

COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN AMERICAN COURTS: THE VIEW FROM THE STATE BENCH*

ALEC C. EWALD AND MARNIE SMITH

Collateral consequences of criminal convictions are restrictions, penalties, and sanctions generally not included in penal codes or sentencing guidelines, but resulting from criminal convictions under U.S. state and federal law. Despite growing interest in these sanctions, we know very little about their presence in American courtroom practice. This article summarizes results of the first survey to query U.S. state-court judges about what role collateral consequences play in criminal proceedings and about judges' general understanding of the nature and efficacy of such sanctions. Our survey yielded some surprising and important results. While critics of collateral consequences often refer to these penalties as silent and invisible, in fact our judges told us that defense attorneys, prosecutors, defendants, and judges frequently discuss these policies in court. At the same time, our results serve as further evidence of serious ambiguities and variation in these laws' purpose, character, and imposition.

More than two million Americans are now in prison or jail, and approximately seven million adults are under criminal supervision of one form or another (Bureau of Justice Statistics, 2006). Those figures give the United States the dubious distinction of having the world's highest incarceration rate (Gottschalk, 2006). About 600,000 offenders are released from U.S. prisons and jails in a typical year, more than four times the rate of thirty years ago (Pinaire, Heumann, and Lerman, 2006). Such figures have helped draw the attention of scholars, practitioners, and the public to what are known as the "collateral" consequences of criminal convictions. Beyond their formal sentence, people convicted of felonies and some misdemeanors in U.S. courts face a number of penalties, restrictions, and disabilities called "collateral" because they lie not in the penal code but in state and federal gun-ownership and voting laws, juror-qualification standards, professional-licensure requirements, entitlement-eligibility rules, and so on. Some restrictions are contained in federal law, such as limits or outright bars for drug offenders on access to federal housing, Social Security, student loans, and federal employment. But most are scattered throughout various parts of state law. Collateral consequences continue to restrict offenders after their actual sentence has ended; indeed, some apply indefinitely, barring a formal pardon or other administrative release.

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These sanctions can have serious effects on an individual's life course after prison—and on the broader society. The presidential election of 2000 shined a spotlight on felony disenfranchisement, particularly Florida's law (since amended) indefinitely preventing felons from voting even after their sentences were completed. Professional-licensing restrictions have also begun to draw attention—like press stories about the inmate trained to cut hair in a New York prison, and then barred by law from receiving a barber's license upon release (Haberman, 2003). (As of 1999, all fifty states restricted former felony offenders from working as barbers, beauticians, or nurses [Pinaire, Heumann, and Lerman, 2006].) Beyond such discrete examples, incarceration and collateral consequences together now skew some of our most fundamental social measurements, such as rates of unemployment (Western, 2006) and voter turnout (McDonald and Popkin, 2001). If we accept political philosopher Judith Shklar's conclusion that the right to vote and the ability to work are at the very core of American citizenship (Shklar, 1991), the meaning of these sanctions runs deep indeed.

One authority concludes that imposing collateral consequences “has become an increasingly central purpose of the modern criminal process” (Chin and Holmes, Jr., 2002:699). Yet despite some outstanding recent scholarship on collateral sanctions, much remains unknown, including their place in courtroom practice. This article begins to fill that gap, focusing on “the view from the bench”: how collateral consequences in American courts look through the eyes of the more than two hundred general-jurisdiction state-court judges from forty-one states who completed a by-mail survey about these policies. In addition to asking a set of practical questions about collateral sanctions' presence in routine courtroom practice, we were also interested in what these elite participants in the legal system think about the substance of such policies. We asked judges about how well collateral consequences are generally understood, what they believe the purposes of such policies are, and whether they believe they are effective. Our survey showed that collateral consequences are often not “invisible” in American courtrooms, that courtroom practice relating to the imposition of collateral consequences in the United States contains significant variation, and that judges' views of collateral sanctions are quite complex. These results help move us toward a better understanding of how collateral consequences function in the American criminal-justice system—an essential topic for scholars and practitioners in a variety of areas, given the deep economic, political, and social impact of these policies. The results also help advance the ongoing debate over the administration and efficacy of such policies, addressing such questions as whether these restrictions should be understood as punitive or regulatory and whether judges should exert some discretion in their imposition.

PREVIOUS RESEARCH

Critical Scholarship. Despite its considerable growth in the last ten years, scholarship on collateral consequences remains in a state of relative infancy. We outline that

literature here to introduce the leading substantive questions to readers who may be unfamiliar with this policy area, to show what gaps we try to begin to fill, and to explain the provenance of the particular questions posed in our survey.

By and large, research has tended to focus on legal and doctrinal issues in the law of collateral consequences, as well as normative, ethical, and racial aspects of such policies. And while a few authors have offered principled defenses of individual collateral consequences (Manfredi, 1998), scholarship has generally argued for reform. Intriguingly, the first issue of the *American Political Science Review*, published in 1906, featured an article referring to possible racial motives behind post-Reconstruction changes to felony disenfranchisement laws, observing that those changes “may have been inspired, in part at least, by the belief that they were offenses to the commission of which negroes were prone, and for which negroes could be much more readily convicted than white men” (Rose, 1906:25). Racial disproportion was a major focus of a report published by the Sentencing Project and Human Rights Watch in 1998 on laws barring people with felony convictions from voting (Fellner and Mauer, 1998). More recently, Jack Chin and Margaret E. Finzen have explored the racial impacts of collateral consequences (Chin, 2002; Finzen, 2005).

