

D R A F T

FOR DISCUSSION ONLY

**UNIFORM COLLATERAL SANCTIONS AND
DISQUALIFICATIONS ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For November 4-6, 2005 Drafting Committee Meeting

WITH PREFATORY NOTE AND COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATIONS ACT

TABLE OF CONTENTS

Prefatory Note 1
SECTION 1. SHORT TITLE 5
SECTION 2. DEFINITIONS 5
SECTION 3. COLLECTION OF COLLATERAL SANCTIONS AND
DISQUALIFICATIONS 6
SECTION 4. ADVISEMENT AT GUILTY PLEA 9
SECTION 5. ADVISEMENT UPON RELEASE OR AT SENTENCING 14
SECTION 6. LIMITATION OF COLLATERAL SANCTIONS AND DISQUALIFICATION
RELATED TO EMPLOYMENT, EDUCATION AND LICENSING 16
SECTION 7. RELIEF FROM COLLATERAL SANCTIONS BASED ON EVIDENCE OF
REHABILITATION TO ASSIST IN EMPLOYMENT 24
APPENDIX 27

UNIFORM COLLATERAL SANCTIONS AND DISQUALIFICATION ACT

Prefatory Note

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 criminal offense.¹ In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s.² 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. The Department of Justice estimates that if the 2001 imprisonment rate remains unchanged, 6.6% of Americans born in 2001 would serve prison time during their lives³--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.⁴

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.

¹ A growing literature deals with reentry. *See, e.g.*, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS OF THE COMMUNITY (2005); REGINALD A. WILKINSON, ED., REENTRY BEST PRACTICES: DIRECTOR’S PERSPECTIVES (Association of State Correctional Administrators 2004); MARC MAUER & MEDA CHESNEY-LIND, EDS., INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (New Press 2002); CHRISTOPHER MELE & THERESA A. MILLER, EDS., CIVIL PENALTIES, SOCIAL CONSEQUENCES (Routledge 2005); JEREMY TRAVIS & MICHELLE WAUL, EDS., PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES (Urban Institute Press 2005); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY (Urban Institute Press 2005).

² In November, 2004, the Bureau of Justice Statistics reported that the rate of growth of the national prison system had diminished to 2.1%, which was less than the average annual growth 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).

³ 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).

⁴ Laura E. Glaze & Seri Palla, *Probation and Parole in the United States, 2003*, at 1, Bureau of Justice Statistics Bulletin (July 2004, NCJ 205336).

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.⁵ 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,⁶ could not possess a firearm,⁷ and was barred from service in the military⁸ and on juries, state and federal, civil and criminal.⁹ If a non-citizen, the convicted person could be deported.¹⁰ These disabilities have been called "collateral consequences" "civil disabilities" and "collateral sanctions." The term "collateral sanction" is used here 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. It is "collateral" because it is not part of the direct sentence. It is a "sanction" because it applies because and only because of conviction of a criminal offense.

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;¹¹ a 1991 law required states to revoke some drug offender's driver's licenses or lose federal funding,¹² in 1993, Congress made drug offenders ineligible to participate in the National and Community Service Trust Program.¹³ In 1996, Congress provided that persons convicted of drug offenses would automatically be ineligible for certain federal benefits;¹⁴ a year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit.¹⁵ In 1998, persons convicted of drug crimes were made ineligible for federal educational aid¹⁶ and for residence in public housing.¹⁷ In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits.¹⁸

Like Congress, state legislatures have also been attracted to regulating convicted persons. Studies of disabilities imposed by state law or regulation done by law students in Maryland and

⁵ See, e.g., Bureau of Justice Statistics, Report of the National Task Force on Privacy, Technology and Criminal Justice Information (Aug. 2001).

⁶ See JEFF MANZA & CHRIS UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Oxford forthcoming).

⁷ 18 U.S.C. § 922(g).

⁸ 10 U.S.C. § 504.

⁹ See Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

¹⁰ See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

¹¹ 42 U.S.C. § 1320a-7(a)(3), added by Pub. L. 100-93, Aug. 18, 1987, 101 Stat. 680.

¹² 23 U.S.C. § 159, added by Pub. L. 102-143, Title III, § 333(a), Oct. 28, 1991, 105 Stat. 944.

¹³ 42 U.S.C. § 12602(e), added by Pub. L. 103-82, Sept. 21, 1993, 107 Stat. 785.

¹⁴ 21 U.S.C. § 862a, added by Pub. L. 104-193, Title I, § 115, Aug. 22, 1996, 110 Stat. 2180.

¹⁵ 26 U.S.C. § 25A(b)(2)(D), added by Pub. L. 105-34, Aug. 5, 1997, 111 Stat. 788.

¹⁶ 20 U.S.C. § 1091(r), added Pub. L. 105-244, Title IV, § 483(a) to (f)(1), Oct. 7, 1998, 112 Stat. 1735.

¹⁷ 42 U.S.C. § 13662, Pub. L. 105-276, Title V, § 577, Oct. 21, 1998, 112 Stat. 2640.

¹⁸ 21 U.S.C. § 862, added by Pub. L. 100-690, Title V, § 5301, Nov. 18, 1988, 102 Stat. 4310.

Ohio show literally hundreds of collateral sanctions on the books in those states.¹⁹ 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, and 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.²⁰

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 criminal punishment, but mere civil regulation.²¹ 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.”²² 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.²³ 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. Inevitably, offenders, most not legally trained, are surprised when they discover statutory 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. About half of American jurisdictions provide by rule, statute or court decision that defendants must be advised of the possibility of deportation when pleading guilty.

¹⁹ 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).

²⁰ Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005) (“Increasingly, private landlords are following the lead of public housing and screening people for criminal histories”).

²¹ See Gabriel J. Chin, *Are Collateral Sanctions Premised On Conduct Or Conviction?: The Case Of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n.10 (2003) (Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1357- 64 (1991); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 692-707 (1999)).

²² See *Guilty Pleas*, 33 GEO. L.J. ANN. REV. CRIM P. 363, 373 (2004).

²³ See, e.g., *Foo v. State*, 102 P.3d 346, 357-58 (Hawai’i 2004); *People v. Becker*, 800 N.Y.S.2d 499, 502-03 (Crim. Ct. 2005); *Page v. State*, 615 S.E.2d 740, 742-43 (S.C. 2005). For a discussion of this principle, see Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

The criminal justice system must pay attention to collateral sanctions. If the number of statutes triggered is a reliable indicator, collateral sanctions in many instances are what is really at stake, the real point of achieving a conviction. In state courts in 2002, 59% of those convicted of felonies were not sentenced to prison; 31% received probation and 28% jail terms.²⁴ 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 imposed by dozens of statutes. Yet the defendant as well as the court, prosecutors and defense lawyers involved need know nothing about them.

This Act deals with several aspects of the creation and imposition of collateral sanctions. The provisions are largely procedural, and designed to rationalize and clarify policies and provisions which are already widely accepted by the states.

Section 3 proposes that collateral sanctions and disqualifications contained in state statutes or regulations be collected in individual titles of the state code and state administrative code. The titles will be known as *Collateral Sanctions on Offenders*.

Sections 4 and 5 propose to make the existence of collateral sanctions known to defendants at important moments: When deciding whether to plead guilty, so they can make an informed decision, and when leaving the custody of the criminal justice system, so they can conform their conduct to the law. Given that collateral sanctions and disqualifications will have been codified, it will not be difficult to make this information available to offenders.

Section 6 limits the collateral sanctions and disqualifications applicable to employment. It is a modified version of Section 4-1005 of the Model Sentencing and Correction Act which has been widely adopted in the states.

Section 7 works in conjunction with Section 6, creating a limited judicial relief mechanism for offenders subject to a collateral sanction which prevents them from working. Persons successfully obtaining relief will be exempt from the absolute bar of the collateral sanction. However, they will be subject to evaluation and approval or disapproval by the employer or administrative board based on the facts underlying the conviction. The provision is designed to do nothing more than lift an absolute bar imposed by a conviction to allow a case-by-case evaluation.

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), and the solutions they propose will be mentioned.

²⁴ Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, at 2, Bureau of Justice Statistics Bulletin (Dec. 2004, NCJ 206916).

