WHAT ARE DEFENSE LAWYERS FOR? LINKS BETWEEN COLLATERAL CONSEQUENCES AND THE CRIMINAL PROCESS

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The content of a lawyer's duties under the Sixth Amendment is dynamic, changing with developments in custom and law. Custom is important because competence is measured by compliance with "[p]revailing norms of practice."[1] If many or most lawyers fail to do something that very good lawyers regard necessary, the omission's ordinariness makes it competent for Sixth Amendment purposes.[2] However, professional norms advance. For example, if a norm arises among reasonably competent attorneys that clients should be warned about the possibility of deportation, ultimately all attorneys may become obligated to do so, as the Supreme Court recently held in *Padilla v. Kentucky*.[3]

The law also shapes counsel's duties.[4] For example, counsel has no duty to investigate to find evidence that would be inadmissible.[5] However, if legal developments render new categories of evidence admissible,[6] an obligation to find that evidence may spring into existence.[7] Similarly, the Court's recent decisions in *Lafler v. Cooper* and *Missouri v. Frye* recognized the current

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1. Strickland v. Washington, 466 U.S. 668, 688 (1984).

2. *See id*. at 687-90 (recognizing that very good lawyers may defend the same case in different ways but that doing so is acceptable as long as the attorney's performance is "reasonable[] under prevailing professional norms").

3. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1480-83 (2010).

4. *See* DeSchon v. State, 197 P.3d 476, 481-82 (Mont. 2008).

5. *See id*.

6. *See* Eddings v. Oklahoma, 455 U.S. 104, 110-17 (1982) (discussing how evidence of mitigating circumstances must now be considered in capital punishment sentencing).

7. *See* Wiggins v. Smith, 539 U.S. 510, 529-38 (2003) (requiring defense counsel to investigate any mitigating evidence for capital punishment sentencing to comply with professional standards).

importance of disposing of cases through guilty pleas, rather than trials, and required counsel to be effective in that context, as well as in trials.[8]

This Essay proposes that a combination of legal developments in courts and legislatures and of changing professional customs is giving rise to a new obligation of counsel to address collateral consequences.[9] I advocated for this development ten years ago, but I recognized that then-existing law recognized almost no connection between defense counsel and collateral consequences.[10] The law has started to evolve.

Part I of this Essay proposes that in many cases, collateral consequences, not fine or imprisonment, are the most significant consequences in criminal cases. Most people convicted of crimes, even felonies, do not go to prison.[11] What is at stake for many defendants facing criminal charges is not a long stretch in prison, but a lifetime with a criminal record. Accordingly, if attorneys want to help clients, they must think about collateral consequences. Part II discusses some ways in which the law makes collateral consequences relevant to the criminal case.

I. WHAT IS REALLY AT STAKE IN CRIMINAL PROSECUTIONS

In the United States, we live in an era of mass conviction.[12] Many distinguished scholars have used a different term: "mass incarceration."[13] Since

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8. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407-08 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render . . . adequate assistance of counsel . . . ."); Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (explaining that a fair trial does not remedy inadequate assistance of counsel because "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences").

9. *See infra* Part II.

10. *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 704-09 (2002).

11. *See infra* notes 17-24 and accompanying text.

12. *See generally* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012) [hereinafter Chin, *The New Civil Death*] (drawing from this Article for this Section).

13. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (Mary Pattillo et al. eds., 2004); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165; Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587 (2011); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010) (book review).

1970, and even more profoundly since 1980, there has been an increase in both the rate of imprisonment and the absolute number of people in prison.[14] That increase has been called "unprecedented in the history of liberal democracy."[15] In 1980, more than 500,000 Americans were confined to prisons and jails; today there are nearly two million.[16]

Yet, the term "mass incarceration" obscures the reality that prison is not the default tool of the criminal justice system.[17] There are approximately 1.1 million new state felony convictions in a typical year[18] and some multiple of that in misdemeanors.[19] In addition, there are approximately 80,000 federal convictions each year, mostly felonies.[20] Most defendants convicted of felonies are not sentenced to state prison—about sixty percent receive probation only or probation with local jail time.[21] Even more defendants convicted of

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14. Chin, *The New Civil Death*, *supra* note 12, at 1803-04.

