

Florida State University College of Law
Scholarship Repository

Scholarly Publications

10-2013

Informal Collateral Consequences

Wayne A. Logan

Florida State University College of Law

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the [Criminal Law Commons](#)

Recommended Citation

Wayne A. Logan, *Informal Collateral Consequences*, 88 *WASH. L. REV.* 1103 (2013),
Available at: <https://ir.law.fsu.edu/articles/167>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

INFORMAL COLLATERAL CONSEQUENCES

Wayne A. Logan*

After a thirty-year punitive binge, the nation is in the process of awakening to the vast array of negative effects flowing from its draconian crime control policies.¹ The shift is perhaps most evident in the realm of corrections, which since the early 1980s has experienced unprecedented population growth.² Driven by a number of factors, not the least of which is the enormous human and financial cost of mass incarceration,³ policy makers are now shrinking prison and jail populations⁴ and pursuing cheaper non-brick-and-mortar social control options.⁵

This Essay examines another facet of the shift: increasing concern over collateral consequences, the many ostensibly non-penal sanctions attaching to convictions, which have proliferated in recent years⁶ and

* Gary & Sallyn Pajcic Professor of Law, Florida State University College of Law. Thanks to Jack Chin, Matthew Lister, Margaret Colgate Love, and Jenny Roberts for their very helpful comments on the paper. Thanks also to participants at the collateral consequences workshop hosted by the University of Minnesota Law School's Robina Institute, especially Professors Anthony Duff and Susan Sered, who provided valuable insights as commentators. Finally, thanks go to Josephine Ennis, J.D. 2013, for her expert editorial assistance.

1. On the political and social catalysts behind the nation's shift toward increased punitiveness more generally, see JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 *HARV. J.L. & POL'Y* 715, 722–55 (2013).

2. See LAUREN E. GLAZE & ERIKA PARKS, U.S. DEP'T OF JUSTICE, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2011, at 1 fig.1 (2012), available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>.

3. The reform efforts of the "Right on Crime" movement, comprised mainly of fiscal conservatives otherwise typically staunch crime-control advocates, evidence this shift. See *RIGHT ON CRIME*, <http://www.rightoncrime.com/> (last visited Aug. 21, 2013).

4. See NICOLE D. PORTER, THE SENTENCING PROJECT, *ON THE CHOPPING BLOCK 2012: STATE PRISON CLOSINGS* (2012), available at <http://sentencingproject.org/doc/publications/On%20the%20Chopping%20Block%202012.pdf>.

5. See *id.*; see also THE PEW CTR. ON THE STATES, *STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS* 6 (2011); Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 *N.C. L. REV.* 581, 636–40 (2012).

6. See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 *FED. PROBATION*, Sept. 1996, at 10, 11–15 (surveying marked increase in collateral consequences between 1986 and 1996); Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 *J. CRIM. L. & CRIMINOLOGY* 1213, 1214–15 (2010) ("At no point in United States history have collateral

impose disabilities that often dwarf in personal significance the direct consequences of conviction, such as imprisonment.⁷ Long the focus of critical scholarly commentary,⁸ collateral consequences recently drew the attention of the Supreme Court in its landmark decision *Padilla v. Kentucky*⁹ holding that defendants have a Sixth Amendment right to be informed of a collateral consequence (in *Padilla*, deportation) attaching to a guilty plea.¹⁰ Further testament to the national concern, the American Bar Association is now compiling a comprehensive inventory of collateral consequences imposed nationwide,¹¹ casting in bold relief the many “invisible punishments” to which convicted individuals are subject.¹²

The attention now being paid to collateral consequences is most assuredly welcome. Missing from the reappraisal, however, is attention to the range of informal consequences of conviction. Unlike formal collateral consequences, such as loss of public housing eligibility, deportation, occupational disqualification, or electoral disenfranchisement, these consequences do not attach by express operation of law. Rather, they are informal in origin, arising independently of specific legal authority, and concern the gamut of negative social, economic, medical, and psychological consequences of conviction. For instance, it is well known that a criminal conviction can legally disqualify an individual from an occupation and housing; yet, a conviction also has a very negative impact on individuals’ job and housing prospects even absent such formal disqualifications. No less significant are the negative social and economic effects felt by third

consequences been as expansive and entrenched as they are today.”).

7. The category of “collateral consequences” actually encompasses two forms of non-penal disability: a “collateral sanction,” imposed by operation of law as a result of conviction; and a discretionary “disqualification,” also arising from conviction, but imposed after an individualized inquiry by a legal authority. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 2(2), (5), 8 (2010), available at http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf. Consistent with common usage, the broader category is used here.