Political scientists Brian Pinaire and Milt Heumann and their coauthors have closely examined public opinion regarding collateral consequences, the effects of such policies on disbarred lawyers, and the subtleties of physician-sanctioning procedures (Pinaire, Heumann, and Bilotta, 2003; Heumann, Pinaire, and Clark, 2005; Pinaire, Heumann, and Lerman 2006; Heumann, Pinaire, and Lerman, 2007). Nora Demleitner has contrasted American collateral consequences with their European counterparts and argued that narrowly targeted sanctions might be more effective than some broad-brush penalties (Demleitner 1999, 2000, 2005). Brian C. Kalt has concluded that the categorical exclusion of felons from jury service is theoretically ambivalent and ultimately unwise (Kalt, 2003). And as noted above, scholars have demonstrated that because the United States incarcerates so many people and imposes collateral consequences on an even greater number, our basic measurements of unemployment (Western, 2006) and voter turnout (McDonald and Popkin, 2001) need recalibration.

But with a few notable exceptions—such as Michael Pinard’s exhortation that criminal-defense lawyers add discussion of collateral consequences to their “holistic mindset” (Pinard, 2004)—not much attention has been paid to what role these sanctions play in the criminal-justice process. A common refrain is that they play little if any role at all. Criminologist Jeremy Travis first prominently described these consequences as “invisible” in his contribution to an edited collection on collateral consequences titled *Invisible Punishment* (Travis, 2002). (When Sing Sing warden Lewis Lawes wrote of the “invisible stripes” worn by former inmates in 1938, he was characterizing post-incarceration effects generally, not describing trial-court practice [Lawes, 1938].) Travis argued that “these punishments typically take effect outside of the traditional sentencing framework—in other words, are imposed by operation of

law rather than by the decision of the sentencing judge—[and] they *are not considered part of the practice or jurisprudence of sentencing*” (Travis 2002:16-17; emphasis added). The phrase “invisible punishment” recurs in scores of recent academic articles on collateral consequences; others describe such sanctions as “a secret sentence” (Chin and Holmes, Jr., 2002:700). The assumption that collateral consequences are accurately described as “invisible” appears to be prominent and widely shared.

But academics have precious little empirical evidence beyond the anecdotal level regarding this facet of collateral consequences. To the public, collateral consequences and their effects indeed remain largely out of sight, and certainly they are not formally imposed by a sentencing judge, nor part of any sentence. But as we explain, our survey results strongly challenge the conventional “invisible” wisdom, suggesting that collateral consequences surface relatively frequently, but unevenly, in courtroom practice in the United States.

The ABA’s “Standards.” In 2004 the American Bar Association issued a comprehensive and critical report on collateral consequences (American Bar Association, Criminal Justice Standards Committee, 2004). *Collateral Sanctions and Discretionary Disqualification of Convicted Persons* is a “Black Letter” document designed not only as a statement of principles and objectives, but also as something like a code of conduct for attorneys. While such documents have no formal or binding effect on the legal community, the Supreme Court has cited a previous ABA *Standards* report as reflecting “[p]revailing norms of practice” for defense attorneys, and as “guides to determining what is reasonable” (*Strickland v. Washington*, 1984, at 688).

The ABA’s report challenged current law directly, and its recommendations can be summarized as follows. First, collateral consequences should be limited only to those specifically warranted by a given offense; second, information regarding such consequences should be made readily available; third, defendants should be fully informed, both before pleading and at sentencing, of any and all relevant collateral consequences; fourth, such consequences ought to be considered as a factor in sentencing, with judges given discretion in their imposition; and fifth, there should be a judicial avenue for obtaining relief from such consequences.

The ABA’s proposals helped frame our survey. The first and last recommendations call for statutory change, and so fall outside our purview here. But our respondents suggest that judges share some of the ABA’s critical conclusions about current practice. Somewhat surprisingly, not a single judge mentioned the ABA report in their survey responses and comments, despite the fact that the *Standards* were published well before our survey was conducted.

The courts, meanwhile, have so far been relatively quiet. With the exception of a number of state and federal cases examining disenfranchisement, there is very little case law addressing the many theoretical, practical, and legal questions raised by collateral consequences. However, most federal and state appellate courts have held that the right of criminal defendants to effective counsel does not entail a requirement that counsel advise defendants of the possible collateral consequences of a con-

viction (Chin and Holmes, Jr., 2002:699; Ostroff, 2003). In a case it described as “one of first impression in this circuit,” the Ninth Circuit Court of Appeals ruled in the 2000 case *U.S. v. Littlejohn* that to ensure that a guilty plea is indeed voluntary, a U.S. district court must advise the defendant of at least some post-sentence restrictions he may face. However, *Littlejohn* led to a complex outcome, and its impact remains uncertain.

Jeffrey Littlejohn sought to have his guilty plea for distribution of cocaine withdrawn, arguing that because he had not been informed by the court of the post-sentence ineligibility for Food Stamp and Social Security benefits he would face, his plea had not been truly voluntary. In dismissing his appeal, the Ninth Circuit said that the district court *should* have informed him of these disqualifications, but that its failure to do so was “harmless error.” The court reached that conclusion because in its judgment the defendant’s ignorance of these disqualifications was “harmless.” Noting that Littlejohn pled guilty under an agreement enabling him to avoid entirely twelve of the thirteen counts in his indictment and receive a governmental recommendation that he receive as short a sentence as sentencing guidelines allowed for the remaining charge, the court concluded it was simply impossible to believe that he would have refused that agreement and faced almost certain life imprisonment had he known about these collateral consequences (*Littlejohn*, at 970). The case also reveals a further complication in the law and practice of imposing collateral sanctions. Because a federal district judge generally does not have the Pre-Sentencing Report (PSR) at the time of a plea hearing, a judge hearing a criminal case will sometimes not be *able* to properly inform a defendant of potential collateral consequences, since the PSR often contains information about prior offenses and other characteristics that determine whether collateral consequences may be imposed (*Littlejohn*, at 968).

