The American Bar Association has adopted a novel approach to the collateral consequences of a criminal conviction that promises to have a major impact on sentencing policy and practice. Approved by the ABA House of Delegates in August of 2003, the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons are premised on the idea that it is neither fair nor efficient for the justice system to label significant legal disabilities and penalties as "collateral" and thereby give courts permission to ignore them in the process of criminal sentencing, when in reality those disabilities and penalties are frequently the most important and permanent results of a criminal conviction.

Historically, legal treatment of collateral penalties has been ad hoc and inconsistent. Indeed, there has been no meeting of the minds about what makes a penalty "collateral," or about the due process implications of such a label. In a somewhat arbitrary set of distinctions created by constitutional interpretation and court rule, courts have deemed some legal consequences of conviction to be within the purview of the criminal justice system, while categorizing others as regulatory or civil, and therefore unnecessary to take into account at the time of a guilty plea or at sentencing. Even within a single jurisdiction, some judges, defense lawyers and prosecutors educate themselves about collateral consequences, while others do not. Variation in individual practices and in the treatment of particular consequences has led to an unjustifiable and unnecessary inconsistency in the application of collateral consequences as a whole.

One goal of the new Standards is to encourage awareness of the full legal consequences of a criminal conviction, particularly those that are mandatory upon conviction. There is no justification for the legal system to operate in ignorance of the effects of its actions. Prosecutors when deciding how to charge, defendants when deciding how to plead, defense lawyers when advising their clients, and judges when sentencing should be aware, at least, of the legal ramifications of the decisions they are making.

A second goal is to focus attention on the impact of collateral consequences on the process by which a convicted person re-enters the free community, and is
encouraged and supported in his efforts to become a law-abiding and productive member of society. As our prison population has increased in recent years, the concern for offender reentry has grown correspondingly. At the same time, however, the laws restricting convicted persons in their ordinary life activities have multiplied, discouraging rehabilitation of criminals, and participating in the creation of a class of people who live permanently at the margin of the law. The criminal justice system aims at avoiding recidivism and promoting rehabilitation, yet collateral sanctions and discretionary barriers to reentry may severely impede an offender's ability for self-support in the legitimate economy, and perpetuate his alienation from the community.

The new ABA Standards distinguish between "collateral sanctions" (penalties that automatically become effective upon conviction even if not included in the court's judgment of conviction or put on the record) and "discretionary disqualification" (penalties based on conduct underlying a criminal conviction, which could occur whether or not the person has been convicted). Collateral sanctions should be strictly limited, and subject to waiver or modification in appropriate cases. Offenders should be able to obtain relief in a timely and effective fashion. Discretionary disqualification on grounds related to conviction should be permitted only if the conduct constituting the offense would provide a substantial basis for imposing the disqualification.

If adopted as positive law in a particular jurisdiction, the new Standards would result in three central changes to current sentencing practice:

1. **Codification.** Because collateral sanctions are often difficult to find, mandatory sanctions applicable to a particular offense or category of offense would be consolidated and collected in a single section of a jurisdiction's code. The difficulty in locating all of the widely dispersed statutes imposing collateral penalties undermines the fundamental purpose of notice and fairness behind criminal codes, and indeed, written law of any kind.

2. **Notice.** Before accepting a guilty plea or imposing a sentence, sentencing judges would be required to ensure that the defendant had been informed of the full range of mandatory consequences of the conviction. Failure to notify the defendant of applicable collateral sanctions would not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or court rule, or where the failure rendered the plea constitutionally invalid.

3. **Consideration at sentencing.** Sentencing judges would be required to take into account collateral sanctions as part of the discretionary function of shaping a sentence, to ensure appropriate overall proportionality and severity of punishment.

Reprinted below is the black letter of the Standards, and portions of the explanatory report submitted to the ABA House of Delegates in the summer of 2003. The report refers to "proposed" Standards, but they have now been adopted as ABA policy. As of March 2004, the official commentary to accompany the black letter was in the final stages of approval by the ABA Criminal Justice Standards Committee.

**ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION) COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS**

**PART I. DEFINITIONS AND OBJECTIVES**
Standard 19-1.1 Definitions

For purposes of this chapter:

(a) The term "collateral sanction" means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.

(b) The term "discretionary disqualification" means a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.

