

Day Two

Collateral Consequences of Convictions

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SUMMARY

Collateral consequences are those legal consequences that result from a conviction but that are separate from the punishment itself. These consequences result from the fact of conviction, not the fact of incarceration, and include outcomes such as deportation or loss of immigration status, loss of educational or employment opportunities, loss of right to vote or bear arms, and inability to get public housing or even a mortgage loan, among other things. From a personal perspective, these consequences can be the most serious consequences of a criminal conviction, but from a public policy view, they can be even more problematic because they can prevent people with criminal records from successfully reintegrating into the community. As such, they can present public safety concerns.

Panelists discussed the fact that defense attorneys are not obligated by law to advise clients of these consequences, and opined that judges and prosecutors are often unaware of the real impact a criminal conviction will have on a particular defendant. The panelists suggested that defense attorneys make themselves aware of these consequences to be able to fully advise their clients, and that judges and prosecutors take them into account as grounds for a different charge or as part of the overall penalty for the crime.

In order to confront these issues, a number of legal groups are identifying possible consequences in an effort to make judges and attorneys aware of potential outcomes following a conviction. Some jurisdictions are implementing programs to minimize the impact of these consequences. For example, some courts are authorized to waive or modify certain collateral consequences. One program in Illinois allows convicted persons to seek waivers from professional regulatory agencies in order to maintain a professional license. Another program allows them to seek a certificate of good conduct from the parole board, indicating that they have demonstrated success and some level of rehabilitation. Finally, because many of these consequences are statutory, the answer may require legislative action. Panelists suggested that these consequences be eliminated to assist convicts in making a successful reentry to the community as law-abiding citizens so that public safety can be enhanced.

COLLATERAL CONSEQUENCES OF CONVICTIONS

MR. COHEN: My name is Ken Cohen. I'm the general counsel at the U.S. Sentencing Commission, and it is my pleasure to act as your moderator this afternoon for "Collateral Consequences of Convictions." Obviously the repercussions of an offender's criminal conduct does not end simply because the criminal justice process has concluded. The collateral consequences of a conviction continue to adversely impact an offender's quality of life long after he or she returns to the community. Collateral consequences of conviction can include adverse employment consequences, immigration concerns, the loss of educational opportunities, and these all present hurdles to successful reintegration back into the community.

And so this panel is going to examine the need to effectively combat these problems for convicted-persons, what can be done to raise their level of social acceptance, what answers lie in community-based programs, and when legislative action is required. This panel is going to discuss all these obstacles and review the viability of programs designed to address these specific difficulties faced by offender returning to the community.

And we have a very impressive panel today. We are going to try and leave time for questions. I think we're one of the few panels that doesn't have any slide presentations, so I'm certain we'll have time for questions.

Our first panelist is Margaret Love. She practices in Washington, D.C., specializing in executive clemency and restoration of rights, sentencing and corrections policy, and legal and government ethics. She currently serves as director of the ABA Commission on Effective Criminal Sanctions and was a reporter for the ABA Justice Kennedy Commission. Ms. Love served in the Justice Department for 20 years, from 1978 to 1997, as senior counsel in the Office of Legal Counsel, as deputy associate attorney general and associate deputy attorney general, and as a U.S. pardon attorney. She has written and lectured widely on executive clemency and the collateral consequences of a criminal conviction, including her new book, which she asked me to plug here, *Relief from the Collateral Consequences of a Criminal Conviction*. It's only \$65, and it's published by Hein.

MS. LOVE: Thank you, Ken.

MR. COHEN: You're welcome.

MS. LOVE: Thank you so much.

MR. COHEN: Ms. Love received her law degree from Yale and her master's degree from the University of Pennsylvania.

She'll be followed by Jorge Montes, who is immediately to my left here. He is the chair of the Prisoner Review Board from the state of Illinois. Mr. Montes was appointed in October of 1994. He earned a bachelor's degree in journalism from the Loyola University of Chicago and his J.D. in 1988 from Loyola School of Law. Mr. Montes served as a supervising litigation attorney for the Cook County State's Attorney's Office, as editor for *Passport*, which is an ABA publication, and as a spokesman for the office of the Illinois Attorney General.

And he'll be followed by Michael Pinard to my far right. Professor Pinard teaches the reentry of ex-offenders clinic, criminal procedure, and the legal profession. He has also taught comparative criminal process at the University of Aberdeen in 2006. His scholarship and research interests focus on the criminal process, criminal defense lawyering, and issues related to the interconnections between the reentry of individuals with criminal records and the collateral consequences of criminal convictions. He served on the executive committee of the Office of Justice Center in Baltimore, the board of directors of the Jobs Opportunities Task Force, and the advisory committee of the Maryland Re-Entry Partnership. He's the immediate past chair of the Maryland State Bar Association's Legal Education and Bar Admissions Committee. He received his J.D. from New York University School of Law and was formerly a staff attorney with the Neighborhood Defenders Services of Harlem and the Office of the Appellate Defender in New York City. Prior to coming to Maryland in 2002, he was assistant professor at St. John's University Law School and a visiting associate professor at Washington University School of Law in St. Louis.

And lastly, we have Pat Nolan, who is to my far left. He is vice president of Prison Fellowship, and heads up Justice Fellowship, its criminal justice reform arm. He served for 15 years in the California State Assembly, four of those as the assembly republican leader. He served on the nine-member U.S. Prison Rate Elimination Committee appointed by the Speaker of the House of Representatives. He also served on the National Commission on the Safety and Abuse in America's Prisons, and he served on Governor Schwarzenegger's 14-member Prison Rehabilitation Strike Team. And I think we all owe a little bit of debt of gratitude to Michael Volkov this afternoon, because I think he kind of teed up this panel pretty well, already talking about collateral consequences over lunch. And so without further ado, I'm going to turn it over to Margy.

MS. LOVE: Thank you very much, and you know, before I say anything, I really would also just like to say thank you to the Commission for this conference. We're the last panel here, and I did miss lunch I confess. Sorry, so I have no idea how we were teed up. But this morning's panels: in particular, I just want to say that first having the four state folks come and talk to us about what was going on in their states and then the federal judges and what's going on in their districts. I was really moved, because there is so much good stuff going on out there in this large country, and it was really wonderful to hear of all those people, and I kept writing people's names down and get in touch with this person and that person. Thank you to the Commission for bringing us all here, for creating this occasion for us all to get to know each other, to get to know the issues, and everything else. So anyway, I just wanted to say that, and I really, truly mean it.

