute. Her advisory guidelines sentencing range was 33-41 months. Nonetheless, I rendered a non-incarceratory sentence today in part because of a number of statutory and regulatory collateral consequences she will face as a convicted felon. I have incorporated those consequences in the balancing of the 18 U.S.C. § 3553(a) factors in imposing a one-year probationary sentence.").

89. *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.8(c) (4th ed. 2015) ("Every jurisdiction provides for some procedural differences based upon a distinction between major and minor crimes."); *see also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317 (2012). Some procedural entitlements do apply uniformly. For example, in all cases the government must establish each element of an offense beyond a reasonable doubt. *See* In re Winship, 397 U.S. 358, 361 (1970). And several trial rights, such as those guaranteed by the Confrontation Clause, apply to all criminal prosecutions, including misdemeanors. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 538 (2009).

90. *See* Natapoff, *supra* note 89, at 1350 ("If the United States Supreme Court can be said to have a misdemeanor theory, it is that lesser punishments should trigger reduced procedural entitlements."). Misdemeanors account for over eighty percent of all criminal cases, with recent estimates placing the total number of misdemeanor cases at about ten million per year. *Id.* at 1320. In other words, if the criminal justice system were a car wash, relatively few defendants would be afforded the "gold package" of procedural entitlements.

91. *Id.* at 1340.

92. *See* Gabriel J. Chin & John Ormonde, *Infamous Misdemeanors and the Grand Jury Clause*, 102 MINN. L. REV. 1911, 1911–12 (2018).

are entitled to the most fulsome degree of discovery,[93] and only some defendants may demand a jury trial.[94]

Given this reality, how procedural protections are allocated—and to whom they are in fact distributed—is critically important. The main dividing line when it comes to allocating procedural entitlements is whether the defendant is charged with a felony or a misdemeanor offense.[95] Defendants charged with a felony, which is an offense that authorizes more than one-year imprisonment upon conviction,[96] receive a jurisdiction's most protective bundle of entitlements. Defendants charged with a misdemeanor, which is an offense that authorizes one year or less imprisonment upon conviction,[97] receive a less protective bundle of procedural protections. In other words, the determination of whether a defendant receives the "gold package" of procedural protections turns on a single metric: the potential term of imprisonment that defendant faces.

As I have detailed elsewhere, "an offense's collateral consequences, no matter how severe, are generally deemed irrelevant for determining what procedural safeguards apply. In other words, a misdemeanor that threatens a severe collateral consequence is classified the same as any other misdemeanor in a jurisdiction's criminal justice system."[98] Accordingly, depending on the jurisdiction, many misdemeanor defendants—including misdemeanor defendants facing severe collateral consequences like deportation or sex offender registration—will not be entitled to our legal system's most hallowed procedural protections, like the right to counsel and the right to demand a jury trial.[99]

The current relationship between collateral consequences and criminal procedures therefore presents something of a puzzle. Although collateral consequences are increasingly recognized as

93. Crane, *supra* note 10, at 780.

94. *Id.*

95. *See* discussion *infra* Subpart IV.A. A defendant's right to counsel and right to demand a jury trial are a little more complicated than the felony-misdemeanor divide that governs nearly every other procedural entitlement that is not uniformly distributed across defendants. But the main point for now is this: all felony defendants receive the right to counsel and right to a jury trial, while only some misdemeanor defendants receive the right to counsel and the right to a jury trial.

96. Crane, *supra* note 10, at 786.

97. *Id.*

98. *Id.* at 796; *see* Clapman, *supra* note 15, at 602–03 (explaining that a defendant's right to counsel is not affected by the possibility of a severe collateral consequence upon conviction); *see also* Crane, *supra* note 10, at 800–11 (detailing how the right to a grand jury, the right to a preliminary hearing, the right to discovery, and the right to a jury trial are not affected by the possibility of a severe collateral consequence upon conviction).

99. *See* discussion *infra* Subparts IV.A., V.A.

"central" to the criminal justice process,[100] they are effectively ignored when it comes to the allocation of criminal procedural entitlements across defendants. The next Subpart analyzes some of the reasons why this curious state of affairs continues to persist.

C. Cracks, But Not Breaks, in the Wall Separating Collateral Consequences and Criminal Procedure

This Subpart analyzes why collateral consequences, despite playing a central role in the criminal justice system, are not accounted for when allocating procedural entitlements. In particular, it identifies a key and oft-overlooked reason for this curious state of affairs: the prospect of incorporating collateral consequences into criminal procedure presents conceptually tricky and doctrinally difficult line-drawing issues, thereby discouraging courts and legislatures from departing from the prison-centric status quo.

Before diving further into that reason, however, a few other possibilities need to be addressed. One possible explanation—that collateral consequences are not that important—can be quickly dismissed. As discussed above, collateral consequences are now a critical part of the criminal justice process. Another possibility—that criminal justice actors, including courts and legislatures, are not yet aware of the significance of collateral consequences in the criminal justice system—is similarly unavailing. While that lack of awareness may have been true decades ago (if it was ever true at all), the increasingly important role of collateral consequences has been well documented by courts and commentators alike.[101]

Another possibility—that there is a "doctrinal wall" separating collateral consequences from criminal procedure rules—requires a little more attention. Indeed, I suspect that this explanation, that collateral consequences simply fall "outside" the procedural rules governing criminal cases, is the reason most criminal justice observers would suggest first for why collateral consequences are rarely considered when it comes to distributing procedural entitlements.[102]

To be sure, there are several criminal justice doctrines that have excluded collateral consequences from their scope. For example, courts have repeatedly held that collateral consequences are effectively outside the reach of the Constitution's Ex Post Facto

100. *See* Pinard, *An Integrated Perspective*, *supra* note 2, at 684 (2006) ("An integrated perspective . . . recognizes the centrality of collateral consequences to the criminal process. . . .").

101. *See* United States v. Nesbeth, 188 F. Supp. 3d 179, 180 (E.D.N.Y. 2016); *see also* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1197 (2016).

102. *See* Crane, *supra* note 10, at 778 n.2.

prohibitions[103] and the Eighth Amendment's Cruel and Unusual Punishment Clause,[104] on the grounds that collateral consequences are not "punishment" as required by those proscriptions.[105]

Moreover, and perhaps more importantly, the distinction between direct and collateral consequences first gained legal prominence in the Supreme Court's decision in *Brady v. United States*,[106] which considered a trial court's obligations when accepting a defendant's guilty plea.[107] In *Brady*, the Supreme Court established that, in order to comply with the Due Process Clause's voluntariness requirement, a trial court needs to ensure only that a defendant is aware of the "direct consequences" of conviction before entering a guilty plea.[108] Consequently, under the rule established in *Brady*, a trial court has no obligation to inform a defendant of a conviction's potential collateral consequences before it accepts the plea as valid.[109] And it is from *Brady* that a related and important doctrine began to flourish: when advising a client whether to accept a guilty plea, counsel need not inform that client about a conviction's potential collateral consequences.[110] (More on this doctrine in a moment.)

There is thus surely something to the claim that collateral consequences have not been integrated into the allocation of procedural entitlements because they are not the sort of sanctions other constitutional rules consider when determining the scope of their own protections. Indeed, I agree with that claim, at least as far as it goes. I think that is one of the reasons why collateral consequences are generally not considered when distributing procedural entitlements.

---

103. U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."); *Id.* § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law. . . .").

104. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

105. *See, e.g.*, Smith v. Doe, 538 U.S. 84, 105–06 (2003) (holding that sex offender registration scheme is "nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause"); *see also* LOVE ET AL., *supra* note 20, § 3:7 (collecting cases involving Ex Post Facto challenges); *id.* § 3:14 (collecting cases involving Cruel and Unusual Punishment challenges).

106. 397 U.S. 742 (1970).

107. *Id.*; *see also* Chin & Holmes, *supra* note 2, at 706, 726–30 (discussing Brady v. United States).

108. *Brady*, 397 U.S. at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

109. Chin & Holmes, *supra* note 2, at 726–30 (discussing trial court's duty under *Brady* to ensure that a guilty plea is voluntary).

110. *See* Padilla v. Kentucky, 559 U.S. 356, 365 & n.9 (2010) (collecting cases for the proposition that "collateral consequences are outside the scope of representation required by the Sixth Amendment" (citation omitted)). *See generally* Chin & Holmes, *supra* note 2 (discussing the collateral consequences rule); Roberts, *supra* note 7 (discussing the need to require a full disclosure of serious collateral consequences of guilty pleas).

What I seek to establish here, however, is that this explanation is not as persuasive, or comprehensive, as it might seem at first blush. To put it another way, the wall separating collateral consequences from procedural entitlements is not as high and not as impermeable as this explanation would suggest. While there may not (yet) be breaks in that metaphorical wall, there are certainly many significant cracks. In other words, there is in fact no strict separation between collateral consequences and procedural entitlements—and there never really has been.[111]

For example, in a long line of cases that began in the 1940s, the Supreme Court has held that a criminal defendant's appeal of his conviction is not rendered moot by the completion of his sentence (that is, his "punishment"), so long as he remains subject to potential collateral consequences from the challenged conviction.[112] And as the Supreme Court explained in *Sibron v. New York*[113] in 1968, a defendant appealing his conviction need not establish "the actual existence of specific collateral consequences"—rather, it will "in effect [be] presumed" that collateral consequences of conviction exist.[114] This presumption, the Court pointed out, reflects "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."[115] Accordingly, "a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction," a showing that rarely will be possible.[116] Since *Sibron*, courts have "proceeded to accept the most generalized and hypothetical of consequences as sufficient to avoid mootness in challenges to [one's] conviction" on appeal, even though his or her sentence has been completed.[117] In other words, the Court has long recognized that a defendant's procedural right to appeal his or her conviction is preserved against claims of mootness by the mere possibility of that conviction's inevitable collateral consequences.

Perhaps the most visible crack in the metaphorical wall dividing collateral consequences and procedural entitlements is the Supreme Court's landmark opinion in *Padilla* in 2010. Until *Padilla*, and as noted above, it was widely accepted that counsel need not advise a client about any potential collateral consequences of conviction before pleading guilty. That understanding was significantly disrupted by *Padilla*. In that case, the Supreme Court rejected the then-consensus

111. Chin & Holmes, *supra* note 2, at 699 ("The idea that collateral consequences are divorced from the criminal process has never really been true . . . .").

112. *See* Sibron v. New York, 392 U.S. 40, 53–58 (1968) (summarizing earlier decisions).

113. *Id.* at 40.

114. *Id.* at 55.

115. *Id.*

116. *Id.* at 57.

117. Spencer v. Kemna, 523 U.S. 1, 10 (1998).

view that "the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."[118] Emphasizing "the seriousness of deportation as a consequence of a criminal plea," the Court held that, under the Sixth Amendment, "counsel must inform her client whether his plea carries a risk of deportation."[119]

Critically, the Supreme Court's holding in *Padilla* was limited to immigration consequences.[120] Recognizing that the Supreme Court itself had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*,"[121] the Court concluded that "[w]hether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation."[122] The Court therefore left to the lower courts the question of whether counsel has a constitutional obligation to advise his or her client about other (nonimmigration) collateral consequences of conviction. Perhaps unsurprisingly, "since *Padilla* was decided there have been lower court rulings going both ways on the issue of whether its logic and reasoning extend counsel's advisory obligations beyond deportation to other consequences of conviction that are not part of the court-imposed sentence."[123] In other words, the Court's decision in *Padilla* added significant new cracks to the metaphorical wall, even if the wall was still left standing.

