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An End to the Mystery, A New Beginning for the Debate: National Inventory of Collateral Consequences of Conviction (NICCC) Provides Complete List of Every Collateral Consequence in the Country

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AN END TO THE MYSTERY, A NEW BEGINNING FOR THE DEBATE:
NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF
CONVICTION (NICCC) PROVIDES COMPLETE LIST OF EVERY
COLLATERAL CONSEQUENCE IN THE COUNTRY

by Alex Tway and Jonathan Gitlen

The American Bar Association, Criminal Justice Section’s National Inventory of Collateral Consequences has completed the first ever survey of all statutory, regulatory and rule-based collateral consequences of criminal convictions in the nation. Collateral consequences have grown explosively as a part of the related “war on drugs” and “tough on crime” movements. This survey, available as a free and searchable website, found 39,547 separate collateral consequences of conviction, the majority of which are mandatory and/or permanent. The database turns suspicions and inferences, such as the disproportionate targeting of controlled substance convictions, into demonstrable facts and sheds light on areas that were previously thought to be inextricable mysteries, such as the 24,629 employment consequences.

This article proceeds in three parts, first presenting an overview of the state of collateral consequences nationally and comparing this state to the aspirational ABA standards on collateral consequences, which are tremendously far apart. Next, a table comparing the collateral consequences in the fifty states is presented, providing rankings in several categories and examining the correlation between collateral consequences in a state and seven variables thought to influence the number or severity of collateral consequences. Finally, another table is presented comparing the relative concentration of each type of consequence within each category of offense. Most consequence types are not well-tailored to the underlying conduct and some, particularly controlled substance offenses, are actually more likely to be tailored towards consequences that have no relationship to the underlying criminal conduct.

The article concludes with a call to action for policies or actions that legislature, judiciary, and individual attorneys ought to put into action now that the primary obstacle to collateral consequence reform has been cast aside.

I. Introduction

Collateral consequences of a conviction are additional legal penalties and disqualifications that follow a criminal conviction. These penalties and disqualifications are incredibly diverse, numerous, and frequently very impactful and long lasting. In response to the steady increase, in the number and severity, of these consequences since the 1980’s, the American Bar Association (ABA) created the ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Person.\textsuperscript{1} The guidelines are aspirational and lay out a system that will increase fairness, and efficiency by making collateral consequences a prime consideration during the guilty plea and sentencing phases of a case, and by tailoring consequences to the specific underlying criminal conduct.\textsuperscript{2}

\textsuperscript{1} ABA Standards for Criminal Justice, Commentary, Collateral Sanctions and Discretionary Disqualification of Convicted Persons 7, 43 (3d ed. 2004) [hereinafter Standards].

\textsuperscript{2} Id. at 11-12.
Guideline 19-2.1 calls for legislatures to codify or reference all collateral consequences in their jurisdiction in a single chapter, and to identify all collateral consequences applicable to each offense. With few exceptions, state legislatures have not been willing to put this standard into effect. Nonetheless, the aims of this standard have now been substantially met by the creation of the American Bar Association, Criminal Justice Section’s National Inventory of Collateral Consequences. This project has produced a database that contains all or almost all of the collateral consequences located in state, federal, territorial statutes, regulations, and rules. This paper will endeavor to provide: an insight into the implications of this database; an overall picture of the data collected; and evaluate whether this data corresponds with other findings and assumptions that have been made about collateral consequences.

II. The Current State of Collateral Consequences and the Implications of the Database

Past scholarship on the topic, has treated collateral consequence as an unknowably vast “black box.” The unstructured, scattered, and effectively random way they are distributed through the federal and state statutory codes, regulations, and rules has, until now, proven to be an insurmountable obstacle. As a result of this project, we now know that there is a minimum of 39,548 collateral consequences of conviction in the United States of America.

Due to the previously incomprehensible size of the forest, past scholarship has focused on the largest and most impactful of the trees—marquee collateral consequences. The most well-known consequences including: mandatory deportation, loss of federal education and welfare benefits; eviction when they consider adding new ones, not judges when they impose sentence, not defense counsel when they advise clients charged with a crime, and not defendant when they plead guilty...). This number includes the 50 states, the District of Columbia, the Virgin Islands, and the statutes of Puerto Rico. All data used for this paper is based on a snapshot of the database taken on September 10, 2014. Since then only incremental updates have been made, adding or deleting entries as sections are added or deleted from the jurisdiction’s code, regulations, and rules. Each jurisdiction is updated once yearly, usually the month after its legislative session ends. Additionally, the project is undergoing continuous updating and maintenance and actively seeks and welcomes any advice from local practitioners on collateral consequences that have been missed or clarifications to existing entries. This does not include consequences that may be contained in municipal codes, local rules, agency operations understandings.