So collateral consequences. If Mr. Volkov set us up in a way that I have no idea what he did, I know Pat set us up, and I did hear Pat this morning set us up to start talking about the things that make it really, really hard to accomplish so much of what has been described here by Doug Burris and by others as one of the most important aspects of offender reentry and successful reentry, and, of course, reduction of recidivism and reduction of crime. It all feeds into this alternatives to incarceration idea and that is, these collateral consequences, and by collateral consequences I mean the legal barriers, the legal and social barriers, I should say, that arise for people with convictions that prevent them from paying their debt to society basically. I think it's pretty much as simple as that. They're rarely considered by courts. They're rarely considered by advocates at sentencing. In fact, they're rarely considered by defendants, because they don't really know about them until it's too late, and yet they may be the most serious consequences of a criminal conviction from the defendant's point of view.

Before I was a lawyer, I was a historian for a little while, for which I was not terribly well suited by temperament, I have to confess, but I am interested to think back on where these collateral consequences came from, and they have their origins in Roman law. When people were convicted of a crime, they lost their citizenship. They lost their property, and they were often banished. That's why so many Romans killed themselves rather than actually be convicted, so their families wouldn't lose everything.

Well, I'm unhappy to report that that system lives on. We're all most familiar with the loss of civil rights, loss of voting rights, loss of [inaudible]. There are only a handful of states that still permanently deprive people of voting rights.

But the more important thing for our purposes today is that there are tremendous barriers that have an economic effect on people with a criminal record: loss of licenses, disqualification from employment, banishment, deportation. As anybody knows or most of you all know, I'm sure, that people who have been convicted of an aggravated felony which is a pretty [inaudible]. Aggravated felonies under the federal immigration laws have a very expansive interpretation including things like convictions for which prosecution is deferred, which are not really even convictions. They're guilty pleas, and the charges are later dismissed upon successful completion of probation, but the iceman cometh, and he will, and he will get you whether or not you have a conviction. I think that's terrible, and I hope that will not be a policy that survives this administration.

As a result of a conviction, a person may no longer serve as an executor or guardian, adopt a child, coach a soccer team as a volunteer, get a mortgage, and I even have clients who have been unable to contribute to a political campaign as a result of their conviction, sometimes many, many years ago. These are all things that my clients experience. I've taken all these things out of my own real life. When people come to me they want—usually a pardon. It's because they can't coach their kid's soccer team.

For the past 25 years, the collateral consequences of conviction have been increasing. They have been getting worse and worse. Since 9/11 it's been, you know, pretty catastrophic for people with a felony record. Backgrounding has increased. You have to have a criminal background check. My daughter is trying to rent her apartment, the condo, and she has to get a criminal record check, according to her condo building, for anybody who she wants to have rent her apartment.

There are 600 firms now engaged in criminal backgrounding. There is an association of professional background screeners I guess it's called. This is alarming. All of this explains why defendants should be concerned about collateral consequences. It doesn't necessarily explain why lawyers should be concerned about them. Until fairly recently, courts have almost uniformly held that collateral consequences, civil consequences as they call them sometimes, no matter how draconian, are not unconstitutional punishment for the purposes of the Fifth and Sixth Amendments. A person need not be warned about them, and often is not, before pleading guilty. In fact, most of the actors at sentencing, including the court, don't even know what they are. Defenders are not ethically obliged to advise their clients about them, and prosecutors are not ethically obliged even to inform themselves of the full range of the penalty to which their charges expose an offender. Very few jurisdictions even know what they are, and I gather there was some talk at lunch, which I missed, I'm sorry, Ken, about the effort now underway in the federal government to collect all of the state collateral consequences. Well, it's going to be a very difficult job, because these things are scattered all over the law books. They are not all collected in the criminal code. It's really hard to find them as anybody—Michael has been one in the

forefront of efforts in Maryland through the law clinic that he supervises to collect the collateral consequences of conviction for Maryland, and they did a great job, but there are not very many states that have actually done it. So if you say that, you're not advising your client, it's kind of hard to advise your client when you have no idea what they are.

It's important that we care about them for public safety reasons. If they are, in fact, posing barriers to successful reentry, they're by definition posing a risk of recidivism. If people can't get jobs, they can't get housing, public housing. I forgot to mention that. That's a very important thing. In many states, you are automatically excluded from public housing which means you can't go back to live with your family. And, and in some cases, you are [inaudible] even not knowing about them can be a crime. For example, if you don't know that you are not allowed to carry a firearm, or if you don't know that you can't vote, you may be subject to prosecution.

There is a guy named Logan somewhere in the state of Wisconsin who was a misdemeanor who had no way of knowing that—or, he really did have a way of knowing, but he didn't think he was subject to the prohibition in the federal firearms statute, because he never lost his civil rights in the state of Wisconsin, because he was not a convicted felon. But it turns out that there is a little technicality in the federal firearms law that certain kinds of misdemeanors do subject you to those provisions.

Five minutes. I can't believe I've been talking that long. It's terrible. I do go on. Well, there's a lot that's not going to get said, I can tell you that.

Anyway, look, I'm going to try to cut to the chase here. My effort today is to set a kind of a framework for what the other panelists will be talking about, a legal framework for lawyers, and I want to mention to you, this is what I planned to talk about mostly, the ABA standards on collateral sanctions and discretionary disqualification of convicted persons. These standards, and I have a couple more copies here if anybody is really interested in them, are the first effort to set out a rational legal framework for understanding the collateral consequences of conviction.

One of the first things that we decided to do was to stop calling them civil consequences. We are firmly of the view that the legal penalties resulting directly and immediately from the fact of conviction are in every sense sanctions, and that's why we call them collateral sanctions. They may not be part of the court-imposed sentence, but they are certainly a sufficient part of the punishment, even if not for the Constitution's purpose, to be considered at sentencing, and by all of the actors engaged in the sentencing project. All actors in the system should be aware of them, and a court or administrative body should be empowered to waive or modify them.

