Sentencing Outcomes: Nonprison Punishments

In the United States, the dominant criminal sanction appears to be imprisonment (see Chapter 7), but appearances can be deceiving: In reality, the majority of criminal defendants receive nonprison sentences. Nevertheless, policymakers typically speak as if prison were the only penalty worth discussing, and much of the criminal justice system operates in an imprisonment mindset. Other countries and some U.S. jurisdictions, however, seek other options or operate under different punishment presumptions.

The terms “nonprison sanctions” and “alternatives to imprisonment” are revealing. Since imprisonment is frequently viewed as the default option, the implication is that such sanctions are acceptable only if they resemble prison in some way. Excellent examples are boot camp, which mimics the conditions of prison, and home confinement.

The United Nations Global Report on Crime and Justice distinguishes countries by the primary form of punishment they use. Some countries focus on imprisonment, others on fines, and still others on a combination of deprivation of liberty and probation. In most of the countries that responded to the U.N. survey, a fine is the most common noncustodial sentence. For example, more than 95% of Japanese offenders are assessed a fine. Noncustodial sanctions are little used in Latin America, Africa, and Asia— with the exception of Japan and South Korea—but are popular in Europe and North America.

The prevalence of noncustodial sanctions does not necessarily indicate a systematically low use of imprisonment. It may reflect a shift away from custody or an increase in the proportion of the population being criminally sanctioned. It may also be a response to other developments in the criminal justice arena, such as a focus on the risk certain offenders pose, increased opportunities to combine criminal with administrative sanctions, the development of new sentencing options, and the prosecution of new criminal actors such as organizations.

Noncustodial sanctions can serve a variety of purposes. Some sanctions, such as
probation and annulment of licenses, are intended to provide some degree of control and supervision over offenders, if less than imprisonment. Other sanctions, such as fines and confiscation, are meant to punish without individual corporal control.

This chapter outlines the use of noncustodial sanctions in the United States. The first part addresses the dominant nonprison sanctions of probation and fines. The second part discusses modern alternative sanctions that have received much public attention but relatively little use. The third section considers a set of punishments labeled “collateral sanctions” that are applied in addition to other sanctions, including imprisonment.

A. TRADITIONAL ALTERNATIVES

The most common and best-established nonprison sanctions are fines and probation. Much of the public debate over punishment turns on the little-used but severe and highly symbolic imposition of capital punishment and the dominant coin of the realm—imprisonment. Yet most criminal sentences use some combination of fines and probation. The use of fines, both alone and especially in conjunction with prison or other sanctions, is far more prevalent than public debate and, indeed, much of the scholarly literature would suggest. Even among felons, straight probation (with no time in jail or prison) is used in about one-third of all cases.

Sanctions often have several components, but the public takes note of only the most severe aspects of the punishment. Among all felons sentenced in 2006 to either incarceration or probation, a fine was imposed on 38%, restitution on 18%, community service on 11%, and treatment on 11%. See Bureau of Justice Statistics, Felony Sentences in State Courts, 2006 (NCJ 226846, December 2009).

For all sanctions, one key but often implicit issue is the purpose of punishment that the sanction is intended to fulfill. When can fines and probation serve purposes similar to those served by prison—that is, when can they “replace” imprisonment? How do constitutional and political considerations limit the use of nonprison sanctions?

1. Fines
Fines have been used extensively in some European countries, where the amount of the penalty is keyed to the type of offense and the offender’s income. This approach has not caught on in the United States, but the use of fines here has been increasing generally, even though judges often express reluctance to levy them. Like many European countries, the United States has also seen a steady increase in statutory or guideline requirements for restitution by criminal offenders to their victims. Only in the United States are offenders asked to pay for some or all of the costs of punishment, though it is not clear how often such fines are in fact imposed or paid.

Some of the recurring issues with fines are whether they are fair to the poor and whether they impose a proportional punishment on either the poor or the rich. In the following case, the Mississippi Supreme Court addresses one of these issues.

Mary Ann Moody v. State

716 So. 2d 562 (Miss. 1998)

Banks, J.

Here we consider the question of whether a standard practice of extracting a set fine from persons accused of writing bad checks on the pain of suffering a full criminal prosecution for failure to do so comports with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. We answer that it does not….

On or about October 12, 1991, Mary Ann Moody wrote a check to the order of City Salvage for $123.89. The check was written in exchange for two doors for Moody’s mother’s house. The check was returned to City Salvage for “non-sufficient funds.” On February 24, 1993, she was indicted by a Jones County Grand Jury, for the crime of False Pretense. Moody was appointed counsel as an indigent defendant. After indictment the district attorney’s office assessed a levy of $500 plus restitution. Moody was given the option of paying a $500 fine plus restitution and having the case nolle prosed, or not paying the fine and being subjected to prosecution. Jeanne Jefcoat of the district attorney’s office testified that this fine is imposed automatically once a defendant is
indicted….Moody testified that she could not pay all the fine, restitution and other costs at one time. Moody’s motion to dismiss the action was denied and the case proceeded to trial.

…She was subsequently convicted of the crime of false pretense [and sentenced to three years in the Mississippi Department of Corrections and fined $1,000, which was ordered one year suspended and $500 suspended] and appeals, raising a violation of the Fourteenth Amendment to the Constitution of the United States as her sole ground on appeal.

Moody claims that the district attorney’s office lacks statutory or constitutional authority to automatically impose a set fine of $500 on all defendants indicted under the Mississippi Bad Check Law. Furthermore, she claims that such a fine violates an indigent’s right to equal protection under the Fourteenth Amendment. The State argues that the fine is merely a plea bargain, and as such is in the discretion of the district attorney. This is a case of first impression before this Court. We are unable to find any cases directly on point in any other jurisdiction.…

In Bearden v. Georgia, 461 U.S. 660 (1983), the United States Supreme Court considered whether a sentencing court can revoke a defendant’s probation for failure to pay the imposed fine and restitution. The Bearden Court stated:

This Court has long been sensitive to the treatment of indigents in our criminal justice system. Over a quarter-century ago, Justice Black declared that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”

Bearden, 461 U.S. at 664 (quoting Griffin v. Illinois, 351 U.S. 12 (1956) (plurality opinion)). The Court held that before revocation of an indigent’s probation, the court must inquire into the reasons for failure to pay. In holding such, the Court opined:

If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternative measures of punishment other than imprisonment. Only if alternative
measures are not adequate to meet the State’s interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay. To do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment.

See also Tate v. Short, 401 U.S. 395 (1971) (holding that a State cannot convert a fine imposed under a fine-only statute into a jail term solely because the defendant is indigent and cannot immediately pay the fine in full).

Moody cites Cassibry v. State, 453 So. 2d 1298 (Miss. 1984), where this Court held that an indigent may not be incarcerated because he is financially unable to comply with an otherwise lawfully imposed sentence of a fine. Cassibry is distinguishable in that, the defendant had failed to pay a fine and was subsequently imprisoned for failure to pay the fine while in this case, Moody was sentenced to an appropriate statutory prison term for her crime. But see Lee v. State, 457 So. 2d 920 (Miss. 1984) (stating Cassibry requires consideration of statutory alternatives to imprisonment for indigents financially unable to pay a fine)…. 

In a case similar to this one, the Oklahoma Criminal Court of Appeals considered whether a defendant was deprived of equal protection in plea bargaining. Gray v. State, 650 P.2d 880 (Okla. Crim. App. 1982). In Gray the defendant claimed that he was denied an opportunity to plea bargain because he was unable to contribute to a special community relations fund. The Gray court opined:

The recognition of plea bargaining as an essential component of the administration of justice, however, does not elevate it to a constitutional right. That is not to say, that a prosecutor can accept or refuse plea negotiations in a way that discriminates against defendants on account of their race, religion, economic status or other arbitrary classification.

The court found that there was no violation of the defendant’s equal protection rights, because he did not attempt to seek a plea bargain.

The State argues that Moody is confusing this fine with a plea bargain. There is no constitutional right to a plea bargain. Allman v. State, 571 So. 2d 244, 254 (Miss. 1990).
The State argues that since there is no constitutional right to a plea bargain there can be no violation in this case. Furthermore, the State claims that since the fine or plea offer is offered to everyone who is indicted, there can be no equal protection violation, because it is treating everyone the same.

The record clearly indicates that after a defendant is indicted under the Bad Check Law, an automatic $500 plus restitution is charged to drop the prosecution. The amount is due immediately. The defendant then has the option of paying the $500 and have the indictment nolle prossed or proceeding to trial. Thus, one who is unable to pay will always be in a position of facing a felony conviction and jail time, while those with adequate resources will not. The automatic nature of the fine is what makes it discriminating to the poor, in that only the poor will face jail time. We hold that an indigent’s equal protection rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a fine, and there is no determination as to an individual’s ability to pay such a fine. Subjecting one to a jail term merely because he cannot afford to pay a fine, due to no fault of his own, is unconstitutional.

Additionally, we note that this procedure does not involve a plea bargain at all because the only charge is nolle prosequi. There is no plea at all. What and all that happens is that a $500 fee is extracted in order to avoid prosecution. Thus the scheme is both procedurally and constitutionally flawed.

We conclude that the only way to put Moody on a footing roughly equivalent to those able to purchase a nolle prosequi is to remand for new sentencing in which the trial court can withhold adjudication and place her on probation requiring restitution plus reasonable efforts to pay a reasonable fine and costs. This remedy does not restrict the trial judges where one complains of indigency. There are methods in use today which allow for indigent status where the penalty to be imposed is a fine. These include working out a payment schedule which is appropriate to the means of the offender. It is a proper solution for this case, granting Moody relief from an improper and unconstitutional practice subjecting her to disparate treatment based upon her indigency. In the future, it is to be hoped that this unconstitutional scheme will be abandoned and the matter of plea
bargains will be handled in a proper manner which comports with the right to equal protection of the laws.

For the foregoing reasons, this matter is reversed and remanded to the circuit court for re-sentencing.

McRae, J., concurring in part and dissenting in part.

The Jones County District Attorney’s approach to enforcing the Mississippi Worthless Check Law by charging a fine to avoid prosecution and incarcerating those who cannot pay discriminates against the poor in violation of the equal protection provisions of the United States Constitution and the Mississippi Constitution and offends the prohibition against imprisonment for civil debt found in art. 3, §30 of the Mississippi Constitution. It further allows the District Attorney’s office to exercise powers well in excess of those afforded it by statute pursuant to the directive of art. 6, §174 of the Mississippi Constitution. The root of the problem, however, lies in our statutory framework that subjects one who “bounces” a check to criminal penalties. To remand Mrs. Moody’s case for resentencing and merely “hope” that the practices used in her situation will be abandoned does nothing to remedy the larger problem.

Miss. Code Ann. §97-19-67(1)(d)(1994) sets the penalty for writing a bad check in excess of $100, regardless of whether a first or second offense, upon conviction, at a fine of not less than $100 and not more than $1000, or imprisonment for not more than three years or both, in the discretion of the court. Jeanne Jefcoat, the Worthless Check Director for the Jones County District Attorney’s Office, however, testified that once an individual has been indicted by the grand jury for writing a bad check, he must immediately pay a set $500 fine, the amount of the check and a variety of fees, or else face trial. She stated that Mrs. Moody was told that to avoid prosecution, she would have to pay more than $800: the $123.89 check, the $500 fine, $163.50 court costs, a $40 processing fee levied by the District Attorney’s Office and a $10 returned check fee. Thus, Mrs. Moody was fined before she was convicted and in essence, promised that if she paid the fine and costs, she wouldn’t be convicted. Contrary to the State’s argument, this cannot be construed as a “standard” plea bargain in any sense merely because Mrs. Moody was
offered the opportunity to pay.…

Imprisonment may be an appropriate remedy for a defendant who refuses or neglects to pay a fine he can afford, or even when collection is unsuccessful despite the defendant’s reasonable efforts to make payment. However, the imprisonment of an indigent defendant who cannot pay a fine imposed to avoid conviction is a violation of the fourteenth amendment to the United States Constitution as well as to art. 3, §30 of the Mississippi Constitution.…

Debtor’s prison was abolished long ago. Our statutory system, nevertheless, allows for imprisonment of one who cannot pay all of the fines that may arise from “bouncing” a check. Further, while they may pursue actions for false pretenses, District Attorneys do not have the authority under our State Constitution or…Code…either to collect civil debts or to use criminal statutes to coerce payment of those debts and any fees and penalties which also might accrue. Moreover, the power to render fines and judgments belongs with the courts and not the District Attorney’s Office. Accordingly, I do not think that the majority has gone far enough by recognizing only the fourteenth amendment problems or “hoping” that problematic debt collection practices are abandoned.

NOTES

1. The use of fines. Straight fines (fines in the absence of other sanctions) are used most often for misdemeanants and other more minor offenders. Some states prohibit the use of fines for certain types of offenses. Little data appear available on fines generally, though it is obvious that fines are rarely used as the only or primary punishment for serious crimes. Of all those convicted of felonies, only 3% received a sanction solely other than prison, jail, or probation. Straight fines are also relatively uncommon in the federal system. In federal court 7.9% of all offenders sentenced during fiscal year 2011 received a sentence that either included a fine as part of or as the sole component of a criminal justice sanction. This number has decreased over time. The federal sentencing guidelines mandate that the court impose a fine unless the offender shows that he is unable to pay a fine and it is unlikely that that situation will change.

Collection of fines remains challenging unless resources are committed to track
payment and implement follow-up punishments, including incarceration. Only for traffic
and parking violations are collection rates high. How should criminal fines be prioritized
if the offender also owes, for example, child support?

Fines may not be as efficient as may appear because their collection can be expensive
and require a substantial back-up system, including sanctions. Can their use nevertheless
be defended on efficiency grounds? What kind of backup system needs to be constructed
to make fines credible and effective? Anne Morrison Piehl & Geoffrey Williams,
Institutional Requirements for Effective Imposition of Fines (2010), available at
www.nber.org/papers/w16476.

2. Who gets fined? Men are more likely to be fined than women; whites are more
likely to be fined than blacks or Hispanics; employed offenders are significantly more
likely to be fined than unemployed offenders; older offenders are more likely to be fined
than younger offenders; nondrug offenders are more likely to be fined than drug
offenders. In urban settings fines are imposed less frequently than in rural or suburban
communities. In sum, fines are more likely to be used for low-level offenses and low-risk
offenders, with judges considering the defendant’s actual or perceived wealth and
income.

3. Fines in white-collar and corporate cases. The largest fines are generally imposed
in healthcare fraud and antitrust prosecutions. Often companies reach agreements with
the prosecution designed to settle criminal charges and civil liabilities arising from the
same nucleus of facts. Such fines are paid into the federal Crime Victims Fund and are
available for disbursement to crime victims and to fund training programs during the
following year.

4. Restitution. In more than one-third of the states, courts are statutorily required to
order restitution unless there are compelling or extraordinary circumstances to the
contrary. In about half the states with crime victims’ rights constitutional amendments,
victims have a right to restitution. Some states allow broad exceptions to restitution
requirements. More than a dozen states require courts to state on the record the reasons
for failing to order restitution or for ordering only partial restitution. Some states—and
the federal government—have enacted specific directives to order restitution to victims of particular offenses.

Restitution is awarded for crime-related expenses incurred by the victim or, in homicide cases, the victim’s family; it includes medical and counseling expenses, lost wages, and costs for lost or damaged property. Some states permit the award of future damages. Nevertheless, victims only infrequently receive restitution. The reasons for this include failure to request restitution, inability to demonstrate or calculate loss, the court’s opinion that restitution is inappropriate in light of other penalties, and the defendant’s inability to pay. Most states require courts to consider the defendant’s financial resources and obligations when awarding restitution. Some states are beginning to move away from this requirement, instead merely considering the defendant’s ability to pay when setting the payment schedule.

In 1996 Congress enacted the Mandatory Victims Restitution Act (MVRA), which mandates that restitution be ordered in full in certain cases to each victim, regardless of the offender’s economic situation. In contrast to fines, restitution is not meant to be punitive but rather to make the victim whole. Despite the MVRA’s mandate, of 86,000 individual federal offenders in fiscal year 2011, only about 13.3% were ordered to pay restitution. Factors that appear to have influenced courts in ordering an offender to pay restitution included the offense of conviction, length and type of sentence imposed, and offender characteristics such as sex, race, education, and citizenship. Historically, the most important factor was the judicial district or circuit in which the offender was sentenced. General Accounting Office, Federal Courts: Differences Exist in Ordering Fines and Restitution (May 1999).

Should victims of child pornography receive restitution from those who possessed the images but did not create them? Compare United States v. Aumais, 656 F.3d 147 (2d Cir. 2011) with In re: Amy Unknown, 701 F.3d 749 (5th cir 2012) (ex base).

The use of fines as the sole or primary sanction for offenses, both violent and nonviolent, raises two central questions. First, when can fines satisfy a sufficient mix of purposes to substitute for or improve on the use of imprisonment, and second, can fines
be made relatively similar in impact for offenders with widely varying wealth? A related concern is whether people with more access to legitimate funds through family and friends will just “pay their way” out of a sanction, while poorer offenders may be induced to commit further crimes to pay their fines. Consider whether these issues are addressed in the following materials.

*Day Fines, Sally T. Hillsman*

Intermediate Sanctions in Overcrowded Times (Michael Tonry and Kate Hamilton eds., 1995)

Day fines—fine sentences in which the amount is set in proportion to both the seriousness of the offense and the financial resources of the offender—have long been the sentence of choice in northern Europe for most offenses. The name derives from the practice of using the offender’s daily income as the base for setting the fine amount.

Systematic day-fine systems typically rely upon flexible, written guidelines. They are increasingly attractive to American judges, prosecutors, and other criminal justice policymakers who look for a wider range of intermediate penalties that can be scaled to provide appropriate punishment for offenses of varying gravity, while reserving imprisonment for violent and predatory offenses.

The fine has always been an attractive sentence in American courts, and it is used more widely than is generally recognized. The fine’s advantages are well known. Fines are unmistakably punitive; they deprive offenders of ill-gotten gain; they are inexpensive to administer; and they provide revenue to cover such things as the cost of collection or compensation to victims. Recent research has supported their deterrent impact: fines are associated with lower rates of recidivism than probation or jail for offenders with equivalent criminal records and current offenses.

Fines have not been used in the United States, particularly as a sole penalty, as frequently or for as wide a range of offenses as in European countries, which share many of our sentencing principles. In Germany, for example, 81 percent of adult offenses and 73 percent of crimes of violence are punished solely by fines. In England, 38 percent of
offenses equivalent to our felonies and 39 percent of violent offenses result in fines. [Those numbers have declined for England and Wales over the last decade.]

A major impediment in American courts has been the widespread view that poor offenders cannot pay fines and that affluent offenders who do so are buying their way out of more punitive sanctions. Whatever truth there is in this view, however, stems largely from American use of “tariff” systems to set fine amounts. Tariff systems use informal “going rates” to guide judges in setting amounts. Because tariff systems tend to equate equity with consistency, they generally result in fines keyed to the lowest common economic denominator. This tends to limit judges’ ability to adjust fines to an individual offender’s financial means and to restrict their use of fines to less serious crimes or first offenders.

In contrast, day fines provide courts with greater capacity to vary fine amounts in a systematic and principled way. Day-fine systems accomplish this by a two-step process. First, the judge sentences an offender to a given number of fine units (e.g., 10, 15, or 90), which reflects the appropriate degree of punishment. Courts that rely on day fines have developed informal guidelines or benchmarks that suggest what number (or range) of units is appropriate for crimes of differing gravity.

The second step is to determine the monetary value of these units. Courts typically develop a rough but standardized method for calculating the proportion of a defendant’s daily income that they view to be a “fair share” for the purposes of fining.

Using information routinely available from the police, a pretrial agency, probation, or (most often) the defendant, the judge will estimate the defendant’s daily income and calculate the day-fine unit value. Multiplication of the number of units by this unit value produces the fine amount.

Since 1988, a day-fine system has been operating successfully in the Criminal Court of Richmond County, Staten Island, New York. A day-fine program has also been running successfully for over a year in the Maricopa Superior Court in Phoenix, Arizona. In Milwaukee, the day fine was introduced with considerable success as a strategy to reduce high levels of default among low-income offenders. Day-fine projects are under way in
Oregon, Iowa, and Connecticut as part of a national demonstration project on “structured fines” sponsored by the Bureau of Justice Assistance. Numerous other jurisdictions are beginning to experiment with the concept, sometimes with encouragement from their state legislatures. In California, for example, legislation authorizes implementation of day-fine pilots.

_Fines Reduce Use of Prison Sentences in Germany, Thomas Weigend_  
Intermediate Sanctions in Overcrowded Times (Michael Tonry and Kate Hamilton eds., 1995)

Between 1968 and 1989, the former West Germany greatly reduced the proportion of convicted offenders sentenced to prison. In 1968, roughly a quarter of convicted offenders were sentenced to imprisonment. Two years later, the size of that group had dropped from 136,000 to 42,000, and the percentage of convicted offenders who were imprisoned had fallen from 24 percent to 7 percent. In 1989 (the latest year for which data are available), only 33,000 persons, less than 6 percent of adults convicted in West Germany, were sent directly to prison.…[The percentage data remains accurate even after German unification. Overall, however, imprisonment has increased substantially in Europe over the last decade. See Hans-Joerg Albrecht, Sanction Policies and Alternative Measures to Incarceration: European Experiences with Intermediate and Alternative Criminal Penalties, available at www.unafel.or.jp/english/pdf/RS_No80/No80_07VE_Albrecht.pdf.]

The remarkable decline in prison use is due to a determined assault on use of short-term imprisonment. At the [start of the twentieth century], more than 50 percent of offenders received prison sentences of three months’ duration or less. Legislation passed in 1921 obliged the courts to impose fines instead of short prison terms whenever the purpose of punishment could as well be achieved by a fine. Even so, the portion of short prison sentences among all prison sentences remained high; 83 percent of offenders sentenced to imprisonment in 1968 received sentences of six months or less. By that time, the German legislature had embraced the idea that short-term imprisonment does more harm than good: it disrupts the offender’s ties with his family, job, and friends, introduces
him into the prison subculture, and stigmatizes him for the rest of his life, but does not allow sufficient time for promising rehabilitative measures. Moreover, the data on the deterrent effectiveness of short-term imprisonment were inconclusive at best.

As a consequence, the German legislature in 1970 enacted section 47, sub. 1 of the Penal Code: “The court shall impose imprisonment below six months only if special circumstances concerning the offense or the offender’s personality make the imposition of a prison sentence indispensable for reforming the offender or for defending the legal order.” That amendment meant, in effect, that prison sentences below six months could be imposed only under exceptional circumstances for purposes of rehabilitation or general prevention. The number of such sentences dropped dramatically from 184,000 (1968) to 56,000 (1970); after some ups and downs, that figure reached a low of 48,000 in 1989 (and many of these were suspended).

At the same time, the German legislature extended the possibility of suspending short-term prison sentences (suspension being the German equivalent of probation)…. The court can combine suspension with various conditions and restrictions, including the duty to make restitution to the victim or to pay a sum of money to the state or to a charitable organization…. German courts have made use of the suspension option with consistently increasing frequency. In 1968, the year before the reform, only 36 percent of prison sentences were suspended. By 1979, that portion had climbed to 65 percent, and it has not significantly changed since then (1989—67 percent). Prison sentences of six months or less have been suspended even more liberally (1989—77 percent). Revocations of suspension have diminished despite the more generous use of suspension. Whereas 46 percent of suspensions were revoked in 1986, less than a third (29 percent) were revoked in 1989.

**FIGURE 1**

**Criminal Sanctions, 1968 and 1989**
For minor offenses, German law since 1975 offers an additional option of informal sanctioning. According to section 153a of the Code of Criminal Procedure, either the public prosecutor or the court can “invite” a suspect to pay a sum of money to the state, the victim, or a charitable organization in exchange for dismissal of the criminal prosecution. The theory of this quasi-sanction is that the suspect, by making the payment, eliminates the public interest in prosecuting the minor offense. The payment neither requires a formal admission of guilt nor implies a criminal conviction, but the (presumed) offender must pay an amount of money roughly equivalent to the fine that might be imposed if he were convicted. The use of this procedural option has greatly increased since its inception; prosecutors and courts employ it not only in petty cases but also for sanctioning fairly serious, especially economic, offenses without trial. Taking the quasi-sanction of section 153a into account, the distribution of criminal sanctions in Germany...

before and after the reforms of 1970 and 1975 is shown in figure 1.