Standard 19-1.2 Objectives

(a) With respect to collateral sanctions, the objectives of this chapter are to:

(i) limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense;

(ii) prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person's chances of successfully reentering society;

(iii) provide the means by which information concerning the collateral sanctions that are applicable to a particular offense is readily available;

(iv) require that the defendant is fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged;

(v) include collateral sanctions as a factor in determining the appropriate sentence; and

(vi) provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.

(b) With respect to discretionary disqualification of a convicted person, the objectives of this chapter are to:

(i) facilitate reentry into society, and reduce recidivism, by limiting situations in which a convicted person may be disqualified from otherwise available benefits or opportunities;

(ii) provide that a convicted person not be disqualified from benefits or opportunities because of the conviction unless the basis for disqualification is particularly related to the offense for which the person is convicted; and

(iii) create a mechanism for obtaining review of, and relief from, discretionary disqualification.
PART II. COLLATERAL SANCTIONS

Standard 19-2.1 Codification of collateral sanctions

The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.

Standard 19-2.2 limitation on collateral sanctions

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

Standard 19-2.3 Notification of collateral sanctions before plea of guilty

(a) The rules of procedure should provide that a court ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

(b) Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.

Standard 19-2.4 Consideration of collateral sanctions at sentencing

(a) The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence.

(b) The rules of procedure should require the court to ensure at the time of sentencing that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel has so advised the defendant.

(c) Failure of the court or counsel to inform the defendant of applicable collateral sanctions should not be a basis for challenging the sentence, except where otherwise provided by law or rules of procedure.
Standard 19-2.5 Waiver, modification, relief

(a) The legislature should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.

(b) Where the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction.

(c) The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.

(d) An order entered under this Standard should:

(i) have only prospective operation and not require the restoration of the convicted person to any office, employment or position forfeited or lost because of the conviction;

(ii) be in writing, and a copy provided to the convicted person; and

(iii) be subject to review in the same manner as other orders entered by that court or administrative body.

Standard 19-2.6 Prohibited collateral sanctions

Jurisdictions should not impose the following collateral sanctions:

(a) deprivation of the right to vote, except during actual confinement;

(b) deprivation of judicial rights, including the rights to:

(i) initiate or defend a suit in any court under one's own name under procedures applicable to the general public;

(ii) be eligible for jury service except during actual confinement or while on probation, parole, or other court supervision; and

(iii) execute judicially enforceable documents and agreements;

(c) deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public. Accordingly, conviction or confinement alone:

(i) should be insufficient to deprive a person of the right to contract or dissolve a
marriage; parental rights, including the right to direct the rearing of children and to live with children except during actual confinement; the right to grant or withhold consent to the adoption of children; and the right to adopt children; and

(ii) should not constitute neglect or abandonment of a spouse or child, and confined persons should be assisted in making appropriate arrangements for their spouses or children;

(d) deprivation of the right to acquire, inherit, sell or otherwise dispose of real or personal property, except insofar as is necessary to preclude a person from profiting from his or her own wrong; and, for persons unable to manage or preserve their property by reason of confinement, deprivation of the right to appoint someone of their own choosing to act on their behalf;

(e) ineligibility to participate in government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security; provided, however, that a person may be suspended from participation in such a program to the extent that the purposes of the program are reasonably being served by an alternative program; and

(f) ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.

**Part III. DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS**

Standard 19-3.1 Prohibited discretionary disqualification

The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities, including housing, employment, insurance, and occupational and professional licenses, permits and certifications, on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.

Standard 19-3.2 Relief from discretionary disqualification

The legislature should establish a process for obtaining review of, and relief from, any discretionary disqualification.

Standard 19-3.3 Unreasonable discrimination

Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise. In addition, each jurisdiction should enact legislation prohibiting the denial of insurance, or a private professional or occupational license, permit or certification, to a convicted person on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for denial even if the person had not been convicted.

**Report to the ABA House of Delegates**

August 2003
Introduction

Persons convicted of a crime ordinarily expect to be sentenced to a term of probation or confinement, and perhaps to a fine and court costs. What they often do not anticipate is that conviction will expose them to numerous additional legal penalties and disabilities, some of which may be far more onerous than the sentence imposed by the judge in open court.

These collateral consequences of conviction include such familiar penalties as disenfranchisement, deportation, and loss of professional licenses, as well as newer penalties such as felon registration and ineligibility for certain public welfare benefits. They may apply for a definite period of time, or indefinitely for the convicted person's lifetime. To the extent they occur outside the sentencing process, they often take effect without judicial consideration of their appropriateness in the particular case, without notice at sentencing that the individual's legal status has dramatically changed, and indeed without any requirement that the judge, prosecutor, defense attorney or defendant even be aware of them.

