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THE NEW CIVIL DEATH: RETHINKING PUNISHMENT IN THE ERA OF MASS CONVICTION

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INTRODUCTION

Borrowing from its English forebears, the United States once had a form of punishment called civil death. Civil death extinguished most civil rights of a person convicted of a crime and largely put that person outside the law's protection. Civil death as an institution faded away in the middle of the twentieth century. Policymakers recognized that almost all convicted persons eventually rejoin society, and therefore, it was wise and fair to allow them to participate in society with some measure of equality.

This Article proposes that civil death has surreptitiously reemerged. It no longer exists under that name, but effectually a new civil death is meted out to persons convicted of crimes in the form of a substantial and permanent change in legal status, operationalized by a network of collateral consequences. A person convicted of a crime, whether misdemeanor or felony,[1] may be subject to disenfranchisement[2] (or deportation if a noncitizen[3]), criminal registration and community notification requirements,[4] and the ineligibility to live, work, or be present in a particular location.[5] Some are not allowed to live outside of civil confinement at all.[6] In addition, the person may be subject to occupational debarment[7] or ineligibility to establish or maintain family relations.[8] While the entire array of collateral consequences may not apply to any given person, the State is always able to add new disabilities or to extend existing limitations. As a practical matter, every criminal sentence contains the following unwritten term:

> The law regards you as having a "shattered character."[9] Therefore, in addition to any incarceration or fine, you are subject to legal restrictions and limitations on your civil rights, conduct, employment, residence, and relationships. For the rest of your life, the United States and any State or local-

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[1] *See infra* note 49 and accompanying text.
[2] *See infra* notes 30, 112 and accompanying text.
[3] *See infra* note 54 and accompanying text.
[4] *See infra* notes 124, 129 and accompanying text.
[5] *See infra* notes 133-36 and accompanying text.
[6] *See infra* notes 120-21, 136 and accompanying text.
[7] *See infra* notes 56-57, 117-18 and accompanying text.
[8] *See infra* note 55 and accompanying text.
[9] Chaunt v. United States, 364 U.S. 350, 358 (1960) (Clark, J., dissenting).

> ity where you travel or reside may impose, at any time, additional restrictions and limitations they deem warranted. Their power to do so is limited only by their reasonable discretion. They may also require you to pay the expense of these restrictions and limitations.

For many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.

The magnitude of the problem is greater than ever. The commonly used term "mass incarceration" implies that the most typical tool of the criminal justice system is imprisonment. Indeed, there are two million people in American prisons and jails, a huge number, but one which is dwarfed by the six-and-a-half million or so on probation or parole[10] and the tens of millions in free society with criminal records.[11] The vast majority of people who have been convicted of crimes are not currently in prison. However, because of their criminal records, they remain subject to governmental regulation of various aspects of their lives and concomitant imposition of benefits and burdens. People convicted of crimes are not subject to just one collateral consequence, or even a handful. Instead, hundreds and sometimes thousands of such consequences apply under federal and state constitutional provisions, statutes, administrative regulations, and ordinances.[12] As one Ohio court recognized in 1848, "[D]isabilities . . . imposed upon the convict" are "part of the punishment, and in many cases the most important part."[13]

As practically important as collateral consequences are, in a line of cases examining individual restrictions, the Court has held they are subject to extremely limited constitutional regulation.[14] Because collateral consequences are deemed to be something other than criminal sanctions, they can generally be applied without notice from the court or defense counsel at the time of a guilty plea.[15] Moreover, new ones

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[10] *See infra* note 83.

[11] *See infra* note 85.

[12] *See* Margaret Colgate Love, Essay, *The Collateral Consequences of* Padilla v. Kentucky*: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 116 n.12 (2011), http://www.pennumbra.com/essays/12-2011/Love.pdf (listing inventories of collateral consequences in particular jurisdictions).

[13] Sutton v. McIlhany, 1 Ohio Dec. Reprint 235, 236 (C.P. Huron County 1848).

[14] *See infra* Section I.D.

[15] *See infra* notes 146-48, 208 and accompanying text.

can be imposed retroactively after plea bargains have been made and sentences fully satisfied.[16]

There is a little-noticed but significant countertradition. In *Weems v. United States*[17] and *Trop v. Dulles*,[18] the Supreme Court found punishments cruel and unusual under the Eighth Amendment in part because of burdensome and systematic collateral consequences.[19] In addition, alongside cases holding that particular collateral consequences were not punishment, other Supreme Court decisions have shaped the right to jury trial, right to counsel, and other aspects of criminal procedure in light of the fact that collateral consequences are at stake in criminal judgments.

The Court's cases, then, simultaneously suggest that individual collateral consequences *are not* punishment, but that systematic loss of legal status in the form of actual or potential subjection to an interlocking system of collateral consequences *is* punishment. This paradox can be reconciled by understanding the degradation of a convict's legal status to be a unitary punishment, the new civil death.

Exclusively at issue in this Article are legal consequences imposed by state action, not social stigma or status in the sense of reputation or esteem. To illustrate, that some may choose not to hire or marry a person with a criminal record is not a collateral consequence of conviction or a part of civil death as used here; however, legal prohibitions on hiring or marriage of convicted persons would be.[20] In addition, the wisdom, fairness, efficiency, and justice of the new civil death are

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[16] *See infra* notes 90-95, 136 and accompanying text.

[17] 217 U.S. 349 (1910).

[18] 356 U.S. 86 (1958).

[19] *See infra* notes 159-79 and accompanying text.

[20] *See, e.g.*, UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 2(1), 5 (2010) (defining the term "collateral consequence" and describing how judges should give notice of these consequences); STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS standard 19-1.1 (2003) ("The term 'collateral sanction' means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence."); Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 968 (2010) ("The state thus bears responsibility for what it does and authorizes during the term of punishment . . . . But the retributive punishment does not include whatever difficulties—economic, physical, psychological—the offender may suffer after release from supervision of the criminal justice system . . . . When the state releases the offender and extinguishes any remaining conditions, it has said all it had to say.").

important topics, but ones beyond the scope of this Article.[21] Instead, the primary goal is to show that civil death both exists and is constitutionally significant.

This Article proceeds in three parts. Part I describes the historical punishment of civil death, its decline, and its revival in the form of a system of collateral consequences imposed by positive law based on criminal conviction. Part I also describes the lenient judicial regulation of these restrictions, which has generally found individual collateral consequences to be "civil" and "regulatory" and thus not subject to constitutional limits applicable to criminal punishment.

Part II proposes that civil death should be constitutionally cognizable by showing that the systematic loss of legal status, subjecting an individual to numerous collateral consequences, has historically been treated as criminal punishment. In addition, the Supreme Court has frequently recognized the role of criminal convictions in imposing collateral consequences and shaped criminal procedure to account for this reality.

Part III proposes a reconciliation of the Court's holdings, showing that while the Court has held that individual collateral consequences are not punishment, it has nevertheless held that systematic loss of legal status is. It also describes some of the implications of understanding a civil death loss of legal status to be an inherent element of criminal, not civil, punishment, or at least that such a loss ought to be a subject of constitutional concern.

I. CIVIL DEATH IN THE UNITED STATES

A. *Civil Death and Its Decline Before 1980*

At common law, there was an English and American[22] institution of "civil death" as a punishment associated with conviction (or "attain-

[21] Perhaps a good place to begin such an inquiry is to note the connections between race and status, conviction, and collateral consequences. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 173-208 (2010) (arguing that collateral consequences disproportionately affect African Americans and resemble old Jim Crow laws); ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 35-76 (1982) (examining slavery across cultures and arguing that a complex system of social exclusion, rather than race alone, drives slavery systems); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 262-64 (2002) (discussing the disproportionate effect of collateral consequences on African Americans in the context of drug crimes).

[22] *See generally* 13 CORPUS JURIS *Convicts* § 2 (1917) ("By the ancient common law when sentence was pronounced for treason or other felony the offender was . . . placed

der") for treason or felony.[23] As the New York Court of Appeals explained in 1888, under the English common law, a person sentenced for felony was

> placed in a state of attainder. There were three principal incidents consequent upon an attainder for treason or felony,—forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death. Forfeiture was a part of the punishment of the crime . . . by which the goods and chattels, lands and tenements of the attainted felon were forfeited to the king . . . . The blood of the attainted person was deemed to be corrupt, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor . . . . The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord Coke, the attainted person "is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*," or, as stated by Chitty, "he is disqualified from being a witness, can bring no action, nor perform any legal function; he is in short regarded as dead in law."[24]

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in a state of attainder. And there were three principal incidents consequent on such attainder, namely, forfeiture, corruption of blood, and an extinction of civil rights, more or less complete, which was denominated civil death." (footnotes omitted)); COLIN DAYAN, THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS 44-70 (2011) (discussing legal alienation in American history and how historic practices paved the way for contemporary developments); READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 490-92 (Roscoe Pound & Theodore F.T. Plucknett eds., 3d ed. 1927) (citing additional sources); Rebecca McLennan, *The Convict's Two Lives: Civil and Natural Death in the American Prison* (exploring the development of civil death in American prisons in the nineteenth century and its relation to contemporary policy), *in* AMERICA'S DEATH PENALTY: BETWEEN PAST AND PRESENT 191, 194-98, 208-12 (David Garland et al. eds., 2011); Kim Lane Scheppele, *Facing Facts in Legal Interpretation* (examining the concept of civil death in the context of a case where a court refused to allow a murderer to inherit from the decedent), *in* LAW AND THE ORDER OF CULTURE 42, 54-59 (Robert Post ed., 1991); Note, *Civil Status of Convicts*, 14 COLUM. L. REV. 592, 592-94 (1914) (analyzing various judicial interpretations of state civil death statutes); Note, *The Legal Status of Convicts During and After Incarceration*, 37 VA. L. REV. 105, 105-10 (1951) (describing civil death jurisprudence under then-existing law); Case Comment, *Persons: The Status of Convicts*, 5 CALIF. L. REV. 81, 82-83 (1916) (investigating the history and then-contemporary application of civil death in California).

[23] The opposite of "civil death" was not "criminal death." *See* Wageman v. Brown, 1 Ohio Dec. Reprint 69, 72 (1844) ("The words *natural* death were used in contradistinction to the words '*civil* death.'"); *see also Ex parte* Christy, 44 U.S. (3 How.) 292, 325 (1845) (Catron, J., dissenting) (referring to "a natural or civil death").

[24] Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888) (citations omitted) (quoting 3 EDWARD COKE, COMMENTARY ON LITTLETON *386 and 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON CRIMINAL LAW *725); *see also, e.g.*, Wallach v. Van Riswick, 92 U.S. 202, 210 (1875) (describing forfeiture and corruption of blood under English common law); Rhea v. Rhenner, 26 U.S. (1 Pet.) 105, 108 (1828) ("It has been uniformly considered, that banishment, or abjuration, is a civil death of the husband."); Rutherford's Heirs v. Wolfe, 10 N.C. (3 Hawks) 272, 277 (1824) (noting the connection between attainder and civil death); State v. Duket, 63 N.W. 83, 85 (Wis. 1895) ("By the common law cer-

Loss of status as a form of punishment also existed in other ancient legal regimes.[25]

The consequences of attainder were on the minds of our Constitution's drafters. The Constitution provides, "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[26] The delegates declined to adopt

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tain consequences resulted from judgment given in capital cases, namely, attainder, 'by which the defendant was no longer of any credit or reputation. He cannot be a witness in any court, neither is he capable of performing the functions of another man; for, by anticipation of his punishment, he is already dead in law.'" (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *380-81)). *But see* Rankin's Heirs v. Rankin's Ex'rs, 22 Ky. (6 T.B. Mon.) 531, 537 (1828) (holding a man sentenced to death for murder still had the power to make a will).

[25] As the Second Circuit explained,

> [I]n ancient Athens, the penalty for certain crimes was placement in a state of "infamy," which entailed the loss of those rights that enabled a citizen to participate in public affairs, such as the rights to vote, to attend assemblies, to make speeches, and to hold public office. The Roman Republic also employed infamy as a penalty for those convicted of crimes involving moral turpitude.
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> The infamy practice in the ancient world over the years evolved into "civil death" laws in Medieval continental countries and into the "attainder" laws of Medieval England, which caused all family and political rights to be forfeited as additional punishment for crimes carrying sentences of death or life imprisonment.

