Editor’s note: This past year has seen a burgeoning of scholarship dealing with collateral consequences broadly defined, from lawyers, social scientists, and philosophers. CCRC’s good friend Alessandro Corda has selected fifteen notable articles published in 2018-19, with information, links, and abstracts. They are organized into five categories:

1. Legal collateral consequences
2. Collateral consequences and criminal procedure
3. Sex offender registration laws
4. Informal collateral consequences
5. Criminal records, expungement, sealing, and other relief mechanisms

A complete and regularly updated collection of scholarship on issues relating to collateral consequences and criminal records can be found on our “Books & Articles” page. From time to time we will preview and comment on new articles, and Alessandro has promised to provide another round-up by the end of the year. We hope he will continue in the role of CCRC’s official bibliographer.

(1) Legal collateral consequences:

Are Collateral Consequences Deserved?

Brian Murray, Seton Hall Law School

95 Notre Dame L. Rev. (2020, forthcoming)
Date Posted on SSRN: March 23, 2017

While bipartisan passage of the First Step Act and state reforms like it will lead to changes in sentencing and release practices, they do little to combat the collateral consequences that ex-offenders face upon release. Because collateral consequences involve the state’s infliction of serious harm on those who have been convicted or simply arrested, their existence requires justification. Many scholars classify them as punishment, but modern courts generally diverge, deferring to legislative labels that classify them as civil, regulatory measures. This label avoids having to address existing constitutional and legal constraints on punishment. This Article argues that although collateral consequences occur outside of the formal boundaries of the criminal system, they align with utilitarian purposes for criminal punishment, such as incapacitation. Interpreting the nature of collateral consequences, legislative justifications during their creation and during reform efforts, and judicial doctrine confirms that decision-makers are operating on utilitarian terrain while cognizant of functional concerns in the criminal system. But these philosophical premises inhibit broad reform efforts relating to collateral consequences because public-safety and risk prevention rationales chase utility. The result is extra punishment run amok and in desperate need of constraints. This Article suggests a different approach to reforming
collateral consequences: subjecting them to the constraints of retributivism by first asking whether they are deserved. Retributivist constraints emphasize dignity and autonomy, blameworthiness, proportionality, restoration, and impose obligations and duties on the state, suggesting many collateral consequences are overly punitive and disruptive of social order. This mode of analysis aligns with earlier Supreme Court precedent and accounts for retributivist constraints that already exist in present day sentencing codes. Proponents of rolling back collateral consequences should consider how utilizing desert principles as a constraint on punishment can alleviate the effects of collateral consequences on ex-offenders.

Third-Class Citizenship: The Escalating Legal Consequences of Committing a “Violent” Crime

Michael M. O’Hear, Marquette University Law School


For many years, American legislatures have been steadily attaching a wide range of legal consequences to convictions — and sometimes even just charges — for crimes that are classified as “violent.” These consequences affect many key aspects of the criminal process, including pretrial detention, eligibility for pretrial diversion, sentencing, eligibility for parole and other opportunities for release from incarceration, and the length and intensity of supervision in the community. The consequences can also affect a person’s legal status and rights long after the sentence for the underlying offense has been served. A conviction for a violent crime can result in registration requirements, lifetime disqualification from employment in certain fields, and a loss of parental rights, among many other “collateral consequences.” While a criminal conviction of any sort relegates a person to a kind of second-class citizenship in the United States, a conviction for a violent crime increasingly seems even more momentous — pushing the person into a veritable third-class citizenship. This article provides the first systematic treatment of the legal consequences that result from a violence charge or conviction. The article surveys the statutory law of all fifty states, including the diverse and sometimes surprisingly broad definitions of what counts as a violent crime. While the article’s aims are primarily empirical, concerns are raised along the way regarding the fairness and utility of the growing length and severity of sentences imposed on “violent” offenders and of the increasingly daunting barriers to their reintegration into society.