Nevertheless, and despite *Littlejohn*, in fact standard guidance for federal judges is that a discussion of the loss of civil rights should be part of any plea hearing. In the 2007 *Benchbook*, the Federal Judicial Center recommends that if a plea relates to a felony offense, judges should “consider” asking the defendant, “Do you understand that the offense to which you are pleading is a felony offense, that if your plea is accepted you will be adjudged guilty of that offense, and that such adjudication *may* deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm?” (Federal Judicial Center 2007:75).

Punitive or Regulatory? A fundamental ambiguity persists within American collateral-consequences law: whether the purposes of such sanctions are *punitive*, *regulatory*, or some uncertain combination of the two. In strictly legal terms, as noted above, these sanctions are mere indirect consequences of a criminal conviction; they “attach to, but are legally separate from, the criminal sentence” (Pinard, 2004:1074). In practical terms, they are imposed not by any action of a sentencing court, but by administrative agencies, state and local bureaucracies, or professional boards, often years or even decades after sentencing. Thus, it is reasonable to conclude that collateral sanc-

tions are fundamentally *regulatory*: not meant to punish, but to ration scarce resources or ensure that only certain citizens are eligible for a given profession, for example. But such a characterization ignores the very real penalties imposed by collateral consequences, which sometimes place greater and longer-lasting burdens on an offender than does the formal sentence. The president of the National District Attorneys Association has described collateral consequences as “simply a new form of mandated sentences” (Johnson, 2001).

The debate over disenfranchisement law offers a good example of the ambiguous nature of such sanctions. Is disenfranchisement meant to serve punitive ends (either by affecting the disenfranchised person in a retributive, incapacitative, or rehabilitative way or by deterring other would-be criminals), or meant to protect the franchise—regardless of any effects it might have on the disenfranchised person himself? The U.S. Supreme Court has chosen the latter answer, concluding that because its purpose is not to punish but to “designate a reasonable ground of eligibility for voting,” disenfranchisement “is not a punishment but rather a non penal exercise of the power to regulate the franchise” (*Trop v. Dulles*, 1958, at 96-97). The regulatory argument for disenfranchisement also appears in a famous 1884 state-court ruling, in which the Alabama Supreme Court declared that “the manifest purpose” of denying suffrage to ex-convicts is not to punish, but instead “to preserve the purity of the ballot box, which is the only sure foundation of republican liberty” (*Washington v. State*, 1884, at 585).

But numerous sources have concluded that the deprivation of voting rights both was and is essentially punitive in nature. Historian Alexander Keyssar writes of criminal-disenfranchisement law that “the punitive thrust clearly was present for much of the nineteenth century” (Keyssar, 2000:162-63). In 1995 a federal judge described disenfranchisement as “the harshest civil sanction imposed by a democratic society,” an “axe” by which a person is “severed from the body politic and condemned to the lowest form of citizenship” (*McLaughlin v. City of Canton*, 1995, at 971). And contemporary supporters frequently describe disenfranchisement as “one form of punishment” (Clegg, 2001:177), and “part of the sanction for a specified . . . crime” (Gaziano, 1999).

This is not merely an academic dispute, since no policy’s efficacy can be measured without a clear understanding of its objectives. And the question has important implications for those engaged in the criminal-justice process. For example, if collateral sanctions were meant to be punitive, one could make a much stronger argument that they should indeed play a prominent role in courtroom practice. Public imposition can only enhance the efficacy of such penalties, particularly in terms of their retributive, deterrent, and “expressive” functions, and in fact such a public dimension might well be *necessary* to those purposes. Indeed, under early American criminal-disenfranchisement law, the removal of an offender from the franchise was explicitly punitive, and public enunciation of the penalty was an essential way the restriction was made meaningful (Demleitner, 2000). By contrast, a restriction with a straight-

forward *regulatory* purpose—to prevent crooked doctors from prescribing pills, to keep people with a certain kind of “bias” off juries, or to allocate scarce federal housing—need never surface in court in order to fulfill its objectives entirely.

The belief that collateral consequences *should* figure explicitly in a criminal trial and sentencing is a major theme of the ABA’s recommendations, and a point made by many reformers. That argument stems from an understanding that while their *design* may be only partly punitive, these sanctions have substantial punitive *effects*. Though many reformers regard those effects as excessively harsh, the ABA’s approach is not at all necessarily a critical one: if such policies are meant to achieve retributive, deterrent, or expressive functions, they can do so much more effectively if they are publicly imposed.

METHODS

While this article does not develop and test a behavioral hypothesis about the imposition of collateral consequences, scholars and policymakers currently know so little about these policies that exploratory and descriptive research has value. Our article is the first to attempt to describe the presence of collateral sanctions in state courts; to survey judges for their evaluations of the purposes of such policies, focusing on the crucial punitive/regulatory question; and to gauge how the criticisms and proposals of the ABA square with the experiences of state trial-court judges.

Our survey was mailed to one thousand judges in state trial courts of general jurisdiction across the United States in the winter of 2005-06, their names having been selected randomly from the 2001 edition of *BNA’s Directory of State and Federal Courts, Judges, and Clerks*. Our study proceeded on the assumption that judges supervising state-court criminal trials face sufficiently common tasks that a national survey would shed light on important questions; because state collateral-consequence laws vary, future research on such policies might profitably adopt a single-state approach.

