

MANAGING COLLATERAL CONSEQUENCES IN THE SENTENCING PROCESS: THE REVISED SENTENCING ARTICLES OF THE MODEL PENAL CODE

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The debased legal status that results from a criminal conviction makes possible a regime of restrictions and exclusions that feels like punishment to those who are subject to it and looks like punishment to the community. Policy makers are beginning to understand that the goal of reintegrating criminal offenders into society is not well served by a legal system that makes them permanently ineligible for many of its benefits and opportunities and effectively marks them as social outcasts. Because courts have failed to address issues of severity and proportionality raised by punitive mandatory collateral penalties, and because legislatures have been unwilling to dial them back in any meaningful fashion, reformers have turned to the sentencing system to restore collateral consequences to an appropriate regulatory role. One such reform proposal is the American Law Institute's Model Penal Code: Sentencing (MPC), which integrates collateral consequences into a sentencing system that gives the court rather than the legislature responsibility for shaping and managing criminal punishment in particular cases. Just as the court decides what sentence it will impose within a statutory range, the court also decides which mandatory collateral penalties will apply and for how long. This gives sentencing courts new tools to further the rehabilitative goals of sentencing, and at the same time it enables them to avert issues of proportionality and procedural fairness that lurk in any categorical scheme. In effect, the MPC scheme converts collateral consequences from senseless punishment to reasonable case-specific regulation.

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INTRODUCTION

America’s experiment with mass incarceration seems at last to be losing its charm. The high cost of prison cells no longer yields a corresponding increase in public safety, as indiscriminate imprisonment has destabilized entire communities.¹ Even conservatives now concede that “[i]t’s easier to say, ‘Let’s spend a few dollars a day managing you at your home where you can spend time with your family, where you can work, instead of hundreds of dollars a day, keeping you in a cell.’”² The social damage done by the “lock’em up” approach to crime control of the late twentieth century has led, in the twenty-first, to more nuanced sentencing strategies that emphasize prevention over punishment and rehabilitative community-based programs over construction of secure facilities and mandatory minimum prison sentences.³ Giving people a

1. See, e.g., Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 83, 93–94 (Joan Petersilia & Kevin R. Reitz eds., 2012); PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES, at xi (Jeremy Travis & Michelle Waul eds., 2004) (discussing the impact of incarceration on communities).

2. Carrie Johnson, *With Holder in the Lead, Sentencing Reform Gains Momentum*, NPR (Aug. 7, 2013, 4:22 AM), <http://www.npr.org/2013/08/07/209253516/with-holder-in-the-lead-sentencing-reform-gains-momentum> (quoting political advocate Grover Norquist); see also, e.g., E.J. Hurst II, *Federal Sentencing and Prison Reform Now Bipartisan Issues*, HILL (Aug. 13, 2014, 7:00 AM), <http://thehill.com/blogs/pundits-blog/crime/214998-federal-sentencing-and-prison-reform-now-bipartisan-issues>.

3. See U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1–5 (2013) [hereinafter SMART ON CRIME]; *Statement of Principles*, RIGHT ON CRIME, <http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles> (last visited Jan. 21, 2015); see also Letter from Jonathan Wroblewski, Dir. of the Office of Policy & Legislation, Criminal Div., U.S. Dep’t of Justice, to the Hon. Patti B. Saris, Chair, U.S. Sentencing Comm’n 3 (July 11, 2013), available at http://www.ussc.gov/Meetings_and_Rulemaking/Public_Comment/20130801/Public_Comment_DOJ_Proposed_Priorities.pdf (reporting that the

stake in society is now seen by both progressives and conservatives as a more reliable and less expensive way of dissuading people from antisocial behavior than banishing them to a prison cell.

A logical goal of these new strategies is the eventual reintegration into the community of those who come under the control of the criminal justice system.⁴ But in tension with this systemic goal is the vast and growing body of laws and policies that exclude people with a criminal record from a wide range of generally available benefits and opportunities and stigmatize them in the community.⁵ These so-called “collateral consequences” of conviction are a product of the same punitive impulse that produced long prison terms, compounded by an aversion to risk many Americans associate with the terrorist attacks of 9/11.⁶ Collateral consequences now reach into every corner of modern life, making it hard to earn a living, get an education, find a place to live, and maintain stable family relationships.⁷ U.S. Attorney General Eric Holder has recognized that “the consequences of a criminal conviction can remain long after someone has served his or her sentence . . . making a proper transition into society difficult.”⁸ The debased legal status produced by conviction invites discrimination, and the fact that communities of color are disproportionately affected exacerbates this malign effect. While many have deplored the racial implications of

Justice Department now espouses a pragmatic view that “reducing reoffending and promoting effective reentry . . . are core goals that can be successfully achieved and must be included in any effective sentencing and corrections framework”).

4. See *Statement of Principles*, *supra* note 3 (discussing the goals of an “ideal criminal justice system”).

5. See *infra* Part II.A.

6. MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* §§ 1:2, 1:11 (NACDL Press & Thompson Reuters eds., 2013) [hereinafter LOVE ET AL., *COLLATERAL CONSEQUENCES*].

7. See *infra* notes 68, 82 and accompanying text.

8. SMART ON CRIME, *supra* note 3, at 5.

It is well documented that the consequences of a criminal conviction can remain long after someone has served his or her sentence. Rules and regulations pertaining to formerly incarcerated people can limit employment and travel opportunities, making a proper transition back into society difficult. Currently, the Justice Department is working with the American Bar Association to publish a catalogue of these collateral consequences imposed at the state and federal level. To address these barriers to reentry, the Attorney General will issue a new memorandum to Department of Justice components, requiring them to factor these collateral consequences into their rulemaking. If the rules imposing collateral consequences are found to be unduly burdensome and not serving a public safety purpose, they should be narrowly tailored or eliminated.

Id.; see also Eric Holder, U.S. Att’y Gen., Address to the American Bar Association’s House of Delegates (Aug. 12, 2013), available at <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations>.

America's experiment with mass incarceration, far more serious long-term problems arise from mass conviction, since this is what cements the system of control that Michelle Alexander has called the "New Jim Crow."⁹

It is hard to regard restrictions and exclusions based upon criminal history as "civil" and "regulatory" when they take effect automatically and bear little or no relationship to the conduct underlying the crime.¹⁰ Why should someone convicted of possessing drugs be disqualified decades later from obtaining an electrician's license,¹¹ from bidding on government contracts,¹² or from obtaining a small business loan?¹³ There seems to be no logical connection between cheating on one's taxes and possessing a firearm, although in most states a tax conviction results in permanent loss of the right to bear arms.¹⁴ But constitutional doctrine has lagged far behind logic, leaving legislatures free to ignore principles of proportionality, fairness, and due process when enacting status-based penalties.¹⁵

As a practical matter, however, collateral consequences have become more important to many criminal defendants than any penalty likely to be imposed by the court. Competent defense counsel now understand that severe and certain collateral consequences must be considered in counseling clients and in bargaining with the government.¹⁶ Courts and prosecutors alike must be concerned that collateral consequences not "gum[] up the plea-bargaining assembly line" on which the modern criminal justice system has come to depend.¹⁷

It therefore seems fitting that modern sentencing-reform proposals should address collateral consequences in the context of court-imposed

9. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* 11 (2010).

10. *See infra* Part II.A.

11. *See, e.g.*, IOWA CODE ANN. § 103.35 (West 2010); MD. CODE ANN., BUS. OCC. & PROF. § 14-317(a)(1)(iii) (LexisNexis Supp. 2014).

12. *See, e.g.*, 30 ILL. COMP. STAT. ANN. 500/50-10 (West 2009).

13. 13 C.F.R. § 115.18(b) (2014).

14. *See* MARGARET COLGATE LOVE, NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, RESTORATION OF RIGHTS RESOURCE PROJECT (2014), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Loss_and_Restoration_of_Civil_Rights_and_Firearms_Privileges.pdf [hereinafter LOVE, RESTORATION OF RIGHTS] (surveying the law on loss and restoration of civil rights and firearms privileges in all 50 states).

15. *See infra* Part II.

16. *See generally* LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 8:1–22 (discussing the role played by collateral consequences at each stage of a criminal case).

17. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1159 (2011).

punishments and measure their legitimacy in terms of the goals of a sentencing system. The American Law Institute's (ALI) revision of the sentencing articles of the Model Penal Code (MPC) does just that, integrating mandatory collateral penalties directly into the sentencing process by making the sentencing court responsible for their imposition and removal.¹⁸ Recent state reforms that follow this model suggest that making collateral consequences part and parcel of criminal sentencing may be an idea whose time has finally come.¹⁹

Part I of this Article reviews how the modern regime of collateral consequences frustrates the rehabilitative goals of the criminal justice system. Not only are convicted persons limited in where they can live and how they can support themselves, they are set apart as members of a pariah class that can be discriminated against with impunity.²⁰ Traditional relief mechanisms, like pardon, have fallen into disuse, while at the same time modern technology has made it almost impossible for someone with a criminal record to escape their past.²¹

Part II discusses how collateral consequences have for the most part escaped constitutional regulation even though as a practical matter they operate in a punitive fashion.²² Because the courts have failed to address issues of severity and proportionality raised by collateral consequences, just as legislatures have been unwilling to dial them back in any meaningful fashion, it has fallen to sentencing theorists and law reform organizations to develop a way to manage them so that they do not frustrate reintegration and undermine fundamental constitutional values. This Part describes proposals by the American Bar Association and the Uniform Law Commission that have begun this work.²³

Part III examines the approach to collateral consequences proposed by the ALI in the revised sentencing articles of the MPC: Sentencing.²⁴ This proposal, if finally adopted by the ALI, would be the first effort to fully integrate collateral consequences into the structure of criminal sentencing since the original Model Penal Code more than half a century

18. LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 9.6.

19. See, e.g., COLO. REV. STAT. ANN. §§ 18-1.3-107(1), -1.3-213(1), -1.3-303(1) (West Supp. 2014) (sentencing alternatives, probation, and community corrections respectively); VT. STAT. ANN. tit. 13, §§ 8001–17 (Supp. 2014).

20. LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 1:11–12.

21. *Id.* § 1:11.

22. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1793 (2012) (“[T]he systematic loss of legal status, subjecting an individual to numerous collateral consequences, has historically been treated as criminal punishment.”).

23. See *infra* Part II.B.

24. MODEL PENAL CODE: SENTENCING (Tentative Draft No. 3, Apr. 24, 2014), [hereinafter MPC APRIL 2014 DRAFT]. Some revisions may be made in these provisions before the entire MPC: Sentencing is finally acted on by the ALI.

ago.²⁵ In making the sentencing court responsible for determining which mandatory consequences will apply and for how long, the ALI proposal provides a way of managing the constitutional problems lurking in a punitive regime of status-based exclusions and restrictions by moving them “toward an administrative law model, where penalties are reasonably related to the criminal conduct, and more flexibly applied.”²⁶ In other words, the MPC proposal provides a way to convert collateral consequences from punishment to regulation.

I. THE PRACTICAL PROBLEM: HOW COLLATERAL CONSEQUENCES FRUSTRATE REINTEGRATION, IMPOSE NEEDLESS HARDSHIP, AND ISOLATE COMMUNITIES OF COLOR

A criminal conviction carries with it a wide variety of statutory and regulatory penalties and restrictions in addition to the sentence imposed by the court. These so-called “collateral consequences” of conviction are frequently more punitive and long lasting than court-imposed sanctions like a prison term or fine.²⁷ While collateral consequences have been a familiar feature of the American justice system since colonial times,²⁸ they have become more important and more problematic in the past 20 years for three reasons: they are more numerous and more severe, they affect more people, and they are harder to avoid or mitigate.