Beyond Punishment? A Normative Account of the Collateral Legal Consequences of Conviction

Zachary Hoskins, University of Nottingham, Department of Philosophy

Oxford University Press, 2019

People convicted of crimes are subject to a criminal sentence, but they also face a host of other restrictive legal measures: Some are denied access to jobs, housing, welfare, the vote, or other goods. Some may be deported, may be subjected to continued detention, or may have their criminal records made publicly accessible. These measures are often more burdensome than the formal
sentence itself. In Beyond Punishment?, Zachary Hoskins offers a philosophical examination of these burdensome legal measures, called collateral legal consequences. Drawing on resources in moral, legal, and political philosophy, Hoskins analyzes the various kinds of collateral consequences imposed in different legal systems and the important moral challenges they raise. Can collateral legal consequences ever be justified as forms of criminal punishment or as civil measures? Hoskins contends that, considered as forms of punishment, such restrictions should be constrained by considerations of proportionality and offender reform. He also argues that they may in a limited range of cases be permissible as risk-reductive civil measures. Whether considered as criminal punishment or civil measures, however, collateral legal consequences are justifiable in a far narrower range of cases than we find in current legal practice. Considering just how pervasive collateral legal consequences have become and their dramatic effects on offenders’ lives, Beyond Punishment? sheds valuable light on whether these restrictive measures are ever morally justified.

Wealth-Based Penal Disenfranchisement

Beth A. Colgan, UCLA School of Law


This Article offers the first comprehensive examination of the way in which the inability to pay economic sanctions—fines, fees, surcharges, and restitution—may prevent people of limited means from voting. The Supreme Court has upheld the constitutionality of penal disenfranchisement upon conviction, and all but two states revoke the right to vote for at least some offenses. The remaining jurisdictions allow for re-enfranchisement for most or all offenses under certain conditions. One often overlooked condition is payment of economic sanctions regardless of whether the would-be voter has the ability to pay before an election registration deadline. The scope of wealth-based penal disenfranchisement is grossly underestimated, with commentators typically stating that nine states sanction such practices. Through an in-depth examination of a tangle of statutes, administrative rules, and policies related to elections, clemency, parole, and probation, as well as responses from public disclosure requests and discussions with elections and corrections officials and other relevant actors, this Article reveals that wealth-based penal disenfranchisement is authorized in forty-eight states and the District of Columbia. After describing the mechanisms for wealth-based penal disenfranchisement, this Article offers a doctrinal intervention for dismantling them. There has been limited, and to date unsuccessful, litigation challenging these practices as violative of the Fourteenth Amendment’s equal protection and due process clauses. Because voting eligibility is stripped of its fundamental nature for those convicted of a crime, wealth-based penal disenfranchisement has been subject to the lowest level of scrutiny, rational basis review, leading lower courts to uphold the practice. This Article posits that these courts have approached the validity of wealth-based penal disenfranchisement through the wrong frame—the right to vote—when the proper frame is through the lens of punishment. This Article examines a line of cases in which the Court restricted governmental action that would result in disparate treatment between rich and poor in criminal justice practices, juxtaposing the cases against the Court’s treatment of wealth-based discrimination in the Fourteenth Amendment doctrine and the constitutional
relevance of indigency in the criminal justice system broadly. Doing so supports the conclusion that the Court has departed from the traditional tiers of scrutiny. The resulting test operates as a flat prohibition against the use of the government’s prosecutorial power in ways that effectively punish one’s financial circumstances unless no other alternative response could satisfy the government’s interest in punishing the disenfranchising offense. Because such alternatives are available, wealth-based penal disenfranchisement would violate the Fourteenth Amendment under this approach.

Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions

Gabriel J. Chin, University of California, Davis – School of Law

102 Marq. L. Rev. 233 (2018)

National policy with respect to collateral consequences is receiving more attention than it has in decades. This article outlines and explains some of the reasons for the new focus. The legal system is beginning to recognize that for many people convicted of crime, the greatest effect is not imprisonment, but being marked as a criminal and subjected to legal disabilities. Consequences can include loss of civil rights, loss of public benefits, and ineligibility for employment, licenses, and permits. The United States, the 50 states, and their agencies and subdivisions impose collateral consequences—often applicable for life—based on convictions from any jurisdiction. However, because they were deemed “civil,” collateral consequences have been created and imposed with few constitutional limitations. In recent years, the American Law Institute, American Bar Association, and Uniform Law Commission all have proposed reforms, which are now being seriously considered in a number of jurisdictions. Meanwhile, scholars have advanced, and courts have sometimes accepted, an argument that they previously rejected, namely that collateral consequences can be of constitutional magnitude. As courts take collateral consequences more seriously, legislatures have begun to reduce the numbers of collateral consequences and provide legal mechanisms for the relief of those that remain.

The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios

Alessandro Corda, Queen’s University Belfast School of Law


Collateral consequences (CCs) of criminal convictions such as disenfranchisement, occupational restrictions, exclusions from public housing, and loss of welfare benefits represent one of the salient yet hidden features of the contemporary American penal state. This chapter explores, from a comparative and historical perspective, the rise of the many indirect “regulatory” sanctions flowing from a conviction and discusses some of the unique challenges they pose for
legal and policy reform. US jurisprudence and policies are contrasted with the more stringent approach adopted by European legal systems and the European Court of Human Rights (ECtHR) in safeguarding the often-blurred line between criminal punishments and formally civil sanctions. The aim of this chapter is twofold: (1) to contribute to a better understanding of the overreliance of the US criminal justice systems on CCs as a device of social exclusion and control, and (2) to put forward constructive and viable reform proposals aimed at reinventing the role and operation of collateral restrictions flowing from criminal convictions.

Collateral Consequences of Criminal Conviction: Law, Policy and Practice

Margaret Colgate Love, Law Office of Margaret Love

Jenny Roberts, Washington College of Law, American University

Wayne A. Logan, Florida State University Law School

West/NACDL, 3d ed. 2018-2019

This volume is a comprehensive resource for practicing lawyers, judges and policymakers on the legal restrictions and penalties that result from a criminal conviction over and above the court-imposed sentence. Today, many millions of Americans have a criminal record of some kind, potentially triggering a vast array of highly burdensome and stigmatizing consequences that can have life-long debilitating effects. This volume provides comprehensive discussion and analysis of these after-effects of the nation’s ongoing “tough on crime” policies, ranging from loss of civil rights and employment opportunities, to firearms dispossession, registration and residency restrictions, and immigration consequences. It also discusses state and federal laws applicable to access to and use of criminal records, and the informal consequences that exist apart from formal legal restrictions. It serves as a single go-to resource for lawyers, judges, and policymakers as they negotiate the often complex and obscure statutes and regulations that come into play as a consequence of arrest and conviction.

Collateral Consequences of Punishment: A Critical Review and Path Forward

David S. Kirk, University of Oxford, Department of Sociology

Sara Wakefield, Rutgers School of Criminal Justice

1 Annual Review of Criminology 171 (2018)

The unprecedented growth of the penal system in the United States has motivated an expansive volume of research on the collateral consequences of punishment. In this review, we take stock of what is known about these collateral consequences, particularly in the domains of health,
employment, housing, debt, civic involvement, families, and communities. Yet the full reckoning of
the formal and informal consequences of mass incarceration and the tough-on-crime era is
hindered by a set of thorny challenges that are both methodological and theoretical in nature. We
examine these enduring challenges, which include (a) the importance of minimizing selection bias,
(b) consideration of treatment heterogeneity, and (c) identification of causal mechanisms
underlying collateral consequences. We conclude the review with a focused discussion on
promising directions for future research, including insights into data infrastructure, opportunities
for policy tests, and suggestions for expanding the field of inquiry.

