Wrongful Collateral Consequences

*Abigail E. Horn**

Abstract

Collateral consequences of criminal convictions perpetuate racial hierarchy, disadvantage individuals and families, undermine communities, and harm the public by hindering reentry efforts. This Article is the first to systematically expose another overlooked characteristic of collateral consequences—the extent to which they are imposed wrongfully. Wrongful collateral consequences are those that attach erroneously and in clear violation of the law. The causes are structural. Imposing collateral consequences requires a two-step matching process. First, an administrator must match a person to his or her criminal-records data. Second, an administrator must match the criminal-records data to the law enacting the collateral consequence—to determine whether the consequence should lawfully attach. These steps are simple to state, but difficult to implement. Errors occur at both steps. Wrongful collateral consequences arise because criminal-records data is notoriously incomplete and inaccurate. They also arise because the laws enacting collateral consequences are structurally complex—legislators employ catchall clauses to enumerate the triggering offenses and complex duration clauses to prescribe the length of the consequences. Reforms are possible. Two would get at the root causes: improving criminal-records data and simplifying collateral-consequence laws. Other reforms would leave in place the existing structure but should be implemented immediately: improvements in procedural due process, creative plea bargaining by criminal-defense counsel, and quality controls by administrators who do the two-step matching. These reforms would prevent wrongful collateral consequences at the margins, but not eradicate the problem. Wrongful collateral consequences ultimately present yet another reason why collateral consequences, and the caste system they create, are misguided and unjust.

Table of Contents

* J.D., Yale Law School, 2006. Many thanks to Sonya Bishop, Jules Epstein, Ken Jacobsen, Elizabeth Kukura, Wayne Logan, Aaron Marcus, Sandra Mayson, Lauren Ouziel, and Liliana Zaragoza. Thanks especially to Maria Pulzetti for her constant encouragement and support.

Introduction

We live in an era of mass conviction and mass incarceration.[1] A staggering 2.1 million people are incarcerated in the United States in

[1] *See, e.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1803–06 (2012).

federal, state, and local prisons and jails.[2] Incarceration in prison, furthermore, is only "the deep end of the criminal justice system."[3] Between seventy and one hundred million Americans have a criminal record, or about one in three adults.[4] Scholars describe this new normal as the carceral state—omnipresent penal control via conviction, incarceration, community supervision, and so-called "collateral consequences"[5] of criminal convictions.[6]

The carceral state is the object of fierce critiques,[7] but among these, a major one has been overlooked. Missing thus far is the argument that one pillar of the carceral state—collateral consequences—is structurally predisposed to error. This Article now exposes the problem of *wrongful* collateral consequences—collateral consequences imposed erroneously and in clear violation of the law. In doing so, it

---

2 *See* DANIELLE KAEBLE & LAUREN GLAZE, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2015, at 1, 2 (2016), https://www.bjs.gov/content/pub/pdf/cpus15.pdf [https://perma.cc/H3GE-TL76].

3 Jeremy Travis & Bruce Western, *Poverty, Violence, and Black Incarceration*, *in* POLICING THE BLACK MAN 294, 301 (Angela J. Davis ed., 2017). There are an additional 4.6 million people under the supervision of probation or parole. *See* KAEBLE & GLAZE, *supra* note 2.

4 *See* REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU'RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 1, 68 n.1 (2014), http://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf [https://perma.cc/2RRT-BSA9] (defining criminal record to include a record of arrest or conviction for a felony, misdemeanor, or infraction); *see also* Jo Craven McGinty, *The Numbers: This Column Is on Your Permanent Record*, WALL ST. J., Aug. 8, 2015, at A2. The states have 105 million individual people in their criminal-records databases. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2014, at 2 (2015), https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf [https://perma.cc/5M7V-86SP]. However, some people have criminal records in multiple states. *See id.*

5 *See, e.g.*, McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in a Post-*Padilla *World . . . Or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 148 (2011) (critiquing the term "collateral" and proposing, instead, "enmeshed penalties" or "enmeshed consequences").

6 *See* MARIE GOTTSCHALK, CAUGHT 1–2, 22 (2015); *see also* Allegra M. McLeod, *Confronting the Carceral State*, 104 GEO. L.J. 1405, 1407–08 (2016). Justice Sotomayor too has referred to the carceral state. *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) ("By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.").

7 *See* McLeod, *supra* note 6, at 1407–08; Jonathan Simon, *Racing Abnormality, Normalizing Race: The Origins of America's Peculiar Carceral State and Its Prospects for Democratic Transformation Today*, 111 NW. U. L. REV. 1625, 1626 (2016). *See generally* GOTTSCHALK, *supra* note 6.

adds a new dimension to the charge that collateral consequences, like the carceral state generally, are misguided and unjust.

Today's dispiriting reality of mass conviction, mass incarceration, and all-encompassing collateral consequences[8] reflect economic and legal changes in the United States since the 1970s.[9] The past four decades wrought economic upheaval associated with the decline of urban manufacturing and the dismantling of social welfare systems.[10] The loss of jobs spurred young people to "underground economies," which gave rise to violence.[11] At the same time, tough-on-crime politicians enacted mandatory minimum sentences for drug convictions,[12] very long sentences for violent crimes,[13] and pervasive collateral consequences of convictions.

Scholars and advocates have appropriately focused on scaling back the carceral state, primarily because it perpetuates racial hierarchy.[14] In the United States, we disproportionately incarcerate people of color, in particular African Americans.[15] Systemic racial bias accumulates over the course of a criminal prosecution. As a case proceeds from arrest to charging, conviction, and sentencing, people of color suffer disproportionate treatment at the hands of police, prosecutors, and judges,[16] due in part to unconscious racism—a form of implicit bias.[17]

The carceral state disproportionately punishes people of color, not only through imprisonment but also through the indelible mark of the criminal record.[18]

---

8 *See* Chin, *supra* note 1.

9 *See* Marc Mauer, *The Endurance of Racial Disparity in the Criminal Justice System*, *in* POLICING THE BLACK MAN, *supra* note 3, at 31, 33, 36; Travis & Western, *supra* note 3, at 296–300.

10 *See* MICHELLE ALEXANDER, THE NEW JIM CROW 49–50 (2010); Mauer, *supra* note 9; Travis & Western, *supra* note 3, at 296–300.

11 *See* McLeod, *supra* note 6, at 1407.

12 *See, e.g.*, ALEXANDER, *supra* note 10, at 52, 86.

13 *See, e.g.*, Travis & Western, *supra* note 3, at 300.

14 *See, e.g.*, Simon, *supra* note 7, at 1647.

15 Among African-American adults, 1,745 of 100,000 are incarcerated in federal and state prisons, compared to 312 of 100,000 white adults. E. ANN CARSON & ELIZABETH ANDERSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015, at 1, 10 (2016), https://www.bjs.gov/content/pub/pdf/p15.pdf [https://perma.cc/GR2A-2BC6]. The carceral state also disadvantages the poor, immigrants, and lesbian, gay, bisexual, and transgender people. *See* GOTTSCHALK, *supra* note 6, at 4; JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE (2011).

16 *See, e.g.*, Mauer, *supra* note 9, at 42. The disparate treatment of African Americans is particularly evident in drug cases. GOTTSCHALK, *supra* note 6, at 124, 126–28.

17 *See, e.g.*, Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012).

18 *See* DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS

A criminal record strips its bearer of political, economic, and social rights. Collateral consequences arise from every level of government, in the form of thousands of statutes, regulations, and ordinances.[19] They limit one's right to vote, to jury service, to public housing, to public-sector employment, to occupational licensing, to pension benefits, to federal funds for higher education, to public benefits, to firearm possession, to child custody, and to driving privileges. A criminal record may result in deportation, branding as a sex offender, and even restrictions on where one can live, work, or simply be present.[20] These losses collectively amount to a form of "civil death."[21]

Like the carceral state generally, collateral consequences enact racial hierarchy, disadvantaging people of color.[22] Their disparate impact, if not a motivating factor, is at least "foreseeable."[23] Collateral consequences have rolled back many advances of the civil rights movement, as measured by employment, education, and other socioeconomic markers, thereby perpetuating racial hierarchy.[24] Collateral consequences brand people of color[25] and people with criminal records alike[26] as lawbreaking and irredeemable. They reflect the same pernicious stereotypes of black male criminality that undergirded slavery and Jim Crow segregation.[27] Yet, perversely, collateral

---

INCARCERATION 36–37 (2007); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 644 (2014).

19 *See Welcome to the NICCC*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, https://niccc.csgjusticecenter.org [https://perma.cc/WC4S-4PLS].

20 *See, e.g.*, GOTTSCHALK, *supra* note 6, at 243; PAGER, *supra* note 18, at 24, 33; Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 490–94 (2010).

21 *See* Chin, *supra* note 1, at 1790. These collateral consequences are "formal" ones, required by law. In addition, people with criminal records suffer "informal" collateral consequences, based in stigma rather than law, such as employment discrimination. *See* PAGER, *supra* note 18, at 24, 34; Pinard, *supra* note 20, at 474. This Article focuses on formal collateral consequences, although informal consequences also impose heavy burdens.

22 *See, e.g.*, Jacqueline Johnson, *Mass Incarceration: A Contemporary Mechanism of Racialization in the United States*, 47 GONZ. L. REV. 301, 308, 313 (2012); Pinard, *supra* note 20, at 516–17.

23 *See* Pinard, *supra* note 20, at 517.

24 *See* GOTTSCHALK, *supra* note 6, at 242.

25 *See, e.g.*, Adrienne Lyles-Chockley, *Transitions to Justice: Prisoner Reentry as an Opportunity to Confront and Counteract Racism*, 6 HASTINGS RACE & POVERTY L.J. 259, 269–70 (2009); David Rudovksy, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 308 (2001).

26 *See, e.g.*, Regina Austin, *"The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV. 173, 177 (2004).

27 *See, e.g.*, ALEXANDER, *supra* note 10, at 138; Bryan Stevenson, *A Presumption of Guilt:*

consequences are imposed with a claim to "moral legitimacy"—that they are applied because of a conviction, unmoored from race.[28]

Racial bias, moreover, is not the only reason why collateral consequences are unjust—they are also counterproductive. Collateral consequences hinder the efforts of people with criminal records to move on from their past. Like incarceration,[29] they increase recidivism.[30] The harm ripples outward. When people with criminal records suffer in the job market, their families and communities step in to help. Families and communities provide food, housing, utilities, transportation, and other necessities. This financial burden, moreover, does not fall on everyone equally, but disproportionately on communities, largely in cities, with high incarceration rates.[31] Often, these communities are already struggling financially.[32] The net result is to increase poverty[33] and to "cement[]" income inequality among people of color.[34] Families and communities also suffer intangible stigma.[35] They experience the unfairness of the criminal justice system, a lesson leading to weakened political engagement and participation.[36]

Scholars and advocates have worked to bring these injustices to light. One foundational effort sought to compile and sort collateral consequences nationwide.[37] The Court Security Improvement Act of

---

The Legacy of America's History of Racial Injustice, *in* POLICING THE BLACK MAN, *supra* note 3, at 3, 8, 11–12.

28 *See* PAGER, *supra* note 18, at 37.

29 *See* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 442 (2014) (observing that people "may emerge from prison not only without job skills, but also incapacitated for future work because of severe and lasting physical and mental health issues"); Travis & Western, *supra* note 3, at 309–10 (observing that incarceration weakens employment outcomes by increasing stigma and by undermining job skills, physical and mental health, and social networks).

30 *See* PAGER, *supra* note 18, at 25, 33; Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 333–34.

31 *See* ALEXANDER, *supra* note 10, at 190–91; Pinard, *supra* note 20, at 468; Travis & Western, *supra* note 3, at 312.

32 *See* PAGER, *supra* note 18, at 25.

33 *See, e.g.*, Roberts, *supra* note 30, at 332.

34 Travis & Western, *supra* note 3, at 312.

35 *See, e.g.*, WAYNE A. LOGAN, KNOWLEDGE AS POWER 126–27 (2009).

36 *See* GOTTSCHALK, *supra* note 6, at 248; ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 12 (2009), http://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf [https://perma.cc/FGP7-CN6G].

37 *See, e.g.*, Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 34 (Marc Mauer & Meda Chesney-Lind eds., 2002) (calling for the codification of collateral consequences in one place); Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 116–21 (2011) (same); *see also* MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS

2007 mandated a national study of collateral consequences.[38] The American Bar Association ("ABA"), the grantee, undertook the project in 2012.[39] The ABA produced an online, searchable inventory of collateral consequences in the United States.[40]

Lawyers are also waging an attack on collateral consequences in the courts. At issue is the dichotomy between collateral consequences and criminal punishments such as incarceration, probation, and parole. Collapsing the civil/criminal distinction would have significant ramifications for criminal defendants.[41] This divide justifies excluding collateral consequences from the constitutional protections[42] afforded by the Sixth Amendment right to counsel,[43] the Ex Post Facto Clause's prohibition on retroactive punishment,[44] the constitutional protections for knowing and voluntary guilty pleas,[45] and the right to proportionate punishment.[46]

This distinction is beginning to prove vulnerable to challenge. In *Padilla v. Kentucky*,[47] the Supreme Court "breach[ed] the previously chink-free wall between direct and collateral consequences."[48] This landmark case recognized that one civil consequence, deportation, is a

---

§§ 1:2, 9:7 (2013) (praising the ABA's work to catalogue collateral consequences); Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 719 (2012) (same).

38 *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543 (2008).

39 *See* Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, NIJ J., Sept. 2013, at 25, 25; *see also New Website Launched on Collateral Consequences*, ABA WASH. LETTER, Oct. 2012, at 5, 5. In 2017, control of the inventory passed to the Council of State Governments. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-691, NONVIOLENT DRUG CONVICTIONS: STAKEHOLDERS' VIEWS ON POTENTIAL ACTIONS TO ADDRESS COLLATERAL CONSEQUENCES 5, 6 (2017), www.gao.gov/assets/690/688187.pdf.

40 *See* Justice Ctr., *supra* note 19.

41 *See* Padilla v. Kentucky, 559 U.S. 356, 364 & n.8 (2010) (citing Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 124 n.15 (2009)).

42 *See generally* Smyth, *supra* note 5, at 147.

43 *See* U.S. CONST. amend. VI; *see also* Chaidez v. United States, 568 U.S. 342, 350–51 (2013).

44 *See* U.S. CONST. art. I, § 10, cl. 1; *see also* Smith v. Doe, 538 U.S. 84, 105–06 (2003); Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

45 *See* U.S. CONST. amends. V, XIV; *cf.* Brady v. United States, 397 U.S. 742, 748 (1970); *see also* Roberts, *supra* note 41, at 126.

46 *See* U.S. CONST. amend. VIII; *see also* Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 39 (2011) (critiquing the lack of Eighth Amendment proportionality review for the Immigration and Nationality Act's deportation scheme).

47 559 U.S. 356 (2010).

48 *Chaidez*, 568 U.S. at 352–53.

"particularly severe 'penalty'" that is "intimately related to the criminal process," with deportation "nearly an automatic result" of some convictions.[49] As such, *Padilla* held that the Sixth Amendment requires criminal-defense counsel to effectively advise a client about the immigration consequences of a criminal conviction.[50] There are also signs of a thaw in the Ex Post Facto context. In 2003, the Supreme Court held in *Smith v. Doe*[51] that sex-offender registration was a civil consequence, which states may impose retroactively.[52] More recently, however, an increasing number of courts have distinguished *Smith* and held that sex-offender registration laws are punitive and, therefore, cannot be imposed retroactively.[53]

Given the intense focus on collateral consequences, it is surprising that scholars have overlooked another significant feature of collateral consequences: the extent to which they are imposed wrongfully. This Article fills this gap. It exposes the problem of wrongful collateral consequences—collateral consequences imposed erroneously and in clear violation of the law.

As this Article explains, wrongful collateral consequences have been concealed, in part, by taxonomy. Although widely used, it is a misnomer to say that mandatory[54] collateral consequences are "automatic."[55] In fact, applying collateral consequences requires a two-step matching process. First, an administrator must match people to crimi-

---

49 *Padilla*, 559 U.S. at 365–66.

50 *See Chaidez*, 568 U.S. at 352.

51 538 U.S. 84 (2003).

52 *See id.* at 92, 105–06 (holding that Alaska intended to enact a civil regulatory scheme and that the statue was not "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil'" (alteration in original) (citation omitted)). Justice Stevens criticized the majority's approach as open to "manipulat[ion]" to produce a preferred end. *Id.* at 113 (Stevens, J., dissenting).

53 *See* Doe v. Snyder, 834 F.3d 696, 700–05 (6th Cir. 2016); Doe v. State, 189 P.3d 999, 1000–03 (Alaska 2008); Gonzalez v. State, 980 N.E.2d 312, 316, 321 (Ind. 2013); Hevner v. State, 919 N.E.2d 109, 111–13 (Ind. 2010); Wallace v. State, 905 N.E.2d 371, 374, 378 (Ind. 2009); State v. Letalien, 985 A.2d 4, 7, 16 (Me. 2009); Doe v. Dep't of Pub. Safety, 62 A.3d 123, 130, 143 (Md. 2013); Doe v. State, 111 A.3d 1077, 1090, 1100 (N.H. 2015); State v. Williams, 952 N.E.2d 1108, 1121 (Ohio 2011); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004, 1019, 1030 (Okla. 2013); Commonwealth v. Muniz, 164 A.3d 1189, 1208, 1216 (Pa. 2017).

54 This Article uses the term "collateral consequences" to refer to mandatory collateral consequences, as opposed to discretionary ones. For a discussion of the distinction between mandatory and discretionary collateral consequences, see *infra* notes 71–74 and accompanying text.

55 *See* Justice Ctr., *supra* note 19; *see also* NAT'L INST. OF JUSTICE, NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION USER GUIDE FREQUENTLY ASKED QUESTIONS paras. 1–2 (n.d.), https://www.ncjrs.gov/pdffiles1/nij/252073.pdf [https://perma.cc/F4AL-XSVG].

nal-records data. Second, an administrator must match the criminal-records data to the laws enacting collateral consequences—applying the law to the criminal record to determine if a particular consequence should lawfully attach.

These two steps are simple to state, but not to enact. Criminal-records data is essential to both steps of the matching process. Criminal-records data, however, is notoriously inaccurate and incomplete.[56] As a result, administrators match people to erroneous criminal-records data—data that belongs to someone else, or data that is flawed. They also match erroneous criminal-records data to the laws enacting collateral consequences. As a result, people suffer wrongful collateral consequences, such as wrongful sex-offender registration, wrongful felon disenfranchisement, and wrongful employment consequences for workers.[57]

Wrongful collateral consequences also arise for a second, structural reason—because the laws enacting collateral consequences are complex. Legislatures often do not simply list all of the crimes that trigger a particular consequence. Instead, they write more expansively, using "catchall" provisions,[58] such as residual clauses and elements clauses,[59] which require legal interpretation.[60] Lawmakers also add complexity to duration clauses, which prescribe the length of time a consequence will attach.[61] Simple duration clauses ameliorate the harm of collateral consequences. But complex ones may lead to error because they require both hard to obtain data, and legal interpretation.

