

D R A F T

FOR APPROVAL

UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

WITH PREFATORY NOTE AND PRELIMINARY COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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May 31, 2009

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UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT

Prefatory Note

Both the criminal justice system and society as a whole face the problem of managing the growing proportion of the free population that has been convicted of a state or federal criminal offense. In a trend showing little sign of abating, the U.S. prison population has increased dramatically since the early 1970s. Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, at 1, Bureau of Justice Statistics Bulletin (Oct. 2005, NCJ 210677)). 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 lives. 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). This may be an underestimate given that the incarceration rate has increased every year since 2001. *See also* PEW CENTER ON THE STATES, 1 IN 100: BEHIND BARS IN AMERICA IN 2008 (2008)

(http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf); PEW CENTER ON THE STATES: ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS (2009)

(http://www.pewcenteronthestates.org/uploadedFiles/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf)

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 four million adults were on probation on December 31, 2006, almost twice as many as the combined number on parole, in jail or in prison. Laura E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United States, 2006*, at 1, Bureau of Justice Statistics Bulletin (Dec. 2006, NCJ 220218). 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. *Survey of State Criminal History Information Systems, 2003*, at 2, U.S. Dept. of Justice, Bureau of Justice Statistics (Feb. 2006, NCJ 21097). 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. (Bonczar, *Prevalence of Imprisonment, supra*, at 5.)

The growth of the convicted population means that there are literally millions of people being released from incarceration, probation and parole supervision every year. They 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 all arms of government and the general public, via Internet, of aggregations of public record information, including criminal convictions, about all Americans. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY AND CRIMINAL JUSTICE INFORMATION (Aug. 2001). 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. Corinne A. Carey, *No Second Chance: People With Criminal Records Denied Access To Public Housing*, 36 U. TOLEDO L. REV. 545, 553 (2005); *see generally* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 ST. THOMAS L. REV. 387 (2006).

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. *See JEFF MANZA & CHRIS UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford 2006). Convicted individuals may be ineligible to hold public office. *See, e.g., State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934). Federal law bars persons with convictions from possessing firearms (18 U.S.C. § 922(g)), military service (10 U.S.C. § 504), and on juries, civil and criminal. Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65 (2003). If a non-citizen, a person convicted of a crime may be deported. 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 solely because of conviction of a criminal offense. The Act also uses the term "disqualification" to refer to disadvantage or disability that an administrative agency, civil court or other state actor other than a sentencing court is authorized, but not required, to impose based on a conviction. Collectively, collateral sanctions and disqualifications are defined as collateral consequences.

In recent years, collateral sanctions have been increasing. Federal law now imposes dozens of them on state and federal offenders alike. KELLY SALZMANN & MARGARET COLGATE LOVE, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (ABA 2009), available at <http://www.abanet.org/cecs/internalexile.pdf>. 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 (42 U.S.C. § 1320a-7(a)(3); a 1991 law required states to revoke some driver's licenses upon conviction or lose federal funding (23 U.S.C. § 159), in 1993, Congress made individuals with drug convictions ineligible to participate in the National and Community Service Trust Program. 42 U.S.C. § 12602(e). In 1996, Congress provided that individuals convicted of drug offenses would automatically be ineligible for certain federal benefits. 21 U.S.C. § 862a. A year later, Congress rendered them ineligible for the Hope Scholarship Tax Credit. 26 U.S.C. §

25A(b)(2)(D). In 1998, individuals convicted of drug crimes were made ineligible for federal educational aid (20 U.S.C. § 1091(r)), and for residence in public housing. 42 U.S.C. § 13662. In addition, 1988 legislation authorized state and federal sentencing judges to take away eligibility for federal public benefits. 21 U.S.C. § 862. *Id.*, App. 1 (“Federal Consequences Affecting a Person with a Felony Drug Conviction”).

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 Maryland and Ohio show literally hundreds of collateral sanctions and disqualifications on the books in those states. *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* (2007)

(<http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=589>). Studies done for the District of Columbia, Michigan, New York, and Minnesota are to similar effect. *See* PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS (2004); Michigan Reentry Law Wiki, Michigan Poverty Law Program, available at http://reentry.mplp.org/reentry/index.php/Main_Page; NEW YORK STATE BAR ASS’N, SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006). *See also* Minnesota Statutes, Chapter 609B, Collateral Sanctions (2007), available at https://www.revisor.leg.state.mn.us/bin/getpub.php?pubtype=STAT_CHAP&year=current&chapter=609b. 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). 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. *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). The most important consequence of this principle is in the context of guilty pleas. In a series of cases, the Supreme Court held that a guilty plea is invalid unless “knowing, voluntary and intelligent.” Courts have held that while a judge taking a guilty plea must advise of the “direct” consequences—imprisonment and fine—defendants need not be told by the court or their counsel about collateral sanctions. *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); Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002)). 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.

Another problem is that it has become increasingly difficult to avoid or mitigate the impact of collateral consequences. Most states have not yet developed a comprehensive and effective way of “neutralizing” the effect of a conviction in cases where it is not necessary or appropriate to take it into account. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task. As a practical matter, in most jurisdictions people convicted of a crime have no hope of ever being able to fully discharge their debt to society. *See generally* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE (William S. Hein & Co. 2006).

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 2002, 59% of those convicted of felonies in state courts were not sentenced to prison; 31% received probation and 28% jail terms. Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2002*, at 2, Bureau of Justice Statistics Bulletin (Dec. 2004, NCJ 206916). 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.” NATIONAL DISTRICT ATTORNEY’S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES §4(a) at 7 (Adopted July 17, 2005).

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 makes clear that neither the provisions of the Act nor non-compliance with them are a basis for invalidating a plea or conviction, making a claim of ineffective assistance of counsel, or suing anyone for money damages.

Section 4 requires collection in a single document of collateral sanctions and disqualifications contained in state statutes or administrative regulations.

Sections 5 and 6 propose to make the existence of collateral consequences known to defendants at important moments: At or before arraignment, so a defendant they can make an informed decision about how to proceed (Section 5), and at sentence 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 and disqualifications will have been codified, it will not be difficult to make this information available.

Section 7 is designed to ensure that automatic, blanket collateral sanctions leaving no room for discretion are imposed by decision of the state legislature, if at all, prohibiting creation of sanctions by ordinance, policy or rule, unless authorized by statute. Section 7(b) also offers guidelines for applying discretionary disqualifications based on criminal conviction.

Section 8 defines the judgments that count as convictions for purposes of imposing collateral sanctions. Sections 8(a) and (b) explain how out of state convictions and juvenile adjudications will be used to impose sanctions in the enacting state. The rest of the section excludes convictions that have been reversed or otherwise overturned (8(c)), pardoned (8(d)), or did not result in a final adjudication because of diversion (8(f)). Some states have forms of relief based on rehabilitation or passage of time, allowing convictions to be expunged, sealed, or set aside; in the case of out of state convictions, 8(e) asks states to make a choice about whether to give effect to grants of such relief by other states.