8. For just a few of the myriad examples, see Neil P. Cohen & Dean Hill Rivkin, *Civil Disabilities: The Forgotten Punishment*, 35 FED. PROBATION, June 1971, at 19; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006).

9. 559 U.S. 356 (2010).

10. *Id.* at 360.

11. See AM. BAR ASS’N, <http://www.abacollateralconsequences.org/CollateralConsequences/map.jsp> (last visited Aug. 22, 2013).

12. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (coining phrase).

parties of convicted individuals, especially dependents, yet these effects too have gone largely unacknowledged in the post-*Padilla* discourse.

This Essay makes the case that attention should be directed to the array of formal and informal collateral consequences alike that are associated with criminal conviction. Part I provides an inventory of informal collateral consequences, which include the negative effects for individuals of stigma, diminished housing and economic opportunities, and ways in which conviction can adversely affect the well-being of third parties, such as family members. Part II examines the meager extent to which such consequences have figured in criminal justice doctrine and policy to date, especially relative to plea advisement and negotiation, and argues for a more robust understanding. Part III offers recommendations on how this fuller understanding can be operationalized.

The task undertaken here is as timely as it is important. While the nation's appetite for incarceration appears to be waning,¹³ state, local, and federal criminal justice systems continue to adjudicate millions of cases annually,¹⁴ and little reason exists to conclude that criminal prosecution and conviction will abate as the preferred public response to misconduct.¹⁵ As criminal justice actors and policymakers have become sensitized to the adverse effects of the formal collateral consequences of conviction, so too should they take account of informal collateral consequences, which can have an equal if not greater effect on individuals' lives.

I. INFORMAL COLLATERAL CONSEQUENCES

A criminal conviction, while a culminating event in the criminal justice process, carries with it an array of negative consequences. The most concrete and well-known consequence involves the deprivation of

13. See E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 1 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (noting that during 2011 the number of prisoners in state and federal facilities declined by 0.9%, the second consecutive year of population decrease).

14. See GLAZE & PARKS, U.S. DEP'T OF JUSTICE, *supra* note 2, at 1 (noting that at yearend 2011 just under 7,000,000 individuals were under adult correctional supervision of some kind, roughly one of every thirty-four residents).

15. See WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 55–56 (2011) (tracing nation's evolution toward view that "a healthy criminal justice system should punish all the criminals it can."); David Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 44–49 (2011) (lauding recent decreases in imprisonment rates but questioning whether they will be sustained when budgetary conditions improve, absent greater public sensitivity for the adverse human consequences of mass imprisonment).

liberty, by means of imprisonment or community supervision.¹⁶ Perhaps less well known, until *Padilla* at least, conviction very often also triggers an array of formal collateral consequences.¹⁷ This Part provides an overview of the many *informal* collateral consequences of conviction, arising outside formal operation of law, significantly affecting the lives of convicted individuals. These negative consequences, ranging from social stigma to diminished housing and employment opportunities, very often also have a spill-over effect on friends and family.

Social stigma has long been recognized as a defining consequence of criminal conviction.¹⁸ While in the past opprobrium associated with criminal status visibly manifested in physical branding and mutilation,¹⁹ over time, societies, including early America, adopted a more forgiving outlook. As the New York Court of Appeals put it in 1936, persons convicted of crimes are “not outcasts, nor to be treated as such.”²⁰

In recent decades, however, this forgiving sentiment has been replaced by a far harsher view. Today, convict status serves as a perpetual badge of infamy, even serving to impugn reputation beyond the grave.²¹ One data point highlighting this shift is found in the significantly decreased application of the executive pardon authority.²² Another is the current nationwide network of sex offender registration and community notification laws, which took root in the 1990s.²³ The laws require the assemblage of conviction and personal identifying information on eligible individuals, and make the information publicly available by way of the internet and other means, often for registrants’ lifetimes.²⁴ Fairly capturing modern sentiment, Chief Justice Rehnquist

16. See GLAZE & PARKS, U.S. DEP’T OF JUSTICE, *supra* note 2, at 1–2 (noting that at yearend 2011 almost 7,000,000 individuals were under adult correctional supervision and that roughly seventy percent of this population was on probation or parole).

17. See *supra* notes 6–12 and accompanying text.

18. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

19. See Pieter Spierenburg, *The Body and the State: Early Modern Europe*, in OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 48 (Norval Morris & David J. Rothman eds., 1995).

20. *People v. Pieri*, 199 N.E. 495, 499 (N.Y. 1936).

