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# LIFELONG COLLATERAL CONSEQUENCES: THE MODERN-DAY SCARLET LETTER

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## ABSTRACT

*The United States has the highest incarceration rate in the world. But what happens to these prisoners once they return to society? The reality is that individuals who have a criminal record face a number of indefinite barriers after they attempt to rejoin their communities. As the number of Americans with felony and misdemeanor convictions continues to rise to staggering levels, it has become more apparent that there is a dire need to eliminate the collateral consequences that continue to burden so many people. This Article addresses why collateral consequences continue to negatively affect all U.S. citizens and describes the various recommendations that have been proposed to finally abolish these unnecessary and harmful exclusionary measures.*

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## I. INTRODUCTION

“In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute.”<sup>1</sup> Justice Thurgood Marshall wrote these powerful words to remind us of the collective mindset necessary to ensure justice in truth.<sup>2</sup>

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1. *Furman v. Georgia*, 408 U.S. 238, 371 (1972) (Marshall, J., concurring) (per curiam) (invalidating a discretionary state capital punishment scheme that was unguided by standards and, thus, subject to arbitrary and capricious application, in violation of the Eighth and Fourteenth Amendments).

2. *See id.*; Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 252–54, 268 (2015).

His wisdom still rings true today as the United States continues to incarcerate more people, at a faster rate, than any other civilized country in the world.<sup>3</sup> Those numbers, however, pale in comparison to the number of people convicted of, or just arrested for, a crime and after completing any court-imposed obligations, are subject to tens of thousands of debilitating consequences that disenfranchise these individuals, their families, and their communities.<sup>4</sup> “Collateral consequences” pose often insurmountable barriers to voting and other civic participation, education, employment, housing, public benefits, property rights, and more.<sup>5</sup> When indefinite in duration or otherwise untailored to their purpose, collateral consequences compound societal issues of social inequity, poverty, and poor health, resulting in a de facto caste or class system or status group.<sup>6</sup> Moreover, they contradict the concept that people are free to move forward living productive lives after “doing their time” and “paying their debt to society.”<sup>7</sup> Every U.S. citizen, criminal history or not, is significantly impacted by collateral consequences, which effectively undermine our democratic society.<sup>8</sup> A significant number of federal and state officials, judges, legal practitioners, and experts highlight the detrimental effects of such exclusionary practices, challenge the ability of such laws and regulations to effectuate their intended purpose, and advise against the substantial and

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3. U.S. COMM’N ON CIVIL RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 2 (June 2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/E2QM-NBD3>]; see also Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 801–02 (Feb. 2019).

4. Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 238–39 (2018); see *Collateral Consequences Inventory*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csgjusticecenter.org/database/results/?page=1> [<https://perma.cc/9E6J-7F8U>] (showing 44,778 collateral consequences in effect in the United States today); see generally U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 1–2.

5. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 9, 77, 101.

6. See Sandra G. Mayson, *Collateral Consequences and the Preventative State*, 91 NOTRE DAME L. REV. 301, 352–55 (Nov. 2015); Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. 1031, 1068 (Jan. 2020); Christopher Uggen et. al., *Democracy and Criminal Justice: Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. 281, 300–02 (May 2006).

7. Jones, *supra* note 2, at 246.

8. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 98; Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 394, 424–25 (Dec. 2011); Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 HARV. L. & POL’Y REV. 123, 177–79 (Winter 2016).

unjust inflictions.<sup>9</sup> With a lens toward the indefinite disenfranchisement of felons, this Article aims to invigorate our need to discuss and address the implications of disenfranchisement in the United States, as it has plagued our individual and collective citizenry for generations, targeting those already systematically forced to the margins.

Part II of this Article discusses the historical scope, purpose, and effect of disenfranchisement practices in the United States and elaborates on modern-day conceptions under our current legal regime and the resulting effects. Part III provides a backdrop of litigation challenging collateral consequences in the United States, demonstrating their elusiveness to legal challenge but courts' awareness and positive treatment of the issue and its related parts. Finally, Part IV discusses how scholarship, as well as legislative and executive dispositions and actions, demonstrate the need to eliminate such consequences and narrowly tailor their application, so as to realize any benefit without unduly causing harm.

