



Never Ending Punishments: A Critical Commentary on Collateral Consequences

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INTRODUCTION

Convicted felons are perhaps one of the most marginalized demographics in America today. This marginalization is compounded by collateral consequences which, as this essay will show, noticeably inhibit convicted felons from full societal membership. Collateral consequences are imposed upon all citizens, over 16 million Americans, representing 7.5% of the adult population, who have a felony conviction (Uggen, Manza, & Thompson 2006). It is no longer enough that felons are punished via incarceration for their actions; collateral consequences represent a type of never ending punishments.

Since the 1970s, the incapacitation model has displaced the rehabilitative model as the dominant penal ideology, producing mass incarceration on a scale never before seen in history (Irwin, 2005). This “incarceration binge” has been, perhaps, the most thoroughly implemented social program of modern times (Currie, 1998). Furthermore, the enormous growth in prison populations, according to Tewksbury and Demoiselle (2003), can be seen as evidence that the

criminal justice system is more concerned with controlling a and incarcerating individuals while not giving much deliberation as to the rehabilitation of offenders. By applying a critical lens to examine felony disenfranchisement and employment barriers for persons convicted of felony crimes this commentary seeks to ask the question of when, if ever, has a person convicted of a felony paid his/her debt to society in full?

COLLATERAL CONSEQUENCES

Collateral consequences are regularly imposed outside the traditional sentencing framework and are considered “civil penalties.” As a result convicted felons are regularly denied access to the very social service programs which could enhance rehabilitation, they include but are not limited to: denial to public housing, restrictions upon driving privileges, access to welfare benefits, restricted ability to receive federal financial aid, discrimination in both the private or public sector employment, as well as the disenfranchisement, or the denial of participating in the democratic process by

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way of the right to vote.

Collateral consequences are blanket restrictions which commonly do not have any relevance to individual responsibility or previous criminal behavior. This is exemplified by the Higher Education Act of 1998, which restricts people with drug convictions from receiving Federal grants or loans which may be used to advance their education. This restriction *only* applies to drug convictions; convictions of a violent or sexual nature are not subject to this restriction. As such, collateral consequences of conviction can in no way reflect nor enhance the criminological goals of deterrence or rehabilitation. Instead of encouraging the reintegration into mainstream society, collateral consequences certify that the convicted felon is somehow permanently flawed and thereby morally inferior. For people who have been convicted of a felony and have paid their debt to society, as directed by the sentencing court, collateral consequences assert that they are inherently unreliable and unworthy of the rights and privileges of societal membership.

EMPLOYMENT BARRIERS

For the over 700,000 convicted felons released from prison in 2009 (Sabol & West, 2010) restrictions upon employment will be an important variable as to whether they will be returned to prison, as desistance research has repeatedly shown that stable employment is the strongest indicator of exiting a criminal lifestyle (Sampson and Laub, 1993; Laub & Sampson, 2003; Uggen, 2000). Lack of meaningful employment often will promote criminality, while gainful employment has been shown to lessen criminal conduct.

Overall, collateral consequences have been imposed against the hiring or licensing of convicted felons resulting in lifetime bans in over 800 different occupations nationwide

(Alarid, Cromwell, & del Carmen, 2008) even though empirical research has yet to show support for the utility of such lifetime blanket employment bans. Perhaps the most inclusive restrictions upon employment can be seen within the Federal government. The Federal Aviation Administration has issued an outright ban of convicted felons for employment in many airport-related occupations (Wheelock, 2005), as well as restrictions barring military enlistment (Frana & Schroeder, 2008). As employment is a key variable within the desistance process, the appropriateness of these government sanctions is questionable.

A criminal record presents a major barrier to employment; in fact, a survey of employers in the Los Angeles area found that over 50% of employers conduct some type of criminal background check (Stoll, Raphael, & Holzer, 2006). Additionally, 60% of employers state that they would not knowingly hire a job candidate with a criminal background (Holzer, 1996).

Pager (2003) provides empirical evidence that any indication of a criminal past “severely limits subsequent employment opportunities” (p. 960). Her research found that holding all other variables constant, a criminal record has an immensely negative effect on employment opportunities, this effect is compounded when race is introduced as findings show that only 5% of African Americans with fictitious criminal records received callbacks from prospective employers.