Reforms could get at the root causes of wrongful collateral consequences. Criminal justice data should be improved. Legislators should forego catchall clauses and use simple duration clauses. These reforms, however, face obvious practical and political obstacles.

Other reforms would leave the existing structures in place but could still help. Legislators should increase the procedural due process protections afforded when collateral consequences attach. Courts should expand the Sixth Amendment right to counsel recognized in

---

56 *See infra* note 98 and accompanying text.

57 *See infra* Section II.B.

58 *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside*, 65 STAN. L. REV. 901, 932–33 (2013).

59 See NAT'L INST. OF JUSTICE, *supra* note 55, paras. 8, 14; *see also infra* notes 216, 219 and accompanying text.

60 *See infra* Section II.B.

61 *See* Justice Ctr., *supra* note 19; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 11–12.

Padilla. Criminal-defense attorneys should work to prevent collateral consequences ex ante by "plea bargain[ing] creatively" to avoid them.[62] They should also begin to track collateral consequences ex post to identify errors. Lax administrative practices too should be confronted, although one reform—audits—could do more harm than good.

Part I of this Article exposes and defines wrongful collateral consequences. Part II explains how impoverished criminal-records data produces wrongful collateral consequences. Part III demonstrates how complex enacting laws—catchall clauses and complex duration clauses—produce wrongful collateral consequences. Part IV examines potential reforms and their limitations.

I. Revealing Wrongful Collateral Consequences

Scholars and advocates have made a compelling case that our caste system of collateral consequences is unjust but have largely overlooked one strand of the argument—the extent to which collateral consequences are imposed wrongfully. In fact, there is almost no scholarly literature acknowledging the existence of wrongful collateral consequences, and even less that addresses the topic globally.[63]

This gap in the literature is particularly surprising given the intense scholarly interest in wrongful *convictions*. Over decades of study, there has been an explosion in the literature on the topic.[64] Although some of this discourse notes that wrongful convictions result in

---

62 *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

63 *Cf.* Love et al., *supra* note 37, § 5:10 (pointing out that "mismatches" occur between people and criminal-records data); Erika Wood & Rachel Bloom, Am. Civil Liberties Union & Brennan Ctr. for Justice, De Facto Disenfranchisement 8 (Oct. 1, 2008), https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf [https://perma.cc/6FAA-YKY5] (arguing that complex voter-disenfranchisement laws are the "root causes of [a] national problem of de facto disenfranchisement"); Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Pa. L. Rev. 257, 293 (2005) (observing that when states seek to impose consequences for extrajurisdictional convictions, there exist dual challenges of obtaining the necessary criminal records and interpreting the law of the other state); Shawndra Jones, Note, *Setting Their Record Straight*, 41 Colum. J.L. & Soc. Probs. 479 (2008) (exposing the problem of factually innocent, exonerated, and pardoned individuals being registered as sex offenders because of inadequate due process and insufficient mechanisms for removal).

64 *See* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. Crim. L. & Criminology 825, 828 (2010).

wrongful collateral consequences,[65] the primary focus of the wrongful conviction movement is wrongful imprisonment.[66]

Still, the wrongful-conviction movement has something important to bear on the topic of collateral consequences. At its best, the wrongful-conviction movement illuminates structural problems in the criminal justice system—problems that extend far beyond individual exonerations.[67] This scholarship demonstrates that by studying wrongful collateral consequences, scholars can expose structural flaws in the system—a project this Article begins to undertake. For this reason, this Article uses the evocative word "wrongful" when describing erroneous collateral consequences.[68]

This Article, however, defines "wrongful" more broadly than it is commonly defined in the wrongful-conviction literature. Wrongful convictions are typically defined narrowly as convictions of factually innocent defendants, such as where the crime did not occur or was committed by someone else.[69] This Article, in contrast, defines wrongful collateral consequences as consequences that attach because of factual or legal error. It includes three types of error within the umbrella term wrongful collateral consequences: (1) collateral consequences erroneously imposed on people without criminal convictions, (2) collateral consequences erroneously imposed on people whose convictions do not lawfully trigger the consequences, and (3) collateral consequences erroneously imposed beyond their legal duration.[70]

---

65 *See* Jessica R. Lonergan, Note, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 438 (2008).

66 *See, e.g.*, Jeffrey S. Gutman, *An Empirical Reexamination of State Statutory Compensation for the Wrongly Convicted*, 82 MO. L. REV. 369, 385 (2017) (equating wrongful convictions with wrongful imprisonment for the purpose of assessing state compensation statutes).

67 *See, e.g.*, Gould & Leo, *supra* note 64, at 841 (identifying sources of wrongful convictions including mistaken eyewitness identification testimony, false confessions, perjury, and poor forensic science).

68 This Article does not suggest that wrongful convictions and imprisonment are "qualitatively" equal to wrongful collateral consequences. *See* Reid Kress Weisbord & George C. Thomas, III, *Judicial Sentencing Error and the Constitution*, 96 B.U. L. REV. 1617, 1627 (2016).

69 *See* James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1250 (2010); Barry C. Scheck & Peter J. Neufeld, *Toward the Formation of 'Innocence Commissions' in America*, 86 JUDICATURE 98, 104 n.24 (2002).

70 In the second and third scenarios, imposing the collateral consequence violates the law. By "the law," this Article refers to the laws enacting the collateral consequences. This Article does not use "wrongful collateral consequences" to refer to situations where imposing a particular collateral consequence violates some other legal source, for example, the Ex Post Facto Clause, Equal Protection Clause, or Title VII. *Cf.* Bernadette Atuahene & Timothy Hodge, *Stategraft*, 91 S. CAL. L. REV. 263, 300 (2018) (defining differently "in violation of . . . law[]").

A. "Mandatory" but Only Nearly "Automatic"

One reason why scholars have failed to expose the problem of wrongful collateral consequences lies in taxonomy. When categorizing collateral consequences, lawmakers, courts, and scholars typically begin by classifying them as either mandatory or discretionary. According to Congress, mandatory collateral consequences are "imposed by law as a result of an individual's conviction."[71] Put differently, they are sanctions "imposed on everyone who is convicted of a relevant criminal offense, and . . . imposed only on those criminals."[72] Deportation, for example, is a "virtually mandatory" consequence of certain convictions.[73] In contrast, discretionary collateral consequences apply because of the decision of some administrator, agency, or court.[74]

Labeling collateral consequences as mandatory is useful. The word mandatory identifies these collateral consequences for what they are—consequences required or commanded by law upon conviction for a triggering offense.[75] This label should be a wakeup call for criminal-defense lawyers and their clients.[76]

The taxonomy problem, thus, is not with the label mandatory. Rather, the problem is that mandatory collateral consequences have often been equated with "automatic" ones. The latter term obscures the fact that there must be an additional, nontrivial, and error-prone process to impose them.

The label "automatic" owes its origins to the American Bar Association,[77] whose Standards for Criminal Justice define a "collateral sanction" as a consequence imposed "automatically" upon conviction for a criminal offense.[78] The label "automatic" gained prominence in

---

71 Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510(d)(2)(A), 121 Stat. 2534 (2008).

72 Smith v. Doe, 538 U.S. 84, 112 (2003) (Stevens, J., dissenting).

73 *See* Padilla v. Kentucky, 559 U.S. 356, 359 (2010); *see also id.* at 369 (noting that deportation is "presumptively mandatory" under the statute).

74 *See* Court Security Improvement Act § 510(d)(2)(B). Discretionary collateral consequences frequently operate as mandatory ones in practice because decisionmakers fail to exercise their discretion. *See* LOVE ET AL., *supra* note 37, § 1:10. For example, as Eisha Jain observes, "Public housing authorities . . . often have discretion over whether to evict households after one member's conviction, . . . [b]ut they may not actually exercise that discretion if they can easily replace one tenant with another from a long waitlist." Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1236 (2016).

75 *See Mandatory*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Of, relating to, or constituting a command; required; preemptory.").

76 *See infra* note 387 and accompanying text (describing the lack of notice afforded criminal defendants that a criminal conviction will trigger collateral consequences).

77 *See* Smyth, *supra* note 5, at 158.

78 *See* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRE-

the ABA's national inventory of collateral consequences. The inventory allows users to search by consequence type, and a single category is "mandatory/automatic."[79]

The Supreme Court too has invoked the term automatic in this context but in a more nuanced way. In *Padilla*, the Court observed that deportation was a "nearly" automatic result of some convictions.[80] The Court was careful to use the qualifier "nearly," for it recognized that deportation requires further process beyond the criminal conviction. The Court understood that a conviction makes a person "subject to" or "eligible for" deportation.[81] It does not make deportation proceedings unnecessary.[82]

Given the importance of the ABA inventory and *Padilla*, advocates and scholars have unsurprisingly employed the term automatic to describe mandatory collateral consequences.[83] The problem is that stripped of *Padilla*'s qualifying "nearly," the label automatic is a misnomer. An automatic process, according to the Supreme Court, is one that involves "no additional decisions, contingencies, or delays."[84] It is "a mechanical cut-and-paste job," that occurs "seamlessly" and without the need for additional decisionmaking or any "special intervention."[85] An automatic process is like "a machine that would go of itself."[86]

Collateral consequences are not such a machine. To the contrary, imposing mandatory collateral consequences requires a two-step matching process. The steps are simple to state but difficult to enact. First, an administrator must match a person to his or her criminal-records data.[87] Second, an administrator must match the criminal-records data to the law enacting the collateral consequence to deter-

---

TIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-1.1(a) (3d ed. 2004). The ABA standards do not use the word "mandatory." *See id.*

79 *See* Justice Ctr., *supra* note 19; *see also* NAT'L INST. OF JUSTICE, *supra* note 55.

80 *See* Padilla v. Kentucky, 559 U.S. 356, 366 (2010); *see also id.* at 392 (Scalia, J., dissenting) (discussing "near-automatic removal").

81 *See id.* at 360, 368.

82 *See id.* at 378–80 (Alito, J., concurring).

83 *See, e.g.*, LOVE ET AL., *supra* note 37, §§ 1:2, 1:10; Love, *supra* note 37, at 118, 121–22; Radice, *supra* note 37, at 717–18; Roberts, *supra* note 30, at 327.

84 *See* Scialabba v. Cuellar De Osorio, 573 U.S. 41, 58 (2014) (plurality opinion) (citations omitted); *see also id.* at 92 (Sotomayor, J., dissenting) (relying upon the same definition).

85 *Id.* at 58, 68 (plurality opinion); *see also id.* at 92 (Sotomayor, J., dissenting) (characterizing an automatic process, like the majority, as one occurring "without a further decision or contingency").

86 *Id.* at 68 (plurality opinion).

87 *See* LOVE ET AL., *supra* note 37, § 5:10 (recognizing the problem of "mismatches" of people to criminal-records data).

mine whether a particular consequence should lawfully attach.[88] That is, an administrator matches a person to data and data to law (or *x* to *y* and *y* to *z*). Thus, collateral consequences are not "automatic," but only "nearly" so.

Some advocates might shy away from this point, for fear of taking collateral consequences out of the ambit of *Padilla*, which many seek to extend. But acknowledging that collateral consequences are not fully "automatic" will not render *Padilla* distinguishable, given the text of that opinion. In *Padilla*, the Supreme Court understood that immigration consequences are not fully "automatic." In his concurring opinion, Justice Alito persuasively explained that immigration consequences require someone to undertake the often complex and contested task of applying immigration law to a criminal conviction.[89] The majority was not troubled. It held that the need for this additional process does not obviate counsel's Sixth Amendment duty to advise a client of the immigration consequences of a conviction.[90]

B. A Potentially Sweeping Problem, Difficult to Detect

In addition to the problem of taxonomy, wrongful collateral consequences have been concealed because they are difficult for individuals to detect. This is so for several reasons. First, criminal defendants plea bargain "blindfolded," with little awareness of the downstream collateral consequences to come,[91] which may reduce awareness when errors arise. Second, collateral consequences attach outside of court, when most criminal defendants are no longer represented by counsel.[92] Third, when collateral consequences do attach, it is typically without notice or with only a weak form of notice that fails to specify the basis for attaching the consequence. Fourth, a person with a criminal record experiences "civil death," the loss of numerous economic, political, and social goods.[93] Psychologically, a natural reaction to this experience is to anticipate stigma,[94] not to attempt the project of parsing lawful collateral consequences from wrongful ones.

---

88 *See* Logan, *supra* note 63.

89 *See* Padilla v. Kentucky, 559 U.S. 356, 378–79 (2010) (Alito, J., concurring).

90 *See id.* at 369 (majority opinion).

91 *See* Stephanos Bibas, *Designing Plea Bargaining from the Ground Up*, 57 WM. & MARY L. REV. 1055, 1074 (2016); *see also id.* at 1075.

92 *See, e.g.*, Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 310 (2015).

93 *See* Chin, *supra* note 1, at 1790.

94 *See* Kelly E. Moore et al., The Self-Stigma Process in Criminal Offenders 2–3, 13 (Oct. 17, 2016) (prepublication manuscript), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5067087/pdf/nihms758898.pdf [https://perma.cc/RNK3-UYRF], *published in* STIGMA & HEALTH, Aug.

But failing to expose the problem of wrongful collateral consequences has a cost. Individuals suffer the unlawful loss of political, economic, and social rights. The system of collateral consequences also accrues legitimacy when it is perceived as "accurate, consistent, trustworthy, and fair."[95] If collateral consequences are regularly wrongful, then such procedural legitimacy is unwarranted.

Fortunately, there are sporadic examples of wrongful collateral consequences that have been well documented.[96] This Article synthesizes these examples in three general areas: wrongful sex-offender registration, wrongful felon disenfranchisement, and the wrongful denial of worker security clearances. These examples illuminate the systemic causes of wrongful collateral consequences: flawed criminal-records data and complex enacting laws. They also suggest that errors are widespread and significant. As scholars of wrongful convictions have noted, because the number of people with criminal convictions is enormous, even a small error rate produces a massive number of errors in absolute numbers.[97]

II. Faulty Criminal-Records Data Causes Wrongful Collateral Consequences

To understand how wrongful collateral consequences attach, it is helpful to return to the two-step matching process. Imposing collateral consequences is not fully automatic. First, an administrator must match people to criminal-records data. Second, an administrator must match this criminal-records data to the laws enacting collateral consequences, to determine whether a particular consequence should law-

---

2016, at 206; *see also* Jason Schnittker & Michael Massoglia, *A Sociocognitive Approach to Studying the Effects of Incarceration*, 2015 Wis. L. Rev. 349, 364.

95 Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 215 (2012).

96 *See infra* Sections II.B, III.C, III.E.

97 *See, e.g.*, Acker & Bonventre, *supra* note 69, at 1246; Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 42 Am. Crim. L. Rev. 1219, 1221–22 (2005). This Article does not attempt to quantify the problem, although it does highlight the need for future studies. Indeed, as scholars have said of wrongful convictions, the extent of the problem may be "unknowable." *See* Gould & Leo, *supra* note 64, at 835–36; Steven E. Raper et al., *Using Root Cause Analysis to Study Prosecutorial Error*, 62 Vill. L. Rev. Tolle Lege 13, 14 (2017). *But see* D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. Crim. L. & Criminology 761, 764 (2007) (arguing that the rate of wrongful convictions for capital rape-murder cases from the 1980s is around 3.3%–5%).

fully attach. Both steps depend upon the quality of criminal-records data. Notoriously, this data is inaccurate and incomplete.[98]

A. Incomplete, Inaccurate, and Mismatched Data

The infrastructure of criminal-records data in the United States is massive.[99] Although a Federal Bureau of Investigation ("FBI") background check is the "gold standard,"[100] there are many more sources of criminal-records data. Every state maintains a central repository of data submitted by the police, prosecutors, and the courts,[101] with financial support from the federal government.[102] Courts also maintain records, which are notable because they contain nonconviction data, such as the initial charges brought by the prosecution.[103] Court administrators generally make this data publicly available on the internet.[104] More criminal-records data is also in the hands of the police, and state and local correctional institutions.[105]

Commercial vendors, in turn, mine the government records. The multibillion-dollar commercial background-check industry buys and collects criminal-records data and sells it on the private market.[106] Commercial vendors complete millions of background checks a year.[107]

No matter the source, maintaining criminal-records data is challenging. This data is "dynamic" and, therefore, requires "constant refinement[] and maintenance."[108] Too often, maintenance falls short. Even the FBI's criminal-records data is incomplete because the states

---

98 *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *supra* note 4, at 7; LOVE ET AL., *supra* note 37, §§ 5:8–12; Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 560 (2016).

99 *See, e.g.*, James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 211 (2008).

100 *See* MADELINE NEIGHLY & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 1, 2, 5 (2013), http://www.nelp.org/publication/wanted-accurate-fbi-background-checks-for-employment [https://perma.cc/RS2J-33ZU].

101 *See* LOVE ET AL., *supra* note 37, § 5:38; Jacobs & Crepet, *supra* note 99, at 181.

102 *See* LOVE ET AL., *supra* note 37, § 5:42; Jacobs & Crepet, *supra* note 99, at 180–81.

103 *See, e.g.*, Jacobs & Crepet, *supra* note 99, at 183–84.

104 *See* LOVE ET AL., *supra* note 37, at §§ 5:5–6; Jacobs & Crepet, *supra* note 99, at 185; Roberts, *supra* note 30, at 328.

105 *See, e.g.*, LOVE ET AL., *supra* note 37, § 5:2.

106 *See, e.g.*, *id.* at 281, 291; *In re* Bulk Distrib. of & Remote Access to Court Records in Elec. Form, 954 N.E.2d 908, 909 (Ind. 2011) (providing for sale of bulk records from Indiana courts' Odyssey case-management system).

107 *See* Jacobs & Crepet, *supra* note 99, at 185–86.