The de-emphasis of nonsuspended short prison sentences and the introduction of conditional dismissal produced a marked shift from custodial sentences (which, even in 1968, had a comparatively low incidence) to monetary sanctions. One might expect this shift to have led to a proportional depletion of German prisons. Curiously, that has failed to occur. Figure 2 shows the numbers of persons (excluding pretrial detainees) held in German prisons on March 31 of selected years.

**FIGURE 2**

**Number of Persons Held in German Prisons, 1968-1989 (excluding pretrial detainees)**


[T]here are rational explanations for this development. First, the overall number of convicted offenders has increased, though not dramatically, from 573,000 (1968) to
609,000 (1989). More important, those who receive nonsuspended prison sentences tend to receive longer sentences than before: within fifteen years, the share of lengthy sentences (two to fifteen years) among all nonsuspended prison sentences increased from 9 percent (1974) to 15 percent. This change may be due to the increase in drug-related offenses, which tend to draw heavy sentences.

Moreover, the initial imposition of a noncustodial sentence does not necessarily mean that the offender can avoid prison, since about one third of suspended sentences are revoked (usually due to the commission of a new offense). Offenders who receive fines can be sent to prison for nonpayment. Under German law, nonpayment can transform a fine into a prison term; the state need not show that the offender willfully refused to pay although he had the means to do so (section 43, Penal Code). Although only 6-7 percent of fined offenders eventually serve a prison term because of nonpayment, this group, due to the large absolute numbers involved, imposes a heavy burden on the corrections system: each year approximately 30,000 such persons enter prison.

In recent years, the German states have increasingly attempted to reduce that number by offering destitute offenders an alternative to prison. They can enter community service programs and thereby work off the fine instead of “sitting it off.” These programs, though reaching only a limited number of offenders, have been described as fairly successful, especially when they are adequately staffed and organized.…

NOTES

1. Day fines. The underlying concept of day fines is that “punishment by a fine should be proportionate to the seriousness of the offense and should have roughly similar impact (in terms of economic sting) on persons with differing financial resources who are convicted of the same offense.” Bureau of Justice Assistance, How to Use Structured Fines (Day Fines) as an Intermediate Sanction (NCJ 156242, 1996). The concept was introduced in Sweden in the 1920s and then adopted in other Scandinavian and European countries. In Germany structured fines are used as the sole sanction for three-quarters of all offenders convicted of property crimes and two-thirds of offenders convicted of assaults. In the United States the first experiment with structured fines began on Staten
Island, New York, in 1988. Fewer than a dozen U.S. jurisdictions have tried structured fine systems experimentally since that time. Why has the concept not (yet) taken off nationally?

In 2009 three states passed legislation that allowed day fines to be imposed at least for some select offenses. Why might the concept be of more interest now? How might day fines become more attractive? Edwin W. Zedlewski, National Institute of Justice, Alternatives to Custodial Supervision: The Day Fine, (NCJ 230401, 111) (May 2010).

2. Structuring day fines. Day fines present structural and policy challenges. First the court must determine the number of fine units for each offense, based on offense seriousness. Then the court sets the dollar amount by multiplying the number of fine units by a portion of the defendant’s daily income, subject to adjustment for taxes, dependents, and special circumstances. Both determinations—the relative seriousness of an offense and relative ability to pay—involves multiple policy choices. How should courts treat unemployed offenders? How should they calculate day fines on offenders working in the shadow economy, engaged in legal but untaxed activity?

3. Constitutional limitations on fines. The Eighth Amendment to the Constitution prohibits “excessive fines.” The provision’s history can be traced back to the English Magna Carta, which gave judges the opportunity to overrule excessive penalties. In recent years the clause has been used most frequently to challenge punitive damage awards in civil cases as well as civil and criminal forfeitures, as discussed in more detail in Chapter 10. See, e.g., United States v. Bajakajian, 524 U.S. 321 (1998) (amount forfeited must be proportionate to the criminal offense); Austin v. United States, 509 U.S. 602 (1993). Might fines in criminal cases raise less of an Eighth Amendment question of absolute proportionality than an equal protection issue, given their disparate impact depending on a person’s resources?

4. Nonprison sanctions and crime rates. Do countries adopt nonprison sanctions only at times of decreasing crime (or decreasing fear of crime)? Note that the emphasis on fines described by Weigend occurred during a time of increasing crime rates.

[O]fficial sentencing policy in Germany has responded in an anticyclical fashion by
discouraging the imposition of prison sentences in the face of a growing crime rate. German policies, and the faithful implementation of their directives by prosecutors and courts, led to a “cushioning” of the crime wave of the 1970s. A greater percentage of offenses than before were resolved without conviction, and potential overcrowding of prisons was avoided by increased use of fines and suspended sentences. The crime wave ebbed after 1983, independent of any action or inaction on the part of criminal justice policymakers.

To what extent have concerns about the negative impact of short-term prison sentences (less than six months) driven the introduction of day fines in Germany? Current social science research in Europe indicates that such short prison terms do not have the feared negative impact, and some countries are moving back toward the imposition of short prison sentences.

May fines be viewed as categorically insufficient for some types of offenders and offenses? The Department of Justice, for example, has indicated that for high-level corporate officials involved in white-collar crime, prison is an appropriate sanction because of its deterrent value, stigmatizing effect, and ability to highlight the seriousness of the offense. Such individual accountability will make it also unlikely that offenders consider a corporate fine merely a function of doing business. See, e.g., Scott D. Hammond, Department of Justice, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Presentation at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), at www.justice.gov/atr/public/speeches/255515.pdf; James B. Comey Jr., The Genesis of the Sentencing Provisions of the Sarbanes-Oxley Act, “Are We Getting Really Tough on White-Collar Crime?,” Hearing Before the Subcomm. on Crime and Drugs, S. Judiciary Comm. (June 19, 2002), pt. 1, reprinted in 15 Fed. Sent’g Rep. 234 (2002).

2. Probation

Probation, an outgrowth of the belief in rehabilitation, emerged during the second half of the nineteenth century. Probationary sentences typically release the offender into the community after sentencing but restrict the offender’s freedom and actions. Usually a probation officer is assigned to supervise the offender. Probationary sentences are by far the most common type of criminal sanction imposed. At the end of 2010, almost 4.9
million adults were on probation in the United States. Half of them had been convicted of a felony, the others of misdemeanors and infractions. More than a quarter of them were drug offenders; 15% of them had been convicted of driving while intoxicated, and another 12% had been convicted of some form of larceny or theft offense. See Bureau of Justice Statistics, Probation and Parole in the United States, 2010 (NCJ 236019, November 2011).

Probationary sentences involve two closely related issues: first, what are acceptable conditions of probation, and second, what are the procedures and consequences for violation of those conditions?

a. Probationary Conditions

The following case explores the foundations and limits of probationary conditions. Consider whether each judge’s gender might have affected his or her view of the condition at issue.

State v. David Oakley

629 N.W.2d 200 (Wis. 2001)

Wilcox, J.

[W]e must decide whether as a condition of probation, a father of nine children, who has intentionally refused to pay child support, can be required to avoid having another child, unless he shows that he can support that child and his current children. We conclude that in light of Oakley’s ongoing victimization of his nine children and extraordinarily troubling record manifesting his disregard for the law, this anomalous condition—imposed on a convicted felon facing the far more restrictive and punitive sanction of prison—is not overly broad and is reasonably related to Oakley’s rehabilitation. Simply put, because Oakley was convicted of intentionally refusing to pay child support—a felony in Wisconsin—and could have been imprisoned for six years, which would have eliminated his right to procreate altogether during those six years, this probation condition, which infringes on his right to procreate during his term of probation, is not invalid under these facts. Accordingly, we hold that the circuit court did
not erroneously exercise its discretion.…

David Oakley (Oakley), the petitioner, was initially charged with intentionally refusing to pay child support for his nine children he has fathered with four different women. The State subsequently charged Oakley with seven counts of intentionally refusing to provide child support as a repeat offender. His repeat offender status stemmed from intimidating two witnesses in a child abuse case—where one of the victims was his own child.…

Oakley…entered into [a] plea agreement in which he agreed to enter a no contest plea to three counts of intentionally refusing to support his children and have the other four counts read-in for sentencing…. The State, in turn, agreed that in exchange for his no contest plea, it would cap its sentencing recommendation to a total of six years on all counts. Oakley, however, was free to argue for a different sentence.

Oakley had paid no child support and there were arrears in excess of $25,000. Highlighting Oakley’s consistent and willful disregard for the law and his obligations to his children, the State argued that Oakley should be sentenced to six years in prison…. Oakley, in turn, asked for the opportunity to maintain full-time employment, provide for his children, and make serious payment towards his arrears.

After taking into account Oakley’s ability to work and his consistent disregard of the law and his obligations to his children, Judge Hazlewood observed that “if Mr. Oakley had paid something, had made an earnest effort to pay anything within his remote ability to pay, we wouldn’t be sitting here,” nor would the State argue for six years in prison. But Judge Hazlewood also recognized that “if Mr. Oakley goes to prison, he’s not going to be in a position to pay any meaningful support for these children.” Therefore, even though Judge Hazlewood acknowledged that Oakley’s “defaults, are obvious, consistent, and inexcusable,” he decided against sentencing Oakley to six years in prison…, as the State had advocated. Instead, Judge Hazlewood sentenced Oakley to three years in prison on the first count, imposed and stayed an eight-year term on the two other counts, and imposed a five-year term of probation consecutive to his incarceration. Judge Hazlewood then imposed the condition at issue here: while on probation, Oakley cannot have any
more children unless he demonstrates that he has the ability to support them and that he is supporting the children he already has. After sentencing, Oakley filed for postconviction relief contesting this condition.…

Refusal to pay child support by so-called “deadbeat parents” has fostered a crisis with devastating implications for our children. Of those single parent households with established child support awards or orders, approximately one-third did not receive any payment while another one-third received only partial payment. For example, in 1997, out of $26,400,000,000 awarded by a court order to custodial mothers, only $15,800,000,000 was actually paid, amounting to a deficit of $10,600,000,000. These figures represent only a portion of the child support obligations that could be collected if every custodial parent had a support order established. Single mothers disproportionately bear the burden of nonpayment as the custodial parent. On top of the stress of being a single parent, the nonpayment of child support frequently presses single mothers below the poverty line. In fact, 32.1% of custodial mothers were below the poverty line in 1997, in comparison to only 10.7% of custodial fathers.…

The effects of the nonpayment of child support on our children are particularly troubling. In addition to engendering long-term consequences such as poor health, behavioral problems, delinquency and low educational attainment, inadequate child support is a direct contributor to childhood poverty. And childhood poverty is all too pervasive in our society. Over 12 million or about one out of every six children in our country lives in poverty….Child support—when paid—on average amounts to over one-quarter of a poor child’s family income. There is little doubt that the payment of child support benefits poverty-stricken children the most. Enforcing child support orders thus has surfaced as a major policy directive in our society.

In view of the suffering children must endure when their noncustodial parent intentionally refuses to pay child support, it is not surprising that the legislature has attached severe sanctions to this crime….The legislature has amended this statute so that intentionally refusing to pay child support is now punishable by up to five years in prison.

But Wisconsin law is not so rigid as to mandate the severe sanction of incarceration as
the only means of addressing a violation of §948.22(2). In sentencing, a Wisconsin judge can take into account a broad array of factors, including the gravity of the offense and need for protection of the public and potential victims. Other factors—concerning the convicted individual—that a judge can consider include:

- the past record of criminal offenses; any history of undesirable behavior patterns; the defendant’s personality, character and social traits; the results of a presentence investigation; the vicious or aggravated nature of the crime; the degree of defendant’s culpability; the defendant’s demeanor at trial; the defendant’s age, educational background and employment record; the defendant’s remorse, repentance and cooperativeness; the defendant’s need for close rehabilitative control; the rights of the public; and the length of pretrial detention.

After considering all these factors, a judge may decide to forgo the severe punitive sanction of incarceration and address the violation with the less restrictive alternative of probation coupled with specific conditions. Wisconsin Stat. §973.09(1)(a) provides:

[I]f a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period, stating in the order the reasons therefor. The court may impose any conditions which appear to be reasonable and appropriate.

The statute, then, grants a circuit court judge broad discretion in fashioning a convicted individual’s conditions of probation. As we have previously observed, “[t]he theory of the probation statute is to rehabilitate the defendant and protect society without placing the defendant in prison. To accomplish this theory, the circuit court is empowered by Wis. Stat. §973.09(1)(a) to fashion the terms of probation to meet the rehabilitative needs of the defendant.” While rehabilitation is the goal of probation, judges must also concern themselves with the imperative of protecting society and potential victims. On this score, we have explained:

[Probation] involves a prediction by the sentencing court society will not be endangered by the convicted person not being incarcerated. This is risk that the legislature has empowered the courts to take in the exercise of their discretion.…

If the convicted criminal is thus to escape the more severe punishment of imprisonment for his wrongdoing, society and the potential victims of his anti-social tendencies must be
protected. State v. Evans, 252 N.W.2d 664, 666 (Wis. 1977). Thus, when a judge allows a convicted individual to escape a prison sentence and enjoy the relative freedom of probation, he or she must take reasonable judicial measures to protect society and potential victims from future wrongdoing. To that end—along with the goal of rehabilitation—the legislature has seen fit to grant circuit court judges broad discretion in setting the terms of probation.…

In the present case, the record indicates that Judge Hazlewood was familiar with Oakley’s abysmal history prior to sentencing. The record reveals that Judge Hazlewood knew that Oakley had a number of support orders entered for his nine children, but he nevertheless continually refused to support them. He was aware that Oakley’s probation for intimidating two witnesses in a child abuse case—where one of the witnesses was his own child and the victim—was in the process of being revoked. Judge Hazlewood was also apprised that Oakley had promised in the past to support his children, but those promises had failed to translate into the needed support. Moreover, he knew that Oakley had been employed and had no impediment preventing him from working.…

Judge Hazlewood asserted that some prison time coupled with conditional probation might convince Oakley to stop victimizing his children. With probation, Judge Hazlewood sought to rehabilitate Oakley while protecting society and potential victims—Oakley’s own children—from future wrongdoing. The conditions were designed to assist Oakley in conforming his conduct to the law.…At the same time, Judge Hazlewood sought to protect the victims of Oakley’s crimes—Oakley’s nine children.

But Oakley argues that the condition imposed by Judge Hazlewood violates his constitutional right to procreate. This court, in accord with the United States Supreme Court, has previously recognized the fundamental liberty interest of a citizen to choose whether or not to procreate. Eberhardy v. Circuit Court for Wood County, 307 N.W.2d 881 (Wis. 1981); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (recognizing the right to procreate as “one of the basic civil rights of man”). Accordingly, Oakley argues that the condition here warrants strict scrutiny. That is, it must be narrowly
tailored to serve a compelling state interest. Although Oakley concedes, as he must, that the State’s interest in requiring parents to support their children is compelling, he argues that the means employed here is not narrowly tailored to serve that compelling interest because Oakley’s “right to procreate is not restricted but in fact eliminated.”…While Oakley’s argument might well carry the day if he had not intentionally refused to pay child support, it is well-established that convicted individuals do not enjoy the same degree of liberty as citizens who have not violated the law. We emphatically reject the novel idea that Oakley, who was convicted of intentionally failing to pay child support, has an absolute right to refuse to support his current nine children and any future children that he procreates, thereby adding more child victims to the list. In an analogous case, Oregon upheld a similar probation condition to protect child victims from their father’s abusive behavior in State v. Kline, 963 P.2d 697, 699 (Or. App. 1998)….

Oakley fails to note that incarceration, by its very nature, deprives a convicted individual of the fundamental right to be free from physical restraint, which in turn encompasses and restricts other fundamental rights, such as the right to procreate. Therefore, given that a convicted felon does not stand in the same position as someone who has not been convicted of a crime, we have previously stated that “conditions of probation may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation.” Edwards v. State, 246 N.W.2d 109 (Wis. 1976). In Krebs v. State, 568 N.W.2d 26 (Wis. Ct. App. 1997), the court of appeals recently applied this established standard to uphold a condition of probation that required a defendant who sexually assaulted his own daughter to obtain his probation agent’s approval before entering into an intimate or sexual relationship. The court found that although the condition infringed upon a constitutional right, it was reasonable and not overly broad.

Applying the relevant standard here, we find that the condition is not overly broad because it does not eliminate Oakley’s ability to exercise his constitutional right to procreate. He can satisfy the condition of probation by making efforts to support his children as required by law….If Oakley decides to continue his present course of conduct—intentionally refusing to pay child support—he will face eight years in prison
regardless of how many children he has. Furthermore, this condition will expire at the end of his term of probation. He may then decide to have more children, but of course, if he continues to intentionally refuse to support his children, the State could charge him again under §948.22(2). Rather, because Oakley can satisfy this condition by not intentionally refusing to support his current nine children and any future children as required by the law, we find that the condition is narrowly tailored to serve the State’s compelling interest of having parents support their children. It is also narrowly tailored to serve the State’s compelling interest in rehabilitating Oakley through probation rather than prison. The alternative to probation with conditions—incarceration for eight years—would have further victimized his children. And it is undoubtedly much broader than this conditional impingement on his procreative freedom for it would deprive him of his fundamental right to be free from physical restraint. Simply stated, Judge Hazlewood preserved much of Oakley’s liberty by imposing probation with conditions rather than the more punitive option of imprisonment.

Moreover, the condition is reasonably related to the goal of rehabilitation. A condition is reasonably related to the goal of rehabilitation if it assists the convicted individual in conforming his or her conduct to the law. See State v. Miller, 499 N.W.2d 215 (Wis. Ct. App. 1993) (ruling that condition on probationer convicted of making obscene telephone calls forbidding him to make calls to any woman other than a family member was reasonably related to his rehabilitation). Here, Oakley was convicted of intentionally refusing to support his children. The condition at bar…is narrowly tailored to serve the compelling state interest of requiring parents to support their children as well as rehabilitating those convicted of crimes…. 

BABLITCH, J., concurring…. 

The two dissents frame the issue in such a way that Oakley’s intentional refusal to pay support evolves into an inability to pay support. This case is not at all about an inability to pay support; it is about the intentional refusal to pay support…. 

The dissents conclude that the majority’s means of advancing the state’s interest is not narrowly tailored to advance the state’s interest. The dissents fail to advance any realistic
alternative solution to what they concede is a compelling state interest. As long as the defendant continues to intentionally refuse to pay support, the alternatives posed by the dissents will end up with incarceration—which of course accomplishes indirectly what the dissents say the state cannot do directly.…

I conclude that the harm to others who cannot protect themselves is so overwhelmingly apparent and egregious here that there is no room for question. Here is a man who has shown himself time and again to be totally and completely irresponsible. He lives only for himself and the moment, with no regard to the consequences of his actions and taking no responsibility for them. He intentionally refuses to pay support and has been convicted of that felony. The harm that he has done to his nine living children by failing to support them is patent and egregious.…Under certain conditions, it is overwhelmingly obvious that any child he fathers in the future is doomed to a future of neglect, abuse, or worse. That as yet unborn child is a victim from the day it is born.

I am not happy with this result, but can discern no other. And the dissents provide none. Accordingly, I join the majority opinion.…

BRADLEY, J., dissenting.

I begin by emphasizing the right that is at issue: the right to have children. The majority acknowledges this right, but certainly does not convey its significance and preeminence. The right to have children is a basic human right and an aspect of the fundamental liberty which the Constitution jealously guards for all Americans. See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

Thus, the stakes are high in this case. The majority’s decision allows, for the first time in our state’s history, the birth of a child to carry criminal sanctions. Today’s decision makes this court the only court in the country to declare constitutional a condition that limits a probationer’s right to procreate based on his financial ability to support his children. Ultimately, the majority’s decision may affect the rights of every citizen of this state, man or woman, rich or poor.

I wholeheartedly agree with the majority that the governmental interest at stake in this
case is of great magnitude….However, when fundamental rights are at issue, the end does not necessarily justify the means. The majority concludes that the means of effecting the state’s interest are sufficiently narrow in light of this governmental interest. I disagree.…

The circuit court order forbids Oakley from fathering another child until he can first establish the financial ability to support his children. Oakley is not prohibited from having intercourse, either indiscriminately or irresponsibly. Rather, the condition of probation is not triggered until Oakley’s next child is born.…

While on its face the order leaves room for the slight possibility that Oakley may establish the financial means to support his children, the order is essentially a prohibition on the right to have children. Oakley readily admits that unless he wins the lottery, he will likely never be able to establish that ability. The circuit court understood the impossibility of Oakley satisfying this financial requirement when it imposed the condition.…Stressing the realities of Oakley’s situation, the circuit court explained:

[Y]ou know and I know you’re probably never going to make 75 or 100 thousand dollars a year. You’re going to struggle to make 25 or 30. And by the time you take care of your taxes and your social security, there isn’t a whole lot to go around, and then you’ve got to ship it out to various children.

In light of the circuit court’s recognition of Oakley’s inability to meet the condition of probation, the prohibition cannot be considered a narrowly drawn means of advancing the state’s interest in ensuring support for Oakley’s children.…

Let there be no question that I agree with the majority that David Oakley’s conduct cannot be condoned. It is irresponsible and criminal. However, we must keep in mind what is really at stake in this case. The fundamental right to have children, shared by us all, is damaged by today’s decision. Because I will not join in the majority’s disregard of that right, I dissent.

SYKES, J., dissenting.

Can the State criminalize the birth of a child to a convicted felon who is likely to be unwilling or unable to adequately support the child financially? That is essentially the
crux of the circuit court order in this case, or at least its apparent practical effect.….  

Oakley must seek the court’s permission and obtain the court’s approval before bringing another child into the world. He is subject to probation revocation and imprisonment if he fathers a child without prior court approval.

While I sympathize with the circuit court’s understandable exasperation with this chronic “deadbeat dad,” I cannot agree that this probation condition survives constitutional scrutiny. It is basically a compulsory, state-sponsored, court-enforced financial test for future parenthood.….  

NOTES

1. *Probation: the most common U.S. sanction.* At the end of 2010, almost 4.9 million adults were on probation in the United States. About half of them had been convicted of a felony offense. See Bureau of Justice Statistics, Probation and Parole in the United States, 2010 (NCJ 236019, November 2011). Of those sentenced to probation, the mean sentence length was 33.6 months, the median 36 months. The United States has the highest probation rate in the world, with 536 per 100,000 population, followed by Canada (269) and England and Wales (217).

In federal court 7.1% of all offenders sentenced between October 1, 2010, and September 30, 2011, received a probation-only sentence. Among felons a large disparity existed: only 2.1% of those convicted of drug trafficking received straight probation, but almost 60% of those convicted of food and drug or environmental and wildlife offenses received a probation sentence. Should certain types of offenders presumptively receive probationary sentences?  

2. *Probationary conditions.* While the specific condition in Oakley may be unusual, another court imposed a ten-year probationary sentence on a twenty-year-old woman with the “reasonable condition” not to conceive or bear any more children during that time, after conviction for failure to provide protection and medical treatment for her 19-month-old daughter. Is this sentence more or less constitutional or defensible than the one in Oakley?
The more general question these sentences raise is: what conditions may or should be imposed as part of probationary sentences? Are no-Internet or no-computer probation conditions, for example, permissible? Probationary sentences are inherently more varied than imprisonment, and idiosyncratic probation conditions, such as the one in Oakley, are often challenged on appeal. For further examples and a critical review of such conditions, see Andrew Horwitz, Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions, 57 Wash. & Lee L. Rev. 75 (2000). Is this flexibility always a virtue? Should lists of conditions be standardized? If so, by whom? See Demarce v. Willrich, 56 P.3d 76 (Ariz. Ct. App. 2002) (upholding lifetime probation for sex offender); People v. Kimbrell, 684 N.E.2d 443 (Ill. App. Ct. 1997) (upholding probation condition for theft offense forbidding contact with defendant’s son’s father); But see Commonwealth v. Hall, 994 A.2d 1141 (Pa. Super. Ct. 2010) (striking down child support payment for victim’s children as condition of probation), appeal granted, 6 A.3d 1287 (Pa. 2010) State v. V.D., 951 A.2d 1088 (N.J. Super. Ct. App. Div. 2008), (striking special probation condition that defendant notify ICE of her convictions for possessing a false document, as defendant could not have reasonably anticipated imposition of this condition).

3. The nature and evolution of probationary sanctions. Probationary sanctions are beginning to focus on the idea of “responsibilization,” shifting more responsibility to offenders to solve their own problems. Is probation a privilege? What obligations flow from it? Some newer probationary sanctions have tended to emphasize greater control than regular probation. Among them are intensive supervised probation and house arrest, which often includes electronic monitoring. Would it be more effective to move a smaller number of higher-risk offenders to increased supervision and decrease supervision for those considered a lesser or intermediate risk? Do the parallel trends of increasing “self-rescue” on the one hand and increasing intensive control on the other suggest differing conceptions of probation in general, or do they reflect the notion that probation may be structured to achieve different purposes for different offenders?