FELONY DISENFRANCHISEMENT

Disenfranchisement, the denial of right to vote for people with a felony conviction, has by far received the majority of scholarly, political and media attention when it comes to collateral consequences. Forty-eight states and the District of Columbia bar felons from voting while in prison; only two states, Maine and Vermont, permit prisoners the

right to vote (King, 2008). Nationwide, felony disenfranchisement disproportionately affects political representation within African American communities' as over 33% of African American males have a felony conviction (Uggen, et al., 2006).

Section Two of the 14th Amendment to the U.S. Constitution gives states explicit constitutional permission to disenfranchise criminals. The text of this amendment states that all males 21 years of age have the right to vote "*except for participation in rebellion, or other crime.*" With this one line States were granted the authority to disenfranchise individuals convicted of criminal behavior. U. S. Supreme Court Justice Thurgood Marshall (1974) wrote that "[T]he denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens" (*Richardson v. Ramirez*, 418 U.S. 24).

One possible argument to support felony disenfranchisement is based upon the logic that a principal goal of elections are to elect representatives to establish criminal justice policies, therefore, a convicted felon *may* vote to elect officials who do not support the current oppressive criminal justice policies. In other words, they will be biased in their voting. However, bias does not exclude the general population from voting. In fact, voting is explicitly about expressing individual biases. In short, by excluding people convicted of felony offenses from the voting process obscures the politics of criminal justice towards one side of the debate.

As Americans enter another Presidential election cycle (2012) felony disenfranchisement is a threat to the very principles of democracy. This threat to democracy was highlighted in the 2000 Presidential election when

disenfranchisement legislation in Florida was critiqued. Florida, at that time, had the nation's highest rate of disenfranchised voters: 827,000 (Uggen & Manza, 2002). Using statistical models, Uggen and Manza (2002) argue that had these former felons been allowed to vote Al Gore would have been elected president in 2000.

Kentucky remains one of only two states, along with Virginia, which impose a lifetime ban on voting by citizens convicted of a felony. This restriction can only be lifted by way of a gubernatorial pardon or clemency. In Kentucky over 6% of the overall population and 23% of the African American population is restricted from voting due to a felony conviction (King, 2008). A basic tenant of democracy is the right of citizens to elect those who govern; banning convicted felons from the vote is a danger to this fundamental principle.

CONCLUSION & DISCUSSION

This commentary has addressed only two of the numerous collateral consequences which are placed upon individuals who are convicted of a felony: voting and employment. The application of collateral consequences raises some serious questions, most notably, are these discriminatory practices? Whereas it may appear, on the surface, the courts do not agree. This may be due to the fact that the status of "convicted felon" is an achieved status. After all, unlike racial minorities convicted felons are responsible for their membership within this classification and therefore "only irrational discrimination against them violates" the law (*U.S. v. McKenzie*, 99 F.3d 813).

In response Bushway and Sweeten (2007) have proposed "sunset clauses" where former felons would have his/her criminal record sealed to all but criminal justice professionals after a 7 year period of desistance. This is similar to The Fair Credit Reporting Act which provides that

consumers who have perhaps experienced bankruptcy and/or collection procedures are granted clemency after 10 years. This allows the consumer to learn from past financial mistakes and start anew. A similar policy has been in place in Canada for decades and has been successful in assisting felons become productive citizens.

Canada has implemented a nationwide policy whereby five years after the completion of a criminal sentence citizens can apply to have their conviction “set aside.” This is not a full pardon as criminal justice officials will have access to past criminal records as needed for investigation and, if necessary, prosecuting purposes. This policy allows former felons to legally state that they have not been convicted of a crime on employment applications thereby bypassing numerous employment barriers. Over 291,000 people have taken advantage of this legislation; of these only 3.18% have been convicted of additional criminal activity. The data suggest that setting aside criminal conviction is a successful practice (Ruddell & Winfree, 2006).

