

# COLLATERAL SANCTIONS AND CIVIL DISABILITIES: THE SECRET BARRIER TO TRUE SENTENCING REFORM FOR LEGISLATURES AND SENTENCING COMMISSIONS\*

## INTRODUCTION

While most people think of the criminal justice system as one that punishes convicted criminals through imprisonment, probation/parole, or mandatory rehabilitation, there is a web of invisible punishments imposed upon those convicted of certain crimes. Types of invisible punishments include loss of welfare benefits, food stamps, public housing, scholarships, and voting rights. Because these sanctions are not part of the traditional criminal justice system, many of them go unrecognized by attorneys, judges, and lawmakers. The failure to recognize these civil sanctions as punishments that impact the lives of the accused results in a situation in which these sanctions are ignored.

However, these invisible, civil, and collateral sanctions are powerful and potentially problematic for states that are trying to achieve sentencing reform. Because these sanctions have not been addressed by most of the public, lawmakers have not been able to fully grasp the impact of criminal sentences they impose. The fact that most lawmakers are unaware of these civil sanctions is especially important in a time when many states are reviewing and/or overhauling their sentencing structures in order to address the problems of overcrowding, mostly caused by the imposition of harsh incarceration requirements for drug crimes imposed in the 1980s.

A state's published sentencing guidelines would certainly not ignore probation, parole, or restitution policies. However, most, if not all, states' criminal codes and sentencing guidelines ignore the existence of these collateral punishments. Nevertheless, these invisible sanctions play an important role in how the system deals with sentencing structures and the reintegration of prior offenders. It is impossible to fully grasp an individual's sentence if it does not include the many punishments that exist along with actual prison time or fines. Additionally, these sanctions can act as barriers to reintegration and rehabilitation and can serve as enablers for high recidivism rates. Therefore, without addressing these sanctions and including them in the debates over sentencing policy, neither this state, nor any other state, will achieve true sentencing reform. Specifically, in a time when Ala-

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bama is desperately trying to achieve sentencing reform, it will have to address the issue of civil sanctions in order to determine its true impact on the system.

While it is debatable whether we should have collateral sanctions—some may serve an important purpose and some may not—the goal of this Comment is to provide lawmakers with evidence that these sanctions exist and that they impact the goals of sentencing policy through ways that, if left alone, will continue to hinder Alabama’s ability to achieve truth-in-sentencing and successful reintegration of prior offenders. Part I of this Comment exposes the existing collateral sanctions both nationally and in Alabama. Part II addresses the collateral damages that these sanctions impose not only upon the convicted but also the system that is trying to deal with the rehabilitation and reintegration of these offenders. Part III discusses the effort by the Alabama Legislature and other Alabama lawmakers to establish a plan for “truth-in-sentencing” through the Alabama Sentencing Commission. In addition, Part III recognizes the “missing ingredient” to the “truth-in-sentencing” effort by arguing that, without addressing these collateral sanctions, the goal of sentencing reform will never be fully accomplished. Finally, Part IV suggests ways in which Alabama lawmakers should deal with the reality of these sanctions and advocates that the legislature push for changes to the way in which offenders are subjected to these invisible penalties.

### I. THE TRUTH IN SENTENCING

After only a few minutes of debate, an amendment to the 1996 welfare law was adopted that permanently denies food stamps and Temporary Aid to Needy Families (“TANF”) to anyone violating a state or federal drug law after August 22, 1996.<sup>1</sup> This is only one strand of the web of invisible sanctions to which the federal and state governments have subjected criminal offenders.<sup>2</sup> The concept of these civil disabilities has expanded during the past twenty years.<sup>3</sup> Under these invisible or collateral sanctions, offenders

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1. 21 U.S.C. § 862a (1999); Herman Schwartz, *Why Losing Food Stamps Is Now Part of the War on Drugs*, L.A. TIMES, June 6, 1999, available at <http://aspin.asu.edu/hpn/archives/Jun99/0162.html> [hereinafter *War on Drugs*]; Herman Schwartz, *Out of Jail and Out of Food*, N.Y. TIMES, Mar. 21, 2002, available at <http://www.mapinc.org/drugnews/v02.n.525.a12.html> [hereinafter *Out of Jail*].

2. See Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 37-38 (Marc Mauer & Meda Chesney-Lind eds., 2002); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 18 (Marc Mauer & Meda Chesney-Lind eds., 2002).

3. Jeremy Travis et al., *Prisoner Reentry: Issues for Practice and Policy*, 17 CRIM. JUST. 12, 17 (2002).

During the past 20 years, however, Congress and state legislatures have significantly increased the number and reach of these disabilities. For example, in the late 1980s and 1990s, Congress passed laws that . . . require barring individuals with drug-related felony convictions from receiving federally funded public assistance and food stamps, require public housing agencies and providers of Section 8 housing to deny housing to individuals convicted of

may be denied welfare benefits, public housing, the ability to gain appropriate skills and training, and the right to vote.<sup>4</sup>

Anyone convicted of a federal or state felony for conduct occurring after August 22, 1996 that involves the possession, use, or distribution of drugs is permanently ineligible to receive food stamps or TANF.<sup>5</sup> The purpose of food stamps is to end hunger and improve nutrition by providing eligible low-income households with the nutritional meals they need.<sup>6</sup> TANF provides financial assistance to families with dependent children for the purpose of meeting basic needs to encourage the care of children in the home while promoting a healthy, self-sufficient, and strengthened family.<sup>7</sup> While the federal law states that any drug offender convicted after August 22, 1996 is ineligible for food stamps and TANF funds, states are able to opt out or place limitations on the ban.<sup>8</sup> So far, twenty-four states, including Alabama, have adopted the ban, eighteen states have modified the law, and eight have opted out completely.<sup>9</sup>

For those states that have adopted the ban, convicted drug users, those in possession and those caught distributing, are banned from this assistance. No one is exempt from the felony ban. Therefore, actual offenders that are banned from family assistance include pregnant women, mothers, fathers, and people in treatment and/or recovery who at one time were convicted for drug offenses.<sup>10</sup> Because this is a lifetime ban from assistance, the ban could potentially deny benefits to people who have lost their jobs through circumstances that have nothing to do with their drug use, years after having been convicted.<sup>11</sup>

Drug offenders also may be excluded from federally subsidized or federal housing. Public housing agencies and providers are permitted to deny housing to anyone who has engaged in "any drug-related or violent criminal

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certain offenses, and suspend eligibility for student loans for those convicted of drug-related offenses.