## II. DISENFRANCHISEMENT PRACTICES IN THE UNITED STATES

Criminal disenfranchisement is a long-standing practice dating back to ancient Greece.<sup>10</sup>

Reserved for the limited number of crimes then considered deserving of death, namely treason and felony offenses in existence at the time, the practice imposed a legal and social stigma on a person, causing them and their family to suffer humiliation and isolation, as a warning to the rest of the community.<sup>11</sup> Continuing through English common law, use of this implement evolved in form, from "civil death" to "attainder laws."<sup>12</sup> To be placed in a state of attainder, under English common law, required a person to sustain a judgment of death or life imprisonment.<sup>13</sup> The result against the offender was "(1) forfeiture of all property to the king; (2) 'corruption of

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9. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 98; Allen, *supra* note 8, at 394, 424–25; Kaiser, *supra* note 8, at 177–79.

10. Jones, *supra* note 2, at 244–45.

11. *Id.*; 4 WILLIAM BLACKSTONE, COMMENTARIES 380–81 (1769); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 49–50 (Fall 2016); see EDWIN H. SUTHERLAND, PRINCIPLES OF CRIMINOLOGY 267 (6th ed. 1965).

12. Jones, *supra* note 2, at 245.

13. *Id.*

blood,’ which destroyed the offender’s right ‘to transmit his estate to his heirs’; and (3) ‘extinction’ of all his cognizable civil rights.”<sup>14</sup>

Historically, the practice sought punishment and general deterrence through incapacitation.<sup>15</sup> According to William Blackstone, the doctrine in its English common law form denoted a policy statement by society that an individual is “no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society,” and thus, “no longer of any credit or reputation.”<sup>16</sup> It is no surprise then that the effects of such a practice, at least for the individuals and families subjected to it, were devastating; the imposition rendered them dead in the eyes of the law, to be exceeded only by actual penalty of death, though the two often went hand-in-hand.<sup>17</sup> Although the severity of this past disenfranchisement regime is widely considered excessive or harsh, today’s practices are even more concerning.<sup>18</sup> Indeed, with society’s reasonable recognition and provision of greater rights, liberties, and opportunities, collateral consequences, particularly over the past decade, “proliferated in number and severity, affected more . . . people, and became more difficult to mitigate.”<sup>19</sup> Now, society strips millions of Americans of not just civil rights but numerous liberties and benefits numbering in the thousands, all while simultaneously expecting those same Americans to successfully acclimate and “reenter” society.<sup>20</sup>

Today, the U.S. Department of Justice (DOJ) estimates that more than 1 out of 4 adults in the United States, i.e., 70 to 100 million people, have a criminal record that can create “an array of lifelong barriers that hamper

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14. *Id.* (quoting Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1794 (May 2012) [hereinafter Chin, *The New Civil Death*]).

15. *Id.*; see BLACKSTONE, *supra* note 11, at 380; SUTHERLAND, *supra* note 11, at 267.

16. BLACKSTONE, *supra* note 11, at 380.

17. See *id.* at 380–81; see also Chin, *The New Civil Death*, *supra* note 14, at 1794–96.

18. Chin, *The New Civil Death*, *supra* note 14, at 1797, 1801–02; Corda, *supra* note 11, at 50.

19. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 12; Mayson, *supra* note 6, at 307–08.

20. See U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 1, 35; Mayson, *supra* note 6, at 306–07; Uggen et. al., *supra* note 6, at 296. Although the Author’s use of the term “reenter” takes its commonly understood meaning within this Article; the term is placed in quotations to emphasize a subjective misunderstanding encompassed within the word—that is that an offender, even if incarcerated and particularly if released back into society, is never truly removed from society and neither are their effects. This is particularly evident by the negative effect of recidivism rates on society.

successful reentry into society.”<sup>21</sup> And those numbers are growing, as each year there are more than a million felony convictions, an even greater number of misdemeanor convictions, and more than 620,000 people released back into their communities from prison.<sup>22</sup> Moreover, the number of potential barriers faced by these individuals is staggering—there are over 44,500 collateral consequences in the United States, with the majority of them lasting an indefinite duration.<sup>23</sup> A felony offense itself potentially subjects a person to over 17,500 consequences, 80 percent of which last indefinitely.<sup>24</sup> And unlike times past, these consequences often apply nationwide, not just in the jurisdiction of conviction.<sup>25</sup>