The criminal justice system must also concern itself with the kind of discrimination, discretionary discrimination, that happens. It may not be an absolute legal bar, but you all probably have run across situations in which you may take a conviction into account. Well, you know, to tell an employer that he may take a conviction into account is to send a subtle signal these days that he better take it into account and exclude the person absolutely. We are not in a very risk-taking mode in this country where people with a criminal record are concerned.

You know, I was struck yesterday by the case of Clark Porter you remember who—he was the fellow who had tremendous success. He had been in prison and he came out. You know, he emerged from years in prison to become a valued and trusted part of his community. Extraordinary criminal

justice success story who is already playing a key role in helping others to avoid his fate. But I imagine that he could not get a job in my old agency, the Department of Justice, in any capacity, probably not even in some sort of menial job, much less the kind of job where he would be the most help to the government. I imagine that he can't get a job in most of the criminal justice agencies in which people at this conference work.

I think that's a terrible shame. I think we are losing a huge resource. I know he probably couldn't even visit anyone in federal prison. I think BOP has a bar. They won't let anybody visit who has a criminal conviction. Certain folks accept it. Like for example Chuck Colson—

MR. NOLAN: He has been denied entrance.

QUESTIONER: He's been denied, too.

MS. LOVE: Oh, he's been denied, Pat?

MR. NOLAN: Um-hum.

MS. LOVE: If we expect the justice system to teach people lessons that they can communicate to others, how can we expect them to do that if we relegate them to the margins of society, if we basically make them a pariah class, an invisible class? It's really hard to understand what we think we are accomplishing. We are no longer in ancient Rome. Maybe it served some purpose at that time, but I frankly don't think it serves much purpose anymore. And yet, we are stuck in that legal framework.

This set of standards I am really proud to say, and I was going to give a report card—oh, phooey, maybe I should write something on this. I guess I'll have to do that. A report card on where we are five years after these standards were adopted by the ABA house, and I was thinking last night that it was the same meeting at which Justice Kennedy spoke to us, and I think it's [inaudible] that these standards were adopted. I remember ABA President Dennis Archer asking me to try to explain them. "Hurry up, hurry up, explain them to me," and I was terrified, and my mind completely froze solid, and I couldn't do it, and I was so embarrassed, but he was—actually Dennis was very good, because he was the one who established the Justice Kennedy Commission and saw instantly that what Justice Kennedy had said was tremendously important, and this is a guy with tremendous political instincts. And I marked the beginning of the emergence from this difficult, tough time from that time back five years ago.

So this is an interesting set of standards. The one standard that I think we have made some good progress with, the only one that got an A, everything else was getting kind of Bs and Ds and Fs here, is to get buy-in for this concept that collateral consequences, collateral sanctions and disqualification are very much a part of the criminal justice process. So I would just simply take issue with what Ken said or I would say that you stated the question. Are these in fact a part of the criminal justice process, or are they not? And this set of standards says they are.

Thank you very much, and I've just set the table, as they say in academia these days, for my colleagues.

(Applause.)

MR. MONTES: Good afternoon, ladies and gentlemen. I'm delighted to be here, and you will be delighted to know that I have a 5:45 flight to Chicago, and therefore I'll have to go very fast, and I'll probably be briefer. Can I take a survey here to see who thinks I'll make it to the airport if I finish in another 10 minutes?

QUESTIONER: Which airport?

MR. MONTES: National. Yeah, good, then I'll take my time.

QUESTIONER: You've got plenty of time.

MR. MONTES: Then I'm going to take my time. Okay, I will not, because I have quite a few things to say, but I'll be brief.

I have been excited and delighted to be at this conference. I think it's so historic, and I feel a little bit out of place. I feel like a dilettante in this circle of experts and academicians, and everybody has fancy charts and Powerpoints and everything. I don't even have one or anything. But I think I have a few things to share that may be helpful to all of you.

I was speaking to Chairman Hinojosa just a little while ago and telling him how wonderful the conference has been and useful to me, but if I could editorialize just a little bit, I would say that if I would have something to do with putting together the whole conference, I would have added a few more prosecutors. I would have added a larger portion or more participation by prosecutors. You know why? Because I think, from my experience in Illinois and as a former prosecutor, I think—20 years ago, but I think that they play a critical role in helping divert people way at the front end, and the only person that I think was here was Charles Hynes from Brooklyn, who is my hero of the prosecutors that are doing the right thing. And I think that we should be paying more attention certainly in Cook County in Illinois, which is a county that kind of wags the whole state. We are now in a real transition, because we're about to see the departure of our very traditional, reactionary, closed-minded state's attorney—nobody is from Chicago here, is there? All right, probably for the first time in history we will have the first woman and the first Latina state's attorney in Cook County, and you should know that I am lobbying and campaigning and fundraising all over the place because I am excited about the possibility that she will bring a more enlightened, holistic approach to prosecutions in Cook County. And I'd like to see that all over the country. That's where I think that we should hear more from prosecutors. They should be here so they could be also indoctrinated a little bit more.

In any event, there are things that could be done, as I said at the front end, but there are a lot of things that could still be done in this criminal justice continuum. I'd like to showcase a few of the things that are somewhat cutting edge, I would think, in Illinois that we're implementing at the back end through the Illinois Prisoner Review Board, which I have had the privilege of chairing for the last five years.

But first let me share with you some of the difficult and sometimes heartbreaking positions that offenders find themselves in because of collateral consequences of their convictions. I'll focus real quickly on four areas. Immigration: there has been a groundswell of cases in Illinois in immigration. You must know that Illinois has a very large immigrant population, especially in the Chicago land area, and we are hearing so many heartbreaking, gut-wrenching cases of people whose lives are being torn apart. For those of you who have any knowledge of immigration law you [inaudible] certainly they're the

people that are undocumented. Well, if they get caught up in the system, they're going to be deported probably. But if you're a permanent legal resident, that means you're here legally the way my parents were for 30 years, and you never made time to go become a citizen, and you get caught with a felony, there's a good chance you are going to be deported. And if you are a permanent legal resident, and you go apply for citizenship today, most times we advise people not to do it, because they'll dig up the records. When they find out that there's a felony in their background, no matter how old, they will be possibly deported.