*Id.*

4. Travis, *supra* note 2. This is not a complete list of collateral sanctions imposed on offenders. While it is difficult to compile a complete list because these are "civil" disabilities and not criminal sanctions and therefore are not collected in one title of the code, a more accurate list may be obtained from the Office of the Pardon Attorney at the United States Department of Justice, *infra* note 5.

5. 21 U.S.C. § 862a(a), (b), (d)(2) (1999); OFFICE OF THE PARDON ATTORNEY, UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION 10 (1996).

6. Alabama Department of Human Resources, Food Stamps, at <http://www.dhr.state.al.us/page.asp?pageid=159> (last updated June 25, 2003).

7. *Id.*

8. 21 U.S.C. § 862a(d) (1999).

9. Nora V. Demleitner, "Collateral Damage": No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1035 (2002); Alabama Department of Human Resources, Food Stamps Program Summarized Eligibility Requirements, at <http://www.dhr.state.al.us/page.asp?pageid=160> (last visited Nov. 15, 2003); Alabama Department of Human Resources, Family Assistance (FA) Program Summarized Eligibility Requirements, at <http://www.dhr.state.al.us/page.asp?pageid=359> (last visited Nov. 15, 2003). States that have chosen to opt out include Connecticut, Michigan, New Hampshire, New York, Ohio, Oklahoma, Oregon, Vermont, and the District of Columbia. Demleitner, *supra*, at 1054.

10. As long as the conviction occurred after August 22, 1996.

11. Rubinstein & Mukamal, *supra* note 2, at 41.

activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises [by others]" if the criminal activity occurred within a "reasonable" time before the person sought admission.<sup>12</sup> Today, applicants for public housing may have to agree to undergo background checks and consent to granting access to the applicant's drug treatment records before obtaining housing.<sup>13</sup> One problem associated with this permissible sanction is that the existence of an illegal drug user in a household may cause all of the tenants to be evicted.<sup>14</sup> Therefore, not only can a convicted drug user be denied housing, but family members may risk eviction if they agree to house that offender. And while convicted drug users may reapply three years after they have been denied if they can show that they have been rehabilitated,<sup>15</sup> those that are subject to sex offender registration are permanently ineligible for federally assisted housing.<sup>16</sup>

Persons convicted of any federal or state offense involving drugs are ineligible to receive any student grant, loan, or work assistance or benefits under the federal work-study program for a statutorily designated period.<sup>17</sup> A person convicted of a drug offense for the first time is ineligible for student financial aid for one year, two convictions require a two-year ineligibility period, and any third or subsequent conviction triggers a permanent denial of aid.<sup>18</sup> For drug sales, a first time conviction results in a two-year ban on financial assistance, and any subsequent offense results in a permanent denial of assistance.<sup>19</sup> Before the congressional ban on student financial aid for drug offenders, the Pell grant had been the primary way for imprisoned offenders to receive skills training.<sup>20</sup> Consequently, there are fewer opportunities, not only for those in prison but also for those that are released from prison either because they are on probation, parole, or their sentence has ended, to gain the skills necessary to secure employment after they are released.

Forty-eight states prohibit prisoners from voting.<sup>21</sup> Most of these states continue this prohibition while the offenders remain under the supervision

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12. 42 U.S.C. § 13662(c) (Supp. 2003); Rubinstein & Mukamal, *supra* note 2, at 46; Travis, *supra* note 2, at 24 (quoting the statute).

13. Rubinstein & Mukamal, *supra* note 2, at 45.

14. Demleitner, *supra* note 9, at 1036.

15. Travis, *supra* note 2, at 24. *But see* OFFICE OF THE PARDON ATTORNEY, *supra* note 5, at 10 (stating that those persons convicted of manufacturing methamphetamine on the premises of federally assisted housing may be permanently banned from such housing).

16. *Id.*

17. *Id.*

18. Demleitner, *supra* note 9, at 1040.

19. *Id.* For both possession and sales, a person may regain eligibility by showing rehabilitation and meeting certain conditions, including two unannounced drug tests. *Id.*; Travis, *supra* note 2, at 24.

20. Anthony Thompson, Address at the National Legal Aid & Defender Association Annual Conference (Nov. 14, 2002), at [http://www.nlada.org/Training/Train\\_Annual/Train\\_Annual\\_Reentry\\_Sessions](http://www.nlada.org/Training/Train_Annual/Train_Annual_Reentry_Sessions).

21. Demleitner, *supra* note 9, at 1040-41.

of the system, such as convicted felons on probation or parole.<sup>22</sup> More than twelve states permanently prohibit ex-offenders from voting.<sup>23</sup> In Alabama, the state constitution prohibits anyone convicted of certain enumerated offenses including murder, arson, robbery, burglary, rape, being a tramp, and adultery from voting.<sup>24</sup> In six states, including Alabama, this ban prohibits approximately one fourth of all African-Americans from voting because of past convictions.<sup>25</sup>

Other collateral sanctions include the congressional law that requires states to revoke or suspend the driver's licenses of those convicted of drug felonies,<sup>26</sup> state sex offender registrations statutes,<sup>27</sup> the prohibition against those convicted of felonies from enlisting in the military,<sup>28</sup> and the denial of Medicare to those convicted of unlawfully manufacturing, distributing, prescribing, or dispensing drugs.<sup>29</sup> Additionally, any person who is convicted of a crime that carries a punishment of imprisonment for a term exceeding one year is prohibited from possessing a firearm.<sup>30</sup> And under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, a legal immigrant may be deported for crimes including aggravated felonies, drug offenses, firearm offenses, and domestic violence.<sup>31</sup>

## II. COLLATERAL DAMAGES

Last year, approximately 600,000 offenders were released from state and federal prisons into their communities.<sup>32</sup> Collateral consequences acted as secret sentences to many of these released offenders. These sanctions

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22. *Id.*

23. *Id.* at 1041.

