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**AN INTEGRATED PERSPECTIVE ON THE COLLATERAL  
CONSEQUENCES OF CRIMINAL CONVICTIONS AND  
REENTRY ISSUES FACED BY FORMERLY  
INCARCERATED INDIVIDUALS**

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#### INTRODUCTION

The past few years have brought dramatically increased attention to the collateral consequences of criminal convictions<sup>1</sup> and the reentry into society of

<sup>1</sup> Collateral consequences are defined simply as the *indirect* consequences that flow from federal and state criminal convictions. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-1.1 (3d ed. 2004), available at <http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf> [hereinafter ABA STANDARDS ON COLLATERAL SANCTIONS] (contrasting collateral consequences arising automatically after sentencing with discretionary punishments that are within the control of the sentencing authority); see Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15-17 (Marc Mauer & Meda Chesney-Lind eds., 2002) (contrasting collateral consequences, which are automatically “imposed by operation of law” upon a conviction, with the direct consequences of sentencing, which are imposed “by the decision of the sentencing judge”). For purposes of this Article, collateral consequences refer to the legal consequences of criminal convictions. It is important to recognize, however, that in addition to these legal consequences individuals with criminal records face an array of social consequences, including various forms of isolation from their families and communities. See Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1968) (defining the social consequences of criminal convictions as those that attach “on account of societal disapprobation,” such as ostracism or refusal to employ individuals with criminal convictions); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1897 (1999) (discussing the stigma that attaches to convicted felons and describing those who have served time as “a permanent undercaste of people who were once in prison, who are stigmatized as felons, and who are subject to an array of collateral disabilities traditionally associated with the status of being a felon”); 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 10, 10 (1996) (stating that formerly incarcerated individuals experience stigma); Dina R. Rose & Todd R. Clear, *Incarceration, Reentry and Social Capital: Social Networks in the Balance*, in *PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN*,

persons convicted of criminal offenses.<sup>2</sup> Legal scholars, policy analysts, anthropologists, elected officials, advocates, clergy persons, legal organizations, and grassroots organizations are all among those who have begun to explore the myriad issues related to these components. For instance, the American Bar Association has adopted standards<sup>3</sup> that urge jurisdictions to, *inter alia*, assemble and codify their respective collateral consequences,<sup>4</sup> implement mechanisms to inform defendants of these consequences as part of the guilty plea and sentencing processes,<sup>5</sup> require courts to consider these consequences when imposing sentences,<sup>6</sup> and narrow the range of consequences.<sup>7</sup> Following the ABA's lead, practitioners, advocates, and law school programs in several jurisdictions across the United States have begun to compile their respective collateral consequences,<sup>8</sup> with the aim of educating

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FAMILIES AND COMMUNITIES 313, 326-34 (Jeremy Travis & Michelle Waul eds., 2003) [hereinafter PRISONERS ONCE REMOVED] (reporting that recently released individuals often feel stigmatized by their communities and discussing other social reentry problems including problems with finances, identity, and relationships with others).

<sup>2</sup> The terms "reentry" and "reintegration" are often used interchangeably in the literature. However, some commentators have observed these to be two distinct concepts. *See, e.g.*, JEREMY TRAVIS ET AL., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 1 (2001), available at [http://www.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://www.urban.org/UploadedPDF/from_prison_to_home.pdf) (distinguishing between reentry, which all prisoners who are released experience, and reintegration, which indicates a successful reentry process). Under this framework, reentry is defined as the "process of leaving prison and returning to society." *Id.* at 1. As a result, "[a]ll prisoners experience reentry irrespective of their method of release or form of supervision, if any." *Id.* Reintegration is the end goal, as it connotes successful reentry. *See, e.g., id.* at 2 (asserting that a major goal of this study is "[m]anaging reentry to achieve long-term reintegration," as doing so would bring about "far-reaching benefits" for former prisoners, as well as their families and communities).

<sup>3</sup> *See generally* ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1.

<sup>4</sup> *Id.* Standard 19-2.1.

<sup>5</sup> *Id.* Standard 19-2.3.

<sup>6</sup> *Id.* Standard 19-2.4.

<sup>7</sup> *Id.* Standard 19-2.5 (opining that there should be a process in place to waive or modify collateral sanctions); *id.* Standard 19-2.6 (stating that certain collateral sanctions should not be imposed).

<sup>8</sup> *See generally* CIVIL ACTION PROJECT, 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 1-29 (2005) [hereinafter THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK], available at [http://www.nlada.org/DMS/Documents/1110924022.69/Consequences%20of%20Criminal%20Proceedings\\_Mar05.pdf](http://www.nlada.org/DMS/Documents/1110924022.69/Consequences%20of%20Criminal%20Proceedings_Mar05.pdf); CMTY. 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 LAWYERS (2004) [hereinafter COLLATERAL CONSEQUENCES IN THE DISTRICT OF COLUMBIA], available at <http://pdsdc.org/communitydefender/collateral%20consequences%20to%20criminal%20con>

various criminal justice actors of their existence.<sup>9</sup>

Simultaneous with these efforts, various governmental and community organizations have begun to explore and implement measures to address the reentry-related needs of individuals exiting correctional facilities and returning to their communities. For instance, several federal and state lawmakers have drafted legislation focused on providing services to these individuals.<sup>10</sup> A number of reentry centers and service providers have proliferated across the country, aiming to coordinate services for individuals transitioning back to society.<sup>11</sup> Similarly, public defense organizations, civil legal services organizations and other community-based advocacy groups have begun to provide reentry-related legal services to these individuals.<sup>12</sup>

The recent focus on these developing fields can be attributed in part to the

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victions%20in%20DC.pdf; NANCY FISHMAN, NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE, BRIEFING PAPER: LEGAL BARRIERS TO PRISONER REENTRY IN NEW JERSEY (2003), available at [http://www.njisj.org/reports/barriers\\_report.html](http://www.njisj.org/reports/barriers_report.html); REENTRY OF EX-OFFENDERS CLINIC, UNIVERSITY OF MARYLAND SCHOOL OF LAW, A REPORT ON THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN MARYLAND (2004) (on file with author); 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 (2004), available at <http://www.defensenet.org/SN/UpdatedBeyondtheConviction.pdf>; Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. TOL. L. REV. 611 (2005).

<sup>9</sup> See, e.g., Charles F. Willson et al., *What the Courts May Not Be Telling Defendants*, BOSTON B.J., Jan.-Feb. 2003, at 10, 11-12 (setting forth various collateral consequences under Massachusetts law, which authors urge defense counsel to consider when advising clients about guilty pleas).

<sup>10</sup> See, e.g., Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005) (authorizing a grant program and a task force regarding reentry of offenders into the community); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. (2005) (same); S.B. 1148, 85th Gen. Assem., Reg. Sess. (Ark. 2005) (enacted) (establishing transitional housing for individuals with convictions reentering society); H. 6961, 2005 Legis. Sess. (Ct. 2005) (establishing a prisoner reentry commission); S.J. Res. 273, 2005 Gen. Assem. (Va. 2005) (establishing a joint subcommittee to study prisoner reentry to society).

<sup>11</sup> See, e.g., Jason Feifer, *Re-entry, Ready or Not: After Release, a New Struggle*, WORCESTER TELEGRAM & GAZETTE, Mar. 23, 2005, at A1 (providing an example of a regional reentry center for released inmates in Worcester, Massachusetts, which provides resources such as information about housing, counseling, and medical services); Kate Zernike, *Helping Inmates Kick Drugs (and the Prison Habit)*, N.Y. TIMES, June 26, 2005, at A16 (reporting that Illinois has opened seven reentry centers, which provide "job and treatment support"). For an extensive listing and descriptions of reentry programs across the United States, see generally AMY L. SOLOMON ET AL., OUTSIDE THE WALLS: A NATIONAL SNAPSHOT OF COMMUNITY-BASED PRISONER REENTRY PROGRAMS (2004), available at [http://www.urban.org/UploadedPDF/410911\\_OTWResourceGuide.pdf](http://www.urban.org/UploadedPDF/410911_OTWResourceGuide.pdf).

<sup>12</sup> See *infra* note 230 (describing the reentry services provided by three important public defense offices).

broadening perspectives of the criminal justice system that have developed over the past two decades. Various advocates and community stakeholders have adopted holistic perspectives that recognize the many overlapping civil and criminal issues that are embedded in the criminal justice system.<sup>13</sup> These holistic perspectives attempt to address the wide-ranging issues that often accompany an individual's involvement with the criminal justice system, and acknowledge the relevance of that individual's family and community in seeking to resolve these issues.<sup>14</sup>

Much of the attention on collateral consequences and reentry is also due to the exploding incarceration levels over the past two decades.<sup>15</sup> From 1973 to 2003, the number of individuals incarcerated in U.S. prisons climbed dramatically, from approximately 200,000 to 1.4 million.<sup>16</sup> As a result, an alarming number of men and women are currently incarcerated in federal and state correctional facilities.<sup>17</sup>

These dramatic imprisonment rates cause concern regarding collateral consequences and reentry because high incarceration rates result in record numbers of prisoners being released from our nation's correctional facilities.<sup>18</sup>

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<sup>13</sup> See *infra* Part IV.B (explaining the role of many organizations that are taking a holistic approach to reentry, offering legal and non-legal services to assist released prisoners with reentry-related logistics).

<sup>14</sup> See, e.g., Terry Brooks & Shubhangi Deoras, *New Frontiers in Public Defense*, CRIM. JUST., Spring 2002, at 51, 51 (observing that public defenders who practice holistic advocacy "aim[] to address the underlying problems in . . . clients' lives" by providing "counseling, social services, treatment alternatives, and aftercare").

<sup>15</sup> See, e.g., Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 307 (2005) ("Although some collateral consequences laws have been around for a long time, they are now gaining increased awareness as a result of the incarceration explosion, which has led to collateral consequences laws affecting massively greater numbers of individuals.").

<sup>16</sup> JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 23 (2005).

<sup>17</sup> The most recent Department of Justice study indicates that at midyear 2004, 1,390,906 men and 103,310 women were incarcerated in federal and state prisons. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2004 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim04.pdf>.

<sup>18</sup> See, e.g., TRAVIS, *supra* note 16, at 39 (highlighting the fourfold increase of individuals presently being released as compared to twenty-five years ago); U.S. GEN. ACCOUNTING OFFICE, PRISONER RELEASES: TRENDS & INFORMATION ON REINTEGRATION PROGRAMS 7 (2001), available at <http://www.gao.gov/new.items/d01483.pdf> [hereinafter GAO PRISONER RELEASES] (drawing a connection between the dramatically increased incarceration rates and the "record numbers of offenders eventually being released and returned to communities"); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255, 256 (2004) (tracing the record numbers of individuals being released to the "explosion in incarceration that this country endorsed and experienced over the last two decades"). Overall, approximately ninety-five percent of all

Presently, approximately 650,000 individuals are released each year from federal and state prisons in the United States.<sup>19</sup> In addition, approximately nine million individuals are released each year from local jails.<sup>20</sup> Several studies indicate that disproportionate numbers of these individuals return to certain “core counties”<sup>21</sup> that are located primarily in urban centers.<sup>22</sup> These communities, already burdened by daunting social and economic travails that impact their viability,<sup>23</sup> must confront critical issues stemming from this

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prison inmates will eventually be released. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REENTRY TRENDS IN THE U.S. (2003), available at <http://www.ojp.usdoj.gov/bjs/reentry/growth.htm>.

<sup>19</sup> U.S. Dep’t of Justice, Learn About Reentry, <http://www.ojp.usdoj.gov/reentry/learn.html> (last visited Apr. 2, 2006) [hereinafter Dep’t of Justice, Learn About Reentry]. Moreover, the number of individuals under some form of correctional supervision – either incarcerated in prisons or jails, or on probation or parole – reached a record 6,889,800 in 2003. LAUREN E. GLAZE & SERI PALLA, U.S. DEP’T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2003 at 1 & tbl. (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus03.pdf>. Approximately 3.2% of adults in the United States were incarcerated or on probation or parole at the end of 2003. *Id.* at 1.

<sup>20</sup> Telephone Interview with Allan J. Beck, Ph.D., U.S. Dep’t of Justice, Bureau of Justice Statistics (Aug. 3, 2005).

<sup>21</sup> JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE 15 (2001), available at [http://www.urban.org/UploadedPDF/410213\\_reentry.pdf](http://www.urban.org/UploadedPDF/410213_reentry.pdf).

<sup>22</sup> See, e.g., NANCY G. LA VIGNE & CYNTHIA A. MAMALIAN, PRISONER REENTRY IN GEORGIA 31 (2004), available at [http://www.urban.org/UploadedPDF/411170\\_Prisoner\\_Reentry\\_GA.pdf](http://www.urban.org/UploadedPDF/411170_Prisoner_Reentry_GA.pdf) (reporting that, of the ninety-five percent of released Georgia prisoners who returned to Georgia, forty-three percent of them returned to eight counties in Georgia); NANCY G. LA VIGNE ET AL., A PORTRAIT OF PRISONER REENTRY IN MARYLAND 2 (2003), available at [http://www.urban.org/UploadedPDF/410655\\_MDPortraitReentry.Pdf](http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.Pdf) (finding that, of the ninety-seven percent of individuals released from Maryland correctional facilities who returned to Maryland, nearly sixty percent returned to Baltimore City); LYNCH & SABOL, *supra* note 21, at 19 (“There is reason to believe that the increased geographic concentrations put the burden of reentry disproportionately on a relatively small number of urban areas . . .”); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1276 (2004) (“Research in several cities reveals that the exit and reentry of inmates is geographically concentrated in the poorest, minority neighborhoods.”).

<sup>23</sup> See, e.g., AMY L. SOLOMON ET AL., FROM PRISON TO WORK: THE EMPLOYMENT DIMENSIONS OF PRISONER REENTRY: A REPORT OF THE REENTRY ROUNDTABLE 13 (2004), available at [http://www.urban.org/UploadedPDF/411097\\_From\\_Prison\\_to\\_Work.pdf](http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf) (observing that, in the context of the various employment-related obstacles for individuals released from correctional facilities, “[c]ommunities that receive large concentrations of released prisoners are already struggling with high rates of unemployment and poverty and a dearth of available jobs”); Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1552-53 (2003) (observing that the possible difficulties that returning individuals face with reentering labor markets can “aggravate social and economic disadvantages within areas where former

dramatic reentry wave. This is particularly true because these counties can expect to absorb increasing numbers of formerly incarcerated individuals in the future.<sup>24</sup>

Moreover, dramatic recidivism rates accompany these escalating numbers of individuals leaving correctional facilities: Approximately two-thirds are rearrested within three years of release.<sup>25</sup> This cycle of reentry and recidivism has raised substantial national and local concerns about community safety and viability.<sup>26</sup> These concerns in turn have led several policy analysts to study various reentry issues<sup>27</sup> and several community stakeholders to take steps to aid individuals reentering these communities.<sup>28</sup>

Elected officials, legal scholars, policy analysts, grassroots organizations, and legal organizations have increasingly recognized collateral consequences and reentry as central to the criminal process and to criminal justice policy.<sup>29</sup> Despite this recent concern and attention, however, collateral consequences and reentry are not considered to be *legally* central or even relevant to the criminal process.<sup>30</sup> As a general matter, there is no point along the criminal

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inmates are concentrated”).

<sup>24</sup> These issues are, of course, quite broad, as the individuals leaving correctional facilities often must confront medical issues as well as the collateral consequences and various stigmas noted in this Article. See Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, in PRISONERS ONCE REMOVED, *supra* note 1, at 33, 54-56 (highlighting the psychological and medical issues that many former inmates will bring to these communities, including social alienation, reliance on the institutional structure, diminished sense of self-worth, and even post-traumatic stress).

<sup>25</sup> See PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994, at 1 (2002), available at [www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf).

<sup>26</sup> See, e.g., LYNCH & SABOL, *supra* note 21, at 14, 19 (observing that the reentry of released individuals raise community-based concerns for public safety, particularly as individuals have been incarcerated for longer periods of time). Furthermore, the decline in participation in prison rehabilitation programs could lead to public safety problems, as could the increase in the number of prisoners released unconditionally, without any community supervision. *Id.* at 19.

<sup>27</sup> See, e.g., GAO PRISONER RELEASES, *supra* note 18, at 6 (“Given the record number of ex-inmates leaving prisons and returning to communities, research and policy experts have begun to focus attention on reintegration . . . including the topic of prison reintegration and its relationship to public safety.”).

<sup>28</sup> See Michael Anft, *Seeking a Smooth Reentry: New Funds and Efforts Help Ex-inmates Return to Society*, 14 CHRON. PHILANTHROPY, June 27, 2002, at 7 (2002) (connecting increased charity and grant maker attention toward reentry issues and the record numbers of individuals exiting correctional facilities); Nora V. Demleitner, *Stopping a Vicious Cycle: Release, Restrictions, Re-Offending*, 12 FED. SENT'G REP. 243, 243 (2000) (stating that concerns regarding recidivism and public safety have led several public and private organizations to provide assistance to individuals upon release).

<sup>29</sup> See *infra* Part II.

<sup>30</sup> Travis, *supra* note 1, at 16.

justice continuum that formally addresses issues related to collateral consequences.<sup>31</sup> For example, neither the federal nor any state criminal process has a formal mechanism that incorporates the scope of these consequences.<sup>32</sup> As a result, defendants often plead guilty<sup>33</sup> to crimes completely unaware of the network of consequences that both can and will attach to their convictions.<sup>34</sup> Moreover, while some legal services and public defense organizations have begun to recognize collateral consequences and provide reentry related services,<sup>35</sup> the criminal defense community overall has yet to fully embrace the relevance of these services to the criminal process.<sup>36</sup>

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<sup>31</sup> Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (remarking that many courts do not require either the trial judge or defense counsel to explain the collateral consequences of a guilty plea to the defendant).

<sup>32</sup> See *infra* notes 119-125 and accompanying text (discussing how courts have almost universally held that due process does not require that defendants be informed of collateral consequences).

<sup>33</sup> This Article emphasizes collateral consequences as pertaining to the guilty plea process, as this is how the vast majority of cases are resolved. MATTHEW R. DUROSE & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, tbl. 4.2 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sc0204st.pdf> (indicating that in 2002 ninety-five percent of felony state court cases were resolved by guilty pleas); U.S. SENTENCING COMM'N, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 22 fig.C (2003) (indicating that in 2003 nearly ninety-six percent of federal cases were resolved by guilty pleas); see also Brief for the National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Respondent at 3, *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) ("Clearly, the criminal justice system relies heavily on the willingness of criminally accused persons to give up their right to a jury trial and other constitutional rights by agreeing to plead guilty."); George Fisher, *A Practice as Old as Justice Itself*, N.Y. TIMES, Sept. 28, 2003, at 11 ("Today the entire criminal justice system depends for its survival on plea bargaining."). The criminal justice system's heavy reliance on guilty pleas has caused some commentators to explore the non-trial related skills that criminal defense attorneys must possess. See, e.g., Chin & Holmes, *supra* note 31, at 698 (opining that "[t]he most important service that criminal defense lawyers perform for their clients is not dramatic cross-examination of prosecution witnesses or persuasive closing arguments for the jury; it is advising clients whether to plead guilty and on what terms"); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 74 (1995) (opining that defense attorneys should "concentrate on becoming effective negotiators" given the prevalence of guilty pleas).

<sup>34</sup> Collateral consequences have been described as "invisible punishments" because they are "imposed by operation of law rather than by decision of the sentencing judge . . . [and] are not considered part of the practice or jurisprudence of sentencing." Travis, *supra* note 1, at 16.

<sup>35</sup> See *infra* Part V (giving examples of public defense groups and other constituencies that have incorporated collateral consequences into their practices).

<sup>36</sup> See *infra* Part IV.A (discussing the traditional philosophies of criminal defense, which focused on narrow legal issues, to explain why the defense community has been slow to



Therefore, although several organizations across the country are beginning to address the array of reentry-related issues and are beginning to provide services, the vast reentry needs of individuals exiting correctional facilities remain unaddressed.<sup>37</sup>

Courts have offered myriad explanations to justify excluding collateral consequences and reentry from the criminal process. For instance, several appellate courts have declared that collateral consequences impose civil restrictions as opposed to criminal penalties, and are therefore detached from the criminal process.<sup>38</sup> Courts have also warned against the burdens of incorporating the vast network of collateral consequences into the criminal process.<sup>39</sup>

Similarly, significant concerns have been raised about incorporating vast reentry needs into the services provided by public defense and civil legal services organizations. Specifically, public defense and civil legal services offices have limited funds<sup>40</sup> and crushing caseloads.<sup>41</sup> In addition, criminal defense attorneys lack the expertise in civil legal services necessary for holistic

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expand their focus); *infra* Part IV.B (explaining the movement to a more holistic representation by some defense attorneys, but pointing out that the defense community has not yet fully embraced this idea so as to fully address collateral consequences and reentry).

<sup>37</sup> See *infra* Part I.B (explaining that the existing networks do not have the capacity to address the needs of all individuals in the criminal justice system, due in part to the rising prison population, as well as the fact that many of these measures are still experimental and do not exist in all jurisdictions).

<sup>38</sup> See *infra* Part I.A.1 (discussing legal challenges alleging that certain collateral consequences violate ex post facto and/or double jeopardy principles). Courts have mostly held that collateral consequences are civil, not punitive under the two-prong test set forth in *United States v. Ward*, 448 U.S. 242 (1980).

<sup>39</sup> See *id.* (discussing the practical explanations courts have provided for excluding collateral consequences from the criminal process, such as the impracticality and burden associated with doing so, given the fact that collateral consequences are constantly changing and are not neatly codified).

<sup>40</sup> See, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 430 (2001).

<sup>41</sup> See, e.g., Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1169 (2003) (“Criminal defense lawyers . . . typically carry grossly excessive caseloads and are therefore severely restricted in how much time they can devote to individual clients.”); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 664 (1986) (observing that public defenders frequently indicate that “excessive caseload[s] . . . prohibit[] their having adequate time to prepare their cases”); McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, CLEARINGHOUSE REV., May-June 2003 at 56, 59 (observing that, as a result of high caseloads, public defense offices “are forced to overlook the noncriminal difficulties that lead to or result from involvement with the criminal justice system”).

reentry practice.<sup>42</sup>

One other possible explanation for the exclusion of these components from the criminal process has escaped analysis, but attaches to the roots of both components. This explanation is conceptual, as it pertains to the ways in which these components have been perceived: The collateral consequences and reentry components have largely been analyzed in respective vacuums – as *separate, individual* processes attached to distinct points along the criminal justice spectrum. Commentators and service providers have tended to address, analyze, and/or critique one component in isolation from the other.<sup>43</sup> Legal scholars have written extensively about collateral consequences, but have devoted scant attention to the connections between these consequences and reentry.<sup>44</sup> Conversely, some defense organizations have begun to work either on collateral consequences or reentry issues, but have not incorporated both components into their practices.<sup>45</sup> Likewise, several organizations and government officials have begun to study and work on various reentry issues – such as employment and housing – without recognizing these as collateral consequences that should be addressed earlier in the criminal process.<sup>46</sup> Nor have these organizations addressed the ways in which the legal barriers imposed by collateral consequences potentially compromise reentry efforts.<sup>47</sup>

In essence, the majority of commentators and advocates have spoken in compartmentalized voices, either focused on collateral consequences or on reentry, without exploring in detail the links between these components.<sup>48</sup> These constituencies have focused their respective energies to address central issues relating to either of these components, without critically engaging the other.<sup>49</sup> As a result, their arguments and perspectives have narrowed the lens through which they view the collateral consequences and reentry components, and have missed opportunities to synergize these components and to develop integrated perspectives that accurately reflect the scope of their interlocking issues.<sup>50</sup>

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<sup>42</sup> See, e.g., Thompson, *supra* note 18, at 275 (stating that collateral consequences mostly affect indigent individuals and “[b]ecause indigent legal services tend to be provided by areas of specialty (housing or government benefits, family law, or criminal defense), it is unlikely that a single defender would have complete knowledge of the wide range of consequences”).