4. The efficacy of probation. Research on the effectiveness of probation indicates that a high percentage of probationers either violate the conditions of probation or
commit another offense while on probation. During 1990 17% of all persons arrested for felonies in large, urban counties were on probation. Nevertheless, risky behavior as well as criminal activity go down during supervision. When the intensity of supervision increases, probation revocations also increase, largely because of technical violations. Increased reliance on probation as an alternative to more expensive prison sentences attracts some support from political conservatives, who approach the issue as one of fiscal responsibility. Studies have indicated that at least a few states have kept increases in the number of prison inmates steady and costs down through expansion of probation as a sentencing option. In Texas, probation has become a safe and cheap alternative to imprisonment: “for every $10.00 spent in prison, probation departments only spend $1.00.” American Bar Association, Criminal Justice Section, State Policy Implementation Project Texas & Mississippi: Reducing Prison Populations, Saving Money, and Reducing Recidivism.

b. Probation Violations

Probation is violated when the offender acts contrary to the conditions of supervision established by the court or the probation department. The violation may be criminal, as in the commission of a new offense, or technical, as in the failure to meet a specific probation condition. Not all violations lead to automatic revocation of probation. While protection of the community is the guiding principle, after a violation other strategies to monitor and control offender behavior may be used.

Do the probation rules give probationers too many chances? Should all probation violations lead to immediate termination of probation?

Because probationary sentences involve substantially lower levels of social control than prison sentences and are served in the community, not only the specified conditions but also the processes for review and revocation reflect the essential qualities and purposes of such sentences. Consider the following policies and procedures in North Carolina.

Violations Policies—Procedures, North Carolina Department of Correction Division of Community Corrections
March 1, 2002

GENERAL PROVISIONS

A violation is any action by the offender that is contrary to the conditions of supervision established by the Court or Post-Release Supervision and Parole Commission. Violations may be criminal (involving the commission of a new offense) or technical (involving a failure to meet one or more specific conditions of the probation judgment or parole or post-release supervision agreement).

1. Violation Philosophy.

All responses to violation behavior will be considered in light of the Department’s mission and objectives, as well as the goals of the supervision process. While protection of the community must always be the primary consideration, it does not follow that revocation is always, or even usually, the most effective or efficient way of achieving this goal. The goal of community supervision is to selectively and proactively intervene with offenders to reduce the likelihood of future criminal activity and promote compliance with the supervision strategy. Strategies involve holding offenders accountable for their actions, monitoring and controlling offender behavior, and referring to rehabilitation programs specific to offender needs. Another significant piece of the supervision strategy is ensuring an appropriate and proportionate response to all violations of the conditions of probation, taking into account offender risk, the nature of the violation, and the objective of offender accountability.

The purpose of this policy is to provide a framework to guide officer decision-making when a violation of probation has occurred….Technical violations of the conditions of probation are inevitable. It is unrealistic to believe offenders, even if they sincerely desire to develop drug-free, pro-social lifestyles, will immediately have the skills or abilities to do so. The issues and forces that brought them into the system will most likely continue to impact their behavior to some extent until they learn new skills and methods of dealing with these forces.

The basic expectations underlying the Division’s policy regarding probation violations
are:

- There will be a response to every detected violation;
- Responses to violations will be proportional to the risk to the community posed by the particular offender, the severity of the violation, and the current situational risk;
- The least restrictive response necessary to respond to the behavior will be used;
- There will be consistency in handling similar violation behavior given similar risk factors;
- Responses to violations will hold some potential for long-term positive outcomes in the context of the supervision strategy;
- While response to violation behavior is determined by considering both risk and needs, risk to the community is the overriding consideration; and
- Probationers who demonstrate a habitual unwillingness to abide by supervision requirements or who pose undue risk to the community will be subject to revocation of probation.

2. **Violation Response Procedures**

When a violation occurs the supervising officer will assess the type of violation (emergency or nonemergency) and take appropriate action.

**A. Emergency Violations**

Emergency violations involve behavior that requires the immediate arrest of the offender in order to ensure public safety. Emergency violations include, but are not limited to, the following:

- An imminent threat by the offender of physical harm to self or others;
- Electronic House Arrest violations such as equipment tampering;
• For probation cases only, possession of contraband necessitating an arrest incidental to search and/or seizure;

• Willful violations of residential facility rules; and/or

• For sex offenders, violations of specific conditions directly related to the crime.…

B. Non-emergency Violations

Non-emergency violations involve behavior that does not indicate the need for immediate arrest of the offender in order to ensure public safety. Non-emergency violations…include:

• A new conviction for any felony or a Class A1, 1 or 2 [or 3] misdemeanor;

• A new conviction for the same offense for which currently being supervised;

• Pending charges on a case about to expire;

• Being charged with a new offense in addition to [or without] one or more technical violations;

• Absconding;

• Financial arrearage of greater than six months for probation… cases…;

• Lesser Electronic House Arrest violations that do not require immediate arrest;

• Possession of a weapon;

• Unwanted contact with the victim;

• Any violation related to substance abuse or any driving violation for DWI Level I or II cases;

• Pending technical violations at the expiration of the term of probation;

• Failure to comply with treatment;

• Notification of non-compliance with the rules of a Day Reporting Center,
residential program, or the DART Program;

- Failure to report for jail time;…

- Non-compliance with community service requirement[;]…

- Verbal refusal to participate in substance abuse screening, not necessitating a Violation Report;

- Non-reporting for supervision;…

- Financial arrearage of less than six months for probation… cases…; the Probation/Parole Officer may consider this violation an “A” violation for cases in which victim restitution is ordered;

- Curfew violation;

- Positive substance abuse screening;

- Unemployment, not seeking employment as ordered, or failure to notify the Probation [] Officer of employment loss;

- GED/school non-attendance;

- Leaving the jurisdiction or changing residence without permission;

- Going to restricted areas;

- Violating an order not to possess pagers or cellular phones;

- Failure to attend a prison tour; and

- Reporting in an unreasonable manner.…

Probation/Parole Officer will respond to non-emergency violations according to the Non-Emergency Violation Response Guidelines. The purpose for the Non-Emergency Violation Response Guidelines is to insure swift and certain response to every violation and to utilize the full continuum of sanctions prior to revocation. The Non-Emergency Response Guidelines apply to all technical violations except substance abuse testing
violations.…

**C. Non-emergency Violation Response Guidelines**

a. **Level I Violation Response**

Upon detection of the offender’s first violation(s), the supervising officer will warn the offender either verbally or in writing or seek the assistance of the Chief Probation Officer in warning the offender either verbally or in writing. The Probation Officer may also require the offender to report more frequently. Subsequent violation(s) may be addressed at Level I or Level II Response.

b. **Level II Violation Response**

If the supervising Probation Officer determines a Level II Response is needed, the officer will staff the case with the Chief Probation Officer. Level II Response includes override of supervision level and use of delegated authority sanctions available within community or intermediate punishment.…

c. **Level III Violation Response**

A Level III Violation Response may be initiated only after options from Level I and Level II have been used. Level III options, which may be pursued after staffing the case with the Chief Probation Officer, include a recommendation for an Intermediate Punishment, extending/modifying probation or contempt of court.…

d. **Level IV Violation Response**

Revocation may be recommended only after staffing the case with the Chief Probation Officer and a Level III response has been used.

3. **Non-emergency Violation Response Charts**

The following chart gives non-emergency violation response guidelines for probation…cases.

4. **Positive Substance Abuse Screening Guidelines**
Following confirmation of the first positive screen result, the Probation Officer will confront the offender with the positive screen result within ten (10) days:

A. Procedure for First Positive Drug Screen Result

1. Offender Admits Illegal Drug Use
   a. If the offender agrees to seek treatment, make a referral to TASC where available for assessment and referral to treatment or to any licensed treatment program where TASC is unavailable.
   b. If the offender refuses to submit to assessment and/or treatment, the officer will staff the case with the Chief Probation Officer and will use delegated authority to have the offender submit to assessment and treatment. If delegated authority is not available issue a…Violation Report or…[a] Non-Compliance Report and recommend a modification to the conditions of supervision requiring substance abuse assessment and compliance with the results.

2. Offender Denies Illegal Drug Use
   a. If the offender refuses to submit to a treatment assessment,… obtain a confirmation test of the positive drug screen from the substance abuse screening lab and forward with a…Violation Report to the court of conviction or…to the Post-Release Supervision and Parole Commission; and,
   b. During the violation hearing, recommend a modification to the conditions of supervision requiring substance abuse assessment and compliance with the results.
B. Procedure for Second or Subsequent Positive Result

Following receipt of the second or subsequent positive screen result, the Probation Officer will review the case with the Chief Probation Officer and treatment provider, if applicable, to evaluate the offender’s treatment needs and determine an appropriate course of action, including but not limited to therapeutic sanctions…

VIOLATION HEARINGS

Violation hearings may be held in the District Court or Superior Court having original jurisdiction, the judicial district in which the offender resides, or the judicial district in which he/she is alleged to have violated probation….
NOTES

1. Probation violations. The structure, purpose, and efficacy of probationary sentences turn as much on the procedures and consequences of violations as on the terms of the sentence itself. One of the puzzles of probationary sentences is that more aggressive enforcement and more rigid responses to conditions such as drug screens can lead to very high rates of violation. Yet nonenforcement may undermine the purposes and goals of the particular sentences. Does the structured and graduated system in North Carolina respond to these concerns? How would you define success in the North Carolina system? Why does it matter whether the court or the agency has the authority to impose sanctions? Should other states adopt a similar system? For a panoply of state responses to probation violators, see Alison Lawrence, National Conference of State Legislatures, Probation and Parole Violations—State Responses (Nov. 2008).

2. Probation violators. The most recent statistics on probation violators in state prisons are from 1991. They show a steady increase since the 1970s in the incarceration of probation violators. As of 1991, almost one-quarter of probationers were incarcerated for probation violations. One-quarter of these had probation revocation hearings because they had committed a new crime, 10% had failed a drug test, 36% did not report to their probation officer, and 12% percent had failed to pay fines or restitution or to comply with other financial commitments. See Robyn L. Cohen, Probation and Parole Violators in State Prison, 1991 (NCJ 149076, August 1995). Is revocation of probation appropriate for any, or all, of these violations?

3. Probation violations and modern social media. May courts use evidence from social media sites, such as Facebook, in probation revocation hearings as a basis for revocation? See State v. Altajir, 33 A.3d 193 (Conn. 2012).

B. MODERN ALTERNATIVE SANCTIONS

Appearing in the news much more often than probation and fines, but in reality much less common, are a range of new sentences—some creations of the postmodern mind and some resurrections of sentences long defunct (and perhaps justly so). The most
significant of these are boot camp, home confinement, shaming sanctions, and community service.

While modern alternative sanctions are relatively rare, they appear to have captured the imagination of the public, politicians, and a fair number of legal scholars. They deserve attention here because of the public attention paid to them and because of the extent to which they reveal deeper symbolic aspects and needs of punishment (a point that may be made about capital sentences as well). Perhaps these unusual but dramatic sanctions highlight a demand for an “expressive” purpose distinct from (or perhaps a component of) the more traditional purposes of retribution and reinforcement of community norms. See Joel Feinberg, The Expressive Function of Punishment, reprinted in Joel Feinberg, Doing and Deserving 98 (1970).

These new sanctions also raise further concern about “net widening.” Will they be applied to offenders who otherwise would go to prison? Or will they instead be imposed on those who would receive probationary sanctions, or even those whose cases would be dismissed? In the latter cases, intermediate sanctions have become supplements rather than alternatives to more traditional criminal justice sanctions.

In thinking about these new kinds of sentences, a useful distinction can be drawn between those that include some degree of physical detention, and that therefore either replace or mimic imprisonment, and those that do not.

1. Nonprison Detention: Boot Camp and Home Confinement

Boot camps were initially considered a promising alternative to detention-based sentences but fell out of favor upon shocking findings of abuse and documented failure of accomplishing their purpose. In the mid-1990s, there were about 75 boot camps for adult offenders in more than 30 states and about 30 for juveniles; since then the number of boot camps has declined precipitously. Many states have closed their boot camps or retained them only for juveniles. In 2005, the federal government eliminated its boot camp program, which had been termed Intensive Confinement Centers (ICCs) because of the view of federal prison officials that the program was neither cost-effective nor successful in preventing people from becoming repeat offenders.
The first boot camps—originally designed for adult men—were developed in 1983 in Georgia and Oklahoma to contain rising confinement costs and alleviate prison overcrowding. Over the next decade boot camps began to serve women and juvenile offenders as well. The average age of state boot camp inmates is between 19 and 20.

Because boot camps are considered an intermediate sanction, only offenders convicted of less serious, nonviolent offenses are usually admitted, and for relatively short periods of time. While the first boot camps were modeled after military boot camps, they came to emphasize education, therapeutic and treatment services, and community aftercare, with the goal of reducing recidivism. Despite initially promising results and wide adoption, in recent years boot camps have fallen out of favor.

From reading the following study of boot camps, do you think they should become (or remain) part of the array of available sanctions in your state? If so, for which offenders? Could a regime be developed that would allow boot camps to reach their goals of decreasing recidivism and reducing cost, or are the two inextricably conflicting purposes?

*Correctional Boot Camps: Lessons from a Decade of Research, Dale G. Parent*

(National Institute of Justice, NCJ 197018, July 2003)

**WHY BOOT CAMPS?**

As the name implies, correctional boot camps are in-prison programs that resemble military basic training.…

**Three Generations of Camps.** Boot camps proliferated in the late 1980s and early 1990s. By 1995, State correctional agencies operated 75 boot camps for adults, State and local agencies operated 30 juvenile boot camps, and larger counties operated 18 boot camps in local jails.

The camps evolved over time….Although first-generation camps stressed military discipline, physical training, and hard work, second-generation camps emphasized rehabilitation by adding such components as alcohol and drug treatment and prosocial skills training. Some also added intensive postrelease supervision that may include
electronic monitoring, home confinement, and random urine tests. A few camps admitted females, but this proved somewhat controversial. Some boot camps, particularly those for juveniles, have substituted an emphasis on educational and vocational skills for the military components to provide comparable structure and discipline.

After the mid-1990s, the number of boot camps declined. By 2000, nearly one-third of State prison boot camps had closed—only 51 camps remained. The average daily population in State boot camps also dropped more than 30 percent.

**Boot Camps’ Goals.** Boot camps had three main goals: reducing recidivism, reducing prison populations, and reducing costs.

Camps were expected to reduce recidivism by changing inmates’ attitudes, values, and behaviors and by addressing factors that increase the likelihood of returning to prison (such as lack of job skills, addiction, and inability to control anger). Camps were expected to reduce prison populations by shortening time served. Reduced length of stay was expected to reduce costs.

**Reducing Recidivism—An Unmet Goal.** NIJ evaluation studies consistently showed that boot camps did not reduce recidivism regardless of whether the camps were for adults or juveniles or whether they were first-generation programs with a heavy military emphasis or later programs with more emphasis on treatment. Most of the research suggested that the limitations of boot camps prevented them from reducing recidivism or prison populations, even as they achieved other goals. These limitations mostly resulted from—

- Low “dosage” effects. The length of stay in boot camps—usually from 90 to 120 days—was too brief to realistically affect recidivism.
- Insufficient preparation of boot camp inmates for reentry into the community. Many boot camps provided little or no postrelease programming to prepare graduates to lead productive lives. In addition, the intensive supervision common to later generations of boot camps meant heightened surveillance levels for boot camp graduates. These factors combined to magnify the high rates of return for
technical parole violations.

- Conflicting or unrealistic goals or mandates set by State legislatures. For example, most boot camp programs sought to reduce prison populations. Shorter programs more effectively meet this goal, but they also lower dosage effects and reduce the likelihood that treatment programs will work, thereby potentially increasing recidivism.

- The absence of a strong underlying treatment model. Pragmatism and local politics often affected boot camp structure more than theory and research results.

**Improving Behavior—A Success Story.** Boot camps were almost universally successful in improving inmates’ attitudes and behavior during the course of the program; they also produced safer environments for staff and residents, presumably due to their highly structured atmosphere and activities.

Several studies indicated that adult boot camp participants had better attitudes about their confinement experiences and had improved their prosocial attitudes more than comparison group members. One study concluded that inmates in adult boot camps had increased self-esteem, reduced antisocial attitudes, increased problem-solving skills, improved coping skills, and improved social support. In other studies, boot camp inmates improved their self-esteem and standardized education scores in reading and math more than comparison group members.

Anxiety and depression declined to a greater degree among juveniles in boot camps than among those in comparison facilities. Dysfunctional impulsivity (the inability to control one’s impulses) increased among youths in comparison facilities but decreased among boot camp participants. Social attitudes improved among youths in boot camps, but worsened among those in comparison facilities.

**Reducing Prison Population—Mixed Results.** NIJ-sponsored boot camp researchers agree that correctional boot camps might achieve small relative reductions

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14 Boot camps were unlikely to lower absolute prison population levels. The camps opened during a time
in prison populations. Boot camps could reduce the number of prison beds needed in a jurisdiction, which would lead to modest reductions in correctional costs.…

However, restrictive entry criteria for boot camp participants often made it impossible to reduce prison populations. For example, some jurisdictions required that boot camp inmates be nonviolent offenders convicted of their first felony. This small pool of eligible candidates typically serves short prison terms before parole. These inmates had little incentive to volunteer for boot camps that would not shorten their terms. When inmates sentenced to longer prison terms were recruited, however, a reduction in time served became a compelling incentive.

Efforts to meet the recidivism goal may work against meeting population and cost reduction goals. For example, lengthening a boot camp term to add more treatment programs in order to reduce the chances of recidivism would shorten the discount in time served and, thus, not reduce the population or prison bed costs.

NOTES

1. Boot camps. Has the 30-year experiment with boot camps failed? What lessons can be drawn about creative or modern sanctions more generally? Does the problem with boot camps lie in their conception? Their operation? Will there be any boot camps in operation in ten years? How could boot camps be reconfigured to fulfill their goals more effectively?

2. Home confinement. While it is relatively rare, many jurisdictions make some use of home confinement as a sanction, especially for short periods of time. For example, in the federal system in 1999 about 16,000 defendants and offenders had home confinement orders. The majority of home confinements, however, occur before trial. Home confinement does not necessarily mean 24-hour confinement: it can allow for specific periods of work or other reasons to leave the home. What purpose does home confinement serve? Do its goals differ from those of imprisonment? Home confinement when major changes in sentencing policies and practices caused prison populations to soar. Even at the height of their popularity, the total capacity of boot camps was minuscule compared to the total prison population.
orders have led to lower recidivism rates and cost-savings. Development Services Group, Inc., U.S. Department of Justice, Home Confinement/Electronic Monitoring: Literature Review (Oct. 15, 2009). In light of such findings, why are home confinement orders not more actively used? May home confinement orders re-create socio-economic distinctions between offenders?


Many states are adopting or considering global positioning system (GPS) tracking for serious offenders, and especially for sex offenders, after their release from prison, including well beyond parole or supervised release. California and a few other states currently require life-long tracking of certain convicted sex offenders. A recent California study has indicated that GPSs tracking is successfully decreasing recidivism and the violation of parole conditions but is more expensive than manual monitoring. Stephen V. Gies et al., U.S. Department of Justice, Monitoring High-Risk Sex Offenders With GPS Technology: An Evaluation of the California Supervision Program, Final Report (Apr. 2012). Other studies, however, have been more cautious in evaluating GPS technology, especially as the technology itself may lead to false alarms, ultimately creating a sense of complacency—rather than urgency—in those monitoring it. See Gaylene S. Armstrong & Beth C. Freeman, Examining GPS monitoring alerts triggered by sex offenders: The divergence of legislative goals and practical application in community corrections, 39(2) J. Crim. Justice 175 (2011).
Although GPS monitoring is discussed mostly as a supplement to a period of incarceration, should jurisdictions start seriously exploring techno-tracking as an alternative to incarceration for certain types of offenders?

2. Nondetention Sanctions: Shaming and Community Service

During the past two decades, shame has emerged as an explicit and independent sanction. Many criminal sentences may convey or carry some shame for the convicted offender. Indeed, the shame associated with the fact of conviction alone for some offenders may, from their perspective or the perspective of friends, family, or fellow workers, be a substantial punishment in itself.

Academics have led the call for officially shaming offenders. John Braithwaite, an Australian scholar, called for greater use of shame in criminal penalties in his 1989 book Crime, Shame and Reintegration. Braithwaite distinguished “reintegrative” shaming, which reaffirms “the morality of the offender by expressing personal disappointment that the offender should do something so out of character” and invites the offender to rejoin the community, from “disintegrative” shaming, which further pushes the offender into outcast status. A leading academic proponent in the United States has been Professor Dan Kahan. A major critic of proposals to sanction through shame is Professor Toni Massaro, who questions the existence of the kind of societies and norms that would make social sanctions such as shame fair, consistent, and effective. See generally Note, Shame, Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law, 116 Harv. L. Rev. 2186 (2003).

While rare, shaming sanctions are starting to appear more often in statutes and in individual cases. Consider the purposes and wisdom of the shaming sanctions in the following statute and case. Should shaming sanctions become more widely used? If so, for what offenses and offenders? And which institutions should design, implement, and test such sanctions?

*Ohio Revised Code §4503.231, Special Plates for Vehicles Registered to Persons Whose Registration Certificates and License Plates Have Been Impounded*
No motor vehicle registered in the name of a person whose certificate of registration and identification license plates have been impounded…shall be operated or driven on any highway in this state unless it displays identification license plates which are a different color from those regularly issued and carry a special serial number that may be readily identified by law enforcement officers. The registrar of motor vehicles shall designate the color and serial number to be used on such license plates, which shall remain the same from year to year and shall not be displayed on any other motor vehicles….

**People v. Glenn Meyer**

680 N.E.2d 315 (Ill. 1997)

McMorrow, J.

The sole question presented for our review in the instant case is whether section 5-6-3(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-6-3(b) (West 1994)) authorizes a trial court to order, as a condition of probation, that the defendant post a large sign at all entrances to his family farm which reads “Warning! A Violent Felon lives here. Enter at your own risk!” The appellate court affirmed the trial court’s imposition of this condition….We reverse, and hold that the trial court exceeded the scope of its sentencing authority because posting a sign of this type is not a reasonable condition of probation under section 5-6-3(b) of the Code. Therefore, we vacate the order of the circuit court in part.

Following a jury trial, the defendant, Glenn Meyer, was convicted of the aggravated battery of Gary Mason. The trial testimony showed that on February 25, 1995, Gary Mason visited the defendant’s farm in order to return some vehicle parts that he purchased from the defendant. Mason and the defendant began to quarrel over whether the parts were functioning properly. During the argument the defendant swung one of the parts at Mason, striking him in the nose and eye, causing several injuries.

At the defendant’s sentencing hearing, evidence was presented in aggravation and mitigation. On behalf of the State, Tim Belford testified that in September 1986, he went
to the defendant’s farm in order to collect monies for two insufficient fund checks issued by defendant to Belford’s employer, the First National Bank of Pittsfield. Belford stated that the defendant eventually gave him the money, but then kicked him and ordered him off the farm. Belford acknowledged that a jury acquitted the defendant of aggravated battery charges stemming from this incident.

Next, Harry Dyel testified that in May of 1990, he went to the defendant’s farm on behalf of his employer, Shelter Insurance Company, in order to investigate a claim filed by the defendant. Dyel testified that the defendant became hostile because he was annoyed by the company’s failure to process his claim promptly. Dyel stated that after he attempted to comply with the defendant’s demands for payment, the defendant pushed him down and kicked him several times, causing injuries to his torso, arms, face and head. The defendant was convicted of the aggravated battery of Dyel. Finally, Gary Mason, the victim in the present case, testified regarding the defendant’s actions on February 25, 1995.

Several witnesses testified in mitigation. Kenwood Foster testified that he is a licensed clinical social worker who operates a private counselling service. The defendant began seeing Foster in the fall of 1991. Foster testified that doctors at several different clinics have diagnosed the defendant as having “major depressive disorder” or clinical depression. Foster further stated that he believes that the defendant may also suffer from a condition similar to a type of post-traumatic stress disorder. He indicated that the defendant has been taking prescription medication known as Zoloft, to control his illness.

