

COLLATERAL CONSEQUENCES RESOURCE LIST JUNE 2010¹

Clients who have been convicted and incarcerated face numerous penalties beyond those imposed in the courtroom. These collateral sanctions may include employment discrimination, occupational restrictions, exclusions from public housing, loss of welfare or food stamps, ineligibility for student loans, exposure to disease, disintegration of family ties, financial loss, barriers to reentry, and deportation. Such sanctions should be part of the judge's consideration of the factors under 18 U.S.C. § 3553(a) and may be offered as reasons to mitigate the length of the incarceration and conditions of probation or supervised release or to lessen the seriousness of the client's criminal history. This resource list is designed to serve as a starting point for exploring the collateral consequences of convictions and imprisonment and for educating your judge about these "invisible punishments."

IN GENERAL

A. Case Law

Gall v. United States, 128 S. Ct. 586 (2007) ("It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.") (emphasis added).

United States v. Gardellini, 545 F.3d 1089 (D.C. Cir. 2008) (affirming below-guideline sentence based in part on court's findings that defendant suffered substantial mental and personal stress as a result of his prosecution, because the court's findings "were directly relevant to the § 3553(a) analysis, which requires sentences to reflect, among other things, 'the history and characteristics of the defendant,' the need to 'protect the public from further crimes of the defendant,' the need to 'provide just punishment for the offense,' and the need to 'afford adequate deterrence'. The district court's conclusion rests on precisely the kind of defendant-specific determinations that are within the special competence of sentencing courts, as the Supreme Court has repeatedly emphasized.") (citing *Gall*, 128 S. Ct. at 597; *Rita v. United States*, 127 S. Ct. 2456, 2469 (2007)).

United States v. Mateo, 299 F.Supp.2d 201 (S.D. N.Y. 2004) ("[T]here is more to the concept of just punishment and deterrence of the particular individual than the temporal and physical hardships imposed by a sentence as measured by the length of time in prison pre-specified by a guidelines range. In fact, beyond the offender's actual deprivation of liberty when incarcerated, a host of other penalties and burdens always attend criminal conviction, to name a few: losses of family life, of socioeconomic status, of employment and career opportunities; diminution of civil rights and entitlements; and countless

¹ Prepared by Denise Barrett and Sara Silva of the Sentencing Resource Counsel Project. For additional cases involving below-guideline sentences, see David Hemingway and Janet Hinton, *Departures and Variances* (last updated Sept. 1, 2009), available at www.fd.org/odstb_SentencingResource3.htm.

humiliations and indignities commonly associated with living in confinement. . . . In essence, the court's discretion to depart is a manifestation of the necessity for a just sentencing scheme to include provisions for that reasoned intuitive judgment, rather than a hard, deterministic formula, to govern the rare case. . . . The concept of what is 'just punishment' thus contemplates a prospective, empirical assessment, necessarily imprecise, of the accumulation of reasonably foreseeable, ordinary hardships and suffering that any given offender is likely to experience in the typical case during the course of a particular range of imprisonment.") (citations omitted).

B. Studies

ABA Standards on Collateral Sanctions, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (January 2009), available at <http://www.abanet.org/cecs/internalexile.pdf>.

Nora V. Deimleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. 153 (1999).

Legal Action Center, *After Prison: Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records* (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide* (June 2008), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=115.

Pew Center on the States, *One in 100: Behind Bars in America 2008* (Feb. 28, 2008), available at http://www.pewcenteronthestates.org/report_detail.aspx?id=35904.

Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623 (2006).

McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 Univ. of Toledo L. Rev. 479 (2005).

Sentencing Project, Marc Mauer and Chesney-Lind, eds., *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2002), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=1.

Amy L. Solomon, Michelle Waul, Ashley Van Ness, Jeremy Travis, *Outside the Walls: A National Snapshot of Community-Based Prisoner Reentry Programs*, Reentry National Media Outreach Campaign (Jan. 27, 2004), available at http://www.urban.org/UploadedPDF/410911_OTWResourceGuide.pdf.

Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (2005), available at <http://www.urban.org/uipress/publications/211157.html>.

U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences upon Conviction* (Nov. 16, 2003) (describing federal consequences of convictions on offenders' ability to vote; serve on federal jury; hold federal office, federal employment or certain federally-issued licenses; serve in armed forces; participate in federal contracts or programs; receive federal benefits; become a U.S. citizen or remain in the U.S.; and live free from registration or community notification requirements), available at http://www.justice.gov/pardon/collateral_consequences.pdf.

Urban Institute, *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute's Prisoner Reentry Portfolio* (Jan. 2006), available at http://www.urban.org/UploadedPDF/411289_reentry_portfolio.pdf.