21. Perhaps the most notable example of this can be found in how, after police fatally shot an unarmed man, then-Mayor of New York City Rudolph Giuliani, in an effort to curb public uproar, stressed that the victim had a criminal record. See Eric Lipton, *Giuliani Cites Criminal Past of Slain Man: Pressed on Shooting, Mayor Criticizes Victim*, N.Y. TIMES, Mar. 20, 2000, at B1.

22. See Margaret Colgate Love, *When the Punishment Doesn’t Fit the Crime: Reinventing Forgiveness in Unforgiving Times*, 38 HUM. RTS., Summer 2011, at 2, 5–6.

23. For discussion of the history and social and political catalysts behind the laws, see WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 49–108 (2009).

24. See *id.* at 49–84 (discussing laws).

posited in the 2002 oral argument in *Smith v. Doe*, involving a constitutional challenge to registration and community notification, that targeted individuals “deserve[] stigmatization.”²⁵

Stigma can affect individual well-being in a variety of ways. Research dating back to the 1960s, for instance, highlights the significant social and psychological difficulties associated with criminal stigma.²⁶ More recent research makes clear that stigma can have a self-fulfilling criminogenic effect, predisposing individuals to become the deviants they were branded to be.²⁷ It is also not uncommon for convicts to be singled out for death, beatings, arson, and vandalism by fellow community members.²⁸

A criminal record can also have profound economic impact, serving in Professor James Jacobs’ words as a “negative curriculum vitae” for individuals.²⁹ Criminal records, now more readily available than ever before,³⁰ have been shown to significantly diminish near and long-term economic well-being.³¹ A criminal conviction often serves as a de facto informal basis for job denial,³² augmenting occupational bars triggered

25. Transcript of Oral Argument at 29, *Smith v. Doe*, 538 U.S. 84 (2003) (No. 01-729), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/01-729.pdf.

26. See IRVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963); SHLOMO SHOHAM, *THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIATION* (1970).

27. See, e.g., Bruce C. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 *ANN. REV. SOC.* 363 (2001); Terri A. Winnick & Mark Bodkin, *Anticipated Stigma and Stigma Management Among Those to Be Labeled “Ex-Con,”* 29 *DEVIANT BEHAV.* 295 (2008). Such outcomes, it warrants mention, are fostered by the common use by police of individuals’ criminal histories to justify searches and seizures. See, e.g., *United States v. Erwin*, 155 F.3d 818 (6th Cir. 1998); *United States v. Myers*, 106 F.3d 936 (10th Cir. 1997); *United States v. Henry*, 48 F.3d 1282 (D.C. Cir. 1995). Police resort to such information has been significantly eased by the advent of portable hand-held devices. See Wendy Ruderman, *New Tool for Police Officers: Records at Their Fingerprints*, *N.Y. TIMES*, Apr. 12, 2013, at A17 (noting officer use of new handheld smartphone devices that allow for immediate access to individuals’ criminal records).

28. See LOGAN, *supra* note 23, at 125–27.

29. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 *N.Y.U. J. LEGIS. & PUB. POL’Y* 177, 177 (2008).

30. See *id.* at 177–78.

31. See JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 112–20 (2003); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 151–85 (2005); Devah Pager, *The Mark of a Criminal Record*, 108 *AM. J. SOC.* 937 (2003).

32. On the disinclination of employers to hire ex-offenders more generally, see Harry J. Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION* 205, 209–10 (Mary Pattillo et al. eds., 2004). Research also makes clear that even employers reluctant to acknowledge a policy of not hiring ex-offenders show a marked disinclination to actually hire ex-offenders. See Devah Pager & Lincoln Quillian, *Walking the Talk?: What Employers Say Versus What They Do*, 70 *AM. SOC. REV.* 355 (2005). On the disparate racial effects of this phenomenon, see Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment*

by formal operation of law.³³ More subtly, conviction can function to disrupt or sever social ties that can be key to finding employment.³⁴ And even when able to secure a job, convicted individuals on average enjoy much lower earning capacity than individuals without a conviction.³⁵ Dashed or limited employment prospects, research has also shown, in turn fuel depression and lessen perceived self-worth, further impairing employment prospects.³⁶

Housing opportunities are also negatively affected by convict status. While statutes and regulations impose formal legal limits on public housing opportunities,³⁷ landlords in the private sector often informally use criminal history as a screening device.³⁸ The fact of criminal conviction, ex-convicts report, serves as the single greatest impediment to securing housing.³⁹ In turn, homelessness itself, in addition to making such matters as job searches far more difficult, increases the likelihood of subsequent arrest and conviction.⁴⁰

Finally, conviction affects far more than the convicted individual. Family and friends endure secondary stigma and ostracism as a result of their connection to convicts,⁴¹ and it is not uncommon for them to experience spill-over violence and disdain.⁴² It should also come as no

Criminal Background Checks, 19 GEO. J. ON POVERTY L. & POL'Y 231 (2012); Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009).

