PRELIMINARY REPORT*

FOR DISCUSSION ONLY

COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

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COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

** The Drafting Committee is presenting this report in order to advise the Conference of its progress to date and to obtain comments regarding certain issues that it is considering. This report has not been reviewed by the Committee on Style and will not be read line by line.*

COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

Issues Memorandum

Introduction

Both the criminal justice system and society as a whole are faced with managing the growing proportion of the free population that has been convicted of a state or federal felony offense. In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s.[1] Prison growth is large in absolute and relative terms; in 1974, 1.8 million people had served time in prison, representing 1.3% of the adult population. In 2001, 5.6 million people, 2.7% of the adult population, had served time. In 2003, the Department of Justice estimated that if the 2001 imprisonment rate remained unchanged, 6.6% of Americans born in 2001 would serve prison time during their lives[2]--this may be an underestimate given that the incarceration rate has increased every year since 2001.

In addition to those serving or who have served prison time, an even larger proportion of the population has been convicted of a criminal offense without going to prison. Over 4 million adults were on probation on December 31, 2003, almost twice as many as the combined number on parole, in jail or in prison.[3]

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. Of course, they must successfully reenter society or be at risk for recidivism. Although no one supports "coddling criminals," society has a strong interest in preventing recidivism. An individual who could have successfully reentered society but for avoidable cause reoffends generates the financial and human costs of the new crime, expenditure of law enforcement, judicial and corrections resources, and the loss of the productive work that the offender could have contributed to the economy.

As the need for facilitating reentry becomes more pressing, several developments have made it more difficult. First, a major challenge for many people with criminal records is the increasingly burdensome legal effect of those records. Apart from self-esteem and informal social stigma, a criminal conviction negatively affects an individual's legal status. For many years, a person convicted of, say, a drug felony, lost his right to vote for a period of time or for life, could not possess a firearm, and was

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[1] In November, 2004, the Bureau of Justice Statistics reported that the rate of grown of the national prison system had diminished to 2.1%, which was less than the average annual grown rate of 3.4 % since 1995, but still positive. Paige M. Harrison & Allen J. Beck, *Prisoners in 2003*, at 1, Bureau of Justice Statistics Bulletin (Nov. 2004, NCJ 205335).

[2] Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, at 1, Bureau of Justice Statistics Special Report (Aug. 2003, NCJ 197976).

[3] Laura E. Glaze & Seri Palla, *Probation and Parole in the United States, 2003*, at 1, Bureau of Justice Statistics Bulletin (July 2004, NCJ 205336).

barred from service in the military and on juries, state and federal, civil and criminal. If a non-citizen, the convicted person could be deported. These disabilities have been called "collateral consequences" "civil disabilities" and "collateral sanctions." This memorandum uses the term "collateral sanction" to mean a legal disability that occurs by operation of law because of a conviction but is not part of the sentence for the crime.

In recent years, collateral sanctions have been increasing. To identify just some of those applicable to drug felons under federal law, 1987 legislation made drug offenders ineligible for certain federal health care benefits;[4] a 1991 law required states to revoke some drug offender's driver's licenses or lose federal funding,[5] in 1993, Congress made drug offenders ineligible to participate in the National and Community Service Trust Program.[6] In 1996, Congress provided that persons convicted of drug offenses would automatically be ineligible for certain federal benefits;[7] a year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit.[8] In 1998, persons convicted of drug crimes were made ineligible for federal educational aid[9] and for residence in public housing.[10] In addition, 1988 legislation authorized a state or federal sentencing judge to take away eligibility for federal public benefits.[11]

Like Congress, state legislatures have also been attracted to limiting the opportunities of convicted persons. Studies of disabilities imposed by state law or regulation done by law students in Maryland and Ohio show literally hundreds of collateral sanctions on the books in those states.[12] These laws limit the ability of convicted persons to work in particular fields, to obtain state licenses or permits, to obtain public benefits such as housing or educational aid, or to participate in civic life.

A second major development is the availability to the all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans. Twenty years ago, an applicant might not have been asked for her criminal record when renting an apartment or applying for a job, and it would have been difficult for even an enterprising administrator to find, say, a 15 year old, out-of-state, marijuana offense. Now, gathering this kind of information is cheap, easy and common.