Foster further testified that certain stresses, such as a perceived threat to the defendant or his family, could trigger a change in the defendant’s behavior. Foster acknowledged that the defendant may perceive certain behavior as threatening, even if the average individual would not feel threatened under similar circumstances.

Friends of the defendant, Gregg Smith, David Gratton and Bruce Lightle, also testified. All three described the defendant’s good character and reputation within the community.

Mary Meyer, the defendant’s wife of 36 years, testified that the defendant’s elderly
mother relies on the defendant, her only child, for care and assistance. Mrs. Meyer stated that she teaches high school, and has always relied on the defendant to manage the farm. She indicated that her family would suffer great hardship if the defendant were incarcerated. Mrs. Meyer also testified regarding the defendant’s prolonged psychological illness and his efforts to control his sickness with medication.

In addition to the testimony of the witnesses, 20 letters were submitted by individuals from throughout the defendant’s community. These letters chronicle examples of the defendant’s generosity and willingness to assist friends and neighbors in need. The letters contain many descriptions of the defendant’s good character and reputation.

Additionally, the presentence investigation report contains a detailed description of the defendant’s mental health history. Several psychological evaluations of the defendant, dating from 1989, show that he suffers from major depressive disorder and possibly an additional psychological malady.

Upon evaluating all of the evidence in mitigation and aggravation, the trial court sentenced the defendant to 30 months’ probation. The court considered the defendant’s family members and the adverse impact that incarceration would have upon them. The court stated that it considered that the defendant was 62 years old, his mother’s age and ill-health, and Mary Meyer’s need to have the defendant care for the farm, in deciding to sentence the defendant to probation instead of prison.

The court conditioned defendant’s probation on the following: (1) payment of $9,615.95 in restitution, (2) payment of a $7,500 fine, (3) payment of a $25 monthly probation services fee, (4) psychological psychiatric evaluation and treatment, (5) one-year home confinement and (6) the placement of a “violent felon” warning sign at each entrance to the defendant’s property for the duration of the probation period. With respect to the sign requirement, the court stated that it believed that “maybe [the sign] will protect society.” The court’s supplemental order regarding the sign provides:

As a condition of probation defendant shall erect and maintain at each entrance of his property a 4’×8’ sign with clearly readable lettering at least 8” in height reading: “Warning! A Violent Felon lives here. Enter at your own Risk!” To be erected by 8-11-95.…. 
The sole issue presented to us for review is whether the trial court was authorized to order the violent felon warning sign as a condition of probation. The defendant maintains that the trial court acted outside of the scope of its sentencing authority because the sign is not a reasonable condition of probation within the meaning of the Unified Code of Corrections. Section 5-6-3(b) of the Code lists 16 permissible probation conditions that the trial court may impose “in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the Court.” (Emphasis added.) The defendant maintains that the warning sign is not a reasonable condition of probation because it does not comport with traditional notions of punishment or probation in Illinois, and instead is an unauthorized “shaming penalty” or a scarlet letter type of punishment. The defendant argues that nothing in the Code supports the subjection of probationers to public ridicule as a goal of probation.

The State responds that while the sign may embarrass the defendant, it is not intended to subject him to public ridicule. Rather, the State and the amicus curiae, the American Alliance for Rights and Responsibilities, contend that this condition of probation furthers the goals of probation because it protects the public and serves to rehabilitate the defendant.

The State maintains that the sign protects the public by warning against provoking the defendant and by reducing the number of guests or business invitees who visit the farm. The State and the amicus argue that the goal of rehabilitation is fostered by the sign because it reminds the defendant that society disapproves of his criminal conduct. The amicus further argues that because the sign reminds the defendant of his offense, the defendant will modify his behavior and will be less likely to commit acts of violence in the future. Finally, both the State and the amicus argue that the trial court acted within its discretion by carefully fashioning the conditions of probation to correspond to the needs of the defendant and the public.

Generally, the trial court is afforded wide discretion in fashioning the conditions of probation for a particular defendant. However, while the trial court has discretion to impose probation conditions which will foster rehabilitation and protect the public, the
exercise of this discretion is not without limitation.

Section 5-6-3(b) of the Code contains 16 permitted conditions of probation which may be imposed “in addition to other reasonable conditions.” (Emphasis added.) Requiring the defendant to erect a sign on his property, proclaiming his status as a violent convicted felon, is not statutorily identified as one of the conditions of probation. The statute gives the trial court the discretion to impose additional conditions of probation provided that they are reasonable. In People v. Ferrell 659 N.E.2d 992 (Ill. App. 1995), the court determined that a probation condition not expressly enumerated in the statute may be imposed as long as it is (1) reasonable and (2) relates to (a) the nature of the offense or (b) the rehabilitation of the defendant as determined by the trial court. We must, therefore, determine whether compelling defendant to post a 4-foot by 8-foot sign in front of his residence which, in 8-inch-high letters, states that defendant is a violent felon is a reasonable condition under section 5-6-3 of the Code.

Section 1-1-2 of the Unified Code of Corrections provides:

The purposes of this Code of Corrections are to:

(a) prescribe sanctions proportionate to the seriousness of the offenses and permit the recognition of differences in rehabilitation possibilities among individual offenders;

(b) forbid and prevent the commission of offenses;

(c) prevent arbitrary or oppressive treatment of persons adjudicated offenders or delinquents; and

(d) restore offenders to useful citizenship. 730 ILCS 5/1-1-2 (West 1994).

Consistent with this legislative intent, this court has recognized repeatedly that the purpose of probation is to benefit society by restoring a defendant to useful citizenship, rather than allowing a defendant to become a burden as an habitual offender. Probation simultaneously serves as a form of punishment and as a method for rehabilitating an offender. Protection of the public from the type of conduct that led to a defendant’s conviction is one of the goals of probation…. 
Although the sign may foster the goals of probation to the extent that it punishes the defendant and protects the public, furtherance of these two goals alone does not render the condition reasonable. Indeed, we are persuaded by defendant’s contention that the sign, in fact, may hamper the goal of rehabilitation, and that the erection of the sign is inconsistent with the conditions of probation listed in section 5-6-3(b). We recognize that the trial court labored arduously and sincerely to develop a sentence which would serve the needs of society and simultaneously avoid incarceration of the defendant. Nonetheless, we hold the sign condition of probation imposed in this case was unreasonable and did not serve the purposes of section 5-6-3(b).

The Tennessee Supreme Court in State v. Burdin, 924 S.W.2d 82 (Tenn. 1996), considered and rejected a comparable “shaming sign,” finding that it was unreasonable. The Tennessee court held that the Tennessee statute at issue there did not authorize a condition of probation which required the defendant to erect a sign in the front yard of his residence which read, “Warning, all children. [Defendant] is an admitted and convicted child molester. Parents beware.”

In Burdin, the defendant pleaded guilty to sexual battery of a 16-year-old victim. As a condition of probation, the court ordered the defendant to place the warning sign in front of his residence where he lived with his mother.

The Burdin court stated:

The consequences of imposing such a condition without the normal safeguards of legislative study and debate are uncertain. Posting a sign in the defendant’s yard would dramatically affect persons other than the defendant and those charged with his supervision…[C]ompliance with the condition would have consequences in the community perhaps beneficial, perhaps detrimental, but in any event unforeseen and unpredictable.

Similarly, in People v. Johnson, 528 N.E.2d 1360 (Ill. App. 1988), the court cautioned against allowing trial courts to impose unconventional conditions of supervision, which may have unknown consequences. The defendant in Johnson was convicted of driving under the influence of alcohol. As a condition of supervision, the trial court in Johnson ordered the defendant to place an advertisement in the local daily newspaper, which
contained her booking picture and an apology. The appellate court vacated this condition, finding it to be inconsistent with the overall intent of section 5-3-6.1.…

We are mindful of the distinctions in the case sub judice and the *Burdin* and *Johnson* cases. However, we agree with the specially concurring opinion in *Johnson*, which observed:

[T]o uphold the condition imposed here would encourage other courts to impose other unusual, dramatic conditions, and the proliferation of these types of conditions would cause problems of a greater magnitude than their propensity to rehabilitate.

See also *People v. Harris*, 606 N.E.2d 392 (Ill. App. 1992) (banishing the defendant from the state of Illinois as a condition of probation was unreasonable because no valid purpose would be served); *People v. Letterlough*, 655 N.E.2d 146 (N.Y. 1995) (condition of probation requiring the defendant to affix a fluorescent sign reading “convicted dwi” to the license plate of any vehicle he drove was not authorized); *People v. Hackler*, 16 Cal. Rptr. 2d 681 (Cal. App. 1993) (court not authorized to require probationer to wear a T-shirt bearing bold printed statement proclaiming his felony status); but see *Lindsay v. State*, 606 So. 2d 652 (Fla. App. 1992) (condition of probation requiring defendant to place a newspaper advertisement showing a mug shot, name and caption “DUI-convicted” upheld under Florida statute); *Goldschmitt v. State*, 490 So. 2d 123 (Fla. App. 1986) (bumper sticker reading “CONVICTED D.U.I.—RESTRICTED LICENSE “ upheld); *Ballenger v. State*, 436 S.E.2d 793 (Ga. App. 1993) (court had the authority to require the defendant to wear a pink fluorescent bracelet reading “D.U.I. CONVICT “).

We hold that section 5-6-3(b) of the Code did not authorize the trial court to require the sign as a condition of the defendant’s probation. The sign contains a strong element of public humiliation or ridicule because it serves as a formal, public announcement of the defendant’s crime. Thus, the sign is inconsistent with the conditions of probation listed in section 5-6-3(b), none of which identify public notification or humiliation as a permissible condition. Further, we determine that the sign may have unpredictable or unintended consequences which may be inconsistent with the rehabilitative purpose of probation.
Finally, the nature and location of the sign are likely to have an adverse effect on innocent individuals who may happen to reside with the defendant. At the time of sentencing in this case, the defendant’s wife was living on the premises where the violent felon sign was to be displayed. The defendant’s elderly mother also intended to live there. The record shows that the defendant has two adult children who visit the farm, as well as young grandchildren. We believe that the manner in which the sign affects others also renders it an impermissible condition of probation.

Conditions which label a defendant’s person or property have a stigmatizing effect and are considered shaming penalties. D. Kahan, What Do Alternative Sanctions Mean? 63 U. Chi. L. Rev. 591 (1996). Although a probationer may experience a certain degree of shame from a statutorily identified condition of probation, shame is not the primary purpose of the enumerated conditions.

The judicially developed condition in the case at bar does not reflect present penological policies of this state as evidenced by our Unified Code of Corrections. The authority to define and fix punishment is a matter for the legislature. The drastic departure from traditional sentencing concepts utilized in this case is not contemplated by our Code. Therefore, we determine that the erection of the sign as a condition of probation was unreasonable, and may be counterproductive to defendant’s rehabilitative potential.…

NOTES

1. Shaming. Shaming has been big news in academic circles since John Braithwaite’s pioneering work in the late 1980s. Occasional shaming sanctions make news—sometimes national news—highly disproportionate to their modest character and infrequent use. Shaming sanctions raise many issues. As is so often the habit of lawyers and legal scholars, among the first questions to be addressed is whether shaming sanctions are “legal” or, in the more common and often distorting reaction, whether they are constitutional. The much more difficult and important questions, however, have received less attention. Are shaming sanctions moral? Effective? To what purpose? Which institutions should authorize, design, impose, and review them? See James Q. Whitman,
What Is Wrong with Inflicting Shame Sanctions?, 107 Yale L.J. 1055 (1998). In People v. Letterlough, 631 N.Y.S.2d 105 (N.Y. 1995), the court rejected a condition of probation for a DUI offender that he affix to any car he drove a fluorescent sign stating “convicted DWI.” In response to Letterlough and People v. McNair, 642 N.Y.S.2d 597 (N.Y. 1996) (rejecting a one-year electronic monitoring sentence as beyond statutory authority), the New York legislature amended the relevant statute in 1996 to expand the authorized purposes of probation:

New York Penal Law §65.10. When imposing a sentence of probation the court may, in addition to any conditions imposed pursuant to [existing authority], require that the defendant comply with any other reasonable condition as the court shall determine to be necessary or appropriate to ameliorate the conduct which gave rise to the offense or to prevent the incarceration of the defendant.

Based on this statutory mandate, what review powers, if any, do New York appellate courts have over probation conditions? How could the court interpret the “reasonableness” requirement?

2. Community service sanctions. A more common alternative to detention is the community service order, either as a stand-alone sentence or in conjunction with fines or shorter periods of incarceration. Community service sanctions seem to be used most often for low-level offenders, perhaps as a more intensive substitute for straight probation. New York instituted a community service sentence program designed both to broaden the base of offenders punished and to reduce the number of offenders serving short jail terms. See Douglas Corry McDonald, Punishment Without Walls: Community Service Sentences in New York City (1986). Community service sentences are usually imposed under the general authority of probationary sanctions. It is very hard to determine how many community service sentences are imposed in the United States, whether they are stand-alone sentences, and how many are successful.

3. Alternative Courts

Sometimes alternative sentences have different purposes from those of traditional sanctions and call for different adjudicative or sentencing institutions. One prominent
example of an alternative court that appears to seek traditional goals is drug court. The growth of drug courts has been dramatic. The first self-identified drug court was created in 1989 at the urging of Judge Herbert Klein in Miami. See Peter Finn and Andrew Newlyn, Miami’s Drug Court: A Different Approach (NCJ 142412, 1996). As of December 2011 there were 1,435 reported drug courts for adult offenders in operation and more than 1,100 more specialized courts dealing with sub-categories of drug offenders. At least 200 drug courts are in the planning stages. See National Institute of Justice, Office of Justice Programs, Drug Courts (2012), at http://www.nij.gov/topics/courts/drug-courts/welcome.htm. Part of this growth may be attributed to the federal Drug Courts Program Office (created and funded by the Violent Crime Control and Law Enforcement Act of 1994), which spent $56 million to support the creation of drug courts between 1995 and 1997. Today the Bureau of Justice Assistance provides grants for the creation of drug courts. For a comprehensive overview, see Celinda Franco, Congressional Research Service, Drug Courts: Background, Effectiveness, and Policy Issues for Congress (Oct. 12, 2010).

Judges and reformers created drug courts in response to both the limited range of sentencing options in traditional criminal courts for drug users and concerns about the effectiveness and cost of punishment instead of—or at least in the absence of—drug treatment. Drug courts typically use a less adversarial approach that is aimed at ensuring public safety. In some states drug courts amount to a diversionary program, where offenders must perform successfully to prevent a criminal conviction. Increasingly, however, drug court programs form part of a probationary sentence or follow a guilty plea while sentencing is being deferred. For a discussion and comparison of different drug court models, see Shelli B. Rossman et al., The Urban Institute, The Multi-Site Adult Drug Court Evaluation: The Drug Court Experience—Final Report (Nov. 2011).

Drug courts have not only spread like wildfire, they have offered a model for breaking the heavily regimented and restricted punishment settings of traditional courts and the erosion of rehabilitation. For drug offenders and others the rehabilitative ideal remains, or is again vibrant as, a goal of “punishment” (though perhaps the goal of rehabilitation is in some important way different from punishment). The broader philosophical and practical
labels used to describe this larger movement are “restorative justice” and “therapeutic courts.” For a comprehensive review of the literature and a discussion of the advantages and disadvantages of restorative justice concepts and models, see Carrie Menkel-Meadow, Restorative Justice: What Is It and Does It Work?, 3 Annu. Rev. Law & Soc. Sci. 161 (2007). We already saw one illustration of restorative purposes in the sentencing circle examined in Chapter 1.

Therapeutic Justice in Alaska’s Courts, Teresa Carns, Michael Hotchkin, and Elaine Andrews


I. THERAPEUTIC COURTS IN ALASKA: HISTORY, DEVELOPMENT AND PRESENT STRUCTURES

Wellness Court…Anchorage Felony Drug Court…Mental Health Court…Therapeutic Justice Courts.…Underlying these new projects is a growing change in the justice system’s response to the difficult problems presented by defendants whose substance abuse or mental disabilities appear to be related inextricably to repeated criminal behavior. Justice professionals describe this approach as “therapeutic justice.”…

Therapeutic justice emphasizes the need to address the root causes of a specific offender’s criminality, to treat the offender to remove the problems and to return the offender to the community as a responsible citizen. Restorative justice emphasizes repair of the relationships between the victim, community and offender. Retributive justice, the model on which much of the United States’ criminal justice system is based, emphasizes fairness and punishment as more important values than rehabilitation or other interests. Each model seeks to express community condemnation in order to protect public safety and deter or dissuade the specific offender and others from similar behavior in the future.…

C. Therapeutic Courts: Assets and Liabilities

[P]olicymakers and justice system professionals have identified a wide range of benefits and concerns based on their experiences [with therapeutic courts].
1. The Views of Judges and Court Administrators. Judges and court administrators differ strongly in their beliefs about the benefits of the therapeutic justice approach. Proponents of therapeutic justice courts believe that the therapeutic justice model has reduced recidivism and increased the chances that defendants can return to their communities as productive individuals. Judges are willing to see a defendant repeatedly in a structured setting for months if they believe that in the end they will not see that defendant back before them for sentencing on repeated offenses. Some judges see the situation as particularly troublesome for misdemeanor offenders who receive at best minimal supervision and often little or no treatment. 

Some court administrators and other judges express concerns that the therapeutic courts will be of limited benefit to a few defendants while consuming scarce resources at a rapid rate. In the short term, the projects require extra time to (1) facilitate the frequent meetings among the professionals and court staff involved in each case, (2) hold regular hearings and (3) administer the network of services, sanctions and incentives required to make the therapeutic process work. Justice system professionals are concerned about the lack of resources for the added work involved in each therapeutic justice project case.

Other concerns include worries that therapeutic courts may be coercive, may become more paternalistic and repressive than the existing system and may be “net-widening,” i.e., they may impose harsher penalties or expectations on relatively less serious offenders rather than targeting more serious offenders. 

Perhaps the most serious concern is that courts will be unable to apply therapeutic justice concepts to more than a select few defendants. In a climate where all courts struggle for resources to address their caseloads’ demands, resource-intensive therapeutic processes appear out of reach for most cases. Therapeutic courts typically serve only a fraction of potentially eligible defendants. [Some observers believe that drug court procedures eventually may become abbreviated and perfunctory if they “go to scale” to serve a majority of the defendants with substance abuse problems. Under such a system, defendants will lose the benefits of individualized attention and therapeutic justice approaches will devolve into pro forma applications that would be no more effective than]
the court procedures they replaced.

2. The Views of Defendants. One stated purpose of therapeutic justice projects is to provide defendants with the structure, resources and incentives to end their addictions or help them resolve the problems that prevent them from leading satisfying and productive lives. Some defendants in therapeutic projects participate because they share the belief that rehabilitation is possible. Other defendants may participate because they believe that the projects are a less onerous choice than incarceration.

Proponents of therapeutic justice cite substantial evidence that coercing treatment through structures such as drug courts may result in better outcomes. Evidence suggests that people in coerced or mandated treatment (as distinct from voluntary treatment) are more likely to complete the treatment. Completion of treatment is critical to significant reduction in the likelihood of relapse.

Conversely, defendants may assess the difficulties of therapeutic justice projects and decide that incarceration is preferable. They may believe that they would fail in any case and would prefer to serve time in custody and be done with it. Some do not believe that they have a problem that needs treatment or that is amenable to the treatment offered, and they may decline to participate on those grounds. Additionally, defense attorneys perceive incarceration as less damaging for some defendants than participation in programs in which the defendant can be repeatedly incarcerated for violations of program guidelines.

3. The Views of Prosecutors. Prosecutors who favor drug courts tend to believe that their role is to “represent[] the community’s interest in public order.” Other prosecutors question that “broader vision” and suggest instead that the goal of the criminal justice system is for prosecutors to “put bad guys in jail” by winning individual cases. Supporters of the therapeutic approach suggest that prosecutors working in therapeutic courts are as zealous as those working in regular courts, but more accountable.…

Some prosecutors may object to specific ways of administering therapeutic justice programs. For example, many oppose pre-plea programs that preserve defendants’ options for going back to trial. “As time passes I am in a weaker position as to my case
and my expenditure of resources.” For this reason, many prosecutors insist on a plea from the defendant as a condition of entry into a therapeutic justice project. Other prosecutors perceive therapeutic justice’s collaborative, non-adversarial approach as incompatible with “the public safety- and punishment-oriented goals of the prosecution[.]” They may reserve use of this approach for specific types of defendants and consider it inappropriate for others.

4. Other Justice System Perspectives. Departments of Corrections and the public have responded favorably to therapeutic justice projects in their current form and scope. They favor the projects’ potential for reducing incarceration costs and for successfully treating addictions….

Many treatment providers also are supportive, although some individuals believe that the process may be too coercive and that coerced treatment does not work. Thorny confidentiality issues may arise with therapeutic justice projects because the projects require agencies to share and discuss information that is otherwise protected by complex confidentiality laws and regulations. Another concern is the change in the role of treatment providers from serving “exclusively as the gatekeepers to treatment, as they have been accustomed to doing,” to having “courts…decide who will be sent to treatment and when treatment can be terminated for poor performance.”

D. Effectiveness of Therapeutic Courts

…Although fewer than one hundred evaluations of therapeutic courts have been published in the last ten years, many are underway. A number of preliminary or partial evaluations have been completed and researchers have considered the effectiveness of many of the separate components of drug courts, particularly the use of monitoring and supervision, completion of treatment programs and use of coerced treatment.

1. Treatment of Addiction/Disease. Various researchers have demonstrated that treatment, if completed, reduces recidivism. Partial completion of treatment often appears to be better than no treatment in reducing recidivism, but length of time in treatment generally predicts the addict’s post-treatment success. Other studies have shown that some types of treatment correlate more significantly with reduced recidivism than
Other components of drug or therapeutic courts also have proven effective when used separately or outside the context of the therapeutic court. In a Washington, D.C. study, monitoring and closely supervising offenders on probation by itself reduced the incidence of positive drug tests. A Florida program uses intensive supervision of probationers for DWI offenders…and has shown significant reduction in recidivism.

The combination of these separate effective elements into therapeutic justice courts has proven successful in many, though not all, instances. Published research shows that many drug courts have reduced recidivism during their existence. However, a few projects have not been able to demonstrate that the drug court population fared any better in terms of post-program recidivism rates than the control or comparison groups.

2. Recidivism. Researchers have conducted very few follow-up evaluations analyzing re-arrest rates and experiences of participants and controls in drug court programs over the months or years after completion of the program. The difficulties posed by long-term evaluations include the added costs of more evaluations, the problem of finding former participants and control group subjects and the management of confidentiality issues. Since most drug court programs are relatively new, insufficient time has elapsed to make realistic follow-up evaluations possible. A similar situation exists for mental health courts and other therapeutic justice projects.…

E. Costs of Therapeutic Justice

Therapeutic justice projects are resource intensive. Even the projects that have functioned for some period of time without outside funding have managed only by using substantial time volunteered by judges, attorneys and other persons and organizations in the community….The resources needed for therapeutic justice projects include added time for judges, attorneys and clerical staff, increased treatment resources, increased monitoring and drug testing of defendants, and expenses (in most programs) for case managers and coordinators.…

A [] realistic analysis would compare the costs for a drug court to the costs of
incarcerating the same defendant for at least a year (the typical length of many drug court programs) and the costs of releasing the defendant untreated (the typical situation for most defendants). In Alaska, the cost for an Anchorage Felony Drug Court participant is estimated at $16,950 annually, as compared to the cost of more than $40,000 per year for incarceration. One observer suggests that because many of the defendants are repeat offenders who face presumptive sentences of two years or more, the actual costs of incarceration usually would be double the $40,000. The cost of incarceration does not include any of the costs associated with investigating the crimes charged, the costs of court processing (clerical and judge time, prosecution and defense costs) or costs of pretrial incarceration or pre-sentence report preparation for felony defendants. The cost for the Anchorage Felony Drug Court does include some attorney time, but neither judge time nor clerical time for any of the participants.

Depending on the program, defendants bear some of the costs.…

These differences in practices highlight different philosophies underlying similar projects. Proponents of having defendants pay argue that even if some defendants cannot participate due to very limited resources, those defendants who can should participate. Others contend that requiring any payment unfairly limits the program to those who have the economic resources to participate.…

II. THERAPEUTIC JURISPRUDENCE: LEGAL ISSUES

[T]he therapeutic justice projects discussed in this Article describe a well-defined approach that differs significantly from that embodied in the traditional American adversarial system. Most of the legal issues that therapeutic justice approaches raise have not been resolved by the courts, although a few courts have issued opinions addressing them.…

A. Constitutional Issues

Courts that have considered cases involving drug courts have dealt with a fairly limited range of the possible constitutional issues that could arise.…

1. Separation of Powers. Many drug court-related cases deal with the defendant’s
rights in plea bargaining situations and the balance of powers between the executive and judicial branches in determining who is eligible for drug court programs and who makes the final decisions on admission to them. Most of the courts deciding cases related to plea bargains appear to treat drug court agreements as any other plea bargain. 