33. See Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1493 (2003) (noting variety of formal occupational prohibitions).

34. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. REV. 1277, 1313–14.

35. Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 CRIME & DELINQ. 410 (2001).

36. See, e.g., Andrew E. Clark et al., *Lags and Leads in Life Satisfaction: A Test of the Baseline Hypothesis*, 118 ECON. J. 222, 233 (2008).

37. See Eumi K. Lee, *The Centerpiece to Real Reform?: Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 254 (2010).

38. Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 325–26 (2010); Rebecca Oyama, Note, *Do Not Re(Enter): The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 183 (2009).

39. KATHARINE H. BRADLEY ET AL., CMTY. RES. FOR JUSTICE, NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 8 (2001), available at http://b3cdn.net/crjustice/a5b5d8fa98ed957505_hq m6b5qp2.pdf.

40. J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 47–48 (2009).

41. See, e.g., Todd R. Clear et al., *Incarceration and the Community: The Problem of Removing and Returning Offenders*, 47 CRIME & DELINQ. 335, 341 (2001).

42. See, e.g., Isolde Raftery, *Man Sentenced to Life for Killing Sex Offenders; Judge Chastises Supporters*, U.S. NEWS ON NBCNEWS.COM (Sept. 18, 2012, 6:31 PM), http://usnews.nbcnews.com/_news/2012/09/18/13943695-man-sentenced-to-life-for-killing-sex-offenders-judge-chastises-supporters (recounting Washington State case where two men were shot

surprise that the limited housing opportunities of convicts negatively affect their families and dependents;⁴³ so too do employment barriers,⁴⁴ denied access to federal government loans for education and training⁴⁵ and eligibility for food stamps.⁴⁶ And, when conviction results in incarceration, others very often feel its negative effects. Imprisonment significantly increases risk of sexual⁴⁷ and physical assault⁴⁸ and exposure to serious medical problems (such as HIV, tuberculosis, and hepatitis).⁴⁹ It also adversely affects mental health,⁵⁰ creating significant difficulties for individuals that impair their ability to function when released.⁵¹ These health-related outcomes can have a direct impact on family members, exacerbating financial hardships experienced,⁵² with the situation being made worse when the inmate is a sole caregiver.⁵³

“because they were sex offenders,” and locals who considered the shooter a hero stalked the wife of one of the victims, spat on her family and threw objects at her car).

43. See Heidi Lee Cain, Comment, *Housing Our Criminals: Finding Housing for the Ex-Offender in the Twenty-First Century*, 33 GOLDEN GATE U. L. REV. 131 (2003); Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539 (2008).

44. See Sharon M. Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in CMTY. LEGAL SERVS., INC. & CTR. FOR LAW & SOC. POLICY, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 13, 14 (2002); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 296 (2009).

45. See 20 U.S.C. § 1091(r)(1) (2006) (rendering ineligible any student who has been convicted of an offense involving the sale or possession of a controlled substance).

46. See LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON THE STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 12 (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

47. Tonisha R. Jones & Travis C. Pratt, *The Prevalence of Sexual Violence in Prison: The State of the Knowledge Base and Implications for Evidence-Based Correctional Policy Making*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 280, 289 (2008).

48. See Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 595 (2007) (noting that inmate violence rate is more than ten times that of the rate in the community at-large).

49. Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC'Y REV. 275, 280, 295–96 (2008); Michael Massoglia, *Incarceration as Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56 (2008); Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115 (2007).

50. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, in PRISONERS ONCE REMOVED: IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 33, 37–46 (Jeremy Travis & Michelle Waul eds., 2003) [hereinafter PRISONERS ONCE REMOVED].

51. *Id.* at 46–48, 54–56.

52. See Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, in PRISONERS ONCE REMOVED, *supra* note 50; Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 113 (1999).

53. See PETERSILIA, *supra* note 31, at 228–29. In some instances, of course, physical removal of a parent can have a beneficial effect. However, research establishes that even criminally active

II. TOWARD A MORE ROBUST UNDERSTANDING

The consequences surveyed above, while long known to social scientists, have to date eluded the attention of criminal justice system policymakers and actors. This Part makes the case for a needed broader, more robust understanding of collateral consequences, one inclusive of those that arise informally beyond formal operation of law.