Sections 9 and 10 create mechanisms for relieving collateral sanctions imposed by law. By definition, collateral sanctions can only be imposed by state actors, so relieving them would have no effect on private persons or businesses, whose dealing with persons with convictions would be regulated, if at all, by law other than this act.

Section 9 creates an Order of Limited Relief, aimed at 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. The Order of Limited Relief merely lifts the automatic bar of a collateral sanction, leaving a licensing agency or public housing authority, for example, free to consider disqualifying the individual on a case by case basis.

Section 10 creates a Certificate of Restoration of Rights for individuals who can demonstrate a substantial period of law-abiding behavior consistent with successful reentry and desistence from crime. The Certificate of Restoration of Rights offers potential public and private employers, landlords and licensing authorities concrete and objective information about an individual under consideration for an opportunity, and thereby could facilitate the reintegration of individuals with convictions whose behavior demonstrates that they are making efforts to conform their conduct to the law.

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 COLLATERAL CONSEQUENCES OF CONVICTION ACT**

2

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

4 Consequences of Conviction Act.

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

6 (1) “Collateral consequence” means a collateral sanction or a disqualification.

7 (2) “Collateral sanction” means a penalty, disability, or disadvantage, however
8 denominated, imposed on an individual as a result of the individual’s conviction for an offense
9 that applies by operation of law whether or not it is included in the judgment or sentence. The
10 term does not include imprisonment, probation, parole, supervised release, forfeiture, restitution,
11 fine, assessment, or costs of prosecution.

12 (3) “Decision-maker” means the state acting directly or through its departments,
13 agencies, officers, or instrumentalities, including municipalities, political subdivisions,
14 educational institutions, boards, or commissions, or their employees[, and government
15 contractors, including subcontractors, made subject to this [act] by contract, by law other than
16 this [act], or ordinance].

17 (4) “Disqualification” means a penalty, disability, or disadvantage, however
18 denominated, that an administrative agency, governmental official, or a court in a civil
19 proceeding is authorized, but not required, to impose on an individual on grounds relating to the
20 individual’s conviction for an offense.

21 (5) “Offense” means a felony, misdemeanor, or [insert term for lesser offenses and other
22 adjudications in enacting state] under the law of this state, another state, or the United States.
23 The term includes a juvenile adjudication.

1 (6) “Person” means an individual, corporation, business trust, estate, trust, partnership,
2 limited liability company, association, joint venture, public corporation, government or
3 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

4 *Legislative Note: If the enacting jurisdiction that uses different terms for imprisonment,
5 probation or parole, they should be added to the second sentence of 2(2). If the statutes of the
6 enacting jurisdiction provide for sub-criminal violations or offenses, the term used to refer to
7 them should be identified in Section 2(5).*

8

9 **Comment**

10 The definitions in paragraphs (2) and (4) are taken from the ABA Standards. (ABA
11 Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of
12 Convicted Persons, Standard 19-1.1 (3d ed. 2004) (hereinafter, “ABA Criminal Justice Standard
13 ____”). They are intended to exclude from the definition of collateral sanction or
14 disqualification direct criminal punishment, such as fine, imprisonment, probation, parole, or
15 supervised release, and the incidents and conditions of those direct punishments. They are also
16 intended to exclude private conduct, such as the hiring decisions of private employers. Covered
17 actions generally include such things as denial of government employment and elective or
18 appointive office, ineligibility for government licenses, permits, or contracts, disqualification
19 from public benefits, public education, public services, or participation in public programs, and
20 elimination or impairment of civil rights, such as voting, or jury service.

21 Whether one of these disabilities is a “collateral sanction” or a “disqualification” depends
22 on how it is applied. If a medical licensing board by law, regulation or policy “must” deny a
23 license to an applicant with a felony conviction, then it is a collateral sanction, because the effect
24 is automatic. If a medical licensing board “may” deny a license to those with felony convictions,
25 then the regulation or policy is a “disqualification.” (Statutes requiring disclosure of criminal
26 convictions, and allowing the decision-maker to consider them as part of a “good moral
27 character” or general fitness analysis implicitly constitute disqualifications.) However, if a
28 criminal court at sentencing takes away a medical license as punishment the action is neither a
29 collateral sanction nor a disqualification. *See, e.g., United States v. Singh, 390 F.3d 168 (2d Cir.
30 2004).* Even if they are enforced by criminal sanctions, restrictions which are not part of the
31 sentence and apply only to convicted individuals constitute collateral sanctions.

32 These definitions and the Act apply to juveniles prosecuted as adults. They also apply to
33 juveniles prosecuted in a family, juvenile or similar courts if the judgments of conviction,
34 however denominated, give rise to collateral sanctions or disqualifications under state law.

35

36 **SECTION 3. LIMITATION ON SCOPE.**

37

38 (a) This [act] does not provide a basis for:

39

40 (1) invalidating a plea, conviction, or sentence;

- (2) a cause of action for money damages; or
- (3) a claim for relief from or defense to the application of a collateral consequence
 failure to comply with Section 4, 5, or 6.

(b) This [act] does not affect:

- (a) the duty an individual's attorney owes to the individual;
- (b) a claim or right of a victim of an offense; or
- (c) a right or remedy available to an individual convicted of an offense under law [act].

Comment

10 Non-compliance with this Act does not give an individual the right to attack a plea or
11 conviction, or the application of a collateral sanction to the individual based on lack of notice.
12 While states adopting this act should comply with it, non-compliance does not necessarily render
13 a conviction or plea illegal or unfair. This is consistent with current law. This section is
14 intended neither to adopt nor reject the decisions stating that while an attorney has no duty to
15 advise defendants of collateral sanctions, affirmatively incorrect or misleading advice may
16 render a plea constitutionally invalid. *See, e.g.*, Goodall v. United States, 759 A.2d 1077, 1082-
17 83 (D.C. 2000); People v. Young, 355 Ill. App. 3d 317, 323-24 (Ct. App. 2005).

SECTION 4. IDENTIFICATION, COLLECTION, AND PUBLICATION OF

LAW REGARDING COLLATERAL CONSEQUENCES.

(a) The [designated governmental agency or official]:

(1) shall identify or cause to be identified any provision in this state's statutes, and administrative rules that imposes a collateral sanction or authorizes the disqualification, and any provision of law that may afford relief from a collateral

(2) within [insert number of days] after the effective date of this [act], shall collect collected citations to, and the text or short descriptions of, the provisions identified in subparagraph (1);

(3) shall update or cause to be updated the collection within [specify period] after session] of the [legislature]; and

(4) in complying with paragraphs (1) and (2), may rely on the study of this state's
ctions, disqualifications, and relief provisions prepared by the National Institute of
ed in Section 510 of the Court Security Improvements Act of 2007, Pub. L. 110-

(b) The [designated governmental agency or official] shall include or cause to be

8 included the following statements in a prominent manner at the beginning of the collection
9 described in subsection (a):

10 (1) This collection has not been enacted into law and does not have the force of
11 law.

12 (2) An error or omission in this collection is not a reason for invalidating a plea,
13 conviction or sentence or for not imposing a collateral sanction or disqualification.