1 Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends
2 on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a
3 license to an applicant with a felony conviction, then it is a collateral sanction, because the effect
4 is automatic. If a medical licensing board “may” deny a license to those with felony convictions,
5 then the regulation or policy is a “disqualification.”²⁶ However, if a criminal court at sentencing
6 takes away a medical license as punishment, the action is neither a collateral sanction nor a
7 disqualification.²⁷ Even if they are enforced by criminal sanctions, restrictions which are not part
8 of the sentence and apply only to convicted persons constitute collateral sanctions.
9

10 **SECTION 3. COLLECTION OF COLLATERAL SANCTIONS AND**
11 **DISQUALIFICATIONS.**

12 (A) Within [six months] after the effective date of this Act, the [officials
13 responsible for compiling the official State Code and the official State Administrative Code]
14 (hereinafter “Revisors”) shall:

15 (i) Prepare drafts of new titles of the [State Code] and [State
16 Administrative Code] (hereinafter (“Codes) to be called *Collateral Sanctions on Offenders*. The
17 Revisors shall identify every provision of the Codes then in force imposing collateral sanctions or
18 disqualifications on offenders, remove them from their location in the Codes and transfer them
19 to the title *Collateral Sanctions on Offenders*. The Revisors shall organize the provisions of the
20 title *Collateral Sanctions on Offenders* in an appropriate manner.

21 (ii) Prepare a report describing any technical amendments to any title of
22 the Code necessary or appropriate to make the Code clear and understandable, without changing
23 its current meaning, including any necessary cross-references from various titles of the Code to

²⁶ Statutes requiring disclosure of criminal convictions, and allowing the decisionmaker to consider them as part of a “good moral character” or general fitness analysis implicitly constitute disqualifications.

²⁷ See, e.g., *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004) (forfeiture of medical license as punishment for drug offense).

1 relevant provisions of the title *Collateral Sanctions on Offenders*.

2 (B) The titles described in Section 3(A) shall not include provisions dealing with:

3 1) Sentencing of offenders (including imprisonment, jail, fines, financial assessments, restitution
4 or forfeiture imposed as part of sentencing), probation, parole, or supervised release; 2) The
5 custody or administration of persons committed to the Department of Corrections; 3)
6 Registration requirements on convicted sex offenders imposed at time of sentence or civil
7 commitment of individuals based on mental illness; 4) Victim's rights which do not directly
8 affect defendants.

9 (C) Unless otherwise directed by statute, after enactment of the titles *Collateral*
10 *Sanctions on Offenders* of the [State Administrative Code] and [State Code], the Revisors shall
11 codify any regulation and any statute imposing collateral sanctions or disqualifications on
12 offenders which thereafter comes into effect into the appropriate location of the appropriate code.

13 (D) The Revisors shall make available or arrange to make available in a single
14 document or volume: 1) The full text of the title *Collateral Sanctions on Offenders* from the
15 [State Code]; 2) The full text of the title *Collateral Sanctions on Offenders* from the [State
16 Administrative Code]; 3) The full text of all provisions of the state Constitution imposing
17 collateral sanctions or disqualifications on offenders; 4) The full text of all provisions of state
18 law offering relief from collateral sanctions or disqualification; and 5) The best available
19 descriptive or full text compilation of collateral sanctions and disqualifications imposed by
20 federal law based on conviction of state criminal offenses. This document shall be called the
21 *[State] Compendium of Collateral Sanctions on Offenders and Provisions for Relief*. In addition
22 to other methods of distribution, this *Compendium* shall be made available without charge on the

1 Internet. It shall be published within four months after adoption of the title *Collateral Sanctions*
2 *on Offenders* in the [State Code] or [State Administrative Code], whichever is earlier, and shall
3 be updated at least annually.

4 **Comment**

5
6 In a very real sense, having the status of “felon” is like being a regulated industry. In
7 effect, each state already has a title of its code called *Collateral Sanctions on Offenders*,
8 regulating the legal status of this group in scores or hundreds of ways. But instead of publishing
9 these laws together in volume “C” of the code, the statutes have been divided up and scattered.
10 The sanctions have proliferated unsystematically, with a prohibition on felons obtaining one kind
11 of license popping up in one corner of a state’s code, a prohibition of felons obtaining some other
12 kind of government employment appearing in an agency’s regulations.
13

14 While some disabilities may be well-known, such as felon disenfranchisement and the
15 felon firearms prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator
16 or bureaucrat could identify all of the statutes that would be triggered by violation of the various
17 offenses in the state’s criminal code. Although the information would be useful to many people,
18 including judges, prosecutors, defense lawyers and those supervising offenders, plus legislators
19 and other policymakers, it would be extremely costly for any of them to develop the information
20 on their own. The dispersion of these laws and regulations defeats the purpose of having
21 published codes in the first place.
22

23 This provision proposes to move all of the statutes and regulations imposing collateral
24 sanctions and disqualifications to single titles or chapters of the state’s code and administrative
25 code. No substantive change in the meaning of the laws is intended. Collecting collateral
26 sanctions from a state’s code and administrative regulations would make the formal written law
27 knowable to those who use and will be affected by it.
28

29 Section 3(A) proposes that Revisors of Statutes (or whatever they are called under state
30 law) will be directed to create new titles of the code and administrative code, and prepare reports
31 describing the technical changes necessary to make the new title and the existing titles coherent.
32 For example, if a provision prohibiting people with certain convictions from holding insurance
33 brokerage licenses is moved from the “Insurance” title to the new title, it may be helpful to have
34 a reference in “Insurance” to the relevant provision of “Collateral Sanctions on Offenders.”
35

36 These collections should be enacted as positive law. This would assist in ensuring that
37 the compilation remains current and complete; if published unofficially, they would quickly go
38 out of date. Because official codification would ultimately require an act of the legislature,
39 codification would give legislators an opportunity to examine the state’s collateral sanctions as a
40 collection. At the moment, it is virtually impossible for policymakers and the public to make

1 informed judgments about whether collateral sanctions are overabundant, just right, or
2 insufficient. The ABA Standards recommended codification. *See* ABA CRIMINAL JUSTICE
3 STANDARD 19-2.1.
4

5 Section 3(C) is designed to ensure that new statutes and regulations containing collateral
6 sanctions and disqualifications continue to be placed in the new codes. Of course, a legislature
7 cannot bind future legislatures, but in the absence of contrary legislative direction, new
8 provisions should be placed in the titles *Collateral Sanctions on Offenders*.
9

10 Once the new titles are created, they should be made available widely; this is the goal of
11 Section 3(D). Of course, for each state, the title from the codes and administrative code will
12 present only part of the picture: also relevant are sanctions imposed by the state Constitution,
13 federal law, and any provisions available for relief. These five categories of information cover
14 the area, and for the benefit of those who do not have ready access to a full set of the state code
15 and administrative regulations, should be made available as a body. Certainly the compendium
16 should be viewable and downloadable on the Internet without charge, and if feasible distributed
17 as a hardcopy booklet.
18

19 **SECTION 4. ADVISEMENT AT GUILTY PLEA.**

20 (A) Before accepting a plea of guilty or [nolo contendere or no contest] to a
21 criminal charge, the court shall personally state the following to the defendant:

22 Conviction of this offense may have legal consequences
23 beyond the [fine / imprisonment / /supervision] I have told you
24 about. These additional legal consequences may include, but are
25 not limited to disqualifying you from obtaining a government
26 license, permit, or employment, making you ineligible for public
27 benefits, such as public housing, forfeiture of property, enhanced
28 punishment if you are convicted of another crime in the future, and
29 limiting your civil rights, such prohibiting you from voting or
30 possessing a firearm. If you are not a citizen of the United States,
31 you are hereby advised that your plea may result in your
32 deportation, removal, exclusion from admission to the United
33 States, or denial of naturalization.

1 (B) After giving the advisement in Section 4(A), the Court shall ask the
2 defendant and defense counsel:

3 Have you, [defendant], and you, [defense counsel], had a sufficient
4 opportunity to discuss these legal consequences?

5 The court shall not accept a plea without an affirmative answer from both the
6 defendant and defense counsel, and shall grant additional time for consultation if requested.

