

D R A F T

FOR APPROVAL

UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION

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 will 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 According to the U.S. Department of Justice, there were about 71 million people with a criminal record in the United States as of December 2003, a number approaching 25% of the entire population.⁵ Minorities are far more likely than whites to have a criminal record: Almost 17% of adult black males have been incarcerated, compared to 2.6% of white males, and almost half have a criminal record.⁶

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

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 October, 2005, the Bureau of Justice Statistics reported that the rate of growth of the national prison system had diminished to 1.9%, which was less than the average annual growth rate of 3.2 % since year-end 1995, but still positive. Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, at 1, Bureau of Justice Statistics Bulletin (Oct. 2005, NCJ 210677).

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).

⁵ *Survey of State Criminal History Information Systems, 2003*, at 2, U.S. Dept. Of Justice, Bureau of Justice Statistics (Feb. 2006, NCJ 21097).

⁶ Bonczar, *supra* note 3, at 5.

must successfully reenter society or be at risk for recidivism. 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 individual could have contributed to the economy. Society also has a strong interest in seeing that individuals convicted of crimes can regain the legal status of ordinary citizens to prevent the creation of a permanent class of “internal exiles” who cannot establish themselves as law-abiding and productive members of the community.

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. 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.⁷ 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.⁸

Apart from impairment of self-esteem and informal social stigma, a criminal conviction negatively affects an individual’s legal status. For many years, an individual convicted of, say, a drug felony, lost his right to vote for a period of time or for life,⁹ could not possess a firearm,¹⁰ and was barred from service in the military¹¹ and on juries, state and federal, civil and criminal.¹² If a non-citizen, the individual could be deported.¹³ 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.

⁷ See, e.g., BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION (Aug. 2001).

⁸ 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”); see generally James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387 (2006).

⁹ See JEFF MANZA & CHRIS UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford forthcoming). Convicted individuals may also be ineligible to hold public office. See, e.g., *State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934) (North Dakota governor removed from office based on conviction rendering him ineligible to vote).

¹⁰ 18 U.S.C. § 922(g).

¹¹ 10 U.S.C. § 504.

¹² See Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003).

¹³ See Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

In recent years, collateral sanctions have been increasing. To identify just some of those applicable to individuals with felony drug convictions, 1987 legislation made individuals with drug convictions ineligible for certain federal health care benefits;¹⁴ a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding,¹⁵ in 1993, Congress made individuals with drug convictions ineligible to participate in the National and Community Service Trust Program.¹⁶ In 1996, Congress provided that individuals convicted of drug offenses would automatically be ineligible for certain federal benefits;¹⁷ a year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit.¹⁸ In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid¹⁹ and for residence in public housing.²⁰ In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits.²¹

Like Congress, state legislatures have also been attracted to regulating convicted individuals. Studies of disabilities imposed by state law or regulation done by law students in Arizona, Maryland and Ohio show literally hundreds of collateral sanctions on the books in those states.²² These laws limit the ability of convicted individuals 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.

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.²³ 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."²⁴ Courts have held that while a judge taking a guilty plea must advise

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

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

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

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

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

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

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

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

²² See Law, Criminal Justice and Security Program, University of Arizona, *Collateral Sanctions: A Comprehensive Study of the Ongoing Effects of Criminal Convictions in Arizona* (2006); 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). An April, 2006 Florida Executive Order directs collection of collateral sanctions by all state agencies. See Fl. Exec. Order No. 6-89 (April 25, 2006) (available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/April/06-89-exoftf.pdf).

²³ 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) (citing 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)).

²⁴ See *Guilty Pleas*, 33 GEO. L.J. ANN. REV. CRIM P. 363, 373 (2004).

of the “direct” consequences—imprisonment and fine—defendants need not be told by the court or their counsel about collateral sanctions.²⁵ 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, individuals with convictions, 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.

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.²⁶ 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 individuals. 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. As a recent resolution of the National District Attorney’s Association recognizes, “the lack of employment, housing, transportation, medical services and education for ex-offenders creates barriers to successful reintegration and must be addressed as part of the reentry discussion.”²⁷

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 4 proposes that collateral sanctions and disqualifications contained in state statutes or administrative regulations be collected in a single document.

Sections 5 and 6 propose to make the existence of collateral sanctions known to defendants at important moments: Early in the pretrial process to they can make an informed decision about how to proceed (Section 5), and when leaving the custody of the criminal justice system, so they can conform their conduct to the law (Section 6). Given that collateral sanctions

²⁵ 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).

²⁶ Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, at 2, Bureau of Justice Statistics Bulletin (Dec. 2004, NCJ 206916).

²⁷ NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).

and disqualifications will have been codified, it will not be difficult to make this information available.

Section 7 defines the judgments that count as convictions for purposes of imposing collateral sanctions, excluding those that have been reversed or set aside, as well as those pardoned based on innocence.

Section 8 limits the collateral sanctions and disqualifications applicable to employment, educational benefits, housing and licensing. 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 9 is designed to ensure that collateral sanctions are imposed by decision of the state legislature, if at all, prohibiting creation of sanctions by ordinance, policy or rule, unless authorized by statute.

Sections 10 and 11 create relief mechanisms. Section 10 is designed for an individual in the process of reentering society. It offers relief from one or more collateral sanctions based on a showing of public safety, and that relief would facilitate reentry. Section 11 creates a Certificate of Good Conduct for individuals who can demonstrate a substantial period of law-abiding behavior consistent with successful reentry and desistence from crime, and offers broader relief from collateral sanctions. The Certificate of Good Conduct would give potential public and private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity. It could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

Section 12 provides that convicted individuals who have been released from prison should have the right to vote.

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 are mentioned.

1 **UNIFORM ACT ON COLLATERAL CONSEQUENCES OF CONVICTION**

2

3 **SECTION 1. SHORT TITLE.** This [act] may be cited as the Uniform Act on

4 Collateral Consequences of Conviction.

5 **SECTION 2. DEFINITIONS.** In this [act]:

6 (1) “Collateral sanction” means a penalty, disability, or disadvantage, however

7 denominated, that is imposed by law as a result of the conviction of an individual for a felony,

8 misdemeanor, or other offense, but not as part of the judgment of the court. The term does not

9 include imprisonment, probation, parole, supervised release, a forfeiture, restitution, a fine, an

10 assessment, or the costs of prosecution.

11 (2) “Disqualification” means a penalty, disability, or disadvantage, however

12 denominated, that an administrative agency, governmental official, or a court in a civil

13 proceeding is authorized, but not required, to impose on an individual convicted of a felony,

14 misdemeanor, or other offense on grounds related to the conviction.