24. ALA. CONST. art. VII, § 182.

25. Travis et al., *supra* note 3, at 17; *Felony Disenfranchisement Laws in the United States* (The Sentencing Project, Washington, D.C.), Oct. 2003, available at <http://www.sentencingproject.org/pdfs/1046.pdf>.

26. Travis, *supra* note 2, at 24 (stating that “[i]n 1992, Congress passed a law requiring states to revoke or suspend the drivers’ licenses of people convicted of drug felonies, or suffer the loss of 10 percent of the state’s federal highway funds”).

27. *Id.* (stating that in 1994, Congress passed the Crime Act which “required each state to enact a sex offender registration law within three years or lose 10 percent of its federal funding for criminal justice programs”).

28. OFFICE OF THE PARDON ATTORNEY, *supra* note 5, at 3. A presidential pardon as well as possible state action will restore the civil rights lost as a result of a felony conviction. *Id.* at 13.

29. 42 U.S.C. § 1320a-7(a)(4) (2003); OFFICE OF THE PARDON ATTORNEY, *supra* note 5, at 8.

30. 18 U.S.C. § 921(g)(1) (2003); OFFICE OF THE PARDON ATTORNEY, *supra* note 5, at 15.

31. 18 U.S.C. § 921(g)(1); Travis, *supra* note 2, at 23. See OFFICE OF THE PARDON ATTORNEY, *supra* note 5, at 11-12, for a more detailed explanation of the deportation laws associated with criminal convictions of legal immigrants. In Alabama, people who are guilty of certain crimes may be refused a license or have their license revoked for certain professions. See e.g., ALA. CODE § 34-5-8 (1975) (stating that a barber’s certificate may be denied or revoked if the applicant/certificate holder is addicted to liquor or drugs); ALA. CODE § 34-7A-16 (1999) (stating that the Board of Cosmetology may deny or revoke an applicant’s/certificate holder’s certificate if they have been convicted of a felony); <http://www.arec.state.al.us/licensing.asp> (last visited Nov. 24, 2003) (stating that one cannot receive a license to sell real estate if convicted of a felony); ALA. CODE § 34-43-15 (2000) (stating that the Massage Therapy Board may refuse to issue or suspend a license if the licensee or applicant is convicted of a felony).

32. Thompson, *supra* note 20.

impose a serious erosion of the network of support for those who are trying to rehabilitate themselves. The idea of collateral sanctions is inconsistent with the goal of re-entry and rehabilitation of offenders when they complete their criminal sanctions, and there are numerous problems associated with these civil disabilities. The National Council on Crime and Delinquency explained this effect by stating that “[e]ven when the sentence has been completely served, the fact that a man has been convicted of a felony pursues him like Nemesis.”<sup>33</sup>

There are numerous problems associated with these secret sentences. First, assessing the civil sanctions that apply to individual offenders is difficult as they are invisible punishments that do not exist within the criminal code and are therefore almost impossible to ascertain. Second, there is no unilateral requirement that mandates the disclosure of these civil disabilities upon arrest. As a result, these sanctions are rarely considered in the decisionmaking process of whether and what to plead versus facing conviction by trial. Third, because there is no disclosure requirement within the penal system, there will never be true truth-in-sentencing as long as there are secret sentences. And finally, there is a serious impact upon the goals of reintegration of rehabilitated offenders into society, especially in light of the disparate impact that these sanctions have on the poor and minorities.

#### *A. Invisibility of Collateral Sanctions*

The first problem with collateral sanctions is that they are not visible. Most of the sanctions are civil punishments authorized and codified by Congress. However, because these are civil sanctions, they are not codified in one particular title or chapter of the U.S. Code.<sup>34</sup> In fact, the American Bar Association (“ABA”) Criminal Justice Standards Committee has recognized this as such a problem that in November 2001, it recommended that all mandatory collateral sanctions be codified and collected in one place in both state and federal statutes so that there would be “truth-in-legislating” the sanctions to ensure that they were readily available and codified with other more traditional criminal sanctions.<sup>35</sup> As the District of Columbia Circuit stated, “[t]he distinction between a collateral and a direct consequence of a criminal conviction, like many of the lines drawn in legal analysis, is obvious at the extremes and often subtle at the margin.”<sup>36</sup> Therefore, it is very difficult for a defendant or counsel to ascertain a complete list of the

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33. Travis, *supra* note 2, at 19.

34. See *id.* at 16, 34; Demleitner, *supra* note 9, at 1032 (“Federal legislation creating collateral consequences for drug offenses is frequently not part of crime legislation; it passes into law without being debated in relevant congressional committees, including the judiciary committee. The so-called “collateral consequences” are legally classified as civil rather than criminal sanctions.” (internal footnotes omitted)).

35. Travis et al., *supra* note 3, at 17.

36. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705 (2002) (alteration in original) (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

sanctions that may be imposed upon the defendant with either a guilty plea or a conviction.