Some collateral consequences serve an important and legitimate public purpose, such as keeping firearms out of the hands of persons convicted of crimes of violence, or barring persons recently convicted of fraud from positions of public trust. Others are more difficult to justify, particularly when applied automatically across the board to whole categories of convicted persons. Perhaps most problematic are laws that limit the exercise of fundamental rights of citizenship, or restrict access to otherwise generally available public benefits and services. The indiscriminate imposition of collateral penalties has serious implications, not only in terms of fairness to the individuals involved, but also in terms of the resulting burdens on the community.

The Criminal Justice Standards currently address the collateral consequences of conviction in three ways. First, the Sentencing Standards create a comprehensive regime for authorizing, structuring, imposing, and analyzing sanctions that should be understood to extend to statutory penalties and disabilities often considered outside the purview of the sentencing court. Second, the Standards on Pleas of Guilty and the Pretrial Release Standards create certain obligations to advise a defendant of applicable collateral consequences. Finally, the Standards on the Legal Status of Prisoners ("LSOP Standards") establish substantive standards for "Civil Disabilities of Convicted Persons." The 1981 LSOP Standards provide that, with only a few exceptions, collateral penalties and disabilities should not be mandatory, and some should not apply at all.
n2 In this respect, the Sentencing Standards implicitly reject the "direct/collateral" analysis that some courts have relied on in holding that statutory consequences of a criminal conviction that take effect automatically are not the business of courts. See note 13 infra. For example, Standard 18-3.13 contemplates that individual offenders may be required to refrain from a number of behaviors (e.g., engaging in certain employment or business, possessing dangerous weapons), as a condition of a compliance program, that are most often found in statutes or rules that are not part of a sentencing code. Thus the Sentencing Standards evidently make no distinction between sanctions traditionally imposed by a judge, and those more commonly imposed by operation of law. Indeed, the Sentencing Standards explicitly refer to some collateral sanctions in the context of organizational sentences. See Standards 18-3.16(d)(iii) and 18-5.4(b)(vii). The general applicability of the principles of the Sentencing Standards to collateral sanctions is discussed in greater detail in Part IV of this introductory memorandum.

n3 The Standards on Pleas of Guilty provide: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." Standard 14-3.2(f). They also provide that, before accepting a plea, the court "should advise" the defendant that he "may face additional consequences, including but not limited to the forfeiture of property, the loss of certain civil rights, disqualification from certain governmental benefits, enhanced punishment if the defendant is convicted of another crime in the future, and, if the defendant is not a United States citizen, a change in the defendant's immigration status." Standard 14-1.4(c). The Pretrial Release Standards provide that the court "should advise" a defendant that, if a non-citizen, he "may be adversely affected by collateral consequences of the current charge, such as deportation . . ." Standard 10-4.3(b)(iv).

n4 See Part VIII of Chapter 23 (2d ed., 1981). Standard 23-8.1 provides for the repeal of all "mandatory civil disabilities" except those "specifically preserved in the standards that follow" (i.e., jury service while actually confined or while on probation or parole (Standard 23-8.5(b)); service as a court-appointed fiduciary during actual confinement (Standard 23-8.5(d)); and continuance in elective or appointive office held at the time of conviction (Standard 23-8.8(c)). Except for these few narrow exceptions, civil disabilities may be imposed only pursuant to a case-by-case judicial determination "that the disability or penalty is necessary to advance an important governmental or public interest." See Standard 23-8.3(a). The burden of proof is on the entity seeking to impose the disability. Standard 23-8.3(d). A court retains the authority to provide relief from collateral sanctions that it imposes by way of "reconsideration." Standard 23-8.3(c). Jurisdictions should make provision for expunging convictions, "the effect of which would be to mitigate or avoid collateral disabilities." See Standard 23-8.2. The LSOP Standards also prohibit absolutely the imposition of certain collateral penalties and disabilities affecting civil, judicial, property, and domestic rights, see Standards 23-8.4 through 8.7, and limit the circumstances in which convicted persons may be denied employment and licensing. See Standard 23-8.8. Since its enactment in 1981, Part VIII of the LSOP Standards has for the most part gone unnoticed by courts, commentators, and legislators. The
This proposed new Volume 19 would supplant the "civil disabilities" provisions of the LSOP Standards with a more balanced and flexible approach to collateral consequences. n5 The new Standards have two distinct but related objectives: First, they would make clear what is now implicit in the Sentencing Standards, that all legal penalties and disabilities resulting directly and immediately from the fact of conviction are in every meaningful sense "sanctions." It follows that "collateral sanctions" should be accounted for explicitly as part of the sentencing process, and imposed only when the conduct underlying the particular offense unambiguously warrants it. All actors in that process should be aware of them, and a court or administrative body should be empowered to waive or modify them in appropriate cases.