Hayden v. Pataki, 449 F.3d 305, 316 (2d Cir. 2006) (en banc) (citing Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 351 (1968)). The Supreme Court has also recognized this history. *See, e.g.*, United States v. Brown, 381 U.S. 437, 448 (1965) ("The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . . ." (quoting Cummings v. Missouri, 71 U.S. (4. Wall.) 277, 320 (1866))); *see also, e.g.*, 1 SAMUEL HALLIFAX, ELEMENTS OF THE ROMAN CIVIL LAW 110 (London, n. pub. 1818) ("Punishments of Natural or Civil Death were called Capital: others, short of Natural or Civil Death, were called Not-Capital."); *The Russian Code* (pt. III), 10 LEGAL OBSERVER 375, 377 (1835) (noting that in the nineteenth century Russian Code "[t]he punishments are those of death; political death; privation of civil rights; corporal punishment; hard labour; transportation; forced enlistment; fines; confiscations and ecclesiastical censures").

[26] U.S. CONST. art. III, § 3, cl. 2. Note that the word "attainder" as used in the Constitution has the dual meaning of conviction *and* punishment. A "Bill of Attainder" means conviction by the legislature. *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961) ("The singling out of an individual for legislatively prescribed punishment constitutes an attainder . . . ."); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323-24 (1866) ("The expression [bill of attainder] is generic, and includes not only legislative acts to punish felonies, but every legislative act which inflicts punishment without a judicial trial."); Briscoe v. Bank of Ky., 9 L. Ed. 709, 930 (1837) (Baldwin, J., concurring) ("Hence, the term bill of attainder, means the conviction of a person of a crime by legislative power . . . ."). "Attainder" as used in the Treason Clause also refers to a specific set of punishments. *See* Nixon v. Adm'r of Gen. Servs, 433 U.S.

forfeiture and corruption of blood beyond a person's lifetime.[27] Civil death, though punishment, was not categorically prohibited.

In England, civil death was a common law punishment, but in the United States, it existed only if authorized by statute.[28] It was far from universal; only eighteen states employed it as of 1937,[29] although states without a formal system of civil death restricted particular civil rights of convicted persons.[30]

By the turn of the nineteenth century, civil death faced increasingly withering criticism. In 1897, a unanimous Supreme Court held that a court of equity could not disregard an answer and enter default judgment against a defendant who was in contempt on another issue. As Justice White explained for the Court, "[I]f such power obtained, then the ancient common law doctrine of 'outlawry,' and that of the continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen."[31] The Illinois Supreme Court in 1907 quoted approvingly a scholar's conclusion that it "raises a feeling of repulsion, whether the incapacity is presented singly or as a consequent of another punishment. It is a barbarism condemned by justice, by reason and by morality."[32] A German commentator wrote in 1916:

425, 473 & n.35 (1977) (explaining that "a bill of attainder originally connoted a parliamentary Act sentencing [someone] to death" and that "attainder of death was usually accompanied by a forfeiture of the condemned person's property . . . and the corruption of his blood, whereby his heirs were denied the right to inherit his estate"); Furman v. Georgia, 408 U.S. 238, 317 n.8 (1972) (Marshall, J., concurring) ("[T]he English also provided for attainder ('dead in law') as the immediate and inseparable concomitant of the death sentence. The consequences of attainder were forfeiture of real and personal estates and corruption of blood.").

[27] *See* Austin v. United States, 509 U.S. 602, 613 (1993) ("The Constitution forbids forfeiture of estate as a punishment for treason 'except during the Life of the Person attainted,' and the First Congress also abolished forfeiture of estate as a punishment for felons." (citations omitted)).

[28] *See, e.g.*, Frazer v. Fulcher, 17 Ohio 260, 262-64 (1848) (rejecting the English common law punishment and distinguishing the tradition of civil punishment in New York because there it was enacted by statute); Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 968 n.1 (1937) (listing civil death statutes from eighteen states).

[29] Note, *supra* note 28, at 968 n.1.

[30] *See* ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 17 (2006) (noting that many states imposed felon disenfranchisement even if they did not impose civil death).

[31] Hovey v. Elliott, 167 U.S. 409, 444 (1897).

[32] Collins v. Metro. Life Ins. Co., 83 N.E. 542, 545 (Ill. 1907) (quoting 1 FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS § 107, at 252 note (3d. 1905)).

> The recognition of the legal rights of the individual follows naturally upon the conception of the free personality. Hence it comes that the penalty of so-called civil death pronounced upon a living man is not consonant with our conception of justice. Therefore this punishment has been done away with nearly everywhere and is not likely to recur.[33]

Perhaps the decline of civil death can be traced to the new reality that conviction of a felony no longer necessarily implied a capital sentence. When all felonies were punishable by death—and such sentences were regularly and speedily carried out—it made some sense to begin to settle the convicted person's affairs as soon as the sentence became final.[34] Civil death in its original application was thus a transitional status in the period between a capital sentence and its execution, not a condition applicable potentially for decades. Blackstone reported, for example, that a benefit of clergy, which prevented execution for a capital felony, also "restored [the convicted person] to all capacities and credits, and the possession of his lands, as if he had never been convicted."[35]

The developing principle of sentencing proportionality reduced the number of executions, which raised doubts about the wisdom and utility of civil death. As a *Harvard Law Review* Note argued in 1937, "It is the volume of parole and pardon figures that gives the vestigial doctrine of civil death a new significance, warranting an examination of the conflicts and inconsistencies into which it has led courts and legislatures."[36] Civil death contradicted the idea that offenders could pay their debt to society and the reality that the prison experience, for many, would be a temporary if significant interruption to their lives.

As Margaret Colgate Love has written, mainstream legal opinion began to recognize the problem of excessive collateral consequences in the 1950s.[37] The 1956 National Conference on Parole, a joint effort

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[33] 1 HEINRICH VON TREITSCHKE, POLITICS 161-62 (Blanche Dugdale & Torben de Bille trans., 1916).

[34] Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1238 n.31 (1998) ("Civil death statutes applied to prisoners facing a capital sentence (a larger proportion of convicted felons at common law than under current laws) to help the death row prisoner's family settle property matters immediately."); Harry David Saunders, *Civil Death: A New look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 990 (1970) ("[C]ivil death was a practical way of settling the earthly affairs of a convicted felon soon to be executed.").

[35] 4 WILLIAM BLACKSTONE, COMMENTARIES *374.

[36] Note, *supra* note 28, at 970-71.

[37] *See, e.g.*, Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1707-17 (2003) (discussing reformers' efforts to limit collateral consequences).

of the U.S. Attorney General, the U.S. Board of Parole, and the National Council on Crime and Delinquency, called loss of civil rights "an archaic holdover from early times" meriting abolition.[38] In 1983, the American Bar Association "confidently predicted that collateral sanctions were on their way to extinction: 'As the number of disabilities diminishes and their imposition becomes more rationally based and restricted in coverage, the need for expungement and nullification statutes decreases.'"[39] By 1984, a House committee had claimed the existence of a "consensus that arbitrary restrictions on the rights of former offenders should be eliminated."[40] In the mid-twentieth century, many civil death statutes were repealed or wholly or partially voided.[41] However, civil death never fully disappeared. New York,[42] the Virgin Islands,[43] and Rhode Island[44] retain forms of it for persons sentenced to life imprisonment, and Idaho retains a version of it for all prisoners,[45] but textually and by court decision, these statutes leave convicted persons in possession of some rights.[46]

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[38] *Id.* at 1708 (quoting NAT'L PROB. & PAROLE ASS'N, PAROLE IN PRINCIPLE AND PRACTICE 136 (1957)).

[39] Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 768 (2011) (citing STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS standard 23-8.2 cmt. (1985)).

[40] *Id.* at 767 (citing H.R. REP. NO. 98-1017, at 134 (1984)).

[41] *See generally* 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 16:2, at 482-88 (4th ed. 2009) (listing state civil death statutes and the repeal or invalidation of most of them).

[42] *See* N.Y. CIV. RIGHTS LAW § 79-a(1) (McKinney 2009) ("[A] person sentenced to imprisonment for life is thereafter deemed civilly dead."). New York's first civil death statute was passed on March 29, 1799. Platner v. Sherwood, 6 Johns. Ch. 118, 120 (N.Y. Ch. 1822).

[43] *See* V.I. CODE ANN. tit. 14, § 92 (1996) ("Whoever is sentenced to imprisonment for life is thereafter deemed civilly dead.").

[44] *See* R.I. GEN. LAWS § 13-6-1 (2002) (declaring that a life prisoner is "deemed to be dead in all respects, as if his or her natural death had taken place at the time of conviction").

[45] *See* IDAHO CODE ANN. § 18-310(1) (2004) ("A sentence of custody to the Idaho state board of correction suspends all the civil rights of the person so sentenced . . . ."). Rights are restored upon discharge from prison, probation and parole. *Id.* § 18-310(2).

[46] *See, e.g.*, *id.* § 18-310(1) (preserving right to sue); N.Y. CIV. RTS. LAW § 79-a(2) (same); *id.* § 79-c ("Nothing in sections seventy-nine or seventy-nine-a of this chapter shall be deemed to deny a convict sentenced to imprisonment the right to injunctive relief for improper treatment where such treatment constitutes a violation of his constitutional rights."); *see also infra* note 64.

B. *The New Civil Death in the Regulatory State*

Even as civil death as an institution bearing that name withered, it was replaced with a new version—a pervasive system of collateral consequences applicable to people convicted of crimes. Historically, such a judgment meant that the person was dead in the eyes of the law; now, the judgment means that the person has a "shattered character."[47] This is not merely a moral observation. It gives rise to a legal status making convicted persons subject to restrictions on freedom, benefits, and rights. Indeed, the Supreme Court has recognized that "[a] felon customarily suffers the loss of substantial rights."[48] However, these effects are not limited to those with felony convictions, as "[a] wide range of civil disabilities may result from misdemeanor convictions."[49] Every conviction implies a permanent change, because these disabilities will "carry through life."[50] For citizens, a prominent collat-

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[47] Chaunt v. United States, 364 U.S. 350, 358 (1960) (Clark, J., dissenting).

[48] Estep v. United States, 327 U.S. 114, 122 (1946); *see also* Daniels v. United States, 532 U.S. 374, 379 (2001) ("States impose a wide range of disabilities on those who have been convicted of crimes, even after their release."); Baldwin v. New York, 399 U.S. 66, 69 n.8 (1970) ("Both the convicted felon and the convicted misdemeanant may be prevented under New York law from engaging in a wide variety of occupations. In addition, the convicted felon is deprived of certain civil rights, including the right to vote and to hold public office.").

[49] *See* Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring) (listing such civil disabilities as "forfeiture of public office, disqualification from a licensed profession, and loss of pension rights" (citations omitted)); *see also* Hopper v. State, 957 N.E.2d 613, 625 (Ind. 2011) (Rucker, J., dissenting) ("Uncounseled pro se defendants may very well plead guilty even to certain misdemeanor offenses that carry devastating collateral consequences ranging from deportation, to eviction from public housing, to barriers in employment."); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Courts*, 45 U.C. DAVIS L. REV. 277, 297-303 (2011) (reviewing a list of possible collateral consequences of misdemeanors, including deportation for noncitizens, sex-offender registration, and eviction from public housing). Misdemeanor convictions can also lead to sex offender registration, *e.g.*, United States v. Ross, 778 F. Supp. 2d 13, 15 (D.D.C. 2011), or deportation, *e.g.*, Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2580-81 (2010). Disenfranchisement is also imposed on people with misdemeanor convictions under the law of some states. *See, e.g.*, S.C. CODE ANN. § 7-5-120(B)(2)–(3) (Supp. 2008); Snyder v. King, 958 N.E.2d 764, 788 (Ind. 2011); *see also* Richardson v. Ramirez, 418 U.S. 24, 76 n.24 (1974) (Marshall, J., dissenting) ("Even a jaywalking or traffic conviction could conceivably lead to disenfranchisement, since § 2 [of the Fourteenth Amendment] does not differentiate between felonies and misdemeanors."); Kane v. Winn, 319 F. Supp. 2d 162, 177 n.18 (D. Mass. 2004) ("The Court does not use the term 'felon,' often used in discussing the disenfranchisement problem, because it is in fact possible to lose the vote for conviction of misdemeanors . . . .").

[50] Fiswick v. United States, 329 U.S. 211, 222 (1946); *see also, e.g.*, *Chaunt*, 364 U.S. at 356 (Clark, J., dissenting) (noting that a federal felony conviction "strips an offender of all civil rights and leaves a shattered character that only a presidential pardon can

eral consequence is the loss of civil rights[51]: "A convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, be subject to impeachment when testifying as a witness, be disqualified from serving as a juror, and may be subject to divorce."[52] To this ever-increasing list may be added the loss of the right to keep and bear arms.[53] For noncitizens, conviction may result in deportation.[54]

The effects of the loss of status are particularly profound given the many areas of life now subject to governmental regulation. Conviction potentially affects many aspects of family relations, including, for example, the ability to adopt, be a foster parent, or retain custody of one's own children.[55] Conviction can make one ineligible for public employment, such as in the military and law enforcement.[56] It can preclude private employment, including working in regulated industries,[57] with government contractors,[58] or in fields requiring a security clearance.