<sup>43</sup> See *id.*

<sup>44</sup> See *infra* Part III.

<sup>45</sup> See *infra* Part III.B.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.*

<sup>48</sup> See *infra* Part III.C.

<sup>49</sup> See *id.*

<sup>50</sup> *But see* discussion *infra* Part V (discussing exceptions to this generalized observation). Some constituencies, particularly policy analysts and national legal organizations such as the American Bar Association, have explicitly recognized the direct relationship between collateral consequences and reentry. See *infra* note 324 and accompanying text. In varying

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This Article advances the fusing of these disconnected perspectives by raising a unified voice that consistently articulates collateral consequences and reentry as *interwoven and integrated* components along the criminal justice continuum.<sup>51</sup> These components are critically intertwined, as they heavily influence and directly impact one another.<sup>52</sup> Collateral consequences relate directly to reentry and the formerly incarcerated individual's ability to move on to a productive, law-abiding life.<sup>53</sup> Similarly, reentry is impacted directly by the constellation of consequences confronting the individual upon his or her release.<sup>54</sup> Communities in turn are broadly affected by the influx of returning individuals weighed down by the obstacles imposed by their criminal convictions long after their formal sentences have lapsed.

The Article asserts that marrying these components broadens and strengthens the arguments previously advanced by commentators and advocates, while also providing a clearer scope through which to analyze these connected issues. This unified, integrated perspective more completely articulates the centrality of these components to the criminal justice system. In turn, this perspective will hopefully influence the debates surrounding these components, as well as the many actors in the criminal justice process who are in a position to directly affect collateral consequences and the reentry process. In particular, defense attorneys, prosecutors, trial courts, appellate courts, elected officials, and community stakeholders could benefit from an enhanced understanding of the intertwining issues embedded in collateral consequences and reentry. These actors could use this integrated approach to better shape litigation and practice-based strategies, resulting in more positive outcomes both for the individuals involved and for their communities.

Part I of this Article provides a background of collateral consequences and reentry. Part II offers a look at the literature devoted to both of these components, and provides an overview of various practices related to reentry. Part III sets out the compartmentalization of collateral consequences and reentry: the scholarly focus in the literature on collateral consequences, the focus of appellate court decisions on collateral consequences as opposed to issues implicated in reentry, and the practical focus by community and legal services organizations on strategies devoted to reentry. Part IV offers some potential explanations for these stratified perspectives and practices. Part V explores the direct link between collateral consequences and reentry, and asserts that a unified, integrated perspective broadens the context within which to analyze the intertwining legal and policy issues. The Article concludes that

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degrees, these individuals and organizations have written about and analyzed issues regarding collateral consequences as correlative to the vast reentry hurdles that await convicted persons upon completion of their sentences. *Id.*

<sup>51</sup> See *infra* Part V.A.

<sup>52</sup> See *infra* Part III.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

while this integrated perspective answers some of the thorny questions regarding collateral consequences and reentry it presents several others that will hopefully be addressed in the near future.

## I. COLLATERAL CONSEQUENCES AND REENTRY: THE BACKDROP

### A. *Collateral Consequences*

Collateral consequences are the indirect consequences of criminal convictions.<sup>55</sup> These consequences comprise a mixture of federal and state statutory and regulatory law, as well as local policies.<sup>56</sup> Direct consequences include the duration of the jail or prison sentence imposed upon the defendant as well as, in some jurisdictions, the defendant's parole eligibility<sup>57</sup> or imposition of fines.<sup>58</sup> Collateral consequences, by contrast, are not part of the explicit punishment handed down by the court; they stem from the fact of conviction rather than from the sentence of the court.<sup>59</sup> These consequences include a vast network of "civil" sanctions<sup>60</sup> that limit the convicted

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<sup>55</sup> Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 *FORDHAM URB. L.J.* 1067, 1073; *see also* Chin & Holmes, *supra* note 31, at 699-700 (contrasting the legal system's approach to direct consequences, such as a prison term or fine, to its approach to collateral consequences, which "can operate as a secret sentence"); Finzen, *supra* note 15, at 305-07 (defining collateral consequences as social and legal penalties that affect individuals convicted or suspected of criminal behavior).

<sup>56</sup> Given these myriad strands of law and policy, commentators have noted the difficulty of grasping the range of collateral consequences that potentially attach to a conviction. *See* Pinard, *supra* note 55, at 1080 n.58.

<sup>57</sup> *See, e.g.,* Michel v. United States, 507 F.2d 461, 463 (2d Cir. 1974) (explaining that defendant must be advised of parole term that automatically attaches to sentence of imprisonment); Craig v. People, 986 P.2d 951, 963 (Colo. 1999) (en banc) ("Mandatory parole is a direct consequence of pleading guilty to a charge which subjects a defendant to immediate imprisonment because it has an 'immediate and largely automatic effect on the range of possible punishment.'" (quoting People v. Birdsong, 958 P.2d 1124, 1128 (Colo. 1998))); People v. Catu, 825 N.E.2d 1081, 1082-83 (N.Y. 2005) (holding that mandatory post-release supervision is a direct consequence that requires notification to defendant).

<sup>58</sup> *See, e.g.,* Duke v. Cockrell, 292 F.3d 414, 417 (5th Cir. 2002) (holding that imposition of a fine is a direct consequence); Parry v. Rosemeyer, 64 F.3d 110, 114 (3d Cir. 1995) (same); Johnson v. State, 654 N.W.2d 126, 135 (Minn. Ct. App. 2002) ("Direct consequences are those that flow definitely, immediately, and automatically from a guilty plea, namely, the maximum sentence to be imposed and the amount of any fine. All other consequences are collateral."), *rev'd on other grounds*, 673 N.W.2d 144 (Minn. 2004).

<sup>59</sup> Travis, *supra* note 1, at 15, 15-17.

<sup>60</sup> *See* Nora V. Demleitner, "Collateral Damage": No Re-entry for Drug Offenders, 47 *VILL. L. REV.* 1027, 1032 (2002) (observing that collateral consequences "are legally classified as civil rather than criminal sanctions").

individual's social, economic, and political access.<sup>61</sup> These sanctions flow from both felony and misdemeanor convictions, irrespective of whether the defendant was sentenced to a term of imprisonment.<sup>62</sup> While several consequences are imposed at the discretion of agencies acting independently of the criminal justice system,<sup>63</sup> many attach automatically upon the conviction by operation of law.<sup>64</sup> These federal and state consequences are vast and wide-ranging. Some of the most notable include temporary or permanent ineligibility for public benefits,<sup>65</sup> public or government-assisted housing,<sup>66</sup> and

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<sup>61</sup> See, e.g., Finzen, *supra* note 15, at 307 (observing that collateral consequences limit individuals' "civil, political, social, and economic rights"). Several commentators have also observed that the collateral damage suffered by individuals often extends to their families and communities. See, e.g., Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing – Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT*, *supra* note 1, at 37, 48 (illustrating how public housing bans extend to families); William J. Sabol & James P. Lynch, *Assessing the Longer-run Consequences of Incarceration: Effects on Families and Employment*, in *CRIME CONTROL AND SOCIAL JUSTICE: THE DELICATE BALANCE* 3, 4-8 (Darnell F. Hawkins et al. eds., 2003) (describing how incarceration can disrupt family networks and community stability). Moreover, it is important to note that in certain instances detrimental consequences, such as the loss of employment, can attach to an individual's mere arrest, irrespective of the ultimate disposition. 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, 481 (2005).

<sup>62</sup> See Walter Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 955 (1970) (observing that disabilities become active "when the offender has been convicted of a crime enumerated" in the disabling statute, regardless of any imprisonment imposed). However, for a brief discussion of some of the ways in which ex-offenders who have served a period of incarceration are particularly affected, see Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491, 1495-99 (2003).

<sup>63</sup> See, e.g., *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995) (collateral consequences "are peculiar to the individual and generally result from the actions taken by agencies the court does not control") (citations omitted).

<sup>64</sup> See ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-1.1(a)-(b) (defining a collateral sanction as a penalty "automatically upon [a] person's conviction," and a discretionary disqualification as a "penalty, disability or disadvantage . . . that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense").

<sup>65</sup> 21 U.S.C. § 862a (2000) (denying assistance and benefits to those convicted of certain drug-related offenses).

<sup>66</sup> 42 U.S.C. § 13661 (2000) (restricting housing assistance for individuals with drug convictions and individuals abusing drugs and alcohol, and granting authority to public housing agencies to deny admission to criminal offenders); 42 U.S.C.S. § 1437f(d)(1)(B)(iii) (2006) (stating that criminal activity of the tenant, "any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy," with exceptions made for victims of certain types of domestic crimes) (LEXIS through Jan. 5, 2006 amendments). See Rubinstein & Mukamal, *supra* note 61, at 43-46 (providing an overview of federal laws hindering those with criminal records

federal student aid;<sup>67</sup> various employment-related restrictions;<sup>68</sup> disqualification from military service;<sup>69</sup> civic disqualifications such as felon disenfranchisement<sup>70</sup> and ineligibility for jury service;<sup>71</sup> and, for non-citizens, deportation.<sup>72</sup>

While the recent focus on collateral consequences might indicate otherwise, such consequences have historically accompanied criminal convictions.<sup>73</sup> Indeed, some organizations have long been concerned about the scope of collateral consequences and their connections to reentry.<sup>74</sup> These organizations have sought to implement measures that facilitate the reentry of ex-prisoners into society.<sup>75</sup> In 1956, for example, the National Conference on Parole (“the Conference”) sought to eradicate laws imposing civil restrictions on individuals with criminal records.<sup>76</sup> Furthermore, in 1962, the National

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from living in public housing).

<sup>67</sup> 20 U.S.C. § 1091(r) (2000) (suspending eligibility for federal student aid if the student has been convicted of a drug offense under state or federal law), *amended by* Deficit Reduction Act of 2005, Pub. L. No. 171, § 8021, 120 Stat. 4 (suspending, as of July 1, 2006, only those convicted of a drug offense while receiving federal student aid).

<sup>68</sup> For an overview of employment-related restrictions imposed by states, see LEGAL ACTION CENTER, *AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 10-11* (2004), *available at* [http://www.lac.org/lac/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/lac/upload/lacreport/LAC_PrintReport.pdf).

<sup>69</sup> 10 U.S.C.S. § 504(a) (2006) (LEXIS through Jan. 6, 2006 amendments) (declaring that “[n]o person . . . who has been convicted of a felony[] may be enlisted in any armed force,” with the qualification that the Secretary of Defense can allow for exceptions in individual “meritorious cases”).

<sup>70</sup> Voting restrictions are based on state law. See SENTENCING PROJECT, *FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1-3* (2005), *available at* <http://www.sentencingproject.org/pdfs/1046.pdf>.

<sup>71</sup> Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003) (observing that thirty-one states and the federal government exclude felons from jury service).

<sup>72</sup> Guy Cohen, Note, *Weakness of the Collateral Consequences Doctrine: Counsel’s Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas*, 16 FORDHAM INT’L. L.J. 1094, 1111-12 (1993) (discussing convictions that expose aliens to deportation).

<sup>73</sup> See, e.g., Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1061-66 (2002); Travis, *supra* note 1, at 17-18. For a detailed history of civil disabilities, including their origins in ancient Greece and Rome, as well as developments in English legal history and early jurisprudence in the United States, see Grant et al., *supra* note 62, at 941-50 (1970).

<sup>74</sup> See, e.g., Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM. URB. L.J. 1705, 1707-17 (2003) (tracing the historical movements and organizations that advocated reforming or eliminating collateral consequences from the 1950s to the present).

<sup>75</sup> See *id.*

<sup>76</sup> Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 155 (1999). The

Council on Crime and Delinquency drafted a Model Act calling “for the discretionary expungement of criminal records, which would restore the individual to the legal position he held prior to his conviction.”<sup>77</sup> In the nearly twenty years that followed these efforts, various commissions further explored issues regarding collateral consequences, and states implemented measures that allowed automatic restoration of civil rights upon completion of sentence.<sup>78</sup> In 1981, following this period of exploration and advocacy, the American Bar Association and the American Correctional Association jointly issued the Standards on the Legal Status of Prisoners.<sup>79</sup> These standards implored jurisdictions to adopt “a judicial procedure for expunging criminal convictions, the effect of which would be to mitigate or avoid collateral disabilities.”<sup>80</sup>

Much of the recent attention devoted to collateral consequences can be attributed to shifts over the last couple of decades toward more punitive, less individualized sentencing schemes, and the proliferation of related federal and state laws that have expanded the reach of collateral consequences.<sup>81</sup> These shifts, epitomized by the “tough on crime” and “war on drugs” movements that began in the 1980s and 1990s,<sup>82</sup> significantly broadened the scope and reach of these consequences, as various federal and state civil sanctions were imposed to punish those convicted of certain offenses.<sup>83</sup> During this time, for instance,

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National Conference on Parole argued that collateral consequences caused a deprivation of civil rights and contradicted goals of the modern corrections system. *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Love, *supra* note 74, at 1713 n.33 (listing the various commissions and professional organizations that have addressed “collateral consequences and their effect on offender reintegration”).

<sup>79</sup> *Id.* at 1713-14.

<sup>80</sup> ABA STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS Standard 23-8.2 (2d. ed. 1983), available at [http://www.abanet.org/crimjust/standards/prisoners\\_status.html](http://www.abanet.org/crimjust/standards/prisoners_status.html). This has recently been superseded by ABA Standards dealing specifically with collateral sanctions, which similarly implore legislatures to provide for subsequent relief from collateral disabilities. ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.5. For a discussion of the various current mechanisms for relief from civil disabilities among the states, see *id.* at 1717-26.

<sup>81</sup> See ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 8 (highlighting that collateral consequences “have been increasing steadily in variety and severity for the past [twenty] years”); TRAVIS, *supra* note 16, at 67-70 (discussing state and federal laws enacted in the 1980s and 1990s that expanded the reach of collateral consequences); Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES, Dec. 29, 2002, at 18 (discussing the wide range of collateral consequences and reporting that “[m]ost of the sanctions were passed by Congress and state legislatures in the 1990’s to get tough on crime”). Any progress made to limit the effect of collateral consequences in the 1960s and early 1970s was “halted, if not reversed” in the late 1980s and 1990s due to the new “‘get tough’ approach to crime.” Demleitner, *supra* note 76, at 155.

<sup>82</sup> Demleitner, *supra* note 76, at 155.

<sup>83</sup> See Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of*

Congress passed laws that temporarily or permanently disqualified persons convicted of felony drug-related offenses from receiving certain federal welfare benefits,<sup>84</sup> and disqualified those convicted of any drug-related offense from receiving federal educational grants.<sup>85</sup> In addition, Congress passed laws declaring individuals (and their households) ineligible for federal housing assistance if they have been convicted of specified criminal activity or otherwise have been found to have engaged in criminal activity.<sup>86</sup> Moreover, Congress gave vast discretion to local housing authorities to establish their own eligibility standards regarding criminal records.<sup>87</sup> As a result, collateral consequences have reached unprecedented breadth in recent decades.<sup>88</sup>

Despite their proliferation, however, collateral consequences remain

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*Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002) (observing that drug offenses “are subjected to more and harsher collateral consequences than any other category of crime”); Demleitner, *supra* note 60, at 1033 (observing that those convicted of drug offenses are disproportionately affected by collateral consequences because “many . . . consequences target them specifically” and that the range of civil sanctions applicable to drug offenses has greatly increased in recent years).

<sup>84</sup> 21 U.S.C. § 862a (2000).

<sup>85</sup> 20 U.S.C. § 1091(r) (2000) (suspending eligibility for federal student aid if an individual has been convicted of a drug offense under state or federal law), *amended by* Deficit Reduction Act of 2005, Pub. L. No. 171, § 8021, 120 Stat. 4 (suspending, as of July 1, 2006, only those convicted of a drug offense while receiving federal student aid).

<sup>86</sup> There are two categorical, lifetime bans from receiving federal housing assistance. 42 U.S.C. § 13663(a) (2000) (denying eligibility for federally assisted housing to an individual – and by extension to his or her household – “who is subject to a lifetime registration requirement under a State sex offender registration program”); 24 C.F.R. § 966.4(l)(5)(i)(A) (2006) (mandating immediate termination of tenancy if any household member has been convicted of manufacturing or producing methamphetamine on the premises). In addition, broad categories of criminal activity could render individuals ineligible for housing assistance, irrespective of conviction. *See* 42 U.S.C.S. § 1437f(d)(1)(B)(iii) (2006) (LEXIS through Jan. 5, 2006 amendments) (providing for termination of public housing assistance if tenant or tenant’s family member engages in drug crime or other crime that threatens other tenants); 42 U.S.C. § 13661(a) (2000) (“Any tenant evicted from federally assisted housing [because] of drug related criminal activity . . . shall not be eligible for [such] housing [for three years], unless the evicted tenant successfully completes a rehabilitation program approved by the public housing agency . . . .”); 42 U.S.C. § 13661(c) (2000) (authorizing public agencies to deny admission to the federal housing program if the applicant or a member of the applicant’s household is or was “engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents”).

<sup>87</sup> United States Department of Housing & Urban Development Directive No. 96-16, Notice PIH 96-16 (HA) (Apr. 12, 1996), *available at* <http://www.hud.gov/offices/pih/publications/notices/96/pih96-16.pdf> (providing “guidance to enhance the ability and related efforts of public housing agencies to develop and enforce stricter screening and eviction as a part of their anti-drug, anti-crime initiatives”).

<sup>88</sup> Chin & Holmes, *supra* note 31, at 699 (“[T]he imposition of collateral consequences has become an increasingly central purpose of the modern criminal process.”).



excluded from the criminal process.<sup>89</sup> No procedural mechanisms – state or federal – incorporate them.<sup>90</sup> As a result, various constituencies remain unaware of their existence and scope.<sup>91</sup> Perhaps most crucially, even institutional actors such as judges, prosecutors, and defense attorneys are often unaware of the array of consequences that can attach to a criminal conviction.<sup>92</sup> This unawareness means that information regarding collateral consequences often does not reach criminal defendants.<sup>93</sup> Thus, defendants often plead guilty or are otherwise sentenced, aware only of the “direct” or immediate consequences that flow from their convictions, while unaware of the “indirect,” but perhaps more lasting, consequences.<sup>94</sup>

### 1. The Legal Challenges

Collateral consequences have been subjected to two primary groups of legal challenges. The first group contains expansive challenges to the very *fairness and propriety* of certain collateral consequences, on the grounds that they are unfairly punitive and that they disproportionately affect particular population segments. Thus, legal claims have been brought challenging consequences such as the civil commitment of sex offenders, sex offender registration, felon disenfranchisement, and ineligibility for federal welfare benefits, on due

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<sup>89</sup> See *infra* Part I.A.1.

<sup>90</sup> See *id.*

<sup>91</sup> There are several reasons for this collective unawareness. The main one, perhaps, is that many collateral consequences are not codified in state and federal criminal codes; instead they are scattered throughout various other statutory or regulatory provisions. See ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.1 cmt. at 21 (“Collateral sanctions have been promulgated with little coordination in disparate sections of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense.”). As a result, these consequences are not intuitively or even easily accessible to institutional actors. Moreover, in most instances, collateral consequences “are imposed by operation of law rather than by decision of the sentencing judge.” Travis, *supra* note 1, at 16. Accordingly, these consequences are not considered as part of the sentencing process, because they never enter into the sentencing formula. See *id.*

<sup>92</sup> See, e.g., Thompson, *supra* note 18, at 273.

<sup>93</sup> *Id.*; see also Lucien E. Ferster & Santiago Aroca, *Lawyering at the Margins: Collateral Civil Penalties at the Entry and Completion of the Criminal Sentence*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES 203, 208 (Christopher Mele & Teresa A. Miller eds., 2005) (arguing that, given criminal caseloads and the necessity of plea bargains, defense counsel and courts have an institutional disincentive to notify defendants of collateral consequences).

<sup>94</sup> See Robert H. Gorman, *Collateral Sanctions in Practice in Ohio*, 36 U. TOL. L. REV. 469, 469 (2005) (observing that defendants are often unaware of the collateral sanctions, which “may be more severe than the judge-imposed sanctions”); ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 7 (stressing that defendants “often do not appreciate . . . that their convictions will expose them to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court”).

process,<sup>95</sup> equal protection,<sup>96</sup> double jeopardy,<sup>97</sup> and ex post facto<sup>98</sup> grounds.<sup>99</sup>

Courts have assessed the relevant legal claims using analyses drawn from traditional due process and equal protection case law. For instance, *Turner v. Glickman* involved a class action challenge to 21 U.S.C. § 862a, which renders individuals convicted of felony drug offenses ineligible to receive certain federal welfare benefits, including food stamps.<sup>100</sup> In analyzing the equal protection claims, the Seventh Circuit first found that the statute does not involve any fundamental right or suspect classification.<sup>101</sup> As a result, the court used rational basis review and upheld the statute, declaring there to be a rational relationship between the disparity of treatment afforded by the statute and the legitimate governmental purposes of deterring drug use and reducing food stamp fraud.<sup>102</sup> The court similarly used rational basis review to reject the due process claims.<sup>103</sup>

The legal issue in double jeopardy and ex post facto challenges has been whether the collateral consequences are an imposition of criminal penalties (in which case the challenge succeeds) or civil penalties (in which case the challenge fails). Most claims have been rejected under a two-pronged analysis set forth in *United States v. Ward*.<sup>104</sup> This analysis calls for courts to first look to whether Congress, in enacting the statute, “indicated either expressly or impliedly a preference” for labeling the penalty civil or criminal.<sup>105</sup> When Congress has indicated an intention to impose a civil sanction, courts are then to determine whether the statutory scheme is “so punitive either in purpose or effect as to negate [Congress’s] intention.”<sup>106</sup> A number of courts, following

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<sup>95</sup> U.S. CONST. amends. V, XIV.

<sup>96</sup> U.S. CONST. amend. XIV.

<sup>97</sup> U.S. CONST. amend. V.

<sup>98</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>99</sup> This Article summarizes legal challenges to collateral consequences brought in the past few decades. However, collateral consequences have long (and frequently) been subject to constitutional challenges, including claims that they violate the bill of attainder clause and constitute cruel and unusual punishment. *See* Grant et al., *supra* note 62, at 1190-98.

<sup>100</sup> 207 F.3d 419, 422-23 (7th Cir. 2000).

<sup>101</sup> *Id.* at 424.

<sup>102</sup> *Id.* at 425.

<sup>103</sup> *Id.* at 426-27.

<sup>104</sup> 448 U.S. 242 (1980). The Supreme Court has laid out several tests to determine whether a penalty is criminal or civil. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (articulating seven-prong test for punishment); Trop v. Dulles, 356 U.S. 86, 96 (1958) (declaring that a statute is “penal” if it “imposes a disability for the purposes of punishment – that is, to reprimand the wrongdoer, to deter others, etc.,” but is “nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose”) (footnotes omitted).