The types of legal and regulatory restrictions imposed under our current regime are vast and significantly affect integral aspects of everyday life.<sup>26</sup> An offender is prohibited from, or limited in, accessing certain employment opportunities, business and occupational licensing, housing, voting, parental rights, education, property rights, immigration status, and other rights, benefits, and opportunities.<sup>27</sup> That is to say nothing of the numerous effects, informal in origin, that do not attach by operation of law, like the “social, economic, medical, and psychological consequences that fall both on the offender and . . . others, primarily dependents.”<sup>28</sup> Moreover, as is often the unfortunate truth with our criminal justice system, the subscription disproportionately affects minorities, the economically disadvantaged, persons with disabilities, and the LGBTQIA+ community, unjustly subjecting those already relegated to the margins of society to

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21. Compare U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 1, 9, with *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [<https://perma.cc/BE4W-SPRA>]; see also Kaiser, *supra* note 8, at 125–26.

22. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 1; Chin, *supra* note 4, at 238; see also Kaiser, *supra* note 8, at 124–25.

23. *Collateral Consequences Inventory*, *supra* note 4 (query).

24. *Id.*; see also Kaiser, *supra* note 8, at 147, 148 (tbl. 3).

25. Chin, *supra* note 4, at 245.

26. See NAT’L ASS’N OF CRIMINAL DEF. LAW., *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME—A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION* 12 (2014); U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 9, 133–34.

27. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 9; Kaiser, *supra* note 8, at 134, 145–46; Mayson, *supra* note 6, at 307–08.

28. Lynn Adelman, *Criminal Justice Reform: The Present Moment*, 2015 WIS. L. REV. 181, 181 (2015); Uggen et. al., *supra* note 6, at 297–99.

further inequitable treatment and status.<sup>29</sup> Similarly, with the female incarceration rate accelerating, there is an increased impact of collateral consequences on women and children.<sup>30</sup> The nature of this effect, by all reasonable calculations, is generally detrimental to the individual, their family, their community, as well as the whole of society.<sup>31</sup> Such a system—where the offender, after paying their debt to society, becomes the offended—demands meaningful change.<sup>32</sup> To aid in that discussion, however, we must first examine the reasons for our modern subscription to the practice and discuss how courts conceptualize such matters.<sup>33</sup>

The infliction of such numerous and significant consequences, especially on so many people, requires justification. And despite disagreement on the exact purposes of disenfranchisement, there are valid, commonly understood policies supporting the practice.<sup>34</sup> For example, collateral consequences are still defended on grounds of deterrence.<sup>35</sup> They are also justified on public safety grounds and the need for preventative measures, invoking the idea that past crimes evidence a likelihood of a person reoffending or being untrustworthy and justifying a need to protect the public from other related or unrelated harm(s).<sup>36</sup> Lastly, advocates of collateral consequences extol to the need for retribution or punishment, including social contract theories surmising that the commission of a crime violates the relationship between people and their established government and rightfully results in the punitive forfeiting of political or social aspects of society.<sup>37</sup> As a whole, arguments in favor of collateral consequences essentially invoke a statement by the government that former offenders or those who come in contact with the law, often as a class, likely have a

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29. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 22; Adelman, *supra* note 28, at 181; Chin, *supra* note 4, at 243; *see* LINDA M. BURTON ET AL., POVERTY, THE STANFORD CTR. ON POVERTY & INEQUALITY 9 (2017), [https://inequality.stanford.edu/sites/default/files/Pathways\\_SOTU\\_2017\\_poverty.pdf](https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_poverty.pdf) [<https://perma.cc/LEA5-95QG>].

30. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 3.

31. *See id.*

32. Kaiser, *supra* note 8, at 150–51; *see* Uggen et. al., *supra* note 6, at 283.

33. *See* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 1.

34. Murray, *supra* note 6, at 1051.

35. *Id.*

36. *Id.* at 1034, 1046, 1051; U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 63, 133; Mayson, *supra* note 6, at 317.

