

Criminal Law & Procedure

THE PROBLEM WITH THE PROLIFERATION OF COLLATERAL CONSEQUENCES

By John G. Malcolm

Note from the Editor:

This article discusses collateral consequences of criminal convictions and argues that such consequences should be rarer and more tailored to specific offenses, in order to avoid penalizing those who have already served their sentences and preventing them from reintegrating into society.

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• Hans A. von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, Heritage Foundation Legal Memorandum No. 145 (Feb. 11, 2015), [available at http://www.heritage.org/research/reports/2015/02/felon-voting-and-unconstitutional-congressional-overreach](http://www.heritage.org/research/reports/2015/02/felon-voting-and-unconstitutional-congressional-overreach).

• Randy H. Magen & Janet Emerman, *Should Convicted Felons Be Denied Admission to a Social Work Education Program? Yes!*, 36 JOURNAL OF SOCIAL WORK EDUCATION 401 (2000), https://www.jstor.org/stable/23043517?seq=1#page_scan_tab_contents.

• Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003), <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1090&context=aulr>.

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When most people think about the consequences of a criminal conviction, they imagine a court-ordered prison sentence or probation with a definite beginning and end, and possibly a fine or restitution order. Many probably think that, when “prison bars and chains are removed,” the offender’s punishment is over and he or she can begin the process of reintegrating into society and becoming a law-abiding citizen.¹

But this image does not match reality. In 1910, in *Weems v. United States*, Supreme Court Justice Joseph McKenna described what awaits a criminal convict at the end of his sentence: “His prison bars and chains are removed, it is true . . .,” but “he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.”² Justice McKenna’s description is still true today. While many of the most severe collateral consequences that used to be imposed on ex-offenders—including limitations on property rights and rights to enter into contracts, get married, and initiate lawsuits³—have gone by the wayside, other less severe, but still pernicious, restrictions have proliferated in America since the 1980s.⁴

I. WHAT ARE COLLATERAL CONSEQUENCES?

Today, there are more than 48,000 federal and state civil laws and regulations that restrict the activities of ex-offenders⁵ and curtail their liberties after they are released from confinement or their period of probation ends. Experts estimate that there are also thousands of similar restrictions in local ordinances.⁶ These restrictions are known as “collateral consequences” (as opposed

1 *Weems v. United States*, 217 U.S. 349, 366 (1910).

2 *See id.*

3 *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PENN. L. REV. 1790-91 (2012); Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999) (on the scope of collateral consequences in the United States).

4 Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52 (1987); Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1 (2014), <http://moritzlaw.osu.edu/students/groups/oslj/files/2012/01/6-Meek.pdf>; Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 11, 14-15 (1996) (“[An] analysis of state legal codes reveals an increase between 1986 and 1996 in the extent to which states restrict the rights of convicted felons. . . . [T]here was an increase in the number of states restricting six rights; voting, holding office, parenting, divorce, firearm ownership, and criminal registration increased.”); Jeremy Travis, *Invisible Punishment, in THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 18 (Marc Mauer & Meda Chesney-Lind eds., 2002).

5 The term “ex-offender” as used in this article refers to a person with a prior criminal conviction.

6 Meek; Olivares et al.; Travis, *supra* note 4.

to the “direct consequences” of conviction, like imprisonment).⁷ In addition, federal, state, and local governments are free to pile on “at any time” whatever “additional restrictions and limitations they deem warranted.”⁸

Collateral consequences are considered to be civil in nature and thus distinct from criminal laws and penalties, so courts, prosecutors, and defense attorneys have generally treated them as falling outside the scope of their control and immediate concern.⁹ Few are as aware as they should be of the full scope of these “post-sentence civil penalties, disqualifications, or disabilities” that follow a conviction,¹⁰ including criminal defendants and defense counsel.¹¹

Legislators have broad discretion when it comes to enacting laws creating collateral consequences. These laws are considered remedial and not punitive, and they are typically justified with appeals to public safety. They can affect, among other things, an

ex-offender’s ability to get a job or a professional license; to get a driver’s license;¹² to obtain housing,¹³ student aid,¹⁴ or other public benefits;¹⁵ to vote, hold public office or serve on a jury;¹⁶ to do volunteer work;¹⁷ and to possess a firearm.