<sup>105</sup> *Ward*, 448 U.S. at 248.

<sup>106</sup> *Id.* at 249. *Turner* also involved a double jeopardy challenge to the federal welfare

*Ward*, have found that the intent behind a statute was non-punitive, that the purpose and effect of the statute did not negate this intent, and that the statute therefore imposed non-punitive civil penalties rather than criminal sanctions.<sup>107</sup>

The second group of legal challenges contains narrower legal claims that have not questioned the propriety of any particular consequence, but rather have challenged *the process* by which consequences were imposed on individual defendants.<sup>108</sup> Specifically, this group contains numerous

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ban. In assessing whether the statute functioned as a criminal punishment, the Seventh Circuit analyzed Congress's intent. While acknowledging that the statute is listed in the criminal code section setting out various drug laws, the court observed that Congress had no role in the decision to place it there. Rather, the Office of Law Revision Counsel made the decision. *Turner*, 207 F.3d at 428. In further analyzing congressional intent, the court turned to the statute's enforcement provisions. The court found that the statute was enforced not through the criminal process, but by state agencies responsible for administering the benefits program. *Id.* at 429. The court then looked to whether the statutory scheme was "so punitive in purpose or effect" that it constituted a criminal penalty. *Id.* (quoting *Ward*, 448 U.S. at 249). After weighing the seven factors set out in *Mendoza-Martinez*, the court held that the appellants did not meet their burden of showing "the clearest proof" that the statute amounted to a criminal penalty. *Id.* at 431 (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

<sup>107</sup> See *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) (holding that Kansas's civil commitment law did not violate the double jeopardy clause or the ex post facto clause, because it did not constitute criminal punishment); *Smith v. Doe*, 538 U.S. 84, 105 (2003) (rejecting ex post facto challenge to Alaska's sexual offender registration requirement, as the law did not constitute criminal punishment). Other cases have referenced *Ward* while relying on the traditional seven-part test set forth in *Mendoza-Martinez*. See, e.g., *Turner*, 207 F.3d at 430 (finding that the denial of certain welfare benefits to felony drug offenders does not constitute criminal punishment); see also Nora V. Demleitner, *A Vicious Cycle: Resanctioning Offenders*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES*, *supra* note 93, at 185, 186 ("Despite their debilitating impact on ex-offenders' lives, courts have generally declined to find such collateral sanctions punishment for constitutional purposes, largely because legislatures justify them in terms of public safety rather than retribution."). Because sex offender registration is not considered to constitute punishment, various state courts have held that defendants need not be informed of their duty to register as part of the guilty plea process. See, e.g., *People v. Montaine*, 7 P.3d 1065, 1067 (Colo. Ct. App. 1999) (insisting that the duty to register as a sex offender is not a direct consequence of the guilty plea because, "[a]lthough the duty to register flows directly from defendant's conviction . . . it does not enhance defendant's punishment for the offense"). But see Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 *FORDHAM URB. L.J.* 1685, 1686 (2003) (opining that "it is not always clear that the primary legislative motivation for a collateral sanction is civil rather than punitive, nor is it always a simple matter to discern the primary motivation").

<sup>108</sup> The interpretation of a particular sanction as either an individual or a group-based deprivation potentially affects perceptions of the deprivation's scope and reach. See, e.g., Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *STAN. L. REV.* 1147, 1149 (2004):

[O]nce the right to vote is cast in group terms, rather than in purely individual ones,

challenges brought by appellants seeking to overturn their convictions on the ground that they were not informed of the consequences attaching to their convictions until after they entered guilty pleas. Some appellants argued that their defense counsel had an affirmative duty to inform them of relevant collateral consequences, and that failure to do so was a violation of the right to effective assistance of counsel.<sup>109</sup> Others have asserted that the trial court had a duty to inform, and that its failure to do so rendered the plea unknowing.<sup>110</sup>

These particular legal challenges have involved numerous collateral consequences, including civil commitment,<sup>111</sup> deportation,<sup>112</sup> sex offender registration,<sup>113</sup> ineligibility for federal health programs,<sup>114</sup> ineligibility for employment-related licenses and employment,<sup>115</sup> inability to vote,<sup>116</sup> termination of parental rights,<sup>117</sup> and suspension of driving privileges.<sup>118</sup>

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criminal disenfranchisement statutes can be seen not only to deny the vote to particular individuals but also to dilute the voting strength of identifiable communities and to affect election outcomes and legislative policy choices.

<sup>109</sup> U.S. CONST. amend. VI.

<sup>110</sup> *E.g.*, *Commonwealth v. Shindell*, 827 N.E.2d 236, 238-39 (Mass. App. Ct. 2005) (rejecting defendant's request to withdraw her guilty plea because the trial judge did not warn her that she would have to register as a sex offender).

<sup>111</sup> *E.g.*, *Ames v. Johnson*, No. CL04-413, 2005 WL 820305, at \*3 (Va. Cir. Ct. Mar. 28, 2005) (concluding that trial counsel's failure to warn of civil commitment collateral consequence did not violate defendant's right to effective assistance of counsel).

<sup>112</sup> *E.g.*, *Gonzalez v. State*, 83 P.3d 921, 923-25 (Or. Ct. App. 2004) (involving a successful ineffective assistance of counsel claim stemming from counsel's failure to adequately warn of collateral deportation consequences).

<sup>113</sup> *E.g.*, *Shindell*, 827 N.E.2d at 237.

<sup>114</sup> *E.g.*, *State v. Merten*, 668 N.W.2d 750, 754-55 (Wis. Ct. App. 2003) (refusing defendant's request to withdraw a plea due to trial court's failure to warn of resulting denial of Medicare and Medicaid benefits).

<sup>115</sup> *E.g.*, *State v. Wilkinson*, No. 20365, 2005 WL 182920, at \*2 (Ohio Ct. App. Jan. 28, 2005) (denying defendant's motion to withdraw his guilty pleas because he was not informed that his pleas could "preclude him from any future employment at any facility providing care to older adults," and could also "jeopardize his nursing license"); *Henry v. State*, No. 207, 2003 Del. LEXIS 507, at \*6 (Oct. 7, 2003) (rejecting defendant's request to withdraw a *nolo contendere* plea based on counsel's failure to "inform him of the possible revocation of his Mortgage Loan Broker License").

<sup>116</sup> *E.g.*, *People v. Boespflug*, 107 P.3d 1118, 1121 (Colo. Ct. App. 2004) (dismissing defendant's argument that "he should be allowed to withdraw his pleas because the court did not advise him that he would lose his right to vote while he was imprisoned").

<sup>117</sup> *E.g.*, *Slater v. State*, 880 So. 2d 802, 803 (Fla. Dist. Ct. App. 2004) (rejecting defendant's claim that "the trial judge should have set aside his pleas of no contest because the sentencing court and his attorney failed to advise him that as a result of a plea, his parental rights would be terminated").

<sup>118</sup> *See Commonwealth v. Duffey*, 639 A.2d 1174, 1175 (Pa. 1994) (rebuffing defendant's claim that his plea was invalid because he was not told that his license would be suspended).

Almost universally, appellate courts have rejected these challenges, declaring that neither trial courts<sup>119</sup> nor defense attorneys<sup>120</sup> are obligated to inform defendants of collateral consequences. Rather, these consequences are considered to be the “indirect” ramifications of criminal convictions,<sup>121</sup> as they

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<sup>119</sup> See *Boespflug*, 107 P.3d at 1121 (holding that the trial court was not required to inform the defendant that he would lose the right to vote while incarcerated, because such loss does not constitute punishment and is therefore a “collateral consequence of a guilty plea for which no advisement is required”); *Duffey*, 639 A.2d at 1176 (holding that the trial court was not required to inform the defendant that his license would be suspended, because “loss of driving privileges is a civil collateral consequence”); *Merten*, 668 N.W.2d at 754 (holding that the trial court was not required to inform the defendant that he would be ineligible for Medicare and Medicaid benefits, because “any consequence arising under [federal] law was collateral to the state court proceedings”).

<sup>120</sup> See *Chin & Holmes*, *supra* note 31, at 699 (observing that the vast majority of federal circuits, the majority of states, and the District of Columbia “have held that lawyers need not explain collateral consequences,” and that “[a]pparently no court rejects the rule”). To prevail on an ineffective assistance of counsel claim, an appellant must generally show that defense counsel’s performance fell below that of a reasonably competent attorney, and that, but for counsel’s performance, there is a reasonable probability that the outcome of the case would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). This analysis has been extended to the guilty plea context. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). An appellant raising an ineffective assistance of counsel claim in the guilty plea context must prove deficient performance, as in *Strickland*, and must also prove that, but for counsel’s performance, “there is a reasonable probability that . . . [the appellant] would not have pleaded guilty and would have insisted on going to trial.” *Id.* at 59.

However, several federal and state courts have distinguished between counsel providing no advice and providing *wrong* advice about collateral consequences. In the latter instance, several courts have held that misinforming a defendant constitutes ineffective assistance of counsel. See, e.g., *United States v. Cuoto*, 311 F.3d 179, 188 (2d Cir. 2002) (holding that affirmative misrepresentation “meets the first prong of the *Strickland* test”); *Roberti v. State*, 782 So. 2d 919, 920 (Fla. Dist. Ct. App. 2001) (“Affirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea.”); *People v. Becker*, 800 N.Y.S.2d 499, 505 (N.Y. Crim. Ct. 2005) (holding that misadvice on potential loss of housing constitutes deficient representation); *Gonzalez v. State*, 83 P.3d 921, 925 (Or. Ct. App. 2004) (upholding ineffective assistance claim where defense counsel misinformed the defendant by stating that pleading guilty “may” lead to deportation, given that “the current immigration scheme all but requires that aliens convicted of aggravated felonies be deported”).

<sup>121</sup> Some penalties are considered indirect specifically because they are imposed by agencies independent of the criminal justice system. See, e.g., *Moore v. Hinton*, 513 F.2d 781, 782 (5th Cir. 1975) (holding that Alabama defendants need not be informed that pleading guilty to driving while intoxicated will result in suspension of driving privileges, as the suspension is imposed by the Alabama Department of Public Safety under a separate proceeding); *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995) (“The failure to warn of . . . collateral consequences will not warrant vacating a plea because they are peculiar to the individual and generally result from the actions taken by agencies the court does not control.”); *Commonwealth v. Shindell*, 827 N.E.2d 236, 238 (Mass. App. Ct. 2005) (holding

impose “civil” rather than “criminal” penalties.<sup>122</sup> Courts routinely rely on these civil/criminal or direct/indirect distinctions to interpret and limit the constitutional parameters of the attorney-client relationship, holding that attorneys are not constitutionally obligated to give clients information regarding collateral consequences when advising them about the ramifications of pleading guilty.<sup>123</sup> Moreover, these distinctions shield trial judges from having to inform defendants of collateral consequences when accepting guilty pleas or pronouncing sentences.

Rather, due process requires that defendants in both federal<sup>124</sup> and state courts be informed only of the conviction’s direct consequences.<sup>125</sup> To a certain extent, an exception to this rule has emerged at the state level in the deportation context: many states now require trial judges to warn defendants of potential deportation consequences prior to accepting guilty pleas.<sup>126</sup> In

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that a defendant need not be informed that he might have to register as a sex offender, because “an entity outside the court [the sex offender registry board] decides whether the defendant ultimately must register”); *Slater*, 880 So. 2d at 804 (finding that termination of parental rights is a collateral consequence because “[i]t is not automatic, but instead entails the discretion of the Department of Children and Families”).

<sup>122</sup> For this reason, Professor Chin observes that the classification of a sanction as either a regulatory measure or a criminal penalty is “critical to [its] constitutionality.” Chin, *supra* note 107, at 1685.

<sup>123</sup> See, e.g., *Henry v. State*, No. 207, 2003 Del. LEXIS 507, at \*4 (Oct. 7, 2003) (holding that counsel need not tell defendant that pleading guilty could lead to revocation of his Mortgage Loan Broker License, because revocation was “correctly classified . . . as a collateral consequence”); *State v. Carney*, 584 N.W.2d 907, 910 (Iowa 1998) (holding that counsel’s failure to inform defendant that a guilty plea could lead to his license being revoked did not constitute ineffective assistance, because “the consequence of license revocation is collateral”); *Ames v. Johnson*, No. CL04-413, 2005 WL 820305, at \*3 (Va. Cir. Ct. Mar. 28, 2005) (insisting that trial counsel had no “constitutional or professional duty” to inform client about the civil commitment process under Virginia’s Sexually Violent Predators Act, because “any possible civil commitment . . . would not flow directly from [the] *nolo contendere* plea but, rather, from a separate civil proceeding”).

<sup>124</sup> See FED. R. CRIM. P. 11(b) (stating that federal courts must “inform the defendant of, and determine that the defendant understands” direct consequences, such as the nature of each charge and the maximum and any minimum sentence, prior to accepting guilty pleas).

<sup>125</sup> See *Brady v. United States*, 397 U.S. 742, 755 (1970) (stating that the voluntariness standard requires that the defendant be made “fully aware of the direct consequences” of a guilty plea (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev’d on other grounds*, 356 U.S. 26 (1958))).

<sup>126</sup> See, e.g., CAL. PENAL CODE § 1016.5(a) (West 1985); CONN. GEN. STAT. ANN § 54-1j(a) (West 2001 & Supp. 2006); D.C. CODE. § 16-713(a) (2001); GA. CODE ANN. § 17-7-93(c) (2004); HAW. REV. STAT. § 802E-2 (LexisNexis 2003); ME. R. CRIM. P. 11(b)(5); MD. RULE 4-242(e) (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1998 & Supp. 2005); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney 2002); N.C. GEN. STAT. § 15A-1022(a)(7) (2005); OHIO REV. CODE ANN. § 2943.031(A) (LexisNexis 2003); OR. REV. STAT. § 135.385(2)(d) (2003); R.I. GEN. LAWS § 12-12-22(a)-(b) (2002); TEX. CODE

addition, while federal courts have long held deportation consequences to be collateral,<sup>127</sup> recent changes in federal law have rendered deportation a virtual certainty for many non-citizens convicted of felonies.<sup>128</sup> Accordingly, many have called for deportation to be recategorized as a direct consequence.<sup>129</sup> Also, isolated exceptions regarding other consequences exist in a handful of federal and state jurisdictions.<sup>130</sup>

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CRIM. PROC. ANN. art. 26.13(a)(4) (Vernon 1989 & Supp. 2004-05); WASH. REV. CODE ANN. § 10.40.200(2) (West 2002); WIS. STAT. ANN. § 971.08(1)(c) (West 1998).

<sup>127</sup> *E.g.*, *Fruchman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976). Because they are considered collateral, federal trial judges are not required to inform non-citizen defendants of possible deportation consequences following guilty pleas. *Id.*

<sup>128</sup> In 1996, Congress enacted two statutes that significantly expanded the category of crimes for which non-citizens could be deported, and that in large measure eliminated the availability of discretionary waivers. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at 8 U.S.C. § 1228(a)(3) (2000)) (accelerating removal proceedings for individuals convicted of “aggravated felonies”); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 304(a)(3), 110 Stat. 3009-546, 3009-587, 3009-594 (codified at 8 U.S.C. § 1229b(a) (2000)) (implementing the new “cancellation of removal” remedy in place of the broader and more generous deportation waiver remedy); *see* Anjali Parekh Prakash, Note, *Changing the Rules: Arguing Against Retroactive Application of Deportation Statutes*, 72 N.Y.U. L. REV. 1420, 1431-37 (1997) (detailing how Congress greatly narrowed the deportation remedies available to aliens). As a result, “it is now virtually certain that an aggravated felon will be removed.” *United States v. Amador-Leal*, 276 F.3d 511, 516 (9th Cir. 2001).

<sup>129</sup> *See* Lea McDermid, Comment, *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 762 (2001) (arguing that due to “the harsh 1996 amendments limiting discretionary relief and judicial review,” it is “no longer appropriate” to characterize deportation consequences as collateral). For a discussion of how federal circuit courts have addressed this question to date, *see* Pinard, *supra* note 55, at 1079 n.56.

<sup>130</sup> For instance, one federal circuit court has held that the automatic denial of federal welfare benefits upon conviction for a felony drug offense renders the consequence direct rather than collateral. *United States v. Littlejohn*, 224 F.2d 960, 969 (9th Cir. 2000). A few states require trial judges to provide information about possible registration requirements to defendants pleading guilty to sexual offenses. *See, e.g.*, AK. R. CRIM. P. 11(c)(4) (2005) (requiring trial courts to inform defendants of registration requirements before accepting guilty pleas to sex offenses or child kidnapping); LA. REV. STAT. ANN. § 15:543(A) (2005) (requiring trial courts to provide written notification of registration requirements “to any defendant charged with a sex offense”); MASS R. CRIM. P. § 12(C)(3)(B) (requiring trial courts to inform defendants that they “may be required to register as . . . sex offender[s]”); WASH. SUPERIOR CT. CRIM. R. § 4.2(g)(6)(l) (requiring courts to notify defendants, in writing, that pleading guilty to sex offenses could result in required registration). Also, the New Jersey Supreme Court has held that trial judges must inform defendants pleading guilty to predicate sex offenses that they face possible civil commitment upon the conclusion of their sentences. *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003) (insisting that the trial court inform the defendant “when the consequence of a plea may be so severe that a defendant may be confined for the remainder of his or her life”). While the court reiterated

In addition to these legal distinctions, appellate courts have offered practical explanations for continuing to exclude collateral consequences from the criminal process. Some have asserted that it is simply too impractical for trial courts to first gather the relevant consequences attendant to each individual conviction, and then inform defendants of the consequences.<sup>131</sup> The task is particularly burdensome given the expansive dockets that stifle criminal courts.<sup>132</sup> It is made even more complicated by the fact that collateral consequences are not centralized, but rather are scattered throughout federal and state statutes, state and local regulatory codes, local rules, and local policies.<sup>133</sup> As one commentator has noted:

One central problem with collateral consequences is the unstructured and ad hoc manner in which they are identified and imposed. No one knows, really, what they are, not legislators when they consider adding new ones, not judges when they impose sentence, not defense counsel when they advise clients charged with a crime, and not defendants when they plead guilty or are convicted of a crime and have no idea how their legal status has changed.<sup>134</sup>

Courts have opined that similar burdens would befall defense attorneys if they were required to inform their clients of the vast array of collateral consequences that either could or would accompany conviction.<sup>135</sup> Other

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that civil commitment is a collateral consequence, it “conclude[d] that fundamental fairness requires that the trial court inform a defendant of the possible consequences under the [New Jersey Sexually Violent Predator] Act.” *Id.*

<sup>131</sup> See, e.g., *Fruchtman*, 531 F.2d at 949 (holding that trial judges need not inform defendants of possible deportation consequences, because “[t]he collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence . . . would impose an unmanageable burden on the trial judge”); *State v. Byrge*, 614 N.W.2d 477, 494 (Wis. 2000) (“The distinction between direct and collateral consequences essentially recognizes that it would be unreasonable and impractical to require a circuit court to be cognizant of every conceivable consequence before the court accepts a plea.”).

<sup>132</sup> Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 96 (1997).

<sup>133</sup> See Pinard, *supra* note 55, at 1080 n.58 (noting commentators’ frequent observations on the difficulty of even ascertaining the relevant collateral consequences in a given case).

<sup>134</sup> Chin, *supra* note 83, at 254.

<sup>135</sup> See *United States v. Yearwood*, 863 F.2d 6, 8 (4th Cir. 1988) (holding that defense attorney’s failure to advise client of deportation consequences did not constitute ineffective assistance, because “[t]o hold otherwise would place the unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea”). *But see* *People v. Becker*, 800 N.Y.S.2d 499, 504-05 (N.Y. Crim. Ct. 2005):

Although it may be objectively unreasonable to require an attorney to be familiar with all of the various possible collateral consequences which may emanate from a particular guilty plea, it is not objectively unreasonable to require an attorney to consult with an expert or complete relevant research to help the attorney accurately and properly advise a defendant regarding potential collateral consequences . . . .



courts have warned that requiring notification of collateral consequences could potentially provide windfalls to defendants on appeal.<sup>136</sup>

## 2. The Policy Perspectives

In addition to these legal challenges, many have raised various policy arguments regarding collateral consequences. Some groups have asserted that certain collateral consequences benefit society.<sup>137</sup> However, others have countered that many collateral consequences are overly broad, attaching automatically to classes of individuals irrespective of the relationship (or lack thereof) between the consequences and the individual's underlying conduct or circumstances.<sup>138</sup> These constituencies have observed that collateral consequences spill expansively across vast spectra of criminal convictions, and are not tailored toward particularized conduct.<sup>139</sup> In response to this concern, some scholars and legal organizations have asserted that trial courts should have the discretion to *not* impose consequences in particular circumstances,<sup>140</sup> and that consequences should be imposed only if necessary and directly related to the defendant's underlying conviction.<sup>141</sup>

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<sup>136</sup> See *Fruchtman*, 531 F.2d at 949 (refusing to require notification of deportation consequences, because to do so would “only sow the seeds for later collateral attack” (quoting *United States v. Sherman*, 474 F.2d 303, 305 (9th Cir. 1973))). Courts have also expressed concern that a notification requirement might be applied retroactively, opening possible avenues for scores of appellants to seek to overturn their pleas. See Chin & Holmes, *supra* note 31, at 736 (pointing out that “[c]ourts are justifiably reluctant to consider implementing a change that could render uncertain large numbers of convictions”).

<sup>137</sup> See ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 9 (“Collateral consequences may serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, protecting children from individuals with histories of abuse, or barring persons convicted of fraud from positions of public trust.”).

<sup>138</sup> A group of political scientists surveyed public perception regarding collateral consequences for felony offenders, and discovered a strong preference for more individualized collateral consequences. Milton Heumann et al., *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, 41 CRIM. L. BULL. 24, 31 (2005).

<sup>139</sup> See, e.g., Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1598-99 (2004) (observing that “blanket provisions” impose the same penalties on “non-violent, first-time offenders” as they do on “hardened criminals”).

<sup>140</sup> See Demleitner, *supra* note 60, at 1027-28.

<sup>141</sup> The American Bar Association has adopted the following standard, recommending that any collateral consequence be tailored to the underlying conduct:

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that 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.

Some groups have also argued against the duration of collateral consequences. Many types of consequences outlast the formal criminal sentence, and potentially span the lifetimes of individuals with criminal records.<sup>142</sup> In response, commentators have proposed certificates of rehabilitation,<sup>143</sup> criminal record “expungement,”<sup>144</sup> pardons,<sup>145</sup> and various other mechanisms<sup>146</sup> intended to provide relief.<sup>147</sup>

Still other constituencies have raised broad philosophical concerns regarding collateral consequences. They have argued that such consequences serve to further punish and stigmatize those convicted of criminal offenses.<sup>148</sup>

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ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.2.

<sup>142</sup> See Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705, 1705 (2003) (“The collateral consequences of a criminal conviction linger long after the sentence imposed by the court has been served . . .”).

<sup>143</sup> See, e.g., CAL. PENAL CODE § 1203.4(a) (West 1985) (allowing a defendant to petition for a certificate of rehabilitation if he “has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section”); MISS. CODE ANN. § 97-37-5(3) (1993); N.Y. CORRECT. L. § 701(1) (McKinney 2003) (“A certificate of relief from disabilities may be granted . . . to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offenses specified therein.”).

