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PADILLA AND THE FUTURE OF THE DEFENSE FUNCTION

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## Collateral Consequences: How Reliable Data and Resources Can Change the Way Law is Practiced

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## COLLATERAL CONSEQUENCES: HOW RELIABLE DATA AND RESOURCES CAN CHANGE THE WAY LAW IS PRACTICED

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## INTRODUCTION

The United States has 7.2 million adults in prison or under correctional supervision, accounting for some 3.1% of the population.<sup>1</sup> Ninety-five percent of these convicts will eventually return home and begin to encounter “hidden” consequences.<sup>2</sup> Our economic, legal, and regulatory schemes systematically marginalize people with criminal records by imposing penalties on ex-offenders that are commonly described as the “collateral consequences of criminal convictions.” The term “collateral consequences” refers to the denial of rights, privileges, benefits, and opportunities in addition to the sanctions imposed by the original criminal sentence. Many of these consequences haunt ex-offenders for the rest of their lives.

### I. OVERVIEW OF COLLATERAL CONSEQUENCES’ IMPACT ON CONVICTED

The issue of collateral consequences is one of the most hotly debated topics among practitioners, lawmakers, and academics. A persistent problem in studying the issue is the inability of any of these groups, let alone the general public, to determine the sheer volume and scope of these penalties. In the fall of 2009, the National Institute of Justice awarded the American Bar Association (ABA) a grant to address this issue and develop a comprehensive national database of consequences on a state-by-state basis.

#### A. Defining “Collateral Consequences”

Collateral consequences are codified in state and federal statutory codes and administrative regulations. They attach by operation of law or through an act of a government entity,<sup>3</sup> such as an administrative body, government official, or civil court. Unfortunately, the term “collateral consequences” defies accurate definition and categoriza-

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1. *Total Correctional Population*, OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=11> (last visited Oct. 27, 2011).

2. Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States*, OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, <http://bjs.ojp.usdoj.gov/content/reentry/reentry.cfm> (last visited Oct. 27, 2011) (based on 2002 survey report).

3. For the purposes of this Article, a “government entity” encompasses any executive, legislative, or judicial body exercising adjudicatory authority over the rights, privileges, benefits, or opportunities of an ex-offender. This definition includes state and federal civil courts, public officials, executive agencies and independent agencies, but it *specifically excludes* any criminal sentencing court.

tion. The jurisprudence on the matter does not seek to identify the phenomenon or fix its boundaries. Rather, the law has developed from an effort to maximize the authority of regulatory bodies and protect the finality of guilty plea convictions by minimizing the duties of actors within the criminal justice system.<sup>4</sup>

Collateral consequences can be classified as automatic collateral sanctions or discretionary disqualifications. Automatic collateral sanctions are penalties, disabilities, or disadvantages automatically imposed on an individual as a result of a conviction.<sup>5</sup> These sanctions attach by operation of law or through the non-discretionary act of a government entity following notice of conviction. On the other hand, discretionary disqualifications are not mandatory. A government entity is authorized—but not required—to impose the consequence on an ex-offender because of a conviction.<sup>6</sup>

Both automatic and discretionary consequences raise troubling questions about the fairness of these penalties and the procedures used to impose them. Automatic sanctions are necessarily overbroad, but they are uniformly applied and provide notice to the public of the penalties inevitably resulting from conviction. These sanctions penalize ex-offenders whose convictions might otherwise be mitigated by the factual circumstances of their criminal behavior, the passage of time, or through their efforts toward rehabilitation. On the other hand, discretionary disqualifications nominally protect against the risk of unjustified application by authorizing the government entity to hear evidence and determine whether the penalty is appropriate in any particular case. Agency discretion, however, introduces the risk of unpredictable or arbitrary applications of penalties.

Before hearing evidence on an individual ex-offender, the government entity determines whether the legislature authorizes it to sanc-

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4. See AMBER HARDESTY, OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS, H.B. 169, 129th Gen. Assemb. (2011) (summarizing the expansive number of occupations over which the different regulatory boards exercise authority over granting, denying, or revoking a license), <http://www.lsc.state.oh.us/analyses129/h0169-i-129.pdf>; see also OR. REV. STAT. ANN. § 670.280 (West 2009); Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, SENTENCING PROJECT (Dec. 16 2005), <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf>.

5. ABA STANDARDS FOR CRIMINAL JUSTICE, THIRD EDITION: COLLATERAL SANCTIONS & DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSS., Standard 19-1.1 (2004), available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_collateral\\_blk.html#1.1](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_blk.html#1.1) [hereinafter ABA COLLATERAL SANCTIONS STANDARDS].

6. *Id.*

tion people convicted of the offense at issue. The government entity makes this categorical determination by interpreting the language of its authorizing statute and deciding whether the offense falls within its permissible scope of authority.<sup>7</sup> While the authority to hear evidence and make individualized determinations addresses the concern that automatic sanctions are overbroad, the categorical determination is fraught with uncertainty.

If the government entity has yet to decide whether a particular offense is within the scope of the authorizing statute, a defense attorney in plea negotiations may find it impossible to predict whether consequences may attach and how to advise the client accordingly. This is especially true where the statute is vague or delegates to the agency the power to define the scope of its own authority. For instance, authorizing statutes commonly define a criminal offense as one “reasonably related to the profession.”<sup>8</sup> If there is no controlling authority on point, a defense attorney’s analysis of whether a particular offense would subject a client to sanctions becomes an exercise in mind-reading or guesswork.

The duration for which collateral consequence statutes are enforced varies. Some range from a few months to many years, while others simply do not indicate whether the consequence will expire at all.<sup>9</sup> Two types of statutes are understood to mean that the consequence can last forever: statutes that explicitly state that the conse-

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7. For example, in Vermont, the statutory language states, “[t]he following conduct by a licensed podiatrist constitutes unprofessional conduct. When that conduct is by an applicant or person who later becomes an applicant, it may constitute grounds for denial of licensure: . . . conviction of a crime related to the profession.” Vt. Stat. Ann. tit. 26, § 375 (b)(5) (West 2003) (amended 2011). Iowa’s code provides that the state fire marshal shall

[r]evoke, suspend, or refuse any license granted pursuant to this chapter when the licensee fails or refuses to pay an examination, license, or renewal fee required by law or when the licensee is guilty of any of the following acts or omissions: . . . Conviction of a felony related to the profession or occupation of the licensee.

IOWA CODE § 100D.5(2)(e) (2010).

8. *See, e.g.*, ALA. ADMIN. CODE r. 536-X-7.01(4)(2011); HAW. REV. STAT. § 436B-10(a)(5) (2010); 225 ILL. COMP. STAT. ANN. 15/15.1 (West 2011); IOWA CODE § 100D.5(2)(e) (2011); OHIO ADMIN. CODE 4765-8-01(A)(11) (2011); 63 PA. CONS. STAT. ANN. § 485.21(15) (West 2011); VT. STAT. ANN. tit. 26, § 375 (West 2003) (amended 2011).