Finally, and most pertinently for purposes of this Article, the Supreme Court has nodded towards the potential relevance of collateral consequences in the context of a defendant's right to demand a jury trial under the Sixth Amendment. As will be explained in more detail in Part V, a defendant charged with a "petty" offense has no federal constitutional right to a jury trial.[124] The lodestar for determining whether an offense is petty is the potential term of imprisonment it authorizes.[125] An offense that threatens more than six months imprisonment is always considered nonpetty and automatically triggers a defendant's right to trial by jury.[126] Conversely, an offense that carries a maximum term of imprisonment of six months or less is "presumed" to be petty.[127] The presumption is

118. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (citations omitted).
119. *Id.* at 374.
120. *Id.*
121. *Id.* at 365.
122. *Id.*
123. LOVE ET AL., *supra* note 20, § 4:7 (collecting cases).
124. *See, e.g.*, Blanton v. City of N. Las Vegas, 489 U.S. 538, 541 (1989); Baldwin v. New York, 399 U.S. 66, 68 (1970).
125. *See Blanton*, 489 U.S. at 541–42.
126. *Id.* at 542.
127. *See id.* at 543. The Supreme Court has also clarified that the critical inquiry is whether any single offense authorizes a term of imprisonment in excess of six months. Lewis v. United States, 518 U.S. 322, 323–24 (1996).

rebutted, and the defendant has a right to a jury trial, "if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."[128]

The Supreme Court's reference to "additional statutory penalties" in *Blanton v. City of North Las Vegas*[129] suggests that at least some collateral consequences may be pertinent when determining whether a defendant has a federal constitutional right to a jury trial.[130] Nevertheless, courts have routinely deemed several significant collateral consequences irrelevant to the Sixth Amendment calculus.[131] Indeed, the leading criminal procedure treatise summarizes post-*Blanton* case law as follows: "Generally, in assessing whether an offense is petty or not, lower courts have agreed that only authorized statutory penalties are to be taken into account; collateral consequences do not count. Significant additional penalties, it seems, will not trigger a jury right."[132] In other words, although the Supreme Court has indicated that an offense's potential collateral consequences can theoretically trigger a defendant's right to a jury trial, that possibility has remained largely theoretical.

So why have courts declined to extend more broadly holdings like *Blanton* (jury trial) or *Padilla* (effective assistance of counsel) or *Sibron* (mootness), all of which recognize the relevance of collateral consequences to procedural entitlements? One important and underappreciated reason is that such extension would require courts to engage in difficult line-drawing decisions given the incommensurability issues raised by collateral consequences. Put another way, incorporating collateral consequences into procedural entitlements more broadly is complicated and potentially messy, and that reality alone is a significant impediment to lower courts expanding the cracks created by cases like *Blanton* and *Padilla* absent more forceful direction from the Supreme Court.

Whatever one might think about procedural regimes based solely on the punishment of imprisonment,[133] the use of a single metric lends itself to clear and easy-to-draw lines. If, for example, a particular procedural entitlement turns exclusively on whether a defendant faces more or less than one year of imprisonment upon conviction, it is conceptually and administratively easy to know whether that defendant is in fact entitled to the procedural right at

128. *Blanton*, 489 U.S. at 543.
129. *Id.* at 541.
130. *See* Crane, *supra* note 10, at 808–09.
131. *See id.* at 809–10.
132. 6 LAFAVE ET AL., *supra* note 89, § 22.1(b).
133. For my own views critiquing such regimes, see Crane, *supra* note 10, *passim*.

issue. Collateral consequences, on the other hand, come in all shapes and sizes—and there are literally hundreds of them.[134]

There is no single metric to compare the relative severity of different collateral consequences to one another or to the sanction of imprisonment. Consider questions like the following: Is registration as a sex offender more or less severe than losing one's professional license? Is being precluded from possessing a firearm more or less severe than being disqualified from public housing or public food assistance? Is deportation the functional equivalent of six months imprisonment? Two years? Five years? Is lifetime registration as a sex offender, with all its attendant burdens, the functional equivalent of three months imprisonment? Three years? You get the point. There is no smooth and obvious "exchange rate" across all these various currencies.

In addition to the incommensurability issues raised by incorporating collateral consequences, collateral consequences also vary across a number of different dimensions that do not exist when it comes to imprisonment. For example, some collateral consequences are imposed by sovereigns other than the prosecuting jurisdiction. Should those be factored in? Some collateral consequences apply only to some defendants, depending on their status or other personal characteristics. Should those be considered? These complexities merely add to judicial concerns about incommensurability and slippery slopes.[135]

In short, there are cracks in the doctrinal walls separating collateral consequences and criminal procedures, but courts (especially lower courts) are understandably and predictably hesitant to widen those cracks given the incommensurability issues and line-drawing problems associated with incorporating collateral consequences. The metric of imprisonment is simple and clean;

134. *See, e.g.*, Chin & Holmes, *supra* note 2, at 699–700 (listing examples of collateral consequences such as deportation, voter disenfranchisement, and loss of federal benefits).

135. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 390 (2010) (Scalia, J., dissenting) (claiming that the right recognized by the majority in *Padilla* "has no logical stopping point"); People v. Suazo, 118 N.E.3d 168, 185–87 (N.Y. 2018) (Garcia, J., dissenting) (lamenting that the majority's decision to extend the constitutional right to a jury trial to a defendant facing deportation "will prove unworkable" and "create a lack of predictability" going forward) (internal quotation marks omitted). Judge Fisher of the District of Columbia Court of Appeals explicitly expressed these concerns during an oral argument in a recent case about whether a defendant has the right to a jury trial because a conviction would subject him to deportation. *See* Oral Argument at 29:03–33:25, Bado v. United States, 186 A.3d 1243 (D.C. 2018), https://www.youtube.com/watch?v=90tVZVSElzg (explicitly raising "slippery slope" concerns about recognizing a right to a jury trial for a defendant subject to deportation upon conviction and stating that such a holding would lead to "quite a crazy patchwork and a lot of work for people trying to decide whether jury trials should be granted").

collateral consequences are varied and messy. The metric of imprisonment lends itself to bright lines and clear rules; collateral consequences lend themselves to more complicated lines and a preference for standards. As a result, we now find ourselves in the otherwise curious place of simultaneously recognizing that the imposition of collateral consequences on defendants is a fundamental goal and tremendously important part of the criminal justice process but declining to recognize the relevance of collateral consequences when allocating procedural entitlements to defendants.

The remainder of this Article seeks to ease these line-drawing concerns and proposes a path forward for incorporating collateral consequences into procedural entitlements, a path that has thus far eluded courts and commentators.[136] Part III sets forth a general framework for incorporating collateral consequences—a framework that requires relatively minimal alterations to current doctrines and is eminently feasible. Parts IV and V then take the framework of Part II and apply it to two separate constitutional rights—the right to counsel and the right to demand a jury trial—demonstrating how the framework I articulate in Part III can (and should) work in practice.

III. A FRAMEWORK FOR INCORPORATING COLLATERAL CONSEQUENCES INTO CRIMINAL PROCEDURE

Subpart A lays out my proposed framework for incorporating collateral consequences into the allocation of procedural entitlements. Subpart B untangles collateral consequences and organizes them in a way that primes them to be incorporated into various procedural rights. Subpart C then analyzes how to consider the relative severity of various collateral consequences in a way that is consistent with existing doctrines.

A. The Path Forward

Before detailing my proposed approach for incorporating collateral consequences, a preliminary remark is in order. The specific framework I suggest is heavily influenced by concerns of practicality and feasibility. In particular, my proposal seeks to work *within* existing doctrine as much as possible. Legal change, and in particular judicially-managed legal change, tends to be incremental and hemmed in by precedent. My framework recognizes that reality when explaining how best to incorporate collateral consequences into current determinations about procedural allocations.

136. As noted earlier, commentators have previously tended either to focus simply on immigration, *see supra* note 15, or argue that a procedural entitlement, like the right to counsel, should be allocated universally to all defendants given the increased prevalence of collateral consequences, *see supra* note 16. This Article looks beyond immigration to other collateral consequences and identifies a more feasible path forward (doctrinally and budgetarily) than the calls for universal expansion of procedural entitlements.

In other words, for purposes of this Article, I do not argue that where the lines have been drawn for particular rights they should be altered.[137] For example, I do not claim that the line dividing those defendants who receive a right to a jury trial from those defendants who presumptively do not—six months potential imprisonment—should be changed in some way. I do not, for example, argue that the dividing line should be moved to three months potential imprisonment, or that all defendants should receive a right to a jury trial. Rather, I leave the lines of demarcation for each procedural entitlement where I find them and instead explain a path forward where collateral consequences are factored in given those existing dividing lines.[138]

With that out of the way, below is my proposed path forward. As an initial matter, each procedural entitlement needs to be viewed separately and treated individually. Each procedural right has its own set of dividing lines and its own set of rationales for why those lines are drawn where they are. Accordingly, the incorporation of collateral consequences must be on a right-by-right basis. That said, the methodology for incorporating collateral consequences is the same across all procedural entitlements. My approach consists of three steps:

1. Step One: Identifying the Theory for How the Procedural Right at Issue Is Allocated Across Defendants

First, courts should identify the dividing line for the particular right at issue and then ascertain the theory that underlies that dividing line. In other words, courts must theorize why some defendants receive the right and others do not. What is the line of demarcation representing and seeking to achieve? How does the right at issue address relative severity and, therefore, how is it allocated across defendants? The answer to these questions can and will vary

137. For one interesting example of scholars advocating for a new dividing line when it comes to the constitutional right to counsel, see 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, 2304 (2017) (urging courts to "abando[n]" the current "actual incarceration" standard for triggering the right to counsel under the Sixth Amendment and replacing it with a new line grounded in the right to meaningful access to courts under the Equal Protection Clause).

138. I also, for purposes of this Article, take it as a given that collateral consequences should be incorporated into determinations about how procedural entitlements are allocated. As I have argued elsewhere, doing so would honor the basic principle that serious penalties warrant serious procedures. *See* Crane, *supra* note 10, at 782. Incorporating collateral consequences would yield numerous benefits to the criminal justice system and its participants. *See id.* at 834–38. Moreover, and as discussed in Part I, collateral consequences are already enmeshed with many other aspects of the criminal justice system—incorporating them when it comes to allocating procedural entitlements would be more, not less, consistent with that reality.

depending on the entitlement at issue. Some rights, for example, will consider relative severity from the perspective of the defendant—is the defendant facing a consequence (e.g., imprisonment) of sufficient severity to trigger heightened procedural protections?[139] Other rights will consider relative severity from a different perspective, such as that of the legislature, asking whether the offense with which the defendant is charged is sufficiently serious from a societal standpoint to trigger heightened procedural protections.[140]

In addition, courts theorizing the dividing line for a given right must pay special attention to whether the dividing line is based on potential sanctions or guaranteed sanctions. Potential sanctions are those that may, but ultimately may not, come to fruition. Most, but not all, procedural rights are triggered by potential sanctions.[141] Guaranteed sanctions are, as one might imagine, sanctions that will in fact be imposed on the defendant upon conviction. Fewer procedural rights, but still some, are triggered by sanctions that will definitely be imposed if the defendant is convicted.[142]

When it comes to this potential-guaranteed axis, my framework adheres to the following analogy (the importance of which will become more apparent shortly): Collateral consequences that may, but may not, be imposed upon conviction—that is, collateral consequences where some modicum of discretion exists before imposition—are akin to potential imprisonment. Collateral consequences that are mandatorily imposed upon conviction are akin to actual imprisonment.