Conviction of a felony generally results in suspension or forfeiture of basic rights of citizenship, such as the right to vote, to serve in the

25. See *infra* Part III (discussing MODEL PENAL CODE Section 306 (1962) (“Loss and Restoration of Rights Incident to Conviction”).

26. See Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 127 (2011) [hereinafter Love, *Collateral Consequences After Padilla*] (discussing the Sixth Amendment problems potentially raised by a regime of punitive mandatory collateral consequences in a system dependent on plea bargaining, and advocating for a return to an administrative model).

27. LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 1:2. The terms defined and consequences enumerated in this paragraph are described in detail in *id.* §§ 2:1–45. Collateral consequences may also include less formal discrimination and social stigma. *Id.* § 1:11; see also Wayne Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1105–09 (2013).

28. See 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, 1708 (2003) [hereinafter Love, *Clean Slate*]. In 1970, the *Vanderbilt Law Review* published a massive 312-page catalogue and analysis of collateral consequences throughout the United States, which concluded that “the entire scheme of civil disabilities appears to obstruct modern correctional goals.” Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 942–49, 1155 (1970). The student authors opined: “Until the harsh injustices presently embodied in civil disabilities laws are terminated, ex-convicts will continue to pass through the gates of freedom only to find the doors of opportunity hopelessly closed.” *Id.* at 1241.

military, and to hold an office of public or private trust.²⁹ Misdemeanors as well as felonies may result in the loss of a job or an occupational license.³⁰ Depending on the nature of the crime, conviction may result in eviction from public housing; debarment from government contracts; forfeiture of pension benefits; enrollment on a public registry; and ineligibility for bank loans, welfare benefits, and student aid.³¹ Conviction may also result in the loss of parental rights, the right to travel freely, the right to possess a firearm, and the right to live in certain areas.³² Regulated private businesses are also frequently required by law to deny employment to people with a conviction record, even in menial jobs.³³ For a noncitizen, conviction may result in deportation or ineligibility for naturalization.³⁴

A national compilation of collateral consequences has identified hundreds of laws and rules in every jurisdiction requiring that conviction be taken into account in allocating public benefits and opportunities.³⁵ Many conviction-related restrictions admit of no exceptions and apply across the board without regard to any relationship between crime and

29. See LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 2:2–5, 2:7.

30. See *id.* § 4:15 (“Collateral Consequences and the Right to Counsel in Misdemeanor Cases”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 299 (2011) (discussing the pervasive effect of a misdemeanor conviction on the ability to find and keep work).

31. See LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, ch. 2 (“Types of Collateral Consequences”); Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT’L INST. JUST. 24, 26 (2013), available at <https://ncjrs.gov/pdffiles1/nij/241924.pdf> (describing the ineligibility of convicted persons to obtain government contracts or participate in government programs); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–700 (2002) (describing the ineligibility of convicted persons from obtaining welfare benefits and student aid); Love, *Collateral Consequences After Padilla*, *supra* note 26, at 93 (describing a public employee’s loss of pension benefits upon conviction).

32. LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, ch. 2.

33. *Id.* People with a criminal record are categorically excluded by federal law from jobs in which they would have contact with vulnerable populations, such as education and health care, and from working in banking and transportation. See *id.* §§ 2:9–14.

34. *Id.* §§ 2:46–60.

35. NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org> (last visited Mar. 6, 2015) [hereinafter NAT’L INVENTORY]; see also Berson, *supra* note 31 (discussing the utility of the National Inventory of the Collateral Consequences of Conviction); Lorelei Laird, *Ex-Offenders Face Tens of Thousands of Legal Restrictions, Bias and Limits on Their Rights*, A.B.A. J. (June 1, 2013, 5:00 AM), http://www.abajournal.com/magazine/article/ex-offenders_face_tens_of_thousands_of_legal_restrictions (describing the National Inventory as a valuable resource for the accused when considering the unforeseen consequences of a plea deal or conviction).

penalty.³⁶ One scholar has argued that “[g]iven the breadth and permanence of collateral consequences, [convicted] individuals are perhaps more burdened and marginalized by a criminal record today than at any point in U.S. history.”³⁷ Another notes that “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.”³⁸ Collateral consequences have been called a “secret sentence”³⁹ that consigns its subjects to a species of “internal exile.”⁴⁰

Collateral consequences may be “more important, ironically, for relatively less serious crimes.”⁴¹

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, in terms of both social policy and the legal effect, lies in the collateral consequences.⁴²

In addition to sanctions and disqualifications imposed by law or rule, conviction results in permanent damage to reputation and loss of privacy because modern technology has made it almost impossible for someone to put their past behind them.⁴³ In the United States, social

36. Michael Pinard, *Reflections & Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1218–19 (2010).

37. *Id.*; see also JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISON REENTRY 136 (2003) (“[T]hese invisible punishments and legal restrictions are growing in number and kind, being applied to a larger percentage of the U.S. population and for longer periods of time than at any point in U.S. history.”).

38. Chin, *supra* note 22, at 1832.

39. Chin & Holmes, *supra* note 31, at 700 (stating that “[c]ollateral consequences can operate as a secret sentence” when there is no obligation of court or counsel to notify the defendant about them).

40. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 153 (1999) (“While the United States can banish noncitizen offenders from its territory, exile in penal colonies abroad for citizens has long been abolished. Nevertheless, upon release from prison or discharge from non-incarcerative sentences, many ex-offenders find themselves internally exiled.”).

41. *Id.* at 1806.

42. *Id.* (quoting *Sutton v. McIlhany*, 1 Ohio Dec. Reprint 235, 236 (C.P. Huron County 1848)); see also Roberts, *supra* note 30, at 300.

43. See LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 1:11, 5:5.

ostracism is facilitated by widespread background checking that affects life activities as various as renting an apartment, making a political contribution, and accompanying one's own child on a school field trip.⁴⁴ Many private employers are advised by their lawyers or insurers not to take a risk on hiring someone with a criminal record, no matter how dated or minor.⁴⁵ Many businesses hoping for a government contract or grant fear having to report that one of their key employees has a criminal record, lest it damage their chances of success.⁴⁶

If the range of collateral legal and social consequences is enormous, the number of people now affected by them is staggering. America's love affair with criminal punishment that resulted in an escalation of her prison populations beginning in the 1970s produced a corresponding explosion in the number of people who have a criminal record.⁴⁷ The "two million people in American prisons and jails . . . is dwarfed by the six-and-a-half million or so on probation or parole and the tens of millions in free society with criminal records."⁴⁸ Misdemeanors as well as felonies result in loss of social status, and a guilty plea will frequently be sufficient to trigger collateral consequences even if no conviction results.⁴⁹ Nowadays, any documented adverse encounter with the

44. *Id.* §§ 5:1–7; *see also* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME: A ROADMAP TO RESTORE RIGHTS AND STATUS AFTER ARREST OR CONVICTION 20, 39 (2014), *available at* <http://www.nacdl.org/restoration/roadmapreport/>. The National Employment Law Project reported in 2013 that "[i]n Fiscal Year 2012, the FBI released roughly 17 million rap sheets for employment background checks. This is more than six times the number of FBI background checks conducted for employment and licensing purposes in 2002." MADELINE NEIGHLY & MAURICE Emsellem, THE NAT'L EMPLOYMENT LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT; REWARD: GOOD JOBS 8 (2013), *available at* <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

45. *See* LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 6:18–23 (discussing employers' desire to minimize risk and loss by reducing the potential for negligent hiring lawsuits).

46. *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 328 (2009) (discussing how employers conduct background checks "to assess their risk of committing crimes that could cause physical, financial, and reputational damage to the organization").

47. *See* MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, THE NAT'L EMPLOYMENT LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 4 (2011) (noting that "over one in four U.S. adults has a criminal record"), *available at* http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

48. Chin, *supra* note 22, at 1791 (footnote omitted). *See generally* THE PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009), *available at* <http://www.convictcriminology.org/pdf/pew/onein31.pdf>.

49. *See* NAT'L INVENTORY, *supra* note 35 (revealing that many collateral consequences are now triggered by a guilty plea, frustrating efforts to avoid collateral

criminal justice system, such as an arrest, may have long-term adverse effects on an individual's social and economic opportunities.⁵⁰ Given the number of people affected, “collateral consequences have become one of the most significant methods of assigning legal status in America.”⁵¹ It is a well-documented and lamentable fact that people of color are disproportionately represented in the population of those with criminal records.⁵²

As the number of people affected by an increasingly severe regime of collateral consequences has ballooned in the past 20 years, the mechanisms in the law for avoiding or mitigating collateral consequences have shriveled.⁵³ Executive “forgiveness” mechanisms like pardon have atrophied in most jurisdictions,⁵⁴ and judicial “forgetfulness” remedies are both limited in scope and unreliable in light of modern technology and background checking practices.⁵⁵ While some

consequences through front-end diversionary dispositions); *see also* Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 445–46 (2013); Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT’G REP. 6, 7 (2009).

50. *See, e.g.*, RODRIGUEZ & Emsellem, *supra* note 47, at 3 (describing the hardships people with criminal records face in gaining employment).

51. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 9 (3d ed. 2003) [hereinafter ABA COLLATERAL SANCTIONS STANDARDS].

52. *See, e.g.*, MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA 49 (1995) (“[A]t every criminal justice system stage from arrest through incarceration, blacks are present in numbers greatly out of proportion to their presence in the general population.”).

53. *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 774–79 (2011) (discussing atrophy of relief mechanisms in most U.S. jurisdictions).

54. *See* Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 U. SAINT THOMAS L.J. 730, 756–68 (2012) (cataloguing pardon mechanisms in the states); *see also* LOVE, RESTORATION OF RIGHTS, *supra* note 14 (“Characteristics of Pardon Authorities”).

55. Margaret Colgate Love, *Expungement of Criminal Records: “The Big Lie,”* CRIME REP. (June 23, 2011, 1:30 AM), <http://www.thecrimereport.org/viewpoints/2011-06-expungement-of-criminal-records-the-big-lie> (describing news reports of a young mother's rejection as a volunteer parent helper for her son's youth football team because of a conviction for check forgery that had been expunged years before). *See generally* Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio's Framework for Sealing Criminal Records*, 36 U. TOL. L. REV. 595, 609 (2005) (“[T]he individual may have to live the rest of his life with a cloud over his head and hope that his secret is never revealed.”); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 178–79 (2008); Martin Kaste, *Digital Data Make for a Really Permanent Record*, NPR (Oct. 29, 2009, 9:26 AM), <http://www.npr.org/templates/story/story.php?storyId=114276194>; Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, <http://www.nytimes.com/2006/10/17/us/17expunge.html>.

jurisdictions are implementing systemic strategies like “ban-the-box” programs in an effort to encourage a more pragmatic and enlightened approach to hiring,⁵⁶ this friendly persuasion has limited usefulness where the law contradicts it. The very notion of paying one’s debt to society now seems quaint.