15. THE VIOLENCE OF INCARCERATION 1, 14 (Phil Scraton & Jude McCulloch eds., 2009).

16. Lauren E. Glaze, *Correctional Population in the United States, 2010*, *in* PRISONERS SERIES, at 1 (U.S. Dep't of Justice, NCJ 236319, 2011) [hereinafter Glaze, *Correctional Population 2010*], *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf; Paul Guerino et al., *Prisoners in 2010*, *in* CORRECTIONAL POPULATIONS IN THE UNITED STATES SERIES, at 1 (U.S. Dep't of Justice, NCJ 236096, rev. 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf; *see also* Allen J. Beck & Darrell K. Gilliard, *Prisoners in 1994*, *in* CORRECTIONAL POPULATIONS IN THE UNITED STATES SERIES, at 1 (U.S. Dep't of Justice, NCJ 151654, 1994), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/Pi94.pdf.

17. *See infra* notes 18-22 and accompanying text (discussing that while the phrase "mass incarceration" does not capture the full impact of collateral consequences, this observation is not meant to imply that scholars using the phrase are unaware of the collateral consequences of criminal conviction, or have not paid enough attention to them in their scholarship; the observation is about the limits of the term, not about the work of those who use it).

18. *E.g.*, Sean Rosenmerkel et al., *Felony Sentence in State Courts, 2006 — Statistical Tables*, *in* FELONY SENTENCES IN STATE COURT, at 1 (U.S. Dep't of Justice, NCJ 226846, rev. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

19. *See* R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 1, 47 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx (reporting that misdemeanors comprised seventy-nine percent of the criminal caseload in a 2008 study of eleven state courts); Lynn Langton & Donald J. Farole, Jr., *Census of Public Defender Offices, 2007*, *in* CENSUS OF PUBLIC DEFENDERS OFFICES, at 1 (U.S. Dep't of Justice, NCJ 228538, rev. 2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf (reporting that public defenders surveyed were assigned a total of 378,400 felony and 575,770 misdemeanor cases in 2007); *see also* KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2010, at 16 tbl.16 (2011), *available at* http://ag.ca.gov/cjsc/publications/candd/cd10/preface.pdf (reporting nearly 1.4 million arrests in California in 2010, of which 448,552 were for felonies and the remainder for misdemeanors or status offenses—indicating that misdemeanor convictions are more common than felony convictions); *2006–2010 Disposition of Adult Arrests*, N.Y. ST. DIVISION CRIM. JUST. SERVS., http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf (last visited Mar. 15, 2012) (reporting that in 2010, there were 546,416 adult arrests—leading to 35,597 felony convictions—and 286,131 convictions for misdemeanors or lesser offenses); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1320 & n.25 (2012) (estimating 10.5 million nontraffic misdemeanors annually) (citing ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009)).

20. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES tbl.5.1 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/fjs08st.pdf (reporting 82,823 federal convictions in the year ending September 30, 2008, of which 75,832 were felonies).

21. ROSENMERKEL ET AL., *supra* note 18, at 4 tbl.1.2.

misdemeanors avoid incarceration.[22] While many people are sentenced to prison, and even though sentence length has increased in recent decades, the average term is now less than five years.[23] Accordingly, it is likely that the vast majority even of those sentenced to prison will spend most of their lives in free society.[24]

Those convicted but not incarcerated are typically sentenced to probation.[25] Six-and-a-half million people were on probation at some point during 2009,[26] three times the number in prison or jail.[27] At the broadest level of generality, approximately sixty-five million adults have a criminal record of some kind, although some of those involve arrests not leading to conviction.[28] Accordingly, the size of the offender population is not just the two million in custody; it also includes the more than six million in the control of the criminal justice system who are not in custody, plus the tens of millions who have a record but are not in prison or jail or on probation or parole.[29]

The "incarceration" part of mass incarceration implies that actual confinement is the most important feature of the system. However, as legally and socially significant as a term in prison is, for most people convicted of crimes, collateral consequences will generate the most significant effects.[30] Merely escaping incarceration hardly means that a person with a conviction is not subject to other legal consequences as a result of her conviction.[31]

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22. *See, e.g.*, *2006–2010 Disposition of Adult Arrests*, *supra* note 19, at 5 (reporting that between 2006 and 2010, between 18% and 19.8% of those arrested for misdemeanors were sentenced to prison or jail, while another 0.9% to 1% were sentenced to jail plus probation).