2. Step Two: Determining Which Collateral Consequences are Eligible to be Considered

After ascertaining the theoretical underpinnings for how a particular procedural entitlement is allocated across defendants, the next step is to decide which collateral consequences should be considered when deciding whether a collateral consequence triggers that entitlement. Not every collateral consequence will or should be eligible for such consideration. That would be unwieldy and, more importantly, would ignore the theory underlying the allocation of the right at issue.

Take the following example: If a procedural entitlement is only triggered by actual imprisonment (and therefore is not triggered by potential imprisonment), collateral consequences that are merely possible but not guaranteed should be excluded when deciding whether a defendant is entitled to that procedural protection. To consider collateral consequences that may not ever come to fruition would be inconsistent with how the line treats imprisonment, since

139. *See id.* at 831, 833–34.
140. *See id.* at 830–31.
141. *See* discussion *infra* Subparts II.B.2., IV.A.
142. *See* discussion *infra* Subparts II.B.2., IV.A.

potential imprisonment alone does not trigger the procedural protection. If, however, the entitlement can be triggered by potential imprisonment (regardless of whether any actual imprisonment is imposed), then collateral consequences that may not ultimately be imposed should also be considered.

Subpart III.B. goes into such eligibility considerations in more detail and identifies three characteristics of collateral consequences that will be relevant for determining which collateral consequences should be considered for incorporation under any particular right. For now, it is important to understand that the second step in my general framework is determining which collateral consequences are eligible for consideration. A collateral consequence's eligibility will depend on the theory underlying the allocation of the right at issue—and not every collateral consequence will be eligible for each entitlement. It is a consequence-by-consequence and right-by-right inquiry.

3. Step Three: Deciding Whether an Eligible Collateral Consequence is Sufficiently Severe to Entitle the Defendant to the Procedural Protection at Issue (a.k.a., Conducting the "Relative Severity" Analysis)

After concluding which collateral consequences are eligible for consideration for a particular entitlement, the third and final step is to determine whether any eligible collateral consequence is sufficiently severe to trigger the entitlement at issue. If, for example, a procedural entitlement is triggered by six months of potential imprisonment, the court should determine whether an eligible collateral consequence should be considered at least as severe as six months potential imprisonment. Or, if a procedural entitlement is triggered by one year of potential imprisonment, the court should determine whether an eligible collateral consequence is at least as severe as one year of potential imprisonment.

Subpart III.C. explains how courts should go about determining the relative severity of collateral consequences, including how they should focus on the same sort of liberty interests that existing doctrines emphasize when it comes to imprisonment. The point for now is that the final step is to take each eligible collateral consequence and determine whether it is sufficiently severe, based on where the demarcation line exists for the right at issue, to trigger the procedural entitlement.

In sum, when incorporating collateral consequences into procedural entitlements, courts should: (1) ascertain the theory of relative severity that underlies the allocation of the right at issue; (2) determine which collateral consequences are eligible for consideration, based on the theory of relative severity it developed in step one; and (3) determine whether any eligible collateral consequence is sufficiently severe to trigger the entitlement at issue.

B. Which Collateral Consequences Are Eligible?: The Multiple Dimensions of Collateral Consequences

As eluded to earlier, collateral consequences come in all shapes and sizes. This can make the project of incorporating collateral consequences into criminal procedural entitlements a complicated enterprise. Indeed, it is precisely these sorts of complications that discourage courts and legislatures from seeking to incorporate collateral consequences more broadly. This Subpart eases some of that complexity by cataloging collateral consequences along several key dimensions: (1) whether the consequence is imposed automatically; (2) whether the consequence is imposed by the same sovereign prosecuting the offense; and (3) whether the consequence applies uniformly to all defendants convicted of the relevant offense.

Examining these dimensions is important because they are relevant to a threshold issue that must be addressed when incorporating collateral consequences: *which* consequences should be considered when determining whether a defendant is entitled to a particular procedural entitlement.[143] This is step two of my general framework. The classifications detailed below are instructive for determining whether a particular consequence should be eligible for consideration depending on the procedural right at issue.

1. Is the Collateral Consequence Imposed Automatically upon Conviction?

The first dimension to consider is whether the collateral consequence is imposed automatically upon conviction, or rather if it is ultimately imposed at the discretion of an administrative entity (and therefore may not ever actually be imposed). Some, but not all, collateral consequences are imposed automatically upon conviction.[144] I will call consequences imposed automatically upon conviction "guaranteed sanctions" and consequences that may not ultimately be imposed "potential sanctions."[145]

---

143. An alternative approach, and one I do not adopt here, is to simply say that all collateral consequences should be eligible for consideration. That would be inconsistent with the theory and rationale for any right that is not allocated to all defendants. If not, all defendants facing some term of imprisonment, for example, receive the procedural protection, why should all collateral consequences be considered? The consequences considered should track the theory underlying how the right is distributed—and for any right that is allocated to some (but not all) defendants, some (but not all) collateral consequences should be eligible for consideration.

144. *See, e.g.*, Robert M. A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32, 33 (2001) ("These collateral consequences are simply a new form of mandated sentences."); *see also* Crane, *supra* note 10, at 795 (explaining how many collateral consequences like sex offender registry and firearm prohibitions are mandatory and "cannot be circumvented by a sentencing judge").

145. This distinction is similar to distinctions drawn by the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualifications and the Uniform Collateral Consequences Act.

The distinction is important when it comes to incorporating collateral consequences into procedural entitlements because some rights are allocated based on "guaranteed sanctions"—like guaranteed imprisonment[146]—and some rights are allocated based on "potential sanctions"—like potential imprisonment.[147] For rights allocated based on guaranteed sanctions, only those collateral consequences that are automatically imposed upon conviction should be considered at step three of my framework.

For the four consequences described in Part II, two are guaranteed sanctions and two are potential sanctions: sex offender registration requirements and firearm prohibitions are guaranteed sanctions; immigration consequences and disqualification from public benefits are potential sanctions.[148]

The ABA Criminal Justice Standards classifies collateral consequences as "collateral sanctions" or "discretionary disqualifications." It defines "collateral sanctions" as "a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence." STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSON § 19-1.1(a) (AM. BAR ASS'N, 3d ed. 2004). And it defines "discretionary disqualification" as "a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction." *Id.* § 19-1.1(b).

The Uniform Collateral Consequences Act defines a collateral consequence as a "collateral sanction or disqualification." UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2.1 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010). It then defines "collateral sanction" as

> a penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual's conviction of an offense which applies by operation of law whether or not the penalty, disability, or disadvantage is included in the judgment or sentence. The term does not include imprisonment, probation, parole, supervised release, forfeiture, restitution, fine, assessment, or costs of prosecution.

Id. § 2.2. And defines "disqualification" as "a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual's conviction of an offense." *Id.* § 2.5.

146. Thiersaint v. Comm'r of Corr., 111 A.3d 829, 833 (Conn. 2015).

147. *Id.*

148. When it comes to consequences ultimately imposed at the discretion of a civil or administrative entity, there may be some debate over how to conceptualize the pertinent consequence. Take immigration consequences as an example. If the consequence is conceptualized as being deported from the United States, then that consequence is ultimately discretionary and may not actually materialize. If, however, the consequence is conceptualized as "becoming deportable"—that is, a change in legal status—then that consequence is automatic and happens immediately upon conviction. For purposes of this Article, I conceptualize the pertinent consequence as things beyond a change in legal status. This is because all convictions lead to a change in legal status—one of convicted criminal.

2. Is the Collateral Consequence Imposed by the Same Sovereign Prosecuting the Offense?

The next question to consider is whether the collateral consequence is imposed by the prosecuting jurisdiction or a separate sovereign. Many collateral consequences are imposed by the same sovereign prosecuting the offense. But some collateral consequences are imposed by a sovereign that is separate from the one prosecuting the case. For example, a criminal conviction in state court can trigger consequences imposed by the federal government, such as immigration consequences,[149] certain firearm prohibitions,[150] and some disqualifications from public benefits.[151] Similarly, a criminal conviction in federal court can trigger consequences imposed by a state government, such as sex offender registration requirements[152] or disqualification from other public benefits.[153]

Whether a collateral consequence is imposed by the same or separate sovereign is relevant in the following way: if the procedural entitlement at issue is allocated based on how serious the *prosecuting jurisdiction* perceives the offense to be, then collateral consequences imposed by other jurisdictions should not be considered in the relative severity analysis. This is because consequences imposed by other sovereigns fail to reflect the views of the prosecuting jurisdiction. If, however, the procedural entitlement is allocated based on relative severity from the perspective of the *defendant*, then consequences imposed by other sovereigns are relevant to the analysis. This is because, from where the defendant stands, it does not matter which government imposes the collateral consequence but rather whether the consequence will or may be imposed at all.

Immigration consequences are imposed only by the federal government and thus will only be the same sovereign for federal prosecutions. Sex offender registration is imposed by both state and federal governments and thus can be the same sovereign for both state and federal prosecutions. The federal firearm prohibition will be the same sovereign for federal prosecutions and a different sovereign for state prosecutions. Similarly, for states that have adopted firearm prohibitions for misdemeanor convictions, they will be the same sovereign for state prosecutions and different sovereign for federal prosecutions. Finally, disqualifications for public benefits are imposed by state and federal governments, and thus whether a particular consequence is imposed by the same or separate sovereign

149. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

150. *See* 18 U.S.C. § 922 (d)(1) (2012).

151. See Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247, 253–54.

152. 42 U.S.C. § 16912(a)–(b) (2012).

153. *See* Love, *supra* note 151, at 253–54.

will depend on whom is prosecuting the case and which consequence is being considered.

3. Does the Consequence Uniformly Apply to All Defendants?

The final question to consider is whether the collateral consequence is uniformly imposed on all defendants convicted of the given offense or if the consequence is imposed only on some defendants. Most consequences apply the same to all defendants convicted of a qualifying offense. For example, firearm prohibitions, sex offender registration requirements, and most disqualifications from public benefits are uniformly applied to all defendants.[154] But some consequences do not work this way. For example, immigration consequences do not apply evenly across defendants; rather, they apply only to noncitizen defendants. For example, an American citizen and non-American citizen can both be convicted of the same misdemeanor drug offense, but only the noncitizen will face the collateral consequence of deportation.[155]

Whether a collateral consequence is imposed uniformly across all defendants convicted of a particular offense is relevant for much the same reason that the identity of the jurisdiction imposing the consequence is relevant—it relates to which perspective the procedural right at issue adopts when considering relative severity. If the theory underlying the entitlement views relative severity from the perspective of the defendant, then it does not matter whether the collateral consequence applies to some defendants but not others. All that matters is whether the consequence may be imposed on that particular defendant. If, however, the theory underlying the entitlement views relative severity from the perspective of the legislature that adopted the offense charged, consequences that are not imposed uniformly should be excluded from consideration and therefore ineligible for the relative severity analysis performed in step three of my framework.

Immigration consequences are not imposed uniformly, as only noncitizen defendants can be subject to such consequences. Requirements imposed on sex offenders are applied uniformly across defendants.[156] Firearm prohibitions are likewise imposed uniformly across defendants charged with the same offense.[157] Finally,

154. *See supra* notes 147–49 and accompanying text.

155. The fact that immigration consequences may be the basis for heightened procedural protections raises one of the most interesting and fascinating questions about integrating collateral consequences into criminal procedure. For instances where immigration consequences entitle a defendant to additional procedures, one upshot is that noncitizen defendants will receive *more* procedural entitlements than American citizens charges with the identical offense.

156. *See, e.g.*, Fushek v. State, 183 P.3d 536, 540–42 (Ariz. 2008) (concluding that sex offender registration requirements were uniformly applied to all similarly situated defendants).