7 **Comment**

8
9 *The Purpose of Advisement.* It is relatively uncontroversial that it is desirable for persons
10 pleading guilty to a criminal offense to understand the legal effects of that plea. It is fair to the
11 individual pleading guilty, who is entitled to understand the consequences of the legal
12 proceedings. It is also important for the court in sentencing²⁸ and to the prosecutor in making
13 charging decisions and arguing for a particular sentence.²⁹ Most courts hold that under the due
14 process clause of the Constitution, in order to make a guilty plea knowing, voluntary and
15 intelligent, a defendant must be told of the term of imprisonment, fine, and post-release
16 supervision that will result from their convictions. Identification of collateral sanctions beyond
17 direct punishment need not be disclosed in order for a plea to be constitutionally valid.³⁰
18

19 Even in the absence of constitutional requirements, however, a majority of the states
20 provide for disclosure of some collateral sanctions. The principal context is in the case of
21 deportation of non-citizens. A number of court decisions hold that it is unnecessary to inform
22 persons pleading guilty of the possibility of deportation if they are not citizens of the United
23 States.³¹ Yet, at least two dozen jurisdictions by court rule or statute require advisement of
24 potential deportation to those pleading guilty.³² By court decision, Colorado and Indiana require

²⁸ See, e.g., *United States v. Pacheco-Soto*, --- F.Supp.2d ----, 2005 WL 2243153 (D.N.M. 2005) (downward departure based on deportable alien status); *State v. Yanez*, 782 N.E.2d 146, 155 (Ohio App. 2002) (noting that deportation may affect sentence); ABA CRIMINAL JUSTICE STANDARD 19-2.4(a) (“The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender’s overall sentence”).

²⁹ See Robert M.A. Johnson, *Collateral Consequences, Message from the President of the National District Attorney’s Association*, May-June, 2001 (http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html)

³⁰ See note 23, *supra*.

³¹ See, e.g., *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Commonwealth v. Fuartado*, 2005 WL 2043680 (Ky. 2005).

³² See U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL RULES § 3, App. K (form guilty plea notification requiring acknowledgement of possible deportation); AZ. R. CRIM P. 17.2(f); CAL. PEN. CODE § 1016(5); CT. GEN. STAT. ANN. § 54-1j; D.C. STAT. § 16-713(a); FLA. R. CRIM. P. 3.170(C)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. § 802E-1 through E-3; 725 ILL. COMP. STAT. 5/113-8; IOWA R. CRIM. P. 2.8(2)(b)(3); ME. R. CRIM. P. 11(b)(5); MD. R. 4-242(e); MA. GEN. L. ANN. 278 § 29D; MA. R. CRIM P.

1 advice of possible deportation, at least in some cases.³³

2
3 Other jurisdictions require advisement of other collateral sanctions. Indiana requires that
4 the defendant be informed that they will “lose the right to possess a firearm if the person is
5 convicted of a crime of domestic violence.”³⁴ Wyoming law requires the court to advise
6 defendants “in controlled substance offenses [of] the potential loss of entitlement to federal
7 benefits.”³⁵ Even jurisdictions not requiring advisement of particular collateral consequences
8 often recognize that it is a good idea.³⁶

9
10 A majority of United States jurisdictions, then, require advice of at least one collateral
11 sanction, showing broad support for the idea that sound public policy and fairness require advice
12 beyond the constitutional floor. Yet, advising a defendant of one or more collateral sanctions
13 without addressing all of them may be misleading. It could reasonably be understood to imply
14 that the imprisonment, fine and other direct punishment, plus the collateral sanctions specifically
15 mentioned, represent the totality of the legal effects of the conviction.³⁷ For example, it would be
16 reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that because the
17 court advised that “federal benefits” might be lost, no state benefits, such as access to public
18 housing, were at risk. For this reason, the provision requires that the court advise defendants
19 about the potential for a broad range of sanctions in several categories. This is the approach of
20 the American Bar Association Criminal Justice Standards.³⁸

12(c)(3)(C); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(1)(f); NEB. REV. STAT. § 29-1819.02(1); N.J. Dir. 12-03 (plea form promulgated pursuant to N.J. R. CRIM. P. 3-9); N.Y. CRIM. PROC. L. 220.50(7); N.C. STAT. § 15A-1022(a)(7); OH. REV. CODE § 2943.031(A); OR. REV. STAT. § 135.385(d); R.I. GEN. L. § 12-12-22; TEX. CODE CRIM. P. ART. 26.13(a)(4); WASH. REV. CODE § 10.40.200(2); WISC. STAT. ANN. § 971.08(1)(c).

³³ See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

³⁴ IND. CODE § 35-35-1-2(a)(4).

³⁵ WY. R. CRIM. P. 11(b)(1).

³⁶ Thus, Utah rules provide: “Unless specifically required by statute or rule, a court is not required to inquire into or advise concerning any collateral consequences of a plea.” Utah R. Crim. P. 11(e). Yet, the comments state that the rule means “the trial court may, but need not, advise defendants concerning the collateral consequences of a guilty plea.” Courts ruling that defendants need not be informed of collateral consequences nevertheless often state that informing them would be a good idea. See, e.g., *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993) (“This is not to say that [counsel] should not advise the client on possible deportation—[counsel] should.”). The facts of reported cases also make clear that courts often advise defendants of collateral sanctions in the absence of a court rule or constitutional obligation. See, e.g., *Duffy v. State*, --- P.3d ----, 2005 WL 2219239 (Mont. 2005) (noting that trial court advised defendant of federal prohibition on felons possessing firearms).

³⁷ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (applying maxim *expressio unius est exclusio alterius*, the statement of one thing is the exclusion of other things). For an example of a misleading disclosure which one court held prevented application of a criminal collateral sanction, see *United States v. Glaser*, 14 F.3d 1213 (7th Cir. 1994).

³⁸ See ABA STANDARDS FOR CRIMINAL JUSTICE: GUILTY PLEAS, Standard 14-1.4(c) (3d ed. 1999):

Before accepting a plea of guilty or nolo contendere, the court should advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to forfeiture of

1 One possible objection to advisement about applicable collateral sanctions is that if
2 defendants actually know about the dozens or hundreds of negative legal effects of a criminal
3 conviction, many will refuse to plead guilty. However, because the sanctions typically apply to a
4 conviction by plea or jury verdict, pleading not guilty is not a means for a guilty person to avoid
5 collateral sanctions. It is reasonable to assume that the largest group of people who will plead
6 not guilty when they otherwise would have pleaded guilty will be those who have a defensible
7 case, but planned to plead guilty under the misapprehension that a criminal conviction was no big
8 deal
9

10 *The Method of Advisement.* A defendant could be informed of potential collateral
11 sanctions in several ways. At some early court appearance, the defendant could simply be given
12 a booklet describing all collateral sanctions to figure out on her own, but simply being handed a
13 booklet that is 30 or 40 pages long or longer is unlikely to be particularly informative to a
14 criminal defendant.
15

16 The defendant could be advised and her understanding confirmed by the court during the
17 guilty plea colloquy. Judicial advisement would have the virtue of putting the defendant's
18 receipt and understanding of the advice on the record, but it would take a great deal of time,
19 perhaps hours, for a judge to read all or part of the 30 or 40 page booklet during every guilty plea
20 colloquy. Furthermore, because the waiver of rights and advisement of consequences typically
21 occurs when the defendant is in the process of actually pleading guilty, it is too late for a
22 defendant to begin to consider these issues for the first time at that point.
23

24 This Act contemplates that the defendant will be advised and counseled by defense
25 counsel before the guilty plea, and that counsel's satisfaction of this obligation will be briefly
26 confirmed on the record by the court. The advantage of advisement by defense counsel is that it
27 would be take less in-court time, and it could be done at a more meaningful stage in the process,
28 as part of the decision whether to plead guilty rather than as part of the plea itself. Competent
29 defense lawyers now advise their clients of potential collateral sanctions.³⁹ Moreover, advice
30 could be tailored to the circumstances of the particular defendant; that is, if the defendant is a

property, the loss of certain civil rights, disqualification from certain
governmental benefits, enhanced punishment if the defendant is
convicted of another crime in the future, and, if the defendant is not a
United States citizen, a change in the defendant's immigration status.
The court should advise the defendant to consult with defense counsel if
defendant needs additional information concerning the potential
consequences of the plea.

³⁹ The Supreme Court recognized this in *INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001), where they explained that "competent defense counsel, following the advice of numerous practice guides, would have advised [defendants] concerning" the possibility of the collateral sanction of deportation based on criminal conviction, and the avenues of relief therefrom. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE, GUILTY PLEAS, 14-3.2(f) (3d ed. 1999) ("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 the entry of the contemplated plea.")