23. ROSENMERKEL ET AL., *supra* note 18, at 6 tbl.1.3 (showing that state prison sentences averaged fifty-nine months). Federal sentences averaged just over five years. FEDERAL JUSTICE STATISTICS, 2008—STATISTICAL TABLES, *supra* note 20, at tbl.5.2.

24. *See* LAUREN E. GLAZE ET AL., U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 3 tbl.2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus09.pdf.

25. *See id.*

26. *Id.*

27. *Id.*; *see also* Glaze, *Correctional Population 2010*, *supra* note 16, at 3.

28. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 27 n.2 (2011), *available at* http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf; *see also* Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012) (reporting the results of a study showing that 30% of surveyed twenty-three-year-olds had been arrested, compared to 22% that had been arrested in a similar 1965 study).

29. *See supra* notes 20-21 and accompanying text.

30. *See infra* note 31 (describing the impacts of collateral consequences).

31. *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 70 (2006) ("While some felons go to prison . . . many others serve time in jail or on probation in their communities. . . . [A]t least some states disenfranchise misdemeanants as well."); *see also*, *e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("Despite their innocuous name, for many convicted offenders, and especially those who never serve any prison time, these 'collateral' consequences 'are . . . the most persistent punishments that are inflicted for [their] crime.'" (alteration in original) (quoting Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52, 52 (1987)); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1054 (noting that of the forty-eight

Criminal convictions have systematic effects on legal rights.[32] A conviction can impair the ability to work for the government, in an industry regulated by the government, or in one where a license or permit is required.[33] Criminal convictions can lead to the loss of public benefits, including public housing.[34] Those with convictions may lose rights to adopt, be a foster parent, or maintain custody of their own children.[35] A conviction can lead to the loss of civil rights, for a citizen, or deportation for a non-citizen.[36] It can lead to forfeiture of a pension, a requirement for registration or monitoring, or a prohibition on living in a particular area.[37]

Criminal records are increasingly available to all branches of the government and all segments of the public through computer databases, thus making collateral consequences susceptible to ready enforcement.[38]

Collateral consequences are not limited to felonies. As the work of Jenny Roberts,[39] J.D. King,[40] and Alexandra Natapoff[41] has shown, even misdemeanor convictions can subject a defendant to a wide range of disabilities relating to employment and public benefits; occupational and professional licenses and permits; and family status and civil rights beyond the sentence itself.

This leads to something of an irony: Loss of legal status is more important, ironically, for relatively less serious crimes. If a person is sentenced to twenty-five years imprisonment at hard labor, it likely matters little that she will be ineligible to get a license as an optometrist when she is released. But to a person sentenced to unsupervised probation and a $250 fine for a minor offense, losing her city job or being unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative can be disastrous. "[I]n many

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states and the District of Columba with disenfranchisement policies, only seventeen limit disenfranchisement to periods of incarceration); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1898 (1999) (criticizing criminal disenfranchisement "as a technique for reinforcing the branding of felons as the untouchable class of American society").

32. Convictions can have other important effects, including effects on employability or self-esteem. Those concerns are put aside for purposes of this discussion, which focuses on legal effects.

33. *See* Demleitner, *supra* note 31, at 156-57.

34. *See id.* at 158.

35. *See* Burton, *supra* note 31, at 54.

36. *See* Demleitner, *supra* note 31, at 153.

37. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION 7-13 (3d ed. 2004) [hereinafter ABA STANDARDS]; UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) (prefatory note), *available at* www.uniformlaws/org/shared/docs/collateral_consequences/uccca_final_10.pdf.

38. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 179-80 (2007) ("[A]dvances in information technology have made . . . criminal records systems more comprehensive, efficient, and easier to use.").

39. Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Courts*, 45 U.C. DAVIS L. REV. 277, 297-303 (2011).

40. J.D. King, *Beyond Life and Liberty: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/so113/papers.cfm?abstract_id=2037500.

41. Natapoff, *supra* note 19.

cases the most important part" of the conviction, in terms of both social policy and the legal effect, lies in the collateral consequences.[42]

In sum, collateral consequences can have a major impact on individuals convicted of crime—in some cases a far more significant impact than imprisonment, fine, probation, and parole—the traditional components of the sentence. A major purpose of the criminal justice system itself, and a major effect of the conviction for the majority who do not go to prison, is labeling the individual with the status of criminal so that collateral consequences can be applied to them; thus, they can be the subject of regulation, in many cases, for the rest of their lives.

II. COLLATERAL CONSEQUENCES AND THE LAW

In spite of their importance to individuals, before *Padilla v. Kentucky*, most courts held that counsel and the court had no duty to advise the client about the possibility of collateral consequences being applied as a result of the conviction—collateral consequences were considered largely irrelevant to the criminal justice system.[43] *Padilla*'s holding that counsel did have a duty to advise about the possibility of deportation was important and may portend extensions to other collateral consequences.[44] Nevertheless, at the moment, some courts continue to hold that the duty of counsel does not extend to collateral consequences.[45] This Section explains why traditional aspects of the client's interests cannot be served unless counsel considers collateral consequences.

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42. Sutton v. McIlhany, 1 Ohio Dec. Reprint 235, 236 (C.P. Huron County 1848); *see also* Margaret Colgate Love, *The Collateral Consequences of* Padilla v. Kentucky*: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 114 (2011) ("While conventionally labeled as civil, collateral consequences are increasingly understood and experienced as criminal punishment, and never-ending punishment at that.").

43. *See* Padilla v. Kentucky, 130 S. Ct. 1473 (2010); Chin & Holmes, *supra* note 10, at 721.

44. *See* Chin, *The New Civil Death*, *supra* note 12, at 1789. For example, I argue that persons convicted of crimes are subject to a modern form of civil death—a punishment they are entitled to be advised of when deciding whether to plead guilty. *Id.*

45. *See, e.g.*, State v. Manuel, No. 105,103, 2012 WL 603227, at *3 (Kan. App. Feb. 10, 2012) (arguing that probation revocation in another case is collateral consequence of which counsel has no duty to warn); *see also* Sames v. State, 805 N.W.2d 565, 569 (Minn. App. 2011) (arguing that there is no duty to warn about firearms ineligibility); Smith v. State, 353 S.W.3d 1, 5 (Mo. App. 2011) (arguing that there is no duty to warn about parole ineligibility). *But see, e.g.*, Robinson v. State, No. A11-550, 2012 WL 118259, at *4 (Minn. App. Jan. 17, 2012) (arguing that sex offender registration is a collateral consequence of which counsel has no duty to warn); Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 105-11 (2012) (discussing cases applying *Padilla* beyond deportation).

A. Plea Bargaining

One way in which counsel can help the client through knowledge of collateral consequences is through plea bargaining.[46] In *Padilla*, the Court noted that

> informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[47]

While *Padilla* addressed the collateral consequence of deportation, other significant consequences, such as loss of professional licenses,[48] forfeitures,[49] and even loss of civil rights,[50] can also be the subject of plea bargains.

Because plea bargains are not limited to traditional criminal punishment, it is arbitrary and irrational to cabin defense counsel's responsibilities in that way.[51] An effective lawyer can use collateral consequences to mitigate other aspects of the sentence, or as the Court suggested in *Padilla*, bargain over charges to obtain a conviction that will have the last onerous collateral consequences.[52]

B. Sentencing

Under most systems of sentencing, judges can impose a range of sentences. Sometimes discretion is limited by guidelines—or mandatory minimum sentence provisions—but conviction of a crime rarely leads

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46. *See Padilla*, 130 S. Ct. at 1477.

47. *Id.* at 1486.