Natasha H. Williams, *Prison Health and the Health of the Public: Ties that Bind, Community Voices*, 13 *Journal of Correctional Health* 80 (2007) (Abstract: "The social, economic, and health consequences of incarceration can no longer be ignored. The disparities experienced by individuals in U.S. jails and prisons reflect the human and social consequences of political policies and cultural biases. More punitive sentencing policies have had a direct impact on ethnic and minority communities. Increasing rates of incarceration and the disproportionate impact on African Americans have resulted in the destruction of entire families and urban communities and increasing health disparities. Rather than mirroring the general population, the proportion of people of color in U.S. prisons and jails reflects the prevailing economic, health, and educational disparities. Rates of communicable and chronic disease during incarceration and upon release demonstrate the severity of these disparities and the extent of unmet health needs, including HIV, sexually transmitted diseases, tuberculosis, chronic disease, mental illness, and substance abuse. The complications of these conditions and the lack of resources and the barriers inmates face when they return to the community are national problems that must be addressed through policy decisions and collaboration and coordination at the local, state, and federal levels.").

Donna Willmott & Juliana van Olphen, *Challenging the Health Impacts of Incarceration: The Role for Community Health Worker*, 3 *Californian Journal of Health Promotion* 38 (2005), available at <http://www.csuchico.edu/cjhp/3/2/38-48-willmott.pdf>.

Future Resources

ABA Criminal Justice Section has been awarded a three year grant to compile a comprehensive and functional inventory of the collateral consequences of criminal convictions in the laws and practices of federal, state, and territorial jurisdictions.

EMPLOYMENT

A. Case Law

Loss of employment was a permissible factor for a court to consider at sentencing, even in the era of mandatory guidelines. *See Koon v. United States*, 518 U.S. 81, 110 (1996) (even though the guidelines prohibit courts from departing on the basis of the defendant's socioeconomic status, a court can still consider the effect of conviction on employment because "a defendant's career may relate to his or her socioeconomic status, but the link is not so close as to justify a categorical exclusion of the effect of conviction on a career. . . . [S]ocioeconomic status and job loss are not the semantic or practical equivalents of each other."); *see also id.* at 114 (Stevens, J., concurring) ("In my opinion, the District Court did not abuse its discretion when it relied on the unusual collateral employment consequences faced by these petitioners as a result of their convictions. I therefore except Part IV-B-1 from my otherwise complete endorsement of the Court's opinion."). Although the majority in *Koon* concluded that the Commission had adequately considered such effects in formulating USSG §5H1.4, *see id.* at 11, nothing in *Koon* prohibits courts from considering them when fashioning a sentence under 18 U.S.C. § 3553(a). *See also id.* at 110-11 ("[I]t is not unusual for a public official who is convicted of using his governmental authority to violate a person's rights to lose his or her job and to be barred from future work in that field. Indeed, many public employees are subject to termination and are prevented from obtaining future government employment following conviction of a serious crime, whether or not the crime relates to their employment.") (citations to California, Kentucky, and Pennsylvania statutes omitted).

Lawrence v. Texas, 539 U.S. 558 (2003) (striking down misdemeanor statute criminalizing private, consensual sexual contact between people of the same gender, in part, because the "stigma" imposed by a conviction "is not trivial," in that it requires registration as a sex offender and disclosure on job applications, and results in "the other collateral consequences always following a conviction").

United States v. Stall, 581 F.3d 276 (6th Cir. 2009) (affirming on plain error review district court's finding that the collateral consequences of defendant's child pornography conviction should factor into its analysis of what constitutes "just punishment," including "the interruption of defendant's education and employment, the dissolution of his engagement, and the stigma attached to this specific offense").

United States v. Anderson, 533 F.3d 623 (8th Cir. 2008) (affirming departure for defendant convicted on insider trading and money laundering based in part on ways in which defendant "suffered atypical punishment such as the loss of his reputation and his company").

United States v. Pauley, 511 F.3d 468 (4th Cir. 2007) (affirming below guideline sentence for child pornography defendant based in part on fact that defendant "lost his teaching certificate and state pension as a result of his conduct. Consideration of these facts is

consistent with § 3553(a)'s directive that the sentence reflect the need for 'just punishment' and 'adequate deterrence'.") (citing 18 U.S.C. § 3553(a)(2)(A) & (B)).

United States v. Jones, 158 F.3d 492 (10th Cir. 1998) (district court "did not abuse its discretion in determining the collateral employment consequences Mr. Jones would suffer as a result of incarceration were atypical . . . [because] the economically depressed area in which Mr. [Jones] lived would attach unique burdens to his incarceration" and because "neither the Sentencing Guidelines nor Tenth Circuit precedent categorically precludes the district court's consideration of employment history in making its departure decision").

United States v. Lupton, 2009 WL 1886007 (E.D. Wis. June 29, 2009) (although court refused to mitigate sentence based on loss of employment that was connected to criminal activity, "I did note that defendant lost not only the broker job with Equis, which flowed from the crimes, but also the job he obtained thereafter . . . which was not so related. . . . I took these factors into account.").

United States v. Vigil, 476 F.Supp.2d 1231 (D. N.M. 2007) (imposing below-guideline sentence, in part, based on fact that defendant "suffered incalculable damage to his personal and professional reputation as a result of tremendous media coverage of his case and the case against his co-conspirators" and "was forced to resign his position as State Treasurer" because "when evaluating the justness of Vigil's punishment for the purposes of reaching a reasonable sentence under *United States v. Booker*, it is important to consider all other forms of punishment Vigil has already suffered").