6 Michael Pinard, An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Face by Formerly Incarcerated Individuals, 86 B.U. L. Rev. 623, 646 (2006); Gabriel Chin, Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. Gender Race & Just., 255, 256 (2002). (“No one knows, really, what [collateral consequences] are, not legislators


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from public housing for controlled substance conviction of any family member;\textsuperscript{10} felony disenfranchisement;\textsuperscript{11} and sex offender registration and notification, have drawn the brunt of attention directed at collateral consequences. Compared to any one of the lesser known 3g,500+ other consequences, these consequences have a vastly greater impact. Nevertheless, they represent only a few entries in the database. The database has no way to measure the number of lives each collateral consequence touches, nor does it measure extra-legal collateral consequences, such as the social stigma of conviction or the effect on the family of the convicted. For this reason our analysis of this database is not intended to displace or discredit the existing scholarship, but to provide a picture of those collateral consequences that do not individually merit their own articles.

Collateral consequences of criminal activity have ancient roots, stretching back to at least the Greco-Roman era.\textsuperscript{12} Collateral consequences employed in the United States are traced back to the concept of civil death in English common law,\textsuperscript{13} and the system of Jim Crow laws enacted following reconstruction.\textsuperscript{14} Modern drug enforcement, prosecution, and sentencing, which all disproportionately affect African Americans, are frequently associated with this history.\textsuperscript{15}

In recent years the war on drugs, welfare reform, and increasing supervision of sex offenders has seen an unprecedented and untracked growth in collateral consequences.\textsuperscript{16} This growth has been accompanied by a similarly massive increase in the number of individuals incarcerated, and subsequently, a correspondingly large increase in people released from incarceration and thus subject to collateral consequences.\textsuperscript{17}

Meanwhile, courts have continued to apply the collateral consequences rule when determining if a guilty plea was given in a knowing, and voluntary manner with a constitutionally competent counsel.\textsuperscript{18} The collateral consequences rule draws a distinction between “direct” or penal consequences, which are imposed by the court as part of the sentence, and collateral consequences, which are any other consequences that may arise as a result of the conviction. This distinction is also at the center of this project, which tracks only collateral consequences. The rule states that defendants need not be advised of the collateral consequences of conviction in order for their plea of guilty to survive due process or effective assistance of counsel scrutiny.\textsuperscript{19} The only exception to this is the affirmative misadvice rule, which says that erroneous information about collateral consequences does violate due process standards, under Strickland.\textsuperscript{20} Defense counsel, the court, or the prosecution can provide this information. This rule has been criticized as “encourage[ing] prosecutors, judges, and defense lawyers to remain silent about the existence or severity of collateral consequences, lest they give incorrect information and thereby undermine the finality of the guilty plea . . . .”\textsuperscript{21} The hands off approach to collateral consequences has affected attorney behavior in a number of ways that fundamentally undermine the rights of the accused considering a plea bargain.\textsuperscript{22}

\textsuperscript{11} See Sentencing Project, Felony Disenfranchisement Law In The United States 1-3 (2005).
\textsuperscript{12} Michael Pinard, Reflections and Perspectives on Reentry and Collateral Consequences, 100 J. Crim. L. & Criminology 1213, 1214 (2010).
\textsuperscript{13} Id.
\textsuperscript{14} See Chin, supra note 6, at 256, 266.
\textsuperscript{15} See id. at 269.
\textsuperscript{16} See id. at 276.
\textsuperscript{17} See Pinard, supra note 6, at 627.
\textsuperscript{19} Pinard, supra note 12, at 1220 n.39.
\textsuperscript{20} Roberts, supra note 18, at 122. See Strickland v. Washington, 466 U.S. 666, 669 (1984) (creating a two-pronged ineffective assistance of counsel rule, requiring that a defendant show that counsel performance was objectively unreasonable and that that poor performance gives rise to a reasonable probability that adequate counsel could have led to a different outcome).
\textsuperscript{21} Roberts, supra note 18, at 122.
\textsuperscript{22} Id. at 145-164.
In 2008 the Supreme Court took on this issue in an indirect way in *Padilla v. Kentucky.* In *Padilla,* the Court did not endorse or repudiate the collateral consequence rule, but instead, followed several states in requiring collateral consequence warnings in the deportation context alone. *Padilla*’s lack of a clear directive in all other situations has left an uncertain landscape and most courts continue to follow the collateral consequences rule, allowing an exception only for immigration status. Although the collateral consequence rule has never been without problems, it made some sense at the time it was created—with collateral consequences were still a “black box” and no one practitioner could be expected to account for every collateral consequence that his or her client faced. Now that the consequences are available and accounted for in one public database, there is no longer any such reasonable rationale.