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mend"); Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) ("Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."), *overruled by* Carafas v. LaVallee, 391 U.S. 234 (1968).

[51] *See* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY (2004), *available at* http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf (discussing the legal barriers facing individuals following a criminal conviction). *But see* Caron v. United States, 524 U.S. 308, 318 (2007) (Thomas, J., dissenting) (discussing the possibility that "an ex-felon's . . . civil rights, such as the right to vote, the right to seek and to hold public office, and the right to serve on a jury, [might be] restored. In restoring those rights, the State has presumably deemed such ex-felons worthy of participating in civic life." (citation omitted)).

[52] North Carolina v. Rice, 404 U.S. 244, 247 n.1 (1971) (citations omitted).

[53] *See* District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (recognizing a fundamental Second Amendment right to keep and bear arms, but noting that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons").

[54] *See* Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.").

[55] *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 825 (2011) ("Certain charges and convictions result in the loss of custody of a child or irrevocable termination of parental rights.").

[56] *See, e.g.*, 10 U.S.C. § 504(a) (2006) (restricting enlistment of people with convictions); FLA. STAT. ANN. § 943.13(4) (West Supp. 2009) (prohibiting employment as law enforcement officers of those convicted of felonies and certain misdemeanors).

[57] For example, the court in *DiCola v. FDA* upheld a lifetime debarment from the pharmaceutical industry based on a criminal conviction:

> The permanence of the debarment can be understood, without reference to punitive intent, as reflecting a congressional judgment that the integrity of the drug industry, and with it public confidence in that industry, will suffer if those

Conviction can also restrict one's ability to hold a government contract, to obtain government licenses and permits, or to collect a vested public pension.[59] Those convicted of certain crimes may lose the right to drive a car.[60] Persons convicted of sex offenses usually have to register, may be excluded from living in particular areas, and are even subject to post-incarceration civil confinement.[61]

Again, the phenomenon addressed here is the myriad legal consequences of conviction imposed by law. There is a general problem of reentry of released prisoners and reintegration of anyone with a criminal record.[62] Having a criminal history generates a range of social effects, most prominently including employment discrimination and other forms of market discrimination. Conviction may result in psychological effects and impair future employability because of forced removal from the labor market. As important and problematic as these limitations are, they are not directly at issue here. Here, the focus is on penalties imposed by positive law, by or at the command of the government itself.[63]

There are differences between traditional civil death and its modern form. Today, a convicted person does not lose her right to sue, one of the features of historical common law and statutory civil

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> who manufacture drugs use the services of someone who has committed a felony subversive of FDA regulation. That judgment may proceed from a skeptical view of the malleability of individual men and women; or from a greater concern with the cost of an error visited upon the public than with the cost of an error felt only by the excluded felon; or more likely from the cumulative force of both sentiments.

77 F.3d 504, 507-08 (D.C. Cir. 1996) (citations omitted).

[58] For example, 46 U.S.C. § 70105 prohibits people with certain convictions from obtaining a federal identification card allowing access to secure transportation areas. Failure to obtain a card could preclude employment necessitating entry into such an area.

[59] *See, e.g.*, Commonwealth v. Abraham, 996 A.2d 1090, 1095 (Pa. Super. 2010) (holding that counsel must "warn his client of the loss of pension as a consequence to pleading guilty"), *appeal granted*, 9 A.3d 1133 (Pa. 2010).

[60] *See* 23 U.S.C. § 159 (requiring states to suspend driver's licenses of people convicted of drug crimes or else lose significant federal highway funds).

[61] *See infra* notes 120-21, 136.

[62] *See, e.g.*, CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Theresa A. Miller eds., 2005); INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (2005); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010).

[63] *See supra* note 20 and accompanying text.

death.[64] The new civil death is also not as harsh as expatriation, in that a modern citizen subject to civil death nevertheless remains a citizen and therefore may continue to reside in the United States.[65]

On the other hand, modern civil death is harsher and more severe in several important ways. First, extinction of equal legal status affects a wider range of interests than it did in past decades. In England and even in early to mid-twentieth century America, there were fewer public benefits to lose.[66] In addition, there were then many fewer businesses and professions for which one did not need a license, a permit, or the ability to obtain a government contract.[67] Now, for a person who must work for a living, loss of the right to do business with the government—or work in any regulated industry—could result in exclusion as complete as civil death under the nineteenth-century statutes.

The disabilities are also stickier. While the new civil death, like the old, can be mitigated through pardon and other forms of legal relief,[68] pardon was a much more realistic hope for convicted persons in the past than it is now.[69] Moreover, while historically the disabilities of civil

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[64] *See, e.g.*, Roberts v. U.S. Dist. Court, 339 U.S. 844, 845 (1950) (per curiam) (holding that a conviction does not strip a prisoner of her right to proceed in federal court in forma pauperis); Thompson v. Bond, 421 F. Supp. 878, 882 (W.D. Mo. 1976) ("[A] state statute, which . . . deprives all state inmates of the right to file any type of civil action in state court contravenes the constitutional imperative that citizens are entitled to reasonable access to courts."); Sabin v. Butter, 493 So. 2d 469, 469-70 (Fla. App. 1986) (holding that a state law limiting access to state court was unconstitutional). *But see* Joan Dayan, *Held in the Body of the State: Prisons and the Law* (suggesting that elimination of prison law libraries effectively eliminated prisoners' right to sue), *in* HISTORY, MEMORY, AND THE LAW 183, 244-47 (Austin Sarat & Thomas R. Kearns eds., 1999).

[65] For example, *Afroyim v. Rusk* held that a citizen cannot be deprived of citizenship status involuntarily. 387 U.S. 253, 257 (1967). However, this difference may not be significant to the extent that people with convictions remain subject to residential restrictions and post-release civil incarceration. *See infra* notes 121, 133, 136.

[66] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 734-37 (1964).

[67] *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) ("Society today is built around entitlement . . . . Many of the most important of these entitlements now flow from government . . . ." (alteration omitted) (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965))).

[68] *See* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE BY STATE RESOURCE GUIDE (2006) ("Pardon is assigned a central role in overcoming the legal barriers to reintegration of criminal offenders in almost every U.S. jurisdiction[]; indeed, in most jurisdictions it is the *only* mechanism by which adult felony offenders can avoid or mitigate collateral penalties and disabilities.").

[69] *See* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1181-82 (2010) ("[I]n most years between 1900 and 1936, more than half of the thousands of petitions filed were sent forward to the White House with a favorable official recommendation. At the White House, the president usually ap-

death generally applied only in the state of conviction,[70] now a conviction in one jurisdiction generally has effects across the entire country.[71] Often one jurisdiction will impose a disability without regard to whether the jurisdiction of conviction does so.[72] In both of these ways, the new civil death is more difficult to escape than the old.

C. *Mass Conviction, Not (Just) Mass Incarceration*

The new civil death is of great practical importance because of the rise of mass conviction. Many distinguished scholars have used a different term to describe this phenomenon: "mass incarceration."[73] They observe that since 1970, and even more profoundly since 1980, there has been an increase in both the rate of imprisonment and the absolute number of people in prison. That increase has been called

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proved cases recommended favorably . . . and sometimes was more inclined to leniency." (footnote omitted)); *id.* at 1192 (noting that during the administrations of Presidents Kennedy through Carter, pardon grant rates ranged from thirty to forty percent); *see also* LOVE, *supra* note 68, at 18-38 (discussing pardon practices in the states).

[70] *See* Huntington v. Attrill, 146 U.S. 657, 673 (1892) ("And personal disabilities imposed by the law of a State, as an incident or consequence of a judicial sentence or decree, by way of punishment of an offender, and not for the benefit of any other person . . . are doubtless strictly penal, and therefore have no extra-territorial operation.").

[71] *See, e.g.*, FLA. STAT. ANN. § 790.23(1)(e) (West Supp. 2009) (denying firearms to those convicted in other states).

[72] In *Logan v. United States*, for example, a defendant with three state battery convictions was prohibited from possessing firearms under federal law, despite the fact that the law in his state of conviction imposed no such prohibition. 552 U.S. 23, 26 (2007); *see also, e.g.*, HAW. REV. STAT. § 846E-1 (Supp. 2007) (defining "sexual offense" to include "any federal, military, or out-of-state conviction for any offense that under the laws of this State would be a sexual offense"); Jeffrey B. Kuck, Annotation, *Elections: Effect of Conviction Under Federal Law, or Law of Another State or Country, on Right to Vote or Hold Public Office*, 39 A.L.R.3d 303, 313-14 (1971) (discussing cases holding that under the law of one state, conviction in another state can trigger disenfranchisement).

[73] *See, e.g.*, ALEXANDER, *supra* note 21; TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA (2006); DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION (2007); MARY PATTILLO ET AL., IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION (2004); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477 (2009); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration since 1950*, 2010 U. CHI. LEGAL F. 165; Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOW. L.J. 587 (2011); James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010) (book review).

"unprecedented in the history of liberal democracy."[74] In 1980, more than 500,000 Americans were confined to prisons and jails; today there are nearly two million.[75]

Yet, focusing exclusively on "mass incarceration"[76] obscures the reality that most convicted persons are not sentenced to prison. There are approximately 1.1 million new state felony convictions in a typical year,[77] and some multiple of that in misdemeanor convictions.[78] In addition, there are approximately 80,000 federal convictions each

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[74] Jude McCulloch & Phil Scraton, *Introduction* to THE VIOLENCE OF INCARCERATION 1, 14 (Phil Scraton & Jude McCulloch eds., 2009).

[75] LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 1 tbl.1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf; PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 236096, PRISONERS IN 2010, at 2 tbl.1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf; *see also* ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, NCJ 151654, PRISONERS IN 1994, at 2 (1995), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/Pi94.pdf.

[76] While this Section proposes that the phrase "mass incarceration" does not capture the full impact of collateral consequences, this observation is not meant to imply that scholars using the phrase are unaware of the collateral consequences of criminal conviction, or have not paid enough attention to them in their scholarship. The observation is about the limits of the term, not about the work of those who use it.

[77] *E.g.*, SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf.

[78] Systematic misdemeanor statistics are not readily available, but it is clear that misdemeanor convictions are more common than felony convictions. *See* KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA 2010, at 16 (2011), *available at* http://ag.ca.gov/cjsc/publications/candd/cd10/preface.pdf (reporting nearly 1.4 million arrests in California in 2010, of which 448,552 were for felonies and the remainder for misdemeanors or status offenses); NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), *available at* http://www.ncsconline.org/d_research/csp/2008_files/EWSC-2008-Online%20Version%20v2.pdf (reporting that misdemeanors comprised seventy-nine percent of the criminal caseload in a 2008 study of eleven state courts); LYNN LANGTON & DONALD J. FAROLE, JR., BUREAU OF JUSTICE STATISTICS, NCJ 228538, PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES 12 tbl.5a (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf (reporting that public defenders surveyed were assigned a total of 378,400 felony and 575,770 misdemeanor cases in 2007); *2006–2010 Disposition of Adult Arrests*, N.Y. ST. DIVISION CRIM. JUST. SERVICES, http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf (last visited Mar. 15, 2012) (reporting that in 2010, there were 546,416 adult arrests, leading to 35,597 felony convictions, and 286,131 convictions for misdemeanors or lesser offenses); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. (forthcoming 2012) (manuscript at 9 & n.25), *available at* http://ssrn.com/abstract-2010826 (estimating 10.5 million nontraffic misdemeanors annually (citing NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURT 11 (2009))).

year, most of which are felonies.[79] Most defendants convicted of felonies are not sentenced to state prison—about sixty percent receive probation only or probation with local jail time.[80] Even more defendants convicted of misdemeanors avoid incarceration altogether.[81] While many are sentenced to prison, and even though sentence length has increased in recent decades, the average term is now less than five years.[82] Accordingly, it is likely that the vast majority even of those sentenced to prison will spend most of their lives in free society.

Those convicted but not incarcerated are typically sentenced to probation. Six-and-a-half million people were on probation at some point during 2009,[83] three times the number in prison or jail.[84] At the broadest level of generality, approximately sixty-five million adults have a criminal record of some kind, although some of those involve arrests not leading to conviction.[85] Accordingly, the size of the offender population is not just the two million in custody; it also includes the more than six million in the control of the criminal justice system who are not in custody plus the tens of millions who have a record but are not in prison or jail or on probation or parole.

The "incarceration" part of mass incarceration implies that actual confinement is the most important feature of the system. However, as legally and socially significant as a term in prison is, for most people convicted of crimes, collateral consequences will generate the most

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[79] *See Federal Justice Statistics, 2008—Statistical Tables*, BUREAU JUST. STAT. tbl.5.1 (Nov. 2010), http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2008/tables/fjs08st501.pdf (reporting 82,823 federal convictions in the year ending September 30, 2008, of which 75,832 were felonies).