(2) Collateral consequences and criminal procedure:

Incorporating Collateral Consequences into Criminal Procedure

Paul T. Crane, U.S. Department of Justice, Criminal Division

54 Wake Forest L. Rev. 1 (2019)

A curious relationship currently exists between collateral consequences and criminal procedures.
It is now widely accepted that collateral consequences are an integral component of the American
criminal justice system. Such consequences shape the contours of many criminal cases, influencing
what charges are brought by the government, the content of plea negotiations, the sentences
imposed by trial judges, and the impact of criminal convictions on defendants. Yet, when it comes
to the allocation of criminal procedures, collateral consequences continue to be treated as if they
are external to the criminal justice process. Specifically, a conviction’s collateral consequences,
no matter how severe, are typically treated as irrelevant when determining whether a defendant is
entitled to a particular procedural protection. This Article examines that paradoxical relationship
and, after identifying a previously overlooked reason for its existence, provides a framework for
incorporating collateral consequences into criminal procedure. Heavily influenced by concerns of
practicality and feasibility, the proposed methodology establishes a theoretically coherent path
forward that requires only modest adjustments to existing doctrines. After setting forth the three-
step framework, the Article applies its insights to the two most hallowed rights in our criminal
justice system: the constitutional right to counsel and the constitutional right to a jury trial.

Wrongful Collateral Consequences

Abigail E. Horn, Lawyer

87 Geo. Wash. L. Rev. 315 (2019)

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

(3) Sex offender registration laws:

_Beyond Panic: Variation in the Legislative Activity for Sex Offender Registration and Notification Laws Across States Over Time_

_Robert Lytle_, Department of Criminal Justice at the University of Arkansas at Little Rock


_Nationwide moral panic has long served as a primary explanation for sex offense laws. These laws, however, remain primarily left to state legislatures, which implies potential variation in their content over time. Variation in legislative content, to the degree that it represents implementation, not only suggests differential consequences for registrants and communities, but also it would raise questions to the sufficiency of moral panic as a sole explanation for sex offense policy change. I build upon earlier work by exploring variation in the content and timing of sex offender registration and notification (SORN) reform in all 50 states over time. After documenting variation in these laws, I present the ways in which SORN legislative content has evolved differently across states. In addition, the timing of legislative reforms differed not only across states but also within states over time. These findings have implications for existing theoretical assertions regarding criminal justice policy._
Challenging the Punitiveness of “New-Generation” SORN Laws

Wayne A. Logan, Florida State University College of Law


Sex offender registration and notification (SORN) laws have been in effect nationwide since the 1990s, and publicly available registries today contain information on hundreds of thousands of individuals. To date, most courts, including the Supreme Court in 2003, have concluded that the laws are regulatory, not punitive, in nature, allowing them to be applied retroactively consistent with the Ex Post Facto Clause. Recently, however, several state supreme courts, as well as the Sixth Circuit Court of Appeals, addressing challenges lodged against new-generation SORN laws of a considerably more onerous and expansive character, have granted relief, concluding that the laws are punitive in effect. This article examines these decisions, which are distinct not only for their results, but also for the courts’ decidedly more critical scrutiny of the justifications, purposes, and efficacy of SORN laws. The implications of the latter development in particular could well lay the groundwork for a broader challenge against the laws, including one sounding in substantive due process, which unlike ex post facto–based litigation would affect the viability of SORN vis-à-vis current and future potential registrants.

(4) Informal collateral consequences:

Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism

Alessandro Corda, Queen’s University Belfast School of Law

Sarah E. Lageson, Rutgers School of Criminal Justice

British Journal of Criminology (2019, online first)

The privatization of punishment is a well-established phenomenon in modern criminal justice operations. Less understood are the market and technological forces that have dramatically reshaped the creation and sharing of criminal record data in recent years. Analyzing trends in both the United States and Europe, we argue that this massive shift is cause to reconceptualize theories of penal entrepreneurialism to more directly address the role of technology and commercial interests. Criminal records, or proxies for them, are now actively produced and managed by third parties via corporate decision-making processes, rather than government dictating boundaries or outsourcing duties to private actors. This has led to what we term ‘disordered punishment’, imposed unevenly and inconsistently across multiple platforms, increasingly difficult for both government and individuals to control.
Criminal Employment Law