In many cases, the public safety benefits of a particular collateral consequence significantly outweigh any burden it places on an ex-offender. For example, it is perfectly reasonable to prohibit convicted sex offenders from running day care centers or residing or loitering near elementary schools; such a prohibition is a prudent way to protect children from people with a track record of abusing the vulnerable.¹⁸ Prohibiting violent felons from

7 See *Weems*, 217 U.S. at 366; Joe Palazzolo, *5 Things to Know About Collateral Consequences*, WALL ST. J. (May 17, 2015), <http://blogs.wsj.com/briefly/2015/05/17/5-things-things-to-know-about-collateral-consequences/>; Burton, *supra* note 4. The National Inventory of Collateral Consequences of Conviction lists 48,229 entries. Of these, 35,485 entries—roughly 74 percent—relate to employment, occupational or professional licensure, or business licenses. The Justice Center, Council of State Governments, <https://niccc.csjusticecenter.org/map/> (last accessed May 1, 2017) (hereinafter Inventory). Other estimates place employment-related collateral consequences at between 60 and 70 percent of the total. Palazzolo, *supra*. According to the National Association of Criminal Defense Attorneys, “[t]here are approximately 48,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits based on criminal convictions.” Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae, p. 6, *Packingham v. North Carolina*, No. 15-1194, <http://www.scotusblog.com/wp-content/uploads/2016/12/15-1194-amicus-petitioner-NACDL.pdf> (last accessed May 1, 2017).

8 See Chin, *supra* note 3.

9 See, e.g., *Hawker v. New York*, 170 U.S. 189, 196–200 (1898); *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) (arguing that a collateral consequence, no matter how severe, is “not the sentence of the court which accept[s] the plea but of another agency over which the trial judge has no control and for which he has no responsibility.”); *abrogated by Padilla v. Kentucky*, 559 U.S. 356 (2010); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989) (A collateral consequence “may result from a criminal prosecution, but is not a part of or enmeshed in the criminal proceeding.”).

10 See Ram Subramanian et al., *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction*, VERA INST. (2014), <http://archive.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v4.pdf> (on state reforms) (hereinafter Vera).

11 In *Padilla v. Kentucky*, a longtime U.S. resident and Vietnam veteran was arrested and pled guilty to transporting marijuana after defense counsel assured him that deportation would not follow a guilty plea. The federal government did institute deportation proceedings. Padilla argued he had inadequate notice of the consequences of his plea. The Supreme Court held that defense counsel must advise noncitizen defendants of potential immigration consequences of a conviction. See Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 How. L.J. 675 (2011); Case Comment, *United States v. Muhammad: Tenth Circuit Holds that Defendant Need Not Be Informed of Collateral Consequences Before Pleading No Contest*, 128 HARV. L. REV. 1860 (2015), <https://harvardlawreview.org/2015/04/united-states-v-muhammad/> (arguing that “defendants have a constitutional right to knowledge of the direct—but not collateral—consequences of their plea.”).

12 23 U.S.C. § 159 (2000) (revocation or suspension of drivers’ licenses of individuals convicted of drug offenses); see also, e.g., Fla. Stat. § 322.055(2) (same).

13 Rebecca Beitsch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, PEW CHARITABLE TRUSTS (July 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons>.

14 See, e.g., 20 U.S.C. § 1091(r) (prohibiting students convicted of drug offenses while receiving student aid from receiving such aid for a period of years after conviction).

15 See, e.g., 13 C.F.R. § 123.101(i) (prohibiting someone who is “presently incarcerated, or on probation or parole following conviction for a serious criminal offense,” from receiving a federal home disaster loan); 13 C.F.R. § 124.108(a)(4)(ii) (prohibiting someone who is “currently incarcerated, or on parole or probation pursuant to a pre-trial diversion or following conviction for a felony or any crime involving business integrity,” from being eligible to participate in the U.S. Small Business Administration’s 8(a) Business Development Program); see also Beitsch, *supra* note 13.

16 See Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 73–74 (2003); see also, e.g., Cal. Civ. Code § 203(a)(5) (prohibiting persons in California “who have been convicted of malfeasance in office or a felony” from serving on a jury unless their rights have been restored).

17 See, e.g., AM. BAR ASSOC. COMM. ON EFFECTIVE CRIM. SANCTIONS & PUB. DEF. SERV. D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 18, 31 (2009), available at <https://www.americanbar.org/content/dam/aba/migrated/cecs/interalexile.authcheckdam.pdf> (noting laws that bar certain offenders from volunteer work that involves the presence of a minor); KIM AMBROSE, WA. DEFENDER ASSOC., BEYOND THE CONVICTION 12–13 (2013), <http://www.defensenet.org/resources/publications-1/beyond-the-conviction/Beyond%20the%20Conviction%20-Updated%20-%202007.pdf> (same); JAMES FRANK ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION IN OHIO 31, available at <http://ocjs.ohio.gov/CollateralConsequences.pdf> (report to the Ohio Office of Criminal Justice Services finding that Ohio law provides that “[a]ny person who has been convicted of a disqualifying offense is incompetent to hold a public office, to be publicly employed, or even to be a volunteer in certain public positions, such as volunteer firefighter.”).