[80] ROSENMERKEL ET AL., *supra* note 77, at 4 tbl.1.2.

[81] *See, e.g.*, *2006–2010 Disposition of Adult Arrests*, *supra* note 78, at 5 (reporting that between 2006 and 2010, between 18% and 19.8% of those arrested for misdemeanors were sentenced to prison or jail, while another 0.9% to 1% were sentenced to jail plus probation).

[82] State prison sentences averaged fifty-nine months. ROSENMERKEL ET AL., *supra* note 77, at 6 tbl.1.3. Federal sentences averaged just over five years. *Federal Justice Statistics, 2008—Statistical Tables*, *supra* note 79, tbl.5.2.

[83] LAUREN E. GLAZE & THOMAS P BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 231674, PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 3 tbl.2 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus09.pdf.

[84] *Id.*; *see also* GLAZE, *supra* note 75, at 3.

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

significant effects. Merely escaping incarceration hardly means that a person with a conviction is not subject to other legal consequences as a result of her conviction.[86] Criminal records are increasingly available to all branches of the government and all segments of the public through computer databases, thus making collateral consequences more susceptible to ready enforcement.[87]

Loss of legal status is more important, ironically, for relatively less serious crimes. If a person is sentenced to twenty-five years imprisonment at hard labor, it likely matters little that she will be ineligible to get a license as a chiropractor when she is released. But to a person sentenced to unsupervised probation and a $250 fine for a minor offense, losing her city job or being unable to teach, care for the elderly, live in public housing, or be a foster parent to a relative can be disastrous. "[I]n many cases the most important part" of the conviction,[88] in terms of both social policy and the legal effect, lies in the collateral consequences.

D. *Collateral Consequences as Unrestrained by the Constitution*

Courts have imposed few limits on creation and implementation of collateral consequences. They are generally regarded as nonpunitive.

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[86] *See* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 70 (2006) ("While some felons go to prison . . . many others serve time in jail or on probation in their communities. . . . [A]t least some states disenfranchise misdemeanants as well."); *see also, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("Despite their innocuous name, for many convicted offenders, and especially those who never serve any prison time, these 'collateral' consequences 'are . . . the most persistent punishments that are inflicted for [their] crime.'" (alteration in original) (quoting Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52)); Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1054 (noting that of the forty-eight states and the District of Columba with disenfranchisement policies, only seventeen limit disenfracement to periods of incarceration); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1898 (1999) (criticizing criminal disenfranchisement "as a technique for reinforcing the branding of felons as the untouchable class of American society").

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

[88] Sutton v. McIlhany, 1 Ohio Dec. Reprint 235, 236 (C.P. Huron County 1848); *see also* Love, *supra* note 12 at 114 ("While conventionally labeled as civil, collateral consequences are increasingly understood and experienced as criminal punishment, and never-ending punishment at that.").

Accordingly, they are not evaluated for overall proportionality,[89] nor is there significant scrutiny for reasonableness. In addition, existing collateral consequences may be imposed without warning, and new ones may be created and imposed after a sentence has been fully served.

1. Individual Collateral Consequences as Regulatory Measures

The modern law of collateral consequences seems to have begun with *Hawker v. New York*.[90] Hawker, a physician, was convicted of performing an abortion, a felony at the time.[91] The New York legislature later passed a law prohibiting those convicted of a felony from being licensed to practice medicine.[92] The Supreme Court upheld the prohibition by a vote of six to three, with Justice Harlan writing for the dissenting Justices.

The majority concluded that the disqualification was not truly based on the conviction; the conviction was mere evidence.[93] The disability was instead based on violating the law, which made Hawker ineligible because he had a bad moral character. The law was not ex post facto, because the disability was based on the illegal conduct of which the conviction is mere evidence.[94] Anyone proved to have performed abortions would be similarly ineligible.[95]

Another leading (and problematic) decision, *Kennedy v. Mendoza-Martinez*, establishes a test for determining whether a law is criminal punishment or civil regulation.[96] The test employs seven[97] nonexclusive,[98] unweighted factors, filtered through a rule that only the "clearest proof" will overcome a legislative claim that a measure is civil.[99]

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[89] *See, e.g.*, Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684-89 (2009) (discussing a lack of proportionality in immigration law as compared to criminal punishments).

[90] 170 U.S. 189 (1898).

[91] *Id.* at 189.

[92] *Id.* at 190.

[93] *Id.* at 195.

[94] *Id.* at 197-98.

[95] For an extended discussion of this case, see Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685 (2003).

[96] 372 U.S. 144, 168 (1963).

[97] *See id.* at 168-69 (listing the seven factors).

[98] *See* United States v. Ward, 448 U.S. 242, 249 (1980) (holding that the factors may overlap, and that not all need be present in every case).

[99] *E.g.*, Seling v. Young, 531 U.S. 250, 261 (2001).

Examination of the purposes of the legislature generally does not extend beyond the text of the law itself.[100] Of course, the outcome of any seven-factor, nonexclusive test is indeterminate, and the key cases have been decided by very close votes. *Mendoza-Martinez* itself invalidated, by a five-to-four vote, automatic expatriation of those who avoided wartime military service by leaving the United States.[101]

The result is that a State may subject convicted persons to harsh treatment. While it is unconstitutional if the State acts in such a fashion for "punitive" purposes, that treatment is entirely permissible if the underlying reason is to protect public safety or to promote some other aspect of the public interest. But virtually no examination of the actual motivation of the legislature is permitted by the judiciary. Obviously, a test putting so much weight on formal categorization will uphold many measures that are in fact motivated by a desire to punish.[102]

United States v. Brown held that a law criminalizing service by a Communist in union offices was an unconstitutional bill of attainder,[103] which necessarily required a finding that the law constituted punishment. The opinion offered a compelling argument that the quest for a sharp difference between punitive and regulatory measures is futile; punishment, including imprisonment and capital punishment itself, is often imposed for preventative purposes.[104] One must, therefore, question the wisdom of a rule relying so much on a distinction between regulation and punishment, when the two are often not different in

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[100] Hudson v. United States, 522 U.S. 93, 100 (1997).

[101] 372 U.S. at 186.

[102] *See, e.g.*, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1282 (1998) ("The *Mendoza-Martinez* factors over the years have been applied in a highly selective and ultimately inconsistent manner."); Paul W. Tappan, *The Legal Rights of Prisoners*, 293 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 109 (1954) ("The deprivation of 'civil rights' may be conceived to be either an auxiliary punishment in itself or the incidental consequence of conviction and sentence, not intended to be specifically punitive but merely protective of public interests and of official convenience. Such a distinction as this appears unimportant to the offender: he may well consider these losses to be a part of the vindictive punishments that society exacts. And, in fact, they do appear very frequently to reflect retributive sentiments rather than any real need for community protection.").

[103] 381 U.S. 437, 440 (1965).

[104] *See id.* at 458 ("It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment."); *see also, e.g.*, Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 708-09 (2008) (arguing that involuntary commitment of "sexually violent predators" is punishment because it is "quite similar to incarceration").

principle.[105] More recently, Justice Stevens persuasively argued that the search for legislative intent behind sex offender registration laws was beside the point: "In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment."[106] Whatever the merits of these more searching tests for punishment, they are not the law today.

Even if they do not rise to the level of "punishment," restrictions on people with convictions must nevertheless be rational under the Equal Protection Clause.[107] However, rational basis review performed by courts in this context is far from exacting.[108] For example, courts have found denials of public benefits to people with convictions to be "rational" because such restrictions save taxpayer money.[109] In addition,

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[105] *See* Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 494 (2009) ("In an advanced regulatory pyramid . . . self-regulation constitutes the base of the pyramid with escalated forms of enforcement—command regulation and punishment—at the top."); Max Minzner, *Why Agencies Punish*, 53 WM. & MARY L. REV. 853, 857 (2012) (arguing that "retribution is an important and, in most cases, the dominant motivation" for "civil" regulatory sanctions); *see also* Dan Markel et al., *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 620-21 (2011) (arguing that some collateral consequences are punishment because with them "the state may . . . be continuing its message of condemnation"). *See generally* BARRY M. MITNICK, THE POLITICAL ECONOMY OF REGULATION (1980); Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

[106] Smith v. Doe, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting).

[107] *See* Marshall v. United States, 414 U.S. 417, 430 (1974) (upholding the exclusion from a rehabilitation program of persons with more than one felony conviction). *See generally* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 27-51 (2005) (analyzing case law on criminal record-based occupational restrictions).

[108] For example, it is not necessarily unconstitutional to treat license holders with convictions differently from applicants. *Compare* Heller v. Ross, 682 F. Supp. 2d 797, 807 (E.D. Mich. 2010) (upholding differential treatment of applicants and licenseholders convicted of felonies), *with* Miller v. Carter, 547 F.2d 1314, 1316 (7th Cir. 1977) (per curiam) (invalidating differential treatment), *aff'd by an equally divided Court*, 434 U.S. 356 (1978).

[109] *See* Houston v. Williams, 547 F.3d 1357, 1364 (11th Cir. 2008) ("[C]onservation of funds constitutes a rational basis on which to deny assistance to convicted felons and sex offenders."); Turner v. Glickman, 207 F.3d 419, 424-25 (7th Cir. 2000) (holding that denial of food stamp program benefits to convicted persons does not violate the Equal Protection Clause); Hall v. West, No. 99-7070, 1999 WL 1072252, at *2 (Fed. Cir. Nov. 17, 1999) (per curiam) (upholding denial of veterans' benefits to those in prison); Peeler v. Heckler, 781 F.2d 649, 651-52 (8th Cir. 1986) (upholding the denial of Social Security disability benefits to an inmate against an ex post facto challenge because "there is a rational connection between [the denial] and the nonpunitive goal of regulating the distribution of disability benefits"); Carbonaro v. Reeher, 392 F. Supp. 753, 760 (E.D. Pa. 1975) (upholding the restriction on educational aid to people with felony convictions and explaining that "[t]he felon classification bears a rational

courts do not require legislatures or agencies to classify people with convictions precisely.[110]

The Supreme Court has found denial or burdening the exercise of civil rights to be unobjectionable in many circumstances, including deportation for noncitizens[111] and deprivation of a citizen's right to vote,[112] hold public office,[113] serve on a jury,[114] testify,[115] and possess firearms.[116] It has approved prohibitions on occupational licenses,[117] and on private employment where there is a public interest.[118] It has upheld denial of public benefits,[119] and special restrictions, such as registration[120] and incarceration[121] of sex offenders.

At some point, the Constitution limits the power of legislatures.[122] The Court has held that prisoners serving less than life sentences can-

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relationship to the legitimate state purpose of assuring that only responsible citizens receive state aid").

[110] *See, e.g.*, *Carbonaro*, 392 F. Supp. at 759-60 (rejecting the claim that classification was unconstitutionally under- or overinclusive).

[111] Galvan v. Press, 347 U.S. 522, 529 (1954).

[112] Richardson v. Ramirez, 418 U.S. 24, 54-55 (1974).

[113] *See* Baldwin v. New York, 399 U.S. 66, 69 n.8 (1970) (noting that in New York, "the convicted felon is deprived of certain civil rights, including the right . . . to hold public office"); *see also* Caron v. United States, 524 U.S. 308, 318 (1998) (Thomas, J., dissenting) (discussing the possibility that "an ex-felon's . . . civil rights, such as the right to vote, the right to seek and to hold public office, and the right to serve on a jury, [might be] restored. In restoring those rights, the State has presumably deemed such ex-felons worthy of participating in civic life." (citation omitted)); Andrea Steinacker, Note, *The Prisoner's Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801, 804-08 (reviewing state positions on restrictions on former felons' right to hold public office).

[114] *See generally* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

[115] *E.g.*, FED. R. EVID. 609.

[116] *See supra* note 53.

[117] Hawker v. New York, 170 U.S. 189, 196 (1898); *see also* Upshaw v. McNamara, 435 F.2d 1188, 1189-90 (1st Cir. 1970) (upholding a restriction on public employment); M & Z Cab Corp. v. City of Chicago, 18 F. Supp. 2d 941, 951 (N.D. Ill. 1998) (upholding denial of a taxi medallion).

[118] *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960) (upholding the disqualification of ex-felons from waterfront union office).

[119] *See* Flemming v. Nestor, 363 U.S. 603, 612 (1960) (upholding the denial of Social Security benefits on the basis of a statute that denied benefits to those deported for criminal convictions); *see also supra* note 109.

[120] Smith v. Doe, 538 U.S. 84, 105-06 (2003).

[121] Kansas v. Hendricks, 521 U.S. 346, 371 (1997).