United States v. Jagemann, 2007 WL 2325926 (E.D. Wis. Aug. 8, 2007) (finding that prison was not necessary to satisfy the purposes of punishment for defendant convicted of possession with intent to distribute cocaine, in part, because "defendant faced significant collateral consequences based on his conviction, including the possible suspension of his license by state authorities and his prescription-writing privileges by the DEA. This added to both the punitiveness and the deterrent effect of the felony conviction, in a manner not faced by a defendant who did not hold such licenses") (citing 18 U.S.C. §§ 3553(a)(2)(A) & (B)).

United States v. Nowak, 2007 WL 528194 (E.D. Wis. Feb. 15, 2007) (imposing probation sentence on defendant convicted of selling a firearm to a person he knew was a felon, in part, because defendant's lack of education, health problems and felony record made it "highly unlikely [that] he would find comparable employment after a prison term," and the court found that it "can and should consider the collateral consequences in deciding the appropriate sentence").

United States v. Stone, 374 F.Supp.2d 983 (D. N.M. 2005) (imposing below-guideline sentence on defendant convicted of aggravated sexual abuse, in part because defendant "suffered a lot as a result of his crime," including being terminated from his job and divorced by his wife; his sentence of incarceration "coupled with Stone's personal losses,

reflects the seriousness of his offense, promotes respect for the law, and provides just punishment”).

United States v. Redemann, 295 F.Supp.2d 887 (E.D. Wis. 2003) (departing downward, in part, because “a great deal of adverse publicity in his small town . . . injured his business, which was dependant on defendant’s reputation and good will” which “partially satisfied the need for just punishment, . . . will likely deter him from future misconduct, which mitigates the need to protect the public from further crimes,” and served general deterrence because “someone else in defendant’s position tempted to also become involved in such a scheme need only consider what happened to defendant in order to reconsider”).

United States v. Samaras, 390 F.Supp.2d 805 (E.D. Wis. 2005) (imposing below guideline sentence, in part, because “as a consequence of his conviction and sentence, defendant lost a good public sector job, another factor not supported by the guidelines”).

United States v. Scott, 503 F.Supp.2d 1097 (E.D. Wis. 2007) (finding that just punishment did not require prison sentence, in part, because “[d]efendant also suffered significant collateral consequences in the probable loss of her . . . job [as an educational assistant with Milwaukee Public School system], which added to the punitiveness of her conviction”).

United States v. Wachowiak, 412 F.Supp.2d 958 (E.D. Wis. 2006) (noting that “the guidelines failed to account for the significant collateral consequences defendant suffered as a result of his conviction,” which included that “he was compelled to resign as piano teacher of children and as a church musician” and that “[h]is future career as a teacher was ruined”).

B. Studies

Svenja Heinrich, *Reducing Recidivism through Work: Barriers and Opportunities for Employment of Ex-Offenders*, Great Cities Institute, University of Illinois at Chicago (Sept. 2000).

Webster Hubbell, *Without Pardon: Collateral Consequences of a Felony Conviction*, 13 Fed. Sentencing Rpt. 223 (2000-2001) (recounting the various jobs that he, a convicted felon, Associate Attorney General, and formerly the third-highest law enforcement official in the United States, is now permanently barred from holding).

Devah Pager, *Evidence-Based Policy for Successful Prisoner Reentry*, Reaction Essay (2006), available at http://www.princeton.edu/~pager/cpp_pager.pdf.

U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences upon Conviction* (Nov. 16, 2003) (describing among other things federal consequences of convictions on offenders’ ability to hold federal office, federal

employment or certain federally-issued licenses), available at http://www.justice.gov/pardon/collateral_consequences.pdf.

HOUSING

A. Case Law

United States v. Anderson, 533 F.3d 623 (8th Cir. 2008) (affirming departure for defendant convicted on insider trading and money laundering based in part on ways in which defendant “suffered atypical punishment such as the loss of his reputation and his company”).

United States v. Pegross, 2008 WL 3286263 (E.D. Mich. Aug. 7, 2008) (refusing to consider the loss of defendant’s home and investment properties, among other collateral consequences, not because they are not relevant but simply because defendant “does not explain under which provision of § 3553(a) the Court should consider these unfortunate effects of his incarceration”).

See also Special Offender Groups, Sex Offenders, *infra*.

B. Studies

Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 Fed. Probation 20 (June 2007) (discussing indicia of “trustworthiness” that landlords weigh in reviewing application and discussing the additional concern of tort liability).

Legal Action Center, *Housing Laws Affecting Individuals with a Criminal Conviction* (2000), available at http://lac.org/doc_library/lac/publications/housing_laws.pdf (last visited June 1, 2010).

Legal Action Center, *Safe at Home: A Reference Guide for Public Housing Officials on the Federal Housing Laws Regarding Admission and Eviction Standards for People with Criminal Records* (Fall 2004), available at http://www.lac.org/doc_library/lac/publications/Safe@Home.pdf.