The legal system has not successfully managed the proliferation of collateral sanctions in several respects. One problem is that collateral sanctions are administered largely outside of the criminal justice system. Court decisions have not treated them as

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[4] 42 U.S.C. § 1320a-7(a)(3), added by Pub. L. 100-93, Aug. 18, 1987, 101 Stat 680.
[5] 23 U.S.C. § 159, added by Pub. L.102-143, Title III, § 333(a), Oct. 28, 1991, 105 Stat. 944.
[6] 42 U.S.C. § 12602(e), added by Pub. L. 103-82, Sept. 21, 1993, 107 Stat 785.
[7] 21 U.S.C. § 862a, added by Pub.L. 104-193, Title I, § 115, Aug. 22, 1996, 110 Stat. 2180.
[8] 26 U.S.C. § 25A(b)(2)(D), added by Pub. L. 105-34, Aug. 5, 1997, 111 Stat 788.
[9] 20 U.S.C. § 1091(r), added Pub.L. 105-244, Title IV, § 483(a) to (f)(1), Oct. 7, 1998, 112 Stat. 1735.
[10] 42 U.S.C. § 13662, Pub.L. 105-276, Title V, § 577, Oct. 21, 1998, 112 Stat. 2640.
[11] 21 U.S.C. § 862, added by Pub. L. 100-690, Title V, § 5301, Nov. 18, 1988, 102 Stat. 4310.
[12] *See* Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. Toledo L. Rev. 611 (2005); Re-Entry of Ex-Offenders Clinic, University of Maryland School of Law, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (2004).

criminal punishment, but mere civil regulation. The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court held that a guilty plea is invalid unless "knowing, voluntary and intelligent." Courts have held that while a judge taking a guilty plea must advise of the "direct" consequences—imprisonment and fine—defendants need not be told by the court or their counsel about collateral sanctions. For example, the Constitution does not require that a defendant pleading guilty to a drug felony with an agreed sentence of probation be told that, even though she may walk out of court that very day, for practical purposes, her life may be over: Military service, higher education, living in public housing, even driving a car, may be out of the question. Many people are surprised when they discover obstacles they were never told about. The major exception to the exclusion of collateral sanctions from the guilty plea process is in the area of deportation. The District of Columbia and 25 states provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty.

It is problematic for the criminal justice system to pay so little attention to collateral sanctions, because in many instances they are what is really at stake. In state courts in 2002, 59% of those convicted of felonies were not sentenced to prison; 31% received probation and 28% jail terms.[13] In a high percentage of cases, the real work of the legal system is done not by fine or imprisonment, but by changing the legal status of convicted persons. The legal effects the legislature considers important are in the form of collateral sanctions. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them.

A second, related, problem with the legal system's administration of collateral sanctions is that in most jurisdictions, no one knows what they are. While some disabilities may be well-known, such as felon disenfranchisement and the felon firearms prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator or bureaucrat could identify all of the statutes that would be triggered by violation of the various offenses in the state's criminal code. There is no incentive for any particular actor to spend the time to learn the details of a very complex feature of a state's laws if they are not required to do so. Another reason is that the sanctions have proliferated unsystematically, with a prohibition on felons obtaining one kind of license popping up in one corner of a state's code, a prohibition of felons obtaining some other kind of government employment appearing in an agency's regulations. Thus, even if a defendant or attorney wanted to find out about them, it would be exceedingly difficult to do so.

There are at least three consequences of the legal system's ignorance of collateral sanctions imposed under its law. First, because there is no systematic knowledge of collateral sanctions, the problem of informing individual defendants before they plead guilty is costly for any individual to solve. Second, it is virtually impossible for policymakers and the public to make informed judgments about whether collateral sanctions are overabundant, just right, or insufficient. Third, without ready access to information about what collateral sanctions are applicable to particular offenses,

[13] Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, at 2, Bureau of Justice Statistics Bulletin (Dec. 2004, NCJ 206916).

convicted individuals who want to comply with the law may violate a statute solely because they are unaware of it.

