

A Reentry-Centered Vision of Criminal Justice



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In recent years, record numbers of individuals have been released from U.S. correctional facilities and have reentered their communities. At present, approximately 650,000 individuals are released annually from U.S. federal and state prisons,¹ while an estimated additional 7 million are released from its jails.² In addition, the number of individuals with criminal records—whether or not they were incarcerated—continues to climb.³ At present, approximately 20 percent of adults in the United States have criminal records.⁴

The overwhelming majority of these individuals either have confronted or will confront, at least to some extent, the collateral consequences that have attached or will attach to their convictions. As has been recounted elsewhere, collateral consequences are additional penalties imposed by various laws and regulations, the most persistent of which include exclusion from governmental-assisted housing, ineligibility for employment, ineligibility for public benefits and other forms of governmental assistance, and voter disenfranchisement.⁵ These legal barriers, both individually and collectively, impede the reentry process.⁶

As collateral consequences have garnered increased attention over the past several years, so have the broader family- and community-based effects of *both* criminal convictions and incarceration. For example, scholars, advocacy groups, and policy organizations have begun to explain and analyze the impact of incarceration on individuals *other than* the persons serving time—such as their families—as well as on the communities from which these individuals come and to which they return.⁷

Largely as a result of the dramatically increased numbers of individuals exiting our correctional facilities annually, reentry has assumed a prominent role in criminal justice debates and reform efforts.⁸ Organizations and government agencies at the federal, state, and local levels have devoted substantial resources to reentry efforts and, relatedly, have studied the broader effects of convictions and incarceration.

However, despite the substantial resources and dedicated efforts directed toward assisting individuals to navigate the reentry process, reentry practices remain

narrow and stratified.⁹ As a result, the overall needs of individuals with criminal records remain largely unmet.

With the goal of encouraging criminal justice stakeholders, as a whole, to embrace collateral consequences and reentry as integral components of the criminal justice system, the essay aims to set forth a broader, more robust vision of reentry.¹⁰ Specifically, it envisions a reentry-centered criminal justice system, a vision that restructures the traditional roles of all actors in the criminal justice system to focus heavily on the reentry-related needs of the offender, his or her family, and his or her community.

Part I details the shortcomings of current reentry practice. Part II sets forth a reentry-centered vision of criminal justice that recasts the roles of defense attorneys, prosecutors, and judges. Part III sets out a couple of ways in which the reentry-centered model differs from models that, at first blush, appear to be similar and then explains that broader reforms are necessary to fully realize the reentry-centered vision.

I. Shortcomings of Current Reentry Practice

The practice of reentry has blossomed over the past several years. Legal services organizations, governmental organizations and agencies, and numerous faith-based and other community-based organizations now provide extensive reentry services. Although most of these services are geared toward the reentering individual, some extend to his or her family. The vast majority of these services are introduced after the individual has been released from incarceration.¹¹ As a result, these services are introduced when the individual's reentry needs are often the most urgent.

However, for the most part, the legal actors who figure prominently throughout the criminal process—defense counsel, prosecutors, and judges—are largely absent from the reentry process. As a result, the actors who, at least theoretically, possess detailed information about the individual who will ultimately reenter—such as the circumstances that led to the individual's interaction with the criminal justice system, his or her family background and work history, and his or her prior criminal record—are not among the network of individuals and organizations¹² dedicating resources to reentry.

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Criminal defense counsel could potentially become a vital reentry-services provider.¹³ Some public defender offices and other defenders across the United States have incorporated collateral consequences and/or reentry components into their practices. For instance, a few public defender offices and defender organizations have collected and published the various collateral consequences that attach to convictions in their respective jurisdictions.¹⁴ Some offices incorporate collateral consequences at the outset of representation by asking questions during the initial client interview that relate directly to these consequences¹⁵ and subsequently tailor the representation to account for those consequences. Some offices utilize these consequences at the plea-bargaining stage, by informing prosecutors of these consequences and negotiating plea agreements that appreciate the full range of punishment that will ultimately be imposed on the client.¹⁶ Some offices represent clients in civil matters that arise out of, or relate directly to, the criminal case.¹⁷ Lastly, some public defender offices provide reentry-related services, such as expunging criminal records and accessing various services for their clients.¹⁸

