THINKING BEYOND BAN THE BOX: HOW TO ALLEVIATE DISPROPORTIONATE SENTENCING TO ASSIST EX-OFFENDERS IN REJOINING SOCIETY

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INTRODUCTION

Criminal sentences are meant to punish offenders' actions, incapacitate, deter future behavior, rehabilitate, and grant retribution.[1] Should these goals extend beyond the sentence? More precisely, should punishment continue for the remainder of a convicted individual's life following completion of his or her sentence?

Conventional criminal sentences include only the direct punishments for a crime.[2] These direct forms of punishment include incarceration, fines, and community supervision.[3] While these may be the first aspects of a criminal sentence that come to mind, they are not the sole forms of punishment imposed. In addition to these direct forms of punishment, many indirect effects, or collateral consequences, can arise.

Federal circuits are split on how to address collateral consequences in sentencing, and the Supreme Court has yet to opine on the matter.[4] Some federal circuits consider external factors in sentencing, including collateral consequences, while others do not.[5] The circuits that consider these consequences of imposing criminal sentences deviate from the advisory Federal Sentencing Guidelines ("the Sentencing Guidelines") and may impose lesser sentences than the crime may ordinarily warrant.[6] Conversely, other jurisdictions that ignore the consequences of the sentences may be imposing sentences that over-punish offenders. This discrepancy in the treatment of collateral consequences for sentencing purposes likely leads to a violation

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[1] ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:1 (2017).

[2] *See* 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, 634 (2006).

[3] *Id.*

[4] *See* United States v. Nesbeth, 188 F. Supp. 3d 179, 186 (E.D.N.Y. 2016).

[5] *See* United States v. Morgan, 635 F. App'x 423, 446–47 (10th Cir. 2015); United States v. Musgrave, 761 F.3d 602, 608–09 (6th Cir. 2014); United States v. Stewart, 590 F.3d 93, 141 (2d Cir. 2009); *Nesbeth*, 188 F. Supp. 3d at 186–87.

[6] *See Stewart*, 590 F.3d at 142; United States v. Pauley, 511 F.3d 468, 474–76 (4th Cir. 2007); *Nesbeth*, 188 F. Supp. 3d at 187.

of horizontal equity and can result in disparate sentencing impacts on two otherwise similarly situated criminal defendants.

One of these collateral consequences is the inability to obtain employment following completion of the sentence.[7] Possessing a criminal record makes individuals 50% less likely to receive a callback interview or job offer.[8] Additionally, unemployed former convicts are much more likely to recidivate.[9] This increased chance of recidivism can impose a greater burden on our justice system, our economy, and our society. Should the justice system permit additional impediments to ex-convicts in obtaining employment?

Former criminals often face this collateral consequence and have great difficulty in finding jobs because many employers inquire about criminal history on job applications. Numerous legal scholars contend that screening based on criminal history is discriminatory and should be prohibited under Title VII.[10] However, the countervailing argument is that employers could be placing themselves at risk if they were to inadvertently hire convicted felons.[11]

Advocates in favor of eliminating this form of employment discrimination against formerly convicted individuals started the Ban the Box Campaign.[12] This movement aspires to prohibit the question or "box" on employment applications that asks about criminal history.[13] Ban the Box Campaign proponents argue that individuals should not have to disclose their criminal history on job applications. Since the inception of the movement in 1998,[14] 150 cities and counties and thirty different states have adopted Ban the Box policies.[15]

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7 *See* Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 646 (2005).

8 Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009).

9 S. COAL. FOR SOC. JUSTICE, THE BENEFITS OF BAN THE BOX 3–4 (May 1, 2016), https://www.southerncoalition.org/wp-content/uploads/2018/11/BantheBox_WhitePaper.pdf.

10 *See generally* Aaron F. Nadich, *Ban the Box: An Employer's Medicine Masked as a Headache*, 19 ROGER WILLIAMS U. L. REV. 767, 768–69 (2014).

11 Rhonda Smith, *Employer Concerns About Liability Loom as Push for Ban-the-Box Policies Spreads*, Daily Lab. Rep. (BNA) No. 150, at 1–2 (Aug. 5, 2014).

12 *About: The Ban the Box Campaign*, BAN THE BOX CAMPAIGN, http://bantheboxcampaign.org/about (last visited Oct. 12, 2016).

13 *Id.*

14 Smith, *supra* note 11.

15 BETH AVERY & PHIL HERNANDEZ, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2018), http://stage.nelp.org/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf.

Ban the Box legislation[16] has important positive implications for society, as well as for the formerly convicted individuals. Ban the Box can help reduce recidivism rates, which in turn improves community safety.[17] Additionally, decreased recidivism rates lower correctional costs.[18] Ban the Box helps convicted individuals rejoin their communities and gain employment opportunities for which they might not have been considered otherwise.

This Comment argues that collateral consequences, including ex-offenders' difficulties in finding employment, is not consistently being fully considered during the sentencing process, which leads to disproportionate and inconsistent sentences. This Comment concludes that, to improve proportionality and uniformity of sentences, judges should uniformly consider collateral consequences when sentencing.

Part I of this Comment analyzes the federal sentencing process, including the Sentencing Guidelines and the discretion of sentencing judges.[19] Part II describes the collateral consequences that arise from criminal sentences and how various courts handle these considerations when sentencing. Part II also provides background information on the collateral consequence of unemployment following convictions. Part III identifies the split between the position of the Second and Fourth Circuits and the position of the Sixth, Seventh, and Tenth Circuits and discusses how various circuits give different levels of consideration to collateral consequences. Part IV suggests potential solutions to the split among circuits, which could contribute to imposing fairer, more just, and more proportional sentences. Finally, Part IV discusses how the recommendations would operate in practice, particularly when compared to alternative solutions.

I. FEDERAL SENTENCING

A. *Sentencing Guidelines*

The Sentencing Reform Act of 1984 ("the Act") developed the original Federal Sentencing Guidelines.[20] The Act's purpose was to create a fair and uniform sentencing system.[21] Congress sought to achieve this purpose by ensuring honesty, reasonable uniformity, and proportionality in sentencing.[22] The Sentencing Guidelines were created to advance the purposes of

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16 Ban the Box legislation is also often referred to as Fair Chance legislation.

17 S. COAL. FOR SOC. JUSTICE, *supra* note 9, at 3–4.

18 *Id.*

19 While similar logic may apply to state courts, this Comment only evaluates federal sentencing.

20 U.S. SENTENCING GUIDELINES MANUAL § 1(A)(1)(3) (U.S. SENTENCING COMM'N 2016).

21 *Id.*

22 *Id.*

criminal punishment through the federal sentencing process.[23] Additionally, the Sentencing Guidelines explain that they promote the purposes of sentencing, which are the need for a sentence:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
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> (B) to afford adequate deterrence to criminal conduct;
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> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .[24]

The Sentencing Guidelines enumerate different categories and state what offense level results when all factors are combined.[25] The type of crime, the severity of the crime, the criminal history of the offender, and any exacerbating factors determine the offense levels.[26] The final "level" is determined by adding all pertinent factors, at which point a federal judge can use the sentencing table and determine the appropriate sentencing range.[27] Specifically, the judges determine the appropriate sentence by selecting the appropriate offense level on the vertical axis and the appropriate criminal history category on the horizontal axis.[28] The sentencing table includes forty-three different offense levels and six different categories of criminal history to select from.[29]

The Supreme Court has established that a district court sentence is presumptively reasonable if it falls within the Sentencing Guidelines and if the guideline range has been properly calculated.[30] However, this does not mean that a sentence outside the Sentencing Guidelines is presumed unreasonable.[31]

While sentencing courts must consider the Sentencing Guidelines, they may deviate from the Sentencing Guidelines if atypical facts are present.[32] A case is "atypical" when the Sentencing Guidelines seem to apply, but the

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23 *Id.* § 1(A)(1)(2).

24 18 U.S.C. § 3553(a)(2) (2016); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 1(A)(1)(2).