An Act could deal with several aspects of the creation and imposition of collateral sanctions, including procedural issues with respect to the imposition of collateral sanctions, substantive limitations on collateral sanctions, and the restoration of the rights of those subject to collateral sanctions. Some of the issues have been anticipated by the ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed. 2003) ("ABA Standards"), and the solutions they propose will be mentioned.

Procedural Issues

Collection. In effect, each state has a title of its code called "Convicted Felons," regulating the legal status of this group in scores or hundreds of ways. But instead of publishing these laws together in volume "C" of the code, the statutes have been divided up and scattered throughout the code. The first and most basic step that each state should take is to collect its collateral sanctions and put them in one place, so they can be made them available to policymakers, prosecutors, defense attorneys, judges, and the general public. The dispersion of the laws defeats the purpose of having published codes in the first place.

Collecting collateral sanctions from a state's code and administrative regulations seems uncontroversial; no one could object to making formal written law knowable to those who use and will be affected by it. The job could be done officially or unofficially. For example, it could be done by government officers such as the state's Legislative Counsel or Reviser of Statutes, by the state's Attorney General or a state's Advisory Committee on the Rules of Criminal Procedure. Alternatively, the project could be contracted out, performed by a state bar committee, or a law school as was done in Maryland or Ohio.

Another question is the legal status of the compilation. The compilation could be enacted as positive law as part of the state code, and collateral sanctions not included would be ineffective. Because codification would require an act of the legislature, codification would encourage the legislators to examine the state's collateral sanctions as a collection. The ABA Standards recommended codification. *See* Standard 19-2.1. Alternatively, the compilation could be published informally as a secondary reference, or by the state as something short of positive law. (But even if the legislature does not codify collateral sanctions, it should be encouraged to draft its collateral sanctions statutes unambiguously. Among the issues that should be addressed explicitly are whether a particular sanction applies to out-of-state convictions, and what particular offenses are included under a general description, such as "crime of moral turpitude.")

Whoever compiles the document, it should be made widely available. Certainly it should be viewable and downloadable on the Internet without charge, and if feasible

distributed as a hardcopy booklet. The compilation should also be updated annually as new legislation enacts new sanctions and repeals old ones.

Advice to Defendant of Applicable Collateral Sanctions. It is relatively uncontroversial that, to the extent feasible, persons pleading guilty to a criminal offense should be advised of applicable collateral sanctions during the guilty plea process.[14] Collection of a jurisdiction's collateral sanctions resolves most of the difficulty; once a collection exists, the information can somehow be made available to the defendant under an appropriate court rule or statute.

The defendant could be informed in several ways. The defendant could simply be given the booklet as part of the paperwork to figure out on her own, the defendant could be advised and counseled by defense counsel before the guilty plea, or the defendant could be advised and her understanding confirmed by the court during the guilty plea colloquy.

Simply being handed a booklet that is 30 or 40 pages long or longer is unlikely to be particularly informative to a criminal defendant. The advantage of judicial advisement would be that the defendant's receipt and understanding of the advice would be on the record, but it would take a great deal of time for a judge to read all or part of the 30 or 40 page booklet during every guilty plea colloquy. Furthermore, because the waiver of rights and advisement of consequences typically occurs when the defendant is in the midst of actually pleading guilty, it is not particularly helpful for a defendant to begin to consider these issues for the first time at that point.

The advantage of advisement by defense counsel is that it would be take less in-court time, and it could be done at a more meaningful stage in the process, as part of the decision whether to plead guilty rather than as part of the plea itself. Moreover, the advice could be tailored to the circumstances of the particular defendant. That is, if the defendant is a licensed barber rather than a licensed broker, the lawyer could focus on that and the other collateral sanctions of concern to the specific defendant. The judge is not in a position to do this as well, if for no other reason than the judge will not have access to the client's privileged information. The defendant's receipt and understanding of advice about collateral sanctions could quickly be put on the record by the judge during the guilty plea colloquy.