37. Mayson, *supra* note 6, at 316–17; Brian Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1525–26 (2003).

shattered character, are worth less, or are less deserving than others.<sup>38</sup> Regardless of the basis, countless lawsuits challenging the validity of collateral consequences are filed each year.<sup>39</sup>

### III. CHALLENGING COLLATERAL CONSEQUENCES IN THE UNITED STATES

Courts in the United States are no strangers to claims challenging the use of collateral consequences. Yet, these barriers have proven “extremely resistant to legal challenge.”<sup>40</sup> Courts, today at least, generally do not consider these consequences as punishment, but rather civil regulatory measures or sanctions that “curtail constitutional civil rights . . . , civil statutory protections (such as under the Voting Rights Act), and eligibility for public benefits” and opportunities.<sup>41</sup> The argument goes: if such consequences are not punishment, they cannot violate the state’s power to inflict punishment, meaning claims concerning the Eighth Amendment’s requirement of proportionality, prohibitions on double jeopardy, ex post facto laws, bills of attainder, and more are dead in the water.<sup>42</sup> Similarly, nearly all substantive due process and equal protection challenges to the state’s power to regulate individuals through collateral consequences, which receive the lenient standard of rational basis review, fail.<sup>43</sup>

Despite these encumbrances, courts today appear more conscious of, and more prone to address, claims concerning collateral consequences and the human dignity of offenders.<sup>44</sup> For example, in 2010, the U.S. Supreme Court issued its decision in *Padilla v. Kentucky*, holding that a noncitizen defendant has a constitutional right to receive notice from their lawyer about the deportation consequence of pleading guilty.<sup>45</sup> Disagreeing with the

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38. Chin, *The New Civil Death*, *supra* note 14, at 1790; Uggen et. al., *supra* note 6, at 296–97 (quoting NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT ON CORRECTIONS 47 (1973)).

39. See Mayson, *supra* note 6, at 310.

40. *Id.*; see Chin, *supra* note 4, at 235.

41. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 10; see Murray, *supra* note 6, at 1043–45.

42. Mayson, *supra* note 6, at 310–13; *but cf.*, *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010) (noting, however, that deportation is not a criminal sanction, in a strict sense, or a collateral consequence).

43. Chin, *supra* note 4, at 243–44; Mayson, *supra* note 6, at 313–14.

44. Adelman, *supra* note 28, at 190–91; Kaiser, *supra* note 8, at 169.

45. 559 U.S. at 373–74; Adelman, *supra* note 28, at 191.

Supreme Court of Kentucky's ruling that the risk of deportation concerned only collateral matters, the *Padilla* Court began its analysis by pointedly stating it had never distinguished "between direct and collateral consequences" in defining the scope of constitutionally ineffective counsel.<sup>46</sup> The Court went on to reason that, regardless of removal proceedings being civil in nature and any resulting deportation not being a criminal sanction in a strict sense, "deportation . . . is intimately related to the criminal process" and, thus, "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."<sup>47</sup> The Court also rendered a very important decision regarding the relationship of the Eighth Amendment and the idea of human dignity in *Brown v. Plata*.<sup>48</sup> In *Plata*, the Court upheld a decision requiring California "to reduce its prison population" in order to relieve serious overcrowding and, thus, ensured prisoners are afforded constitutionally sufficient health care under the Eighth Amendment.<sup>49</sup> Declaring prominently in that opinion, at the beginning of the Court's conception of the law, Justice Anthony Kennedy wrote, "[P]risoners may be deprived of rights that are fundamental to liberty[.]" yet they "retain the essence of human dignity inherent in all persons."<sup>50</sup> Indeed, the Court's language in *Plata* is "some of the strongest language in decades about the rights of prisoners" and "identifie[s] human dignity as the important value underlying the Eighth Amendment."<sup>51</sup> State courts also wrestle with the validity of collateral consequences and have recently allowed for successful challenges to these laws and regulations.<sup>52</sup>

#### IV. THE NEED TO ELIMINATE OR REDUCE THE BURDENS OF COLLATERAL CONSEQUENCES

To date, there is widespread agreement among scholars, judges, and practitioners about the need to eliminate or lessen the burdens of collateral consequences, as there is limited evidentiary support for their value.<sup>53</sup> More specifically, a review of relevant data causes reasonable concerns that the

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46. 559 U.S. at 356–57.

47. *Id.* at 365–66.

48. *Brown v. Plata*, 563 U.S. 493, 510 (2011).

49. *Id.* at 509–10, 545; Adelman, *supra* note 28, at 191.

50. *Plata*, 563 U.S. at 510.