[122] A number of opinions recognize that inmates retain some civil rights. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.").

not be denied the right to marry;[123] and so people with convictions who are not in prison, on probation, or on parole cannot be arbitrarily prohibited from marrying. Nor, probably, could a legislature require the sterilization of convicted people, at least without careful line-drawing and process.[124] Nevertheless, an extremely broad range of restrictions is permissible, so long as the restrictions are regulatory and rational within the meaning of the law.

2. Innovative Collateral Consequences

Because collateral consequences are not, strictly speaking, punishment, existing limitations may be imposed retroactively on people not subject to them at the time of conviction. In addition, states are free to create new restrictions in previously unregulated areas. Thus, if rational basis review[125] is taken seriously, then it appears that a truly unfortunate and spectacular range of potential discriminations may be visited long after the fact on those convicted of crime.

It would seem that virtually all denials of public benefits or services are rational because such benefits direct scarce resources to the most deserving. The federal government could, apparently, deny applications for Social Security, Medicare, and Medicaid from some or all people with felony convictions[126]—because "conservation of funds constitutes a rational basis on which to deny assistance to convicted felons and sex offenders."[127] In the absence of some positive federal law to the contrary, states apparently could deny people with convictions

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[123] *Id.* at 91.

[124] *See* Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541-42 (1942) (striking down a law mandating sterilization of repeat offenders convicted of larceny but not embezzlement).

[125] As *FCC v. Beach Communications, Inc.* summarized,

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of legislative facts explaining the distinction in a record has no significance in rational-basis analysis.

508 U.S. 307, 314-15 (1993) (citations omitted) (internal quotation marks omitted).

[126] For example, 21 U.S.C. § 862(b) allows state and federal sentencing judges to deny federal benefits to those convicted of drug possession offenses. *See* Students for Sensible Drug Policy Found. v. Spellings, 523 F.3d 896, 901 (8th Cir. 2008).

[127] Houston v. Williams, 547 F.3d 1357, 1364 (11th Cir. 2008).

access to public hospitals, higher education, and state benefit programs for the same reason.

Courts could find virtually all employment and licensing restrictions rational, as long as the job or occupation is one for which honesty, integrity, and moral character are relevant, for "[i]t is not open to doubt that the commission of crime—the violation of the penal laws of a state—has some relation to the question of character."[128] It is hard to imagine a job so insignificant and inconsequential that it could be done as well by a person of bad character as by someone who was hard working and honest. Because public employment is both a public benefit and a public trust, perhaps all restrictions in that area are rational.

Registration requirements, which originated outside the sex offender context,[129] are now returning to their roots, with more jurisdictions requiring the registration of people with records involving non-sex crimes.[130] Although *Lambert v. California* held that a particular person with a conviction could not be held liable for nonregistration based on the facts of that case,[131] the Court did not hint that criminal registration might be unconstitutional in general.[132]

One novel restriction is the limitation on the residence and movement of people convicted of sex offenses. The North Carolina Supreme Court held that people with criminal records can be denied access to public parks.[133] Although some residential restrictions have been struck down on state law grounds,[134] including under state ex

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[128] Barsky v. Bd. of Regents of Univ. of N.Y., 111 N.E.2d 222, 226 (N.Y. 1953) (quoting Hawker v. New York, 170 U.S. 189, 196 (1898)), *aff'd*, 347 U.S. 442 (1954).

[129] *See* WAYNE LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 20-48 (2009) (tracing the early development of registration requirements in the United States).

[130] *See id.* at 73-74 (discussing non-sex offender criminal registration requirements in Alabama, California, Connecticut, Florida, Hawaii, Illinois, Indiana, Kansas, Louisiana, Mississippi, Montana, Nevada, Oklahoma, and Tennessee); *see also, e.g.*, FLA. STAT. ANN. § 775.13 (West 2005) (providing for general felon registration).

[131] *See* 355 U.S. 225, 229-30 (1957) (holding registration law unconstitutional as applied because defendant "did not know of the duty to register and . . . there was no proof of the probability of such knowledge").

[132] *See id.* at 229 ("Registration laws are common and their range is wide.").

[133] *See* Standley v. Town of Woodfin, 661 S.E.2d 728, 729 (N.C. 2008) (upholding ordinance prohibiting sex offenders from entering public parks owned, operated, or maintained by the municipality); *see also* Doe v. City of Lafayette, 377 F.3d 757, 758 (7th Cir. 2004) (en banc) (upholding a prohibition on a particular sex offender's entering into any of the city's parks).

[134] *See, e.g.*, Terrance v. City of Geneva, 799 F. Supp. 2d 250, 254 (W.D.N.Y. 2011); Fross v. Cnty. of Allegheny, 20 A.3d 1193, 1207 (Pa. 2011).

post facto clauses,[135] many courts considering the question have held that these restrictions are not ex post facto punishments, but instead reasonable regulations[136]—even if they mean that for practical purposes a person cannot legally live anywhere in a particular city.[137]

Bare majorities of the Sixth Circuit[138] and the North Carolina Supreme Court[139] upheld a satellite-based monitoring (SBM) program. The Massachusetts Supreme Judicial Court invalidated one by an equally close margin.[140] The North Carolina Court described the program as remarkably burdensome and intrusive. Participants are required to

> wear a transmitter, which is a bracelet held in place by a strap worn around one ankle. . . . Second, participants wear a miniature tracking device (MTD) around the shoulder or at the waistline on a belt. The MTD may not be hidden under clothing. The device contains the Global Positioning System (GPS) receiver and is tethered to the ankle bracelet by a radio-frequency (RF) signal. . . . The MTD includes an electronic screen that

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[135] *See* Wayne Logan, *Populism and Punishment: Sex Offender Registration and Community Notification in the Courts*, CRIM. JUST., Spring 2011, at 37, 39-40 (discussing a variety of state court cases relying on ex post facto arguments to invalidate residential restrictions).

[136] *See, e.g.*, Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1017 (8th Cir. 2006) (holding that residency requirements were not punishment); Crawford v. State, No. CR-09-1883, 2011 WL 2658813, at *9 (Ala. Crim. App. July 8, 2011) (holding that a residency restriction was not an ex post facto law due to a lack of punitive effect); People v. Picklesimer, 226 P.3d 348, 358 (Cal. 2010) (finding that sex offender residency restrictions were not punishment). *But see, e.g.*, ACLU of Nev. v. Cortez Masto, 719 F. Supp. 2d 1258, 1260 (D. Nev. 2008) (finding registration and residency restriction laws to be "the equivalent [of] a new punishment tacked on to the original sentence . . . in violation of the Ex Post Facto . . . Clause[]"), *aff'd in part, rev'd in part*, No. 08-17471, 09-16008, 2012 WL 414664 (9th Cir. Feb. 20, 2012); State v. Letalien, 985 A.2d 4, 7 (Me. 2009) (concluding that retroactive application of new sex offender registration and in-person verification requirements were punitive). *See generally* Marjorie A. Shields, Annotation, *Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders*, 25 A.L.R. 6th 227, 305-16 (2007) (collecting cases where residency laws were held constitutional or not); William M. Howard, Jr., *Validity of State Sex Offender Registration Laws Under Ex Post Facto Prohibitions*, 63 A.L.R. 6th 351, 378-427 (2011) (discussing validity of state sex offender registration laws under ex post facto principles).

[137] *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1080-81 (2012) (providing examples of sex offenders forced to leave their homes to comply with residency requirements); Joseph L. Lester, *Off to Elba!: The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 AKRON L. REV. 339, 350-51 (2007) (discussing the effects of restrictions on sex offenders, including being forced to quit their jobs and move).

[138] Doe v. Bredesen, 507 F.3d 998, 1000 (6th Cir. 2007) (2-1 decision). *See generally* Frank Jaehoon Lee, Note, *Severing the Invisible Leash: A Challenge to Tennessee's Sex Offender Monitoring Act in* Doe v. Bredesen, 44 U.C. DAVIS L. REV. 683, 696-99 (2010).

[139] State v. Bowditch, 700 S.E.2d 1, 2 (N.C. 2010) (4-3 decision).

[140] Commonwealth v. Cory, 911 N.E.2d 187, 198 (Mass. 2009) (4-3 decision).

> displays text messages communicating possible violations or information to the participant. Third, a base unit is required for charging the MTD's battery . . . . The MTD requires at least six hours of charging per twenty-four hour period.[141]

In another case, a North Carolina court upheld the SBM program against an ex post facto challenge even though the program rules imposed a curfew, required a daily schedule, and necessitated six hours at home to charge the tracking device.[142]

Regulation of this kind is costly, which ordinarily might deter states from creating and expanding such programs. However, statutes often require the people being monitored to pay the costs;[143] these requirements have been upheld.[144]

If residence and movement restrictions and monitoring requirements are rational and not punishment as applied to sex offenders, then there is a strong argument that they are also rational and not punishment for those convicted of other crimes. If children and others should be protected from sex offenders, then surely it is rational that they be protected from drug offenders, those who committed violent offenses or offenses with high possibilities of violence such as burglary, or, for that matter, from serial quality-of-life misdemeanants.[145]

3. No Right to Notice at Plea or Sentence

Because collateral consequences have traditionally been understood as civil and nonpunitive, a defendant has not been constitutionally entitled to notice of existing restrictions from the Court before pleading guilty or to advice about the restrictions from defense coun-

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[141] *Bowditch*, 700 S.E.2d at 4.

[142] State v. Vogt, 685 S.E.2d 23, 26 (N.C. Ct. App. 2009) (2-1 decision), *aff'd per curiam*, 700 S.E.2d 224 (N.C. 2010) (4-3 decision). *But see id.* at 24 n.7 (reserving ability of monitorees to challenge particular features of the rules).

[143] *See* ALA. CODE § 15-20A-20(e) (Westlaw through Act 2012-78 of 2012 Reg. Sess.) ("Anyone subject to electronic monitoring pursuant to this section, unless he or she is indigent, shall be required to reimburse the supervising entity a reasonable fee to defray supervision costs . . . [and] such amount shall not exceed fifteen dollars ($15) per day.").

[144] *See, e.g.*, *In re* DNA Ex Post Facto Issues, 561 F.3d 294, 297 (4th Cir. 2009) (upholding a requirement that prisoners pay for DNA testing against an ex post facto challenge); State *ex rel.* Olivieri v. State, 779 So. 2d 735, 739-40, 749-50 (La. 2001) (upholding a requirement that offenders bear expenses of community notification); Commonwealth v. Derk, 895 A.2d 622, 630 & n.6 (Pa. Super. Ct. 2006) (rejecting ex post facto challenge to a $250 fee for processing a DNA sample that the sentencing judge ordered the defendant to submit).

[145] *Cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) (upholding as rational a ban on two unrelated persons living in a single housing unit).

sel when considering how to proceed in the case.[146] Deportation is, at the moment, the important exception. In March 2010 in *Padilla v. Kentucky*, seven Justices voted that the Sixth Amendment required defense counsel to advise clients about the possibility that a guilty plea would lead to deportation.[147] Some lower courts have applied the advice requirement of *Padilla* to other collateral consequences,[148] but the Supreme Court itself has not yet indicated how broadly *Padilla* will apply. As a general matter, people plead guilty to relatively minor offenses with relatively small punishments having no idea of what could happen to them, other than the possibility of deportation. Or, they plead guilty because they do know what will happen and they can live with it, but years later, the legislature adds additional collateral consequences (possibly including, of course, deportation) to an old conviction.

In sum, particularly in cases where the traditional forms of punishment are relatively light, collateral consequences will be one of the major effects of the criminal judgment. Yet, under the law as it now exists, it is not clear that the defendant has a right to be advised of the most important legal effects of the decision to enter a plea agreement.

II. THE CONSTITUTION AND THE NEW CIVIL DEATH

Although the Supreme Court has shown deference to legislatures when reviewing individual collateral consequences, its analysis and outcomes have been different when penalties systematically impair legal status. As explained below, the traditional form of civil death was widely regarded as punishment. In addition, the Supreme Court has held that certain other sanctions analogous to civil death are subject to

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[146] Recent cases include Davis v. Russell, No. 08-0138, 2011 WL 1770932, at *12 (E.D. Mo. May 10, 2011) ("Petitioner's counsel did not provide ineffective assistance of counsel and the plea court did not violate Petitioner's federal constitutional rights by failing to advise Petitioner that he may be subject to civil commitment . . . upon his release from prison . . . ."); Rigger v. State, 341 S.W.3d 299, 313 (Tenn. Crim. App. 2010) ("A trial court has no duty to advise a guilty-pleading defendant of a collateral consequence of his plea."); Carroll v. Commonwealth, 701 S.E.2d 414, 420 (Va. 2010) (holding that a plea was not invalid for failure of the court to warn of collateral consequence). *See generally* Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703-12 (2002) (discussing the general rule that counsel is not required to warn about collateral consequences); Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 131-34 (2009) (same).