Another variable is the effect of non-compliance with a court rule or statute mandating advice. The criminal justice system depends in large part on the finality of guilty pleas. Accordingly, there is strong reason not to upset a plea for a technical

[14] One objection that has been raised to advisement about applicable collateral sanctions is that if defendants actually know about the dozens or hundreds of negative legal effects of a criminal conviction, they will refuse to plead guilty. This may be true, but because the sanctions typically apply to a conviction by plea or jury verdict, pleading not guilty is not a means for a guilty person to avoid collateral sanctions. It is reasonable to assume that the largest group of people who will plead not guilty when they otherwise would have pleaded guilty will be those who have a defensible case, but planned to plead guilty under the misapprehension that a criminal conviction was no big deal.

deficiency in guilty plea procedure, and this is the prevailing rule.[15] But what if the defendant can demonstrate a serious and prejudicial violation of a rule requiring defendants to be informed of collateral sanctions? What if, for example, a defendant shows that: 1) the judge failed to confirm during the guilty plea colloquy that her defense lawyer had advised her of collateral sanctions, and she was in fact not informed that her guilty plea to a drug offense meant that she would be unable to adopt her foster child;[16] 2) that she would not have pleaded guilty if she had known the legal consequences; and 3) she has a colorable argument that she is not guilty of the offense?

In favor of the conclusion that noncompliance with a rule should never lead to upsetting a plea is the argument that jurisdictions would be justifiably reluctant to adopt a rule that could upset the finality of pleas. Under current law there is no requirement that defendants be advised; it would be an example of the rule that "no good deed goes unpunished" if a state's effort to offer more than current law requires resulted in undermining pleas that are by all appearances entirely valid.

A counterargument might be that a rule stating in text "there are no penalties for failing to comply with this rule" is unlikely to command respect; it might be systematically ignored. On the other hand, if the rule is crafted so that courts can easily apply it, pleas upset on the basis of noncompliance will be vanishingly rare. If a case should come up when there is flagrant non-compliance and a defendant was misled, the conviction is unjust. In such a one-in-a-million case, the argument would go, the system can afford a second look.

In any event, the rule should be drafted in such a way that judges can successfully comply with it, with minimal burden. If the rule is well-structured, the procedure will be followed and the question of remedy for non-compliance will be of little practical importance.

Another possible time for notification of collateral sanctions is upon the defendant's discharge from custody, parole, or probation supervision, or when walking out of court after sentencing itself if the defendant will not be subject to further custody. Although these moments are not thought to be "critical stages of the prosecution" for due process purposes, if the legislature wants to encourage compliance with the legal restrictions and promote successful reentry into legitimate society, it would be an opportune time to advise individuals of applicable legal restrictions, as well as mechanisms for restoration of rights under state law.

The ABA Standards recommended requiring that defendants be advised of the codified list of consequences by defense counsel, and that the judge should confirm that the advisement had taken place. The notification and confirmation applied at both plea and sentence. (ABA Standards 19-2.3(a) and 19-2.4(b)). Violation of the rule, in and of

[15] *See, e.g.,* Fed. R. Crim. P. 11(h) ("A variance form the requirements of this rule is harmless error if it does not affect substantial rights.").
[16] *See* Amy E. Hirsch, et al., *Every Door Closed: Barriers Facing Parents with Criminal Records* 68-69 (2002).

itself, is not a basis for withdrawing the plea. ABA Standard 19-2.3(b) ("failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be the basis for withdrawing a plea of guilty, except where otherwise provided by law, or where the failure renders the plea constitutionally invalid.")

Substantive Limitations on Collateral Sanctions

An Act could provide some sort of general standard with respect to collateral sanctions, could prohibit a specified list of collateral sanctions, or, following the lead of the ABA Standards and the Model Sentencing and Corrections Act, could do both. The Model Sentencing and Corrections Act ("MSCA"), § 4-1001(b) provides that a convicted person "retains all rights, political, personal, civil and otherwise", including, among others it lists, the right to vote. The ABA Standards has a list of sanctions which should never be imposed under any circumstances, such as "deprivation of the right to vote, except during actual confinement." (ABA Standard 19-2.6(a)).

