FOREWORD

This book is divided into nine chapters, with two appendices. Chapter 1 introduces the issues of law and policy that are raised by the collateral consequences of a criminal conviction, gives some historical background, and explains the terminology that will be used throughout the book. It previews some of the practice issues that will be explored in later chapters, many spurred by the “seismic” decision of the Supreme Court in Padilla v. Kentucky, and the particular problems created by interjurisdictional application of collateral consequences.

Chapter 2 surveys the various types of collateral consequences, including loss of civil and political rights, employment opportunities, and a variety of government benefits; business and professional licensing restrictions; firearms dispossessions; family-related and immigration consequences; and sex offender registration, residency restrictions, and public notification requirements. This chapter also includes a section on the collateral consequences of juvenile adjudications.

Chapters 3 and 4 deal with challenges to collateral consequences based on the Constitution. Chapter 3 surveys the panoply of constitutional issues, including substantive limits (e.g., the Commerce Clause and Ex Post Facto Clause, the First Amendment’s right of free association and the Second Amendment’s right to bear arms, the Eighth Amendment’s prohibition on cruel and unusual punishment, and the guarantees of the Equal Protection Clause) and procedural limits (e.g., the Due Process Clause and the Full Faith and Credit Clause). Chapter 4 is entirely devoted to the issues raised by the Supreme Court’s decision in Padilla v. Kentucky, principally for criminal defense lawyers under the Sixth Amendment’s Right to Counsel Clause but also indirectly for prosecutors and judges. Chapter 2 also addresses constitutional challenges to specific collateral consequences, such as firearms dispossessions and sex offender registration.

Chapter 5 deals with issues relating to criminal records, including trends in access to and use of criminal records, the regulation of commercial background-checking companies under the Fair Credit Reporting Act, and proposals to improve the way background checks are done through better access to Criminal Justice Information Repositories. Chapter 6 deals with regulation of employment and licensing under Title VII of the Civil Rights
Act of 1964 and under state nondiscrimination laws and systemic limits on pre-employment inquiries, including “ban-the-box” schemes. A final section deals with employer liability for negligent hiring, and statutory limits on liability intended to encourage employers concerned about limiting risk.

Chapter 7 deals with legal mechanisms to avoid and mitigate collateral consequences, including back-end relief mechanisms like executive pardon and judicial expungement and front-end avoidance dispositions like deferred adjudication. It describes the tension between forgiveness and forgetfulness that has informed the public policy debate over relief and restoration for more than 60 years. It then discusses some of the newer approaches to relief in the Uniform Collateral Consequences of Conviction Act and the sentencing articles of the Model Penal Code.

Chapter 8 is a review of practice issues in criminal cases, from the prosecutor’s charging decision and the defense lawyer’s counseling of the client through plea negotiations and sentencing. The chapter also addresses practice issues involved in postconviction challenges implicating collateral consequences and postconviction relief. The purpose of this chapter is to underscore how collateral consequences have become a central concern in criminal cases, including in minor misdemeanor cases where counsel may not always be present.

Chapter 9 looks ahead, describing recent proposals to establish a framework within which collateral consequences may be identified, limited, made known to those potentially affected by them, and relieved in appropriate cases. It also describes some recent efforts in the states to implement aspects of these reform initiatives. An ongoing project of the Council of State Governments for American Bar Association to catalogue and analyze all of the laws and regulations imposing collateral consequences, in the states and in the federal system, will make it possible to better understand and manage them.

Two appendices contain helpful original research and primary source material. Appendix A contains a report that summarizes relief mechanisms in each U.S. jurisdiction, including 50-state charts on executive pardon, judicial expungement and set-aside, and laws limiting consideration of conviction in employment and licensing. Appendix B contains the black letter of the 2003 ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification, provisions of the Model Penal Code: Sentencing relating to diversionary (non-conviction) dispositions and collateral consequences, the 2010 Uniform Collateral Consequences of Conviction Act, the 2012 EEOC Enforcement Guid-
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