However, these various efforts remain the exception, as most defender organizations do not incorporate these collateral consequences and reentry components. Recognizing this representational gap, some organizations, most prominently the American Bar Association, urge defense counsel to incorporate collateral consequences into client representation, most specifically by informing clients about the existence and scope of such consequences.¹⁹

However, the various recommendations that place upon defense counsel the responsibility to inform clients about the collateral consequences and to work through reentry issues with their clients are shortsighted. The main drawback to a defense-focused approach is that defense attorneys cannot handle these complex issues alone. Perhaps most critically, defense attorneys simply do not have the resources or expertise to handle these vast and multifaceted issues. The legal aspects of collateral consequences and reentry involve an intricate mix of criminal and civil law.²⁰ The nonlegal aspects of these components involve various services needs that include the client and, often, his or her family. These needs, to be properly addressed, often require expertise that defense attorneys do not possess. As a result, defense counsel, as part of her duties, must cultivate a network of organizations that could best serve, individually or collectively, the client's multidimensional needs.

Moreover, informing defendants about collateral consequences is simply not enough. Although this is a necessary step toward incorporating collateral consequences into practice, it is only a first step. An intermediate step involves the attorney counseling the client in light of these consequences, which could include incorporating these consequences into discussions with the client regarding the feasibility of accepting a plea bar-

gain. The ultimate step involves working on ways to provide meaningful relief from such consequences. Again, defense counsel simply cannot address these issues alone. Rather, meaningful relief can come about only if prosecutors and judges also incorporate these consequences into their practices.²¹

However, prosecutors and judges, as a whole, have not engaged collateral consequences issues. For instance, prosecutors, the most powerful entity in the criminal justice system,²² generally do not consider collateral consequences when making charging decisions or offering plea bargains.²³ They also do not inform defendants of the various collateral consequences that will attach to their convictions. Likewise, judges as a whole do not factor collateral consequences into the punishment calculus.

These critical gaps remain at the post-punishment phase, when the defendant actually returns to the community. Although correctional systems have made significant strides in recent years by providing some reentry services to individuals, these services often begin at the tail end of the individual's sentence, rather than at the outset of incarceration.²⁴ Moreover, although legal services organizations and various community organizations now provide extensive reentry services to individuals as they reenter communities, such services are often fragmented. For instance, civil legal services providers often do not coordinate their services with other service providers, such as public defender offices.²⁵ Moreover, because back-end reentry services providers often do not coordinate with the front-end criminal justice actors—public defenders, prosecutors, and judges—their services often employ a reactive and piecemeal approach to reentry, rather than one that is proactive and comprehensive.

As a result, current practices reflect a stratified approach to reentry in two ways: First, some criminal justice agencies work on reentry-related issues, whereas others maintain their traditional roles. As a result, the agencies engaged in reentry work shoulder the burdens of working on these issues alone. Second, those same agencies are generally doing reentry work in isolation, rather than coordinating efforts with other organizations to provide holistic services. As a result, reentry practices, on the whole, are fragmented and reactive, rather than interlinked and proactive.

II. The Reentry-Centered Vision

Given the exploding numbers of individuals with criminal records in the United States, as well as the proliferation of laws and policies that extend the punishment past the formal criminal sentence, productive and meaningful reentry is critical to the well-being of individuals with criminal records, their families, and their communities. However, the criminal justice system has yet to fully appreciate the magnitude of reentry, as it continues to relegate the reentry process to the very end of the criminal justice continuum. It perceives reentry as a step—the last step—along this continuum, rather than as a vital component that permeates

the entire continuum. As such, the front-end players in the criminal justice system—defense counsel, prosecutors, and judges—often play minimal roles in the reentry process, to the extent they are involved at all.