15 (3) “Collateral consequence” means a collateral sanction or disqualification.

16 **Comment**

17 The definitions in paragraphs (1) and (2) are taken from the ABA Standards.²⁸ They are

18 intended to exclude from the definition of collateral sanction or disqualification direct criminal

19 punishment, such as fine, imprisonment, probation, parole, or supervised release, and the

20 incidents and conditions of those direct punishments. They are also intended to exclude private

21 conduct, such as the hiring decisions of private employers. Covered actions generally include

22 such things as denial of government employment and elective or appointive office, ineligibility

23 for government licenses, permits, or contracts, disqualification from public benefits, public

²⁸ ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY
DISQUALIFICATION OF CONVICTED PERSONS, Standard 19-1.1 (3d ed. 2004) (hereinafter, “ABA CRIMINAL
JUSTICE STANDARD ____”).

1 education, public services, or participation in public programs, and elimination or impairment of
2 civil rights, such as voting, or jury service.
3

4 Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends
5 on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a
6 license to an applicant with a felony conviction, then it is a collateral sanction, because the effect
7 is automatic. If a medical licensing board “may” deny a license to those with felony convictions,
8 then the regulation or policy is a “disqualification.”²⁹ However, if a criminal court at sentencing
9 takes away a medical license as punishment,³⁰ the action is neither a collateral sanction nor a
10 disqualification. Even if they are enforced by criminal sanctions, restrictions which are not part
11 of the sentence and apply only to convicted individuals constitute collateral sanctions.
12

13 These definitions apply to juveniles prosecuted as adults. They also apply to juveniles
14 prosecuted in a family, juvenile or similar court if the judgments of conviction, however
15 denominated, give rise to collateral sanctions or disqualifications under state law.
16

17 **SECTION 3. SCOPE OF ACT.** This [act] does not:

- 18 (1) provide a basis for invalidating, or afford a remedy to invalidate, a conviction or plea;
19 (2) except as otherwise provided in Sections 7 through 12, provide a basis for not
20 imposing, or afford a remedy for imposing, a collateral sanction or disqualification; or
21 (3) address the duty an individual's attorney owes to the individual.

22 **Comment**

23 Non-compliance with this Act does not give an individual the ability to attack a plea or
24 conviction. While states adopting this act should comply with it, non-compliance does not
25 necessarily render a conviction or plea illegal or unfair. This is consistent with current law. This
26 section is not intended to adopt or reject the decisions stating that while an attorney has no duty
27 to advise defendants of collateral sanctions, affirmatively incorrect or misleading advice may
28 render a plea constitutionally invalid.³¹
29

²⁹ Statutes requiring disclosure of criminal convictions, and allowing the decision-maker to consider them as part of a “good moral character” or general fitness analysis implicitly constitute disqualifications.

³⁰ See, e.g., *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004) (forfeiture of medical license as punishment for drug offense).

³¹ 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).

1 **SECTION 4. IDENTIFICATION, COMPILATION, AND PUBLICATION OF**
2 **LAWS REGARDING COLLATERAL SANCTIONS AND DISQUALIFICATIONS.**

3 (a) The [Revisor] shall:

4 (1) identify any provision in [this state's Constitution], statutes, and
5 administrative rules that imposes a collateral sanction or authorizes the imposition of a
6 disqualification, and any provision that may afford relief from them;

7 (2) not later than [insert date], prepare a compilation of citations to, and the text or
8 short descriptions of, the provisions identified under subparagraph (a)(1); and

9 (3) update the compilation after each [regular session] of the legislature.

10 (b) The [Revisor] shall include the following statements in a prominent manner at the
11 beginning of the compilation:

12 (1) This compilation has not been enacted into law and does not have the force of
13 law.

14 (2) An error or omission in this compilation is not a reason for overturning a
15 conviction or a plea of guilty or nolo contendere or for otherwise avoiding the imposition of a
16 collateral sanction or disqualification.

17 (3) The laws of the United States and other jurisdictions impose additional
18 collateral sanctions and disqualifications not listed in this compilation.

19 (4) This compilation does not include any law or other provision regarding a
20 collateral sanction or a disqualification, or relief from such, enacted or adopted after the
21 compilation was last updated or, if not updated, completed.

22 (c) The [Revisor] shall:

1 (1) publish, or cause to be published, the compilation, updated as required under
2 subsection (a)(3) as an appendix to the [state codes]; and

3 (2) within [four] months after initial compilation and after preparation of an
4 update, make the latest version of the compilation available on the Internet without charge.

5 **Comment**

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

14
15 While some disabilities may be well-known, such as disenfranchisement and the firearms
16 prohibition, in most jurisdictions no judge, prosecutor, defense attorney, legislator or agency
17 staffer could identify all of the statutes that would be triggered by violation of the various
18 offenses in the state’s criminal code.³² Although the information would be useful to many
19 people, including judges, prosecutors, defense lawyers and those supervising individuals with
20 convictions, as well as legislators and other policymakers, it would be extremely costly for any of
21 them to develop the information on their own. The dispersion of these laws and rules defeats the
22 purpose of having published codes in the first place.

23
24 Section 4(a) proposes that Revisors of Statutes create a compilation with citations to and
25 short descriptions of all statutes and administrative rules creating collateral sanctions and
26 disqualifications. This compilation would not be positive law, but would be appended to the
27 state code, and also be made available separately. This compilation would create a single
28 document that readers could consult to understand the state of the law. No substantive change in
29 the meaning of the laws is intended through this compilation, and it would so state. Yet,
30 collecting collateral sanctions and disqualifications in the state’s code and administrative
31 regulations, and describing them in simple, plain language, would make the formal written law
32 knowable to those who use and are affected by it.

33
34 Some states do not have codified regulations. In those states, the law should require
35 boards, agencies and other promulgators of regulations to notify the revisor of statutes of new
36 regulations creating collateral sanctions or disqualifications.
37

³² See footnote 22, *supra*, for a listing of state compilations.

1 Although the compilations would not replace the underlying law they describe, they
2 should be officially published as appendices to states' codes. This would assist in ensuring that
3 the compilations remain current and complete; if published unofficially, they might well go out
4 of date. Further, including the compilations in the codes will give legislators an opportunity to
5 examine the state's collateral sanctions and disqualifications as a body. At the moment, it is
6 virtually impossible for policymakers and the public to make informed judgments about whether
7 collateral sanctions and disqualifications are overabundant, just right, or insufficient.

8
9 The ABA Standards recommended formal codification, i.e., removing such provisions
10 from their current locations and transferring them in toto to a new title. *See* ABA CRIMINAL
11 JUSTICE STANDARD 19-2.1. However, this might leave the amended laws confusing and difficult
12 to understand, and most of the benefit of full codification can be achieved by creating the
13 compilations proposed here.