n5 The most significant ways in which the new Standards modify the policies embodied in Part VIII of the LSOP Standards are described in Part V of this report, infra.

Second, the proposed new Volume 19 would establish a framework for dealing with unreasonable discrimination against convicted persons. Discretionary disqualification from benefits or opportunities on grounds related to conviction, while not a "sanction" that must be considered at sentencing, may just as surely prevent or discourage convicted persons from successfully reentering the free community, and impose on the community the costs of their recidivism. Therefore, the proposed Standards prohibit discretionary administrative or judicial disqualification of a convicted person from eligibility for a benefit or opportunity on grounds related to the conviction, unless there is a substantial relationship between the person's offense conduct and the specific duties and responsibilities of the particular benefit or opportunity involved.

I. Background and Goals

The American legal system has long recognized that certain legal disabilities flow from a criminal conviction in addition to the sentence imposed by the court. n6 But the collateral consequences of conviction have been increasing steadily in variety and severity for the past 20 years, and it has become increasingly difficult to shake off their lingering effects. n7 Moreover, the dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending. n8 If not administered in a sufficiently deliberate manner, a regime of collateral consequences may frustrate the reentry and rehabilitation of this population, and encourage recidivism. n9
n6 Conceptually, these collateral legal disabilities are remnants of the ancient Greek concept of "infamy," or the penalty of "outlawry" among the Germanic tribes, both of which implied the permanent exclusion of an offender from the community: "The outlaw's children were considered as orphans and his wife a widow. Besides losing his family rights, he also lost all his possessions and even his right to life (if we can use that expression), for anyone could kill him with impunity." Mirjan Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. Law, Criminology & Police Science 347, 350 (1968).

n7 See, e.g., J. Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in Invisible Punishment: The Social Costs of Mass Imprisonment (M. Chesney-Lind & M. Mauer, eds. 2002); Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 Cambridge L.J. 599, 603 (1997) ("the clear trend in recent years has been for them to increase in number and complexity.").

n8 Over 600,000 persons were released from state and federal prisons in 2000. See Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison and Jail Inmates at Midyear 2001* (2002).


A typical case illustrates the breadth and impact of collateral consequences. Consider a first offender who pleads guilty to felony possession of marijuana. This offender may be sentenced to a conventional term of probation, community service, and court costs. Unbeknownst to this offender, and perhaps to any other actor in the sentencing process, as a result of his conviction he may be ineligible for many federally-funded health and welfare benefits, food stamps, public housing, and educational assistance. His driver's license may be automatically suspended, he may no longer be eligible for certain employment and professional licenses, and he may be unable to obtain life or automobile insurance. He will be precluded from enlisting in the military, possessing a firearm, or obtaining a security clearance. If the child of an elderly parent, he may be disqualified from serving as a court-appointed guardian, or as executor of his parent's estate. If a citizen, he may no longer have the right to vote and serve on a jury; if not, he will become immediately deportable. In a case like this, the real punishment is imposed through the collateral consequences of the guilty plea that may only gradually become clear, not by the
The Supreme Court recognized in *INS v. St. Cyr*, 533 U.S. 289 (2001), that avoiding the collateral consequence of deportation is likely to be "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead proceed to trial." *Id.* at 323.

Collateral consequences have accumulated with little coordination in disparate provisions of state and federal codes, making it difficult to determine all of the penalties and disabilities applicable to a particular offense. Judges are ordinarily not required to advise defendants of collateral consequences at plea or sentence, and defense counsel ordinarily need not inform their clients about collateral consequences when advising about the appropriate course of action. Because judges and defense lawyers need not consider them, there is no compelling reason for prosecutors to educate themselves about them either.