<sup>144</sup> See Demleitner, *supra* note 76, at 162 (urging “expungement of criminal records” to relieve individuals of collateral consequences).

<sup>145</sup> ABA JUSTICE KENNEDY COMM’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 64-75 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf> (tracing history of the pardon power, finding that it has been underutilized, and recommending that it be revitalized to foster reintegration by relieving eligible individuals of the collateral consequences of their convictions).

<sup>146</sup> See, e.g., TRAVIS, *supra* note 16, at 77 (arguing that individuals should have the right to seek judicial relief from collateral sanctions).

<sup>147</sup> See ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, Standard 19-2.5 (advancing legislative, judicial, and administrative mechanisms to waive or modify collateral consequences, or to relieve individuals from consequences already imposed). *But see* Demleitner, *supra* note 107, at 186 (explaining that, while “state and federal law hold out the promise” of mechanisms to provide relief, the mechanisms often are not panaceas); Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: *Restoring Economic Rights for Ex-Offenders*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 8, on file with author) (arguing that relief mechanisms do not adequately address “the critical period following release during which ex-offenders and their families most desperately need temporary supports and employment opportunities”).

<sup>148</sup> See, e.g., Grant et al., *supra* note 62, at 1230 (lamenting that an individual’s release into the community is often met with “distrust, suspicion and hostility,” and that “[c]ivil disabilities play a significant role in fostering these attitudes by affixing an additional stigma

Furthermore, they assert that by denying or limiting these individuals' social, economic, and civic access, collateral consequences continue to treat them as outcasts long after their formal sentences have expired.<sup>149</sup>

B. *Reentry of Individuals with Criminal Records*

The criminal justice system's commitment to reintegrating formerly incarcerated individuals into communities has wavered along political and philosophical currents.<sup>150</sup> While certain facets of the criminal justice system are designed to aid individuals through the reentry process, the relationship between the criminal process and reintegration has become attenuated due to practical constraints and due to philosophical shifts over the past three decades.<sup>151</sup>

However, concerns have emerged at national, state, and local levels over the past few years regarding the release of individuals from correctional facilities and their return to communities. The concerns perhaps reached their apex during the 2004 State of the Union Address, when President George W. Bush announced an initiative to focus on reentry issues, and committed \$300 million over four years to fund various reentry programs.<sup>152</sup> This commitment has received bipartisan support,<sup>153</sup> and has stimulated related legislative<sup>154</sup> and

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on the offender's already inferior status"); Angela Behrens, Note, *Voting – Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004) (discussing the historical stigma attached to disenfranchisement and other collateral consequences).

<sup>149</sup> See, e.g., Demleitner, *supra* note 76, at 160 (stating that collateral consequences "label the ex-offender an 'outcast,' and frequently make it impossible for her ever to regain full societal membership").

<sup>150</sup> See TRAVIS, *supra* note 16, at xvii-xviii, 17-20 (explaining that the goal of reintegration has wavered depending on which philosophies of punishment are dominant).

<sup>151</sup> See *infra* notes 188-193 and accompanying text (elaborating on the shift from indeterminate sentencing to determinate sentencing).

<sup>152</sup> President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html>. This initiative proposes that agencies, including the Department of Labor, the Department of Housing and Urban Development, and the Department of Justice coordinate programs and services aimed to "help ex-offenders find and keep employment, obtain transitional housing and receive mentoring." U.S. Dep't of Labor, President Bush's Prisoner Re-entry Initiative: Protecting Communities by Helping Returning Inmates Find Work, <http://www.dol.gov/cfbci/reentryfactsheet.htm> (last visited Apr. 5, 2006). In addition, the Attorney General, as a follow-up to this initiative, has announced a pilot program in seven cities that will "provide money for one staffer in the U.S. attorney's office to assess and coordinate re-entry programs in that area." Lila T. Mills, *Ashcroft Touts Efforts to Help Ex-Prisoners Re-Enter Society*, CLEV. PLAIN DEALER, Sept. 21, 2004, at B2.

<sup>153</sup> See, e.g., Adam Cohen, Editorial Observer, *Charles Colson and the Mission That Began with Watergate*, N.Y. TIMES, Jul. 25, 2005, at A18 (reporting that the Second Chance Act of 2005 "is supported by some of the most liberal members of Congress, and some of the most conservative, and by groups ranging from George Soros's Open Society Institute to

governmental efforts.<sup>155</sup>

President Bush's call was preceded by efforts at the national level to address reentry issues. In 2002, the United States Department of Justice distributed funds to support reentry efforts across the United States as part of its Serious and Violent Offender Reentry Initiative, also known as the Going Home Program.<sup>156</sup> The program's purpose is to study the myriad reentry-related issues and to devise and implement programs that aim to address the obstacles that formerly incarcerated individuals and their communities must resolve to foster successful reintegration.<sup>157</sup> These funds have created Reentry Partnership Initiatives in eight jurisdictions.<sup>158</sup> The partnerships are comprised of criminal justice personnel, social services personnel, and community groups. These personnel and groups study and work through various reentry obstacles, and devise legal, legislative, and grassroots strategies to address these issues.<sup>159</sup>

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the Christian Coalition"); *Ways Sought to Aid Released Inmates*, CHI. TRIB., May 9, 2005, at Metro 3 (reporting that Illinois Governor Blagojevich established a bipartisan commission to "find ways to steer recently released inmates . . . toward education and job training"); Jennifer Warren, *National Movement Favors Rehabilitation of Prisoners*, SEATTLE TIMES, Mar. 28, 2005, at A6 (relating emerging bipartisan support for various rehabilitative measures including reentry programs).

<sup>154</sup> See, e.g., Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005) (establishing programs to assist individuals with reentry).

<sup>155</sup> See, e.g., Samiha Khanna, *City Offers Aid with Re-Entry; For Former Inmates – A Chance to Work*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 29, 2005, at B1 (reporting that city officials in Durham, North Carolina, will "keep at least five entry-level jobs in the Public Works Department open specifically to ex-offenders").

<sup>156</sup> See Office of Justice Programs, U.S. Dep't. of Justice, Reentry: State Activities and Resources, <http://www.ojp.usdoj.gov/reentry/sar/welcome.html> (last visited Apr. 5, 2006) (detailing each state's reentry-related activities and resources).

<sup>157</sup> See Dep't of Justice, Learn About Reentry, *supra* note 19.

<sup>158</sup> The eight jurisdictions are: Baltimore, Maryland; Burlington, Vermont; Columbia, South Carolina; Kansas City, Missouri; Lake City, Florida; Las Vegas, Nevada; Lowell, Massachusetts; and Spokane, Washington. See DOUGLAS YOUNG ET AL., NAT'L INST. OF JUSTICE, ENGAGING THE COMMUNITY IN OFFENDER REENTRY 2 (2002), available at <http://www.ncjrs.org/pdffiles1/nij/grants/196492.pdf>. The Justice Department has subsequently awarded grants to other cities and organizations. For instance, through the Office of Community Oriented Policing Services, and as part of its Value-Based Reentry Initiative, the Justice Department has awarded grants to five organizations located in Boston, Detroit, Kansas City, Oakland, and Washington, D.C. The grants will allow these organizations to continue programs aimed at reentering individuals, and to serve as model programs that could be replicated in other jurisdictions. COMMUNITY ORIENTED POLICING SERVS., U.S. DEP'T OF JUSTICE, VALUE-BASED INITIATIVE AND VALUE-BASED REENTRY INITIATIVE (2004), available at <http://www.cops.usdoj.gov/mime/open.pdf?item=1026>.

<sup>159</sup> See LAVIGNE ET AL., *supra* note 22, at 4 (describing the collaborations fostered by the Maryland Re-entry Partnership Initiative).

In addition, these funds created the Reentry Court Initiative, designed to start or assist experimental reentry courts in several jurisdictions across the United States.<sup>160</sup> These courts are designed to provide “judicial oversight” of the reentry process.<sup>161</sup> Specifically, these courts provide resources for formerly incarcerated individuals during the reentry process, with the aim of reducing recidivism and enhancing public safety.<sup>162</sup>

Various efforts have also begun at the state level to study and address reentry issues. For instance, the National Governors Association’s Center for Best Practices launched the Prisoner Reentry State Policy Academy during the summer of 2003.<sup>163</sup> The Academy’s stated goal is “to help Governors and other state policymakers develop and implement effective prisoner reentry strategies that reduce recidivism rates by improving access to key services and supports.”<sup>164</sup> Seven states were selected to participate in this program,<sup>165</sup> with the purpose of gathering information regarding pertinent reentry obstacles in their respective jurisdictions and recommending strategies for improving services.<sup>166</sup>

Several other reentry programs have blossomed in cities and counties across the United States.<sup>167</sup> Like those begun as part of the Reentry Partnership

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<sup>160</sup> The courts exist in California, Colorado, Delaware, Florida, Iowa, Kentucky, New York, Ohio, and West Virginia. CHRISTINE LINDQUIST ET AL., NAT’L INST. OF JUSTICE, REENTRY COURTS PROCESS EVALUATION (PHASE 1) FINAL REPORT 3-5 (2003), *available at* <http://www.ncjrs.org/pdffiles1/nij/grants/202472.pdf>.

<sup>161</sup> TRAVIS, *supra* note 16, at 59 (comparing the judicial oversight reentry courts provide for the reentry process to the judicial oversight a drug court provides for an addict’s treatment process).

<sup>162</sup> See LINDQUIST ET AL., *supra* note 160, at 1. For a description of the various reentry courts’ “core elements,” see *Reentry Courts*, CRIM. JUST., Spring 2002, at 15, 15.

<sup>163</sup> See NGA CENTER FOR BEST PRACTICES, APPLICATION GUIDELINES FOR THE PRISONER REENTRY STATE POLICY ACADEMY, *available at* <http://www.nga.org/cda/files/042403PRISONERREENTRY.pdf>.

<sup>164</sup> *Id.*

<sup>165</sup> These seven states are Georgia, Idaho, Massachusetts, Michigan, New Jersey, Rhode Island, and Virginia. NANCY G. LAVIGNE ET AL., URBAN INST., VOICES OF EXPERIENCE: FOCUS GROUP FINDINGS ON PRISONER REENTRY IN THE STATE OF RHODE ISLAND I (2004), *available at* [www.urban.org/UploadedPDF/411173\\_Prisoner\\_Reentry\\_RI.PDF](http://www.urban.org/UploadedPDF/411173_Prisoner_Reentry_RI.PDF).

<sup>166</sup> As an example of the studies that have been done pursuant to this program, researchers from the Urban Institute surveyed community service organizations and recently released individuals in Rhode Island regarding the obstacles to reentry. The survey identified several obstacles, including lack of prerelease planning, lack of identification upon release, various housing-related obstacles including lack of affordable housing and housing restrictions based on drug trafficking convictions, lack of employment opportunities, lack of health care access, and child support arrearages. See *generally id.*

<sup>167</sup> See Roberto Santiago, *Putting Faith in Ex-cons*, MIAMI HERALD, Feb. 20, 2005, at 1BR (reporting the goals of a newly formed eight-county reentry task force). In addition to these governmental programs, private enterprise has become involved with reentry programs. See, e.g., Julie Poppin, *Reinventing Re-Entry: BI Inc. Seeks to Improve the*

Initiatives, some of these programs involve broad coalitions working together to address reentry issues.<sup>168</sup> Others were initiated by state and local correctional departments across the United States<sup>169</sup> that have implemented expansive reentry programs both inside and outside of correctional facilities.<sup>170</sup>

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*Transition from Prison Life*, ROCKY MOUNTAIN NEWS, Dec. 20, 2004, at 2B (reporting that the Boulder, Colorado-based Behavioral Interventions established reentry services across the United States through government contracts and that “[r]e-entry services are now [its] fastest-growing business component”). Although this Article focuses on the emergent emphasis on reentry, there are long-standing reentry programs scattered throughout the United States. See, e.g., Mills, *supra* note 152, at B2 (describing a reentry program in Cleveland that has been in existence for about thirty years).

<sup>168</sup> See, e.g., Riva Brown, *Parolees Aided in Transition*, CLARION-LEDGER (Jackson, Miss.), Oct. 17, 2004, at 1B (reporting that the recently formed Mississippi Collaborative Interagency Reentry Team is comprised of law enforcement, education, and social service officials who collaborate to help eligible adults and teenagers reenter their communities); Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, CRIM. JUST., Spring 2002, at 12, 13 (describing collaborations between police departments, faith institutions, corrections agencies, prosecutors, youth groups, and crime victims). See also REENTRY POLICY COUNCIL, CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 5 (2005), available at <http://www.reentrypolicy.org/report/report-pdf.php> (observing the increased recognition by community organizations and service providers in “non-criminal justice sectors” of the broad needs of individuals exiting correctional facilities).

<sup>169</sup> See Reginald A. Wilkerson, *Offender Reentry: A Storm Overdue*, 5 CORRECTIONS MGMT. Q. 46, 46 (2001), available at <http://www.drc.state.oh.us/web/Articles/article66.htm> (“The concept of offender ‘reentry’ is beginning to take the corrections world by storm – a much overdue storm.”).

<sup>170</sup> See, e.g., Texas Dep’t of Criminal Justice, Serious and Violent Offender Reentry Initiative Program, <http://www.tdcj.state.tx.us/pgm&svcs/pgms&svcs-serious-offender-pgm.htm> (last visited Apr. 6, 2006) (announcing Texas Department of Criminal Justice program, to be overseen by the Department’s Rehabilitation and Reentry Program Division, which will begin working with inmates in Administrative Segregation on reentry-related issues six months prior to their release); Jim Collar, *Prisons are Part of Pilot, Federal Program Targets Recidivism*, OSHKOSH NORTHWESTERN, July 10, 2005 (reporting that staff, managers, social workers, and parole officials from the Wisconsin Department of Corrections will undergo training to improve reentry as part of a federal pilot program aimed at reducing recidivism); Wilson Lievano, *Smoothing Their Reentry: Ex-inmates Get Help for Transition to Society*, BOSTON GLOBE, Jan. 20, 2005, at 1 (describing the recently formed Regional Reentry Center Initiative in Massachusetts as a joint program between the state Department of Correction and Parole Board that helps former inmates who are not on parole navigate the reentry process, and observing that the program begins ninety days before the individual is released); Zernike, *supra* note 11, at A1 (describing an Illinois program that focuses on reducing recidivism of repeat offenders, in which parole agents work closely with recently released individuals to help them secure housing, employment, and identification). Several stakeholders have urged that an individual’s reentry-related issues need to be addressed during the early stages of incarceration, rather than waiting until the moment of release. See, e.g., PHILADELPHIA CONSENSUS GROUP ON REENTRY &

Other programs provide direct legal services to individuals through public defense offices and through civil legal services organizations who have incorporated the reentry component into their practices by representing clients in civil matters related to various legal obstacles upon release.<sup>171</sup> Still other programs provide broader individual and community-based services, which include working with incarcerated individuals on issues that will impact their reentry, assisting recently released individuals and their families as they work through various economic, social and health issues, and undertaking studies and adopting policies designed to cultivate model reentry practices.<sup>172</sup>

The spread of so many new and diverse organizations stems from the record number of individuals leaving correctional facilities annually.<sup>173</sup> Currently, approximately 650,000 individuals are released each year from federal and state prisons.<sup>174</sup> An additional nine million individuals are released each year from local jails.<sup>175</sup> While these individuals return to various communities across the United States, several studies illustrate that certain “core counties”<sup>176</sup> within a few large states disproportionately absorb this influx of

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REINTEGRATION OF ADJUDICATED OFFENDERS, THEY’RE COMING BACK: AN ACTION PLAN FOR SUCCESSFUL REINTEGRATION FOR OFFENDERS THAT WORKS FOR EVERYONE 13, available at <http://www.fcnetwork.org/reading/philadelphiareentry.pdf> [hereinafter PHILADELPHIA CONSENSUS GROUP ACTION PLAN] (“[W]aiting until release is imminent would be to squander what is, for offenders and the service providers who wish to help them, a golden opportunity for intervention.”). Moreover, candidates to manage correctional facilities have articulated that preparing inmates for reentry is a vital component of correctional services. See Kristin Zaguski, *Finalists Seek to Enrich Inmates: The Candidates to Lead the Douglas County Jail Say Preparing Inmates for Release is Critical*, OMAHA WORLD-HERALD, June 28, 2005, at 05B (reporting that all three finalists to lead the Douglas County jail expressed the importance of preparing inmates for reentry by, inter alia, addressing inmates’ mental health and substance abuse needs).

<sup>171</sup> See *infra* notes 230-232 and accompanying text (describing the reentry programs of several public defense offices and service organizations).

<sup>172</sup> See Gerald P. López, *Shaping Community Problem Solving Around Community Knowledge*, 79 N.Y.U. L. REV. 59, 77 (2004) (describing the goals of the nascent East Harlem Reentry Initiative as helping ex-offenders and their families deal with a wide range of issues, shaping model practices and policies, and educating various constituencies of the need for “better-coordinated reentry services”).

<sup>173</sup> See, e.g., Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, in PRISONERS ONCE REMOVED, *supra* note 1, at 285, 285 (“As unprecedented numbers of people return home from prison, state officials, government agencies, community-based programs, and neighborhood residents all face a new set of challenges in maximizing these prisoners’ successful reentry into the freeworld [sic.]”); Thompson, *supra* note 18, at 256 (stating that inmates have long had problems successfully reintegrating into their communities upon release, but “[w]hat is new, though, is the scale of the current problem”).

<sup>174</sup> Dep’t of Justice, *Learn About Reentry*, *supra* note 19.

<sup>175</sup> Interview with Allan J. Beck, *supra* note 20.

<sup>176</sup> See *supra* note 21 and accompanying text.

returning individuals.<sup>177</sup> These communities already confront various social obstacles and suffer from a lack of resources, problems which are themselves compounded by the escalating numbers of individuals returning from correctional facilities.<sup>178</sup>

The escalating numbers of reentering individuals have heightened long-standing concerns of correctional personnel regarding modes of release,<sup>179</sup> and have raised critical issues regarding recidivism and public safety.<sup>180</sup> This is because approximately two-thirds of individuals released from correctional facilities in many states across the country are rearrested for new crimes within three years of release.<sup>181</sup> This convergence of escalating reentry and recidivism presents significant public safety concerns.<sup>182</sup>

Some mechanisms of the criminal process are designed to address reentry-related issues.<sup>183</sup> For instance, the parole system is technically aimed at

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<sup>177</sup> JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 7 (2003) (stating that Los Angeles County receives approximately one-third of the prisoners released on parole in California).

<sup>178</sup> See SOLOMON ET AL., *supra* note 23, at 13 (observing that “[c]ommunities that receive large concentrations of released prisoners are already struggling with high rates of unemployment and poverty”).

<sup>179</sup> See, e.g., PETERSILIA, *supra* note 177, at 15 (observing that correctional officials have long been concerned with how to facilitate successful transitions, but that they have never dealt with the sheer numbers of individuals currently being released).

<sup>180</sup> See *id.* at 6 (“Some policymakers worry that prisoner *reentry* equates with prisoner *recidivism* and may serve to increase crime in the community.”).

<sup>181</sup> LANGAN & LEVIN, *supra* note 25, at 1 (finding, in a study covering two-thirds of all U.S. prisoners, that 67.5% of those released in 1994 were subsequently rearrested for a new offense).

<sup>182</sup> See, e.g., *Federal Offender Reentry and Protecting Children from Criminal Recidivists: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 7 (2004) (statement of Rep. Portman) (“First and foremost, offender reentry is about preventing crime and keeping our communities safe.”); Sara B. Miller, *A Shift to Easing Life After Prison*, CHRISTIAN SCI. MONITOR, Feb. 23, 2005, at 1 (reporting that states are “increasingly focusing attention” on supporting individuals as they leave prison “[i]n an effort to reduce troubling rates of crime by former inmates”); Dennis Tatz, *State Hopes to Curb Crime with Reentry Centers; Aims to Prevent Ex-convicts from Returning to Crime*, THE PATRIOT LEDGER (Quincy, Mass.), Oct. 9, 2004, at 20 (reporting that state parole board offices in eight communities across Massachusetts have opened reentry centers aimed at reducing recidivism); Editorial, *A High Bar After Prison*, BOSTON GLOBE, Oct. 6, 2004, at A18 (linking the possibility of reducing recidivism to preparation for reentry).

<sup>183</sup> In fact, the federal government requires that, if possible, federal inmates serve the latter portions of their incarceration in “pre-release custody,” which is geared toward reentry. Specifically,

[t]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a



facilitating reintegration<sup>184</sup> by reducing the stigma attached to imprisonment,<sup>185</sup> by providing direct services to parolees,<sup>186</sup> and by facilitating personalized and individualized relationships between parole agents and parolees.<sup>187</sup> However, the criminal justice system's philosophical and practical shift in the 1970s and 1980s away from both the rehabilitative model<sup>188</sup> and indeterminate sentencing schemes<sup>189</sup> wrought radical changes for the parole concept at both the federal and state levels. Since the 1970s, several states have abolished their discretionary parole systems.<sup>190</sup> In addition, several states along with the federal government have shifted away from indeterminate sentencing, resulting

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reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

18 U.S.C. § 3624(c) (2000).

<sup>184</sup> PETERSILIA, *supra* note 177, at 88 (observing that parole was originally designed to facilitate the transition from prison to the community). See *State v. Jordan*, 817 N.E.2d 864, 871 (Ohio 2004) (“[P]ostrelease control furthers the goal of successfully reintegrating offenders into society after their release from prison.”) (citation omitted).

<sup>185</sup> See John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities and Prisoners*, 26 CRIME & JUST. 121, 126 (1999) (“Historically, the development of probation and parole was intended to offer the prospect of reintegration to criminal offenders as alternatives to the stigma of imprisonment.”) (citation omitted).

<sup>186</sup> Thomas J. Bamonte, *The Viability of Morrissey v. Brewer and the Due Process Rights of Parolees and Other Conditional Releasees*, 18 S. ILL. U. L.J. 121, 125-26 (1993) (describing the historical function of parole boards in providing individualized services to parolees).

<sup>187</sup> See *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir. 1975):

In order to fulfill his dual responsibilities for helping the parolee reintegrate into society and evaluating his progress . . . it is essential that the parole officer have a thorough understanding of the parolee and his environment, including his personal habits, his relationships with other persons, and what he is doing, both at home and outside it.

<sup>188</sup> See Andrew Von Hirsch, *Penal Theories*, in THE HANDBOOK OF CRIME & PUNISHMENT, 661-62 (Michael Tonry ed., 1998) (chronicling the shift away from the “traditional model”); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003) (observing that rehabilitation was “the central professed goal of American criminal justice . . . until the final quarter of the twentieth century”).

<sup>189</sup> See, e.g., Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 14 (1999) (recounting some of the concerns raised in the 1970s regarding indeterminate sentencing, and how ideologically diverse groups came to embrace determinate sentencing structures).

