

FEATURES

## Ex-offenders face tens of thousands of legal restrictions, bias and limits on their rights

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*Peter Ninemire: "I had never been to prison before, and that sentence said to me that I was incorrigible. I was looking at either spending the rest of my life in prison or becoming a fugitive." Photo by Nathan Harmon.*

Growing up in northwest Kansas in the 1970s, Peter Ninemire was on the skinny side, with long, dark hair covering his eyes and a wild streak that drew him to marijuana. When he lost his father at age 22, Ninemire says, the wheels came off completely. He fell deep into drug addiction and started racking up drug-related convictions through the 1980s.

By 1989, Ninemire had two prior convictions and was facing a third, for cultivation of marijuana. He was looking at 25 years in prison. "I had never been to prison before," he says, "and that sentence said to me that I was incorrigible. I was looking at either spending the rest of my life in prison or becoming a fugitive."

Ninemire chose the fugitive route—adding about five years to his sentence when he was caught 15 months later.

These days he's grateful he went to prison: It forced him to stop using drugs and gave him the structure he needed to change his life. Still on the inside but no longer "trapped in my own addiction," he got involved with the sentencing-reform group

Families Against Mandatory Minimums; helped found Jericho Road, a prison youth counseling program; and became interested in social work and counseling.

Ninemire's public defender, Marilyn Trubey, thought this about-face might make a strong case for a presidential commutation. Though Ninemire didn't expect much, he filled out the paperwork. And his sentencing judge, who was critical of mandatory minimums, wrote a letter in support. On Jan. 20, 2001—"the greatest day of my life," Ninemire says—President Bill Clinton, on his last day in office, commuted the remaining 15 years of Ninemire's sentence. In all, Ninemire served 10 years.

But he found life after prison doesn't start with a clean slate. Nobody wanted to rent an apartment to a parolee; his then-girlfriend had to sign the papers. Despite the commutation and the recommendations of his parole officer, federal prosecutors insisted he serve his entire 4½ years of supervised release. When he applied for an addiction counseling license, he needed special consideration. And he once considered working in the financial industry to supplement his income, but because he had a felony conviction, he was ineligible for certain licenses the job required.

His presidential pardon, his record of accomplishments and the kind of crime he had committed were not considered relevant. The obstacles he faced are part of the collateral consequences of criminal conviction: any consequences of conviction not handed down by a court. They include a multitude of legal restrictions, the best known of which might be loss of the rights to vote and own a firearm. Collateral consequences also include the unofficial social stigmas that confront ex-offenders, such as trouble finding a job and the damage prison does to the ex-con's skills and abilities.

Ninemire persevered and—11 years after his release from prison—he became an addiction and mental health therapist running his own practice in Wichita. And though he was able to overcome those barriers, he knows he's an exception—he had some money and strong family support.

The ex-offenders he works with face a variety of collateral consequences that make their recovery harder. He cites the steep fines faced by ex-offenders (many of whom can't find income-generating jobs) that make it impossible to regain their driver's licenses, setting them up for more legal trouble.

"These people are going to keep breaking the law because there's no hope that they will ever pay their fines," he says. "I see this with my clients quite a bit. They drive without a license because they have to have a job and to get to their probation officer."

That's why more and more stakeholders are now calling for reform to remove collateral consequences. By creating obstacles between ex-offenders and a new life, advocates say, collateral consequences may even encourage recidivism.

Marc Levin of the Texas Public Policy Foundation is an attorney and policy director of the Right on Crime project, which makes a politically conservative case for criminal justice reform.

"A lot of modern research has shown that you want to make the path of law-abidingness very attractive," Levin says, "and you want to make the path of continuing to break the law very unattractive. So that calls into question the habit in our society of continuing to punish people for many years."

## UNINTENDED EFFECTS

Collateral consequences are not new. Disenfranchisement of those who committed serious crimes has roots in ancient Greek law, and the 14th Amendment expressly says voting rights can be denied "for participation in rebellion or other crime."

But since the mid-1980s, the number of official collateral consequences has expanded dramatically. Some estimates speculate that today's ex-offenders could face up to 50,000 legally mandated collateral consequences, including restrictions on housing, employment, public benefits and immigration.