However, reentry is arguably the most vital component of the criminal justice system because it is the end result of the criminal process. In general, the criminal justice system is *individual-focused*, as it views the defendant in relative isolation from his or her family and community. The criminal process tends not to consider, at least in any significant way, the individual's family and/or community interests. However, the reentry process, more than any other stage along the criminal process, is the point at which the criminal justice system truly converges with the community. As a result, the reentry process, at its core, is *community-rooted*. It is the point at which the individual, after serving his sentence, interacts once again with his family, neighbors, and the larger community. Thus, unlike the other components of the criminal justice system, *everyone* has a personal and immediate stake, and therefore a concern, in reentry. Accordingly, the reentry process should be one of the main focal points of the criminal process.

The reentry-centered vision of criminal justice places reentry at the criminal justice system's core. Specifically, it envisions all of the actors in the criminal justice system focusing their efforts on the defendant's eventual return to his or her community. It does not in any way diminish the punishment that befalls individuals convicted of crimes; rather, it brings into focus the *range of punishments* that will actually be imposed upon these individuals and requires the actors not only to recognize the various punishments but also to work toward providing these individuals with the resources necessary to work through the obstacles brought about by these punishments, as well as the other obstacles that confront individuals with criminal records. It is an individual-, family-, and community-based approach to criminal justice. The approach begins with the criminal defense attorney but carries through to the prosecutor and judge. It recognizes all of the other actors necessary to make reentry successful—including civil legal services attorneys, probation and parole officers, social workers, and various services providers—but realizes that criminal defense attorneys, prosecutors, and judges can begin working on these issues at the outset of an individual's interaction with the criminal justice system and that these three actors wield particular influence over the individual and the process.

A. The Criminal Defense Attorney

The reentry-centered vision of criminal justice begins with the criminal defense attorney. The criminal defense attorney is the actor in the criminal justice system who develops the closest working relationship with the client. She is duty-bound to represent fully the client's interests and to work with the client to achieve his or her goals.²⁶

However, the traditional defense role does not extend to working through—or in the face of—the issues pre-

sented by collateral consequences; nor does the role extend to reentry-related services.²⁷ Instead, it is limited to the underlying criminal case and does not encompass the various "collateral" issues that have and/or potentially will affect the client.²⁸

A reentry-centered vision would require defense counsel to, at a minimum, analyze the potential collateral consequences that might attach to any type of criminal conviction (whether the client is convicted of the charged crime or pleads guilty to some other offense); advise the client about these consequences; counsel the client about the important decisions to be made—such as whether to enter a guilty plea—in light of these consequences; and coordinate a reentry plan for the client that considers the legal obstacles related to these consequences, as well as the client's nonlegal obstacles.

The reentry plan is perhaps the most critical of these duties, because it would involve a network of organizations and individuals coordinating their efforts to provide holistic services to the client. As noted above, defense counsel does not have the resources or expertise to handle the myriad legal and nonlegal reentry issues. Also, reentry services tend to be fragmented, with individuals and organizations providing assistance on the issues that fall within their respective parameters but leaving other issues to fall through the cracks.

Given the complex and far-reaching reentry issues that will potentially arise, the client needs a point person to coordinate and oversee the services. The reentry-centered model envisions defense counsel having this role. Thus, the model would require defense counsel to coordinate a holistic reentry plan with a network of organizations. Together, these service providers would attempt to address the myriad issues that the client will confront.

Obviously, this expanded defense role would call for some additional resources. Public defenders, in particular, are generally under-resourced, and their limited resources are stretched thin. However, the reentry-centered vision would not require drastic resource reallocation. Rather, counsel's primary role would simply be to coordinate the various reentry services.²⁹ The major obstacle, at the outset, would be developing the network of service providers. However, both the development and the implementation of these services could be the primary responsibility of other personnel within these offices, such as social workers or recent law school graduates working in these offices on fellowships. Also, local bar associations could assume some responsibility for developing these networks.