9. *Compare* ARK. CODE ANN. § 6-51-609 (West 2011) (which does not state any duration for the consequence), *with* OKLA. STAT. ANN. tit. 85, § 41(A)(5) (West 2010) (repealed 2011) (specifying that the duration is for seven years).

quence is indefinite<sup>10</sup> and statutes that give no indication of expiration even if an administrative board has the discretion to cut it short.<sup>11</sup>

Moreover, some collateral sanctions remove potential workers from the employment market even though ex-offenders, employers, and consumers could all benefit from less regulation. In some instances, collateral bars to employment prevent someone who was trained for a job while incarcerated—at taxpayers' expense—from taking the very job for which he or she was trained.<sup>12</sup>

The systematic application of collateral consequences in the United States interferes with ex-offenders' successful rehabilitation and re-entry into society. This leads to increased recidivism, inadequately protects public safety, and contributes to the nation's incarceration rate, which is the highest in the world.<sup>13</sup> Whether it was the war on drugs, "get tough on crime" campaigns, mandatory minimums, or any of the other programs implemented during the past twenty years, the results have, for the most part, been the same: the United States still has the largest prison population in the world and the highest rates of recidivism.<sup>14</sup> Furthermore, these policies disproportionately affect minority populations, males, and the young.<sup>15</sup>

Lawmakers employing crime deterrence policies have made stricter laws and longer sentences, and have strengthened the ability of police to vigorously investigate all types of criminal activity. But testimony given by Stephen Saltzburg before the Equal Employment Opportunity Commission on behalf of the ABA suggests that removing barriers to employment and government services may better serve the

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10. See, e.g., OKLA. STAT. ANN. tit. 21, § 266 (West 1999).

11. See, e.g., 225 ILL. COMP. STAT. ANN. 410/4-7 (West 2011); OKLA. STAT. ANN. tit. 1, § 35 (West 2008).

12. See *infra* Part III.

13. Roy Walmsley, *World Prison Population List (Eighth Edition)*, KING'S COLL. LONDON: INT'L CTR. FOR PRISON STUDIES (Jan. 2009), [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf).

14. *Id.*

15. *Collateral Costs: Incarcerations Impact on Economic Mobility*, PEW CHARITABLE TRUSTS, 4 (Sept. 23, 2010), [http://www.pewcenteronthestates.org/uploaded/Files/Collateral\\_Costs.pdf?n=8653](http://www.pewcenteronthestates.org/uploaded/Files/Collateral_Costs.pdf?n=8653) [hereinafter *Collateral Costs*].

community.<sup>16</sup> The achievement of short-term employment reduced recidivism rates of ex-offenders by as much as 58%.<sup>17</sup>

Aside from the substantial economic burden to tax payers—over fifty billion dollars a year—incarceration carries far-reaching economic and social externalities for ex-offenders, families, and communities. The ABA data shows that, nationwide, thousands of statutes operate to deny an employment opportunity to people with criminal records.<sup>18</sup> Even though an ex-offender “pays his debt to society” by successfully completing the criminal sentence and community supervision imposed on him, the punishment continues long after the jailer puts the ex-offender on a bus home.<sup>19</sup> These statutes add a large piece to the employment puzzle, which is in addition to that created by the thousands of unregulated employers who deny employment to those with a criminal record.<sup>20</sup>

Recidivism will remain uncontrolled so long as ex-offenders are systematically denied employment opportunities—no matter how draconian criminal sentences become or how vigorously law enforcement works to investigate criminal activity. Without the opportunity to work for an “honest dollar,” ex-offenders are faced with the Hobson’s choice of returning to criminal activity to support themselves and provide for their families. For those ex-offenders fortunate enough to find work, they can expect to be paid 11% less in wages than an individual without a criminal conviction.<sup>21</sup> Allowing access to employment would enhance public safety by addressing a key contributor to recidivist criminal activity and giving the ex-offender an opportunity to rehabilitate.

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16. Stephen Saltzberg, *The Use of Criminal Records for Employment Screening Background Checks*, ABA (July 26, 2011), [http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011july26\\_stephensaltzburgeoc\\_t.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011july26_stephensaltzburgeoc_t.authcheckdam.pdf) (stating that barriers to employment result in higher recidivism rates and that if “a former offender cannot support himself or herself with honest employment, criminal activity is unfortunately more likely to result”).

17. *The Statistics*, SAFER FOUNDATION, <http://www.saferfoundation.org/news-views/the-statistics> (last visited Oct. 28, 2011) (citing a recidivism study by Loyola University in Chicago).

18. *See infra* Part III.

19. *See infra* Part III.

20. *See infra* Part III.

21. *Collateral Costs*, *supra* note 15, at 11.

### B. Operational Effect of Automatic and Discretionary Collateral Consequences

The jurisprudence concerning collateral consequences developed to protect several interests. One interest is to protect the state's authority to regulate commercial activity. Another interest is to preserve the efficiency and finality of guilty plea convictions against constitutional challenges based on the double jeopardy clause<sup>22</sup> and other protections afforded to criminal defendants. The judicial opinions promoting the state interest in effective governance over the fundamental rights of criminal defendants weakened the very constitutional protections that criminal defendants and ex-offenders asserted. This phenomenon may be observed in the formalistic distinctions made between direct criminal punishments and collateral consequences in the progeny of *Strickland*<sup>23</sup> and *Hill*.<sup>24</sup> If it develops in Justice Steven's absence, the *Padilla* decision may serve as a turning point in this line of cases—where the goals of preserving the state's authority to regulate commercial activity and continually fill its prisons begins to succumb to the weight of the fundamental rights guaranteed to criminal defendants by the Constitution. Indeed, the shift in *Padilla* from describing consequences as “collateral” to recognizing them as “integral” signified a fundamental shift in the Court's analysis and has brought it more in line with the reality faced by people with criminal records.<sup>25</sup> With *Padilla* in its infancy, however, ex-offenders continue to struggle with criminal penalties disguised as benign economic regulations.

The state's duty to protect the health, safety, and welfare of its citizens generally trumps an individual's right to enter a chosen profession.<sup>26</sup> Courts grant the legislature broad discretion in preventing unqualified people from entering regulated professions pursuant to the state's police power.<sup>27</sup> A restriction based solely on an earlier conviction, however, operates as both a commercial regulation and an addi-

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22. The double jeopardy clause, applied to the states through the Fourteenth Amendment, prevents the government from putting individuals “in jeopardy of life or limb” twice “for the same offence.” U.S. CONST. amend. V.

23. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

24. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

25. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).

26. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Gandhi v. State Med. Examining Bd.*, 483 N.W.2d 295, 300–01 (Wis. Ct. App. 1992).