Numerous federal statutes restrict certain offenders from federal housing (vouchers and public housing) programs. See generally Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide*, Federal System (June 2008), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=115; U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences upon Conviction* (Nov. 16, 2003), available at http://www.justice.gov/pardon/collateral_consequences.pdf; see. e.g., 42 U.S.C. § 13663(a) (barring convicted sex offenders subject to mandatory lifetime registration requirements); 42 U.S.C. § 1437n(f)(1) (barring persons convicted of manufacturing methamphetamine on premises receiving federal assistance); 42 U.S.C. § 13661(a) (restricting persons evicted from federally assisted housing for drug-related criminal

activity from readmission for three years); 42 U.S.C. § 13661(c) (restricting persons whose criminal activity occurred within “reasonable period of time prior to admission decision”).

FINANCES

A. Case Law

United States v. Anderson, 533 F.3d 623 (8th Cir. 2008) (affirming departure for defendant convicted on insider trading and money laundering based in part on ways in which defendant “suffered atypical punishment such as . . . the ongoing case against him from the Securities and Exchange Commission”).

United States v. Chavez, 230 F.3d 1089 (8th Cir. 2000) (Bright, J., concurring) (criticizing lengthy sentences required by Sentencing Guidelines, which require that defendant convicted of drug offenses “spend thirty-five years in federal prison. It costs the United States government and its taxpayers approximately \$22,000 per year to keep a federal offender in prison. Therefore, it will cost the taxpayers \$836,000 for his incarceration. This sentence is a waste of time, money, and, more importantly, a man’s life. These unwise Sentencing Guidelines put nonviolent offenders in prison for years, they ruin the lives of the prisoners, their families, and they also hurt our economy and our communities by draining billions of dollars from the taxpayers and keeping productive members of society locked up. The opportunity costs imposed by the Sentencing Guidelines are staggering.”).

United States v. Vigil, 476 F.Supp.2d 1231 (D. N.M. 2007) (imposing below-guideline sentence, in part, based on fact that defendant and his family “have endured the expense and emotional cost of two very lengthy, public trials” and have “incurred several hundred thousand dollars in attorney fees and costs” because “when evaluating the justness of Vigil’s punishment for the purposes of reaching a reasonable sentence under *United States v. Booker*, it is important to consider all other forms of punishment Vigil has already suffered”).

United States v. Adelson, 441 F.Supp.2d 506 (S.D. N.Y. 2006) (enormous restitution award “virtually guarantees that Adelson will be making substantial restitution payments for the rest of his life. So far as monetary sanctions are concerned, therefore, the Court did indeed impose a life sentence.”).

United States v. Angelos, 345 F.Supp.2d 1227 (D. Utah 2004) (“the 61-year sentence the court is being asked to impose in this case will cost the taxpayers . . . about \$1,265,000,” money that could be “spent on other law enforcement or social programs that in all likelihood would produce greater reductions in crime and victimization”).

United States v. Redemann, 295 F.Supp.2d 887 (E.D. Wis. 2003) (departing downward, in part, because “defendant lost a lot before he ever set foot in this courtroom,” including in part that he “was civilly prosecuted by the OCC before the filing of criminal charges,

which resulted in a \$75,000 penalty, a \$100,000 restitution order, and debarment from future involvement with federally regulated financial institutions,” which “partially satisfied the need for just punishment, . . . will likely deter him from future misconduct, which mitigates the need to protect the public from further crimes,” and serves general deterrence as well because “someone else in defendant’s position tempted to also become involved in such a scheme need only consider what happened to defendant in order to reconsider”).

United States v. Hughes, 825 F.Supp. 866 (D. Minn. 1993) (“The foreseeable costs to society of this [lengthy sentence of] incarceration are at least twofold. First, such lengthy incarceration substantially reduces the likelihood that the defendant will be able to become a productive member of society upon his release. Second, the monetary cost to the American taxpayer of this incarceration will exceed \$270,000. Further, the non-rehabilitation purposes of incarceration – retribution, deterrence and incapacitation – would all be more than adequately served by a far shorter sentence. Both society and the defendant will pay a dear cost for this sentence and receive very little in return.”).

United States v. Gaind, 829 F.Supp. 669 (S.D. N.Y. 1993) (“[T]he destruction of defendant’s business has already achieved to a significant extent some although not all of the objectives otherwise required to be sought through the sentencing process. Elimination of the defendant’s ability to engage in similar or related activities – or indeed any major business activity – for some time, and the substantial loss of assets and income resulting from this have decreased for the foreseeable future his ability to commit further crime of the type he was tempted to undertake, and constitutes a source of both individual and general deterrence. Others engaged in similar activities or considering engaging in them have doubtless already learned through informal sources that loss of the business entity involved is an obvious consequence of such illegal behavior. Because of the destruction of the defendant’s testing business, the necessity for achieving the purposes of sentencing through sentencing itself has been reduced.”).

B. Studies

Counsel of State Governments, *Repaying Debts* (providing “research findings, with supporting statistics, to explain the origins and extent of the problems associated with the repayment responsibilities of people released from prisons and jails”), available at <http://reentrypolicy.org/publications/1688:file>.

Prisoner Reentry Institute at John Jay College of Criminal Justice, *Sentencing for Dollars: The Financial Consequences of a Criminal Conviction* (Feb. 9, 2007), available at www.jjay.cuny.edu/SENTENCINGFORDOLLARS_moneybackground.ppt.