14
15 Once the compilations are created, they should be made available widely; this is the goal
16 of Section 4(c). For each state, the compilation from the codes and administrative code will
17 present only part of the picture: also relevant are sanctions imposed by the state Constitution, and
18 any provisions available for relief. These four categories of information largely cover the area,
19 and for the benefit of those who do not have ready access to a full set of the state code and
20 administrative rules, should be made available as a body. Certainly these documents should be
21 viewable and downloadable on the Internet without charge, and if feasible distributed as a
22 hardcopy booklet.

23 24 **SECTION 5. NOTICE OF COLLATERAL CONSEQUENCES IN PRETRIAL**

25 **PROCEEDING.** Not later than the time of arraignment or other judicial proceeding at which an
26 individual is formally advised of the potential sentence for crime for which the individual is
27 charged, [the person designated by the court] shall provide to the individual the following notice
28 in writing:

29 **NOTICE OF COLLATERAL CONSEQUENCES**

30 Conviction of this offense may have legal consequences beyond whatever imprisonment, supervision
31 and fine are provided by law. These additional legal consequences may include, but are not limited
32 to, disqualifying you from obtaining a government license, permit, or employment; making you
33 ineligible for public benefits, such as public housing; forfeiture of property; enhancing punishment
34 if you are convicted of another crime; and limiting your civil rights, such as prohibiting you from

1 voting or possessing a firearm. If you are not a citizen of the United States, conviction may result
2 in your deportation, removal, exclusion from admission to the United States, or denial of
3 naturalization. The law provides ways to obtain relief from collateral consequences, and further
4 information on collateral consequences and relief from them is available on the Internet [at list
5 website].

6 **Comment**

7 *The Purpose of Advisement.* It is relatively uncontroversial that it is desirable for
8 individuals charged with a criminal offense to understand what is at stake. Collateral sanctions
9 and disqualifications are also important for the court in sentencing³³ and to the prosecutor in
10 making charging decisions and arguing for a particular sentence.³⁴ However, there is no
11 constitutional requirement that collateral sanctions and disqualifications be brought into the
12 process; most courts hold that under the due process clause of the Constitution, in order to make
13 a guilty plea knowing, voluntary and intelligent, a defendant must be told of the term of
14 imprisonment, fine, and post-release supervision that will result from their convictions.
15 Identification of collateral sanctions beyond direct punishment need not be disclosed in order for
16 a plea to be constitutionally valid.³⁵

17
18 Even in the absence of constitutional requirements, however, a majority of the states
19 provide for disclosure of some collateral sanctions. The principal context is in the case of
20 deportation of non-citizens. A number of court decisions hold that it is unnecessary to inform
21 individuals pleading guilty of the possibility of deportation if they are not citizens of the United
22 States.³⁶ Yet, at least two dozen jurisdictions by court rule or statute require advisement of
23 potential deportation to those pleading guilty.³⁷ By court decision, Colorado and Indiana require

³³ See, e.g., *United States v. Pacheco-Soto*, 386 F. Supp.2d 1198 (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”).

³⁴ 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)

³⁵ See note 25, *supra*.

³⁶ See, e.g., *Broomes v. Ashcroft*, 358 F.3d 1251 (10th Cir. 2004); *Commonwealth v. Fuartado*, 170 S.W.3d 384, 385-86 (Ky. 2005).

³⁷ See U.S. DIST. CT. FOR THE DIST. OF COLO. LOCAL RULES § 3, App. K (form guilty plea notification requiring acknowledgment 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 in at least some cases.³⁸

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.”³⁹ Wyoming law requires the court to advise
6 defendants “in controlled substance offenses [of] the potential loss of entitlement to federal
7 benefits.”⁴⁰ Even jurisdictions not requiring advisement of particular collateral consequences
8 often recognize that it is a good idea.⁴¹

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.⁴² 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.⁴³

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).

³⁸ See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *Segura v. State*, 749 N.E.2d 496 (Ind. 2001).

³⁹ IND. CODE § 35-35-1-2(a)(4).

⁴⁰ WY. R. CRIM. P. 11(b)(1).

⁴¹ 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*, 120 P.3d 398 (Mont. 2005) (noting that trial court advised defendant of federal prohibition on possessing firearms by individuals with felony convictions).

⁴² 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).

⁴³ 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 individual to
5 avoid collateral sanctions. It is reasonable to assume that the largest group of people who will
6 plead not guilty when they otherwise would have pleaded guilty will be those who have a
7 defensible case, but planned to plead guilty under the misapprehension that a criminal conviction
8 was no big deal.

9
10 *The Method and Timing of Advisement.* A defendant could be informed of potential
11 collateral sanctions in several ways. At some early court appearance, the defendant could simply
12 be given a booklet describing all collateral sanctions to figure out on her own, but simply being
13 handed a booklet that is 30 or 40 pages long or longer is unlikely to be particularly informative to
14 a 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. Therefore, this act
23 contemplates that the notification will take place well before any guilty plea.

24
25 The notice will be provided by the court, in writing and in general terms, at arraignment
26 or some other early point in the process. If the arraignment or appearance is by mail, the notice
27 may be given by mail. The notice may be part of another document or form which is given to
28 the defendant at arraignment. This notice will give the defendant an opportunity to ask their
29 attorney about the issue. Some retained or appointed counsel will give advice on collateral
30 sanctions and disqualifications; this is often considered part of the job by competent defense
31 attorneys.⁴⁴ However, if the lawyer in the criminal case does not give advice, the defendant will

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.

⁴⁴ 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

1 know to seek other counsel or research the issue on their own.

2
3 Whoever looks into the matter will find their burden eased by the compilation of
4 collateral sanctions that is contemplated by Section 4 of this Act. All of the necessary
5 information will be readily at hand.

6
7 *The Effect of Non-Compliance on the Validity of the Plea.* Compliance with this
8 provision should be fast and simple, therefore, the question of the consequences of non-
9 compliance should arise rarely if ever. However, the criminal justice system depends on the
10 finality of judgments. Accordingly, there is strong reason not to upset a plea for a technical
11 deficiency in guilty plea procedure, and this is the prevailing rule.⁴⁵ Section 3(1) provides that
12 the general rule applies here, so failure to receive notice of collateral sanctions and
13 disqualifications is not a basis for challenging a plea or conviction.