27. *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999); *Barry v. Barchi*, 443 U.S. 55, 61–62, 67–68 (1979); *Cornwell v. Cal. Bd. of Barbering & Cosmetology*, 962 F. Supp. 1260, 1271–72 (S.D. Cal. 1997).



tional penalty attaching to an ex-offender who has already been punished by a criminal sentencing court.

These restrictions on employment are upheld so long as they are reasonable and not arbitrary.<sup>28</sup> This means, at a bare minimum, the crimes should be reasonably related to the profession being regulated.<sup>29</sup> The restrictions are not usually viewed as criminal penalties by the courts, but rather as civil penalties or regulations, which means they are not subject to the enhanced protections that the Constitution requires before imposing a criminal punishment.<sup>30</sup> Courts defer to the legislature in making this determination, effectively giving the legislature the ability to opt out of criminal procedure.<sup>31</sup> The civil regulation is then analyzed under rational basis review where it becomes almost impossible for an ex-offender to challenge.<sup>32</sup>

Approximately 95% of convictions result from guilty pleas.<sup>33</sup> But these convictions are vulnerable to challenges under due process and the Sixth Amendment. Following reversal, the government is free to begin the prosecution again, but unavailable witnesses and missing evidence could effectively end the matter in the defendant's favor.<sup>34</sup> Jurisprudence safeguards the finality of guilty plea convictions by minimizing the due process and Sixth Amendment duties of courts and defense attorneys.

A guilty plea conviction satisfies due process when the defendant makes the plea knowingly, intelligently, and voluntarily.<sup>35</sup> The ulti-

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28. *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

29. *See Conn.*, 526 U.S. at 291–92; *Barchi*, 443 U.S. at 61–62, 67–68; *Cornwell*, 962 F. Supp. at 1271–72.

30. Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 GEO. L.J. 1, 9 (2005) (“The main relevant provisions are the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, and the Ex Post Facto Clause. Among these, the most important are the Fifth and Fourteenth Amendments, which have been interpreted to require an elevated standard of proof (‘beyond a reasonable doubt’) in criminal cases not applicable in civil cases (‘a preponderance of the evidence’).”).

31. *Hudson v. United States*, 522 U.S. 93, 99–100 (1997) (holding that defendant bears a heavy burden of showing a legislative decision to deny criminal procedures is unconstitutional if the legislature has chosen to label the punishment as civil).

32. *See Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 124–25 (1978) (rejecting a substantive due process claim after applying rational basis review to an economic regulation with “little discussion”).

33. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010) (citing Bureau of Justice Statistics, DEP’T OF JUSTICE, *Sourcebook of Criminal Justice Statistics 2003*, at 418 (2005)).

34. *See id.* at 1496–97 (Scalia, J., dissenting).

35. *See Johnson v. Zerbst*, 304 U.S. 458, 467–69 (1938).

mate responsibility for guarding against entry of involuntary pleas falls upon the judge receiving the plea. The Sixth Amendment guarantees effective assistance of criminal defense counsel<sup>36</sup> and charges defense attorneys with the duty to competently advise criminal defendants considering whether to plead guilty.<sup>37</sup> A criminal defendant who is not adequately informed or competently advised can therefore attack the criminal conviction itself. Traditionally, the criminal defense attorney is charged only with explaining the potential ramifications that a guilty plea may have on the ultimate sentence. Counsel has not been required to explain the potential collateral consequences and, in reality, given the enormous number of statutes and regulations involved, counsel would have been hard pressed to identify the range of potential consequences for his client.<sup>38</sup>

Collateral consequences can therefore be negatively defined as the civil penalties that result from criminal convictions that do not require advance notice to the defendant before he pleads guilty. This definition, however, is wholly inadequate for the purpose of describing the phenomenon of collateral consequences and categorizing data within it. Efforts to simplify the task by creating a positive definition require the omission of important elements. For instance, collateral consequences generally can be defined as those penalties not included in the originally-imposed criminal sentence. This bright-line definition captures the vast majority of collateral consequences, but misses those occurring within the criminal sentence, such as parole eligibility and whether sentences are served concurrently, among others. When we speak of collateral consequences in this article, therefore, we refer to those penalties resulting from a criminal conviction that are not part of the court-imposed sentence. These penalties are generally considered civil in nature and do not include diversion programs, probation, or parole obligations.<sup>39</sup>

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36. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

37. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (applying *Strickland* to plea bargaining).

38. See 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 (2004).

39. See, e.g., *Adult Collateral Consequences Statute Demonstration Website*, ABA, <http://isrweb.isr.temple.edu/projects/accproject/index.cfm> (last visited Oct. 30, 2011) (providing snapshot of statutes in form that existed when collected by ABA Study between August 2009 and August 2010).

### C. Addressing the Problems

Despite their discriminatory effect, occupational collateral consequences are sometimes necessary, provided they are fair and reasonable. For example, barring convicted burglars from occupations performed in private residences or preventing child predators from seeking employment where they would likely have unsupervised contact with children are fair and reasonable rules in light of the legitimate public safety concerns they address.<sup>40</sup> These concerns may be legitimate immediately after a person is released from prison. For the vast majority of crimes, however, there is conceivably a point at which the conviction becomes irrelevant when determining whether to decline to give an individual an employment opportunity based upon that conviction. Some convictions remain relevant for a longer period of time and lawmakers are qualified to determine the length of those periods. Unfortunately, 90% of the statutes reviewed to date that contain collateral consequences fail to establish an expiration date and may therefore attach indefinitely.

For example, in Michigan an individual may be forever barred from obtaining a fishing license after being convicted under the Natural Resource and Environmental Protection Act for catching a trout without an all-species license.<sup>41</sup> The Act provides that following a conviction for this misdemeanor, “the court may . . . by order provide that the [fisher] shall not secure . . . licenses for . . . the remainder of [that] year . . . and during the next succeeding year, or longer in the discretion of the court.”<sup>42</sup>

In Alabama, failure to operate a boat in a reasonable and prudent manner could result in an indefinite suspension of an operating license.<sup>43</sup> The Alabama statute provides the criminal offense that may cause a revocation of the license, but it offers no guidance on the length of the suspension. Therefore, the licensing body is authorized to revoke the license permanently if it sees fit.

Undefined durations are not limited to minor recreational consequences. In Alabama, a medical professional who helps perform an

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40. *See, e.g.*, OKLA. STAT. ANN. tit., 21 § 2100.2 (West 2011) (“Any company engaged in the business of ice cream truck vending shall conduct an annual name search against the Oklahoma Sex Offender Registry for each ice cream truck operator prior to allowing such person to engage in the business of ice cream truck vending in this state.”).

41. MICH. COMP. LAWS. § 324.43559 (2011).

42. *Id.*

43. ALA. CODE § 33-5-70(d) (2011).

abortion on a minor without parental consent can lose his or her license.<sup>44</sup> Once again, the statute fails to state how long the revocation lasts, leaving it within the discretion of the regulatory body to determine whether the medical professional may ever return to his or her chosen occupation or whether the license revocation is permanent.