The reduced legal status that allows almost unlimited discrimination against convicted persons, and the damaged social status that encourages it, are understood to contribute to recidivism.⁵⁷ The inability to find worthwhile work is the most immediately harmful effect of a criminal record in terms of public safety.⁵⁸ The damage done by collateral consequences extends to the convicted person’s family and community and business associates.⁵⁹ A former high-level government official wrote of his own experience in the justice system that conviction “bar[s] us—often permanently—from the means to live a normal life.”⁶⁰ The pervasive system of legal restrictions and social shunning reinforces a preexisting sense of alienation in communities of color.⁶¹

56. See LOVE ET AL., *COLLATERAL CONSEQUENCES*, *supra* note 6, § 6:17.

57. See, e.g., PETERSILIA, *supra* note 37, at 144; JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 74 (2005).

58. See generally RODRIGUEZ & Emsellem, *supra* note 47, at 3 (discussing the negative impact on public safety when workers with criminal records cannot find “stable employment”). Furthermore, social science research in the past 10 years has demonstrated that employment is a key factor in reducing recidivism and ensuring positive public safety outcomes. See, e.g., CHRISTY VISHNER ET AL., URBAN INST.: JUSTICE POLICY CTR., *EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASES IN THREE STATES* 8 (2008), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf (finding in a study of former prisoners in Ohio, Texas, and Illinois that individuals who were employed and earning higher wages after release from prison were less likely to return to prison the first year out); WASH. STATE INST. FOR PUB. POL’Y, *EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT* 6 (2006), <http://www.wsipp.wa.gov/rptfiles/06-01-1201.pdf> (finding statistically significant reduction in recidivism in 16 “community-based employment training, job search, and job assistance programs for adult offenders”); see also SHADD MARUNA, *MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES* 117–30 (2001) (demonstrating the link between work and successful rehabilitation of offenders through personal narratives).

59. See generally Ewald & Uggen, *supra* note 1.

60. Webb Hubbell, *The Mark of Cain*, S.F. CHRON., June 10, 2001, <http://www.sfgate.com/opinion/article/The-mark-of-Cain-2910287.php> (noting that a criminal conviction keeps people permanently trapped on the “lowest rung” of society, and that “for the most part, rehabilitation remains a dirty word”).

61. See generally Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470–71 (2010) (discussing the correlation between collateral consequences and race); see also George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1900 (1999). Michelle Alexander observes that:

The “whites only” signs may be gone, but new signs have gone up—notices placed in job applications, rental agreements, loan applications, forms for

In sum, purely as a practical matter, criminal conviction exposes many millions of Americans to legally condoned discrimination and social stigma that is hard to distinguish from punishment, at least as ordinary Americans would understand that term. In turn, punitive collateral penalties frustrate the rehabilitative goals of current criminal justice strategies.⁶² The policies are not just in tension; they are at war with one another. The next Part discusses courts' unwillingness to impose meaningful constitutional discipline on collateral consequences and what is being done to work around it.

II. THE THEORETICAL PROBLEM: FITTING "CIVIL" CONSEQUENCES INTO A CRIMINAL JUSTICE FRAMEWORK

A. Collateral Consequences as a Largely Unregulated Aspect of Punishment

The label "collateral" came into use in the 1970s as a way of distinguishing penalties imposed by law upon conviction without court action from "direct" penalties that were effective only if included in the sentencing court's judgment.⁶³ The latter were subject to constitutional limitation while the former were not, on the unconvincing theory that statutory penalties are by their nature regulatory and therefore not punitive.⁶⁴ In a pair of cases decided on the same day in 2003, the Supreme Court put its imprimatur on this analysis.⁶⁵ In this way, an analytical framework borrowed from administrative law was applied to statutory penalties generated by the fact of being convicted, mandatory and discretionary alike, no matter how severe and long lasting.⁶⁶ The

welfare benefits, school applications, and petitions for licenses, informing the general public that "felons" are not wanted here. A criminal record today authorizes precisely the forms of discrimination we supposedly left behind

ALEXANDER, *supra* note 9, at 141.

62. See, e.g., Hubbell, *supra* note 60.

63. See LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 1:8 n.5.

64. Chin, *supra* note 22, at 1806–08.

65. See *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dept. of Pub. Safety v. Doe*, 538 U.S. 1 (2003) (CDPS). In CDPS, the Court upheld Connecticut's sex offender registration and notification scheme against a procedural due process attack, condoning the State's choice to predicate registration eligibility on a conviction alone without any individualized risk assessment. LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 2:40. In *Smith*, the Court found that the Alaska registration and notification law was punitive neither in its intent nor effects, allowing for its retroactive application under the Constitution's Ex Post Facto Clause. *Id.*

66. Chin, *supra* note 22, at 1807 (describing the Supreme Court's creation of a test to determine whether a penalty was punitive or regulatory).

only consequences of conviction that qualified as “punishment” for purposes of the Due Process and Ex Post Facto Clauses of the Constitution were those contained in the sentencing court’s judgment.⁶⁷ All other consequences of conviction are considered “civil disabilities” that had no place in the punishment calculus and that therefore need not be considered in the sentencing process.⁶⁸

As mandatory statutory penalties have become more severe in recent years, there are signs that courts may be growing uncomfortable with the mechanical distinction between direct and collateral consequences, particularly when dealing with restrictions on residency and association.⁶⁹ State courts have also invalidated retroactive application of sex offender registration and supervision requirements on ex post facto grounds,⁷⁰ notably when imposed on juveniles,⁷¹ and have required warnings about deportation consequences as an aspect of a defendant’s right to counsel.⁷² One leading scholar has proposed that

67. See *id.* at 1806–15 (discussing the case law on convictions that qualify as “punishments”).

68. *Id.* at 1806–07.

69. See LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 2:40–46, 3:8–9; see, e.g., *State v. Jamgochian*, 832 A.2d 360 (N.J. Super. Ct. App. Div. 2003) (finding potential ineffective assistance of counsel in failing to advise the defendant that community supervision for life would include travel restrictions); *Ward v. State*, 315 S.W.3d 461, 475 (Tenn. 2010) (stating that the statutory consequence of lifetime supervision was “a mandatory part of the sentence” about which a defendant considering a guilty plea should have been advised by the court); see also *In re Taylor*, 60 Cal. 4th 1019 (2015) (holding that mandatory residence restrictions on sex offenders on parole violate due process).

70. In *State v. Williams*, 952 N.E.2d 1108 (2011), the Ohio Supreme Court considered successive amendments to the state’s sex offender registration law and held that “all doubt has been removed” over whether the law was punitive in character. *Id.* at 1112; see also *Doe v. State*, No. 2013–496 (N.H. Feb. 12, 2015) (successive amendments to its law over a 20-year period, including increasingly onerous notification requirements, made its lifetime-registration-without-review requirement punitive as applied to Tier II and Tier III offenders). Other cases are collected in Wayne Logan, *Sex Offense-Related Collateral Consequences*, in LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 2:40.

71. See *In re J.B.*, Nos. 87–93 MAP 2013, 2014 Pa. LEXIS 3468, at *2 (Pa. Dec. 19, 2014) (holding that state sex offender registration and notification law violates juvenile offenders’ due process rights by its use of an irrebuttable presumption of recidivism).

72. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (holding that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes” (footnote omitted)). See generally LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, ch. 4 (“Collateral Consequences and the Right to Counsel”) (reviewing authorities and case-law developments since the *Padilla* decision).

“[w]hether or not any individual collateral consequence is punishment, the overall susceptibility to collateral consequences is punishment.”⁷³

However, for the most part, the formalistic direct/collateral distinction survives, and sentencing courts generally continue to regard even severe mandatory collateral consequences as none of their business.⁷⁴ At least as a matter of constitutional law, “existing collateral consequences may be imposed without warning, and new ones may be created and imposed after a sentence has been fully served.”⁷⁵ Under rational basis review, “a truly unfortunate and spectacular range of potential discriminations may be visited long after the fact on those convicted of crime.”⁷⁶

B. Proposals to Integrate Collateral Consequences into the Sentencing Function

Rather than wait for constitutional doctrines to evolve, law reform organizations have stepped up to propose that, as a matter of sound public policy, courts should be authorized to consider and potentially limit mandatory collateral consequences as part of the sentencing function. In effect, these reforms promise to restore collateral consequences to a regulatory rather than punitive function.

The first proposal to challenge the binary direct/collateral paradigm came in 2003 from the American Bar Association:

73. See Chin, *supra* note 22, at 1826. Chin argues that the medieval institution of civil death, which declared a felony offender “dead in the eyes of the law,” has reemerged in a modern judgment that the convicted person has a “shattered character.” *Id.* at 1799 (quoting *Chaunt v. United States*, 364 U.S. 350, 358 (1960) (Clark, J., dissenting)). Chin points out that “[a]lthough 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.” *Id.* at 1815. He cites two Supreme Court cases, *Trop v. Dulles*, 356 U.S. 86 (1958), and *Weems v. United States*, 217 U.S. 349 (1910), invalidating certain “accessory punishments” analogous to civil death in support of his thesis that conviction itself may constitute cruel and unusual punishment under the Eighth Amendment because it involves the “total destruction of a person’s legal status in society.” *Id.* at 1818.

74. See, e.g., *State v. Trotter*, 330 P.3d 1267, 1269 (Utah 2014) (holding that counsel had no obligation to notify defendant about sex offender registration because it is a collateral, not a direct, consequence of conviction); cf. *Ward v. State*, 315 S.W.3d 461, 474–75 (Tenn. 2010) (holding that the trial court should have informed the defendant convicted of aggravated sexual battery of statutory lifetime community supervision, since this was “an additional part of a defendant’s sentence” and “an undesirable and punitive consequence” of the guilty plea). See generally LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, §§ 4:6–8, 4:12–14.

75. See Chin, *supra* note 22, at 1807.

76. *Id.* at 1811.

[I]t is neither fair nor efficient for the criminal justice system to label significant legal disabilities and penalties as “collateral” and thereby give permission to ignore them in the process of criminal sentencing, when in reality those disabilities and penalties can be the most important and permanent result of a criminal conviction.⁷⁷

The ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons asserts that “legal penalties and disabilities resulting directly and immediately from the fact of conviction are in every meaningful sense ‘sanctions’ that should be accounted for explicitly in the context of the sentencing process, and imposed only when the conduct underlying the particular offense warrants it.”⁷⁸ Further, “[a]ll actors in that [sentencing] process should be aware of these ‘collateral sanctions,’ and a court or administrative body should be empowered to waive or modify them in appropriate cases.”⁷⁹

The ABA Collateral Sanctions Standards propose that mandatory collateral penalties should be strictly limited and enacted only in situations where the legislature “cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.”⁸⁰ Furthermore, a court should ensure, before accepting a guilty plea and at sentencing, that the defendant had been informed about any collateral penalties that take effect automatically upon conviction.⁸¹ In addition, the

77. ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 51, at 11. The first edition of the ABA Standards for Criminal Justice addressed the issue of “civil disabilities” in its volume on correctional policies and practices. *See* AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS pt. 8 (“Civil Disabilities of Convicted Persons”) (2d ed. 1983). The 1962 Model Penal Code conceived of an integral role for the sentencing court in relieving collateral penalties, but not in their imposition in the first instance. *See infra* Part III.B. The Standards for sentencing promulgated by the ABA in 1993 mention collateral consequences only in relation to organizational defendants. *See* AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING, Standard 18-5.4(b)(vii) (3d ed. 1993) (stating that presentence reports should include “[a]n assessment of the impact of possible sanctions and collateral consequences upon an organizational defendant, including employees, creditors and other third parties”).

78. ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 51, at 12–13.

79. *Id.* at 13.

80. *Id.* Standard 19-2.2.

