

## A Better Way To Consider Collateral Consequences Of Conviction

By Harry H. Rimm and Christopher Shields

It is time for federal courts to appraise more realistically all consequences that a criminal conviction has on a defendant.

When determining a sentence for a criminal defendant, federal courts are required by statute to impose a sentence that is “sufficient, but not greater than necessary.” See 18 U.S.C. §3553(a). Among the factors that federal courts consider are the history and characteristics of the defendant, as well as the need for “just punishment.” See *id.* Too often, however, sentencing courts do not consider the full extent of the consequences that a defendant faces as a result of conviction, resulting in the imposition of potentially excessive sentences.

The consequences of a criminal conviction are not limited to the “formal” components of a sentence imposed by the court,

such as incarceration, supervised release, restitution and a fine. Courts and scholars alike have recognized that a criminal sentence also includes “collateral consequences.” These consequences are not expressly included in a sentence, but can include immigration consequences, loss of professional licenses and the loss of rights ranging from voting to gun ownership. While many of the consequences are imposed by statute in jurisdictions, defendants further face various informal collateral consequences which exist apart from any specific legal or statutory authority. These may include social stigma and isolation, humiliation, unusual exposure to widespread and negative publicity, loss of housing opportunities, loss of a job and/or career and divorce, as well as reputational harm suffered by a defendant’s family members.

The increased online availability of court records and conviction histories has amplified the social and employment-related ramifi-



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cations of a conviction. In sum, a convicted defendant often will face severe civil and social repercussions which endure long after his formal sentence is served.

That a criminal defendant will face collateral consequences stemming from conviction is neither novel nor controversial at this time. Recent years have seen increased scholarly attention on the existence and wide-reaching impact of collateral consequences, with the U.S. Supreme Court recognizing the import of collateral immigration consequences of a conviction in *Padilla v. Kentucky*, 559 U.S. 356 (2010), finding that defense attorneys must advise their non-citizen clients of the potential immigration consequences from a guilty plea.

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In an effort to increase awareness of collateral consequences and the true impact of criminal sentencing, the ABA has contributed to the compilation of the National Inventory of Collateral Consequences of Conviction, an online database of collateral consequences, which are imposed by statute across various jurisdictions around the country. Such studies and databases often do not reflect other collateral consequences which are less quantifiable but nonetheless experienced acutely by many defendants, such as social stigma and alienation.

Despite increased awareness of collateral consequences, there is currently a split among U.S. Courts of Appeals as to whether such consequences may be considered in connection with federal sentencing. Some courts have thoughtfully accounted for collateral consequences when imposing sentences, including by varying from the Sentencing Guidelines. Many other courts, however, do not account for collateral consequences or are expressly prohibited from doing so. As a result, defendants often face sentences which, when taking such consequences into account, could exceed what is required for “just punishment” consistent with 18 U.S.C. §3553(a)(2)(A). Further, this split among Circuit Courts can result in sentencing disparities around the country, with

defendants in certain jurisdictions facing more severe punishments than those in jurisdictions which give due weight to collateral consequences in sentencing.

Here in New York, the Second Circuit is one of the few Circuits that expressly allows sentencing courts to consider collateral consequences. This has been so since at least 2009, when the Second Circuit affirmed a below-guidelines sentence in *United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009), noting that “[i]t is difficult

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to see how a court can properly calibrate a ‘just punishment’ if it does not consider the collateral effects of a particular sentence.” Similarly, the U.S. Courts of Appeals for the Fourth and Eighth Circuits have also been receptive to weighing the impact of collateral consequences. See *United States v. Anderson*, 533 F.3d 623, 633-34 (8th Cir. 2008) (affirming downward variance from Sentencing Guidelines based in part on defendant’s “loss of his reputation and his company”); *United States v. Pauley*, 511 F.3d 468, 474-75 (4th Cir. 2007) (consideration of defendant’s loss of teaching certificate and state pension “is

consistent with §3553(a)’s directive that the sentence reflect the need for ‘just punishment’”).

In practice, however, district courts in the Second Circuit and elsewhere often do not appear to give due weight to collateral consequences in their sentencing decisions. Indeed, many sentencing memoranda do not discuss such consequences. One notable exception in recent years was the sentence imposed in *United States v. Nesbeth*, 188 F. Supp. 3d 179 (E.D.N.Y. 2016). In that case, the court imposed a below-Guidelines and non-custodial sentence on a young woman convicted of drug offenses. The court noted the multitude of additional, ongoing consequences that the defendant faced, including the unlikelihood of fulfilling her goal of becoming a teacher due to her status as a felon. While *Nesbeth* generated considerable publicity at the time, the court’s frank discussion and express consideration of collateral consequences remain uncommon today.

By contrast, numerous federal appellate courts have expressly prohibited district courts from giving weight to collateral consequences, including the U.S. Courts of Appeals for the Sixth, Seventh, Tenth and Eleventh Circuits. For example, the Tenth Circuit has held that a court erred when, in fashioning a sentence for an Oklahoma attorney and politi-

cian convicted of bribery, it considered the publicity, loss of law license and deterioration of physical and financial health faced by the defendant due to his conviction. See *United States v. Morgan*, 635 F. App'x 423 (10th Cir. 2015). Similarly, the Eleventh Circuit recently vacated a sentence in which the court had determined that the defendant's likely loss of her medical license supported a downward variance from the Sentencing Guidelines. See *United States v. Howard*, 28 F.4th 180 (11th Cir. 2022).

Federal courts which prohibit consideration of collateral consequences have expressed concern that considering "these sorts of consequences—particularly ones related to a defendant's humiliation before his community, neighbors and friends—would tend to support shorter sentences in cases with defendants from privileged backgrounds, who might have more to lose along these lines," as the Sixth Circuit noted in *United States v. Musgrave*, 761 F.3d 602, 608 (6th Cir. 2014). Such concerns are understandable and well-intentioned. That approach, however, overlooks that defendants of all backgrounds face collateral consequences; the social stigma, humiliation, immigration consequences, decreased employment opportunities and loss of civil rights which stem from conviction are not limited

to defendants of certain races, demographics or wealth levels. Thus, to refuse to consider collateral consequences out of concern for disparate treatment is effectively to throw the baby out with the bathwater, with the result that defendants of all backgrounds are denied a realistic sentencing approach that acknowledges the wide-reaching and lingering effects of a conviction even after a formal sentence has been served and completed.

Among other things, individuals with a conviction history have historically been denied access to public housing and are more likely to be homeless as a result. See Wayne A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103, 1108 (2013). Additionally, African-American job applicants with a criminal conviction faced a larger decrease in likelihood of receiving a callback than white applicants with a conviction. See Devah Pager, *The Mark of a Criminal Record*, 108 American Journal of Sociology 5 (March 2003): 937-75. Such analyses offer a glimpse at how defendants face continued punishment even after they have paid their debt to society by completing the sentence imposed.

In fashioning a sentence that is "sufficient, but not greater than necessary," 18 U.S.C. §3553(a), a sentencing judge must understand the full extent of punishment

faced by the defendant, including collateral consequences. While this does not mean that courts should refrain from imposing the more tangible components of a sentence such as incarceration, the most equitable and just sentencing approach is to consider collateral consequences for all types of defendants, not to ignore the reality of the wide and long-lasting impact of a conviction. A more consistent—and widespread—recognition of collateral consequences in sentencing decisions would promote the aims of "just punishment" for defendants of all backgrounds across the country.