[147] 130 S. Ct. 1473, 1482 (2010).

[148] *See* Margaret Colgate Love, *Collateral Consequences after* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 105-11 (2011) (discussing lower court cases applying *Padilla* beyond deportation).

Eighth Amendment scrutiny because of their systematic effects on an individual's legal status. Finally, the Court has considered the fact that criminal convictions impose a range of collateral consequences in shaping the rights to counsel, jury trial, and other aspects of criminal procedure. These holdings suggest that civil death is an effect of a criminal judgment of constitutional magnitude.

A. *Civil Death and Collateral Consequences as Punishment*

By referring to attainder—one aspect of which is civil death—as punishment, the Constitution suggests that civil death is punishment.[149] In addition, the Supreme Court has so held. In *Johnson v. Rockefeller*, a three-judge district court upheld the New York civil death statute's ban on marriages by inmates serving life sentences;[150] the Supreme Court summarily affirmed.[151] The district court's opinion suggested that the legislative prohibition was justified as a form of pun-punishment: "A state has considerable freedom within the limits of the Eighth Amendment in determining what form punishment for crime shall take. Deprivation of physical liberty is not the sole permissible consequence of a criminal conviction."[152] The court also rejected the claim that the law was infirm because inmates serving nonlife sentences were allowed to marry: "The fact that the state has provided less severe punishment for less serious crime does not invalidate its continued ban on marriage as an additional punishment for crimes of the most serious nature."[153]

The Supreme Court later offered a definitive judgment that civil death was punishment. In *Turner v. Safley*, the Court held that prison officials could not prohibit marriage as a correctional rule.[154] However, the Court distinguished rather than overruled *Johnson*. The Court explained that *Johnson* turned on the ground that the prohibition there

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[149] *See supra* notes 26-27 and accompanying text.

[150] Johnson v. Rockefeller, 365 F. Supp. 377, 380-81 (S.D.N.Y. 1973), *aff'd mem. sub nom.* Butler v. Wilson, 415 U.S. 953 (1974).

[151] *Butler*, 415 U.S. 953.

[152] *Johnson*, 365 F. Supp. at 380.

[153] *Id.* at 381 n.3. *But cf. id.* at 381 & n.1 (Lasker, J., concurring) (agreeing that the "marriage bar may be regarded as a punishment" but contending that "this point is not free from doubt").

[154] 482 U.S. 78, 97 (1987).

applied "only [to] inmates sentenced to life imprisonment; and, importantly, denial of the right was part of the punishment for crime."[155]

More recently, Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, referred to civil death as punishment.[156] Many other authorities[157] and commentators[158] have also characterized civil death in punitive terms.

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[155] *Id.* at 96; *see also* Langone v. Coughlin, 712 F. Supp. 1061, 1066 (N.D.N.Y. 1989) (finding the restriction under the New York law as amended to be irrational even though "punishment is the primary justification for the marriage prohibition").

[156] *See* Stogner v. California, 539 U.S. 607, 647 (2003) (Kennedy, J., dissenting) (discussing an English statute declaring Bishop Francis Atterbury a traitor and "subject[ing] him to a range of punishments not previously imposed, including exile and civil death. The Duke of Wharton, who registered the lengthiest dissent, commented that 'this Bill seems as irregular in the punishments it inflicts, as it is in its foundation, and carries with it an unnatural degree of hardship.'" (citations omitted)); *see also* Ullmann v. United States, 350 U.S. 422, 453 & n.8 (1956) (Douglas, J., dissenting) (noting that under French law, civil death was one of the punishments leading to infamy).

[157] *See, e.g.*, Simmons v. Galvin, 575 F.3d 24, 62-63 (1st Cir. 2009) (Torruella, J., dissenting) (arguing that the historical function of disenfranchisement and civil death was punishment); Villalon v. Bowen, 273 P.2d 409, 412 (Nev. 1954) ("[E]ven where a statute has incorporated [civil death] as a part of the punishment for crime, the courts have been reluctant to invoke it unless the express language of the statute left no escape and compelled them to do so." (quoting Annotation, *Civil Effects of Sentence to Life Imprisonment*, 139 A.L.R. 1308, 1310 (1942)) (internal quotation marks omitted)); Cole v. Campbell, 968 S.W.2d 274, 277 (Tenn. 1998) ("Tennessee does not have a civil death statute . . . . In addition, the limits of punishment are set by the Legislature and no punishment may be imposed without statutory authority. Accordingly, the [court below] erred in concluding that the convicted felon . . . lacked standing to file an action to seek public records under the Public Records Act."); *see also* Deutch v. Hoffman, 211 Cal. Rptr. 319, 320 (Ct. App. 1985) ("Statutes relating to civil death or the suspension of civil rights are penal in nature and are to be strictly construed."); Hughes v. Dwyer, 546 S.W.2d 733, 735 (Mo. Ct. App. 1977) ("Upon conviction for a felony the English Common Law assessed the additional penalty of 'attainder' which included the concepts of forfeiture, corruption of the blood and civil death. . . . It is evident that the civil death statute, being penal in nature, has received a rigid interpretation from the Missouri courts."); Platner v. Sherwood, 6 Johns. Ch. 118, 131 (N.Y. Ch. 1822) ("The penal consequences of attainder must be necessary deductions, severely required by the premises . . . .").

[158] *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES *377 ("Some punishments consist in exile or banishment, by abjuration of the realm, or transportation to the American colonies: others in loss of liberty, by perpetual or temporary imprisonment. . . . [O]thers induce a disability, of holding offices or employments, being heirs, executors, and the like."); 2 POLITICAL DICTIONARY, FORMING A WORK OF UNIVERSAL REFERENCE, BOTH CONSTITUTIONAL AND LEGAL 604 (1846) ("[A]ll the known punishments have involved the infliction of pain by different means, as death, mutilation of the body, flogging or beating, privation of bodily liberty by confinement of various sorts, banishment, forced labour, privation of civil rights, pecuniary fine."); Robert D. Cooter & Wolfgang Fikentscher, *Indian Common Law: The Role of Custom in American Indian Tribal Courts* (pt. II), 46 AM. J. COMP. L. 509, 534 n.53 (1998) ("A 'civil death,' which arose historically . . . as a punishment for wrongdoing, implied that the person

Two Supreme Court cases invalidating punishments analogous to civil death suggest the punitive nature of civil death. In *Weems v. United States*[159] and *Trop v. Dulles*,[160] the Court found total destruction of a person's legal status in society to be cruel and unusual punishment under the Eighth Amendment.

Weems originated in the Philippines which was a U.S. territory at the time. The Court in *Weems* invalidated the *cadena temporal*, a punishment where, for a period of years, the person sentenced would be imprisoned and perform hard labor for the State.[161] In addition to the hard labor, those sentenced to *cadena temporal* would thereafter suffer "accessory penalties,"[162] namely, "civil interdiction,"[163] "perpetual absolute disqualification,"[164] and "subjection to surveillance during life."[165] The Court regarded these penalties, clearly recognizable as versions of modern collateral consequences, as harsh:

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ceases to be a legal person and loses the rights of a person."); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 917 (2004) (noting that some penal systems imposed "a kind of 'civil death' as further punishment"); Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 73-74 (2003) ("Criminal disenfranchisement has its roots in the punishment of 'civil death,' imposed for criminal offences under Greek, Roman, Germanic and later Anglo-Saxon law." (footnote omitted)); Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 985 n.4 (1962) ("Civil death statutes have been sustained as valid exercises of legislative power to prescribe punishment for crimes." (citing Quick v. W. Ry., 92 So. 608 (Ala. 1922))); *see also Quick*, 92 So. at 609 (upholding a civil death statute by finding that it did "not appear ever to have been supposed that the Legislature might not impose disability to sue as punishment for crime").

[159] 217 U.S. 349 (1910). *See generally* Margaret Raymond, *"No Fellow in American Legislation":* Weems v. United States *and the Doctrine of Proportionality*, 30 VT. L. REV. 251 (2006) (discussing the facts and holding of *Weems*).

[160] 356 U.S. 86 (1958).

[161] *See Weems*, 217 U.S. at 364 ("They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.").

[162] *Id.*

[163] *See id.* ("Civil interdiction shall deprive the person punished, as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*.").

[164] *See id.* at 364-65 ("The penalty of perpetual absolute disqualification is the deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay, etc.").

[165] *See id.* at 364 (noting that subjection to surveillance required the person punished to lawfully support himself by "some trade, art, industry, or profession," submit to inspection, report his residence to authorities, and obtain permission before moving).

> His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.[166]

The Court was also concerned about the portion of the sentence involving painful labor,[167] and it is difficult to identify precisely what about the nature and degree of *cadena temporal* made it unconstitutional.[168] Nevertheless, the "accessory penalties" were a basis,[169] perhaps the most important basis, for the Court's ruling.[170]

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[166] *Id.* at 366.

[167] *See id.* ("What painful labor may mean we have no exact measure. It must be something more than hard labor.").

[168] The relatively minor nature of the crime at issue, a false entry in a government financial record, also gave the Court pause. "It must be confessed that [the sentencing laws], and the sentence in this case, excite wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime." *Id.* at 365.

[169] *See id.* at 377 ("It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind."); *see also* Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075 (1964) ("It was plainly not the length of the imprisonment alone, considered in relation to the gravity of the offense, that determined the result. Rather, it was the combination of an excessive but conventional mode of punishment with a good deal of laid-on unpleasantness offensive for its novelty as well as its severity that supported the characterization of Weems' punishment as cruel and unusual.").

[170] Sentences to hard labor were constitutionally uncontroversial. In any event, the Court affirmed many such convictions. *See, e.g.*, Hendrix v. United States, 219 U.S. 79, 91 (1911) (upholding the lower court's penalty of life at hard labor for murder), *overruled on other grounds by* Funk v. United States, 290 U.S. 371 (1933). This outcome held true even for nonhomicide cases. *See, e.g.*, Rodriguez v. United States, 198 U.S. 156, 157 (1905) (embezzlement); Hall v. United States, 168 U.S. 632, 634 (1898) (mail theft). Given this, Justice White, dissenting for himself and Justice Holmes, concluded "that the accessory punishments are the basis of the ruling now made." *Weems*, 217 U.S. at 412 (White, J., dissenting). White argued that the accessory punishments, even if unconstitutional, were severable. *Id.* The majority's response indicated that White correctly perceived the centrality of the accessory punishment: "It is suggested that the provision for imprisonment in the Philippine Code is separable from the accessory punishment, and that the latter may be declared illegal, leaving the former to have application." *Id.* at 381. Instead of holding that the conditions of imprisonment would themselves have invalidated the sentence, the Court concluded that the accessory punishments were not severable. *Id.* at 381-82. For further evidence that Justice White doubted the constitutionality of total deprivation of status, see the discussion of *Hovey v. Elliott*, 167 U.S. 409 (1897), *supra* note 31 and accompanying text.

A half-century later in *Trop v. Dulles*, five Justices found another "accessory penalty"—expatriation or denationalization of a United States citizen—to be cruel and unusual because it destroyed legal personality.[171] They ruled that Congress had no power to punish a U.S. citizen with denationalization for desertion in time of war.[172] The citizen could be executed, they explained, but deprivation of citizenship was cruel and unusual.[173]

The plurality opinion suggested that denationalization is substantially similar to civil death. By imposing denationalization as punishment, they explained,

> There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. . . . In short, the expatriate has lost the right to have rights.[174]

Uncertainty based on the possibility of future discrimination was the key feature making "[t]his punishment . . . offensive to cardinal principles for which the Constitution stands."[175] Justice Brennan's opinion, providing the necessary fifth vote, also found the uncertainty created by the status to be critical.[176]

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[171] 356 U.S. 86, 101-02 (1958) (plurality opinion).

[172] *Id.* at 103.

[173] *See id.* at 99 ("Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."); *see also id.* at 112 (Brennan, J., concurring) ("And as a deterrent device this sanction would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.").

[174] *Id.* at 101-02 (plurality opinion).

[175] *Id.* at 102; *see also id.* ("It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated.").

[176] Chief Justice Warren's plurality opinion was joined by Justices Black, Douglas, and Whittaker. *Id.* at 87. Justice Brennan's concurring opinion was consistent with the plurality. First, Justice Brennan concluded that because "expatriation is made a consequence of desertion, it must stand together with death and imprisonment—as a form of punishment." *Id.* at 110 (Brennan, J., concurring). In addition, he agreed with the plurality that the uncertainty created by the consequence was central. Because

> American law has had little experience with this status . . . [its] ultimate impact on the petitioner [is] unknown and unknowable. . . . [While he] may perhaps live, work, marry, raise a family, and generally experience a satisfactorily happy life . . . [t]he uncertainty, and the consequent psychological hurt, which must

The dissenters insisted that expatriation was not punishment.[177] They also insisted that if it were, it would not be cruel and unusual because its consequences would be limited.[178] The dissenters claimed that noncitizens in the United States enjoyed a much greater set of rights than convicted persons in fifteenth century England: "He need not be in constant fear lest some dire and unforeseen fate be imposed on him by arbitrary governmental action—certainly not while [the Supreme Court] sits."[179] Thus, on this point, the dissenters would apparently have agreed that a punishment subjecting an offender to an open-ended range of discrimination and disability was constitutionally doubtful.

