Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy

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Americans think we know an awful lot about our penal system. Yet policymakers, jurists, academics, offenders, and the public alike remain largely ignorant of more than 35,000 hidden sentence laws across the nation. "Hidden sentence" refers to any punishment imposed by law as a direct result of criminal status, but not as part of a formally recognized, judge-issued sentence. Thus, both restrictions on prisoners' rights and "collateral consequences" laws are hidden sentences; so are penalties imposed during pre-trial detention or for having a criminal record. Part I of this article uses the National Inventory of the Collateral Consequences of Conviction alongside information on offenders' rights litigation to outline a resource for understanding this vast body of law. Part II uses these data to discuss the reality of these laws (a) as holding primary importance for offenders' lives and the penal system as a whole, (b) as purposively enacted through legislation, administrative rules, or decisional law, and (c) as punishments—deprivations or harms imposed in response to criminal acts. Then, in Part III, this article analyzes the unique part about these punishments—their hiddenness—and the characteristics of this body of law that serve to hide it in varying degrees from public and professional view. Part IV problematizes this hiddenness, arguing it threatens both any purpose of punishment they could serve and their legitimacy according to core American principles. The article concludes in Part V by discussing the most ready means to make hidden sentence law transparent.

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Introduction

We have a knowledge problem. Crime and fear of crime are constant concerns in today's United States, salient in highly successful television shows from *The Wire* to *Breaking Bad*, prominent in political campaigns from Reagan to Obama, and governing issues from the War on Crime and the War on Terror to mass school shootings and the drug "epidemic."[1] In

[1] Much of the increased attention results from the spike in crime rates during the 1970s and 1980s that did not relent until the 1990s. This official pattern is true regardless of the measure used. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 147006, Criminal Victimization in the United States: 1973–92 Trends (1994) (measuring victimization reports); Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 236018, Homicide Trends in the United States, 1980–2008 (2011) (measuring homicide rates, widely agreed upon to be the crime rates that can be the most objectively determined); Bureau of

recent decades, we have seen vast increases in the number of criminal offenses, the crimes punishable by imprisonment, the length of prison sentences, the number of persons imprisoned, and the number of prisons.[2] Whether this "mass incarceration" trend is necessary or effective,[3] the United States has unquestionably become a punitive society. And yet, everyone—scholars and policymakers, judges and lawyers, the public and even offenders[4] themselves—remains almost entirely oblivious to the most prevalent punishment practices, the ones most responsible for controlling the everyday lives of *approximately one in three American adults*.[5]

JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 234319, ARREST IN THE UNITED STATES, 1980–2009 (2011) (measuring arrest rates).

[2] *E.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (contrasting harsh and degrading U.S. and U.K. penal policies to the comparatively mild and merciful policies in Continental Europe). By 2003, the number of inmates in the U.S. prison system had exceeded its historical average by at least five times, and the United States now has the highest incarceration rates in the world. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 12–14 (2006). The trend has leveled off, and there is conjecture on a pending reversal. *E.g.*, Michelle S. Phelps, *Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 LAW & POL'Y 51, 51 (2013). It would, however, be some time before declining imprisonment populations would place the United States alongside similar advanced democracies.

[3] Support for high prison rates as a tactic in reducing crime is now marginal at best. *See, e.g.*, RYAN S. KING, ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 8 (2005), http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf [http://perma.cc/7DTJ-6GYH] (reviewing research on mass imprisonment and concluding that "incarceration is one factor affecting crime rates, its impact is more modest than many proponents suggest, and is increasingly subject to diminishing returns"); JONATHAN SIMON, MASS IMPRISONMENT ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014) (discussing recent judicial and political decisions that show mass incarceration could and should be at an end). At most, increased prison rates can account for only about 25% of the decrease in crime rates since the 1970s. KING, ET AL., *supra*. Many argue even these slight returns are unjustified because of the drastic effects of imprisonment on offenders and the population at large. *See, e.g.*, HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND TRANSFORMATION OF AMERICAN PUNISHMENT (2015) (showing the fiscal unsustainability of mass incarceration policies); JOHN IRWIN, THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS (2005) (a case study of California's Solano State Prison, its relationship to the rise of the contemporary punitive state, and its detrimental effect on inmates and former inmates); WESTERN, *supra* note 2 (criticizing mass incarceration's disparate effects on especially poor, urban, black men).

[4] This article uses "offenders" as shorthand for "criminalized persons," meaning all people labeled or designated "criminal" by a legal process. The most common criminal label derives from conviction, but people may be legally presumed criminal based upon various other legal statuses: arrest, indictment, pre-trial or post-trial incarceration, etc. *See infra* tbl.2. It uses "ex-offenders" similarly: criminalized persons who are released back into their communities after incarceration, on probation or parole, etc. The overlap or ambiguity between these groups is a problem of the sort mentioned in Part II, *infra*.

[5] Because jurists, policymakers, and academics are so focused on felony imprisonment to the exclusion of all else, it is remarkably difficult to find statistics on even misdemeanors or criminal history records, much less hidden sentences. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors,* 66 STAN. L. REV. 611, n.3 (2014). Perhaps the best way to estimate hidden sentence figures with available data is through criminal records, since many hidden sentences apply upon existence of any criminal record and since criminal histories can be started at arrest or earlier (*e.g.*, upon suspicion). There are currently at least 77 million persons in the United States with criminal history records. FED. BUREAU OF INVESTIGATION, NAT'L CRIME INFORMATION CTR., CRIMINAL JUSTICE INFO. SERV.'S DIV., NEXT GENERATION IDENTIFICATION SYSTEM (2015), https://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi

During imprisonment, probation, and other penal supervision, offenders are subject to myriad restrictions on their civil, political, and social rights—including limited speech, religious exercise, privacy, and spousal and parental rights.[6] Afterwards, some of these penalties end, others continue, and still more begin. For example, ex-offenders may be excluded from thousands of occupations, from food stamps and social security, or from living in certain locations.[7] A few sanctions—such as restricted due process and other procedural protections—even begin prior to conviction, upon arrest or pre-trial detention. Most are permanent; others can be reduced or eliminated over time or through (extensive) effort. Some are limited to specific categories like felons or drug offenders, but many apply to all offenders. Some accrue through statute or regulation and others by judicial decree. All told, there are on average *about 2,100 legislative and administrative penalties per state* aimed at persons released from correctional supervision,[8] in addition to an uncounted number imposed by judicial ruling or that accrue during and before supervision.