81. *Id.* Standards 19-2.3, 19-2.4. The ABA Standards distinguish two types of collateral penalties: a penalty that takes effect automatically upon conviction (“collateral sanction”) and a penalty that may be imposed subsequently in the discretion of a court, administrative agency, or official (“discretionary disqualification”). *Id.* Standard 19-1.1. The Standards providing for compilation of an inventory, notice at plea and sentence, and relief address only “collateral sanctions.” Love, *Clean Slate*, *supra* note 28, at 1738–39 (citing ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 51, Standards 19-2.3 through 19-2.5). Standards for imposing a “discretionary disqualification” are set forth in

court should consider any applicable mandatory collateral consequences in determining a defendant's overall sentence.⁸² The commentary to this Standard explains that “[i]n accordance with generally applicable principles of [sentencing], the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”⁸³ Standard 19-2.5(a) provides that a court should be authorized to waive, modify, or grant “timely and effective relief” from any applicable mandatory collateral consequence.⁸⁴ The commentary is not particular about the timing of this relief, stating that “[j]urisdictions could choose to allow the waiver authority to be exercised at the time of sentencing, or only at some later date.”⁸⁵

If the 2003 ABA Collateral Sanctions Standards did not fully resolve the issue of whether the sentencing court should have power to grant relief from collateral consequences at sentencing,⁸⁶ six years later the Uniform Law Commission did.⁸⁷ Under Section 10 of the 2010 Uniform Collateral Consequences of Conviction Act, an individual may petition the sentencing court “at or before sentencing” for “an order of limited relief” from particular mandatory collateral consequences related to employment, education, public benefits, or occupational licensing.⁸⁸ The sentencing court’s authority depends on a finding that relief “will

Standard 19-3.1. *See id.* at 1741 (stating that disqualification would only be appropriate if there were a “substantial basis” for disqualification based upon the conduct underlying the conviction).

82. ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 51, Standard 19-2.4 (“Consideration of collateral sanctions at sentencing”).

83. *Id.* Standard 19-2.4 cmt. These “generally applicable principles of sentencing” include the parsimony embodied in the federal Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a) (2006), and the notice that ensures a deterrent effect. *See id.*

84. ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 51, Standard 19-2.5(a).

85. *Id.* Standard 19-2.5 cmt. It is not clear how a sentencing court could “ensure that the totality of the penalty is not unduly severe,” *id.* Standard 19-2.4 cmt., unless it were empowered to grant relief from statutory sanctions at the time of sentencing.

86. At the time the ABA Standards were developed, only one state gave its courts power to relieve collateral consequences at sentencing. *See LOVE ET AL., COLLATERAL CONSEQUENCES, supra* note 6, § 7:23 (describing the unique provisions of N.Y. CORRECT. LAW § 702(1), which authorizes the sentencing court to issue a Certificate of Relief from Disabilities at the time of sentencing to remove collateral sanctions applicable to persons with no more than one felony conviction not being sentenced to a prison term).

87. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT Section 10(a) (2010) [hereinafter UCCCA].

88. *Id.* The commentary states that “[r]elief under Section 10 . . . may be granted by the court as a part of sentencing . . . until the close of the proceeding at which sentencing is imposed.” *Id.* Section 10 cmt. Thereafter, relief must be obtained from a “board or agency [which] may act after sentencing even if the individual is still on parole, probation, or otherwise under the control of the court for other purposes.” *Id.*

materially assist the individual in obtaining or maintaining employment, education, housing, public benefits, or occupational licensing,” and that “the individual has substantial need for the relief requested in order to live a law-abiding life.”⁸⁹ While the Uniform Act itself contains no advice about overall proportionality,⁹⁰ the Section 10 relief effectively implements the requirement in the ABA Standards that collateral consequences be taken into account in fashioning a package of sanctions by giving the sentencing court the power to dispense with statutory penalties that would otherwise frustrate the rehabilitative purposes of sentencing.⁹¹

The ALI’s proposed revision of the sentencing articles of the MPC⁹² builds on and fills gaps left by the treatment of collateral consequences in the ABA Standards and the Uniform Act, combining features of both to produce an integrated framework for considering collateral consequences in the criminal case and beyond.⁹³ The collateral consequences provisions of the MPC: Sentencing approved by the ALI in May 2014 are the subject of the final part of this Article.

III. THE RADICAL BUT NOT-SO-NEW APPROACH OF THE MODEL PENAL CODE: SENTENCING

It is fitting that the ALI has addressed the subject of collateral consequences in the context of its long-running project to produce a modern sentencing code, since this seems implicitly to acknowledge that they are as much a part of criminal punishment as the penalties imposed

89. *Id.* Section 10(b)(1)–(2).

90. The Uniform Act is intended to be “largely procedural” and therefore contains no substantive limitation on legislatures considering adoption of mandatory collateral sanctions. *See id.* prefatory note.

91. *See id.* Section 10 cmt. (“[Section 10] allows an individual to apply for relief from a collateral sanction relating to employment, education, housing, public benefits, or occupational licensing on a showing that the relief will assist in leading a law-abiding life.”). Under Section 10(a) of the Uniform Act, petitions for relief may be presented to the sentencing court only on the day of sentencing and thereafter must be presented to a “designated board or agency,” reflecting concerns about the burden on courts of a responsibility some drafters considered ancillary to the judicial role at best. *Id.* Section 10(a)(2). It appears that the sanctions from which relief may be obtained under Section 10 include those imposed by any unit of government, including county and municipal ordinances.

92. *See MPC APRIL 2014 DRAFT*, *supra* note 24; *see also LOVE ET AL., COLLATERAL CONSEQUENCES*, *supra* note 6, § 9:6 (describing the background of the current MPC project and noting that the current phase of the project on the execution of sentence deals with many issues unforeseen in 1962 when the original Code was promulgated). As will be seen in Part III.B, *infra*, collateral consequences were very much a part of the 1962 Model Penal Code.

93. *See MPC APRIL 2014 DRAFT*, *supra* note 24.

by the court. It is doubly fitting that the proposal currently under consideration by the Institute traces its lineage directly to ideas that originated with the architect and guiding spirit of the original 1962 Model Penal Code, Professor Herbert Wechsler.⁹⁴ While the approach to collateral consequences of the 1962 Code was adopted by only a few states, some recent state enactments suggest that the time may now be more propitious for managing collateral consequences as part of the criminal case.⁹⁵

The following discussion of the relevant provisions of the MPC: Sentencing shows how collateral consequences can be integrated into the sentencing process in a framework animated by the rehabilitative purposes of sentencing. In this regard, many of the provisions of the draft that are currently under consideration in the Institute hark back to innovative ways of dealing with collateral consequences first proposed in the so-called Age of Reform⁹⁶ and are similar in purpose and effect to the analogous provisions of the 1962 Code.⁹⁷ The MPC: Sentencing proposal could be strengthened, and burdens placed on the judiciary alleviated, by incorporating features of the 1962 Code and the ABA Collateral Sanctions Standards that limit legislatures in enacting mandatory collateral consequences in the first instance.

94. Compare *infra* Appendix A (providing the language approved by the ALI at the Annual Meeting in May 2014), with *infra* Appendix B (providing the original 1962 Code language).

95. In 2013, Colorado enacted legislation authorizing the sentencing court to issue an “order of collateral relief” to “relieve a defendant of any collateral consequences of the conviction, whether in housing or employment barriers or any other sanction or disqualification that the court shall specify.” See COLO. REV. STAT. §§ 18-1.3-107 (1), (3) (sentencing alternatives), 18-1.3-213(1), (3) (probation), 18-1.3-303(1), (3) (community corrections) (West Supp. 2014). In 2007, New Jersey amended its Rehabilitated Convicted Offenders Act to allow a court at the time of sentencing to issue a certificate “that suspends certain disabilities, forfeitures or bars to employment or professional licensure or certification that apply to persons convicted of criminal offenses.” N.J. STAT. ANN. § 2A:168A-7 (West 2011).

96. See LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 1:4. See generally Love, *Clean Slate*, *supra* note 28, at 1707–17 (describing model criminal law reform proposals between 1950 and 1984).

97. MODEL PENAL CODE art. 306 (“Loss and Restoration of Rights Incident to Conviction or Imprisonment”) (1962) [hereinafter 1962 MPC]. The collateral consequences provisions of the 1962 MPC are discussed in Part III.B, *infra*. The provisions on relief in Sections 306.1 and 306.6 are reproduced in Appendix B, *infra*.

A. Collateral Consequences in the Model Penal Code: Sentencing

The approved draft of the MPC: Sentencing substantially integrates collateral consequences into the court's sentencing function.⁹⁸ It accomplishes this in the following ways:

The sentencing commission must publish a compendium of collateral consequences and develop guidance for sentencing courts

Section 6x.02(1) makes it the responsibility of the jurisdiction's sentencing commission, "[a]s part of the sentencing guidelines," to compile a compendium of all "collateral consequences"⁹⁹ contained in the jurisdiction's statutes and regulations. While both the ABA Standards and the Uniform Act require a similar compilation,¹⁰⁰ the fact that the MPC: Sentencing proposal makes it a "part of the sentencing guidelines" confirms the close connection between collateral consequences and the

98. These provisions are set forth in Appendix A, *infra*. They were substantially revised several times in the two years following their first presentation to the ALI at the 2012 Annual Meeting. See *89th Annual Meeting Agenda*, AM. LAW INST., <http://2012am.ali.org/agenda.cfm> (submitting draft for discussion at the 2012 ALI Annual Meeting); *90th Annual Meeting Agenda*, AM. LAW INST., <http://2013am.ali.org/agenda.cfm> (submitting draft for discussion at the 2013 ALI Annual Meeting); MODEL PENAL CODE: SENTENCING (Council Draft No. 4, Sept. 25, 2013) (on file with author). At the Council Meetings in September of 2013 the Reporters were directed to prepare further revisions for consideration at the Council's January 2014 meeting. See Model Penal Code: Sentencing, Memorandum to the Council, December 16, 2013 (on file with author). The version of the collateral consequences provisions presented to the Council in January 2014 is substantially the same as the version presented at the Annual Meeting in Tentative Draft No. 3. Compare Model Penal Code: Sentencing, Memorandum to the Council, December 16, 2013, *supra*, with MPC APRIL 2014 DRAFT, *supra* note 24. While they may yet undergo further editorial revisions before the entire Code is submitted for approval to the 2016 ALI Annual Meeting, it is safe to say that what appears in Appendix A, *infra*, represents the ALI's current thinking on the subject.

99. See MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.02(1). The term "collateral consequences" is defined in § 6x.01 to include both mandatory and discretionary consequences of conviction that are imposed by state or federal law "as a direct result of an individual's conviction but are not part of the sentence ordered by the court." See *id.* § 6x.01(1). A collateral consequence is mandatory "if it applies automatically, with no determination of its applicability and appropriateness in individual cases." *Id.* § 6x.01(2). A collateral consequence is discretionary if "a civil court, or administrative agency or official is authorized, but not required, to impose the consequence on grounds related to an individual's conviction." *Id.* § 6x.01(3).