The guidelines would see the abolition of the collateral consequences rule and the affirmative advice rule, and replace them with a rule mandating that defendants be advised of relevant collateral sanctions before a guilty plea is accepted. Additionally, the guidelines would require that mandatory collateral consequences be considered and given weight at the time of sentencing. For the one-third of collateral consequences that are mandatory, permanent, and lack specific relief, sentencing is the only time any consideration can possibly be given as to whether the sanctions are appropriate to the crime. Many of these consequences have taken on an increasingly penal character, becoming indistinguishable at the extremes. Ultimately, basic fairness requires that these penalties be considered as a part of the sentence.

Some commentators have concurred with the standards or proposed similar solutions. Others would take a more broad approach by formally ending the war on drugs, eliminating all collateral consequences that affect benefits necessary for survival or advancement, limiting other collateral consequences to those based on individualized risk assessment, and focusing on reintegrating offenders into society.

Still others have proposed that courts create a reasonableness test and require that defendants entering a plea bargain be warned by the court about those consequences that are both likely to apply and severe enough that they would affect a reasonable defendant’s decision. Such a test would certainly be a step in the right direction, but with the database in hand, attorneys can do better. Editing from the list of all consequences down to those that the client must know about will still be necessary due to the staggering list of consequences that automatically or potentially attach to every conviction. The difference is that now that list can be tailored to the individual client rather than boilerplate aimed at a hypothetical reasonable client.

It has also been argued that the best way to enable attorneys to advise their clients of the collateral consequences that may result

23 *Padilla* v. Kentucky, 559 U.S. 356 (U.S. 2010); See also *Cháidez* v. United States, 133 S. Ct. 1103 (holding that *Padilla* does not apply retroactively).
24 *Padilla* at 373.
25 *Standards,* supra note 1, § 19-2.3.
26 Id. § 19-2.4.
28 Pinard, *supra* note 6, at 646–49 (discussing a variety of proposals designed to more narrowly tailor collateral consequences, including trial court discretion). Chin, *supra* note 6, at 274–5 (proposing mandatory notification of applicable consequences at the time of a guilty plea as well as sentencing, and codification of all collateral consequences in a single section of each jurisdiction’s code.) Such codification is already in place in the State of Minnesota, see Minn. Stat. § 609B (2014), although the database identifies many collateral consequences not reflected in the chapter.
29 See *Demleiter,* supra note 8, at 1051–53 (proposing a post war on drugs “Marshall plan”).
30 See Roberts, *supra* note 27, at 713–19 (proposing a court-enforced severity and likelihood of applicability test. This plan perhaps underestimates the sheer number of mandatory consequences, as warning defendants of every consequence that is both mandatory and severe would involve reading approximately one third of the database).
from a plea would be for defenders or reentry specialists to create “digests” that detail the severe consequences of the most common offenses in a few-page document.\(^{31}\) This is seen as preferable to more complete sources, and it would be a simple and elegant solution, if only systems of collateral consequences were simple and elegant. As it stands, every state has hundreds of consequences that result from any felony or any misdemeanor, and the Federal system has hundreds more. Even sifted down to only those consequences that are permanent or severe, the resulting list will be very long: literally every client charged with a misdemeanor or felony will be facing a shockingly long list of potential consequences, many of which will be irrelevant to them. Furthermore, reading the entire list to every client would be an incredible waste of limited time, so attorneys must familiarize themselves with this database and familiarize themselves with their clients’ and their interests in order to determine which consequence types are relevant to their clients’ lives. That an attorney can technically be constitutionally sufficient without doing so is not a requirement that attorneys not do so. Attorneys should remember that the constitutional norm of the Sixth Amendment is merely a basic threshold.\(^{32}\)

### III. Overview of the Database

The guidelines draw an often forgotten distinction between collateral sanctions, penalties or disabilities that are imposed automatically upon conviction, and discretionary disqualifications, disabilities or disadvantages that an official or agency is authorized but not required to impose on a person because of the conviction.\(^{33}\) The database maintains this distinction by use of the consequence types “Mandatory/Automatic” and “Discretionary.” Nationally, mandatory consequences are far more popular, comprising 21,914 entries against 15,756 discretionary entries.\(^{34}\) In light of their potentially arbitrary application, the guidelines go on to emphasize that mandatory consequences ought to be narrowly tailored to “those that are specifically warranted by the conduct constituting a particular offense.”\(^{35}\) The extent to which the laws are in line with this guideline is a subjective determination, which is more difficult to make based on the database, but it is notable that any felony conviction will expose a defendant to 17,904 consequences, and any misdemeanor will expose them to 8,743 collateral consequences. This equates to 39.79\% and 19.43\% of all consequences, respectively.\(^{36}\)

The guidelines also state that collateral consequences ought not unduly frustrate the ability of a person to reintegrate into society or infringe on fundamental rights.\(^{37}\) Permanent

\(^{31}\) Chin, supra note 5, at 686.