Together, these various forms of extra-criminal sentencing[9] make up the part of an offender's punishment insulated from public and professional

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[https://perma.cc/74VB-A2FW]; Fed. Bureau of Investigation, Criminal Justice Info. Serv.'s Div., *NGI Officially Replaces IAFIS—Yields More Search Options and Investigative Leads, and Increased Identification Accuracy*, 16 CJIS Link 1, 1 (Oct. 2014); *see also* Bureau of Justice Statistics, U.S. Dep't of Justice, NCJ 244563, Survey of State Criminal History Information Systems, 2012 (2014) (showing 100,280,900 separate criminal records in the 50 states); Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp't Law Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment (2011). The 2014 census data estimate there are 244,563,515 Americans over age 18. U.S. Census Bureau, USA QuickFacts (2014).

[6] These penalties are most often considered as restrictions on "prisoners' rights" or somewhat more broadly as restrictions on "offenders' rights." *See generally* John A. Fliter, Prisoners' Rights: The Supreme Court and Evolving Standards of Decency (2001); David L. Hudson, Jr., Prisoners' Rights (2007); Christopher E. Smith, *Prisoners' Rights and the Rehnquist Court Era,* 87 Prison J. 457 (2007); Jack E. Call, *The Supreme Court and Prisoners' Rights,* 59 Fed. Probation 36 (1995).

[7] The penalties that accrue after imprisonment, probation, and other official sentences end are often referred to as the "collateral consequences of a criminal conviction." *See generally* Margaret Colgate Love et al., Collateral Consequences of Criminal Convictions: Law, Policy and Practice (2013 ed., 2013); Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. 153 (1999); Walter Matthews Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 Vand. L. Rev. 929 (1970); Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501 (2003).

[8] *See infra* tbl. 7 and accompanying text.

[9] This article purposefully uses the terms "extra-criminal" and "sentence." The Supreme Court has long differentiated between "criminal" sanctions and the other "civil" penalties imposed on offenders. *See infra* notes 147–149 and accompanying text; *see also* Joshua Kaiser, *We Know It When We See It: The Increasingly Tenuous Line between "Direct Punishment" and "Collateral Consequences"*, Crim. L. Prac. (forthcoming 2015) (manuscript at 3–12) (on file with author) (a history of Supreme Court doctrine defining criminal punishment). However, Part II.C of this article argues—as others do—that these sanctions are not properly called "civil." *E.g.*, Nora V. Demleitner, *Abusing State Power or Controlling Risk: Sex Offender Commitment and Sicherungverwahrung,* 30 Fordham Urb. L.J. 1621, 1635–36 (2003) (noting that these carry the hallmarks of criminal sanctions). Going further, though, this article chooses not to call them "non-criminal," implying they are divorced from criminal-law

knowledge, the hidden part. This article thus introduces the term "hidden sentence" to mean all punishments that the law imposes as a direct result of criminal status, but not as part of a formally recognized, judge-imposed sentence. The hidden sentence is the largely unrecognized and unconsidered deprivation of rights and privileges to which the law subjects criminal offenders, and that takes place during a visible sentence, before it is imposed, and after its completion (often until death). And for most offenders, it is the part of their punishment that will matter most. Yet, as this article shows, professionals, offenders, and the public alike remain blissfully and detrimentally unaware of its full extent.

Hiddenness is not merely an esoteric, philosophical concern—nor is it a partisan issue. Regardless of whether extra-criminal punishments are praiseworthy, intolerable, or entirely insignificant,[10] this article argues their hiddenness generates substantial malignancies in the modern penal system—and scholarly understandings of it.[11] If we *do* punish, we must do so *trans-*

processes. "Extra-criminal" better captures the parallels between hidden and visible sentences, the only practical differences being the decision makers that impose them and the consequent differences in procedural protections. *See infra* Part I; *see also* Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 77 (Austin Sarat et al. eds., 2011).

Similarly, hidden sanctions are accurately described as punishment according to most reasoned definitions. *See infra* Part II.C; *see also* JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 64–65 (2005) ("collateral consequences" is a misnomer because they are in fact punishments, so calling them collateral consequences is detrimental to the reentry process). Because they are *legally instituted* punishments, they are best described as "sentences."

[10] For those who wish to know the author's perspective on whether offenders should lose other rights in addition to imprisonment, fine, etc., I am ambivalent. Many hidden sentences could (if they were not hidden) effectively serve legitimate goals; *see infra* Part IV.A. Restrictions on gun ownership or even voting rights, for instance, seem appropriate for those guilty of gun- or voting-related crimes. I am skeptical of some other hidden sentences, however, because I am not sure that they serve any goals our penal system can or ought to ascribe—and because they consistently apply more broadly than would be justified by any legitimate purpose of punishment. *See, e.g.*, Demleitner, *supra* note 7, at 157 (stating that no empirical evidence shows that all felons—rather than those guilty of voter fraud—are likely "to either engage in election fraud or to vote in an anti-democratic, anti-rule-of-law manner"); Mark M. Stavsky, *No Guns or Butter for Thomas Bean: Firearms Disabilities and Their Occupational Consequences*, 30 FORDHAM URB. L.J. 1759, 1768 (2003) (discussing the difficulties of restricting gun ownership to all felons, even those whose crime involved no firearms or was completely nonviolent, which may have detrimental consequences for broad categories of offenders). This article, however, stays neutral on the desirability of harsher punishments. I assume from the outset that we do and always will impose at least some extra-criminal sentences, and I try to move forward to the more important argument: *If we do punish, we ought to punish openly*.