Twenty-six surveys were returned as undeliverable, and 282 responded to at least part of the survey, yielding a net response rate of 29 percent. (No reminder postcard was mailed to recipients.) Many respondents also e-mailed, called on the telephone, or sent in further comments on letterhead. This is certainly a lower response rate than we had hoped for, and slightly smaller numbers of judges responded to individual questions, making the effective response rate for a typical question a couple of percentage points lower. As a general matter, this overall response rate is acceptable for an elite mail survey: one recent article analyzed the results of a survey with a 33 percent response rate (Hojnacki and Kimball, 1999). However, as that article points out, the more important question is whether our sample is a representative one. Because the survey was entirely anonymous, we are not able to establish conclusively that we captured a representative sample of state trial-court judges, but based on some data the survey did gather, we believe we likely did so. Most important, judges responded from forty-one states, in all regions of the country; they include predominantly rural as well as heavily urbanized states, states with varying political cultures and partisan profiles,

and states with different racial populations. Crime rates vary considerably in the United States, and our judges came from states across this spectrum as well (United States Department of Justice, Federal Bureau of Investigation, 2007).

Most heavily represented were Pennsylvania (nineteen respondents); California (seventeen); Ohio (fifteen); Illinois (thirteen); Texas (twelve); and Indiana (ten). Other states with relatively high numbers of respondents included Arizona (six), Colorado (eight), Florida (eight), Michigan (seven), Minnesota (eight), North Carolina (nine), Oregon (seven), Tennessee (eight), and Wisconsin (seven). Smaller states were not absent from the sample: judges in Delaware, Hawaii, Montana, North Dakota, South Dakota, Utah, and West Virginia returned surveys.

Our responding judges also were broadly representative of the diverse ways state trial-court judges are chosen. States choose trial-court judges in five general ways: merit selection (seventeen states); partisan election (nine states); nonpartisan election (seventeen states); gubernatorial or legislative appointment (four states); and combined methods (four states) (American Judicature Society, 2007). Our respondents came from states of each type. Thirty-five served in eleven merit-selection states; seventy-eight hailed from nine partisan-election states (including multiple judges from large states such as Illinois, Ohio, Pennsylvania, and Texas); eighty-six came from sixteen non-partisan-election states; four came from one legislative-appointment state; and twenty-one came from four combined-method states. Our sample does appear to have been slightly more male than the state benches from which it is drawn. About 89 percent of respondents who identified their gender were male; gaps in the published data make it difficult to establish a clear gender breakdown of state trial-court judges in the aggregate, but the most comprehensive study available suggests that something like one-fifth of the general-jurisdiction state bench is female (Rottman and Strickland, 2006:16-20).

In sum, anonymity precludes us from stating with certainty that our results are generalizable to the broader population of state trial-court judges. But we think it likely that our sample is indeed a good one, and that our survey accomplished its central objective of generating useful, suggestive data about the American state trial judge's experiences and opinions relating to collateral consequences.

DATA

Courtroom Practice. We first posed a few practical questions for judges, focusing on the application, as it were, of collateral consequences in American courtrooms.

Collateral consequences do not seem to be as invisible as some commentators have said they are (see Table 1). The most striking result is just how often *someone* participating in a criminal trial *does* raise the fact of collateral consequences. Most judges report that some party—prosecutor, defense attorney, defendant—raises the issue of collateral consequences at least occasionally in their courtroom. (As many respondents noted, the sole function of a jury is to determine guilt or innocence.)

Table 1
Collateral Sanctions and Courtroom Practice
 Statement: "In cases you have presided over, how frequently do the following parties discuss collateral consequences?"

	Always	Often	Sometimes	Rarely	Never	No Basis
Prosecutors (N = 228)	2.5%(5)	9.3%(22)	30.5% (70)	37.3%(86)	14.0% (32)	6.4%(13)
Defense Attorneys (N = 230)	5.0 (11)	33.6 (79)	34.5 (80)	16.0 (37)	3.8 (8)	7.1 (15)
Defendants (N = 227)	3.0 (7)	13.6 (32)	26.8 (61)	30.6 (70)	13.2 (30)	12.8 (27)
Juries (N = 226)	0.4 (1)	1.7 (4)	8.1 (17)	21.4 (49)	42.7 (97)	25.6 (58)
Any party during plea bargaining (N = 224)	5.2 (11)	18.2 (42)	36.8 (82)	14.3 (32)	3.0 (7)	22.5 (50)
Yourself, during sentencing* (N = 230)	6.1 (14)	21.3 (49)	33.4 (78)	24 (55)	14.8 (34)	

Note: Due to rounding, percentages may not total 100.

* While these results are presented here, this question was asked separately and worded slightly differently. We asked, "How frequently do you discuss collateral consequences during sentencing?"

Still, these responses do have another side, implying that many trials may fall short of the full information for defendants emphasized in the ABA report. According to the best estimates of just over half our judges (51 percent) prosecutors rarely or never discuss collateral consequences. Almost one-fifth say defense attorneys rarely or never discuss such sanctions (although judges are ultimately speculating as to what kinds of communication between defense attorneys and their clients takes place *outside* the courtroom). Almost half our respondents say that defendants themselves rarely or never discuss collateral consequences. Recidivism could be one explanation: where a defendant is facing a second or third felony conviction, most or all collateral consequences will already have been applied to that defendant. With approximately two-thirds of released prisoners in the United States rearrested within a few years (Department of Justice, Bureau of Justice Statistics, 2002:1), a great many criminal defendants in some jurisdictions will find themselves in that position. Still, these figures suggest that in a substantial number of cases, defendants may have little or no information about collateral consequences.