Now let me put a real face on this, and it's real close to home, because it's my uncle who came before the Prisoner Review Board five years ago. I recused myself. But he came because over 33 years ago in Chicago, as a result of a bar brawl, he killed another man who was attacking him, in self-defense, and he was convicted of manslaughter, and he did about three years. He came out and did beautifully, and he married, and then he went on to live in Michigan and bought two homes, three homes. His kid is in Iraq today, and he called me the other day very distressed because the governor has not decided his clemency—nobody from Illinois here? I got to be careful. All right, so nobody is from Illinois, right?

QUESTIONER: We'll get your back.

MR. MONTES: All right, you got my back. Okay, so the governor has been sitting on this case for five years, and now there's this new regulation or new rule that immigration is going to possibly implement, we are told, that all permanent legal residents should check in once a year, under certain categories, most categories, and if there's any kind of felony in their background, they stand the chance of being deported.

So he's got a kid in Iraq who is giving his life for our country. He's a grandfather now. He is living a law-abiding life. He is living a model existence, as far as I'm concerned, and he stands to be deported because of—this is all retroactive, by the way, because the laws kicked in I believe in 1986, but it doesn't matter here. Forget the Constitution. This is all retroactive, and if you committed a felony, you're going to possibly be deported.

Ex-felons in Chicago, for example, just to echo what Margy said, cannot live in public housing, and sex offenders, even if convicted of statutory rape, have few housing options. You'd say so who cares about sex offenders, right? But, but wait. There are all kinds of sex offenders, the statutory sex offenders. Oh, how about sex offenders who aren't sex offenders? What? Yeah, they're not. Like in Illinois, if you were involved in a gang, and you shot somebody under the age of 17 up to two years ago, you were considered a sex offender, because you fell into the Sex Offender Registration Act, so you're a sex offender. Now that made no sense, so somebody brought it to my attention, and I started working with legislators, and by the time we knew it, about a year and a half ago, we got the law changed, and now you will be put on a child murderer list but not a sex offender list and everybody prefers to be on the child murderer list than on the sex offender list, because then you could live in different places, right? Your housing opportunities are very limited.

Most importantly, and as we've heard all morning, one of the largest barriers for people, or collateral consequences, are for people looking for employment, and one of the greatest indicators of your success or your possibility of recidivating is whether you have a job or not, and I think most studies bear that out.

I'm going to highlight four programs that the parole board is aggressively promoting in Illinois. The first two were imported from New York. Who is from New York? Nobody from New York, okay. They're imported from New York through guess who? Barack Obama, who saw the certificates of relief from disabilities and certificates of good conduct in New York and thought they were interesting, and so he brought them to Illinois, and about five or six years ago, they were made law in the state of Illinois.

Let me really quickly run down through the certificates. Certificates of relief from disability: these allow ex-offenders to receive waivers from the state's professional regulatory agency. Ex-offenders can petition the parole board if they have not been convicted of a violent crime or a nonprobationary offense. They cannot be sex offenders. They cannot have more than two felonies as the law stands now, and they can receive a waiver from the regulatory agency for up to 27 different professions out of the approximately 65 that require licenses, such as roofers, cosmetologists, nail technicians, whatever. There's a whole list of them.

Interesting enough, in areas where a lot of ex-offenders go into and probably do it illegally, now they can go get a waiver if they want. The board will give them a waiver. We rarely turn down any waivers. I don't think in the last two years we've turned down any petitions for waivers, other than one who wanted to become a realtor, and he was in prison for forgery. So we think that one worked real well.

So then we go on to certificates of good conduct. These could be used to show employers that the board feels that the petitioner is, according to the law, "rehabilitated," which was a little scary to the board to be able to tell somebody, "You are rehabilitated," but that's what the law says.

Those with misdemeanors must wait one year from the date of the termination of their sentence to be able to apply for one and be eligible. Those with felonies must wait three years from the termination of the sentence to be eligible and there [audible] no violent offenders, please, and only two felony convictions.

Now in the course of the last two years, we have been pushing, with the help of a number of agencies there in Illinois and with the advice of Margy Love, who has been a real mentor to me, and we're grateful for her assistance in all these efforts, we have been pushing the boundaries, and we've come real close, we think maybe in the veto session in November, we'll be able to eliminate all the limits on felonies. It will be multiple felonies, it doesn't matter and we'll include violent offenders who will be able to get certificates of good conduct.

Now you may say, "Well, these are really just band-aids." Well, they're band-aids, but it's better than nothing, right? And we're building these up. We're growing these. They started real small, they're growing, and one day there will be many pardons, we think, because in Illinois the governor hasn't been granting very many pardons. I think he's got a backlog of 3,000 pardons.

And that's my next topic. Within the last ten years, and certainly within the last five years as chairman, I have helped triple the amount of petitions that have come up for pardon, and Margy and I have talked about this at length about how really this could be possibly another frontier to help with collateral consequences of convictions, because if governors would begin to take these things very seriously, then maybe we would begin to see a lot more relief in that area.

We're really not the role model state to be up here talking about this because our governor is probably the worst in the whole land in terms of deciding these cases, but there are a number of things that are helping him move along, and that is all the bad press that he's been getting lately, and in fact, just last week there, the *Tribune* had a front-page article criticizing him for not deciding these cases and that, just as confidential stuff, we learned now that his legal team is really interested in moving these forward a little bit more consistently. Well, I mean he decided one in the last year but he's going to be [inaudible] he did 19 last week and really made a dent in those 3,000.

Moreover, and more interestingly and more importantly, he was sued in federal court last year—didn't think it was going to stand the challenge, but it did, and the federal judge said, "Hey, listen, you don't have to decide favorably or unfavorably. You could decide how you want, because the Constitution gives you that right, but you must decide in a reasonable amount of time," and of course, everybody—they're running for cover, and of course they're resisting the suit, but it's moving forward, and it resisted summary judgment, is that right? I'm a little far removed from litigation these days. We're hopeful that that's going to help continue to open that area, and as far as I'm concerned, I'm going to continue to push for more clemency.