25 *See generally* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20.

26 *See generally id.*

27 *See* CHARLES DOYLE, HOW THE FEDERAL SENTENCING GUIDELINES WORK: A BRIEF OVERVIEW 15–16 (2011).

28 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 5(A).

29 *Id.*

30 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 1(A)(1)(2); Rita v. United States, 551 U.S. 338, 347–53 (2007).

31 *Rita*, 551 U.S. at 354–55.

32 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § (1)(A)(1)(2).

conduct is different from the norm.[33] Atypical facts include, but are not limited to, lack of guidance as a youth, physical condition, and coercion.[34]

Additionally, these deviations are appropriate in light of the Supreme Court's holding in *United States v. Booker*[35] that the Sentencing Guidelines are not mandatory (as originally established in 18 U.S.C. § 3553(b)(1)) but instead are advisory.[36] While the Sentencing Guidelines are no longer binding on federal courts, they are still the starting point for federal judges to begin a sentencing analysis.[37] However, district court judges must consider other factors in addition to the Sentencing Guidelines to reach an appropriate sentence.[38] Judges are required to "make an individualized assessment based on the facts presented. If [the judge] decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."[39]

B. *Discretion of Federal Judges to Deviate from Sentencing Guidelines*

Courts are permitted to depart from the Sentencing Guidelines.[40] In *Williams v. New York*,[41] the Supreme Court determined that it is appropriate for sentencing judges to consider a wide range of information. In *Williams*, the Court explained that "a sentencing judge could exercise wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."[42]

Federal judges deviate from the Sentencing Guidelines by imposing sentences outside their specifications in two different ways: departures or variances.[43] A departure is a sentence imposed under the framework of the Sentencing Guidelines but which falls outside their range.[44] In contrast, a variance is a sentence above or below the Sentencing Guidelines

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33 *Id.* § 1(A)(1)(4)(b).

34 *Id.*

35 543 U.S. 220 (2005).

36 *Id.* at 245.

37 *Id.* at 245–46; DOYLE, *supra* note 27, at 1.

38 *See* Gall v. United States, 552 U.S. 38, 49–50 (2007).

39 *Id.* at 50.

40 *Booker*, 543 U.S. at 233.

41 337 U.S. 241 (1949) *superseded by statute*, Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1837, *as recognized in* United States v. Astronomo, 183 F. Supp. 2d 158 (D. Mass. 2001).

42 *Id.* at 246.

43 PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES § 6.01(A) (David Debold ed., 5th ed. 2016). While both departures and variances are currently available, this was not always true. Specifically, variances existed only after the Court stated in *Booker* that the Sentencing Guidelines are advisory. *Id.*

44 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 1(B)(1.1) cmt. 1(E); Irizarry v. United States, 553 U.S. 708, 714 (2008).

recommendation based on the judge's consideration of the 18 U.S.C. § 3553(a) factors.[45]

District courts are permitted to "impose sentences within statutory limits based on appropriate consideration of all of the factors listed in § 3553(a), subject to appellate review for 'reasonableness.'"[46] The 18 U.S.C. § 3553(a) factors courts may consider include the nature and circumstances of the offense, the defendant's history, the kinds of available sentences, relevant policy statements, the need to provide punishment, how to avoid unnecessary sentencing disparities, and the need to provide restitution.[47] Specifically, § 3553(a) provides that federal judges, when imposing a sentence, may consider:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
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> (2) the need for the sentence imposed [to promote the purposes of sentencing] . . . ;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ;
> >
> > (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission . . . ;
>
> (5) any pertinent policy statement . . . ;
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
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> (7) the need to provide restitution to any victims of the offense.[48]

Since *Booker*, many district courts have chosen to use the discretion granted by § 3553 and have deviated from the Sentencing Guidelines. Specifically, in 2015, only 47.3% of cases were sentenced within the Sentencing Guidelines.[49] Thus, many judges have chosen to exercise their discretion to deviate.

The Supreme Court has affirmed the importance of giving deference to district courts' discretion in departing from the Sentencing Guidelines.[50] In

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45 United States v. Brown, 578 F.3d 221, 226 (3d Cir. 2009); United States v. Cruz-Perez, 567 F.3d 1142, 1146 (9th Cir. 2009); PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES, *supra* note 43, § 6.01(A); OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 1 (2014).

46 Pepper v. United States, 562 U.S. 476, 490 (2011) (quoting Gall v. United States, 552 U.S. 38, 49–51 (2007)).

47 18 U.S.C. § 3553(a) (2016).

48 *Id.*

49 U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT 1 (2015).

50 Koon v. United States, 518 U.S. 81, 96–98 (1996), *superseded by statute*, PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, *as recognized in* United States v. Thurston, 358 F.3d 51 (1st Cir. 2004).

Koon v. United States,[51] the Court held that appellate courts are to review departures from the Sentencing Guidelines by an abuse-of-discretion standard.[52] The *Koon* Court explained that departures from the Sentencing Guidelines are afforded substantial deference for several reasons.[53] First, these departures are a common exercise of sentencing court discretion.[54] Second, sentencing courts have an institutional advantage in this area based on the quantity of Sentencing Guidelines cases they hear.[55]

In sentencing, federal judges are permitted to determine what sentences are appropriate. They may return with either sentences that fall within the Sentencing Guidelines or sentences that fall outside its parameters. While federal judges have this discretion to make individual determinations for each offender, the Sentencing Guidelines do not provide specific examples of what types of factors are sufficient to justify a sentence that falls outside the calculated sentence parameters under § 3553. Therefore, clarification is needed. Otherwise, judges will impose inconsistent sentences.

II. COLLATERAL CONSEQUENCES

Collateral consequences may reasonably fall within the § 3553 factors that can warrant a deviation from the Sentencing Guidelines. However, there is debate on whether it is appropriate for judges to consider collateral consequences when sentencing.[56] Prior to analyzing whether considering collateral consequences is appropriate, collateral consequences must first be fully understood.

A collateral consequence is distinguishable from a direct consequence of a criminal sentence.[57] "Collateral consequences are the penalties, disabilities, or disadvantages imposed upon a person as a result of a criminal conviction . . . . Put another way, collateral consequences are opportunities and benefits that are no longer fully available to a person, or legal restrictions a person may operate under . . . ."[58] In contrast, a direct consequence has a "definite, immediate and largely automatic effect."[59] A

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51 518 U.S. 81 (1996), *superseded by statute*, PROTECT Act, Pub. L. No. 108-21, 117 Stat. 650, *as recognized in Thurston*, 358 F.3d 51.

52 *Id*. at 96–99.

53 *Id*. at 98–99.

54 *Id*.

55 *Id*.

56 *See* United States v. Nesbeth, 188 F. Supp. 3d 179, 186 (E.D.N.Y. 2016).

57 Pinard, *supra* note 2, at 634.

58 THE FED. INTERAGENCY REENTRY COUNCIL, A RECORD OF PROGRESS AND A ROADMAP FOR THE FUTURE 10 (2016) (quoting Am. Bar Ass'n, *Collateral Consequences Project*, https://www.ncjrs.gov/pdffiles1/nij/252073.pdf).

59 Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

consequence is collateral when an individual or entity other than the sentencing court must take action.[60]

Collateral consequences are not included in the court's judgment, unlike direct consequences.[61] Instead, collateral consequences are imposed indirectly as a result of the criminal sentence.[62] While collateral consequences are not imposed as parts of sentences, many scholars believe these consequences can impact offenders more severely than direct consequences.[63] Collateral consequences have a profound impact on individuals' lives because they can have long-term effects on the individual, the individual's future, and the individual's family.[64]

A. *Overview of Collateral Consequences*

Sentencing judges do not *explicitly* hand down collateral consequences to offenders.[65] However, collateral consequences automatically attach with the sentence and can be both severe and serious. Collateral consequences include, but are not limited to, ineligibility for military service, employment restrictions, financial instability, restrictions on occupational licensure, termination of parental rights, decreased access to public benefits and housing, deportation, voter disenfranchisement,[66] and civil commitments.[67] Many of these collateral consequences continue to plague individuals convicted of crimes for the remainder of their lives.[68]

The offenders are not the only individuals negatively impacted by collateral consequences. Collateral consequences also have a deleterious impact on businesses looking for talented workers, on communities,[69] and on families.[70]

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60 United States v. Littlejohn, 224 F.3d 960, 965 (9th Cir. 2000).