We also asked judges about their own role: "How frequently do you discuss collateral consequences during sentencing?" Though only about a quarter answered "always" or "often," all told just over 60 percent of responding judges say they mention collateral consequences during sentencing always, often, or sometimes—further evidence that collateral consequences are not always silently imposed (see Table 1). At the same time, however, the range of responses is striking: about 38 percent of respondents rarely or never discuss these consequences at sentencing. As we show

Table 2
Normative Aspects of the Law of Collateral Consequences

Statement	Strongly Agree	Agree	Disagree	Strongly Disagree
The purposes of collateral consequences are clearly described in the statutes of your state (N = 211)	1.9% (4)	19.9%(42)	63.0%(133)	15.0%(32)
Defendants have a right to know that pleading guilty may affect their post-incarceration rights (N = 232)	41.4 (96)	48.3 (112)	9.1 (21)	1.3 (3)
It is the judge's responsibility to inform defendants of collateral consequences associated with a conviction (N = 232)	7.8 (18)	28 (65)	50.4 (117)	13.8 (32)
It is the defendant's responsibility to know the consequences of a conviction (N = 232)	16.4 (38)	58.2 (135)	22.8 (53)	2.6 (6)
It is the defense lawyer's responsibility to inform the client of possible collateral consequences (N = 232)	55.6 (129)	41.4 (96)	3.0 (7)	0.0 (0)
Collateral consequences should be read to convicted persons during sentencing (N = 229)	6.6 (15)	24.9 (57)	50.2 (115)	18.3 (42)
Requirements to explicitly discuss collateral consequences during trial/sentencing would make them more effective (N = 225)	2.7 (6)	36.4 (82)	42.2 (95)	18.7 (42)
Judges should be able to use discretion in imposing collateral consequences (N = 219)	12.8 (28)	44.7 (98)	28.8 (63)	13.7 (30)
Collateral consequences effectively aid in retribution (N = 220)	2.3 (5)	47.8 (105)	41.4 (91)	8.6 (19)
Collateral consequences effectively aid in rehabilitation (N = 225)	1.3 (3)	37.3 (84)	52.0 (117)	9.3 (21)
Collateral consequences effectively aid in deterrence (N = 229)	2.6 (6)	37.6 (86)	46.7 (107)	13.1 (30)
Collateral consequences inhibit the reentry of criminals into society (N = 224)	8.5 (19)	57.1 (128)	29.9 (67)	4.5 (10)

below, judges believe that defendants *should* know about these consequences, but over one-third of our judges rarely or never mention them during sentencing.

Normative Questions. In addition to the practical matter of how often collateral consequences actually surface in state courts, we were keen to know how our judges approached several of the controversial aspects of these sanctions, particularly those addressed in the ABA report. While judges neither write these statutes nor currently exercise any direct discretion in their administration, judges are experienced, highly informed participants in American criminal justice, and that alone makes their opinions worth knowing (see Table 2).

First, we asked judges whether they agreed that “[t]he purposes of collateral consequences are clearly described in the statutes of your state.” Less than 2 percent

strongly agreed, and almost one-fifth agreed. Meanwhile, almost two-thirds disagreed, and 15 percent strongly disagreed (see Table 2). In other words, almost four in five of our respondents—a very highly educated group of Americans, and naturally one particularly attuned to state law—did not believe the purposes of collateral consequences were clearly described in the laws of their state.

Staying with the topic of how well-understood such sanctions are, we asked whether judges agreed with one of the ABA's central points: "[d]efendants have a right to know that pleading guilty may affect their post-incarceration rights." In one of the clearest responses we received on any question, nine in ten of our judges agreed or strongly agreed that defendants have a right to know about collateral consequences. About 41 percent strongly agreed, while 48 percent agreed; only 9 percent disagreed, and just over 1 percent strongly disagreed. This is a particularly striking result, given that as noted above, state and federal appellate courts have held that the right to effective counsel does *not* entail notification of collateral sanctions.

If criminal defendants have a right to know that a conviction will limit their post-incarceration rights, who bears responsibility for making sure they have that knowledge? We asked whether "[i]t is the judge's responsibility to inform defendants of collateral consequences associated with a conviction." About 8 percent strongly agreed and 28 percent agreed, but most did not agree: just over half disagreed, and almost 14 percent strongly disagreed (see Table 2). In short, most of our judges rejected responsibility for explaining collateral consequences. In additional comments some added to their survey responses, judges gave a number of reasons. "It is not the judge's role to advise the defendant of collateral consequences." "I believe it is defense counsel, not the Court, who should advise of collateral consequences. They know their client's situation more than judicial officers." "The law specifically does not require the judge to notify the defendant of all collateral consequences arising out of a criminal conviction." Others pointed out that to explain all the possible consequences would be impossible, and the potential of overlooking one could cause further problems. "To require the court to advise a defendant of every possible collateral consequence is unrealistic." "Courts cannot be expected to anticipate all of these possible consequences." "We judges in my state are required to go through a long list of things with defendants when they plead guilty. However, we are not required to inform them of loss of collateral rights. We probably should. Nowhere in my state is there a list of all such rights."

Next we asked if judges agreed that "[i]t is the defendant's responsibility to know the consequences of a conviction." Almost three in four answered in the affirmative. Just over 16 percent strongly agreed, while 58 percent agreed. Almost one-quarter disagreed, and just 2 percent strongly disagreed. While a majority of our judges believe defendants carry the responsibility of knowing about such sanctions, our next query showed that almost all of them believe defense attorneys should carry the burden of informing those defendants. Asked if they agreed that "[i]t is the defense lawyer's responsibility to inform the client of possible collateral consequences," nine-

teen in twenty agreed or strongly agreed—the greatest level of unanimity achieved by any question. Indeed, just over 55 percent strongly agreed, with about 41 percent agreeing. Not a single judge strongly disagreed.