157. *See* 18 U.S.C. § 922 (d)(1) (2012).

disqualifications from public benefits may or may not be applied uniformly, depending on the precise collateral consequence at issue.[158]

Below are two charts that summarize the above discussion. Because the vast majority of criminal convictions in the United States are by state jurisdictions, the first chart is by far the more important one.

CHART 1: STATE CRIMINAL CONVICTIONS:

For *State* Criminal Convictions:	**Apply Automatically?**	**Same Sovereign?**	**Apply Uniformly?**
Immigration Consequences	No	No	No
Sex Offender Requirements	Yes	Yes	Yes
Firearm Prohibitions	Yes	Maybe	Yes
Disqualification from Public Benefits	Maybe	Maybe	Maybe

CHART 2: FEDERAL CRIMINAL CONVICTIONS:

For *Federal* Criminal Convictions:	**Apply Automatically?**	**Same Sovereign?**	**Apply Uniformly?**
Immigration Consequences	No	Yes	No
Sex Offender Requirements	Yes	Yes	Yes
Firearm Prohibitions	Yes	Maybe	Yes
Disqualification from Public Benefits	Maybe	Maybe	Maybe

C. Ranking the Relative Severity of Collateral Consequences

After determining which collateral consequences should be considered (step two), the next step is deciding whether an eligible collateral consequence is sufficiently severe to trigger the procedural entitlement at issue (step three). This is another area where

158. *See* Love, *supra* note 151, at 253–54.

incorporating collateral consequences can be rife with complexity and, in particular, raises numerous issues related to incommensurability.[159] Recall that under existing law the determination of whether a defendant receives a particular entitlement turns on a single type of sanction—imprisonment.[160] By incorporating collateral consequences, however, things can no longer be so simple. This Subpart addresses two important questions about how to determine whether an eligible collateral consequence is sufficiently severe to trigger the entitlement at issue. In so doing, I also seek to substantially lessen concerns about incommensurability and slippery slopes.

The first question is whether relative severity should be viewed from an objective or subjective perspective. Viewing relative severity from a subjective perspective means judging (and comparing) the severity of a particular consequence on an individualized basis.[161] Each person will experience a particular consequence differently. For some, losing the right to possess a firearm might be a tremendously significant consequence—weightier than jail time. For others, losing that right might yield little more than a shoulder shrug. For some defendants, especially the impoverished, being prohibited from public housing or certain welfare programs could be devastating. For other defendants, like white collar criminals, such disqualifications might be utterly inconsequential. A subjective assessment of severity would depend on each individual and how each collateral consequence would be experienced by that individual. As a result, a subjective assessment would vary from person to person and consequence to consequence.

This approach offers some benefits. For example, assessing the relative severity of a particular consequence on an individual basis would further the goal of individualized treatment in the criminal justice system.[162] Furthermore, such an approach might appear to ease some of the incommensurability concerns associated with collateral consequences because all one needs to do is inquire about how a particular consequence would impact a particular defendant. The need to determine whether sex offender registration or disqualification from public housing is, as a general matter, more severe would be unnecessary; all that would be necessary would be to determine which is more severe for that specific defendant. Likewise, the difficult task of determining how many months imprisonment a particular collateral consequence would "equal" would be avoidable;

159. For a thoughtful and interesting essay on related issues involving relative crime severity, see generally Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

160. *See supra* Part I.

161. *See* Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 123–24 (2007).

162. *Id.* at 123.

all that needs to be determined is how many months imprisonment is the functional equivalent of a particular collateral consequence for a specific defendant.

The costs of the subjective approach, however, far outweigh the benefits. To begin, such an individualized, case-by-case approach would prove exceedingly difficult. It would be hard, to say the least, to accurately and fairly assess how severe each and every collateral consequence would be for each and every defendant. Indeterminacy of that magnitude, combined with the wide discretion afforded trial judges on such matters, would likely lead to disparate results across defendants. And, like other disparate results, it would likely have a regressive impact on racial and ethnic minorities and on indigent defendants. Such an approach would also incentivize defendants to claim that whatever collateral consequences applied were, in fact, quite severe to them—even if that were not true. A defendant facing firearm prohibitions might actually care very little about her Second Amendment rights, but if claiming that such a prohibition would severely impact her were the difference between the right to counsel or the right to a jury trial, then odds are that defendant will have a newfound appreciation for her right to bear arms.

Finally, a subjective approach would be inconsistent with current doctrines about relative severity, all of which follow an objective approach—that is, an approach that objectively assesses the relative severity of a particular sanction.[163] For example, when determining whether a defendant is entitled to a right that turns on potential imprisonment—say the right to a jury trial, which is automatically given for offenses authorizing more than six months imprisonment—courts do not inquire about the impact such imprisonment might have on an individual defendant, or how that individual defendant would be affected by such a possible stint in the clink.[164] As with any possible sanction, not all defendants are going to experience imprisonment equally. For example, some defendants might experience five months imprisonment the same way another would experience six months. Does that mean the first defendant should also receive a jury trial? Existing doctrines offer a resounding no. They instead all look at relative severity through an objective lens. The same should be done when it comes to incorporating collateral consequences.

Having determined that the relative severity of a collateral consequence should be viewed objectively, the next question to

163. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161 (1968) ("In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we . . . refer to objective criteria.").

164. *See* Bell v. Wolfish, 441 U.S. 520, 541–44 (1979) (determining that prison conditions for pretrial defendants do not amount to a Due Process violation, "particularly where it appears that nearly all pre-trial detainees are released within 60 days").

consider is what metric or method should be used to assess a consequence's relative severity. Once again, there are several options from which to choose, assuming the right at issue does not provide further guidance. For example, severity could be assessed based on the degree to which it infringes on a constitutional right (e.g., firearm prohibitions scoring high, public benefit disqualifications scoring low). Or it could be assessed based on the degree to which it directly impacts a defendant's day-to-day life (e.g., public benefit disqualifications scoring high, firearm prohibitions scoring low).

And, once again, I propose hewing closely to existing doctrines and, specifically, the deprivation of constitutional liberty interests of the sort akin to imprisonment. More specifically, I believe courts, absent more specific guidance based on the right at issue, should assess a collateral consequence's relative severity by considering whether the consequence deprives or otherwise infringes on a defendant's constitutional liberty interests to approximately the same degree as the relevant term of imprisonment.[165]

This, to be sure, is an opaque standard, and one that is subject to reasonable disagreement. While it might be nice to imagine a neat and tidy way to translate all collateral consequences into months of imprisonment—for example, deportation is worth sixty months' imprisonment, lifetime sex offender registration is worth thirty months, and so on—such an enterprise would be little more than pulling numbers out of thin air.

Fortunately, such precise measurements are rarely if ever needed for purposes of allocating procedural entitlements. Most entitlements are triggered by either any amount of imprisonment (one day or more), more than six months imprisonment, or more than one year imprisonment.[166] Thus, courts need only roughly assess a collateral consequence's relative severity, placing it in one of four categories: (1) the functional equivalent of no imprisonment; (2) the functional equivalent of less than six months imprisonment (but more than zero); (3) the functional equivalent of six months and one day imprisonment to one year imprisonment; and (4) the functional equivalent of more than one year imprisonment.

Recognizing there is room for reasonable disagreement, my own suggestion would be to assess the four collateral consequences

165. Derendal v. Griffith, 104 P.3d 147, 154 (Ariz. 2005) ("To mandate a jury trial, collateral consequences must approximate in severity the loss of liberty that a prison term entails."); *see also* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (considering whether a five-thousand-dollar fine and five years of probation with certain conditions "approximate the severe loss of liberty caused by imprisonment for more than six months"); Blanton v. City of N. Las Vegas, 489 U.S. 538, 542 (1989) (acknowledging that penalties other than imprisonment, such as "probation or a fine may engender 'a significant infringement of personal freedom,' but they cannot approximate in severity the loss of liberty that a prison term entails").

166. *See infra* Parts III (counsel), IV (jury).

discussed in this Article as follows. Immigration consequences, such as permanent banishment from the United States, is the functional equivalent of more than one-year imprisonment. "Like incarceration, deportation separates a person from established ties to family, work, study, and community. In this forced physical separation, it is similar in severity to the loss of liberty that a prison term entails."[167] Because removal from the United States is for at least ten years and often for life,[168] deportation is the functional equivalent of more than one-year imprisonment.[169]

Sex offender registration is either the functional equivalent of more than one year imprisonment or the functional equivalent of six months and one day imprisonment to one year imprisonment.[170] Lifetime sex offender registration seems to fit comfortably in the latter and, while some may disagree, I believe fifteen years of sex offender registration is also a sanction that should be considered the functional equivalent of more than one year imprisonment.

With respect to firearm prohibitions, I believe these are the functional equivalent of one day to six months' imprisonment—especially lifetime firearm bans. "[T]he right to keep and bear arms," the Supreme Court has held, "is fundamental to our scheme of ordered liberty."[171] Firearm prohibitions thereby infringe on constitutional liberty interests more than zero,[172] but not nearly as much as sex offender registration requirements or deportation do. I accordingly would consider such prohibitions as the functional equivalent of between one day and six months' imprisonment.

As for disqualification from public benefits, this presents to me the most difficult category to assess. On the one hand, disqualifications from public benefits can, depending on the

167. Bado v. United States, 186 A.3d 1243, 1250 (D.C. 2018) (citations and alterations omitted).

168. *Id.* at 1251, n.14 (citing 8 U.S.C. §§ 1227, 1229a).

169. Lee v. United States, 137 S. Ct. 1958, 1968 (2017) (recognizing that "preserving the right to remain in the United States may be more important to the client than any potential jail sentence").

170. *See, e.g.*, Fushek v. State, 183 P.3d. 536, 541–44 (Ariz. 2008) (explaining why lifetime sex offender registration is a severe penalty—"much more severe than a comparatively short probation period"); *see also* Wayne A. Logan, *Liberty Interested in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1168–70 (1999); Shelley Ross Saxer, *Banishment of Sex Offenders: Liberty, Protectionism, Justice, and Alternatives*, 86 WASH. U. L. REV. 1397, 1398–99 (2009); Rachel Marshall, *I'm a Public Defender. My Clients Would Rather Go to Jail than Register as Sex Offenders*, VOX (July 5, 2016, 8:00 AM), https://www.vox.com/2016/7/5/12059448/sex-offender-registry.

171. McDonald v. City of Chicago, 561 U.S. 742, 767, 778 (2010) ("[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.").

172. *See, e.g.*, *id.* at 778; District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008).

defendant, have a truly significant impact on a defendant's way of life.[173] On the other hand, disqualifying a defendant from public benefits does not infringe on any recognized constitutional liberty interest—they are more like privileges than constitutional rights. And such disqualifications typically do not look or act like banishment in the way deportation does or, to a lesser extent, sex offender registration requirements do. Depending on the specific benefit at issue, I would therefore categorize disqualification from public benefits either as the functional equivalent of no imprisonment or the functional equivalent of six months or less imprisonment—with most such collateral consequences being the equivalent of no imprisonment.

The following chart summarizes my suggested categorizations of collateral consequences:

CHART 3: THE FUNCTIONAL IMPRISONMENT EQUIVALENTS FOR FOUR COLLATERAL CONSEQUENCES

Functional Equivalent Time Imprisonment:	**~No Imprisonment**	**~One Day to Six Months**	**~More than Six Months to One Year**	**~More than One year**
Immigration Consequences				X
Sex Offender Registration				X
Firearm Prohibitions		X		
Disqualification from Public Benefits	X			

Again, I want to emphasize that assessing the functional equivalent of any given collateral consequence is an area where reasonable people can disagree. Moreover, for purposes of my project, the real point is to encourage courts (and legislatures) to begin thinking about collateral consequences in terms of these four categories: (1) ~No imprisonment; (2) ~one day to six months imprisonment; (3) ~six months and one day imprisonment to one year imprisonment; and (4) ~More than one year imprisonment. While courts may at the outset reach different conclusions, they ultimately will settle on some sort of consensus over time. In other words, any likely disagreement about appropriate categorization should not be a deterrent to engaging in the enterprise itself.