Benjamin Levin, University of Colorado Law School

39 Cardozo L. Rev. 2265 (2019)

This Article diagnoses a phenomenon, “criminal employment law,” which exists at the nexus of employment law and the criminal justice system. Courts and legislatures discourage employers from hiring workers with criminal records and encourage employers to discipline workers for non-work-related criminal misconduct. In analyzing this phenomenon, my goals are threefold: (1) to examine how criminal employment law works; (2) to hypothesize why criminal employment law has proliferated; and (3) to assess what is wrong with criminal employment law. This Article examines the ways in which the laws that govern the workplace create incentives for employers not to hire individuals with criminal records and to discharge employees based on non-workplace criminal misconduct. In this way, private employers effectively operate as a branch of the criminal legal system. But private employers act without constitutional or significant structural checks. Therefore, I argue that the criminal system has altered the nature of employment, while employment law doctrines have altered the nature of criminal punishment. Employment law scholars should be concerned about the role of criminal records in restricting entry into the formal labor market. And criminal law scholars should be concerned about how employment restrictions extend criminal punishment, shifting punitive authority and decision-making power to unaccountable private employers.

Privatizing Criminal Stigma: Experience, Intergroup Contact, and Public Views about Publicizing Arrest Records

Sarah E Lageson, Rutgers School of Criminal Justice

Megan Denver, Northeastern University School of Criminology and Criminal Justice

Justin T. Pickett, University of Albany School of Criminal Justice

21 Punishment & Society 315 (2019)

Current U.S. policy allows private companies to publish arrest records prior to conviction in print and online sources, yet little is known regarding the extent to which people actively search for criminal records or whether the public supports these policies. Utilizing two large public opinion surveys (N = 1008 and N = 1601), we find that approximately 15% of Americans searched online for conviction records last year (an estimated 38 million people), but that a strong majority (88%) oppose the publication of arrest records by private companies. We measure correlates of
opposition to record disclosure and find that having high-quality interpersonal contact with an arrestee diminishes support for publicizing arrest records and also tempers views of recidivism risk for those with nonviolent convictions. Findings suggest that learning firsthand about the negative consequences of contemporary criminal labels changes popularly held views on the value of immediate arrest record disclosure.

The Collateral Consequences of Incarceration for Housing

David S. Kirk, University of Oxford, Department of Sociology

In Handbook on the Consequences of Sentencing and Punishment Decisions (Beth M. Huebner & Natasha A. Frost eds., 2018), pp. 53-68.

The ability to obtain safe, decent, and affordable housing is critical to the successful reentry and reintegration of formerly imprisoned individuals back into society. Yet many convicted individuals face significant barriers to securing housing, both in the private and the public market. One barrier includes the so-called “invisible punishments”—that is, the legal and regulatory sanctions beyond the criminal sentence imposed in court. For instance, certain classes of felons may be automatically and even permanently banned from receiving public housing benefits or vouchers. A second related barrier is the stigma of a criminal record. Easy access to criminal records makes it easy and efficient for landlords and other real estate professionals to access criminal history information about a prospective tenant or buyer. In fact, because of the vast racial and ethnic disproportionality in the criminal justice system, the use of criminal records in housing decisions has civil rights implications in accordance with the Fair Housing Act. A third barrier is a lack of income in combination with a dearth of affordable housing in the U.S. The employment prospects of the average convicted individual are already dismal, and an ever-growing body of research demonstrates that job prospects and wages are further undermined by criminal conviction. Without stable income, one’s housing prospects are sorely curtailed. This chapter will review what is known about the housing experiences of formerly incarcerated individuals as well as the consequences of these barriers to stable housing.