108 Kohler-Hausmann, *supra* note 18, at 643.

fail to provide the dispositions of criminal arrests.[109] Only twenty-nine states entered final disposition data for more than 60% of arrests occurring within a five-year period prior to one study.[110] The data was similarly incomplete for older arrests.[111]

Missing disposition data is no small matter. This is because an arrest hardly guarantees a conviction, let alone a conviction for the most serious charge brought by the prosecution. Many criminal defendants are never convicted or plead guilty to a lesser offense. In one national study, only 54% of felony arrests resulted in a felony conviction.[112] Only 66% resulted in a conviction at all.[113] The remaining cases were dismissed, resulted in a deferred adjudication, or were sent to a diversion program.[114]

A related problem is that criminal-records data is often missing postdisposition changes, particularly expungements. State and local repositories expunge such data, only to have it persist with the FBI[115] and in commercial databases.[116]

Criminal-records data is not only incomplete, but it is also inaccurate. One cause is human error. Real people, clerks or other court employees, must enter dispositions into courthouse databases. Common errors include listing the wrong offense, listing an offense twice, or using the wrong name for the defendant.[117] As has been said of prison records, "because people perform [these tasks], mistakes are inevitable."[118]

---

109 *See, e.g.*, GOTTSCHALK, *supra* note 6, at 244.

110 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *supra* note 4.

111 *See id.* at 2–3.

112 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 22 (2013), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4845 [https://perma.cc/H55Y-GPLF].

113 *See id.*

114 *See id.* The 66% conviction rate and 54% felony conviction rate were consistent with data from other years of the same study. *See id.* at 22, 25.

115 *Cf.* NEIGHLY & EMSELLEM, *supra* note 100, at 9–10, 19 (noting that in 2010, a mere 1,306 people petitioned the FBI to modify or correct their FBI records, although many more have erroneous or incomplete FBI records).

116 *See* PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER LAW CTR., BROKEN RECORDS 20–21 (2012), https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf [https://perma.cc/3DMC-ZX5E]; Radice, *supra* note 37, at 750; Roberts, *supra* note 30, at 341; Adam Liptak, *Criminal Records Erased by Courts Live to Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1. In addition to commercial databases, criminal-records data persists in other forms on the internet, for example, in social media websites, newspapers, and blog entries. *See* Sarah Esther Lageson, *Found Out and Opting Out*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 131, 135 (2016) (arguing for an expanded definition of criminal "record" to include online sources).

117 *See* LOVE ET AL., *supra* note 37, §§ 5:8, 5:10; Jacobs & Crepet, *supra* note 99, at 198.

118 OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL

Inaccurate criminal records also result from misstatements in court. During a guilty plea, the prosecutor will typically recite to the judge the terms of the plea. During this process, the Supreme Court has recognized, a criminal defendant has "no incentive to contest what does not matter,"[119] and in fact, has an incentive to remain silent for fear of "irk[ing] the prosecutor or court by squabbling about superfluous" issues.[120] For example, a criminal-defense lawyer could reasonably ignore a prosecutor's overly general statement that a defendant is pleading guilty to section (a) of a criminal statute when he or she agreed to plead guilty to subsection (a)(1) rather than (a)(2) or (3).[121]

In addition to the problems of incomplete and inaccurate criminal-records data, there is also the problem of mismatches.[122] Administrators match people to other people's criminal records with disturbing regularity.[123] Some mismatches occur because arrestees give false biographical information.[124] More often, the problem occurs because of weak search criteria. Administrators identify matches based on names and birthdays, which are not unique identifiers, rather than fingerprints or social security numbers.[125] This harm falls on people who have no criminal record whatsoever, and on those who do.

B. Faulty Data Causes Wrongful Collateral Consequences

Incomplete, inaccurate, and mismatched criminal-records data causes wrongful collateral consequences. Three examples illustrate these problems.

BUREAU OF PRISONS' UNTIMELY RELEASES OF INMATES 20 (2016), https://oig.justice.gov/reports/2016/e1603.pdf [https://perma.cc/V3CR-XZVX].

119 Mathis v. United States, 136 S. Ct. 2243, 2253 (2016).

120 Descamps v. United States, 570 U.S. 254, 270 (2013).

121 *See, e.g.*, United States v. Shepherd, 880 F.3d 734, 737, 746 (5th Cir. 2018) (observing that plea agreement was unclear as to whether the defendant pleaded guilty to public sexual indecency or public sexual indecency to a minor under ARIZ. REV. STAT. ANN. § 13-1403).

122 *See, e.g.*, Jones, *supra* note 63, at 482–87.

123 Mismatches between people and criminal-records data also result in wrongful arrests and even detention of people who have no criminal records whatsoever. *See, e.g.*, Robert Faturechi & Jack Leonard, *ID Errors Put Hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011), http://articles.latimes.com/2011/dec/25/local/la-me-wrong-id-20111225 [https://perma.cc/7UW2-H8ZN]; Dan Frosch, *Mistaken Identity Cases at Heart of Denver Lawsuit Over Wrongful Arrests*, N.Y. TIMES, (Feb. 16, 2012), https://www.nytimes.com/2012/02/16/us/lawsuit-in-denver-over-hundreds-of-mistaken-arrests.html [https://perma.cc/GPJ4-WCLK].

124 *See, e.g.*, LOVE ET AL., *supra* note 37, § 5:9.

125 *See id.* at 287; YU & DIETRICH, *supra* note 116, at 15, 33 (suggesting that where fingerprints are unavailable, background checks should be based upon "a combination of name, date of birth, social security number, former residences, gender, race, and physical description (such as height and weight)").

1. Wrongful Sex-Offender Registration

Registration as a sex offender is one of the most draconian consequences of a criminal conviction. A registrant's reputation is destroyed, eliminating most employment and housing prospects.[126] Federal law bars lifetime registrants and their households from federally assisted housing.[127] Some states and municipalities impose residency restrictions, which bar registered sex offenders from living—and sometimes working or even being located—within certain zones, such as within a few hundred or thousand feet from a school or park.[128] These restrictions effectively bar registered sex offenders from residing in some high-density areas,[129] as in parts of Miami and Los Angeles.[130] Sex offenders are also at risk of vigilante threats and violence.[131]

For most registrants, registration data is available publicly on the internet.[132] Federal guidelines require the states to post on the internet extensive biographical information, including registrants' names, residences, workplace addresses, school addresses, vehicle descriptions, license plate numbers, physical descriptions, and current photographs.[133] The public can search registry websites or sign up for automatic updates by email or through smartphone applications. Commercial entities mine the government registries and republish the data,[134] making registration indelible on the internet.

On top of this, registered sex offenders must navigate a byzantine system of reporting requirements—often including in-person report-

126 *See, e.g.*, LOGAN, *supra* note 35, at 125–26.

127 42 U.S.C. § 13663(a) (2012); 24 C.F.R. § 960.204(a)(4) (2018).

128 *See, e.g.*, David A. Singleton, *Representing Sex Offenders*, *in* HOW CAN YOU REPRESENT THOSE PEOPLE? 139, 145 (Abbe Smith & Monroe E. Freedman eds., 2013) (arguing that residency restrictions are arbitrary in their geographic cutoffs and apply irrationally to offenders whose victims were adults).

129 *See, e.g.*, LOGAN, *supra* note 35, at 79.

130 *See* Joseph Goldstein, *Housing Restrictions Keep Sex Offenders in Prison Beyond Release Dates*, N.Y. TIMES (Aug. 21, 2014), https://www.nytimes.com/2014/08/22/nyregion/with-new-limits-on-where-they-can-go-sex-offenders-are-held-after-serving-sentences.html?mcubz=1 [https://perma.cc/QF6Z-VT66]; Ian Lovett, *Neighborhoods Seek to Banish Sex Offenders by Building Parks*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/us/building-tiny-parks-to-drive-sex-offenders-away.html?mcubz=1 [https://perma.cc/Q2PR-K5JS].

131 *See* GOTTSCHALK, *supra* note 6, at 204; LOGAN, *supra* note 35, at 126; Allegra M. McLeod, Essay, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1581 (2014).

132 *See* 34 U.S.C. §§ 20920, 20922 (2012).

133 *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,059 (July 2, 2008).

134 *See, e.g.*, Moe v. Sex Offender Registry Bd., 6 N.E.3d 530, 537 (Mass. 2014).

ing for life.[135] The requirements are quite detailed and extend far beyond the requirement to register one's home address.[136] Few people could comply to the letter, especially over decades or even a lifetime.[137] Failure to comply is a felony[138] and may carry a mandatory prison sentence.[139]

It follows that avoiding sex-offender registration is often the top priority for criminal defendants, beyond even avoiding incarceration.[140] One goal is to negotiate a guilty plea to an offense that does not require registration, a common practice known as charge bargaining.[141] This works because in most states, sex-offender registration is triggered solely by the offense of conviction.[142] There is no individualized determination of risk.[143]

Given its severity, it is disturbing to consider that anyone is wrongfully registered. But wrongful registrations occur, and not infrequently. In 2017, the Pennsylvania State Police issued an annual report, which revealed that of 2,447 new registrations completed in one recent year, it had rejected 126—about five percent—as not requiring registration.[144] In 2017, the Massachusetts State Auditor reported the results of an audit of the state Sex Offender Registry Board ("SORB").[145] The most newsworthy finding was that SORB was miss-

---

135 *See* 34 U.S.C. §§ 20911(4), 20913(c), 20915(a)(3) (2012).

136 *See id.* §§ 20913, 20914; *see also* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,055–58.

137 Registrants must keep current esoteric and fast-changing biographical information. *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,055–58 (setting forth federal guidelines for the states). For example, some registrants without fixed workplaces must register the places where they "work[] with whatever definiteness is possible under the circumstances, such as information about normal travel routes or the general area(s) in which the sex offender works." *Id.* at 38,056. Some registrants must keep current "the place or places where the registrant's vehicle or vehicles are habitually parked, docked, or otherwise kept." *Id.* at 38,057. Some registrants must keep current any temporary lodging of "seven or more days." *Id.* at 38,056. The list goes on and on. *See id.* at 38,055–58.

138 *See* 34 U.S.C. § 20913(e) (2012) (directing the states to impose a maximum penalty greater than one year).

139 *See, e.g.*, MINN. STAT. § 243.166(5) (2017) (setting forth both a mandatory minimum sentence of "not less than a year and a day" and a procedure for departures).

140 *See* LOGAN, *supra* note 35, at 131.

141 *See, e.g.*, McLeod, *supra* note 131, at 1574–75. Charge bargaining, however, is made more difficult by expansive registration laws that include even low-level sexual offenses. *See id.*

142 *See id.* at 1575.

143 *See id.* at 1574.

144 *See* PA. STATE POLICE, MEGAN'S LAW SECTION ANNUAL REPORT 2 (2018), https://www.pameganslaw.state.pa.us/Documents/MegansLawAnnualReport.pdf [https://perma.cc/7PCX-7567].

145 *See* OFFICE OF THE STATE AUDITOR, SEX OFFENDER REGISTRY BOARD 4, 18 (Sept. 26,

ing addresses for almost 1,800 registrants.[146] But the report also included a startling footnote. SORB initially reported that it had 250 sex offenders awaiting classification.[147] But after the auditors completed their fieldwork, SORB reported that the 250-person figure was wrong.[148] SORB cryptically explained that the problem was the data—that "during the board's system upgrade, there were issues with some legacy records in the data conversion process. . . . [O]nce this was corrected, [SORB] determined that only 13 offenders out of this 250 have a registration requirement and 5 of them are currently incarcerated."[149]

Other wrongful sex-offender registrations occurred in California during the rollout of a new case-management system known as Odyssey.[150] In 2016, the Alameda County Superior Court found that Odyssey had resulted in wrongful registrations under section 290 of the state penal code,[151] the state's sex-offender registration law.[152] In a subsequent lawsuit, the county public defender alleged that the cause was "a coding error" in Odyssey, which converted all California drug registrations to sex-offender registrations for almost three months.[153]

2. Wrongful Voter Disenfranchisement

Wrongful collateral consequences also arise in the context of felon disenfranchisement—the practice of depriving citizens of the

---

2017), https://www.mass.gov/files/documents/2017/09/26/201614083s.pdf [https://perma.cc/QG23-ZRNH].

146 *See id.* at 18; *see also* Jeremy C. Fox, *Audit: Sex Offender Registry Lacking*, BOS. GLOBE, Sept. 28, 2017, at B4.

147 *See* OFFICE OF THE STATE AUDITOR, *supra* note 145, at 4 tbl.

148 *See id.* n.†.

149 *Id.*

150 *See* California v. Cruz, Nos. 178801, 16-CR-014010, at 4 (Super. Ct. Cal. Alameda Cty. Mar. 3, 2017), https://www.documentcloud.org/documents/3514379-Order-Denying-Odyssey-Motion.html [https://perma.cc/5K4R-DHGM] (citing several specific cases).

151 *See id. Cruz* was the lead case of approximately 2,000 cases raising motions to compel production of an accurate, contemporaneous record of the court proceedings. *See id.* at 1.

152 *See* CAL. PENAL CODE § 290 (West 2017).

153 Petition for Original Writ of Mandate and Accompanying Memorandum of Points and Authorities at 23, 43, Woods v. California, No. A151018 (Cal. Ct. App. Apr. 12, 2017), https://assets.documentcloud.org/documents/3678678/2016-Original-Writ-BWoods-ECruz-Original-Odyssey.pdf [https://perma.cc/D6MJ-BBJA] (distinguishing CAL. HEALTH & SAFETY CODE § 1590 from CAL. PENAL CODE § 290); *see also* Order Denying Petition Filed, Woods v. California, No. A151018 (Cal. Ct. App. June 28, 2017), http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2190036&doc_no=A151018&request_token=NiIwLSIkXkw9WzBJSyNNVE5IMFQ6UVxfJiJORztRMCAgCg%3D%3D [https://perma.cc/JY85-2WLG] (dismissing petition for lack of standing and because petitioners did not file in the lower court).

right to vote based upon criminal convictions.[154] Felon-disenfranchisement laws apply widely, to approximately one out of every forty adults.[155] Approximately 6.1 million people were disenfranchised as a result of a felony conviction as of 2016,[156] with a disproportionate impact on people of color.[157]

This disproportionate impact is consistent with the origins of felon disenfranchisement laws. They derive from Reconstruction-era laws designed to strip African Americans and naturalized immigrants of the right to vote.[158] Historically, states have implemented felon-disenfranchisement laws through voter "purges"—the removal of disqualified voters en masse.[159]

Through the twentieth century, the states conducted voter purges for criminal convictions, among other reasons,[160] despite the enact-

---

154 *See* GOTTSCHALK, *supra* note 6, at 244–45; MYRNA PÉREZ, BRENNAN CTR. FOR JUSTICE, VOTER PURGES 14 (Sept. 30, 2008), http://www.brennancenter.org/sites/default/files/legacy/publications/Voter.Purges.f.pdf [https://perma.cc/GK6F-G9EU].

155 *See* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016), http://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016 [https://perma.cc/W39V-MCNK].

156 *See id.* at 6.

157 Among African-American adults, over 7.4% are disenfranchised, compared to only 1.8% of the non-black population. *Id.* at 3–4. More recently, this situation has been ameliorated in part by a successful ballot initiative in Florida. *See, e.g.*, Tim Elfrink, *The Long, Racist History of Florida's Now-Repealed Bans on Felons Voting*, WASH. POST (Nov. 7, 2018), https://www.washingtonpost.com/nation/2018/11/07/long-racist-history-floridas-now-repealed-ban-felons-voting/?noredirect=on&utm_term=.7189f8bed260 [https://perma.cc/RS37-MWX6]. The initiative, passed in November 2018, amended the state constitution to provide that felon disenfranchisement "shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation." FLA. CONST. art. 6, § 4(a). The restoration provision excludes murder and felony sexual offenses. *See id.* at § 4(b).

158 *See* H.R. REP. NO. 103-9, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 105; Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349, 360–61 (2012); Pinard, *supra* note 20, at 470, 512–13; Steve Barber et al., Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 483, 486 (1988). This presupposes, of course, that would-be voters were eligible for naturalization in the first place—a status denied to Asian Americans even after the ratification of the Fourteenth Amendment. *See* John Hayakawa Torok, *Reconstruction and Racial Nativism: Chinese Immigrants and the Debates on the Thirteenth, Fourteenth, and Fifteenth Amendments and Civil Rights Laws*, 3 ASIAN L.J. 55, 66, 68 (1996).

159 *See, e.g.*, Barber et al., *supra* note 158, at 499.

160 For example, as of 1986, forty states had laws on the books purging voters from the rolls for nonvoting. *See* Brief for Am. History Professors as Amici Curiae in Support of Respondents at 16, Husted v. A. Philip Randolph Inst., 138 S. Ct. 1833 (2018) (No. 16-980); *see also* Williams v. Osser, 350 F. Supp. 646, 653 (E.D. Pa. 1972) (Luongo, J., dissenting).

ment of the Voting Rights Act of 1965.[161] Voter purges have had a disproportionate impact on African-American voters.[162]

Congress attempted to limit voter purges through the National Voter Registration Act ("NVRA") of 1993.[163] Under the NVRA, states can only remove voters from the rolls in limited circumstances,[164] including "by reason of criminal conviction."[165] Removal, moreover, is not required.[166] States may leave on the rolls voters who are temporarily disqualified because of a criminal conviction so that these voters do not have to reregister when the penalty ends.[167]

Yet some states continue to undertake systemic voter purges, including purges based upon criminal convictions.[168] Voter purges are highly decentralized.[169] The power to purge the rolls often lies with local election officials, such as a county supervisor of elections, county commissioner, or county clerk,[170] although the NVRA required the states to designate a chief election official.[171] Local officials sometimes remove voters "because of an apparent 'match'" between a voter registration record and a list of people ineligible to vote, such as disenfranchised felons.[172] In doing so, officials rely on criminal-records data from a mix of sources, including local courts and prisons.[173] The quality of this criminal-records data is dubious.[174] As a result, voter purges have wrongfully disenfranchised "hundreds—if not thousands—of

161 *See* S. REP. NO. 103-6, at 3 (1993).

162 *See* H.R. REP. NO. 103-9, at 3 (1993); Barber et al., *supra* note 158, at 487–96, 499.

163 *See* 52 U.S.C. § 20501(b) (2012); *see also* H.R. REP. NO. 103-9, at 15 ("The purpose of this requirement is to prohibit selective or discriminatory purge programs.").

164 *See* 52 U.S.C. § 20507(a)(3)–(4) (2012); *see also A. Philip Randolph Inst.*, 138 S. Ct. at 1846 & n.5 (assuming *arguendo* that this is so).

165 52 U.S.C. § 20507(a)(3)(B) (2012). The Help America Vote Act of 2002 mandated that states create and use statewide voter-registration databases. *See id.* § 21083(a)(1)(A). The only reference to felon disenfranchisement is the requirement that the states "shall coordinate the computerized list [of voters] with State agency records on felony status." *Id.* § 21083(a)(2)(A)(ii)(I). States can remove voters from the rolls only "in accordance with" the NVRA's voter protections. *Id.* § 21083(a)(2)(A)(i).