In bench trials, judges themselves determine the guilt or innocence of the accused. We asked, “How frequently do you consider collateral consequences when determining whether someone has committed a felony or misdemeanor?” We received some intriguing responses. Only 5 percent said they “always” did so, while about 12 percent indicated “often.” Almost one-quarter said they “sometimes” took such sanctions into account, and almost 14 percent said they “rarely” did so. But close to 45 percent said they “never” considered collateral consequences.

As worded, this question admits of different interpretations: some might have read it as being about guilt or innocence (in bench trials) while others could have read the query as focusing on post-conviction sentencing, where such discretion exists. That’s an important difference, and the question could have been more precisely worded—but on either reading, the results illustrate a sharp division among U.S. judges. Close to half say they never consider collateral consequences when determining whether someone has committed a misdemeanor or felony, while about 40 percent of respondents always, often, or sometimes consider these consequences. The latter response confirms a comment made in 2001 by the president of the National District Attorneys Association: “[j]udges often consider the collateral consequences of a conviction. When the consequences are too severe, many judges change their rulings, sentencing felonies as misdemeanors and expunging records to avoid what they believe to be an unjust result” (Johnson, 2001).¹

Are Collateral Consequences Punitive or Regulatory?

The Judicial Role. As explained above, the American law of collateral consequences combines both punitive and regulatory elements and indeed seems ambivalent as to which set of objectives is primary. We wanted to know what state-court judges thought about this important question, and our survey approached it from a few different angles. First, we posed a set of questions about the judicial role in imposing collateral consequences (see Table 2). In addition to their specific substantive interest, they help shed light on the punitive/regulatory question.

First, we asked whether state-court judges agreed that “[c]ollateral consequences should be read to convicted persons during sentencing.” Only about 7 percent strongly agreed; about 25 percent agreed, while about half disagreed, and just over 18 percent strongly disagreed. We also wanted to know if state-court judges thought such a public dimension (during either trial or sentencing) would enhance the effectiveness of these penalties, and we asked if “requirements to explicitly discuss collateral consequences during trial/sentencing would make them more effective.” Again, only a

¹ Our data do not enable us to say whether courtroom discussion of collateral consequences *actually* affects sentencing decisions. This would be an excellent question for further research.

very small number strongly agreed—less than 3 percent—but more than one-third agreed. About 42 percent disagreed, and almost 19 percent strongly disagreed. Finally, we probed judges' views on one of the ABA's recommendations: "Judges should be able to use discretion in imposing collateral consequences." Almost 13 percent strongly agreed, and almost 45 percent agreed. Just under 29 percent disagreed, while just short of 14 percent strongly disagreed.

These questions elicited a good deal of disagreement among judges. Less than a third thought they should be required to read collateral consequences at sentencing, and only slightly more believed such policies would be enhanced by some requirement that they be discussed during a trial. Yet at the same time, substantial minorities agreed with each statement. While these questions are not direct proxies for whether judges think collateral consequences are (or should be) primarily punitive or regulatory in nature, they do provide helpful context. For example, if judges believed collateral consequences had essentially punitive purposes, we might expect most of them to indicate support for the idea that such policies should have an explicit role in criminal trials. But substantial majorities of respondents rejected both the idea that they should read a list of consequences at sentencing, and the more general notion that some required courtroom presence for these penalties would enhance their effectiveness. However, a majority of respondents did agree or strongly agree that they should possess discretion in imposing such consequences—a view consistent with an understanding of these sanctions as punishments.

In part, these views can be read simply as an expression of judges' confidence in their own abilities, together with a natural reluctance to endorse any further statutory impositions upon their work. However, these responses also do seem to mirror the general ambivalence in American law and political discourse regarding the fundamental character of these sanctions.

In the final set of questions, we asked respondents to agree or disagree with a set of statements about how effectively collateral sanctions generally achieve penal goals (see Table 2). The results reflected serious doubt among state-court judges regarding the punitive efficacy of these policies. Exactly half of respondents either disagreed or strongly disagreed that such consequences "effectively aid in retribution," while about 61 percent disagreed or strongly disagreed that collateral consequences "effectively aid in rehabilitation," and about as many either disagreed or strongly disagreed that collateral consequences "effectively aid in retribution." Finally, about 65 percent agreed or strongly agreed that these sanctions "effectively inhibit the re-entry of criminals into society."

Specific Sanctions. We next probed the punitive/regulatory divide by asking judges about particular collateral consequences. These questions addressed seven common sanctions: disenfranchisement; restrictions on jury service; termination of parental rights; professional-license restrictions; restriction of firearms possession; loss of access to public housing and entitlements; and the revocation of access to student loans. In each case, we asked judges if they agreed with a pair of statements about the sanc-

tion—one about its *punitive* character, the other about its *regulatory* nature. Instead of asking judges simply and directly whether they thought a given restriction achieved punitive or regulatory goals, we presented statements about the punitive and regulatory aspects of each restriction. There were two reasons for this choice. The first is that while the two objectives do exist in some tension, they are not exclusive—so, we elected not to force judges into an either-or choice between them. The second is that we also hoped to employ these questions to get some sense of judges' views of how effective these policies are. So, we posed first a statement that a given restriction is a "reasonable punishment," and second a simple declarative statement about a presumptive regulatory objective of that restriction, and asked judges whether they agreed or disagreed with each.