B. The Prosecutor

The prosecutor is the most prominent and powerful actor in the criminal justice system. Through both her discretionary power to decide whether to charge the defendant with a crime and her authority to determine the actual charge(s) the defendant will face, the prosecutor, in the vast majority of cases, charts the course through the criminal process that the defendant will travel.³⁰ This course

includes the collateral consequences that will one day confront the defendant, as such consequences attach to the ultimate conviction. Thus, the consequences can be more or less severe, depending on the conviction. However, as with defense counsel, the prosecutor at present has no obligation to incorporate collateral consequences and the broader reentry issues into her practice.

A reentry-centered vision of the criminal justice system would recast the prosecution role. Specifically, collateral consequences would figure prominently in the prosecutor's critical decisions. This would start with the charging decision. Just as the prosecutor, when exercising her charging power, considers all the circumstances surrounding the crime—including the type of offense, the harm to the victim, the defendant's prior record, the strength of the evidence, and the community's interest in prosecution—so should she also consider the collateral consequences that would attach to the defendant should he or she be convicted of the charge. This would allow the prosecution to recognize all of the ramifications of a conviction and would hopefully lead to more informed charging decisions.

For instance, a prosecutor choosing between charging Crime A (a low-level felony) or Crime B (a high-level misdemeanor) should consider the collateral consequences that would attach to a conviction of each charge. Along with all the other factors the prosecutor weighs when making charging decisions, she should then balance the severity of each charge against the severity of the respective collateral consequences. So, for example, a prosecutor in this hypothetical may choose to charge the defendant with Crime B, which, although a lesser crime, carries with it a host of collateral consequences that will affect the defendant's ability to secure public housing and various types of employment. Thus, a prosecutor in this instance would recognize and assess the *additional* punishments that would befall the defendant if convicted and make the charging decision accordingly.

Once the prosecutor has charged the defendant, she should provide notice to defense counsel and the court of the collateral consequences that could potentially attach to the defendant if he or she were convicted. This would alert these critical actors to the full range of punishments facing the defendant. In turn, this would allow these actors to take the steps necessary to ensure that the defendant is fully informed of all ramifications and, at least for defense counsel, to strategize accordingly.

Perhaps most importantly, such notice would lead to better-informed, and therefore more meaningful, plea discussions. This is particularly crucial because the overwhelming majority of cases are resolved by plea.³¹ Indeed, the system simply cannot function without this reliance on plea bargains.³² Collateral consequences should be central to plea negotiations. Both prosecutors and defense attorneys should consider the various consequences that would attach to any type of conviction, which would help all parties (including, most importantly, the

defendant) assess the impact of the plea on reentry; a reentry-centered approach to plea bargaining would thus lead to more transparency for all the front-end actors.

C. The Judge

As with defense counsel and prosecutors, judges should also focus on collateral consequences and reentry as part of their decision-making process. In this context, the most critical decisions relate to sentencing. Thus, as part of their sentencing calculus, judges should consider the collateral consequences that will attach to the defendant's conviction.

As a general matter, judges have no legal obligation to even inform defendants of collateral consequences, much less consider such consequences when imposing sentences.³³ However, a reentry-centered approach would require judges to incorporate these consequences into their practices. Indeed, the American Bar Association urges judges not only to consider these consequences when imposing sentences³⁴ but also to evaluate these consequences in each instance and, if they determine that any or some consequences are too harsh or not necessary in given situations, to waive or modify those particular consequences.³⁵

III. Implementing the Vision

Several steps would need to be taken to implement the reentry-centered vision described above. The first step is explaining how this vision differs from a couple of models that arguably implement some of its aspects. The second step is recognizing that this vision cannot be fully realized without legislative reform.

Reentry courts exist in a handful of jurisdictions across the United States and oversee several of the issues noted above, particularly the coordination of various individual- and family-related services.³⁶ However, reentry courts come into focus only at the very back end of the criminal justice system, once the defendant has completed his or her sentence and has actually begun the reentry process. The reentry-centered vision set out above advocates a proactive reentry approach that begins the moment the defendant enters the criminal justice system and requires the institutional front-end criminal justice actors to consider how their decisions and strategies will impact the defendant's eventual reentry.