166 See Am. Civil Rights Union v. Phila. City Comm'rs, 872 F.3d 175, 182, 187 (3d Cir. 2017) (holding that county need not purge registered voters temporarily disqualified from voting during their incarceration).

167 *See id.*

168 *See* PÉREZ, *supra* note 154, at 7, 14–15.

169 *See* Barber et al., *supra* note 158, at 496.

170 *See* PÉREZ, *supra* note 154, at 15–16, 31–32.

171 *See* 52 U.S.C. § 20509 (2012).

172 *See* PÉREZ, *supra* note 154, at 22.

173 In addition, United States Attorneys are required under the NVRA to notify state election officials when a state resident is convicted of a felony in federal district court. 52 U.S.C. § 20507(g) (2012).

174 *See supra* Section II.A.

registrants who have not been convicted of felonies due to improper matching procedures."[175]

In Arkansas, for example, an administrator for the state's crime database produced a computer-generated list of supposedly ineligible voters in 2016.[176] The administrator sent the list to county election officials to purge the voters from the rolls.[177] But after the counties began removing voters, they discovered that the list was rife with error.[178] Among other problems, it erroneously labeled as felonies between four and five *thousand* convictions that arose in municipal courts, which cannot impose felony convictions.[179] Due to the red flags, some county officials voluntarily inspected the state's list.[180] One county reviewed each name—a process that took about five hundred hours and involved reams of court records.[181] It concluded that 1,119 of 1,730 people on the list—65%—were wrongfully identified to be disenfranchised.[182]

3. Wrongful Employment Consequences for Workers

Workers with criminal records face formidable employment consequences. Formal legal barriers prevent people with criminal convictions from working in certain jobs, working for public employers, or obtaining occupational licenses.[183] The public-safety rationale for these laws is only sometimes logical.[184] Some states restrict people

---

175 Am. Civil Rights Union v. Phila. City Comm'rs, 872 F.3d 175, 187 n.71 (3d. Cir 2017).

176 *See* Brian Fanney, *Slipped in Count on Felony Data, Center Exec Says*, ARK. DEMOCRAT-GAZETTE (Sept. 4, 2016), https://www.arkansasonline.com/news/2016/sep/04/slipped-in-count-on-felony-data-center-/ [https://perma.cc/H6G8-LW7V]; *see also* Brian Fanney, *20,000 Cases Erroneously Listed Felonies*, ARK. DEMOCRAT-GAZETTE (Sept. 3, 2016), https://www.arkansasonline.com/news/2016/sep/03/20-000-cases-erroneously-listed-felonie/ [https://perma.cc/X7D8-RQJM].

177 *See* Chelsea Boozer, *Error Flags Voters on Arkansas List; Thousands in Jeopardy of Having Their Registration Canceled*, ARK. DEMOCRAT-GAZETTE (July 25, 2016), https://www.arkansasonline.com/news/2016/jul/25/error-flags-voters-on-state-list-201607 [https://perma.cc/T7MU-YD4N].

178 *See id.*

179 *See* Fanney, *Slipped in Count on Felony Data*, *supra* note 176.

180 *See* Brandon Mulder, *Pulaski County Clerk's Office: Poll-Data Flaw Affected 1,119; Fault on 65% of Flagged-Voter List*, ARK. DEMOCRAT-GAZETTE (Aug. 29, 2016), https://www.arkansasonline.com/news/2016/aug/29/clerk-s-office-poll-data-flaw-affected--1/ [https://perma.cc/U5LQ-YPDT].

181 *See id.*

182 See *id.*

183 *See* LOVE ET AL., *supra* note 37, §§ 2:7–11; PAGER, *supra* note 18, at 33; Pinard, *supra* note 20, at 492–93.

184 *See* PAGER, *supra* note 18, at 33 (suggesting that "individuals with a history of violent crime are clearly inappropriate candidates for employment in child care institutions or schools").

with criminal records "from jobs as septic tank cleaners, embalmers, billiard room employees, real estate agents, plumbers, eyeglass dispensers, and barbers."[185] Workers also face informal consequences—employer aversion, hostility, and stereotyping.[186]

The scope of employment background checks increased dramatically post-9/11, as more laws required such checks and employer demand rose.[187] The size of the background-check machine is now enormous. About 2,800 state laws require or authorize FBI criminal background checks for employment or licensing.[188] The FBI conducted approximately 120 million criminal-records checks for employment, licensing, and other non–criminal justice purposes from 2009 to 2013.[189] This figure does not include background checks by state governments or the booming commercial background-check industry.[190]

For workers with criminal records, wrongful collateral consequences make a dire employment situation worse. One source of wrongful collateral consequences for workers is faulty criminal-records data.

To focus on one industry, port workers must obtain a security clearance called the Transportation Worker Identity Credential ("TWIC") card, which is contingent upon an FBI background check.[191] This is an important program, both for national security and for workers. It affects a large number of people: the Transportation Security Administration ("TSA") issued over 3.3 million TWIC cards in fewer than 10 years.[192] In addition, port jobs are coveted. They pay blue-collar workers a livable wage, often with the protection of a union.[193] But under the TWIC law, port workers are disqualified if

185 *Id.*

186 *See id.* at 24, 34.

187 *See* LOVE ET AL., *supra* note 37, § 5:5.

188 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-162, CRIMINAL HISTORY RECORDS: ADDITIONAL ACTIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND CHECKS 9 (2015).

189 *See id.* at 1.

190 *See supra* notes 106–07 and accompanying text.

191 The TWIC card is a product of a post-9/11 law, the Maritime Transportation Security Act ("MTSA") of 2002, which protects port security by imposing background checks on workers who seek to enter secure areas. *See* 46 U.S.C. §§ 70101–70117 (2012).

192 *See* TRANSP. SEC. ADMIN., U.S. DEP'T OF HOMELAND SEC., TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL (TWIC) INFORMATION FOR THE MILITARY TO MARINER INITIATIVE 3 (2015), www.cmts.gov/downloads/TWIC.pdf.

193 *See* MAURICE EMSELLEM ET AL., NAT'L EMP'T LAW PROJECT, A SCORECARD ON THE POST-9/11 PORT WORKER BACKGROUND CHECKS 1 (2009), www.nelp.org/content/uploads/2015/03/PortWorkerBackgroundChecks.pdf; *see also* LOVE ET AL., *supra* note 37, § 2:11 (noting the importance of this "blue collar job market").

they have a conviction for an enumerated felony offense.[194] The disqualification is either permanent or for a term of years, depending on the crime.[195]

The TWIC law also provides an appeal process,[196] which workers' rights advocates have generally heralded.[197] This appeal process makes TWIC a particularly useful example because appeals leave a paper trail, demonstrating when wrongful collateral consequences arise. The National Employment Law Project has published remarkable data on these appeals.[198] Between October 2007 and May 2013, 54,271 workers appealed the denial of their TWIC cards.[199] The overwhelming majority—52,299—were successful.[200]

This startling number of reversals cries out for an explanation. The answer is that TSA rejects any port worker whose FBI background check shows a disqualifying *arrest*, without noting the disposition.[201] But the FBI often lacks disposition data for charges, which may be dismissed or reduced.[202] In addition, an FBI background check may not include the data necessary to show that a conviction has lapsed for the purposes of the TWIC law.[203] Thus, over 96% of port workers won their appeals.[204]

III. Complex Enacting Laws Cause Wrongful Collateral Consequences

Even assuming that criminal-records data is complete, accurate, and not mismatched, wrongful collateral consequences arise for a second structural reason—because enacting laws are complex.

194 46 U.S.C. § 70105(c)(1) (2012).

195 The MTSA provides a "waiver" process, allowing workers to seek discretionary relief from a disqualifying criminal conviction. *Id.* § 70105(c)(2).

196 *Id.* § 70105(c)(4); 49 C.F.R. § 1515.5 (2018). If the TSA denies a TWIC card, the worker has the right to an appeal to an Administrative Law Judge and, if unsuccessful, to the "TSA Final Decision Maker." *Id.* § 1515.11. Judicial review is in a federal court of appeals, as in the immigration context. *See id.* § 1515.11(h) (citing 49 U.S.C. § 46110).

197 *See* Emsellem et al., *supra* note 193, at 3–5.

198 *See* Neighly & Emsellem, *supra* note 100, at 22.

199 *See id.*

200 *See id.*

201 *See* 49 C.F.R. § 1572.103(d) (2018) (providing that when a background check "discloses an arrest for a disqualifying crime listed in this section without indicating a disposition[,] . . . [t]he applicant must provide TSA with written proof that the arrest did not result in conviction for the disqualifying criminal offense, within 60 days after the service date of . . . notification [from the TSA]").

202 *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *supra* note 4.

203 *See infra* Section III.F.3.

204 *See* Neighly & Emsellem, *supra* note 100, at 22.

Lawmakers have expansive goals for collateral consequences, and so they draft deliberately elaborate enacting statutes. This Article addresses two sources of this complexity: (1) catchall clauses used to enumerate triggering crimes and (2) complex duration clauses.

A. Lawmakers Add Complexity with Catchall Clauses

Most collateral consequences do not apply upon conviction for every crime, but only to a subset. To delineate the triggering offenses, legislators need drafting techniques. The simplest option is to list all crimes that trigger a particular consequence by name and statute.[205] Lists are cumbersome but clear.[206]

But listing crimes is sometimes insufficient to fulfill legislators' expansive goals. For example, legislators often endeavor to encompass crimes in all jurisdictions[207]—something they cannot practically list. Legislators also seek to account for the fact that over time criminal laws are amended, renumbered, and repealed.[208] Legislators seek to encompass crimes as they existed in the past,[209] and listing all such crimes is difficult.

Furthermore, legislators recognize that if they list the crimes that trigger a particular collateral consequence, the courts will interpret their lists as exclusive.[210] That is, all unlisted crimes will not trigger the collateral consequence. In shorthand, this is the canon of *expressio unius est exclusio alterius*, or the notion "that the inclusion of specific terms signifies the exclusion of terms not mentioned."[211] In fact, an empirical study of congressional drafting practice revealed that legislators are both aware of the concept *expressio unius* and apply the principle in practice, intuitively if not by name.[212]

---

205 *See* NAT'L INST. OF JUSTICE, *supra* note 55, para. 8.

206 *See, e.g.*, 21 C.F.R. §§ 1308.11–1308.15 (2018) (federal drug schedules); *see also infra* Section III.C.2 (discussing Alabama reform enumerating crimes by name and statute, ALA. CODE § 17-3-30.1 (2017)).

207 *See* Logan, *supra* note 63, at 289.

208 *See* Kay L. Levine, *The External Evolution of Criminal Law*, 45 AM. CRIM. L. REV. 1039, 1046, 1092 (2008).

209 So long as the courts characterize collateral consequences as civil, and therefore outside of the protection of the Ex Post Facto Clause, legislators are free to impose them retroactively. *See* Smith v. Doe, 538 U.S. 84, 105–06 (2003); Kansas v. Hendricks, 521 U.S. 346, 361 (1997).

210 *See* Gluck & Bressman, *supra* note 58.

211 *Id.* at 932.

212 *See id.* at 932–33 (reporting on legislators "explaining that they 'signaled' whether they wished a list to be something other than exclusive, usually through the use of the word 'including' or a catch-all term"); *see also id.* at 952 (reporting that legislators "deployed the concepts underlying" *expressio unius*).

Legislators therefore turn to other strategies, particularly the use of catchall clauses to identify the crimes that trigger a particular collateral consequence.[213] For example, the Immigration and Nationality Act does not list most triggering offenses, but refers to "broad categor[ies] of crimes, such as crimes involving moral turpitude or aggravated felonies."[214]

Catchall terms take several forms. The bluntest is based on the grade of the crime, such as where all "felony" convictions trigger a particular consequence.[215] These are rough-hewn terms. They do not account for the fact that the category "felony" encompasses a wide range of criminal behavior and is defined differently across jurisdictions.[216]

A more tailored type of catchall clause is an "elements clause," in which a consequence applies upon conviction for a crime with certain elements. Elements are the crime's "legal definition—the things the 'prosecution must prove to sustain a conviction.'"[217] A famous elements clause in criminal law is in the Armed Career Criminal Act ("ACCA"), a harsh federal mandatory-minimum statute.[218] Under the ACCA's elements clause, a triggering offense is one that "has as an element the use, attempted use, or threatened use of physical force against the person of another."[219]

---

213 *See id.* at 932–33.

214 Padilla v. Kentucky, 559 U.S. 356, 378 (2010) (Alito, J., concurring) (emphasis omitted) (citation omitted); *see also* 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony"); Sessions v. Dimaya, 138 S. Ct. 1204, 1210–11 (2018) (striking as unconstitutionally vague one portion of the definition of "aggravated felony," 18 U.S.C. § 16(b) (2012)).

215 *See, e.g.*, ARIZ. CONST. art. VII, § 2 (disenfranchising voters "convicted of treason or felony," absent restoration); ARIZ. REV. STAT. ANN. § 13–904(A)(1) (2018) (suspending based upon a "conviction for a felony" the right to vote, absent restoration); Harvey v. Brewer, 605 F.3d 1067, 1081 (9th Cir. 2010) (upholding constitutionality of this statute); *see also* NAT'L INST. OF JUSTICE, *supra* note 55, paras. 8, 14.

216 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 188, at 21.

217 Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (quoting *Elements of Crime*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

218 The ACCA imposes a severe mandatory minimum sentence on a defendant who meets the definition of an "armed career criminal" because, in relevant part, he or she has three or more earlier convictions for a "serious drug offense" or "violent felony." 18 U.S.C. § 924(e)(1) (2012). The ACCA historically provided three ways a conviction counted as a "violent felony": one clause lists generic crimes, another is an elements clause, and the third was a residual clause. *Id.* § 924(e)(2)(B). The Supreme Court invalidated the residual clause in *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

219 18 U.S.C. § 924(e)(2)(B)(i) (2012). Similarly, the immigration removal statute provides for the removal of any noncitizen convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). The category "aggravated felony" includes a "crime of violence," which is defined in part by an elements clause. 18 U.S.C. § 16(a) (2012).

Another, more expansive type of catchall clause is a "residual clause." A residual clause provides that a particular consequence applies if the defendant is convicted of a crime that has "certain common characteristics . . . regardless of how they were labeled by state law," that is, as elements or not.[220] Again, a famous residual clause is in the ACCA, which defined a "violent felony" to include any felony that "involves conduct that presents a serious potential risk of physical injury to another."[221] The Supreme Court famously struck this residual clause as unconstitutionally vague in *Johnson v. United States*.[222]

Most collateral-consequence laws do not list all triggering crimes, but rather employ catchall terms, as the ABA found when building its inventory of all collateral consequences nationwide.[223] A collateral consequence might be triggered upon conviction for "any felony" or upon conviction for "crimes involving moral turpitude," or "crimes of violence,"[224] categories defined through elements clauses and residual clauses.

B. Interpreting Catchall Clauses

The prevalence of catchall terms had a profound effect on the ABA's inventory project. It would have been valuable to build a database searchable by crime so that practitioners could look up a crime and see all of the collateral consequences it triggers.[225] Unfortunately, creating such a database is far from practical because of catchall clauses. The ABA found that determining "which consequences are triggered by a particular crime . . . must be made on a case-by-case basis, an exercise which exceeded the scope of [its] project."[226]

---

220 *See* Taylor v. United States, 495 U.S. 575, 589 (1990) (chronicling the legislative history of the ACCA).

221 *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2012), *invalidated by Johnson*, 135 S. Ct. at 2563.

222 135 S. Ct. 2551, 2563 (2015).

223 *See* NAT'L INST. OF JUSTICE, *supra* note 55, para. 8.

224 *See id.* ("In most cases, the crimes that trigger particular consequences are identified in the database in terms of general categories (e.g., 'any felony,' 'crimes involving moral turpitude,' 'crimes of violence'), because this is the way most consequences identify their triggering offenses."); *see also* OHIO JUSTICE & POLICY CTR., THE OHIO CIVICC DATABASE USER GUIDE para. 10 (2017), https://civicc.opd.ohio.gov/Home.aspx/GetPDF?Length=4 [https://perma.cc/JJP3-DMFP] (observing that Ohio employs catchall terms to define offenses involving "dishonesty," "moral turpitude," and "violence").

225 *See* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 686 (2011) (proposing a searchable database for the twenty-five most common crimes in a jurisdiction).

226 NAT'L INST. OF JUSTICE, *supra* note 55, para. 8. In contrast, the Ohio Justice and Policy Center has attempted to identify the state crimes that fall within particular catchall clauses, while recognizing the challenges of this project. OHIO JUSTICE & POLICY CTR., *supra* note 224, para. 8.

Indeed, even a case-by-case inquiry by the ABA would not have been enough. This is because reasonable lawyers or jurists might disagree about which crimes fall within a given catchall clause.[227]

Resolving such disputes is no small matter. Put simply, the task is matching criminal-records data to catchall clauses. But behind this notion is the challenging application of one set of laws (criminal statutes) to another set of laws (laws enacting collateral consequences). This raises many potentially contested questions.

The first challenge is to identify the relevant criminal-records data. In criminal law, the relevant data is generally the offense of conviction.[228] As the Supreme Court has explained, it would be "utter[ly] impractical[]" for sentencing courts to reconstruct the facts of past crimes to determine whether they trigger a downstream consequence.[229] For this reason, among others,[230] courts use the "categorical approach," looking only at the offense of conviction, not the facts of the crime.[231]

But even looking only to the conviction requires determining how narrowly or broadly to define it—something that may not be clear from the criminal-records data. Consider, for example, a person with a conviction for aggravated assault. The relevant data point might be the aggravated-assault conviction, period.[232] Or it might be the conviction for aggravated assault, subsection (a)(4).[233] Or it might be the conviction for aggravated assault, subsection (a)(4), with an intentional *mens rea*.[234]

---

227 *See* Padilla v. Kentucky, 559 U.S. 356, 378–79 (2010) (Alito, J., concurring) (explaining the challenges of determining whether a crime is an "aggravated felony" or one "involving moral turpitude" under the Immigration and Nationality Act).

228 *See* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).

229 *See* Johnson v. United States, 135 S. Ct. 2551, 2562 (2015) (citation omitted).

230 *See* Taylor v. United States, 495 U.S. 575, 601–02 (1990) (explaining that two rationales for applying the categorical approach are the statutory text and legislative history). Another rationale is constitutional avoidance. The categorical approach "avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." Descamps v. United States, 570 U.S. 254, 267 (2013); *see also id.* at 269–70.