18 See, e.g., Nat’l Conf. of State Legislatures, *Enactments Concerning Sex Offenders Near Schools and Child-Care* (Sept. 19, 2006), available at http://www.npr.org/programs/morning/features/2006/oct/prop83/ncl_schools.pdf; N.H. Rev. Stat. Ann. § 170-E:29(III) (2013) (restricting activity of those convicted of “a violent or sexually-related crime against a child”); see also Ian Lovett, *Public-Place Laws Tighten Rein on Sex Offenders*, N.Y. TIMES (May 29, 2012), http://www.nytimes.com/2012/05/30/us/sex-offenders-face-growing-restrictions-on-public-places.html?_r=0; Roger Przybylski, Office of Justice Programs, Dep’t of Justice, *Recidivism of Adult Sex Offenders* (July 2015), available at <https://www.smart.gov/pdfs/RecidivismofAdultSexualOffenders>.

purchasing or possessing firearms is another example of a targeted and tailored policy.¹⁹ Similarly, laws forcing a public official who has been convicted of bribery or public corruption to resign from office²⁰ or prohibiting someone convicted of defrauding a federal program from participating in a related industry for a period of time impose collateral consequences that are sensible and directly related to the substance of the offenses committed.²¹ Other restrictions, such as those on voting, may make sense for some period of time, but perhaps not indefinitely.²² In these and

other cases, the public safety justification is legitimate, and not just a cover for extending punishment of ex-offenders who have already served their sentences.

II. THE PROBLEMS WITH COLLATERAL CONSEQUENCES

Many people convicted of crimes are never sent to prison, and, of those who are, more than 95 percent—tens of millions of people²³—will eventually be released and return to our communities.²⁴ They face long odds when it comes to trying to put their past actions behind them. In addition to having to endure the stigma associated with being convicted criminals, many ex-offenders have substance abuse issues, limited education, and limited job skills and experience. On top of these

pdf (discussing high recidivism rates for new sex crimes by adult sex offenders). Some have argued, however, that some restrictions and registration requirements for sex offenders may have gone too far and may end up doing more harm than good. See Jill Levinson & Andrew J. Harris, *SORNA: Good Intentions, Flawed Policy, and Proposed Reforms*, ENGAGE, Vol. 13, Issue 3 (Oct. 2012), available at <http://www.fedsoc.org/publications/detail/an-exchange-over-the-sex-offender-registration-and-notification-act-sorna>.

- 19 See 18 U.S.C. § 922(g)(1); *District of Columbia v. Heller*, 554 U.S. 570, 626–627 (2008) (“Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons.”). *But see* U.S. v. Barton, 633 F.3d 168, 173 (3d Cir. 2011) (“*Heller’s* statement regarding the presumptive validity of felon gun dispossession statutes . . . does not foreclose” parties with a criminal conviction from bringing an as-applied challenge.); Collateral Consequences Resource Center, *Second Amendment Challenges to Felon-in-possession Laws* (Dec. 13, 2014), <http://ccresourcecenter.org/2014/12/13/second-amendment-challenges-felony-dispossession-laws/>. Some have urged, however, that individuals convicted of nonviolent offenses should be able to petition to have their Second Amendment rights restored. See, e.g., Paul Bedard, *House Votes to Let Nonviolent Ex-felons Restore Gun Rights*, WASH. EXAMINER (June 5, 2015), <http://www.washingtonexaminer.com/house-votes-to-let-nonviolent-ex-felons-restore-gun-rights/article/2565685>; James King, *This Ex-con is Trying to Get Guns in the Hands of Non-violent Felons*, THE WEEK (Mar. 2016), <http://theweek.com/articles/614883/ex-conv-trying-guns-hands-nonviolent-felons>.
- 20 See, e.g., Nat’l Conf. of State Legislatures, *Penalties for Violations of State Ethics and Public Corruption Laws* (Feb. 2, 2015), <http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx>.
- 21 See, e.g., 12 U.S.C. § 1829 (2000) (prohibiting persons convicted of crimes of dishonesty or breach of trust from owning, controlling, or otherwise participating in the affairs of a federally insured banking institution, subject to waiver by the FDIC; waiver may not be given for 10 years following conviction in the case of certain offenses involving the banking and financial industry); 10 U.S.C. § 2408 (2000) (persons convicted of fraud or felony arising out of defense contract prohibited from working in any capacity for a defense contractor or subcontractor for a period of at least five years); see also *DiCola v. Food & Drug Admin.*, 77 F.3d 504, 507 (D.C. Cir. 1996) (upholding the Food and Drug Administration’s lifetime ban of a former drug company executive from “providing services in any capacity to the pharmaceutical industry” after conviction of adulterating a drug product and failing to keep adequate records: “The permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation.”).
- 22 Some have argued that it is perfectly reasonable to deny the right to vote to convicted felons. See Hans A. von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, Heritage Foundation Legal Memorandum No. 145 (Feb. 11, 2015), available at <http://www.heritage.org/research/reports/2015/02/felon-voting-and->