61 Pinard, *supra* note 2, at 634 (explaining that various courts have held that direct consequences include incarceration, fines, and parole eligibility).

62 *Id.*

63 *See, e.g.*, Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1103–04 (2013); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 125 (2009).

64 Logan, *supra* note 63, at 1008.

65 Pinard, *supra* note 2, at 634.

66 WHITE HOUSE COUNCIL OF ECON. ADVISERS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 48 (2016); MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2:1 (2016); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302 (2015).

67 *See* George v. Black, 732 F.2d 108, 111 (8th Cir. 1984).

68 Pinard, *supra* note 2, at 633.

69 Barack Obama, *Commentary: The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 833 (2017).

70 WHITE HOUSE COUNCIL OF ECON. ADVISERS, *supra* note 66, at 50–51.

Collateral consequences can be either formal or informal.[71] Informal collateral consequences do not arise from a statute. Instead, informal collateral consequences are the negative social, economic, and psychological consequences stemming from convictions.[72] Informal collateral consequences include the social stigma of having a conviction and the decreased employment opportunities that are available following a conviction.[73]

In contrast, certain collateral consequences formally attach to a conviction by operation of laws and regulations.[74] These formal collateral consequences can include deportation, voter disenfranchisement, required offender registration, termination of parental rights, and loss of occupational licensing.[75] Because formal collateral consequences have increased in number, severity, and complexity, the Uniform Collateral Consequences of Conviction Act was enacted to create a registry of collateral consequences.[76] The Uniform Collateral Consequences of Conviction Act requires each state to collect information on all collateral consequences, including citations and short descriptions, to allow judges, legislators, lawyers, and defendants to use this information to make decisions.[77] This information is particularly important in sentencing and plea negotiations.[78] The American Bar Association takes the position that these formal collateral consequences should be limited, codified, and considered at sentencing.[79]

While many formal collateral consequences have obvious and discrete effects, informal employment consequences are more speculative in nature and are difficult to quantify at sentencing. However, federal judges still should address the employment collateral consequences to accurately and proportionally sentence individuals to ensure that they are not being overpunished. Fundamentally, offenders should be sentenced uniformly and in a manner commensurate with their crimes, regardless of whether doing so may be inconvenient or challenging for courts.

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71 Logan, *supra* note 63, at 1104.

72 *Id.*

73 *Id.* at 1106.

74 *See id.* at 1104, 1116.

75 LOVE ET AL, *supra* note 66, § 2:1.

76 UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT § 4 (NAT'L CONFERENCE OF COMM'RS 2010).

77 *Id.*

78 In terms of plea negotiations, these compilations of collateral consequences allow individuals charged with crimes and their counsels to have full awareness of the implications of accepting or denying an offered plea.

79 AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standards 19-2.1 to .4 (3d ed. 2004).

B. *The Ban the Box Campaign: Combatting One Pervasive Collateral Consequence*

While many collateral consequences exist, the Ban the Box Campaign focuses on one large informal collateral consequence. The Ban the Box Campaign seeks to combat the collateral consequence of unemployment following a conviction.[80]

1. What Is Ban the Box?

The Ban the Box Campaign encourages legislatures and employers to prohibit the use of the box that inquires about criminal history on job applications.[81] While Ban the Box legislation discourages criminal history questions on job applications, it does not completely prohibit background checks during the hiring process.[82] Most forms of Ban the Box legislation permit background checks for certain industries and when the committed crime relates to the duties of the job being sought, so employers can discover the relevant criminal history of applicants.[83] Therefore, Ban the Box legislation does not subject employers to unnecessary risk. The underlying premise behind Ban the Box legislation's delaying and limiting the use of background checks is that doing so will give individuals with criminal histories an opportunity to prove themselves to employers based on their qualifications first, before employers consider the potential employees' criminal histories.[84] Thus, Ban the Box legislation merely preserves opportunities for offenders that likely would be unavailable if employers could screen applicants based on criminal history in the early stages of the application process.

The Ban the Box movement began in Hawaii in 1998, where the first piece of legislation that banned the criminal history box on job applications was enacted.[85] Hawaii's original Ban the Box legislation states that employers may inquire into the criminal history of job applicants only after giving applicants a conditional offer, and then they may inquire only if the conviction is rationally related to the job.[86]

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80 *See About: The Ban the Box Campaign*, *supra* note 12.

81 *See id.*

82 *See* AVERY & HERNANDEZ, *supra* note 15, at 1.

83 *See, e.g.*, COLO. REV. STAT. ANN. § 24-5-101(4)(b) (West 2017); HAW. REV. STAT. ANN. § 378-2.5 (West 2017).

84 AVERY & HERNANDEZ, *supra* note 15, at 1.

85 Smith, *supra* note 11.

86 HAW. REV. STAT. ANN. § 378-2.5 (West 2017).

The question of whether a former conviction and a job are rationally related is a fact-based determination.[87] However, *Kahumoku v. United Airlines, Inc.*[88] provides an illustrative example of a rational relationship that exists between the conviction and the duties of a job, which justifies termination of employment under the Hawaii Ban the Box legislation's standard.[89] In *Kahumoku*, the Ninth Circuit held that a previous conviction for having sexual contact with a mentally disabled or physically helpless individual was rationally related to the duties and responsibilities of an airport employee.[90] Specifically, the Ninth Circuit explained that this conviction was rationally related to the duty of assisting disabled passengers and children in the airport.[91]

Since 1998, twenty-nine additional states, the District of Columbia, and 150 cities and counties have followed Hawaii's lead and enacted some form of Ban the Box legislation, which requires public or private employers to remove criminal history questions from job applications.[92] Additionally, ten of those thirty states went a step further in their statutory schemes, prohibiting private employers from asking about conviction history on job applications.[93]

In addition to the state statutes that have been enacted, President Obama banned the criminal history box in federal employment through an executive order on November 2, 2015.[94] President Obama directed the Office of Personnel Management to modify its rules to delay criminal history inquiries to a later point in the hiring process.[95]

The Obama Administration continued to support the Ban the Box Campaign by creating the White House Fair Chance Business Pledge,

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87 Wright v. Home Depot U.S.A., Inc., 142 P.3d 265, 275–76 (Haw. 2006).

88 584 F. App'x 295 (9th Cir. 2014).

89 *See id.* at 296.

90 *Id.*

91 *Id.*

92 AVERY & HERNANDEZ, *supra* note 15, at 1 (stating that the thirty states which have enacted Ban the Box policies are Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Wisconsin); Smith, *supra* note 11.

93 AVERY & HERNANDEZ, *supra* note 15, at 1.

94 Press Release, The White House, Office of the Press Sec'y, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation; Peter Baker, *Obama Takes Steps to Help Former Inmates Find Jobs and Homes*, N.Y. TIMES (Nov. 2, 2015), https://www.nytimes.com/2015/11/03/us/obama-prisoners-jobs-housing.html.