231 *See Mathis*, 136 S. Ct. at 2248; *see also* Sessions v. Dimaya, 138 S. Ct. 1204, 1213–15 (2018) (applying the categorical approach to 18 U.S.C. § 16(b)); *Johnson*, 135 S. Ct. at 2557 (applying the categorical approach to the ACCA's residual clause); *Descamps*, 570 U.S. at 257 (applying the categorical approach to the ACCA's enumerated offenses); Johnson v. United States, 559 U.S. 133, 144 (2010) (applying the categorical approach to the ACCA's elements clause). *But see* Nijhawan v. Holder, 557 U.S. 29, 36 (2009) (providing that sometimes the underlying facts are the reference point).

232 *See, e.g.*, 18 PA. CONS. STAT. § 2702(a) (2017).

233 *See, e.g.*, *id.* ("A person is guilty of aggravated assault if he . . . attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon . . . .").

234 *See id.*

The Supreme Court resolves this issue with the doctrine of divisibility.[235] In short, a conviction is defined as the narrowest crime that a jury would be required to find unanimously to convict.[236] A court narrows the conviction this far, but no further.[237] It does not narrow the conviction into which of the "various factual ways of committing some component of the offense" the defendant actually employed—because the jury would not need to agree on those means.[238]

But divisibility is a contested issue.[239] And still, the matching process is not complete. All that is established is the relevant criminal-records data side of the match. There is still more work to be done—applying to the conviction the law enacting the collateral consequence. Here, an administrator must interpret both the text of the criminal statute, and the text of the law enacting the consequence.[240] These laws can be vague or ambiguous. Interpreting each one requires the full inventory of statutory interpretation tools, such as an analysis of the context in which it was enacted.[241]

This matching process takes place over and over and over again. There is potentially a new question for every collateral consequence, as applied to every criminal statute. One can picture the challenge as matching two modified roulette wheels.[242] One wheel has riddles; one has pictograms. Both wheels spin and then stop. Every time the wheels stop, one must determine whether the results match. This

---

235 *See Mathis*, 136 S. Ct. at 2249.

236 *See id. Mathis* illustrated the concept of divisibility with the example of a hypothetical burglary statute that criminalized either lawful *or* unlawful entry with the intent to steal, "so as to create two different offenses, one more serious than the other." *Id.*

237 *See id.*

238 *Id.*

239 *See, e.g.*, United States v. Howell, 838 F.3d 489, 498 (5th Cir. 2016) (holding that Texas crime of family-violence strangulation, TEX. PENAL CODE ANN. § 2201(a)(1), (b)(2)(B) (West 2009), is not divisible by mental state); United States v. Headbird, 832 F.3d 844, 849 (8th Cir. 2016) (holding that Minnesota crime of assault with a dangerous weapon, MINN. STAT. § 609.222(1) (2014), is not divisible by the type of weapon used).

240 For example, the federal firearm disability statute bars gun possession by anyone convicted of a "misdemeanor crime of domestic violence," 18 U.S.C. § 922(g)(9) (2012), which is defined, inter alia, as a crime that has "as an element, the use or attempted use of physical force," *id.* § 921(a)(33)(A)(ii). *See also* Voisine v. United States, 136 S. Ct. 2272, 2278–80 (2016) (defining "use" in this context); United States v. Castleman, 134 S. Ct. 1405, 1410 (2014) (defining "force" in this context).

241 *See* King v. Burwell, 135 S. Ct. 2480, 2489 (2015) ("[W]hen deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions.'" (citations omitted)).

242 *Cf.* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007) (employing roulette metaphor).

matching process is hard enough for the courts,[243] but in the case of collateral consequences, administrators generally do it. It is not surprising that wrongful collateral consequences result.

C. Catchall Clauses Cause Wrongful Collateral Consequences

The difficulty caused by catchall clauses is illustrated by two examples: wrongful sex-offender registration and wrongful voter disenfranchisement. Sex-offender registration is a useful example because this issue—unlike other collateral consequences—is often litigated within criminal cases, resulting in a body of appellate decisions.[244] Voter disenfranchisement is a timely example, given recent litigation and reform efforts around catchall terms.[245]

1. Wrongful Sex-Offender Registration

The federal sex-offender registration law is currently set forth in Title I of the Adam Walsh Child Protection and Safety Act, title I of which is known as the Sex Offender Registration and Notification Act ("SORNA").[246] Under SORNA, a conviction for a "sex offense" requires registration, without any individualized determination of risk.[247] SORNA defines a "sex offense" in several ways,[248] including at least three catchall provisions.[249]

These catchall clauses raise the foundational question whether the categorical approach applies to registration. It does.[250] SORNA does not require the states "to look beyond the elements of the offense of conviction in determining registration requirements, except

---

243 *See* Johnson v. United States, 135 S. Ct. 2551, 2558 (2015).

244 Sex-offender registration is litigated in criminal appeals in two primary ways. First, defendants challenge registration as a condition of supervised release. *See, e.g.*, United States v. Faulls, 821 F.3d 502, 509–16 (4th Cir. 2016); United States v. Dodge, 597 F.3d 1347, 1350–56 (11th Cir. 2010). Second, defendants challenge registration within failure to register prosecutions, for which an element of the offense is whether the defendant was required to register in the first place. *See, e.g.*, United States v. Hill, 820 F.3d 1003, 1004–06 (8th Cir. 2016); United States v. Rogers, 804 F.3d 1233, 1235–38 (7th Cir. 2015); United States v. Price, 777 F.3d 700, 703–05 (4th Cir. 2015); United States v. Gonzalez-Medina, 757 F.3d 425, 428–32 (5th Cir. 2014).

245 *See, e.g.*, 2017 Ala. Laws 378 (codified at ALA. CODE § 17-3-30.1 (2017)); Thompson v. Alabama, 293 F. Supp. 3d 1313 (M.D. Ala. 2017).

246 *See* Pub. L. 109-248, 120 Stat. 587 (2006).

247 *See* 34 U.S.C. § 20913 (2012) (requiring a "sex offender" to register); *id.* § 20911 ("The term 'sex offender' means an individual who was convicted of a sex offense.").

248 *See id.* § 20911.

249 *See id.* § 20911(5)(A)(i)–(ii), (5)(C).

250 *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,031 (July 2, 2008).

with respect to victim age."[251] Just so, courts have applied the categorical approach to SORNA's first catchall clause,[252] defining a "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another."[253] They have looked to the facts to determine the parties' ages, where applicable.[254]

At the same time, courts have applied mixed approaches as to another SORNA catchall term, which includes in the definition of "sex offense" as "[a]ny conduct that by its nature is a sex offense against a minor."[255] Several federal courts of appeals have rejected the categorical approach in this context.[256] The Maryland Supreme Court, by contrast, applied the categorical approach to a similar catchall clause under state law.[257] This issue is still a contested one.

This disagreement is significant. When courts disagree as to how to interpret catchall clauses, administrators have great discretion—at least until the disagreements are resolved in court. In Pennsylvania, for example, some county officials required people to register as sex offenders based upon the facts underlying their convictions for misdemeanor corruption of a minor.[258] A state appellate court, however, applied the state's categorical approach and held that this crime is categorically not a triggering offense.[259] In Texas, law enforcement officials considered the elements *and* the facts of out-of-state convictions

---

251 *Id.* at 38,031.

252 *See, e.g.*, United States v. Faulls, 821 F.3d 502, 512 (4th Cir. 2016); United States v. Rogers, 804 F.3d 1233, 1237 (7th Cir. 2015).

253 34 U.S.C. § 20911(5)(A)(i) (2012).

254 SORNA provides that the definition of a "sex offense" excludes certain "consensual sexual conduct" where the victim was at least thirteen and the offender not more than four years older. *Id.* § 20911(5)(C). When interpreting this catchall clause, at least two federal courts of appeals have looked at the facts of the prior conviction to determine the parties' ages. *See* United States v. Gonzalez-Medina, 757 F.3d 425, 431 (5th Cir. 2014); *Rogers*, 804 F.3d at 1237.

255 34 U.S.C. § 20911(7)(I) (2012); *see also id.* § 20911(5)(A)(ii) (defining "sex offense" as "a criminal offense that is a specified offense against a minor"); *id.* § 20911(7) (defining "specified offense against a minor").

256 *See* United States v. Hill, 820 F.3d 1003, 1005 (8th Cir. 2016); United States v. Price, 777 F.3d 700, 708 (4th Cir. 2015); United States v. Dodge, 597 F.3d 1347, 1355 (11th Cir. 2010).

257 *See* State v. Duran, 967 A.2d 184, 194 (Md. 2009) (applying the categorical approach to a catchall clause defining an "offender" as a person who "has been convicted of a crime that involves conduct that by its nature is a sexual offense against a person under the age of 18 years").

258 *See, e.g.*, Commonwealth v. Andres, No. 208 WDA 2013, 2014 WL 10980097, at *2 (Pa. Super. Ct. Feb. 28, 2014) (noting that a county probation officer had notified the defendant that he was required to register based upon his conviction for corruption of a minor, 18 PA. CONS. STAT. § 6301(a)(1) (2012), *amended by* Act No. 2010-69, 2010 Pa. Legis. Serv. 2010-69 (West)).

259 *See* Commonwealth v. Sampolski, 89 A.3d 1287, 1289–90 (Pa. Super. Ct. 2014) (finding sex-offender registration not required upon conviction for the Pennsylvania misdemeanor offense of corruption of a minor, § 6301(a)(1)).

until 2012, when a state court held that the categorical approach applies.[260] Such court decisions establish that some discretionary registrations were wrongful. Or as the Ohio Supreme Court put it, "a court cannot assume that a defendant is under a duty to register merely because law enforcement claims that he is."[261]

2. *Wrongful Voter Disenfranchisement*

Catchall clauses also cause wrongful collateral consequences for voters,[262] as illustrated in Alabama. Alabama's felon-disenfranchisement law denies the right to vote to individuals convicted of felonies "involving moral turpitude," unless their voting rights have been restored.[263] The term "moral turpitude" owes its origins to a 1901 state constitutional convention, at which Alabama added the phrase to the state constitution.[264] Although the Supreme Court struck the 1901 law in 1985,[265] finding that it was enacted in an unabashed effort to further "white supremacy" by disenfranchising African-American voters,[266] Alabama reenacted disenfranchisement for crimes of moral turpitude in 1996.[267]

Neither the 1901 version nor the 1996 version of the Alabama Constitution defines moral turpitude.[268] As a result, county registrars had the discretion to interpret the law—and to disenfranchise voters—based upon patchy state-court decisions and guidance from the state Attorney General.[269] The administrative guidance, according to critics, was "non-exhaustive, non-authoritative, vague, and internally

---

260 *See* United States v. Shepherd, 880 F.3d 734, 739 (5th Cir. 2018) (citing Tex. Dep't of Pub. Safety v. Anonymous Adult Tex. Resident, 382 S.W.3d 531, 535 (Tex. App. 2012)).

261 State v. Lloyd, 970 N.E.2d 870, 883 (Ohio 2012).

262 *See* WOOD & BLOOM, *supra* note 63.

263 *See* ALA. CONST. art. VIII, § 177(b); *see also* ALA. CODE § 15-22-36 (2015) (authority of Board of Pardons and Parole to grant pardons); *id.* § 15-22-36.1(a) (setting forth the requirements for a "Certificate of Eligibility to Register to Vote"); *id.* § 17-3-31 (LexisNexis 2007) (authority of Board of Pardons and Parole to grant a "Certificate of Eligibility to Register to Vote").

264 *See* Hunter v. Underwood, 471 U.S. 222, 226 (1985).

265 *See id.* at 233.

266 *See id.* at 229.

267 *See* Thompson v. Alabama, 293 F. Supp. 3d 1313, 1318 (M.D. Ala. 2017). Unlike the 1901 version, the 1996 amendment to the Alabama Constitution applied only to felony, not misdemeanor, offenses. *Id.*

268 *See* ALA. CONST. art. VIII, § 177(b); ALA. CONST. of 1901, art. VIII, § 182; *see also Hunter*, 471 U.S. at 226 (noting that 1901 state constitution does not define "moral turpitude"); *Thompson*, 293 F. Supp. 3d at 1318 (noting that 1996 state constitution does not define "moral turpitude").

269 *See Hunter*, 471 U.S. at 226 (noting that registrars relied upon state law or opinions of the state Attorney General to interpret the "moral turpitude" clause as enacted in 1901);

inconsistent."[270] Among other problems, the guidance did not enumerate the disqualifying crimes or described them only generally, e.g., burglary.[271]

Under this regime, county registrars used their discretion to determine what convictions were crimes of moral turpitude.[272] Some officials, for example, concluded that possession of a controlled substance was grounds for disenfranchisement.[273] In these instances, a county official would prevent individuals from registering to vote.

Fortunately, in 2017, Alabama lawmakers reformed this law, thereby reducing the potential for wrongful voter disenfranchisement.[274] The Felony Voter Disqualification Act aims to "ensure that no one is wrongly excluded from the electoral franchise."[275] The law defines crimes of moral turpitude with a "comprehensive list" of offenses[276] set forth by name and section.[277] The list is exclusive.[278]

In the wake of the Alabama law, reform advocates reported registering thousands of people with felony convictions, many of whom previously believed they were ineligible to vote or were told they were ineligible.[279] One would-be voter had been given "conflicting information" as to whether she was disenfranchised based upon convictions for possession of a controlled substance.[280] Another voter had been

---

Thompson, 293 F. Supp. 3d at 1318 (noting that registrars relied upon the same sources to interpret the "moral turpitude" clause as enacted in 1996).

270 Class-Action Complaint for Declaratory and Injunctive Relief para. 23, *Thompson*, 293 F. Supp. 3d 1313 (No. 2:16-cv-783).

271 *See id.* paras. 27, 29–30.

272 Connor Sheets, *Alabama Election Officials Remain Confused Over Which Felons Should Be Able to Vote*, AL.COM (Oct. 13, 2017, 12:19 PM), http://www.al.com/news/index.ssf/2017/10/alabama_election_officials_rem.html#article [https://perma.cc/4CZB-C8M2].

273 *See id.* (county official stating that prior to the law reform, possession of a controlled substance was a disqualifying felony in Macon County).

274 *See* ALA. CODE § 17-3-30.1 (2017).

275 *Id.* § 17-3-30.1(b)(2)(b).

276 *Id.* § 17-3-30.1(b)(2)(c).

277 *See id.* § 17-3-30.1(c).

278 *See id.* § 17-3-30.1(e). However, the Alabama law does have a provision for analogous crimes committed in other jurisdictions. *Id.* § 17-3-30.1(c)(47) (providing that list of crimes of moral turpitude includes "[a]ny crime as defined by the laws of the United States or by the laws of another state, territory, country, or other jurisdiction, which, if committed in this state, would constitute one of the offenses listed in this subsection.").

279 *See* Connor Sheets, *Thousands of Alabama Felons Register to Vote in Last-Minute Push*, AL.COM (Nov. 27, 2017), http://www.al.com/news/index.ssf/2017/11/advocates_make_last-minute_pus.html [https://perma.cc/GN3T-8VM3].

280 Class-Action Complaint for Declaratory and Injunctive Relief, *supra* note 270, para. 44.

purged from the rolls based on a stalking conviction, which is not a crime involving moral turpitude under the new law.[281]

D. Lawmakers Add Complexity to Duration Clauses

Collateral consequences, fortunately, are not always permanent. Duration clauses mitigate the harm of collateral consequences by limiting them temporally.[282] Yet legislators do not always take the simplest route to establishing duration. In an effort to create more expansive laws, they write complex duration clauses. These produce another form of wrongful collateral consequences—consequences imposed for longer than allowed by law.

The ABA's inventory includes several categories for duration. First, some collateral consequences are "permanent/unspecified," which means either that the consequence attaches until death or that the law is silent on when the consequence will expire.[283] Second, some collateral-consequence laws provide a "specific term."[284] Third, some collateral consequences are "conditional," meaning that they expire if a specified event occurs, such as the completion of drug treatment.[285]

These categories mask even greater variation in the law. Yet scholars have done surprisingly little to parse such duration clauses.[286] Doing so reveals that legislators add layers of complexity.

The first question in evaluating a duration clause is when does the clock start. There are many options. The simplest duration clauses begin consequences on the date of arrest or conviction. The clock can also start on the date of sentencing, after release from incarceration,

---

281 *See id.* para. 42.

282 Permanent or lifetime collateral consequences fail to account for rehabilitation or the natural crime desistance that comes with age. For example, of federal collateral consequences that apply to nonviolent drug offenders, 78% potentially last for life. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 11-12.

283 *See id.* at 11. Notably, collateral-consequence laws of "unspecified" duration are grouped with "permanent" consequences. In contrast, under ordinary contract law principles, "when a contract is silent as to the duration of [a] benefit[], a court may not infer that the parties intended those benefits to vest for life." M & G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 937 (2015).

284 *See id.*

285 *See id.* at 11–12.

286 *Cf.* Christopher Gowen & Erin Magary, *Collateral Consequences: How Reliable Data and Resources Can Change the Way Law Is Practiced*, 39 FORDHAM URB. L.J. 65, 85 (2011) (arguing for simple duration clauses); Wayne A. Logan, *"When Mercy Seasons Justice": Interstate Recognition of Ex-Offender Rights*, 49 U.C. DAVIS L. REV. 1, 10 (2015) (describing duration clauses as mechanisms for restoration by operation of law).

or after completion of all aspects of the criminal sentence.[287] Some collateral consequences start when a person establishes a connection to the jurisdiction, or after release from a hospital or inpatient facility.[288]

The next question is when does the clock stop. The simplest duration clauses end after a specified term of years. But there are many more options. For example, state bans on jury service[289] stop at a wide range of times—upon release from incarceration,[290] completion of supervision,[291] release from incarceration plus fifteen years,[292] or completion of supervision plus ten years.[293] Still other jury-service bans stop when multiple events occur—release from incarceration or seven years from conviction (whichever is longer),[294] or completion of supervision or ten years from conviction (whichever is longer).[295]

Complex duration clauses also sometimes require individuals to apply or otherwise affirmatively take action upon the conclusion of the relevant term. These laws have been criticized for imposing "bureaucratic red tape" between people and rights for which they are legally eligible.[296]

Legislators add more complexity by applying reciprocity to other states. A statute might provide that a collateral consequence applies either for the length of time set forth intrastate, or for the length of time prescribed by the state of conviction.[297] Some collateral consequences provide "credit" for time that the collateral consequence applied out of state.[298]

---

287 *See, e.g.*, 730 ILL. COMP. STAT. ANN. 150/7 (LexisNexis 2018) (setting forth several alternative start dates for ten-year sex-offender registration penalty).