It must be noted that this policy provides symbolic restoration of full citizenship and provides the government with a way to express that one has “reformed” and gives the reformed felon something to lose. This unique policy is a prime example of a sunset clause which allows a citizen full legal rights after an extended period of desistance. The fact that over 96% of those who have had their criminal past set aside seem to have abstained from criminal activity demonstrates that this is an effective policy. In closing, this essay has shown that collateral consequences have an effect which clearly diminishes the rights and privileges of citizens who have previously been convicted of a felony. Within the American judicial system the concept of “paying ones debt to society” is a hollow statement, as upon successful completion of

the court imposed sentence the original conviction is not forgiven. As has been demonstrated by the example of setting aside convictions in Canada and providing full citizenship to former felons reduces the reliance upon prisons for addressing crime. This can only be accomplished through the electoral processes, which in Kentucky former felons are excluded from thereby leaving them voiceless and powerless, it then becomes the responsibility of an informed citizenry to advocate change on their behalf.

If society does not grant reformed convicts a clear path to reintegrate to mainstream society, by way of employment opportunities and suffrage, we are doing nothing more than creating a divided society populated with over 16 million second class citizens, a “disposable class” (Irwin, 2005) with no motivation to change or reason to desist from a life of crime thereby jeopardizing the safety of all citizens.

REFERENCES

- Alarid, F. L., Cromwell, P. F., & del Carmen, R. V. (2008). *Community-Based Corrections*, (7th Ed.). Belmont, Ca: Thompson-Wadsworth.
- Bushway, S. D., & Sweeten, G. (2007). Abolish lifetime bans for ex-felons. *Criminology and Public Policy*, 6(4), 697-706.
- Currie, E. (1998). *Crime and Punishment in America*. New York: Henry Holt and Company.
- Frana, J. F., & Schroeder, R. D. (2008). Alternatives to incarceration. *Justice Policy Journal* 5(2), 1-32.
- Holzer, H. (1996). *What employers want: Job prospects for less-educated workers*. New York: Russell Sage Foundation.
- Irwin, J. (2005). *The Warehouse Prison: Disposal of the New Dangerous Class*. Los Angeles, Ca: Roxbury Publishing Co.

- King, R. S (2008). Expanding the vote: State felony disenfranchisement reform, 1997-2008. Washington, D.C: The Sentencing Project.
- Laub, J. H., & Sampson, R. J. (2003). *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70*. Cambridge, Mass: Harvard University Press.
- Pager, D. (2003). The mark of a criminal record. *American Journal of Sociology*, 108: 937-975
- Ruddell, R. and Winfree, Jr., L. T. (2006) Setting aside criminal convictions in Canada: A successful approach to offender reintegration. *The Prison Journal* (86)4, 452-469.
- Sabol, W. & H.C. West. (2010). *Prisoners in 2009*. NCJ 231675. Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics.
- Sampson, R. J. & Laub, J. H. (1993). *Crime in the Making: Pathways and Turning Points through Life*. Cambridge, Mass: Harvard University Press.
- Stoll, M., Raphael, S., & Holzer, H. (2006) Will employers hire ex-offenders? Employer preferences, background checks and their determinants. In M. Patillo-McCoy, D. Weiman, and B. Western (eds.) *The Consequences of Mass Incarceration on Families and Communities*. New York: Russell Sage Foundation.
- Tewksbury, R., & Demoiselle, M. T. (2003). The Good, the bad, and the (sometimes) ugly truths: American penal goals and perspectives. *American Journal of Criminal Justice*. 28.
- Uggen, C. (2000). Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism. *American Sociological Review* 65:529-46.
- Uggen, C., & Manza J. (2002). Democratic contraction? The political consequences of felon disenfranchisement in the United States. *American Sociological Review* 67:777-803
- Uggen, C., Manza, J., & Thompson, M. (2006). Citizenship, democracy, and the civic reintegration of criminal offenders. *Annals of the American Academy of Political and Social Science*, 605, 281-310.
- Wheelock, D. (2005). Collateral consequences and racial inequality: Felon status restrictions as a system of disadvantage. *Journal of Contemporary Criminal Justice* 21(1), 82-90.