[11] The concepts of "mass incarceration," the U.S.'s "punitive turn," or the recent "imprisonment binge" have been used exclusively to characterize the state of the U.S. penal system since the late 1970s and early 1980s. Joshua Kaiser, The Hidden Sentence and the Hierarchy of Knowledge in the Age of Mass Incarceration 5–9 (2015) (unpublished manuscript) (on file with author); *see also* Michelle Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment* (University of Minnesota–Twin Cities Department of Sociology, MPC Working Paper No. 2014-4, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476051 [http://perma.cc/7KQ2-LX7S]. These concepts, however, are based upon a hierarchy of knowledge that privileges information about imprisonment—especially prison rates—above other types of penological information, including non-carceral sentencing and especially "un-

parently. Otherwise, we threaten both the legitimacy of the punishment and any purpose it is designed to serve.

For both offenders and victims, this article argues opacity is unfair and destroys opportunities for vindication, rehabilitation, and security. It also denies offenders constitutional protections against double jeopardy, *ex post facto* punishment, and bills of attainder without any benefit to victims. For attorneys, judges, and policymakers from any ideology, widespread ignorance defeats any legitimate purpose of punishment that hidden sentences could serve—including achieving justice or reducing crime rates. For the public, obfuscation about and inaccessibility to hidden sentences ensure that they are absent from democratic discussion and accountability, and that they contravene the rule of law.

Lack of transparency is even detrimental to the few advocates and academics who are already concerned with some hidden sentences: either (*a*) prisoners' and other "offenders' rights" (i.e., during formal supervision) or (*b*) the so-called "collateral consequences of a criminal conviction" (i.e., its aftereffects). Thanks to those advocates and academics, many are aware that felons cannot vote during and sometimes after imprisonment, and it may be unsurprising that they are subject to restricted gun ownership. Yet, precisely because these two (separate) discourses do not directly confront hiddenness as a problem, the few hidden sentences they have introduced into public knowledge barely begin to describe the *more than 35,000 laws that currently impose over 42,000 penalties on offenders' and ex-offenders' everyday lives*.[12] Moreover, even recent "groundbreaking" successes of the collateral consequences movement—the Uniform Collateral Consequences of Conviction Act (UCCCA)[13] and the U.S. Supreme Court case *Padilla v. Kentucky*[14]—are somewhat superficial and may not have any drastic effect because they fail to address the knowledge problem holistically.[15]

This article therefore argues that the solution is to reveal the hidden sentence, and it takes important steps in doing so. In the process, it draws on

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official" penal forms. Kaiser, *supra*, at 11. Focusing on the hidden sentence helps to reveal what is obscured by the penal hierarchy of knowledge: that punishment in the United States is not a uniform phenomenon based only on expressive justice and fears of dangerousness, but is often based on more basic logics of exclusion. *Id.* at 29–32.

[12] *See infra*, tbl.7 and accompanying text.

[13] Unif. Collateral Consequences of Conviction Act (National Conference of Commissioners on Uniform State Laws 2010) [hereinafter UCCCA] http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf [http://perma.cc/E4QG-NEEM] (addressing procedural implementation of the "incidental" sanctions that affect ex-offenders).

[14] 559 U.S. 356, 359 (2010) (mandating that defense attorneys notify noncitizen clients of the potential for deportation upon conviction).

[15] *Padilla* has been hailed as a "groundbreaking decision," potentially harboring incorporation of all collateral consequences into the criminal-law process, while the UCCCA supposedly "provide[s] just such a mechanism" to do so. *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 756–59 (2011). Despite laudable intentions of both advancements, this article argues that because neither truly questions the root of the legal and conceptual misunderstandings surrounding hidden sentences, they may ultimately worsen the situation while permanently codifying it. *See infra* notes 210–214 and accompanying text.

the National Inventory of the Collateral Consequences of Conviction (NICCC),[16] a unique dataset of all codified, post-release hidden sentences across fifty-two jurisdictions of the United States.[17] The NICCC was compiled by the American Bar Association's Criminal Justice Section and the National Institute of Justice as an effort to make this area of law more comprehensible to legal professionals, offenders, and the public. It was completed in July 2014.[18] This article is the first systematic analysis of the broad patterns in the NICCC, which I use as a crucial starting point to confront the knowledge problem.

Part I defines hidden sentences and outlines the types of penalties that exist. This overview unifies the "collateral consequences" and "offenders' rights" subject matters while highlighting their common challenge: obscurity. Part II analyzes the characteristics that make these laws hidden *sentences*, as opposed to merely "offenders' rights restrictions" and "collateral consequences."[19] They are *punishments* that are *purposively* created by

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[16] ABA Criminal Justice Section, *ABA National Inventory of the Collateral Consequences of Conviction*, ABA Collateral Consequences of Criminal Conviction (2013), http://www.abacollateralconsequences.org [http://perma.cc/7WHT-V7R8]. The NICCC is publicly available for informational and educational purposes and is an important resource for those interested in understanding post-release, legislative hidden sentences. *See id.* The ABA Criminal Justice Section and the NIJ deserve full credit for completing the herculean task of searching for all relevant legislative provisions and analyzing them for inclusion in the database. This article analyzes the resulting dataset to draw out useful patterns.

In collecting the NICCC, lawyers identified legal provisions that contain hidden sentences by using a LexisNexis search string and then determining whether the results are actually hidden sentences or not. ABA reports that about 30% of the search results are eventually included in the database. ABA Criminal Justice Section, *supra* (select "User Guide"). Provisions may include multiple penalties or a penalty that applies multiple ways or to multiple categories of offenders/offenses, in which case the NICCC includes multiple references to one section of legislative code. The dataset also includes information on the category of the penalty, the category of offenders/offenses that trigger it, whether it is mandatory or discretionary (and details of the actors that have such discretion), its duration, and any relevant methods of relief mentioned in the immediate code.

[17] This article analyzes hidden sentence laws in all 50 states, the District of Columbia, and the federal system. The NICCC also incorporates hidden sentences from the U.S. Virgin Islands and Puerto Rico (excluding hidden sentences enacted in Spanish), but this article omits these two jurisdictions for consistency with other treatments of U.S. penal practices. *E.g.*, David F. Greenberg & Valerie West, *State Prison Populations and Their Growth, 1971–1991*, 39 Criminology 615 (2001); Phelps, *supra* note 11.