20 (c) The [designated governmental agency or official] shall publish or cause to be
21 published the collection created and updated as required under subsection (a). The collection
22 must be available to the public on the Internet without charge within [insert number of] days
23 after it is created or updated.

1

Comment

2 In a real sense, convicted persons are regulated. In effect, each state already has a title of
3 its code called *Collateral Consequences*, regulating the legal status of this group in scores or
4 hundreds of ways. But instead of publishing these laws together, the statutes are divided up and
5 scattered. The sanctions have proliferated unsystematically, with a prohibition on individuals
6 with felony convictions obtaining one kind of license popping up in one corner of a state's code,
7 a prohibition on obtaining some other kind of government employment appearing in an agency's
8 rules. For an example of an effort to examine a jurisdiction's code and regulations and collect
9 the collateral consequences therein, see KELLY SALZMANN & MARGARET COLGATE LOVE,
10 INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND
11 REGULATIONS (ABA Jan. 2009) (<http://www.abanet.org/cecs/internalexile.pdf>).

12

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

21

22 Section 4(a) requires an appropriate government official or agency in each state create a
23 collection with citations to and short descriptions of all statutes and administrative rules creating
24 collateral sanctions and disqualifications. Fortunately, this task has been simplified by a recent
25 federal law which mandates the Director of the National Institute of Justice to identify collateral
26 sanctions and disqualifications in the constitutions, codes and administrative rules of the 50
27 states. Court Security Improvement Act of 2007 § 510, Pub. L. 110-177, 121 Stat. 2534, 2544.
28 Accordingly, the federal government will do the bulk of the initial work.

29

30 This collection will not be positive law, nor will it substantively change existing law.
31 Yet, collecting collateral sanctions and disqualifications in the state's code and administrative
32 regulations, and describing them in simple, plain language, would make the formal written law
33 knowable to those who use and are affected by it.

34

35 Some states do not have codified regulations. There, the law should require boards,
36 agencies and other promulgators of regulations to notify the agency assigned responsibility for
37 the collection of new regulations creating collateral sanctions or disqualifications.

38

39 The ABA Standards recommended formal codification, i.e., removing such provisions
40 from their current locations and transferring them wholesale to a new title. *See* ABA CRIMINAL
41 JUSTICE STANDARD 19-2.1. However, this approach was rejected because it might leave the
42 amended laws confusing and difficult to understand. Most of the benefit of full codification can
43 be achieved by creating the collections described here.

44

1 Once the collections are created, they should be made available widely; this is the goal of
2 Section 4(c). These documents should be viewable and downloadable on the Internet without
3 charge, and if feasible distributed as a hardcopy booklet.

4

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

6 **PROCEEDING.**

7 (a) At or before arraignment for an offense with which the individual is charged, [the
8 designated government agency or official] shall communicate to the individual information
9 substantially similar to the following:

10 **NOTICE OF ADDITIONAL LEGAL CONSEQUENCES**

11 If you are convicted of an offense you may suffer additional legal consequences beyond
12 imprisonment, [probation] [insert jurisdiction's alternative term for probation], periods of [insert
13 term for post-incarceration supervision], and fines. These consequences may include:

- 14 • being unable to get or keep some licenses, permits, or jobs;
15 • being unable to get or keep benefits such as public housing or education;
16 • receiving a harsher sentence if you are convicted of another offense in the future;
17 • having the government take your property; and
18 • being unable to vote or possess a firearm.

19 If you are not a United States citizen, conviction may also result in your deportation, removal,
20 exclusion from admission to the United States, or denial of citizenship.

21 The law may provide ways to obtain some relief from these consequences. Further
22 information about the consequences of conviction is available on the Internet at [insert Internet
23 web address of the collection of laws published under Section 4(c)].

24 **Comment**

25 *The Purpose of Advisement.* Individuals charged with criminal offenses should
26 understand what is at stake. Therefore, they should know about collateral sanctions. Collateral

1 sanctions and disqualifications are also important for the court in sentencing. *See, e.g.*, United
2 States v. Pacheco-Soto, 386 F. Supp.2d 1198 (D.N.M. 2005) (downward departure based on
3 deportable alien status); State v. Yanez, 782 N.E.2d 146, 155 (Ohio App. 2002) (noting that
4 deportation may affect sentence); ABA CRIMINAL JUSTICE STANDARD 19-2.4(a). They also may
5 be important to the prosecutor in making charging decisions and arguing for a particular
6 sentence. *See* Robert M.A. Johnson, *Collateral Consequences, Message from the President of the*
7 *National District Attorney's Association*, May-June, 2001 (http://www.ndaa-apri.org/ndaa/about/president_message_may_june_2001.html).

9
10 However, there is no constitutional requirement that collateral sanctions and
11 disqualifications be brought into the process; most courts hold that under the due process clause
12 of the Constitution, in order to make a guilty plea knowing, voluntary and intelligent, a defendant
13 must be told of the term of imprisonment, fine, and post-release supervision that will result from
14 their convictions. Identification of collateral sanctions beyond direct punishment need not be
15 disclosed in order for a plea to be constitutionally valid.

16
17 Even without constitutional requirements, however, most states provide for disclosure of
18 some at least some collateral sanctions. The principal context is in the case of deportation of
19 non-citizens. A number of court decisions hold that it is not constitutionally required to inform
20 individuals pleading guilty of the possibility of deportation if they are not citizens of the United
21 States. Broomes v. Ashcroft, 358 F.3d 1251 (10th Cir. 2004); Commonwealth v. Fuartado, 170
22 S.W.3d 384, 385-86 (Ky. 2005). Yet, a majority of states provide for advising defendants of
23 potential deportation. Twenty six states, Puerto Rico and the District of Columbia provide for
24 notice by court rule or statute. *See* ALASKA R. CRIM. P. 11(c)(3); AZ. R. CRIM P. 17.2(f); CAL.
25 PEN. CODE § 1016(5); CT. GEN. STAT. ANN. § 54-1j; D.C. STAT. § 16-713(a); FLA. R. CRIM. P.
26 3.170(C)(8); GA. CODE ANN. § 17-7-93(c); HAW. REV. STAT. § 802E-1 through E-3; IDAHO R.
27 CRIM. P. 11(D)(1); 725 ILL. COMP. STAT. 5/113-8; IOWA R. CRIM. P. 2.8(2)(b)(3); ME. R. CRIM.
28 P. 11(b)(5); MD. R. 4-242(e); MA. GEN. L. ANN. 278 § 29D; MA. R. CRIM P. 12(c)(3)(C); MINN.
29 R. CRIM. P. 15.01(10)(d); MONT. CODE ANN. § 46-12-210(1)(f); NEB. REV. STAT. § 29-
30 1819.02(1); N.M. R. CRIM. P. 5-303(F)(5); N.Y. CRIM. PROC. L. § 220.50(7); N.C. STAT. § 15A-
31 1022(a)(7); OH. REV. CODE § 2943.031(A); OR. REV. STAT. § 135.385(d); PUERTO RICO R. CRIM.
32 P. 70; R.I. GEN. L. § 12-12-22; TEX. CODE CRIM. P. ART. 26.13(a)(4); VT. STAT. ANN. Tit. 13, §
33 6565(C); WASH. REV. CODE § 10.40.200(2); WISC. STAT. ANN. § 971.08(1)(c). Kentucky and
34 New Jersey provide for notice though standard plea forms. Ky. Plea Form AOC-491 (Ver. 1.01,
35 Rev. 2-03) (<http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf>); New Jersey Judiciary Plea Form, N.J. Dir. 14-08 (plea form
36 promulgated pursuant to N.J. R. CRIM. P. 3-9)
37 (HTTP://WWW.JUDICIARY.STATE.NJ.US/FORMS/10079_MAIN_PLEA_FORM.PDF). Court decisions in
38 Colorado and Indiana require advice of possible deportation in at least some cases. People v.
39 Pozo, 746 P.2d 523 (Colo. 1987); Segura v. State, 749 N.E.2d 496 (Ind. 2001).