173. *See generally* Pinard, *An Integrated Perspective*, *supra* note 2 (explaining the myriad of issues facing persons convicted of criminal offenses reentering society).

IV. INCORPORATING COLLATERAL CONSEQUENCES INTO THE CONSTITUTIONAL RIGHT TO COUNSEL

This Part incorporates collateral consequences into the Sixth Amendment right to counsel. Subpart A examines the circumstances in which the Supreme Court has held that an indigent defendant is entitled to counsel. Subpart B explains which collateral consequences, based on the lines identified in Subpart A, should be eligible for consideration under my framework. And Subpart C explains the circumstances in which a defendant should be entitled to counsel based on the collateral consequences he or she faces.

A. The Sixth Amendment Right to Counsel

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[174] Through a series of twentieth-century decisions, the Supreme Court extended the Sixth Amendment's right to counsel to include the right of an indigent defendant to have counsel appointed and paid for by the government.[175] In *Gideon v. Wainwright*,[176] the Supreme Court applied that right to the states through the Fourteenth Amendment.[177] In so doing, the Court observed that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[178] The Court has further recognized that the vital aid provided by counsel is by no means limited to potential assistance at the trial itself: "[T]o deprive a person of counsel during the period prior to trial," the Court has cautioned, "may be more damaging than denial of counsel during the trial itself."[179] This is because "the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding."[180]

In addition, defense counsel also provides crucial—perhaps even outcome-altering—assistance through pretrial investigation of the

174. U.S. CONST. amend. VI.

175. *See* Scott v. Illinois, 440 U.S. 367, 370 (1979) ("There is considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense.").

176. 372 U.S. 335 (1963).

177. *Id.* at 341–42.

178. *Id.* at 344 (describing this as "an obvious truth" *and* proclaiming that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours"); *see also* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972) ("The assistance of counsel is often a requisite to the very existence of a fair trial.").

179. Maine v. Moulton, 474 U.S. 159, 170 (1985).

180. *Id.*; Kimmelman v. Morrison, 477 U.S. 365, 377 (1986) ("Without counsel the right to a fair trial itself would be of little consequence, for it is through counsel that the accused secures his other rights." (citations omitted)).

government's case,[181] considered preparation of possible defenses,[182] and informed plea bargaining.[183] As the Supreme Court has observed, the "adversarial testing process" that lies at the heart of the American criminal justice system "will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies."[184] Indeed, the Supreme Court has indicated that a conviction secured without "the guiding hand of [defense] counsel" is not "sufficiently reliable to permit incarceration" since it was not "subjected to the crucible of meaningful adversarial testing."[185]

Finally, "because the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant," counsel's assistance (or the lack thereof) during plea negotiations can dramatically alter a defendant's fate.[186] A defense attorney can "help to reduce the power imbalance between the state and the defendant by playing the roles of counselor (ensuring that defendants understand the consequences of accepting a plea offer) and negotiator (trying to negotiate the best plea possible)."[187] Without the assistance of counsel, a defendant that pleads guilty is likely to do so on comparatively worse plea terms than if counsel were provided.[188] And, perhaps most critically, an innocent defendant proceeding alone may be more likely to plead guilty than if he had counsel's aid.[189]

Given all this, it is no surprise that the Supreme Court has declared that "[t]he right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair

181. *See* Strickland v. Washington, 466 U.S. 668, 680–81 (1984).

182. *Id.*

183. *See* Crane, *supra* note 10, at 825.

184. Kimmelman, 477 U.S. at 384. *See generally* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1106 (2004) ("Adversarial testing requires thorough exploration of defenses as to both guilt and potential penalties and also investigation into the prosecution's case.").

185. Alabama v. Shelton, 535 U.S. 654, 665, 667 (2002) (citation omitted).

186. Missouri v. Frye, 566 U.S. 134, 144 (2012) ("[D]efendants require effective counsel during plea negotiations.").

187. Clapman, *supra* note 15, at 596.

188. *See* Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) (observing that "[c]ounsel is needed" for purposes of plea bargaining and guilty pleas "so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution").

189. Clapman, *supra* note 15, at 596–97 ("Defendants, even if innocent, plead guilty to a misdemeanor with less trepidation. Many may plead guilty on the rational calculation that the apparently minimal penalty attached to a plea conviction is preferable to the alternative: pretrial detention; the time that a trial will consume; the resultant lost wages, lost job security, and lost family time; and the risk of a greater penalty after trial.").

administration of our adversarial system of criminal justice."[190] And given all this, it is surprising (at least to the uninitiated) that many indigent defendants do *not* have a constitutional right to counsel.[191] Although the importance of counsel has been universally recognized by courts and commentators,[192] the right to counsel is not allocated universally to all defendants. Rather, the Supreme Court has held that a defendant has a constitutional right to counsel only under one of two circumstances.

First, any defendant charged with a felony offense has a federal constitutional right to counsel.[193] "[A]bsent waiver," the Supreme Court has explained, the "right to appointed counsel in felony cases is absolute."[194]

Second, a defendant charged with a misdemeanor offense has a constitutional right to government-provided counsel if he is "sentenced to a term of imprisonment."[195] In other words, "no indigent criminal defendant [may] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."[196] This is sometimes referred to as the "actual imprisonment" standard.[197]

The Supreme Court has therefore drawn two lines when it comes to allocating the constitutional right to counsel—one for defendants charged with a felony offense and one for defendants charged with a misdemeanor offense. If charged with a felony offense, the defendant has an "absolute" right to counsel based simply on the *potential* sanctions associated with felony offenses. If charged with a misdemeanor offense, however, the defendant has a right to counsel only if there is the actual (or *guaranteed*) sanction of imprisonment.

The Court has justified its comparatively unusual line-drawing for misdemeanor defendants on three interrelated grounds. First, having "departed from the literal meaning of the Sixth Amendment" by extending its protections to include the appointment of counsel for indigent defendants, the Court has recognized that it must fashion on

190. Maine v. Moulton, 474 U.S. 159, 168–69 (1985).

191. Crane, *supra* note 10, at 826–27.

192. *See* Scott v. Illinois, 440 U.S. 367, 370 (1979).

193. See Nichols v. United States, 511 U.S. 738, 743 n.9 (1994) (confirming that a defendant charged with a felony offense has the constitutional right to counsel regardless of whether any prison time is actually imposed on the defendant); Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

194. Alabama v. Shelton, 535 U.S. 654, 664 (2002).

195. *Scott*, 440 U.S. at 373–74.

196. *Id.* at 374; Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("[N]o person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial."). In *Alabama v. Shelton*, the Supreme Court clarified that a suspended prison sentence also may not be imposed on a misdemeanor defendant unless he was represented by counsel. 535 U.S. at 662.

197. *Scott*, 440 U.S. at 373 (adopting "actual imprisonment as the line defining the constitutional right to appointment of counsel").

its own some set of parameters for when the right to counsel applies, even though the "precise limits and their ramifications" is less than "clear."[198] In other words, once the Court decided to extend the right to counsel beyond its original understanding, it also had to determine how far "to extrapolate an already extended line."[199]

Second, when deciding how far to extend the right to counsel, the Court has consistently rejected expanding it to all criminal defendants because such an "extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[200]

Third, and finally, concerns about causing such confusion or budgetary woes in the states must yield when it comes to sanctions the Court deems "so severe" that they "should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense"—"regardless of the cost to the States implicit in such a rule."[201] Under existing precedent, the Court has concluded only that incarceration, "even for a brief period," is sufficiently severe to require the appointment of counsel.[202] This is because, according to the Court, "actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment"—and therefore actual imprisonment, but not fines or the possibility of imprisonment, warrant the appointment of counsel.[203]

Although the Supreme Court's landmark decision in *Padilla v. Kentucky* expanded the constitutional obligations of defense counsel

198. *Id.* at 372.

199. *Id.* The Court has also recognized that it "cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." *Id.*

200. *Id.* at 373. For a representative sampling of the extensive academic literature calling for the right to counsel to be extended to all criminal defendants, see Clapman, *supra* note 15; King, *supra* note 16; Marcus, *supra* note 16; Roberts, *supra* note 46.

201. *Scott*, 440 U.S. at 372–73; *see also Shelton*, 535 U.S. at 667 (describing the "key Sixth Amendment inquiry" as "whether the adjudication of guilt corresponding to the prison sentence is sufficiently reliable to permit incarceration").

202. *Scott*, 440 U.S. at 372–73.

203. Nichols v. United States, 511 U.S. 738, 746 (1994) ("We reasoned that the Court, in a number of decisions, had already expanded the language of the Sixth Amendment well beyond its obvious meaning, and that the line should be drawn between criminal proceedings that resulted in imprisonment, and those that did not."); *Scott*, 440 U.S. at 367.

To be clear, nearly half of the states go beyond the federal constitutional-floor and provide counsel to an indigent defendant if he is charged with a misdemeanor that merely authorizes incarceration. *See* 3 LAFAVE ET AL., *supra* note 89, § 11.2(a). A significant number of states, however, still limit the right to counsel to those instances in which imprisonment is actually imposed. *See id.*; *see also Shelton*, 535 U.S. at 669 n.8; Clapman, *supra* note 15, at 593 n.43 (providing a sample of state requirements).

when it comes to advising a client about potential immigration consequences,[204] those advice-related rights apply only in cases where the defendant has an entitlement to counsel in the first place.[205] Immigration consequences, like other collateral consequences, are still deemed irrelevant when determining whether a defendant has a constitutional right to counsel.[206] Under existing precedent, "states allow trial courts to avoid appointing counsel simply by certifying that they will not impose incarceration regardless of the seriousness of the misdemeanor offense or the possibility that it will carry other consequences," such as deportation, sex offender registration, or other significant sanctions.[207]

Notably, when considering whether a defendant has a constitutional right to counsel, the Supreme Court considers the severity of the sanction from the perspective of the defendant.[208] This is true both for the felony-based potential sanction line[209] and the misdemeanor-based guaranteed sanction line.[210] Indeed, the Supreme Court has described the "key Sixth Amendment inquiry" as "whether the adjudication of guilt . . . is sufficiently reliable to permit" the imposition of a particular penalty (e.g., incarceration) on the defendant.[211] The focus is on the impact the penalty has on the defendant, and whether an adjudication without counsel is permissible given that penalty.

B. Which Collateral Consequences Should Be Considered

Because the Supreme Court has considered relative severity from the perspective of the defendant, the fact that a collateral consequence may be imposed by a separate sovereign is not a basis for exclusion in this context. Similarly, a collateral consequence is

---

204. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

205. *See id.*

206. Clapman, *supra* note 15, at 603.

207. *See id.* at 592–93; Crane, *supra* note 10, at 827 n.254 ("As a matter of federal constitutional law, courts have uniformly concluded that an offense's potential collateral consequences have no bearing on whether an indigent defendant is entitled to counsel.").

> As a matter of state law, a handful of jurisdictions have indicated that an offense's collateral consequences may be relevant to defining the scope of the right. But those jurisdictions are few in number and, generally speaking, appear to consider an offense's collateral consequences as merely one factor among many when deciding whether the right to state-provided counsel applies in a given case.

Id. (citing 3 LAFAVE ET AL., *supra* note 89, § 11.2(a)).

208. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (citations omitted) (recognizing a right to counsel for any actual imprisonment because "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation").

209. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

210. *See Argersinger*, 407 U.S. at 37.

211. *See* Alabama v. Shelton, 535 U.S. 654, 667 (2002).

eligible for consideration even if it is not imposed across all defendants convicted of a particular offense. This is because the right to counsel inquiry is a defendant-specific one: what are the consequences faced by the defendant in this case? It does not matter if the consequences are faced by only some defendants charged with that offense, and it does not matter if the consequence is imposed by a separate sovereign.

Since the Supreme Court has drawn two separate lines for allocating the constitutional right to counsel—one for felony defendants and one for misdemeanor defendants—considering which collateral consequences are eligible for incorporation also requires two tracks. And, depending on which track a defendant is claiming a right to counsel, some collateral consequences should be excluded from consideration.

For defendants seeking the right to counsel based on the misdemeanor track, only those collateral consequences that are *guaranteed sanctions* should be considered. In other words, consequences that may not ultimately be imposed should be excluded, because the misdemeanor track focuses on actual sanctions, not potential ones. Accordingly, defendants invoking this track may not claim a right to counsel based on potential immigration consequences or potential disqualifications from public benefits, as those involve potential sanctions, not guaranteed sanctions.

For defendants seeking the right to counsel based on the felony track, however, all consequences may be considered. This is because the felony track is not limited to "actual imprisonment," but rather triggers the right to counsel based merely on potential sanctions.

In sum, all collateral consequences may be considered, except for potential sanctions invoked under the misdemeanor track. There, only guaranteed sanctions—that is, those consequences applied automatically upon conviction—should be eligible.

C. Incorporating Collateral Consequences

As noted, existing Supreme Court doctrine allocates the right to counsel along two tracks. For a defendant invoking the felony track,[212] he should be afforded the right to counsel if he faces a potential collateral consequence that is the functional equivalent of more than one year imprisonment. This mirrors the rule set forth in *Gideon* and subsequent cases that afford a defendant the right to counsel when charged with a felony, which is an offense that

212. To be clear, I call this the "felony track" even though only misdemeanor defendants would be the ones claiming a right to counsel on the basis of a collateral consequence—since a defendant charged with a felony would already have the constitutional right to counsel. My use of "felony track" and "misdemeanor track" refers to the two distinct bases for the right to counsel under existing Supreme Court case law—a track based on potential sanctions (felony track) and a track based on guaranteed sanctions (misdemeanor track).

threatens more than one year imprisonment. Under this track, therefore, defendants facing potential immigration consequences upon conviction and defendants facing sex offender registration upon conviction should be entitled to counsel. As explained above, each of these consequences are, in my view, the functional equivalent of more than one year imprisonment.

For a defendant invoking the misdemeanor track, he should be afforded the right to counsel if he faces a guaranteed sanction that is the functional equivalent of at least one day imprisonment. This mirrors the rule established in *Argersinger*[213] and *Scott*,[214] where a defendant is entitled to counsel if he or she is sentenced to any term of actual imprisonment.[215] Under this track, therefore, defendants facing firearm prohibitions that are imposed automatically upon conviction should be afforded counsel.[216] This is consistent with a provision of the federal law prohibiting possession of a firearm for those convicted of a misdemeanor crime of domestic violence. Under 18 U.S.C §921(a)(33), the federal firearm prohibition should not apply after a conviction for what would otherwise qualify as a "misdemeanor crime of domestic violence" unless "the person was represented by counsel in the case, or knowingly and intelligently waived the right to counsel in the case."[217]

Finally, any disqualifications from public benefits that are imposed automatically upon conviction and rise to the level of the functional equivalent of at least one day in jail should also trigger the right to counsel—although I expect that few such consequences will ultimately surpass that threshold.

V. INCORPORATING COLLATERAL CONSEQUENCES INTO THE CONSTITUTIONAL RIGHT TO A JURY TRIAL

This Part incorporates collateral consequences into the Sixth Amendment right to demand a jury trial. Subpart A explains current Supreme Court doctrine regarding the right to demand a jury trial, and theorizes the line dividing those defendants entitled to a jury trial and those that are not. Subpart B then analyzes which collateral consequences are eligible for consideration based on the line identified in Subpart A. And Subpart C explains which collateral consequences should trigger the right to a jury trial.

A. The Sixth Amendment Right to a Jury Trial

The Framers believed a defendant's right to demand a jury trial was so important that they included it in the U.S. Constitution

213. 407 U.S. 25.
214. Scott v. Illinois, 440 U.S. 367 (1979).
215. *Id.* at 374; *Argersinger*, 407 U.S. at 37.
216. Defendants facing sex offender registration requirements imposed automatically upon conviction should also be entitled to counsel under this track.
217. 18 U.S.C. §§ 921(a)(33)(A)(i), (B)(i)(I) (2012).

twice.[218] The constitutional right to a jury trial, since incorporated against the states,[219] provides a criminal defendant with "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[220] According to the Supreme Court, the right to a jury trial exists "in order to prevent oppression by the Government" and reflects a deep "reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."[221] By "insist[ing] upon community participation in the determination of guilt or innocence," the constitutional right to request a jury trial protects "against arbitrary law enforcement" and is "essential for preventing miscarriages of justice."[222]

Jury trials, and the possibility of a jury trial, also impose significant costs on the government. "Compared to bench trials, jury trials often require prosecutors to engage in more intensive preparation and frequently entail more pretrial litigation over procedural and evidentiary issues."[223] Jury trials also, on average, take substantially longer than bench trials.[224] Taken together, this means defendants with the right to demand a jury trial can threaten to consume the government's most depleted and precious resource: time.[225] As one scholar put it, "by withholding the jury trial right governments gain a major strategic advantage, depriving defendants of the option to threaten exercise of the right, with its associated

218. Article III, Section 2 states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art III, § 2, cl. 3. And the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

219. The Sixth Amendment right to a jury trial was incorporated against the states in *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

220. *Id.* at 156. Blackstone described trial by jury as "the grand bulwark" of English liberties. *See* Jones v. United States, 526 U.S. 227, 246 (1999) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 342–44); *see also* District of Columbia v. Clawans, 300 U.S. 617, 634 (1937) (McReynolds, J., dissenting) (observing that there is a "grave danger to liberty when one accused must submit to the uncertain judgment of a single magistrate").

221. *Duncan*, 391 U.S. at 155–56.

222. *Id.* at 156, 158; *see also* Baldwin v. New York, 399 U.S. 66, 72 (1970) ("[T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him."); Williams v. Florida, 399 U.S. 78, 100 (1970) ("[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.").

223. Crane, *supra* note 10, at 807.

224. *See id.* at 806.

225. *See id.* at 806–08.

adverse impact on dockets and justice system resources."[226] For all these reasons, affording a defendant "the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely."[227]

Despite the Supreme Court's grand pronouncements about the importance and value of the right to a jury trial, not all criminal defendants are afforded such a right. "At the time of the adoption of the Constitution there were numerous offenses, commonly described as 'petty,' which were tried summarily without a jury."[228] This "petty offense" exception, in which defendants charged with a petty offense do not receive the right to a jury trial, has been justified on the grounds that "the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive adjudications."[229] Put another way, for some defendants, the potential consequences of conviction are insufficiently severe to warrant imposing the attendant burdens of jury trials on the government and courts.[230]

Because the Constitution does not explicitly provide for how to balance those competing interests, "the definitional task" of establishing the "boundaries of the petty offense category" has "fall[en] on the courts," and it is the courts that must "draw a line in the spectrum of crime, separating petty from serious infractions."[231] The Supreme Court has drawn that line as follows: An offense that threatens more than six months imprisonment is always considered serious and automatically triggers a defendant's constitutional right

226. Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 158 (2009).

227. *Duncan*, 391 U.S. at 158.

228. District of Columbia v. Clawans, 300 U.S. 617, 624 (1937); *see also Duncan*, 391 U.S. at 160 ("So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions.").

229. *Duncan*, 391 U.S. at 160.

230. *See* Baldwin v. New York, 399 U.S. 66, 73 (1970) ("Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.").

231. *Duncan*, 391 U.S. at 160–61. As the Court recognized in *Duncan*, that "process, although essential, cannot be wholly satisfactory, for it requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Id.* at 161. "Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." *Baldwin*, 399 U.S. at 73.

to trial by jury.[232] An offense that carries a maximum term of imprisonment of six months or less is presumed to be petty.[233] That presumption is rebutted, however, and the defendant is entitled to a jury trial "if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."[234] Other penalties that the Supreme Court has explicitly considered include fines,[235] probation,[236] and—most importantly for purposes of considering collateral consequences—suspension of a driver's license.[237]

Under current Supreme Court doctrine, therefore, whether a defendant is entitled to demand a jury trial depends on the relative severity of the offense with which he or she is charged. And the relative severity of that offense is determined by the penalties the legislature has attached to a conviction for that offense—primarily, but not exclusively, the potential term of imprisonment.[238]

---

232. *See, e.g.*, Blanton v. City of N. Las Vegas, 489 U.S. 538, 541–42 (1989); *Baldwin*, 399 U.S. at 68–69. As a result, all felony defendants, but only some misdemeanor defendants, have a constitutional right to a jury trial. A misdemeanor defendant charged only with a "petty" offense has no federal constitutional right to a jury trial.

233. *See Blanton*, 489 U.S. at 543. The Court previously "focused on the nature of the offense and on whether it was triable by a jury at common law." *Id.* at 541 (citing District of Columbia v. Colts, 282 U.S. 63, 73 (1930)); Callan v. Wilson, 127 U.S. 540, 555–57 (1888)). *See generally* Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 133–35 (tracing the Court's various approaches to the petty offense exception over time). According to the Court, it shifted its attention to an offense's potential term of imprisonment because that is a "more 'objective indication[] of the seriousness with which society regards the offense.'" *Blanton*, 489 U.S. at 541 (quoting Frank v. United States, 395 U.S. 147, 148 (1969)).

234. *Blanton*, 489 U.S. at 543. In *Blanton*, the Court predicted that it would be the "rare situation where a legislature packs an offense it deems 'serious' with onerous penalties that nonetheless do not puncture the 6-month incarceration line." *Id.* (citation omitted); *see also* United States v. Nachtigal, 507 U.S. 1, 5 (1993) (repeating the "rare case" observation made in *Blanton*). Notably, the Court made these predictions when misdemeanor offenses triggered far fewer collateral consequences than they do today.

235. Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 837–38 (1994); *Nachtigal*, 507 U.S. at 4; *Blanton*, 489 U.S. at 544; Muniz v. Hoffman, 422 U.S. 454, 476 (1975).

236. *Nachtigal*, 507 U.S. at 5.

237. *Blanton*, 489 U.S. at 544 n.9 ("[W]e cannot say that a 90-day license suspension is that significant as a Sixth Amendment matter, particularly when a restricted license may be obtained after only 45 days.").

238. *Id.* at 542 ("In using the word 'penalty,' we do not refer solely to the maximum prison term authorized for a particular offense. A legislature's view of the seriousness of an offense also is reflected in the other penalties that it attaches to the offense.").