In addition to prohibiting particular sanctions, the MSCA also sets up a general standard, prohibiting discrimination in employment or licensing solely because of a conviction (MSCA § 4-1005(b)), but allowing use of the conviction "if the underlying offense directly relates to the particular occupation, profession or educational endeavor involved." MSCA § 4-1005(c). This is similar to the approach of the ABA Standards, which advise legislatures not to impose a collateral sanction "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." (ABA Standard 19-2.2)

Creation and enactment of a uniform list of permissible collateral sanctions would be extremely challenging. It is true that there is a great degree of state-to-state variance on questions such as whether or when persons convicted of felonies will be allowed to, say, vote, or possess firearms. However, whether wise or unwise, this variation appears to result from conscious legislative choice, rather than the absence of good model language or of careful analysis of merits of the policy.

On the other hand, proposing a general standard, such as that embodied in MSCA § 4-1005(c), might be worth considering. First, the principles of that section are already in the codes of more than half of the states.[17] These statutes vary in whether they cover private employment, public employment and occupational licensing, and whether they apply only when an individual's rights have been restored under other law. In addition, many of these statutes have been rendered less effective through blanket prohibitions or disqualifications contained in other statutes. All permit consideration of the conviction on a case-by-case basis; thus, if the conviction reasonably suggests that the individual will be dangerous or unqualified, the convicted person need not be hired.

[17] *See* Margaret Colgate Love, *Overcoming Legal Disabilities Resulting from Criminal Conviction: A State-By State Resource Guide*, § 4 (Draft May 21, 2005).

Collateral sanctions are meant to protect public welfare and safety, not inflict arbitrary and needless harms. Accordingly, as reflected by the laws already on the books, most states would agree that the question of whether a conviction "directly relates" to a particular occupation or license is an important one. However, unlike a fixed list of permitted and prohibited sanctions, adoption of a general standard would allow the states to draw their own conclusions about its application. On the other hand, a general standard could be adopted but ignored, and in any event is unlikely to create uniformity as states reach different results applying the same standard to the same factual scenarios.

Among the considerations applicable to a general restriction on collateral sanctions are:

1. What the standard should be.
2. Whether the standard applies to private as well as public employment.
3. Whether there are offenses, licenses or occupations exempted from the standard.
4. Whether the protection of the standard will apply only to convicted persons whose rights have been restored or who have avoided re-conviction for a specified period of time.

Restoration of Rights

Another possible feature of an Act would be a procedure for restoration of rights taken away by virtue of a conviction. Every state has a mechanism for restoring rights in the form of a pardon from the governor or an executive body. Typically the authority and procedure for a pardon are established in the state's constitution.

Approximately half of the states have a non-pardon mechanism for restoring rights. These are variously called "expungement," "sealing," "set-aside" and "vacation" of the conviction.

Current state laws vary on a number of dimensions, including:

1. Whether there is a waiting period after conviction.
2. Whether the remedy is available only to first offenders.
3. Whether the remedy is available for misdemeanors only, misdemeanors and some felonies (e.g., non-violent felonies), or for all crimes.
4. Whether the conviction is available for use as a predicate offense should the person reoffend.
5. Whether the individual may deny the conviction if asked by, say, a prospective employer.
6. Whether the physical criminal record is available to law enforcement or destroyed.
7. Applicability of the provision to federal or out-of-state convictions triggering collateral sanctions under state law.

A restoration of rights statute would face some of the same challenges as a list of permitted and prohibited collateral sanctions: It would invoke policy considerations which have not escaped the attention of the legislature. Therefore, to say the least, a Uniform Act would not be adopted by all 50 states.

On the other hand, there is now no modern, model restoration statute from which may borrow. Perhaps because of the limits it imposed on deprivation of rights in the first place, the MSCA had no restoration of rights procedure. The ABA Standards encourage each jurisdiction to have procedures for restoration of rights, but contain no model statute. ABA Standard 19-2.5. Section 306.6 of the Model Penal Code provides for relieving a convicted person from disabilities and vacating the conviction based on good behavior, but the section falls short of a comprehensive model. It is possible that some states would be interested in a carefully drafted model that could be tailored to their needs.