Not a month goes by that the Prisoner Review Board is not out in the community, unlike previous boards, and we have up to 3,000 and 4,000 people gather at high schools to discuss with the board how they could petition for clemency and for expungements, and now we've taken the opportunity to bring in all kinds of lawyers from all kinds of groups, from the bar associations, etc., to discuss sealing. How can you get your record sealed? How can you get it expunged through the courts? You can also get your record expunged through the court.

And, finally, there are the areas of expungement that are also being tested before the Supreme Court. Right now they're actually testing the governor's powers to expunge if there are other convictions in the individual's record, and that's now at the Supreme Court level.

Finally, and within my time allotment I think, there is also a fourth program that we've started at the parole board in Illinois, and that is the Cook County Diversionary Program. As I told you earlier, I'm told that Cook County is the largest unified court district in the country. I don't know if that's still the case. But anyway, we decided that the Parole Board should not be somewhere in Springfield out of reach for everybody, for the majority of the population. So we placed a high-ranking staff member right at ground zero, right at Cook County, and this hearing officer does hearings three and four times a week and is there right at the gate. As they're coming back in on parole revocations, if she determines that this person has committed only some kind of technical offense, or if this person has committed a very light offense, and we have the power to release that individual and have him or her resume parole, she will do so. And not only is it saving families, saving lives, saving jobs, but it's saving a lot of money. At this point, I'm told that we have saved the county and the state over \$2.5 million within the last year and a half alone in bed space that would otherwise be taken by these individuals who don't belong there. They belong out working and with their families and hopefully trying to get their lives together.

I appreciate your time. Thank you for having me.

(Applause.)

MR. COHEN: We'll hear from Professor Pinard.

PROFESSOR PINARD: Okay, I want to back up a bit, and I think that both Margy and Jorge really explained the need for our legal actors at the front end of our criminal justice system to incorporate collateral consequences in all phases of the criminal process, and collateral consequences are the most secretive aspect of our criminal justice system, but they impose the most long-lasting penalties, because they stay with defendants, as Margy explained, long after they have completed their sentences, and they affect their families and communities. So I urge us to adopt the reentry centered vision of the criminal process, and by this I mean that collateral consequences should be a central component of each stage of this process, and it's reentry centered, because collateral consequences, Margy explained, are the legal obstacles that all individuals with criminal records face, whether they return to the community after incarceration or whether they have never served a minute in jail. I mean I think it's important to recognize that incarceration is not sort of the catalyst for collateral consequences. It's the conviction.

Prosecutors, defense attorneys, judges, and defendants should be aware of these consequences and take them into account when making their respective decisions.

So let's start with prosecutors. Maybe we can go back—if there are not too many in the room, we can go back and then tell our friends what it is we're talking about. But we all know that prosecutors have the awesome power to charge individuals with crimes, and charging decisions will often dictate what will happen to the defendant, because the overwhelming majority of cases end in guilty pleas, and this charging authority is even more powerful when we consider the various collateral consequences that will attach to the conviction. So when prosecutors charge individuals with crimes, they think about various factors. They think about the harm to the victim, the harm to the community. They think about the defendant's background. They think about the evidence, and they think about the particular potential sentences for the particular offenses. But they should also consider the various collateral consequences that will attach to conviction given the acute impact on the defendant.

So for instance, the prosecutor might look at crime A and crime B and figure, "You know what, maybe I'll charge the defendant with a lower-level offense based upon the fact that this individual is still going to face a host of collateral consequences which are going to attach to the conviction." So they could sort of take this into their charge calculus, if you will.

Defense attorneys should factor collateral consequences into their initial interviews with clients. So for instance, as Margy explained, there is a public housing ban if you have a conviction in certain jurisdictions. They should ask the client, "Do you live in public housing? Do you have family who lives in public housing?" If it's a drug offense, maybe they should ask the client, "Are you a student? Are you a college student? Are you currently receiving federal financial aid for your education?" Does the client have a job-related license that could be impacted by a criminal conviction, or does the client want to have a job that's going to require a license? So these are the types of things that maybe defense attorneys could ask clients. Defense attorneys should also analyze the collateral consequences that potentially attach to the conviction, have meaningful conversations with clients regarding these consequences, advise them about these consequences, and counsel them accordingly.

The prosecutors and defense attorneys together, it's rare that you say that in one sentence, but they do work together in many instances. They should factor these consequences into plea negotiations, so in a given instance, the defense attorney could talk to a prosecutor about offering a specific plea deal, because less consequences will attach. So for instance, perhaps the defense attorney in a certain situation could convince a prosecutor to offer a misdemeanor plea, if a felony plea would bar the defendant from

receiving certain forms of public benefits. Because again, as Margy explained, our actors don't really know this. So maybe if you educate a prosecutor about the host of consequences a person can face, this person now can face these host of consequences; maybe that will factor into the actual plea. Maybe it could be reduced from a felony to a misdemeanor.

Maybe we could convince the prosecutor to offer a noncriminal disposition if a criminal disposition would exact disproportionate penalties in a certain situation. So for instance, if it's a first-time offender, nonviolent offense, maybe they can convince the prosecutor to offer noncriminal disposition because the penalties are disproportionate in the sense that, given the defendant's background, the collateral penalties are simply just disproportionate to the crime, because again, these penalties, they don't individualize. They attach to any conviction, so it's not like you're considering the specific defendant's background in a given situation. Maybe a prosecutor is hesitant to offer a particular deal that appears lenient but in reality is not when he or she considers these collateral consequences.

Defendants, as Margy explained, must be informed of consequences, so they can make intelligent decisions about whether to plead guilty or go to trial. Several states now require defendants to be made aware of possible deportation consequences, and a couple of states require notice of a couple of other consequences such as the possible lifetime sex offender registration. However, in the meantime, defendants are not legally entitled to be made aware of these consequences, not from their attorneys, not from the prosecutor, and not from the judge.