Because laws barring people with criminal convictions from voting have drawn a great deal of attention in recent years, we give special emphasis here to our questions relating to this policy. Among the American public, studies show that majorities support the disenfranchisement of prisoners, while opposing the indefinite deprivation of voting rights (Manza and Uggen, 2006; Pinaire, Heumann, and Bilotta, 2003). We were keen to know how state-court judges' views compared with those of the public, and asked first whether they agreed that "[d]isenfranchisement during incarceration is a reasonable punishment for convicted criminals." Just over 37 percent (86 of 230) strongly agreed that it is, and more than 51 percent (118 of 230) agreed. Only about 10 percent (22 of 230) disagreed, and a mere 2 percent (4 of 230) strongly disagreed. In sum, almost nine in ten of our judges believe disenfranchisement of incarcerated felons is a "reasonable punishment." This is a very high percentage, particularly given that only about two-thirds of the general public supports inmate disenfranchisement (Manza and Uggen 2006:215).

Seeking to keep the survey's length manageable, we collapsed two different topics into the key phrase in the next question, asking if state-court judges agreed that "[p]ost-incarceration disenfranchisement is a reasonable punishment for convicted criminals." In thirty-five states, some people who are not in prison, but who are still under sentence (on probation or parole) cannot vote, while in a small number of states, some people who have completed their sentences entirely cannot vote (Sentencing Project, 2007). So, in asking judges whether "post-incarceration disenfranchisement" was a reasonable punishment, we accepted a certain loss of precision. Nonetheless, the results were revealing. By a narrow margin, the modal response was "disagree," but more than half our judges effectively endorse post-incarceration disenfranchisement. Just over 16 percent (37 of 229) strongly agreed, while more than 38 percent (88 of 229) agreed; almost 40 percent (91 of 229) disagreed, and almost 6 percent (13 of 229) strongly disagreed. These results may express deference to legislative will as much as substantive commitment to the policies themselves. Nevertheless, American state-court judges appear more supportive of disenfranchisement than the American public—at least, when that sanction is framed as a punishment.

In asking about the regulatory efficacy of disenfranchisement, we faced a bit of a challenge, because arguments for this sanction tend to emphasize its theoretical merits (preserving the terms of the social contract, for example) rather than its practical objectives. We decided to employ a popular metaphor noted above, and asked judges whether they agreed that disenfranchisement aids society by preventing the “pollution” of the electoral process. As explained above, the idea of preventing “pollution” in this context has both metaphorical and practical dimensions, and we believed judges would understand the phrase as referring to a principled, nonpunitive reason for the policy.

The results contrast sharply with those yielded by the previous statements. While overwhelming majorities agreed or strongly agreed with the punitive case for inmate disenfranchisement, almost four in five judges do not believe that disenfranchisement serves society by “prohibiting convicted criminals from polluting the ballot box.” Only 8 percent (17 of 213) strongly agreed, and about 13 percent (28 of 213) agreed. An even 63 percent (134 of 213) disagreed, joined by 16 percent (34 of 213) who strongly disagreed. Even acknowledging the abstract nature of the “pollution” metaphor, that state-court judges do not find this statement persuasive is instructive—particularly given that some American courts, including the U.S. Supreme Court, have essentially said that disenfranchisement pursues such regulatory purposes.

We asked paired questions about six other common collateral consequences: loss of jury rights, parental rights, loss of access to professional licenses, firearm restrictions, loss of access to public housing and welfare, and the revocation of student loans.

A few results stand out here. We thought judges might essentially agree with either the punitive *or* regulatory explanation for many policies, with majorities agreeing and disagreeing with alternating statements. That did not occur, suggesting that judges do not consider the punitive/regulatory question an either/or proposition (see Table 3). Second, substantial numbers of respondents appear distinctly critical of several of these consequences. Majorities of responding state-court judges effectively reject *both* the punitive and regulatory justifications for restrictions on public-housing and welfare eligibility and student loans, while substantial minorities indicate doubts about both punitive and regulatory justifications for jury-service restrictions, as well as the regulatory arguments for the loss of parental rights and professional licensure.

The most striking general result is the diversity of views (see Table 3). The only statements drawing agreement or strong agreement from four in five judges were that the loss of professional licenses is a reasonable punishment and that the restriction on gun ownership for those with criminal convictions is a reasonable punishment and “aid[s] society by keeping convicted criminals from being able to obtain guns and commit further crimes.” State-court judges appear to disagree a good deal over these sanctions, and a great many judges distinguish among various collateral consequences, rather than approving or disapproving of all of them.