A few courts require that a defendant be advised of particular collateral consequences at plea or sentence. *See, e.g., Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver's license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid); *Skok v. State*, 760 A.2d 647 (Md. 2000) (noncitizen permitted to challenge guilty plea by writ of coram nobis where he was not advised of immigration consequences as required by court rule). The most significant context where statutes or court rules require advisement of potential collateral consequences is with respect to deportation. *See State v. Yanez*, 2002 WL 31840905, 2002-Ohio-7076 11 7.8 (Ohio App. Dec 20, 2002) (noting that 18 states in addition to Ohio require advisement, but that the United States does not) (citing *INS v. St. Cyr*, supra).

In determining whether a defendant is legally entitled to notice of a particular consequence of conviction in the context of a guilty plea, the courts have sometimes distinguished between "direct" consequences (as to which notice is required) and "collateral" consequences (as to which it is not). A consequence is generally held to be "collateral" when it is "contingent upon action taken by an individual or individuals other than the sentencing court." *United States v. Littlejohn*, 224 F.3d 960, 965 (9th Cir. 2000). Examples are the possibility of subsequent prosecution as a repeat offender, exposure to potential civil liability, and the possibility of parole revocation. *Id.* Recently, however, some courts have held that statutory collateral consequences that are automatic and self-executing are "direct," even though the court has no role in imposing them. *See, e.g., Littlejohn* (drug offender was entitled to notice at plea colloquy that his conviction would render him automatically ineligible for certain
federally-funded public welfare benefits); *Barkley v. State*, 724 A.2d 558 (Del. 1999) (failure to inform defendant that his driver's license would automatically be revoked upon conviction, as required by applicable court rules, rendered guilty plea invalid). Deportation has, however, consistently been regarded as a collateral rather than a direct consequence of conviction, notwithstanding 1996 amendments to the immigration laws that severely curtailed judicial or administrative discretion to grant relief. *See, e.g.*, United States v. *Amador-Leal*, 276 F.3d 511 (9th Cir. 2002) (deportation is not a direct consequence of conviction because alien offender's actual removal is contingent upon action taken by INS); *United States v. Gonzalez*, 202 F.3d 20, 27 (1st Cir. 2000) ("However automatically' Gonzalez's deportation . . . might follow from his conviction, it remains beyond the control and responsibility of the district court in which that conviction was entered and it thus remains a collateral consequence thereof."). The caselaw is reviewed in Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002). *See also* G. Bankier-Plotkin, *Unconscionable Bargains: Why Defendants Who Plead Guilty Must Be Informed of All the Consequences of a Conviction*, unpublished paper on file with the Criminal Justice Standards Committee.

As a result, all those present at a sentencing may later be surprised to learn the full extent of the offender's changed legal status. Indeed, many collateral consequences are under-enforced simply because the convicted person is unaware of them. An offender's failure to appreciate how his legal situation has changed as a result of his conviction may have far-reaching consequences for his own ability to conform his conduct to the law.

**II. Terminology**

The term "collateral consequences" as used in this document describes two analytically distinct effects of a criminal conviction: "collateral sanctions" and "discretionary disqualification." n14 "Collateral sanctions" are those statutory penalties and disabilities that automatically become effective upon conviction even if not included in the court's judgment of conviction. n15 The term signifies a direct and immediate change in an offender's legal status that does not depend upon some subsequent additional occurrence or administrative action, and that would not have occurred in the absence of a conviction. Examples are automatic loss of firearms privileges, per se disqualification from employment or public benefits, and mandatory felon registration. To the extent an offender's immigration status changes as a result of a criminal conviction, so that he becomes automatically deportable without opportunity for discretionary exception or revision, deportation too must be regarded as a "collateral sanction." n16

n14 There is another definition of collateral consequences. In criminal justice literature, the term "collateral consequences" is sometimes used to refer to the social effects of incarceration. *See* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in Prisons (Michael Tonry & Joan Petersilia, eds., 1999).

n15 A mandatory sentence is not within the definition of collateral sanction, because
it does not take effect unless it is included as part of the sentence imposed by the judge. See United States v, Moyer, 282 F.3d 1311 (10th Cir. 2002) (allowing defendant to withdraw guilty plea where mandatory minimum sentence not imposed by trial court); Hurley v. Bureau of Prisons, 1995 WL 631149 (1st Cir. Oct 24, 1995) ("the Bureau [of Prisons] had no obligation -- indeed no right -- to disregard the [illegal] sentence until the sentencing court or the court of appeals corrected it"). In addition, a defendant must by law generally be informed of the applicable mandatory minimum sentence before pleading guilty. See United States v. Fernandez, 205 F.3d 1020 (7th Cir. 2000); United States v. Hernandez-Wilson, 186 F.3d 1 (1st Cir. 1999); State v. Miller, 756 P.2d 122 (Wash. 1988).