51. Adelman, *supra* note 28, at 191; *see also Plata*, 563 U.S. at 509–11.

52. Chin, *supra* note 4, at 236.

53. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 12–13, 133–37; Chin, *supra* note 4, at 256–60; Mayson, *supra* note 6, at 308–10, 314–17.



benefits of such practices are minimal and scantily supported.<sup>54</sup> Further, any benefit derived is overshadowed by the unfair imposition of negative consequences on individuals, families, communities, and society, which affect: (1) civic life, including participation in political and legal systems; (2) socioeconomic life, including labor market opportunities and occupational attainment; and (3) familial life, including intergenerational transmission of crime as well as communal and aggregate needs for social services.<sup>55</sup>

Interestingly, around the mid-twentieth century, prior to the United States' adoption of its "tough-on-crime" mentality, the American Bar Association (ABA), as well as other organizations and individuals, thought the "era of collateral consequences was drawing to a close" and would result in "the number of consequences diminishing, with those that remained being drawn more rationally and narrowly."<sup>56</sup> Instead, as seen above, the number of consequences, their breadth, and their use exploded.<sup>57</sup> Despite this expansion, however, opposition to current disenfranchisement practices remains prevalent.<sup>58</sup> Perhaps this is because only recently did society begin recognizing that the greatest effect on people convicted of a crime is not imprisonment but being marked as a criminal and subjected to thousands of legal disabilities.<sup>59</sup> Regardless, it appears the United States is at a golden moment for reform with respect to collateral consequences.<sup>60</sup> Professional and legal organizations, jurists, state and federal legislatures, and members of the Executive Branch all agree it is time for a change.<sup>61</sup>

So, what is the general consensus of the concerns presented by current practices regarding collateral consequences, and what recommendations are made in response? As an initial matter, collateral consequences are scattered by the tens of thousands throughout state and federal codes and regulations.<sup>62</sup> This presents a unique hardship that is two-fold: first, many

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54. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 133–34.

55. Mayson, *supra* note 6, at 356; Uggen et. al., *supra* note 6, at 296–99.

56. Murray, *supra* note 6, at 1040 (quoting Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, CRIM. JUST., Fall 2010, at 21, 30). See Adelman, *supra* note 28, at 183–84; Chin, *supra* note 4, at 246–47.

57. Adelman, *supra* note 28, at 183–85; Murray, *supra* note 6, at 1040.

58. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 133–34; Mayson, *supra* note 6, at 308–09.

59. Chin, *supra* note 4, at 235; see Mayson, *supra* note 6, at 308–09.

60. Chin, *supra* note 4, at 235; Mayson, *supra* note 6, at 308–09.

61. Chin, *supra* note 4, at 235–36.

62. See *id.* at 247–48.

“individuals charged with crimes cannot hire lawyers to comb the laws and produce a compendium containing all relevant provisions”;<sup>63</sup> and second, litigation challenging such vast numbers of often complex consequences, particularly when there is an absence of public and professional awareness of them, is by definition impractical if not unfeasible.<sup>64</sup> Additionally, despite public safety bases supporting some collateral consequences, “[m]any . . . are unrelated either to the underlying crime for which a person has been convicted or to a public safety purpose.”<sup>65</sup> When this occurs, the imposition of the collateral consequence generally negatively affects public safety and the public good.<sup>66</sup> Compounding these issues even more, the presence of harsh collateral consequences unrelated to public safety “increase . . . recidivism . . . by limiting or . . . completely barring formerly incarcerated persons’ access to personal and family support.”<sup>67</sup> Thus, current practices often fail in their direct purpose and indirectly frustrate general efforts by systematically promoting and fostering a cycle of “failure-through-exclusion.”<sup>68</sup>

There are also concerns about the effectiveness of any deterrent, retributive, or punitive value presented by these laws.<sup>69</sup> As mentioned, attorneys and courts, in addition to the public, “often lack knowledge of [and generally are not obligated to know] what the totality of the collateral consequences are in their jurisdiction, how long they last, whether they are discretionary or mandatory, or even if they are relevant to public safety or merely an extended punishment beyond a criminal sentence.”<sup>70</sup> That lack of awareness undermines any possible deterrent effect flowing from attachment of the consequences, which are separate and apart from the

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63. *Id.* at 248.