Sentencing Project, Marc Mauer, *Thinking about Prison and Its Impact in the 21st Century* (April 14, 2004) (describing the “economic distortions” caused by prison-oriented sentencing policy), available at http://www.sentencingproject.org/doc/publications/inc_osu_reckless.pdf.

EDUCATION

A. Case Law

United States v. Stall, 581 F.3d 276 (6th Cir. 2009) (affirming on plain error review district court’s finding that the collateral consequences of defendant’s child pornography conviction should factor into its analysis of what constitutes “just punishment,” including “the interruption of defendant’s education and employment, the dissolution of his engagement, and the stigma attached to this specific offense”) (emphasis added).

B. Studies

D. Karpowitz & M. Kenner, *Education and Crime Prevention: The Case for Reinstating Pell Grant Eligibility for the Incarcerated*, New York, Bard College (1994), available at http://www.bard.edu/bpi/pdfs/crime_report.pdf.

Peter Leone, Michael Wilson, & Michael P. Krezmien, *Understanding and Responding to the Education Needs of Special Populations in Adult Corrections*, presented at the John Jay Reentry Roundtable on Education, March 31 – April 1, 2008, available at <http://www.jjay.cuny.edu/ReentryRoundtableonEducation.pdf>.

The Urban Institute, *From the Classroom to the Community: Exploring the Role of Education During Incarceration and Reentry* (2009), available at http://www.urban.org/uploadedpdf/411963_classroom_community.pdf.

The Urban Institute, *The Effects of Postsecondary Correctional Education* (May 2009), available at http://www.urban.org/UploadedPDF/411952_PSE_FINAL%205_29_09_webedited.pdf.

CIVIL RIGHTS / BENEFITS

A. Case Law

United States v. Hensel, 2010 WL 1745278 (10th Cir. May 3, 2010) (“There are many significant consequences of being convicted of a felony. For example, felons often lose many basic civil liberties, including the right to vote or hold public office.”).

B. Studies

Charts prepared by Sentencing Resource Counsel for use in *Logan v. United States*, 128 S. Ct. 475 (2007), available at http://www.fd.org/odstb_LoganCharts.htm.

GAO, *Drug Offenders: Various Factors May Limit the Impacts of Federal Laws that Provide for Denial of Selected Benefits* (Sept. 2005), available at <http://www.gao.gov/new.items/d05238.pdf>.

Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide* (June 2008), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=115.

Sentencing Project, *Felony Disenfranchisement Laws*, available at http://sentencingproject.org/doc/publications/fd_bs_fdlawsinusMarch2010.pdf.

U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences upon Conviction* (Nov. 16, 2003) (describing federal consequences of convictions on offenders' ability to vote; serve on federal jury; hold federal office, federal employment or certain federally-issued licenses; serve in armed forces; participate in federal contracts or programs; receive federal benefits; become a U.S. citizen or remain in the U.S.; and live free from registration or community notification requirements), available at http://www.justice.gov/pardon/collateral_consequences.pdf.

FAMILIES / COMMUNITIES

A. Case Law

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (“[C]ounsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”) (emphasis added).

Gall v. United States, 128 S. Ct. 586 (2007) (discussing government’s concession that “probation could be an appropriate sentence, given the exact same offense, if ‘there are compelling family circumstances where individuals will be very badly hurt in the defendant’s family if no one is available to take care of them’”).

United States v. Stall, 581 F.3d 276 (6th Cir. 2009) (affirming on plain error review district court’s finding that the collateral consequences of defendant’s child pornography conviction should factor into its analysis of what constitutes “just punishment,” including “the interruption of defendant’s education and employment, the dissolution of his engagement, and the stigma attached to this specific offense”) (emphasis added); *see also id.* at 289 (“While family ties of a defendant are not ‘ordinarily relevant,’ they may be relevant insofar as they bear some connection to permissible considerations. With respect to Stall, the district court believed that Stall’s ‘strong social support’ was one reason to think that therapy would be effective, that a lengthy term of supervised release could adequately protect the public, and that a longer term of incarceration was unnecessary to vindicate the statutory sentencing factors.”).

United States v. Anderson, 533 F.3d 623 (8th Cir. 2008) (affirming departure for defendant convicted on insider trading and money laundering based in part on ways in which defendant “suffered atypical punishment such as . . . the harm visited upon him as a result of bringing his wife and friend into the criminal justice system”).

United States v. Lehmann, 513 F.3d 805 (8th Cir. 2008) (affirming sentence of probation with six months community confinement where district court stated “I’m giving you the break primarily because of your son,” who the court found was developmentally disabled and would “decompensate emotionally” and “suffer a setback in his overall development” if his mother was removed from his life and sent to prison).

United States v. Owens, 145 F.3d 923 (7th Cir. 1998) (affirming downward departure based on extraordinary family circumstances, including that defendant’s wife and three young children might have to move to public-assisted housing and receive welfare benefits if defendant received prison sentence).