14
15 **SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT**
16 **SENTENCING; ADVISEMENT UPON RELEASE.**

17 (a) If an individual convicted of a crime is not sentenced to a term of imprisonment or
18 other incarceration, the [court][person designated by the court][designated agency or person]
19 shall at the time of sentencing provide written notice to the individual that collateral sanctions
20 and disqualifications may apply because of the conviction, that there may be ways to obtain relief
21 from them, and that a compilation of the relevant laws and rules is available on the Internet. The
22 notice must give the individual information on how to contact agencies, groups, or persons that
23 offer assistance to individuals seeking relief from collateral sanctions and disqualifications.

24 (b) No sooner than [30], but, if practicable, no later than [10] days before release, an
25 officer or agency releasing an individual from imprisonment or other incarceration shall advise
26 the individual that collateral sanctions and disqualifications may apply because of the conviction,
27 that there may be ways to obtain relief from them, and that a compilation of the relevant laws and

might ensue from the entry of the contemplated plea.”)

⁴⁵ 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.”).

1 rules is available on the Internet. The officer or agency shall also give the individual information
2 on how to contact agencies, groups, or persons that offers assistance to individuals seeking relief
3 from collateral sanctions and disqualifications.

4 **Comment**

5 This section is designed to remind individuals of their legal obligations when they are
6 about to enter free society. Section 6(a) provides for notice of collateral sanctions at sentencing
7 for those sentenced to probation or other sentence not involving prison, jail or other physical
8 custody. For those sentenced to some form of physical custody, Section 6(b) provides for notice
9 shortly before release from confinement (even if the individual will then be on parole or other
10 supervision). Although Section 5 contemplates that these individuals would have gotten general
11 notice of collateral sanctions at the beginning of the criminal proceeding, for many defendants
12 that will have been months or years earlier. The point of notice is not fairness to the defendant in
13 making the decision how to proceed; the conviction by this stage is a fact. Rather, formal
14 advisement promotes enforcement of the law. If, for example, individuals convicted of felonies
15 do not know they are prohibited from possessing firearms, they may violate the law out of
16 ignorance when they would have complied with the law had they known.⁴⁶ In *Lambert v.*
17 *California*,⁴⁷ the Court found a due process violation in convicting an individual with a felony
18 conviction of violation of a registration provision of which she had no knowledge or reason to
19 know.

20
21 This section also requires notice of provisions of law providing for relief from collateral
22 sanctions.⁴⁸ States have concluded that it is fair to the individual and beneficial to society to let

⁴⁶ 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).

⁴⁷ 355 U.S. 225 (1957).

⁴⁸ Several states require by statute or court rule that this information be made available, others no doubt make it available by policy or informally. See, e.g., NEB. REV. STAT. § 29-2264(1) (order on completion of probation "shall include information on restoring other civil rights through the pardon process, including application to and hearing by the Board of Pardons"); 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."); 15 CAL. CODE REGS. § 2511(B)(7) (requiring advice to parolees of "procedure for obtaining a Certificate of Rehabilitation"); N.Y. R. UNIF. TRIAL COURTS § 200.9(a) ("Whenever a defendant has been sentenced to a period of probation . . . and if such defendant is apparently eligible . . . the probation officer . . . shall inform the defendant of his right to make application . . . for a certificate of relief from disabilities, and shall provide such defendant with the required forms . . . to make application to the court if he or she should wish to do so.") cf. MD. CODE, CRIM PROC. § 6-232(a) (requiring notice of right to have conviction expunged in certain circumstances); MD. RULES, Rule

1 at least some individuals with convictions pay their debt to society and move on. Notification to
2 all individuals with convictions will facilitate the participation of deserving but legally
3 unsophisticated individuals. However, failure to provide notice as contemplated in Section 6
4 does not invalidate the applicability of the collateral sanctions, or provide a cause of action for
5 money damages.
6

7 The notice contemplated by this section is modest. There is no right to counsel upon
8 being discharged from prison, probation or parole. The note could be printed on a form issued in
9 the ordinary course of processing an individual for release, along the following lines:
10

11 You should be aware that a number of legal restrictions apply to individuals
12 convicted of criminal offenses, including restrictions on their ability to possess
13 firearms. The list of restrictions imposed by the law of this state, and the
14 available legal procedures for getting them removed, is available on the internet at
15 <http://www.doc.gov/collateralsanctions>. The Legal Aid Society offers a program
16 to assist individuals with convictions in obtaining relief from legal barriers.
17

18 **SECTION 7. EFFECT OF REVERSED OR PARDONED CONVICTION[;**
19 **ARREST NOT RESULTING IN CONVICTION].**

20 (a) A conviction that is reversed, vacated, or otherwise overturned, by a court of
21 competent jurisdiction, or that is the subject of a pardon based on innocence, does not give rise to
22 a collateral sanction or disqualification, and is not evidence that any fact alleged in the course of
23 the associated proceeding is true.

24 (b) A conviction that is the subject of a pardon not based on innocence or an order
25 removing all collateral sanctions, or all collateral sanctions with specified exceptions, in the
26 jurisdiction where the conviction was obtained, does not give rise to a collateral sanction, except
27 that the order shall not remove[;

28 (1)] an otherwise applicable collateral sanction that the order specifies is
29 excepted[;

(2) an otherwise applicable sex offender registration requirement or driver's license suspension or revocation based on conviction of driving under the influence of alcohol or drugs; or

(3) an otherwise applicable restriction on possession of weapons [unless the order expressly restores the individual's ability to possess weapons]].

[(c) An arrest, accusation, complaint, indictment, information, or other proceeding not resulting in a conviction, including a proceeding in which charges are dismissed pursuant to a plea agreement, is not evidence that any fact alleged in the course of the associated proceeding is true.]

Comment

Section 7 regulates the application of collateral sanctions by defining conviction. Section 7(a) deals with convictions that no longer constitute convictions and no longer create a collateral estoppel effect. They include convictions reversed on appeal or vacated by the trial court based on a post-trial motion, as well as convictions pardoned based on innocence. Convictions subject to a writ of habeas corpus and not subsequently retried are also in this category. Section 7(b) provides that convictions that have been the subject of some form of relief, such as a pardon or Certificate of Good Conduct, no longer count as convictions for the purpose of imposing collateral sanctions, but can still be used as proof of the underlying facts.

Section 7(b) makes clear that arrests or charges not leading to conviction cannot be the basis for imposing a collateral sanction, nor can they constitute evidence that the accusation is true. However, nothing prohibits an arrest from being the basis for further inquiry, or the underlying facts verified through independent investigation being the basis for disqualification.

SECTION 8. LIMITATION OF COLLATERAL SANCTION AND DISQUALIFICATION RELATED TO EMPLOYMENT, EDUCATION, HOUSING, AND LICENSING.