[18] Although data collection was complete in late April and early May 2014, organization and consolidation of the data continued until July. ABA Criminal Justice Section *supra* note 16. The NICCC is an ongoing effort, updated annually by ABA/NIJ, but the results presented in this article represent a cross-section of hidden sentences from July 2014 (when the data was completed). Initial results from May 2014 suggested that there were actually between 60,000 and 90,000 post-release, legislative hidden sentences, so the results presented here are, if anything, underestimates of the scale of this area of law.

[19] This section also mentions other terminology that has labeled these laws. The idea of "invisible punishment" is especially close in conceptual focus to "hidden sentences." *See* Travis, *supra* note 9, at 64–65; *see also* Invisible Punishment: The Collateral Consequences of Mass Imprisonment (Marc Mauer & Meda Chesney-Lind eds., 2011) [hereinafter Invisible Punishment]. Although "invisible punishment" makes important strides, "hidden sentences" more accurately describes empirical reality, has more political and normative power, and serves to conceptually and legally link collateral sanctions with restrictions on current offenders' rights. *See infra* notes 153–157 and accompanying text.

law and of *primary* importance to all parties concerned with the penal process. Part III addresses legal factors that make them *hidden* sentences: the scope of hidden sentence law; its dispersion across almost every area of civil and criminal law; its wide variation across and within jurisdictions, by offense type, by phase of the penal process, and in many other ways; and its systematic inconspicuousness. Part III implicates prior terminology and framing (including that of *Padilla*, the UCCCA, and even the NICCC itself) in inadvertently perpetuating the knowledge problem.

Part IV explains the problems with hiddenness. Firstly, no legitimate purpose of punishment supports either labeling these sanctions something besides punishment or keeping them hidden. Secondly, both the broader democratic process and the rule of law rely on transparency. This section does not discuss whether we ought to punish extra-criminally.[20] Instead, it argues that no matter which legitimate penal ends these punishments can be designed to serve, hiddenness alone controverts those goals. Part V concludes by suggesting the most readily available ways (including those in lesser-noticed provisions of the UCCCA) to reveal the hidden sentence in the public discourse on punishment. To function legitimately and properly, the U.S. penal system must publically recognize extra-criminal punishment and meaningfully incorporate it into the penal process.

I. An Overview of the Hidden Sentence: Collateral Consequences and Offenders' Rights as a Single Body of Law

Like other legal punishments, hidden sentences are each an (1) adverse restriction or requirement (2) imposed by law (3) as a direct result (4) of criminal status or label. The distinction between them and visible sentences—such as imprisonment or fine—begins with a single attribute: with rare exception,[21] (5) they are imposed by a process *external to* the crim-

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[20] The literatures on collateral consequences and offenders' rights are both made up almost entirely of this type of argument, claiming hidden sentences are counterproductive, overzealous, or otherwise objectionable while rarely considering any potential utility or function. *E.g.*, Demleitner, *supra* note 7, at 154; Love, *supra* note 15. We should be skeptical of such conclusions because they would be out of logical sequence. Before we judge the desirability or undesirability of legal practices, we must know the phenomenon we wish to analyze. Since no prior author gives due focus to certain characteristics of hidden sentences—i.e., their primacy, purposivity, punitiveness, and hiddenness—any conclusions they make are based on insufficient information.

[21] Interestingly, sentencing judges themselves do have discretion over some hidden sentences, such as restrictions on government loans, contracts, and other federal benefits for drug offenders, *see* U.S. Sentencing Guidelines Manual § 5F1.5 (2014), but those deprivations are still considered additional to and outside of the official criminal sentence. *E.g.*, Students for Sensible Drug Policy Found. v. Spellings, 523 F.3d 896 (8th Cir. 2008) (finding that a federal law restricting access to student financial aid for drug offenders was not so punitive to transform it into a criminal sanction and could thus be applied without violation of the Double Jeopardy Clause). The only genuinely accurate way to define hidden sentences without any exception therefore seems to be an arbitrary, negative definition: all punishments besides

inal law or by a decision maker *other than* a sentencing judge. Based on this difference alone, they might be accurately called "extra-criminal sentences." Yet, this simple trait has caused them to be (6) artificially separated to varying degrees from formally recognized sentences and thereby (7) obscured or ignored to varying degrees in public and professional knowledge. These last two features make them *hidden* sentences.

Subsequent sections expand on these definitional elements: Part II analyzes elements 1–4, and Part III addresses elements 5–7.[22] As a foundation for these arguments, this section uses NICCC data to outline the types of sanctions that constitute hidden sentences. Many are arguably just or desirable, and many might be overzealous, but the point here is to provide a broad overview regardless of these concerns.

First, however, Part I conceptually reunites the collateral consequences of a criminal conviction with offenders' rights during (and before) their official sentences,[23] bridging the gap between these ideas and organizing them into a single, coherent form. It may make intuitive (or normative) sense to distinguish between penalties that accrue during imprisonment or probation and those that operate after release, but this distinction is neither as clear nor as useful as one might assume. As this section shows, the two categories frequently overlap. Penalties considered "prisoners' rights" actually impact prisoners, probationers, pre-trial detainees, and sometimes even those released from custody. Similarly, penalties traditionally thought of as "reentry" issues often begin at conviction or even earlier, meaning they apply to

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those considered to be visible sentences. *See also* Ewald, *supra* note 9, at 83–84. The arbitrariness of the distinction is another clear sign of its unjustifiability.

[22] Subsequent sections also address specific characteristics of these laws, such as the various forms of "criminal status" that trigger them.

Although it is an important link in the causal chain, this article does not discuss how elements 5 and 6 result in element 7. Much of this article presumes that legal doctrine (i.e., elements 5 and 6) leads to tangible, real-world changes in belief, behavior, and knowledge (i.e., element 7). How that process occurs in this case and has throughout history is an empirical discussion for another time. *See* Kaiser, *supra* note 11, at 18–23.

[23] The initial use of "collateral consequences" *did* encompass extra-criminal punishments both before and after release from custody. Yet, the term's focus has narrowed, now being synonymous with only the after-effects of a visible sentence and leaving "offenders' rights" to the purview of a separate literature. *Compare, e.g.*, Grant et al., *supra* note 7, at 939 (investigating "civil disabilities during and after release from prison"), *with* Demleitner, *supra* note 7, at 153 (considering only penalties "upon release from prison or discharge from non-incarcerative sentences").