100. See ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 51, Standard 19-2.1 ("Codification of collateral sanctions"); see also UCCCA, *supra* note 87, Section 4(a)(1) ("Identification, Collection, and Publication of Laws Regarding Collateral Consequences").

sentencing function and process.¹⁰¹ In the same fashion, § 6x.02(2) authorizes the sentencing commission to develop “guidance for courts considering petitions for orders of relief from mandatory collateral consequences under § 6x.04 and may develop formal guidelines for use in ruling on such petitions.”¹⁰² The “authority and limitations” of any such guidelines are to be “governed by” the provisions of the Code containing sentencing guidelines, “subject to the courts’ authority to individualize sentences under [the sentencing guidelines].”¹⁰³

Sentencing courts must ensure that defendants have been notified of applicable collateral consequences and available relief mechanisms

Section 6x.04(1) of the MPC: Sentencing requires the court at the time of sentencing to “confirm on the record” that a defendant has been provided with “a list of all collateral consequences”¹⁰⁴ that apply under the laws of the jurisdiction and under federal law, “a warning that the collateral consequences applicable to the defendant may change over time,” and “a warning that jurisdictions to which the offender may travel or relocate may impose additional collateral consequences.”¹⁰⁵ Defendants must also be informed of their right to petition for relief from

101. See *infra* Part III. One flaw in the compendium requirement of § 6x.02 that could easily be corrected relates to its requirement that jurisdictions link up each crime in the code with all of the consequences that it triggers, whether mandatory or discretionary. See MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.02. Experience has taught that it is technically challenging and potentially misleading to attempt to sort collateral consequences by specific triggering offenses. This is because many if not most collateral consequences are triggered either by broad and imprecise categories of crimes (e.g., crimes involving dishonesty or crimes of moral turpitude), or by criminal conduct identified only by its relationship to a particular benefit or opportunity (e.g., conduct “substantially related to” a licensed activity or conduct that “reflects adversely on” a convicted person’s professional competence). For this reason, the National Inventory of the Collateral Consequences of Conviction presents collateral consequences in 15 different triggering offense categories, identifying specific triggering crimes only if the text of the collateral consequence itself does this. See NAT’L INVENTORY, *supra* note 35.

102. MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.02(2).

103. *Id.*

104. See *id.* § 6x.04(1)(a). Only mandatory collateral consequences (those that take effect automatically upon conviction) are addressed in §§ 6x.04 and 6x.05 on notification and relief. See *supra* and *infra* Part III.A.1–3. Relief from discretionary disqualification presumably comes only through the “certificate of relief from civil disabilities” authorized by § 6x.06. See MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.06.

105. See MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.04(1)(a)–(c). The list must include all collateral consequences that have not already been removed by the court pursuant to the authority of § 6x.04(2), discussed *infra*. The commentary states that “[d]efense counsel should routinely provide and discuss such information with the client at early stages of the prosecution, and before entry of a guilty plea.” *Id.* § 6x.04 cmt b.

collateral sanctions during the period of the sentence under § 6x.04(2) and subsequently under §§ 6x.05 and 6x.06.¹⁰⁶

Sentencing courts may grant relief from specific mandatory collateral consequences at and after sentencing

One of the most progressive features of the MPC: Sentencing is the authority in § 6x.04(2) for the sentencing court, upon petition by the defendant, to grant relief from any mandatory collateral consequence that is “related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.”¹⁰⁷ This authority is similar to the authority given the sentencing court under Section 10 of the Uniform Act, except that it extends through the entire period of the sentence and even afterward. The sentencing court may grant relief “if it finds that the individual has demonstrated by clear and convincing evidence that the consequence imposes a substantial burden on the individual’s ability to reintegrate into law-abiding society, and that public safety considerations do not require mandatory imposition of the consequence.”¹⁰⁸ In deciding whether to grant relief from a particular

106. *See id.* § 6x.04(1)(d). Note that the court’s authority to dispense with collateral penalties under § 6x.04(2), as under §§ 6x.05 and 6x.06, described *infra* Part III.A.3., is limited to mandatory collateral consequences as defined in § 6x.01(2). Discretionary disqualifications are penalties imposed on an individualized basis in the discretion of an “administrative agency or official” and, therefore, by definition would not be susceptible to prior dispensing action of a court. *See id.* § 6x.01(3) cmt. b.

107. *Id.* § 6x.04(2). The Comment states that the restriction on the court’s power under this provision “ensure[s] that the court’s power to grant relief is directed toward removing significant barriers to successful reintegration, rather than toward addressing collateral consequences that do not significantly impede the convicted person’s ability to function as a law-abiding member of society.” *Id.* § 6x.04 cmt. d. But it is not clear why it is necessary to limit the categories of consequences subject to an order of relief in light of the standard for granting relief in § 6x.04(2)(c), which requires a court to find that a consequence “imposes a substantial burden on the individual’s ability to reintegrate into law-abiding society.” *Id.* Many if not most other categories of mandatory consequences are potentially just as burdensome to an offender’s ability to reintegrate, such as motor vehicle licenses, public contracts, and mandatory GPS supervision. Even restrictions on possession of firearms could impose a substantial burden on an individual’s ability to reintegrate if it means the loss of employment as a security guard or in the military, and there would appear to be few public safety benefits achieved if the conviction is for a nonviolent crime, such as making false statements in a loan application. The Uniform Act incorporates a similar arguably unnecessary and inappropriate limitation on a court’s power. *See* UCCCA, *supra* note 87, Section 10 (providing that relief authority is limited to consequences “related to employment, education, housing, public benefits, or occupational licensing”).

108. *See* MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.04(2)(b). The standard for granting relief under § 6x.04(2) and (3) is similar to but less explicit than the standard under Section 10 of the UCCCA, which conditions the court’s authority to dispense with particular collateral consequences upon a finding that “granting the petition will

collateral consequence, “the court shall consider any relevant guidelines promulgated by the sentencing commission under § 6x.02(2).”¹⁰⁹

An order of relief removes the mandatory bar, but it “does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer a discretionary benefit or opportunity” and does not bar denial of the opportunity or benefit sought notwithstanding the order of relief as long as “the conduct underlying the conviction is determined to be reasonably related to the benefit or opportunity the individual seeks to obtain.”¹¹⁰ Courts are admonished not to deny relief “arbitrarily, or for any punitive purpose,”¹¹¹ which is a reminder that the line between direct and collateral consequences is often “thin,” and that mandatory collateral consequences “should never be justified as a way of enhancing the punishment of any offender.”¹¹²

Individuals whose sentences have been fully served may obtain relief under § 6x.05 (presumably from the sentencing court) only if they can “demonstrate[] by clear and convincing evidence a specific need for

materially assist the individual in obtaining or maintaining employment, education, housing, public benefits, or occupational licensing,” that the defendant has a “substantial need for the relief requested in order to live a law-abiding life;” and that “granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.” UCCCA, *supra* note 87, Section 10(b)(1)–(3). An earlier draft of the MPC proposal made relief under § 6x.04(2) presumptive at sentencing and discretionary only at subsequent points during the term of the sentence. *See* MODEL PENAL CODE: SENTENCING (Discussion Draft No. 5, Apr. 18, 2013), § 6x.04(2)(a), (3) [hereinafter MPC 2013 DISCUSSION DRAFT]. The revised provision seems more logical and easier to implement.

109. *See* MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.04(2)(d).

110. MODEL PENAL CODE: SENTENCING (Motion Amending MPC APRIL 2014 DRAFT, *supra* note 24, §§ 6x.04–.06, May 16, 2014) (on file with author) [hereinafter MPC May 2014 Motion]. This provision of Tentative Draft #3 was revised by the Annual Meeting. AM. LAW INST., PROCEEDINGS OF THE 2014 ANNUAL MEETING 76–81 (2014). The reasonable relationship standard is explained in Comment (h) as follows:

In making this determination, the decisionmaker shall consider (a) the time elapsed since the person’s conviction; (b) the person’s age at the time of the conviction; (c) the seriousness of the conduct underlying the conviction; (d) the person’s conduct following conviction, including the person’s progress toward rehabilitation, and any information supplied by individuals familiar with the individual’s conduct and character; and (e) any information indicating that granting the benefit or opportunity is likely to pose an unreasonable risk to the safety of the public or of any individual.

This provision was added to the commentary to § 6x.04(3) by action of the ALI Annual Meeting. MPC May 2014 Motion, *supra*; AM. LAW INST., *supra*.

111. *Id.* § 6x.04(2)(d).

112. *Id.* § 6x.04 cmt. g. The Reporters’ Note advises courts to “exercise their relief discretion wisely” since it is “often difficult to discern the regulatory purpose behind many new laws imposing civil restrictions on convicted individuals.” *Id.* § 6x.04 Reporters’ Note g.

relief.”¹¹³ Individuals convicted in other jurisdictions seeking relief from the enacting jurisdiction’s mandatory collateral penalties are also required to meet this standard.¹¹⁴ The Comment indicates that this standard is a “higher” one because of “the administrative burden of opening a new case and obtaining information about the closed case or foreign conviction.”¹¹⁵

Courts may issue residents a certificate restoring all rights and evidencing rehabilitation after a period of law-abiding conduct

The final step in the relief scheme of the MPC: Sentencing is a “certificate of relief from civil disabilities,”¹¹⁶ which any convicted person residing in the state may obtain from a court or agency after a period of postsentence law-abiding conduct (the draft suggests four

113. *Id.* § 6x.05(3).

114. Somewhat anomalously in light of how closely relief from mandatory collateral sanctions is otherwise tied to the sentencing process, this section extends immediate relief to persons convicted and sentenced in other jurisdictions who either reside in the enacting state or are seeking employment in the enacting state. *See id.* § 6x.05(1). The black letter does not specify what court is responsible for granting relief in these circumstances, and the commentary does not discuss this specific provision or interjurisdictional issues generally. It might make better sense, both in theory and in practice, for the enacting jurisdiction to rely upon the judgment of the sentencing court in the jurisdiction of conviction in deciding whether to remove a mandatory restriction, since presumably that court is in a better position to weigh the burdens and benefits of keeping a particular type of mandatory restriction in place, even if not in a position to actually remove it. The Reporters could give some additional thought to the procedures for granting relief to those convicted in other jurisdictions so close to the time of sentencing. The relief provided under § 6x.06 does not present these same theoretical and practical anomalies, since the “certificate of relief from civil disabilities” is not tied to the sentencing process and is predicated upon a longer period of rehabilitation in the enacting state.

115. *See id.* § 6x.05, cmt. b. The only way imposing a higher standard seems likely to lessen the administrative burden is by deterring applications. This seems a particularly questionable approach in light of the fact that new mandatory consequences are enacted on a regular basis. In addition, a person is more likely to need relief from many types of mandatory collateral consequences after their sentence has been served or when they are seeking opportunities in another jurisdiction (e.g., ineligibility for certain business licenses and contracting opportunities). It seems that a better justification for imposing a different standard than the one that applies under § 6x.04 is that the purpose of relief is no longer reintegration, as it was at sentencing. A person still has to show need under both §§ 6x.04 and 6x.05, just a different kind of need because it is no longer being dispensed by the sentencing court with reentry goals in mind.

116. The title of this section seems inapt and will hopefully be changed before final action by the ALI. The word “civil” directly contradicts the linkage between mandatory consequences and the court-imposed sentence established in the previous sections, and the word “disabilities” has been abandoned in recent reforms as understating the punitive effect of many mandatory consequences. *See, e.g.*, UCCCA Section 11 (“Certificate of Restoration of Rights”).

years).¹¹⁷ This certificate “removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this state as a result of prior convictions,” except those determined to be necessary for public-safety purposes.¹¹⁸ The standard for issuing a certificate differs depending on the seriousness of the offense: Where an individual has been convicted of a minor offense, a certificate “should” be issued when the individual has merely avoided reconviction, absent a “clear showing” by the government that a particular collateral consequence should remain in effect.¹¹⁹ However, where an individual has been convicted of a more serious offense, the court must find by a preponderance of the evidence that the individual has shown “proof of successful reintegration into the law-abiding community.”¹²⁰

While a certificate “does not entitle a recipient to any discretionary benefits or opportunities,” it “may be used as proof of rehabilitation for purposes of seeking [them].”¹²¹ The criminal history of an individual who has received a certificate “may not be introduced as evidence in any

117. See MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.06(1). Under a previous draft of the collateral consequences provisions, all mandatory collateral consequences were to “terminate automatically upon completion of the sentence,” unless the prosecuting authority petitioned the sentencing court to request that one or more particular collateral sanctions be continued. See MPC 2013 DISCUSSION DRAFT, *supra* note 108, § 6x.05(1). The commentary explained that this provision “reflects the principle that an offender who completes his sentence has paid his debt to society” and should be “positioned to move forward with a law-abiding life unencumbered.” *Id.* § 6x.05 cmt. a. The court could continue a particular consequence identified by the prosecutor “if it finds that, in light of present circumstances, specific benefits afforded by the [consequence] continue to outweigh any burdens on the offender’s ability to reintegrate into the law-abiding community.” *Id.* § 6x.05(a). In describing the principle reflected in this provision, the Reporters’ Note underscored how integral mandatory collateral consequences are to the convicted person’s sentence: “[W]hen a sentence is over, the burdens it imposes should come to an end.” *Id.* § 6x.05(2)(a).