The other major separation of powers issue focuses on the prosecutor’s exclusive right to decide initial eligibility for drug court admission versus the judge’s right to make the final decision about admission to the drug court. Several state courts, including those in Oklahoma and Florida, have held that separation of powers requires that prosecutors be permitted to make the first determination of admission to drug courts. Judges are not allowed to admit defendants to drug courts over the objections of prosecutors. On the other hand, Iowa and Louisiana courts have held that judges have the power to make the final decision about admission to drug court and are under no obligation to accept the prosecutor’s recommendation.

2. Due Process. A few cases address due process issues that have arisen in drug courts. For example, a Washington case held that the defendant must have a meaningful opportunity to respond to allegations of non-compliance before being terminated from the program. An Oklahoma case held that the court must give written reasons for termination of a defendant. This opinion also held that the court must state why the program sanctions were inadequate or inappropriate for the defendant.

3. Equal Access to Courts (Equal Protection). Several courts have decided that defendants have no right to be admitted to drug courts and that they can be excluded on a variety of grounds. Prior felonies often are mentioned as grounds for ineligibility. A Florida case held that a defendant does not have a constitutional right to participate in a drug court if one had not been established in the circuit in which he was charged. One author has warned that therapeutic justice projects “need to be sensitive to class and race bias, real or apparent. Unless care is taken, diversion courts may tend disproportionately to work with white and middle-class substance abusers.”

Several authors have discussed the question of equal access to drug courts when programs do not have enough slots to serve all of the eligible defendants, as well as the
question of whether the costs of programs where defendants pay all or part of the costs prohibit indigent defendants from using them. These problems have often been addressed in the context of “going to scale” or expanding the programs to serve the estimated seventy to eighty percent of defendants who have substance abuse problems. One court commentator noted: “We must address the fact that we are providing more resources for a misdemeanor drug offense than we are for a non-capital murder offense or a rape offense. Most states can’t afford to continue to do this—politically and fiscally—if problem-solving courts go to scale.”

NOTES

1. Therapeutic courts and restorative justice. The concepts of therapeutic courts and restorative justice exploded in policy and scholarly debates in the 1990s, but these ideas, and the closely linked traditional purpose of rehabilitation, have deep historic roots.

The restorative justice movement has become very popular in developed countries in recent years, though it has existed for decades in African countries in the form of informal customary practices. The goal of restorative justice is to restore the victim and the community that has been harmed. While it has only recently become popular for street offenses, it has been used for decades to address business regulatory challenges. Business regulatory practices focus on restitution, victim empowerment, and the restoration of trust and relationships. Restorative justice can be viewed as an extension of the victim-offender mediation and restorative justice conferences used in business disputes.

2. Judicial and prosecutorial discretion and power sharing. Legislatures have limited judicial discretion in recent years through the establishment of mandatory sentences and sentencing guidelines. As judicial discretion has narrowed, prosecutorial discretion has broadened. How has the tension between prosecutorial and judicial discretion been resolved in therapeutic courts? To what extent are legislative actions necessary to institute therapeutic courts? In what areas would legislative action be helpful in facilitating the work of therapeutic courts? See Daniel Van Ness & Pat Nolan, Legislating for Restorative Justice, 10 Regent U. L. Rev. 53 (1998).
Tensions and contradictory goals and missions may also plague the different players in alternative courts. In mental health courts the criminal justice system and the mental health system often seem to pursue incompatible aims that impact communication negatively and hinder true collaboration. See Michelle Manasse, The Dilemmas and Opportunities of Collaboration: Drawing Lessons from One Mental Health Court, 2:1 J. Court Innovation 157 (2009).

3. Drug courts. Drug courts have emerged as the most common example of therapeutic courts. They provide intensive, long-term treatment services to offenders with long histories of drug use and criminal justice contacts and high rates of health and social problems. Most drug court participants are men with poor employment and educational records, fairly extensive criminal histories, and prior treatment failures. Usually drug courts target offenders who constitute a medium risk to the community. Hallmarks of the program are access to treatment and rehabilitation services as well as frequent alcohol and drug testing, all under ongoing judicial supervision and interaction with each participant. Treatment programs generally run for one year and are outpatient services. A team of social workers and substance abuse counselors assists the drug court judge. Occasional lapses are expected, and sanctions and rewards are built into the program. The penalty is designed to enforce the prescribed treatment regime rather than solely to punish. Drug courts enjoy widespread popularity and substantial funding. Recent empirical studies indicate that support is justified as they have found recidivism reduced and indicia of long-term rehabilitation, at least in certain locales and court configurations. See Michael W. Finigan, Shannon M. Carey & Anton Cox, Impact of a Mature Drug Court Over 10 Years of Operation: Recidivism and Costs (Final Report) (July 2007).

The graduation rate for drug court enrollees ranges between a quarter and two-thirds. This result is better than for many other community-based offender treatment programs. During drug court enrollment, criminal activity and drug use are reduced, but the duration of such success following enrollment remains undetermined. Some program-specific studies have found beneficial longer-term results, notably a decrease in recidivism and a greater likelihood of employment. See, e.g., Shelli B. Rossman et al., The Multi-site Adult Drug Court Evaluation (Urban Institute 2011), available at
Some critics of drug courts believe the courts undermine the adversarial system, since offenders must waive some of their rights in order to be enrolled: courts have a right of access to all treatment records and are permitted ex parte communications with the prosecution. Judicial power changes dramatically in drug courts as the judges become activist problem-solvers, who have refocused the aims of sentencing from retribution to therapy. Another concern, documented in some individual studies, is that drug court participants receive harsher sentences than other offenders. On the other hand, netwidening is a potential problem, as those otherwise sentenced to probation may now be subject to heightened supervision. Finally, some non-addicts choose drug court to avoid criminal conviction, and therefore deplete limited resources unnecessarily.

The drug court model has been exported. In 2001 Glasgow established the first drug court in Scotland. Canada and Ireland also have similar programs as do Australia, New Zealand, Norway, and increasingly countries in Latin America. While the U.S. programs are based on abstinence, this is not always true of drug courts in other countries.

4. Drug courts and prosecutorial discretion. Should the imposition of a drug court probation sentence depend on the prosecutor’s recommendation? In Louisiana v. Taylor, 769 So. 2d 535 (La. 2000), the Louisiana Supreme Court held that a trial court is not authorized to place a defendant in a drug court program absent the prosecutor’s recommendation. How can such a limitation on judicial discretion be justified in this context?

5. Confidentiality concerns. Therapeutic justice courts raise difficult confidentiality concerns, as Carns, Hotchkin, and Andrews observe:

Drug and alcohol courts require access to participants’ drug and alcohol abuse treatment records….The program’s treatment assessor uses this information in determining whether the
defendant is diagnostically appropriate for inclusion in the program and in designing an appropriate case plan. Once a program has accepted a defendant, the drug or alcohol court team uses reports of that person’s ongoing treatment compliance and prognosis to assess the person’s progress. The judge uses the reports to award incentives, impose sanctions and determine whether the participant should graduate, continue in the program or be terminated from the program.…

Drug and alcohol courts face two significant issues created by [the] federal regulatory scheme [protecting information about an individual’s participation in drug or alcohol abuse treatment programs]. First,…[p]articipants consent to release treatment information, both past and future, when they first apply for the programs.…

The second issue facing drug and alcohol courts stems from the fact that the regulatory definition of “program” encompasses virtually all of these courts. This subjects them to the regulatory restrictions on disclosure of information that might identify a patient as an alcohol or drug abuser. A problem arises because the courts conduct public proceedings. Although most interactions among judges, attorneys and offenders in drug court do not go into significant detail about a participant’s treatment, the mere fact that a person is participating in a drug or alcohol court program indicates that the person has abused alcohol or drugs. One author notes that part of drug court procedure is for the judge to “hold[] the offender publicly accountable for the results of the [drug use] test and the treatment progress.” The regulations thus create a conflict between public access to court proceedings and the court’s duty not to identify or discuss drug and alcohol court participants in a public setting.…

…Drug court team members are permitted to use such information for their “official duties with regard to the patient’s conditional release or other action in connection with which the consent was given.” One authority states that the federal regulations have been interpreted to allow team members to mention confidential information in court.…The authority goes on to say that drug court officials should be mindful that consent has not been given to disclose confidential information to unnamed third party bystanders in the courtroom (e.g., public, press and law enforcement). Therefore, courtroom discussions should avoid specific, confidential details of a person’s treatment experience and, instead, focus on more general concerns such as the participant’s progress.

The same authority notes that the question of whether confidentiality rules apply to drug courts has not been fully resolved….
Should there be more concern about confidentiality in other areas of sentencing?

In light of the uneasy fit of drug courts in the criminal system, should drug courts instead be civil courts? See Alex Kreit, The Decriminalization Option: Should States Consider Moving From a Criminal to a Civil Drug Court Model?, 2010 U. Chi. Legal F. 299 (2010).

6. Beyond drug courts. Drug courts have spearheaded the movement toward therapeutic justice. They have been supplemented by a host of other types of courts, some of which are focused on particular types of offenders—mental health courts and veterans’ courts—or particular types of offenses, such as felony DWI courts and wellness courts.

C. COLLATERAL SANCTIONS

Collateral sanctions, or “collateral consequences,” as they are often called, have been part of the U.S. criminal justice system for centuries, and in recent years they have received renewed support from legislatures and policymakers. The origin of collateral sanctions can be found in so-called civil death provisions, prevalent in the nineteenth century and earlier in the United States and Europe. Civil death, the deprivation of an offender’s civil rights, made it impossible for convicted felons to enter into contracts, arranged for automatic divorce from their spouses, prevented them from making a will, and imposed a host of other sanctions on them that amounted to legal death. While many of the most offensive of these restrictions have been eliminated, others remain. Some modern collateral sanctions are particularly restrictive in a regulatory welfare state and, for some offenders, may have more dramatic and longer-term consequences than the sentence imposed in court.

The offenders released from U.S. prisons every year—over 675,000 in 2009—do not again become “free” citizens. To the contrary, they often face such a large number of restrictions that some have called the postrelease period a time of “invisible punishment.” Offenders can be barred from a large number of jobs, from bartender to barber, from securities trader to bail bondsperson, from nurse to beautician. They may be
automatically disqualified from such positions by their felony conviction, the specific offense they committed, or restrictions on necessary licenses or mobility. Ironically, in some prisons, inmates continue to be trained for jobs they cannot hold after release.

With the expansion of the welfare state, limitations or outright bans on public benefits have become a new form of collateral sanction. Drug and sex offenders are not eligible for public housing; drug offenders are barred from welfare benefits and student loans. Political rights are also restricted. In many states offenders are barred from the voting booth, the jury box, and political office—sometimes forever.


There are so many collateral sanctions that judges, prosecutors, and criminal defense attorneys are unable to inform most defendants of all the sanctions that will apply to them. For that reason, the American Bar Association has demanded that such sanctions be cataloged and that defendants be informed of them before they plead guilty. American Bar Association, Criminal Justice Standards, ch. 19 (2003).

Courts have generally declared collateral sanctions civil rather than criminal sanctions. They are assumed to protect the public against risk rather than constituting further punishment of the offender. Because they are civil sanctions, they are typically applied and enforced without the traditional procedural protections that apply in criminal cases. In light of the panoply of collateral sanctions and their impact on the offender, should potential collateral sanctions be included in the pre-sentence report, especially as they may impact compliance with probation and other sentence conditions because they affect the offender’s employment and financial status? See Gabriel J. Chin, Taking Plea Bargaining Seriously: Reforming Pre-Sentence Reports After Padilla v. Kentucky, 31 St.
1. Automatic Disabilities

a. Disenfranchisement

All but two states—Maine and Vermont—prohibit prison inmates from voting. Most states also prevent offenders from voting while under a criminal justice sentence: 35 states prohibit felons from voting while they are on parole, and of those 30 also exclude felony probationers from the voting process. Some states prohibit only those who have committed certain crimes from voting; others do so for all felonies. Offenders automatically regain the right to vote in most states upon completion of their sentence. In a small number of states, a felon must apply for a pardon or undergo another burdensome restoration process to be permitted to vote.

Currently more than 5,8 million U.S. citizens are denied the right to vote because of criminal convictions, and more than 1 million of these have completed their sentences but live in states that deny voting rights to anyone who has been convicted of a felony and has not received a gubernatorial pardon or undergone the restoration process. State rather than federal law governs voting rights, including the right to vote in presidential and congressional elections.

In recent years, the issue of felon disenfranchisement has received more public policy attention, and a few states have acted to ease restrictions on voting rights. In 2007, for example, Maryland’s legislature repealed all provisions of the state’s lifetime voting ban, including the three-year waiting period after sentence completion for certain categories of offenses, and instituted an automatic restoration policy for all persons upon completion of sentence. In Florida, the state’s Office of Executive Clemency voted to amend the state’s voting rights restoration procedure to automatically approve the reinstatement of rights for many persons who have been convicted of nonviolent offenses. In 2011, however, Florida’s governor imposed a five-year waiting period before an offender can apply for restoration of voting rights.

In 1974 the Supreme Court confronted the question whether denial of the right to vote
for felons who had served their sentences violated the equal protection clause. Richardson v. Ramirez, 418 U.S. 24 (1974). In its decision the Court stated that the drafting history, historic practice, and language of section 2 of the Fourteenth Amendment, the apportionment clause, justified state disenfranchisement of felons. The clause reads in part:

[W]hen the right to vote at any election…is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. [Emphasis added.]

In his dissent, Justice Marshall questioned the majority’s analysis of section 2 and advocated addressing the disenfranchisement question under section 1 of the Fourteenth Amendment. He considered the state as having failed its burden of justifying felon disenfranchisement under the compelling interest standard. The state had advocated felon voting restrictions because it wished to prevent voting fraud and because the “likely voting pattern [of felons] might be subversive of the interests of an orderly society.” Are these grounds valid?

About a decade later the Court revisited the issue of felon disenfranchisement in Hunter v. Underwood, 471 U.S. 222 (1985). There the Court struck down Alabama’s constitutional provision barring felons convicted of “any crime [felony and misdemeanor]…involving moral turpitude” from voting. The Court found a violation of the equal protection clause because the state constitutional provision had been passed with a racially discriminatory motive—the exclusion of blacks (and poor whites) from the ballot box.

State courts and lower federal courts have heard numerous challenges on constitutional and statutory grounds to felon disenfranchisement provisions. So far, none of them have been successful. The most frequently cited objections to inmate voting are practical difficulties in arranging for in-prison voting and philosophical objections to granting those who have violated society’s laws the right to participate in the making of laws. Even the ABA’s Criminal Justice Standards in their latest chapter on collateral
sanctions allow for disenfranchisement during incarceration while generally condemning it as a collateral sanction. Standard 19-2.6. In the 1968 version of this chapter, the Standards rejected all disenfranchisement based on a criminal conviction. For a different perspective, one more characteristic of other Western democracies, consider the following case.

**Richard Sauvé v. Canada (Chief Electoral Officer)**


MCLACHLIN, C.J.

1. The right of every citizen to vote, guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms*, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people—those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the Charter as a “reasonable limit…demonstrably justified in a free and democratic society.” I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason. Here, the reasons offered do not suffice.

2. The predecessor to s. 51(e) of the Canada Elections Act, R.S.C. 1985, c. E-2, prohibited all prison inmates from voting in federal elections, regardless of the length of their sentences. This section was held unconstitutional as an unjustified denial of the right to vote guaranteed by s. 3 of the Charter. Parliament responded to this litigation by replacing this section with a new s. 51(e), which denies the right to vote to all inmates serving sentences of two years or more….

7. To justify the infringement of a Charter right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified. This two-part inquiry—the legitimacy of the objective and the proportionality of the means—ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights
violation is warranted—that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.…

20. The objectives’ analysis entails a two-step inquiry. First, we must ask what the objectives are of denying penitentiary inmates the right to vote. This involves interpretation and construction, and calls for a contextual approach. Second, we must evaluate whether the objectives as found are capable of justifying limitations on Charter rights. The objectives must not be “trivial,” and they must not be “discordant with the principles integral to a free and democratic society.”…

21. Section 51(e) denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Prisoners have long voted, here and abroad, in a variety of situations without apparent adverse effects to the political process, the prison population, or society as a whole. In the absence of a specific problem, the government asserts two broad objectives as the reason for this denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or “enhance the general purposes of the criminal sanction.”…

22. This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation…. However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation.…

26. Quite simply, the government has failed to identify particular problems that require denying the right to vote, making it hard to say that the denial is directed at a pressing and substantial purpose. Nevertheless, despite the abstract nature of the government’s objectives and the rather thin basis upon which they rest, prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government’s objectives outright. The proportionality inquiry allows us to determine whether the
government’s asserted objectives are in fact capable of justifying its denial of the right to vote. At that stage, as we shall see, the difficulties inherent in the government’s stated objectives become manifest.

27. At this stage the government must show that the denial of the right to vote will promote the asserted objectives (the rational connection test); that the denial does not go further than reasonably necessary to achieve its objectives (the minimal impairment test); and that the overall benefits of the measure outweigh its negative impact (the proportionate effect test)…. 

28. Will denying the right to vote to penitentiary inmates enhance respect for the law and impose legitimate punishment? The government must show that this is likely, either by evidence or in reason and logic.

29. The government advances three theories to demonstrate rational connection between its limitation and the objective of enhancing respect for law. First, it submits that depriving penitentiary inmates of the vote sends an “educative message” about the importance of respect for the law to inmates and to the citizenry at large. Second, it asserts that allowing penitentiary inmates to vote “demeans” the political system. Finally, it takes the position that disenfranchisement is a legitimate form of punishment, regardless of the specific nature of the offence or the circumstances of the individual offender…. 

30. The first asserted connector with enhancing respect for the law is the “educative message” or “moral statement” theory. The problem here, quite simply, is that denying penitentiary inmates the right to vote is bad pedagogy…. 

31. Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours,…the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country’s boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract
theory and enshrined in the Charter, stands at the heart of our system of constitutional democracy.

32. The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The “educative message” that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government’s power flows.…

38. The theoretical and constitutional links between the right to vote and respect for the rule of law are reflected in the practical realities of the prison population and the need to bolster, rather than to undermine, the feeling of connection between prisoners and society as a whole. The government argues that disenfranchisement will “educate” and rehabilitate inmates. However, disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility.…

To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

39. Even if these difficulties could be overcome, it is not apparent that denying penitentiary inmates the right to vote actually sends the intended message to prisoners, or to the rest of society. People may be sentenced to imprisonment for two years or more for a wide variety of crimes, ranging from motor vehicle and regulatory offences to the most serious cases of murder. The variety of offences and offenders covered by the prohibition suggest that the educative message is, at best, a mixed and diffuse one.

40. It is a message sullied, moreover, by negative and unacceptable messages likely to
undermine civic responsibility and respect for the rule of law. Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to teach it is this: enforced conformity to the law should not come at the cost of our core democratic values…

42. The government also argues that denying penitentiary inmates the vote will enhance respect for law because allowing people who flaunt the law to vote demeans the political system. The same untenable premises we have been discussing resurface here—that voting is a privilege the government can suspend and that the commission of a serious crime signals that the offender has chosen to “opt out” of community membership. But beyond this, the argument that only those who respect the law should participate in the political process is a variant on the age-old unworthiness rationale for denying the vote.

43….Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or “worthy” of voting—whether by reason of class, race, gender or conduct—played a large role in this exclusion. We should reject the retrograde notion that “worthiness” qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law…. 

45. This brings us to the government’s final argument for rational connection—that disenfranchisement is a legitimate weapon in the state’s punitive arsenal against the individual lawbreaker. Again, the argument cannot succeed. The first reason is that using the denial of rights as punishment is suspect. The second reason is that denying the right to vote does not comply with the requirements for legitimate punishment established by our jurisprudence.

46….I do not doubt that Parliament may limit constitutional rights in the name of punishment, provided that it can justify the limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular
constitutional right. This is tantamount to saying that the affected class is outside the full protection of the Charter. It is doubtful that such an unmodulated deprivation, particularly of a right as basic as the right to vote, is capable of justification under s. 1. Could Parliament justifiably pass a law removing the right of all penitentiary prisoners to be protected from cruel and unusual punishment? I think not. What of freedom of expression or religion? Why, one asks, is the right to vote different? The government offers no credible theory about why it should be allowed to deny this fundamental democratic right as a form of state punishment.

47. The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen’s continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the right to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment is tied to society’s acceptance of the criminal as a person with rights and responsibilities.…

52. When the facade of rhetoric is stripped away, little is left of the government’s claim about punishment other than that criminals are people who have broken society’s norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing. On all counts, the case that s. 51(e) furthers lawful punishment objectives fails.…

60. The negative effects of s. 51(e) upon prisoners have a disproportionate impact on Canada’s already disadvantaged Aboriginal population, whose over-representation in prisons reflects “a crisis in the Canadian criminal justice system.” To the extent that the disproportionate number of Aboriginal people in penitentiaries reflects factors such as
higher rates of poverty and institutionalized alienation from mainstream society, penitentiary imprisonment may not be a fair or appropriate marker of the degree of individual culpability…. Aboriginal people in prison have unique perspectives and needs. Yet, s. 51(e) denies them a voice at the ballot box and, by proxy, in Parliament. That these costs are confined to the term of imprisonment does not diminish their reality. The silenced messages cannot be retrieved, and the prospect of someday participating in the political system is cold comfort to those whose rights are denied in the present…. 

62….I leave for another day whether some political activities, like standing for office, could be justifiably denied to prisoners under s. 1. It may be that practical problems might serve to justify some limitations on the exercise of derivative democratic rights. Democratic participation is not only a matter of theory but also of practice, and legislatures retain the power to limit the modalities of its exercise where this can be justified. Suffice it to say that the wholesale disenfranchisement of all penitentiary inmates, even with a two-year minimum sentence requirement, is not demonstrably justified in our free and democratic society.

GONTHER, J., dissenting.

67….If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional. I conclude that this is so in the case at bar.

68. I am of the view that by enacting s. 51(e) of the Act, Parliament has chosen to assert and enhance the importance and value of the right to vote by temporarily disenfranchising serious criminal offenders for the duration of their incarceration….The Chief Justice and I are in agreement that the right to vote is profoundly important, and ought not to be demeaned. Our differences lie principally in the fact that she subscribes to a philosophy whereby the temporary disenfranchising of criminals does injury to the rule of law, democracy and the right to vote, while I prefer deference to Parliament’s reasonable view that it strengthens these same features of Canadian society…. 

70….While there is little logical correlation between maintaining a “decent and responsible citizenry” and any of the past discriminatory exclusions (such as land-
ownership, religion, gender, ethnic background), there clearly is such a logical connection in the case of distinguishing persons who have committed serious criminal offences. “Responsible citizenship” does not relate to what gender, race, or religion a person belongs to, but is logically related to whether or not a person engages in serious criminal activity.

71. [S]erious criminal offenders are excluded from the vote for the reason that they are the subjects of punishment. The disenfranchisement only lasts as long as the period of incarceration. Thus, disenfranchisement, as a dimension of punishment, is attached to and mirrors the fact of incarceration. This fact makes the Canadian experience significantly different from the situation in some American states which disenfranchise ex-offenders for life.

72. It is important to look at prisoner disenfranchisement from the perspective of each serious criminal offender rather than perceive it as a form of targeted group treatment. Disenfranchised prisoners can be characterized loosely as a group, but what is important to realize is that each of these prisoners has been convicted of a serious criminal offence and is therefore serving a personalized sentence which is proportionate to the act or acts committed. Punishment is guided by the goals of denunciation, deterrence, rehabilitation and retribution and is intended to be morally educative for incarcerated serious criminal offenders. Each prisoner’s sentence is a temporary measure aimed at meeting these goals, while also being aimed at the long-term objective of reintegration into the community.…

116. Permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility because such persons have demonstrated a great disrespect for the community in their committing serious crimes: such persons have attacked the stability and order within our community. Society therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish those criminals and to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation.…

119.…The disenfranchisement of serious criminal offenders serves to deliver a
message to both the community and the offenders themselves that serious criminal activity will not be tolerated by the community. In making such a choice, Parliament is projecting a view of Canadian society which Canadian society has of itself. The commission of serious crimes gives rise to a temporary suspension of this nexus: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a further manifestation of community disapproval of the serious criminal conduct.