Whereas a number of states follow the federal constitutional baseline when determining the scope of a defendant's right to a jury trial, many others exceed

Critically, the allocation of the constitutional right to a jury trial is based on potential severity as viewed from the perspective of the *legislature*—not from the perspective of the defendant. Indeed, the Supreme Court has specifically recognized that "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."[239] But the defendant's perspective, the Court has reiterated, is not the relevant inquiry. Instead, when "deciding whether an offense is 'petty,' [the Court has] sought objective criteria reflecting the seriousness with which *society* regards the offense."[240]

The Court's focus on the legislature and its view on severity was on full display in *Lewis v. United States*.[241] In *Lewis*, the Supreme Court considered whether a defendant charged with multiple petty offenses was entitled to a jury trial, given that he faced in the aggregate more than six months imprisonment.[242] The defendant in *Lewis* was charged with two separate offenses, each of which carried a maximum of six months imprisonment, and therefore faced up to one year imprisonment in total.[243] The Court held that "no jury trial right exists where a defendant is prosecuted for multiple petty offenses," even if "the aggregate prison term authorized for the offenses exceeds six months."[244]

The Court clarified that the critical inquiry is whether any single offense authorizes a term of imprisonment in excess of six months.[245] This is because the right to a jury trial is reserved for "defendants accused of serious crimes," and "we determine whether an offense is serious by looking to the judgment of the legislature."[246] "The fact that the [defendant] was charged with two counts of a petty offense does not revise the legislative judgment as to the gravity of that particular offense, nor does it transform the petty offense into a

---

the constitutional floor and provide more expansive jury trial rights. *See* Murphy, *supra* note 233, at 171–73. For example, several states require a trial by jury for all offenses that authorize any amount of potential imprisonment. *See id.* at 171–72. And some jurisdictions provide all criminal defendants a right to a jury trial. *See id.* at 171.

239. Baldwin v. New York, 399 U.S. 66, 73 (1970).

240. *Id.* at 68 (emphasis added); *see also* Duncan v. Louisiana, 391 U.S. 145, 160 (1968) ("The penalty authorized by the law of the locality may be taken as a gauge of its social and ethical judgments of the crime in question."(citation omitted)); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937) (noting that the right to a jury trial is based on severity as understood and reflected by the "laws and practices of the community taken as a gauge of its social and ethical judgments").

241. 518 U.S. 322 (1996).

242. *Id.* at 323.

243. *Id.* at 326.

244. *Id.* at 323.

245. *Id.* at 326–27.

246. *Id.* at 327.

serious one, to which the jury trial right would apply."[247] The Court acknowledged that "the aggregate potential penalty faced by [the defendant] is of serious importance to him."[248] "But to determine whether an offense is serious for Sixth Amendment purposes," the Court emphasized, "we look [only] to the legislature's judgment."[249] In other words, "[w]here we have a judgment by the legislature that an *offense* is 'petty,' we do not look to the potential prison term faced by a *particular defendant*, who is charged with more than one such petty offense."[250]

Notably, the Supreme Court has also limited its "legislative judgment" inquiry to the legislature that enacted the offense at issue.[251] When determining whether a defendant has a constitutional right to a jury trial, the Supreme Court has held that the petty offense inquiry is based on whether the legislature that adopted the offense viewed it as serious. For example, in *Blanton v. City of North Las Vegas*,[252] the Supreme Court considered whether a defendant charged with DUI under Nevada law had a constitutional right to a jury trial.[253] Nevada law provided that the defendant, if convicted of the DUI offense, could serve up to six months in jail, face up to one-thousand-dollar fine, would have to attend an alcohol abuse education course, and would lose his driver's license for ninety days.[254] The Court concluded that the defendant had no constitutional right to a jury trial, because "we do not believe that the *Nevada Legislature* has clearly indicated that DUI is a 'serious' offense."[255] The Court later explained the inquiry required by

247. *Id.* The Court went on to note that

> [t]he Constitution's guarantee of the right to a jury trial extends only to serious offenses, and [the defendant] was not charged with a serious offense. That he was tried for two counts of a petty offense, and therefore faced an aggregate potential term of imprisonment of more than six months, does not change the fact that the Legislature deemed this offense petty. [The defendant] is not entitled to a jury trial.

Id. at 330.

248. *Id.*

249. *Id.*

250. *Id.* at 328. Based on the Court's ruling in *Lewis*, a prosecutor that carefully engages in misdemeanor charge stacking can bring multiple charges and still avoid triggering a defendant's right to a jury trial. For more on this practice.

251. Blanton v. City of N. Las Vegas, 489 U.S. 538, 543–44, 545 n.11 (1989). This is significant because, as discussed above, other sovereigns (such as the federal government) may impose additional penalties upon conviction.

252. *Id.*

253. *Id.* at 543–44.

254. *Id.* at 539–40.

255. *Id.* at 544 (emphasis added). The Court specifically declined "petitioners' invitation to survey statutory penalties for drunken driving in other States. The question is not whether other States consider drunken driving a 'serious' offense, but whether Nevada does." *Id.* at 545 n.11.

Blanton in the following terms: "the question [is] whether a particular legislature deemed a particular offense 'serious.'"[256]

B. Which Collateral Consequences Should Be Considered

As explained above, the right to a jury trial is allocated based on the relative severity of the offense charged, and an offense's relative severity is viewed from the perspective of the legislature that adopted the offense. When determining relative severity, courts look to potential penalties that might result from a conviction. This means that "potential sanctions," such as potential collateral consequences that may not ultimately materialize, may be considered. I accordingly disagree with courts, such as the District of Columbia Court of Appeals in *Foote v. United States*,[257] that have refused to consider collateral consequences that "could be imposed only in hypothetical civil or administrative proceedings."[258] Potential sanctions, not just guaranteed sanctions, are also relevant when it comes to the constitutional right to a jury trial.

While potential sanctions should be considered, collateral consequences that are imposed by a separate sovereign should be excluded when determining whether a defendant has the constitutional right to a jury trial. This is because such consequences do not reflect the views of the legislature that adopted the offense. Likewise, collateral consequences that are not imposed uniformly across defendants should be excluded from consideration, as a sanction imposed only on some defendants does not indicate that the legislature which adopted the offense believed that specific *offense* was sufficiently severe.

As a result, immigration consequences, some firearm prohibitions, and some disqualifications from public benefits should not be considered when deciding whether the right to a jury trial is triggered. Sex offender requirements, some firearm prohibitions, and some public benefit disqualifications, on the other hand, should be eligible for consideration in step three of my incorporation framework. I will now walk through each set of consequences, explaining whether and why they are eligible for consideration.

1. Immigration Consequences

Regardless of whether the prosecution is by a state government or the federal government, immigration consequences should not be considered when determining whether the defendant has a

256. United States v. Nachtigal, 507 U.S. 1, 4 (1993). In *Nachtigal*, the Supreme Court concluded that a DUI charge under federal law was a petty offense because Congress viewed it as such, based on the penalties it authorized upon conviction. *See id.* at 4 (referring to the "controlling legislative determination" made by Congress).

257. 670 A.2d 366 (D.C. 1996).

258. *Id.* at 372.

constitutional right to a jury trial. With respect to state prosecutions, any possible immigration consequences of conviction will be imposed by a separate sovereign—the federal government.[259] Thus, immigration consequences that flow from a state conviction are not the sort of penalty that reflects how the legislature that *adopted* the offense (that is, the state government) views the relative severity of that offense.

There have been three recent cases about whether a defendant subject to potential deportation upon conviction has a constitutional right to a jury trial, but only one reached the right result. The Nevada Supreme Court correctly declined to consider a defendant's potential deportation after a domestic battery conviction on the grounds that such a consequence is "not relevant because [it does] not reflect a determination by the Nevada Legislature that first-offense domestic battery is a serious offense."[260] It is the federal government, not the Nevada legislature, that attached potential immigration consequences to a possible conviction for a Nevada offense.[261] Accordingly, those federal consequences should not be considered when determining the relative severity of the Nevada offense.

Conversely, the District of Columbia Court of Appeals, sitting en banc, held that "the Sixth Amendment entitles a defendant to a jury trial if he is charged with a deportable offense, even if the maximum period of incarceration does not exceed six months."[262] In so doing, it failed to recognize that deportation "should not be taken into account because it is a penalty that results from a congressional enactment and is not part of the penalty designated by the legislature that created the offense, in this case, the Council of the District of Columbia."[263] The court instead mistakenly focused on the fact that Congress "is the only legislative body that can prescribe the penalty of removal for a criminal conviction."[264] The District of Columbia Court of Appeals further concluded, without much reasoned explanation, that there "is no reason grounded in the purpose of *Blanton*'s penalty-based analysis to exclude from Sixth Amendment consideration the serious penalty of removal that attaches to a criminal conviction, and to which the accused is exposed, because it has been imposed by Congress rather than the local legislature."[265] There is, in fact, a reason: *Blanton* instructs that relative severity is viewed from the perspective of the legislature that adopted the offense, not from the perspective of the legislature that imposes the sanction.[266]

259. Amezcua v. Eighth Judicial Dist. Court, 319 P.3d 602, 605 (Nev. 2014).
260. *Id.*
261. *Id.*
262. Bado v. United States, 186 A.3d 1243, 1260 (D.C. 2018).
263. *Id.* at 1257.
264. *Id.*
265. *Id.* at 1258.
266. Blanton v. City of N. Las Vegas, 489 U.S. 538, 541–42 (1989).

The New York Court of Appeals made a similar misstep when it, too, recently held that a defendant charged with an otherwise petty offense is nonetheless entitled to a jury trial when facing the risk of deportation.[267] The New York Court of Appeals accurately observed that "deportation or removal is a penalty of the utmost severity."[268] But it mistakenly concluded that "it is not fatal to defendant's claim that the penalty of deportation or removal from the country is imposed as a matter of federal, rather than state, law."[269] According to the New York Court of Appeals, the "salient fact is that a legislative body authorized to attach a penalty to a state conviction has determined that the crime warrants the onerous penalty of deportation. That New York State could neither designate nor effectuate this specific penalty does not make it any less onerous."[270] While the fact that removal is authorized by federal law does not make deportation less onerous on the defendant, it does—under existing Supreme Court precedent—make the sanction immaterial for purposes of the Sixth Amendment's jury trial right. Like the District of Columbia Court of Appeals, the New York Court of Appeals concentrated on whether deportation is severe (it is) and incorrectly disregarded whether deportation was imposed by the legislature that adopted the offense (it was not).

With respect to federal prosecutions where a conviction could lead to deportation or other immigration consequences, there is no separate sovereign problem. There is, however, another issue that precludes immigration consequences from being considered. Because immigration consequences potentially apply only to noncitizen defendants, they are not a penalty that is uniformly applied across all defendants. As a result, they should not be considered for purposes of determining whether a defendant is entitled to a jury trial, because they do not reflect how Congress views the relative severity of any deportable *offense*. Under existing doctrine, "when determining the right to a jury trial, [courts] are concerned with the seriousness of the offense, rather than with the impact of a conviction on an individual defendant."[271] Accordingly, courts should "consider only those consequences that apply uniformly to all persons convicted of a particular offense."[272]

267. People v. Suazo, 118 N.E.3d 168, 178 (N.Y. 2018).
268. *Id.* at 175.
269. *Id.* at 179; *see id.* at 180 ("Inasmuch as federal deportation will almost invariably flow from certain New York state convictions, we see no persuasive reason to exclude it from the constitutional inquiry of whether the penalties of a crime are severe enough to warrant extending the protections of a jury trial.").
270. *Id.* at 179.
271. Derendal v. Griffith, 104 P.3d 147, 154 (Ariz. 2005).
272. *Id.*

2. Sex Offender Requirements

As for collateral consequences imposed on sex offenders, those should be eligible for consideration, so long as they are imposed by the same sovereign prosecuting the offense. Every state and the federal government have sex offender requirements for qualifying offenses, and for prosecutions where the jurisdiction prosecuting the offense would also be the offense imposing sex offender registration, the defendant should be constitutionally entitled to a jury trial.[273] Sex offender registration requirements, moreover, are applied uniformly across defendants.[274]

This is another area where courts have nonetheless reached conflicting results. The Arizona Supreme Court, for example, has correctly held that sex offender registration is a relevant penalty for determining whether a defendant has the constitutional right to a jury trial.[275] Meanwhile, the District of Columbia Court of Appeals has incorrectly held that sex offender registration and related requirements imposed by the same sovereign prosecuting the offense should not be considered when deciding whether the defendant has the right to a jury trial.[276]

3. Firearm Prohibitions

As for firearm prohibitions, they typically apply uniformly so they should not be excluded on that basis. The main question here is whether the jurisdiction prosecuting the offense is the same as the one that would impose a firearm prohibition. As noted, the federal government imposes a firearm prohibition for all domestic violence misdemeanor offenses.[277] But state prosecutions for such offenses should not consider that potential federal firearms ban because the penalty is imposed by a separate sovereign—namely, the federal government.[278] If, however, the federal government is prosecuting

273. At least two courts have held, correctly in my view, that potential sex offender requirements imposed by a separate sovereign upon conviction—for example, by the defendant's resident jurisdiction after a conviction by a different jurisdiction—should not be the basis for triggering a right to a jury trial. *See* Ivy v. United States, No. 5:08-CR-00021-TBR, 2010 WL 1257729, at *3–4 (W.D. Ky. Mar. 26, 2010); Rauch v. United States, No. 1:07-CV-0730 WMW, 2007 WL 2900181 (E.D. Cal. Sept. 28, 2007). These decisions correctly observe that sex offender requirements imposed by a separate sovereign do not necessarily reflect the views of the jurisdiction that adopted the offense of potential conviction.