\(^{32}\) Roberts, supra note 18, at 182–83.

\(^{33}\) Standards, supra note 1, § 19-1.1.

\(^{34}\) A third category, “Discretionary (Waiver)” operates like as a hybrid of a mandatory and discretionary consequence. Unlike a true discretionary consequence, which is not imposed unless an official or agency acts, a discretionary (waiver) consequence is imposed unless an official or agency grants an exemption. These consequences are relatively rare and comprise only 1,878 entries.

\(^{35}\) Standards, supra note 1, § 19-1.2.

\(^{36}\) This includes tremendous overlap, as consequences that only target misdemeanor convictions are relatively rare. This also includes consequences that may be triggered by any of the database’s sixteen categories in addition to any felony. Finally, it should be noted that offenses that trigger based on any offense “related to” the consequence at stake without an enumerated list of related offenses have been coded as “any misdemeanor/any felony.” In the absence of any enumerated offenses, this is the most cautious way to code these consequences.

\(^{37}\) Standards, supra note 1, § 19-2.3.
consequences are highly suspect under this standard, as well as the previous. Permanent consequences that affect employment, any form of licensing, or government benefits can make reintegration permanently impossible. Permanent disqualifications are also highly unlikely to be justifiable under the previous standard as well, since it is known that people who desist from crime for several years are about as likely to reoffend as the general population. For these reasons, permanent consequences should be avoided in all but the most extreme and narrowly tailored cases. Instead, they are pervasive, comprising 30,950 of the entries in the database, or 78.34% of the nation’s collateral consequences. A mere

8,051, or 20.38% have specific durations.

The standards also state that judicial or administrative relief from collateral sanctions should be available for every consequence. Relief provisions contained within the statute or regulation that creates the consequence, or that make specific reference to the statute or regulation are considered specific relief. Specific relief can be advantageous because it applies with certainty and ensures that there is at least one way to remove a given consequence. General relief ironically suffers from some of the same problems as the collateral consequences schemes it is meant

40 There are 534 consequences that have been coded as “conditional” durations. These are consequences where the affected party can be said to hold the key to their own release, usually complying with a court order or paying a debt, like child support arrearages.

to provide relief from due to painting with a wide brush and being insufficiently flexible to tailor to the circumstances of each individual case. General relief is not always sufficient, may not be applicable to every consequence, may be difficult to secure, or may be denied by an administrator who finds relief from all consequences inappropriate for a certain individual, but would have been willing to grant specific relief for some consequences, if available. These relief provisions are coded in the database under the relief section in the entry describing the associated collateral consequence. Only 7,271 entries, or 22.53% of entries contain specific relief.

In addition to tracking all of the nation’s collateral consequences, the database endeavors to track all statutory, regulatory, and rules-based general relief. As of September 2013 the database contains 1,429 such entries. For the purposes of the database, general relief includes anything that may allow a convicted person to avoid collateral consequences, for example, pardon, expungement, sealing or amending their record, and obtaining a certificate of rehabilitation. Also included are deferred adjudication or probation before judgment programs that allow an accused person to dispose of their charge[s] without incurring a conviction. The final type of general relief includes statutes that limit the ability of third parties (e.g. employers) to either access criminal records or to consider them in their decisions. These protections are becoming increasingly popular, but as of yet are inconsistently applied, frequently insufficient to ensure that only truly relevant convictions may be considered, and vulnerable to abuses such as the use of post-hoc discovered convictions to justify prior employment decisions.