120. From the perspective of the person whose criminal activity has resulted in their temporary disenfranchisement, their benefiting from society brought with it the responsibility to be subjected to the sanctions which the state decides will be attached to serious criminal activity such as they have chosen to undertake. This understanding is complemented by the rehabilitative view that those who are in jail will hope and expect to regain the exercise of the vote on their release from incarceration, just like they hope and expect to regain the exercise of the fullest expressions of their liberty. Once released from prison, they are on the road to reintegration into the community. Obtaining the vote once released or paroled is a recognition of regaining the nexus with the community that was temporarily suspended during the incarceration.…

159. [G]iven that, the objectives are largely symbolic, common sense dictates that social condemnation of criminal activity and a desire to promote civic responsibility are reflected in disenfranchisement of those who have committed serious crimes. This justification is rooted in a reasonable and rational social and political philosophy which has been adopted by Parliament. Further, it can hardly be seen as “novel.”…The view of the courts below is that generally supported by democratic countries. Countries including the United States, the United Kingdom, Australia, New Zealand, and many European countries such as France and Germany, have, by virtue of choosing some form of prisoner disenfranchisement, also identified a connection between objectives similar to those advanced in the case at bar and the means of prisoner disenfranchisement.…

NOTES
1. Voting restrictions on felons in the United States. In the United States voting restrictions based on a prior criminal record go back to the beginning of the Republic. They did not begin to play a prominent role until after the Civil War, when Southern legislatures in particular used them to prevent blacks from voting. See Hunter v. Underwood, 471 U.S. 222 (1985) (striking down Alabama voting restriction because it was motivated by racial animus). Even though in recent years states have cut back on voting restrictions on those with criminal convictions, currently 48 states prevent inmates from voting. See generally Felony Disenfranchisement, The Sentencing Project, at www.sentencingproject.org.

2. Justifications for felon disenfranchisement. Felon disenfranchisement has been justified on a number of grounds. Some have claimed that felons violate the implicit social contract and should therefore be excluded from voting. Others have stated that civic virtues are necessary for participation in political decision making; in their absence, individuals should be excluded from the polity. Among the more practical and frequently raised arguments are potential election fraud by convicted felons (the “purity of the ballot box” argument), potential problems of arranging for voting in prisons, and in the past, racial arguments defending felon disenfranchisement as a way of excluding blacks (and sometimes also poor whites) from voting. For a discussion of the political philosophies underlying criminal disenfranchisement, see Alec Ewald, “Civil Death”: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 Wis. L. Rev. 1045. In light of the Canadian high court’s decision, are there certain justifications that you consider particularly valid (or invalid)?

3. Race and felon disenfranchisement. Despite challenges to disenfranchisement provisions on equal protection grounds, the Supreme Court has upheld state laws disenfranchising felons generally. See Richardson v. Ramirez, 418 U.S. 24 (1974). In a handful of subsequent cases, however, courts have struck down disenfranchisement provisions that were animated by racial bias, in violation of the equal protection clause.

A 1998 study published by Human Rights Watch and the Sentencing Project illuminated the racially disproportionate impact of the exclusion of felons from voting. The Sentencing Project & Human Rights Watch, Losing the Vote: The Impact of Felony
Disenfranchisement in the United States (October 1998) (available at www.sentencingproject.org/pdfs/9080.pdf). Because of their overrepresentation among convicted felons and their large numbers in states that continue disenfranchisement after an offender’s sentence has been served, 1.8 million African Americans are excluded from the franchise. Should the disproportionate racial impact on a fundamental constitutional right—the franchise—be a reason for striking down such legislation on equal protection grounds? How could a legislator use the study to argue for the abolition or at least the restriction of felon disenfranchisement?

4. The impact of felon disenfranchisement in elections. The 2000 presidential election, whose outcome hinged on the result in the state of Florida, focused national attention in part on felon disenfranchisement. The state, with its large inmate population, disenfranchises not only prison inmates but also ex-offenders released from any criminal justice sanction unless they have their civil rights restored which remains a difficult and protracted process despite some recent changes. Many argued that felon disenfranchisement changed the outcome of the presidential election in Florida. For some empirical support for the possible impact of felon disenfranchisement on election outcomes, see Christopher Uggen & Jeff Manza, Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States, 67 Am. Soc. Rev. 777 (2002). For an account of how a new movement to restore voting rights to felons may significantly influence the electoral map, see Emily Bazelon, The Secret Weapon of 2008: Felons Are Getting the Vote Back—and Republicans Aren’t Stopping Them, Slate (April 27, 2007).

5. Restoration of voting rights. Most states automatically restore voting rights to all offenders after they have served their criminal justice sentence. Some, however, restrict automatic restoration provisions to first-time or nonviolent offenders. States that do not have automatic restoration provisions offer administrative, judicial, or legislative relief. The difficulty and cost of obtaining relief varies based on the procedure and the state. See Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (2008).

When a criminal justice sanction ends may also be disputed. In Johnson v. Bredesen,
624 F.3d 742 (6th Cir. 2010), the court upheld Tennessee’s disenfranchisement law, which conditioned restoration of voting rights on payment of court-ordered victim restitution and child support obligations.

6. Felon disenfranchisement—uniquely American? In most other Western democracies, voting restrictions on convicted felons are very limited. Germany, for example, allows disenfranchisement only upon conviction of one of a very small number of offenses, including treason and voting fraud, for a maximum period of five years, and only if imposed by a judge at sentencing in open court. See Nora V. Demleitner, Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative, 84 Minn. L. Rev. 753 (2000). In Scoppola v. Italy (No. 3), App. No. 126/05, Eur. Ct. H.R. (May 22, 2012), the European Court of Human Rights reviewed international law and comparative developments:

III. RELEVANT INTERNATIONAL AND EUROPEAN DOCUMENTS

A. International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations on 16 December 1966)

40…

Article 10

…

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation…”

Article 25

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status] and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;....

B. United Nations Human Rights Committee

41. In its General Comment no. 25 (1996) on Article 25 of the International Covenant on Civil and Political Rights, the Human Rights Committee expressed the following view:

“14. In their reports, States parties should indicate and explain the legislative provisions which would deprive citizens of their right to vote. The grounds for such deprivation should be objective and reasonable. If conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence. Persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.”…

C. American Convention on Human Rights of 22 November 1969

43. Article 23 of the American Convention, under the heading “Right to Participate in Government”, provides:

“1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters;....

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.”

D. Venice Commission Code of Good Practice in Electoral Matters

44. This document, adopted by the European Commission for Democracy through
Law (“the Venice Commission”) at its 51st plenary session (5-6 July 2002) and submitted to the Parliamentary Assembly of the Council of Europe on 6 November 2002, lays out the guidelines developed by the Commission concerning the circumstances in which people may be deprived of the right to vote or to stand for election. The relevant passages read as follows:

(i) provision may be made for depriving individuals of their right to vote and to be elected, but only subject to the following cumulative conditions:

(ii) it must be provided for by law;

(iii) the proportionality principle must be observed; conditions for depriving individuals of the right to stand for election may be less strict than for disenfranchising them;

(iv) the deprivation must be based on mental incapacity or a criminal conviction for a serious offence;

(v) Furthermore, the withdrawal of political rights or finding of mental incapacity may only be imposed by express decision of a court of law.

IV. COMPARATIVE LAW

A. The legislative framework in the Contracting States

45. Nineteen of the forty-three Contracting States examined in a comparative law study place no restrictions on the right of convicted prisoners to vote: Albania, Azerbaijan, Croatia, Cyprus, Czech Republic, Denmark, Finland, Ireland, Latvia, Lithuania, Moldova, Montenegro, Serbia, Slovenia, Spain, Sweden, Switzerland, “the former Yugoslav Republic of Macedonia” and Ukraine.

46. Seven Contracting States (Armenia, Bulgaria, Estonia, Georgia, Hungary, Russia and the United Kingdom) automatically deprive all convicted prisoners serving prison sentences of the right to vote.

47. The remaining sixteen member States (Austria, Belgium, Bosnia and Herzegovina, France, Germany, Greece, Luxembourg, Malta, Monaco, Netherlands, Poland, Portugal, Romania, San Marino, Slovakia and Turkey) have adopted an intermediate approach:
disenfranchisement of prisoners depends on the type of offence and/or the length of the custodial sentence. Italy’s legislation on the subject resembles that of this group of countries.

48. In some of the States in this category the decision to deprive convicted prisoners of the right to vote is left to the discretion of the criminal court (Austria, Belgium, France, Germany, Greece, Luxembourg, Netherlands, Poland, Portugal, Romania and San Marino). In Greece and Luxembourg, in the event of particularly serious offences disenfranchisement is applied independently of any court decision.

**B. Other relevant case-law**

1. **Canada**

[discussion of Sauve supra]

2. **South Africa**

(a) **August and Another v. Electoral Commission and Others (CCT8/99:1999 (3) SA 1)**

52. On 1 April 1999 the Constitutional Court of South Africa considered the application of prisoners for a declaration and orders that the Electoral Commission take measures enabling them and other prisoners to register and vote while in prison. It noted that, under the South African Constitution, the right of every adult citizen to vote in elections for legislative bodies was set out in unqualified terms, and it underlined the importance of that right:

“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts.”

53. The Constitutional Court found that the right to vote by its very nature imposed positive obligations upon the legislature and the executive and that the Electoral Act must be interpreted in a way that gave effect to constitutional declarations, guarantees and responsibilities. It noted that many democratic societies imposed voting disabilities on some categories of prisoners. Although there were no comparable provisions in the
Constitution, it recognised that limitations might be imposed upon the exercise of fundamental rights, provided they were, *inter alia*, reasonable and justifiable.

54. The question whether legislation barring prisoners would be justified under the Constitution was not raised in the proceedings and the court emphasised that the judgment was not to be read as preventing Parliament from disenfranchising certain categories of prisoners. In the absence of such legislation, prisoners had the constitutional right to vote and neither the Electoral Commission nor the Constitutional Court had the power to disenfranchise them. It concluded that the Commission was under the obligation to make reasonable arrangements for prisoners to vote.


55. The Constitutional Court of South Africa examined whether the 2003 amendment to the Electoral Act, depriving of the right to vote those prisoners serving sentences of imprisonment without the option of a fine, was compatible with the Constitution.

56. The Constitutional Court found the measure unconstitutional, by nine votes to two, and ordered the Electoral Commission to take the necessary steps to allow prisoners to vote in elections.

57. Chaskalson CJ, for the majority,… noted that this was a blanket exclusion aimed at every prisoner sentenced to imprisonment without the option of a fine, and that there was no information about the sort of offences concerned, the sort of persons likely to be affected and the number of persons who might lose their vote for a minor offence.

58. Madala J, for the minority, considered that the temporary removal of the vote and its restoration upon the prisoner’s release was in line with the Government’s objective of balancing individual rights and the values of society, particularly in a country like South Africa with its very high crime rate.

**3. Australia**

59. The High Court of Australia found by four votes to two against the general voting
ban that had been introduced in the place of the previous legislation, which had provided for the loss of the right to vote only in connection with prison sentences of three years or more (see Roach v. Electoral Commissioner [2007] HCA 43 (26 September 2007)).

60. The High Court noted, *inter alia*, that the earlier legislation took into account the seriousness of the offence committed as an indicium of culpability and temporary unfitness to participate in the electoral process, beyond the bare fact of imprisonment.

In *Hirst* the European Court of Human Rights (ECHR) declared the British disenfranchisement practice regarding inmates in violation of the European Convention of Human Rights. *Hirst v. United Kingdom*, App. No. 40787/98, Eur. Ct. H.R. (July 24, 2001). Despite repeated promises of reviewing the ECHR decision, the British parliament has made no changes to the indiscriminate and automatic denial of voting rights upon imposition of a prison sentence. The Court has notified Great Britain that it is in violation of its treaty obligations. *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, Eur. Ct. H.R. (Oct. 6, 2005). In a recent decision, the ECHR has declared that not all lifetime disenfranchisement of a prisoner violates the Convention. Disenfranchisement, however, must be closely tied to the offense and the sentence imposed, as under Italian law lifetime disenfranchisement follows only upon imposition of a sentence of at least five years imprisonment. *Scoppola v. Italy (No. 3)*, App. No. 126/05, Eur. Ct. H.R. (May 22, 2012).

b. Notification, Registration, and Residency Restrictions

In recent years sanctions have increased dramatically against sex offenders as a class. State and federal legislatures and sentencing commissions have lengthened prison sentences; numerous states have passed civil confinement statutes that allow judges to commit sex offenders civilly after their release from prison, a development sanctioned by the Supreme Court in *Kansas v. Hendricks*, 521 U.S. 346 (1996), and discussed in Chapter 11.

These harsher sanctions came in response to assessments that sentences for sex offenses were disproportionately low compared to other violent and nonviolent crimes and in light of beliefs about the future danger such offenders pose. Incapacitative goals animate sex offender civil commitment statutes, which are based on risk assessments.
derived from the offender’s prior criminal record and assumptions about whether he is likely to reoffend. In addition to civil commitment laws, registration statutes enacted in the mid-1990s require that sex offenders register with local police upon release so that their names can be entered into a database. Notification statutes also require police to alert neighbors, schools, and certain other institutions when a sex offender moves into the area. A new wave of state and local laws has placed formal restrictions on where sex offenders may reside after their release. As you review the next two cases, discussing constitutional challenges to registration rules and residency restrictions for sex offenders, consider more broadly whether these laws are sound from a policy perspective. If you think these types of collateral sanctions are potentially effective, should jurisdictions consider expanding their reach to cover other criminal offenders, such as drug dealers and thieves?

Delbert Smith v. John Doe I

538 U.S. 84 (2003)

KENNEDY, J.

The Alaska Sex Offender Registration Act requires convicted sex offenders to register with law enforcement authorities, and much of the information is made public. We must decide whether the registration requirement is a retroactive punishment prohibited by the Ex Post Facto clause.

The State of Alaska enacted the Alaska Sex Offender Registration Act (Act) on May 12, 1994. Like its counterparts in other States, the Act is termed a “Megan’s Law.” Megan Kanka was a 7-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim’s family, had prior convictions for sex offenses against children. The crime gave impetus to laws for mandatory registration of sex offenders and corresponding community notification. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. §14071, which conditions certain federal law enforcement funding on the States’ adoption of sex offender registration laws and sets minimum standards for state programs. By 1996, every State, the District of
Columbia, and the Federal Government had enacted some variation of Megan’s Law.

The Alaska law…contains two components: a registration requirement and a notification system. Both are retroactive. The Act requires any “sex offender or child kidnapper who is physically present in the state” to register, either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty). Prompt registration is mandated….The sex offender must provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver’s license number, information about vehicles to which he has access, and postconviction treatment history. He must permit the authorities to photograph and fingerprint him.

If the offender was convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender must notify his local police department if he moves. A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution.

The information is forwarded to the Alaska Department of Public Safety, which maintains a central registry of sex offenders. Some of the data…is kept confidential. The following information is made available to the public: “the sex offender’s or child kidnapper’s name, aliases, address, photograph, physical description, description[.,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements…or cannot be located.”…Alaska has chosen to make most of the nonconfidential information available on the Internet.

Respondents John Doe I and John Doe II were convicted of sexual abuse of a minor, an aggravated sex offense.…Both were released from prison in 1990 and completed rehabilitative programs for sex offenders. Although convicted before the passage of the Act, respondents are covered by it. After the initial registration, they are required to
submit quarterly verifications and notify the authorities of any changes. Both respondents, along with respondent Jane Doe, wife of John Doe I, brought an action…seeking to declare the Act void as to them under the Ex Post Facto Clause of Article I, §10, cl. 1, of the Constitution and the Due Process Clause of §1 of the Fourteenth Amendment….

This is the first time we have considered a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the Ex Post Facto Clause. The framework for our inquiry, however, is well established. We must “ascertain whether the legislature meant the statute to establish ‘civil’ proceedings.” Kansas v. Hendricks, 521 U.S. 346, 361 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is “‘so punitive either in purpose or effect as to negate [the State’s] intention’ to deem it ‘civil.’” Because we “ordinarily defer to the legislature’s stated intent,” “‘only the clearest proof’ will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,” Hudson v. United States, 522 U.S. 93, 100 (1997); United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984)….

Whether a statutory scheme is civil or criminal “is first of all a question of statutory construction.” We consider the statute’s text and its structure to determine the legislative objective. Flemming v. Nestor, 363 U.S. 603 (1960). A conclusion that the legislature intended to punish would satisfy an ex post facto challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it.

The courts “must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” Here, the Alaska Legislature expressed the objective of the law in the statutory text itself. The legislature found that “sex offenders pose a high risk of reoffending,” and identified “protecting the public from sex offenders” as the “primary governmental interest” of the law. The legislature further determined that “release of certain information about sex offenders to public agencies and the general public will assist in
protecting the public safety.” As we observed in *Hendricks*, where we examined an ex post facto challenge to a post-incarceration confinement of sex offenders, an imposition of restrictive measures on sex offenders adjudged to be dangerous is “a legitimate nonpunitive governmental objective and has been historically so regarded.” In this case, as in *Hendricks*, “nothing on the face of the statute suggests that the legislature sought to create anything other than a civil…scheme designed to protect the public from harm.”

Respondents seek to cast doubt upon the nonpunitive nature of the law’s declared objective by pointing out that the Alaska Constitution lists the need for protecting the public as one of the purposes of criminal administration. As the Court stated in Flemming v. Nestor, rejecting an ex post facto challenge to a law terminating benefits to deported aliens, where a legislative restriction “is an incident of the State’s power to protect the health and safety of its citizens,” it will be considered “as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.” [P]recedents instruct us that even if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State’s pursuit of it in a regulatory scheme does not make the objective punitive…

The procedural mechanisms to implement the Act do not alter our conclusion. After the Act’s adoption Alaska amended its Rules of Criminal Procedure concerning the acceptance of pleas and the entering of criminal judgments. The rule[s] on pleas [and written judgments for sex offenses and child kidnapping] now require[] the court to “inform the defendant in writing of the requirements of [the Act] and, if it can be determined by the court, the period of registration required.”…

The policy to alert convicted offenders to the civil consequences of their criminal conduct does not render the consequences themselves punitive. When a State sets up a regulatory scheme, it is logical to provide those persons subject to it with clear and unambiguous notice of the requirements and the penalties for noncompliance….Although other methods of notification may be available, it is effective to make it part of the plea colloquy or the judgment of conviction. Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.
Our conclusion is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety—an agency charged with enforcement of both criminal and civil regulatory laws. The Act itself does not require the procedures adopted to contain any safeguards associated with the criminal process. That leads us to infer that the legislature envisioned the Act’s implementation to be civil and administrative.…

We conclude…that the intent of the Alaska Legislature was to create a civil, nonpunitive regime.

In analyzing the effects of the Act we refer to the seven factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), as a useful framework. These factors, which migrated into our ex post facto case law from double jeopardy jurisprudence, have their earlier origins in cases under the Sixth and Eight Amendments, as well as the Bill of Attainder and the Ex Post Facto Clauses…. The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

A historical survey can be useful because a State that decides to punish an individual is likely to select a means deemed punitive in our tradition, so that the public will recognize it as such…. Respondents argue [] that the Act—and, in particular, its notification provisions—resemble shaming punishments of the colonial period.

Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required “to stand in public with signs cataloguing their offenses.” Hirsh, From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts, 80 Mich. L. Rev. 1179 (1982); see also L. Friedman, Crime and Punishment in American History 38 (1993). At times the labeling would be permanent: A murderer might be branded with an “M,” and a thief with a “T.” R. Semmes, Crime and Punishment in Early Maryland 35 (1938); see also Massaro, Shame, Culture, and American Criminal Law, 89
Mich. L. Rev. 1880 (1991). The aim was to make these offenders suffer “permanent stigmas, which in effect cast the person out of the community.” The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one.…

Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment,…either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. By contrast, the stigma of Alaska’s Megan’s Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.…In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

The fact that Alaska posts the information on the Internet does not alter our conclusion…. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

The State’s Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety’s Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska’s citizenry.

We next consider whether the Act subjects respondents to an “affirmative disability or restraint.” Here, we inquire how the effects of the Act are felt by those subject to it. If the
disability or restraint is minor and indirect, its effects are unlikely to be punitive.

The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. The Act’s obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. See [Hudson] (forbidding further participation in the banking industry); De Veau v. Braisted, 363 U.S. 144 (1960) (forbidding work as a union official); Hawker v. New York, 170 U.S. 189 (1898) (revocation of a medical license). The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences….

Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act’s registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

…The Court of Appeals held that the registration system is parallel to probation or supervised release in terms of the restraint imposed. This argument has some force, but, after due consideration, we reject it. Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual’s original offense. [T]he registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the Ex Post Facto Clause.

The State concedes that the statute might deter future crimes. Respondents seize on
this proposition to argue that the law is punitive, because deterrence is one purpose of punishment. This proves too much. Any number of governmental programs might deter crime without imposing punishment. “To hold that the mere presence of a deterrent purpose renders such sanctions ‘criminal’…would severely undermine the Government’s ability to engage in effective regulation.”

The Court of Appeals was incorrect to conclude that the Act’s registration obligations were retributive because “the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed.” The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.

The Act’s rational connection to a nonpunitive purpose is a “most significant” factor in our determination that the statute’s effects are not punitive….A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. The imprecision respondents rely upon does not suggest that the Act’s nonpunitive purpose is a “sham or mere pretext.”

…Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature’s findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is “frightening and high.” McKune v. Lile, 536 U.S. 24, 33 (2002) (“When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault”) (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)).

The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against ex post facto challenges laws imposing
regulatory burdens on individuals convicted of crimes without any corresponding risk assessment…. The State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause.

…Our examination of the Act’s effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska’s intention to establish a civil regulatory scheme. The Act is nonpunitive, and its retroactive application does not violate the Ex Post Facto Clause….

STEVENS, J., dissenting.

…The Court’s opinion[] fail[s] to decide whether the statutes deprive the registrants of a constitutionally protected interest in liberty….

The statutes impose significant affirmative obligations and a severe stigma on every person to whom they apply….

The registration and reporting duties imposed on convicted sex offenders are comparable to the duties imposed on other convicted criminals during periods of supervised release or parole. And there can be no doubt that the “widespread public access,” to this personal and constantly updated information has a severe stigmatizing effect. In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty.

It is also clear beyond peradventure that these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender’s liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction.

[T]he Constitution prohibits the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. As the Court...
recognizes, “recidivism is the statutory concern” that provides the supposed justification for the imposition of such retroactive punishment…. Reliance on that rationale here highlights the conclusion that the retroactive application of these statutes constitutes a flagrant violation of the protections afforded by the Double Jeopardy and Ex Post Facto Clauses of the Constitution.

[T]he State may impose registration duties and may publish registration information as a part of its punishment of this category of defendants. Looking to the future, these aspects of their punishment are adequately justified by two of the traditional aims of punishment—retribution and deterrence. Moreover, as a matter of procedural fairness, Alaska requires its judges to include notice of the registration requirements in judgments imposing sentences on convicted sex offenders and in the colloquy preceding the acceptance of a plea of guilty to such an offense. Thus, I agree with the Court that these statutes are constitutional as applied to postenactment offenses….

GINSBURG, J., dissenting.

[I]n resolving whether the Act ranks as penal for ex post facto purposes, I would not demand “the clearest proof” that the statute is in effect criminal rather than civil. Instead, guided by Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963), I would neutrally evaluate the Act’s purpose and effects.

…What ultimately tips the balance for me is the Act’s excessiveness in relation to its nonpunitive purpose…. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender’s risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of
recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

John Doe I, for example, pleaded nolo contendere to a charge of sexual abuse of a minor nine years before the Alaska Act was enacted. He successfully completed a treatment program, and gained early release on supervised probation in part because of his compliance with the program’s requirements and his apparent low risk of re-offense. He subsequently remarried, established a business, and was reunited with his family. He was also granted custody of a minor daughter, based on a court’s determination that he had been successfully rehabilitated. The court’s determination rested in part on psychiatric evaluations concluding that Doe had “a very low risk of re-offending” and is “not a pedophile.” Notwithstanding this strong evidence of rehabilitation, the Alaska Act requires Doe to report personal information to the State four times per year, and permits the State publicly to label him a “Registered Sex Offender” for the rest of his life.

Satisfied that the Act is ambiguous in intent and punitive in effect, I would hold its retroactive application incompatible with the Ex Post Facto Clause, and would therefore affirm the judgment of the Court of Appeals.