41
42 Other jurisdictions require advisement of other collateral sanctions. Indiana requires that
43 the defendant be informed that they will “lose the right to possess a firearm if the person is
44 convicted of a crime of domestic violence.” IND. CODE § 35-35-1-2(a)(4). Wyoming law
45 requires the court to advise defendants “in controlled substance offenses [of] the potential loss of
46 entitlement to federal benefits.” WY. R. CRIM. P. 11(b)(1). Even jurisdictions not requiring

1 advisement of particular collateral consequences often recognize that it is a good idea. Thus,
2 Utah rules provide: “Unless specifically required by statute or rule, a court is not required to
3 inquire into or advise concerning any collateral consequences of a plea.” UTAH R. CRIM. P.
4 11(e). Yet, the comments state that the rule means “the trial court may, but need not, advise
5 defendants concerning the collateral consequences of a guilty plea.” *See also*, e.g., United States
6 v. Banda, 1 F.3d 354, 356 (5th Cir. 1993). Accordingly, courts often advise defendants of
7 collateral sanctions in the absence of a court rule or constitutional obligation. *See, e.g., United*
8 *States v. Nam Hong*, No. 07-CR-172-S (01), 2009 WL 688610, paras. 15 & 16 (W.D.N.Y. Jan.
9 28, 2009) (Plea Agreement) (noting that “the defendant has had the opportunity to fully
10 determine what the consequences of the defendant’s conviction may be on the defendant’s
11 immigration status”).

12 A substantial majority of United States jurisdictions, then, require advice of one or more
13 collateral sanctions, showing broad support for the idea that sound public policy and fairness
14 require advice beyond the constitutional floor. Yet, advising a defendant of some collateral
15 sanctions without addressing all of them may be misleading. It could reasonably be understood
16 to imply that the imprisonment, fine and other direct punishment, plus the collateral sanctions
17 specifically mentioned, represent the totality of the legal effects of the conviction. *See, e.g.,*
18 *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168
19 (1993) (applying maxim *expressio unius est exclusio alterius*, the statement of one thing is the
20 exclusion of other things); *United States v. Glaser*, 14 F.3d 1213 (7th Cir. 1994). For example, it
21 would be reasonable but incorrect for a defendant pleading guilty in Wyoming to assume that
22 because the court advised that “federal benefits” might be lost, no state benefits, such as access
23 to public housing, were at risk. For this reason, the provision provides for notice to defendants
24 about the potential for a broad range of sanctions in several categories. This is the approach of
25 the American Bar Association Criminal Justice Standards, which provides:
26

27 Before accepting a plea of guilty or nolo contendere, the
28 court should advise the defendant that by entering the plea,
29 the defendant may face additional consequences including
30 but not limited to forfeiture of property, the loss of certain
31 civil rights, disqualification from certain governmental
32 benefits, enhanced punishment if the defendant is convicted
33 of another crime in the future, and, if the defendant is not a
34 United States citizen, a change in the defendant’s
35 immigration status. The court should advise the defendant
36 to consult with defense counsel if defendant needs
37 additional information concerning the potential
38 consequences of the plea.

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

40 One possible objection to advisement about applicable collateral sanctions is that if
41 defendants actually know about the dozens or hundreds of negative legal effects of a criminal
42 conviction, many will refuse to plead guilty. However, because the sanctions typically apply to a
43 conviction by plea or jury verdict, pleading not guilty is not a means for a guilty individual to

1 avoid collateral sanctions. It is reasonable to assume that the largest group of people who will
2 plead not guilty when they otherwise would have pleaded guilty will be those who have a
3 defensible case, but planned to plead guilty under the misapprehension that a criminal conviction
4 would have little effect.

5

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

11

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

20

21 The notice will be provided by the court, in general terms, at arraignment or some other
22 early point in the process. If the arraignment or appearance is by mail, the notice may be given
23 by mail. The notice may be part of another document or form which is given to the defendant at
24 arraignment. This notice will give the defendant an opportunity to seek advice about the issue.
25 Whoever looks into the matter will find their burden eased by the collection of collateral
26 consequences described in Section 4 of this Act. All of the necessary information will be readily
27 at hand.

28

29 The notice should be provided in a language that the defendant understands. This should
30 create little additional cost, because there is generally an interpreter at arraignment for non-
31 English speaking defendants.

32

33 *The Effect of Non-Compliance on the Validity of the Plea.* Compliance with this
34 provision should be fast and simple, therefore, the question of the consequences of non-
35 compliance should arise rarely if ever. However, the criminal justice system depends on the
36 finality of judgments. Accordingly, there is strong reason not to upset a plea for a technical
37 deficiency in guilty plea procedure, and this is the prevailing rule. *See, e.g.*, FED. R. CRIM. P.
38 11(h) ("A variance from the requirements of this rule is harmless error if it does not affect
39 substantial rights."). Section 3(a)(1) provides that the general rule applies here, so failure to
40 receive notice of collateral sanctions and disqualifications is not a basis for challenging a plea or
41 conviction. *See also* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND
42 DISCRETIONARY DISQUALIFICATIONS, Standard 19-2.3(b) (3d ed. 2003) ("Failure of the court or
43 counsel to inform the defendant of applicable collateral sanctions should not be a basis for
44 withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or
45 where the failure renders the plea constitutionally invalid.")

46

1 **SECTION 6. NOTICE OF COLLATERAL CONSEQUENCES AT SENTENCING**

2 **AND UPON RELEASE.**

3 (a) An individual convicted of an offense must be given notice as provided in subsection

4 (b):

5 (1) that collateral consequences may apply because of the conviction;

6 (2) of the Internet web address of the collection of laws published under Section

7 4(c);

8 (3) that there may be ways to obtain relief from collateral consequences;

9 (4) of contact information for government or nonprofit agencies, groups, or

10 organizations, if any, offering assistance to individuals seeking relief from collateral

11 consequences; and

12 (5) of when an individual convicted of a crime may vote under this state's law.

13 (b) The [designated government agency or official] shall provide the information in

14 subsection (a) at sentencing. In addition, if an individual is sentenced to imprisonment or other

15 incarceration, the officer or agency releasing the individual shall provide the information in

16 subsection (a) not more than [30] days, and, if practicable, at least [10] days before release.