<sup>190</sup> See TIMOTHY A. HUGHES ET AL., U.S. DEP'T OF JUSTICE, TRENDS IN STATE PAROLE, 1990-2000, at 1 (2001), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tsp00.pdf> (reporting that by the end of 2000, sixteen states had abolished discretionary parole for all offenders and four additional states had abolished discretionary parole “for certain violent offenses or other crimes against a person”).

in the substantial diminishing of the discretionary parole releases that accompanied indeterminate sentences.<sup>191</sup> Instead, inmates now serve higher percentages of their sentences under determinate sentencing schemes, and increasing numbers are released after having served their full terms.<sup>192</sup> These particular inmates are then released without any parole supervision.<sup>193</sup>

Simultaneously, however, the sheer volume of individuals who are now imprisoned as a result of the three-decade rise in incarceration has increased parole officers' caseloads dramatically.<sup>194</sup> These bulging caseloads have transformed the nature of parole over the last couple of decades from the traditional individualized counseling-oriented model to a less individualized and more surveillance-based model.<sup>195</sup> As a result, parole supervision has strayed from a more cooperative, parolee-centered relationship to one in which the parole officer's focus is to ensure that the parolee abides by the parole conditions.<sup>196</sup> Thus, both philosophical shifts and practical constraints have

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<sup>191</sup> See LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2002, at 6 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus02.pdf> ("Discretionary releases of prisoners to parole supervision by a parole board have decreased from 50% of adults entering parole in 1995 to 39% . . . in 2002.").

<sup>192</sup> TRAVIS, *supra* note 16, at 54-55 (observing that in 2001 one-fifth of released prisoners were not supervised upon release, which author attributes in part to prisoners who were required to serve their full sentences and prisoners who decided to be released without supervision).

<sup>193</sup> See LYNCH & SABOL, *supra* note 21, at 12-13 (reporting that out of approximately 600,000 individuals released from prison in 1998, 126,000 were released without any supervision after having served their full sentences); Thompson, *supra* note 18, at 257 ("These individuals will not be on parole; they will not be subject to any release conditions; they will have no duty to report to – or work with – a parole officer.").

<sup>194</sup> See, e.g., GLAZE & PALLA, *supra* note 19, at 5 (reporting that the number of individuals on parole increased 3.1% in 2003, nearly double the average annual increase since 1995); HUGHES ET AL., *supra* note 190, at 1 (observing that even with the shift away from discretionary parole policies in several states, the number of individuals under parole supervision increased threefold from 1980 to 2000); *A Stigma That Never Fades*, THE ECONOMIST, Aug. 10, 2002, at 25 (estimating that parole officers' caseloads have doubled since the 1970s).

<sup>195</sup> PETERSILIA, *supra* note 177, at 77 (claiming that parole officers have shifted to a surveillance model); see *Latta v. Fitzharris*, 521 F.2d 246, 250-51 (9th Cir. 1975) (concluding that, due to the "special" relationship, parole officers need not obtain a warrant to search a parolee's home). David Garland argues that this is a broader managerial shift that has changed the ways in which all aspects of the criminal justice system – from policing to incarceration policies – are administered. He then focuses on both parole and probation, arguing that these agencies have "de-emphasized the social work ethos that used to dominate their work and instead present themselves as providers of inexpensive community-based punishments, oriented towards the monitoring of offenders and the management of risk." DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 18 (2001).

<sup>196</sup> See, e.g., Emily Bazelon, *Catch and Release*, LEGAL AFF., Mar.-Apr. 2004, at 36, 36

transformed the parole system into one that centers on monitoring behavior and ensuring compliance with parole conditions.<sup>197</sup>

Other traditional mechanisms of the criminal justice system are simply ill-equipped to handle the massive needs of an ever-increasing reentry population. For instance, while most prisons offer some form of rehabilitation-focused programming – such as educational and vocational training – that obviously relate to reentry,<sup>198</sup> these programs reach only a small percentage of incarcerated individuals.<sup>199</sup>

Also, more recently developed programs have not yet reached the mainstream. While reentry courts hold some promise for alleviating the crushing caseloads that confront parole officers,<sup>200</sup> they remain at the experimental stage and have yet to expand beyond a few jurisdictions.<sup>201</sup> In addition to reentry courts, several jurisdictions have prerelease facilities, where

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(reporting that “[b]eleaguered parole officers complain that heavy caseloads render meaningful supervision impossible, forcing them to make due with hectoring lectures and spot curfew checks”); Richard P. Seiter, *Prisoner Reentry and the Role of Parole Officers*, 66 FED. PROBATION, Dec. 2002, at 50, 51 (stating that because of their increased caseloads, parole officers have shifted from providing individualized services “to concentrat[ing] on surveillance, and the impersonal monitoring of offenders”).

<sup>197</sup> Some commentators have argued that the monitoring role has essentially limited the parole officer’s function to violating parolees when they stray from the rules. Some have even argued that the need to reduce crushing caseloads create incentives for parole officers to violate parolees. Irrespective of the reasons, significant numbers of prison admissions are the result of parole violations. See, e.g., TRAVIS, *supra* note 16, at 32 (stating that approximately one third of prison admissions in 2000 resulted from parole violations); CALIFORNIA LITTLE HOOVER COMMISSION, BACK TO THE COMMUNITY: SAFE AND SOUND PAROLE POLICIES 8 (2003), available at <http://www.lhc.ca.gov/lhcdir/172/report172.pdf> (reporting that approximately seventy percent of California parolees return to prison for parole violations). See also JAMES M. BYRNE ET AL., EMERGING ROLES AND RESPONSIBILITIES IN THE REENTRY PARTNERSHIP INITIATIVE: NEW WAYS OF DOING BUSINESS 12 (2003), available at <http://www.bgr.umd.edu/pdf/Roles%20and%20Responsibilities.pdf> (“Correctional administrators recognize that it is probation and parole failures, not new prison admissions . . . that fuel our current prison-crowding crisis”).

<sup>198</sup> See TRAVIS, *supra* note 16, at 169 (stating that “the primary rationale for these programs is that they reduce the recidivism rates of prisoners once they return home”).

<sup>199</sup> PETERSILIA, *supra* note 177, at 184 (reporting that in 2002 only twelve percent of individuals released from state prisons had participated in a prerelease program).

<sup>200</sup> See generally Terry Saunders, *Staying Home: Effective Reintegration Strategies for Parolees*, 41 JUDGES J. 34 (2002), reprinted in JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 67 (Bruce J. Winnick & David B. Wexler eds., 2003) (discussing a reentry court in Harlem that is implementing different supervisory techniques to assist parolees’ successful reintegration).

<sup>201</sup> Cait Clarke and James Neuhard, Paper, “*From Day One*”: *Who’s in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 28 n.45 (2004) (noting that reentry courts currently exist in only nine states).

inmates spend the latter portions of their sentence in anticipation of release.<sup>202</sup> Some of these facilities provide a range of services that seek to ease the transition from facility to community.<sup>203</sup> However, these facilities usually take a limited number of inmates, and thus the demand far outstrips capacity.<sup>204</sup>

So while the past few years have brought widespread attention to the various reentry issues pertaining to formerly incarcerated individuals, their families, and their communities, the capacities of the various traditional and contemporary networks in the criminal justice system that are designed specifically to address these issues have yet to meet the needs of the expanding reentry population.

## II. COLLATERAL CONSEQUENCES AND REENTRY: THE LITERATURE, THE PRACTICE, AND THE INTERPRETATION

Concerns regarding collateral consequences and reentry have led legal scholars, policy analysts, elected officials, advocates, and the media to address these issues in differing contexts. These issues also illuminate the converging criminal and civil issues embedded in the criminal justice system. This has led legal organizations, public defense organizations, civil legal services organizations, and other community-based advocacy groups to explore and implement policy and practice-based strategies addressing these issues. The efforts of these disparate groups have been shaped by the complex and expansive issues relating to collateral consequences and reentry, and have helped to set out, clarify, and focus issues requiring further exploration.

For the most part, legal scholars have focused on collateral consequences and have not explored in-depth the multitudinous issues surrounding reentry. These scholars have offered detailed legal and policy arguments regarding collateral consequences, and have laid the groundwork for further exploration

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<sup>202</sup> See, e.g., Texas Dep't of Criminal Justice, *supra* note 170 (detailing state program that will begin working with inmates in Administrative Segregation six months prior to their release on reentry-related issues).

<sup>203</sup> See, e.g., MARTA NELSON & JENNIFER TRONE, VERA INSTITUTE OF JUSTICE, WHY PLANNING FOR RELEASE MATTERS 2 (2000), available at [http://vera.org/publication\\_pdf/planning\\_for\\_release.pdf](http://vera.org/publication_pdf/planning_for_release.pdf) (describing services offered by the Montgomery County Pre-release Center in Maryland, which include family centered counseling, a relapse prevention course, and coordinating release plans with probation and parole officers); Ayelish McGarvey, *Reform Done Right: A Chicago Program Demonstrates the Logic of Preparing Prisoners for Life on the Outside*, AM. PROSPECT, Dec. 2003, at 42, 44 (describing services provided by the Safer Foundation's North Lawndale Adult Transition Center, a work-release program in Chicago that provides education courses, job readiness courses, and substance abuse treatment, with the aim of preparing inmates for employment).

<sup>204</sup> See PETERSILIA, *supra* note 177, at 99 (observing that "halfway homes or community reentry centers . . . have never reached more than a small number of prison releasees"); McGarvey, *supra* note 203, at 43 (reporting that three percent of formerly incarcerated persons in Illinois went through a work-release program).

of their various permutations. For instance, several scholars have set out the numerous consequences attached to criminal convictions. They have highlighted both the *legal* consequences of criminal convictions that are imposed automatically by operation of law or at the discretion of agencies independent of the criminal justice system,<sup>205</sup> as well as the *social* consequences of criminal convictions for individuals released from correctional facilities.<sup>206</sup> In doing so, these scholars have articulated the various ways in which criminal convictions can marginalize these individuals and constrain their economic, legal, and social opportunities.

Some scholars have addressed these broad legal and social issues by analyzing the fairness and propriety of collateral consequences, and by exploring the purposes of these consequences in the context of punishment theory. For instance, Professor Nora Demleitner has thoroughly analyzed the fit between the various legal consequences of criminal convictions and the traditional justifications for punishment.<sup>207</sup>

Other scholars have written expansively about punishment in this context by highlighting the sustained social stigmatization that results from criminal

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<sup>205</sup> See Chin, *supra* note 83, at 259 (stating that felons lose fundamental rights such as the right to serve on federal juries and the right to vote in some states).

<sup>206</sup> See Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 176 (2004) ("Whatever respite from disgrace and embarrassment the incarcerated may enjoy while confined in prison or jail with others similarly situated, the stigma reattaches when the convicted are released from physical custody or freed from the supervision of the criminal justice system.").

<sup>207</sup> Professor Demleitner argues that collateral consequences, at least in their present form, do not serve rehabilitative, deterrent, or preventative purposes. Demleitner, *supra* note 76, at 160-61. They do not serve rehabilitative purposes, she asserts, because they negatively constrain the individual's ability to reenter. *Id.* They do not serve deterrent purposes in part because the public is generally unaware of their existence. *Id.* at 161. She further asserts that collateral consequences are too broad to serve preventative purposes. *Id.* Professor Demleitner points to some evidence that collateral consequences have a retributive function, *see id.* at 160, but argues that "[i]f that is the case, collateral sentencing consequences should be clearly designated as part of the sentence at the time punishment is imposed and explicitly considered part of the penalty." *Id.* Other scholars have similarly argued that collateral consequences do not fit within traditional penal justifications. *See, e.g.,* Fletcher, *supra* note 1, at 1896 (arguing that the registration requirement for sex offenders "hardly make[s] sense under any standard rationale for punishment").

Professor Demleitner has also addressed this issue specifically in the civil commitment of sex offender context, arguing that the punitive nature of commitment should mandate that the issue be addressed at the sentencing phase. She argues that this "would fulfill the goals of the traditional punishment regime, provide predictability to criminal defendants, assure visibility, and place sanctions that pursue traditional punishment goals squarely into the criminal arena." Nora V. Demleitner, *Abusing State Power or Controlling Risk?: Sex Offender Commitment & Sicherungsverwahrung*, 30 FORDHAM URB. L.J. 1621, 1641 (2003) [hereinafter Demleitner, *Abusing State Power*].

convictions. As part of this broader punishment argument, some scholars have challenged the legal distinctions between criminal and civil penalties.<sup>208</sup> Specifically, scholars have critiqued appellate court classifications of certain consequences as indirect “civil” penalties that do not constitute “criminal” punishment.<sup>209</sup>

Other scholars have focused on narrower legal issues by exploring collateral consequences in the context of the criminal process and the attorney-client relationship. These commentators have opined that, irrespective of their legal status, collateral consequences are a core component of the criminal process because of their attachment to criminal convictions.<sup>210</sup> Some have observed, for instance, that criminal convictions are the sole trigger for certain consequences and, more narrowly, that some consequences, such as the ineligibility for federal welfare benefits or federal students loans, attach only to drug offenses.<sup>211</sup> These scholars have challenged the expansiveness of these consequences<sup>212</sup> and have critiqued both the fact that they are not included in the criminal process and that criminal justice actors are generally unaware of their existence and scope.<sup>213</sup>

Specifically, these commentators have highlighted the criminal justice

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<sup>208</sup> As noted above, this distinction is critical because it determines the set of rights and procedures that will attach to a particular penalty. *See* Chin, *supra* note 83, at 253 (arguing that although the formal sentence associated with a drug conviction may be insignificant, the “real sentence comes like a ton of bricks in the form of a series of statutes denying convicted felons a variety of rights”).

<sup>209</sup> *See* Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 101 (2002) (asserting that the federal law denying grants and loans to college students who have been convicted of drug offenses could be construed as punishment, but that recent Supreme Court decisions have often “allowed Congress to escape all of these constitutional strictures simply by characterizing its sanctions as ‘civil disabilities’ rather than punishment”); Demleitner, *supra* note 207, at 1635-41 (citing scholars who have critiqued the Supreme Court’s classification of post-sentence confinement of sex offenders as a civil penalty, and broadly critiquing the fact that such confinement is not considered to be part of the criminal punishment); Karlan, *supra* note 108, at 1151-55 (arguing that disenfranchisement is punishment and critiquing Supreme Court precedent declaring this sanction a regulatory measure).

<sup>210</sup> *See* Archer & Williams, *supra* note 147 (manuscript at 1) (“Virtually every felony conviction carries with it a life sentence.”); Chin, *supra* note 83, at 253 (asserting that “collateral consequences may be the most significant penalties resulting from a criminal conviction”).

<sup>211</sup> *See* Archer & Williams, *supra* note 147 (manuscript at 4); Chin, *supra* note 83, at 254 (observing that drug convictions “are associated with the greatest number and severity of collateral sanctions”).

<sup>212</sup> *See, e.g.,* Nora V. Demleitner, *Smart Public Policy: Replacing Imprisonment with Targeted Nonprison Sentences and Collateral Sanctions*, 58 STAN. L. REV. 339, 356 (2005) (arguing that collateral consequences “lack any proportionality”).

<sup>213</sup> *See, e.g.,* Demleitner, *supra* note 76, at 154.

system's heavy reliance on guilty pleas,<sup>214</sup> and have explored and critiqued the lack of information regarding collateral consequences provided to criminal defendants during the plea process.<sup>215</sup> These commentators have argued that defendants should be informed of these consequences as part of their constitutional right to either effective assistance of counsel or due process.<sup>216</sup> Thus, some have challenged the body of appellate decisions declaring the lack of information provided to defendants regarding these consequences to be of no constitutional moment.<sup>217</sup> These scholars have taken issue with not only the constitutional parameters set out by the courts regarding these issues but also the practical constraints offered by courts to maintain the exclusion of collateral consequences from the criminal process.<sup>218</sup>

As both an alternative and supplement to these constitutional arguments, several scholars have argued that defense counsel has various ethical obligations to impart information regarding collateral consequences to their clients. These scholars have argued that defense attorneys have a duty to inform their clients because knowledge of the true breadth of their criminal convictions would allow clients to better assess the costs and benefits of

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<sup>214</sup> See *supra* note 33.

<sup>215</sup> See, e.g., Chin & Holmes, *supra* note 31, at 698-703 (exploring the information problems presented by the current view of collateral consequences and the lawyer-client relationship).

<sup>216</sup> See, e.g., *id.* at 736-41.

<sup>217</sup> Professor Gabriel Chin and Richard Holmes opine that “[t]his wall of precedent is surprising because it seems inconsistent with the framework that the Supreme Court has laid out for analyzing claims of ineffective assistance of counsel.” *Id.* at 701. Specifically, they argue that the collateral consequences doctrine, which essentially holds that attorneys need not advise clients about collateral consequences, is inconsistent with the Court’s analysis in *Strickland v. Washington*, which looks to the norms of the legal profession as a factor in assessing professional competence. *Id.* at 701-02; see *Strickland v. Washington*, 466 U.S. 668, 671 (1984) (concluding that courts should look to “prevailing norms of practice” as one guide in judging the effectiveness of counsel). They look to sources that “suggest that lawyers should be concerned about collateral consequences,” such as ABA standards, treatises, and other practitioner resources to support their position that the norms of the legal profession require attorneys to advise their clients of these consequences. Chin & Holmes, *supra* note 31, at 704.

<sup>218</sup> For instance, one commentator has highlighted the burdens that some courts have warned about if federal trial judges were required to inform defendants of all collateral consequences – specifically, that judges might not be aware of all consequences, as they differ from state-to-state, or that defense attorneys might be in a better position to inform the defendant of these consequences. Priscilla Budeiri, Comment, *Collateral Consequences of Guilty Pleas in the Federal Criminal Justice System*, 16 HARV. C.R.-C.L. L. REV. 157, 192 (1981). She then critiques these perspectives by arguing that federal trial judges can become familiar with these consequences; that the states, as they are imposing these consequences, should take responsibility for warning defendants of their existence; and that defendants pleading guilty to criminal offenses are not always represented by counsel. *Id.*

entering guilty pleas versus proceeding to trial.<sup>219</sup> Some of these scholars have confined their analysis to deportation, singling out this consequence as the most severe and life-altering.<sup>220</sup> Others, meanwhile, have raised more expansive arguments that consider the obligations of defense counsel to inform defendants of all collateral consequences attending their convictions.<sup>221</sup>

Unlike legal scholars, who have extensively detailed the complex legal and social issues flowing from collateral consequences, other commentators have written richly of various issues related to the reentry component. These commentators, who include psychologists, policy analysts, and service providers, have offered numerous insights and critiques of various reentry policies, and have articulated several recommendations for successful reintegration.<sup>222</sup>

In addition, correctional departments across the United States have begun brainstorming and implementing extensive reentry programs, as well as providing direct and individualized reentry services.<sup>223</sup> These various efforts and programs seek to address reentry-related issues through all stages of incarceration, due to the increasing recognition of the correlation between individualized prerelease planning and successful reintegration.<sup>224</sup> As a result,

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<sup>219</sup> See, e.g., Chin & Holmes, *supra* note 31, at 704 (arguing that according to standards of professional conduct, “counsel has an obligation to offer legal advice on all of the legal considerations that might be relevant to the client’s decision,” including collateral consequences).

<sup>220</sup> See, e.g., Cohen, *supra* note 72, at 1096 (asserting that defense attorneys have constitutional obligation to inform clients of guilty pleas’ immigration consequences); John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 2003 U. MICH. J.L. REFORM. 691, 734 (arguing that trial courts should advise defendants of possible deportation consequences, as deportation “is unique in its severity and certainty”); McDermid, *supra* note 129, at 768-71 (arguing that defense attorneys should have an affirmative duty to investigate their clients’ potential deportation consequences and to advise clients about those consequences); L. Griffin Tyndall, Note, “*You Won’t Be Deported . . . Trust Me!*” *Ineffective Assistance of Counsel and the Duty to Advise Alien Defendants of the Immigration Consequences of Guilty Pleas*, 19 AM. J. TRIAL ADVOC. 653, 672 (1996) (arguing that the consequence of deportation is “direct” and that a defense attorney has a constitutional obligation to warn a non-citizen client of the probability of deportation).

<sup>221</sup> See generally Chin & Holmes, *supra* note 31 (exploring constitutional and ethical obligations). In addition, at least one federal judge has argued that defense attorneys have an obligation to inform clients of collateral consequences, and that courts should ensure that attorneys have done so. Harold Baer Jr., *Outside Counsel: Alerting the Federal Defendant to the Breadth of Civil Disabilities*, N.Y. L.J., Dec. 22, 2003, at 4.

<sup>222</sup> See, e.g., Stephanie S. Covington, *A Woman’s Journey Home: Challenges for Female Offenders*, in PRISONERS ONCE REMOVED, *supra* note 1 at 67, 85-89 (recommending various reentry services for women that should begin at the outset of their sentences).

<sup>223</sup> See *infra* notes 225-226 (describing some example programs established by corrections departments).

<sup>224</sup> See, e.g., PETERSILIA, *supra* note 177, at 15 (reporting that correctional departments in



some departments have implemented programs during the early incarceration stages,<sup>225</sup> while others have begun to formulate concrete plans for release toward the later stages of incarceration.<sup>226</sup>

Numerous governmental and community organizations have also focused on the needs of individuals post-release. These organizations' services encompass a range of interrelated needs of individuals leaving correctional facilities, and include assistance with family-related issues, housing, employment, public benefits, mental health treatment, and substance-abuse treatment.<sup>227</sup> These organizations help individuals obtain the documentation necessary to access services such as photographic identification, birth certificates, social security cards, and drivers' licenses.<sup>228</sup>

In addition to the non-legal assistance highlighted above, some public defense organizations have begun to represent clients on reentry-related matters as they exit correctional facilities or complete community-based sentences. These organizations provide an array of overlapping services that include housing-related assistance, public benefits assistance, employment assistance, and assistance expunging criminal records.<sup>229</sup> As criminal defense

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Maryland, Pennsylvania, and Washington have developed new risk indicators that "tie prison programs with postrelease risks and needs").

<sup>225</sup> See, e.g., Reginald Wilkinson et al., *Prison Reform Through Offender Reentry: A Partnership Between Courts and Corrections*, 24 PACE L. REV. 609, 628 n.102 (2004) (describing Ohio's correctional processes' shift toward a philosophy that begins preparation for the inmate's eventual release "immediately upon [his or her] arrival into the state prison system through the development of an individualized reentry accountability plan designed to identify and target offender risk and need areas").

<sup>226</sup> See, e.g., Alan Gustafson, *500 Prisoners Nearing Their Release Date Attend a Transition Fair*, STATESMAN J. (Salem, Or.), Oct. 15, 2004, at 1C (describing a "transitional fair" held at Oregon's largest pre-release facility that provided potential employment opportunities and coordinated various services for inmates who were within six months of release).

<sup>227</sup> See, e.g., Vera Institute of Justice, *Project Greenlight: The Process*, [http://www.vera.org/project/project1\\_9.asp?section\\_id=3&project\\_id=46&sub\\_section\\_id=24](http://www.vera.org/project/project1_9.asp?section_id=3&project_id=46&sub_section_id=24) (last visited Apr. 6, 2006) (describing the services provided by the program implemented in the Queensboro Correctional Facility in New York City by Project Greenlight).

<sup>228</sup> For example, the Vera Institute for Justice has implemented a program in conjunction with the New York City Department of Correction and the Center for Employment Opportunities to coordinate release planning in New York City jails at the intake stage. The planning includes providing inmates with identification documents and other services related to employment training, substance abuse treatment, and housing. For a fuller description of this project, see Vera Institute of Justice, *Project Greenlight: Overview*, [http://www.vera.org/project/project1\\_1.asp?section\\_id=3&project\\_id=46&sub\\_section\\_id=1](http://www.vera.org/project/project1_1.asp?section_id=3&project_id=46&sub_section_id=1) (last visited Apr. 6, 2006).