n16 As previously noted, the courts have generally held deportation to be a "collateral" rather than a "direct" consequence of conviction in the context of a defendant's challenge to the validity of his guilty plea. See note 13, supra. At the same time, Professors Chin and Holmes point out that a growing number of state jurisdictions are requiring courts to ensure that aliens are advised about the deportation consequences of a conviction, by statute or court rule. See Chin & Holmes, supra note 13, at 708, n. 119; State v. Yanez, 2002 WL 31840905, 2002-Ohio-7076 P 7 (Ohio App. Dec 20, 2002). Moreover, the federal statute which until 1990 authorized state and federal judges to issue a binding Judicial Recommendation Against Deportation ("JRAD") at sentencing was held to impose a higher duty of care on attorneys to warn their clients of the possibility of deportation. Chin & Holmes, supra, at 708, nn. 120, 121; see also note 30, infra (discussing JRAD's). Finally, misadvice about deportation or other collateral consequences is generally treated differently by the courts than mere non-advice. Chin & Holmes, supra, at n. 121.

The legal effect of a "collateral sanction" occurs or is authorized because of the conviction, and would not occur based on the underlying conduct alone. An illustration of this is 20 U.S.C. § 1091(r)(I), which provides that "a student who has been convicted of any offense . . . involving the possession or sale of a controlled substance shall not be eligible to receive any grant, loan or work assistance under this subchapter." (Emphasis supplied.) This statute does not apply to the class of students who are drug users, nor even to those who have violated the drug laws. Instead, it is aimed exclusively at students who have been convicted of drug crimes, and it is self-executing. All convicted drug law violators are in the affected class, and none but convicted drug law violators are in the affected class. Moreover, the legal effect of the disqualification is immediate and unqualified, and does not require any further discretionary action to come into play. It is in every sense just as "direct" a consequence of conviction as a penalty imposed by the judge. See United States v. Littlejohn, supra note 13.

"Collateral sanctions" are to be distinguished from discretionary penalties or disabilities based on conduct underlying a criminal conviction, which could occur whether or not the person has been convicted. The proposed Standards deal with this more attenuated effect of conviction under the rubric of "discretionary disqualification." The disqualifying conduct might be established by the conviction, but it also might also be established in some other way, such as by a civil action or administrative determination. An example of a discretionary disqualification is the law that excludes persons who engage in "drugrelated criminal activity" from federally funded housing benefits. See 24 C.F.R. § 966.4(1)(5)(i)(B). This provision
states that a person may be evicted from public housing "regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction." 24 C.F.R. § 966.4(1)(5)(iii)(A). Accordingly, drug law violators may be evicted even if they were never convicted. See, e.g., Edgecomb v. Housing Auth. of the Town of Vemon, 824 F. Supp. 312 (D. Conn. 1993). Although, as a practical matter, many disqualified individuals' misconduct will be discovered through the criminal process, this is in some sense a coincidence, for the law is not aimed solely at persons convicted of crimes, and conviction has no consequence in and of itself. Individuals who in fact use drugs but are not convicted may as a practical matter be less likely to be penalized than individuals who use drugs and are convicted. But because the law covers conduct rather than conviction, it is not a collateral sanction under these Standards. Note also that in our example the penalty of eviction is discretionary (a person "may" be evicted), and thus distinguishable from the automatic ineligibility for student financial aid discussed in the preceding paragraph.

We recognize that the line between a mandatory collateral sanction and discretionary disqualification is not always a bright one. And, de facto distinctions that rely on a conviction to establish conduct may as a practical matter be just as burdensome and discouraging as distinctions based on rigid legal categories. But because they tend to be more subtle, they are correspondingly more difficult to get a handle on. For example, reasonable people might disagree about how to characterize the situation where membership in a disfavored category (e.g., drug traffickers) is established administratively by the fact of a (drug trafficking) conviction alone. If convicted persons are as a practical matter the only people disqualified under such a protocol, and if all convicted persons are disqualified without consideration of the equitable merits of their case, then this may look more like a mandatory "sanction" based on the fact of conviction, than a discretionary disqualification based on the conduct underlying the conviction. We have gone as far as we can in drawing a distinction between the two categories. We expect that further refinements will come only with experience.