17 **Comment**

18 Section 6 provides for notice of collateral consequences at sentencing and, if sentenced to
19 jail or prison, at the time of release. Although Section 5 contemplates that these individuals
20 would have gotten general notice of collateral sanctions at the beginning of the criminal
21 proceeding, for many defendants that will have been months or years earlier. The point of notice
22 is not fairness to the defendant in making the decision how to proceed; the conviction by this
23 stage is a fact. Rather, formal advisement promotes enforcement of the law. If, for example,
24 individuals convicted of felonies do not know they are prohibited from possessing firearms, they
25 may violate the law out of ignorance when they would have complied with the law had they
26 known. *See, e.g.*, United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003) (defendant properly
27 convicted of being felon in possession of a firearm, notwithstanding claim that he would not
28 have pleaded guilty had he realized he would not be entitled to possess a firearm); Saadiq v.
29 State, 387 N.W.2d 315 (Iowa) (affirming conviction in spite of defendant's claim that he was not
30

1 told he could not possess a firearm), *appeal dismissed*, 479 U.S. 878 (1986). In *Lambert v.*
2 *California*, 355 U.S. 225 (1957), the Court found a due process violation in convicting an
3 individual with a felony conviction of violation of a registration provision of which she had no
4 knowledge or reason to know.
5

6 This section also requires notice of provisions of law providing for relief from collateral
7 sanctions. Several states require by statute or court rule that this information be made available,
8 others no doubt make it available by policy or informally. *See, e.g.*, NEB. REV. STAT. § 29-
9 2264(1); AZ. R. CRIM. P. 29.1; 15 CAL. CODE REGS. § 2511(B)(7); N.Y. R. UNIF. TRIAL COURTS
10 § 200.9(a); *cf.* MD. CODE, CRIM PROC. § 6-232(a); MD. RULES, Rule 4-329. States have
11 concluded that it is fair to the individual and beneficial to society to let at least some individuals
12 with convictions pay their debt to society and move on. Notification to all individuals with
13 convictions will facilitate the participation of deserving but legally unsophisticated individuals.
14 However, failure to provide notice as contemplated in Section 6 does not invalidate the
15 applicability of the collateral sanctions, or provide a cause of action for money damages. *See*
16 Section 3(a).
17

18 The notice contemplated by this section is modest. There is no right to counsel
19 upon being discharged from prison, probation or parole. The note could be printed on a
20 form issued in the ordinary course of processing an individual for release.
21

22 **SECTION 7. AUTHORIZATION REQUIRED FOR COLLATERAL SANCTION;
23 DISQUALIFICATION; AMBIGUITY.**

24 (a) A collateral sanction may be imposed only by statute or ordinance, or by a rule
25 authorized by law and adopted in accordance with [insert citation to State Administrative
26 Procedure Act or any other applicable law].

27 (b) In deciding whether to impose a disqualification on an individual, a decision-maker
28 shall undertake an individual assessment to determine whether the benefit or opportunity at issue
29 should be granted. In making that decision, a decision-maker may not consider the fact of a
30 conviction, but may consider the particular facts and circumstances involved in the offense if
31 they are substantially related to the benefit or opportunity at issue. The decision-maker shall also
32 consider other relevant information, including whether the individual has been granted relief
33 such as an order of limited relief or a certificate of restoration of rights.

34 (c) A law creating a collateral consequence that is ambiguous as to whether it imposes a

1 collateral sanction or authorizes a disqualification must be construed as authorizing a
2 disqualification.

3 **Comment**

4 Reentry of individuals with criminal convictions is a matter of important state policy. If a
5 program of prisoner reentry fails, then the state as a whole suffers the consequences.
6 Accordingly, Section 7(a) provides that blanket collateral sanctions may be created only by
7 statute or ordinance, or by an agency authorized by statute to create collateral sanctions which
8 has created a rule through formal rulemaking.
9

10 Section 7(b) offers guidance to decisionmakers imposing discretionary disqualifications.
11 It is minimally directive, in order to give decision-makers flexibility to use factors reasonable
12 under the circumstances. Section 7(b) requires decisionmakers to make disqualification
13 decisions based on the conduct underlying the conviction, rather than looking at the conviction
14 alone. Thus, if the Plumber's Board grants licenses to those, say, who were fired from a job or
15 suspended from school for marijuana possession, then it is likely not unreasonably dangerous or
16 risky to public safety to license applicants convicted of precisely the same conduct. On the other
17 hand, if an agency would deny a position to a school bus driver applicant who had his parental
18 rights terminated in a civil action based on child abuse, that is strong evidence that a conviction
19 for child abuse is directly related to fitness for the employment. *See ABA CRIMINAL JUSTICE*
20 *STANDARD 19-3.1.* Nothing in this Section or any other part of the Act authorizes or requires
21 preferences for applicants who have criminal convictions.
22

23 Although not stated in text, the time since the misconduct occurred may be relevant.
24 Some jurisdictions have a term of years, after which, if the individual has not been convicted of
25 another crime, rehabilitation is presumed. *See, e.g., N.M. Stat. Ann. § 28.2.4(B)* (three years after
26 imprisonment or completion of parole and probation); *N.D. Cent. Code § 12.1-33-02.1(2)(c)*
27 (five years after discharge from parole, probation or imprisonment).
28

29 A number of other factors are potentially relevant. Some sources provide more specific
30 guidelines which may be helpful to decision-makers. The following is from the Model
31 Sentencing and Corrections Act:
32

33 **Model Sentencing and Corrections Act, § 4-1005.**
34 **[Discrimination; Direct Relationship].**

35
36 (a) This section applies only to acts of discrimination directed at
37 persons who have been convicted of an offense and discharged
38 from their sentence.
39

40 (b) It is unlawful discrimination, solely by reason of a conviction:
41

42 (1) for an employer to discharge, refuse to hire, or
43 otherwise to discriminate against a person with respect to the

1 compensation, terms, conditions, or privileges of his employment.
2 For purposes of this section, "employer" means this State and its
3 political subdivisions and a private individual or organization
4 [employing 15 or more employees for each working day in each of
5 20 or more calendar weeks in the current or preceding calendar
6 year];

7
8 (2) for a trade, vocational, or professional school to
9 suspend, expel, refuse to admit, or otherwise discriminate against a
10 person;

11
12 (3) for a labor organization or other organization in which
13 membership is a condition of employment or of the practice of an
14 occupation or profession to exclude or to expel from membership
15 or otherwise to discriminate against a person; or

16
17 (4) for this State or any of its political subdivisions to
18 suspend or refuse to issue or renew a license, permit, or certificate
19 necessary to practice or engage in an occupation or profession.

20
21 (c) It is not unlawful discrimination to discriminate against a
22 person because of a conviction if the underlying offense directly
23 relates to the particular occupation, profession, or educational
24 endeavor involved. In making the determination of direct
25 relationship the following factors must be considered:

26
27 (1) whether the occupation, profession, or educational
28 endeavor provides an opportunity for the commission of similar
29 offenses;

30
31 (2) whether the circumstances leading to the offense will
32 recur;

33
34 (3) whether the person has committed other offenses since
35 conviction or his conduct since conviction makes it likely that he
36 will commit other offenses;

37
38 (4) whether the person seeks to establish or maintain a
39 relationship with an individual or organization with which his
40 victim is associated or was associated at the time of the offense;
41 and

42
43 (5) the time elapsed since release.