But imagine a person in Baltimore City, where I work, who pleads guilty to a misdemeanor offense. Again, misdemeanors, felonies, right? These things are going to attach. Or let's imagine this person pleads guilty to a misdemeanor offense in Baltimore City. Misdemeanor offense in Baltimore City, he pleads guilty, he or she pleads guilty. Pick your misdemeanor, except for some quality of life offenses. He or she is going to be ineligible to live in public housing for 18 months. This plea may impact or his or her ability to get an employment-related license, and if it's a misdemeanor drug offense or a felony drug offense, no matter where it is, and the defendant is receiving a student loan, that student loan can be taken away, and if it's a felony drug offense in certain states, not Maryland actually, where they changed the law a couple years ago, but if it's a felony drug offense, then the individual can be made ineligible for public benefits. And these are just some of the consequences. Margy explained some of the others. I think this person should know about these consequences before he or she pleads guilty, and in my work, I've seen lots of individuals who literally are shocked when they finish their sentences, and when they're trying to get a job, and they're trying to live with their families, and that's when they find out, they discover the true impact of their convictions.

Judges should also be made aware of these consequences. The ABA standards on collateral sanctions urge judges to consider consequences at sentencing, to give them the authority to waive consequences in certain situations that they deem appropriate, and to provide relief from these consequences. However, judges should also know about these consequences so they can help—some would say nudge, but let's be more productive and say help—prosecutors and defense attorneys work out dispositions that minimize the defendant's exposure to collateral consequences, or if not minimizing these consequences, at least provide transparency to defendants.

So again, we should push for a reentry-centered vision of the criminal process, one that appreciates in full the range of penalties that are attached to criminal convictions and recognize that these

individuals, whether or not incarcerated, will one day have to confront and struggle through these consequences.

Thank you.

(Applause.)

MR. COHEN: Our last presenter is Mr. Nolan.

MR. NOLAN: Well, I too, would like to thank the Commission for this symposium. This has been so rich in content, and also the chance to collaborate with folks around the country is wonderful.

I thought as a recovering politician that it would probably be helpful for me to talk to you about how legislators look at these types of issues and how we can create a climate that makes it easier for the legislators to give relief from some of these collateral sanctions. You've got to understand I think Everett Dirksen, who was a wonderful senator from Illinois, summed up a legislator's mentality when he said, "When I feel the heat, I see the light." And that really is the attitude most legislators have. They respond to public opinion, and a lot of these draconian laws we have are the result of them reflecting public opinion.

I've been involved in many issues, both here and while I was in the legislature, and the sad reality is that the merits of legislation really don't have a lot to do with whether it passes or not. You can create the best case possible for some reforms, and they don't have a chance. I think that's what Mike Volkov and Bobby Vassar were trying to get across. What was included or not included in the Second Chance Act didn't have to do with whether it was a good idea or not. There were a lot of good ideas that were left on the cutting room floor, but you need votes to do it. You need to have a majority vote in each committee to get it through, and so part of our challenge is how to get enough votes in the committees all the way through the process to change these laws, and the way to do that is, of course, change public opinion so that legislators will respond to that.

I think the fact that the Second Chance Act passed by such an overwhelming margin, every single Democrat voted for it, but two-thirds of the Republicans voted for it, shows that there has been a change in public attitudes on this. It's starting to dawn on the public that their safety is at stake here and that when people don't come out of prison better than they went in, in fact may come out worse, maybe it's in our own interest that we do something to help them make that transition.

Now I don't want to overplay the Second Chance Act, because within a few weeks after it passed, another two or three bills went through with more collateral sanctions on housing, and I think employment. Now they were narrow things, but the same Congress that passed the Second Chance Act also put more restrictions in. So all of them didn't quite get it, but at least we have started the trend. And as we deal with the collateral sanctions, I'd like to talk to you about what I think needs to be done to have the conversations in communities and to get thinking and caring people talking about this as something that affects all of us and that we're paying a price for these current policies.

The first is we have to keep in mind that public safety is key. The reason the public has supported many of these things is they think it makes them safer. That's why they're doing it. They're afraid. People live in fear of crime. One of the problems with modern society is any crime that's heinous

that happens anywhere in the country is broadcast immediately on the news, and people who live in a community in which that crime would never happen are afraid that night. When Megan was kidnapped down in Florida, I think Megan was her name, all of us saw that awful, brutal act, and it chilled anybody who has a child, and so the public overreacted to that even though in most communities in the United States, an awful thing like that hasn't happened. Yet for every American it was real, because they saw it on their TV, and people were able to whip up sentiment.

So first, we have to convince those in the public that they are better off and safer with the reforms we advocate than with the current situation. And what I've found is you don't start out talking about the good reasons for reform. We first have to condemn and indict our current system. We have to show them that this system that we pay so much for in fact hasn't made us safer. If you start out just talking about reforms, they think you're a fuzzy-headed liberal. Even me, a rock-ribbed conservative, people think I've sold out, I've gone native, all of these things they've accused me of, and I've learned that first we have to explain to them how we haven't been made safer by this system. You know, you look at the number of people we incarcerate compared to red China of all things, and you know, per capita it's like six times the amount of our population that we incarcerate versus them who we view as a cold-blooded, tyrannical regime. That's shocking to people who have [inaudible] and then you talk about the recidivism rate, and I don't put it just in terms of recidivism, because that's a government term. I talk about the failure rate. Our prisons fail us two-thirds of the time. People get rearrested within three years of their release.

If you went to a hospital where two out of three times people were still sick when they left, you would find a new doctor and a new hospital. A business, a transmission shop, that two out of three times the car that left the garage had to be brought back for repair, you'd find a new repair shop. We have to do business differently, and I think we have to make that point to the public that our current system isn't making us safer. That's our burden first. Then they're open to change.

Then we need to show them examples of where these types of reforms have made us safer, and a couple of examples, I love the presentation of the fellow from Virginia with those statistics he had. Those are worth their weight in gold in discussions you'll have with your neighbor. If you can show them that the recidivism actually dropped by doing these different alternatives to incarceration, their minds light up. All of a sudden they're open to it, because it's shown that they're safer for that.