United States v. Gauvin, 173 F.3d 798 (10th Cir. 1999) (affirming downward departure based in part on need to minimize impact of sentence on children where defendant supported his four young children and defendant’s wife worked 14-hour days at employment miles from home, no extended family could take custody of children, and wife therefore risked losing her job and/or custody of the children if defendant were removed from the home).

United States v. Lupton, 2009 WL 1886007 (E.D. Wis. June 29, 2009) (noting that defendant’s “family suffered serious financial consequences” and that “separation from defendant’s family due to a prison term would certainly affect both” the family and the defendant; “I took these factors into account” in determining an appropriate sentence).

United States v. Haynes, 557 F.Supp.2d 200 (D. Mass. 2008) (“[T]here is growing evidence that the coerced removal of residents from poor and disadvantaged neighborhoods – even of those thought to be involved in criminal activity – may, in some cases, undermine a community’s ability to self-regulate and exercise informal social control over crime by further disrupting the creation of social and familial bonds. . . . [T]hese concerns . . . suggest that courts should tread extremely cautiously when deciding whether and how long to incarcerate nonviolent drug offenders. . . . The facts presented by Haynes’ case force the Court to confront the inescapable fact that disadvantaged communities like Bromley-Heath are injured both by crime and by the subsequent mass incarceration of their young men. Courts may no longer ignore the possibility that the mass incarceration of nonviolent drug offenders has disrupted families and communities and undermined their ability to self-regulate, without necessarily deterring the next generation of young men from committing the same crimes. . . . [P]ublic safety . . . requires that Haynes be permitted to return to his children so that they do not repeat his errors.”) (citations omitted).

United States v. Pegross, 2008 WL 3286263 (E.D. Mich. Aug. 7, 2008) (refusing to consider the relocation of defendant’s children to western region of country, among other collateral consequences, not because they are not relevant but simply because defendant “does not explain under which provision of § 3553(a) the Court should consider these unfortunate effects of his incarceration”).

United States v. Jagemann, 2007 WL 2325926 (E.D. Wis. Aug. 8, 2007) (finding that prison was not necessary to satisfy the purposes of punishment for defendant convicted of possession with intent to distribute cocaine, in part, because “his family (including his ex-wife, to whom he paid alimony) depended on defendant, and a prison sentence would harm them without adding significantly to punishment or deterrence”) (citing 18 U.S.C. §§ 3553(a)(1) and (a)(2)(A) & (B)).

United States v. Nowak, 2007 WL 528194 (E.D. Wis. Feb. 15, 2007) (finding that the court found that it “can and should consider the collateral consequences in deciding the appropriate sentence,” and imposing probation sentence on defendant convicted of selling a firearm to a person he knew was a felon, in part, because “[i]mprisonment would . . . have harmed those who depended on defendant, financially and emotionally: his kids, his fiancée, and his mother and sister (and her five kids)”).

United States v. Bailey, 369 F.Supp.2d 1090 (D. Neb. 2005) (departing downward where defendant’s daughter “has a serious illness or condition [caused by physical and sexual abuse while in mother’s home], Bailey’s presence is critical to the child’s continued recovery, and the defendant’s presence cannot reasonably be duplicated by using other providers”).

United States v. Bortnik, 2006 WL 680544 (E.D. Pa. March 15, 2004) (departing downward where defendant’s son requires “careful, constant monitoring” due to congenital heart defect, to which defendant contributes, and defendant is also “responsible for the family’s economic stability, . . . [which is] particularly important in light of Nathan’s heart defect, as it is essential to keep insurance payments timely so that Nathan’s coverage is not dropped,” and “the Court does not believe that taking defendant out of his family environment for a protracted period of time will serve a useful social or penal purpose”).

United States v. Mateo, 299 F.Supp.2d 201 (S.D. N.Y. 2004) (discussing instances “in which, by reason of individual circumstances, some of the stings and hardships that imprisonment implies come to bear extraordinarily more heavily on some inmates than on others. Particularities affecting some individuals may cause some of the adjunct losses that follow criminal conviction to engender what amounts to materially enhanced deprivations and suffering that, for some offenders more than others, may operate as the functional equivalents of punishment by time in prison and that may also consequentially produce other substantially greater adverse social effects. For instance, . . . the pain and suffering endured during twelve months in custody by a mother who is the sole provider of five dependent children and who, in her first transgression, stole to feed them, may fairly be regarded as qualitatively greater than that felt during an equal prison term by a career offender with no family ties for whom jail effectively serves as a primary residence.”).

United States v. Redemann, 295 F.Supp.2d 887 (E.D. Wis. 2003) (departing downward, in part, because “a great deal of adverse publicity in his small town . . . soured his personal relationships with people he had known for a long time and caused emotional

harm to his children” and “contributed to the ill health of defendant’s wife and, he believes, to her death;” these collateral consequences “partially satisfied the need for just punishment, . . . will likely deter him from future misconduct, which mitigates the need to protect the public from further crimes,” and served general deterrence because “someone else in defendant’s position tempted to also become involved in such a scheme need only consider what happened to defendant in order to reconsider”).