41 See generally Christine N. O’Brien & Jonathan J. Darrow, Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes.

THE RATE OF RECIDIVISM INCREASES ALONGSIDE THE NUMBER OF CONSEQUENCES THAT AFFECTS ACCESS TO GOVERNMENT BENEFITS.
The General background checks come in two primary varieties. The first are those that authorize background checks very broadly, for instance they may authorize an agency to perform background checks on all applicants for any program under its purview. These are both referenced as specific background checks in the relevant entries and included as general background checks, since they will also apply to applicants that are yet to be created or discovered. There are also background checks that are directed at a particular consequence, but are not accompanied by any specific language anywhere in the statutory or regulatory code authorizing action to be taken based on that background check. These can be seen in any context, but they are commonly associated with licensing, programming, or anything requiring an application. These background checks are considered highly suspect due to the likelihood that they exist in service of an uncodified collateral consequence. It is highly unlikely that a background check is being performed and not evaluated on some basis, even if there is no statutory or regulatory authorization for that evaluation.43 This is a practice that the guidelines would like to see completely abolished.44 It is not within the scope of the project to identify collateral consequences that are not codified, so these entries are coded merely as background checks. Local practitioners ought to treat these as uncodified consequences until proven otherwise and advise clients accordingly. It is worth noting that the two types of general background checks also track background checks. These are tracked the same way that relief is tracked, with background checks that are specific to a collateral consequence in some way being referenced in the entry for that consequence and general background checks, which are not associated with any specific consequences, being coded as their own entries. 15,557 entries, or 39.3% of collateral consequences have a specific background check. Of these, 4,610 are found in the same statute as the consequence, while 10,947 are found in a separate statute.45 4,041 entries are general background checks.

Prohibiting Discrimination, 42 Wake Forest L. Rev. 991 (2007) (containing in depth analysis of state court cases resulting from those state’s laws limiting use of convictions, in making employment decisions).

42 Many states have adopted a streamlined background check statute, especially for employment licensing, wherein one statute will authorize specific background checks for many different collateral consequence creating statutes, thus the same background check frequently appears as a specific background check in many different entries.

43 It is worth noting that many licensing statutes contain a requirement that the applicant demonstrate “good moral character.” These are included in the database as discretionary collateral consequences only when accompanied by a criminal background check. Good moral character requirements that are not accompanied by background checks were not included in the database because there is no statutory indication that the mere existence of a criminal conviction would trigger an exclusion. Consequences triggered by the facts underlying a conviction but not the mere fact of conviction are not considered collateral to the conviction. Nonetheless, these statutes may operate as de facto collateral consequences despite lacking specific statutory authorization.

44 Standards, supra note 1, § 19-2.1 (calling for identification and codification of all collateral consequences in a jurisdiction).
background checks discussed here are in no way mutually exclusive, and an agency-
wide background check could easily be a harbinger of un-codified consequences as well.

Overall, the guidelines and the national reality of collateral consequences are very
far apart. Perhaps the starkest indicators of this are the 13,471 permanent, mandatory
consequences with no specific relief. This represents 34.08% of all collateral consequences
nationwide. These automatic, perpetual, and often inescapable consequences are
the most procedurally arbitrary and can easily be considered the worst of the worst.

On the contrary, a mere 51, or 1.14% of collateral consequences are discretionary,
have a limited duration, and offer specific relief. If these criteria are loosened so that
only two of the three conditions need to be satisfied, we see that 5,723 consequences, or
14.4% of consequences have at least two of these three properties. These consequences
can be considered less procedurally arbitrary. While not fully in procedural compliance
with the guidelines, these consequences are closer to them than the vast majority of their
peers. The remaining 19,438 consequences, 49.15% of the total, have two of three properties
in common with the worst offenders. This means that they are either discretionary, of
limited duration, or have specific relief. This indicates a modicum of effort to narrow the
arbitrariness compared to the worst of the worst, but having only one non-arbitrary
element means these consequences are still very far from compliance with the standards.

IV. Analysis of Correlations Between State Consequences and Relevant Variables

Table number one illustrates this data. For each state, the federal jurisdiction and the
District of Columbia47 this table displays the number of total consequences in the database,
as well as the number of consequences triggered by sex offenses, controlled substance offenses
and consequences affecting government benefits. These categories have been
selected because they have been identified as especially severe, and as driving forces in the
recent expansion of collateral consequences. Additionally, each state is compared based
on percentage of consequences considered less procedurally arbitrary, most procedurally
arbitrary, percentage triggered by any felony and percentage triggered by any misdemeanor.
These variables provide insight into the extent to which a state’s consequences are
of broad or limited applicability, with lower scores being more arbitrary in the first
category and less arbitrary in the next three.

Each state was also compared on the basis of seven categories that have been
identified as driving the creation and severity of collateral consequences, or that
collateral consequences are thought to either increase or decrease. The factors chosen are
population,48 population density, political party influence, percentage of African American
population,49 status as a previously

45 The majority of disabilities or sanctions that lack specific relief may nonetheless be removed by a pardon.
However, there do exist some sanctions that will not be removed by pardon, although pardons are exceedingly
rare in many states. Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: a
State-by-State Resource Guide 5-8 (2005). The availability and applicability of inferior forms of general relief to a
consequence that lacks specific relief vary from state to state and even consequence to consequence. It is highly likely that
many of these consequences with no specific relief can only be relieved by increasingly rare pardons. Id.; see e.g., Demleiter,
supra note 8, at 1042 (federal immigration consequences triggered by controlled substance offenses can typically
only be relieved by pardon, unless eligible for First Offender Act or other deferred adjudication program).