When addressing regulations preventing ex-offenders from performing a job, lawmakers should weigh several factors. First, there should be a legitimate and articulated public safety concern calling for the restriction. Second, lawmakers should tailor the restriction's duration and triggering crimes so that the restriction addresses the gravity and probability of the public safety concern without unnecessarily excluding people who are capable of doing the job, but do not pose a significant risk. Third, lawmakers should balance the value of the restriction against the threat of recidivism that the state's overall occupational licensing regime poses.

The following criteria should comprise the first steps toward creating a fair and just approach toward collateral consequences:

1. First and foremost, the federal government and all state governments should utilize studies, including the ABA study, that examine the collateral consequences that result from convictions under specific statutes.
2. Legislators should review the statutes in their states and clarify the following areas:
  - a. Any statute containing a collateral consequence should clearly specify which crimes cause the consequence, exclude those crimes that are omitted, and prevent unelected governmental entities from expanding the scope of their own authority by applying the consequence to unlisted crimes.<sup>45</sup>
  - b. All statutes containing a collateral consequence should clarify the terms of its duration or define the consequence as permanent.<sup>46</sup>
3. Defense attorneys should be required to address collateral consequences with their clients in the following ways:

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44. *Id.* § 26-21-6.

45. Preferably, statutes should provide a direct citation to the offense to avoid confusion among similar criminal offenses.

46. Undefined durations ordinarily occur in the context of discretionary disqualifications. While a discretionary decision maker can weigh the evidence and tailor an appropriate sanction for a particular ex-offender, these undefined periods can also give rise to permanent disqualifications where such consequences may not be appropriate. Lawmakers who rely on discretionary decision makers should provide minimum and maximum durations for the penalties that these agencies impose.

a. By asking questions during the initial client interview that are intended to identify potential consequences important to the client.

b. By consulting resources on collateral consequences, such as the ABA Study, and discussing the results with the client.

4. Finally, the courts should consider at least heightened rational basis review of penalties to determine whether the restriction is grounded in a legitimate and articulable public safety concern and whether the triggering crimes and duration of the penalty bear a reasonable relationship to the gravity of the public safety concern and the probability that the restricted offender would cause the related harm.

## II. AMERICAN BAR ASSOCIATION COLLATERAL CONSEQUENCE FEDERAL GRANT

The ABA is in the process of gathering statutes and administrative regulations containing a collateral consequence, categorizing them based on their attributes, and determining which criminal offenses might subject an offender to a particular penalty. ABA Criminal Justice Section Delegate Steven Saltzburg declared this the “most ambitious project the ABA has ever undertaken.”<sup>47</sup>

During the first few months, the team worked closely with LexisNexis and a data development team to design a methodology to collect and review the statutes containing collateral consequences in each state. The methodology continues to be analyzed, revised and tested against published studies, such as the Minnesota, Arizona, and federal compilations.

The statutes collected, with many containing multiple consequences, are now being reviewed by research attorneys through a process internally referred to as “coding.” Coding consists of several steps, including a determination as to whether a consequence attaches automatically or requires a government entity to make a discretionary act, whether the consequence has a fixed, permanent, or undefined duration, and whether the statute specifies any mechanism for relief or an opportunity to appear.

Finally, the attorneys search for crimes that would subject a person to the consequence following conviction. This portion of the coding is complicated because many statutes ambiguously describe crimes ra-

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47. Stephen A. Saltzburg, Remarks at the ABA Criminal Justice Section Council Meeting (May 2010).

ther than citing them or explicitly naming them. Some of these descriptions are helpful, such as those specifying the particular element that triggers a consequence—for example, an offence containing an element of fraud.<sup>48</sup> Others are more problematic, however, employing imprecise terms like “crimes involving moral turpitude.”<sup>49</sup>

When a statute used non-specific language such as, “crimes involving moral turpitude,” the attorneys reviewed case law to determine how state courts have defined these phrases. For example, North Carolina requires its chiropractic license applicants to demonstrate “good moral character.”<sup>50</sup>

The final product of the study will be a freely accessible website allowing visitors to submit a criminal statute and view a list of collateral consequences that may result from conviction. It will also work in the reverse to display the crimes that may subject an offender to a specific penalty.

The information resulting from the study will be valuable for anyone involved in the criminal justice system, whether that person is a defense attorney, prosecutor, criminal defendant, lobbyist, or policy maker. The ability to compare data between states is valuable for policymakers trying to determine how one state compares to the rest of the country.

Additionally, the study will serve as an invaluable resource for historians and social scientists studying how consequences change over time. The federal government addressed a glaring flaw in the criminal justice system when it funded this study. Without proper maintenance, however, the database will degrade if new and revised consequences go uncollected. The resource will lose its practical functionality if data becomes inaccurate. Therefore, it will be imperative to properly maintain this resource with timely updates and consistent coding standards.

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48. *See, e.g.*, COLO. REV. STAT. Ann. § 10-6-108 (West 2011); N.Y. ENVTL. CONSERV. LAW § 27-1407 (McKinney 2011).

49. *See, e.g.*, CAL. BUS. & PROF. CODE § 7211.9 (West 2011); CONN. GEN. STAT. ANN. § 1-100b (West 2011); D.C. CODE § 3-509 (2011); IDAHO CODE ANN. § 50-1604 (2011); LA. REV. STAT. ANN. § 33:2553 (2011); NEV. REV. STAT. ANN. § 644.1955 (West 2011).

50. N.C. GEN. STAT. § 90-143 (2011).

### III. IMPACT OF COLLATERAL CONSEQUENCES ON OCCUPATIONAL LICENSURE: COSMETOLOGY LICENSE CASE STUDY

To illustrate the discussion above, this section focuses on the collateral consequences affecting the practice of cosmetology. This case study demonstrates how consequences operate and the problems that state variations cause. Generally, these sanctions may vary in discretionary authority, the range of qualifying offenses, and the availability of relief.

Cosmetology is the study of beauty treatment and includes specializations ranging from hairstyling to nail and makeup application. Although requirements vary slightly by state, applicants for a cosmetology license must be at least sixteen years old, have a high school education, and have specialized training in cosmetology.<sup>51</sup> Twenty-five states impose collateral consequences applicable to cosmetologists.<sup>52</sup>

The language of the statutes governing cosmetology licensing varies dramatically by state. For example, in Washington, D.C., the statute to revoke the license of a cosmetologist merely requires that the board or commission take into consideration “[t]he bearing, if any, the criminal offense or offenses for which the person was convicted will have on his fitness or ability to perform one or more such duties or responsibilities under the license.”<sup>53</sup> In contrast, Wisconsin’s stat-

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51. *See State Beauty License Requirements*, BEAUTY SCHOOLS DIRECTORY, [http://www.beautyschoolsdirectory.com/faq/state\\_req.php](http://www.beautyschoolsdirectory.com/faq/state_req.php) (last visited Oct. 30, 2011).