[unconstitutional-congressional-overreach](#) (“Those who are not willing to follow the law cannot claim a right to make the law for everyone else. And when an individual votes, he or she is indeed either making the law—either directly in a ballot initiative or referendum or indirectly by choosing lawmakers—or deciding who will enforce the law by choosing local prosecutors, sheriffs, and judges.”). Others, such as the NAACP, have argued that convicted felons should not lose their right to vote. See NAACP, *Felon Disenfranchisement Is About Race*, THE ROOT (Oct. 2, 2012), <http://www.theroot.com/articles/politics/2012/10/felon-disenfranchisement-naACP-launches-campaign/>; see also *Developments in the Law—One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002) (criticizing felony disenfranchisement laws). State laws vary considerably on this issue, with 48 states and the District of Columbia imposing at least some restrictions on felon voting. See Nat’l Conf. of State Legislatures, *Felon Voting Rights* (2016), available at <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx/>. In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the Supreme Court upheld the constitutionality of California’s felony disenfranchisement law. The essential issue appears to remain, as Associate Supreme Court Justice Clarence Thomas put it: Is the ex-offender “worthy of participating in civic life”? *Caron v. United States*, 524 U.S. 308, 318 (1998) (Thomas, J., dissenting).

- 23 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, 628 (2006) (estimating that roughly 65,000 individuals are released from prison and 9 million individuals are released from local jails each year); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, WALL ST. J. (Aug. 7, 2015), <http://on.wsj.com/1MSctje>; Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL’Y INITIATIVE (Mar. 14, 2016), <http://www.prisonpolicy.org/reports/pie2016.html>.
- 24 “At least 95% of all state prisoners will be released from prison at some point; nearly 80% will be released to parole supervision.” Timothy Hughes & Doris James Wilson, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Reentry Trends in the United States*, <https://www.bjs.gov/content/reentry/reentry.cfm> (last visited Dec. 19, 2016). “Virtually all offenders convicted of a federal crime are released from prison eventually and return to society or, in the case of illegal aliens, are deported to their country of origin.” Glenn R. Schmitt & Hyun J. Konfrst, U.S. Sentencing Comm., *Life Sentences in the Federal System 1* (2015), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf (noting that, in 2013, all offenders who received a life sentence without parole or who effectively received a life sentence due to their age and sentence duration made up only 0.4 percent of all federal criminal sentences). See also Pew Charitable Trusts, *Prison Time Surges for Federal Inmates* (Nov. 18, 2015), http://www.pewtrusts.org/-/media/assets/2015/11/prison_time_surges_for_federal_inmates.pdf (“With the exception of the comparatively small number of offenders who are sentenced to death or life behind bars or who die while incarcerated, all inmates in federal prisons will eventually be released.”).

built-in challenges, they have to navigate a tangle of collateral consequences as they stake out their new lives, and the number and breadth of these consequences can be debilitating.

Regrettably, many ex-offenders will end up committing additional offenses after their release, thereby posing a continuing threat to public safety.²⁵ Although many of these individuals would have committed additional crimes regardless of any collateral consequences imposed upon them, many others would like to turn over a new leaf and become productive, self-reliant, law-abiding members of society, but find themselves thwarted in these efforts by collateral consequences. As the American Bar Association has pointed out, “[i]f promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.”²⁶ It is not in anyone’s best interests to consign ex-offenders to a permanent second-class status. Doing so will only lead to wasted lives, ruined families, and more crime.

A. *Too Many, Too Broad, Too Opaque*

Researchers for the Justice Center at the Council of State Governments have identified over 48,000 collateral consequences scattered throughout state and federal codes, with thousands more at the local level. Texas, for example, has over 200 collateral consequences in 22 different sections of the state code.²⁷ Many other states have enacted unknown numbers of collateral consequences that are “scattered—one might say hidden—throughout their codes and regulations.”²⁸ In addition, the number of people convicted of a crime has risen dramatically

since the 1970s and, with that, the number of people living with the collateral consequences of their crimes has risen as well.

While many of the collateral consequences described above are directly targeted at promoting public safety, many others have a tenuous connection to public safety and appear to be more punitive in nature than remedial. The proliferation of such excess restrictions makes it unnecessarily difficult for ex-offenders to reintegrate into society.²⁹ Moreover, not all collateral consequences are reasonably related to the offenses committed by those subject to them. For example, Ohio law provides for the suspension or revocation of an offender’s driver’s license upon conviction of some crimes that are entirely unrelated to driving.³⁰ Why restrict an ex-offender’s ability to get or drive to a job or to pick up his or her children from school if that individual poses no greater risk to people on the road than any other driver? Similar problems can arise with respect to another category of collateral consequences: those that revoke eligibility for certain government benefits. For example:

- A criminal conviction may cost a military veteran his or her pension, insurance, and right to medical treatment,³¹ which is particularly troubling because studies indicate that veterans who are suffering from post-traumatic stress disorder and therefore in serious need of medical treatment may be more likely to commit crimes.³²
- In the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Congress barred individuals convicted of state or federal drug offenses from receiving, in addition to student aid, federal cash assistance under the Temporary Assistance for Needy Families (TANF)

25 In a study of 25,431 federal offenders released from prison or commencing a term of probation in 2005, 49.3 percent were rearrested within eight years for a new crime or for one or more technical violations of the supervised release conditions—the median time to rearrest was 21 months—31.7 percent were reconvicted, and 24.6 percent were reincarcerated. Kim Steven Hunt & Robert Dumville, U.S. Sentencing Comm., *Recidivism Among Federal Offenders: A Comprehensive Overview* (Mar. 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf. In another study in 2014, 76.6 percent of offenders released from state prison were rearrested within five years, 55.4 percent were convicted, and 28.2 percent were reincarcerated. Matthew Durose et al., Bureau of Justice Statistics, Dep’t of Justice, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010* (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>.

26 See ABA, *Standards for Criminal Justice, Collateral Sanction and Discretionary Disqualification of Convicted Persons*, 10 (3d ed. 2004) (referencing compilations of various states’ collateral consequences for comparison) (hereinafter ABA Standards).

27 See *id.* at 21, 22. While some states apply collateral sanctions only to convictions rendered in that state, others apply sanctions based on convictions rendered in other jurisdictions as well, so ex-offenders must often scour the codes of multiple states if they wish to know the full scope of disabilities that might apply to them.

28 Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L.J.* 753, 784 (2011); see also ABA Standards, *supra* note 26; Oh. Just. & Pol’y Ctr., *Civil Impacts of Criminal Convictions Under Ohio Law*, <http://civicohio.org/> (state database of collateral consequences, a keyword search of “mandatory” on Dec. 29, 2016, resulted in 596 entries).

29 See Tracy Sohoni, *The Effects of Collateral Consequence Laws on State Rates of Returns to Prison* (July 2015) (unpublished PhD dissertation, University of Maryland, on file with National Criminal Justice Reference Service) (showing correlation between various collateral consequences, employment rates, and recidivism); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 *COLUM. HUM. RTS. L. REV.* 193 (2004) (same); Richard P. Seiter & Karen R. Kadel, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 *CRIME AND DELINQUENCY* 360 (2003) (same).

30 NAT’L ASSOC. CRIM. DEFENSE LAWYERS, *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME* 33 (2014), http://thf_media.s3.amazonaws.com/2014/pdf/Collateral%20Damage%20FINAL%20Report.pdf (hereinafter NACDL) (statement of Gary Mohr, Director, Ohio Department of Rehabilitation and Correction); see also Frank et al., *supra* note 17, at 4–5.

31 DEP’T OF JUSTICE, *FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION* 3–4 (2000), https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf (hereinafter DOJ Report).

32 See, e.g., Matthew Wolfe, *From PTSD to Prison: Why Veterans Become Criminals*, *DAILY BEAST* (July 28, 2013), <http://www.thedailybeast.com/articles/2013/07/28/from-ptsd-to-prison-why-veterans-become-criminals.html>; David Wood, *Combat Veterans with PTSD, Anger Issues More Likely to Commit Crimes: New Report*, *WORLD POST* (Oct. 10, 2012), http://www.huffingtonpost.com/2012/10/09/veterans-ptsd-crime-report_n_1951338.html.

program and food stamps under the Supplemental Nutrition Assistance Program (SNAP).³³

- States may also categorically bar certain types of offenders, such as all drug³⁴ and sex offenders,³⁵ from government housing for any period of time, and they can suspend or revoke a driver's license on the basis of a conviction.³⁶

While these restrictions may make sense for some limited class of ex-offenders whose convictions are related to government assistance programs, depriving broad swaths of ex-offenders of the ability to get assistance for themselves and their families, to live in affordable housing in a stable environment, or to obtain educational assistance to enhance their skills is hardly conducive to helping them become productive citizens.