44
45 (d) [The State Equal Employment-Opportunity Commission has
46 jurisdiction over allegations of violations of this section in a like

1 manner with its jurisdiction over other allegations of
2 discrimination.]

3

4 *See also, e.g., N.Y. CORR. L. § 753; TEX. STANDARDS AND RULES FOR*
5 *CERTIFICATION OF SHORTHAND REPORTERS, § XII.*

6

7 Section 7(c) is a rule of construction. In cases of ambiguity, a provision must be
8 construed to impose a disqualification rather than an automatic collateral sanction.

9

10 **SECTION 8. EFFECT OF CONVICTION BY ANOTHER STATE OR THE**
11 **UNITED STATES; VACATED OR PARDONED CONVICTION.**

12 (a) For purposes of authorizing or imposing collateral consequences in this state, a
13 conviction for an offense in a court of another state or the United States is deemed a conviction
14 of the offense in this state with the same elements. If there is no offense in this state with the
15 same elements, the conviction is deemed a conviction of the most serious offense in this state
16 which is established by the elements of the offense. A misdemeanor in the jurisdiction of
17 conviction may not be deemed a felony in this state, and an offense below a misdemeanor in the
18 jurisdiction of conviction may not be deemed a conviction of a crime in this state.

19 (b) For purposes of authorizing or imposing collateral consequences in this state, a
20 juvenile adjudication in another state or the United States may not be deemed a felony,
21 misdemeanor, or offense below a misdemeanor in this state, but may be deemed a juvenile
22 adjudication for the juvenile violation in this state with the same elements in the underlying
23 offense. If there is no juvenile violation in this state with the same underlying elements, the
24 juvenile adjudication is deemed an adjudication of the most serious juvenile violation in this state
25 which is established by the underlying elements of the juvenile adjudication.

26 (c) A conviction that is reversed, overturned, or otherwise vacated by a court of
27 competent jurisdiction of this state, another state, or the United States on grounds other than
28 rehabilitation or good behavior may not serve as the basis for authorizing or imposing a

¹ collateral consequence in this state.

(d) A pardon issued by another state or the United States has the same effect for purposes of authorizing, imposing, and relieving collateral consequences in this state as it has in the issuing jurisdiction.

Alternative A

(e) A conviction that has been expunged, sealed, annulled, set aside, or otherwise vacated by a court of competent jurisdiction of another state or the United States on grounds of rehabilitation or good behavior, or for which civil rights were restored pursuant to statute, has the same effect for purposes of authorizing, imposing, and relieving collateral consequences in this state as it has in the jurisdiction of conviction, except that vacation or restoration of civil rights does not relieve collateral consequences applicable under the law of this state for which relief could not be granted under Section 11, or for which relief was expressly withheld by the court order or by the law of the jurisdiction that vacated the conviction. An individual convicted in another jurisdiction may seek relief under Section 9 or 10 from any collateral consequence for which relief was not granted in the issuing jurisdiction, other than those listed in Section 11, and the [designated board or agency] shall consider that the conviction was vacated or civil rights restored in deciding whether to issue an order of limited relief or certificate of restoration of rights.

Alternative B

20 (e) A conviction that has been expunged, sealed, annulled, set aside, or otherwise
21 vacated by a court of competent jurisdiction of another state or the United States on grounds of
22 rehabilitation or good behavior, or for which civil rights were restored pursuant to statute, is
23 deemed a conviction for purposes of authorizing or imposing collateral consequences in this state

1 as provided in subsection (a). An individual convicted in another jurisdiction may seek relief
2 under Section 9 or 10 from any authorized or imposed collateral consequence, other than those
3 listed in Section 11, and the [designated board or agency] shall consider that the conviction was
4 vacated or civil rights restored in deciding whether to issue an order of limited relief or
5 certificate.

(f) A charge or prosecution in any jurisdiction that has been finally terminated without a judgment of conviction and imposition of sentence based on participation in a deferred prosecution or diversion program may not serve as the basis for authorizing or imposing a collateral consequence in this state. This subsection does not affect the validity of any restrictions or conditions imposed by law as part of participation in the deferred prosecution or diversion program, either before or after the termination of the charge or prosecution.

Comment

Sections 8(a) and (b) provide for imposing collateral sanctions in the enacting state based on criminal convictions in other states. Because the definitions of crimes vary from state to state, an out-of-state conviction, in many cases, will not be identical to a conviction in the enacting state. Put-of-state convictions are domesticated using essentially the approach of *Blockburger v. United States*, 284 U.S. 299 (1932), comparing the elements of the offense of conviction to offenses in the enacting state. However, an out-of-state sub-criminal offense cannot become a misdemeanor or felony, and a misdemeanor cannot become a felony.

Section 8(c) provides that convictions that have been overturned on the merits do not give rise to collateral sanctions. If the conviction has been overturned based on legal or factual error, on appeal, motion for a new trial, or collateral review, it does not give rise to a collateral consequence in this state. Similarly, Section 8(f) provides that a prosecution that has finally terminated without a conviction based on participation in a diversion program does not give rise to collateral sanctions. Section 8(d) gives comity in the enacting state to pardons from other jurisdictions, giving them the same effect that they would have in the state where the pardon occurred.

30 Some states have forms of relief from collateral consequences based on rehabilitation or
31 good behavior, variously denominated expungement, vacation, set-aside and sealing. In the state
32 where the relief is granted, this Act does not change its legal effect; it has whatever force it has.
33 Section 8(e) contains bracketed options for the effect of out of state relief. The first treats a

1 conviction that has been relieved on some legal basis as not giving rise to a collateral
2 consequence, the second treats it like any other conviction.

3

4 **SECTION 9. ORDER OF LIMITED RELIEF.**

5 (a) An individual convicted of an offense may petition for an order of limited relief from
6 one or more collateral sanctions related to employment, education, housing, public benefits, or
7 occupational licensing. The petition may be presented to the:

- 8 (1) sentencing court at or before sentencing; or
9 (2) [designated board or agency] at any time after sentencing.

10 (b) Except as otherwise provided in Section 11, the court or the [designated board or
11 agency] may issue an order of limited relief relieving one or more of the collateral sanctions
12 described in subsection (a) if, after reviewing the record, including the individual's criminal
13 history, any filing by a prosecutor or victim under Section 14, and any other relevant evidence, it
14 finds the individual has established by a preponderance of the evidence that:

15 (1) granting the petition will materially assist the individual in obtaining or
16 maintaining employment, education, housing, public benefits, or occupational licensing;
17 (2) the individual has substantial need for the relief requested in order to live a
18 law-abiding life; and

19 (3) granting the petition would not pose an unreasonable risk to the safety or
20 welfare of the public or any individual.

21 (c) A decision-maker may consider the conduct underlying a conviction in the same
22 manner as provided in Section 7(b).