Importantly, this article does *not* argue that everything that happens in custody is punishment. It is not always true, for instance, that prison guards' use of force is "punishment" by Part II.C's definition, but it is also true that the legal rules presented in Part I are punishment by that definition. *See* Martin R. Gardner, Hudson v. Palmer—*"Bright Lines" but Dark Directions for Prisoner Privacy Rights*, 76 J. CRIM. LAW & CRIMINOLOGY 75, 106–07 (1985) (distinguishing between going to prison *for* punishment and going to prison *as* punishment); *see also* Wilson v. Seiter, 501 U.S. 294, 300 (1991) (making a similar distinction).

Finally, not all collateral consequences are hidden sentences, which refers specifically to *legally imposed* punishment of offenders. There are some *actual* collateral consequences that are conceptually distinct because they are (1) social rather than legal or (2) apply to offenders' families, communities, and so forth. *See infra* notes 135–138 and accompanying text.

both reentering offenders *and* currently supervised ones. Moreover, the types of penalties are effectively identical for the two classifications. Most importantly, this article argues that both offenders' rights and collateral consequence laws share the same key definitional elements laid out above. Parts II and III elaborate on those, while Part I uses the NICCC's categories to organize both types of laws into a coherent whole.

It is worthwhile to note that the reason offenders' rights law and collateral consequences law are often thought of as distinct and unrelated is that the former is analyzed from the point of view of decisional law, while the latter is largely considered a legislative issue. Whether the bulk of offenders' rights law is judicial and the bulk of collateral consequences are legislative is an empirical question that has yet to be answered. This section shows, however, that one thing is clear: both types of laws include decisional law, legislation, *and* a vast amount of administrative regulation. Indeed, as Part V argues, even reform options are similar for the two types of laws. This article does not argue that it is meaningless to distinguish between punishment for current offenders and released ones. It does, however, argue (*a*) that it is erroneous to assume each of them face a distinct set of hidden sentence laws, and (*b*) that hiddenness is the key normative issue for all such punishments.

The NICCC, however, was collected based on the "collateral consequences" logic, which typically focuses on (*a*) legislation and regulation that (*b*) targets offenders released back into the community.[24] Despite acknowledging that conditions of imprisonment, probation, and parole all "appear to fall within the [Court Security Improvement Act of 2007] definition and are treated as 'collateral consequences' by some courts,"[25] the NICCC project team explicitly chose to exclude issues of offenders' rights as mere "incidents of the [visible] sentence."[26] With less explanation, it also excluded judicial rulings.[27] In order to bridge these gaps, this section therefore supplements NICCC data with synopses of offenders' rights law and judicial doctrine.

Table 1 shows the types of hidden sentence laws identified by the NICCC with the percentage of laws each category represents. Each can be triggered by one or more types of offenses and criminal statuses.[28] They are

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[24] *E.g.*, Travis, *supra* note 9, at 39–40, 63–71; Demleitner, *supra* note 7, at 153; Grant et al., *supra* note 7, at 1218–41; Mukamal & Samuels, *supra* note 7, at 1516; Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. Rev. 623, 627 (2006). It could be that legislation and agency rules *tend* to control post-release sanctions and judicial doctrine *tends* to control offenders' rights. It would be impossible, however, to defend that statement since nobody has yet counted all hidden sentences of either type. Moreover, as this section shows, there is a fair amount of overlap between the two domains, and many penalties extend before and after release. The distinction on this basis is thus artificial.

[25] American Bar Ass'n, National Inventory of the Collateral Consequences of Conviction Coding Manual 30 (4th ed. 2014) (contact staff at NICCC to view).

[26] *Id.*

[27] *Id.* at 4.

[28] *See infra* tbl.5 and tbl.8.

not mutually exclusive (e.g., bans from public office are limits on both employment and political participation).

A. *Employment and Occupational Licensing*

Of the 42,634 hidden sentences in the NICCC, the majority (together, 62.2%) are restrictions on employment and occupational licenses.[29] Many public agencies require background checks.[30] Others outright exclude certain offenders; Louisiana, for instance, bars them from the Lottery Corporation, its South Central Human Services Agency, and three Transit Authorities.[31] Every jurisdiction bans (or removes) offenders from a host of public offices[32] and other public positions, from teachers and law enforcement officers to school bus drivers and garbage collectors.[33]

TABLE 1
TYPES OF POST-RELEASE HIDDEN SENTENCE LEGISLATION AND REGULATION IN THE UNITED STATES

	Frequency	Percentage
Business license and other property rights	15,180	35.6%
Education	675	1.6%
Employment	23,715	55.6%
Family/domestic rights	1,874	4.4%
Government benefits	1,180	2.8%
Government contracting and program participation	1,864	4.4%
Government loans and grants	293	0.7%
Housing	1,240	2.9%
Judicial rights	1,436	3.4%
Motor vehicle licensure	2,106	4.9%
Occupational and professional license and certification	15,623	36.6%
Political and civic participation	4,579	10.7%
Recreational license, including firearms	1,459	3.4%
Registration, notification, and residency restrictions	3,499	8.2%
Total number of hidden sentences	42,634	100.0%

[29] Many additional barriers to the labor market are *actual* collateral consequences, largely from social stigma. *See infra* notes 135–138 and accompanying text.

[30] *See, e.g.*, MD. CODE. ANN., TRANSP. § 2-103.4 (West 2015) (allowing the Department of Transportation to conduct background checks for all prospective and some current employees).

[31] LA. REV. STAT. ANN. §§ 47:9016, 48:1456, 48:1604, 48:1655 (2015); LA. CIV. CODE ANN. art. 28 (2015).

[32] *See, e.g.*, KY. CONST. § 150 (removing/disqualifying public officials convicted of felonies, high misdemeanors, or influencing elections); ALA. CODE § 36-9-2 (2015) (removing all felons from office).