52. ARIZ. REV. STAT. ANN. § 32-572 (2011); ARK. CODE ANN. § 17-26-105 (2011); CAL. BUS. & PROF. CODE § 7403 (West 2011); COLO. REV. STAT. § 12-8-132 (2011); Conn. Gen. Stat. § 20-254 (2011); 24-3-3.1 DEL. CODE ANN. tit. 24 § 5107 (2011); D.C. CODE § 47-2853.12 (2011); FLA. ADMIN. CODE ANN. r. 64B8-51.002 (2011); GA. CODE ANN. § 43-10-9 (2011); IDAHO CODE ANN. § 54-506 (2011); 225 ILL. COMP. STAT. ANN. 410/4-7 (West 2011); IOWA ADMIN. CODE r. 645-65.2 (2011); KAN. STAT. ANN. § 65-1908 (West 2011); KY. REV. STAT. ANN. § 317A.050 (West 2011); LA. REV. STAT. ANN. § 37:354 (2011); MD. CODE ANN., BUS. OCC. & PROF. § 5-314 (West 2011); MICH. COMP. LAWS ANN. § 339.1207 (West 2011); MINN. STAT. § 155A.27 (2011); Mo. Rev. Stat. § 329.050 (2011); MONT. CODE ANN. § 37-31-304 (2011); NEV. REV. STAT. ANN. § 644.1955 (West 2011); N.H. CODE ADMIN. R ANN. BAR § 301.01 (2011); N.J. STAT. ANN. § 45:5B-16 (West 2011); N.M. STAT. ANN. § 61-17A-21 (West 2011); N.Y. GEN. BUS. LAW § 410 (Consol. 2011); N.C. GEN. STAT. § 88B-24 (2011); N.D. CENT. CODE § 43-11-31 (2011); OHIO REV. CODE ANN. § 4709.07 (West 2011); OKLA. STAT. ANN. tit. 59 § 199.11 (2011); 63 PA. CONS. STAT. ANN. § 510 (West 2011); TENN. CODE ANN. § 62-4-127 (West 2011); UTAH CODE ANN. § 58-11a-302 (West 2011); W. VA. CODE R. § 3-1-4 (2011); WIS. STAT. ANN. § 454.06(1)(B) (West 2011); 10 GUAM CODE ANN. §§ 18113, 18129 (2010).

53. D.C. CODE § 47-2853.12 (2011).

ute provides that to receive a license, an applicant must prove that he or she has not been “convicted of a felony committed while engaged in the practice of barbering or cosmetology.”<sup>54</sup>

One of the biggest problems with these consequences becomes apparent when determining which crimes may trigger the penalty. The majority of the state statutes reviewed leaves this triggering language vague and, therefore, open to broad interpretation and arbitrary enforcement. The most common language requiring an applicant to demonstrate “good moral character” uses the lack thereof as grounds for revocation or denial of a license.<sup>55</sup> Other state statutes clarify the restriction with more precision. States like Delaware and North Dakota may deny or revoke a cosmetology license to an applicant convicted of a crime related to the profession.<sup>56</sup> Although more helpful than a “good moral character” requirement, these states are still vague in determining which crimes are related to the practice of cosmetology.<sup>57</sup> This ambiguity leads to unpredictable applications of collateral consequences. It also delegates substantial legislative power to the regulatory body to create additional penalties for criminal offenses by excluding them from a regulated profession.

For example, what is the rationale behind prohibiting a hair stylist from pursuing his or her trade because he or she was convicted of driving under the influence? In New Mexico, the court left open the possibility that a DUI could constitute a “crime of moral turpitude.”<sup>58</sup> Such broad discretion to exclude a person from a profession based solely upon a conviction under a poorly-defined statute should raise due process concerns because the statutes fail to adequately define and limit the consequence of criminal behavior.

The vagueness of these statutes leaves applicants at the mercy of a licensing board and with little recourse to appeal an unfavorable ruling. Some states offer an opportunity for the applicant to appear before the regulatory authority and request reconsideration of an adverse determination to appeal an unfavorable decision. For example, in California, the cosmetology board is authorized to deny a license

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54. WIS. STAT. ANN. § 454.06(1)(b) (West 2011).

55. *See, e.g.*, KY. REV. STAT. ANN. § 317A.050 (West 2011); N.J. STAT. ANN. § 45:5B-16 (West 2011); 63 PA. CONST. STAT. ANN. § 510 (West 2011).

56. DEL. CODE ANN. tit. 24, § 5107 (2011); N.D. CENT. CODE § 43-11-31 (2011).

57. DEL. CODE ANN. tit. 24, § 5107 (2011); N.D. CENT. CODE § 43-11-31 (2011).

58. *In re* Termination of Kibbe, 996 P.2d 419, 422–23 (N.M. 1999) (stating that a DUI in this case was not a crime of moral turpitude but that this finding “does not foreclose disciplinary action against a different employee in the future for similar conduct”).



based on a required criminal background check of an applicant.<sup>59</sup> Alternatively, in Louisiana, the state allows licensing board appeals to go through its Nineteenth District Judicial Court.<sup>60</sup>

Although post-deprivational hearings and judicial review usually satisfy the minimum standards of due process when a government entity regulates commercial activity, they offer little promise for the disappointed applicant because of the deference afforded to the initial decision maker in these matters. For example, California courts will only reverse an agency's decision when the petitioner establishes by "substantial evidence" that an abuse of discretion has occurred.<sup>61</sup> Likewise, Louisiana courts decline to "interfere with the bona fide judgment of the Board [when supported by] substantial evidence" unless the complainant can show that the Board exceeded its constitutional authority.<sup>62</sup>

Determining the extent of an agency's constitutional authority presents a challenge. Regulatory bodies are often equipped with vague statutes creating penalties with undefined durations that are triggered by ambiguously-defined criminal activity. Many of the cosmetology statutes require the applicant to demonstrate "good moral character." This qualification works as both an undefined duration and a vague description of the criminal activity resulting in a sanction. If the authorizing statute is silent on duration, the board has no duty to revisit its decision at a later date.<sup>63</sup> The profession of cosmetology may be forever closed to that individual. In what amounts to an enormous delegation of legislative power, the agency effectively determines the scope of its own authority by interpreting these vague authorizing statutes and deciding which convictions demonstrate a lack of "good moral character" and for how long that presumption might apply.

Finally, these interpretations enjoy considerable deference from the courts. Under these circumstances, a complainant is hard-pressed to demonstrate an abuse of discretion when the agency claims that it

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59. CAL. BUS. & PROF. CODE § 7403 (West 2011).