118. See § 6x.06(4).

119. See *id.* § 6x.06(3)(a).

120. See *id.* § 6x.06(3)(b). This provision provides further guidance to courts in making this determination:

In making this determination, the court may consider the amount of time that has passed since the individual’s most recent conviction, any subsequent involvement with criminal activity, and when applicable, participation in treatment for mental-health or substance-abuse problems linked to past criminal offending. In assessing postconviction reintegration, the [court or designated agency] should not require extraordinary achievement, and when weighing evidence of reintegration should be sensitive to the cultural, educational, or economic limitations affecting petitioners.

Id.

121. See *id.* § 6x.06(4).

civil action” against an employer based on conduct of an employee or former employee.”¹²²

Receipt of a certificate, coupled with the standards for discretionary decision makers discussed in the preceding Section¹²³ should go a long way toward neutralizing the stigma of an individual’s criminal history in the content of administrative allocation of benefits and opportunities and reassure private employers concerned about negligent hiring liability.¹²⁴

Courts are encouraged to approve deferred adjudication to avoid collateral consequences

An additional way in which the MPC: Sentencing links collateral consequences to sentencing policy is in authorizing a court to defer adjudication “to facilitate offenders’ rehabilitation and reintegration” in situations where a defendant should be held “accountable for criminal conduct through a formal court process,” but where “justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal conviction.”¹²⁵ “If the defendant materially satisfies the conditions for deferred adjudication, the court shall dismiss the underlying charges with prejudice,” and this disposition “shall not be considered a conviction for any purpose.”¹²⁶ Under this section, “deferred adjudication shall not be conditioned on a guilty plea,”¹²⁷ which accounts for the growing number of situations in which collateral consequences are triggered by a formal admission of guilt short of conviction.¹²⁸

122. *See id.* § 6x.06(5).

123. *See id.* § 6x.04(3); *see also supra* note 110.

124. *See* LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 6:22 (“Negligent Hiring—Limiting Liability by Statute”).

125. MPC APRIL 2014 DRAFT, *supra* note 24, § 6.02B(2) (“Deferred Adjudication”); *see also id.* § 6.02A(2) (“Deferred Prosecution”) (allowing deferred prosecution “to hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with formal charge and conviction”).

126. *Id.* § 6.02B(8).

127. *Id.* § 6.02B(5).

128. *See, e.g.*, 8 U.S.C. § 1101(a)(48)(A) (2006) (stating that under the Immigration and Nationality Act, a guilty plea coupled with some court-ordered “restraint on the alien’s liberty” constitutes a conviction that may warrant deportation); *see also State v. Brothers*, 59 P.3d 1268 (N.M. Ct. App. 2002) (holding that a deferred adjudication scheme does not erase the conviction for purposes of sex offender registration, even though the charges were dismissed); TRANSPORTATION SECURITY ADMINISTRATION, LEGAL GUIDANCE ON CRIMINAL HISTORY RECORDS CHECKS 3–5 (2004), *available at* www.afge.org/?documentID=2194 (describing various scenarios the TSA considers to be convictions including a person who “enters plea of guilty followed by deferred adjudication where court places defendant on probation for a period of 2 years”).

Summary

The scheme for dealing with collateral consequences in the MPC: Sentencing seems premised on an assumption that mandatory statutory penalties imposed upon conviction should be conceived and treated as an integral part of the authorized punishment even if they are not imposed by the sentencing court. For this reason, §§ 6x.04 and 6x.05 together draw a clear line between mandatory collateral consequences, which the sentencing court controls during the term of the sentence, and discretionary collateral consequences, whose imposition and relief are controlled by executive agencies and civil courts.¹²⁹ This distinction reinforces the close functional link between mandatory collateral consequences and the court-imposed sentence. And the functional demarcation of responsibility between criminal and civil institutions underscores the distinct institutional competences of criminal courts and civil decision makers, whether executive or judicial. It avoids constitutional problems by allowing for the conversion of punishment to regulation.

The relief available under § 6x.06 from a civil court or agency through a “certificate of relief from civil disabilities” is different in kind from the relief that is available from the sentencing court under §§ 6x.04 and 6x.05.¹³⁰ The § 6x.06 certificate goes beyond removing mandatory consequences that are conceptually part of the sentence, to provide the sort of “proof of rehabilitation” that is available through executive pardon, addressing the stigma of conviction as well as its legal incidents.¹³¹

If the sentencing court is authorized to decide which mandatory collateral consequences will apply and when they will terminate, it must be the case that they are as much a part of the court’s sentencing function as a fine or prison term. Accordingly, a court ought to evaluate mandatory collateral consequences in terms of the same considerations of proportionality and fairness as those that govern the sanctions the court itself imposes. The success of the system contemplated by the MPC proposal requires that sentencing courts know what mandatory penalties are triggered by particular offenses, and that they have standards to guide them in deciding whether and when to remove them. It also requires that

129. See MPC APRIL 2014 DRAFT, *supra* note 24, §§ 6x.04–05.

130. A conceptual anomaly in the scheme in the April 2014 MPC draft is the provision for relief to those convicted in other jurisdictions, which probably belongs in § 6x.06 rather than § 6x.05, since by definition it is not tied to the sentence imposed by the court. Any relief during the period of the sentence ought to come from the (criminal) court in the jurisdiction of conviction, as opposed to a (civil) court in the state of residence.

131. See *id.* § 6x.06.

discretionary decision makers understand their obligations once the court lifts an automatic bar. The first two requirements are met by the compendium and guidance requirements of § 6x.02, and the third requirement is met by the “substantial relationship” standard set forth in § 6x.04(3) and further explicated in commentary.

One important shortcoming of the MPC: Sentencing scheme is the absence of any substantive limiting principles by which to determine which collateral consequences are appropriate for enactment in the first instance.¹³² As we will see in the following Section, this was an important feature of the 1962 Model Penal Code, and it avoids requiring the sentencing court to make judgments that are more properly those of a legislature or regulatory agency.

B. Collateral Consequences in the 1962 Model Penal Code

The collateral consequences provisions of the MPC: Sentencing, as described in the preceding Section, appear far reaching and even radical. It is fair to say that when the American Law Institute Council agreed in 1999 to authorize a project to revisit the sentencing articles of the MPC, few of its members anticipated addressing, as part of a sentencing code, consequences of conviction generally regarded as civil and beyond the sentencing court’s authority in every U.S. jurisdiction save one.¹³³ Likely even fewer would have thought it logical or appropriate to make the sentencing court responsible for the imposition and removal of what were then still commonly referred to as “civil disabilities.”¹³⁴

But the MPC: Sentencing proposal would not have surprised the drafters of the original Model Penal Code, notably the legendary Herbert Wechsler. It was Professor Wechsler himself who personally drafted the 1962 Code’s Article 306 on “Loss and Restoration of Rights Incident to Conviction or Imprisonment”¹³⁵ and who explained its provisions to the 1961 Institute meeting.¹³⁶ While few jurisdictions adopted Article 306—indeed it has been all but lost to memory—Professor Wechsler would immediately recognize the 2014 MPC proposal as the lineal

132. While the ABA Standards propose substantive limitations on mandatory collateral consequences, the Uniform Collateral Consequences of Conviction Act suffers from a similar absence of standards to guide legislatures in enacting “collateral sanctions.” *See supra* notes 81, 90–91.

133. *See* LOVE ET AL., COLLATERAL CONSEQUENCES, *supra* note 6, § 7:23 (describing New York’s Certificate of Relief from Disabilities).

134. *See, e.g.*, OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996).

135. 1962 MPC, *supra* note 97, art. 306.

136. *See* Love, *Clean Slate*, *supra* note 28, at 1712 n.31.

descendant of his handiwork half a century ago—although he would probably have some structural improvements to suggest.¹³⁷

Article 306 was the product of its time, an age of reformers who “believed in giving people a second chance, and that this was, in any event, the best way to reduce recidivism.”¹³⁸ Then, as now, hundreds of legal restrictions coupled with “penalties imposed by public opinion”¹³⁹ frustrated efforts to deter convicted individuals from a life of crime.¹⁴⁰ As one contemporary reformer noted, “The more heavily he bears the mark of his former offense, the more likely he is to reoffend.”¹⁴¹ The law reformers of the time considered the development of effective restoration procedures of paramount importance in “reintegrating [the convicted individual] with the society from which he has become estranged.”¹⁴² At

137. See *supra* Part III. In the comment to § 6x.01, the Reporters acknowledge that they are “[b]uilding on the guidance offered by the original Code” by seeking both to limit and relieve collateral consequences. See MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.01 cmt. a. However, there is no mention of Section 306.6 of the original Code that foreshadows §§ 6x.05 and 6x.06 in the comments to those sections. Compare *infra* Appendix B, with MPC APRIL 2014 DRAFT, *supra* note 24, § 6x.05 cmt. a., and *id.* § 6x.06 cmt. a. As discussed *infra*, in several ways Section 306.6 contains a more helpful description of the effect of the authorized relief than do any of the three relief provisions of the 2014 draft. See *infra* Part III.B–C.

138. Love, *Clean Slate*, *supra* note 28, at 1707.

139. Special Project, *supra* note 28, at 1149.

140. *Id.* at 1155 (“[T]he entire scheme of civil disabilities appears to obstruct modern correctional goals.”).

141. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 148 (1966) (“There is considerable evidence to indicate that the failure of the criminal law to clarify the status of the reformed offender impedes the objective of reintegrating him with the society from which he has become estranged.”).

142. *Id.* at 148; see also Special Project, *supra* note 28, at 1153–54 (discussing various model restoration acts that collectively “reflect the drafters’ belief that rehabilitation of the criminal is of primary importance to society”). The same year the 1962 Code was approved, the National Council on Crime and Delinquency approved a “more far-reaching provision” that would have restored all rights automatically upon completion of sentence, annulled the conviction, and limited the discretion of licensing boards. *Id.* The National Probation and Parole Association also called for no loss of rights for probationers and full restoration of rights upon completion of sentence for those sent to prison. *Id.* at 1154; see also Love, *Clean Slate*, *supra* note 28, at 1708–09. The 1970 Study Draft of the National Commission on Reform of Federal Criminal Laws took an even more progressive approach, authorizing the sentencing court to relieve “any or all disqualifications imposed by law as a consequence of conviction” at the time of sentencing or “at any time after sentence.” FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS: A PROPOSED NEW FEDERAL CRIMINAL CODE (TITLE 18, UNITED STATES CODE) § 3503 (1971). This proposal also provided that any remaining disqualification or disability would terminate automatically five years after completion of sentence. *Id.* § 3504. Thereafter, the conduct underlying the conviction could be considered by a discretionary decision maker if “relevant” to the individual’s

the time, a handful of states provided for automatic restoration of rights upon completion of sentence, but most relied upon a governor's pardon to return the "reformed offender" to society's good graces.¹⁴³ But automatic restoration did not provide sufficient confirmation of good moral character for employment and licensing, and pardon was considered an inherently unreliable remedy, especially for those with limited means and few connections.¹⁴⁴ Expungement laws in a handful of states were of uncertain effect and riddled with exceptions.¹⁴⁵

Article 306 addresses the issue of collateral consequences in three ways: (1) by limiting mandatory consequences (disabilities) to those specifically authorized by the constitution or tied directly to the criminal offense, (2) by authorizing the sentencing court to dispense with mandatory consequences upon completion of sentence, and (3) by authorizing the sentencing court to issue a further order.¹⁴⁶ The Code's relief provisions effectively allocate to the sentencing court the governor's power to forgive.