If civil death, old or new, were entirely equivalent to *cadena temporal* and expatriation, then it would be an unconstitutional cruel and unusual punishment. Whatever may be said for this, the traditional permissibility of civil death suggests that a doctrinal argument that the new civil death is now unconstitutional would be challenging. Nevertheless, *Trop* and *Weems* make clear that profound impairment of legal personality is constitutionally significant.

B. *Collateral Consequences and Constitutional Criminal Procedure*

In *Padilla v. Kentucky*, the Supreme Court held that noncitizen clients considering guilty pleas were entitled to be warned about the possibility of deportation,[180] even though deportation was not a criminal punishment.[181] Dissenting for himself and Justice Thomas, Justice Scalia argued, "The Sixth Amendment guarantees the accused a lawyer 'for his defense' against a 'criminal prosecutio[n]'—not for sound advice about the collateral consequences of conviction."[182] Scalia's proposition is consistent with the body of cases holding that deportation and other collateral consequences are not criminal punishment.

> accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment.

Id. at 110-11; *see also id.* at 110 n.7 ("[T]his very uncertainty of the consequences makes expatriation as punishment severe."). In *Furman v. Georgia*, Justice Brennan indicated his support for the *Trop* plurality opinion. 408 U.S. 238, 271 & n.13 (1972) (Brennan, J., concurring).

[177] *See Trop*, 356 U.S. at 124-25 (Frankfurter, J., dissenting).

[178] *Id.* at 127.

[179] *Id.* (internal quotation marks omitted).

[180] 130 S. Ct. 1473, 1494 (2010).

[181] *See id.* at 1481 ("[R]emoval proceedings are civil in nature . . . ." (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984))).

[182] *Id.* at 1494.

But the argument overlooks another line of authority in which the Court understood collateral consequences to be an important part of the criminal justice system. Indeed, in a little-noticed line of cases, unmentioned in *Padilla*, the Court has relied on collateral consequences, among other considerations, to shape the contours of constitutional criminal procedure.

At the broadest level of generality, the Court has frequently noted that a criminal conviction carries with it "opprobrium and stigma."[183] The important stigma here is not mere social or reputational disadvantage; it is crystallized in law in the form of collateral consequences.[184]

The Court has recognized that a purpose and an effect of prosecutions are to impose collateral consequences. Accordingly, collateral consequences prevent a criminal case from becoming moot on appeal or being collaterally attacked even after expiration of the sentence.[185]

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[183] Reno v. ACLU, 521 U.S. 844, 872 (1997); *see also, e.g.*, Lewis v. United States, 518 U.S. 322, 334 (1996) (Kennedy, J., concurring in the judgment) ("Opprobrium attaches to conviction of . . . crimes [punishable by more than six months incarceration] regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury. . . . [C]onvictions for petty offenses do not carry the same stigma as convictions for serious crimes."); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) ("The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)) (internal quotation marks omitted)); United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting) ("Before we place the stigma of a criminal conviction upon any such citizen the legislative mandate must be clear and unambiguous.").

[184] As the Court explained in *Lawrence v. Texas*,

> The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. . . . We are advised that if Texas convicted an adult for private, consensual homosexual conduct . . . the convicted person would come within the registration laws of at least four States were he or she to be subject to their jurisdiction. This underscores the consequential nature of the punishment and the state-sponsored condemnation attendant to the criminal prohibition. Furthermore, the Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms, to mention but one example.

539 U.S. 558, 575-76 (2003) (citations omitted).

[185] *See, e.g.*, Spencer v. Kemna, 523 U.S. 1, 8-11 (1998); Sibron v. New York, 392 U.S. 40, 55-57 (1968); *see also* United States v. Morgan, 346 U.S. 502, 512-13 (1954) (holding that the defendant could challenge an old federal conviction through coram nobis when it increased the sentence under a subsequent state conviction). However, "[o]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual

Conversely, the Court has recognized that one of the states' interests in criminal convictions is to impose collateral consequences. Accordingly, "even after a defendant has served the full measure of his sentence, a State retains a strong interest in preserving the convictions it has obtained. States impose a wide range of disabilities on those who have been convicted of crimes, even after their release."[186]

The Court has often characterized collateral consequences as punishment. The Court explained in 1892 that when the State imposes consequences such as "attainder, or infamy, or incompetency of a convict to testify," these consequences are "strictly penal."[187] In *Ball v. United States*, the Court found an invalid sentence to be "an impermissible punishment" even though it was concurrent with another valid sentence, because of "potential adverse collateral consequences that may not be ignored."[188]

The Court often considers collateral consequences in evaluating whether there is a right to counsel under the Sixth Amendment. A primary example is *Padilla v. Kentucky* itself, but there are many earlier examples. In *Argersinger v. Hamlin*, Justices Powell and Rehnquist found the collateral consequences of misdemeanors important in deciding that the right to counsel should extend beyond felonies.[189] They explained, "When the deprivation of property rights and interest is

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'in custody' for the purposes of a habeas attack upon it." Maleng v. Cook, 490 U.S. 488, 492 (1989).

[186] Daniels v. United States, 532 U.S. 374, 379 (2001); *see also* Pennsylvania v. Mimms, 434 U.S. 106, 108 n.3 (1977) ("If the prospect of the State's visiting . . . collateral consequences on a criminal defendant who has served his sentence is a sufficient burden as to enable him to seek reversal of a decision affirming his conviction, the prospect of the State's inability to impose such a burden following a reversal of the conviction of a criminal defendant in its own courts must likewise be sufficient to enable the State to obtain review of its claims on the merits here.").

[187] Huntington v. Attrill, 146 U.S. 657, 673 (1892); *see also* Singleton v. State, 21 So. 21, 23 (Fla. 1896) (explaining that testimonial "disability is as much a part of the pains and penalties of the violated law as incarceration, and, after conviction, it attaches as surely as any other part of the punishment"); State *ex rel.* Mitchell v. McDonald, 145 So. 508, 511 (Miss. 1933) ("'[T]he conviction of an infamous crime in a foreign country, or in any other of the United States, does not render the subject of such conviction an incompetent witness in the courts of this state,' [since] 'infamy is a punishment as well as stigma on character.'" (quoting Commonwealth v. Green, 17 Mass. (16 Tyng) 515, 515 (1822) and 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 522, at 939 n.3 (2d ed. 1923))).

[188] 470 U.S. 856, 865 (1985); *see also* Rutledge v. United States, 517 U.S. 292, 302 (1996) ("[C]ollateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.").

[189] 407 U.S. 25, 48 & n.11 (1972) (Powell, J., concurring in the judgment).

of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process."[190]

Systematic effects on civil status also influenced some decisions on the right to jury trial. In *Baldwin v. New York*, five members of the Court relied on the existence of collateral consequences in finding a right to a jury trial for misdemeanors.[191] The plurality explained, "Both the convicted felon and the convicted misdemeanant may be prevented under New York law from engaging in a wide variety of occupations. In addition, the convicted felon is deprived of certain civil rights, including the right to vote and to hold public office."[192] Decades later, Justice Kennedy, writing for himself and Justice Breyer, found that collateral consequences justified recognition of a right to a jury trial for felonies and serious misdemeanors, regardless of sentence. "Opprobrium attaches to conviction of . . . crimes [punishable by more than six months incarceration] regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury."[193] Collateral consequences also informed the es-

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[190] *Id.* In *Middendorf v. Henry*, 425 U.S. 25 (1976), all of the Justices found collateral consequences to be relevant to the question of the right to counsel in summary courts martial. *Compare id.* at 58 (1976) (Marshall, J., dissenting) (arguing for a right to counsel in "a summary court-martial conviction [because it] is . . . regarded as a criminal conviction . . . that . . . has collateral consequences both in military and civilian life"), *with id.* at 39 (majority opinion) (holding no right to counsel to exist in part becuase "[c]onviction . . . would likely have no consequences . . . beyond the immediate punishment meted out by the military, unlike conviction for such civilian misdemeanors as vagrancy or larceny which could carry a stamp of 'bad character' with conviction"). While in *Scott v. Illinois*, 440 U.S. 367, the Court held five to four that there was no right to counsel in misdemeanor prosecutions when no jail sentence was imposed, opinions of the four dissenters and Justice Powell's concurrence recognized the importance of collateral consequences. *See id.* at 382-83 (Brennan, J., dissenting) ("The authorized penalty is also a better predictor of the stigma and other collateral consequences that attach to conviction of an offense."); *id.* at 389-90 (Blackmun, J., dissenting) (concluding that "an indigent defendant in a state criminal case must be afforded appointed counsel whenever the defendant is prosecuted for a nonpetty criminal offense . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment" (emphasis omitted)); *id.* at 374-75 (Powell, J., concurring) ("[T]he drawing of a line based on whether there is imprisonment (even for overnight) can have the practical effect of precluding provision of counsel in other types of cases in which conviction can have more serious consequences.").

[191] 399 U.S. 66, 69 (1970) (plurality opinion).

[192] *Id.* at 69 n.8; *see also id.* at 75 (Black, J., concurring in the judgment) (noting that "imprisonment for less than six months may still have serious consequences").

[193] Lewis v. United States, 518 U.S. 322, 334 (1996) (Kennedy, J., concurring in the judgment). Justice Kennedy's opinion in *Lawrence v. Texas*, joined by Justice Breyer, included the fact of collateral consequences as part of the "stigma" resulting from a criminal conviction. *See supra* note 184; *see also* Blanton v. City of N. Las Vegas, 489 U.S. 538, 543-45 (1989) (noting the possibility that nonincarceration penalties for a DUI

tablishment of the right to free transcripts on appeal for indigents even in minor cases,[194] and the prohibition on prosecutorial vindictiveness.[195]

Collateral consequences were hardly the only consideration shaping these doctrines. However, these cases show that the Court has long recognized, both explicitly and implicitly, that punitive collateral consequences are part of the stakes of criminal prosecutions, and as such, warrant consideration in determining the rules of constitutional criminal procedure.

III. TOWARD ACCOMMODATING THE NEW CIVIL DEATH INTO CRIMINAL PROCEDURE

Looking at individual collateral consequences in isolation, the Supreme Court has held that they are not punishment and has placed little substantive or procedural restriction on their imposition. Yet the same Court has understood civil death and other systematic loss of status as punishment and has used the existence of collateral consequences to shape important criminal procedure doctrines, such as the rights to counsel and to jury trial.

These two lines of cases have not been in dialogue with each other, but they are reconcilable. Individual collateral consequences are not necessarily punishment; if the only collateral consequences of a drug conviction, for example, were that the defendant lost her driver's license, then perhaps it would be appropriate to treat that loss as completely separate from the criminal case. But convicted persons suffer a general loss of legal personality and status, which, as *Trop* and *Weems* suggest, is punishment. As Chief Justice Warren explained, "Conviction of a felony imposes a *status* upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportu-

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could trigger the right to a jury trial, but a ninety-day driver's license suspension and the possibility of a higher sentence for a future offense was insufficient).

[194] *See* Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) ("The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. A fine may bear as heavily on an indigent accused as forced confinement. The collateral consequences of conviction may be even more serious, as when . . . the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds.").

[195] *See* Blackledge v. Perry, 417 U.S. 21, 28 n.6 (1974) (invalidating an increase in charges from a misdemeanor to a felony based on the exercise of the right to appeal, noting that "conviction of a 'felony' often entails more serious collateral consequences than those incurred through a misdemeanor conviction").

nities."[196] Whether or not any individual collateral consequence is punishment, the overall susceptibility to collateral consequences is punishment. This is the case at least when, as now, there is a vigorous, existing network of collateral consequences.[197]

In addition, even if being subjected to collateral consequences is not punishment, *strictissimi juris*, it may be within the scope of the criminal provisions of the Bill of Rights. *Padilla v. Kentucky* held that defendants were entitled to be warned by their lawyers about the possibility of deportation because, although not criminal,[198] deportation followed conviction automatically,[199] had a "close connection to the criminal process,"[200] and was severe.[201] *Padilla* required advice about a particular collateral consequence—deportation. But deportation, like civil death or expatriation, has systematic effects on status. It does not merely affect employment, or residence, or family relationships; instead, it "may result also in loss of both property and life; or of all that makes life worth living."[202] Deportation is simultaneously a specific collateral consequence and a systematic destruction of status.