95 The White House, Office of the Press Sec'y, *supra* note 94.

which asks companies to commit to removing unnecessary hiring barriers.[96] Many large employers have since signed this pledge, including Coca-Cola, Microsoft, Starbucks, Google, Uber, Walmart, and Staples.[97] In addition to those companies that have signed the pledge, Facebook, Target, Home Depot, and Koch Industries have instituted specific Ban the Box policies.[98]

Congress has also taken steps toward Banning the Box for the federal government by introducing the Fair Chance Act.[99] If enacted, the Fair Chance Act would prohibit both the federal government and federal contractors from inquiring into criminal history until a conditional job offer has been presented.[100] While this would be a great stride toward reducing the employment consequences in the federal arena, the Fair Chance Act will not have an impact on the private sector. Approximately 85% of U.S. jobs are based in the private sector, so the Fair Chance Act will not impact the vast majority of employment opportunities.[101]

Additionally, despite these efforts across the nation, the existing Ban the Box legislation varies significantly among states and municipalities.[102] First, Ban the Box legislation varies on when employers can conduct background checks.[103] Various laws permit employers to conduct background checks when the applicant is deemed qualified, following an interview, or

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96 Press Release, The White House, Office of the Press Sec'y, Fact Sheet: White House Launches the Fair Chance Business Pledge (Apr. 11, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge.

97 Carimah Townes, *Numerous Major Corporations Join White House Initiative to Ban the Box*, THINK PROGRESS (Apr. 12, 2016, 5:51 PM), https://thinkprogress.org/numerous-major-corporations-join-white-house-initiative-to-ban-the-box-65756e240e52; *Take the Fair Chance Pledge*, THE WHITE HOUSE, https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge (last visited Feb. 26, 2018).

98 Mark V. Holden, *Why Koch Industries 'Banned the Box'*, WALL ST. J. (Aug. 17, 2016, 6:38 PM), https://www.wsj.com/articles/why-koch-industries-banned-the-box-1471473505; Brent Staples, *Target Bans the Box*, N.Y. TIMES (Oct. 29, 2013, 3:18 PM), https://takingnote.blogs.nytimes.com/2013/10/29/target-bans-the-box.

99 Baker, *supra* note 94.

100 FAIR CHANCE ACT, S. REP. No. 114-200, at 1 (2016); Baker, *supra* note 94.

101 *See* Niall McCarthy, *Scandinavia Leads the World in Public Sector Employment*, FORBES (July 21, 2017, 9:23 AM), https://www.forbes.com/sites/niallmccarthy/2017/07/21/scandinavia-leads-the-world-in-public-sector-employment-infographic/#578075581820.

102 *See* Fred W. Alvarez et al., *"Ban the Box": A Discussion of State and Local Laws Restricting Inquiries into an Applicant's Criminal History*, JONES DAY (Sept. 2014), http://www.jonesday.com/ban-the-box-a-discussion-of-state-and-local-laws-restricting-inquiries-into-an-applicants-criminal-history-09-16-2014.

103 *See, e.g.*, CONN. GEN. STAT. ANN. § 46a-80(b) (West 2016) (no inquiry into criminal history permitted until candidate is deemed qualified); HAW. REV. STAT. ANN. § 378-2.5(b) (West 2017) (criminal history inquiries may be made only following receipt of conditional offer); LA. STAT. ANN. § 42:1701(A) (2016) (no inquiry into criminal history until interview or conditional offer); Va. Exec. Order No. 2015-41 (Apr. 3, 2015) (background checks are not permitted until the candidate has signed a waiver, been found eligible, and is being considered for position).

after making a conditional offer to an applicant.[104] Second, the statutes vary based on whether they apply to private employers, public employers, or both.[105] Third, the legislation varies on what kind of information employers can consider. Specifically, they vary on whether limitations are imposed on the type of offense or how much time has lapsed since the conviction.[106] Fourth, the state legislation varies significantly on how employers are directed to consider criminal history.[107]

Overall, at this point, thirty states, 150 local government entities,[108] Congress,[109] the Obama Administration,[110] and numerous companies[111] have taken steps toward addressing the collateral consequence of employment discrimination following a conviction by limiting an employer's ability to seek disclosure of criminal history. This widespread attack on criminal history disclosure demonstrates that this informal collateral consequence is impacting society and that many individuals and government entities believe it is neither appropriate nor necessary for a criminal conviction to have a dramatic, lifelong negative impact on offenders' employment opportunities.

2. The Impact of the Ban the Box Campaign

The general goal of Ban the Box legislation is to give a convicted individual the opportunity to be considered for employment prior to employers discovering his criminal history.[112] This goal is justified because there is a negative relationship between learning about criminal history and hiring formerly convicted individuals.[113] Additionally, there is a significant link between unemployment and recidivism.[114] A study found that employment following a conviction can reduce recidivism rates by up to twenty percent for nonviolent crimes.[115]

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104 *See* CONN. GEN. STAT. ANN, § 46a-80(b) (West 2016); HAW. REV. STAT. ANN. § 378-2.5(b) (West 2017); LA. STAT. ANN. § 42:1701(A) (2016); Va. Exec. Order No. 2015-41 (Apr. 3, 2015).

105 *See* AVERY & HERNANDEZ, *supra* note 15, at 19–21.

106 *See id.*

107 Adriel Garcia, Comment, *The* Kobayashi Maru *of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 TEMP. L. REV. 921, 947–48 (2013).

108 AVERY & HERNANDEZ, *supra* note 15, at 1.

109 Baker, *supra* note 94.

110 *See* The White House, Office of the Press Sec'y, *supra* note 94; Baker, *supra* note 94.

111 Townes, *supra* note 97.

112 Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL'Y 371, 373 (2008).

113 *Id.* at 381.

114 Stewart D'Alessio et al., *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, 40 AM. J. CRIM. JUST. 336, 340 (2015).

115 AARON YELOWITZ & CHRISTOPHER BOLLINGER, MANHATTAN INST., PRISON-TO-WORK: THE BENEFITS OF INTENSIVE JOB-SEARCH ASSISTANCE FOR FORMER INMATES 12 (2015).

While formerly convicted individuals who obtain jobs may still relapse, job attainment removes some pressure to support themselves and their families.[116] Therefore, removing an obstacle, which often inhibits finding employment, is a crucial part of reintegrating former convicts into society.[117]

A study was conducted in 2014 to evaluate the impact of Hawaii's Ban the Box legislation.[118] This study focused on Hawaii's legislation because it was the first of its kind and also a very strict form of Ban the Box legislation.[119] The study found that in the six years following the enactment of the Hawaii statute, there was an overall decline in repeat offending for felonies.[120] Specifically, repeat felony offenses decreased by an average of 11.4%.[121]

This study also found that Hawaii's Ban the Box statute did not have any meaningful impact on minorities.[122] This finding is particularly significant because some scholars contend that in the absence of criminal background checks, employers will resort to stereotyping applicants and guessing criminal history of applicants based on race.[123]

Many scholars who support the movement contend that disclosure of criminal history by job applicants is a form of employment discrimination under Title VII.[124] While convicted individuals could not bring a disparate-treatment claim under Title VII because they are not a protected class,[125]

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116 Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair-Chance Policies* 1, NAT'L EMP'T LAW PROJECT (Aug. 2016), https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf.

117 *Id.*

118 D'Alessio et al., *supra* note 114, at 342.

119 *Id.* at 341 (explaining that Hawaii's Ban the Box legislation prohibits background checks until a conditional offer has been made, and even then, the offer may be revoked only if the crime has a rational relationship to the duties of the job).

120 *Id.* at 345.

121 *Id.*

122 *Id.* at 348.

123 Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 22469, 2016); Sendhil Mullainathan, *Ban the Box? An Effort to Stop Discrimination May Actually Increase It*, N.Y. TIMES (Aug. 19, 2016), https://www.nytimes.com/2016/08/21/upshot/ban-the-box-an-effort-to-stop-discrimination-may-actually-increase-it.html; Shankar Vedantam, *'Ban the Box' Laws, Do They Help Job Applicants with Criminal Histories?*, NPR (July 19, 2016, 5:06 AM), https://www.npr.org/2016/07/19/486571633/are-ban-the-box-laws-helping-job-applicants-with-criminal-histories.

124 *See, e.g.*, Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 206 (2004); Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2808–10 (2015).