1 licensed barber rather than a licensed broker, the lawyer could focus on that and the other
2 collateral sanctions of concern to the particular defendant as an individual. The judge is not in a
3 position to do this as effectively, if for no other reason than the judge will not have access to the
4 client's privileged information. The defendant's receipt and understanding of advice about
5 collateral sanctions can quickly be put on the record by the judge during the guilty plea colloquy.
6

7 Counsel's task will be made easier by the compilation of collateral sanctions that is
8 contemplated by Section 3 of this Act. All of the necessary information will be readily at hand.
9 However, counsel's advice in this area, as in others, is expected to be competent rather than
10 perfect. A lawyer should be familiar with the law, including the law of collateral sanctions,⁴⁰ and
11 should make a reasonably diligent investigation about relevant facts.⁴¹ But if, in spite of
12 reasonable efforts, it turns out that the plea had unintended negative consequences, because, say,
13 a defendant's naturalization was invalid for reasons not known to the lawyer, or a defendant
14 failed to mention a business association that would be impaired by a conviction, that would not
15 suggest that a lawyer's representation was inadequate. However, even jurisdictions which, in
16 general, impose no duty to advise defendants of collateral sanctions, hold that attorneys who give
17 incorrect, misleading advice may render a plea constitutionally invalid.⁴²
18

19 Although the major statutory change is in the context of the guilty plea colloquy, other
20 areas of practice and policy will also change. For example, many jurisdictions have written plea
21 forms, as pleadings or exhibits, which are signed by the defendant and defense counsel and filed
22 as part of the record of the case. These forms should be amended to include the advisement of
23 collateral sanctions, and acknowledgement of the opportunity for defense consultation.
24 However, given the importance of ensuring that the defendant is actually informed and has
25 actually had the opportunity to consult with counsel, the oral advisement should not be dispensed
26 with. Another change might be amendment of the terms of government contracts with public
27 defender organizations or private contract attorneys, to require this advice as part of
28 representation of defendants.
29

30 *The Effect of Non-Compliance on the Validity of the Plea.* A difficult question is the
31 effect of non-compliance with a court rule or statute mandating advice. Existing law requiring
32 advice of possible deportation deals with this problem in several ways. Some provisions are
33 silent about the consequences of non-compliance.⁴³ Others specifically provide for plea
34 withdrawal if required advice is not given.⁴⁴ New York, by contrast, states that the failure to
35 advise a defendant in accordance with the law "shall not be deemed to affect the voluntariness of
36 a plea of guilty or the validity of a conviction."⁴⁵ Wyoming requires notice of discretionary and

⁴⁰ ABA MODEL RULE OF PROFESSIONAL CONDUCT 1.1 (competence).

⁴¹ *Id.*, Rule 1.3 (diligence).

⁴² *See, e.g.*, *Goodall v. United States*, 759 A.2d 1077, 1082-83 (D.C. 2000); *People v. Young*, 355 Ill.App.3d 317, 323-24 (2005).

⁴³ *See, e.g.*, AZ. R. CRIM. P. 17.2(f).

⁴⁴ *See, e.g.*, NEB. REV. STAT. § 29-1819.02(2).

⁴⁵ N.Y. CRIM. PROC. L. § 220.50(7).

1 mandatory assessments, and states that a failure to advise does not affect the validity of a plea,
2 “but assessments, the general nature of which were not disclosed to the defendant, may not be
3 imposed upon the defendant unless the defendant is afforded an opportunity to withdraw the
4 guilty plea.”⁴⁶
5

6 The criminal justice system depends in large part on the finality of guilty pleas.
7 Accordingly, there is strong reason not to upset a plea for a technical deficiency in guilty plea
8 procedure, and this is the prevailing rule.⁴⁷ But what if the defendant can demonstrate a serious
9 and prejudicial violation of a rule requiring defendants to be informed of collateral sanctions?
10 What if, for example, a defendant who received a probationary sentence shows that: 1) the judge
11 failed to confirm during the guilty plea colloquy that her defense lawyer had advised her of
12 collateral sanctions, and she was in fact not informed that her guilty plea to a drug offense meant
13 that she would be unable to adopt her foster child;⁴⁸ 2) that she would not have pleaded guilty if
14 she had known the legal consequences; and 3) she has a colorable argument that she is not guilty
15 of the offense?
16

17 In favor of the conclusion that noncompliance with a rule should never lead to upsetting a
18 plea is the argument that jurisdictions would be justifiably reluctant to adopt a rule that could
19 upset the finality of pleas. Under current law there is no requirement that defendant’s be advised;
20 it would be an example of the rule that “no good deed goes unpunished” if a state’s effort to offer
21 more than current law requires resulted in undermining pleas that are by all appearances entirely
22 valid. On the other side is the idea that a rule stating in text “there are no penalties for failing to
23 comply with this rule” is unlikely to command respect; it might be systematically ignored.
24

25 This provision does not address the consequences of non-compliance.⁴⁹ The arguments
26 on both sides are reasonable, but ultimately it is not a point on which uniformity is essential. In
27 any event, the rule has been drafted in such a way that judges can successfully comply with it,
28 with minimal burden. Accordingly, the procedure will be followed routinely, and the question of
29 remedy for non-compliance will be of little practical importance.
30

31 **SECTION 5. ADVISEMENT UPON RELEASE OR AT SENTENCING.** Within 30

⁴⁶ WY. R. CRIM. P. 11(b)(1)(B).

⁴⁷ See, e.g., FED. R. CRIM. P. 11(h) (“A variance from the requirements of this rule is harmless error if it does not affect substantial rights.”).

⁴⁸ See Amy E. Hirsch, et al., *Every Door Closed: Barriers Facing Parents with Criminal Records* 68-69 (2002).

⁴⁹ This is essentially the approach of the ABA, which contemplates that jurisdictions will make their own decisions about the consequences of non-compliance. See ABA CRIMINAL JUSTICE 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.”)

1 days before a person convicted of a crime is released from prison or jail, or, if the person is not
2 sentenced to prison or jail, at the time of sentencing, officer or agency releasing or sentencing the
3 offender shall provide written notice to the offender that collateral sanctions and disqualifications
4 may apply to the offender because of the offender's conviction. The notice shall include a copy
5 of, or information on how to obtain, the [State] *Compendium of Collateral Sanctions and*
6 *Provisions for Relief* referred to in Section 3(D) of this Act.

7 **Comment**

8 Defendants convicted after trial will not have had the notice contemplated in Section 4 as
9 part of the guilty plea colloquy. In addition, many defendants who did plead guilty will have
10 received notice months or years before they are released from custody; many will probably have
11 no recollection of what they were told. Persons in prison, of course, are subject to strict rules
12 which are well known so there would generally be little value in informing prisoners about the
13 largely theoretical additional level of regulation. However, once offenders are no longer in the
14 physical custody of the criminal justice system, they should be informed that their conduct and
15 status is subject to special restriction. The point is not fairness to the defendant in making the
16 decision how to plead; the conviction by this stage is a fact. Rather, formal advisement promotes
17 enforcement of the law. If, for example, persons convicted of felonies do not know they are
18 prohibited from possessing firearms, they may violate the law out of ignorance when they would
19 have complied with the law had they known.⁵⁰ In *Lambert v. California*,⁵¹ the Court found a due
20 process violation in convicting a felon of violation of a registration provision of which she had
21 no knowledge or reason to know.

22
23 This section also requires notice of provisions of law providing for relief from collateral
24 sanctions.⁵² To the extent that states provide for relief, they have concluded that it is fair to the
25 individual offender and beneficial to society to let at least some former offenders pay their debt
26 to society and move on. Notification to all offenders will facilitate the participation of deserving

⁵⁰ See, e.g., *United States v. Bethurum*, 343 F.3d 712 (5th Cir. 2003) (defendant properly convicted of being felon in possession of a firearm, notwithstanding claim that he would not have pleaded guilty had he realized he would not be entitled to possess a firearm); *Sadiq v. State*, 387 N.W.2d 315 (Iowa) (affirming conviction in spite of defendant's claim that he was not told he could not possess a firearm), *appeal dismissed*, 479 U.S. 878 (1986).

⁵¹ 355 U.S. 225 (1957).

⁵² See, e.g., AZ. R. CRIM. P. 29.1 ("Prior to his or her absolute discharge, a probationer shall receive from his or her probation officer, or the court if there is no probation officer, a written notice of the opportunity to have his or her civil rights restored, to withdraw his or her plea of guilty or no contest, or to vacate his or her conviction.").