46 The 534 conditional consequences, 1.35% of the total, discussed at note 40 supra, are excluded from this
number because they defy classification in this manner.

47 The District of Columbia and the Federal jurisdiction are included in the table for reference, but they are excluded
from the correlation calculations as their unique status makes them significant outliers.


49 Id.
mandatory segregation state, state budget per person, crime rate, and recidivism rate.

The bottom portion of the table shows the Pearson correlation between the statistics drawn from the database and the potential influencers. With few exceptions, the

**THESE CONSEQUENCES ARE NOT SPECIFICALLY TAILORED TO THE UNDERLYING CRIMINAL CONDUCT.**

correlations discovered are fairly weak. This shows the possibility that the factors truly driving expansion of collateral consequences are not considered here or have yet to be discovered.

Higher population and larger state budgets are both fairly strongly correlated with an increase in the number of raw collateral consequences, where the cause of this relationship is not entirely clear. (R = .716 and .659, respectively). Notably, the correlation between population and number of controlled substance consequences is much less pronounced (R = .301). State budget per person is weakly correlated with an increase in less arbitrary collateral consequences (R = .2983), a moderate decrease in most arbitrary consequences (R = -.396) and weakly correlated with a decrease in number of raw collateral consequences (R = -.221). This is one of the most powerful correlations observed in the data and suggests a fairly strong relationship between spending per person and what we would regard as more fair collateral consequences. The Population density weakly correlates with an increase in raw collateral consequences (R = .163) and a decrease in both less and most arbitrary consequences (R = -.105 and -.166, respectively). Values this low are unlikely to be indicative of any trend.

The “tough on crime” movement has been considered a major source of the recent growth in collateral consequences. This movement has been associated with members of both political parties in recent years, but it is generally more closely associated with the Republican Party. The Democratic Party is associated with more liberal values, which have been linked with more relaxed collateral consequences. We found a weak correlation between percent of collateral consequences considered most procedurally arbitrary and Republican Party influence (R = .264), in addition to percentage of consequences triggered by any felony (R = .180). Perhaps surprisingly, we also found a weak correlation between Democratic Party influence and number of consequences related to government benefits (R = -.294), but this vanishes when we controlled for the population variate. (R = .04). This could also be simply explained by those states having more benefit programs.

It has been suggested that the modern regime of collateral consequences has its origins in the Jim Crow laws mandating racial segregation that existed predominantly in the South. Admittedly simplifying a complex system that existed in various forms in many other states, I used the seventeen states that had mandatory school segregation at the time of Brown v. The Board of Education as a simple means to detect which states had the most commitment to Jim Crow laws. Here we found a weak correlation between these 17 states and more overall collateral consequences (R = .249), a higher percentage of consequences considered most arbitrary (R = .283), and a higher concentration of consequences resulting

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52 For the purpose of calculating correlation with political party, “red states” were assigned a value of one, and “blue states” a value of negative one, and swing states a value of zero, so the negative r represents a positive correlation between democratic majorities and government benefit consequences.
53 See Chin, supra note 6, at 255.
from controlled substance offenses (R=.331). These findings are not out of line with the predictions made by previous scholarship, but the weakness of the correlations suggests that to the rest of the nation has substantially caught up to those states that were once leading the way.

Percentage of African Americans in a state’s population is found to correlate with an increase in raw numbers of collateral consequences by previous studies.\textsuperscript{54} Our data supports these findings, finding a weak-to-moderate correlation between African American population and number of collateral consequences (R = .373), as well as the number of controlled substance collateral consequences (R = .331). Notably, the correlations between African Americans and consequences based on sex offenses (R = .12) and consequences affecting government benefits (R = .076) are much weaker than the correlation with raw number of collateral consequences. There is also a very weak positive correlation between African American population and percentage of consequences considered most arbitrary. (R = .167).

Past scholarship has disagreed over the relationship between crime rates and collateral consequences.\textsuperscript{55} We found that increases in crime rate correlates fairly weakly with

<table>
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<th>Correlations</th>
<th>% any felony</th>
<th>% any misdemeanor</th>
<th>population density</th>
<th>budget per person</th>
<th>% black</th>
<th>mandatory segregation in 1950</th>
<th>red/blue</th>
<th>recidivism</th>
<th>crime rate</th>
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<td>Percent points triggered by any felony</td>
<td>I.A.</td>
<td>0.2357651635</td>
<td>0.0074988765</td>
<td>0.8251457267</td>
<td>-0.0084512672</td>
<td>-0.8255592138</td>
<td>-0.2351250152</td>
<td>-0.1484932356</td>
<td>0.1794818194</td>
</tr>
</tbody>
</table>

\textsuperscript{54} See Ewald, supra note 52, at 216.