B. Employment Restrictions and Recidivism

Perhaps the most ubiquitous and pernicious collateral consequences imposed on ex-offenders are restrictions on their ability to earn a livelihood.³⁷ Sixty to seventy percent of the tens of thousands of identified collateral consequences are employment-related,³⁸ despite the fact that employment is a top predictor of recidivism. Again, for some limited class of offenders, these restrictions may make sense. For example, federal law bars individuals with a prior criminal conviction from holding elected office and, depending on the nature of the conviction,

from working for the military³⁹ or in law enforcement,⁴⁰ private security,⁴¹ and jobs that require a security clearance,⁴² and this limited set of restrictions makes sense insofar as it keeps those convicted of violent crimes away from weapons, and those convicted of corruption from positions of public trust. It is less clear that those convicted of other kinds of crimes should similarly be banned from other professions that require a federal license, such as grain inspectors, locomotive engineers, and merchant mariners.⁴³

State laws restricting employment opportunities for ex-offenders can be even more severe than federal restrictions. For example, Virginia has enacted over 140 mandatory collateral consequences that affect employment, from disqualification to hold any state "office of honor, profit, or trust" to ineligibility to hold a commission as a notary public.⁴⁴ Ohio imposes more than 500 mandatory collateral consequences that restrict employment opportunities including employment as a contractor or truck driver.⁴⁵

Experts estimate that there are thousands of similar employment restrictions in local ordinances.⁴⁶ These can bar ex-offenders from pursuing various occupations such as street peddling, cab driving, and construction.⁴⁷ A multitude of other occupational licensing laws compounds the effect of collateral consequences insofar as they "may either explicitly exclude individuals convicted of certain criminal convictions or implicitly exclude them through a requirement that applicants be of 'good moral character.'"⁴⁸ These include operating a dance hall, a bar, a pool hall, a bowling alley, or a movie theater,⁴⁹ and working as a midwife, an interior designer, a barber, a contractor, an HVAC

33 See MARC MAUER & VIRGINIA MCCALMONT, SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS (Nov. 2013, updated Sept. 2015), available at <http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf>. In 2015, 37 states enforced the TANF ban; 34 states enforced the SNAP ban; 25 states conditioned receipt of welfare on the nature of conviction(s) (e.g., individuals convicted of drug possession but not manufacturing or distribution may receive benefits); some looked to completion of drug treatment programs or a post-conviction waiting period. *Id.* at 2. See also ABA Standards, *supra* note 26, at 39 (arguing that prisoners themselves do not need and should not receive welfare assistance while in prison).

34 24 C.F.R. § 966.4.

35 See NACDL, *supra* note 30, at 33 (providing, e.g., that California bans "every person on the [sex-offender] registry" from public housing, so "those convicted of public urination in California are barred for life from public housing while those convicted of more serious violent offenses are not").

36 See, e.g., JUDGE HAROLD BAER, JR., COLLATERAL CONSEQUENCES OF CONVICTION: A REMINDER OF SOME POSSIBLE CIVIL PENALTIES 8 (2011), available at https://www.nysba.org/uploadedFiles/NYSBA/Sections/Criminal_Justice/Records_of_Conviction/BaerCollateralConsequences-WEB.pdf; RANDY T. LEAVITT, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS 6–7 (2009), available at http://randyleavitt.com/11_Leavitt.pdf.

37 See generally ABA Standards, *supra* note 26; Devah Prager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960 (2003) (discussing employment barriers based on prior criminal conviction); Joe Palazzolo, *For Americans Who Served Time, Landing a Job Proves Tricky*, WALL ST. J. (May 17, 2015), <http://on.wsj.com/1HcwLFY> (same).

38 See Palazzolo, *supra* note 7.

39 DOJ Report, *supra* note 31, at 3; 10 U.S.C. § 504(a) (2006).

40 See, e.g., *Can a Felon Work for the Government?*, JOBS FOR FELONS HUB (Nov. 11, 2015), <https://www.jobsforfelonshub.com/can-a-felon-work-for-the-government/>; Fla. Stat. § 943.13(4) (2016).

41 See U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Apr. 25, 2012) (§§ III.A & VI.A), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; Chin, *supra* note 3, at 1800; see also Vera, *supra* note 10, at 20 (noting state bill to loosen state restrictions on ex-offenders from private security employment).

42 See Chin, *supra* note 3, at 1800.

43 DOJ Report, *supra* note 31, at 4–5.

44 See Va. Code § 18.2-471; § 47.1-4; Inventory, *supra* note 7 (a search for mandatory employment-related restrictions under Virginia law generated 188 search results as of Jan. 16, 2017).

45 See Oh. Just. & Pol'y Ctr., *supra* note 28; Inventory, *supra* note 7 (a search for mandatory employment-related restrictions under Ohio law generated 666 search results as of Jan. 16, 2017).

46 See *id.*; Meek, *supra* note 4.

47 See Meek, *supra* note 4, at 17.

48 *Id.* at 15.