### *B. Failure to Disclose*

It is also difficult for a defendant to ascertain the collateral consequences to conviction because most jurisdictions do not require that these potential sanctions be disclosed to the defendant.<sup>37</sup> The Supreme Court has ruled that the Due Process Clause only requires that the trial court explain the direct consequences of a conviction.<sup>38</sup> And while the ABA Standards require that defense counsel consider collateral consequences of a conviction, most courts “hold that ‘neither the trial judge nor defense counsel is required to explain the ‘collateral consequences’ of a guilty plea to the defendant.’”<sup>39</sup> The decision to plead guilty or go to trial is a main aspect of the penal system at-large. Additionally, an important part of this decision relies on what types of sentences may be imposed. However, one commentator has explained:

No intelligent plea decision can be made by either lawyer or client without full understanding of the possible consequences of a conviction. These consequences describe the defendant’s potential exposure if s/he goes to trial and is convicted of the offense charged or if s/he pleads guilty to the offense charged with no plea bargain. They are the baseline for measuring the worth of any bargain that can be negotiated . . . . In some defendant’s cases the consequences of conviction may be so devastating that even the faintest ray of hope offered by a trial is magnified in significance.<sup>40</sup>

An example of how important collateral consequences are in determining whether to plea or go to trial was outlined by Professor Dan Filler in his recent speech discussing sex offender statutes.<sup>41</sup> Filler argued that sex offender statutes requiring registration upon conviction, a collateral sanction to the criminal penalties involved in sex crimes, has caused offenders to plead to offenses carrying longer prison sentences over sex offenses carrying shorter sentences but requiring the significant and permanent civil disability of registration.<sup>42</sup>

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37. *Id.* at 699 (“[E]ven federal circuits, more than thirty states, and the District of Columbia have held that lawyers need not explain collateral consequences, which, although they might follow by operation of law, are not part of the penalty imposed by the particular statute the defendant is accused of violating.”).

38. *Id.* at 706.

39. *Id.* at 700-01 (quoting *Goodall v. United States*, 759 A.2d 1077, 1081 (D.C. 2000)).

40. *Id.* at 715-16 (quoting ANTHONY AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 204).

41. Daniel M. Filler, Address to the University of Alabama School of Law Faculty (Feb. 23, 2003).

42. *Id.*

Additionally, in some circumstances, knowing the collateral sanctions associated with a specific offense may help the accused's ability to persuade the prosecutor to either prosecute for a lesser charge or offer a better deal. The National Prosecution Standards provide prosecutors with the ability to consider collateral sanctions when prosecuting a defendant.<sup>43</sup> Therefore, while courts should not be required to "consult astrologers or invoke psychic powers to comply with [. . . disclosure responsibilities 'in accepting guilty pleas],"<sup>44</sup> judges should at least be required to consult with the defendant about whether the collateral consequences have been explained.<sup>45</sup> Without this disclosure requirement, collateral consequences may cause similarly situated defendants to receive disparate penalties because they were not fully informed about the consequences of their decisions.<sup>46</sup>

### *C. Barrier to Truth-in-Sentencing*

The goal of truth-in-sentencing cannot be achieved as long as these collateral sanctions remain an enigma. The notion of truth-in-sentencing, a movement that is gaining increased support,<sup>47</sup> stands for the proposition that actual sentences should be known to the public at-large and not imposed or modified away from public view.<sup>48</sup> Therefore, truth-in-sentencing requires that there be actual truth to the sentence that the trial court imposes. In states that are moving toward truth-in-sentencing penal systems, states are striving to ensure that the actual time served reflects the sentence imposed.<sup>49</sup> However, in order to achieve true truth-in-sentencing, states must go beyond just determining time served as compared to the sentence imposed. Until states begin to take into account the civil sanctions that exist parallel to the criminal sanctions, there will never be full truth-in-sentencing because of the web of sanctions existing within the civil laws that are not disclosed anywhere in the existing system. Therefore, the existing system of sanctions that fails to expose both the existence and impact of the collateral sanctions violates the goal of truth-in-sentencing. In exploring the consequences of these invisible punishments, Jeremy Travis stated:

It is ironic that the truth-in-sentencing movement, which promotes the notion of certainty of punishment, values open decision making about the terms of punishment, and denigrates the exercise of discretion in sentencing, has not yet discovered that the "secret sen-

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43. Chin & Holmes, *supra* note 36, at 720.

44. *Id.* at 737 (quoting *People v. Williams*, 721 N.E.2d 539, 544 (Ill. 1999) (alteration in original)).

45. See Travis, *supra* note 2, at 34.

46. Chin & Holmes, *supra* note 36, at 741.

47. See THE ALABAMA SENTENCING COMMISSION, RECOMMENDATIONS FOR REFORM OF ALABAMA'S CRIMINAL JUSTICE SYSTEM: 2003 REPORT 1 (2003).

48. Travis et al., *supra* note 3, at 17.

49. ALABAMA SENTENCING COMMISSION, *supra* note 47, at 25 ("As a result, the sentence articulated in court by the judge rarely reflects any 'truth' in how the inmate will be handled.")



tences” that constitute the universe of invisible punishment violate those three principles.<sup>50</sup>

#### *D. Inhibiting Reintegration and Rehabilitation*

Finally, where most people in prison are eventually released into society, the goal of successfully reintegrating these offenders into society to prevent recidivism is significantly compromised not only by the existence of these sanctions but also by their secretiveness. Preventing recidivism requires that states ensure a successful transition into society. However, the network of social and civil barriers inhibits the ability of the states to meet this goal. Successful reintegration requires a society to ask: “If all prisoners come back, how can they be best prepared for the inevitable return home, both from the standpoint of their own rehabilitation *and* community safety?”<sup>51</sup> However, even though those who commit crimes are “expected to become law-abiding and productive citizens, . . . they are denied many of the usual means of doing so [by the civil disabilities placed on offenders].”<sup>52</sup>

Most of these people being released from prison face problems that necessitate “treatment and basic necessities and to find safe and sober housing so they can successfully reintegrate back into the community, live drug- and crime-free, and provide for themselves and their families.”<sup>53</sup> Therefore, there are several consequences to these sanctions inhibiting the goal of successful reintegration. First, these sanctions have a gross impact on mothers who are trying to bring their families together in order to prevent the next generation from repeating this generation’s grave mistakes. Second, the civil sanctions act as a barrier to successful re-entry by imposing legal barriers to obtaining necessary job training and skills, as well as suitable employment. Finally, these sanctions act as a barrier to rehabilitation, especially in light of the fact that they have a disparate impact on the poor and minorities.<sup>54</sup> As a result of these sanctions:

Not only is it harder to find work, drive to work, and get an education, it is harder to exercise the individual autonomy that is taken for granted by others in society—being a parent, living in public housing with one’s family, relying on public benefits such as food stamps and welfare assistance, moving freely without notice to the

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50. Travis, *supra* note 2, at 34.