(a) In this section, "state" means:

1 (1) the state acting directly and through its departments, agencies, officers, or
2 instrumentalities, including municipalities, political subdivisions, educational institutions,
3 boards, or commissions, or their employees [.] [; and]

4 [(2) government contractors (including subcontractors) made subject to this
5 section by contract, law other than this act, or ordinance.]

6 (b) Except as otherwise provided in subsection (d), the state, without individualized
7 inquiry, because of a conviction [or because of an arrest or criminal charge], may not:

8 (1) [terminate or] refuse to hire an individual, or otherwise discriminate against an
9 individual with respect to the compensation, terms, conditions, or privileges of employment,
10 except that an individual may be temporarily suspended or conditioned pending an individualized
11 inquiry; [or]

12 (2) refuse to admit an individual, or otherwise discriminate against an individual
13 with regard to an educational opportunity;

14 (3) refuse to rent, sell to, or otherwise discriminate against an individual with
15 respect to housing; or

16 (4) suspend, revoke, condition, or refuse to issue or renew a license, permit, or
17 certificate necessary to practice or engage in an occupation, profession, trade, or business, except
18 that a license, permit or certificate may be temporarily suspended or conditioned pending an
19 individualized inquiry.

20 (c) The state may exclude an otherwise qualified individual from employment, education,
21 housing or licensing opportunities based on a conviction if the decisionmaker determines that
22 granting the opportunity presently poses an unacceptable risk to the safety or welfare of any

1 individual or the public, including the risk that granting the opportunity will provide an occasion
2 for the individual to commit a similar offense. [In determining whether the individual poses an
3 unacceptable level of risk, the state may consider:

- 4 (1) the individual's age when the offense was committed;
- 5 (2) the time since commission of the offense and since release;
- 6 (3) the length and consistency of the individual's work history, including whether
7 the individual has a recent record of steady employment;
- 8 (4) the individual's education level;
- 9 (5) the facts and circumstances underlying the crime and their relation, if any, to
10 the duties or functions of the occupation, profession, or educational opportunity;
- 11 (6) the individual's rehabilitation and conduct since the offense, including
12 whether the individual has received a certificate under Section 10 or 11; and
- 13 (7) whether other individuals who engaged in similar prohibited conduct, whether
14 or not convicted, would be excluded on the ground that they present an unacceptable risk.]

15 (d) Subsection (b) is not applicable to law enforcement agencies [as defined in [insert
16 reference to other law defining law enforcement agencies]] [including the attorney general,
17 prosecutors' offices, police departments, sheriffs' departments, the state police, and the
18 department of corrections.] [However, law enforcement agencies in their discretion may
19 consider employment applications from individuals with criminal records.]

20 (e) This section does not eliminate any legal right or remedy, or create a private right of
21 action for damages or relief other than a declaration that a policy is invalid or, if an individual
22 has shown that an employment, education, housing, or licensing opportunity was denied in

violation of this section, for an order that the individual’s application be reconsidered in accordance with this section.

Comment

The principle that at least some licenses and employment opportunities should not be arbitrarily denied to people with criminal convictions is well established in state codes. As Margaret Love’s research shows,⁴⁹ more than 30 states have statutory restrictions on collateral sanctions and disqualifications imposed by state actors. Many of these statutes seem to be based on the Model Sentencing and Corrections Act. These restrictions fall into four categories:

Hawaii,⁵⁰ New York,⁵¹ Pennsylvania⁵² and Wisconsin⁵³ regulate consideration of a conviction in public and private employment and occupational licensure.

Arizona,⁵⁴ California,⁵⁵ Colorado,⁵⁶ Connecticut,⁵⁷ Florida,⁵⁸ Kentucky,⁵⁹ Louisiana,⁶⁰ Minnesota,⁶¹ Missouri,⁶² New Jersey,⁶³ New Mexico,⁶⁴ and Washington⁶⁵ prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not regulate private employment. Kansas⁶⁶ prohibits disqualification from public and private employment but does not regulate occupational licensing.

⁴⁹ See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE, Ch. 4 (William S. Hein & Co. 2006).

⁵⁰ HAW. REV. STAT. § 831-3.1.

⁵¹ N.Y. CORRECTIONS L. §§ 750-56.

⁵² 18 PA. C.S. ANN. § 9124-25.

⁵³ WISC. STAT. ANN. § 111.321 & § 111.335.

⁵⁴ AZ. REV. STAT. § 13-904(E).

⁵⁵ CAL. BUS. & PROF. CODE §§ 490, 493. See also CAL. CODE REGS. Tit. 2, § 7287.4(d)(1)(B).

⁵⁶ COLO. REV. STAT. § 24-5-101.

⁵⁷ CT. GEN. STAT. ANN. § 46a-80.

⁵⁸ FLA. STAT. ANN. § 112.011.

⁵⁹ KY. REV. STAT. § 335B.020.

⁶⁰ LA. STAT. ANN.-R.S. 37:2950.

⁶¹ MINN. STAT. ANN. § 364.01-.10.

⁶² ANN. MISSOURI STAT. §§ 314.200 & 561.016.

⁶³ N.J. STAT. ANN. §§ 2A:168A-1 & 2C:51-1.

⁶⁴ NEW MEX. STAT. ANN. §§ 28-2-1 to 28-2-6.

⁶⁵ WASH. REV. CODE ANN. § 9.96A.020.

⁶⁶ KAN. STAT. ANN. § 22-4710.

1 Arkansas,⁶⁷ Delaware,⁶⁸ Indiana,⁶⁹ Maine,⁷⁰ Michigan,⁷¹ Montana,⁷² North Dakota,⁷³
2 Oregon,⁷⁴ South Carolina⁷⁵ Texas⁷⁶ and Virginia⁷⁷ regulate occupational licensing but not
3 employment.
4

5 Illinois⁷⁸ Massachusetts,⁷⁹ Ohio,⁸⁰ Oklahoma, and West Virginia⁸¹ bar consideration of a
6 conviction only when rights have otherwise been restored or a conviction vacated or expunged.
7

8 Although the laws vary in specifics, most statutes provide that a conviction shall not be
9 an absolute bar. However, almost all also permit the conviction or the facts underlying it to be
10 weighed by the decision-maker on a case by case basis, depending on whether it is “directly” or
11 “substantially” related to the employment or license at stake.
12

13 The principle that convictions should be disqualifying only if related to the current
14 opportunity is deep in the law. Of the minority of states without general laws, many nevertheless
15 require some sort of nexus in the context of at least one licensing or regulatory regime. At least
16 10 states use the test alone,⁸² at least 7 others provide that a felony *or* a crime substantially

⁶⁷ ARK. CODE ANN. § 17-1-103(a).