48. *Ex parte* Reed, Nos. WR-50,961-04, WR-50,961-05, 2009 WL 97260, at *4 (Tex. Crim. App. Jan. 14, 2009) (discussing plea bargain involving surrender of peace officer's license); *In re* Meyers, 164 A.D.2d 268 (N.Y. App. Div. 1990) (discussing resignation from bar as part of plea bargain).

49. Libretti v. Wyo. Atty. Gen., 60 F. App'x 194 (10th Cir. 2003) (discussing forfeiture of property as part of plea agreement).

50. City of Baldwin v. Barrett, 458 S.E.2d 619, 620-21 (Ga. 1995) (discussing the right to hold public office).

51. *See Padilla*, 130 S. Ct. at 1485.

52. *See id.* at 1489.

automatically to only one sentence.[53] Judges choose among lawful sentences by examining statutory factors[54] and general principles of sentencing, which are broad.[55] Because courts can consider almost everything when exercising their sentencing discretion, they have always had the power to take into consideration that the defendant would be subject to collateral consequences, just as they can consider almost anything else.[56]

There is some evidence that collateral consequences are moving to a more formal sentencing factor.[57] The ABA adopted its Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons in 2003.[58] Standard 19-2.4(a) provides, "The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence."[59] The commentary explains that "the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity."[60]

The approach of the ABA Standards takes collateral consequences as a given and shapes the sentence in light of it.[61] Another approach is to use the sentencing court as a tribunal for determining which collateral consequences apply.[62] The American Law Institute's *Model Penal Code: Sentencing, Preliminary Draft 8* uses the sentencing court as a tribunal to determine whether collateral consequences should apply.[63] There are two versions of § 6.08.[64] The second version provides, "No collateral sanction authorized by state law shall take effect upon any offender convicted in [the relevant jurisdiction] unless affirmatively ordered by the sentencing court under this section. This provision supersedes any contrary provision in state law."[65]

Under this approach, only certain selected collateral consequences may be imposed on a defendant, based on a decision at sentencing.[66] The defense

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53. *See, e.g.*, LA. REV. STAT. § 14:30.1(B) (2011) (discussing murder convictions in jurisdictions without the death penalty as one exception).

54. *See, e.g.*, ARIZ. REV. STAT. § 13-701(D) (LexisNexis 2012).

55. Williams v. New York, 337 U.S. 241 (1949).

56. Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1435 (2011) [hereinafter Chin, *Illegal Entry as Crime*].

57. *See* 21 U.S.C. § 862(a) (2012). For state and federal drug distribution offenses, collateral consequences are at issue in every sentencing. Under 21 U.S.C. § 862(a), a little-known federal statute, judges are allowed to deny federal benefits to those convicted the first or second time; the third time, permanent ineligibility is mandatory. *Id.*

58. ABA STANDARDS, *supra* note 37, at 19-2.4.

59. *Id.* at 19-2.4(a).

60. *Id.* at 19-2.4 Commentary.

61. *Id.* at 19-2.4.

62. MODEL PENAL CODE: SENTENCING (Preliminary Draft No. 8 2012), *available at* http://extranet.ali.org/docs/model_penal_code_pd8_online.pdf.

63. *Id.*

64. *See id.* § 6.08 Reporter's Introductory Note (stating that the following provision is configured two alternative ways).

65. § 6.08(I) (Imposition of Collateral Sanctions).

66. *See id.*

attorney will be responsible for representing the defendant in the proceeding where that determination is made.[67]

The first version works another way. It provides, "At the time of sentencing, the court may grant an order of relief from any collateral sanction imposed by the law of [the relevant jurisdiction]. . . . In every case, there shall be a presumption in favor of relief from collateral sanctions."[68] If this version is chosen, then the sentencing commission will be authorized to "develop advisory guidelines for the imposition of collateral sanctions under § 6.08, including nonexclusive lists of factors that courts may consider as grounds for departing from the presumption against the imposition of collateral consequences set forth in § 6.08(3)."[69] On this approach, the sentencing court will be a place where otherwise applicable collateral consequences can be lifted.[70] Once again, defense counsel will have a central role.