III. Structure of the Standards

The proposed new Volume 19 is divided into three parts. Part I defines key terms, and sets out the objectives of the substantive provisions of the following parts. Collateral consequences of any kind should be strictly limited, and in any event closely related to the offense conduct involved. The defendant should be fully informed about collateral sanctions before pleading guilty and at sentencing, and the court should take them into account in determining the appropriate sentence. Discretionary disqualification should not discourage reentry of offenders into law-abiding society. Relief from collateral sanctions or discretionary disqualification should be readily available from the sentencing judge or an appropriate administrative agency.

Part II regulates the means by which collateral sanctions are imposed, sets out some substantive limits, and provides that relief from collateral sanctions should be readily available. Standard 19-2.1 provides that collateral sanctions should be collected in a single place in a jurisdiction's criminal code, making it possible for all actors in the system to determine what they are. Standard 19-2.3 requires a sentencing judge, before accepting a plea of guilty, to see that the defendant has been informed of all applicable collateral sanctions. n17 Standard 19-2.4 requires a sentencing court to take into account applicable collateral sanctions in determining an offender's overall
sentence, and to confirm that the offender has been made aware of them. n18

n17 Except as otherwise provided by statute or applicable rules of court procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under the Pleas of Guilty Standards has been discharged. In this regard, Standard 14-3.2(f) provides that defense counsel must, "to the extent possible," determine and advise the defendant of "possible collateral consequences" in advance of the entry of any plea. See note 3, supra. If information on applicable collateral sanctions is properly collected and made available to defense counsel pursuant to Standard 19-2.1, the contingent nature of this defense counsel duty should be eliminated. Note that a failure to notify a defendant under this Standard does not mean that the collateral sanction is ineffective or cast doubt on the validity of the plea, though the existence of a statute or court rule requiring such notification might. See, e.g., Skok v. State, 724 A.2d 558 (Del. 1999); Barkley v. State, 760 A.2d 647 (Md. 2000).

n18 Collateral sanctions may but need not be included in the terms of the sentence imposed in open court, as required for a court-imposed sentence by the Sentencing Standards. See Standards 18-5.19, 18-5.20, 18-5.21. See Part V(1), infra.

Standard 19-2.2 provides that a collateral sanction should not be imposed on persons convicted of a particular offense unless the legislature determines that "the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified." Only such unambiguous circumstances justify dispensing with the case-by-case determinations contemplated by the Sentencing Standards. n19

n19 In recognizing the possibility that some collateral sanctions will be so clearly appropriate given the nature of the offense that the costs of making a discretionary case-by-case decision at the time of sentencing may not be justifiable, these Standards create a narrowly tailored exception to the individualized approach of the LSOP Standards, and of the Sentencing Standards themselves. See Part V(1)(a), infra.

Standard 19-2.4(a) requires a sentencing court to take into account applicable collateral sanctions in fashioning a package of sanctions at sentencing. n20 Although not stated in black letter, the sentencing judge's task will be facilitated if the legislature factors collateral sanctions into the statutory framework for sentencing, and takes them into consideration in determining the appropriate sanctions for each offense; n21 and, if the agency performing the intermediate function includes collateral sanctions in its guidance for sentencing courts, and when it collects, evaluates and disseminates information about sentences imposed in the jurisdiction. n22
n20 In accordance with the generally applicable principles of the Sentencing Standards, the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity. See Standards 18.6.1, 18-6.2. It follows from the principle that collateral sanctions are brought directly into the sentencing process that they should not be enhanced or enforced except in accordance with the same principles that apply to the more conventional elements of a criminal sentence. Retroactive application of collateral sanctions presents particularly sensitive and difficult issues.

n21 See Standards 18-1.2, 18-2.1, 18-2.2, 18.2.4, 18-2.5, 18.3.11.

n22 See Standards 18-3.1, 18.3.12, 18-4.1, 18-5.1. It would also be helpful for presentence reports to include collateral sanctions in their descriptions of authorized sentences and sentence recommendations. Standard 18-5.4.