60. LA. REV. STAT. ANN. § 37:607 (2011).

61. *Matanky v. Bd. of Med. Exam'rs*, 144 Cal. Rptr. 826, 834 (Cal. Ct. App. 1978) ("Courts should pay great deference to the expertise of the administrative agency in determining the proper penalty to be imposed." (citing *Cadilla v. Bd. of Med. Exam'rs*, 103 Cal. Rptr. 455, 459 (Cal. Ct. App. 1972))).

62. *Sciortino v. La. State Bd. of Cosmetology*, 194 So. 2d 409, 411 (La. Ct. App. 1967) (citing *State ex rel. Rathe v. Jefferson Parish Sch. Bd.*, 19 So. 2d 153, 167-68 (La. 1944)).

63. Lawmakers could address this problem by establishing a time limit on the admissibility of prior convictions patterned after Federal Rule of Evidence 609(b). See FED. R. EVID. 609(b).

has the authority to sanction the complainant where it found a conviction amounts to “substantial evidence” demonstrating the complainant’s lack of “good moral character” and leaves that presumption in place for a disproportionate length of time.

Ironically, some of the states with collateral consequences relating to the practice of cosmetology also provide cosmetology training through its correctional vocational programs. Seven of the eighteen states reviewed offer cosmetology training in their prisons. Generally, these programs promote a compelling public interest by providing employment opportunities to former convicts, thereby substantially reducing the likelihood of recidivism among those who find employment when released from custody.<sup>64</sup> Illinois spends about \$21 million annually for adult education in correctional facilities.<sup>65</sup> A portion of that budget funds cosmetology training for inmates.<sup>66</sup> Nevertheless, the Illinois cosmetology licensing board may never allow these people to put their training to use. It is authorized to revoke, suspend, or refuse a cosmetology license to any person convicted of a felony, a misdemeanor involving an element of dishonesty, or a crime related to the profession.<sup>67</sup> Without some guarantee that a trainee could obtain a license following release, Illinois taxpayers pay to teach offenders a job skill that may never be utilized. The licensing board undermines the public good advanced by these vocational programs when it snatches the opportunity away from the trainee at the moment he or she attempts to re-enter society and is most vulnerable to recidivism.<sup>68</sup>

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64. Michigan, which requires applicants to demonstrate “good moral character,” MICH. COMP. LAWS ANN. § 339.1207 (West 2011), heard twenty cosmetology license appeals in 2009 following criminal conviction denials. See *Cosmetology Board Minutes, Michigan Department of Licensing and Regulatory Affairs*, <http://www.dleg.state.mi.us/dms/results.asp?docowner=BCSC&doccat=Cosmetology&doctype=Meeting+Minutes> (last visited Oct. 31, 2011).

65. See, e.g., OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE GOVERNOR, ILLINOIS STATE BUDGET: FISCAL YEAR 2012 (2011), ch. 8 at 2, available at [http://www.state.il.us/budget/FY2012/FY12\\_Operating\\_Budget.pdf](http://www.state.il.us/budget/FY2012/FY12_Operating_Budget.pdf); *Dixon Correctional Center*, ILL. DEP’T OF CORRECTIONS, <http://www.idoc.state.il.us/subsections/facilities/information.asp?instchoice=dix> (last visited Nov. 2, 2011); *Vienna Correctional Center*, ILL. DEP’T OF CORRECTIONS, <http://www.idoc.state.il.us/subsections/facilities/information.asp?instchoice=vie> (last visited Nov. 2, 2011).

66. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE GOVERNOR, ILLINOIS STATE BUDGET: FISCAL YEAR 2012 (2011), ch. 2 at 50, available at [http://www.state.il.us/budget/FY2012/FY12\\_Operating\\_Budget.pdf](http://www.state.il.us/budget/FY2012/FY12_Operating_Budget.pdf) (indicating portion of budget directed toward vocational rehabilitation).

67. 225 ILL. COMP. STAT. ANN. 410/4-7 (West 2011).

68. In cases where the state legislature has established a vocational training program for inmates teaching the skills of a particular occupation, courts should apply greater scrutiny when licenses are denied based on a conviction. The state legislature

In some cases, consequences affecting employment are sound policy, such as when they limit an offender's access to vulnerable populations or national security interests. But for professions such as cosmetology, the public safety concerns giving rise to these employment restrictions are outweighed by the danger and costs of recidivism created by a systematic regime that denies employment opportunities to ex-offenders. This is especially true where vague authorizing statutes without durational limits prevent an otherwise qualified candidate from the opportunity to earn an honest living. In cases where an ex-offender entered prison unskilled and enrolled in a vocational program to learn a trade like cosmetology, these statutes may block that person's only avenue to lawful and fulfilling employment.

#### IV. REDUCING AMBIGUITY IN THE STATUTORY LANGUAGE OF COLLATERAL CONSEQUENCES

Lawmakers should evaluate employment-related collateral consequences and seek to clarify the relationship between the restrictions, the activity being regulated, and the public safety concern it addresses. They should also seek to clarify what criminal convictions may result in those restrictions. Courts, for their part, should apply a heightened rational basis review to collateral consequences because of their relationship to criminal penalties and the danger that these agencies can effectively define the scope of their own authority.

##### A. Application of Heightened Rational Basis Review for Collateral Consequences

Courts should pay particular attention to the legitimate and articulated public safety concerns asserted in authorizing statutes. The gravity and probability of the public safety concern coming to fruition should be weighed against the risk that the restrictions are over-inclusive, under-inclusive, vague, or grounded in animus towards the ex-offender. Another factor should be whether an offender in the position of the applicant represents a greater public safety concern while unemployed than the applicant would represent if allowed to secure a license and seek employment in a lawful occupation. These restrictions should be suspect when they disproportionately advance the purported public safety concern against the risk of an unreasonable

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has effectively spoken on the public safety concern that a convicted applicant represents assuming a particular occupation when it acts to train convicts to perform that job. A contrary decision by an agency is in apparent conflict with the legislature's policy on the matter.

application. Pure animus toward ex-offenders without articulating a public safety concern is not a legitimate government interest and does not support scrutiny under a heightened rational basis review. These individuals have paid their debt to society. Alternatively, courts could recognize the inherently punitive nature of blanket criminal restrictions and review them for violations of constitutional protections such as double jeopardy and the ex post facto clause.<sup>69</sup>

Under the law regulating plumbers in Rhode Island, a plumber may lose his license after a felony conviction that has virtually no relationship to his regulated activity:

The director of labor . . . shall revoke the license of any master plumber . . . or journeyman plumber . . . after a hearing when the weight of the evidence establishes . . . any licensee . . . is convicted of a felony.<sup>70</sup>

The broad implications of this statute means that if a person commits a felony, such as promoting gambling by bookmaking at a race track,<sup>71</sup> that person would be prevented from practicing his or her profession—even though the crime and the regulated activity are virtually unrelated and the risk to public safety is exceedingly low. Here, it appears the restriction is over-inclusive, disproportionately severe compared to any articulable public safety concern, and appears to be based purely on animus towards convicted felons. The court should require the legislature to articulate its public safety concerns relative to the criminal offenses it finds relevant. Far too many crimes are classified as felonies to apply a single public safety concern to each of them identically.