[33] *See, e.g.*, ARK. CODE. ANN. § 25-16-1101 (2015) (excluding those convicted of felonies and certain misdemeanors from all public office and employment); COLO. REV. STAT. § 22-63-301 (2015) (discharging teachers after a hearing for felony convictions, or immediately for drug offenses and child sex offenses); 06-096-400 ME. CODE. R. § 4 (LexisNexis 2015) (limiting employment at and licenses to operate solid waste management facilities); MINN. STAT. § 419.06 (2015) (making all offenders ineligible for law enforcement); N.Y. COMP. CODES. R. & REGS. tit. 8 § 156.3 (2015) (banning bus drivers without "good moral character," assessment of which includes convictions).

Most careers that require licenses—including not only doctors and lawyers, but also barbers, bartenders, plumbers, and beauticians—now can or must ban people with a criminal record.[34] Even some private non-licensed occupations—such as burglar alarm agents or administrators of assisted living residences[35]—exclude offenders, and others are free to do so through background checks.[36] Hidden sentences that do not expressly limit employment often do so indirectly. For instance, offenders who cannot possess firearms also cannot serve as security guards, private investigators, and so forth.[37]

Like other hidden sentences, employment and licensing restrictions rarely if ever take effect upon release, instead being triggered at conviction, sentencing, or by other criminal statuses.[38] These sanctions are thus essentially equivalent for probationers, parolees, and ex-offenders—except probationers and parolees may also be *required* to find and maintain employment among the scant options left to them.[39]

Even prisoners are barred from employment and licenses *based on* these laws, limiting prison officials' options for work release or other employment. We tend not to imagine prisoners working, but it would be quite feasible (especially by telecommuting or e-commuting) *if not for hidden sentences*. Courts today widely deny prisoners' right to work or work release.[40] Since judicial rulings also remove their right *not* to work,[41] prisoners

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[34] *E.g.*, Wis. Stat. §454.15 (2015) (discretionary denial/suspension/revocation by cosmetology examining board of licenses for cosmetologists, manicurists, aestheticians, and electrologists). *See also* Demleitner, *supra* note 7, at 156; Note, *Civil Disabilities of Felons*, 53 Va. L. Rev. 403, 406 (1967).

[35] Fla. Stat. § 489.518 (2015).

[36] *See, e.g.*, 15 U.S.C. § 78q (2012); Mukamal & Samuels, *supra* note 7, at 1503–05, 1508–11 (details on EEOC rules and all states' background check policies for employers, landlords, and others); *see also* U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 753 (1989); James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol'y 177, 208–10 (2008). The effects of this practice are vastly magnified by an offender's race. Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 105–08 (2007) (blacks' chances for obtaining employment are decreased by about two-thirds by having a criminal record, but whites' chances are only decreased by about half); *see also* Western, *supra* note 2; David F. Weiman, *Barriers to Prisoners' Reentry into the Labor Market and the Social Costs of Recidivism*, 74 Soc. Res. 575, 590 (2007).

[37] Stavsky, *supra* note 10, at 1763; *see, e.g.*, 430 Ill. Comp. Stat. 65/4. (2015) (prohibiting firearm ownership for various terms depending on offense).

[38] See *infra* tbl.2.

[39] *E.g.*, 18 U.S.C. § 3562 (2012) (allowing employment requirements to be issued as conditions of probation); S.C. Code Ann. § 24-21-430 (2015) (requiring probationers to reasonably maintain suitable employment). Note that conditions of probation applied by the sentencing judge are not typically considered hidden sentences, nor are statutes that allow such conditions. *Accord* Parry v. Rosemeyer, 64 F.3d 110 (3d Cir. 1995). Some courts, however, find the opposite—again demonstrating the unclear line between visible and hidden sentences. *See, e.g.*, Munich v. United States, 337 F.2d 356, 676–78 (9th Cir. 1964) (considering eligibility for probation or parole as a collateral consequence); People v. Gravino, 928 N.E.2d 1048, 1055–56 (N.Y. 2010) (considering conditions of probations as collateral consequences).

[40] *See, e.g.*, Johnson v. Rowley, 569 F.3d 40 (2d Cir. 2009) (prisoners have no liberty interest in specific job assignments); Ard v. Leblanc, 404 F. App'x 928, 929 (5th Cir. 2010)

are essentially sentenced to work at the discretion of prison officials—but within limits imposed on all offenders' employment and licensing.

B. Government Contracting, Business Licenses, and Other Property/Access Rights

A substantial quantity of hidden sentences (together, 40.0%) limit licenses to sell or distribute goods, own or operate businesses, provide contractual services, and participate in government programs.[42] Colorado, for instance, excludes offenders from licenses to handle or do business with fireworks, to run child care facilities, and to distribute alcohol, among others.[43] Financial interests are also affected. Federal law, for example, revokes credit union status, removes control of credit unions, and denies securities exchange membership.[44] A small number of hidden sentences abridge access to state and federal government contracts, substantially constraining property interests; offenders cannot, for instance, contract to provide Medicaid services.[45] Moreover, many restrictions on public and private contracts and licenses impact supervised and released offenders alike, who could otherwise maintain business and financial interests.

These categories also include other property and access rights. Offenders are ineligible for government programs like financial assistance for drug-free workplaces or Nebraska's Critical Incident Stress Management Program.[46] Property derived from or used in crimes is often forfeit,[47] vehicles

(work release statutes without "mandatory language to place a substantive limit on official discretion" create no constitutionally protected liberty interests); Garza v. Miller, 688 F.2d 480 (7th Cir. 1982) (no statutory right or protected liberty or property interest in employment in prison); Hoptowit v. Ray, 682 F.2d 1237, 1254 (9th Cir. 1982) ("Idleness and the lack of programs are not Eighth Amendment violations.").

[41] *See* U.S. CONST. amend XIII, § 1; Mikesca v. Collins, 928 F.2d 126, 126 (5th Cir. 1991) (holding that work without pay is permissible for prisoners under Thirteenth Amendment); Ruark v. Solano, 928 F.2d 947, 949–50 (10th Cir. 1991) (holding that Thirteenth Amendment's restriction on involuntary servitude does not apply to prisoners).

[42] As with other categories, limits on business licenses overlap with occupational licenses, employment, and other hidden sentences.