There is also a potential argument that the reentry-centered vision is similar to a community-court model. One major critique of the community-court model is that it sacrifices, to some extent, the adversarial nature of the criminal justice system and views the defense attorney more as a collaborator than as the traditionally zealous advocate for the accused.³⁷ However, the reentry-centered model does not, in any way, disrupt the adversarial nature of the criminal process. Rather, it actually enhances the attorney-client relationship because it requires the attorney to fully work through the true effects of a criminal conviction and to counsel the client accordingly. In doing so, the reentry-centered model calls for defense counsel to

advocate *more* for the client, as it demands more information from the prosecution and requires counsel to use that information through all phases of the representation. In essence, it demands more of the prosecution and provides more information to defense counsel. Therefore, it enhances counsel's ability to advocate for her client.

At least one substantial step must be taken to fully realize a robust reentry-centered model of criminal justice: legislative reform is necessary to give judges the discretion necessary to waive collateral consequences in instances they deem appropriate.³⁸ Currently, a range of collateral consequences attaches to every type of conviction, whether or not the consequences actually relate to the underlying conduct³⁹ and irrespective of the defendant's individualized circumstances. Moreover, certain types of convictions—specifically those related to drug activity—carry with them a range of unique and particularized consequences.⁴⁰ Accordingly, judges need to have the discretion to waive consequences in instances they deem appropriate, for instance, when they believe that the defendant's circumstances do not require the full range of these consequences or that the defendant would be unduly burdened by a particular consequence.⁴¹ Without this discretion, judges cannot make the individual-based determinations that are necessary for effective reentry practice.

IV. Conclusion

The time has come to shift the traditional defendant/victim criminal justice paradigm to one that recognizes and appreciates the defendant's eventual return to the community. The reentry-centered paradigm seeks to enhance the prospect of individuals, preserve families, and promote community safety.

Overall, defense counsel, prosecutors, and judges should focus on reentry at the outset of the criminal process. The criminal justice system should adopt a forward-looking approach to punishment, one that considers (and lays out) the effects of the punishment on the individual, his or her family, and his or her community. Such an approach would also incorporate ways for the defendant to maintain and/or enhance his or her family ties, which are critical to reentry.

A reentry-centered approach would require these legal actors to be cognizant, at the outset, of the various legal hurdles that would actually or potentially confront the defendant upon reentry and to take the steps specific to their roles that would help the defendant appreciate and work through those hurdles. Thus, prosecutors would be required to consider these hurdles when making charging decisions, as well as to inform defense counsel of their existence. Defense counsel would be required to analyze these hurdles and to both advise and counsel the client accordingly. In addition, defense counsel would be required to coordinate a reentry plan for the client that would, *inter alia*, account for these hurdles. Lastly, judges would be required to consider these legal hurdles when

imposing sentences and to waive or modify consequences if, in particular instances, they would be too harsh or unnecessary.

Notes

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¹ See U.S. Dep't of Justice, Office of Justice Programs, Reentry, available at <http://www.reentry.gov/> (last visited Sept. 26, 2007).

² See Theodore M. Hammelt et al., *The Burden of Infectious Disease among Inmates of and Releases from U.S. Correctional Facilities*, 92 AM. J. PUB. HEALTH 1789 (2002) (estimating the number of individuals released from jail based on 1993 Bureau of Justice Statistics).

³ As well, the number of individuals incarcerated continues to climb. It is estimated that the five-year period from 2006 to 2011 will see an additional 192,000 inmates in U.S. state and federal prisons. PEW CHARITABLE TRUSTS, PUBLIC SAFETY, PUBLIC SPENDING: FORECASTING AMERICA'S PRISON POPULATION 2007-2011, at 9 (2007), available at <http://www.pewpublicsafety.org/pdfs/PCT%20Public%20Safety%20Public%20Spending.pdf>.