Rudy Giuliani was mayor of New York, and I say this to Republican audiences. He not only succeeded in driving the crime rate down, more importantly he succeeded in doing it at a time he was lowering the prison population. The number of inmates in New York City went down, and that's the gem, that the public in New York was safer, and he did it while cutting the prison population. Why? By making wise decisions about who stays in and who leaves. Michael Jacobson, you know, was his commissioner of corrections. Well, Mike's background was as a budget analyst, and he looked at numbers coldly and said, "Where is the tipping point where we don't get any more public safety for incarceration? All we get is cost but no public safety. That's the point at which we ought to let them loose," and he looked at it not from some fuzzy-headed liberal or bleeding heart's point of view but as a cold-blooded budget analyst and said the public is not getting the bang for the buck by keeping these folks any longer. And he carefully structured the time people were incarcerated and what we did with them to make the transition so he could lower the number while increasing public safety.

And so we can point to a few of those things and say to the public, “We should expect more of our government. We should expect them to make wise decisions like that.” We don’t have the background to do that, and we ought to hold them accountable.

And then I think there are two major argument lines, both of which are important for us. The first is the practical and societal impact of collateral consequences, and the second is moral. If you don’t use both, I think you lose some in the process. The societal ones are that everybody understands that you need to be able to support yourself. That old expression “root, hog, or die.” That’s our society. You got to be able to earn a living, and when you explain to people the nonsensical restrictions there are in employment and give them some examples of the restrictions—I think it’s thirty-some states won’t let a felon have a barber or cosmetologist license. What on earth is the public afraid of, they won’t put the comb in the green goop? You know, that’s no danger to the public. The public is astounded by that, or that a felon can’t work at a school, hospital, or nursing home. Well, mowing the lawn at a school is not a danger to the kids. Now if the kid is a child molester, yeah, but the sanction should be related to the crime. But if somebody kited checks or committed welfare fraud, mowing the lawn isn’t going to be a problem. Doing the laundry in a senior citizens’ home or a hospital isn’t going to be a problem. That’s an honorable job that will earn a wage and pay taxes, help them support their family. The public understands that. They don’t know that our rules restrict things like that, so part of our role is to talk to our neighbors and bring up these practical examples. You can talk about numbers all you want. It’s people. It’s putting a face on the people.

And I don’t mean to be offensive to anybody who is not Christian, but for those of us who are Christians, look how Jesus talked. He talked in parables. He talked about real-life situations. He didn’t just lecture. He told a story of a human being and the impact things had on that person. Now we can draw the principles from that, but people care about people, so you need to put a human face on it. Talk about real-life situations where somebody has been denied a barber’s license or couldn’t work in a nursing home.

There was a guy, the father of a young lady who used to work for me. He had been a bank president. He [lived] in New Jersey. He could not find a job at a nursing home, a school. He couldn’t teach in a private school. Even a Catholic school didn’t allow him because of the state licensing. This guy was a bank president, and he wasn’t accused of doing anything with children or anything else. It was loans. He had unfortunately started a bank at the time the economy went south. How did that make sense? You know, and so talking about those real-life situations is important.

Then they also need to understand the benefit to society. This person becomes not a taker from society but a contributor to society. They produce. They do the job. They pay taxes. They support their family. This is all positive for society. That’s what we want ex-offenders to do, and if you make the point to them, “Gee, we’re putting up these roadblocks and these barriers,” all of a sudden it dawns on them that this is something wrong, that this doesn’t make sense, and I think we need to take advantage of the public’s natural suspicion of government agencies to say, “Look, it isn’t serving us well.”

As a legislator, I made the mistake of turning a blind eye to everything about the Department of Corrections. I was just a saluter. Anything they asked for I voted for. Now as a conservative, I was suspicious of the DMV, of OSHA, of the Department of Health. I was worried about all those bureaucracies, but I literally just gave a pass to the Department of Corrections bureaucracy, and I shouldn’t have. I should have held them to the same accountability that I did others, and I think that’s

one of the things we have to have the public do. Look at the decisions they make. Does it make us safer or not? Does preventing somebody from becoming a barber really make us safer? If not, why in the heck are we doing it? That's the type of conversation we have to get going.

But then we also have to talk about the morality of it, that we can't just write these people off. Because they have done something wrong in their life, we can't just say they're sub-humans or marginalize them forever. President Bush said this in the State of the Union Address in supporting the Second Chance Act. He said, "America is the land of second chances, and when an inmate walks through the gates of a prison, it should be to a better life." Now President Bush pays attention to the public mood. Now that was from his heart, but he also pays attention to the public mood. That expresses where most Americans are. You can rely on it, and so talk to them in those terms. Now that's not talking about the practicality. That's talking about just basic goodness, who we are as a nation. We do believe in second chances. To those who are religious, it's redemption.

I had a state senator say to me once, a buddy of mine, Ed Davis, who was a chief of police of L.A., and I had supported him in his primary, and we were good friends, and so good friends can express their differences of opinion. He had a bill to give worker's compensation coverage to inmates, and we were at a dinner together with our wives, and Ed said, "Are you going to support my worker's comp bill?" I said, "Ed, that's the stupidest idea in the world. Why should the business in my district pay higher rates to their worker's comp carrier for some convict?" And he said, "Well, Pat, you know, most of these inmates have families, and if they get injured while they're in prison, they have to be able to support them. There should be some way to help them." And I said to him, "Well, you know, they should have thought of that before they committed their crime," and of course most legislators would say that I think in both parties. He looked me straight in the eye and said, "Pat, how can you call yourself a Christian and say that." And that just pierced right to my heart. He challenged me there, and I think we have to challenge our neighbors. How can we—and you don't have to be a Christian. How can we say we're human beings who care about others, and turn a blind eye to the suffering or the needs of those coming out of prison? They have families. They can contribute things to society. Why on earth would we marginalize them? And I think that's the debate we have to have. First of all, practically and societally it helps, but also morally our obligation is to help give a hand to these folks as they come out. I think that's the way we will change the public opinion, and through public opinion the legislature will follow. Thanks.

(Applause.)

MR. COHEN: Are there questions from the audience? Okay. Yes.

MS. CHAIKEN: Hi, Rebecca Chaiken, U.S. Probation District of Minnesota. Maybe this is a stupid question, but it's probably directed to the professor. What is the best way of finding out in my state, for example, what the collateral consequences are? I mean, I know a lot of the federal ones, denial of federal benefits, that sort of thing, but I don't really know about the barbers or the health care workers or the school bus drivers.