[43] COLO. REV. STAT. § 12-47-304(2)(a) (2015); 8 COLO. CODE REGS. § 1507-12 (2015); 12 COLO. CODE REGS. § 2509-8.

[44] 12 U.S.C. §§ 1772d, 1786 (2012); 15 U.S.C. § 78c (2012).

[45] *E.g.*, ALA. ADMIN. CODE r. 560-X-1-.24 (2015) (disqualifying Medicaid provider applicants convicted of fraud); D.C. MUN. REGS. 29 §§ 1304, 9410 (2015) (suspending, denying, or revoking Medicaid provider agreements for program-related offenses, drug offenses, fraud, and interfering with program-related investigations). Many states also have blanket prohibitions on contracts with offenders. *E.g.*, ARIZ. REV. STAT. ANN. § 41-2613 (2015); CONN. GEN. STAT. § 31-57b (2014).

[46] 2 C.F.R. §§ 182.510, 421.30, 782.30, 902.30, 1401.110, 1536.30, 2245.30, 2339.30, 2429.30, 3001.30, 3186.30 (2015) (all denying grants and assistance from various federal agencies); 176 NEB. ADMIN. CODE §176-001 (2015) (denying/revoking trauma counseling and support through Critical Incident Stress Management services for felony convictions).

[47] Wisconsin, for example, confiscates all property gained from or used in committing crimes, including specifically tank vessels violating environmental requirements and all navigational, sensing, and other equipment used for crimes in connection with submerged resources. WIS. STAT. § 973.075(1) (2015); *see also* Matthew Costigan, *Go Directly to Jail, Do*

may be impounded or given interlock devices,[48] and civil fines may be imposed[49] (all immediately upon conviction). Child support arrearage, in particular, comes with a host of liens, withholdings, and forfeitures.[50] Especially noteworthy are provisions that limit the ability to claim bankruptcy.[51]

C. Loans, Grants, and Education

Hidden sentences also curb access to government loans and grants, especially educational ones. Offenders may be excluded from lending programs like federal PLUS loans or awards like Wyoming's Hathaway scholarship.[52] Offenders are also ineligible for job training assistance, small business loans, and so forth.[53] Such sanctions can apply to any convicted person, and some even specifically apply to prisoners.[54]

Offenders also have limited access to educational resources besides financial aid and school employment. Criminal statuses can lead to suspension, expulsion, and bans from K-12 and college campuses.[55] Other

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Not Pass Go, Do Not Keep House, 87 J. Crim. Law & Criminology 719 (1997) (personal and real property forfeiture after conviction).

[48] Wash. Admin. Code. § 204-96-010 (2015) (impounding vehicles for driving on suspended licenses); Or. Rev. Stat. § 813.602 (2013) (requiring interlock devices on first DUI conviction). After multiple DUIs, some states impose forfeiture of the offender's vehicle. *E.g.*, Mo. Rev. Stat. § 82.1000 (2015).

[49] *E.g.*, 7 C.F.R. § 3.91 (2015) (allowing Department of Agriculture to impose up to $11,000 fine for trafficking food stamps).

[50] *E.g.*, Ala. Admin. Code r. 660-3-12-.04 (2014), 660-3-16-.02 (2009), 660-3-16-.06 (2009), 660-3-17-.04 (2005) (arrearage allows discretionary liens and levies against personal or real property, income withholding, and increase in future payments).

[51] *E.g.*, 11 U.S.C.A. § 707 (West 2014) (allows dismissal of bankruptcy filings upon motion of victims of violent and drug-trafficking crimes); *id.* § 1328 (2012) (ineligibility to discharge debt from restitution and fines included in visible sentences—though not other fees and liability arising from proceedings). Most offenders face fines, fees, restitution orders, and other monetary sanctions, which therefore often cause massive debt relative to expected earnings. *See* Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 Am. J. Soc. 1753 (2010). Inability to discharge such debt through bankruptcy is undoubtedly a significant barrier to offenders' opportunities and abilities to maintain (or return to) social and economic citizenship.

[52] 220 U.S.C. § 1078-2 (2012) (applies to convictions of fraudulently obtaining federal funds); Wyo. Stat. Ann. § 21-16-1303 (West 2007) (applies to all felons and incarcerated persons).

[53] 401 Ky. Admin. Regs. 46:060 (2015), 46:070 (2015) (5-year denial of financial assistance from the waste tire trust program for all felons); Md. Code Regs. 34.04.02.13 (2015) (cancelling historic preservation loans for misstating facts in applications); N.M. Code R. § 11.2.12.8 (West 2015) (excluding On-the-Job Training Program participants from companies that have violated various federal laws); 12 Pa. Code § 81.111 (2015) (requiring criminal history reports to show if legally responsible individual for small-business loans eligibility).

[54] *E.g.*, Wyo. Stat. Ann. § 21-16-1303 (West 2007); *see also* Joshua Page, *Eliminating the Enemy: The Import of Denying Prisoners Access to Higher Education in Clinton's America*, 6 Punishment & Soc'y 357 (2004).

[55] Mich. Comp. Ann. Laws § 380.1311 (West 2015) (discretionary suspension/expulsion from public schools for gross misdemeanors or persistent disobedience, and mandatory expulsion for arson and criminal sexual conduct on school grounds).

educational and vocational programs exclude offenders,[56] and prisoners have no right to work training or other educational access.[57]

D. Civil and Recreational Rights or Privileges

The NICCC categorizes 8.0% of hidden sentences as limits on motor vehicle or recreational licenses. Motor vehicle licenses can be revoked in all jurisdictions for repeated or severe vehicular offenses, and sometimes for other (often drug- or alcohol-related) offenses.[58] Insurance companies are allowed to cancel policies for various offenses, making it illegal to drive in states that require insurance.[59] Other restrictions involve licenses to hunt, fish, own dangerous animals, and so forth (often for violating related laws),[60] and they can even limit civil rights, especially firearm possession.[61]

Furthermore, prison officials are free to impose additional restrictions on civil liberties and other privileges as long as they are "reasonably related to legitimate penological interests."[62] Prisoners' free speech and press rights are thus often curtailed; their mail, for example, can be inspected or restricted,[63] and they may be forbidden to receive political publications, even

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[56] *E.g.*, 110 Ill. Comp. Stat. § 17/20 (2011) (disqualifying felons from College Planning Program); La. Rev. Stat. Ann. 15 § 17:2048.31 (2015) (allowing background checks for all health-professional training).