During that time, the number of Americans subject to such restrictions has expanded because tougher sentencing sent more people to prison for more offenses. Levin estimates that 20 percent of Americans have some kind of criminal record. And the U.S. Department of Justice's Bureau of Justice Statistics reported in 2009 that more than 700,000 prisoners are released every year.

Collateral consequences are now harder to avoid or mitigate. Expunging or sealing a record often requires expensive legal fees. Executive pardons, which were the main relief mechanism in colonial days, are now very rare: President Barack Obama pardoned more turkeys than people in 2012. And there's no way at all to lift some consequences.



*Marc Levin: "What we would tell folks who may be skeptical is that even if you don't sympathize with the offenders, don't do it for them —do it for you." Photo by Josh Huskin.*

Reformers agree that collateral consequences can be effective if they relate to the type of offense and the risk of recidivism—for example, banning convicted child molesters from working with children. But other restrictions have little or no relationship to the prior conviction, they say.

As a result, there's evidence that collateral consequences actually hurt ex-offenders' efforts to keep their lives on track. A 2009 study sent job applicants who were evenly matched, except that one of the two had a criminal record, on job interviews. The criminal record reduced the chances of a callback by 50 percent for all applicants—and twice as much for blacks as for whites.

“People coming out of prison have a large number of things they're already facing: stigma, spotty work history, low education levels, issues around substance abuse and mental health,” says Jesse Jannetta, a senior research associate at the Urban Institute in Washington, D.C. “Collateral consequences can create a practical barrier that can make the already difficult situation of community integration more difficult.”

One example is Pat Nolan, the Chuck Colson Distinguished Fellow on Justice at Prison Fellowship in Lansdowne, Va., a Christian prisoner outreach group founded by the former special counsel to Richard Nixon who served time himself in the Watergate scandal. Nolan went to prison in the 1990s for accepting illegal campaign contributions as a California state legislator.

A former attorney, Nolan could have reapplied to practice law after his release from prison. But at the time, he says, he had a family to support and he simply couldn't afford to spend thousands of dollars on the process. Another former prisoner he knows went from high-level embassy work to making ends meet with two fast-food jobs.

Jannetta adds that former prisoners may also feel less invested in society when they're excluded.

“When you restrict somebody from the right to vote and things like that, in a sense you are continuing to withhold their citizenship,” Jannetta says. “That restricts the way people feel about citizenship. When does the punishment stop, or at what point have I done my time?”

And a feeling of investment in society, says Levin, is better for everyone.

“What we would tell folks who may be skeptical is that even if you don't sympathize with the offenders, don't do it for them—do it for you,” Levin says. “It does benefit public safety to remove barriers to being law-abiding.”

The problem is so clear that calls for reform are bipartisan. Marc Mauer, executive director of the Sentencing Project in Washington, D.C., cites the Second Chance Act of 2007, which grants money to organizations trying to reduce recidivism through housing, employment assistance, drug treatment and other social services.

“House leadership came from the Congressional Black Caucus,” he says. “In the Senate, it came from Sam Brownback from Kansas, one of the most conservative members of Congress.

“There’s now, I think, growing recognition that it’s in everyone’s interest that when people come home from prison, they are in a better position to make it,” Mauer says.



*Pat Nolan: Through his work at Prison Fellowship, the former California assemblyman has become a leading conservative critic of the criminal justice system. Photo by David Hills.*

## **CHANGING POLICY**

The Second Chance Act, the first federal law addressing prisoner re-entry, has granted \$250 million to state and local governments to pursue research-backed re-entry programs. It also funds research into what works. Funding has been reauthorized several times without apparent controversy.

Leah Kane is the deputy project director for the Reentry Policy Council, a project of the Council of State Governments Justice Center in New York City. She works with state and local agencies on prisoner re-entry programs, which are often organized around the Second Chance Act.

“It was not the be-all and end-all,” she says, “but the passage of the act was a galvanizing experience. It was the first time Congress acted.”

Kane says the law encourages grantees to make collateral consequences a priority, and many do. This often requires them to bring in multiple agencies or even nonprofits, she says, since the restrictions touch on numerous areas of social services as well as criminal justice.