1 but legally unsophisticated offenders.
2

3 **SECTION 6. LIMITATION OF COLLATERAL SANCTIONS AND**
4 **DISQUALIFICATION RELATED TO EMPLOYMENT, EDUCATION AND**
5 **LICENSING.**

6 (A) This section applies only to acts by the State, its instrumentalities (including
7 municipalities, subdivisions, boards, agencies, commissions and their employees), and
8 government contractors made subject to this provision by contract or statute, directed at persons
9 who have been convicted of an offense and have completed any term of incarceration imposed as
10 part of the sentence.

11 (B) Notwithstanding any other provision of law, no existing or hereinafter
12 enacted regulation, ordinance or policy shall impose a collateral sanction unless specifically
13 authorized by statute. Neither a general grant of authority to make regulations or ordinances, nor
14 a grant of authority to establish good moral character, admission or hiring standards shall
15 constitute specific authorization, but they shall constitute authority to take the facts underlying
16 convictions into account on a case by case basis in accordance with Section 6(D). Any
17 regulation, ordinance or policy imposing collateral sanctions without specific authorization shall
18 be construed as imposing a discretionary disqualification to be evaluated in accordance with
19 Section 6(D).

20 (C) Notwithstanding any other provision of law, it is unlawful, solely by reason
21 of a conviction:

22 (1) For the State to discharge, refuse to hire, or otherwise to discriminate

1 against a person with respect to the compensation, terms, conditions, or privileges of his
2 employment. [However, this section is not applicable to police departments, sheriff's
3 departments, the state police, the department of corrections, and other law enforcement
4 agencies];

5 (2) For a State trade, vocational, or professional school to suspend, expel,
6 refuse to admit, or otherwise discriminate against a person; or

7 (3) For the State to suspend, revoke or refuse to issue or renew a license,
8 permit, or certificate necessary to practice or engage in an occupation, profession, trade or
9 business.

10 (4) All statutes now in force imposing collateral sanctions related to
11 employment, education or licensing shall be deemed to impose discretionary disqualifications to
12 be evaluated in accordance with Section 6(D), except [firearms, contact with vulnerable groups,
13 law enforcement positions]. Any statute hereinafter enacted shall not be construed as imposing a
14 collateral sanction, unless it explicitly states that this provision is inapplicable, or there is no
15 reasonable interpretation of the statute other than that it imposes a collateral sanction

16 (D) It is not unlawful for the State to disqualify a person from employment,
17 education or licensing if the decisionmaker determines, based on the relevant facts and
18 circumstances, including the facts and circumstances of the offense, if they are relevant, that the
19 person is presently unfit. In determining whether the prior conviction is directly related to the
20 person's present fitness for the opportunity at issue, the following factors must be considered:

21 (1) The policy of this State, reflected in this Act, that former offenders
22 should work, in order to promote public safety, reduce recidivism, and to encourage them to take

1 responsibility for their obligations, including the obligation to support themselves and their
2 families;

3 (2) The facts and circumstances underlying the crime, and their relation, if
4 any, to the duties or functions of the occupation, profession, or educational endeavor;

5 (3) Any increased risk to the safety or welfare of individuals or the public
6 if the opportunity is granted, including whether it will provides an opportunity for the
7 commission of similar offenses;

8 (4) The person's rehabilitation and the person's conduct since the offense,
9 including whether the person has committed other serious offenses since conviction;

10 (5) The age of the person when the offense was committed;

11 (6) The time elapsed since commission of the offense and since release;

12 and

13 (7) Whether persons other than the applicant who have engaged in the
14 prohibited conduct underlying the conviction (whether or not convicted) have been or would be
15 disqualified.

16 (E) If conviction of a crime is used as a basis for rejection of an applicant for
17 employment an education a program, or a license, permit or certificate, such rejection shall be in
18 writing and shall set forth the evidence relied on and the reason or reasons for the rejection. A
19 copy of such rejection shall be provided to the applicant.

20 **Comment**

21 The principle that at least some licenses and employment opportunities should not be
22 arbitrarily denied to people with criminal convictions is well established in state codes. As

1 Margaret Love’s research shows,⁵³ 32 states have broad statutory restrictions on collateral
2 sanctions and disqualifications imposed by state actors. Many of these statutes seem to be based
3 on the Model Sentencing and Corrections Act. These restrictions fall into four categories:
4

5 Hawaii,⁵⁴ New York,⁵⁵ Pennsylvania⁵⁶ and Wisconsin⁵⁷ regulate consideration of a
6 conviction in public and private employment and occupational licensure.
7

8 Colorado,⁵⁸ Connecticut,⁵⁹ Florida,⁶⁰ Kentucky,⁶¹ Minnesota,⁶² New Mexico,⁶³ and
9 Washington⁶⁴ prohibit disqualification from public employment and occupational licensure solely
10 on grounds of conviction, but do not regulate private employment. Kansas⁶⁵ prohibits disqualification
11 from public and private employment but does not regulate occupational licensing.
12

13 Arkansas,⁶⁶ California,⁶⁷ Delaware,⁶⁸ Illinois,⁶⁹ Indiana,⁷⁰ Louisiana,⁷¹ Maine,⁷²
14 Michigan,⁷³ Missouri,⁷⁴ Montana,⁷⁵ New Jersey,⁷⁶ North Dakota,⁷⁷ Oregon,⁷⁸ South Carolina⁷⁹ and
15 Virginia⁸⁰ regulate occupational licensing but not employment.
16

⁵³ See Margaret Colgate Love, *Overcoming Legal Disabilities Resulting from Criminal Conviction: A State-By State Resource Guide*, § 4 (Draft May 21, 2005).

⁵⁴ HAW. REV. STAT. § 831-3.1.

⁵⁵ N.Y. CORRECTIONS L. §§ 750-55.

⁵⁶ 19 PA. C.S. ANN. § 9125.

⁵⁷ WISC. STAT. ANN. § 111.321 & § 111.335.

⁵⁸ COLO. REV. STAT. § 24-5-101.

⁵⁹ CT. GEN. STAT. ANN. § 46a-80.

⁶⁰ FLA. STAT. ANN. § 112.011.

⁶¹ KY. REV. STAT. § 335B.020.

⁶² MINN. STAT. ANN. § 364.03.

⁶³ NEW MEX. STAT. ANN. §§ 28-2-1 to 28-2-6.

⁶⁴ WASH. REV. CODE ANN. § 9.96A.020.

⁶⁵ KAN. STAT. ANN. § 22-4710.

⁶⁶ ARK. REV. STAT. § 13-904.

⁶⁷ CAL. BUS. & PROF. CODE §§ 490, 493.

⁶⁸

⁶⁹ 730 ILL. COMP. STAT. 5/5-5-5.

⁷⁰ IND. CODE § 25-1-1.1-1.

⁷¹ LA. STAT. ANN.-R.S. 37:2950.

⁷² 5 MAINE REV. STAT. ANN. § 5301.

⁷³ MICH. COMP. LAWS ANN. § 338.42.

⁷⁴ ANN. MISSOURI STAT.

§§ 314.200 & 561.016.

⁷⁵ MONT. CODE ANN. § 37-1-201.

⁷⁶ N.J. STAT. ANN. §§ 2A:168A-1 & 2C:51-1.

⁷⁷ N.D. CENT. CODE, 12.1-33-02.1.

⁷⁸ OR. REV. STAT. § 670.280.

⁷⁹ S. C. CODE § 40-1-140.

⁸⁰ VA. CODE ANN. § 54.1-204.

1 Arizona,⁸¹ California,⁸² Ohio,⁸³ Illinois⁸⁴ Massachusetts,⁸⁵ and West Virginia⁸⁶ bar
2 consideration of a conviction only when rights have otherwise been restored or a conviction
3 vacated or expunged.
4

5 Although they vary in specifics, most statutes provide that a conviction shall not be an
6 absolute bar. However, almost all also permit the conviction or the facts underlying it to be
7 weighed by the decisionmaker on a case by case basis, depending on whether it is “directly” or
8 “substantially” related to the employment or license at stake.
9

10 The “substantial” or “direct” relation test is deep in the law. Of the minority of states
11 without general laws, many nevertheless apply the test in the context of at least one licensing or
12 regulatory regime. At least 10 states use the test alone,⁸⁷ at least 7 others provide that a felon *or* a
13 crime substantially related to the license or occupation is disqualifying.⁸⁸ Accordingly, the states

⁸¹ AZ. REV. STAT. § 13-904(E).