125 *See generally* 42 U.S.C. § 2000e-2 (2016) (explaining that it is unlawful for employers to discriminate because of an "individual's race, color, religion, sex, or national origin").

scholars argue that these individuals still have recourse under Title VII.[126] Individuals with criminal records could bring action under Title VII if they can show that considering criminal history in hiring could have a disparate impact on protected minorities.[127] Assuming this stance is correct, Ban the Box combats and alleviates this form of discrimination. Ban the Box reduces discrimination for ex-convicts, who are otherwise qualified, in finding employment.

Since their inception in 1998, Ban the Box policies have become common and widespread. They are helping reintegrate offenders into society while still accounting for risks and employer concerns. However, Ban the Box legislation combats only one collateral consequence and reduces the impact of only that consequence; Ban the Box legislation does not resolve the issue of disproportionate sentences. Therefore, despite the success of Ban the Box legislation, another solution is required.

III. THE CIRCUIT SPLIT

While the Ban the Box Campaign attempts to reduce the impact of one collateral consequence, there is another method available to address collateral consequences before they become an issue for offenders. This method mandates recognition of collateral consequences in sentencing. However, circuits are split on how to address collateral consequences.[128] The circuit split is over whether it is appropriate for judges to consider the resulting collateral consequences when sentencing.[129] The Supreme Court has yet to decide whether considering these consequences is permissible.[130]

A. *Circuits That Explicitly Refuse to Consider Collateral Consequences*

The Sixth and Tenth Circuits have established that collateral consequences may not be considered during the federal sentencing process.[131] In *United States v. Musgrave*,[132] the U.S. Court of Appeals for the Sixth Cir-

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126 *See* Clark, *supra* note 124, at 206.

127 *Id.*

128 *See* United States v. Morgan, 635 F. App'x 423, 446–47 (10th Cir. 2015); United States v. Nesbeth, 188 F. Supp. 3d 179, 186 (E.D.N.Y. 2016); Gregory N. Racz, *Exploring Collateral Consequences:* Koon v. United States*, Third Party Harm, and Departures from Federal Sentencing Guidelines*, 72 N.Y.U. L. REV. 1462, 1492–93 (1997).

129 *See Morgan*, 635 F. App'x at 446–47; *Nesbeth*, 188 F. Supp. 3d at 186; Racz, *supra* note 128, at 1492–93.

130 *Morgan*, 635 F. App'x at 446–47; *Nesbeth*, 188 F. Supp. 3d at 186.

131 *See Morgan*, 635 F. App'x at 446–47; United States v. Musgrave, 761 F.3d 602, 608–09 (6th Cir. 2014).

132 761 F.3d 602 (6th Cir. 2014).

cuit explained that "[t]he collateral consequences of the defendant's prosecution and conviction are 'impermissible factors' when fashioning a sentence that complies with [Congress's view of the crime's seriousness]."[133] The Sixth Circuit determined that the district court acted inappropriately by considering the defendant's substantial legal fees, the years spent in litigation, his likelihood of losing his Certified Public Accountant license, and how the felony conviction would follow him for the remainder of his life.[134] The Sixth Circuit held that the district court's sentence must be reevaluated on remand without considering any collateral consequences.[135]

Similarly, in *United States v. Morgan*,[136] the Tenth Circuit decreed that it is improper to consider collateral consequences.[137] Specifically, the court found that the district court's consideration of the collateral consequences of the defendant's loss of his law license and the deterioration of his reputation, physical health, and financial stability was improper.[138] The Tenth Circuit's opinion explained that while the Supreme Court has yet to rule on this question, considering collateral consequences when sentencing is clearly improper.[139] The court made a policy argument that considering collateral consequences can often favor individuals with privileged backgrounds.[140]

The Tenth Circuit reasoned that considering collateral consequences is improper because doing so could lead to unnecessary disparities between sentences, which § 3553 expressly seeks to avoid.[141] The Tenth Circuit further supported its position by citing 28 U.S.C. § 994(d), which enumerates the duties of the United States Sentencing Commission, and several Sentencing Guidelines policy statements.[142] The cited policy statements declare that employment record, socioeconomic status, and vocational skills are not ordinarily relevant in determining departures.[143]

B. *The Eleventh and Seventh Circuit Approach*

In contrast to the approach of the Sixth and Tenth Circuits, the Eleventh and Seventh Circuits do not consider all external factors when sentenc-

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133 *Id.* at 608 (citing United States v. Peppel, 707 F.3d 627, 635–36 (6th Cir. 2013)).

134 *Id.* at 608–09.

135 *Id.* at 609.

136 635 F. App'x 423 (10th Cir. 2015).

137 *Id.* at 446–47.

138 *Id.* at 445.

139 *Id.* at 446–47.

140 *Id.*

141 *Id.* at 446.

142 *Id.* at 447. The U.S. Sentencing Commission creates the Federal sentencing guidelines and drafts policy statements. 28 U.S.C. § 994(a) (2016).

143 *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, §§ 5(H)(1.2), 5(H)(1.5), 5(H)(1.10).

ing. Both of these circuits have determined it is inappropriate for judges to consider certain collateral consequences, but they have not categorically denied factoring any collateral consequences into sentencing determinations.[144]

While the Seventh Circuit acknowledged that some rational sentencing discrepancies are allowed, the court held in *United States v. Stefonek*[145] that a departure for the defendant, a single mother of a twelve-year-old with learning disabilities, from the Sentencing Guidelines because of family ties and a middle-class status in the community was improper.[146] The court reasoned that the combination of services rendered to the community as a nurse and the negative impact that imprisonment would have on the defendant's child was insufficient to justify a downward departure from the Sentencing Guidelines.[147]

First, the Seventh Circuit explained that the defendant's service to the community as a nurse, which gave her the opportunity to commit Medicare and tax fraud, was inappropriate to consider because doing so would effectively give her a sentencing discount based on her middle-class status.[148] The court explained that educated and trained middle-class criminals are even more culpable than uneducated and deprived criminals.[149] Thus, the court refused to allow sentencing judges to use her job as a nurse, which gave rise to her middle-class status, as a justification for a downward departure.[150]

Second, the court explained that the defendant did not provide sufficient evidence to demonstrate that her child would be impacted more than any other child with an imprisoned parent.[151] Therefore, the court found that while extraordinary family ties can be considered in sentencing, the family situation in *Stefonek* was not significant enough to impact sentencing.[152]

Overall, the Seventh Circuit in *Stefonek* held that socioeconomic status cannot give rise to a departure from the guidelines.[153] However, the Seventh Circuit does allow consideration of the collateral consequence of family circumstances. This allowance is not merely permitted in the abstract; in *United States v. Owens*,[154] the Seventh Circuit found a downward departure

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144 *See* United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013); United States v. Stefonek, 179 F.3d 1030, 1037–38 (7th Cir. 1999).

145 179 F.3d 1030 (7th Cir. 1999).

146 *Id*. at 1037–38.

147 *Id*.

148 *Id*. at 1038.

149 *Id*.

150 United States v. Stefonek, 179 F.3d 1030, 1038 (7th Cir. 1999).

151 *Id*.

152 *Id*.

153 *Id*.

154 145 F.3d 923 (7th Cir. 1998).

based on extraordinary family circumstances was appropriate.[155] In *Owens*, the defendant worked two jobs, regularly cared for his children, and visited his brother with Down syndrome daily.[156] Additionally, the defendant indicated that his common-law wife and three children would require public-assistance housing and welfare benefits if the defendant had to go to jail.[157] The district court judge found these facts sufficient to warrant a downward departure in the defendant's sentence from the 168–210 month range to 120 months (the statutory minimum sentence).[158] The Seventh Circuit affirmed this determination, giving deference to the district court judge.[159]

Like the Seventh Circuit, the Eleventh Circuit refuses to consider social status as a reason for reducing a sentence. The Eleventh Circuit reviewed a downward variance from the Sentencing Guidelines in *United States v. Kuhlman*.[160] Several circuits interpret *Kuhlman* to mean that the Eleventh Circuit holds that no collateral consequences may be considered in sentencing.[161] In actuality, the Eleventh Circuit held only that the specific considerations were an inappropriate basis for such a significant deviation.[162] In *Kuhlman*, the Eleventh Circuit held that the district court's reduced sentence was unreasonable.[163] The court explained that it was inappropriate to grant a sentence of time served, as opposed to fifty-seven months, for stealing $3 million merely because the defendant performed numerous community service hours and because of his social status.[164]

The *Kuhlman* court further explained that "[t]he Sentencing Guidelines authorize no special sentencing discounts on account of economic or social status."[165] In *Kuhlman*, the Eleventh Circuit merely held that middle- or upper-class criminals should not be given more leniency than poor criminals.[166] While *Kuhlman* does not expressly condone considering collateral consequences in sentencing, *Kuhlman*'s holding also does not state that external considerations may never be considered. The *Kuhlman* court actually illustrated a commitment only to uniform sentencing.[167]

The logical conclusion is that *Kuhlman* stands for the proposition that the specific consideration of economic or social status is inappropriate to

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155 *Id.* at 929.