274. *See, e.g.*, Fushek v. State, 183 P.3d 536, 540–41 (Ariz. 2008).

275. *Id.* at 543.

276. Olafisoye v. United States, 857 A.2d 1078, 1083 (D.C. 2004).

277. *See supra* notes 59–61 and accompanying text.

278. *See, e.g.*, State v. Woolverton, 371 P.3d 941, 944 (Kan. Ct. App. 2016) ("Woolverton notes that federal law prohibits domestic-violence offenders from purchasing firearms. But the existence of a *federal* statute says nothing about how the Kansas Legislature views the offense [of misdemeanor domestic violence], and we look to the punishments it has established to determine the seriousness of the offense."); Amezcua v. Eighth Judicial Dist. Court, 319 P.3d

the qualifying offense, then the federal firearms ban should be considered.[279]

Similarly, if the state has its own firearms prohibition for qualifying misdemeanor offenses, as many states do, then a state prosecution that could potentially lead to a state-imposed firearm ban should be considered. Interestingly, whether a potential firearms prohibition triggers the right to a jury trial has been the most extensively litigated collateral consequence.[280] And, once again, this is an area where courts have reached conflicting conclusions.[281]

4. Disqualifications from Public Benefits

With respect to disqualifications from public benefits, whether such a consequence should be considered here depends on the particular consequence at issue. If it is imposed by the same sovereign and it applies uniformly across defendants, then it should be considered. If, however, it is imposed by a separate sovereign—such as a federal disqualification imposed after a state conviction—or if it is not imposed uniformly across all defendants convicted of the pertinent offense, then it should not be eligible for consideration.

C. Incorporating Collateral Consequences

Having determined which collateral consequences are eligible for consideration—sex offender requirements, some firearm prohibitions, and some disqualifications from public benefits—the next step is to decide which potential sanctions, if any, are sufficiently severe to trigger a defendant's right to a jury trial. Recall that the line dividing serious offenses from presumptively petty offenses for purposes of the constitutional right to a jury trial is six months of potential imprisonment. And further recall that potential collateral consequences should be "viewed in conjunction with the maximum authorized period of incarceration" in order to determine whether they collectively "reflect a legislative determination that the offense in question is a 'serious' one."[282] For the reasons discussed below, sex offender registration and most firearm prohibitions should trigger a defendant's constitutional right to a jury trial, while disqualifications from public benefits should typically not trigger a jury trial right.

602, 605 (Nev. 2014) (holding that the federal firearm ban for persons convicted of a misdemeanor domestic violence offense is irrelevant because it was Congress that enacted the firearm prohibition, not the applicable state legislature).

279. *See, e.g.*, United States v. Chavez, 204 F.3d 1305, 1314 (11th Cir. 2000); United States v. Jardee, No. 4:09-mj-091, 2010 WL 565242, at *2–4 (D.N.D. Feb. 12, 2010); United States v. Combs, No. 8:05CR271, 2005 WL 3262983, at *2–3 (D. Neb. Dec. 1, 2005); United States v. Smith, 151 F. Supp. 2d 1316, 1318 (N.D. Okla. 2001).

280. *See* Crane, *supra* note 10, at 810, 810 n.163.

281. *See infra* note 280 and accompanying text.

282. Blanton v. City of N. Las Vegas, 489 U.S. 538, 543 (1989).

Because sex offender requirements are the functional equivalent of more than one-year imprisonment, they should trigger a defendant's constitutional right to demand a jury trial. The Arizona Supreme Court correctly held as much when it recognized, contrary to the conclusion of other courts, that "the potential of sex offender registration reflects a legislative determination that [the defendant] has been charged with serious crimes."[283] In support of its finding that sex offender registration was sufficiently severe to warrant a jury trial, the Arizona Supreme Court reviewed the obligations and restraints imposed on convicted sex offenders, such as the wealth of information the offender must provide upon his release, the duty to "notify law enforcement within seventy-two hours of any move or change of name," and the "widespread publicity [that] accompanies sex offender registration."[284]

As for firearm prohibitions imposed by the same sovereign, those potential sanctions should also typically trigger a defendant's constitutional right to a jury trial. Because firearm prohibitions are, in my view, the functional equivalent of somewhere between one day and six months imprisonment, the defendant should be constitutionally entitled to a jury trial any time a firearm prohibition is paired with a potential term of imprisonment.[285] This runs contrary to the position of most courts that have considered the issue.[286] Those decisions, however, were all issued before the Supreme Court's opinion in *McDonald v. City of Chicago*,[287] which held that a person's right to bear arms was a "fundamental" right. Those decisions should be revisited in light of *McDonald* and, for the reasons set forth earlier, a defendant facing a lifetime firearm prohibition should have a constitutional right to a jury trial.[288]

---

283. Fushek v. State, 183 P.3d 536, 543 (Ariz. 2008). *But see, e.g.*, Olafisoye v. United States, 857 A.2d 1078, 1084 (D.C. 2004) (holding there is no constitutional right to a jury trial for potential sex offender registration).

284. *Fushek*, 183 P.3d at 542–43.

285. If, however, there is no threat of potential imprisonment upon conviction, then the possibility of a firearm prohibition alone should not trigger a defendant's constitutional right to a jury trial.

286. *See* United States v. Chavez, 204 F.3d 1305, 1314 (11th Cir. 2000) (holding that potential firearm prohibition is not sufficiently severe to render charged offense "serious" and therefore trigger the constitutional right to a jury trial); United States v. Jardee, No. 4:09-mj-091, 2010 WL 565242, at *4 (D.N.D. Feb. 12, 2010); United States v. Combs, No. 8:05CR271, 2005 WL 3262983, at *3 (D. Neb. Dec. 1, 2005). *But see* United States v. Smith, 151 F. Supp. 2d 1316, 1317 (N.D. Okla. 2001) (holding "that a lifetime prohibition on the possession of a firearm is a serious penalty which entitles a Defendant to a jury trial under the 6th Amendment").

287. 561 U.S. 742 (2010).

288. Courts denying a defendant a jury trial have also relied on 18 U.S.C. §921(a)(33) when concluding that the federal firearm prohibition does not render an offense "serious" for purposes of the Sixth Amendment. Section 921(a)(33) provides in pertinent part that a person shall not be deemed to have been convicted of a "misdemeanor crime of domestic violence," and therefore shall not

As for disqualifications from public benefits that are imposed by the same sovereign that is prosecuting the offense, those consequences of conviction—while eligible for consideration—typically should not trigger the constitutional right to a jury trial. In *Blanton*, for example, the Supreme Court held that a ninety-day suspension of a driver's license did not render an otherwise petty offense "serious" for purposes of the Sixth Amendment.[289] While some disqualifications may be sufficiently severe to trigger a jury trial right, those should be considered truly exceptional, as it will be unusual for such disqualifications to infringe on a defendant's constitutional liberty interests to a degree approximating several months of imprisonment.[290]

In sum, offenses that might lead to sex offender registration or extended firearm prohibitions—if such consequences are imposed by the same sovereign prosecuting the offense—should trigger a defendant's constitutional right to a jury trial.

VI. CONCLUSION

For far too long, criminal procedural entitlements have been distributed according to an outdated model, where heightened procedural protections are allocated based only on the sanction of imprisonment. That model has not persisted because it is legally required, nor has it persisted because it leads to just or, for that matter, sensible outcomes. But it has persisted nonetheless. If

---

be deemed to have been convicted of an offense that prohibits possession of a firearm in the future, unless his case was tried by a jury or he knowingly waived his right to a jury "in the case of a prosecution for an offense . . . for which a person was entitled to a jury trial in the jurisdiction in which the case was tried." 18 U.S.C. § 921(a)(33) (2012). "The statute's express language," the Eleventh Circuit explained in *Chavez*, "conveys Congress' recognition that some domestic violence offenses do not carry with them the entitlement to a jury trial even though a conviction results in the prohibition of firearm possession." *Chavez*, 204 F.3d at 1314. While that observation is correct as far it goes—some jurisdictions will not afford defendants a right to a jury trial for offenses that qualify as a "misdemeanor crime of domestic violence"—it does not mean that federal defendants facing a federal lifetime firearms ban should be deprived a right to a jury trial. Section 921(a)(33) simply recognizes that some jurisdictions, such as state jurisdictions, may not provide a jury trial right for such offenses. And as explained in the previous Subpart, the *federal* firearms prohibition should not trigger a right to a jury trial in a *state* prosecution. *See supra* Subpart V.B.

289. Blanton v. City of N. Las Vegas, 489 U.S. 538, 543–44 (1989).

290. One such "exceptional" case may be the penalty at issue in *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). In that case, the Eighth Circuit concluded that a fifteen-year driver's license revocation was sufficiently severe to render the offense "serious" for purposes of the constitutional right to a jury trial. *Id.* at 1204 (observing that "[r]evocation of a license to operate a motor vehicle very often can work a substantial hardship on its holder" and that a "15-year license revocation, considered together with the maximum six month prison term, is a severe enough penalty to indicate that the Nebraska legislature considers third-offense DWI a serious crime").

nothing else, this Article seeks to spark a broader conversation about how to chart a different course—one that aligns the allocation of criminal procedural protections with the indisputable reality that collateral consequences play a central role in our criminal justice system.

As demonstrated by Part IV (incorporating collateral consequences into the constitutional right to counsel) and Part V (same for the constitutional right to a jury trial), a path forward—one that is feasible and largely consistent with existing doctrine—is readily available. And the framework developed here is not limited to those two constitutional rights. It can be applied by courts and legislatures to all procedural entitlements that are currently distributed unevenly across defendants, such as the right to a grand jury, the right to a preliminary hearing, and rules regarding increased discovery.

It is now well accepted that collateral consequences have a tremendous impact on criminal defendants and are integral to the criminal justice system. It will eventually become accepted that the procedural protections afforded to defendants should take these realities into account as well. As courts and legislatures increasingly undertake the important project of incorporating collateral consequences into criminal procedural entitlements, this Article establishes a pathway for doing so in a manner that is theoretically coherent, doctrinally consistent, and practically feasible.