64. *Padilla v. Kentucky*, 559 U.S. 356, 381–82 (Alito, J., concurring); Chin, *supra* note 4, at 235; Kaiser, *supra* note 8, at 125–27.

65. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 133.

66. *Id.*

67. *See id.* at 100; Chin, *supra* note 4, at 253–54; Kaiser, *supra* note 8, at 173–74.

68. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 100, 133; Chin, *supra* note 4, at 253–54; Kaiser, *supra* note 8, at 173–74.

69. Kaiser, *supra* note 8, at 173–75.

70. Letter of Transmittal from Catherine E. Lhamon, U.S. Comm’n on Civil Rights Chair, to President Donald Trump, Vice President Mike Pence, & Speaker of the House Nancy Pelosi (June 13, 2019) (on file with Drake University Law School); *see* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 133; Chin, *The New Civil Death*, *supra* note 14, at 1814–15; Kaiser, *supra* note 8, at 166–68.

punishment itself.<sup>71</sup> This same line of reasoning is used to counter support for collateral consequences based on retribution or the need to punish.<sup>72</sup>

As a result of the above, we see numerous recommendations for change in legal and professional discourse on the issue.<sup>73</sup> Some argue for greater notice to offenders of collateral consequences, while others argue against how courts classify or weigh the constitutionality of such practices.<sup>74</sup> These recommendations (as well as the research and efforts behind them) are just and deserving of attention; their adoption, however, is unlikely to bring the immediate, systemic change needed by numerous Americans subdued by collateral consequences, as they advocate for methods requiring individualized considerations of potential consequences or the often arduous change in thought and development of case law.<sup>75</sup> For such an evasive and prevalent issue as collateral consequences, the United States needs something more—we need sweeping change, uniform in application and encompassing in reach.<sup>76</sup>

Perhaps the most influential recommendations seen from research and scholarship, then, is that collateral consequences, at least many of them, should never attach to and loom over offenders, their families, and their communities, and that no person ought to be permanently disempowered and precluded from societal participation through the imposition of such consequences and the ensuing degraded status.<sup>77</sup> In other words, some collateral consequences need done away with and others, at least, need narrowing in their duration.<sup>78</sup> In 2004, the ABA's Criminal Justice Section promulgated model standards for "Collateral Sanctions and Discretionary Disqualification of Convicted Persons."<sup>79</sup> The standards call for uniform prohibitions of, and relief from, discretionary disqualifications for convicted

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71. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 133; *see* Kaiser, *supra* note 8, at 171, 178–79.

72. Kaiser, *supra* note 8, at 171–73.

73. *See, e.g., id.* at 176.

74. *See, e.g., id.*; Chin, *The New Civil Death*, *supra* note 14, at 1827–29; Mayson, *supra* note 6, at 303, 359.

75. *See* Adelman, *supra* note 28, at 201–02; Mayson, *supra* note 6, at 303, 359.

76. *See* Adelman, *supra* note 28, at 201–02; Chin, *supra* note 4, at 258–59.

77. *See* Adelman, *supra* note 28, at 201–02.

78. *See id.*

79. COLLATERAL SANCTIONS CRIMINAL JUSTICE SECTION STANDARDS (AM. BAR ASS'N 2004).

persons.<sup>80</sup> It does so by advocating the prohibition of certain collateral consequences altogether, including those that deny judicial rights, the right to vote, legally recognized domestic relationships, property rights, and eligibility for government programs that “provid[e] the necessities of life” (for which there are no reasonable alternatives) or for “governmental benefits relevant to successful reentry into society, such as educational and job training programs.”<sup>81</sup> The ABA further recommends the legislature authorize “timely and effective” process that allows the waiver, modification, or the like of collateral consequences, including relief from “all collateral sanctions,” with those determinations receiving reciprocity among jurisdictions.<sup>82</sup> Other bar organizations make similar recommendations, and that is not all.<sup>83</sup> “[T]he Uniform Law Commission promulgated the Uniform Collateral Consequences of Conviction Act in 2009,” providing two different forms of relief: “Orders of Limited Relief[,] available as early as sentencing[,] and Certificates of Restoration of Rights[,] available after a period of law-abiding conduct.”<sup>84</sup> In 2012, the Equal Employment Opportunity Commission issued guidance warning employers that the use of “criminal records to categorically screen job applicants could expose them to Title VII liability.”<sup>85</sup> Two years later, “the National Association of Criminal Defense Lawyers released a major report on [collateral consequences], the Congressional Overcriminalization Task Force held a hearing on the subject, and the American Law Institute proposed a Model Penal Code chapter to address it.”<sup>86</sup> That Model Penal Code, as approved in 2017, pushes back on our current regime by proposing, for example, that no offender be disqualified to vote after serving a custodial sentence or disqualified from jury service after any sentence or period of community