49 *Id.*

installer or repairman, or a cab driver. The list goes on and on,⁵⁰ each law magnifying the effect of the one before it.⁵¹ Even creative politicians would be hard-pressed to come up with a legitimate public safety rationale for prohibiting an ex-offender from serving as a midwife, an interior designer, an HVAC installer, or a barber. This is particularly absurd when one considers that many ex-offenders receive training to become barbers or HVAC installers and repairmen while incarcerated,⁵² only to discover upon release that they cannot get a license to practice in the one field in which they now have a marketable skill.⁵³

Research shows that states with heavy occupational licensing burdens and restrictions for ex-offenders have seen higher average levels of recidivism for new criminal offenses than have states with fewer occupational licensing burdens and restrictions.⁵⁴ Studies have also shown a positive correlation between collateral consequences and lower employment rates as well as higher

recidivism rates.⁵⁵ Although more research is needed, existing research strongly suggests that imposing irrational restrictions on economic opportunities for ex-offenders undermines efforts to promote public safety and a cost-effective criminal justice system.⁵⁶

III. WHAT SHOULD BE DONE

Like the criminal conviction itself, civil sanctions carry real consequences that can be as injurious as they are “demoralizing.”⁵⁷ It is, therefore, time to rethink the collateral consequences we impose on people with criminal records when those consequences increase the likelihood that ex-offenders will fail in their efforts to reform and to provide for their families.

Under certain circumstances, presidents and governors can issue pardons and restore an individual’s civil rights, and courts can expunge criminal records or issue certificates of rehabilitation,⁵⁸ thereby providing some deserving ex-offenders with some relief from the burdens otherwise imposed by collateral consequences. Employers may also help to improve ex-offenders’ employment prospects by voluntarily delaying their inquiry into a job applicant’s prior criminal record until later in the hiring process—a practice commonly referred to as a “ban the box” policy. However, it is important that this is done voluntarily—there is evidence suggesting that employers will employ race as

50 This does not even scratch the surface. See Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 38 HARV. J. L. & PUB. POL’Y 209 (2015).

51 See, e.g., Daniel Walters, *From Prison to Olympia*, INLANDER (Jan. 14, 2016), <http://www.inlander.com/spokane/from-prison-to-olympia/Content?oid=2658314> (anecdotes of employment barriers of collateral consequences).

52 Eugene L. Meyer, *Prisoners Learning Barber Trade in Jail*, WASH. POST (Oct. 3, 2001), available at <http://articles.latimes.com/2001/oct/03/news/cl-52695>; Suzanne Le Mignot, *Barber School Gives Jail Inmates Second Chance*, CBS CHI. (Oct. 5, 2012), available at <http://chicago.cbslocal.com/2012/10/05/barber-school-gives-jail-inmates-second-chance/>; James Miller, *Marion Correctional Institution’s Barber Program Gives Inmates Get [sic] a Clean-cut Benefit*, MARION STAR (April 29, 2014), <http://www.marionstar.com/story/news/2014/04/29/barber-program-gives-inmates-get-a-clear-cut-benefit/8482799/>; Larry Yellen, *Stateville’s First-ever Class of Barbers Graduate*, FOX 32 (Nov. 18, 2015), <http://www.fox32chicago.com/news/local/51335959-story>.

53 See, e.g., Mike Cronin, *Texas Aids Convicted Felon in Training as Barber but Denies License*, TEX. WATCHDOG (June 7, 2012), <http://www.texaswatchdog.org/2012/06/texas-aids-convicted-felon-in-training-as-barber-but-denies/1339021201.column>; Michael Schulte, *Felony Conviction, Barrier to Obtaining Professional License*, GA. CTR. FOR OPPORTUNITY (Nov. 2014), <http://georgiaopportunity.org/access-professional-licenses-benefit-returning-citizens/> (listing some of the “80 professions that are off-limits to those with a felony conviction, including barber, cosmetologist, electrical contractor, plumber, conditioned air contractor, auctioneer, utility contractor, registered trade sanitarian, and scrap metal processor”); Sondra Wolfer & Helen Peterson, *Ex-Con Barber’s Cut Some Slack*, N.Y. DAILY NEWS (Feb. 21, 2003), <http://www.nydailynews.com/archives/news/ex-con-barber-cut-slack-article-1.676409>; Bryant Jackson-Green, *How Occupational Licensing Blocks Path to Success for Ex-Offenders*, ILL. POL’Y (Apr. 7, 2015), <https://www.illinoispolicy.org/how-occupational-licensing-blocks-path-to-success-for-ex-offenders/> (listing licenses that can be denied due to a felony record in Illinois, including barber, nail technician, pet shop operator, referee, livestock dealer, and dance hall operator).

54 Stephen Slivinski, *Turning Shackles into Bootstraps, Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, Center for the Study of Economic Liberty at Arizona State University Policy Report No. 2016-01 (Nov. 7, 2016) (estimating “that between 1997 and 2007 the states with the heaviest occupational licensing burdens saw an average increase in the three-year, new-crime recidivism rate of over 9%. Conversely, the states that had the lowest burdens and no [‘good-character’] provisions saw an average decline in that recidivism rate of nearly 2.5%.”).