Table 3
Punitive and Regulatory Arguments for Particular Collateral Sanctions

Statement	Strongly Agree	Agree	Disagree	Strongly Disagree
Jury-service restrictions are a reasonable punishment for convicted criminals (N=229)	21.4% (49)	55.0% (126)	21.8% (50)	1.7% (4)
Jury-service restrictions aid society by prohibiting convicted criminals from distorting the judicial system (N=218)	15.6 (34)	42.7 (93)	37.6 (82)	4.1 (9)
Termination of parental rights is a reasonable punishment for convicted criminals (N=191)	2.1 (4)	26.5 (49)	60.2 (115)	12.0 (23)
Termination of parental rights aids society by keeping parents from harming their children (N=195)	9.2 (18)	42.6 (83)	40.0 (78)	8.2 (16)
Professional-license restrictions are a reasonable punishment for convicted criminals (N=229)	17.5 (40)	73.4 (168)	8.7 (20)	0.4 (1)
Professional-license restrictions aid society by allocating licenses only to those who are most deserving (N=217)	11.5 (25)	51.2 (111)	36.9 (80)	0.5 (1)
Gun-license restrictions are a reasonable punishment for convicted criminals (N=231)	50.1 (117)	47.6 (110)	1.7 (4)	0.0 (0)
Gun-license restrictions aid society by keeping convicted criminals from being able to obtain guns and commit further crimes (N=228)	40.4 (92)	44.3 (101)	12.7 (29)	2.6 (6)
Public-housing and welfare restrictions are a reasonable punishment for convicted criminals (N=218)	8.3 (18)	39.0 (85)	44.0 (96)	8.7 (19)
Public-housing and welfare restrictions on convicted criminals are used to distribute society's resources to more worthy citizens (N=214)	4.2 (9)	29.4 (63)	55.1 (118)	11.2 (24)
Revocation of student loans is a reasonable punishment for convicted criminals (N=215)	7.0 (15)	36.3 (78)	48.0 (103)	8.8 (19)
Revocation of student loans of convicted criminals is used to distribute society's resources to more worthy citizens (N=209)	5.3 (11)	31.0 (65)	52.0 (109)	11.5 (24)

CONCLUSION

Our survey of state-court judges regarding collateral sanctions leads to three general conclusions. First, while such consequences seem to be much more present in the typical courtroom than is often assumed, their public imposition appears quite varied. Second, judicial ideas about collateral consequences seem to reflect real ambivalence, both as to the efficacy of these policies and as to whether they are primarily punitive or regulatory. Third, the scholar's eternal lament—further research is needed!—is amply warranted here.

According to state-court judges, the collateral consequences of criminal convictions are not entirely “invisible” in state courts. They are not uniformly discussed by any one party, nor do they play a role in each criminal trial, but they are often present in courtroom practice. They are discussed by *some* defense attorneys, prosecutors, judges, and defendants, *some* of the time. But while the imposition of such policies may not be entirely silent, as many critics have argued, our results do also support the general conclusion that these penalties are quite unevenly applied in our state courts. In 1996 the Department of Justice described collateral-consequence statutes as a “crazy-quilt” (Department of Justice, Office of the Pardon Attorney, 1996). Courtroom practice represents another aspect of these policies that is characterized by uncertain variation. It is possible that given such variation, these sanctions today are not imposed clearly, publicly, and consistently enough to function as the kind of “expressive” or “shaming penalties” (Kahan, 1996) some advocates presumably have in mind.

Our results also suggest that such differences in courtroom practice may reflect enduring ambiguities within such sanctions, particularly relating to their fundamental purpose. About 80 percent of our respondents did not believe the purposes of collateral consequences were clearly defined in their state’s statutes. Meanwhile, about 60 percent of our judges said they themselves discuss collateral consequences at sentencing at least sometimes, while the rest rarely or never do. For a judge to talk about such sanctions during trial or sentencing makes perfect sense if the penalties are understood as punitive, but some might suggest it would be unnecessary and indeed perhaps inappropriate to do so if they are essentially regulatory in nature. Whatever their purpose, our judges seem well aware of the penal effects of these laws, particularly given the consensus among respondents that defense attorneys should inform defendants of the collateral consequences attaching to a conviction.

Our respondents disagreed a good deal when faced with a set of questions about what several prominent collateral consequences actually *do*. Even assuming varying interpretations of our statements about punitive and regulatory purposes, it is clear that there is a considerable diversity of views among state-court judges over these consequences. At least half did not agree that collateral consequences generally achieve retributive, deterrent, or rehabilitative objectives. And judges appear to differentiate among collateral consequences, supporting revocation of gun rights, disenfranchisement, and professional-license restrictions much more strongly than other sanctions. Particularly given the ABA’s recommendation that judges be given discretion in administering collateral consequences, these are important findings. They suggest that judges with the discretion to impose some or all collateral consequences at sentencing might vary in the sanctions they apply.

Finally, our results suggest various avenues for future research. Interviews and surveys of the primary actors in the judicial process (judges, prosecutors, defense counsel, defendants) should probe in more depth what role various sanctions play in criminal trials, and which specific consequences concern defendants (and their attor-

neys) the most. Though we did not ask directly how important collateral consequences are to defendants, our respondents offered sharply divergent comments and anecdotes on this question, many volunteering explanations and commentary in addition to answering our queries. Of particular interest is how significant collateral consequences are in defendants' plea-bargaining decisions. Anecdotally, several of our respondents confirmed the 2001 observation of the National District Attorneys Association president: "When [collateral] consequences are significant and out of anyone's control, victims of criminal conduct are less likely to cooperate. Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge and is disproportionate to the offense and offender" (Johnson, 2001). But other respondents indicated that in their experience, defendants do not care about collateral consequences, and would not listen even if you told them—again, an experience that could be partly explainable by high rates of recidivism.

The diversity of judges' experiences and views of these policies suggests that future research might profitably explore what kinds of variables help predict whether a particular judge, prosecutor, or defense counsel will choose to bring discussion of collateral consequences into a criminal trial. And participants in the criminal-justice process are not the only ones whose views merit exploration. We need to know a great deal more about when and why state and federal legislators have put specific collateral consequences in place, and how bureaucrats understand their role in meting out these indirect but often quite serious sanctions.

The moment a felony conviction is announced in the United States, a set of reverberations pushes out from the courtroom. The labor market, the jury pool, and, in most states, the voter roll are all changed, and the cumulative effects of these policies on the American polity and on particular communities are now substantial. Yet we still know too little about the history, purposes, and imposition of these "collateral" consequences of a criminal conviction. We hope this study begins to shed light on these important policies. **jsj**

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