⁶⁸ 75 DEL. LAWS c. 262.

⁶⁹ IND. CODE § 25-1-1.1-1.

⁷⁰ 5 MAINE REV. STAT. ANN. § 5301.

⁷¹ MICH. COMP. LAWS ANN. § 338.42.

⁷² MONT. CODE ANN. § 37-1-201.

⁷³ N.D. CENT. CODE, 12.1-33-02.1.

⁷⁴ OR. REV. STAT. § 670.280.

⁷⁵ S. C. CODE § 40-1-140.

⁷⁶ TEX. OCCUPATIONS CODE ANN. § 53.021(a).

⁷⁷ VA. CODE ANN. § 54.1-204.

⁷⁸ 775 ILL. COMP. STAT. 5/2-103; *see also* 730 ILL. COMP. STAT. 5/5-5-5 (describing certificate of relief from disabilities).

⁷⁹ MASS. GEN. LAWS ANN. 127 § 152; *see also* MASS. GEN. LAWS ANN. ch. 151B § 4(9).

⁸⁰ OHIO REV. CODE § 2953.33(B).

⁸¹ W. VA. CODE, § 5-1-16a.

⁸² *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 individual 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

1 related to the license or occupation is disqualifying.⁸³ Accordingly, the states are virtually
2 unanimous in holding that in some instances, criminal convictions should be considered not as a
3 broad category, but based on their specific facts and circumstances, as they relate to the license,
4 privilege or employment at issue. Collateral sanctions are meant to protect public welfare and
5 safety, not inflict arbitrary and needless harms. Accordingly, as reflected by the laws already on
6 the books, most states agree that it is important whether a conviction relates to fitness to engage
7 in a particular occupation or to obtain a particular license. Other informed observers agree; for
8 example, the National District Attorneys Association, while supporting collateral sanctions
9 necessary to protect the public, states that “[r]elief from some collateral sanctions may be
10 appropriate if they do not relate to the conduct involved in the offense of conviction.”⁸⁴
11

12 At one level, these prohibitions are not surprising. Frequently, conditions of parole,
13 probation, or supervised release require employment or educational training, and stable housing.
14 Accordingly, the law recognizes that these factors promote rehabilitation and reintegration, and
15 may be necessary for it. However, it must be acknowledged that even in states with broad
16 protective legislation, the principle is honored, to some extent, in the breach. Many statutes and
17 regulations can be identified, even in these states, which conflict with the non-discrimination
18 provisions by imposing absolute bars even in the absence of a general or fact-specific
19 determination that the offense is “directly related” to the sanction.
20

21 Section 8 is based on the Model Sentencing and Corrections Act (“MSCA”), § 4-1005.

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”).

⁸³ 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 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.”)

⁸⁴ See, e.g., NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES § 7, at 10 (Adopted July 17, 2005).

1 However, the provision in this Act does not identify a list of prohibited collateral sanctions, as do
2 the Model Sentencing and Corrections Act and the ABA Standards. The Model Sentencing and
3 Corrections Act, § 4-1001(b) provides that a convicted individual “retains all rights, political,
4 personal, civil and otherwise”, including, among others it lists, the right to vote. The ABA
5 Standards has a list of sanctions which should never be imposed under any circumstances, such
6 as “deprivation of the right to vote, except during actual confinement.” (ABA CRIMINAL JUSTICE
7 STANDARD 19-2.6(a)).
8

9 Section 8(a) differs from the MSCA by limiting its coverage to state actors, excluding
10 private employers. Regulation of public employment and licensing is less controversial than
11 would be reaching into the decisions of private businesses. In addition, public employment and
12 licensing are often done with the public interest in mind (for example, in the context of veteran’s
13 preferences, or reserved opportunities for the disabled). If any category of employer is going to
14 take a chance by helping individuals with convictions, it is likely to be the public sector.⁸⁵
15

16 [However, Section 8(a) contemplates that private corporations performing government
17 functions or services might, by contract or statute, be made subject to these restrictions. It is far
18 less intrusive to ask private companies who choose to do business with the state to comply with a
19 policy like this; if a private company finds it objectionable, they may forego the business.
20 Further, even if this is not a point upon which uniformity is likely, this section is not meant to
21 discourage states from deciding on their own that private employers as a group should be
22 covered; some now do and there is no reason they should not continue if it works for them.
23 States should examine their laws governing public employment and licensing to ensure that they
24 conform to this policy.]
25

26 Section 8(b) establishes the general principle that blanket collateral sanctions should not
27 be created with respect to employment, admission to educational institutions, housing, and
28 licensing. The restriction applies to formal and informal policies, and individual decisions. This
29 provision is similar to the MSCA in that in effect it contemplates that there will be no
30 categorical, absolute collateral sanctions in the employment and licensing context. Everything, it
31 appears, will be dealt with on a case-by-case basis. Nevertheless, it should serve as a reminder of
32 the principle that blanket collateral sanctions should be sharply limited to the situations where
33 they are genuinely necessary.
34

35 Section 8(c) describes the factors relevant to a case by case analysis of a conviction.
36 Section 8(c)(2) uses the passage of time as a factor. Some jurisdictions have a term of years,
37 after which, if the individual has not been convicted of another crime, rehabilitation is

⁸⁵ See, e.g., Editorial, *Cities that Lead the Way*, N.Y. TIMES, Mar. 31, 2006 (discussing anti-discrimination policies regarding individuals with conviction for city agencies and city contractors in Boston, Chicago and San Francisco).

1 presumed.⁸⁶

2
3 Factor (c)(7) is designed to determine whether the disqualification is based on conduct or
4 conviction. If the Plumber's Board grants licenses to those, say, who were fired from a job or
5 suspended from school for marijuana possession, then it is probably not unreasonably dangerous
6 or risky to public safety to allow an applicant who was convicted of precisely the same conduct
7 to have a license to practice. On the other hand, if the agency would deny a position to a school
8 bus driver applicant who had his parental rights terminated in a civil action based on child abuse,
9 that is strong evidence that a conviction for child abuse is directly related to fitness for the
10 employment.⁸⁷ Nothing in this section is meant to authorize or require preferences for applicants
11 who have criminal convictions.
12

13 Section 8(d) differs from the MSCA by allowing law enforcement employers to bar
14 individuals based on conviction, rather than on a case by case analysis. A number of states
15 specifically exclude law enforcement from the coverage of their statutes, and undoubtedly many
16 others, not mentioning it specifically, do so in practice. At the same time, that agencies are
17 allowed to discriminate because exempted from the general rules does not mean they always do;
18 some jurisdictions allow individuals with criminal records to be, for example, law enforcement
19 officers, even though they may not be required to let them compete for those jobs.
20

21 **SECTION 9. STATUTORY AUTHORIZATION REQUIRED FOR**
22 **COLLATERAL SANCTION.** If a rule, ordinance, or policy imposes a collateral sanction
23 without specific statutory authorization it is deemed to authorize the imposition of a
24 disqualification. A general grant of authority to adopt rules, ordinances or policies, or a grant of
25 authority to establish standards requiring good moral character or other criteria for hiring,
26 licensing, or admission to educational programs may not be interpreted as granting specific
27 authorization, but is authority to take the facts underlying a conviction into account on a case-by-
28 case basis.