\textsuperscript{55} Id. at 215-16. It should also be noted that crime rates have been in general on the decline since the early 1990s, which is the period wherein the largest growth in collateral consequences occurred. The database is currently not constructed to measure changes in collateral consequences over time but, if regular updates are maintained, it will be capable of measuring changes from this point forward.

Most telling, recidivism rates were found to have no relationship to a number of collateral consequences and the procedural arbitrariness of those consequences or the general applicability of the consequences. The only relationship found for recidivism was that it increases alongside the number of consequences that affects access to government benefits (R = .343). This is a phenomenon that has been suggested and analyzed in great detail by previous articles, as loss of access to survival-type benefits can frequently impede reintegration and drive recidivism.\textsuperscript{56} What lawmakers may regard as common-sense wisdom is frequently at odds with the findings of criminological studies, where the realm of collateral consequences is an excellent example of this phenomenon. Many studies have addressed this and found that collateral consequences impede a convicted

\textsuperscript{56} See Pew Center on the States, supra note 39, at 25-28.
person’s ability to reintegrate into society while having no effect, or counterintuitive effects on their likelihood of re-arrest or reconviction. One study even found that the mere act of labeling someone a felon actually increased the likelihood of reoffending. Recidivism rates have also not shown substantial change during the entirety of the war on drugs era.

Among the offense categories tracked in this table, sex offenses are of interest for the utter lack of correlation they show. They are not notably correlated with any variable in a way that substantially differs from that of the overall number of raw collateral consequences.

Finally, the percentage of offenses triggered by any felony or misdemeanor mostly show very weak relationships across the board. They correlate moderately with each other (R = .358) due to substantial overlap in consequences triggered by any conviction. Mercifully, consequences triggered by any misdemeanor show a moderate negative correlation with consequences considered the most arbitrary (R = -.411). Such consequences, which create automatic lifetime sanctions for what are thought to be relatively minor offenses, epitomize unfairness. It is perhaps a ray of hope that they are relatively rare and are, to some extent, being avoided.

V. Let the Punishment Fit the Crime: Tailoring of Consequences to the Relevant Offense Categories

Scholarship on the subject of collateral consequences targeting particular categories has alleged that certain types of offenses—specifically felonies, drug offenses and sex offenses—are subject to a greater number of consequences that are more severe because they attack vital benefits, such as immigration status, housing, or public benefits. Table two attempts to shed some light on this topic by evaluating the relative concentrations of the major offense categories within the major consequence categories.

The most commonly targeted categories are by far employment (24,629), professional licensing (16,097), and business and property rights (15,531). Of these, occupational licensing showed a very high concentration in any felony and any misdemeanor—the most arbitrary offense categories. Conversely, these categories are also highly concentrated in the fraud category, which is reasonably tailored to many business and occupational licenses.

Government Benefits, Education, Housing, and Family Rights

These categories are grouped together because they are considered impermissible or highly suspect by the guidelines and can be very damaging to the possibility of reintegration. Government benefits consequences are especially damaging to reintegration because they frequently attack programs necessary for basic, everyday survival, such as food stamps or housing benefits. In the database, government benefits also include immigration status and deportation. Government benefits consequences have a high concentration of fraud triggers—a relationship that is reasonably justifiable based on the facts of the offense. However, considering the vital nature of the benefits at stake, short durations and discretionary consequences should be preferred here. Education shows a very high concentration in any felony and any misdemeanor category. Together with the high representation of any felony or any misdemeanor in the employment and occupational licensing categories, this represents an
 alarming trend of denying a vast array of economic opportunities to anyone convicted of any crime. All of these categories show an above-average concentration in controlled substances, with education and housing being particularly high. This is problematic because there is no particular connection between these categories and controlled substances.

Finally, housing and family rights show a high concentration in both person offenses and sex offenses, as anticipated, due to the pervasiveness of consequences impacting sex offender residency.

Motor vehicle consequences and Recreational Licensing

These categories are the most promising in terms of being narrowly tailored to the underlying facts of the offense. Motor vehicle consequences are overwhelmingly concentrated in the motor vehicle offense category and recreational license consequences are overwhelmingly concentrated with recreational license offenses. Ideally every category would look like this or better. Motor vehicle license consequences are also commonly associated with controlled substance convictions, due in part to federal mandate. With the exception of consequences triggered only by driving under the influence, these consequences are not narrowly tailored to the offense and can serve no purpose other than being punitive.