On the question of scope, Section 306.1 limits the "disqualifications or disabilities" that a convicted person can be made to "suffer" to ones that are:

- (a) necessarily incident to execution of the sentence of the Court;
- (b) provided by the Constitution or the Code;
- (c) provided by a statute other than the Code, when the conviction is of a crime defined by such statute; or
- (d) provided by the judgment, order, or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission

competency to perform a function or exercise a right or privilege. *Id.* § 3505(d). The relief did not apply to firearms privileges. *Id.* § 3505(f).

143. *See generally* Special Project, *supra* note 28, at 1143–52 (discussing the disadvantages of various relief mechanisms available in 1970).

144. *See id.* (discussing the disadvantages of pardon); *see also* Nat'l Council on Crime & Delinquency, *Annulment of a Conviction of Crime: A Model Act*, 8 CRIME & DELINQUENCY 97, 99–101 (1962) (noting both that "the power of the administrative agency is not well known and the agency is ordinarily less accessible than a court" and that pardon is "not a regular remedy available in the ordinary course of affairs to all offenders").

145. *See Love, Clean Slate, supra* note 28, at 1710–11 nn. 20–22 (citing Nat'l Council on Crime & Delinquency, *supra* note 144, at 99–101). In 1962, six states had expungement laws; by 1970, that number had doubled. *See* Special Project, *supra* note 28, at 1148–50 (indicating that in 1970 twelve states had adopted provisions for expungement or set-aside, but that they applied to few crimes and seemed particularly vulnerable to legislative contraction).

146. *See infra* Appendix B.

of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.¹⁴⁷

In a word, the mandatory statutory collateral penalties authorized by subsections (a) through (c) must be closely tied to the crime committed and to the sentence imposed by the court, while the discretionary penalties authorized by subsection (d) must be “reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.”¹⁴⁸ Additional sections of Article 306 authorize forfeiture of public office (but not public employment),¹⁴⁹ and of the right to vote (only while in prison), and to serve on a jury (only while under sentence).¹⁵⁰

In contrast to the “forgetting” approach of the expungement statutes that were advocated by some organizations at the time,¹⁵¹ the 1962 Code embodied a “forgiving” approach to restoration of rights. Article 306 authorizes a court upon completion of sentence or shortly thereafter to issue an order providing that “so long as the defendant is not convicted of another crime, the judgment shall not thereafter constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction.”¹⁵² This order effectively terminates all mandatory collateral consequences upon completion of sentence. (The fact that Article 306 makes no provision for relief before the sentence has been fully served may be explained by the fact that in the early 1960s there were few laws restricting where a defendant could work or live.¹⁵³)

147. 1962 MPC, *supra* note 97, Section 306.1. No commentary was ever published. *See Love, Clean Slate, supra* note 28, at 1712 n.31.

148. 1962 MPC, *supra* note 97, Section 306.1. The provision in Section 306.1(d) that refers to “the statute defining such jurisdiction” is modified by the final phrase, so that it clearly contemplates a discretionary as opposed to a mandatory penalty.

149. *See id.* Section 306.2. A note following Section 306.2 states that “[t]he words ‘or employment’ have been deleted from the section . . . in accordance with the action of the Institute at the May 1961 meeting.” *See id.* Section 306.2, Status of Section; *see also* AM. LAW INST., PROCEEDINGS OF THE 1961 ANNUAL MEETING 309–13 (1961); *Love, Clean Slate, supra* note 28, at 711–12 n.31.

150. *See* 1962 MPC, *supra* note 97, Section 306.3. Section 306.4 assures prisoners the right to testify, and Section 306.5 assures them the right to appoint an agent to act for them in the free community. *Id.* Sections 306.4–5.

151. *See* Gough, *supra* note 141, at 148–49.

152. 1962 MPC, *supra* note 97, Section 306.6(1).

153. *See generally* Special Project, *supra* note 28 (discussing the mandatory restrictions in the 1960s). The compilation of collateral consequences in the 1970 *Vanderbilt Law Review* reveals that most restrictions on public employment applied to “officers” as opposed to “employees.” *Id.* at 989–97. It also points out that consideration of conviction in occupational and professional licensing schemes was discretionary rather than mandatory. *Id.* at 1002–18. While “it is generally concluded that substantial

After a further period of law-abiding conduct, the court may issue a further order vacating the record of conviction.¹⁵⁴ The ostensible purpose of this set-aside relief is to restore the convicted individual's social status and reputation lost as a result of conviction.¹⁵⁵ Neither order precludes a decision maker from considering the conduct underlying the crime whenever relevant to establishing "competency . . . to perform a function or to exercise a right or privilege,"¹⁵⁶ and neither order authorizes the recipient to deny having been convicted.¹⁵⁷

discrimination is practiced [in private employment.] . . . [p]ast criminality is usually overlooked in employing persons for low-skilled jobs." *Id.* at 1001–02. The *Vanderbilt* study reported no collateral consequences affecting housing, education, or welfare benefits. *See generally id.*

154. *See infra* Appendices A–B.

155. *See* 1962 MPC, *supra* note 97. The black letter of Section 306.6(3) does not distinguish between the effect of a restoration order under Section 306.6(1) and a vacatur under Section 306.6(2). No commentary was ever published that might have explained the distinction. The most we have, other than the black letter itself, is Professor Wechsler's explanation of the difference between the two orders on the floor of the 1961 Annual Meeting in terms of the different effect given under the immigration laws to New York's certificate of good conduct (offender remains deportable) and Minnesota's expungement order (offender no longer deportable). AM. LAW INST., *supra* note 149, at 312. His explanation suggests that he believed a vacatur would signify the recipient's good moral character, a finding required under the immigration laws in effect at the time to avoid deportation. On the issue of candor, he explained that "you can't say, 'I have never been convicted,' but you can say 'I haven't been convicted because the judgment was vacated' and call attention to the order." *Id.* at 310. He also noted that "the Council of the Institute differs markedly with the Council on Crime and Delinquency [CCD] as to the policy of that provision." *Id.* at 313. The reference was to the then-recent action of the CCD to approve a policy of "annulment," whereby the fact of conviction could be denied. *Id.* at 312; *see also* Nat'l Council on Crime & Delinquency, *supra* note 144, at 97, 99–101.

156. *See infra* Appendix B, Section 306.6(3)(d). The Section also provides that neither an order of relief nor a vacatur "preclude[s] proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order." 1962 MPC, *supra* note 97, Section 306.6(3)(d). An order of relief under this Section has prospective effect only and does not preclude proof of the conviction when relevant to determination of the rights or liabilities of third parties, to sentencing for a subsequent crime, and to impeachment. *Id.*

157. *See* 1962 MPC, *supra* note 97, Section 306.6(3)(f) (providing that neither order "[j]ustif[ies] a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order").

*C. Comparison of the 1962 and 2014 ALI Proposals:
Back to the Future?*

As discussed in the preceding section, the goal of the collateral consequences provisions in the 1962 Model Penal Code was to give people convicted of crime “an incentive to reform” by relieving specific legal restrictions and “removing the infamy of [their] social standing.”¹⁵⁸ The MPC: Sentencing provisions approved by the ALI Annual Meeting in May of 2014 pursue the same goal, in a context where the number of legal restrictions has been vastly expanded.¹⁵⁹ The way to that goal, now as then, leads to the same courthouse door.

It is not surprising that the relief provisions of the 1962 Model Penal Code foreshadow the relief provisions in the MPC: Sentencing. Over half a century, the ALI has remained committed to a two-step relief scheme incorporated into the sentencing process, based on the “forgiving” approach of pardon as opposed to the “forgetting” approach of record sealing. Both the old and new Codes provide for relief from mandatory penalties from the sentencing court, and for a further form of relief that essentially forgives the offense, under the old Code by vacating the record of conviction and under the new Code by certifying the individual’s rehabilitation. While the 1962 Code placed both relief functions in the sentencing court, the MPC: Sentencing draft is conceptually sounder in dividing them between a criminal and civil process. Both old and new Codes contain a standard to guide the imposition of conviction-related penalties where there is no mandatory restriction, and an official act (judicial vacatur under the old Code, judicial certificate under the new) signifying that an individual’s debt to society has been fully paid.

The primary difference between the two Code schemes lies in the substantive limits on the types of mandatory collateral consequences that may be imposed in the first place. The 1962 Code imposed limiting principles requiring that statutory collateral consequences must be tied directly to the crime and the court-imposed sentence; the MPC: Sentencing contains no similar limiting principles. Indeed, it leaves the development of any substantive limitations to the discretion of the sentencing commission, through “guidance” to courts considering requests for relief. This approach does not promise an adequate limit on collateral penalties that affect an individual’s ability to establish himself as a law-abiding member of the community, such as housing, employment, and education. Moreover, the sentencing commission’s “guidance” to courts would not even be as forceful as “guidelines” that

158. Gough, *supra* note 141, at 162.

159. *See supra* Part II.

the commission is invited (but not required) to adopt under § 6x.02. A provision similar to Section 306.1 establishing standards for legislative enactments would greatly strengthen the current draft of the new Code, inter alia by avoiding burdensome requests to courts to dispense with legislative penalties on a case-by-case basis.

If a standard-setting function were given to the sentencing commission through issuance of “guidelines” and some suggestion of substantive limitations similar to the ones in Section 306.1 of the 1962 Code, the commission could determine administratively which kinds of mandatory collateral penalties are generally appropriate depending upon the type of crime. This would be some improvement over the current draft, though still not as effective as imposing limits directly on the legislature. Guidelines could include general formulations of both crime-specific and defendant-specific standards. As to the former, the guidelines could helpfully provide that, in considering whether to afford relief, a court should take into account whether imposing a particular mandatory consequence is substantially justified by the elements of the offense of conviction. As to the latter, the guidelines could direct the court to consider whether relief from a particular type of mandatory consequence is likely to facilitate reintegration, and whether relief from a particular type of mandatory consequence is likely to pose an unreasonable risk to the safety of the public or any individual. States that enact the provisions of the MPC should consider making these improvements.

CONCLUSION

The debased legal status that results from a criminal conviction facilitates a regime of restrictions and exclusions that feels like punishment to its subjects and looks like punishment to the community. Yet punitive collateral consequences have for the most part escaped constitutional regulation, allowing legislatures and administrative agencies to exclude people from a multitude of benefits and opportunities because of their criminal record. This threatens the overall goals of the justice system by making it difficult for this population to support themselves and their families in a lawful and productive manner. The emerging policy goal of reintegrating criminal offenders into society is not well served by a legal system that effectively condemns them as social outcasts.