⁴ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT 29-30 (rev. ed. 2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf> (describing the FBI Master Name Index of criminal records, with 38.5 million names, and comparable records of states, which held 59 million names in 1999). There are approximately 16 million citizens serving time for a felony or with a felony record. Christopher Uggen et al., *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 281 (2006).

⁵ For an overall description of these consequences, see Nora V. Demleitner, "Collateral Damage": No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1034-45 (2002); Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1073-78 (2004).

⁶ See, e.g., Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 273 (2004) (explaining that the stigmas attached to collateral consequences further separate individuals with criminal records "from law-abiding members of society"); Robert M.A. Johnson, *Relief from the Web of Invisible Punishment*, CRIM. JUST., Spr. 2007, at 6 ("Statutorily imposed consequences upon conviction, together with increased visibility of conviction, are increasingly recognized as significant obstacles for convicted persons' efforts to reenter society").

⁷ For discussions of how incarceration impacts families, see Donald Braman & Jennifer Wood, *From One Generation to the Next: How Criminal Sanctions Are Reshaping Family Life in Urban America*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 157 (Jeremy Travis & Michelle Waul eds., 2003); Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORD. URB. L.J. 1671, 1673-78 (2003). For discussions of how incarceration impacts communities, see generally TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African-American Communities*, 56 STAN. L. REV. 1271 (2004).

⁸ See Thompson, *supra* note 6, at 257.