Government Contracting and Political and Civic participation

These categories are partially narrowly tailored, showing a very high concentration in public corruption offenses, one of the most easily defended associations this table demonstrates.

64 Due to the primary purpose of the database being to serve a search engine, violent sex offenses are coded as both sex offenses and crimes of violence. This is the primary reason that crimes of violence are concentrated so strongly in housing and family consequences. The remainder of this relationship can be explained primarily by consequences relating to domestic violence, which are reasonably tailored to the offense here.

65 See Demleitner, supra note 8, at 1037.

66 See Standards, supra note 1, § 19-2.6.

67 See Chin, supra note 6, at 259.

Government contracting consequences also have a high concentration of fraud triggers, another easily defensible association. However, these positives are blunted by a strong concentration of any felony triggers. Felon disenfranchisement in particular is barred by the guidelines and has been criticized as having the purpose of enforcing white supremacy.

Procedural Arbitrariness by Category

Finally, table II also breaks down each offense category on the basis of percentage of consequences considered most arbitrary and least arbitrary. There is little variance outside of two points of interest. First, motor vehicle offenses are overwhelmingly more likely to be among the least arbitrary. This is most likely because permanent sanctions are exceedingly rare in the motor vehicle category. Second, public corruption and sex offenses score lowest in both the least arbitrary and most arbitrary categories. This implies a trend of wanting to maintain severity but make an effort to ensure that the consequence is at least partially tailored to the underlying acts.

VI. Conclusion

The creation of this database should be a watershed moment in the history of collateral consequences. No more will hand wringing about the incomprehensible and mysterious mass of collateral consequences be a valid excuse for inaction from any actors in the criminal justice system. These results demand action from every actor in the system.

Legislatures, even from those states that scored well compared to their peers, must take steps to reduce the number of collateral consequences generally, but they must especially reduce the number of the worst offenders. The 13,471 mandatory, permanent consequences with no specific relief effectively mean that nearly every crime carries a life-long sanction of some sort. These consequences are not specifically tailored to
the underlying criminal conduct, as 5,370 of them are triggered by any felony. This should be at the forefront of every debate on collateral consequences reform that arises in the future.

Courts should likewise respond to the existence of this database by ceasing to enforce the collateral consequence rule, and especially the affirmative misadvice exception. Provided the ABA and its contributors continue to maintain the database as an accurate repository, there is no longer any permissible justification for such a rule that encourages secrecy about collateral consequences.

Finally, and most importantly, practitioners must make use of the database. They must familiarize themselves with the most common consequences in their jurisdiction and be willing and able to employ the database to research more unusual consequences that will be of relevance to their individual clients considering a plea. Whether or not their jurisdiction requires such notice, basic fairness certainly does.

Legislative action is also necessary in tailoring consequence types to triggering offense types. Any felony or misdemeanor triggers should be exceedingly rare, since these triggers are necessarily not tailored to the individual offense in any way, but instead they are overwhelmingly common. Consequences that are tailored to offenses that have no factual relationship to each other also require immediate attention, for example controlled substances offenses and housing.

The statistical evidence gleaned from our correlation analysis is far less groundbreaking. Other than lending some weak evidence to support preexisting notions on the origins of collateral consequences, no significant revelations were discovered. This could mean that the true variables that drive the growth of collateral consequences have yet to be identified.

Finally, the usefulness of the database for statistical purposes could be limited by the fact that it is, first and foremost, designed to be searchable by end users. Due to significant overlap in several categories and decisions that make sense from the end user search perspective, but not necessarily an analytical perspective, a more thorough parsing of the database may be necessary before stronger trends can be revealed.
Alex Tway is currently a Senior Research Assistant at George Washington University Law School, working on a project that will code and statistically analyze the outcomes of child custody cases involving allegations of abuse and/or parental alienation. Prior to this he was a Reviewer for the American Bar Association National Inventory of Collateral Consequences Where he helped create and review the database underlying this article and developed a passion for empirical analysis in and of law. This passion has carried him through to his current position, which, like the NICCCC, intends to create as complete a database as possible. Prior to coming to the ABA Mr. Tway worked as a consulting attorney at Lawlor & Englert, assisting in Federal criminal defense and appellate practice. Mr. Tway is a graduate of George Washington Law School (J.D.) and Drexel University (B.S.).

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THE COMMISSION RECOGNIZED THAT BURDENS IMPOSED ON INDIVIDUALS CONVICTED OF FEDERAL AND STATE CRIMINAL LAWS OFTEN MADE IT DIFFICULT FOR THOSE INDIVIDUALS TO BE ABLE TO SUCCESSFULLY RE-ENTER SOCIETY AFTER SERVING WHATEVER CRIMINAL SENTENCE WAS IMPOSED ON THEM.