At the time of this writing, the Model Penal Code draft has not been approved by the American Law Institute, and even when it is, it will not be law per se.[71] Nevertheless, it is consistent with other law in suggesting that collateral consequences are, at a minimum, a permissible consideration in imposing sentence.[72]

C. Non-Incarceration Supervision[73]

For those not sentenced to prison or jail, there is usually a sentence to probation.[74] For clients who are going to prison or jail, there is often some form of supervised release afterwards.[75] Collateral consequences will often have a significant impact on a client's ability to successfully complete supervised release or probation.[76] Therefore, defense counsel looking out for their clients' interests cannot ignore them.

The pre-sentence report, the critical document in developing facts for the judge to use in sentencing, does not ordinarily list collateral consequences to which a client will be subject.[77] Collateral consequences and information generated as part of the sentencing process sometimes overlap—for example,

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67. *See id.*

68. § 6.08(3)-(3)(a) (Advisement of Collateral Sanctions, Order of Relief).

69. *Id.* § 6B.02A(5).

70. *See id.*

71. *See id.* (noting on the bottom of every page that it is a preliminary draft not yet approved).

72. *See* Chin, *Illegal Entry as Crime*, *supra* note 56, at 1435 n.101.

73. *See generally* Gabriel J. Chin, *Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After* Padilla v. Kentucky, 31 ST. LOUIS U. PUB. L. REV. 61 (2011) [hereinafter Chin, *Taking Plea Bargaining Seriously*] (drawing from that article for this Section).

74. *See* 18 U.S.C. § 3561 (2006).

75. *See id.*

76. *See* Chin, *Taking Plea Bargaining Seriously*, *supra* note 73, at 74.

77. *See generally* FED. R. CRIM. P. 32(d) (describing the information included in the pre-sentence reports).

the collateral consequence of firearms ineligibility[78] is also a probation and supervised release condition,[79] and clients generally are informed of these conditions.[80] But "there is no systematic effort to canvass the restrictions to which a convicted person is subject as part of the sentencing process."[81] This is unfortunate because the client's chances of succeeding on probation or supervised release can be affected by counsel's understanding and accommodation of the collateral consequences to which the client is subject.[82]

1. The Client's Financial Condition

The client's future financial and employment prospects are important to know before sentencing.[83] Federal Rule of Criminal Procedure 32 requires a pre-sentence report to contain information about "the defendant's financial condition."[84] Financial condition is important because of the sentencing goal of "the need to provide restitution to any victims of the offense,"[85] and because the amount of a fine depends on "the defendant's income, earning capacity and financial resources."[86]

A client's financial condition is typically not a static fact, and it is affected by context.[87] That is, other than the wealthy, an underrepresented group in the criminal justice system, most people's "financial condition" is determined by their earning capacity.[88]

A critical factor in the client's earning capacity is that the conviction dramatically changes the kinds of employment that are lawfully available.[89] It makes little sense to calculate earning potential based either on employment settings that are legally prohibited or on the retention or acquisition of licenses or permits for which a client is no longer eligible. To advocate for a restitution schedule and a fine, then, often requires defense counsel to be aware of collateral consequences and their effect on the client's earning potential.[90]

The importance of the client's financial status does not end at sentencing. In addition to, or in lieu of, incarceration, most people convicted of felonies

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78. 18 U.S.C. § 922(g) (2006).
79. *Id.* § 3563(b)(8).
80. *See id.*
81. Chin, *Taking Plea Bargaining Seriously*, *supra* note 73, at 74.
82. *See id.*
83. *Id.*
84. FED. R. CRIM. P. 32(d)(2)(A)(ii).
85. 18 U.S.C. § 3553(a)(7) (2006), *invalidated by* United States v. Booker, 543 U.S. 220 (2005).
86. *Id.* § 3572(a)(1); *see also* § 3572(b) (providing that "a fine or other monetary penalty" should be imposed "only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution").
87. Chin, *Taking Plea Bargaining Seriously*, *supra* note 73, at 74.
88. § 3572(a)(I); *see also* United States v. Blackman, 950 F.2d 420, 425 (7th Cir. 1991) (discussing earning capacity as a factor in determining earning capacity).
89. *See* Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 619.
90. Chin, *Taking Plea Bargaining Seriously*, *supra* note 73, at 74.