- ⁹ See 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, 669 (2006) (describing how most reentry services do not incorporate ways to work through the collateral consequences that the individual with the criminal record is often facing).
- ¹⁰ In this context, reentry involves the legal consequences that attach to convictions, as well as the myriad nonlegal obstacles that confront individuals during the reentry process. The latter could include, among other obstacles, access to various social services, family reunification issues, and non-legal barriers to obtaining employment (such as the general reluctance of employers to hire individuals with criminal records).
- ¹¹ See, e.g., Melissa Rothstein, *Reaching through the Prison Walls: Social Work in an Appellate Defender Office*, CHAMPION, Apr. 2006, at 31 (noting that service providers usually do not begin working with individuals until after they have been released or until they are close to their release date).
- ¹² There are institutional actors in the criminal justice system—such as probation and parole officers—who are designated, in part, to provide reentry services. Often, however, the front-end legal actors in the criminal justice system do not interact meaningfully with these other actors.
- ¹³ For an argument that criminal defense attorneys should incorporate collateral consequences into their practices, see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 713-18 (2002). For an argument that defense services should extend to both collateral consequences and reentry, see generally Pinard, *supra* note 5.
- ¹⁴ See, e.g., THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS AND OTHER ADVOCATES FOR PERSONS WITH CRIMINAL RECORDS (2004), available at http://www.nlada.org/DMS/Documents/1100886992.2/Consequences%20of%20Criminal%20Proceedings_Oct04.pdf; RE-ENTRY PROGRAM, PUB. DEFENDER SERV. FOR THE DISTRICT OF COLUMBIA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS (2004), available at <http://www.pdsdc.org/communitydefender/Collateral%20Consequences%20to%20Criminal%20Convictions%20in%20DC.pdf>; WASH. DEFENDER ASS'N, BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS IN WASHINGTON STATE NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS (rev. ed. 2005), available at <http://www.reentry.net/library.cfm?fa=download&resourceID=91426&appView=folder&folderID=87247&print>.
- ¹⁵ See McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 498 (2005) (explaining how intake personnel at defender organizations can screen for collateral consequences issues).
- ¹⁶ See *id.* at 495-96 (providing examples of some ways in which attorneys from the Bronx Defenders have incorporated collateral consequences into plea bargaining discussions).
- ¹⁷ For instance, the Neighborhood Defender Service of Harlem "represents clients in three principal areas related to their criminal cases: police brutality and misconduct; housing and eviction matters; and family court child protective proceedings." Neighborhood Defender Service of Harlem, Mission and Organization, available at <http://www.ndsny.org/mis-sion.htm> (last visited Sept. 26, 2007).
- ¹⁸ For instance, the Public Defender Service of the District of Columbia has a Community Defender Program, which, in part, "responds to the legal and social service needs of those who are returning home from prison, assisting them in making a successful transition back into the community." Public Defender Service of the District of Columbia, Community Defender Program, at <http://www.pdsdc.org/CommunityDefender/index.asp>. Also, at least one indigent appellate office, the Office of the Appellate Defender in New York, provides reentry-related services to its clients. A description of this program is available at the Office of the Appellate Defender, Social Work/Re-entry Program, available at http://www.appel-latedefender.org/social_work.html.
- ¹⁹ A.B.A. CRIM. JUST. SEC. STDS., PLEAS OF GUILTY, Std. 14-3.2(f) (1999) ("To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of . . . any plea, as to the possible collateral consequences that might ensue . . . from the plea.").
- ²⁰ See Demleitner, *supra* note 5, at 1032 (noting that collateral consequences "are legally classified as civil rather than criminal sanctions"). While these sanctions are technically civil, they are tied directly to criminal convictions.
- ²¹ This reentry-centered vision would require that defense counsel, prosecutors, and judges incorporate the entire range of legally imposed collateral consequences that would potentially impact the defendant. These consequences are rooted in federal, state, and local law. Examples of federal-based collateral consequences are the federal laws that prohibit individuals convicted of certain drug offenses from receiving federal welfare benefits or financial aid. See 21 U.S.C. § 862a (2000) (disqualifications related to federal welfare benefits); 20 U.S.C. § 1091(r)(1) (2006) (rendering students convicted of "any federal or state law involving the possession or sale of a controlled substance" while they are receiving educational-related federal grants, loans, or work assistance ineligible to receive said assistance). Examples of state-based collateral consequences are the voting restrictions that are placed upon individuals because of a felony conviction and the inability of individuals to secure employment-related licenses because of a conviction. See SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2007) (setting out the disenfranchisement categories in all fifty states), available at http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf; LEGAL ACTION CENTER, AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 10-11 (2004) (providing overview of state-imposed employment restrictions). Perhaps the most dramatic example of a collateral consequence rooted in local law pertains to housing. Although federal law imposes some disqualifications on individuals convicted of certain offenses, local housing authorities have the authority to impose additional restrictions on these individuals based on criminal records.
- ²² For an overall description and detailed examination of prosecutorial power, see ANGELA JORDAN DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007).
- ²³ Accordingly, prosecutors generally know very little, if anything, about collateral consequences. See A.B.A. COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, REP'T TO THE HOUSE OF DELEGATES ON REPRESENTATION RELATING TO COLLATERAL CONSEQUENCES (2007) [hereinafter COMM'N ON EFFECTIVE CRIMINAL SANCTIONS] (recommending that "federal, state, territorial and local governments . . . encourage prosecutors to inform themselves of the collateral consequences that may apply in particular cases"), available at <http://meetings.abanet.org/webupload/commupload/CR209800/newsletterpubs/Report.V.PDF.121306.pdf>.
- ²⁴ There are, however, some exceptions to this traditional practice, as correctional facilities in some jurisdictions have taken steps to begin reentry services at the outset of the individual's incarceration. See, e.g., Reginald Wilkinson et al., *Prison Reform through Offender Reentry: A Partnership between Courts and Corrections*, 24 PACE L. REV. 609, 528 n.102 (2004).