Partly as a result of the law, Mauer says, “every corrections system around the country will say it’s doing work around re-entry.” Jannetta says funding for these programs is now less of a challenge.

A few states have also made changes to their policies on collateral consequences. Among other things, Right on Crime lobbied for a mobile unit that issues identification cards to people leaving prison in Texas. Another victory for ex-offenders was a 2012 Ohio bill that removes prohibitions on professional licensing for ex-offenders and provides immunity to employers from negligent hiring lawsuits. Numerous advocacy groups for prisoners or re-entry lobby for these kinds of laws; Ninemire did it for Families Against Mandatory Minimums in Kansas for five years.

Federal agencies are also working on the issue. Kane cites the Federal Interagency Reentry Council, a group of 20 agencies working to remove federal barriers to re-entry. The council got its start in January 2011 with seven presidential Cabinet members attending the meeting, signaling Obama's support for the effort.

One of the council's first activities was to produce a series of "myth busters" fact sheets about prisoner re-entry. A public housing fact sheet informed local authorities that they are not required to ban ex-offenders, although they may choose to do so. Nolan says public housing agencies often don't realize they have that discretion. As a result, he says, ex-offenders may put their families at risk of eviction if they move in while they look for work, but they often risk it because they have little choice.

Agencies that belong to the council are also taking action. The U.S. Department of Veterans Affairs changed its policies to make it easier for ex-offenders to claim veterans benefits. And in 2012, the Equal Employment Opportunity Commission issued guidelines for employers considering arrest and conviction records of job seekers. The guidelines advise employers that they may run afoul of civil rights laws if they consider criminal records without relating the conduct to the job.

Advocates say the EEOC guidelines were important because they address a persistent problem that often has racial undertones.

"In most jurisdictions there's no allowance made for looking at the relevance of the conviction to the job at hand, the whole record or the age of conviction," says Mauer. "So a property offense where the sentence was completed 20 years ago can still exclude someone from employment."

## **PREVENTING PLEAS**

That kind of consequence might make defendants think twice about pleading guilty—if they understand the collateral consequences of the plea.

"I think when most people are sentenced or plea-bargain, they have no idea," says Jannetta. Collateral consequences "become part of your overall punishment package, but that's never really clear or explained to you. And I think if punishments are going to be effective, they shouldn't be invisible."

That might change thanks to the 2010 U.S. Supreme Court decision in *Padilla v. Kentucky*. Experts anticipate the case will soon require defense attorneys to explain every collateral consequence stemming from a guilty plea. And that could change the way criminal defense law is practiced.



*Margaret Colgate Love: "This will be a slow evolution. There is not much of a constituency for people with a criminal record." Photo by David Hills.*

In *Padilla*, the lawyer for lawful permanent resident Jose Padilla incorrectly advised him that there would be no deportation consequences from his drug conviction. Lower courts denied Padilla's claim of ineffective assistance of counsel, but the Supreme Court majority held that defendants have the right to simple advice about the deportation consequences of a guilty plea, even though immigration has long been considered a collateral consequence rather than a direct one.

A dissent by Justice Antonin Scalia said the ruling creates a slippery slope: It could result in a requirement to advise defendants about all types of collateral consequences. Indeed, lower appeals courts have already extended it to require counsel's warning on issues like pension eligibility and sex-offender registration.

*Padilla* figures prominently in *Collateral Consequences of Criminal Convictions: Law, Policy and Practice*, a recent treatise co-authored by attorney Margaret Colgate Love and law professors Jenny Roberts and Cecelia Klingele.

Love, a Washington, D.C., solo practitioner who works on restoration of rights and executive clemency, is heavily involved in efforts to understand and reform collateral consequences. By requiring attorneys to give defendants a fuller idea of what consequences await them, she wrote in a 2011 legal article, *Padilla* could end up destabilizing "the guilty plea system on which the criminal justice system has come to depend."

Indeed, Levin says there's already evidence that high-profile collateral consequences can disrupt the plea-bargaining system.