will be under the supervision of the criminal justice system in some form: Most people convicted in federal court serve either probation instead of prison or supervised release after prison.[91] Standard conditions of probation and supervised release include that a person pay restitution,[92] "work regularly at a lawful occupation,"[93] and "support the defendant's dependents and meet other family responsibilities."[94] Failure to comply is a common reason for a return to prison.[95] Thus, even if the client is fortunate enough to be able to pay any restitution and fine in full at sentencing, the client will ordinarily be subject to ongoing financial and employment responsibilities. These ongoing financial obligations, imposed as part of the criminal judgment, also suggest that defense counsel must understand the client's future occupational situation at the time of sentencing.

2. General Compliance with Law

In addition to payment of financial obligations, probation and supervised release require the defendant to be generally law-abiding. It is a condition of both that "the defendant shall not commit another federal, state or local offense."[96] When the violations are of *malum in se* criminal prohibitions, a person should not be heard to complain that she did not know, for example, that it was illegal to rob banks.[97] Beyond that, the legal restrictions on those convicted of crime are often little known even to lawyers and judges.

III. CONCLUSION

Congress and state legislatures have made imposing collateral consequences on individuals one of the central functions of the criminal justice

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91. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 5B1.3 (2011) ("Conditions of Probation"), *with* § 5D1.3 ("Conditions of Supervised Release") (explaining that probation and supervised release are similar in many ways). Both are administered by the U.S. Probation Service. The conditions mandated by statute and the sentencing guidelines are, for the most part, the same. They are also similar in that the conditions of probation and conditions of supervised release are communicated by a probation officer at the time of sentencing. *See* 18 U.S.C. § 3563(d) (2003) ("The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required."); 18 U.S.C. § 3583(f) (2008) ("The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.").

92. U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3(a)(6), 5D1.3(a)(6) (2011).

93. §§ 5B1.3(c)(5), 5D1.3(c)(5).

94. §§ 5B1.3(c)(4), 5D1.3(c)(4).

95. *See Who Does What: Probation Officer: Qs & As*, FED. JUDICIAL CTR., http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu5b&page=/federal/courts.nsf/page/683B2E77F298C69F85256A3E006E0B61?opendocument (last visited Nov. 4, 2012).

96. U.S. SENTENCING GUIDELINES MANUAL §§ 5B1.3(a)(1), 5D1.3(a)(1).

97. United States v. Ortuno-Higareda, 450 F.3d 406, 411-412 (9th Cir. 2006) (citing several cases), *vacated en banc*, 479 F.3d 1153 (9th Cir. 2007).

system. The criminal justice system has its own special punishments—prisons and jails—but also links convicted persons to the general apparatus of the regulatory state. Given that the same legislatures that create the criminal code also created the collateral consequences applicable to violators of the criminal law, it is hard not to regard them as parts of a unified regulatory system. Perhaps for this reason, notwithstanding judicial views that collateral consequences are not part of the criminal process, in practice it has not been possible to divorce them from the criminal process. Defense counsel ignore collateral consequences only at the price of worse criminal outcomes for their clients.

In an important way, the interests of all parties—prosecution, regulators, defense attorney, and defendant—are aligned. The government wants its laws followed, and defense counsel wants to give the client the best possible chance to avoid incarceration. But, a system aiming for compliance with a complex set of restrictions must actually articulate the nature of the behavior it seeks to prohibit and promote.[98] And, it is impossible for defense counsel seeking to aid the client to comply with the law to offer advice without knowledge of applicable collateral consequences. As an institutional matter, it is in everyone's interests for the collateral consequences imposed by law to be known to all parties. The current system, thus, contains the puzzle of requiring people with convictions to follow a complex regulatory regime without informing them of what it is. This is unjustifiable and should change.

98. *See, e.g.*, United States v. Gallo, 20 F.3d 7, 12 (1st Cir. 1994).