51. Travis et al., *supra* note 3, at 14.

52. Margaret Colgate Love, *Deconstructing the New Infamy: A Preview of the Section’s Project on Collateral Sanctions*, CRIM. JUST., Fall 2001, at 30, 30.

53. Rubinstein & Mukamal, *supra* note 2, at 39 (internal footnote omitted).

54. This is not a complete list of the impact from these invisible punishments. Because it is difficult to obtain even a list of all of the civil sanctions, it is almost impossible to gauge the full impact of these civil disabilities. For purposes of this Comment, the three implications discussed are for the purpose of proving that implications do and will continue to exist until these sanctions are either included in the process of truth-in-sentencing or eliminated.

police, and establishing a residence without suffering the rejection of one's neighbors.<sup>55</sup>

### *1. Impact on Mothers*

Since the ban against permanently issuing food stamps and TANF to anyone convicted of a drug felony, 92,000 women have been convicted of drug offenses in the states that have adopted the ban.<sup>56</sup> Of these convicted women, about two thirds are mothers with a combined total of approximately 135,000 children.<sup>57</sup> In Alabama, from 1996 through 1999, 1339 women with children have been affected by this ban, of which sixty-one percent are African-American.<sup>58</sup> Because the only people that are eligible for food stamps and TANF are the poor, it is these women who are conversely impacted by such a ban. Therefore, "[a] single-parent family of three, for example, in which only the two children are entitled to food stamps [because the mother is an offender], will obviously divide the food three ways. And when the mother cannot get welfare benefits she may not apply for them for others in the family."<sup>59</sup>

Therefore, the economic hardships faced by these women not only affect themselves but also their ability to act as sufficient caregivers to meet the basic needs of their children. At least one study shows that although the purpose of welfare is to keep families intact,<sup>60</sup> some mothers may be forced to place their children in the care of others, thereby resulting in the opposite of the stated goal.<sup>61</sup> And according to the Office of Juvenile and Justice Delinquency Prevention, children that suffer from neglect are likely to engage in violent crimes during adolescence and adulthood.<sup>62</sup> Additionally, because of the potential barrier to living in public housing, these mothers are forced to spend the little money they do acquire on rent and other necessities that may have been covered by the federal assistance that is available to non-offenders. Therefore, even if the mother somehow survives and is able to prevent herself from re-offending, the barriers of economic hardship and increased stress will likely cause the child to suffer and eventually imitate the exact behavior that put the family in the situation in which they are currently trying to survive.

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55. Travis, *supra* note 2, at 24-25.

56. *Out of Jail*, *supra* note 1.

57. *Id.*

58. PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 5-6 (2002).

59. *Out of Jail*, *supra* note 1.

60. *See supra* notes 6-7 and accompanying text.

61. ALLARD, *supra* note 58, at 10.

62. *Id.* at 14.

## 2. Bar to Skills Training and Gainful Employment

The sanctions that prohibit offenders from obtaining financial assistance for skills training, the revocation of drivers' licenses, the prohibition against offenders joining the military, and the impact of the firearms ban all have the potential of preventing previous offenders from obtaining suitable employment that will help them from re-offending. The ban against federal financial assistance for education "effectively close[s] a large number of employment opportunities, skilled and unskilled, to ex-offenders, and have made it more difficult for them to get additional skills training."<sup>63</sup> In fact, a year after their release, sixty percent of former inmates do not have legitimate employment.<sup>64</sup> In the 2000-01 school year, approximately 9000 students were found ineligible for aid because of this ban.<sup>65</sup> The inability of ex-offenders to gain financial access to education for the purpose of expanding employment opportunities perpetuates the cycle of being unable to better one's life through legitimate means. In fact, ex-offenders who are prohibited from obtaining "education and job training will become likely recidivists unless they receive reintegration assistance."<sup>66</sup>

Additionally, the inability to obtain a driver's license, enlist in the military, and own a firearm may be direct, rather than indirect, barriers to obtaining legal employment. When ex-offenders are released from prison, they are expected to contribute to society through legitimate employment. However, many of the sanctions act as limits to an ex-offender's employability. If an ex-offender's driver's license is revoked, that offender will not have access to any employment opportunities that require mobility and may be barred from obtaining a job because of not being able to drive to an interview.<sup>67</sup> A good and solid employment opportunity, as well as a potential place for rehabilitation, is the armed forces. The armed forces can give those that are enlisted training, job skills, and a way to pay for college while earning a good paycheck.<sup>68</sup> However, most ex-offenders are not given that opportunity.<sup>69</sup> And while it may not be appropriate to allow all ex-offenders to own a firearm, other good jobs such as working as a security officer may be impossible for ex-offenders because of their inability to own a gun.<sup>70</sup>

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63. Demleitner, *supra* note 9, at 1040.

64. *Id.* (quoting Joan Petersilia, *When Prisoners Return to the Community: Political, Economic and Social Consequences*, SENTENCING & CORRECTIONS ISSUES FOR THE 21ST CENTURY (U.S. Department of Justice, National Institute of Justice, Washington, D.C.), Nov. 2000, available at [www.ncjrs.org/pdffiles1/nij/184253.pdf](http://www.ncjrs.org/pdffiles1/nij/184253.pdf)).