- (explaining that Ohio's correctional system begins to prepare inmates for reentry at the very outset of incarceration).
- ²⁵ See Pinard, *supra* note 9, at 675-77 (explaining the historical divide between civil legal services attorneys and public defender organizations, and the resulting compartmentalization of "criminal" and "civil" issues).
- ²⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT 1.2(a) (1983) ("[A] lawyer shall abide by a client's decisions concerning the obstacles of representation").
- ²⁷ For a critique of the term *traditional* to describe the defense role, see Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539, 562-67 (2007). Professor Quinn rightly observes that there is not "a single defense attorney model." *Id.* at 562. Her critique is an important one, as it reminds us all not to overgeneralize descriptions of defense counsel. However, in the context of this Article, *traditional* is an apt term. Indeed, the traditional defense role does not extend to collateral consequences because, for the most part, defense attorneys have no legal obligation to inform their clients about the collateral consequences that either will or potentially attach to their convictions. See Chin & Holmes, Jr., *supra* note 13, at 699 (explaining that most state and federal courts have held that attorneys "need not explain collateral consequences" to their clients). Moreover, the defense role is essentially confined to the trial and appellate processes and does not extend to reentry. However, as Professor Quinn observes, several defender organizations have long provided expansive services that extend beyond their traditional—or required—role, including reentry-related services.
- ²⁸ See, e.g., COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, *supra* note 23, at 3 ("Traditionally, the role of the defender was to minimize the pain the clients suffer, and the pain was defined as incarceration or financial penalties."); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 124 (2004) (stating that defender traditionally focused on "removing or reducing" the possibility of incarceration).
- ²⁹ Unfortunately, there are some jurisdictions in the United States where defense counsel cannot assume this role. Some jurisdictions do not have institutional defenders. Also, in some jurisdictions it is not uncommon for criminal defendants to represent themselves. In jurisdictions where defense counsel simply cannot handle this role and in instances where defendants represent themselves, courts should assume the responsibility to appoint a person to coordinate these services.
- ³⁰ See DAVIS, *supra* note 22, at 22 ("The charging decision is the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion.").
- ³¹ In 2004, the most recent year for which statistics are available, approximately ninety-five percent of individuals convicted of felony offenses in state court pled guilty. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fs04.pdf>.
- ³² See DAVIS, *supra* note 22, at 43 ("Many believe that the entire system would come to a crashing halt if the [plea bargaining] process were abolished.").
- ³³ See, e.g., Pinard, *supra* note 9, at 643 n.119 (citing cases holding that trial judges have no duty to inform defendants of collateral consequences).
- ³⁴ A.B.A. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS, Std. 19-2.4(a) (2004) [hereinafter COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS] ("The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's sentence.").
- ³⁵ *Id.* at Std. 19-2.5(a) ("The legislature should authorize a court, . . . to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction."). The commentary to this standard states that such waiver or modification should occur "if the sanctions have become inappropriate or unfair based on the facts of the particular case." *Id.*
- ³⁶ See, e.g., Tamar M. Meekins, "Specialized Justice": *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 26-27 (2006) (describing the reentry court model).
- ³⁷ See, e.g., Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1248-49 (1998) (arguing that the underlying features of the adversarial system—which the author asserts are the "duty of partisanship," the avoidance of conflicts, and the protection of client confidences—"comes into conflict with rehabilitative penal practice"); Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. L. REV. & SOC. CHANGE 637, 647 (2006) (expressing concern that the professionals who work in problem-solving courts "may expect the holistic defense team to cooperate unconditionally").
- ³⁸ See COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS, *supra* note 34, at Std. 19-2.5 (a) (stating that "[t]he legislature should authorize a court to . . . enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction").
- ³⁹ The American Bar Association recommends that collateral consequences should not be imposed on a defendant "unless it determines that the conduct constituting th[e] particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified." *Id.* at Std. 19-2.2.
- ⁴⁰ See generally Gabriel J. Chin, *Race, the War on Drugs and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002). See also Gwen Rubenstein & Debbie Mukamal, *Welfare and Housing-Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 37-49 (Marc Mauer & Meda-Chesney Lind eds., 2002) (explaining the collateral consequences that specifically apply to individuals convicted of drug offenses); Demleitner, *supra* note 5, at 1033 (describing how collateral consequences disproportionately target those convicted of drug offenses).
- ⁴¹ See *supra* note 35 and accompanying text.