156 *Id.* at 926.

157 *Id.*

158 *Id.*

159 *Id.* at 928–29.

160 711 F.3d 1321 (11th Cir. 2013).

161 *See* United States v. Morgan, 635 F. App'x 423, 445 (10th Cir. 2015); United States v. Nesbeth, 187 F. Supp. 3d 179, 186 (E.D.N.Y. 2016).

162 *Kuhlman*, 711 F.3d 1321, 1328–29 (11th Cir. 2013).

163 *Id.*

164 *Id.*

165 *Id.* at 1329.

166 *Id.*

167 *See id.*

consider during sentencing. Because collateral consequences are the external impacts of a sentence,[168] the social status of the defendant, such as in *Kuhlman*, is thus not even a collateral consequence. The social status of the defendant in *Kuhlman* was a factor that existed prior to the crime and did not stem from the sentence. While the Eleventh Circuit could have denied considering the ramifications of the sentence on the defendant's social status, it did not do so.[169] Instead, the Eleventh Circuit denied granting a "sentencing discount[] on account of economic or social status."[170] Therefore, despite discussion to the contrary, the Eleventh Circuit is not completely consistent with the Sixth and Tenth Circuits.

C. *The Circuits That Consider Collateral Consequences When Sentencing*

A third position, adopted by the Second and Fourth Circuits, is that collateral consequences may be considered at sentencing.[171] In *United States v. Stewart*,[172] prior to reaching the Second Circuit, the district court explained how the defendant's "conviction made it 'doubtful that the defendant could pursue' his career as an academic or translator, and therefore that the need for further deterrence and protection of the public is lessened because the conviction itself" was substantial punishment.[173] The Second Circuit further stated that § 3553 demands just punishment for the crime, and the defendant was being sufficiently punished.[174] The court explained that it would be difficult for a court to impose a just punishment without considering the collateral effects of a sentence.[175] The Second Circuit upheld the deviation from the Sentencing Guidelines and found that the district court had not abused its discretion.[176]

Similarly, in *United States v. Pauley*,[177] the district court granted a shorter sentence after weighing various factors, including the defendant losing his teaching certificate, losing his state pension, and attending rehabilitation.[178] The Fourth Circuit upheld the district court's finding and determined that the lesser sentence was appropriate because the district court

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168 Mayson, *supra* note 66, at 302; Pinard, *supra* note 2, at 634.

169 *See Kuhlman*, 711 F.3d at 1329.

170 *Id.*

171 *See* United States v. Stewart, 590 F.3d 93, 141 (2d Cir. 2009); United States v. Pauley, 511 F.3d 468, 474–76 (4th Cir. 2007).

172 590 F.3d 93 (2d Cir. 2009).

173 *Id.* at 141.

174 *Id.*

175 *Id.*

176 *Id.* at 142.

177 511 F.3d 468 (4th Cir. 2007).

178 *Id.* at 474–76.

appropriately weighed many § 3553(a) factors.[179] The Fourth Circuit explained that considering the collateral consequences is consistent with § 3553(a)'s requirement for sentences to reflect just punishment and adequate deterrence.[180]

This division between circuits has led to inconsistency in the application of federal sentencing, which should be consistent among federal courts. Given that a goal of the Act is to promote consistency among sentences, this circuit split is not promulgating Congress's goals and should be resolved to create a fairer and more just nationwide sentencing system.

IV. RECOMMENDATION ON HOW TO RESOLVE THE CIRCUIT SPLIT AND HOW TO IMPROVE PROPORTIONALITY OF CRIMINAL SENTENCES

Despite the positive effect of Ban the Box legislation on the impact of one collateral consequence to ex-offenders, Ban the Box legislation should not be as necessary as it is presently and is not the answer to the problem. Instead, the problem of collateral consequences arising from sentences should be addressed at sentencing. If federal judges can better consider what felony convictions mean as a whole when sentencing, there would be less need for Ban the Box legislation. Therefore, federal judges should follow the lead of the Second and Fourth Circuits and consider collateral consequences when sentencing.

A. *Recommended Treatment of Collateral Consequences for Sentencing Purposes*

While collateral consequences are not directly part of a sentence—unlike imprisonment, probation, or fines—many scholars argue that these consequences carry punitive weight, are a form of punishment, and thus should be considered part of a sentence.[181]

1. Consideration of Collateral Consequences Is Consistent with the Federal Sentencing Guidelines

The 2016 Federal Sentencing Guidelines provide, in 18 U.S.C. § 3553(b), that if "a particular case presents atypical features, the Act allows the court to depart from the guidelines and sentence outside the pre-

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179 *Id.* at 475; *see supra* notes 47–48 and accompanying text.

180 *Pauley*, 511 F.3d at 474–75.

181 Mayson, *supra* note 66, at 316; *see* AM. BAR ASS'N, *supra* note 79, Standard 19-2.4.

scribed range. In that case, the court must specify reasons for departure."[182] Moreover, 18 U.S.C. § 3553(a) provides several factors that federal judges can consider when sentencing under the Sentencing Guidelines.[183]

Collateral consequences should already be considered by courts under 18 U.S.C. § 3553(a)(2)(A).[184] Considering collateral consequences under this subparagraph of § 3553 could reasonably result in a variance if the sentencing judge determines that the consequence is significant enough. Under § 3553(a)(2)(A), collateral consequences must be considered to adequately "provide just punishment for the offense."[185] If collateral consequences are not considered, then the combination of collateral consequences and the imposed sentence could punish offenders more than is required. Doing so could make the punishment disproportionate to the crime.

2. Consideration of Collateral Consequences Is Consistent with Supreme Court Precedent

In *Gall v. United States*,[186] the Supreme Court reviewed a sentence that was outside the range suggested by the Sentencing Guidelines.[187] The Sentencing Guidelines calculation suggested that an appropriate sentence would fall in the range of thirty to thirty-seven months of *imprisonment*.[188] However, the defendant in *Gall* was sentenced to *probation* for thirty-six months.[189] While the record does not indicate whether the district court considered possible disparity in sentencing, the Court presumed that the requisite consideration and weight had been given to avoiding disparities because the Sentencing Guidelines range was properly calculated.[190]

The *Gall* Court explained that judges should begin the process of sentencing by correctly calculating the Sentencing Guidelines range.[191] However, this calculation alone is not presumed to be reasonable; judges have a further obligation to make an "individualized assessment based on the facts presented."[192] Next, the sentencing judge should "consider *all* of the [18 U.S.C.] § 3553(a) factors."[193] Then, if the judge selects a sentence

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182 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 1(A)(1)(2).
183 18 U.S.C. § 3553(a) (2016).
184 *See id.*; *Pauley*, 511 F.3d 474–75.
185 18 U.S.C. § 3553(a)(2)(A); *accord Pauley*, 511 F.3d at 474–75.
186 552 U.S. 38 (2007).
187 *Id.* at 43–44.
188 *Id.* at 43.
189 *Id.*
190 *Id.* at 54.
191 *Id.* at 49.
192 *Gall*, 552 U.S. at 49–50.
193 *Id.* (emphasis added).

outside the Sentencing Guidelines range, she must ensure that she has a valid justification for doing so.[194]

The *Gall* Court held that these sentencing decisions are evaluated on an abuse-of-discretion standard.[195] The Court explained several situations where an abuse of discretion could be found, including a miscalculation of the Sentencing Guidelines' range, a failure to consider the § 3553(a) factors, and a failure to explain the court's reasoning for deviating from the Sentencing Guidelines.[196] Thus, as collateral consequences arguably fall within the § 3553(a) factors, courts should consider them when sentencing. Furthermore, if judges fail to consider collateral consequences, which fall within § 3553(a), they are committing reversible error by abusing their discretion.