The new civil death is an implicit term of every criminal conviction, and it is within the zone of concern of constitutional criminal proce-

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[196] Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting), *overruled by* Carafas v. LaVallee, 391 U.S. 234 (1968).

[197] As an analogy, no one would claim that each of the individual disadvantages of imprisonment—subjection to classification, prison rules, solitary confinement, mail restrictions, transfer—is a separate punishment that must be explained at a guilty plea. But imprisonment is punishment. *See, e.g.*, United States v. Garcia, 698 F.2d 31, 33 (1st Cir. 1983) (holding that withholding information regarding the parole evaluation process did not violate "the principles of due process"); Houston v. Lack, 625 F. Supp. 786, 790-91 (W.D. Tenn. 1986) (refusing to require advising felons about ineligibility for programs that could reduce their sentences), *aff'd per curiam*, No. 86-5198, 1989 WL 47448 (6th Cir. May 9, 1989); State v. Parker, 629 N.W.2d 77, 80 (Wis. Ct. App. 2001) (finding no due process obligation to warn of a possible transfer to an out-of-state prison).

[198] *See* 130 S. Ct. 1473, 1477 (2010) (holding that "when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear"); *see, e.g.*, Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST., Summer 2010, at 36, 40 (analyzing the implications of *Padilla*); Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, CRIM. JUST., Fall 2010, at 21, 22 (same).

[199] 130 S. Ct. at 1486.

[200] *Id.* at 1482; *see also id.* at 1481 ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century.").

[201] *See id.* at 1486 ("The severity of deportation—'the equivalent of banishment or exile'—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation." (quoting Delgadillo v. Carmichael, 332 U.S. 388, 390-391 (1947))).

[202] Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

dure, either because it is punishment or based on the rationale of *Padilla v. Kentucky*. This outcome has a number of implications for the criminal justice process.

A. *Ex Post Facto*

One important concern is whether imposing new or different collateral consequences after conviction amounts to an ex post facto law and is therefore unconstitutional. If the new civil death is not punishment, then of course, there would be no significant ex post facto issue. If the new civil death is punishment, there still is no significant issue. In 1960, Chief Justice Warren opined, accurately, that conviction worked a change in legal status.[203] Thus, while the particulars of the regime of collateral consequences change from time to time, by 1960 (or perhaps earlier), it was clear that the State could deprive convicted persons of civil rights, public benefits, occupational licenses, and employment in regulated industries, subject only to minimal judicial review. It was also clear that deprivations could be imposed retroactively as well as prospectively.

B. *Notice*

In the past, courts have held that neither the court nor counsel had a duty to advise clients of collateral consequences at the time of a plea.[204] Accordingly, clients pleaded guilty without knowing what was really at stake. With full knowledge, in some instances, they may have concluded that it was worth the risk of going to trial to avoid an onerous collateral consequence, or important enough to sell assets or borrow money to finance a more vigorous defense, given their understanding of the true nature of the downside risk. In addition, if consideration of collateral consequences were a Sixth Amendment duty, clients would ask for, and attorneys would seek, available plea bargains to other offenses that might avoid severe consequences.

One reason for the lack of a duty of advice was the general conclusion that collateral consequences are not punishment. Courts reasoned that the duty of advice is limited to the "direct" consequences of the plea, such as a prison sentence or fine. The automatic and punitive nature of civil death makes it a direct consequence, but even if it

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[203] Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting), *overruled by* Carafas v. LaVallee, 391 U.S. 234 (1968).

[204] *See* sources cited *supra* note 146.

were not, the Supreme Court in *Padilla* noted that while the distinction was employed by lower courts, the Supreme Court had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'"[205] The Supreme Court has held that "a guilty plea 'not only must be voluntary but must be a knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences.'"[206] The consequence of civil death is a penalty that follows conviction with certainty.

Courts can much more readily advise defendants about civil death than about numerous individual collateral consequences.[207] One reason courts in the past found no duty to advise was that court and counsel may not be aware that individual collateral consequences exist, because they may be in an obscure, noncriminal statute or regulation. In addition, the court may not be aware of the facts showing that a particular collateral consequence is potentially or actually applicable to the particular client.[208] But the new civil death applies to each and every person who pleads guilty to a crime. Therefore, determination of its applicability requires no legal or factual investigation or analysis by the court. In addition, it applies in exactly the same way to each and every person pleading guilty.[209] Accordingly, it will not be necessary to individualize the advisement; every person faces exactly the same change in legal status. This point is consistent with requiring courts and counsel to advise of other extremely important collateral consequences like deportation and sex offender registration, which are also automatic and severe.

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[205] *Padilla*, 130 S. Ct. at 1481 (quoting Strickland v. Washington, 466 U.S. 668, 689 (1984)).

[206] Haring v. Prosise, 462 U.S. 306, 319 (1983) (alterations omitted) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

[207] *See* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 684-85 (2011) (describing the task of informing defendants of collateral consequences as "herculean").

[208] *See* Nichols v. United States, 511 U.S. 738, 748 (1994) (rejecting a claim that courts should warn uncounseled misdemeanor defendants of the possibility of a higher sentence if convicted of another crime); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) ("[U]nsolicited advice concerning the collateral consequences of a plea which necessitates judicial clairvoyance of a superhuman kind can be neither expected nor required."); Joseph v. Esperdy, 267 F. Supp. 492, 494 (S.D.N.Y. 1966) ("[I]t seems onerous and absurd to expect a judge to explain to each and every defendant who pleads guilty the full range of collateral consequences of his plea and, indeed, to anticipate what those collateral consequences are." (emphasis omitted)).

[209] That is, like minority, alienage, or expatriation, civil death is a single legal status. Like all of those things, it will bear on particular individuals differently.

Models promulgated by the Uniform Law Commission and the American Bar Association[210] require broad notice of collateral consequences. The Uniform Collateral Consequences of Conviction Act contains a general warning which offers plain language covering much of the territory:

> NOTICE OF ADDITIONAL LEGAL CONSEQUENCES
>
> If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction's alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:
>
> - being unable to get or keep some licenses, permits, or jobs;
> - being unable to get or keep benefits such as public housing or education;
> - receiving a harsher sentence if you are convicted of another offense in the future;
> - having the government take your property; and
> - being unable to vote or possess a firearm.
>
> If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.
>
> The law may provide ways to obtain some relief from these consequences.[211]

The Act also provides that "[b]efore the court accepts a plea of guilty or nolo contendre from an individual, the court shall confirm that the

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[210] *See* STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY standard 14-1.4(c) (1997) ("[T]he court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status."); *id.* standard 14-3.2(f) ("To the extent possible, defense counsel should 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."); *see also* STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS standard 19-2.3(a) (2003) ("[A] court [should] ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense . . . . by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.").

[211] UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 5(a) (2010).

individual received and understands the notice required by subsection (a) and had an opportunity to discuss the notice with counsel."[212]

C. *Consideration in Sentencing*

Legislatures punish offenders to achieve one or more ends. Punishment can protect the public from future misconduct by individuals who have committed crimes by reducing the opportunities for an individual to reoffend. It can impose deprivations on an individual to communicate social disapproval for misconduct, balance the scales of justice, deter the individual or other potential offenders, and promote reflection by, and reformation of, the person punished. All of these things can be achieved through the collateral consequences attendant to civil death, just as they can be through incarceration or other traditional forms of punishment.

Because civil death serves the function of punishment, and is either punishment in the constitutional sense or its constitutional cousin, it is appropriate that actors in the criminal justice system account for it and use it. The potential punishment for a criminal offense is considered at several places along the way.

The first place is during charging and plea bargaining. Prosecutors, when considering what to charge, should take into account the potential effects of civil death. The majority decision in *Padilla v. Kentucky* held that it is appropriate for prosecutors and defense attorneys to plea bargain around collateral consequences.[213] Justice Stevens noted that consideration of deportation would benefit both sides because it would give the defendant an opportunity to plead to something that would not lead to deportation, and it would benefit the prosecution by encouraging the defendant to accept that plea.[214]

Another important stage is sentencing. Sentencing is designed to impose punishment that is proportionate to the offense and consistent with that imposed on similar offenders. These goals cannot be achieved without evaluating the total package of sentencing facing an individual. Accordingly, the ABA Criminal Justice Standards provide that "[t]he legislature should authorize the sentencing court to take

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[212] *Id.* § 5(b).

[213] 130 S. Ct. 1473, 1486 (2010).

[214] *Id.*; *see also* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1435 (2011) ("[B]ased on negotiations with defense counsel, prosecutors regularly consider lesser charges, diversion, or non-prosecution to allow relatively less serious offenders to avoid deportation.").

into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence."[215]

D. *Legislative Reform*

Some groups have urged limitation of the use of collateral consequences.[216] There is no comprehensive, official collection of collateral consequences, which makes them more difficult to employ intelligently in individual cases and systematically. Judges and lawyers cannot consider the ones that exist, and legislatures cannot consider their overall structure, if they do not know what they are. This problem is about to be solved. Congress directed the National Institute of Justice to undertake a fifty-state survey of collateral consequences, which is now underway.[217] Accordingly, in the reasonably near future, the legal effects of a criminal judgment should be more readily ascertainable.

Once a complete picture emerges, legislatures should consider collateral consequences in evaluating the overall fairness and severity of criminal punishment associated with particular offenses or classes of offenses. Legislatures could decouple criminal conviction and civil death by applying disadvantages on a case-by-case basis, making them discretionary instead of automatic.[218] Legislatures could also consider making relief readily available to those who maintain clean records for a period of time.[219]

The fundamental question, though, is the overall burden of collateral consequences. Legislatures, of course, must ensure that public safety is maintained. But if those convicted of crimes are under such

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[215] STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS standard 19-1.1.

[216] *See id.* standard 19-2.6 (listing collateral sanctions that legislatures should not impose, including deprivation of the right to vote, and other civil rights, public benefits, and programs relevant to reentry); *see also* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 7 (2010) (limiting authority of subordinate levels of government to create mandatory collateral consequences and presuming that ambiguous sanctions are discretionary, not mandatory).

[217] Love, *supra* note 12, at 116 n.12.

[218] *See* STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS standard 19-2.2 (stating that restrictions should be discretionary rather than automatic unless "the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified").

[219] *See* LOVE, *supra* note 68, at 96 ("Many people who commit a crime or even more than one crime make a reasonable effort to turn their lives around and stay out of trouble with the law. It would seem sound public policy to encourage them to do so.").

systematic and severe restrictions that it is difficult or impossible for them to support themselves and their families, former convicts will reoffend. Further, legislatures decide fairness and efficiency of criminal penalties, not mere constitutionality.

CONCLUSION

At common law, a consequence of being found to have committed a crime was the extinction of a person's being, through execution or civil death. Now, conviction is an increasingly common characteristic of people in free society, and the law does not provide that the tens of millions of Americans with criminal records, no matter how trivial, are written off permanently. However, while the states have eliminated the formal regime of civil death, an equivalent system of legal deprivation, in which most rights of people with criminal records are held at sufferance, has arisen to take its place.

The new civil death is even more significant in its effects than historical civil death. The rise of mass conviction means a greater percentage of the population is subject to it. And the rise of the regulatory state means that more important legal consequences flow from degraded legal status.

The constitutional law of collateral consequences is equivocal about its treatment of the new civil death. One major line of cases, exemplified by *Smith v. Doe*,[220] holds that specific constituent aspects of that status—individual collateral consequences—are not punishment. Therefore restrictions supported by minimal rationality may be imposed retroactively and without notice. Another line of cases, represented by *Trop v. Dulles*[221] and *Padilla v. Kentucky*,[222] holds that systematic destruction of legal status is punishment, or at least of constitutional significance, and that the criminal justice system should be structured to ensure that convictions are imposed fairly, in part because they allow the imposition of collateral consequences.

The tension between these cases can be resolved by understanding the critical impact of a conviction to be the change in legal status. A person with a clean record is free and equal. However, after conviction, even years after satisfaction of the sentence, the law regards a

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[220] 538 U.S. 84 (2003).

[221] 356 U.S. 86 (1958).

[222] 130 S. Ct. 1473 (2010).

person with a record as an appropriate subject for restrictive regulation. The essential nature of the legal disadvantage is not disenfranchisement, for example, or ineligibility for a particular license. Those disabilities change across time and geography. What does not change is that the convicted person is subject to whatever regulation legislatures deem merited. Similarly, a lawyer or judge candidly advising an individual about her status might not be able to warn her of each specific disadvantage she will suffer, but can and should make clear that in general civil rights, employment opportunities, and other aspects of status in society will, or may be, limited or reduced. This is a momentous punishment, and our law has not sufficiently accounted for it.