⁸² CAL. CODE REGS. Tit. 2, § 7287.4(d)(1)(B).

⁸³ OHIO REV. CODE § 2953.33(B).

⁸⁴ 775 ILL. COMP. STAT. 5/2-103.

⁸⁵

MASS. GEN LAWS ANN. 127 § 152.

⁸⁶ W. VA. CODE, § 5-1-16a.

⁸⁷ *See, e.g.*, ALA. CODE § 34-1A-5 (d)(2)a. (“An applicant [for an alarm system installer license] shall not be refused a license solely because of a prior criminal conviction, unless the criminal conviction directly relates to the occupation or profession for which the license is sought.”); IOWA CODE ANN. § 147.3 (health related professions licensing; “A board may consider the past felony record of an applicant only if the felony conviction relates directly to the practice of the profession”); MASS. GEN. LAWS ANN. 112 § 52D (“The board . . . may [discipline] any dentist convicted . . . of a felony related to the practice of dentistry”); MD. R. 4-340(e) (procedures required after sentencing in drug crime cases) (“If the defendant holds a license, but has no such prior conviction, the court shall determine whether, prima facie, there is a relationship between the current conviction and the license, including” [then listing factors]); MISS. CODE § 73-67-27(1)(e) (license may be denied or revoked if person has conviction or charges “that directly relates to the practice of massage therapy or to the ability to practice massage therapy.”); NEB. REV. STAT. § 87-404 (franchise termination protections inapplicable when “the alleged grounds are (a) the conviction . . . an indictable offense directly related to the business”); NEV. REV. STAT. § 625.410(4) (discipline permissible based on “Conviction of . . . any crime an essential element of which is dishonesty or which is directly related to the practice of engineering or land surveying”); N.C. GEN. STAT. ANN. § 88A-21(a)(1) (grounds for discipline include “Conviction of [a crime] if any element of the crime directly relates to the practice of electrolysis.”); 59 OK. STAT. ANN. § 1503A(B) (requiring rejection of “an applicant who has a felony conviction which directly relates to the duties and responsibilities of the occupation of pawnbroker.”); VERNON’S TEXAS STAT. & CODES ANN., GOVERNMENT CODE § 52.029(a)(6) (discipline permitted for “a final conviction of a felony or misdemeanor that directly relates to the duties and responsibilities of a certified court reporter”).

⁸⁸ *See, e.g.*, ALASKA STAT. § 08.68.270 (“The board may [discipline] a person who . . . (2) has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee”); IDAHO CODE § 54-2103(23) (“In good standing” means that an applicant: (e) Has not been convicted of a felony . . .; and (f) Has no criminal conviction record or pending criminal charge relating to an offense the circumstances of which substantially relate to the practice of veterinary medicine.”); 225 ILL. COMP. STAT. ANN. 2/110(a)(2) (discipline permitted against licensed acupuncturist for “Conviction of any crime under the laws of any U.S. jurisdiction that is (i) a felony, (ii) a

1 are virtually unanimous in holding that in some instances, criminal convictions should be
2 considered not as a broad category, but based on their specific facts and circumstances, as they
3 relate to the license, privilege or employment at issue. Collateral sanctions are meant to protect
4 public welfare and safety, not inflict arbitrary and needless harms. Accordingly, as reflected by
5 the laws already on the books, most states agree that it is important whether a conviction
6 “directly relates” to a fitness to engage in a particular occupation or to obtain a particular license.
7

8 However, it must be acknowledged that even in states with broad protective legislation,
9 the principle is honored, to some extent, in the breach. Many statutes and regulations can be
10 identified, even in these states, which conflict with the non-discrimination provisions by
11 imposing absolute bars even in the absence of a general or fact-specific determination that the
12 offense is “directly related” to the sanction.
13

14 Section 6 is based on the Model Sentencing and Corrections Act, § 4-1005. However,
15 the provision in this draft does not identify a list of prohibited collateral sanctions, as do the ABA
16 Standards and the Model Sentencing and Corrections Act. The Model Sentencing and
17 Corrections Act, § 4-1001(b) provides that a convicted person “retains all rights, political,
18 personal, civil and otherwise”, including, among others it lists, the right to vote. The ABA
19 Standards has a list of sanctions which should never be imposed under any circumstances, such
20 as “deprivation of the right to vote, except during actual confinement.” (ABA CRIMINAL JUSTICE
21 STANDARD 19-2.6(a)).
22

23 Section 6(A) differs from the original by limiting its coverage to state actors, excluding
24 private employers. Regulation of public employment and licensing is less controversial than
25 would be reaching into the decisions of private businesses. In addition, public employment and
26 licensing are often done with the public interest in mind (for example, in the context of veteran’s
27 preferences, or reserved opportunities for the disabled). If any category of employer is going to
28 take a chance by helping ex-offenders, it is going to be the public sector.
29

30 However, Section 6(A) contemplates that private corporations performing government
31 functions or services might, by contract or statute, be made subject to these restrictions. It is far
32 less intrusive to ask private companies who choose to do business with the state to comply with a
33 policy like this; if a private company finds it objectionable, they may forego the business.

misdemeanor, an essential element of which is dishonesty, or (iii) directly related to the practice of the profession.”); R.I. STAT. ANN. § 23-16.3-12 (3) (discipline of clinical laboratory scientists authorized for “A conviction . . . which is a felony or which is a misdemeanor, an essential element of which is dishonesty, or of any crime which is directly related to the practice of the profession”); UTAH CODE ANN. § 13-12-3(6)(b) (restricting franchise termination except “Where the alleged grounds are caused by the conviction of the dealer or distributor . . . of a criminal offense directly related to the business”); 26 VT. STAT. ANN. § 2424(e) (“As used in this section, “in good standing” means that the applicant: . . . (5) has not been convicted of a felony; or (6) has no criminal conviction record nor pending criminal charge relating to an offense that relates substantially to the practice of veterinary medicine.”); ANN. CODE W. VA. § 30-3-14(c)(2) (discipline authorized for: “Being found guilty of a crime in any jurisdiction, which offense is a felony, involves moral turpitude or directly relates to the practice of medicine.”)

1 A statute like this represents a policy direction, which a legislature might wish to make
2 permanent. Yet, short of amending a state constitution or the U.S. Constitution, a given
3 legislature cannot absolutely bind future legislatures. Thus, the approach of the ABA Criminal
4 Justice Standards, essentially to ban collateral sanctions in most circumstances,
5 ⁸⁹ cannot be effectively accomplished through a mere statute—although at any given moment a
6 legislature might accept it, a future legislature is free to go in a different direction.
7

8 Nevertheless, a state legislature can enact legislation constraining and channeling the
9 creation and imposition of collateral sanctions. Section 6(B) represents one possible solution.
10 This provision is designed to restrict creation of absolute, blanket collateral sanctions to the
11 legislature. Individual agencies, municipalities and boards may not be equipped or inclined to
12 consider large policy questions when drafting ordinances and regulations. Accordingly, in order
13 to, say, simplify their own decisionmaking, or because they did not think deeply about the issue,
14 a board might impose absolute bans on some or all persons with criminal convictions under
15 circumstances when the legislature as a whole would find a categorical policy unwarranted. The
16 idea of Section 6(B) is to require that such determinations be made by the legislature itself, which
17 considers the welfare of the state as a whole in addition to the concerns of the licensed
18 occupation or profession, or of the particular locality.
19

20 Another technique suggested in Sections 6(B) and (C) is to write interpretive
21 presumptions into law. In addition to depriving lawmakers lower than the legislature itself of
22 power to impose collateral sanctions, existing ordinances and regulations imposing collateral
23 sanctions would be re-written en masse to impose discretionary disqualifications. Section (C)(4)
24 would create an interpretive presumption that statutes did not intend to impose collateral
25 sanctions, unless the statute exempted itself from Section (C)(4) or there was no other reasonable
26 interpretation.
27

28 Another possibility suggested in this draft is to anticipate the handful of particular,
29 specified circumstances where they will be justified. This approach is suggested by a line in
30 Section 6(C), which differs from the Model Sentencing and Corrections Act by allowing law
31 enforcement employers to bar persons based on conviction, rather than on a case by case
32 analysis. Arizona, Colorado, Florida, Hawaii, Louisiana, New Mexico and New York
33 specifically exclude law enforcement from the coverage of their statutes, and undoubtedly many
34 others, not mentioning it specifically, do so in practice. Another collateral sanction which will
35 undoubtedly be part of state law in the future is limitation of the ability of sex offenders to work

⁸⁹ ABA CRIMINAL JUSTICE STANDARD 19-2.2 provides:

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

1 in schools, hospitals and with the elderly.⁹⁰

2
3 Section 6(C) establishes the general principle that blanket collateral sanctions will not be
4 created with respect to employment, admission to educational institutions and licensing. It
5 applies both to formal and informal policies, and individual decisions. This provision is similar
6 to the MSCA in that in effect it contemplates that there will be no categorical, absolute collateral
7 sanctions in the employment and licensing context. Everything, it appears, will be dealt with on
8 a case-by-case basis. However, when adopted by a state, inevitably there will be at least a
9 handful of exceptions; persons with recent armed robbery convictions, for example, will not be
10 permitted to have pistol permits; pedophiles will not receive licenses to operate day care centers.
11 Nevertheless, it should serve as a reminder of the principle that blanket collateral sanctions
12 should be sharply limited to the situations where they are genuinely necessary.