(5) Criminal records, expungement, sealing, and other relief mechanisms:

Expungement of Criminal Convictions: An Empirical Study

J.J. Prescott, University of Michigan Law School

Sonja B. Starr, University of Michigan Law School

Harv. L. Rev. (Forthcoming 2020).
Date Posted on SSRN: March 16, 2019
Laws permitting the expungement of criminal convictions are a key component of modern criminal justice reform efforts and have been the subject of a recent upsurge of legislative activity. This debate has been almost entirely devoid of evidence about the laws’ effects, in part because the necessary data (such as sealed records themselves) have been unavailable. We were able to obtain access to deidentified data that overcomes that problem, and we use it to carry out a comprehensive statewide study of expungement recipients and comparable non-recipients. We offer three key sets of empirical findings. First, among those legally eligible for expungement, just 6.5% obtain it within five years of eligibility. Drawing on patterns in our data as well as interviews with expungement lawyers, we point to reasons for this serious “uptake gap.” Second, those who do obtain expungement have extremely low subsequent crime rates, comparing favorably to the general population—a finding that defuses a common public-safety objection to expungement laws. Third, those who obtain expungement experience a sharp upturn in their wage and employment trajectories; on average, within two years, wages go up by 25% versus the pre-expungement trajectory, an effect mostly driven by unemployed people finding jobs and very minimally employed people finding steadier or higher-paying work.

Criminal Records, Positive Credentials and Recidivism: Incorporating Evidence of Rehabilitation Into Criminal Background Check Employment Decisions

Megan Denver, Northeastern University School of Criminology and Criminal Justice

Crime and Delinquency (2019, online first)

Decision makers increasingly incorporate “evidence of rehabilitation” into criminal background checks. Positive credentials can decrease criminal record stigma and improve employment outcomes, but we lack research on whether rehabilitative factors used in such assessments are correlated with recidivism. The current study examines more than 1,000 state-mandated criminal background checks in the rapidly growing health care sector. Everyone in the sample received an initial denial and requested reconsideration by submitting evidence of rehabilitation. The findings indicate prior employer recommendations and program completion are positively correlated with clearance to work, but conditional on contesting in the first place, none of the evidence of rehabilitation factors are negatively correlated with recidivism. Persistently pursuing an employment opportunity through a contestation process may, in itself, signal rehabilitation and lower risk.

Credentialing Decisions and Criminal Records: A Narrative Approach

Megan Denver, Northeastern University School of Criminology and Criminal Justice

Alec C. Ewald, University of Vermont, Department of Political Science

56 Criminology 715 (2018)
Decision makers such as employers and state occupational licensing officials are often encouraged or required to incorporate evidence of rehabilitation into hiring decisions when applicants have criminal records. Current policy movements at the local, state, and federal levels may increase the use of such individualized assessments. Yet little is known about which types of information these decision makers use, how they evaluate evidence, and how they ultimately make determinations. We examine a sample of 50 unarmed security guard licensing decisions in New York State using content analysis. We find that administrative law judges rely on a narrative framework to document whether applicants currently have a prosocial identity and merit licensure. Judges typically describe one of two prosocial identity narratives for successful applicants: The applicant demonstrates achieving meaningful change, or his or her criminal record represents an aberration. Two factors seem vital to these assessments: applicants’ postconviction trustworthiness, as demonstrated through good conduct or inferred through positive appraisals, and credible testimony. In narrative explanations, personal responsibility and adult milestones are often discussed, reflecting a judicial nod to the notion of a “transition to adulthood.” The results hold implications for scholars and policy makers examining employment barriers, stigma remediation, and collateral sanctions for individuals with criminal records.


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35 Justice Quarterly 584 (2018)

Ban-the-Box (BTB) legislation, which bans employers from asking about criminal history records on the initial job application, is arguably the most prominent policy arising from the prisoner reentry movement. BTB policies assume: 1) most employers ask about criminal records, and 2) inquiries occur at the application stage. However, we lack reliable information about the validity of these assumptions or about public attitudes towards criminal background checks, which limits our understanding of the potential scope of this innovative policy. Using survey data from a national probability sample, we estimate that in the past year, over 31 million U.S. adults were asked about a criminal record on a job application. According to our survey, virtually all of the criminal record inquiries occurred at the application stage, highlighting the potential of BTB. However, we also found that the public is sharply divided on whether to prevent employers from asking on applications, as per BTB.