65. Travis, *supra* note 2, at 24.

66. Demleitner, *supra* note 9, at 1034.

67. *See id.* at 1037.

68. *See* U.S. Army, *Army Benefits*, at <http://www.goarmy.com/army101/benefits.htm> (last visited Nov. 15, 2003).

69. *See* OFFICE OF THE PARDON ATTORNEY, *supra* note 5 and text accompanying note 28.

70. *See id.* at 15.

### 3. Increased Recidivism

Finally, these invisible punishments act as a barrier to rehabilitation and successful reintegration. These civil sanctions serve as a significant barrier to ex-offenders seeking successful reintegration into society, especially in light of the fact that these sanctions have a disparate impact on the poor and minorities. Many of the 600,000 prison inmates that are released annually are drug users and are treatment-needy offenders.<sup>71</sup> And because African-Americans and other minorities are disproportionately arrested, convicted, and sentenced for drug offenses, they are disproportionately affected by the civil sanctions that prohibit successful rehabilitation and re-entry.<sup>72</sup> Without the ability to obtain assistance after one's release (besides a bus ticket), it is difficult for ex-offenders to access sustenance, treatment, and a safe and sober living arrangement, thereby increasing their chances of recidivism.<sup>73</sup> The ban against public assistance acts as a "catch-22" for those seeking successful reintegration.<sup>74</sup> For those that struggle financially, most jobs that they can obtain, especially without any training, barely pay enough to afford rent.<sup>75</sup> Public assistance bans, including food stamps, TANF, housing, and student financial aid, "turn all offenders, especially poor, female and minority offenders, their families and their communities, into 'collateral damage.['] . . . These restrictions frequently lead to re-offending and ultimately re-imprisonment."<sup>76</sup> And because even ex-offenders have to eat and live, they are tempted to steal or deal drugs to survive.<sup>77</sup>

An estimated ninety percent of imprisoned drug offenders who do not get treatment will be behind bars again within three years.<sup>78</sup> Therefore, without treatment, it is more than likely that an ex-offender will re-offend.<sup>79</sup> Treatment providers are also hurt by these civil sanctions. Residential drug-treatment facilities sometimes depend on the clients' food stamps for purchasing food.<sup>80</sup> Because the loss of food stamps hampers drug-treatment

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71. Demleitner, *supra* note 9, at 1033; ALABAMA SENTENCING COMMISSION, *supra* note 47, at 2 ("One-third of the new offenders sent to prison are convicted of drug possession, drug sales or felony DUI."). With approximately 28,000 inmates, almost half—12,744—participated in a substance abuse program between January and August of 2002. *Id.* at 2-3. An additional 7493 inmates were on waiting lists. *Id.* at 3.

72. See Rubinstein & Mukamal, *supra* note 2, at 40. Therefore, more than half of the inmates in Alabama prisons are in need of substance abuse treatment.

73. *Id.* at 42.

74. See *id.*

75. See *War on Drugs*, *supra* note 1. Ex-offenders would not have to pay rent, or at least full rent, if they were able to obtain public assistance for housing. However, because they are not able to have subsidized housing, they have to pay for housing, which means less money for food and necessities, for which they can obtain no help either because of the ban on food stamps and TANF. However, they cannot obtain a better job that would help pay more of the bills because they cannot receive student financial aid. Therefore, the cycle of poverty is perpetuated under this system of civil sanctions.

76. Demleitner, *supra* note 9, at 1048.

77. See *id.*

78. *Id.*

79. Rubinstein & Mukamal, *supra* note 2, at 43.

80. See *id.*

facilities' ability to serve clients, it is likely that they have to cut the number of clients to survive, thereby increasing the number of drug abusers who receive no treatment.<sup>81</sup>

### III. IMPACT ON ALABAMA

Because these civil sanctions pose significant barriers to the support system of ex-offenders and the goals of moving toward more treatment over more prison beds, these methods of invisible punishment must be brought to light so that they can be considered as part of the states' punishment policies, incorporated into the sentencing structure, and subjected to legislative debate.

#### A. *The Alabama Sentencing Commission*<sup>82</sup>

On January 23, 1998, the Alabama Judicial Study Commission ("JSC") created a special committee to study Alabama's sentencing policies and practices.<sup>83</sup> The committee was charged with studying the strengths and weaknesses of Alabama's criminal sentencing system.<sup>84</sup> As a result of the study, the JSC recommended that the legislature create the Alabama Sentencing Commission ("Sentencing Commission") as a separate agency to serve as a research arm to the judicial system responsible for analyzing and reporting necessary information to lawmakers regarding the sentencing process.<sup>85</sup> In 2000, the Alabama Legislature passed an act creating a permanent sentencing commission with the responsibilities to: (1) serve as a clearinghouse on sentencing practices; (2) make recommendations to lawmakers concerning laws relating to criminal offenses, sentences, correctional, and probation issues; and (3) review the overcrowded jail problem and make recommendations for resolution to lawmakers.<sup>86</sup> The act provided that all proposals by the Sentencing Commission should reflect the following principles of Alabama's penological philosophy: (1) secure the public safety by providing a "swift and sure" response to the commission of crime; (2) estab-

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81. *See generally id.* (stating that the loss of food stamps jeopardizes drug-treatment programs and therefore is likely to increase drug abuse).

82. Members of the Sentencing Commission are Joseph A. Colquitt, Chairman, Beasley Professor of Law, University of Alabama School of Law; Hon. Marcel Black, State Representative; Hon. Eleanor I. Brooks, District Attorney; Rosa Davis, Esq., Chief Assistant Attorney General; Stephen A. Glassroth, Esq., Attorney at Law; Donal Campbell, Commissioner, Department of Corrections; Dr. Lou M. Harris, Jr., Faulkner University; Trey King, Esq., Governor's Legal Advisor; Hon. O.L. Johnson, District Judge; Samuel L. Jones, County Commissioner; Emily A. Landers, Victims Advocate; Hon. P.B. McLauchlin, Jr., Circuit Judge; Hon. David A. Raines, Circuit Judge; Joe Reed, Jr., Esq., Faulk & Reed, L.L.P.; Hon. William C. Segrest, Board of Pardons and Paroles; Hon. Rodger M. Smitherman, State Senator; and Lynda Flynt, Executive Director. ALABAMA SENTENCING COMMISSION, *supra* note 47.