Lack of sensitivity to the range of negative extralegal consequences of conviction is widespread in the criminal justice system. Courts, for instance, while prone to acknowledge the stigmatizing effect of conviction,⁵⁴ typically fail to lend legal significance to its associated negative impact. The disinterest was on abundant display in the 2003 Supreme Court decision *Smith v. Doe*,⁵⁵ where the Court concluded that Alaska's sex offender registration and community notification law was punitive in neither intent nor effect, allowing it to be imposed retroactively consistent with the Constitution's Ex Post Facto Clause.⁵⁶ According to the *Smith* majority, while public dissemination of conviction information might have "adverse consequences," including "public shame," "humiliation," and "social ostracism," with a "lasting and painful impact," targeted individuals were not subject to *additional* punishment.⁵⁷

From a doctrinal perspective, the *Smith* majority's conclusion that the overt shaming effects of registration and community notification do not qualify as additional punishment is subject to critique.⁵⁸ At the same time, however, the majority's presumption that convictions have informal punitive effect is important, and builds upon recent academic work concerning the "experience of punishment."⁵⁹ As Professor John Bronsteen and his co-authors establish, when considering the proportionality of a given sanction, attention must be paid to the range of negative hedonic consequences that predictably attend conviction,⁶⁰ even when not resulting from formal operation of law.⁶¹

parents can and do provide positive-parenting influence, as well as needed financial support. *Id.*

54. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 872 (1997) (noting the "opprobrium and stigma of a criminal conviction").

55. 538 U.S. 84 (2003).

56. *Id.* at 103–04.

57. *Id.* at 99–101.

58. See LOGAN, *supra* note 23, at 136–41.

59. See John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463 (2010) [hereinafter Bronsteen et al., *Experience of Punishment*]; John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009).

60. Bronsteen et al., *Experience of Punishment*, *supra* note 59, at 1486.

61. Such a fuller legal understanding, it should be noted, does not require adoption of an unduly

Even more significant as a possible objection is the potentially contingent and individualized experiential nature of disabilities, a matter now the subject of lively debate among penal theorists.⁶² While in some instances the psychological, physical, social, and economic hardships of conviction discussed above might be mitigated or avoided altogether as a result of individual circumstances, this reality does not alter the baseline of convict experience. An individual's unusual personal charisma or relative educational attainment, for instance, might lessen the difficulty of securing employment, but the extralegal disability itself, not shared by the non-convict population at large, is worthy of recognition.

A similar point might be made with respect to criminal stigma. It too can have a variable quality, depending on the nature of the underlying offense,⁶³ and perhaps even among certain individuals⁶⁴ and sub-populations.⁶⁵ Yet even accepting this, its derogatory nature can scarcely

expansive view of state agency as punisher. While the consequences discussed here are not expressly prescribed by legal code, they trace to conviction, a quintessential act of government. Nor, from a policy and prudential perspective, does their extralegal quality make them any less real and debilitating to those affected. Of late, the question of "who" imposes punishment has been a central point of contention for a number of contemporary retributive theorists, who maintain that experiences must be intentionally imposed by authorized state agents to qualify as punishment. See David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1650–51, 1664 (2010); Dan Markel et al., *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 619–20 (2011). I take no position on whether extra-legal harms should justify, from a retributivist perspective, a punishment "sentencing adjustment[]" as such. See Markel et al., *supra*, at 619. Indeed, collateral consequences, including those of an informal nature, are as a technical matter non-punitive in character. Just the same, the disavowal of state responsibility reflects a troubling indifference to the ramifications of government action. As the Court unanimously noted in the context of a challenge to Alabama's forced disclosure of NAACP membership lists:

It is not sufficient to answer, as the State does here, that whatever repressive effect compulsory disclosure of names . . . may have . . . follows not from *state* action but from *private* [action]. The crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the production order that private action takes hold.

NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 463 (1958); see also Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 93 (1982) (noting that there need only be a "reasonable probability" that the compelled disclosure of names would subject individuals to "threats, harassment, or reprisals from either Government officials or private parties" (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976))).

62. See Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1765 n.95 (2012) (citing work dating back to the 1990s and recent resurgence of interest in the issue).

63. Convictions for sex offenses, in particular, generate perhaps the most ill will of all. On the reasons thought to account for this, see LOGAN, *supra* note 23, at 91.

64. See, e.g., Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 748 (1998) ("An offender has to care what others think about him; otherwise, shame can get no grip on him. The broader and deeper [an offender's] attachments, the greater will be his shame. If he lacks the requisite attachments . . . he will . . . be 'shameless' . . .") (footnote omitted).