In *Koon*, while addressing the question of the discretion level for sentencing judges, the Court described how to consider a conviction's impact on a career.[197] The Court explained this in the context of the defendants losing all future law enforcement career prospects following the conviction.[198] The Court stated that socioeconomic status is inappropriate to consider when determining a sentence.[199] However, the Court continued to explain that while one's career does relate to his or her socioeconomic status, "the link is not so close as to justify categorical exclusion of the effect of the conviction on a career."[200]

Based on the facts of the case, the *Koon* Court found that the defendants' losing career prospects was inappropriate to consider when sentencing.[201] The Court reasoned that this factor should not be given weight because career-related consequences are appropriate and expected when individuals use their governmental authority as police officers to violate another's rights.[202] Following the *Koon* decision, it appears the Court believes that career-related consequences can factor into individual sentencing determinations when doing so is appropriate based on the facts of the case. Therefore, based on *Koon*, considering collateral consequences, such as career consequences following a conviction, appears consistent with Supreme Court precedent.

In 2010, the Supreme Court addressed whether a defendant needed to be informed of the collateral consequence of deportation that would follow a conviction. In *Padilla v. Kentucky*,[203] the defendant was not informed by

194 *Id.* at 50.
195 *Id.* at 51.
196 *Id.*
197 Koon v. United States, 518 U.S. 81, 109–10 (1996).
198 *Id.*
199 *Id.* at 110.
200 *Id.*
201 *Id.* at 110–11.
202 *Id.*
203 559 U.S. 356 (2010).

counsel that he would be deported under the Immigration Act of 1917 if he entered a guilty plea for drug charges.[204] The *Padilla* Court held that the Sixth Amendment requires counsel to inform clients of the collateral consequence of deportation when discussing pleas.[205]

In *Padilla*, the Court explained that because deportation is a particularly severe penalty that is essentially automatic following a criminal conviction, it is difficult to divorce the civil deportation consequences from the conviction.[206] The Court explained that while deportation is a consequence of a criminal conviction, it is a difficult penalty to classify as direct or collateral.[207] The Court continued to explain that "[t]he collateral versus direct distinction is thus ill suited to evaluating" a competence-of-counsel claim.[208]

While the *Padilla* Court did not hold that all collateral consequences must be given consideration or that the Sixth Amendment requires counsel to inform clients of all collateral consequences, the Supreme Court acknowledged the severity of the collateral consequence of deportation.[209] Additionally, some believe that *Padilla* muddied the distinction between direct and formal collateral consequences.[210] The Court's signal in *Padilla* of the deterioration of the direct/collateral consequence distinction indicates that the Supreme Court believes collateral consequences can be part of a sentence. Thus, a judge's consideration of informal collateral consequences that are severe enough to equate to a form of punishment is consistent with the Supreme Court's reasoning in *Padilla*.

3. Consideration of Informal Collateral Consequences Is Consistent with Treatment of Formal Collateral Consequences

Because formal collateral consequences are conveyed to defendants,[211] considered at sentencing,[212] and considered during sentencing adjustments,[213] it is logical for judges to similarly consider informal collateral consequences, such as employment implications. Furthermore, if the direct/collateral distinction is deteriorating, as *Padilla* seems to indicate,[214] then the more tenuous formal/informal distinction within collateral conse-

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204 *Id*. at 359, 361.

205 *Id*. at 374.

206 *Id*. at 365–66.

207 *Id*. at 366.

208 *Id*.

209 *See Padilla*, 559 U.S. at 365.

210 *See* Logan, *supra* note 63, at 1112; Mayson, *supra* note 66, at 315–16.

211 *Padilla*, 559 U.S. at 366.

212 Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32, 32–33 (2001).

213 *See* Spencer v. Kemna, 523 U.S. 1, 7–8 (1998).

214 *See Padilla*, 559 U.S. at 366; Logan, *supra* note 63, at 1112–13; Mayson, *supra* note 66, at 315–16.

quences should not matter. While formal consequences are more rigid and have a quantifiable impact, employment discrimination based on criminal history also warrants consideration in sentencing. The employment impediments following criminal sentencing should be considered because, like formal collateral consequences, they increase the punishment.

However, unlike formal collateral consequences, informal collateral consequences are not always intended. Informal collateral consequences are not uniformly imposed by statutes and regulations after legislative debate.[215] Instead, informal collateral consequences are societal impediments that follow convictions.[216] Thus, informal collateral consequences must be considered because they are not intended by a legislative body or a judge to be part of the sentence; they tack onto the sentence, expanding it, without a judicial determination or operation of a statute. In contrast, at least the infliction of formal collateral consequences is intended by lawmakers. Therefore, factoring informal collateral consequences into sentences is as appropriate as, if not more appropriate than, considering formal collateral consequences because any form of inflicted punishment should be accounted for at some point.

The fact that informal collateral consequences may not have as measurable an impact as formal collateral consequences does not mean they are irrelevant. In fact, they should be considered more carefully because of the potential for variation. Judges have a responsibility to "fashion a sentence that is 'sufficient, but not greater than necessary' to achieve the statutory purposes of sentencing."[217] To do so, judges should expend any additional time necessary to attempt to determine the extent of the impact of employment impediments following convictions. These additional considerations should take place to ensure that all offenders are punished fairly.

4. Consideration of Collateral Consequences Is Appropriate as a Practical Matter

As the Second Circuit explained in *Stewart*, it would be challenging to impose a fair punishment without looking at the totality of the circumstances in any given case.[218] What would constitute a fair and just punishment in one circumstance may not be fair and just for a different defendant. Collateral consequences are unique to each defendant, like previous criminal record, and factor into the entire situation. As appropriate punishments should match the severity of the crime, the entire punishment must be evaluated to determine whether it is appropriate.

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215 *See* Logan, *supra* note 63, at 1104.

216 *See id.* at 1106.

217 United States v. Jaime, 235 F. Supp. 3d 262, 265 (D.D.C. 2017) (quoting 18 U.S.C. § 3553(a)).

218 United States v. Stewart, 590 F.3d 93, 141 (2d Cir. 2009).

Ignoring collateral consequences is not financially advantageous. The White House Council of Economic Advisers has determined that over-punishment of offenders through incarceration and extensive collateral consequences fails a cost–benefit analysis.[219]

Considering collateral consequences would have a significant impact. The significance of this consideration can be demonstrated by examining the single collateral consequence of postconviction unemployment. The National Employment Law Project estimates that between 65 and 70 million Americans have a criminal record.[220] As there are currently more than 325 million people in the United States,[221] approximately 20–22% of the U.S. population has a criminal history. Because there is such a high criminal history rate in the U.S., a large portion of the American population is impacted by postconviction employment implications.

As future employment opportunities and future earning potential are among the strongest deterrents from committing future crime, improving these opportunities for former offenders could reduce their likelihood of recidivism.[222] One study found that 42% of employed ex-offenders were not rearrested in the 600 days following their release, compared to only 24% of unemployed offenders.[223] If the chance of recidivism is reduced, then the crime rate will also likely decrease. So, if more ex-offenders are employed, recidivism rates will likely decrease, thus improving public safety.[224]

Further, the costs associated with criminal activity and the criminal justice system also could be dramatically, and positively, impacted.[225] While the social costs of crime are difficult to measure, the monetary cost of the criminal justice system could be greatly impacted. As of 2016, the United States spends $80 billion per year on imprisonment.[226] To incarcerate a single prisoner for a year costs $31,166, on average.[227] In light of these high

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219 WHITE HOUSE COUNCIL OF ECON. ADVISERS, *supra* note 66, at 5–6.