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80. “Discretionary disqualifications” are encompassed within the meaning of “collateral consequences,” as used in this Article; such disqualifications include, for example, “the denial of insurance, or a private professional or occupational license, permit or certification, to a convicted person on grounds related to the conviction[.]” *Id.* at § 19-3.3.

81. *Id.* at § 19-2.6; *see also* Chin, *supra* note 4, at 253–54.

82. COLLATERAL SANCTIONS CRIMINAL JUSTICE SECTION STANDARDS §§ 19-2.5, 2.6, 3.1, 3.2 (AM. BAR ASS’N 2004).

83. Chin, *supra* note 4, at 253 (“Bar organizations agree that jurisdictions should refine collateral consequences and eliminate ones that are unnecessary.”).

84. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 32, 34; Chin, *supra* note 4, at 236.

85. Mayson, *supra* note 6, at 309; *see* U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 7, 43.

86. Mayson, *supra* note 6, at 309; *see also* Chin, *supra* note 4, at 236.

supervision.<sup>87</sup> It also calls for the use of “certificate[s] of restoration of rights,” which are not limited by the underlying offense but also post-conviction conduct.<sup>88</sup> Judges, as well as many individual practitioners and scholars, hold no differently.<sup>89</sup>

Most recently in 2019, the U.S. Commission on Civil Rights recommended Congress “pass legislation creating a process to petition for sealing federal conviction records for certain offenses, such as nonviolent crimes, after a reasonable period of time” and “create a reasonable process where a person’s rights are automatically restored when no public safety concerns are present upon completion of the person’s sentence.”<sup>90</sup> The Commission further advocated that Congress should eliminate restrictions on certain benefits based on criminal convictions outright.<sup>91</sup> The same recommendations are echoed throughout the legal scholarship.<sup>92</sup>

Federal and state legislatures evidence similar concerns regarding collateral consequences and their effects with the amount of legislation mitigating collateral consequences increasing.<sup>93</sup> Generally, there is a national legislative trend “toward expanding opportunities for restoration of rights and status after conviction.”<sup>94</sup> For example, in 2007, Congress passed two acts directed at grappling with the extent of the problem—the Court Security Improvement Act of 2007 and the Second Chance Act of 2007.<sup>95</sup> At the state

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87. Chin, *supra* note 4, at 253; *see* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (amended 2010) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 2011); *see also* MODEL PENAL CODE: SENTENCING § 6x (AM. LAW INST., Proposed Final Draft 2017).

88. MODEL PENAL CODE: SENTENCING § 6x.06; *see* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 13.

89. *See, e.g.*, U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 135–37; Adelman, *supra* note 28, at 189, 201.

90. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 135.

91. *Id.* at 135–36.

92. *Id.* at 136–37; *see, e.g.*, Chin, *supra* note 4, at 259.

93. Adelman, *supra* note 28, at 189, 201–02.

94. Chin, *supra* note 4, at 259–60 (quoting Collateral Consequences Research Ctr., *Second Chance Reforms in 2017: Roundup of New Expungement and Restoration Laws* 1 (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf> [<https://perma.cc/Z7KC-8L93>]).

95. *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, 121 Stat. 2534 (requiring National Institute of Justice to conduct national survey of collateral consequences); Second Chance Act of 2007, Pub. L. No. 110-199, §§ 101(d), 101(e)(4), 122 Stat. 657 (codified at 42 U.S.C. § 17501-04 (2012)) (requiring that government entities applying to reauthorize certain criminal offender programs include a plan to

level, we see numerous legislative efforts that directly push back on collateral consequences. As noted by the Collateral Consequences Resource Center's 2016 report, "since 2013, almost every state has taken at least some steps to chip away at the negative effects of a criminal record on an individual's ability to earn a living, access housing, education and public benefits, and otherwise fully participate in civil society."<sup>96</sup> For example, to date, the majority of states have modified their "felon" disenfranchisement laws "to expand voter eligibility and/or improve information to persons with felonies of their voting rights."<sup>97</sup> States also began granting certificates that relieve offenders from disabilities or otherwise show their good conduct.<sup>98</sup>