<sup>229</sup> See Clarke, *supra* note 40, at 34-35 (describing a Kern County (California) Public Defender program that helps expunge misdemeanor convictions, and a Sonoma County (California) Public Defender program that helps welfare recipients expunge criminal records to allow them to apply for certificates of relief or qualify for employment); Arlene Mckanic,

attorneys have not traditionally been trained to address the vast civil issues that comprise reentry practice, some defense organizations have formed civil teams that handle these matters.<sup>230</sup> Others have partnered with civil legal service organizations and/or other community-focused organizations to provide these services.<sup>231</sup>

Likewise, several legal services organizations provide representational services to individuals on reentry-related matters. Many of these organizations provide assistance on issues similar to those that public defense organizations have begun to address, helping clients navigate housing, employment, child support, and public benefits obstacles.<sup>232</sup>

In addition to these services, federal and state legislatures have sought ways to recognize and address multiple issues involving reentry. Several recent legislative initiatives have been geared towards reentry issues, including numerous bills aimed at implementing services to prepare inmates for release,<sup>233</sup> developing reentry strategies focusing on productively transitioning

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*Harlem Group Helps Ex-Felons Win Rights and Jobs*, AMSTERDAM NEWS, July 21, 2004, available at <http://www.indypressny.org/article.php3?ArticleID=1562> (describing the Neighborhood Defender Service of Harlem's newly instituted Reentry Advocacy Project as an interdisciplinary program that combines social work and legal advocacy to address various reentry issues for clients who have been released from correctional facilities, including housing and employment).

<sup>230</sup> Three noted public defense offices – the Neighborhood Defender Service of Harlem, the Bronx Defenders, and the Public Defender Service of the District of Columbia – have long established civil teams that handle an array of matters. See Neighborhood Defender Service of Harlem, NDS Programs, <http://www.ndsny.org/programs.htm> (last visited Apr. 6, 2006) (detailing civil and criminal services offered); The Bronx Defenders, The Civil Action Project, <http://www.bronxdefenders.org/comm/006.html> (last visited Apr. 6, 2006) (describing the Defenders' integrated civil and criminal programs, designed to “minimize the severe and often unforeseen fallout from criminal proceedings and facilitate the reentry of our clients into the community”); The Public Defender Service for the District of Columbia, The Civil Division, <http://www.pdsdc.org/Civil/index.asp> (last visited Apr. 6, 2006) (explaining the role of the new Civil Division in helping to alleviate collateral consequences).

<sup>231</sup> See, e.g., Patricia Puritz & Wendy Shang, *Juvenile Indigent Defense: Crisis and Solutions*, CRIM. JUST., Spring 2000, at 22, 25 (providing an example of a public defense office that refers clients to civil legal aid organization for representation on matters including housing, mental health, and school expulsion).

<sup>232</sup> For example, Community Legal Services, Inc., in Philadelphia, provides legal assistance to individuals with criminal records on civil matters, including employment, public benefits, and public housing. COMMUNITY LEGAL SERVICES, INC., *Information for Ex-Offenders*, [http://www.clsphila.org/Ex-Offenders\\_Information.htm](http://www.clsphila.org/Ex-Offenders_Information.htm) (last visited Apr. 7, 2006). While some legal services organizations do not necessarily tailor their services specifically to individuals with criminal records, significant overlap exists between this population and the need for these particular services.

<sup>233</sup> See, e.g., Assemb. B. 629, 2005-06 Leg., Reg. Sess. (Cal. 2005) (calling for establishing reentry services pilot program in Alameda County); H.B. 04-1074, 63d Gen.

recently released individuals,<sup>234</sup> studying the viability of already existing reentry programming,<sup>235</sup> or continuing to support (and expand) existing reentry services.<sup>236</sup>

### III. THE MISSING LINKS AND INCOMPLETE BRIDGES: THE COMPARTMENTALIZATION OF COLLATERAL CONSEQUENCES AND REENTRY

Legal scholars, policy analysts, legal service organizations, and assorted governmental and community groups have devoted substantial thought, energy, and resources to addressing the thorny legal, social, individual, and community-rooted issues stemming from collateral consequences and reentry.<sup>237</sup> However, for the most part these various constituencies have addressed either the collateral consequences or reentry component in relative

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Assem., Reg. Sess. (Colo. 2004) (enacted) (“The Department of Corrections shall administer appropriate programs for offenders prior to and after release to assist offenders with reentry into society based upon the assessed need as determined by the Director of the Department of Corrections.”); H.B. 376, 2004 Leg., Reg. Sess. (Ky. 2004) (enacted) (developing a homelessness prevention pilot program aimed at preparing a limited number of individuals being released from a state prison for reentry into the community, and providing employment, social, housing, educational, medical, mental health, and “other community services”); S.B. 594, 2004 Leg., Reg. Sess. (La. 2004) (enacted) (calling for State of Louisiana to establish programs with non-governmental organizations “to ensure the disciplined preparation of offenders for their responsible roles in the open community,” which includes the operation of post-release facilities that “shall utilize the supporting resources of probation and parole services, the cooperation of personnel in the fields of welfare, health, education and employment and the participation of the citizens of the state . . . in attempts to achieve increased public safety and to lower rates of recidivism”); S.B. No. 1486, 2004 Leg., Reg. Sess. (Okla. 2004) (enacted) (authorizing creation of reentry program within the Department of Corrections to “provide a continuum of services to meet the needs of offenders assigned or required to complete the program”); H. 1763, 2005 Leg., Reg. Sess. (Va. 2005) (enacted) (calling on the Secretary of Public Safety to coordinate and plan transitional services).

<sup>234</sup> See, e.g., S.B. 384, 85th Gen. Assem., Reg. Sess. (Ark. 2005) (enacted) (focusing on transitional housing); S.B. 983, 2005 Gen. Assem., Reg. Sess. (Conn. 2005) (focusing on transitional housing); H. 1763, 2005 Gen. Assem., Reg. Sess. (Va. 2005) (enacted) (calling on Secretary of Public Safety to coordinate transitional and reentry services to recently released individuals, specifically highlighting treatment, employment, and housing opportunities).

<sup>235</sup> See S.J. Res. 273, Gen. Assem., Reg. Sess. (Va. 2005) (enacted) (establishing joint committee to study Virginia’s reentry programs, and to “identify[] and develop[] strategies to address key needs and overcome barriers for offenders, prior to and upon leaving prison, to reduce the incidence of reincarceration and increase their successful social adaptation and integration into their communities”).

<sup>236</sup> See Second Chance Act of 2005, H.R. 1704, 109th Cong. (2005) (reauthorizing the grant program to the Department of Justice to continue the offender reentry program).

<sup>237</sup> See discussion *supra* Part II.

isolation of the other.<sup>238</sup> While there are exceptions, generally these individuals and groups have failed to recognize that these components are mutually dependant and intertwined, together imposing often impenetrable barriers for individuals leaving correctional facilities, and presenting confounding issues for the communities to which they return.<sup>239</sup> This section first describes these individualistic approaches, and then turns to how these approaches have unduly narrowed the scope of these components and have constrained the ways in which the various interrelated legal issues have been recognized, perceived, and interpreted.

A. *The Scholarly Focus on Collateral Consequences*

As illustrated above, several legal scholars have explored richly the vast legal and social intricacies of collateral consequences.<sup>240</sup> In doing so, they have laid the important and critical base to support further exploration of these consequences' myriad dimensions. However, in articulating their various legal and policy arguments – whether addressing broad-based constitutional and philosophical concerns relating to conceptions of punishment, or raising somewhat narrower constitutional and ethical concerns relating to the exclusion of these consequences from the criminal process – scholars have yet to analyze critically the numerous connections between collateral consequences and reentry. Rather, scholars have focused almost exclusively on the various constitutional and ethics-based issues rooted in the collateral consequences component.<sup>241</sup>

Several of these legal scholars have acknowledged connections between collateral consequences and reentry. They have observed that collateral consequences present numerous reentry-related obstacles for individuals exiting correctional facilities, and thus impede their ability to return successfully to their communities.<sup>242</sup> For instance, some scholars have noted the negative effect of collateral consequences on employability and the ability of individuals to lead productive, crime-free lives.<sup>243</sup> More broadly, they have

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<sup>238</sup> *See id.*

<sup>239</sup> *See id.*

<sup>240</sup> *See* discussion *supra* Part II.

<sup>241</sup> *See* Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES*, *supra* note 93, at 9, 11.

<sup>242</sup> Demleitner, *supra* note 60, at 1027 (stating that collateral consequences of drug convictions “hinder individual offenders’ rehabilitation and reintegration into society by restricting welfare benefits, employment and skills training opportunities”).

<sup>243</sup> Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 ALA. L. REV. 375, 375 (2004) (“Additionally, these sanctions can act as barriers to reintegration and rehabilitation and can serve as enablers for high recidivism rates.”); Chin, *supra* note 83, at 254 (“What is clear is that these collateral sanctions may make it impossible for convicted persons to be employed, to lead law-abiding lives, to complete

also articulated the social stigma resulting from criminal convictions by highlighting the extent to which collateral consequences further marginalize individuals with criminal records.<sup>244</sup> Because of the impediments that such stigmas impose, some scholars have urged the elimination of those consequences that are not related to the defendant's conviction and that unduly interfere with his or her ability to successfully reintegrate.<sup>245</sup>

For the most part, however, these scholars have not explored in detail the extent to which these collateral consequences compromise reintegration. Specifically, the legal arguments presented thus far have been process-oriented, as they have focused on the lack of information provided to defendants with regard to these consequences, and/or have critiqued the notion that such consequences do not constitute *legal* punishment.<sup>246</sup> In presenting their arguments, however, scholars have not embraced the reentry component as *additional support* for their propositions. As such, these arguments have essentially neglected the *results-oriented* functionality of collateral consequences. Rather, the reentry component has been noted only at the margins, usually to indicate the additional hurdles these consequences will present upon release.<sup>247</sup> In short, the reentry component has not been incorporated as *central* to the various legal arguments raised against collateral consequences and/or the processes by which they are imposed.

There are exceptions to this generalization, as a few legal scholars have explored in-depth the connections between collateral consequences and reentry. Professor Anthony C. Thompson, for example, has critiqued the "fragmented" approach to reentry, observing that "[t]he criminal justice and civil justice actors and service providers have yet to develop a coordinated approach to providing both front-end recognition of the range of consequences as well as delivery of services for individuals reentering society."<sup>248</sup> Accordingly, Professor Thompson has addressed the various obstacles to

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probation, or to avoid recidivism."); Demleitner, *supra* note 60 at 1048 (opining that there is a partial connection between collateral consequences and recidivism).

<sup>244</sup> Demleitner, *supra* note 76, at 157-60; Thompson, *supra* note 18, at 273 ("These social exclusions not only further complicate ex-offenders' participation in the life of their communities, but they also quite effectively relegate ex-offenders to the margins of legitimate society, stigmatizing them and further highlighting their separation from law-abiding members of society."). One scholar argues that collateral consequences "such as social stigmatization as a criminal and harm to future employment" also create disincentives for innocent defendants to plead guilty. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 987 (1989).

<sup>245</sup> Demleitner, *supra* note 76, at 161-62 (arguing that "[e]ffective collateral consequences require a coherent theoretical framework and a public, proportionate, narrowly targeted, and individualized application," and that such consequences "that serve merely exclusionary purposes should be limited in scope or abolished entirely").

<sup>246</sup> See *supra* notes 242-244 and accompanying text.

<sup>247</sup> See *id.*

<sup>248</sup> Thompson, *supra* note 18, at 275-76.

successful reentry and, in that context, set forth and incorporated the collateral consequences component. However, his focus was not to address the various legal and policy arguments pertaining to collateral consequences, but rather to urge service providers – specifically, public defense and civil legal services organizations – to incorporate “comprehensive reentry programming.”<sup>249</sup> He has articulated that reentry programming includes both the front-end collateral consequences component and the back-end reentry component.<sup>250</sup>

Also, Professors Deborah N. Archer and Kele S. Williams have rigorously exposed the ways in which collateral consequences converge to impede individuals as they reenter their communities.<sup>251</sup> Specifically, they have detailed the impact these consequences have on individuals, families, and communities, and have explained the relationship between these consequences, reentry, and recidivism.<sup>252</sup> Professors Archer and Williams argue that reform-based litigation strategies are necessary “to truly dismantle this crippling web of collateral sanctions and to restore ex-offenders to full citizenship.”<sup>253</sup> They assert that litigation under state law theories holds the most promise for systemic change and then offer several potential litigation strategies.<sup>254</sup>

#### B. *The Practice of Reentry*

In contrast to legal scholars, various legal services organizations, public defense organizations, community-based service providers, and community and government-based coalitions have focused primarily on issues relating to the reentry component.<sup>255</sup> Specifically, these groups provide legal and social services that aim to facilitate the individual’s reintegration into his or her community.<sup>256</sup> Some of these groups are also attempting to address reentry obstacles through community education, the mobilization of communities to prepare for the return of individuals from correctional facilities, the expansion

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<sup>249</sup> *Id.* at 290-306.

<sup>250</sup> Professor Thompson acknowledges the practical hurdles, including lack of resources, training, and expertise, as well as the philosophical hurdles to full incorporation of the reentry component. However, he offers possible solutions to these obstacles, such as structuring finely-tuned referral processes that would allow coordination among different legal service organizations based on particular areas of expertise. *Id.* at 293-94. He further suggests developing law school clinics centered on the cross-cutting needs of returning individuals with criminal convictions. *Id.* at 298-99. Thus, Professor Thompson’s focus relates to the incorporation of collateral consequences and reentry into criminal and civil law practices, rather than on the policy and analytical dimensions of these components.

<sup>251</sup> *See generally* Archer & Williams, *supra* note 147.

<sup>252</sup> *Id.* at 3-8.

<sup>253</sup> *Id.* at 2.

<sup>254</sup> *Id.* at 32-54.

<sup>255</sup> *See* discussion *supra* Part II.

<sup>256</sup> *See id.*

of services to recently released individuals, and legislative strategies.<sup>257</sup>

In large measure, however, groups are providing these various reentry services and brainstorming ways to address these myriad obstacles without critically engaging the often insurmountable hurdles to reintegration imposed by the extensive and far-reaching legal sanctions that accompany criminal convictions and shadow individuals once the “formal” portion of their sentences have concluded.<sup>258</sup> Specifically, these groups have tended to work *around* these collateral consequences issues, rather than formulate ways to work *through* these issues. As a result, these groups, to the extent they have considered collateral consequences have perceived these legal sanctions as a separate, individualized component to be addressed, if at all, in a separate forum.

For instance, the various reentry-focused coalitions, including the reentry partnerships funded by the Department of Justice, tend to focus on the manifold transitional needs that encompass reentry, including housing, health care, mental health issues, substance abuse treatment and employment.<sup>259</sup> While addressing these needs is indispensable to successful reentry, these groups have attempted to do so without engaging critically the collateral consequences component at the front end of the criminal justice system; specifically, through ways that seek to educate core constituencies about these consequences so that informed decisions are made during the early stages of the criminal process or plans are implemented at these early stages to coordinate reentry services in light of these consequences.

Similarly, some public defense organizations have begun to provide reentry services to clients upon completion of their criminal sentences without incorporating collateral consequences into their practices at the plea bargaining stage, or without gaining an institutional knowledge of the extent and scope of these consequences.<sup>260</sup> As a result, criminal defendants are largely unaware of these consequences at the guilty plea or sentencing stage.<sup>261</sup> A few public defense organizations are amassing the various collateral consequences in their respective jurisdictions with the aims of incorporating these consequences into their practices and educating various constituent communities.<sup>262</sup> However, these organizations are relatively few in number and are eclipsed by organizations that are either focusing on certain aspects of the reentry

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<sup>257</sup> See *id.*

<sup>258</sup> See discussion *supra* Part III (describing the compartmentalization of the issues of reentry and collateral consequences).

<sup>259</sup> See Faye S. Taxman et al., *With Eyes Wide Open: Formalizing Community and Social Control Intervention in Offender Reintegration Programmes*, in *AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION* 233, 240-45 (Shadd Maruna & Russ Immarigeon, eds. 2004).

<sup>260</sup> See *supra* notes 229-231 and accompanying text.

<sup>261</sup> See *supra* note 94 and accompanying text.

<sup>262</sup> See *supra* note 8.

component, or have yet to engage meaningfully either of these components.

Likewise, civil legal service organizations are providing reentry-related representation on obstacles relating to housing, employment, and public benefits without confronting the formal legal barriers imposed by collateral consequences relating directly to these obstacles.<sup>263</sup> While some of these organizations involved in impact litigation, community education, and/or policy work do recognize these connections, many others are providing narrow, individualized services without engaging the broader legal issues that impact reentry.

C. *The End Result: The Disconnection Between Collateral Consequences and Reentry*

The end result of the foregoing is that in large measure legal commentators, governmental and community groups, and legal services organizations are exploring and engaging the collateral consequences and reentry components in relative isolation of the other.<sup>264</sup> These isolated strategies and approaches have compartmentalized these components. As a result, these approaches have distorted the analytical and perceptual lenses through which these components are viewed and interpreted. Perhaps most importantly, the gaps in these perspectives, strategies, and approaches have constricted both the ways in which individualized services are provided in these contexts<sup>265</sup> as well as how other critical constituencies perceive and interpret these issues, thereby cutting off possible avenues of reform.

For instance, appellate courts have considered countless legal claims brought by appellants challenging their guilty pleas on the ground that they were not informed of the particular consequences attached to their convictions during the guilty plea process. Some appellants have argued that their defense attorneys' failure to convey this information abridged their constitutional right to effective assistance of counsel. Others have asserted that this duty to inform rested with the trial court. In all instances, however, the *legal* issue pertained to whether or not the appellant had to have been informed of the specific consequence at issue<sup>266</sup> as part of the guilty plea process.

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<sup>263</sup> See *supra* note 232 and accompanying text.

<sup>264</sup> See discussion *supra* Part II (relating the work of these groups on either one or the other component, but not both simultaneously).

<sup>265</sup> See Smyth, *supra* note 61, at 486 (declaring that a legal services gap disables clients from dealing with collateral consequences, observing that existing services in this area "are fragmented and marked by a lack of coordination and communication," and that "when clients are able to access services, the providers are often uninformed about the wide-ranging consequences of criminal proceedings, particularly those outside the provider's narrow practice areas").

<sup>266</sup> To date, appellate courts have only confronted a particular collateral consequence in their rulings reinforcing the indirect and non-punitive nature of collateral consequences. That is, appellants have challenged either the constitutionality of a particular consequence,



The vast majority of these appellate courts have rejected the appellants' claims, declaring these consequences to be non-direct and detached from the criminal process – either because the consequences were imposed by agencies outside the criminal justice system,<sup>267</sup> or because the consequences inflicted were deemed to be civil, rather than criminal, penalties.<sup>268</sup> In so holding, however, appellate courts have confined their analyses to the moment at which the defendant entered the plea, without considering the longer-term reentry – and therefore more lasting – ramifications attached to the conviction.<sup>269</sup> That is, similar to the arguments offered by legal commentators,<sup>270</sup> appellate decisions in this regard have been *process-oriented* rather than *result-focused*. By isolating their analyses to this moment, appellate courts have not considered the innumerable ways in which the collateral consequence(s) at issue will impede these appellants upon reentry. Indeed, this reentry dimension is particularly crucial because it is there that the *effects* of the criminal conviction upon the individual materialize.<sup>271</sup>

As a result, when assessing whether defense attorneys or trial courts were obligated to inform appellants about the collateral consequences of their convictions, appellate courts have missed the critical constitutional dimension: the punitive and long-lasting effects of these consequences once the “formal” criminal sentence has expired. In essence, by rooting the analyses to the moment that the guilty plea was entered, appellate courts have ignored the constitutional due process issues attached to these consequences in the long-term, and have instead both narrowed the legal inquiry and illuminated the practical difficulties of implementing systems to inform defendants of these consequences.

Moreover, these constrained perspectives have affected the ways in which elected officials perceive these components. The flurry of recent state legislation has focused on studying various reentry-related obstacles, developing generalized reentry services,<sup>272</sup> or on addressing discrete reentry

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such as sex offender registration or civil commitment, *see supra* notes 95-107 and accompanying text, or the lack of notification regarding a particular consequence. *See supra* notes 108-130 and accompanying text. No appellate court has yet dealt with the constellation of consequences that often converge upon an individual with a criminal conviction.

<sup>267</sup> *See, e.g.*, *People v. Ford*, 657 N.E.2d 265, 268 (N.Y. 1995) (collateral consequences “are peculiar to the individual and generally result from the actions taken by agencies the court does not control”).

<sup>268</sup> *See supra* notes 105-107 and accompanying text.

<sup>269</sup> *See Chin & Holmes, supra* note 31, at 700 (“The real work of the conviction is performed by the collateral consequences.”).

<sup>270</sup> *See supra* Part II.

<sup>271</sup> *See Chin & Holmes, supra* note 31 at 699-700 (giving examples of the collateral consequences that accompany a conviction or guilty plea).

<sup>272</sup> For instance, a bill introduced in the California Assembly in February 2005 charges the Department of Correction to establish and operate a reentry services pilot program in

issues.<sup>273</sup> While these initiatives pointedly recognize the need to assemble the various reentry obstacles that individuals with criminal records must confront, as well as the impact these obstacles have on recidivism and community safety, they have yet to connect the multitudinous ways in which the legal barriers imposed by collateral consequences impact reentry.<sup>274</sup>

The failure to appreciate fully the relationship between collateral consequences and reentry is perhaps best exemplified by statutes or court rules in several states that isolate the deportation consequence. These statutes and rules require that defendants, either at the guilty plea or sentencing stage, be warned that the conviction could result in deportation.<sup>275</sup> This warning recognizes the permanent effects that the criminal conviction could potentially have on a non-citizen's ability to remain in the United States.<sup>276</sup> Accordingly, this requirement is reentry-focused, as it recognizes the conviction's lasting effects. However, states have implemented this requirement without extending notice to defendants of other potential consequences.<sup>277</sup> By doing so, these

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Alameda County. The aim of the program is to "prepare participants for successful reintegration into society." Assemb. B. 629, 2005-06 Leg., Reg. Sess. (Cal. 2005). However, only those convicted of violent offenses would be eligible for the services, which would include assessments of individualized needs and developing reentry plans based on those needs, including housing, education, and substance abuse treatment. *Id.* Similarly, a bill introduced in the Connecticut General Assembly called for the establishment of a permanent commission on the reentry of prisoners. H.B. 6961, 2005 Gen. Assem., Reg. Sess. (Conn. 2005).

<sup>273</sup> See *supra* note 234 (focusing on services for recently released individuals).

<sup>274</sup> However, there are exceptions, as a few legislatures have recognized the connections between collateral consequences and reentry. For instance, the Virginia legislature passed a joint resolution in 2002 to create a subcommittee to study collateral consequences. S.J. Res. 86, 2002 Leg., Reg. Sess. (Va. 2002) (enacted). Also, the Illinois Legislature recently passed a bill that permits the sealing of residents' non-violent felony convictions to facilitate reentry after incarceration. See S.B. 3007, 93d Gen. Assem., Reg. Sess. (Ill. 2003). The bill is "designed to help former prisoners find work by allowing them to avoid reporting their nonviolent crimes to prospective employers." *Legislature Approves Bill to Seal Some Felony Convictions; Advocates Say for More Than 36,000 Former Prisoners Each Year, Finding Work Will Be Easier*, PR NEWSWIRE, Nov. 10, 2004. However, records will still be available to those screening for certain jobs, such as child care workers and school bus drivers. See *id.*

<sup>275</sup> See *supra* note 126; see also *People v. Becker*, 800 N.Y.S.2d 499, 502 (2005) (observing that "much of the attention regarding collateral consequences has focused on the extraordinary, and often irrevocable, consequence of deportation").