MS. LOVE: Oh, you're from Minnesota?

MS. CHAIKEN: Yes, ma'am.

MS. LOVE: Boy, are you lucky.

MS. CHAIKEN: Oh. I feel that way.

MS. LOVE: Actually, Minnesota is the first state that has actually codified all of its collateral sanctions. The revisor of statutes, Michelle Timmons, did this as a part of our uniform law project. There is a new uniform law. I forgot to say this during my talk. There's a new uniform law on the collateral consequences of conviction, and one of the provisions is to gather them all in one place. So Michelle was our guinea pig, and she did it for all the collateral sanctions in Minnesota law, and I can give you the cite if you want, and it's all electronic. It's got little links to the actual statute. It's totally cool.

Now it does not include the discretionary disqualifications. It's only the collateral sanctions, but it's a great kind of template, and it's one that perhaps NIJ, which has now been directed by Congress to collect all of the collateral sanctions and discretionary disqualifications from all 50 states. Marlene knows about this. She's smiling. Ha ha—it's going to be a tough project. They may use this as a possible template. The federal collateral consequences also have to be gathered, and our ABA commission is working on that project.

But take a look at Minnesota because it's all been done.

MS. CHAIKEN: Good, thank you.

MR. COHEN: Other questions from the audience?

Well, I had a question actually triggered by something that was said by Professor Pinard, which was that many collateral consequences are triggered by the conviction itself and not necessarily by the fact of incarceration. If that's the case, is there any way for sentencing courts, for the courts at the phase of sentencing, to consider the collateral consequences, and if so, how should a sentencing judge consider them?

PROFESSOR PINARD: I think at the state level that would be the ideal system, that judges should think about the range of penalties that are going to be visited upon this defendant who has either just pled guilty or has been found guilty in some way, and how they could use it is, you know, you can't really get around many of these consequences, but certainly when you're thinking about the "direct penalty" which is sort of the jargon that's used to distinguish jail or prison or probation from these collateral sanctions, then certainly you can think about that in a way, lessening the direct penalty. So maybe if it's a choice between jail or no jail, or prison and jail, or prison or no prison, or the actual sentence itself, then I think judges should consider the fact that this individual, when he or she is finished with that sentence, is going to be punished in a whole new and more sustained way than with a jail or prison sentence. So that's the way judges can use it. They could use this and say, "These are the penalties, so therefore we're going to lessen the jail sentence," for instance, or the difference between jail and no jail.

MS. LOVE: Could I just add to that? There's one state that actually does this, and that's New York. For years they have had a certificate system whereby the sentencing court can actually issue a certificate of relief from disabilities. This is something that comes out of the forties, actually it's been years and years. It's not used that much. The sentencing courts are obliged by their own rules to advise

defendants of the availability of this relief, but a lot of them don't even know it. It's interesting. We discovered this last year at a conference.

But the other thing is that the Model Penal Code has a provision in it that brings these before the sentencing court. This is 50 years ago that all of these wonderful ideas have already been thought of by somebody else a long time ago, and now we're sort of—it's back to the future in a way. So I completely agree with you. It's part of the ABA standards that the courts ought to be able to consider these in imposing the penalty. But it's a very interesting idea, and I think that you could really do it. I'm not sure exactly how you would do it in a guideline structure.

MR. COHEN: A follow-up question is how should sentencing commissions consider collateral consequences?

MS. LOVE: You know, the first task force draft of these standards had a role for commissions. We were backed off a little bit by our standards committee that didn't want to actually have these as a part of the sentence. We want it as a part of the sentence so that the sentencing court would either impose them or in a later version dispense with certain ones that were statutory ones. They would have the power to dispense certain ones. That's what they do in New York. Our standards committee, which has plenty of prosecutors on it I can tell you, kind of backed us off that, and so we ended up with this kind of compromise proposal, but I think it ought to be absolutely the role of the Sentencing Commission to concern itself with these.

MR. NOLAN: Could I ask a question practically? First of all, I absolutely agree it should be considered part of the sentence and whatever we can do we should do that. But given the option of more time in prison or collateral sanctions, my hunch is most defense lawyers and most defendants would say, "Gee, if I don't have to go to prison, or if it lessens my time in prison, I'll accept the collateral sanctions." And we all know the horrid price they will pay for that, but it's the idea of paying now versus paying later, and if it minimizes their time in prison, my hunch is they would gladly take more sanctions. I don't know how we deal with that, and maybe that's not practical. Maybe there are some defense attorneys here who might explain what I have wrong here. But my hunch is they would gladly bargain prison time for continued collateral sanctions.

MR. BERGSTROM: Mark Bergstrom with the Pennsylvania Commission on Sentencing . I was wondering when you were talking about the collateral sanctions and Model Penal Code, with the ABA now working on the model sentencing section of that, if there has been any consideration of building what you're talking about into those revised standards when they're looking at sentencing and parole.

MS. LOVE: I think you mean the American Law Institute that's—

MR. BERGSTROM: Yes.

MS. LOVE: Yes, I've been involved a little bit in that project, too. We've been kind of beating up on our reporter who remains to be persuaded that they belong in a sentencing system, but you know, unless they run out of money in the ALI for this project, write to Lance Liebman, the director of the American Law Institute. Say these should be considered as a part of your project. Everyone write to Lance Liebman.

No, seriously, I don't know. We may cut this project short. I hope we do not.

MR. COHEN: Are there other questions?

PROFESSOR PINARD: Can I say one more thing? If people took my comments to say that in my regime a defendant would choose between collateral consequences and prison, I wasn't saying that. I think that given our regime now, that's assuming that we can't do anything about these collateral consequences in most states, that a judge should factor that into—

MR. COHEN: Okay.

PROFESSOR PINARD:—the sentencing. But I also think, getting back to your point, Pat, that if these sanctions were more individualized, right, if they were particularized to a defendant's background, if they related to the offense, then we could have a better discussion about how to implement them in the system in terms of the bargaining and things of that nature as well.

MR. COHEN: If there are no more questions, I think we'll conclude our panel. Thank you so much for attending the symposium and this panel in particular.