Standard 19-2.5 provides that collateral sanctions should be subject to waiver, modification, or "timely and effective relief from a court or a specified administrative agency. n23 Standard 19-2.5(a) contemplates a process for obtaining relief from particular collateral sanctions, and Standard 19-2.5(c) provides for a judicial process that can lead to an order providing general relief from all collateral sanctions imposed by the law of that jurisdiction. The broad scope of paragraph (c) is further distinguishable from the more narrowly focused paragraph (a) in that it may serve as a vehicle for recognizing and rewarding rehabilitation. Accordingly, an order obtained pursuant to Standard 19-2.5(c) may not only accomplish general relief from legal disabilities imposed as a result of the conviction, it may also serve as evidence of a convicted person's good character. See Part V(2) and notes 33 and 34, infra. Standard 19-2.5(b) provides that a jurisdiction should make provision for obtaining relief from collateral sanctions based upon a conviction obtained in another jurisdiction.

n23 Waiver or modification of a collateral sanction under Standard 19-2.5, whether at the time of sentencing or at some later time, would not preclude a court or administrative agency from taking action based on the conduct underlying the conviction, pursuant to Standard 19-3.1. See infra.

Finally, Standard 19-2.6 provides that collateral sanctions depriving individuals of certain civil, judicial, and domestic rights should never be categorically imposed, carrying forward parts of the existing LSOP Standards. n24 In addition, a convicted person should not be denied eligibility for government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security benefits, unless the purposes of the program in question are reasonably being served by an alternative program.
The LSOP Standards explicitly exempt the right to sit on a jury during actual confinement of (as well as, surprisingly, while on probation and parole), and the right to serve as a court-appointed fiduciary. See Standard 23-8.5(b) and (d). The Standards Committee proposal makes no change in the current ABA policy on jury service, but does not specifically prohibit a bar against convicted persons serving as court-appointed fiduciaries. This subject, like prisoner jury service and prisoner voting, see infra, should be dealt with under the general provisions of Standards 19-2.2 and 19-2.5(a).

Standard 19-2.6(a) bars deprivation of the right to vote as a result of conviction. Continuing the policy of the LSOP Standards, it leaves open the question whether states may deny persons the right to vote "during actual confinement." n25 The issue of prisoner voting remains subject to the general test in Standard 19-2.2. See note 25, supra.

n24 The black letter of LSOP Standard 23-8.4 provides that prison inmates should vote at their place of residence, as opposed to their place of confinement. However, the commentary states: "The standard takes no position with respect to whether prisoners should be denied the right to vote while actually incarcerated."

Part III of the proposed Standards deals with unreasonable barriers to reentry posed by discretionary disqualification from benefits and opportunities on grounds related to a person's criminal conviction. It incorporates the substance of those provisions of the LSOP Standards not included in Part II, including those dealing with unreasonable denial of insurance, employment, licensing, and public housing.

Standard 19-3.1 deals with "discretionary disqualification," defined as a penalty that a non-judicial government agency or official is authorized but not required to impose on grounds "related to" a person's conviction. See proposed Standard 19-1.1(b). Recognizing that criminal misconduct may in some circumstances be relevant to the awarding of particular benefits or opportunities, this Standard permits discretionary disqualification if a finding that the person had engaged in the offense conduct would provide "a substantial basis for imposing the disqualification even if the person had not been so convicted." Even if a collateral sanction had been waived or modified pursuant to Standard 19-2.5, at the time of sentencing or at some later time, a court or an administrative agency could still take action based on the conduct underlying the conviction, pursuant to Standard 19-3.1. See note 24, supra. Standard 19-3.2 provides for the establishment of a process for obtaining review of, and relief from, any discretionary disqualification.

Recognizing that the issue of private employment is a particularly sensitive one, though clearly important in the context of offender reentry, Standard 19-3.3 calls upon jurisdictions to encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise. This section also provides for the adoption of legislation prohibiting the denial of insurance, or a private professional or occupational license, permit or certification, on grounds related to conviction "unless the conduct underlying the conviction would provide a
substantial basis for denial even if the person had not been convicted."

Conclusion

The development of the Standards on Collateral Sanctions and Disqualification of Convicted Persons has been an exciting, challenging, and intense project. It has required resolution of novel and difficult analytical and structural issues, many of first impression, in order to justify a place within the traditional framework of sentencing for penalties that have traditionally not been regarded as the business of courts. But the work has taken on some urgency as the number of convicted persons and the variety of collateral penalties have together grown steadily over the past 20 years. . .

. . .

We hope the proposed new Standards will be regarded as a thoughtful, well-crafted, and balanced set of practice principles, one that will increase awareness of collateral penalties and limit their inappropriate use. In particular, we hope they will make a helpful contribution to the important process now underway of devising programs to facilitate offender reentry.