55 See Sohoni; Uggen & Manza; Seiter & Kadela, *supra* note 29.

56 See *id.*; see also Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT’L INST. JUST. J. 42 (2012), available at <http://www.nij.gov/journals/270/pages/criminal-records.aspx> (citing related materials from the Justice Department); Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply,”* NAT’L EMPLOYMENT L. PROJECT, 3 n. 6 (2011) (arguing that “the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety.”), available at http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf. Collateral consequences likely account for significant losses in potential economic growth. At least one study has connected collateral consequences to a 1.5 percent to 1.7 percent reduction in the employment rate for men and estimates that “[i]n GDP terms, these reductions in employment cost the U.S. economy between \$57 [billion] and \$65 billion in lost output” in 2008 alone. John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, CTR. FOR ECON. & POL’Y RES., at 14 (Nov. 2010). “Survey results suggest that between 60 [percent] and 75 percent of ex-offenders are jobless up to a year after release.” *Research on Reentry and Employment*, Nat’l Inst. of Just., Dep’t of Justice, <https://www.nij.gov/topics/corrections/reentry/pages/employment.aspx> (last visited Jan. 9, 2017).

57 Kenneth L. Karst, *The Supreme Court 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 6–7 (1998).

58 See *Ex parte Garland*, 71 U.S. 333 (1866) (discussing the consequences of a pardon); NACDL, *supra* note 30, at 20 (discussing expungement); Collateral Consequences Resource Center, *State-Specific Resources*, <http://ccresourcecenter.org/resources-2/state-specific-resources/> (last accessed Oct. 25, 2016) (discussing various state and federal processes for restoration of rights); Joe Palazzolo, *Brooklyn Judge Issues First Federal “Certificate of Rehabilitation,”* WALL ST. J. (Mar 8, 2016), <http://blogs.wsj.com/law/2016/03/08/brooklyn-judge-issues-first-federal-certificate-of-rehabilitation/>.

a proxy for criminality when “ban the box” is mandated by the government.⁵⁹

There are also things state and federal legislators can do to address unduly onerous collateral consequences. Legislators should consolidate all existing collateral consequences in a single location in order to make them more accessible so the public (including defendants and their attorneys) is aware of the full consequences of criminal conviction.⁶⁰ In addition, legislators should reassess the collateral consequences enacted within their jurisdictions to ensure that they are necessary to protect the public, reasonably related to the offense committed, and not capable of being enforced indiscriminately or arbitrarily. Any restriction that does not satisfy these parameters should be amended or repealed so that ex-offenders who are earnestly working to lead lawful, prosperous lives and to provide for their families are not needlessly thrown off-course.⁶¹ Legislators might also consider establishing more robust procedures for ex-offenders to petition for relief or waivers from certain collateral consequences, which could be granted in meritorious cases.

IV. CONCLUSION

In light of growing evidence that a number of collateral consequences may frustrate reintegration into the community and encourage recidivism, some states have already begun to reassess what collateral consequences should attach to which convictions, as well as why and for how long.⁶² While some collateral consequences are justifiable as a way to protect public safety, many are not. Unjustifiable collateral consequences are punitive in nature, designed to continue punishing ex-offenders once they complete their sentences for the crimes they committed. The public’s desire to continue to stigmatize an ex-offender may be understandable, but it comes at a high cost and should be resisted to promote justice and public safety.

Since most ex-offenders—millions of them—at some point will be released from custody and return to our communities, it is important that we do everything we can to encourage them to become productive, law-abiding members of society and that we not put too many impediments, in the form of excessive collateral

consequences, in their way that will hinder their efforts. More attention must be paid to this issue to avoid these dangerous and counterproductive results. In a time of intense polarization, this is one of the few issues people can rally around and on which we can find common ground. It is not in anybody’s best interest to relegate the formally incarcerated to a backwater of second-class citizenship status.

⁵⁹ John G. Malcolm & John-Michael Seibler, *Mandatory “Ban the Box” Requirements May Do More Harm Than Good*, Heritage Foundation Legal Memorandum No. 198 (Jan. 30, 2017), available at <http://www.heritage.org/research/reports/2017/02/mandatory-ban-the-box-requirements-may-do-more-harm-than-good>.

⁶⁰ See ABA Standards, *supra* note 26 (standard 19-2.1); see also Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 118–21 (2012) (arguing that counsel should inform defendants of potential collateral consequences).

⁶¹ See generally ABA Standards, *supra* note 26; see also Dep’t of Justice, *Smart on Crime—Reforming the Criminal Justice System for the 21st Century* 5 (Aug. 2013), <https://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf>. Some organizations, such as the National Association of Criminal Defense Lawyers, have suggested an even more aggressive approach to addressing the problems created by overweening collateral consequences. See NACDL, *supra* note 30, at 33.

⁶² See Vera, *supra* note 10 (on state reform efforts between 2009-2014).