John Doe v. Tom Miller

405 F.3d 700 (8th Cir. 2005)

COLLOTON, C.J.

In 2002, in an effort to protect children in Iowa from the risk that convicted sex offenders may reoffend in locations close to their residences, the Iowa General Assembly passed, and the Governor of Iowa signed, a bill that prohibits a person convicted of certain sex offenses involving minors from residing within 2000 feet of a school or a registered child care facility. The district court declared the statute unconstitutional on several grounds….

Because we conclude that the Constitution of the United States does not prevent the State of Iowa from regulating the residency of sex offenders in this manner in order to protect the health and safety of the citizens of Iowa, we reverse the judgment of the district court. We hold unanimously that the residency restriction is not unconstitutional
on its face.…

I

Iowa Senate File 2197, now codified at Iowa Code §692A.2A, took effect on July 1, 2002. It provides that persons who have been convicted of certain criminal offenses against a minor, including numerous sexual offenses involving a minor, shall not reside within 2000 feet of a school or registered child care facility. The law does not apply to persons who established a residence prior to July 1, 2002, or to schools or child care facilities that are newly located after July 1, 2002.…

Almost immediately after the law took effect, three named plaintiffs—sex offenders with convictions that predate the law’s effective date—filed suit asserting that the statute is unconstitutional on its face.…The named plaintiffs, identified as various “John Does,” had committed a range of sexual crimes, including indecent exposure, “indecent liberties with a child,” sexual exploitation of a minor, assault with intent to commit sexual abuse, lascivious acts with a child, and second and third degree sexual abuse, all of which brought them within the provisions of the residency restriction. A defendant class, including all of Iowa’s county attorneys, also was certified.

During a two-day bench trial, plaintiffs presented evidence concerning the enforcement of §692A.2A, including maps that had been produced by several cities and counties identifying schools and child care facilities and their corresponding restricted areas. After viewing these maps and hearing testimony from a county attorney, the district court found that the restricted areas in many cities encompass the majority of the available housing in the city, thus leaving only limited areas within city limits available for sex offenders to establish a residence. In smaller towns, a single school or child care facility can cause all of the incorporated areas of the town to be off limits to sex offenders. The court found that unincorporated areas, small towns with no school or child care facility, and rural areas remained unrestricted, but that available housing in these areas is “not necessarily readily available.” Doe v. Miller, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004).

Plaintiffs also presented evidence of their individual experiences in seeking to obtain
housing that complies with the 2000-foot restriction. Several of the plaintiffs…have friends or relatives with whom they would like to live, but whose homes are within 2000 feet of a school or child care facility. Many…live in homes that are currently compliant, either because they were established prior to July 1, 2002, or because the homes are outside the 2000-foot restricted areas. These plaintiffs, however, testified that they would like to be able to move into a restricted area. Still others…are living in noncompliant residences that they wish to maintain.

…

In addition to evidence regarding the burden that §692A.2A places on sex offenders, both plaintiffs and defendants presented expert testimony about the potential effectiveness of a residency restriction in preventing offenses against minors. The State presented the testimony of Mr. Allison, a parole and probation officer who specialized in sex offender supervision. Allison described the process of treating sex offenders and his efforts at preventing recidivism by identifying the triggers for the original offense, and then imposing restrictions on the residences or activities of the offender. According to Allison, restrictions on the proximity of sex offenders to schools or other facilities that might create temptation to reoffend are one way to minimize the risk of recidivism. In the parole and probation context, Allison also has authority to limit offenders’ activities in more specific ways, and he testified that he attempts to remove temptation by preventing offenders from working in jobs where they would have contact with potential victims or from living near parks or other areas where children might spend time unsupervised. In addition to the limits that he imposes on offenders under his supervision, Allison also testified that there is “a legitimate public safety concern” in where unsupervised sex offenders reside. In Allison’s view, reoffense is “a potential danger forever.”…

The plaintiffs offered the testimony of Dr. Luis Rosell, a psychologist with experience in sex offender treatment. Dr. Rosell estimated that the recidivism rate for sex offenders is between 20 and 25 percent, and like Allison…stated his belief that the key to reducing the risk of recidivism is identifying the factors that led to the offender’s original offense and then helping the offender to deal with or avoid those factors in the future. Dr. Rosell testified that reducing a specific sex offender’s access to children was a good idea, and
that “if you remove the opportunity, then the likelihood of reoffense is decreased.” He did not believe, however, that “residential proximity makes that big of a difference.”

Moreover, Dr. Rosell thought that a 2000-foot limit was “extreme.” [He] worried that the law might be counterproductive to the offender’s treatment goals by causing depression and potentially removing the offender from his “support system.”

After hearing the testimony of all three experts and of the individual plaintiffs, the district court declared that §692A.2A was unconstitutional…. Having found the statute unconstitutional, the district court issued a permanent injunction against enforcement.

II

We first address the contention that §692A.2A violates the rights of the covered sex offenders to due process of law under the Fourteenth Amendment. The appellees (to whom we will refer as “the Does”) argue that the statute is unconstitutional because it fails to provide adequate notice of what conduct is prohibited, and because it does not require an individualized determination whether each person covered by the statute is dangerous. This claim relies on what is known as “procedural due process.”

…The Does contend that they are deprived of notice required by the Constitution because some cities in Iowa are unable to provide sex offenders with information about the location of all schools and registered child care facilities, and because it is difficult to measure the restricted areas, which are measured “as the crow flies” from a school or child care facility. We disagree that these potential problems render the statute unconstitutional on its face. A criminal statute is not vague on its face unless it is impermissibly vague in all of its applications, and the possibility that an individual might be prosecuted in a particular case in a particular community despite his best efforts to comply with the restriction is not a sufficient reason to invalidate the entire statute….Due process does not require that independently elected county attorneys enforce each criminal statute with equal vigor, and the existence of different priorities or prosecution decisions among jurisdictions does not violate the Constitution.

The Does also argue that §692A.2A unconstitutionally forecloses an “opportunity to be heard” because the statute provides no process for individual determinations of
dangerousness.…

We…conclude that the Iowa residency restriction does not contravene principles of procedural due process under the Constitution. The restriction applies to all offenders who have been convicted of certain crimes against minors, regardless of what estimates of future dangerousness might be proved in individualized hearings. Once such a legislative classification has been drawn, additional procedures are unnecessary, because the statute does not provide a potential exemption for individuals.…Thus, the absence of an individualized hearing in connection with a statute that offers no exemptions does not offend principles of procedural due process.

III

The Does also assert that the residency restriction is unconstitutional under the doctrine of substantive due process.…The Does argue that several “fundamental rights” are infringed by Iowa’s residency restriction, including the “right to privacy and choice in family matters,” the right to travel, and “the fundamental right to live where you want.” The district court agreed that §692A.2A infringed upon liberty interests that constitute fundamental rights, applied strict scrutiny to the legislative classifications, and concluded that the statute was unconstitutional.

The Does first invoke “the right to personal choice regarding the family.”…

We do not believe that the residency restriction of §692A.2A implicates any fundamental right of the Does that would trigger strict scrutiny of the statute.…The Does’ characterization of a fundamental right to “personal choice regarding the family” is so general that it would trigger strict scrutiny of innumerable laws and ordinances that influence “personal choices” made by families on a daily basis.…

Unlike the precedents cited by the Does, the Iowa statute does not operate directly on the family relationship. Although the law restricts where a residence may be located, nothing in the statute limits who may live with the Does in their residences.…

While there was evidence that one adult sex offender in Iowa would not reside with his parents as a result of the residency restriction, that another sex offender and his wife
moved 45 miles away from their preferred location due to the statute, and that a third sex offender could not reside with his adult child in a restricted zone, the statute does not directly regulate the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute. We therefore hold that §692A.2A does not infringe upon a constitutional liberty interest relating to matters of marriage and family in a fashion that requires heightened scrutiny.

The Does also assert that the residency restrictions interfere with their constitutional right to travel. The modern Supreme Court has recognized a right to interstate travel in several decisions [and has] explained that the federal guarantee of interstate travel “protects interstate travelers against two sets of burdens: ‘the erection of actual barriers to interstate movement’ and ‘being treated differently’ from intrastate travelers.” Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 277 (1993)…. The Does argue that §692A.2A violates this right to interstate travel by substantially limiting the ability of sex offenders to establish residences in any town or urban area in Iowa. They contend that the constitutional right to travel is implicated because the Iowa law deters previously convicted sex offenders from migrating from other States to Iowa. The district court agreed, reasoning that the statute “effectively bans sex offenders from residing in large sections of Iowa’s towns and cities.”

We respectfully disagree with this analysis. The Iowa statute imposes no obstacle to a sex offender’s entry into Iowa, and it does not erect an “actual barrier to interstate movement.” Bray, 506 U.S. at 277 (internal quotation omitted). There is “free ingress and regress to and from” Iowa for sex offenders, and the statute thus does not “directly impair the exercise of the right to free interstate movement.” Saenz v. Roe, 526, U.S. 489, 501(1999). Nor does the Iowa statute violate principles of equality by treating nonresidents who visit Iowa any differently than current residents, or by discriminating against citizens of other States who wish to establish residence in Iowa. We think that to recognize a fundamental right to interstate travel in a situation that does not involve any of these circumstances would extend the doctrine beyond the Supreme Court’s pronouncements in this area. That the statute may deter some out-of-state residents from traveling to Iowa because the prospects for a convenient and affordable residence are less
promising than elsewhere does not implicate a fundamental right recognized by the Court’s right to travel jurisprudence.

The Does also urge that we recognize a fundamental right “to live where you want.” … Some thirty years ago, our court said “we cannot agree that the right to choose one’s place of residence is necessarily a fundamental right,” Prostrollo v. Univ. of S.D., 507 F.2d 775, 781 (8th Cir. 1974), and we see no basis to conclude that the contention has gained strength in the intervening years…. The Does have not developed any argument that the right to “live where you want” is “deeply rooted in this Nation’s history and tradition,” Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore, 431 U.S. at 503 (plurality opinion))…. We are thus not persuaded that the Constitution establishes a right to “live where you want” that requires strict scrutiny of a State’s residency restrictions.

Because §692A.2A does not implicate a constitutional liberty interest that has been elevated to the status of “fundamental right,” we review the statute to determine whether it meets the standard of “rationally advancing some legitimate governmental purpose.” Reno v. Flores, 507 U.S. 292, 306 (1993)…. The Does contend… that the statute is irrational because there is no scientific study that supports the legislature’s conclusion that excluding sex offenders from residing within 2000 feet of a school or child care facility is likely to enhance the safety of children.

We reject this contention because we think it understates the authority of a state legislature to make judgments about the best means to protect the health and welfare of its citizens in an area where precise statistical data is unavailable and human behavior is necessarily unpredictable….

We think the decision whether to set a limit on proximity of “across the street” (as appellees suggest), or 500 feet or 3000 feet (as the Iowa Senate considered and rejected, see S. Journal 79, 2d Sess., at 521 (Iowa 2002)), or 2000 feet (as the Iowa General Assembly and the Governor eventually adopted) is the sort of task for which the elected policymaking officials of a State, and not the federal courts, are properly suited….

The record does not support a conclusion that the Iowa General Assembly and the
Governor acted based merely on negative attitudes toward, fear of, or a bare desire to harm a politically unpopular group [and]…we are not persuaded that the means selected to pursue the State’s legitimate interest are without rational basis.

IV

The Does next argue that the residency restriction, “in combination with” the sex offender registration requirements of §692A.2, unconstitutionally compels sex offenders to incriminate themselves in violation of the Fifth and Fourteenth Amendments. The district court concluded that a sex offender who establishes residence in a prohibited area must either register his current address, thereby “explicitly admitting the facts necessary to prove the criminal act,” or “refuse to register and be similarly prosecuted.” 298 F. Supp. 2d at 879. The court then held that §692A.2A “unconstitutionally requires sex offenders to provide incriminating evidence against themselves,” and enjoined enforcement of the residency restriction on this basis as well.

We disagree that the Self-Incrimination Clause of the Fifth Amendment renders the residency restriction of §692A.2A unconstitutional. Our reason is straightforward: the residency restriction does not compel a sex offender to be a witness against himself or a witness of any kind. The statute regulates only where the sex offender may reside; it does not require him to provide any information that might be used against him in a criminal case. A separate section of the Iowa Code, §692A.2, requires a sex offender to register his address with the county sheriff. The Does have not challenged the constitutionality of the registration requirement, or sought an injunction against its enforcement, and whatever constitutional problem may be posed by the registration provision does not justify invalidating the residency restriction.…

V

A final, and narrower, challenge advanced by the Does is that §692A.2A is an unconstitutional ex post facto law because it imposes retroactive punishment on those who committed a sex offense prior to July 1, 2002….In determining whether a state statute violates the Ex Post Facto Clause by imposing such punishment, we apply the framework outlined in Smith v. Doe, 538 U.S. 84, 92 (2003)…. 
The district court found that in passing the residency restriction of §692A.2A, the Iowa General Assembly intended to create “a civil, non-punitive statutory scheme to protect the public.” The Does do not dispute this conclusion on appeal, and we agree that the legislature’s intent was not punitive.

We must next consider whether the Does have established that the law was nonetheless so punitive in effect as to negate the legislature’s intent to create a civil, nonpunitive regulatory scheme. In this inquiry, we refer to what the Supreme Court described in Smith v. Doe as “useful guideposts”...[F]ive factors drawn from Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, (1963), as particularly relevant: whether the law has been regarded in our history and traditions as punishment, whether it promotes the traditional aims of punishment, whether it imposes an affirmative disability or restraint, whether it has a rational connection to a nonpunitive purpose, and whether it is excessive with respect to that purpose. These factors are “neither exhaustive nor dispositive,” Smith, 538 U.S. at 97. (quotation omitted)...

Turning first to any historical tradition regarding residency restrictions, the Does argue that §692A.2A is the effective equivalent of banishment, which has been regarded historically as a punishment....

While banishment of course involves an extreme form of residency restriction, we ultimately do not accept the analogy between the traditional means of punishment and the Iowa statute. Unlike banishment, §692A.2A restricts only where offenders may reside. It does not “expel” the offenders from their communities or prohibit them from accessing areas near schools or child care facilities for employment, to conduct commercial transactions, or for any purpose other than establishing a residence. With respect to many offenders, the statute does not even require a change of residence: the Iowa General Assembly included a grandfather provision that permits sex offenders to maintain a residence that was established prior to July 1, 2002, even if that residence is within 2000 feet of a school or child care facility. Iowa Code §692A.2A(4)(c)....We thus conclude that this law is unlike banishment in important respects, and we do not believe it is of a type that is traditionally punitive.
The second factor that we consider is whether the law promotes the traditional aims of punishment—deterrence and retribution. Smith v. Doe, 538 U.S. at 102. The primary purpose of the law is not to alter the offender’s incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The Iowa statute is designed to reduce the likelihood of reoffense by limiting the offender’s temptation and reducing the opportunity to commit a new crime.

The statute’s “retributive” effect is similarly difficult to evaluate. The Supreme Court emphasized that the reporting requirements were “reasonably related to the danger of recidivism” in a way that was “consistent with the regulatory objective.” Smith at 102. While any restraint or requirement imposed on those who commit crimes is at least potentially retributive in effect, we believe that §692A.2A, like the registration requirement in Smith v. Doe, is consistent with the legislature’s regulatory objective of protecting the health and safety of children.

The next factor we consider is whether the law “imposes an affirmative disability or restraint.” Imprisonment is the “paradigmatic” affirmative disability or restraint, Smith at 100, but other restraints, such as probation or occupational debarment, also can impose some restriction on a person’s activities. Id. at 100-01. While restrictive laws are not necessarily punitive, they are more likely to be so; by contrast, “if the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” Id. at 100. For example, sex offender registration laws, requiring only periodic reporting and updating of personal information, do not have a punitive restraining effect. At the same time, civil commitment of the mentally ill, though extremely restrictive and disabling to those who are committed, does not necessarily impose punishment because it bears a reasonable relationship to a “legitimate nonpunitive objective,” namely protecting the public from mentally unstable individuals. Kansas v. Hendricks, 521 U.S. 346, 363 (1997).

Iowa Code §692A.2A is more disabling than the sex offender registration law at issue in Smith v. Doe. The residency restriction is certainly less disabling, however, than the civil commitment scheme at issue in Hendricks, which permitted complete confinement of affected persons. In both Smith and Hendricks, the Court considered the degree of the restraint involved in light of the legislature’s countervailing nonpunitive purpose, and the
Court in *Hendricks* emphasized that the imposition of an affirmative restraint “does not inexorably lead to the conclusion that the government has imposed punishment.” 521 U.S. at 363 (internal quotation omitted). Likewise here, while we agree with the Does that §692A.2A does impose an element of affirmative disability or restraint, we believe this factor ultimately points us to the importance of the next inquiry: whether the law is rationally connected to a nonpunitive purpose, and whether it is excessive in relation to that purpose.

This final factor—whether the regulatory scheme has a “rational connection to a nonpunitive purpose”—is the “most significant factor” in the ex post facto analysis. *Smith* at 102. The requirement of a “rational connection” is not demanding: A “statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance.” Id. at 103. The district court found “no doubt” that §692A.2A has a purpose other than punishing sex offenders, 298 F. Supp. 2d at 870, and we agree. In light of the high risk of recidivism posed by sex offenders, see *Smith v. Doe*, 538 U.S. at 103, the legislature reasonably could conclude that §692A.2A would protect society by minimizing the risk of repeated sex offenses against minors.

... The Does also urge that the law is excessive in relation to its regulatory purpose because there is no scientific evidence that a 2000-foot residency restriction is effective at preventing sex offender recidivism. “The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy,” but rather an inquiry into “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.” *Smith* at 105. In this case, there was expert testimony that reducing the frequency of contact between sex offenders and children is likely to reduce temptation and opportunity, which in turn is important to reducing the risk of reoffense. None of the witnesses was able to articulate a precise distance that optimally balanced the benefit of reducing risk to children with the burden of the residency restrictions on sex offenders, and the Does’ expert acknowledged that “there is nothing in the literature that has addressed proximity”.

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We believe the legislature’s decision to select a 2000-foot restriction, as opposed to the other distances that were considered and rejected, is reasonably related to its regulatory purpose.***

The judgment of the district court is reversed, and the case is remanded with directions to enter judgment in favor of the defendants.

MELLOY, C.J., concurring and dissenting.

I join in the majority’s opinion, sections I through IV. However, I dissent as to section V because I believe section 692A.2A is an unconstitutional ex post facto law.

…I agree with the majority that the purpose of section 692A.2A is to protect the public. This purpose is nonpunitive, so we must determine if the statute is so punitive either in purpose or effect as to negate the State’s intention to deem it civil.

Though I believe a rational connection exists between the residency restriction and a nonpunitive purpose, I would find that the restriction is excessive in relation to that purpose. The statute limits the housing choices of all offenders identically, regardless of their type of crime, type of victim, or risk of re-offending. The effect of the requirement is quite dramatic: many offenders cannot live with their families and/or cannot live in their home communities because the whole community is a restricted area. This leaves offenders to live in the country or in small, prescribed areas of towns and cities that might offer no appropriate, available housing. In addition, there is no time limit to the restrictions.

…The severity of residency restriction, the fact that it is applied to all offenders identically, and the fact that it will be enforced for the rest of the offenders’ lives, makes the residency restriction excessive. …Because the imposition of the residency requirement “‘changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,’” Stogner v. California, 539 U.S. 607, 612 (2003)(quoting Calder v. Bull, 3 U.S. 386, 390 (1798), I would find section 692A.2A is an unconstitutional ex post facto law that cannot be applied to persons who committed their
offenses before the law was enacted.

NOTES

1. An array of constitutional challenges. As detailed in Smith v. Doe and Doe v. Miller, sex offenders subject to new registration requirements and residency restrictions have attacked these laws in many state and federal courts by bringing constitutional challenges based on an array of different theories and constitutional provisions. Especially when the laws are applied to offenders originally convicted before the registration requirement or restriction was enacted, the most common challenge is based on the ex post facto clause. Notably, ex post fact challenges address only when, and not whether, these laws can be applied. Some of them will be resolved on constitutional grounds, others based on statutory interpretation. See, e.g., Reynolds v. United States, 132 S. Ct. 975 (2012); Carr v. United States 130 S. Ct. 2229 (2010). Other, broader challenges to these laws include claims based on due process, both procedural and substantive, equal protection, cruel and unusual punishment, double jeopardy, and self-incrimination. Most registration and residency restrictions are upheld against these challenges, validated as civil provisions that are generally justified by the state’s interest in protecting public safety.

2. Are registration and residency restrictions sound policy? Registration and residency laws are enacted purportedly to protect the health and safety of the public. In theory, knowing where sex offenders live helps law enforcement solve sex crimes and enables the public to protect themselves against known registered offenders. In theory, residency restrictions reduce the contacts offenders have with children, which may in turn reduce offenders’ ability and temptation to commit offenses. However, critics of these laws have developed arguments and evidence suggesting that registration and residency restrictions are not as beneficial as legislators may hope.

First, 80-90% of sex offenders’ victims are family members or people known to the offender despite high-profile cases that imply the contrary and heighten public fears of sexual abuse by strangers. While registration and residency restrictions may help curb random sex offenses and in fact deter non-registered potential sex offenders, they are
unlikely to operate in a manner that can effectively curtail the vast majority of sex offenses, including those committed by registered offenders.

Second, registration and residency restrictions are in tension with each other. If an offender lives within a restricted zone, he may choose not to register his address for fear that he will be told to move. Consequently, neither law enforcement nor neighbors will know where the sex offender resides, a situation that will undermine the interests of public safety.

Third, all of these sex offender restrictions drain law enforcement resources. Police departments must choose between hiring more people to enforce and administer the restrictions or requiring the personnel they have to take time away from other enforcement priorities to enforce sex offender-related laws.

Fourth, the registration and residency restrictions have negative effects on sex offenders. The laws hinder the offender’s rehabilitation when he is unable to find employment, a place to live, and to establish beneficial relationships with friends and neighbors. Often, offenders reoffend because they fail to develop a social environment that supports them in preventing a relapse. This is especially true when such restrictions last for the duration of an offender’s life, as no tangible benefit exists to engage with counseling and complete rehabilitation efforts. The benefits of a crime-free life appear minuscule.

Fifth, the laws not only harm the offender’s ability to rehabilitate, but they also affect offenders’ families. Children may be pulled out of school and spouses may have to quit their jobs because an offender is required to relocate; family members may be shunned once an ex-offender’s prior conviction becomes public knowledge. See J.J. Prescott & Jonah E. Rockoff, Do Sex Offender Registration and Notification Laws Affect Criminal Behavior? 54 J. L. & Economics 161 (2011).

Sixth, the restrictions affect law enforcement on the front end. When charged with a sex offense, defendants may be less likely to plead guilty or into enter a plea agreement, knowing that they will be subject to registration and residency restrictions. With a reduction in the number of guilty pleas, trial dockets will become more crowded and
child—and adult—victims of sex offenses will have to endure the trauma of a trial. Rose Corrigan, When is a Rapist a Sex Offender? Prosecuting Sex Crimes After Megan’s Law, Western Political Science Association Annual Meeting Paper (Apr. 17, 2011), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1766831. Sex abuse cases have a higher trial rate than most other types of cases, with the exception of other serious violent and civil rights charges. A South Carolina study has indicated that sex offenders are increasingly more likely to be permitted to plead to non-sex offenses or even be acquitted, which ultimately will decrease public safety. Elizabeth Letourneau et al., Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence Against Women, Grant 231989 (Sept. 2010), available at https://www.ncjrs.gov/pdffiles1/nij/grants/231989.pdf. Perhaps in response to such developments, a number of state courts permit registration of persons for non-sex offenses, including kidnapping of a minor.

Emphasizing all of the concerns set out above, the Iowa County Attorneys Association issued a Statement on Sex Offender Residency Restrictions in Iowa (February 14, 2006) urging legislators to rework the broad restrictions under Iowa law. This important statement originating from law enforcement officials has led some jurisdictions, though not all, to question whether the benefits of these laws really outweigh the undesirable consequences. If you were a legislator in a state considering a sex offender residency restriction bill, how might you gather information about the costs and benefits of such legislation and weight these data.