<sup>276</sup> However, one commentator warns that these statutes are "largely ineffective" because "the admonition is a blanket warning for every defendant, citizen or not, delivered as part of the plea mantra and done without any inquiry about whether this is a topic the defendant has discussed with her counsel." Florian Miedel, *Increasing Awareness of Collateral Consequences Among Participants of the Criminal Justice System: Is Education Enough?* N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 7, on file with author).

<sup>277</sup> See *id.* (observing that New York law only requires warnings regarding possible

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statutes have separated the deportation consequence from the myriad other consequences that can or will attach to convictions. This hierarchal perspective of collateral consequences ignores both the centrality of other critical collateral consequences to reentry as well as the ways in which those consequences can collapse to impose often insurmountable barriers to reintegration.<sup>278</sup>

Perhaps most crucially, the compartmentalized perspective is the lens through which the criminal justice system's institutional actors – namely prosecutors, defense attorneys, and judges – perceive the relevance of these components to their duties.<sup>279</sup> Because collateral consequences are not considered to be legally relevant to the criminal process,<sup>280</sup> these actors have no legal obligation to consider and incorporate the vast majority of these consequences into their respective practices at the charging,<sup>281</sup> counseling,<sup>282</sup> negotiation,<sup>283</sup> or sentencing stages.<sup>284</sup> Moreover, they similarly have no institutional responsibility to incorporate the reentry component, as this is construed to be the separate and detached “back end” of the criminal process.

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deportation consequences, thereby “leaving out a whole range of other potentially devastating collateral consequences”).

<sup>278</sup> One commentator observes that the arguments detailing the harshness of the deportation consequence could be extended to the “harmful nature” of many other collateral consequences. Jamie Ostroff, Note, *Are Immigration Consequences of a Criminal Conviction Still Collateral? How the California Supreme Court's Decision In re Resendiz Leaves this Question Unanswered*, 32 SW. U. L. REV. 359, 378-79 (2003). This commentator warns, however, that “[t]he inevitable result will be a shift from the present bright-line rule of direct versus indirect consequences, to a purely subjective entanglement surrounding the question, ‘How harsh is too harsh?’” *Id.* at 379.

<sup>279</sup> See Miedel, *supra* note 276 (manuscript at 3) (“[S]ince courts treat collateral consequences as exactly that – collateral – and do not hold lawyers responsible for their failures to inform clients about them, it is not surprising that defense lawyers take their cue from the courts and also treat these concerns as secondary.”).

<sup>280</sup> See Travis, *supra* note 1, at 16 (observing that collateral consequences “are not considered part of the practice or jurisprudence of sentencing”).

<sup>281</sup> *But see* Robert M.A. Johnson, *Collateral Consequences*, PROSECUTOR, May-June 2001, at 5, 5 (arguing that prosecutors should consider collateral consequences when making charging decisions).

<sup>282</sup> See generally Smyth, *supra* note 61 (advising defense lawyers to become better counselors and negotiators in light of the plea bargaining/collateral consequences model of criminal justice).

<sup>283</sup> Several commentators have observed that a working knowledge of collateral consequences could help defense attorneys negotiate with prosecutors. Glen Edward Murray, *Civil Consequences of Criminal Conduct*, N.Y.S.B.J., Nov. 1991, at 28, 30; Smyth, *supra* note 61, at 494 (explaining how attorneys in one public defense office have secured more favorable plea deals for clients by educating prosecutors about the collateral consequences that attach to the clients and their families); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM. L. REV. 1461, 1502 (2003).

<sup>284</sup> See Demleitner, *Abusing State Power*, *supra* note 207, at 1634-41.

IV. DEMYSTIFYING THE CATEGORIZATION OF COLLATERAL CONSEQUENCES  
AND REENTRY

There are potential explanations for the categorization of the collateral consequences and reentry components. Legal scholars might be focused on identifying, examining, and critiquing the underlying theories and structures that, above the surface, allow for the imposition of collateral consequences and, below the surface, allow for the imposition of these consequences without notice. As such, scholars might be focused on the *process* by which these penalties are imposed rather than on the *application* of these consequences at the reentry stage. Conversely, service providers might be focused on creating avenues for meaningful reentry services, rather than – or, even in light of – the legal barriers that attach automatically to criminal convictions. Other potential explanations are more complex, as they are rooted in traditional philosophies of indigent lawyering. These traditional philosophies stratify broad-ranging legal and social services by instead focusing on the narrow issues that most align with particular training and specialization.

A. *Traditional Philosophies of Criminal Defense and Civil Legal Services  
Lawyering*

Criminal defense lawyering has traditionally focused on the narrow *legal* issues presented by the individual client's interaction with the criminal justice system.<sup>285</sup> The lawyer's role under the traditional model is quite simple: secure the best legal result for his or her client.<sup>286</sup> Thus, the traditional model's main focus rests on the client's *legal* situation related to the criminal charge, rather than on the factors that possibly led to or contributed to that situation.<sup>287</sup> As a result, this model largely leaves unaddressed the client's broader social needs, as well as other *legal* needs that parallel the criminal charge.<sup>288</sup>

This relatively narrow lawyering methodology is not unique to criminal defense. Rather, while lawyers were historically general practitioners who handled an array of legal matters,<sup>289</sup> the dramatic influx of lawyers following World War II fostered a movement toward specialization.<sup>290</sup> This influx, coupled with the complexities that came with newly developing legal fields

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<sup>285</sup> See, e.g., Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123-24 (2004).

<sup>286</sup> See *id.*

<sup>287</sup> See *id.* (positing that traditional defense attorneys leave social work to others).

<sup>288</sup> See *id.* (remarking that social intervention is limited to allowing the lawyer to achieve case dispositions for their clients).

<sup>289</sup> See SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR. ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 29 (1992) (reporting that historically, “[t]he lawyer was . . . a generalist, personally ready to render whatever legal service a private client might require”).

<sup>290</sup> See *id.* at 13.

and changing law, very much demanded that lawyers develop expertise in isolated areas.<sup>291</sup>

The public defense and legal services movements that blossomed in the 1950s and 1960s came on the heels of this increased specialization. Lawyers in both the criminal and civil arenas developed expertise in their respective areas.<sup>292</sup> As a result, both public defense and civil legal services offices were organized around specialty areas,<sup>293</sup> and rigid role identification soon became the norm.

In addition, funding restrictions have also significantly constrained the boundaries of both criminal and civil legal services. Both public defense offices and civil legal services providers have funding streams that limit the range of services they can offer as well as issues they can address.<sup>294</sup> These restrictions have helped to rigidify the division between “criminal” and “civil” issues in these practice contexts, as providers have been forced to tailor services to their respective funding constraints.<sup>295</sup> These circumstances have in large measure atomized “criminal” and “civil” issues. By separating and isolating these strands, the traditional lawyering model fails to recognize the ways in which these issues often overlap and converge on individuals, their families, and their communities.<sup>296</sup>

In much the same way, the rigid perspectives fostered by specialization have influenced and shaped the ways that criminal defense practitioners have both envisioned their role and addressed their clients’ legal issues. In what Professor Kim Taylor-Thompson describes as the “individualized vision of practice,”<sup>297</sup> criminal defense attorneys have focused their objectives on individual clients, working independently of other institutions and groups with whom there are potential synergies.<sup>298</sup> On the practice side, the traditional

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<sup>291</sup> See *id.* at 40 (observing that “changing law and new complexities have put an increasing premium on specialization to maintain competence and to keep abreast of subject matter”).

<sup>292</sup> See *id.* at 41, 53 (observing that criminal defense and prosecution “have become a discrete specialty in most large urban and metropolitan suburban areas” and that “[u]nder the umbrella of the Legal Services Corporation, poverty law . . . has become a complex collection of specialties with various sub-specialties”).

<sup>293</sup> See Thompson, *supra* note 18, at 292 (attributing the organizing around specialty areas in part to the “ever-increasing complexity of legal cases”).

<sup>294</sup> See *e.g.*, Smyth, *supra* note 41, at 59 (arguing that that decrease in government spending on civil legal services in the 1990s, coupled with restrictions on representation of prisoners by programs with Legal Services Corporation funding, caused many civil legal services organizations to avoid representing individuals involved with the criminal justice system).

<sup>295</sup> *Id.*

<sup>296</sup> See *supra* notes 285-288 and accompanying text.

<sup>297</sup> Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 162 (2004).

<sup>298</sup> See *id.* (concluding that public defenders view themselves as independent actors

model of representation in this context has focused on a narrow, albeit critical, aspect of the client's life – the legal issue that is the direct cause of the client's interaction with the criminal justice system.<sup>299</sup> The attorney's sole function, in this model, is to resolve that issue in a way that best serves the client's interest.<sup>300</sup> This model does not address the client's "whole" needs, which include both the factors that contributed to his or her involvement with the criminal justice system and the forward-looking strategies needed to prevent the client's return to the criminal justice system.<sup>301</sup>

By extension, the traditional model has potentially influenced the ways in which practitioners and courts have considered the relevance of both collateral consequences and reentry to their duties, as well as the connection between these two components. As the traditional model separates "criminal" and "civil" issues, criminal practitioners as well as both trial and appellate courts simply have not recognized the relevance of the "civil" collateral consequences to the criminal process.<sup>302</sup> Rather, traditional stratification narrowly constructs the "criminal" issues to the exclusion of all other potential issues.<sup>303</sup> These isolated perspectives, in turn, account for the countless appellate decisions that view these other related consequences as "collateral," "civil," and "indirect," despite the fact that many consequences attach to the individual automatically (or virtually automatically) as a result of his or her criminal conviction.<sup>304</sup>

Moreover, the traditional model of representation has restrained criminal practitioners from extending their services to the reentry component. Again, the services and obligations under the traditional model conclude with the disposition of the *legal criminal* matter and do not encompass *civil* issues.<sup>305</sup> Thus the various reentry hurdles – the *civil* issues that collapse on the individual post-disposition – fall outside the traditional model of representation.

In much the same way, the collateral consequences and reentry components have been perceived as distinct and specialized fields. Indeed, the rigid line between "criminal" and "civil" issues as well as between "legal" and "non-legal" services is particularly manifest in this context. As a result, legal

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serving individual clients, to the extent that many "cannot imagine . . . how they might work with other institutions, groups, and individuals"). Professor Taylor-Thompson suggests that part of the reason for these individualized perspectives might reside with the evolution of legal rights that the Warren Court attached to the criminally accused in the 1960s. *Id.* at 163. These expanded rights "seemed to set an expectation that a new, more invigorated role for the defense would become the norm." *Id.*

<sup>299</sup> See *supra* notes 285-288 and accompanying text.

<sup>300</sup> See *id.*

<sup>301</sup> See *id.*

<sup>302</sup> See *id.*

<sup>303</sup> See *id.*

<sup>304</sup> See discussion *supra* Part III.C.

<sup>305</sup> See Smyth, *supra* note 41, at 56 ("Most public defenders do not think beyond the termination of the pending criminal case.").

scholars have concentrated on the legal principles underlying collateral consequences.<sup>306</sup> Service providers have tended to focus either on collateral consequences or on reentry, rather than on developing a coordinated approach that incorporates both.<sup>307</sup> Accordingly, these stratified perspectives have failed to recognize fully the connections between these two components.

B. *The Movement Toward a Holistic Perspective*

Even with the funding restrictions noted above, certain quarters of the criminal defense community have moved over the past few decades toward a holistic approach.<sup>308</sup> This approach expands the provision of legal services to address issues that could have either contributed to the client's initial involvement with the criminal justice system, or that could impact the client's ability to remain away from the system once the criminal matter has concluded.<sup>309</sup> Specifically, several public defense offices have expanded their roles to address non-criminal legal matters – such as housing and employment – as well as non-legal matters, such as psychological, socioeconomic, and family issues that impact their clients' lives.<sup>310</sup> Some of these defense organizations have also broadened their identities by establishing offices in their clients' communities and/or by otherwise forging ties with the communities in which they are located or in which their clients reside.<sup>311</sup> Through these efforts, defenders have reconceptualized themselves as problem-solvers and community stakeholders, rather than solely as individualized legal services providers.<sup>312</sup>

This holistic movement in the criminal defense context is part of a broader response to traditional forms of legal services lawyering. Indeed, the benefits of a more holistic form of representation – one that focuses on problem-solving

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<sup>306</sup> See discussion *supra* Part II.

<sup>307</sup> See Thompson, *supra* note 18, at 275-76 (describing attempts to address reentry as “fragmented”).

<sup>308</sup> An apt description of holistic lawyering is that it “analyze[s] the whole client (past, present, and future), not just the narrow legal problem.” Edward D. Shapiro, *Fresh Perspectives: The Practice of Holistic Lawyering*, CBA REC., Feb-Mar. 2002, at 38, 38.

<sup>309</sup> For a brief description of this development, see Pinard, *supra* note 55, at 1067-68.

<sup>310</sup> For an in-depth explanation of holistic or “whole-client” representation, see Clarke, *supra* note 40, at 429-36.

<sup>311</sup> See Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141, 1146 n.10 (2003) (drawing a link between the community defender movement and holistic representation); Kim Taylor-Thompson, *Individual Actor vs. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2458 (1996) (observing that “public defender offices traditionally have ignored” community relationships and that “[i]n contrast, the community defender office sees its clients as individuals with ties to the community, who should be understood in the context of that community, and thereby rejects a wholly individualized conception of its role”).

<sup>312</sup> For examples of defense organizations that have begun programs and provide services that include broader communities, see Clarke, *supra* note 40, at 445-53.

and the client's broader needs – have been recognized throughout various sectors of legal services.<sup>313</sup> As a result, there has been a trend to look beyond the specific legal issues of the particular client's situation to address broader issues that might explain, at least to a certain extent, the reasons for the client's involvement with the particular system, as well as help find solutions to these overlapping issues.<sup>314</sup>

However, while the holistic lawyering concept has transformed the provision of legal services, and particularly the defense role vis-à-vis clients and client communities,<sup>315</sup> this concept has yet to embrace, on a broad scale, the collateral consequences and reentry components of the criminal justice system.<sup>316</sup> As a result, mainstream criminal defense services – even some services that are considered to be “holistic” – do not include *full* representation on the collateral consequences and reentry components.<sup>317</sup>

The relative lack of *lawyer* focus on these components may well correlate to the lack of attention that trial courts have afforded these components, as well as the ways in which appellate courts have interpreted the legal issues pertaining to collateral consequences.<sup>318</sup> The attorney's function is to focus on the clients' needs, legal or otherwise.<sup>319</sup> Indeed, the attorney's role as

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<sup>313</sup> See *supra* note 230 (describing the broader civil units of three public defense offices); Brooks & Deoras, *supra* note 14, at 51 (describing holistic advocacy in public defense offices).

<sup>314</sup> See *supra* note 308 and accompanying text.

<sup>315</sup> See Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 302 (2002) (observing that the increasing spread of holistic practice has led defense attorneys to view their roles differently).

<sup>316</sup> Pinard, *supra* note 55, at 1069. One commentator has asserted that while the federal government, numerous community groups, law enforcement representatives, and faith institutions have begun to work on various reentry issues, “little attention has been paid to the role that the legal community should play.” Thompson, *supra* note 18, at 260. However, one commentator has noted the shortcomings of the holistic model, see Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at v-xi, on file with author) (detailing the practical, professional, and ethical constraints upon holistic lawyering by public defenders), and another commentator has keenly observed the shortcomings of the holistic model in the collateral consequences context. See Laura Johnson, *Collateral Consequences of Criminal Convictions: Do We Mean What We Do?*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 4, on file with author) (“The reality is that even the best trained, most sensitive, most holistically-oriented lawyer will, in the end, often have nothing but some very hard choices to offer a client facing criminal charges.”).

<sup>317</sup> See Johnson, *supra* note 316 (manuscript at xi-xii) (setting forth the inherent limitations of the holistic lawyering approach).

<sup>318</sup> See *supra* note 266 and accompanying text (critiquing the courts' failure to recognize collateral consequences as part of the legal process).

<sup>319</sup> But see *supra* notes 285-288 and accompanying text (relating the traditional lawyering model that rejects the notion that a lawyer should address a client's social needs).



counselor and advisor is designed to create a relationship that allows the client to reveal his or her needs, which the attorney then incorporates into the representation. One of the attorney's chief functions is to *translate* the client's legal issues and other needs to the court.

Conversely, the court's main focus is to address the legal issues presented in the case, rather than to focus on, or even to consider, the defendant's broader needs. While the trial court is concerned with the defendant's needs, such concern is usually limited to how those needs relate to the legal mechanisms needed to ensure fair process.<sup>320</sup> Appellate courts are focused on needs only to the extent that they relate to the process needed to secure related constitutional or statutory rights. Quite simply, if the attorney does not focus on the client's needs then no one else will, unless the attorney's failure to do so is so egregious that it abridges the client's right to effective assistance of counsel.<sup>321</sup>

#### V. THE INEXTRICABLE LINK BETWEEN COLLATERAL CONSEQUENCES AND REENTRY: THE NEED FOR AN INTEGRATED PERSPECTIVE

The holistic mindset has transformed the ways in which public defenders represent clients.<sup>322</sup> These defenders now take an expansive representational approach that appreciates and attempts to address the often multiple legal and non-legal issues that contribute to the client's interaction with the criminal justice system.<sup>323</sup> A similar approach is necessary to appreciate fully the connections between collateral consequences and reentry. In essence, appreciating these connections requires the recognition of all the legal *and* non-legal issues that are embedded within these components.

Fortunately, examples of integrated perspectives in this context abound as several policy analysts, policy organizations, and legal organizations have contributed rich literature that addresses the multifaceted issues pertaining to collateral consequences and reentry.<sup>324</sup> In contrast to legal scholars, who have

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<sup>320</sup> See *supra* notes 124-130.

<sup>321</sup> See *supra* note 120 (detailing the usual rejection of ineffective assistance of counsel claims predicated on failure to warn of collateral consequences).

<sup>322</sup> See *supra* note 315 and accompanying text.

<sup>323</sup> See *supra* note 308 and accompanying text (defining holistic lawyering).

<sup>324</sup> See, e.g., ABA STANDARDS ON COLLATERAL SANCTIONS, *supra* note 1, at 8-9 (recognizing that the increasing number of collateral consequences will affect the expanding numbers of individuals who will ultimately be released from prisons); Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, in PRISONERS ONCE REMOVED, *supra* note 1, at 22-25 (tying the reentry-related hurdles faced by formerly incarcerated individuals and their families directly to some of the various collateral consequences, including ineligibility for public housing and federal welfare benefits); see also Gary Fields, *Arrested Development: After Prison Boom, a Focus on Hurdles*, WALL ST. J., May 24, 2005, at A1 (reporting that some of the most significant reentry hurdles are imposed by federal, state, and local governments through various legal restrictions); see generally Nkechi Taifa, *Roadblocked Re-entry: The Prison After Imprisonment*, NAT'L BAR ASS'N MAG., May-June 2004, at 20 (setting out in detail the

focused their writings on issues relating to collateral consequences, several of these analysts and organizations have connected collateral consequences and reentry by exploring in detail the extent to which these consequences hamper the ability of individuals to reintegrate successfully upon the conclusion of their criminal sentences.

One group that has explored these connected issues is the Philadelphia Consensus Group on Reentry and Reintegration of Adjudicated Offenders.<sup>325</sup> This group, which met in 2002, included prison officials, faith-based community members, law enforcement officers, health officials, service providers, and representatives from several community groups, the district attorney's office, the public defense office, and the probation department.<sup>326</sup> The purpose of the meeting was to make specific findings regarding the various reentry hurdles confronting individuals leaving Philadelphia's prisons and to recommend various measures aimed toward facilitating safe and productive reintegration.<sup>327</sup> The group produced several recommendations, one of which called upon the Philadelphia criminal justice system to "examine and eliminate legal and administrative barriers that unduly inhibit successful offender reintegration."<sup>328</sup>

In addition, several public defense offices have incorporated collateral consequences into their practices, recognizing the post-dispositional effects of these consequences on their clients. The Bronx Defenders, a community public defense office in New York City, perhaps has the most established structure. Its Civil Action Project has assembled the range of collateral consequences in New York that attach to arrests, misdemeanor convictions, and felony convictions.<sup>329</sup> Lawyers from the Civil Action Project train the office attorneys on these consequences, consult with the attorneys in necessary instances, and develop strategies for incorporating these consequences into negotiations and plea discussions with prosecutors.<sup>330</sup> The Civil Action Project has also developed statewide educational materials on these issues.<sup>331</sup> Other

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interplay between various collateral consequences and reentry).

<sup>325</sup> PHILADELPHIA CONSENSUS GROUP ACTION PLAN, *supra* note 170, at 2-4 (summarizing the background, goals, and mission statement of the Philadelphia Consensus Group).

<sup>326</sup> *Id.* at 1.

<sup>327</sup> *Id.* at 2 (identifying the group's mission statement to "make Philadelphia a better, safer, more financially responsible city" and to "develop and promote pragmatic and concrete measures to enhance participation in society of men and women leaving the Philadelphia Prison System").

<sup>328</sup> *Id.* at 17.

<sup>329</sup> See generally THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK, *supra* note 8 (explaining the effect of arrests and convictions on an individual's ability to secure employment, housing, public benefits, and various other necessities).

<sup>330</sup> See Smyth, *supra* note 61, at 494-95 (asserting that "prosecutors and judges respond best to consequences that offend their basic sense of fairness," particularly in the areas of housing, employment, student loans, and immigration).

<sup>331</sup> See generally THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK, *supra*

defense organizations have likewise developed materials on collateral consequences and have incorporated reentry into their practices.<sup>332</sup>

Moreover, the New York State judiciary has begun exploring the connections between collateral consequences and reentry. Concerned about the lack of generalized knowledge regarding collateral consequences, New York Court of Appeals Chief Judge Judith S. Kaye organized a colloquium to explore these issues as part of the New York State Judicial Institute Academy.<sup>333</sup> This full day program brought together practitioners, judges, and law school clinicians to explore ways to educate each other about these consequences, including how these consequences interface with reentry.<sup>334</sup>

Various other constituencies have begun examining the effects of collateral consequences on individuals, families, and communities, and have shaped strategies and formulated opinions pertaining to the various aspects of collateral consequences and reentry.<sup>335</sup> These strategies and opinions have already influenced the ways in which various actors – including courts, legislatures, and various community stakeholders – perceive these aspects of the criminal justice system.<sup>336</sup>

For instance, legislation proposed in Congress recognizes the connections between collateral consequences and reentry. The Second Chance Act of 2005<sup>337</sup> seeks to address the reentry-related needs of former offenders with the

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note 8 (suggesting practice tips for criminal defense attorneys for dealing with different types of collateral consequences); The Bronx Defenders: The Civil Action Project, <http://www.bronxdefenders.org/comm/006.html> (last visited Apr. 7, 2006).