### **B. Reducing Ambiguity with Clear and Concise Language**

Lawmakers should ensure that statutory language is clear and unambiguous to cabin the authority of regulatory agencies and to ensure that public safety concerns are being addressed without unnecessarily restricting opportunities to those who need them. Generally, a statute is unconstitutionally vague as to violate due process when its language fails to convey a sufficiently definite warning that certain con-

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69. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325–26 (1866) (“[A]n ex post facto law is . . . one which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed; or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required.”).

70. R.I. Gen. Laws § 5-20-27 (2011).

71. *Id.* § 11-19-14.1.

duct is proscribed when “measured by common understanding and practices or where its language is such that people of common intelligence must necessarily guess at its meaning.”<sup>72</sup> Alarming, many statutes fail to identify specifically which crimes will cause a particular consequence. Instead, many statutes rely on phrases without a specific legal definition. Judges may be competent to determine the meaning of these phrases after the conduct has occurred and attorneys have briefed both sides of the question, but the same cannot be said of a “person of common intelligence” before the act or during plea negotiations for a crime such as bookmaking at a racetrack. Phrases such as “good moral character,” “crimes of moral turpitude,” “violent crimes,” or “crimes against children” provide little guidance as to what crimes actually qualify. Indeed, they often have no discernible relationship to the regulated activity.

In Nebraska, the statute governing landscape architecture licenses states:

Any applicant or landscape architect convicted of a felony, or other criminal offense, under state law, federal law or the law of another jurisdiction, and which if committed in this state would have constituted a felony under the state law, may be held in violation of the Code of Practice promulgated by the State Board of Landscape Architects if, in the opinion of the Board, the events and circumstances leading to the conviction indicate a condition *which would affect the competency of the registrant to serve the life, health, and property of the public.*<sup>73</sup>

Phrases like “a condition, which would affect the competency of the registrant to serve the life, health, and property of the public” provide no guidance in determining what crimes will prevent an applicant from registering with the board. These vague qualifying phrases also make the job of a defense attorney trying to advise his client on a plea and the potential effects of conviction next to impossible. Given the broad authority delegated to the board, predicting the legal effect of a conviction is unworkable unless lawmakers explicitly cite the qualifying crimes and exclude the rest. This clarification would give the public fair notice and reserve the exercise of this qua-

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72. 16B AM. JUR. 2D *Constitutional Law* § 972 & n.4 (2011) (citing *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967); *Ga. Pac. Corp. v. Occupational Safety & Health Review Comm’n*, 25 F.3d 999, 1005 (11th Cir. 1994); *Wotton v. Bush*, 261 P.2d 256 (Cal. 1953); *Trio Distrib. Corp. v. City of Albany*, 143 N.E.2d 329, 332 (N.Y. 1957); *State v. Abner*, 334 N.E.2d 530, 534–35 (Ohio Ct. App. 1974)).

73. 231 NEB. ADMIN. CODE § 8-005.05 (2011) (emphasis added).

si-criminal legislative function to the elected representatives in the state legislature.

### C. Providing Clear, Identifiable Expiration Dates for Penalties

Additionally, statutory consequences should specify the duration of the restriction to better align the gravity and probability of the public safety concern with the prior conviction and balance it against the public harm that may result from the systematic marginalization of convicted persons. To date, the vast majority of the statutes reviewed by the ABA team provide no expiration date, creating a presumption that these denials may be permanent.

Although the initial marginalization of an ex-offender may benefit public safety, eventually such exclusion will result in diminishing and negative returns. Ex-offenders are deprived of honest sources of income, are systematically disenfranchised, and finally become burdens on the community by relying on welfare or engaging in recidivist criminal activity. Determining the duration of an ex-offender's stigmatization should account for these diminishing and negative returns, as well as the risk of danger the ex-offender poses that prompted the restriction in the first place. A recent study from Carnegie Mellon University shows that ex-offenders who go longer than three years without an additional arrest are no more likely than any other person to commit a crime.<sup>74</sup> Providing expiration dates to the consequences will also motivate ex-offenders to wait out their suspension rather than return to criminal activity.

### V. ETHICAL OBLIGATIONS AND RESPONSIBILITIES OF DEFENSE ATTORNEYS

A primary goal of the ABA study is to provide defense attorneys with a tool for use in effectively counseling defendants who are considering guilty pleas. When used as a source for information on potential consequences, it may also allow attorneys to better craft plea agreements. In the wake of *Padilla v. Kentucky*, the question remains of whether defense counsel is obligated to affirmatively advise clients on the broad range of collateral consequences outside the context of

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74. Alfred Blumstein & Kiminori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, 263 NIJ J. 10 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/226870.pdf> (noting the correlation between the timeframe an ex-offender is likely to recidivate depends on the age of the offender at the time of his first crime and the type of crime committed).

immigration.<sup>75</sup> The Court's shift in focus from "collateral" to "integral" provides an opportunity to re-examine obligations counsel has during the plea bargaining process — especially as it relates to advising clients about the potential collateral consequences of an offered plea.<sup>76</sup>

With the aid of the ABA Study and other state and federal studies, defense counsel will have tools to use in working toward achieving the aspirations that Justice Stevens articulated in his *Padilla* opinion. With sources for systematic review, they will be aided in affirmatively advising clients of likely consequences of a particular conviction without creating an untenable burden for over-worked and resource-deprived criminal defense attorneys.<sup>77</sup> Accordingly, advising and consulting with clients regarding the collateral consequences of conviction will become not only preferable given the inherent duties incumbent upon defense counsel and evolving norms of professional standards — it will be eminently practical.

The role of defense counsel extends far beyond the narrow confines of establishing guilt or innocence. Indeed, the ABA Standards for Criminal Justice on the Function of Defense Counsel note "[t]he basic duty defense counsel owes to the administration of justice . . . is to serve as the accused's *counselor and advocate* with courage and devotion and to render effective, quality representation."<sup>78</sup> An attorney who ignores collateral consequences — which can often be more severe and enduring than criminal sentences — ignores a central component of his duty to the accused. These consequences not only affect clients individually, but they also reach their families and society collectively. Furthermore, when considering that 95% of criminal

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75. Consider a recent Symposium entitled *Padilla and the Future of the Defense Function*, sponsored by the National Association of Criminal Defense Lawyers (NACDL) and the National Legal Aid and Defender Association (NLADA), and co-sponsored by the ABA Criminal Justice Section Task Force on Comprehensive Representation Materials.

76. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011) (discussing *Padilla*'s acknowledgment of the importance of the plea bargaining process and advocating for further regulation); Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675 (2011) (advocating for a professional standard of competence requiring affirmative advice as to collateral consequences).