Executive actions in the United States generally echo a similar disposition toward reducing the negative impacts of collateral consequences.<sup>99</sup> "Both the Obama and Trump Administrations have sought to broaden opportunities for incarcerated students," despite barriers that result from their conviction or incarceration.<sup>100</sup> The Obama Administration launched the Second Chance Pell program in 2015, "which partners colleges and universities with penal institutions to allow eligible incarcerated students to receive Pell Grants and pursue a postsecondary education."<sup>101</sup> Notably, this program affords financial support to prisoners despite a federal ban on Pell Grants for people in prison.<sup>102</sup> The Trump Administration extended this program and made efforts in the way of evaluating its results.<sup>103</sup> In 2013, the DOJ, under then-U.S. Attorney General Eric Holder, announced an initiative called: "Smart on Crime: Reforming the Criminal

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assess "the statutory, regulatory, rules-based, and practice-based hurdles to reintegration of offenders into the community"); *see also* Mayson, *supra* note 6, at 308.

96. Chin, *supra* note 4, at 259–60 (quoting Collateral Consequences Research Ctr., *Four Years of Second Chance Reforms, 2013-2016: Restoration of Rights & Relief from Collateral Consequences* 1 (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf> [<https://perma.cc/ZP2A-PSRF>]); *see, e.g.*, UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 2 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

97. Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENT'G PROJECT, June 27, 2019, at 4.

98. Adelman, *supra* note 28, at 189–90.

99. *See* U.S. COMM'N ON CIVIL RIGHTS, *supra* note 3, at 84–85.

100. *Id.*

101. *Id.* at 85.

102. *Id.* at 84–85.

103. *Id.* at 85.

Justice System for the 21st Century.”<sup>104</sup> The DOJ provided core principles animating “smart on crime” policies for consideration of federal and state governments.<sup>105</sup> With a focus on reentry and reevaluating the legitimacy of certain collateral consequences, the DOJ highlighted areas deserving special consideration, “with the aim of reducing unnecessary barriers to reentry.”<sup>106</sup> Holder was even specific about immediately eliminating certain collateral consequences, such as the cessation of “voter disenfranchisement as a collateral consequence of convictions.”<sup>107</sup>

In conclusion, the use of collateral consequences in the United States is no small matter. There are tens of thousands of these barriers spread throughout the nation, affecting tens of millions of people.<sup>108</sup> The effect left is devastating and always life-altering for offenders, their families, and their communities, as it frustrates “virtually every aspect of [the] human endeavor.”<sup>109</sup> But the practice affects the whole of society too, by degrading the net stability and wealth of our civic, social, and financial institutions and resources.<sup>110</sup> According to the data and expert analysis, the solution is clear: many of the collateral consequences imposed today should be eliminated and none ought to permanently disempower and exclude the offenders, their families, and their communities from the many rights, benefits, and opportunities afforded to and reasonably required for the success of the individual and society.<sup>111</sup>

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104. Jones, *supra* note 2, at 263 (quoting U.S. Dep’t of Justice, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century* 1 (2013), <http://www.justice.gov/sites/default/files/ag/legacy/2013/08/12/smart-on-crime.pdf> [<https://perma.cc/63NY-XL2H>]).

105. *Id.* at 263.

106. *Id.*; see also Matt Apuzzo, *Holder Urges States to Lift Bans on Felons’ Voting*, N.Y. TIMES (Feb. 11, 2014), <http://www.nytimes.com/2014/02/12/us/politics/holder-urges-states-to-repeal-bans-on-voting-by-felons.html>.

107. Jones, *supra* note 2, at 263–64.

108. *Collateral Consequences Inventory*, *supra* note 4 (query).

109. See NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 26, at 12.

110. See Mayson, *supra* note 6, at 356.

111. See NAT’L ASS’N OF CRIMINAL DEF. LAW., *supra* note 26, at 12; U.S. COMM’N ON CIVIL RIGHTS, *supra* note 3, at 135–37.