65. See *id.* at 749 (asserting that shaming will have less "retributive bite" if an individual's "attachments run to a criminal subculture, in which case 'shaming' him may perversely become a source of pride").

be questioned.⁶⁶ As Professor Alexandra Natapoff recently observed, “for a person who has been publicly transformed from law-abiding citizen into criminal, a significant psycho-social line has been crossed.”⁶⁷

Likewise, the fact that not all convicts will experience an informal disability, and that its onerousness might be individualized, should not diminish the need to acknowledge such effects. Indeed, purely as a matter of statistical likelihood, the empirical commonality of their occurrence affords principled basis for their consideration.⁶⁸ More significant, notwithstanding the indisputably wholesale nature of the modern adjudicatory process, defendants enjoy a retail-level right to individualized justice,⁶⁹ one sensitized to such variable effects.

Despite the foregoing, the justice system has been reluctant to attach importance to post-conviction disabilities. Courts have only occasionally taken into account harm suffered by third parties when assessing the propriety of punishments, almost always in the federal white-collar context,⁷⁰ and as a rule ignore the reputational harms suffered by those ensnared in the criminal process.⁷¹ And, until *Padilla*, courts typically refused to require pre-plea advisement of formal collateral consequences.⁷²

66. For evidence of this, one need only consider recent efforts by jurisdictions to subject other offender groups to registration and notification, and the proliferation of for-profit Internet websites and tabloids that publish “mug shots” of individuals merely arrested for offenses, often of a very minor nature. See, e.g., Holly Zachariah, *Convicted Dealers Featured on Web*, THE COLUMBUS DISPATCH (Nov. 11, 2012, 6:28 AM), <http://www.dispatch.com/content/stories/local/2012/11/11/convicted-dealers-featured-on-web.html> (convicted drug dealers); BUSTED MUGSHOTS, <http://www.bustedmugshots.com> (last visited Aug. 23, 2013) (arrests for broad array of non-serious offenses, such as trespassing, public intoxication and loitering). Profits also flow to entities charging fees to have the public mug shots removed. See Susanna Kim, *Businesses Charge Hundreds To Remove Mug Shots Online*, ABCNEWS.COM (Apr. 23, 2012), <http://abcnews.go.com/Business/businesses-make-profit-copying-mug-shots-online-critics/story?id=16157378>.

67. Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1327 (2012).

68. See *supra* notes 18–54 and accompanying text.

69. See, e.g., *In re Dir. of Assigned Counsel Plan of N.Y.C.*, 603 N.Y.S.2d 676, 686 (N.Y. Sup. Ct. 1993) (noting that the “right to individualized justice . . . is a hallmark of our constitutional and democratic system”).

70. See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1390–91 (2002). This solicitude, Professor Brown concluded from a review of judges’ sentencing explanations, is due in significant part to “defendants and third parties in those settings more often prompt[ing] empathy.” *Id.* at 1421.

71. See, e.g., *Paul v. Davis*, 424 U.S. 693 (1976). For a critique of *Paul v. Davis*, with particular attention paid to its precedential use by courts concluding that publicized conviction information does not trigger procedural due process protection, see Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167 (1999).

72. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1814–15 (2012). As Professor Chin observes, however,

Padilla, along with the Court's more recent opinions in *Missouri v. Frye*⁷³ and *Lafler v. Cooper*,⁷⁴ also evincing critical concern over the workings of the nation's plea-driven criminal justice system,⁷⁵ signal a welcome reality-based understanding of the system's extralegal quality.⁷⁶ *Padilla* in particular might also signal a desire on the part of the Court to do away with the long-criticized doctrinal divide between direct and collateral consequences more generally,⁷⁷ requiring courts, as Professor Bibas recently urged, to "focus[] on the importance of particular consequences rather than their criminal or civil labels."⁷⁸ Already, the influence of *Padilla* is showing tangible effect in decisions that extend its logic beyond the context of deportation,⁷⁹ highlighting the need to conceive of the challenge at hand in terms of "mass conviction, not (just) mass incarceration."⁸⁰

III. OPERATIONALIZING CHANGE

Presuming that informal collateral consequences warrant attention, the practical question arises of how they can be made more salient in the day-to-day criminal justice process. This Part outlines the ways in which this can occur, focusing in particular on the institutional roles of the chief actors in the nation's plea-dominated system.

Without question, responsibility for highlighting the informal

although unmentioned in *Padilla* itself, concern over collateral consequences actually did figure in prior decisions of the Court, shaping constitutional criminal procedure in areas including the right to counsel and jury trial. *Id.* at 1822–25.

73. ___ U.S. ___, 132 S. Ct. 1399 (2012) (holding that defense counsel's failure to inform a client of a favorable plea offer constitutes ineffective assistance of counsel).