3. Risk assessment. The Supreme Court held that individual risk assessments were not needed for entry into sex offender databases. Thus, states can continue to classify offenders broadly based on the offense of conviction. Different states take different offenses as predicate crimes for entry into the database. Recent research indicates that the prediction of whether an offender will commit another serious sex-based violent crime in the short term is most effective when it combines an actuarial risk assessment, based on prior record, type of sex offense, and similar factors, with a clinical prediction model. Eric S. Janus & Robert A. Prentky, Forensic Use of Actuarial Risk Assessment with Sex Offenders: Accuracy, Admissibility and Accountability, 40 Am. Crim. L. Rev. 1443
4. Recidivism and sex offenses. The Smith v. Doe Court relies in part on the substantial risk that convicted sex offenders pose to the public. It cites a study indicating that sex offenders are much more likely than other offenders to commit a sex crime. But the same holds true for other types of criminals, such as drug and property offenders, with respect to their general crime of conviction. Moreover, reconviction rates for sex offenders are the second lowest among all offenders. Does this indicate that the Court’s analysis is incorrect? Or does it support a more limited sex offender registry?

Many sex offender registries include the personal information of those convicted of possession of child pornography based on the assumption that such possession offenses make it more likely that the offender will commit a sexual crime against a child. How should the public assess knowledge of a convicted sex offender, defined broadly, living in its community?

5. Conduct-based ban. May sanctions or limits be imposed on offenders based on noncriminal conduct after sentencing? In Doe v. City of Lafayette, Ind., 377 F.3d 757 (7th Cir. 2004), the Seventh Circuit, sitting en banc, upheld the city’s decision to ban a sex offender from all park property for life after he had visited a park and admitted to having had sexual urges while observing the children playing there. In this case the offender’s prior criminal record combined with his later conduct (or thoughts?) caused the city to act. Administrative agencies and courts may also impose sanctions based on criminal conduct, even if no criminal conviction occurs. See Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002) (eviction from public housing upheld when a member of the household or a guest engaged in drug-related criminal activity, regardless of whether the tenant knew, or should have known, of the drug-related activity).

6. Federal involvement in sex offender registration and tracking. In 2006 Congress enacted the Adam Walsh Child Protection and Safety Act which created a national sex offender registry and encouraged states to adopt a uniform three-tier system for sex offender registration. This Act followed a number of prior federal acts, all named after
the victims of sex offenders, which required states to establish notification and registration regimes and provided federal funding. The Adam Walsh Act also created a new federal crime for failing to register and update information as required by state or federal law. Though subject to various legal challenges, most lower courts have upheld the authority of Congress to require sex offender registration and to criminalize a failure to register.

PROBLEM 8-1. DON’T WORK IN MY BACKYARD

As detailed on the city’s official website, the City of Upper Arlington, Ohio, has enacted a sex offender ordinance that “bars convicted sexual offenders from living or working within 1,000 feet of any school premises, licensed daycare facility, preschool, public park, swimming pool, library, or playground.” In light of Smith v. Doe and Doe v. Miller, what kinds of constitutional arguments might you be able to make against this legislation if you were representing a person who, after having pled guilty to a sex offense while in college, has been working for over a decade as a real estate agent in a professional office building in Upper Arlington that happens to be 950 feet from a licensed daycare facility?

c. Firearms

For convicted felons, the most common collateral sanction (sometimes called a disability), which may be imposed for a term or for life, is the state and federal prohibition of the possession of firearms. Some statutes single out certain types of felony offenses or classes of offenses to trigger a firearms ban. Typically, drug offenses are included in this category. What rationale justifies this collateral sanction?

Given the broad applicability of such prohibitions, the wide availability of firearms, and the strong legal, cultural, and social traditions surrounding gun ownership, it is not surprising that the desire to own firearms is among the most common reasons former offenders request relief from collateral sanctions.

Ohio Revised Code §2923.13, Having Weapons While Under Disability

(A) No person shall knowingly acquire, have, carry, or use any firearm or dangerous
ordnance, if any of the following apply:

(1) The person is a fugitive from justice.

(2) The person is under indictment for or has been convicted of any felony offense of violence.…

(3) The person is under indictment for or has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse.…

(4) The person is drug dependent, in danger of drug dependence, or a chronic alcoholic.

(5) The person is under adjudication of mental incompetence.

(B) No person who has been convicted of a felony of the first or second degree shall violate division (A) of this section within five years of the date of the person’s release from imprisonment or from post-release control that is imposed for the commission of a felony of the first or second degree.

(C) Whoever violates this section is guilty of having weapons while under disability. A violation of division (A) of this section is a felony of the fifth degree [punishable by six, seven, eight, nine, ten, eleven, or twelve months]. A violation of division (B) of this section is a felony of the third degree [punishable by one, two, three, four, or five years].

Ohio Revised Code §2923.14, Relief from Disability

(A) Any person who, solely by reason of the person’s disability under division (A)(2) or (3) of section 2923.13 of the Revised Code, is prohibited from acquiring, having, carrying, or using firearms, may apply to the court of common pleas in the county in which the person resides for relief from such prohibition.

(B) The application shall recite the following:

(1) All indictments, convictions, or adjudications upon which the applicant’s disability is based, the sentence imposed and served, and any release granted under a

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community control sanction, post-release control sanction, or parole, any partial or conditional pardon granted, or other disposition of each case;

(2) Facts showing the applicant to be a fit subject for relief under this section.

(C) A copy of the application shall be served on the county prosecutor.…

(D) Upon hearing, the court may grant the applicant relief pursuant to this section, if all of the following apply:

(1) The applicant has been fully discharged from imprisonment, community control, post-release control, and parole, or, if the applicant is under indictment, has been released on bail or recognizance.

(2) The applicant has led a law-abiding life since discharge or release, and appears likely to continue to do so.

(3) The applicant is not otherwise prohibited by law from acquiring, having, or using firearms.…

NOTES

1. Felon-in-possession statutes. State and federal law prohibits some convicted felons from owning and using firearms. Federal law prohibits a convicted felon whose crime was “punishable by a term exceeding one year” from possessing firearms. Do you believe felon-in-possession statutes are effective as law-enforcement tools? Are statutes such as Ohio’s over- or underinclusive? As a state legislator, would you support such legislation? Why?

2. Removal of firearms disabilities. Most states provide judicial or administrative relief from firearms disabilities, but no equivalent procedure exists at the federal level. A part of the federal felon-in-possession statute grants the secretary of the treasury the right to reinstate a former felon’s firearms privileges if past good conduct indicates that the disability should be removed. Since 1992, however, Congress has failed to fund this portion of the secretary’s work. The U.S. Supreme Court declared that a lack of review amounted to inaction rather than denial—and the Bureau of Alcohol, Tobacco and Firearms had to act for judicial review to apply. United States v. Bean, 537 U.S. 71
(2002). The sole avenue of relief from a federal firearms bar, therefore, is a presidential pardon.

3. The domestic violence firearms ban. Federal law prohibits all persons convicted of a domestic violence misdemeanor from possessing firearms. This may be particularly problematic for police officers and members of the military who lose not only their right to possess a firearm but consequently also their employment. What consequences may such a law have for prosecutorial and judicial decision-making?

2. Administrative Sanctions

While many collateral sanctions befall the offender automatically upon conviction, others are imposed in regulatory hearings. One of the most important and pervasive illustrations of such a collateral sanction is deportation, which is declared by an immigration judge or the immigration agency rather than by the criminal court. For a proposal to allow the criminal sanctioning and the deportation decisions to be made by the sentencing judge, see Margaret Taylor & Ronald Wright, The Sentencing Judge as Immigration Judge, 51 Emory L.J. 1131 (2002).

Since the 1996 immigration acts, the deportation of criminal offenders has expanded dramatically. In 1986 not quite 2,000 noncitizens were removed for criminal violations; in fiscal year 2010 the figure had risen to almost 217,000, with approximately 45,000 of the convictions underlying the deportations based on drug offenses and 36,000 on driving under the influence. Removal is now mandatory for all noncitizens convicted of “aggravated felonies,” a large category of offenses that includes more than just the most heinous crimes that the term implies. Moreover, deportation can occur upon conviction of “crimes of moral turpitude.” Not surprisingly, lower courts sometimes disagree on the definitions of some these terms.

Immediately upon the passage of the 1996 legislation, the Immigration and Naturalization Service enforced the deportation provisions retroactively. This means that individuals who had pled guilty to offenses many years, and often decades, in the past were detained and deported without having available to them the more generous discretionary relief provisions they had relied on in earlier legislation. In its 2001
decision in INS v. St. Cyr, 533 U.S. 289 (2001), the Supreme Court held that such
discretionary relief remained available to these individuals since they had relied on them
in working out plea bargains.

Whether criminal defendants need to be informed of the immigration consequences of
a guilty plea by the court, the prosecutor, or their counsel has been an important question,
with far-reaching consequences for other, albeit less dramatic, collateral sanctions. Either
through legislative or judicial mandate, a number of states have required courts to inform
defendants that immigration consequences may attach to a conviction if the defendant is
not a U.S. citizen.

Jose Padilla v. Kentucky

130 S. Ct. 1473 (2010)

STEVENS, J.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of
the United States for more than 40 years. Padilla served this Nation with honor as a
member of the U. S. Armed Forces during the Vietnam War. He now faces deportation
after pleading guilty to the transportation of a large amount of marijuana in his tractor-
trailer in the Commonwealth of Kentucky.¹

In this postconviction proceeding, Padilla claims that his counsel not only failed to
advise him of this consequence prior to his entering the plea, but also told him that he
“‘did not have to worry about immigration status since he had been in the country so
long.’” 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel’s erroneous
advice when he pleaded guilty to the drug charges that made his deportation virtually
mandatory. He alleges that he would have insisted on going to trial if he had not received
incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme Court of Kentucky denied Padilla
postconviction relief…. The court held that the Sixth Amendment’s guarantee of

¹ Padilla’s crime, like virtually every drug offense except for only the most insignificant marijuana
offenses, is a deportable offense under 8 U.S.C. §1227(a)(2)(B)(i).
effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. In its view, neither counsel’s failure to advise petitioner about the possibility of removal, nor counsel’s incorrect advice, could provide a basis for relief.

We granted certiorari to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

I

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.…

The Nation’s first 100 years was “a period of unimpeded immigration.” C. Gordon & H. Rosenfield, Immigration Law and Procedure §1.(2)(a), p. 5 (1959)….  

The Immigration and Nationality Act of 1917 (1917 Act) brought “radical changes” to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54-55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil….  

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien shall not be deported.” This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the
Executive to prevent deportation….Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

However, the JRAD procedure is no longer part of our law….in 1990 Congress entirely eliminated it. In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation….Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.6 Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance.

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

II

Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” McMann v. Richardson, 97 U.S. 759, 771 (1970); Strickland v. Washington, 466 U.S. 668 (1984). The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e., those matters not within the sentencing authority of the state trial court. In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” The Kentucky high court is

6 The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term “removal” rather than “deportation.”
far from alone in this view.

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*, 466 U.S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty;” but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F. 2d 35, 38 (D.C Cir. 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla’s claim.

III

Under *Strickland*, we first determine whether counsel’s representation “fell below an objective standard of reasonableness.” Then we ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” We long have recognized that “[p]revailing norms of practice as reflected in
American Bar Association standards and the like…are guides to determining what is reasonable….” Although they are “only guides,” and not “inexorable commands,” Bobby v. Van Hook, 558 U. S. 4, 130 S. Ct. 13 (slip op., at 5) (2009) (per curiam), these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation….”[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients….” Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as Amici Curiae 12–14 (footnotes omitted) (citing, inter alia, National Legal Aid and Defender Assn., Guidelines, §§6.2-6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants §1.3 (3d ed. 2003); 2 Criminal Practice Manual §§45:3, 45:15 (2009))….

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U.S.C. §1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance…, other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading
the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of Strickland. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy Strickland’s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that Strickland applies to Padilla’s claim only to the extent that he has alleged affirmative misadvice. In the United States’ view, “counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case…,” though counsel is required to provide accurate advice if she chooses to discusses these matters.

There is no relevant difference “between an act of commission and an act of omission” in this context.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the
advantages and disadvantages of a plea agreement.” Libretti v. United States, 516 U.S. 29, 50-51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the Strickland analysis.” Hill v. Lockhart, 474 U.S. 52, 62 (1985) (White, J., concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and amici have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar “floodgates” concern in Hill, but nevertheless applied Strickland to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.12

A flood did not follow in that decision’s wake. Surmounting Strickland’s high bar is never an easy task. Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. There is no reason to doubt that lower courts—now quite experienced with applying Strickland—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

12 However, we concluded that, even though Strickland applied to petitioner’s claim, he had not sufficiently alleged prejudice to satisfy Strickland’s second prong. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy Strickland’s prejudice prong… Hill does not control the question before us. But its import is nevertheless clear. Whether Strickland applies to Padilla’s claim follows from Hill, regardless of the fact that the Hill Court did not resolve the particular question respecting misadvice that was before it.
Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial.…Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, [] the challenge may result in a less favorable outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.…

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.…

V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” Richardson, 397 U.S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.
Taking as true the basis for his motion for postconviction relief, we have little
difficulty concluding that Padilla has sufficiently alleged that his counsel was
constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he
can demonstrate prejudice as a result thereof, a question we do not reach because it was
not passed on below.…

ALITO, J., concurring.

I concur in the judgment because a criminal defense attorney fails to provide effective
assistance within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), if the
attorney misleads a noncitizen client regarding the removal consequences of a conviction.
In my view, such an attorney must (1) refrain from unreasonably providing incorrect
advice and (2) advise the defendant that a criminal conviction may have adverse
immigration consequences and that, if the alien wants advice on this issue, the alien
should consult an immigration attorney. I do not agree with the Court that the attorney
must attempt to explain what those consequences may be. As the Court concedes,
“[i]mmigration law can be complex”; “it is a legal specialty of its own”; and “[s]ome
members of the bar who represent clients facing criminal charges, in either state or
federal court or both, may not be well versed in it.” The Court nevertheless holds that a
criminal defense attorney must provide advice in this specialized area in those cases in
which the law is “succinct and straightforward”—but not, perhaps, in other situations.
This vague, halfway test will lead to much confusion and needless litigation.

I

Under Strickland, an attorney provides ineffective assistance if the attorney’s
representation does not meet reasonable professional standards. Until today, the
longstanding and unanimous position of the federal courts was that reasonable defense
counsel generally need only advise a client about the direct consequences of a criminal
conviction. While the line between “direct” and “collateral” consequences is not always
clear, the collateral-consequences rule expresses an important truth: Criminal defense
attorneys have expertise regarding the conduct of criminal proceedings. They are not
expected to possess—and very often do not possess—expertise in other areas of the law,
and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. A criminal conviction may also severely damage a defendant’s reputation and thus impair the defendant’s ability to obtain future employment or business opportunities. All of those consequences are “seriou[s],” but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were “prevailing professional norms,” it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court’s opinion would not just require defense counsel to warn the client of a general risk of removal; it would also require counsel in at least some cases, to specify what the removal consequences of a conviction would be.

The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. “Most crimes affecting immigration status are not specifically mentioned by the
[Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as crimes involving moral turpitude or *aggravated felonies*. “M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an “aggravated felony” or a “crime involving moral turpitude [(CIMT)]” is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) (“Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject”); *id.*, §5.2, at 146 (stating that the aggravated felony list at 8 U.S.C. §1101(a)(43) is not clear with respect to several of the listed categories, that “the term ‘aggravated felonies’ can include misdemeanors,” and that the determination of whether a crime is an “aggravated felony” is made “even more difficult” because “several agencies and courts interpret the statute,” including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues);…. Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien, or whether a particular state disposition will result in a “conviction” for purposes of federal immigration law. The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen,” *Immigration Law and Crimes* §2:1, at 2-2 to 2-3.

….I therefore cannot agree with the Court’s apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.
The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel’s duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]” of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. But “[w]hen the law is not succinct and straightforward…, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is “succinct, clear, and explicit.” How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer?

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court’s rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences….A nonconstitutional rule
requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information.

Fourth, the Court’s decision marks a major upheaval in Sixth Amendment law…. The majority appropriately acknowledges that the lower courts are “now quite experienced with applying Strickland,” but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel’s duty to advise on collateral consequences….

II

While mastery of immigration law is not required by Strickland, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant’s plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases…[R]easonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one’s professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases….

Second, incompetent advice distorts the defendant’s decision making process and seems to call the fairness and integrity of the criminal proceeding itself into question….[W]hen a defendant bases the decision to plead guilty on counsel’s express misrepresentation that the defendant will not be removable[,] it seems hard to say that the
plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights.

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court’s approach, not require any upheaval in the law….

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney’s expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client’s determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel’s duty to assist the client. Instead, an alien defendant’s Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.

SCALIA, J., dissenting.

In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we
often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer “for his defense” against a “criminal prosecutio[n]”—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of Justice Alito’s concurrence, I dissent from the Court’s conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney’s assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable, overkill.

***

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963), and that the right to “the assistance of counsel” includes the right to effective assistance, Strickland v. Washington, 466 U.S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment’s textual limitation to criminal prosecutions….We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state….

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at
hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within “the range of competence demanded of attorneys in criminal cases,” McMann v. Richardson, 397 U.S. 759, 771 (1970). We have never held, as the logic of the Court’s opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point….But it seems to me that the concurrence suffers from the same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence’s suggestion that counsel must warn defendants of potential removal consequences—what would come to be known as the “Padilla warning”—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act. We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar’s devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given…

The Court’s holding prevents legislation that could solve the problems addressed by today’s opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant’s attention, and what warnings must be given. Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for
example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel’s misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today’s sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well-defined area.

**PROBLEM 8-2. WHAT’S WORSE?**

Juan Nico, a permanent resident alien who entered the United States at age three and has lived here since then, got caught up in a bar brawl. He admits to having been drunk when his sister’s ex-boyfriend, Bob Friendly, came into the bar. His sister had told him about the abuse Bob had inflicted on her, and he decided to show Bob what it would be like to be beaten up. Bob had not fully sat down when Juan threw a beer mug at him but missed. Juan and Bob got into a fight, which ended when other patrons separated them. Both had minor injuries, largely scrapes and bruises.

The district attorney suggests that Nico plead guilty to assault with a one-year suspended sentence. It is the local district attorney’s policy to offer such pleas to noncitizens. Had Nico been a citizen, the district attorney would have insisted on some jail time.

If he accepts the plea, Nico will become automatically deportable as an aggravated felon since he committed a crime of violence. As Nico’s attorney, what options do you have at your disposal? Could you attack the district attorney’s policy offering different pleas to citizens and noncitizens?

Assume Nico accepted the plea but neither the district attorney nor his attorney discussed with him the resulting immigration consequences. What opportunities, if any, may he have to avoid removal from the United States?

**NOTES**
1. **Deportation as a civil sanction.** A long line of cases defines deportation as a civil rather than a criminal sanction. The distinction has traditionally been that collateral sanctions are indirect, and in the case of deportation they are imposed by an agency outside the criminal justice system. None of the procedural protections that attach in criminal cases, therefore, applied in deportation hearings, even though deportation for a criminal offense includes a long-term ban on reentry and often requires the offender to uproot his entire life and be separated from his family. See INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). *Padilla*, however, changes this framework by recognizing the harsh sanction of removal. Now failure to advise a client of potential adverse immigration consequences can constitute ineffective assistance of counsel in a criminal case, subject to the test set forth in *Strickland*.

2. **Defense counsel’s role.** After the 1996 immigration legislation substantially expanded the category of crimes making aliens deportable, some state legislatures mandated that courts inform noncitizen criminal defendants of potential immigration consequences. In some other states, courts have ruled to that effect. Chapter 19 of the ABA Standards on Collateral Sanctions (2003) recommends that judges inform criminal defendants before the guilty plea of the whole panoply of potential collateral sanctions. This would necessitate that courts compile a list of existing sanctions, many of which are currently unknown to judges, prosecutors, and defense counsel. How likely is the expansion of *Padilla* to other collateral sanctions, such as civil commitment, sex offender notification or disenfranchisement?

3. **Prosecutorial manipulation of collateral sanctions.** Prosecutors are able to influence the imposition of collateral consequences through charging decisions and plea offers. If a defendant refuses to accept an apparently generous plea offer because of a collateral consequence, and the judge agrees with the defendant’s decision because she considers the collateral sanction too harsh, what options does she have?

4. **Representation outside the criminal context.** While an alien has a right to counsel in immigration proceedings, no right to governmentally funded counsel exists. How could *Padilla* be used to expand *Gideon* outside the strictly criminal process?
5. **Retroactivity.** One of the questions that remains open after *Padilla* is whether it applies to criminal cases decided before the Court issued its opinion. State and lower federal courts have split over the question whether the decision is a new rule of constitutional law or merely an application of *Strickland*, the existing precedent. Under the Supreme Court’s method of analysis set out in *Teague*, the answer determines in part whether the rule will be applied retroactively. Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011), *cert. granted*, 132 S. Ct. 2101 (2012) (mem.).

6. **Welfare and financial aid benefits.** Federal law gives sentencing courts discretion to bar drug offenders temporarily from access to benefits. 21 U.S.C. §862(a). Studies have shown that neither state nor federal courts take advantage of this provision. See Robert Musser Jr., Denial of Federal Benefits to Drug Traffickers and Drug Possessors: A Broad-Reaching but Seldom Used Sanction, 12 Fed. Sent’g Rep. 252 (2000). Upon a third conviction for sale of illegal narcotics, the ban becomes mandatory. 21 U.S.C. §862a requires that states permanently deny certain welfare benefits and food stamps to people convicted of state or federal felony drug possession, use, or sale offenses, unless the state explicitly opts out of such a ban. Currently, less than a dozen states retain the ban, with many having loosened or entirely abandoned it over the last few years. The denial of welfare benefits has been found to have a particularly devastating impact on women released from prison, who are more likely to suffer a relapse as they find it more difficult to establish a life for themselves without support and as their families are more likely to dissolve without financial assistance. See Amy E. Hirsch, Parents with Criminal Records and Public Benefits: “Welfare Helps Us Stay in Touch with Society,” in *Every Door Closed: Barriers Facing Parents with Criminal Records* 27, 31 (Community Legal Services 2002). The first conviction for a drug possession or sale offense also carries with it a temporary denial of financial aid benefits for students applying to or enrolled in institutions of higher learning. The sponsor of the legislation wanted the provision to apply only for convictions occurring while the student receives such benefits, but currently it is being implemented to apply to anyone with a drug offense conviction, however far in the past. The third possession or second sale offense results in indefinite suspension of financial aid. Students may restore their eligibility if they complete a drug rehabilitation program that complies with certain criteria. See 20 U.S.C. §1091(r).
Even though courts have generally held individual collateral sanctions to be civil and therefore not subject to protections under the criminal procedural system, could the sheer amount of collateral sanctions and their impact in the modern world suffice for such protections to apply? After all, the fact of a criminal conviction changes an individual’s status permanently and makes her subject to the imposition of collateral sanctions at any point. See Gabriel J. Chin, The New Civil Death, Rethinking Punishment in the Era of Mass Conviction, 160 U. Penn. L. Rev. 1789 (2012).

7. Administrative sanctions based on criminal conduct. Collateral sanctions depend on a criminal conviction. Some administrative restrictions, however, are based not on a criminal conviction but rather on criminal conduct. For example, involvement in drug activity carries with it a ban from public housing, irrespective of whether the renter was convicted of a drug offense. Although criminal conduct is most easily proven through a criminal record, a formal conviction is not required. See, e.g., HUD v. Rucker, 545 U.S. 125 (2002) (housing authority may evict tenant even if tenant had given neither consent nor had knowledge of family member’s or guest’s illicit drug activities).

8. Extralegal collateral sanctions. Employers such as schools, long-term care facilities, and security services are statutorily obligated to investigate the criminal record of a job applicant. In addition to governmental restrictions imposed on offenders after they have served their criminal justice sentences, nongovernmental (private) disabilities apply as well. Many employers voluntarily check criminal records and refuse to hire ex-offenders. Licensing boards frequently deny ex-offenders licenses for employment positions ranging from attorney to beautician. Ex-offenders are also finding it increasingly difficult to rent apartments and homes. This is particularly problematic for sex offenders, but many other offenders are also denied housing by rental agencies and homeowners. Should the government protect the civil rights of ex-offenders who have served their sentences? Would an ex-offender nondiscrimination act have any chance of being enacted?

Notably, in his 2004 State of the Union address, President George W. Bush spoke passionately about the importance of showing compassion (and providing job training and placement services) to convicted offenders because “America is the land of second
chance.’” In April 2008 the president signed the “Second Chance Act” into law. It provides federal grants to government agencies and not-for-profit organizations with the goal of decreasing recidivism of those returning back to their communities. Despite recent budget cuts, the program remains funded, albeit at a lower level than in preceding years.