288 *See, e.g.*, OHIO REV. CODE ANN. § 2950.07(A)(4) (West 2017) (duty of certain individuals to register as sex offender commences upon establishing a residence, beginning work, or starting school in Ohio).

289 *See* Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 150-57 (2003).

290 *See, e.g.*, N.D. CENT. CODE §§ 12.1-33-01(1)(a) (2012), 27-09.1-08(2)(e) (2016).

291 *See, e.g.*, IDAHO CODE § 18-310(1) (2002).

292 *See* OR. CONST. art. I, § 45(1)(a)-(b).

293 Jury Plan for the Superior Court of the District of Columbia § 7 (2013).

294 *See* CONN. GEN. STAT. ANN § 51-217(a)(2) (West 2003).

295 *See* KAN. STAT. ANN. §§ 21-4615(1)–(2), 43-158(c) (2002).

296 *See* WOOD & BLOOM, *supra* note 63, at 10 (critiquing voter-disenfranchisement laws, which require individuals to complete paperwork before their voting rights are restored).

297 *See, e.g.*, KAN. STAT. ANN. § 22-4906(k) (West 2017) (duration of sex-offender registration for registrants convicted out of state "moving to" Kansas is either the duration required by Kansas law or the duration required out of state, whichever is longer).

298 *See, e.g.*, OHIO REV. CODE ANN. § 2950.07(E) (West 2017) (registered sex offender can apply for credit for time registered in another jurisdiction but bears the burden of proving compliance out of state).

On top of this, legislators sometimes create multiple tiers of duration, depending on the crime. These clauses are particularly complex. For example, Michigan prohibits people convicted of felonies from possessing a firearm for a term of years.[299] The law contains two tiers.[300] The default duration is three years after the completion of all aspects of one's sentence,[301] but it is five years if the conviction is for a "specified felony."[302] Specified felonies are defined, in part, through catchall terms[303] with all of the difficulty such terms entail.

Complex duration clauses may also be contingent upon future events. For example, a harsh collateral-consequence law might provide that the duration becomes longer, or even starts over if the individual is convicted of another triggering offense.[304] Conversely, the law might provide for early relief if the individual satisfies certain conditions.[305]

Complex duration clauses can require statutory interpretation. Their texts can contain ambiguities, which litigants can reasonably debate, requiring adversarial testing in court.[306] In addition, they are not fixed. Lawmakers are constitutionally free to tinker with them, and to impose the changes retroactively, presuming that the Ex Post Facto Clause does not apply.

E. Complex Duration Clauses Require More Data

The simplest duration clauses use a start date that is easy to identify, such as the date of conviction. They end at a time that is easy to identify, such as after a term of years.

In comparison, complex duration clauses require much more criminal-records data. Depending on the terms, applying them might require data on when a person was released from incarceration, finished supervision, or was granted relief from the collateral consequence. This data, moreover, is decentralized. It is not available upon

---

299 *See* MICH. COMP. LAWS ANN. § 750.224f (West 2004).

300 People v. Perkins, 703 N.W.2d 448, 451 (Mich. 2005) (citing § 750.224f).

301 *See* § 750.224f(1). A "felony" is an offense punishable by imprisonment of four years or more. § 750.224f(5).

302 *See id.* § 750.224f(2).

303 *See id.* § 750.224f(6); *see also Perkins*, 703 N.W.2d at 452 (holding that crime of larceny from the person, MICH. COMP. LAWS ANN. § 750.357, falls within this residual clause).

304 *See, e.g.*, *infra* notes 323–25.

305 *See, e.g.*, N.C. GEN. STAT. § 14-208.12A (2017) (providing for petition for early termination of sex-offender registration).

306 *See, e.g.*, Commonwealth v. Giulian, 141 A.3d 1262, 1264 (Pa. 2016) (interpreting for the purpose of expungement statute the meaning of the duration clause "has been free of arrest or prosecution for five years following the conviction for that offense" (citation omitted)).

the click of a button or a mouse. Rather, the necessary data can be in the hands of local jails, state prisons, state parole authorities, local probation departments, the courts, or beyond. An administrator must track it down, and sometimes the individual affected must do the tracking down first.[307] Either way, this is not easy.

By analogy, administrators who calculate federal prison sentences must regularly obtain records from state and local prisons and jails. They have explained that it is not always apparent which entity has the relevant records, let alone who the contact person is or the best way to reach them.[308] Unsurprisingly, administrators sometimes have trouble connecting.[309] These difficulties have had significant ramifications, including documented cases where inmates were kept in prison beyond their lawful release date.[310]

In addition, the data necessary to apply complex duration clauses may require interpretation. This too can be a challenge. Jurisdictions use different terminology to refer to the same events.[311] For example, local-jail records might show that a person was "released," but only because he or she was shipped to state prison. Similarly, state prison records might show that a person was "released," but only to be transferred to another facility. Conversely, an inmate might have completed the relevant sentence but remain in custody because he or she is still serving a sentence on another case.

F. Complex Duration Clauses Cause Wrongful Collateral Consequences

Complex duration clauses cause wrongful collateral consequences, as illustrated by the examples of wrongful sex-offender registration, wrongful voter disenfranchisement, and wrongful employment consequences for workers.

---

307 *See infra* notes 362–63 and accompanying text.

308 *See* OFFICE OF THE INSPECTOR GEN., *supra* note 118, at 16.

309 *See id.*

310 An examination of the federal Bureau of Prisons ("BOP") revealed that between 2009 and 2014, the BOP released over four thousand inmates at the wrong time, including one hundred fifty-seven errors due to admitted staff error. *Id.* at 1. Of the admitted staff errors, all but five were late releases. *Id.* at 8. The most common error was misapplication of jail credit, for which the BOP must obtain and interpret data from other entities, such as local jails and state prisons. *See id.* at 13–14.

311 *See id.* at 16.

1. Wrongful Sex-Offender Registration

Complex duration clauses produce wrongful sex-offender registrations. People are kept on the registry, with all of its burdens, after their registration terms are legally expired, sometimes for years or even for life.

Even simple duration clauses can cause wrongful registrations. In one such example, administrators in Illinois erroneously noted that a registration term began when the individual was convicted of attempted rape in 1981 when his conviction actually occurred in 1979.[312] This error could have advanced the end date of registration by two years.[313] Although the error was corrected, such instances highlight the potential for errors that go unchecked.

Moreover, simple duration clauses are not the main source of the problem. Many more wrongful registrations arise from complex duration clauses.

In Vermont, some sex offenders must register for ten years,[314] which begins to run upon completion of the prison sentence and supervision.[315] To implement this duration clause, administrators need to know when registrants completed their sentences. It is particularly challenging to track down this data for individuals convicted outside of Vermont. As a result, a 2014 audit revealed that administrators were using a shortcut.[316] Rather than determining when sentences expired in out-of-state cases, administrators were sometimes substituting a later date—the date when the individual started registration.[317] This practice wrongfully extended registration terms, sometimes by years.[318]

Complex duration clauses also cause wrongful sex-offender registration through the use of tolling. Tolling stops the clock from ticking on a registration term.[319] The states have discretion whether to toll

---

312 *See* People v. Jones, 82 N.E.3d 1257, 1262 n.5 (Ill. App. Ct. 2017).

313 *See id.*

314 *See* VT. STAT. ANN. tit. 13, § 5407(e) (2017).

315 *See id.* The norm today is that individuals must register as sex offenders immediately upon release from incarceration, if not before release. *See* LOGAN, *supra* note 35, at 69. But until the mid-1990's, "it was not unusual for states to allow considerable time for compliance" with the registration requirement after release from incarceration. *Id.*

316 *See* DOUGLAS R. HOFFER, VT. STATE AUDITOR, RPT. NO. 14-03, SEX OFFENDER REGISTRY: QUESTIONABLE RELIABILITY WARRANTS ADDITIONAL IMPROVEMENTS 16–17 (2014), http://auditor.vermont.gov/sites/auditor/files/files/reports/performance-audits/SOR-audit-report-7.16.2014.pdf [https://perma.cc/9G4D-UYSC].

317 *See id.*

318 *See id.*

319 *See* Artis v. District of Columbia, 135 A.3d 334, 337 (D.C. 2016).

sex-offender registration during periods of subsequent incarceration.[320] State laws vary as to whether they impose tolling.[321] In states that require tolling, the terms can be quite nuanced. For example, a Pennsylvania law tolled registration during incarceration for a parole violation in the original triggering case, but not during incarceration for any other reason.[322]

Illinois has two provisions that penalize registered sex offenders who are reincarcerated.[323] The difference between the two is significant. First, a person who is reincarcerated because of a violation "that relates" to the original triggering crime faces a particularly harsh penalty: the clock restarts entirely, and he or she faces a brand new ten-year term.[324] In contrast, a person who is reincarcerated for an unrelated offense faces a lesser, but still significant penalty: the ten-year term is tolled while he or she is in custody.[325] Applying one clause versus the other can make years of difference. In one case, Illinois determined that a registrant's three-month prison sentence was "related to" his original 1991 case and imposed a brand-new ten-year registration term.[326] Only after the defendant filed a mandamus petition did the state acknowledge that the three-month sentence was unrelated and that registration should instead have only been tolled.[327]

Wrongful sex-offender registration also arises frequently from the tier structure of many registration laws. Under the federal SORNA, Tier I registrants must register for fifteen years, Tier II registrants for twenty-five years, and Tier III registrants for life.[328] The tier is based upon the triggering offense.[329] Federal district courts have repeatedly

---

320 *See* National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,068 (July 2, 2008).

321 *Compare* HAW. REV. STAT. § 846E-12 (2014) (tolling registration "during any period of time the covered offender is committed or recommitted to prison or confined to a halfway house, or an equivalent facility, pursuant to a parole or probation violation"), *with* United States v. Moore, 449 F. App'x 677, 680 (9th Cir. 2011) (noting that Oregon has exercised its discretion not to toll sex-offender registration).

322 *See, e.g.*, 42 PA. CONS. STAT. § 9795.2(a)(3) (repealed 2012) ("The registration period . . . shall be tolled when an offender is recommitted for a parole violation or sentenced to an additional term of imprisonment.").

323 *See* 730 ILL. COMP. STAT. 150/7 (West 2007 & Supp. 2018).

324 *See id.*

325 *See id.*

326 *See* Lesher v. Trent, 944 N.E.2d 479, 481 (Ill. App. Ct. 2011).

327 *See id.* ("As previously noted, the defendants mistakenly believed that the defendant's three-month incarceration in 2002 was related to his original sex offense. They later acknowledged that this was a mistake.").

328 *See* 34 U.S.C. §§ 20911(3)–(4), 20915(a) (2012).

329 *See id.* § 20911(2)–(4).

found that individuals were convicted of Tier III/lifetime offenses, only to have courts of appeals determine that they were properly Tier I/ten-year offenders.[330] But for the court intervention, these registrants would have been wrongfully registered for life.

2. Wrongful Voter Disenfranchisement

Voter disenfranchisement based upon a criminal conviction is not always permanent. In fact, many states have liberalized their laws since the mid-1990s, and the majority now provide for the restoration of voting rights at various points postconviction.[331] The most straightforward duration clauses, in fourteen states, permit voting after release from incarceration.[332]

In other states, duration clauses are more complex, which can result in wrongful voter disenfranchisement. Arkansas, for example, is one of the more restrictive states: individuals convicted of felonies are entitled to have their voting rights restored after they have completed their sentence.[333] Arkansas puts the burden on the individual to supply the county clerk with documentation that he or she is eligible for restoration.[334] Yet the administrator responsible for an Arkansas voter purge admitted that his office did not even track restorations.[335]

In Tennessee, a byzantine voter-disenfranchisement law permits restoration, but only after release from incarceration, discharge of supervision, and payment of financial obligations, including restitution and child support.[336] This statute requires hard-to-obtain criminal-records data, including whether the "person is current in all child support obligations,"[337] information in the hands of the state Department of Human Services.[338] Although the state's certification form provides

---

330 *See* United States v. Berry, 814 F.3d 192, 200 (4th Cir. 2016); United States v. White, 782 F.3d 1118, 1137 (10th Cir. 2015); United States v. Cabrera-Gutierrez, 756 F.3d 1125, 1138 (9th Cir. 2014); *see also* State v. Moir, 794 S.E.2d 685, 695 (N.C. 2016) (following *Berry* and *White*).

331 *See* GOTTSCHALK, *supra* note 6, at 246; WOOD, *supra* note 36, at 16.

332 *See* UGGEN ET AL., *supra* note 155, at 4.

333 *See* ARK. CONST. amend. LI, §§ 9(a)(1), 11(a)(4), 11(d)(2).

334 *See id.* § 11(d)(2)(A).

335 *See* Boozer, *supra* note 177; John Moritz, *ACLU Again Seeks Voter-Roll Data; Hand Over Felons List, Fix Mistakes, Secretary of State's Office Told*, ARK. DEMOCRAT-GAZETTE (Nov. 3, 2016, 5:45 AM), https://www.arkansasonline.com/news/2016/nov/03/aclu-again-seeks-voter-roll-data-201611-1/ [https://perma.cc/5PLU-M7FW].

336 *See* TENN. CODE ANN. § 40-29-202 (Supp. 2017).

337 *Id.* § 40-29-202(c); *see also* Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010) (upholding the constitutionality of this law).

338 *See* DIV. OF ELECTIONS, TENN. DEP'T OF STATE, CERTIFICATE OF RESTORATION OF VOTING RIGHTS, SS-3041, https://sos-tn-gov-files.s3.amazonaws.com/forms/ss-3041.pdf [https://perma.cc/2G6F-BVNK].

that a state election official will verify this information,[339] one study suggested that local officials do not conduct this check,[340] raising questions about the accuracy of its implementation.[341]

3. Wrongful Employment Consequences for Workers

Complex duration clauses also result in wrongful employment consequences for workers. For workers to return to the port, the TWIC law has two tiers of duration.[342] Some convictions require a permanent ban,[343] while others trigger a temporary one.[344] The temporary ban ends seven years after conviction and five years after incarceration, whichever is later.[345]

This duration clause, of course, requires data on when the worker was released from incarceration. Unfortunately, the TSA puts the burden on the workers to supply this data[346] by obtaining official documents from prisons and jails.[347] Moreover, these records—even if accurate and complete—are difficult for workers to read and interpret.[348]

In one case, the TSA disqualified a port worker based upon a decades-old criminal conviction.[349] The worker challenged the determination and corrected the TSA's erroneous finding that his convic-

339 *See id.* (providing that "the Coordinator of Elections will verify with the Department of Human Services that the applicant does not have any outstanding child support payments or arrearages").

340 *See* Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 319 (2017).

341 This same study found that African-American male applicants were "four times more likely to be denied because of child support" than other male applicants. *Id.* at 331.

342 *See* 46 U.S.C. § 70105(c)(1) (2012).

343 *See id.* § 70105(c)(1)(A); *see also* 49 C.F.R. § 1572.103(a) (2018).

344 *See* 46 U.S.C. § 70105(c)(1)(B); *see also* 49 C.F.R. § 1572.103(b) (2018).

345 *See* 46 U.S.C. § 70105(c)(1)(B); *see also* 49 C.F.R. § 1572.103(b)(1) (2018).

346 *See* 49 C.F.R. § 1515.5(b)(4) (2018); *see also* NAT'L EMP'T LAW PROJECT, HOW TO RESPOND TO A TSA INITIAL DETERMINATION THAT YOU MAY NOT BE ELIGIBLE FOR A TWIC CARD: OVERVIEW OF THE TWIC WAIVER AND APPEAL PROCESS 2 (2009), www.nelp.org/content/uploads/2015/03/OverviewofTWICWaiver.pdf ("If you were convicted of an interim disqualifying felony but the conviction date was over seven years ago *AND* you were released from incarceration over five years ago, you will need to provide TSA with court documents verifying the conviction date *AND* prison or jail documents verifying your release from incarceration date.").

347 NAT'L EMP'T LAW PROJECT, *supra* note 346.

348 *See* Radice, *supra* note 37, at 767.

349 *See* Boyer v. Freeman, No. 1:11-cv-21, 2011 WL 8129472, at *1 (E.D. Va. July 14, 2011) (granting defendants' motion to dismiss *pro se* civil rights complaint against TSA employee complaining that the plaintiff's TWIC card was only granted after excessive delays).

tion arose in Indiana.[350] Despite this clarification, the TSA persisted in asking the worker to provide proof of his release date from the Indiana Department of Corrections.[351] As the worker had been incarcerated in Pennsylvania, this was impossible.[352] The worker ultimately provided the TSA with documentation from the Pennsylvania Department of Corrections proving that he had been released in 1996.[353] The TSA then granted the TWIC card.[354] This process took more than a year,[355] a delay tantamount to denying the worker his job.[356]

IV. Reforming Wrongful Collateral Consequences at the Margins

Reforms would alleviate some wrongful collateral consequences—collateral consequences imposed erroneously and in clear violation of the law—and at the same time decrease the impact of collateral consequences in general. Some reforms can and should be implemented immediately. Calls to perfect the system, however, will inevitably fall short. Therefore, reforms are not a substitute for a robust argument that collateral consequences are misguided and unjust, something that wrongful collateral consequences demonstrate.[357]

A. Root Causes: Improving Data, Eliminating Catchalls, and Simplifying Duration Clauses

The most obvious thing to be done about wrongful collateral consequences is to address their root causes. As explained above, wrongful collateral consequences arise from the two-step matching process by which collateral consequences attach: (1) matching people to criminal-records data and (2) matching criminal-records data to enacting laws to determine whether a particular consequence should attach.

Criminal-records data is essential to both steps. One obvious reform, therefore, is to improve the quality of this data.[358] Advocates have long pressed for such improvements at the state and federal level.[359] The federal government too has encouraged and financially

350 *See id.* at *2.
351 *See id.*
352 *Id.*
353 *Id.*
354 *Id.*
355 *Id.*
356 *See* U.S. Gov't Accountability Office, *supra* note 188, at 20.
357 *See supra* notes 22–36 and accompanying text.
358 *See, e.g.*, Logan & Ferguson, *supra* note 98, at 591.
359 *See, e.g.*, Neighly & Emsellem, *supra* note 100, at 11–13, 28–30.

supported the states in doing so through the National Criminal History Improvement Program.[360] Advocates and scholars have also called for better regulating the private commercial background-check industry, particularly through the Fair Credit Reporting Act ("FCRA").[361]

Relatedly, some of the problems with flawed criminal-records data could be alleviated by placing the burden on the government, rather than the individual, to track down missing data.[362] For example, the FBI searches for missing disposition information when conducting firearm-purchase background checks under the Brady Handgun Violence Prevention Act of 1993.[363]

Another root-cause reform is to reduce complexity in the laws enacting collateral consequences. Legislators should list all triggering offenses, without the use of catchall clauses.[364] Legislators should also use simple duration clauses with easy-to-identify start and end dates.[365]

Although legislative change would not be easy, the time may be right to eliminate one type of catchall clause—the residual clause. The Supreme Court struck the ACCA's residual clause in *Johnson*, and there followed a cascade of vagueness challenges to residual clauses in other statutes.[366] Another residual clause was struck by the United States Sentencing Commission, which eliminated the residual clause

---

360 34 U.S.C. § 10132(c)(19) (2012).