77. Chin, *supra* note 76, at 677–78.

78. ABA STANDARDS FOR CRIMINAL JUSTICE, THIRD EDITION: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4–1.2(b) (1993) (emphasis added), available at [http://americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/prosecution\\_defense\\_function.authcheckdam.pdf](http://americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf).

convictions are obtained through guilty pleas,<sup>79</sup> counsel's duty to competently advise clients on the likely consequences of those pleas is irrefutable.

The plea negotiation does not exist in a vacuum of traditional criminal sanctions. Rather, the negotiation must account for and incorporate a clear analysis of the consequences and a strategy to mitigate them. Recognizing this, the ABA Criminal Justice Standards on Pleas of Guilty instruct defense counsel to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."<sup>80</sup> In light of the effects consequences have on an individual, and thus their role in the sentence itself, the ABA Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons suggests that "[t]he 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."<sup>81</sup> Accounting for the importance and severity of consequences and recognizing their bargaining value in the plea negotiation process requires close communication with the client and affirmative advice. Ethical and professional obligations mandating these practices are important steps towards achieving the goal of an integrated criminal defense.<sup>82</sup>

Public defenders and legal services organizations have long experimented with and advocated for an integrated approach to client representation.<sup>83</sup> Holistic defenders provide services designed to address

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79. See, e.g., Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 & n.2 (2002) (noting that "[m]ore than ninety percent of dispositions on the merits of criminal prosecutions are convictions, and more than ninety percent of convictions result from guilty pleas" (citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics 1999*, at 432-33 tbl.5.32 (2000))); see also Bibas, *supra* note 79, at 103 & n.2 (observing that more than 95% of felony adjudications in state courts are resolved via guilty pleas (citing *Sourcebook of Criminal Justice Statistics Online, Table 5.46.2004*, BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, <http://www.albany.edu/sourcebook/pdf/t5462004.pdf> (last visited Nov. 2, 2011))).

80. ABA STANDARDS FOR CRIMINAL JUSTICE, THIRD EDITION: PLEAS OF GUILTY, Standard 14.3.2(f) (1999).

81. ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 5, standard 19-2.4.

82. For discussion on the topic of "integrated" or "holistic" defense, see 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 (2005).

83. See, e.g., The Center For Holistic Defense, a project of the Bronx Defenders, which proposes on its website that



substance addiction, mental health issues, immigration consequences, and even civil rights restoration. These services compliment strict legal advocacy by recognizing the additional factors clients struggle with in dealing with the criminal justice system. Even among the private defense bar, a client-centered focus will improve the quality of criminal defense representation. The long experience and success of the holistic defense movement,<sup>84</sup> combined with the availability of efficient research, should demonstrate that advising clients on collateral consequences is not as burdensome as some have argued.

Effectively utilizing the ABA Study and other studies will require the defense attorney to implement a routine practice that includes gathering basic background information from a client and applying that knowledge to identify relevant consequences, as well as the goals and concerns of the client. Gathering this information should include, at minimum, a set of intake questions designed to collect information about the client's background and career ambitions and alert the attorney to significant and known potential consequences.<sup>85</sup> It should also help guide the attorney's discussions with the client to locate less notorious consequences that are of particular interest to the client. For instance, if counsel learns that the client holds any sort of occupational license, the attorney must consider the likely impact of a guilty plea on that license. The same holds true for issues regarding child custody, public housing eligibility, and benefits. This information, together with research using such tools as the ABA Study, will substantially reduce any perceived burden upon defense counsel while allowing for an informed analysis of the most likely and relevant consequences a particular client will face.<sup>86</sup>

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[t]he key insight of holistic defense is that to be truly effective advocates for our clients, we as defenders must broaden the scope of our work to include both the collateral consequences of criminal justice involvement as well as the underlying issues, both legal and non-legal, that have played a part in driving our clients into the criminal justice system in the first place.

*What is Holistic Defense*, CTR. FOR HOLISTIC DEF., [http://www.holisticdefense.org/what\\_is\\_holistic\\_defense/](http://www.holisticdefense.org/what_is_holistic_defense/) (last visited Oct. 31, 2011).

84. *See, e.g.*, Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations, ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS & PUB. DEFENDER SERV. FOR D.C. (Jan. 2009), <http://www.pdsdc.org/Resources/Publication/Collateral%20Consequences%20of%20Conviction%20in%20Federal%20Laws%20and%20Regulations.pdf>.

85. Chin, *supra* note 76.

86. *See* Chin, *supra* note 76, at 690–91.

Asking a short list of questions can provide defense counsel with the information needed to identify important individual collateral consequences in a timely manner.<sup>87</sup> The advantage of a tailored analysis over a static “cheat-sheet” is that the advice becomes affirmative and individualized, allowing the defendant to make an informed decision. At a minimum, the attorney should ask the following questions during the initial interview with the client:

- How are you currently employed, or how do you currently earn a living?
- Do you currently or are you likely in the future to reside in public housing?
- Do you currently or are you likely in the future to receive food stamps or other benefits, such as unemployment or Social Security?
- Are you a citizen of the United States?
- Do you hold any licenses, permits or government contracts?
- What are your goals for future employment?
- Do you have any children, or do you serve as a foster parent?<sup>88</sup>

While it is impossible to provide advice as to every consequence that flows from any given conviction (and indeed to do so would reduce the meaningfulness of such advice in light of the overwhelming amount of information), focused questionnaires will enable practitioners to identify and advise about likely consequences for any particular client.

### CONCLUSION

When confronted with a potential plea, an in-custody client’s immediate concern may well be securing the shortest jail or prison term possible. However, as the conversation between client and attorney continues, that concern often immediately segues into questions regarding the impact on employment, housing, food stamps, and many other rights and benefits. Moreover, a considerable number of criminal cases resolve with no actual imprisonment. Often, individuals who have no significant criminal history will be offered probationary pleas as a matter of course — an option that a client, whether in or out of custody, will typically view as preferable to a “roll of the dice” at

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87. *See id.* at 688–90.

88. These questions are adapted from Professor Chin’s work, but are phrased somewhat differently and omit references to firearms.

trial.<sup>89</sup> Rolling the dice, however, may in fact be a better option considering the consequences that may soon follow.

This analysis does not obviate the need to advise generally about the comprehensive and broad-reaching consequences that the entry of a guilty plea may trigger.<sup>90</sup> But overall, the use of the ABA's consequences database in conjunction with a client-centered analysis will make the affirmative advice regarding collateral consequences a practical and achievable task. When the ABA Study becomes available to the public, it will aid in lessening the burden on defense attorneys of providing this information, and will assist them in fulfilling their professional duty to render affirmative advice regarding collateral consequences.<sup>91</sup>

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89. This is especially true if the client must remain in custody pending the trial.

90. See Chin, *supra* note 76, at 688–90.

91. *Id.*