220 MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3, 27 n.2 (2011); *Ensuring People with Convictions Have a Fair Chance to Work*, NAT'L EMP'T LAW PROJECT, http://www.nelp.org/campaign/ensuring-fair-chance-to-work/ (last visited Oct. 12, 2016).

221 *Current Population*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ (last visited Oct. 31, 2016).

222 *See* Pager, *supra* note 7, at 619, 647.

223 Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 398 (2011).

224 S. COAL. FOR SOC. JUSTICE, *supra* note 9, at 3–4.

225 *See* D'Alessio et al., *supra* note 114, at 347.

226 Sally Q. Yates, Deputy Att'y Gen., Lecture at Fordham University (Nov. 14, 2016), *in* U.S. DEP'T OF JUSTICE, https://www.justice.gov/opa/speech/deputy-attorney-general-sally-q-yates-delivers-mcnamara-memorial-lecture-fordham.

227 CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012).

costs of prisons alone, even a slight decline in repeat offenses would generate considerable governmental savings.[228]

B. *Recommendation in Action: Test Suite*

The recommendations made in this Comment to improve proportionality of sentences and increase uniformity between sentences in different jurisdictions would provide federal judges with more guidance on sentencing. Specifically, circuit courts reading the Sentencing Guidelines to include collateral consequences as a factor would eliminate a great deal of variation between sentences. Moreover, it likely would result in a myriad of benefits to society, such as decreased recidivism, lower correctional costs, decreased crime, and more proportional sentences.

Under this interpretation of the Sentencing Guidelines, the Eleventh and Seventh Circuits will still be able to choose not to consider economic and social status when sentencing,[229] as those are only surrounding circumstances and not true collateral consequences. However, the Eleventh and Seventh Circuits will be permitted to consider true collateral consequences. The Sixth and Tenth Circuits, which do not currently consider collateral consequences when sentencing,[230] would need to consider collateral consequences as a factor when reviewing the Sentencing Guidelines. However, federal judges would still be afforded discretion to deviate from the Sentencing Guidelines when appropriate. This Comment's proposed interpretation of the Sentencing Guidelines would effectively endorse the Second and Fourth Circuits' jurisprudence on the matter of collateral consequence consideration in sentencing. The federal judges who have given weight to collateral consequences when sentencing will obtain affirmative approval that they are warranted in considering these implications.

Adding collateral consequences to the list of factors for judges to consider may slow down courts initially. It may take judges additional time to determine whether and how to adjust sentences in light of collateral consequences. However, over time, this will lead to more just punishments, and a standard will eventually be created. After judges determine how to adjust sentences for certain collateral consequences, they can continue to apply that standard, as they do for other factors. Thus, the slowdown in courts will not be permanent and will likely just take a slight adjustment period. Once this adjustment period has passed, judges will be able to sen-

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228 D'Alessio et al., *supra* note 114, at 347 (citing Richard B. Freeman, *Why Do So Many Young American Men Commit Crimes and What Might We Do About It?*, 10 J. ECON. PERSP. 25, 25–26 (1996)).

229 *See* United States v. Kuhlman, 711 F.3d 1321, 1329 (11th Cir. 2013); United States v. Stefonek, 179 F.3d 1030, 1037–38 (7th Cir. 1999).

230 *See* United States v. Morgan, 635 F. App'x 423, 447–48 (10th Cir. 2015).

tence cases and consider all pertinent factors and consequences and will hand down more just punishments.

C. *Why Ban the Box Statutes Alone Are Unable to Solve the Issue at Hand*

While Ban the Box legislation has realized considerable success,[231] there is too much variation in the state statutes[232] to expect consistent results. Specifically, the variation in Ban the Box statutes does substantially further the congressional goals of the Act, which are to create honesty, reasonable uniformity, and proportionality in sentencing.[233] Widespread variation between state legislation promotes neither fairness nor uniformity in sentencing.[234] This is because the statutes do not adequately reduce the disparity of sentences imposed on similar offenders for similar crimes.

Although the sentences could theoretically be consistent, they continue to impose different impacts and, consequently, differing levels of punishment. Since collateral consequences, such as difficulty in finding employment, exist long after the sentence is served,[235] even a seemingly slight disparity in collateral consequences that compounds for many years can lead to a considerable difference in impact. For example, if two individuals commit the same crime and are given identical sentences, but the offenders live in different states with different Ban the Box policies, each offender will effectively have a different level of punishment because of the employment collateral consequences alone. Imposing different punishments on offenders based merely on geographic location violates the principle of fairness in sentencing.

The limitations on the Ban the Box laws found in the variations also reduce uniformity in the application of the laws and their effects. Several Ban the Box laws apply only to private employers with more than fifteen employees.[236] Many other Ban the Box laws apply only to public employers.[237] Consequently, if an ex-offender is qualified to work in an industry that is laden primarily with small businesses or is primarily in the private sector, the Ban the Box laws would not have an impact on his post-conviction job prospects.

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231 *See, e.g.*, D'Alessio et al., *supra* note 114, at 345.

232 AVERY & HERNANDEZ, *supra* note 15, at 19–21.

233 U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 1(A)(1)(3).

234 *See id.*

235 Pinard, *supra* note 2, at 633.

236 820 ILL. COMP. STAT. 75/15 (2015); N.J. STAT. ANN. § 34:6B-13 (West 2015).

237 CAL. LAB. CODE § 432.9 (West 2018); COLO. REV. STAT. ANN. § 24-5-101 (West 2017); DEL. CODE ANN. tit. 19, § 711(g) (West 2016); LA. STAT. ANN. § 42:1701 (2016); MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2017).

Additionally, Ban the Box addresses only one, albeit pervasive and serious, collateral consequence. Thus, this addresses only one piece of the collateral consequence problem. Ban the Box legislation would have no impact on formal collateral consequences or other informal collateral consequences.

CONCLUSION

Employment is related to recidivism.[238] Ban the Box statutes reduce this collateral consequence by giving convicted individuals greater employment opportunities, which lessens the lifelong impact of the convictions. While these statutes mitigate the problem, the issue should be addressed at sentencing to prevent additional undue harm and punishment to ex-offenders. To the extent that the collateral consequence of unemployment following conviction and other collateral consequences are unaccounted for in sentencing, convicted individuals are suffering from inconsistent impacts of sentences. These disproportionate punishments should no longer be inflicted. Sentencing judges should consider the totality of the circumstances in each case, including any relevant collateral consequences.

Sentencing judges should already be considering collateral consequences when sentencing because it is consistent with Supreme Court precedent, the language of the Sentencing Guidelines, and the purposes of sentencing. Additionally, both informal and formal collateral consequences should be considered, despite the greater ease for judges to consider formal collateral consequences, since informal collateral consequences are difficult to quantify and thus difficult to factor into sentencing. Both must be considered because both types of consequences punish offenders and contribute to the overall result of a sentence.

This proposed solution will assist in alleviating the disparity between courts, which are still in disagreement about how much weight should be given to collateral consequences. This approach will also help align the federal sentencing system more closely with the purposes of the Sentencing Reform Act of 1984.[239] The proportionality of sentences to the crimes will be increased, the likelihood of sentencing individuals to a more just punishment will be increased, and disparity between the sentences of similar offenders will be reduced.

Fundamentally, judges have an obligation to impose just punishment. Without considering collateral consequences when sentencing, gaining a full understanding of each defendant's situation is impossible. How can a judge impose a just punishment without completely understanding the circumstances and the full extent of the inflicted sanction?

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238 S. COAL. FOR SOC. JUSTICE, *supra* note 9, at 3–4.

239 *See* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 20, § 1(A)(1)(3).