361 *See, e.g.*, YU & DIETRICH, *supra* note 116, at 11–14 (explaining that FCRA applies not only to credit history reports, but to any "consumer report," including criminal-history records issued by commercial providers); *id.* at 28–29.

362 *See, e.g.*, NEIGHLY & EMSELLEM, *supra* note 100, at 8, 28.

363 *See, e.g.*, *id.* at 26 (citing National Instant Criminal Background Check System Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993)).

364 *See* Gowen & Magary, *supra* note 286, at 84 (calling upon legislators to draft collateral-consequence laws that "explicitly cite the qualifying crimes and exclude the rest").

365 *See* WOOD & BLOOM, *supra* note 63, at 9 (calling upon legislators to simplify voter disenfranchisement laws so that citizens are eligible to vote immediately upon release from prison); Gowen & Magary, *supra* note 286 (arguing that legislators should include duration clauses and that the expiration dates should be "[c]lear" and "[i]dentifiable").

366 *Supra* note 222. The Supreme Court struck as unconstitutionally vague the residual clause in the Immigration and Nationalities Act, which defines a "crime of violence" as, *inter alia*, "any . . . offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b) (2012); Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018); *see also* Commonwealth v. Beal, 52 N.E.3d 998, 1008 (Mass. 2016) (declaring the residual clause of the Massachusetts ACCA unconstitutionally vague in light of *Johnson*); *cf.* Henry v. Spearman, 899 F.3d 703, 709 (9th Cir. 2018) (holding that petitioner made a *prima facie* showing that the residual clause of the California felony-murder statute was unconstitutionally vague under *Johnson*).

from the career offender guideline in response to *Johnson*.[367] Some legislators have done the same. For example, in 2012, Ohio set forth an enumerated list of crimes to define the term "crime of moral turpitude"[368] for certain employment purposes.[369] Alabama's legislature enumerated the crimes of moral turpitude for its felon-disenfranchisement law.[370] Other legislators should follow this lead and replace catchall terms with enumerated lists of triggering offenses.[371]

B. Procedural Due Process

Another legislative reform is to provide the basic rights of procedural due process—notice and an opportunity to be heard[372]—when collateral consequences attach. For example, Hawaii law regulates when certain employers can refuse to hire workers with criminal records.[373] Among other provisions, the law prohibits covered employers from considering convictions outside "the most recent ten years, excluding periods of incarceration"—a provision that requires data on when a job applicant was imprisoned.[374] Towards this end, the law pro-

---

367 *See* U.S. SENTENCING GUIDELINES MANUAL supp. app. C, amend. 798 (U.S. SENTENCING COMM'N 2015) (amending U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2)).

368 *See* OHIO REV. CODE ANN. § 4776.10(A) (LexisNexis 2017). The Ohio legislation also protected workers by requiring a "direct nexus" between the conviction and the "duties or responsibilities" of the job. *Id.* § 4776.10(B); *see also* Joe Vardon, *Bill Signings Include Help for Freed Felons*, COLUMBUS DISPATCH (June 27, 2012, 9:32 AM), https://www.dispatch.com/content/stories/local/2012/06/27/bill-signings-include-help-for-freed-felons.html [https://perma.cc/FFL7-76SC].

369 *See* OHIO REV. CODE ANN. § 4776.10 (2018) (providing that definition of "crime of moral turpitude" applies "[a]s used in Chapters 4713., 4738., 4740., 4747., and 4749. and sections 4725.40 to 4725.59 of the Revised Code"). The definition of "crime of moral turpitude" applies to the "Ohio Optical Dispensers Board, the Registrar of Motor Vehicles (with regard to motor vehicle salvage dealers, motor vehicle auctions, and salvage motor vehicle pools), the Construction Industry Licensing Board, the Hearing Aid Dealers and Fitters Licensing Board, and the Director of Public Safety (with regard to private investigators and security guards)." MARGARET LOVE, SUMMARY OF PROVISIONS OF S.B. 337 RELEVANT TO COLLATERAL CONSEQUENCES 4 (2012) (emphasis omitted), https://reentry.franklincountyohio.gov/JPP-reentry/media/Documents/Providers/sb-337-summary.pdf [https://perma.cc/353A-BCK8].

370 *See* ALA. CODE § 17-3-30.1(c) (2017) (listing crimes of moral turpitude for the purpose of felon disenfranchisement).

371 *See, e.g.*, *supra* Section III.C.2 (describing Alabama reform defining "moral turpitude" for voting purposes).

372 *See* Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

373 *See* HAW. REV. STAT. ANN. § 378-2.5 (LexisNexis 2016); *see also* Shimose v. Haw. Health Sys. Corp., 345 P.3d 145, 147 (Haw. 2015). The state law, among other things, limits covered employers from considering a criminal record until after making a "conditional offer of employment." § 378-2.5(b).

374 *See* § 378-2.5(c); *see also Shimose*, 345 P.3d at 152 n.10 (describing the legislative history of this duration clause).

vides procedural protections: workers must be given an opportunity to prove their release date.[375]

The value of due process is also illustrated by the TWIC program for credentialing port workers. The TWIC law provides workers with notice that they have been denied based on a background check,[376] along with the "basis for the determination."[377] Workers may appeal to the TSA[378] and to a court, if necessary.[379] These procedural rights protected the jobs of over fifty thousand port workers[380] (although they still suffered the delay).[381]

Conversely, the harm of insufficient notice is illustrated in the context of voter disenfranchisement. Some states notify individuals after they have been disenfranchised due to a criminal conviction.[382] But few states, if any, require notice before conducting voter purges.[383] Wrongfully disenfranchised voters may be unaware that they have been removed from the rolls until Election Day. By then it is too late to reregister in jurisdictions with advance voter-registration requirements.[384] Even if time theoretically exists, the reregistration process can be burdensome, particularly for poor or less-educated voters, including those who lack reliable internet access.[385] Some voters may also not reregister out of frustration, humiliation, or alienation from the political process.[386]

---

375 *See* § 378-2.5(c). A violation is actionable under Hawaii antidiscrimination law. *See id.* § 378-2(a)(1) (defining discrimination to include the refusal to hire because of "arrest and court record"); *see also Shimose*, 345 P.3d at 148 & n.1 (noting that prospective employee filed a complaint with the state Civil Rights Commission and, thereafter, a state court lawsuit).

376 *See* 46 U.S.C. § 70105(c)(4), (p) (2012); 49 C.F.R. § 1572.21(d)(2) (2018); *see also* NEIGHLY & EMSELLEM, *supra* note 100, at 39 (appending a copy of an initial denial letter).

377 *See* 49 C.F.R. § 1572.21(d)(2)(ii) (2018).

378 *See* 46 U.S.C. § 70105(c)(4) (2012); 49 C.F.R. §§ 1515.5(b), 1572.21(d) (2018).

379 *See* 49 C.F.R. § 1515.5(g) (2018) (citing 49 U.S.C. § 46110).

380 *See* NEIGHLY & EMSELLEM, *supra* note 100, at 22.

381 *See, e.g.*, *supra* notes 349–56 and accompanying text.

382 *See* PÉREZ, *supra* note 154, at 22. Sex-offender registration is a notable exception.

383 *See id.* at 21.

384 *See* Am. Civil Rights Union v. Phila. City Comm'rs, 872 F.3d 175, 187 (3d Cir. 2017).

385 *See* S. REP. NO. 103-6, at 18 (1993); *cf.* Margot Sanger-Katz, *Hate Paperwork? Medicaid Recipients Will Be Drowning in It*, N.Y. TIMES (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/upshot/medicaid-enrollment-obstacles-kentucky-work-requirement.html [https://perma.cc/9VSA-ACW7] (describing how "administrative hurdles" reduce participation in pension plans, food stamps, and voting, especially for the poor "who tend to have less stable work schedules and less access to resources that can simplify compliance: reliable transportation, a bank account, internet access").

386 *See* Jeffrey A. Blomberg, Note, *Protecting the Right Not to Vote from Voter Purge Statutes*, 64 FORDHAM L. REV. 1015, 1037 (1995).

C. *Criminal-Defense Reforms*

1. *Extending* Padilla

Another mechanism to reduce wrongful collateral consequences—and collateral consequences in general—is to recognize broader Sixth Amendment rights to counsel. Traditionally, criminal defendants have received little advice about the collateral consequences their convictions will trigger.[387] A defendant can plea bargain for probation, for example, without having any idea that the conviction will impact his or her ability to obtain federal student loans or legally drive a car.

In *Padilla*, however, the Supreme Court held that the Sixth Amendment requires criminal-defense attorneys to advise clients about the immigration consequences of criminal convictions.[388] Many scholars have persuasively argued that *Padilla* should apply to at least some collateral consequences.[389] Advocates have pressed this claim in court with mixed success. For example, some courts have extended the reasoning in *Padilla* to sex-offender registration,[390] but other courts have disagreed.[391] Extending *Padilla* beyond immigration would alleviate some wrongful collateral consequences. It would increase the defendant's own awareness of which consequences ought to apply and would encourage criminal-defense counsel to make a record of the issue—useful to prevent errors and address them when they arise.[392]

---

387 *See, e.g.*, Chin, *supra* note 1, at 1815; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 630 (2006); Andrew E. Taslitz, *Destroying the Village to Save It: The Warfare Analogy (Or Dis-Analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 HOW. L.J. 501, 516 (2011).

388 *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010).

389 *See* Chin, *supra* note 225, at 676; Love, *supra* note 37, at 114; Colleen F. Shanahan, *Significant Entanglements: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387, 1406–07 (2012).

390 *See* United States v. Rose, 71 M.J. 138, 140 (C.A.A.F. 2012); Taylor v. State, 698 S.E.2d 384, 387–89 (Ga. Ct. App. 2010); People v. Dodds, 7 N.E.3d 83, 97 (Ill. App. Ct. 2014); People v. Fonville, 804 N.W.2d 878, 894–95 (Mich. Ct. App. 2011).

391 *See* Embry v. Commonwealth, 476 S.W.3d 264, 272 (Ky. Ct. App. 2015); Commonwealth v. Sylvester, 62 N.E.3d 502, 507–08 (Mass. 2016) (interpreting state law as it existed in 2002); Taylor v. State, 887 N.W.2d 821, 826 (Minn. 2016); State v. Trotter, 2014 UT 17, para. 33, 330 P.3d 1267, 1277.

392 Under *Padilla*, criminal-defense counsel would have an incentive to make such a record to avoid a future claim that he or she provided ineffective assistance. *See, e.g.*, United States v. Swaby, 855 F.3d 233, 240 (4th Cir. 2017) (granting habeas corpus relief on a *Padilla* ineffective assistance of counsel claim); United States v. Rodriguez-Vega, 797 F.3d 781, 786 (9th Cir. 2015) (granting 28 U.S.C. § 2255 habeas petition on a *Padilla* ineffective assistance of counsel claim). Whether or not required by law, members of the criminal-defense bar are proactively training to provide such advice. *See infra* notes 394–400 and accompanying text.

2. Creative Plea Bargaining

Padilla is also notable for encouraging criminal-defense lawyers to "plea bargain creatively" to avoid collateral consequences.[393] This language has been a call to arms for the criminal-defense bar.[394] Some large public defender offices now have in-house specialists who master particular collateral consequences, such as immigration,[395] sex-offender registration,[396] or public housing.[397] They issue interoffice memos, provide training, and take phone calls when red flags arise.[398]

Some criminal-defense lawyers now interview[399] and advise their clients about collateral consequences,[400] and honor their client's priorities in plea negotiations.[401] There are many such tools. Criminal-defense lawyers negotiate guilty pleas to offenses that do not require certain consequences,[402] seek to downgrade felony offenses to misdemeanors,[403] carefully state the factual basis for guilty pleas,[404] and negotiate sentence length.[405] If all else fails, the client can choose trial,[406]

---

393 *Padilla*, 559 U.S. at 373; *see also* Lee v. United States, 137 S. Ct. 1958, 1961 (2017); Missouri v. Frye, 566 U.S. 134, 138 (2012); Lafler v. Cooper, 566 U.S. 156, 160 (2012); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118 (2011); Thea Johnson, *Measuring the Creative Plea Bargain*, 92 IND. L.J. 901, 920–25 (2017).

394 For example, the National Association of Criminal Defense Lawyers ("NACDL") 2013 conference included "The Collateral Consequences of a Conviction & Potential Remedies for Relief." *Criminal Justice in the 21st Century*, NAT'L ASS'N CRIM. DEF. LAW., https://www.nacdl.org/advocacyevents.aspx [https://perma.cc/RAN9-MYZ6]; *see also* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 364 (2011) (describing a post-*Padilla* training in Wisconsin's Office of the State Public Defender).

395 *See, e.g.*, Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1533 (2011).

396 *See* Robin Walker Sterling, *Raising Race*, CHAMPION, Apr. 2011, at 26.

397 *See* Jain, *supra* note 74, at 1211 n.77.

398 *See* Johnson, *supra* note 393, at 943–45; Smyth, *supra* note 5, at 160.

399 *See* LOVE ET AL., *supra* note 37, § 8:4; Chin, *supra* note 225, at 676; Gowen & Magary, *supra* note 286, at 89; Johnson, *supra* note 393, at 920–21; Smyth, *supra* note 5, at 153, 156–57.

400 *See* Johnson, *supra* note 393, at 919.

401 *See* LOVE ET AL., *supra* note 37, § 8:10; Smyth, *supra* note 5, at 145, 155 ("What is more important—jail or prison time (the liberty interest)? Custody of children? Immigration status? Housing or a job? There is no universal answer; only each client can decide for herself.").

402 *See, e.g.*, Smyth, *supra* note 5, at 163.

403 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 39, at 27.

404 *See* Johnson, *supra* note 393, at 924; Smyth, *supra* note 5, at 164.

405 *See* LOVE ET AL., *supra* note 37, § 8:17.

406 *See* Lee v. United States, 137 S. Ct. 1958, 1968 (2017) (recognizing that a defendant facing deportation could rationally decide to go to trial rather than plead guilty despite having little or no defense).

particularly in misdemeanor cases where collateral consequences may dwarf the traditional punishment at stake.[407]

In some jurisdictions, creative plea bargaining around collateral consequences can take place explicitly.[408] Some prosecutors are receptive to arguments that avoiding a particular consequence will further public safety, for example, by allowing the defendant to maintain lawful employment or housing.[409] Other collateral consequences strike prosecutors as unfair, such as consequences that are disproportionate to the crime or harm family members,[410] such as relatives who will be evicted from public housing.[411]

In other cases, criminal-defense attorneys fear negotiating so overtly. They understandably believe that if they reveal the client's motivations, the prosecutor will intentionally seek the very consequence the client wishes to avoid.[412] The prosecutor, of course, has almost complete control over what charges to bring or withdraw.[413] Therefore, some criminal-defense lawyers negotiate creatively without revealing the client's motivations.[414]

Creative plea bargaining will mitigate some wrongful collateral consequences, in addition to ameliorating collateral consequences generally. A criminal-defense lawyer focused on collateral consequences can make an accurate record in court of the offense of convic-

---

407 *See* Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (acknowledging that deportation is "sometimes the most important part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes"). For example, in at least eight states, merely failing to pay criminal debts results in a driver's license suspension. ALICIA BANNON ET AL., BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT 24 (Oct. 4, 2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [https://perma.cc/WJL5-BYAC]. This collateral consequence has a severe impact on one's ability to work, where public transportation is unavailable, limited, or otherwise unreliable. *See* Todd A. Berger & Joseph A. DaGrossa, *Overcoming Legal Barriers to Reentry: A Law School–Based Approach to Providing Legal Services to the Reentry Community*, 77 FED. PROB. 3, 5 (2013) (describing the importance of a driver's license to finding and retaining employment for people reentering the workforce after incarceration).

408 *See, e.g.*, Johnson, *supra* note 393, at 922.

409 *See* LOVE ET AL., *supra* note 37, § 8:7; Smyth, *supra* note 5, at 146, 150, 160–61.

410 *See* Smyth, *supra* note 5, at 146, 151.

411 LOVE ET AL., *supra* note 37, § 8:7.

412 *See* Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 793–95, 819 (2016); Jain, *supra* note 74, at 1202; Johnson, *supra* note 393, at 931–32; Smyth, *supra* note 5, at 162.

413 *See, e.g.*, Angela J. Davis, *The Prosecution of Black Men*, *in* POLICING THE BLACK MAN, *supra* note 3, 178, 179–83; Crane, *supra* note 412, at 798–99.

414 Ideally, criminal-defense counsel will educate prosecutors and judges about collateral consequences, with the hope that over time, more explicit negotiation will become positive and fruitful. *See* Smyth, *supra* note 5, at 160–62.

tion, may establish on the record that a consequence does not apply, or that the consequence applies for only a limited duration.[415] Such a record will improve the criminal-records data and may obviate errors when administrators apply complex enacting laws.

There are obstacles to creative plea bargaining, of course, but not insurmountable ones. Some criminal-defense lawyers lack even basic knowledge of collateral consequences and have little time or resources to devote to the issue.[416] However, as offices gain expertise, they will recognize that the same fact patterns appear again and again, producing efficiencies.[417] Second, some criminal-defense lawyers fear that advising a client about collateral consequences will harm the client's best interests—that, if informed, the client will "insist upon a trial" at the risk of a greater sentence.[418] This fear is overblown, as there are strong incentives to plead guilty.[419] And even if valid, demanding a trial is the client's choice to make.[420] Third, criminal-defense lawyers may hesitate to address collateral consequences on the record because of time pressure from judges and court staff[421] in high-volume criminal courtrooms.[422] But this concern should not carry the day. As *Padilla* cau-

---

415 Relatedly, criminal-defense counsel might put on the record that the terms and motivation behind the plea bargain were to avoid the collateral consequence—a practice that could insulate the client from retroactive application of the collateral consequence in the future. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) ("[A] constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

416 *See, e.g.*, Anthony C. Thompson, *The Promise of* Gideon*: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 718–19 (2013) (describing the underfunding of public defenders).