13
14 Section 6(D) describes the factors relevant to a case by case analysis of a conviction.
15 Eleven states have as positive law the policy set forth in (D)(1), sometimes as a preamble to their
16 statute, sometimes as a licensing factor, as here.⁹¹

17
18 Section 6(D) uses the passage of time as a factor. Some jurisdictions have a term of
19 years, after which, if the person has not been convicted of another crime, rehabilitation is
20 presumed.⁹²

21
22 Factor (D)(7) is designed to determine whether the disqualification is based on conduct or
23 conviction. If Plumber’s Board grants licenses to those, say, who were fired from a job or
24 suspended from school for marijuana possession, then it is probably not unreasonably dangerous
25 or risky to public safety to allow an applicant who was convicted of precisely the same conduct
26 to have a license to practice. On the other hand, if the agency would deny a position to a school
27 bus driver applicant who had his child taken away in a civil action based on child abuse, that is
28 strong evidence that a conviction for child abuse is directly related to fitness for the
29 employment.⁹³

⁹⁰ See, e.g., 5 ME. REV. STAT. ANN. § 5301(2)(E); WASH. REV. CODE § 9.96A.020(3) & (4).

⁹¹ ARK. CODE ANN. § 17-1-103(a) (“(1) It is the policy of the State of Arkansas to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the assumption of the responsibilities of citizenship. (2) The public is best protected when offenders are given the opportunity to secure employment or to engage in a meaningful trade, occupation, or profession.”); COLO. REV. STAT. ANN. § 24-5-101(2); CT. GEN. STAT. ANN. § 46a-79; 730 ILL. COMP. STAT. 5/5-5-5(h) (recognizing “the public policy of this State, as expressed in Article 5.5 of this Chapter, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses”); MINN. STAT. ANN § 364.01; MONT. CODE ANN. § 37-1-201; N.J. STAT. ANN. 2A:168A-1; New Mexico Stat. Ann. § 28-2-2; N.Y. CORRECTIONS L. § 753 (factor in evaluating decision); REV. CODE WASH. ANN. § 9.96A.010; WISC. STAT. ANN. § 111.31.

⁹² See, e.g., N.M. STAT. ANN. § 28.2.4(B) (three years after imprisonment or completion of parole and probation); N.D. CENT. CODE § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or imprisonment).

⁹³ ABA CRIMINAL JUSTICE STANDARD 19-3.1 (“The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities . . . on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification

1 **SECTION 7. RELIEF FROM COLLATERAL SANCTIONS BASED ON**
2 **EVIDENCE OF REHABILITATION TO ASSIST IN EMPLOYMENT.**

3 (A) A person subject to collateral sanctions because of a criminal conviction in
4 this State or another jurisdiction may apply to the [general trial jurisdiction] Court in the county
5 in which they live for relief from one or more collateral sanctions imposed by the law of this
6 State.

7 (B) In order to obtain relief, the applicant must show:

8 (i) That removal of the collateral sanction(s) is necessary:

9 (a) To obtain particular public or private employment, or

10 (b) To obtain a license, permit, certificate or other government
11 approval, which is necessary for the applicant to obtain employment or to operate a business
12 owned by the applicant, and

13 (ii) That at least [2] years has elapsed since the conviction giving rise to
14 the collateral sanction(s), and since release from the prison or jail sentence imposed under that
15 conviction, and

16 (iii) That for the [2] years immediately prior to application, and during the
17 pendency of the application, the applicant has been engaged in a law-abiding occupation or
18 activity, including but not limited to lawful employment, training, education, or rehabilitative
19 programs, and has been free of felony convictions during that period, and

20 (iv) That there is no unresolved intentional or unjustified failure to
21 comply with the terms of the sentence for the offense giving rise to the collateral sanction, and

even if the person had not been convicted.”)

1 (v) That there are no unresolved criminal charges pending against the
2 applicant, and

3 (vi) If the applicant was convicted of an offense involving drugs or
4 alcohol, or if the conduct underlying the criminal conviction involved drugs or alcohol, the
5 results of any urinalysis required by the court are free of evidence of the use of illegal drugs.

6 If these showings are made, the Court shall grant the application, and issue an order relieving the
7 applicant from the effect of specified collateral sanction(s).

8 (C) The effect of an order issued under this section is to remove the specified
9 collateral sanction(s) presenting an absolute bar to employment or licensing. An order issued
10 pursuant to this Section does not preclude the decisionmaker from considering the facts
11 underlying the conviction, or considering that they have been established by the judgment of
12 conviction. A government decisionmaker shall evaluate the underlying facts using the factors set
13 forth in Section 6(C) of this Act.

14 (D) The applicant shall serve a copy of an application under this Section on the
15 prosecuting attorney for the county where the applicant resides, and, if it is not the same agency,
16 the prosecutor's office responsible for obtaining the conviction giving rise to the collateral
17 sanction. Prosecutors served shall be allowed to appear and participate.

18 **Comment**

19
20 All or virtually all states have pardons; about half the states also have expungement,
21 sealing, set-aside, vacation, or some other mechanism for restoring civil rights or avoiding
22 collateral sanctions. I am not optimistic that a uniform law in this area would be widely adopted.
23 This provision is designed to come at the problem a different way. It does not undo the
24 conviction as a whole, or even eliminate collateral sanctions as a whole. Instead, it is tightly
25 linked to employment.
26

1 The importance of this provision is related to the breadth of Section 6. If Section 6
2 substantially cuts back on categorical collateral sanctions, and turns all but a few into
3 discretionary determinations, a provision like this may come into play rarely or be entirely
4 unnecessary. On the other hand, if the legislature and administrative agencies cannot hold back
5 from imposing broad collateral sanctions across a wide range of contexts, a relief valve will be
6 essential.

1 **APPENDIX**

2
3 **ORIGINAL VERSION OF MODEL SENTENCING AND**
4 **CORRECTIONS ACT, § 4-1005**
5

6 (a) This section applies only to acts of discrimination directed at persons who have been
7 convicted of an offense and discharged from their sentence.

8 (b) It is unlawful discrimination, solely by reason of a conviction:

9 (1) for an employer to discharge, refuse to hire, or otherwise to discriminate
10 against a person with respect to the compensation, terms, conditions, or privileges of his
11 employment. For purposes of this section, "employer" means this State and its political
12 subdivisions and a private individual or organization [employing 15 or more employees for each
13 working day in each of 20 or more calendar weeks in the current or preceding calendar year];

14 (2) for a trade, vocational, or professional school to suspend, expel, refuse to
15 admit, or otherwise discriminate against a person;

16 (3) for a labor organization or other organization in which membership is a
17 condition of employment or of the practice of an occupation or profession to exclude or to expel
18 from membership or otherwise to discriminate against a person; or

19 (4) for this State or any of its political subdivisions to suspend or refuse to issue
20 or renew a license, permit, or certificate necessary to practice or engage in an occupation or
21 profession.