83. THE ALABAMA SENTENCING COMMISSION, INITIAL REPORT TO THE LEGISLATURE app. c at 1 (2002).

84. *Id.*

85. *Id.* at 2.

86. *Id.*

lish a sentencing system that provides certainty in sentencing while avoiding unwarranted disparities; (3) promote truth-in-sentencing; (4) prevent prison overcrowding while ensuring that the system does not prematurely release prisoners; (5) provide judges with sentencing options that are flexible; (6) increase the available sentencing options; and (7) limit the discretion given to district attorneys in charging crimes.<sup>87</sup>

The establishment of the Sentencing Commission had not only the support of the Chief Justice and the Attorney General,<sup>88</sup> but it had tremendous public support as well.<sup>89</sup> One editorial stated: "A state sentencing commission could give Alabama's criminal sentencing system the overhaul it has long needed."<sup>90</sup> With the passage of the legislation that created the Sentencing Commission, Attorney General Bill Pryor stated:

The Legislature's final approval this afternoon of House Bill 83 represents a tremendous victory for State of Alabama and the many people who have contributed their efforts to an important and worthy cause—the repair of our terribly broken system for sentencing criminals. As Attorney General, I have made it my priority to bring "truth-in-sentencing" to the citizens of Alabama and I believe we have taken a great step forward today.<sup>91</sup>

The Attorney General explained that the purpose of the Sentencing Commission would be to review the existing sentencing structure and recommend changes to the policies and practices appropriate for the state.<sup>92</sup> For more than two years, the Sentencing Commission embarked on a review of Alabama's sentencing practices and policies.<sup>93</sup> In its 2003 recommendations, the Sentencing Commission recommended legislation that, if approved, would:

- establish an effective, fair, and efficient sentencing system that promotes truth-in-sentencing;
- provide a wider array of sentencing options for non-violent offenders;
- authorize individualized sentencing as warranted by mitigating and aggravating factors, maintaining judicial discretion in sentencing—both in the time imposed and the use of sentencing;

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87. *Id.* at 3.

88. See Attorney General Bill Pryor, *Sentencing Reform*, at [www.ago.state.al.us/issue/sentence.htm](http://www.ago.state.al.us/issue/sentence.htm) (last visited Nov. 15, 2003).

89. See, e.g., Editorial, *A Model Idea*, BIRMINGHAM NEWS, Aug. 11, 1999; Editorial, *Justice System Needs Repairs*, MONTGOMERY ADVERTISER, Apr. 26, 1999; Editorial, *Pryor Commitment*, TIMES DAILY (FLORENCE), May 16, 1999.

90. *A Model Idea*, *supra* note 89.

91. Press Release, Attorney General Bill Pryor, Statement of Attorney General Bill Pryor Regarding Final Passage of Sentencing Bill (May 11, 2000), at <http://www.ago.state.al.us/news/051100a.htm>.

92. *Id.*

93. ALABAMA SENTENCING COMMISSION, *supra* note 47, at 1.

- avoid unwarranted sentencing disparities among felony offenders with similar criminal records who have been found guilty of the same or comparable offenses, eliminating distinctions of sentences based on race, gender, wealth, or the jurisdiction; and
- prevent prison overcrowding, while avoiding the premature release of prisoners.<sup>94</sup>

In making its recommendations the Sentencing Commission was attentive to the directives of the legislature by trying to make recommendations that would establish sentences that actually reflect the gravity of the crime and be consistent with the protection of the public while promoting rehabilitation of offenders.<sup>95</sup>

### *B. The Missing Ingredient*

Currently, Alabama is facing a severe overcrowding problem in both county jails and state prisons, with more than 28,000 inmates currently housed in Alabama prisons.<sup>96</sup> The Department of Corrections' occupancy is 199.7% more than what the facilities were designed to house.<sup>97</sup> In recognizing these problems, the Alabama Legislature commissioned the Sentencing Commission to study Alabama's current sentencing structure and provide a series of recommendations that would assist in the relief of prison overcrowding, requiring the Sentencing Commission to develop a process whereby Alabama would move toward truth-in-sentencing, while increasing the number of community correction alternatives.

Throughout its report, the Sentencing Commission relies on recommendations that enhance Alabama's ability to provide truth-in-sentencing while emphasizing sentencing alternatives for non-violent offenders including increasing community and intermediate punishment.<sup>98</sup> The Sentencing Commission's recommendations included adopting truth-in-sentencing measures over the next four years and expanding community punishment alternatives for non-violent offenders.<sup>99</sup> The truth-in-sentencing measures would require that convicts actually serve the full term of their sentence imposed.<sup>100</sup> The recommended community corrections programs would be designed to keep felons in their home counties by making them work and participate in substance abuse and other treatment programs.<sup>101</sup> Once introduced, the legislature will review the proposed legislation, debate its con-

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94. *Id.* at 1-2.

95. *Id.* at 2.

96. See Stan Bailey, *Riley Gets 30 Days to File State Convict Removal Plan*, BIRMINGHAM NEWS, Mar. 14, 2003; ALABAMA DEPARTMENT OF CORRECTIONS, JANUARY 2003 MONTHLY STATISTICAL REPORT 1 (2003).

97. See ALABAMA DEPARTMENT OF CORRECTIONS, *supra* note 96, at 2.

98. ALABAMA SENTENCING COMMISSION, *supra* note 47, at 43.

99. Stan Bailey, *Panel Oks Truth-in-Sentencing Report*, BIRMINGHAM NEWS, Feb. 25, 2003.

100. *Id.*

101. *Id.*

tents, most likely make changes to it, and either pass or reject its recommendations.