United States v. Norton, 218 F.Supp.2d 1014 (E.D. Wis. 2002) (granting downward departure to non-prison sentence where imprisonment would cause defendant’s family to be splintered, with the youngest children placed in foster care and the oldest left on his own with no means of support or health insurance, because “[s]ociety has an interest in maintaining stable family units, which are more likely to produce productive, law abiding citizens;” the court reasoned, “Some commentators have criticized the courts’ reliance on ‘third party harm’ in justifying departures rather than focusing on the culpability of the defendant [but] I believe that it is proper to consider both factors in determining whether to depart based on family circumstances. In fashioning an appropriate sentence, a court must consider the public interest. The public interest requires that a defendant be held accountable for her conduct. However, the public also has an interest in not having children unnecessarily placed in foster care. Such placements increase costs to taxpayers and may be more likely to cause children to become law breakers.”).

United States v. Wehrbein, 61 F.Supp.2d 958 (D. Neb. 1999) (departing downward for defendant convicted of low level methamphetamine trafficking and weapons possession because 11-year-old son, whose emotional and mental disorders improved markedly when defendant returned from serving state sentence on similar charges, would be harmed if defendant was again removed from home, there were no available caregivers who could substitute for defendant, and federal government could have avoided or lessened impact on child if it had not delayed 14 months after referral to instigate federal prosecution; “There are tangible costs to society (and real people like Christopher) when the government does not prosecute low-level drug dealers (like Wehrbein) promptly. . . . Those costs should be borne by prosecutors and law enforcement agencies rather than innocent children when the resulting third-party harm caused by their sloth is severe compared to the criminal conduct of an ordinary drug dealer like Wehrbein.”).

United States v. Hammond, 37 F.Supp.2d 204 (E.D. N.Y. 1999) (departing downward based in part on defendant’s “extraordinary relationship with his young children and his wife’s need for assistance in supporting and controlling them” because “[a] sentence without a downward departure would contribute to the needless suffering of young, innocent children”).

B. Studies

James Forman, Jr., *Why Care about Mass Incarceration*, available at http://scholarship.law.georgetown.edu/fwps_papers/121.

Joseph Edward Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 *Harvard Civil Rights- Civil Liberties Law Review* (2009) (discusses

social stigma associated with mass incarceration in black community and how incarceration disintegrates the community).

Joseph Murray, David P. Farrington, Ivana Sekol and Rikke F. Olsen, *Effects of Parental Imprisonment on Child Antisocial Behavior and Mental Health: A Systemic Review* (Sept. 2009), available from SRC (finding that “parental imprisonment is quite a strong risk factor for both child antisocial behavior and mental health problems” although more study is needed to determine whether parental imprisonment is a causal risk factor or merely correlative).

Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *Stanford Law Review* 1271 (2004).

Jeremy Travis, Elizabeth McBride, and Amy Solomon, *Families Left Behind: The Hidden Costs of Incarceration and Reentry* (June 2005), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf.

Christopher Wildeman, *Imprisonment and Infant Mortality* (rev. May 2010), available at <http://www.psc.isr.umich.edu/pubs/pdf/rr09-692.pdf>.

SPECIAL OFFENDER GROUPS

A. Non-Citizens

1. Case Law

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (“[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes. . . . These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction . . . [and] confirm our view that, as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”) (internal punctuation and citation omitted); *see also id.* at 1481-82 (because deportation, although civil in nature, is a “particularly severe penalty,” is “intimately related to the criminal process,” and is automatic for a broad class of offenders, it is “uniquely difficult to classify as either a direct or a collateral consequence of conviction); *see also id.* at 1486 (“[C]ounsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”).

United States v. Navarro-Diaz, 420 F.3d 581 (6th Cir. 2005) (remanded in light of *Booker* where district court noted that defendant would be punished more than a citizen due to ineligibility for halfway house placement).

United States v. Davoudi, 172 F.3d 1130 (9th Cir. 1999) (ineligibility for halfway house placement can justify downward departure).

United States v. Pacheco-Soto, 386 F.Supp.2d 1198 (D. N.M. 2005) (downward departure based on defendant's ineligibility for early release, minimum security prison, and credit for participation in residential drug or alcohol treatment program).

2. Studies

Dan Kesselbrenner and Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (2005) available at www.nationalimmigrationproject.org.

U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences upon Conviction* (Nov. 16, 2003) (describing federal consequences of convictions on offenders' ability to become a U.S. citizen or remain in the U.S.), available at http://www.justice.gov/pardon/collateral_consequences.pdf.

B. Sex Offenders

1. Case Law

Comstock v. United States, ___ S.Ct. ___, 2010 WL 1946729, *30 n.15 (May 17, 2010) (Thomas, J., dissenting) (listing state statutes imposing registration and residency requirements on sex offenders); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2669 n.3-n.5 (2008) (Justice Alito, dissenting) (listing state statutes imposing registration and residency requirements on and permitting civil commitment of sex offenders). Like deportation, sex offender registration and residency restrictions are “particularly severe penalt[ies]” that are “intimately related to the criminal process” and are automatic for a broad class of offenders.” *Padilla*, 130 S. Ct. at 1480, 1481-82. Arguments can and should be made that, like deportation, these “collateral consequences” should be deemed “an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on . . . defendants who plead guilty to specified [sex] crimes.” *See id.* at 1480.