⁸⁶ 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).

⁸⁷ 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 even if the person had not been convicted.")

1 **Comment**

2 Reentry of individuals with criminal convictions is a matter of important state policy. If a
3 program of prisoner reentry fails, then the state as a whole pays the price. Accordingly, this
4 provision is designed to restrict creation of absolute, blanket collateral sanctions to the
5 legislature. Individual agencies, municipalities and boards may not be equipped or inclined to
6 consider large policy questions when drafting ordinances and regulations. Accordingly, in order
7 to, say, simplify their own decision- making, or because they did not think deeply about the issue,
8 a board might impose absolute bans on some or all individuals with criminal convictions under
9 circumstances when the legislature as a whole would find a categorical policy unwarranted.
10 Section 9 requires that such determinations be made by the legislature itself, which considers the
11 welfare of the state as a whole in addition to the concerns of the licensed occupation or
12 profession, or of the particular locality.
13

14 **SECTION 10. CERTIFICATE OF RELIEF FROM COLLATERAL SANCTION.**

15 (a) On motion of an individual convicted of an offense, the court that sentenced the
16 individual may issue, at any time, a certificate of relief from one or more collateral sanctions
17 relating to employment, education, housing, public benefits or occupational licensing[, except a
18 sex-offender registration requirement or driver's license suspension or revocation based on
19 conviction of driving under the influence of alcohol or drugs]. The motion must specify all
20 collateral sanctions and convictions from which relief is sought. The individual shall serve a
21 copy of the motion on the agency that prosecuted the individual, which may appear and
22 participate. The court shall hold a hearing before deciding the motion if requested by the
23 individual or the prosecutor. The court may issue a certificate if, after reviewing the record,
24 including the individual's criminal history, and any response, the court finds that relief from a
25 collateral sanction is consistent with public safety and is likely to assist the individual in
26 maintaining employment, reentering the community, or living a law-abiding life.

27 (b) If an individual is or will be subject to a collateral sanction under the law of this state

1 based on a conviction in another jurisdiction, the [trial court of general jurisdiction in this state]
2 of the county where the collateral sanction will apply, on petition of the individual, may issue a
3 certificate of relief from one or more collateral sanctions relating to employment, education,
4 housing, public benefits or occupational licensing[, except a sex-offender registration
5 requirement or driver's license suspension or revocation based on conviction of driving under the
6 influence of alcohol or drugs]. The petition must specify all collateral sanctions and convictions
7 from which relief is sought. The individual shall serve a copy of the petition on the [appropriate
8 prosecuting authority in this state], which may appear and participate. The court shall hold a
9 hearing before deciding the petition if requested by the individual or the prosecutor. The court
10 may issue the certificate if, after reviewing the record, including the individual's criminal history,
11 and any response, the court finds that relief from a collateral sanction is consistent with public
12 safety, and is likely to assist the individual in maintaining employment, reentering the
13 community, or living a law-abiding life.

14 (c) The issuance of a certificate of relief from collateral sanctions relieves the individual
15 from any collateral sanction specified in the certificate but does not preclude a decision maker
16 from considering the facts underlying the conviction or that the facts have been established by the
17 judgment of conviction. [The state as defined in Section 8(a) shall evaluate the underlying facts
18 using the factors set forth in Section 8(c).]

19 (d) A certificate of relief from collateral sanctions may be modified upon motion of the
20 individual or modified or revoked by the issuing court for cause and is revoked by operation of
21 law if the holder is subsequently convicted of a felony.

22 **Comment**

1 This Section creates a mechanism for relief from a collateral sanction as an aid to
2 reintegration into society. The remedy is in addition to any others that might already exist.
3 Section 10(a) contemplates that an individual convicted in this state may obtain relief from the
4 sentencing court. An individual with a federal conviction or a conviction from another state may
5 obtain relief from a court of this state where the individual lives or works under 10(b). In either
6 case, the court is not necessarily asked to make the final decision. If, for example, an individual
7 is absolutely prohibited from obtaining a license as a barber because of a felony conviction, the
8 effect of a certificate of relief from that collateral sanction will be to allow the individual to apply
9 for a license. As 10(c) makes clear, the licensing agency may still consider whether the facts
10 underlying the conviction render the individual unqualified for licensing. But the decision will
11 be based on the underlying facts, not on the conviction itself.
12

13 Section 10(d) provides for modification on motion of the individual if, for example, the
14 individual later wishes to apply for a different license than the one covered in the initial
15 application. It can also be modified or revoked on motion of the prosecution, based on, for
16 example, misconduct implicating public safety short of a felony conviction. A felony conviction
17 revokes the certificate automatically.
18

19 In order for employers, boards, law enforcement agencies and others to monitor the
20 validity of certificates issued under Section 10(a), they should be treated as further proceedings in
21 the underlying criminal case for purposes of docketing and filing, and in the state's central
22 criminal justice record system. If use of a revoked or forged certificate is not already
23 criminalized by a state's fraud or forgery statute or other penal law, states should consider adding
24 a specific criminal statute criminalizing such conduct.
25

26 **SECTION 11. CERTIFICATE OF GOOD CONDUCT.**

27 (a) An individual convicted of a crime within or without this state who lives or works in
28 this state may apply for a certificate of good conduct from the [trial court of general criminal
29 jurisdiction] in the [county] where the individual lives or, if the individual does not live in this
30 state, where the individual works. The court shall give notice of the application to [insert name
31 of appropriate prosecuting authority in this state], which may appear and participate. To obtain a
32 certificate of good conduct, the individual must establish that:

33 (1) at least [five] years have elapsed since the most recent conviction of the
34 individual of any felony or of a misdemeanor involving violence or dishonesty and, if applicable,

1 since release from [prison] [prison, jail, half-way house, home detention, or other confinement];

2 (2) for the [five] years before issuance of an order granting the certificate the
3 individual has been engaged in, or seeking to engage in, a lawful occupation or activity,
4 including employment, training, education, or rehabilitative programs or, if the individual is
5 retired or disabled, that the individual has a lawful source of support;

6 (3) the individual complied with the terms of any criminal sentence, or that
7 failure to comply is justified or involuntary;

8 (4) no criminal charges are pending against the individual; and

9 (5) if the individual was convicted of an offense involving drugs or alcohol or, if
10 the conduct underlying the criminal conviction involved drugs or alcohol, the result of any test
11 required under subsection (b) does not show the use of illegal drugs.