<sup>332</sup> For instance, the Public Defender Service for the District of Columbia (PDS) has incorporated collateral consequences and reentry through its Community Re-entry Program. Attorneys from this program have written a guide that outlines the collateral consequences of D.C. convictions. *See generally* COLLATERAL CONSEQUENCES IN THE DISTRICT OF COLUMBIA, *supra* note 8. In addition, these attorneys handle civil matters stemming from these consequences and provide transition services to recently released individuals. The Public Defender Service for the District of Columbia, The Civil Division, <http://www.pdsdc.org/Civil/index.asp> (last visited Apr. 6, 2006); *see also* Smyth, *supra* note 61, at 499-500 (referring to various defender groups providing resources to guide defense attorneys on collateral consequences and reentry concerns).

<sup>333</sup> Partners in Justice Colloquium, <http://www.nycourts.gov/ip/partnersinjustice> (last visited Mar. 30, 2006) (linking to the working papers, agenda, and participants of the forum, all of which focus on developing connections between courts, clinical programs, and the practicing bar).

<sup>334</sup> *Id.*

<sup>335</sup> Smyth, *supra* note 61, at 499-500 (listing groups that have compiled resources discussing collateral consequences and reentry).

<sup>336</sup> *See id.* at 494 (asserting that defenders have been successful when “they are able to educate prosecutors and judges on the draconian hidden consequences for the clients and their families”).

<sup>337</sup> This legislation was introduced into the House of Representatives on April 19, 2005, and into the Senate on October 27, 2005. *See* Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. (2005) (concerning

goal of reducing recidivism and enhancing public safety.<sup>338</sup> As a result, the legislation considers the needs of former offenders and their victims, as well as the needs of their respective families and communities.<sup>339</sup> The legislation seeks to establish or improve various reentry mechanisms, including the ways in which state and local correctional agencies facilitate the reentry of individuals leaving prison or jail.<sup>340</sup> More narrowly, this includes resolving discrete reentry obstacles, such as ensuring that each individual has documentation (such as identification),<sup>341</sup> addressing various employment-related hurdles,<sup>342</sup> and helping individuals to “secur[e] permanent housing upon release or following a stay in transitional housing.”<sup>343</sup>

This legislation also calls for the Attorney General, in consultation with various governmental agencies and community stakeholders, to form an interagency task force that would submit a report with recommendations regarding the various barriers to reentry.<sup>344</sup> Specifically, the legislation charges the task force to “identify Federal and other barriers to successful reentry of offenders into the community and analyze the effects of such barriers on offenders and on children and other family members of offenders.”<sup>345</sup> This task force would report on such issues as eligibility for federal housing programs,<sup>346</sup> eligibility for various federal public benefits such as food stamps,<sup>347</sup> and employment-related barriers.<sup>348</sup> As a result, this

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“Federal programs and activities relating to the reentry of offenders into the community”); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. (2005) (largely mirroring the House version of the bill).

<sup>338</sup> Second Chance Act of 2005: Community Safety Through Recidivism Prevention, H.R. 1704, 109th Cong. § 2 (2005).

<sup>339</sup> *Id.* § 3(a) (listing various methods for improving the reentry process).

<sup>340</sup> *Id.* § 3(a)(1)(A).

<sup>341</sup> *Id.* § 3(a)(1)(D) (addressing obstacles to obtaining such documents as identification papers, referrals to services, medical prescriptions, and job training certificates).

<sup>342</sup> *Id.* § 3(a)(8)(C) (seeking to facilitate collaboration between corrections, schools, and employment sectors, in order to reduce barriers to employment).

<sup>343</sup> *Id.* § 3(a)(5).

<sup>344</sup> *Id.* § 4(a), (c) (requiring that the report be submitted within one year after enactment of the Act).

<sup>345</sup> *Id.* § 4(c).

<sup>346</sup> *Id.* § 4(c)(1) (including admissions and evictions).

<sup>347</sup> *Id.* § 4(c)(3) (listing also Social Security and Veterans benefits).

<sup>348</sup> *Id.* § 4(c)(7). Moreover, the legislation calls for states, local governments, territories, or Native American tribes to apply for grants to develop long-term reentry plans in their respective jurisdictions. *Id.* § 3(d)(1). Among the requirements for securing the grant are that the applicant (1) provide a plan for analyzing existing laws, regulations, and practice that impose reentry hurdles, (2) make recommendations regarding laws, regulations, and practices that inhibit employment and “full civic participation,” and (3) “identif[y] and make[] recommendations with respect to those laws, regulations, rules or practices *that are not directly connected to the crime committed* and the risk that the ex-offender presents to

legislation offers an integrated perspective by recognizing the difficulties that collateral consequences present for reentry.

The recent focus on these components has also broadened the traditional perceptions of the criminal justice system. The holistic perspective has already dramatically altered perspectives relating to criminal defense lawyering and the ways that other aspects of the criminal justice system can serve the defendant's broader social needs.<sup>349</sup> In addition, the recent focus on collateral consequences and on reentry has further extended these perspectives. Various constituencies have reshaped the roles of criminal justice actors by focusing on the relationships between collateral consequences and due process.<sup>350</sup> They have adopted broader perspectives that recognize the overlapping criminal and civil issues embedded in the criminal justice system, as well as how those issues impact individuals with criminal records, their families, and their communities long after the formal sentence has concluded.<sup>351</sup>

Despite these efforts, the integrated perspective that recognizes the overlapping criminal and civil issues embedded in the collateral consequences and reentry components has not extended to the majority of jurisdictions. However, we have reached a critical moment, given the record numbers of individuals who are both incarcerated and released each year into communities nationwide.<sup>352</sup> This critical moment calls for reframing the perspectives regarding collateral consequences and reentry toward an integrated vision that recognizes both their interdependence to each other and their centrality to the criminal justice system. This holistic perspective attempts to contextualize the intertwined issues that have heretofore been compartmentalized, both in the literature setting out and critiquing various strands of the components and in the practice-based perspectives that have categorized these components.

A. *The Benefits of an Integrated Perspective*

1. More Accurate Narratives Provide the Contextual Bases for the Need to Understand and Incorporate Collateral Consequences into the Criminal Process

An integrated perspective that consistently couples collateral consequences

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the community.” *Id.* § 3(f)(4) (emphasis added); *see also id.* § 3(f) (listing the other requirements to secure a grant); Second Chance Act of 2005: Community Safety Through Recidivism Prevention, S. 1934, 109th Cong. § 3(e) (2005) (listing, in the Senate version of the legislation, identical requirements for securing a grant).

<sup>349</sup> *See* Bernhard, *supra* note 315, at 302 (“New defender offices are emphasizing a holistic approach to client representation, and the federal government is encouraging this development.”).

<sup>350</sup> *See supra* note 130 (listing situations where defendants must be informed of certain collateral consequences).

<sup>351</sup> *See supra* notes 324-332.

<sup>352</sup> *See supra* notes 16-20 and accompanying text.

and reentry provides the more accurate narrative necessary to understand and work through these interrelated issues. It provides a broad vision of the criminal process and recognizes at all points the intersection of “criminal” and “civil” issues that abound throughout. An integrated perspective in this regard recognizes the centrality of collateral consequences to the criminal process, particularly because these consequences shape the long-term effects of the conviction.<sup>353</sup> Therefore, recognition of these consequences molds the reentry dimension as they directly impact the options and opportunities available to individuals upon the conclusion of their sentences.

## 2. More Informed Charging Decisions

An integrated perspective also assists prosecutors with charging decisions and plea negotiations. Several commentators have explored the vast powers afforded the prosecution through their charging discretion.<sup>354</sup> These powers are particularly broad because the vast majority of cases in both the state and federal systems are resolved through guilty pleas.<sup>355</sup> As a result, commentators have observed that the prosecutor’s decision as to the actual criminal charge often dictates the ultimate disposition of the entire case.<sup>356</sup>

Detailed recognition and knowledge of the collateral consequences of criminal convictions and of how those consequences impact reentry would assist prosecutors tremendously in their charging decisions. For instance, a prosecutor might decide in a given case that charging the defendant with a misdemeanor, rather than a felony, would both lessen the collateral consequences that could potentially attach to a conviction while recognizing that *some* collateral consequences would *still* attach to that conviction.<sup>357</sup>

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<sup>353</sup> See *supra* notes 60-71 and accompanying text.

<sup>354</sup> See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 21 (1998) (explaining prosecutorial charging powers); Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 *BYU L. REV.* 669, 671 (1992) (“No government official can effect a greater influence over a citizen than the prosecutor who charges that citizen with a crime.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 *HARV. L. REV.* 1521, 1525 (1981) (“Decisions whether and what to charge, and whether and on what terms to bargain, have been left in prosecutors’ hands with very few limitations.”).

<sup>355</sup> See *supra* note 33.

<sup>356</sup> See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2120 (1998) (arguing that, given the prevalence of plea bargaining, the prosecutor “acts essentially in an inquisitorial mode”); Vorenberg, *supra* note 354, at 1526 (asserting that the prosecutor’s charging decision is “the key to the prosecutor’s control over plea bargaining”).

<sup>357</sup> For example, in the possession of narcotics context, a prosecutor could decide to charge a defendant with misdemeanor, rather than felony possession, recognizing that a guilty plea to the felony charge would result in a range of collateral consequences, including ineligibility for food stamps, public housing, and federal student loans, while also recognizing that a guilty plea to the misdemeanor charge would not exclude the defendant

Accordingly, fundamental notions of fairness would inform these charging decisions, as prosecutors would be better able to consider the true *individualized* impact of the resulting convictions.<sup>358</sup>

### 3. More Informed Plea Negotiations and Dispositions

An integrated perspective would also better inform plea negotiations between prosecutors and defense counsel. Given the primacy of plea bargains in the criminal justice system,<sup>359</sup> plea negotiations between opposing counsel are a critical and often dispositive dimension of criminal practice. Incorporating the collateral consequences and reentry components into these negotiations would allow defense attorneys to more accurately lay out both the immediate and long-term effects of the particular disposition.<sup>360</sup> Conveying this information to prosecutors and courts would enable both entities to more fully understand and appreciate these effects and would encourage them to calibrate their positions accordingly.<sup>361</sup>

### 4. More Accurately Reveals the Legal Issues Embedded in the Collateral Consequences and Reentry Components

The integrated perspective would also more accurately set out the potential

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from obtaining food stamps, but, as with the felony charge, could render the defendant ineligible for public housing and student loans. *See supra* notes 62-67 and accompanying text; *see also* THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK, *supra* note 8, at 9-13, 19-20 (comparing the collateral consequences of felony and misdemeanor convictions in New York). Of course, if the prosecutor believes the situation warrants, he or she could decide not to institute particular charges, believing that the collateral consequences that would attach to the conviction are overly burdensome to the particular defendant. For other examples of how prosecutors could and should use collateral consequences to inform charging decisions, see Catherine A. Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2006) (manuscript at 3-4, on file with author).

<sup>358</sup> *See, e.g.*, Thompson, *supra* note 18, at 274 (“Although prosecutors may not have an express professional obligation to consider the real impact of a conviction, practical concerns about fairness, as well as the societal concern about creating obstacles to the reentry of ex-offenders who have paid their debt to society, may impose such a duty.”).

<sup>359</sup> *See supra* note 33.

<sup>360</sup> *See* Chin & Holmes, *supra* note 31, at 715-16.

<sup>361</sup> *See* Chin & Holmes, *supra* note 31, at 718-19 (arguing that a defense lawyer who “[i]dentif[ies] and explain[s] collateral consequences to the prosecutor or court may influence the decision to bring charges at all, the particular charges that are brought, the counts to which the court or prosecution accept a plea, and the direct consequences imposed by the court at sentencing”); ABA STANDARDS ON CRIMINAL SANCTIONS, *supra* note 1, Standard 19-2.1, cmt. at 22 (“Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients, and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making.”).

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legal issues involving the lack of notice provided to defendants regarding collateral consequences. As noted above, lawyers, and consequently courts, have confined their analyses of whether or not appellants were required to have been informed of a particular consequence to the moment at which he or she entered the guilty plea. However, an integrated perspective recognizes that the more accurate analysis considers first the long-term reentry-related effects of the particular consequence. As such, this perspective broadens the legal claims that are presented to courts. It also invites more accurate longitudinal analyses that incorporate the reentry dimension into the legal question of informing defendants about the range of consequences that might attach to the conviction as a result of the guilty plea.

5. Exposes the True Effects of Collateral Consequences

Lastly, the integrated perspective would, at the very least, bring collateral consequences to the surface. Doing so would more accurately expose the reentry-related obstacles tied to these consequences and would provide both criminal justice actors and the public with a richer understanding of the criminal process.<sup>362</sup> This richer understanding would, in turn, stimulate meaningful conversations regarding the breadth – and perhaps even the necessity – of these consequences.<sup>363</sup>

B. *Some Questions Raised by Adopting an Integrated Perspective of Collateral Consequences and Reentry*

While the benefits of advancing an integrated perspective that envisions collateral consequences and reentry as interwoven components are plentiful, it is important to recognize that this perspective also raises questions regarding the legal and logistic issues that would soon follow. This section sets out two potential issues.<sup>364</sup> However, the Article does not attempt to resolve these

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<sup>362</sup> Two commentators have made a similar observation, albeit in a much different context. They assert that litigation should be brought challenging the network of consequences that, even if ultimately unsuccessful, would alert policymakers and the general public to their existence. Archer & Williams, *supra* note 147 (manuscript at 2) (arguing that a “state specific litigation strategy, coordinated with legislative and public education efforts” would, even if unsuccessful, act “as a counter to the lack of political will and negative public opinion that often hinders legislative reform in this area”).

<sup>363</sup> See, e.g., Johnson, *supra* note 316 (manuscript at 4) (incorporating collateral consequences at sentencing “could represent the beginning of a true public discourse or debate about the wisdom of the actual disabilities that we impose on persons convicted of crimes”).

<sup>364</sup> Certainly these are only two of several potential issues. However, commentators have explored at least two other issues that flow from a holistic perspective: first, redefining (and broadening) the criminal defense attorney’s role; and second, finding ways to incorporate a holistic perspective regarding these components even in the face of challenging resource constraints. For a discussion regarding the broadening of the defense attorney’s role, see Thompson, *supra* note 18, at 294-96. For some suggestions on incorporating these



issues, but rather urges that these issues deserve deliberative analyses.

1. Does the Integrated Perspective Change the Current Status of Collateral Consequences as “Civil” and “Indirect” Sanctions that Do Not Comprise Criminal Punishment?

As discussed above, appellate courts have routinely rejected broad legal challenges to collateral consequences, holding them to be non-punitive civil penalties rather than criminal sanctions.<sup>365</sup> More narrowly, appellate courts have relied on the direct/indirect and civil/criminal distinctions to hold that neither defense attorneys nor trial courts are required to inform defendants of these consequences as part of the guilty plea or sentencing process.<sup>366</sup> As a result, the non-criminal nature of these consequences separates them from the *criminal* punishment imposed upon the defendant.

The conceptualization of punishment is critical because its existence triggers various constitutional protections for those accused or convicted of crimes.<sup>367</sup> However, the punishment question is particularly murky because of the various definitions and explanations that courts and commentators have offered.<sup>368</sup> Many commentators have espoused and debated punishment perspectives in an attempt to cleanly distinguish between criminal and civil systems, with some having observed that the distinctions between these systems are fluid and have changed over time.<sup>369</sup>

In the criminal context, perhaps the most crystallized observation is that punishment incorporates only “those sanctions specifically imposed by the state as a result of a criminal conviction.”<sup>370</sup> Accordingly, punishment relates to the penalties imposed under the auspices of the criminal justice system. Conversely, penalties imposed by agencies *outside* of the criminal justice

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components, even with resource constraints, see Pinard, *supra* note 55, at 1092-93.

<sup>365</sup> See *supra* note 107.

<sup>366</sup> See *supra* notes 119-124 and accompanying text.

<sup>367</sup> See, e.g., *supra* note 107 and accompanying text (observing courts’ refusal to find constitutional violations where penalties were not “criminal punishment”). This distinction is constitutionally important because, for instance, the Double Jeopardy Clause of the United States Constitution forbids a person from being punished twice for the same crime. U.S. CONST. amend. V. Similarly, the Ex Post Facto Clause forbids punishment or increased punishment to be exacted upon a person for an act committed at a time prior to the existence of such punishment. U.S. CONST. art 1, § 10, cl. 1.

<sup>368</sup> See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 12 (3d ed. 2001) (“[T]here is no universally accepted non-arbitrary definition of the term ‘punishment.’”).

<sup>369</sup> See, e.g., Chin, *supra* note 107, at 1686 (proposing that a sanction can be distinguished as criminal or civil based on whether it is imposed because of conviction or conduct); Demleitner, *supra* note 60, at 1032 (discussing the punitive nature of collateral consequences).

<sup>370</sup> Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 32 (2003).

system are not, as a general rule, considered to constitute punishment.<sup>371</sup>

One question that then emerges is whether an integrated perspective, envisioning collateral consequences and reentry as interwoven components, changes the punishment equation. Some commentators have argued that collateral consequences, standing alone, constitute punishment because they are imposed on those convicted of criminal acts.<sup>372</sup> However, the reentry component illustrates how these penalties actually bear upon these individuals by manifesting the ways in which collateral consequences converge to limit, if not stifle, the individual's social, political, and economic access. In essence, does this manifestation transform the collateral consequences into *criminal* punishment?

2. Does the Integrated Perspective Require Prosecutors to Undertake a Larger Role Regarding Collateral Consequences and Reentry Components?

Several scholars have argued that both trial courts and defense attorneys have duties to inform criminal defendants of collateral consequences.<sup>373</sup> Some commentators have also urged that courts (in the form of reentry courts) and defense attorneys have roles in facilitating the release of individuals from correctional facilities back to their communities.<sup>374</sup> However, what role, if any, should prosecutors have in a system that envisions collateral consequences and reentry as integrated and integral components of the criminal process?<sup>375</sup>

One commentator, while serving as president of the National District Attorneys Association, asked a similar question in the collateral consequences context.<sup>376</sup> He urged that prosecutors consider these consequences in order “to

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<sup>371</sup> DRESSLER, *supra* note 368, at 12 (giving as examples the disbarment of a lawyer or the actions of a lynch mob). See *In re Resendiz*, 19 P.3d 1171, 1179 (Cal. 2001) (asserting that some California courts have “called ‘collateral’ any consequence . . . that ‘does not inexorably follow from a conviction of the offense involved in the plea’” (quoting *People v. Crosby*, 5 Cal. Rptr. 2d 159, 160 (Cal. Ct. App. 1992))). For this reason, Professor Gabriel J. Chin observes that the standard response to the complaint that collateral consequences represent unfair punishment is that they “are not punishment at all; rather, they are civil regulatory measures designed to prevent undue risk by proven lawbreakers.” Chin, *supra* note 107, at 1685.

<sup>372</sup> TRAVIS, *supra* note 16, at 64 (arguing that collateral consequences constitute punishment because “they are legislatively defined penalties imposed on individuals convicted of crimes, resulting in serious, adverse consequences”).

<sup>373</sup> See *supra* Part II.

<sup>374</sup> See Pinard, *supra* note 55, at 1092-94 (focusing on defense attorneys); Travis, *supra* note 16, at 272-74 (focusing on reentry courts).

<sup>375</sup> I thank Professor Alan Hornstein for suggesting that I consider whether or not prosecutors should have a duty to inform defendants of collateral consequences.

<sup>376</sup> Johnson, *supra* note 281, at 5 (“In the performance of our duties as prosecutors, should we . . . consider the consequences of the accused outside of the justice system, that

see that justice is done.”<sup>377</sup> However, even assuming that prosecutors should have a role regarding these components, several questions arise as to the extent of this role.

For instance, in the collateral consequences context, the American Bar Association has adopted standards requiring defense attorneys to inform their clients of all possible consequences that attach to their convictions.<sup>378</sup> However, given that prosecutors institute the charges that lead to these convictions, should they have a similar duty to inform defense counsel about the range of consequences that will or can attach? Such a duty would especially benefit defendants in jurisdictions that do not provide counsel at the initial appearance. These defendants often enter guilty pleas without consultation.<sup>379</sup> While judges inform these individuals of the constitutional rights they waive by so pleading, judges are not obligated to inform defendants of these collateral consequences.<sup>380</sup> Should the prosecutor in this instance, as part of his or her role as “minister of justice,”<sup>381</sup> inform the unrepresented defendant of these consequences? If so, how would prosecutors balance these additional duties with their caseloads and various resource constraints?

Similarly, to what extent should prosecutors become involved in reentry? Specifically, should the prosecution’s role extend to developing, administering, and/or participating in reentry-focused programming that focuses on individuals released from correctional facilities, victims of criminal acts, and/or their respective communities?<sup>382</sup>

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are imposed upon conviction as a matter of law?”).

<sup>377</sup> *Id.*

<sup>378</sup> ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY, Standard 14-3.2(f) (3d ed. 1999), available at [http://www.abanet.org/crimjust/standards/guiltypleas\\_blk.html#3.2](http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#3.2) (“To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”).

<sup>379</sup> See STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* iv (2004), <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/execsummary.pdf> (“[T]housands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.”).

<sup>380</sup> See *supra* note 119.

<sup>381</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (1999) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

<sup>382</sup> Some prosecutors do believe their function extends to the reentry component, and have established reentry-related programs. See, e.g., Bruce Western, *Lawful Re-entry*, AM. PROSPECT, Dec. 1, 2003, at 54 (describing a program run by the Brooklyn, New York, district attorney’s office that has fostered collaboration between law enforcement and community organizations to address public safety issues, and that has implemented various programs for individuals exiting correctional facilities, including job placement and education programs).

## CONCLUSION

The perspectives offered in this Article recognize that the criminal justice system (as well as the literature and practices that are both reactive to and reflective of these overlapping criminal and civil issues) has reached a transformative moment that will shape the perceptions of the individuals, families, and communities that are affected by and operate within the system. These perceptions could potentially influence philosophical perspectives on punishment and debates involving the viability or applicability of collateral consequences and reentry practices. This influence could extend to administrative and practice-based measures aimed at incorporating either or both of these components into the criminal process, to litigation strategies related to these components' various strands, and to appellate court perceptions of the various legal issues tied to these consequences. These perceptions could also influence the legal and non-legal services provided to individuals exiting correctional facilities. Perhaps most importantly, they can influence community perspectives of the legal and social obstacles imposed upon these individuals and how those obstacles further stigmatize reentering individuals and potentially impact community safety. Moreover, these perspectives will be shaped at a critical moment as increasing numbers of individuals exit correctional facilities, as collateral consequences impede their ability to successfully reintegrate, and as these complex issues present numerous public safety and social concerns for the various communities to which these individuals return.

As a result, collateral consequences and reentry are inseparable components. Those practicing or otherwise participating in the front end of the criminal justice system must understand the full scope of collateral consequences, given their direct impact on the individual's ability to reenter society upon the conclusion of his or her sentence. Similarly, those practicing in the various back-end reentry-related efforts must explicitly bring collateral consequences within their efforts. While several groups have worked doggedly to address these various consequences upon reentry, these groups can use their learned lessons to further inform those working at the front end about the true and lasting effects of criminal convictions.

However, this integrated perspective is not a panacea to the manifold questions that persist with regard to both of these components. While an integrated perspective would resolve some issues regarding these components, it would present a host of new questions regarding the nature of criminal punishment as well as the heretofore rigidly defined roles of various criminal justice actors. As a result, it leaves open for robust debate questions that converge at the intersection of the criminal and civil divide.