Lawrence v. Texas, 539 U.S. 558 (2003) (striking down misdemeanor statute criminalizing private, consensual sexual contact between people of the same gender, in part, because the “stigma” imposed by a conviction “is not trivial,” in that it requires registration as a sex offender and disclosure on job applications, and results in “the other collateral consequences always following a conviction”).

United States v. Garate, 543 F.3d 1026 (8th Cir. 2008) (court properly considered lasting effects of registering as a sex offender in deciding to impose below-guideline sentence).

United States v. Baird, 2008 WL 151258 (D. Neb. Jan. 11, 2008) (imposing below-guideline sentence because “the defendant has already suffered serious consequences as a result of his actions. A conviction for possession of child pornography carries

considerable stigma. Baird has lost his military career, has a felony conviction on his record, and will have to register as a sex offender.”).

United States v. Ontiveros, 2008 WL 2937539 (E.D. Wis. July 24, 2008) (noting that “there are also significant lifetime collateral consequences that flow from” defendant’s conviction, including that he “will be required to register as a sex offender,” which is a “shameful label” that “will follow him the rest of his life and will substantially limit where he will be able to work and even live. Add to this a lifetime under the supervision of a probation agent . . . and it is clear that the sentence imposed in this case offers substantial deterrence both to Ontiveros and anyone else who would consider committing such a crime”).

United States v. Wachowiak, 412 F.Supp.2d 958 (E.D. Wis. 2006) (noting that “the guidelines failed to account for the significant collateral consequences defendant suffered as a result of his conviction,” which included he will be “forced to live with the stigma of being a convicted sex offender”).

2. Studies

Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 Jnl of Contemporary Crim. Justice 67 (2005) (“Drawing on data from 121 registered sex offenders in Kentucky, this research shows that social stigmatization, loss of relationships, employment, and housing, and both verbal and physical assaults are experienced by a significant minority of registered sex offenders.”).

Jill Levenson and Leo Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step from Absurd?*, 49 Int’l Jnl of Offender Therapy and Comparative Criminology 168 (2005).

Jill Levenson, et. al., *Sex Offender Residence Restrictions: Sensible Crime Policy or Flawed Logic?*, 71 Federal Probation (Dec. 2007).

National Governors Association Center for Best Practices, *Managing Convicted Sex Offenders in the Community*, available at <http://www.nga.org>.

U.S. Dept. of Justice, Office of the Pardon Attorney, *Statutes Imposing Collateral Consequences upon Conviction* (Nov. 16, 2003) (describing federal consequences of convictions on offenders’ ability to live free from registration or community notification requirements), available at http://www.justice.gov/pardon/collateral_consequences.pdf.

C. **Offenders with Multiple Convictions**

1. Case Law

Like deportation, recidivist enhancements such as those found at 18 U.S.C. §§ 924(c) & 924(e) and USSG §4B1.1 impose “particularly severe penalt[ies]” that are “intimately

related to the criminal process” and are automatic for a broad class of offenders.” *Padilla*, 130 S. Ct. at 1480, 1481-82. Arguments can and should be made that, like deportation, the collateral consequence of significantly enhanced future penalties based on a conviction for a predicate that satisfies the definition of a “crime of violence” or “violent felony” should be deemed “an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on . . . defendants who plead guilty to” those predicate offenses, thereby requiring accurate legal advice at the time of any such plea. *See id.* at 1480-82.

United States DeCarlo, 443 F.3d 447 (6th Cir. 2006) (noting that “a second conviction holds the potential for ‘adverse collateral consequences’ aside from the concurrent sentence, such as delay of eligibility for parole, a harsher sentence under a recidivist statute for any future offense, credibility impeachment, and societal stigma”).

United States v. Sanchez-Rodriguez, 161 F.3d 556 (9th Cir. 1998) (en banc) (downward departure upheld in part because delay in bringing federal charges prejudiced defendant’s opportunity to obtain a sentence concurrent to the state sentence he was already serving).

United States v. Montanez, 2007 WL 2318527 (E.D. Wis. Aug. 9, 2007) (imposing below-guideline sentence, in part, to account for lost opportunity for defendant to serve concurrent time with his state sentence due to two-year delay in bringing federal charges); *see also United States v. Groos*, 2008 WL 5387852 (N.D. Ill. Dec. 16, 2008) (imposing below-guideline sentence, in part, because the period of uncertainty resulting from four-year delay in prosecuting his case provided significant additional punishment).

2. Studies

Statement of David Kennedy, Director, Center for Crime Prevention and Control, John Jay College of Criminal Justice at VII (U.S. Sentencing Commission Regional Hearing, Chicago Illinois, 9/9/2009) (“Extreme federal sanctions are often seen in the affected communities as illegitimate, racially motivated, and unfairly imposed. This contributes to a culture of principled disengagement from law enforcement that is dramatically undercutting the ability of the criminal justice system to function, and even to what should be taken as a withdrawal from the rule of law and civil society.”).

U.S. Sentencing Commission, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at 48, 89-91, 142 (Nov. 2004) (describing racial impact of sentencing offenders with prior drug offenses as career offenders).