74. ___ U.S. ___, 132 S. Ct. 1376 (2012) (holding that defense counsel's mistaken legal understanding, inducing a client to reject a plea offer, constitutes ineffective assistance of counsel).

75. *Id.* at 1388 (noting that over ninety percent of convictions in state and federal courts result from guilty pleas).

76. See Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1133 (2013) (noting that the three cases cement a "right to *extralegal* counsel [that] applies exclusively to the comparatively unstructured domains of the plea-bargain and guilty plea" (emphasis added)).

77. *Padilla v. Kentucky*, 559 U.S. 356, 364–65 (2010). On the persistent confusion characterizing the issue of direct versus collateral consequences, with only the former kind of consequence requiring advisement by counsel, see Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124–25 (2009).

78. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1147 (2011); see also *id.* ("The Sixth Amendment test should be not whether a consequence is labeled civil or collateral, but whether it is severe enough and certain enough to be a significant factor in criminal defendants' bargaining calculus.").

79. See Margaret Colgate Love, *Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 105–11 (2011).

80. Chin, *supra* note 72, at 1803.

collateral consequences of conviction will fall chiefly upon defense counsel.⁸¹ Any suggestion, however, of adding more duties to defense counsel—especially already overburdened and underpaid public defenders—will likely prompt immediate objection. Indeed, *Padilla*, while lauded by the defense bar in principle, has triggered concern for the added counseling burdens it imposed on defenders.⁸² Deportation, at issue in *Padilla*, affords a foremost example, requiring an understanding of a highly specialized and complex body of statutes and regulations.⁸³ The consequences at issue here, however, do not require sophisticated legal expertise. Nor will apprising clients of such consequences impose much in the way of added time commitment, a particular concern to already overburdened public defenders.⁸⁴ Counsel will simply be obliged to highlight to clients the adverse economic, social, and personal consequences possibly resulting from conviction, in keeping with increasingly accepted holistic lawyering norms.⁸⁵

Other institutional actors, however, can and should also play a role. As for prosecutors, acknowledgment of the full consequences of conviction aligns with their core duty to “seek justice” in individual cases.⁸⁶ At the same time, consistent with the teachings of procedural justice,⁸⁷ appearing to do justice by being open and transparent affords broader public legitimacy benefit. As Robert Johnson, former head of

81. See *Libretti v. United States*, 516 U.S. 29, 50 (1995) (“[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement . . .”).

82. See, e.g., Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1397–1413 (2011); Shanthi Prema Raghu, *Supporting the Criminal Defense Bar's Compliance with Padilla: It Begins with Conversations*, 9 SEATTLE J. SOC. JUST. 915, 922, 928 (2011).

83. See *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010); see also *id.* at 378 (Alito, J., concurring) (noting that it is often “not an easy task” to determine whether conviction for a particular offense will trigger deportation).

84. See Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885 (2010) (discussing state and national data regarding enormous public defender caseloads and litigation mounted to help ameliorate the situation).

85. See, e.g., Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479 (2005); see also Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1502 (2003) (urging that defense counsel “maintain a working knowledge of the potential sentencing consequences of any negotiated settlement”).

86. See MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2010); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2(c) (1993); see also Catherine A. Christian, *Collateral Consequences: Role of the Prosecutor*, 54 HOW. L.J. 749, 750 (2011) (“[A] just and fair prosecutor will consider the collateral consequences that may apply . . . and take them into account when considering a disposition.”).

87. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002).

the National District Attorneys Association has stated, when prosecutors fail to disclose the full consequences of a brokered conviction they risk “suffer[ing] the disrespect and los[ing] the confidence of the very society we seek to protect.”⁸⁸

With informal collateral consequences put on the table, so to speak, the parties will be better positioned to efficiently negotiate outcomes based on what *Padilla* called “informed consideration” of the nature and scope of the consequences of conviction.⁸⁹ It can also be hoped that with fuller awareness of the actual consequences of conviction, the balance of negotiating power will be affected,⁹⁰ resulting in increased use of diversion and deferred prosecution arrangements, avoiding the negative effects of conviction altogether.⁹¹

Ultimately, greater understanding of the range of consequences associated with conviction could likewise mitigate what has been called “plea bargaining’s innocence problem”: the possibility of legally innocent defendants pleading guilty to a lesser offense in order to avoid being subjected to much harsher punishment as a result of trial.⁹² Such susceptibility is perhaps especially at play with individuals charged with minor offenses, who possibly plead guilty simply so that they can be released from detention.⁹³

Finally, judges can and should play a role. Already, in the wake of *Padilla*, consideration is being given to expanding Rule 11 plea colloquy expectations of judges.⁹⁴ While not a substitute for particularized advice

88. Robert M.A. Johnson, *Collateral Consequences*, CRIM. JUST., Fall 2001, at 32, 33. Cf. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (2000) (arguing that aligning criminal liability with community’s shared sense of fairness and proportionality affords consequentialist benefits).