However, the Sentencing Commission's report does not address the issue of collateral sanctions as dictated by the civil code.<sup>102</sup> In fact, in the more than two years that the Sentencing Commission has met to review Alabama's sentencing practices and policies, the issue of civil sanctions has never been mentioned in a meeting.<sup>103</sup> Nor has the Alabama Legislature mandated that the Sentencing Commission study the existence and impact of these sanctions.<sup>104</sup> As a result, there are no legislative recommendations to address these sanctions as part of the overhaul of Alabama's sentencing structure.<sup>105</sup> It is impossible to meet the goals of the legislative agenda establishing truth-in-sentencing and increased community correction programs without addressing civil sanctions in the analysis and restructuring of the state's sentencing policies and practices.

Civil sanctions impede the ability to have true truth-in-sentencing and successful reintegration.<sup>106</sup> Therefore, if the recommended overhaul of the sentencing system is supposed to impose sentences that reflect the gravity of the crime and promote the rehabilitation of offenders, the sun must shine on the existence of civil sanctions and the barriers that these sanctions impose on the stated goals. This is especially true in light of the fact that Alabama's prison system houses a disproportionate number of minorities who are disparately impacted by the civil sanctions.<sup>107</sup> Because these offenders have been denied the social safety net that assists non-offenders with achieving basic necessities such as food, clothing, housing, and education, their ability to re-enter society and conform to society's norms as established by the criminal laws will be impacted. Therefore, as long as civil sanctions exist as invisible collaterals of the criminal system, Alabama will not be able to achieve true sentencing reform.

#### IV. SUGGESTIONS

In order to meet the goals of the state's sentencing reform, Alabama lawmakers must call for several steps to be taken. The Sentencing Commission's report and recommendations will not be complete without a thorough review of the existing collateral sanctions and an analysis of the effects that these sanctions have on the state's sentencing practices. Therefore, the following is a list of suggested steps to be taken to ensure that these invisible punishments become part of the forthcoming debate on the restructuring of the system.

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102. See ALABAMA SENTENCING COMMISSION, *supra* note 47.

103. Telephone Interview with Lynda Flynt, Executive Director of Sentencing Commission (Sept. 2003).

104. *Id.*

105. See ALABAMA SENTENCING COMMISSION, *supra* note 47, at 43-56.

106. See *supra* text accompanying notes 33-79.

107. ALABAMA DEPARTMENT OF CORRECTIONS, *supra* note 96, at 7.



### *A. Disclose the Sanctions*

The Alabama Legislature should pass a law mandating that the Sentencing Commission review the existing civil sanctions and recommend a way to make them more easily accessible to defendants, counsel, lawmakers, and practitioners. While the legislature debates the proposed legislation submitted by the Sentencing Commission, it should add a stipulation mandating that the Sentencing Commission undertake a review of the sanctions and report to the legislature with recommendations at the next regular legislative session on how to collect the sanctions in one area of the Alabama Code to ensure that the sanctions are fully disclosed.

### *B. Ensure Defendants' Knowledge*

Currently, there are no laws requiring that defendants be made aware of the existing sanctions before deciding whether to plead or go to trial.<sup>108</sup> The legislature should mandate that defense counsel must ascertain sanctions that may apply to their clients and make sure that their clients are aware of their options. Additionally, the legislature should require that judges ensure that defendants are aware of the collateral sanctions along with the criminal sanctions when they enter a guilty plea.

### *C. Determine Application of Sanctions*

The Sentencing Commission should determine how the civil sanctions apply to the existing sentencing structure and how they will apply to the recommended changes proposed by the commission. Because civil sanctions are a significant part of the way offenders are reintegrated and rehabilitated, it is important to know the impact they will have on these goals.

### *D. Recommend Changes*

The Sentencing Commission should review the existing civil sanctions and make recommendations as to whether the legislature should make changes to the existing disabilities imposed on ex-offenders. For example, the state can potentially opt out of or limit the permanent ban on food stamps and TANF, restructure the process to restoring civil rights so that ex-offenders may be eligible for certain scholarships and employment opportunities, remove the ban on voting for ex-felons, etc. The Sentencing Commission should review these options and report to the legislature in the next regular session with suggestions.

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108. See *supra* notes 35-41 and accompanying text.

## CONCLUSION

As Alabama addresses the issue of sentencing reform, it will be impossible to achieve true reform without acknowledging, researching, and analyzing the existence of collateral sanctions and the impact that they have on the criminal system. In order to achieve true “truth-in-sentencing” and successful reintegration and rehabilitation of ex-offenders, Alabama must look at how the existence of these invisible punishments affects these goals. The way the state deals with how ex-offenders are transitioned from prison into their communities will significantly support the way offenders are rehabilitated and prevented from re-offending. Civil sanctions are important issues in determining how the state will ensure public safety while establishing a sentencing system that promotes truth-in-sentencing, unwarranted disparities among felony offenders, and community correction alternatives for non-violent offenders.

Civil sanctions can no longer be ignored. To achieve these goals, lawmakers must demand that the Sentencing Commission follow the aforementioned suggestions. Without addressing the issue of civil sanctions, the overhaul of the sentencing structure will be incomplete and continue to promote silent sentences, disparities in punishments, and barriers to rehabilitation—leading to recidivism. Therefore, lawmakers must demand a “Rational and Planned Approach to Reform”<sup>109</sup> that consists of all aspects of the criminal justice system, including those that invisibly continue to hamper the successful reintegration of ex-offenders and increase the likelihood of recidivism because without a focus on these issues, true reform and truth-in-sentencing will never be achieved.

*Sabra Micah Barnett*

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109. ALABAMA SENTENCING COMMISSION, *supra* note 47, at 1.