417 *Cf.* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2072 (2016) (arguing that because the police act systemically in searches and seizures, the resulting cases "fall into readily identifiable patterns" known to practitioners); John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1294 (1994) (recognizing that public defenders are repeat players who deal with a "finite list of constantly-recurring crimes[, which] in turn raise[] an equally finite set of legal and strategic issues for each such crime").

418 Roberts, *supra* note 41, at 189.

419 *See id.* at 190–91.

420 *See* Jones v. Barnes, 463 U.S. 745, 751 (1983); *Criminal Justice Section Standards Defense Function § 4-5.2(a)(iii)*, A.B.A. CRIM. JUST. SEC. (June 30, 2017), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk/#5.2 [https://perma.cc/VU4G-NJWS].

421 *See* Bibas, *supra* note 91, at 1076–77 ("Plea bargaining rushes cases along, foreclosing the opportunities to speak that laymen so desire. . . . Defense lawyers tell their clients to stay quiet and script their plea allocutions, suppressing their voices.").

422 *See, e.g.*, Crane, *supra* note 412, at 824.

tions, criminal-defense counsel should not "remain silent on matters of great importance."[423]

3. Tracking Collateral Consequences Ex Post

Another criminal-defense reform involves tracking collateral consequences through internal, automated case-management systems, which some large public defender offices have implemented.[424] These systems facilitate creative plea bargaining ex ante by allowing public defenders to track salient demographic information.[425] They also have the potential to reduce wrongful collateral consequences ex post because, unlike paper files, they are easily searchable and not sent to storage.[426]

With case-management systems, criminal-defense lawyers can track particularly severe or common collateral consequences, such as sex-offender registration or driver's license suspensions. After closing a case, lawyers could note in the database whether the conviction requires the consequence and, if so, for what duration. In the future, a paralegal or other staff member could check whether officials got it right. For registration, this would require checking the online registry. For driver's license suspensions, an office could obtain the necessary data from the criminal court, traffic court, or their clients. When errors arise, the office could notify the clients, and either follow up or make referrals.[427]

---

423 Padilla v. Kentucky, 559 U.S. 356, 370 (2010).

424 *See* NAT'L ASS'N FOR PUB. DEF., CASE MANAGEMENT SYSTEM COMPARISON (2015), http://www.publicdefenders.us/files/NAPD_CMS_comparison.pdf [https://perma.cc/MWM2-VJFY]; N.Y. STATE DEF. ASS'N, PUBLIC DEFENSE CASE MANAGEMENT SYSTEM (2016), http://c.ymcdn.com/sites/www.nysda.org/resource/resmgr/PDFs--other/PDCMS_Overview_2016.pdf [https://perma.cc/V2G2-H2KB]. *But see* PUB. DEF. SERV. FOR D.C., FISCAL YEAR 2018 CONGRESSIONAL BUDGET JUSTIFICATION 12 (2017), http://www.pdsdc.org/docs/default-source/annual-reports-and-budgets/fy-2018-pds-congressional-budget-justification---final.pdf?sfvrsn=dcf79cd0_2 [https://perma.cc/7T25-L7RW]; Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1076 (2015) (noting that many offices lack case-management systems).

425 *See* N.Y. STATE DEF. ASS'N, *supra* note 424, at 6 (noting that case-management system allows public defenders to track "special needs," such as immigration status).

426 *See* Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 681, 692 (2016).

427 Tracking collateral consequences ex post would also increase institutional self-awareness about the impact of collateral consequences on public defender clients. *See* Crespo, *supra* note 417, at 2065–66. *But see id.* at 2090 n.174 (noting the limitations of a public defender database for this purpose).

There are, of course, counterarguments. First, collateral consequences attach after the attorney-client relationship ends,[428] which may preclude some lawyers from further representation under their funding schemes.[429] Private criminal-defense lawyers would need to be retained. But criminal-defense lawyers already correct some errors ex post. In particular, criminal-defense lawyers have been instrumental in notifying prisons when their clients are wrongfully imprisoned beyond their lawful release date,[430] a widespread problem.[431]

There are also practical obstacles. Some public defenders lack the time, funding, and expertise to build complex databases.[432] Individual lawyers may resent spending precious time on data entry.[433] However, these objections should not deter criminal-defense lawyers from starting small,[434] with one or two consequences, particularly in holistic public defender offices[435] where digital case-management systems are already in place. To the extent offices are overwhelmed with follow-up work, the area of wrongful collateral consequences is ripe for assistance by law school clinics or pro bono counsel.

---

428 *See* Mayson, *supra* note 92, at 310; *see also* Bazelon, *supra* note 426, at 692–93 (arguing that certain ethical duties of counsel extend beyond the termination of a criminal case).

429 *See* Pinard, *supra* note 387, at 675.

430 *See* Office of the Inspector Gen., *supra* note 118, at 22.

431 *See id*; Michelle Theriault Boots, *Clerical Errors Have Kept Hundreds of Alaska Inmates in Jail Beyond their Sentences*, Anchorage Daily News (May 23, 2016), https://www.adn.com/alaska-news/2016/05/21/clerical-errors-have-kept-hundreds-of-alaska-inmates-in-jail-beyond-their-sentences/ [https://perma.cc/9KLP-NFSP]; Spencer S. Hsu, *D.C. Jail Held Man for 77 Days After His Case Was Dropped Until Another Inmate Flagged an Attorney*, Wash. Post (Oct. 1, 2017), https://www.washingtonpost.com/local/public-safety/dc-jail-held-man-for-77-days-after-his-case-was-dropped-until-another-inmate-flagged-an-attorney/2017/10/01/61235af2-9f0a-11e7-8ea1-ed975285475e_story.html?noredirect=on&utm_term=.e77388f907c0 [https://perma.cc/5GWJ-4EKD].

432 *See, e.g.*, Metzger & Ferguson, *supra* note 424, at 1075–76.

433 *Id.* at 1076.

434 *Cf. id.* at 1121–22 (advocating for "[p]ilot projects" to begin the task of marshaling data to improve public defender services).

435 A "holistic" criminal defense practice focuses on the client's self-identified legal and social needs, provides an interdisciplinary response, and has a connection to the community. *See, e.g.*, Smyth, *supra* note 5, at 165–67 ("If a penalty or consequence is likely and related to our client's criminal charges, we should know about it, tell our client about it, *and* work to avoid or mitigate it." (emphasis added)); *see also* Bazelon, *supra* note 426, at 703 (noting that holistic criminal-defense lawyers "collapse the distinction between 'current' and 'former' clients" for the purpose of assisting clients facing collateral consequences).

D. Administrative Reforms

1. Administrative Quality Controls

Other reforms that can and should take place immediately are basic quality control measures for administrators who impose collateral consequences. These basic quality controls are sometimes missing. For example, state and local election officials often operate with little oversight, lack of attention to detail, and overconfidence in their data.[436] TWIC-card administrators used a disorganized collection of emails and memos for internal guidance.[437]

The Department of Justice Office of the Inspector General has set forth a simple menu of administrative reforms in an analogous context, the calculation of federal inmate release dates.[438] Administrators should create and maintain centralized directories of where to obtain criminal-records data.[439] Administrators also need training,[440] written policies,[441] and supervision. They should be required to act with care and attention to detail.[442] And when errors do arise, administrators should document them, detail the causes, and provide notice not only internally but also to the individuals affected.[443]

2. Audits

Administrative weaknesses could also be revealed through audits of collateral-consequence administrators.[444] Audits might lead to some

---

436 *See* PÉREZ, *supra* note 154, at 23–24, 35.

437 *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SECURITY, TWIC BACKGROUND CHECKS ARE NOT AS RELIABLE AS THEY COULD BE 3, 8, 27, (2016), https://www.oig.dhs.gov/assets/Mgmt/2016/OIG-16-128-Sep16.pdf [https://perma.cc/5AA2-YQP7].

438 *See* OFFICE OF THE INSPECTOR GEN., *supra* note 118, at 26.

439 *Cf. id.* at 16–17 (noting that experienced staff members responsible for calculating prison sentences for the BOP keep "direct phone numbers, e-mail addresses, preferred communication methods, and other helpful information not always available online . . . [in] their individual rolodexes, electronic documents, or other methods, and share this information with their teammates only on an ad hoc basis").

440 *Cf. id.* at 17 & n.23, 21 (describing training provided to staff members on sentence calculations and noting areas for improvement).

441 *Cf. id.* at 7 n.10 (citing BOP's written policies for sentence calculations).

442 *See, e.g.*, JACK WAGNER, PA. DEP'T OF THE AUDITOR GEN., PA. AUDITOR GENERAL GIVES C- TO STATE'S INTERNET REGISTRY FOR SEX OFFENDERS; SAYS IT'S IMPROVED BUT STILL NOT MAKING THE GRADE 9 (2010) (reporting that auditors reported over 129 misspellings to the state police officials responsible for the state's sex offender registry, as well as inconsistencies in the use of spacing and hyphenation).

443 By analogy, when the BOP determines that an inmate was wrongfully incarcerated beyond his or her release date, it completes a "late release notice." OFFICE OF THE INSPECTOR GEN., *supra* note 118, at 3, 10. While it does not appear that this notice goes to the individual, BOP does provide the individual with a copy of his or her sentence computation. *Id.* at 10.

444 *Cf.* Mary De Ming Fan, *Reforming the Criminal Rap Sheet: Federal Timidity and the*

improvements. However, as explained below, there are major drawbacks to audits as a reform measure: they risk further entrenching the collateral-consequence regime and making things worse for other people.

Here, the relevant type of audit is the performance audit, which evaluates "evidence against criteria"[445] to assist officials in improving performance, reducing costs, taking corrective action, and enhancing accountability.[446] Auditors obtain evidence through methods such as "direct physical examination, observation, computation," examining documents, taking testimony, surveys, and sampling.[447]

Sex-offender registries are one collateral consequence already audited regularly. These audits are concerned with false negatives—registered sex offenders who are not maintaining their registration data as required by law.[448] Interestingly, some audits also ask questions about false positives—people who are wrongfully registered as sex offenders or wrongfully registered for too long.

Vermont is one state that included such questions.[449] The Vermont state auditor evaluated the registry for "critical errors," defined as both missing information on registered sex offenders and wrongful registrations.[450] The Vermont registry is small; it includes only 2,055 registrants.[451] But the audit revealed 253 critical errors, including 2

Traditional State Functions Doctrine, 33 AM. J. CRIM. L. 31, 63 (2006) (recommending auditing of state criminal records data); Logan & Ferguson, *supra* note 98, at 599–600 (same). *See generally* Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose*, 119 YALE L.J. 1339 (2010) (recommending audits as a method to improve prosecutors' compliance with discovery obligations).

445 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-331G, GOVERNMENT AUDITING STANDARDS *para.* 2.10 (2011) [hereinafter GAGAS]; *see also id.* paras. 6.56–.57 (describing the central role of "sufficient, appropriate evidence" to a performance audit). The GAO's Government Auditing Standards are known familiarly as the Yellow Book. *See, e.g.*, Nancy Kingsbury, *The Government Accountability Office and Congressional Uses of Federal Statistics*, 631 ANNALS AM. ACAD. POL. & SOC. SCI. 43, 43–44, 52–53 (2010).

446 *See* GAGAS, *supra* note 445, paras. 6.56–.57.

447 *See id.* paras. 6.61–.65; *see also id.* para. A6.04 (classifying evidence as "physical, documentary, or testimonial" and providing examples of each).

448 *See, e.g.*, OFFICE OF THE STATE AUDITOR, *supra* note 145, at 1; Debra Todd, *Sentencing of Adult Offenders in Cases Involving Sexual Abuse of Children: Too Little, Too Late? A View from the Pennsylvania Bench*, 109 PENN ST. L. REV. 487, 533–34 (2004).

449 *See* HOFFER, *supra* note 316, at 2.

450 *See id.*

451 *Compare id.* at 5 (counting 2,055 registered sex offenders), *with* NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, MAP OF REGISTERED SEX OFFENDERS IN THE UNITED STATES 2 (2017), http://www.missingkids.com/content/dam/pdfs/SOR%20Map%20with%20Explanation_10_2018.pdf [https://perma.cc/D4L6-2HJU] (counting 874,725 registered sex offenders in the United States and territories).

wrongfully registered individuals.[452] In 20 cases, the state had registered people for life instead of 10 years.[453] Twenty-one other people were correctly listed as 10-year registrants, but given incorrect end dates—wrongfully extending their registration terms beyond the lawful duration.[454]

The Vermont audit also assessed the quality of the internal "controls."[455] It determined that one source of critical errors was that employees were applying the statutory criteria for lifetime registration in part based upon "institutional memory" rather than written guidance.[456] In some cases, there was no oversight.[457]

The Vermont audit was successful in revealing wrongful collateral consequences and correcting them. It suggests that states that are auditing their sex offender registries should include questions about wrongful registrations.[458] These states are conducting audits of registry data anyway and need only broaden their mandate.[459] Including questions about wrongful registrations will also further public safety because wrongful registrations dilute registries, making it more difficult for law enforcement officers to focus on dangerous individuals.[460]

---

452 See HOFFER, *supra* note 316, at 2.

453 *See id.* at 8.

454 *See id.* In one of these cases, an incorrect end date would have required registration for seven years longer than provided by law. *See id.* at 7–8.

455 *See id.* at 1, 15, 28, 31; *see also* MICHAEL POWER, THE AUDIT SOCIETY 11, 20 (1999) (describing value of audits in evaluating internal control systems).

456 *See* HOFFER, *supra* note 316, at 16.

457 *See id.* at 15; *see also* THOMAS H. MCTAVISH, MICH. OFFICE OF THE AUDITOR GEN., PERFORMANCE AUDIT OF THE SEX OFFENDER REGISTRIES 15, 18 (2005), https://audgen.michigan.gov/finalpdfs/04_05/r5559504.pdf [https://perma.cc/J4LR-6DGN] (observing that only two full-time employees managed the state's 35,000 sex offender records).

458 *Cf.* Jones, *supra* note 63, at 506 (noting that some states audit their sex offender registries and proposing state "independent oversight board[s]" to identify wrongfully registered individuals).

459 *See, e.g.*, THOMAS P. DINAPOLI, OFFICE OF THE N.Y. STATE COMPTROLLER, DIV. OF LOCAL GOV'T & SCH. ACCOUNTABILITY, SEX OFFENDER REGISTRATION 2 (2014), http://www.osc.state.ny.us/localgov/audits/swr/2014/SORA/global.pdf [https://perma.cc/RG75-AD97]; TORI HUNTHAUSEN, LEGISLATIVE AUDIT DIV., INFORMATION SYSTEMS AUDIT, SEXUAL OR VIOLENT OFFENDER REGISTRY 1 (2011), https://leg.mt.gov/content/Committees/Interim/2011-2012/Law-and-Justice/Meeting-Documents/Feb-2012/SVOR-audit.pdf [https://perma.cc/V9VV-CZ84]; MCTAVISH, *supra* note 457, at 10; STEVE J. THERIOT, DEPARTMENT OF PUBLIC SAFETY SEX OFFENDER AND CHILD PREDATOR REGISTRY: PERFORMANCE AUDIT 3 (2008), https://lla.la.gov/PublicReports.nsf/E147D0F04240D722862574730063A2C6/$FILE/00001B22.pdf [https://perma.cc/JWZ4-ANHY].

460 *See* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT § II (2008), https://oig.justice.gov/reports/plus/e0901/results.htm [https://perma.cc/DN9Z-ZKCN]; *cf.* McLeod, *supra* note 131, at 1575–76 (not-

Yet there are significant counterarguments against encouraging more audits. One is that audits are time-consuming and expensive.[461] They impose costs both on the auditor and on the object of the audit.[462]

But this is not the primary reason to question audits as a reform measure to address wrongful collateral consequences. An even greater problem is that audits may push administrators to become more punitive. For example, Montana audited its sex offender registry.[463] In the resulting report, the auditor recommended that administrators flag as noncompliant all registrants who had failed to verify their addresses as required.[464] This advice was more punitive than the administrators' own common sense, which was that flagging these registrants was a waste of resources because the registrants were living at their address of record and had only failed to return a form saying so.[465] This example suggests that audits may prompt demands to tighten up on people seen as skating by on collateral consequences.[466]

Another problem with audits as a reform measure is that audits reassure the public. Auditors are characterized by independence, which they closely guard.[467] An audit produces assurance and, thereby, increases credibility.[468] It burnishes the image of the object without improving it and further entrenches the system being audited.[469] Therefore, audits of collateral consequences are a poor vehicle for addressing deeper concerns, including their questionable morality or utility, and instead may further solidify them—wrongful or not.[470]

---

ing that even non-wrongful registrations dilute sex offender registries due to their "overbreadth").

461 *See* POWER, *supra* note 455, at 2, 27; Daniel Austin Green, *Whither and Whether Auditor Independence*, 44 GONZ. L. REV. 365, 379 (2009).

462 *See* POWER, *supra* note 455, at 2, 27.

463 *See* HUNTHAUSEN, *supra* note 459.

464 *See id.* at 16–17.

465 *See id.* at 17.

466 *Cf.* POWER, *supra* note 455, at 97 (observing that an audit changes its object).

467 *See* GAGAS, *supra* note 445, paras. 3.02–.03; *see also* AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, CODE OF PROFESSIONAL CONDUCT §§ 1.000, 1.200.001 (2014), https://www.aicpa.org/content/dam/aicpa/research/standards/codeofconduct/downloadabledocuments/2014december15contentasof2016august31codeofconduct.pdf [https://perma.cc/N3AC-ZVXW] (defining government auditors as auditors in "public practice" and requiring independence).

468 *See* POWER, *supra* note 455, at 15, 28, 123, 147; *see also* GAGAS, *supra* note 445, para. 1.17.

469 *See* POWER, *supra* note 455, at 143; *see also id.* at 145–47.

470 More optimistically, audits might reveal the sheer impracticality of tracking hundreds of thousands of registered sex offenders, NAT'L CTR. FOR MISSING & EXPLOITED CHILDREN, *supra*

Conclusion

A criminal conviction is an indelible brand, which may deprive the bearer of thousands of political, economic, and social rights. These losses—collateral consequences—are too often imposed wrongfully, in clear violation of the law. This is a system structurally predisposed to error. Revealing wrongful collateral consequences should be a cause for reform, but not to perfect the system. Rather, exposing the problem of wrongful collateral consequences adds another weapon to the arsenal of scholars and advocates intent on scaling back the carceral state by reducing the number, breadth, and duration of collateral consequences that perpetuate an unjust caste system in our country.

note 451, thereby undermining support for the project. *See, e.g.*, McLeod, *supra* note 131, at 1577 (observing that the pursuit of technical registration violations diverts law enforcement resources).