12 (b) In connection with an application for a certificate of good conduct, the court may
13 order any test or investigation it considers reasonably necessary, which shall include at least the
14 preparation of a report of the type prepared before sentencing an individual convicted of a felony.

15 (c) If the requirements of subsection (a) are met, and the court finds no reason to deny the
16 application, the court may grant the application and issue a certificate of good conduct. The
17 certificate must identify the offenses of which the individual was convicted.

18 (d) [Except as provided in subsection (e),] [the] issuance of a certificate of good conduct
19 removes collateral sanctions applicable under the law of this state but does not preclude a
20 decisionmaker from considering the facts underlying the conviction and that they were
21 established by the judgment of conviction. [The state as defined in Section 8(a) shall evaluate
22 the underlying facts using the factors set forth in Section 8(c).]

1 [(e) Issuance of a certificate of good conduct does not remove an otherwise applicable
2 sex- offender registration requirement, or driver's license suspension or revocation based on
3 conviction of driving under the influence of alcohol or drugs. Issuance of a certificate of good
4 conduct does not remove an otherwise applicable restriction on possession of weapons unless it
5 expressly restores the individual's ability to possess weapons.]

6 [(f) Issuance of a certificate of good conduct in this state renders the underlying
7 convictions inadmissible in a lawsuit alleging that a public or private decision-maker was
8 negligent or otherwise at fault for hiring, retaining, licensing, leasing to, admitting to a school or
9 program, or otherwise transacting with an individual, if the decision-maker had knowledge of the
10 certificate at the time of the alleged negligence or other fault. Issuance of a certificate of good
11 conduct in this state is admissible as evidence of due care by any person who had knowledge of
12 it, in deciding to hire, retain, license, lease to, admit to a school or program, or otherwise interact
13 with an individual.]

14 [(g)] A certificate of good conduct may be revoked by the issuing court for cause and is
15 revoked by operation of law if the holder is subsequently convicted of a felony.

16 **Comment**

17 This section is designed to recognize for individuals who have successfully reintegrated
18 into society, and have demonstrated their good behavior for a substantial period of time. They
19 have largely paid their debt to society, and can be relieved of collateral sanctions. There is of
20 course a trade-off between the breadth of the relief and the showing necessary to obtain it; the
21 broader the relief, the greater the showing that should be required to obtain it.

22
23 Section 11(a)(1) requires passage of a period of time after release. A good record in
24 prison or other custody is not irrelevant, but is insufficient to show the reintegration into free
25 society which is at issue. Section 11(a)(2) requires that the individual be involved in some
26 legitimate activity in the period after release, or, if the individual is retired or disabled, that the
27 individual has a lawful source of support. Section 11(a)(3) requires satisfaction of all provisions

1 of all criminal sentences. This does not necessarily mean complete satisfaction if the
2 requirement exists over a period of years; for example, if an individual was sentenced to pay
3 restitution of \$1,500 per year for 7 years, five years after release, if the individual was current on
4 the payments, and otherwise eligible, the individual could receive a certificate of good conduct
5 even though two years of restitution payments remained. In addition, Section 11(a)(3)
6 contemplates that a failure to meet a condition of a criminal sentence may be excused, and a
7 certificate of good conduct awarded, if the individual shows that the failure was beyond their
8 control.

9
10 Certificates of good conduct have two consequences. First, under Sections 7(b) and
11 11(d), a conviction which is subject to a certificate of good conduct does not count as a
12 conviction for purposes of statutes imposing collateral sanctions. However, the underlying facts
13 may still be considered by a licensing agency.

14
15 In addition, a certificate of good conduct provides an objective basis for public and
16 private employers, landlords and other decision-makers to differentiate among individuals with
17 convictions. Many employers and landlords are willing to deal with people with criminal
18 records, so long as they are now law-abiding. A certificate of good conduct gives them some
19 assurance that that is the case. [Decision-makers who rely on a certificate will have some legal
20 protection under Section 11(f): The certificate is admissible in evidence should a lawsuit occur,
21 as evidence of due care, but the underlying conviction is not.]

22
23 In order for employers, boards, law enforcement agencies and others to monitor the
24 validity of certificates issued under Section 11, applications from persons with convictions in the
25 issuing state should be treated as further proceedings in the underlying criminal case for purposes
26 of docketing and filing, and in the state's central criminal justice record system. If use of a
27 revoked or forged certificate is not already criminalized by a state's fraud or forgery statute or
28 other penal law, states should consider adding a specific criminal statute criminalizing such
29 conduct.

30
31 **SECTION 12. VOTING RIGHTS.** An individual may not be denied the right to vote
32 because of: (1) conviction for an offense other than a felony; or (2) for a felony [except during
33 actual incarceration] [after completion of the sentence imposed, including probation,
34 incarceration, parole and other post-incarceration supervision.].

35 36 **Comment**

37
38 This is derived from Model Sentencing and Corrections Act Section 4-110, which
39 provides:

- 1
2 (a) A person convicted of an offense does not suffer civil death or corruption of blood.
3 (b) Except as provided by [the Constitution of this State or] this Act, a person convicted
4 of an offense does not sustain loss of civil rights or forfeiture of estate or property by reason of a
5 conviction or confinement; he retains all rights, political, personal, civil, and otherwise, including
6 the right to:
7 (1) be a candidate for, be elected or appointed to, or hold public office or
8 employment;
9 (2) vote in elections;
10 (3) hold, receive, and transfer property;
11 (4) enter into contracts;
12 (5) sue and be sued;
13 (6) hold offices of private trust in accordance with law;
14 (7) execute affidavits and other judicial documents;
15 (8) marry, separate, obtain a dissolution or annulment or marriage, adopt children,
16 or withhold consent to the adoption of children; and
17 (9) testify in legal proceedings.
18 (c) This section does not affect laws governing the right of a person to benefit from the
19 death of his victim.
20
21

22 **SECTION 13. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
23 applying and construing this uniform act, consideration must be given to the need to promote
24 uniformity of the law with respect to its subject matter among states that enact it.

25 **SECTION 14. SAVINGS AND TRANSITIONAL PROVISIONS.** [if any]

26 **SECTION 15. EFFECTIVE DATE.** This [act] takes effect . . .