22 (c) It is not unlawful discrimination to discriminate against a person because of a

1 conviction if the underlying offense directly relates to the particular occupation, profession, or
2 educational endeavor involved. In making the determination of direct relationship the following
3 factors must be considered:

4 (1) whether the occupation, profession, or educational endeavor provides an
5 opportunity for the commission of similar offenses;

6 (2) whether the circumstances leading to the offense will recur;

7 (3) whether the person has committed other offenses since conviction or his
8 conduct since conviction makes it likely that he will commit other offenses;

9 (4) whether the person seeks to establish or maintain a relationship with an
10 individual or organization with which his victim is associated or was associated at the time of the
11 offense; and

12 (5) the time elapsed since release.

13 (d) [The State Equal Employment-Opportunity Commission has jurisdiction over
14 allegations of violations of this section in a like manner with its jurisdiction over other
15 allegations of discrimination.]

16 **Comment**

17
18 There is a direct correction between employment and recidivism. E.g., ECON, Inc. at 3-4,
19 76; D. Glaser, *The Effectiveness of a Prison and Parole System* 311-61 (1964); Nat'l Advisory
20 Comm'n Correc.Std. 16.13 and Commentary. Providing employment opportunities to persons
21 convicted of crime would seem, then, to be a primary goal of the criminal justice system. See,
22 e.g., Article IV, Part 8 supra; ABA Joint Comm., §§ 4.1 to 4.4, 10.4 and Commentary; Nat'l
23 Advisory Comm'n Correc.Stds. 16.13, 16.17 and Commentary. The intent of this section is to
24 implement this goal by prohibiting discrimination against offenders by the State or when the
25 offender is engaged in employment-related activities unless there is a direct relationship, as
26 defined in subsection (c), between the offense and the activity which the person seeks to pursue.
27 See, e.g., ABA Joint Comm., §§ 10.1 to 10.7 and Commentary; Nat'l Advisory Comm'n
28 Correc.Std. 16.17 and Commentary. See also *Smith v. Fussenich*, 440 F.Supp. 1077

1 (D.Conn.1977) (Conn. statute barring released felony offender from employment as security
2 guard or private detective found overbroad because it does not recognize differences in fitness
3 and character of felony offenders nor the relationship between the offense committed and the
4 requirements of the job).

5
6 The great majority of states, in their licensing requirements, presently require no such
7 relationship nor, indeed, exhibit any rational purpose for most of the restrictions imposed. E.g.,
8 President's Comm'n on, Corrections at 90- 91. As the Task Force found:

9
10 "[I]t seems appropriate to suspend or revoke licenses for offenses involving dangerous
11 driving, both to remove the unfit driver from the road and to deter such behavior. But to bar
12 convicted persons from numerous activities without regard to the particular conviction's
13 relevance to the particular activity can be expected seriously to impede efforts to rehabilitate
14 offenders by encouraging their participation in society, without any compensating benefit to
15 society.

16
17 "Most of the law in this area is overly broad. Thus, good character is often made a
18 prerequisite for activities where it is of no particular relevance. It is, for example, a common
19 requirement for obtaining a barber's license. Yet it is doubtful whether good character is of any
20 more importance to exercise of one's duties as a barber than to most other occupations. And
21 regulatory legislation generally makes no effort to define the kind of character, and thus the kind
22 of convictions, relevant to fitness. In the area of individual licenses, professional and
23 occupational groups are often given the power to determine who is initially qualified to receive a
24 license and to regulate the standards of those licenses by defining rules of conduct and revoking
25 or suspending licenses for breach of those rules. Such groups tend to be primarily concerned with
26 the interests of their own members. Thus, when faced with the problem of whether to license
27 persons with criminal records, they may be unduly concerned with the effect on the status of their
28 professions. Further, to the extent they try to consider the public interest, they are likely to have
29 an unrealistic view of the importance of their own profession or occupation"

30
31 Id. at 91. For a comprehensive survey of statutory restrictions on the ability of a person
32 convicted of an offense to obtain or retain a license, see, ABA Clearinghouse on Offender
33 Employment Restrictions, Removing Offender Employment Restrictions (March 1976). It is
34 there reported, for example, that 47 states require evidence of good moral character (22 of these
35 states also require that the applicant be free of a criminal record) in order for an applicant to
36 obtain a barber's license.

37
38 The House of Delegates of the American Bar Association adopted, in 1975, a resolution
39 recommending the repeal of laws that discriminated against ex-offenders in state employment
40 and licensing when the discrimination is based solely on the existence of prior convictions. 61
41 A.B.A.J. 1088 (1975). At least three states now require that, unless the offense relates to the
42 employment sought, a person convicted of an offense may not be disqualified from employment
43 by the state or from practicing any occupation or profession for which the state must issue a

1 license. E.g., Conn.Gen.Stat. Ann., § 4-61n to 61s (West Supp.1977); Fla.Stat. Ann., § 112.011
2 (West Supp.1977); Wash.Rev.Code Ann., §§ 9.96A.010 to (West 1977). Hawaii has a similar
3 statute prohibiting discrimination by private employers. Haw.Rev.Stat. ch. 378 (Supp.1975).
4 Offenses include those committed in another jurisdiction.
5

6 Subsection (a) is intended to permit an employer to discontinue in his employ an
7 employee charged with an offense who is awaiting trial or sentence or has been convicted and
8 committed to the division of community based services. It is hoped that an employer would not
9 normally choose to discontinue employment but might do so in the case of a well publicized trial.
10

11 The bracketed language in subsection (b)(1) restricts the reach of the section to private
12 employers that come under the purview of the Equal Employment Opportunity Act of 1972. A
13 state that has enacted its own Equal Employment Opportunity Act may choose to track the
14 requirements of its own Act.
15

16 Subsection (d) derives from the Proposed New Federal Criminal Code, § 3505.
17 Subsection (e) provides a method for initial agency determination for a state that has enacted its
18 own state Equal Opportunity Act. E.g., Haw.Rev.Stat. ch. 378 (Supp.1975) Hawaii E.O.C. has
19 jurisdiction to hear ex-offender employment discrimination complaints); Conn.Gen.Stat. Ann., §
20 4-61q. (West Supp.1977) (Conn. Human Rights and Opportunities Commission has jurisdiction
21 to hear ex-offender discrimination complaints with respect to state employment or licensing).
22 The attached table provides Hawaii statistics as to its experience with ex-offender employment
23 discrimination complaints. It indicates that such complaints will not be unduly burdensome; their
24 number is small compared to the total number of complaints brought.
25

26 This section includes no exemption of the profession of law from the operation of the
27 section. It is recognized that courts have traditionally viewed the regulation of the practice of law
28 within their inherent power. E.g., *In re Mackay*, 416 P.2d 823, 836-37 (Alaska 1964), cert.
29 denied, 385 U.S. 890 (1966); *Brotsky v. State Bar*, 57 Cal.2d 287, 301, 19 Cal.Rptr. 153, 159,
30 368 P.2d 697, 703 (1962); *In re Lavine*, 2 Cal.2d 324, 327-328, 41 P.2d 161, 162-64 (1935);
31 *State Bar Ass'n v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 230, 140 A.2d 863, 868
32 (1958); *In re Opinion of the Justices*, 279 Mass. 607, 610, 180 N.E. 725, 727 (1932); *In re Fox*,
33 296 So.2d 701, 703-04 (Miss.1974); *In re Buckles*, 331 Mo. 405, 53 S.W.2d 1055 (1932); *In re*
34 *Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 286-287, 275 N.W. 265, 266-68 (1937);
35 *In re Community Action for Legal Services, Inc.*, 26 App.Div.2d 354, 361, 274 N.Y.S.2d 779,
36 784 (1966); *Jenkins v. Oregon State Bar*, 241 Or. 283, 286, 405 P.2d 525, 526 (1965). It is
37 further recognized that courts generally view legislative statements concerning qualification for
38 the practice of law to state minimum standards beyond which they may require additional
39 qualifications. E.g., *In re Lavine*, 2 Cal.2d 324, 41 P.2d 161, 163 (1935). The decision not to
40 exempt the legal profession reflects a determination that such exemption from the operation of
41 the section would create an anomaly in terms of policy of this Part. More important, it was
42 considered that to exclude offenders from the practice of law solely because of the commission
43 of an offense is to create a discrimination unwarranted in its overbreadth. Cf. *Smith v. Fussenick*,

1 440 F.Supp. 1077 (D.Conn.1977). It is, of course, true that this section will not control in a
2 jurisdiction in which a court determines that it represents an intrusion into the court's prerogative
3 to govern the practice of law. It is hoped, however, that in such jurisdictions courts will consider
4 and expressly assume the policy choice reflected in the section.