In the early 2000s, the Texas legislature decided to require juvenile sex offenders to stay on the sex offender registry for a lifetime. "What happened was, the first year that went into effect, prosecutors had trouble getting plea bargains," Levin says.



“They felt there was a decline in the reporting of offenses. They told the legislature this isn’t working—we need to go back to having a procedure for taking juveniles out.”

In Ohio, he notes, prosecutors were also amenable to lifting collateral consequences, but they couldn’t find where they were listed in the criminal code.

## **CATALOGING CONSEQUENCES**

That inability to easily understand clients’ collateral consequences could grow into a serious problem for defense attorneys. Under *Padilla*, defenders could be required to warn clients about any collateral consequences serious enough to stop them from taking a plea deal. But with tens of thousands of collateral consequences, many of which are judicial or administrative judgment calls, there’s a lot to learn.

“I would certainly not call the discussion panicked, but [*Padilla*] does add quite a bit to the already heavy burden of public defenders,” says Love.

To help lawyers and others confront this challenge, the ABA Criminal Justice Section has undertaken an ambitious project—cataloging all the collateral consequences faced by defendants in the United States into a searchable online database. The result is the National Inventory of the Collateral Consequences of Conviction (<http://www.abacollateralconsequences.org/>), a website where users can look up collateral consequences by offense type, jurisdiction, consequence or keyword. It went live in September.

Love directs the national inventory project. She says with only 17 jurisdictions entered, project staff had identified more than 17,000 collateral consequences. She expects nearly 50,000 before the inventory is completed in mid-2014.

Love says it’s slow going because many collateral consequences must be analyzed as well as entered. For example, she says, a law saying a conviction “shall be justification for refusal to issue a license” doesn’t make it clear whether refusal is required or up to the issuing agency’s discretion. When interpretations are unclear, the inventory errs on the side of a stricter interpretation.

Another challenge is that the law keeps changing during the process of collecting and entering data.

Love says the national inventory grows out of an attempt by the Uniform Law Commission to address collateral consequences through a Collateral Consequences of Conviction Act. She’s the ABA’s liaison to the ULC committee that drafted the



legislation in 2009. The proposed legislation requires states to list all their collateral consequences in a document, notify defendants of the consequences they face, mitigate consequences under some circumstances, and create forms of relief.

Unfortunately, Love says, many states found the collection requirement too difficult. Though at least nine states have considered the law, only North Carolina has passed it. To ease the burden, the committee chair lobbied successfully for federal funding for the national inventory. The ABA Criminal Justice Section won the bid.

Before working on the inventory, Love helped compile several similar resources through the ABA and the Justice Department. Recently she also led the Restoration of Rights Project of the National Association of Criminal Defense Lawyers. The project is a collection of jurisdiction-specific information on mitigating collateral consequences. An updated version was published as an appendix to Love's collateral consequences treatise.

Another current effort to address collateral consequences is the update of the Model Penal Code's sentencing provisions by the American Law Institute. (Love and Klingele are both involved in that project.) The relevant proposed section, if adopted by states, would require detailed warnings to defendants, turn most collateral consequences into discretionary sanctions, require them to expire automatically at the end of the sentence, and create a certificate of good conduct—a relief mechanism available after five years.

Love says the ABA's national inventory is unique—it crosses jurisdictions and legal disciplines and attempts to be comprehensive. And while the intended audience is lawyers and judges, she believes it could also be useful to defendants and policymakers.

“Vermont's governor [recently signed] what we believe would be the broadest pension forfeiture law in the nation,” she says. “We expect our inventory could be used to show exactly how unusually broad it is, which might raise questions about its fairness and efficacy.”

These cataloging efforts help lawyers and defendants understand what they're up against, but they don't stop legally mandated collateral consequences. For that, jurisdictions have to repeal collateral consequence laws or enact relief—more likely the second, Love says.

In the long term, Love believes *Padilla* will force the justice system to change collateral consequence restrictions into disqualifications that can be imposed at a judge's discretion. By making plea bargains less attractive, she believes, the system

will evolve toward one where sanctions are applied by discretion in a way that fits the crime. But she doesn't see it happening right away.

"This will be a slow evolution," she says. "There is not much of a constituency for people with a criminal record."

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