89. See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

90. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–77 (2004) (discussing effect of information asymmetries on bargaining positions of parties); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1240–41 (2008).

91. See Margaret Colgate Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences*, 22 FED. SENT’G REP. 6 (2009).

92. See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013). In an effort to redress scholarly uncertainty over the extent of the problem’s occurrence, the authors report the results of a clinical study in which over half of the study’s innocent participants were willing to falsely admit guilt in return for a reduced punishment. *Id.* at 36–37.

93. See *id.* at 38 (noting that the study’s results in this regard conform with prior work raising concern over factually innocent low-level offenders pleading guilty).

94. See COMMUNICATION FROM THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES TRANSMITTING AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2072, H.R. DOC. NO. 113-25, at 3–4 (2013) (amendment to Rule 11 adopted by the Supreme Court requiring notice of possible

by counsel,⁹⁵ the sentencing court can reinforce to a pleading defendant the informal collateral consequences of conviction.⁹⁶ Judicial advisement will have particular benefit, again, for the large number of defendants charged with minor offenses, who if indigent lack access to publicly provided counsel at the plea negotiation stage as a result of constitutional doctrine⁹⁷ or procedural rule.⁹⁸ Indeed, public acknowledgement of such consequences by judges in open court will have the salutary effect of highlighting the broader human consequences of the nation's penchant for criminal convictions.⁹⁹

While the focus here has been on the duties of defense counsel, prosecutors, and judges, it should be noted that these actors need not go it alone. Indeed, the path can be paved by bar associations and other entities that can provide instruction and training on informal collateral consequences, much as they have done already in the wake of *Padilla* with respect to the immigration consequences of conviction.¹⁰⁰

CONCLUSION

When it comes to criminal justice, we live in promising times. At long last, draconian sentencing policies are being reconsidered and the collateral consequences of conviction, triggered by formal operation of statutes and regulations, are attracting the critical attention of courts and

immigration consequences of conviction).

95. See Danielle M. Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 949–60 (2012) (discussing why a court's plea colloquy cannot serve as a substitute for adequate advisory assistance of defense counsel).

96. This reinforcement, it should be noted, is particularly important because, unlike formal collateral consequences, informal collateral consequences are not susceptible of back-end administrative or judicial relief. See Love, *supra* note 79, at 121–26 (describing current and possibly future avenues of relief from formal collateral consequences).

97. See *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (reaffirming the “actual imprisonment” standard prescribed in *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

98. See, e.g., Justin Marceau & Nathan Rudolph, *The Colorado Counsel Conundrum: Plea Bargaining, Misdemeanors, and the Right to Counsel*, 89 DENV. U. L. REV. 327 (2012) (describing Colorado rules and practice allowing for “pre-counsel” pleas in misdemeanor cases).

99. This Essay, it should be emphasized, has focused solely on individual defendant-level effects. Research, however, has made clear that mass convictions and incarceration have major negative social, political, and economic effects on poor and minority communities as a whole. See, e.g., Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004). For an argument that such impact should be considered by sentencing judges in particular cases, see Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423 (2013).

100. See, e.g., N.Y.C. BAR ASS'N, *PADILLA V. KENTUCKY: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER* 4 (2011), available at <http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOREportFINAL6.15.11.pdf>.

policymakers. While surely a positive development, this shift in consciousness has been lacking in a fundamentally important respect: it has ignored the range of informal collateral consequences also attending conviction yet not arising by formal operation of law, which can have equal if not greater negative effect on individuals.

This Essay has sought to redress this deficit and make the case that informal, and not just formal, collateral consequences should figure in the nation's post-*Padilla* effort to achieve a fairer and more transparent criminal justice system. While without question *Padilla* marks a critically important development in the Supreme Court's willingness to regulate the nation's plea-dominated system,¹⁰¹ it is unlikely that the change urged here will come about as a result of constitutional mandate. Rather, the change will of necessity result from the work of front-line criminal justice actors determined to ensure that individuals facing criminal conviction are sensitized to their prospective membership in what has been aptly called "a stigmatized caste, condemned to a lifetime of second-class citizenship."¹⁰²

101. See, e.g., Bibas, *supra* note 78, at 1118 (noting that *Padilla* "marks a watershed in the Court's approach to regulating plea bargains").

102. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31 (2012).