23 (d) The order of limited relief must specify:
24 (1) the particular collateral sanction from which relief is granted; and
25 (2) any restrictions imposed pursuant to Section 12(a).

(e) Issuance of an order of limited relief relieves a collateral sanction to the extent provided in the order.

Comment

The principle that at least some licenses, benefits and employment opportunities should not be denied to people with criminal convictions unless the conviction is meaningfully related to the opportunity is well established in state codes. More than 30 states have statutory restrictions on collateral sanctions and disqualifications imposed by state actors. *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). A core principle of many of these laws is that individuals should be excluded from situations where their conviction presents a risk to public safety, but they should not be excluded if there is no connection between the crime committed and the opportunity sought. *See also NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES* § 7, at 10 (Adopted July 17, 2005) (while supporting collateral sanctions necessary to protect the public, states that “[r]elief from some collateral sanctions may be appropriate if they do not relate to the conduct involved in the offense of conviction.”)

18 Sections 9 and 10 attempt to harmonize society's interests in public safety and its interest
19 in reentry and reintegration into society. Sections 9 and 10 create new mechanisms for relief of
20 collateral sanctions under some circumstances. Section 9 is aimed at removing specific legal
21 barriers for individuals first reentering society. It allows an individual to apply for relief from a
22 collateral sanction relating to employment, education, housing, public benefits, or occupational
23 licensing on a showing that the relief will assist in leading a law-abiding life.

25 Relief may be granted by the court at or before sentencing. If the individual does obtain
26 relief at sentencing, the order can be issued only by the board or agency (in many states it is
27 likely to be the parole board) assigned responsibility for issuing the orders. Sections 9 and 10
28 can be invoked by individuals with out of state convictions facing collateral sanctions in the
29 enacting state.

31 Issuance of an Order of Limited Relief does not guarantee that an individual will get the
32 benefit or opportunity sought; it merely allows case-by-case determination under Section 9(c),
33 and Section 7(b). For example, a regulation might prohibit all individuals with felony
34 convictions from being licensed as Paramedics. An individual may persuade a court or the
35 designated board or agency to issue an Order of Limited Relief from that collateral sanction.
36 That would lift the absolute bar, but would not restrict the Paramedic licensing board from
37 considering whether a license should issue, based on the conduct underlying the conviction. The
38 decisionmaker is also entitled to consider the conviction conclusive proof that the individual
39 committed every element of the offense of conviction. Agencies may by rule or policy require
40 applicants to provide or disclose information necessary or helpful to the agency's decision.

42 Sections 9 and 10 are based in part on the Model Sentencing and Corrections Act
43 (“MSCA”), § 4-1005. However, this Act does not identify a list of prohibited collateral

1 sanctions, as do the Model Sentencing and Corrections Act and the ABA Standards. The Model
2 Sentencing and Corrections Act, § 4-1001(b) provides that a convicted individual “retains all
3 rights, political, personal, civil and otherwise”, including, among others it lists, the right to vote.
4 The ABA Standards has a list of sanctions which should never be imposed under any
5 circumstances, such as “deprivation of the right to vote, except during actual confinement.” ABA
6 CRIMINAL JUSTICE STANDARD 19-2.6(a).

7
8 Sections 9 and 10 also differ from the MSCA by limiting its coverage to state actors,
9 excluding private employers. Regulation of public employment and licensing is less
10 controversial than would be reaching into the decisions of private businesses. In addition, public
11 employment and licensing are often done with the public interest in mind (for example, in the
12 context of veteran’s preferences, or reserved opportunities for the disabled). If any category of
13 employer is going to take a chance by helping individuals with convictions, it is likely to be the
14 public sector. *See, e.g.*, Editorial, *Cities that Lead the Way*, N.Y. TIMES, Mar. 31, 2006
15 (discussing anti-discrimination policies regarding individuals with conviction for city agencies
16 and city contractors in Boston, Chicago and San Francisco).

17
18 However, the Act contemplates that enacting states might choose to make private
19 corporations performing government functions or services, by contract or statute, be made
20 subject to Sections 9 and 10 through the definition of “decision-maker” in Section 2(3). It is far
21 less intrusive to ask private companies who choose to do business with the state to comply with a
22 policy like this; if a private company finds it objectionable, they may forego the business.
23 Further, even if this is not a point upon which uniformity is likely, this section is not meant to
24 discourage states from deciding on their own that private employers as a group should be
25 covered; some now do and there is no reason they should not continue if it works for them.
26 States should examine their laws governing public employment and licensing to ensure that they
27 conform to this policy.

28
29 **SECTION 10. CERTIFICATE OF RESTORATION OF RIGHTS.**

30 (a) An individual convicted of an offense may petition the [designated board or agency]
31 for a certificate of restoration of rights relieving collateral sanctions not sooner than [five] years
32 after the individual’s most recent conviction of a felony [or misdemeanor] in any jurisdiction, or
33 not sooner than [five] years after the individual’s release from confinement pursuant to a
34 criminal sentence in any jurisdiction, whichever is later.

35 (b) Except as otherwise provided in Section 11, the [designated board or agency] may
36 issue a certificate of restoration of rights if after reviewing the record, including the individual’s
37 criminal history, any filing by a prosecutor or victim under Section 14, and any other relevant

(c) A certificate of restoration of rights must specify any restrictions imposed and collateral sanctions from which relief has not been granted under Section 12(a).

12 (d) Issuance of a certificate of restoration of rights relieves all collateral sanctions,
13 except those listed in Section 11 and any others specifically excluded in the certificate. A
14 decision-maker may consider the conduct underlying the conviction in the same manner as
15 provided in Section 7(b).

Comment

Like Section 9, Section 10 allows the designated board or agency to relieve collateral sanctions. Section 10 relief, called a Certificate of Restoration of Rights, is available more broadly; it applies to any collateral sanction, or all collateral sanctions (except those listed in Section 11), and there is no required showing that relief is needed for purposes of reentry. However, the applicant must make a substantial showing of good behavior for a period of years prior to the issuance of the Certificate. (The number of years is to be determined by enacting states, but the Act brackets five years.) For that period, the individual must have no disqualifying convictions and no incarceration pursuant to sentence, have been employed, in school, or in rehabilitation, or, if retired or disabled, show a lawful source of income, and have complied with all terms of any criminal sentence.

28 The Act brackets whether conviction of a misdemeanor will render an individual
29 ineligible, because a state might conclude that some minor traffic or parking offenses and the like
30 should not be disqualifying. However, Section 10(b) makes issuance of a Certificate

1 discretionary by using the board “may issue” one. Accordingly, even in a state not providing for
2 automatic ineligibility based on misdemeanor convictions, a misdemeanor involving violence or
3 dishonesty, or a pattern of low-level violations, might be grounds for denial.

4

5 Section 10(d) provides that a Certificate of Restoration of Rights relieves all collateral
6 sanctions, except those listed in Section 11, and any that the board elects not to relieve pursuant
7 to Section 12(a). For example, under Section 12(a), the board might conclude that an individual
8 has demonstrated good behavior, warranting general relief from the burdens of a felony
9 conviction, yet not want the individual to be around alcohol or firearms. In such a case, the
10 Certificate will so state. Section 10(c).