Because courts have failed to address issues of severity and proportionality raised by punitive mandatory collateral penalties, and because legislatures have been unwilling to dial them back in any meaningful fashion, reformers have turned to the sentencing system to mitigate the effect of harsh collateral penalties that have no legitimate

penal or regulatory purpose. Their proposals give courts new tools to further the rehabilitative goals of sentencing and at the same time avoid issues of proportionality and procedural fairness that most frequently arise when categorical laws, as opposed to individualized judicial decisions, control the quantum of punishment. The Model Penal Code: Sentencing is the most sophisticated effort to date to convert collateral consequences from punishment to regulation by providing a way to lift their mandatory nature and allowing the penalty to be considered administratively on a case-by-case basis. While in some ways the new MPC proposal does not improve structurally upon the way the 1962 Code dealt with collateral consequences, it goes a long way toward limiting them to reasonable case-specific regulation rather than senseless punishment. It is devoutly to be hoped that in the current climate there will be greater receptivity to the ALI's proposals on collateral consequences than there was when the original Code was promulgated half a century ago.

APPENDIX A

MODEL PENAL CODE: SENTENCING
TENTATIVE DRAFT NO. 3 (APRIL 24, 2014), AS MODIFIED BY ACTION OF
THE 2014 ALI ANNUAL MEETING
ARTICLE 6X—COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION

§ 6x.01. Definitions.

(1) For purposes of this Article, collateral consequences are penalties, disabilities, or disadvantages, however denominated, that are authorized or required by state or federal law as a direct result of an individual's conviction but are not part of the sentence ordered by the court.

(2) For purposes of this Article, a collateral consequence is mandatory if it applies automatically, with no determination of its applicability and appropriateness in individual cases.

(3) For purposes of this Article, a collateral consequence is discretionary if a civil court, or administrative agency or official is authorized, but not required, to impose the consequence on grounds related to an individual's conviction.

§ 6x.02. Sentencing Guidelines and Collateral Consequences.

(1) As part of the sentencing guidelines, the sentencing commission [or other designated agency] shall compile, maintain, and publish a compendium of all collateral consequences contained in [the jurisdiction's] statutes and administrative regulations.

(a) For each crime contained in the criminal code, the compendium shall set forth all collateral consequences authorized by [the jurisdiction's] statutes and regulations, and by federal law.

(b) The commission [or designated agency] shall ensure the compendium is regularly updated.

(2) The sentencing commission shall provide guidance for courts considering petitions for orders of relief from mandatory collateral consequences under § 6x.04, and may develop formal guidelines for use in ruling on such petitions. The authority and limitations of any such guidelines are governed by Article 6B of this Code, subject to the courts' authority to individualize sentences under § 7.XX.

§ 6x.03. Voting and Jury Service.

No person convicted of a crime shall be disqualified from exercising the right to vote [, except that an individual serving a custodial sentence as a result of a felony conviction may be disqualified while incarcerated].

A person convicted of a crime may be disqualified from serving on a jury only until the sentence imposed by the court, including any period of community supervision, has been served.

§ 6x.04. Notification of Collateral Consequences; Order of Relief.*

(1) At the time of sentencing, the court shall confirm on the record that the offender has been provided with the following information in writing:

(a) A list of all collateral consequences that apply under state or federal law as a result of the current conviction;

(b) a warning that the collateral consequences applicable to the offender may change over time;

(c) a warning that jurisdictions to which the offender may travel or relocate may impose additional collateral consequences; and

(d) notice of the offender's right to petition for relief from mandatory collateral consequences pursuant to subsection (2) during the period of the sentence, and thereafter pursuant to §§ 6x.05 and 6x.06.

(2) At any time prior to the expiration of the sentence, a person may petition the court to grant an order of relief from an otherwise-applicable mandatory collateral consequence imposed by the laws of this state that is related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business.

(a) The court may dismiss or grant the petition summarily, in whole or in part, or may choose to institute proceedings as needed to rule on the merits of the petition.

(b) When a petition is filed, notice of the petition and any related proceedings shall be given to the prosecuting attorney;

(c) The court may grant relief from a mandatory collateral consequence if, after considering any guidance provided by the sentencing commission under § 6x.02(2), it finds that the individual has demonstrated by clear and convincing evidence that the consequence imposes a substantial burden on the individual's ability to reintegrate into law-abiding society, and that public safety considerations do not require mandatory imposition of the consequence.

(d) Relief should not be denied arbitrarily, or for any punitive purpose.

(3) An order of relief granted under this Section does not prevent an authorized decisionmaker from later considering the conduct underlying the conviction when making an individualized determination whether to confer a discretionary benefit or opportunity, such as an occupational or

* Section 6x.04(3) in Tentative Draft #3 was revised by action of the Annual Meeting in May 2014. *See supra* note 110.

professional license. In such cases, the benefit or opportunity may be denied notwithstanding the court's order of relief if the conduct underlying the conviction is determined to be reasonably related to the benefit or opportunity the individual seeks to obtain. If the decisionmaker determines that the benefit or opportunity should be denied based upon the conduct underlying the conviction, the decisionmaker shall explain the reasons for the denial in writing.

§ 6x.05. Orders of Relief for Convictions from Other Jurisdictions; Relief Following the Termination of a Sentence.

(1) Any individual who, by virtue of conviction in another jurisdiction, is subject or potentially subject in this jurisdiction to a mandatory collateral consequence related to employment, education, housing, public benefits, registration, occupational licensing, or the conduct of a business, may petition the court for an order of relief if:

(a) The individual is not the subject of pending charges in any jurisdiction;

(b) The individual resides, is employed or seeking employment, or regularly conducts business in this jurisdiction; and

(c) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on the individual's ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(2) An individual convicted in this jurisdiction whose sentence has been fully served may petition under this Section for relief from a mandatory collateral sanction if:

(a) No charges are pending against the individual in any jurisdiction; and

(b) The individual demonstrates that the application of one or more mandatory collateral consequences in this jurisdiction will have an adverse effect on his or her ability to seek or maintain employment, conduct business, or secure housing or public benefits.

(3) The court may grant relief if it finds that the petitioner has demonstrated by clear and convincing evidence a specific need for relief from one or more mandatory consequences, and that public safety considerations do not require mandatory imposition of the consequence. In determining whether to grant relief, the court should give favorable consideration to any relief already granted to the petitioner by the jurisdiction in which the conviction occurred.

(4) A petition filed under subsection (1) or (2) shall be decided in accordance with the procedures and standards set forth in § 6x.04(2), and an order of relief shall have the effect described in § 6x.04(3).

§ 6x.06. Certificate of Relief from Civil Disabilities.

(1) Any person convicted of one or more misdemeanors or felonies crimes may petition [the designated agency or court] in the [county] in which the individual resides for a certificate of relief from civil disabilities, provided that:

(a) No criminal charges are pending against the individual; and

(b) [Four] or more years have passed since the completion of the individual's past criminal sentences with no further convictions.

(2) When a petition is filed, notice of the petition and any scheduled hearings related to it shall be sent to the prosecuting attorney of the jurisdiction that handled the underlying criminal case.

(3) In ruling on a petition filed under subsection (1), the court shall determine the classification of the most serious offense for which the individual has been convicted.

(a) When the individual has been convicted of one or more [fourth or fifth] degree felonies or misdemeanors, the [court or designated agency] should issue the certificate whenever the individual has avoided reconviction during the period following completion of his or her past criminal sentences, unless the prosecution makes a clear showing why the application of one or more collateral consequences should remain in effect.

(b) When the individual has been convicted of a [first, second, or third] degree felony, the [court or designated agency] may issue a certificate of relief from civil disabilities if, after reviewing the record, it finds by a preponderance of the evidence that the individual has shown proof of successful reintegration into the law-abiding community. In making this determination, the court may consider the amount of time that has passed since the individual's most recent conviction, any subsequent involvement with criminal activity, and when applicable, participation in treatment for mental-health or substance-abuse problems linked to past criminal offending. In assessing postconviction reintegration, the [court or designated agency] should not require extraordinary achievement, and when weighing evidence of reintegration should be sensitive to the cultural, educational, or economic limitations affecting petitioners.

The court may issue a certificate of relief from civil disabilities if it finds by a preponderance of the evidence, after reviewing the record, that the individual has become a law-abiding member of society. In making this determination, the court shall consider the person's conduct following conviction, including the person's progress toward rehabilitation as evidenced by participation in treatment for mental-health or substance-abuse problems linked to past criminal offending; the amount of time that has elapsed since conviction; the nature of the conduct underlying the crime of conviction; and any

information supplied by individuals familiar with the individual's conduct and character.

(4) A certificate of relief from civil disabilities removes all mandatory collateral consequences to which the petitioner would otherwise be subject under the laws of this state as a result of prior convictions except as provided by Article 213. A court may specify that the certificate should issue with additional exceptions when there is reason to believe that public-safety considerations require the continuation of one or more mandatory collateral consequences. A certificate shall have the effect of an order of relief described in § 6x.04(3).^{*} A certificate does not entitle a recipient to any discretionary benefits or opportunities, though it may be used as proof of rehabilitation for purposes of seeking such benefits or opportunities.

(5) Information regarding the criminal history of an individual who has received a certificate of relief from civil disabilities may not be introduced as evidence in any civil action against an employer or its employees or agents that is based on the conduct of the employee or former employee.

^{*} See AM. LAW INST., *supra* note 110.

APPENDIX B

MODEL PENAL CODE (1962)
ARTICLE 306 – LOSS AND RESTORATION OF RIGHTS
INCIDENT TO CONVICTION OR IMPRISONMENT

Section 306.1. Basis of Disqualification or Disability.

(1) No person shall suffer any legal disqualification or disability because of his conviction of a crime or his sentence on such conviction, unless the disqualification or disability involves the deprivation of a right or privilege that is:

(a) necessarily incident to execution of the sentence of the Court;

or

(b) provided by the Constitution or the Code; or

(c) provided by a statute other than the Code, when the conviction is of a crime defined by such statute; or

(d) provided by the judgment, order or regulation of a court, agency or official exercising a jurisdiction conferred by law, or by the statute defining such jurisdiction, when the commission of the crime or the conviction or the sentence is reasonably related to the competency of the individual to exercise the right or privilege of which he is deprived.

(2) Proof of a conviction as relevant evidence upon the trial or determination of any issue, or for the purpose of impeaching the convicted person as a witness is not a disqualification or disability within the meaning of this Article.

Section 306.6. Order Removing Disqualifications or Disabilities; Vacation of Conviction; Effect of Order of Removal or Vacation

(1) In the cases specified in this Subsection the Court may order that so long as the defendant is not convicted of another crime, the judgment shall not thereafter constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime:

(a) in sentencing a young adult offender to the special term provided by Section 6.05(2) or to any sentence other than one of imprisonment; or

(b) when the Court has theretofore suspended sentence or has sentenced the defendant to be placed on probation and the defendant has fully complied with the requirements imposed as a condition of such order and has satisfied the sentence; or

(c) when the Court has theretofore sentenced the defendant to imprisonment and the defendant has been released on parole, has fully complied with the conditions of parole and has been discharged; or

(d) when the Court has theretofore sentenced the defendant, the defendant has fully satisfied the sentence and has since led a law-abiding life for at least [two] years.

(2) In the cases specified in this Subsection, the Court that sentenced a defendant may enter an order vacating the judgment of the conviction:

(a) when an offender [a young adult offender] has been discharged from probation or parole before the expiration of the maximum term thereof; or

(b) when a defendant has fully satisfied the sentence and has since led a law-abiding life for at least [five] years.

(3) An order entered under Subsection (1) or (2) of this Section:

(a) has only prospective operation and does not require the restoration of the defendant to any office, employment or position forfeited or lost in accordance with this Article; and

(b) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the determination of an issue involving the rights or liabilities of someone other than the defendant; and

(c) does not preclude consideration of the conviction for purposes of sentence if the defendant subsequently is convicted of another crime; and

(d) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege that such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order; and

(e) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, except that the issuance of the order may be adduced for the purpose of his rehabilitation; and

(f) does not justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order.