11

12 Section 10(d) provides that the state shall not impose a collateral sanction that has been
13 relieved by a Certificate. A Certificate of Relief also provides relief from disqualifications.
14 Under Section 10(d), a decision-maker considering imposing a disqualification should examine
15 the facts of the holder’s misconduct under Section 7(b).

16

17 **SECTION 11. COLLATERAL SANCTIONS NOT SUBJECT TO ORDER OF**

18 **LIMITED RELIEF OR CERTIFICATE OF RESTORATION OF RIGHTS.** An order of
19 limited relief or certificate of restoration of rights may not be issued to relieve the following
20 collateral sanctions:

21 (1) requirements imposed by [insert citation to state’s “Megan’s Law” enacted pursuant
22 to 42 U.S.C. Section 14071 or its associated regulations];

23 (2) a motor vehicle license suspension, revocation, limitation, or ineligibility pursuant to
24 [insert citation to state DWI laws], or a motor vehicle license suspension, revocation, limitation,
25 or ineligibility pursuant to [insert citation to provision providing for license suspension for traffic
26 offenses], for which restoration or relief is available pursuant to [insert citation to occupational,
27 temporary, and restricted licensing provisions]; or

28 (3) ineligibility for employment pursuant to [insert references to laws restricting
29 employment of convicted individuals by law enforcement agencies including the attorney
30 general, prosecutor’s office, police department, sheriff’s department, the state police, or the
31 department of corrections].

Comment

2 Section 11 provides that Orders of Limited Relief from Collateral Sanctions issued under
3 Section 9 and Certificates of Restoration of Rights issued under Section 10 do not relieve certain
4 collateral sanctions. Section 11(1) provides that sex offender registration requirements cannot be
5 relieved. Section 11(2) provides that sanctions related to motor vehicle licensing cannot be
6 relieved. In these particular areas, additional methods of relief would be duplicative and perhaps
7 inconsistent with the detailed and elaborate provisions for temporary or restrictive licenses that
8 now exist. Section 11(3) provides that laws prohibiting hiring of persons with criminal records
9 by law enforcement agencies may not be relieved. However, that some states exclude persons
10 with convictions from law enforcement employment does not mean they must or always do.
11 Nothing in this Section prohibits states from permitting law enforcement agencies to consider
12 hiring individuals with criminal records.

To the extent that the legislature has no power to remove collateral consequences imposed by the state constitution cannot be relieved by statute, no relief granted under this Act would purport to cover them.

SECTION 12: ISSUANCE, MODIFICATION, AND REVOCATION OF ORDER

OF LIMITED RELIEF AND CERTIFICATE OF RESTORATION OF RIGHTS.

(a) When a petition is filed under Section 9 or 10, including a petition for enlargement of an existing order of limited relief or certificate of restoration of rights, the [designated board or agency] shall notify the office that prosecuted the offense giving rise to the collateral consequence from which relief is sought and, if the conviction was not obtained in a court of this state, the [Office of the Attorney General of this state or an appropriate prosecuting office in this state]. The court or [designated board or agency] may issue an order or certificate subject to restriction, condition, or additional requirement. When issuing, denying, modifying, or revoking an order or certificate, the [designated board or agency] may impose conditions for reapplication.

(b) The [designated board or agency] may restrict or revoke an order of limited relief or certificate of restoration of rights it previously issued or an order issued by a court in this state if it finds just cause by a preponderance of the evidence. Just cause includes subsequent conviction of the holder for a felony in this state, or for an offense in another jurisdiction that is deemed a

1 felony in this state under Section 8(a). An order of restriction or revocation may be issued:

2 (1) on motion of the [designated board or agency] or the office of the prosecutor

3 that obtained the conviction, or a government agency designated by that prosecutorial office;

4 (2) after notice to the individual to whom the order or certificate was issued and

5 any other prosecutor that has appeared in the matter; and

6 (3) after a hearing pursuant to rules adopted under the [insert reference to the state

7 administrative procedure act] if requested by the individual or the prosecutor who made the

8 motion or any prosecutor that has appeared in the matter.

9 (c) The [designated board or agency] shall order any test, report, investigation, or

10 disclosure by the individual it reasonably believes necessary to its decision to issue, modify or

11 revoke an order of limited relief or certificate of restoration of rights. If there are material

12 disputed issues of fact or law, the individual and any prosecutor notified under subsection (a) or

13 another prosecutorial agency designated by a prosecutor notified under subsection (a) shall have

14 the opportunity to submit evidence and be heard on those issues.

15 (d) The [designated board or agency] shall maintain a public record of the issuance,

16 modification, and revocation of orders of limited relief and certificates of restoration of rights.

17 The criminal history record system of the [state criminal justice record agency] shall include

18 issuance, modification, and revocation of orders and certificates.

19 [(e) The [designated board or agency] may adopt rules for application, determination,

20 modification, and revocation of orders of limited relief and certificates of restoration of rights, in

21 accordance with the provisions of [insert reference to state administrative procedure [act]].]

22 **SECTION 13. RELIANCE ON ORDER OR CERTIFICATE AS EVIDENCE OF**

23 **DUE CARE.** In a judicial or administrative proceeding alleging negligence or other fault, an

1 order of limited relief or a certificate of restoration of rights may be introduced as evidence of a
2 person's due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or
3 otherwise transacting business or engaging in activity with the individual to whom the order was
4 issued, if the person knew of the order or certificate at the time of the alleged negligence or other
5 fault.

Comment

This section, applies to private as well as public decisionmakers. Unless persons with criminal records are to be permanently unemployed and homeless, some businesses must transact with them, yet, they take legal risks if they do. Business owners have few sources of objective evidence about the backgrounds of applicants, and an Order of Limited Relief or Certificate of Restoration of Rights issued by government authority after investigation is reasonably relied upon. This section provides protection for public and private entities transacting with holders of Orders of Limited Relief and Certificates of Restoration of Rights.

15 **SECTION 14. VICTIM'S RIGHTS.** A victim of an offense may participate in
16 proceedings for issuance, modification, and revocation of orders of limited relief and certificates
17 of restoration of rights [in the same manner as at a sentencing proceeding pursuant to [insert
18 citation to state crime victim's act]] [to the extent permitted by rules adopted by the [designated
19 board or agency]].

20 **SECTION 15. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
21 applying and construing this uniform act, consideration must be given to the need to promote
22 uniformity of the law with respect to its subject matter among states that enact it.

SECTION 16. SAVINGS AND TRANSITIONAL PROVISIONS.

24 (a) This [act] applies to collateral consequences whenever enacted or imposed, unless the
25 law creating the collateral consequence expressly states that this [act] does not apply.

26 (b) This [act] does not invalidate the imposition of a collateral sanction on an individual
27 before [the effective date of this [act]], but a collateral sanction validly imposed before [the

1 effective date of this [act]] may be the subject of relief under this [act].

2 **SECTION 17. EFFECTIVE DATE.** This [act] takes effect . . .