[57] Boulware v. Fed. Bureau of Prisons, 518 F. Supp. 2d 186, 189 (D.D.C. 2007) ("[P]risoners do not have a due process right to participate in vocational and educational programs, let alone one of their choosing.").

[58] *E.g.*, Colo. Rev. Stat. Ann. § 42-2-125(1)(m) (revoking driver's license for underage drinking) (West 2015); 2-2000 Del. Admin. Code §§ 2208 (2015), 2210 (revoking/suspending driver's license for "problem driving habits," violating license restrictions, permitting unlicensed people to drive, and passing stopped school buses).

[59] *E.g.*, Cal. Ins. Code § 11629.73 (West 2015); Iowa Code § 515D.4 (2015).

[60] *E.g.*, 515 Ill. Comp. Stat. Ann. § 5/20-105 (West 2015); 520 Ill. Comp. Stat. Ann. § 5/3.5 (West 2015); *id.* at § 5/3.6 (West 2015) (repealed 2015); 625 Ill. Comp. Stat. Ann. §§ 45/5-16, 45/11A-4 (West 2015).

[61] *E.g.*, Ark. Code Ann. §§ 5-73-103 (West 2009); 720 Ill. Comp. Stat. Ann. §§ 5/24-1.1, 5/24-3, 5/24-3.1 (West 2015) (felons ineligible to possess/own/be sold firearms); D.C. Mun Regs. 24 § 2103 (2015) (deny press pass for felonies, violent crimes, and crimes of moral turpitude); Or. Admin. R. 165-014-0280 (2015) (ineligibility to gather signatures for referenda and initiatives for fraud, forgery, and election offenses).

[62] Turner v. Safley, 482 U.S. 78, 89 (1986). The Court determined the reasonableness of prison restrictions depends on (1) whether the regulation has a "valid, rational connection" to the penological interest, (2) whether alternative avenues of exercising the right in question were left unabridged, (3) the effect of the restriction or lack thereof on prison guards, other inmates, and prison resources, and (4) the existence of immediate alternatives to the restriction—which may demonstrate an exaggerated response. *Id.* at 89–91.

The same test is also used in a number of other contexts that concern constitutional rights. *Turner*, for instance, also applied the test to consider restrictions on inmates' ability to marry under the constitutional right to privacy. *Id.* at 94–100.

[63] *See, e.g.*, *id.* at 91 (holding that correspondence with inmates at other prisons may be completely banned, since it was "reasonably related" to the goal of preventing escape plans and inmate violence); Wolff v. McDonnell, 418 U.S. 539 (1974) (allowing inspection of attorney-to-inmate mail, as long as it is opened in the presence of the inmate); Procunier v. Martinez, 416 U.S. 396 (1974).

of their own writing.[64] Prisoners' exercise of religion has also been limited in many ways.[65]

E. Political and Judicial Rights

Voting restrictions are perhaps the most widely known hidden sentences. Forty-seven states still deny felons the vote—either during supervision, for a time afterwards, or permanently.[66] In addition, offenders lose other political rights, such as the ability to serve on juries, act as a lobbyist, or hold positions of public trust.[67]

Offenders also face severe limits on judicial rights (with political restrictions, 14.1% of hidden sentences). For example, they can be ineligible for indemnification or punitive damage limitations.[68] Most states also use convictions as grounds to impeach witnesses' credibility and to establish essential facts for subsequent civil actions.[69]

Incarcerated offenders, whether imprisoned as a sentence or held in pretrial detention, have particularly curtailed judicial rights. The Prison Litigation Reform Act of 1996[70] (PLRA) constrains civil actions for all persons housed in a jail or prison[71]: they cannot proceed to court without first ex-

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[64] Van den Bosch v. Raemisch, 658 F.3d 778, 781 (7th Cir. 2011).

[65] *E.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–53 (1987) (holding that the financial strain and institutional security are valid reasons for not allowing Muslim prisoners on work detail to return to the prison for Jumu'ah). The Religious Land Use and Institutionalized Persons Act, however, substantially increased protection for prisoners' religious exercise. *E.g.*, Nelson v. Miller, 570 F.3d 868, 877 (7th Cir. 2009) (using a strict scrutiny standard, instead of *Turner*'s rational basis test, to reject the practice of clergy verification for special, religious diets).

[66] Kevin G. Buckler & Lawrence F. Travis, III, *Reanalyzing the Prevalence and Social Context of Collateral Consequence Statutes*, 31 J. Crim. Just. 435, 441 (2003). *See, e.g.*, Ore. Const. Art. II, § 3; Tex. Const. Art. VI, § 1; Haw. Rev. Stat. Ann. § 831-2 (2010). Relatedly, incarcerated persons are not counted accurately for census purposes and hence electoral districting, appearing in their county of incarceration rather than their county of residence. Prison Policy Initiative, *Prison Gerrymandering Project* (2015), http://www.prisonersofthecensus.org [http://perma.cc/S22L-E4BQ].

[67] *See, e.g.*, Buckler & Travis, *supra* note 66, at 442–43, Ind. Code § 33-28-5-18 (2014); N.C. Gen. Stat. § 120C-602 (2014); *see supra* notes 32–33.

[68] *E.g.*, Ky. Rev. Stat. § 304.29-081 (2015); Ohio Rev. Code Ann. § 2315.21 (West 2015).

[69] *E.g.*, Ind. Code § 34-39-3-1 (2014) (collateral estoppel for convictions of crimes punishable by year or more imprisonment); Ky. Rev. Stat. Ann. KRE 609 (West 2015) (allowing impeachment if witness denies conviction of crime punishable by year or more imprisonment).

[70] Prison Litigation Reform Act, 42 U.S.C.A. § 1997e (West 2015) [hereinafter PLRA]. The PLRA was passed to reduce an alleged increase in frivolous litigation by prisoners. James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 Harv. J. on Legis. 105, 113 (2000). Nonetheless, many dispute whether this increase existed in the first place. *S*ee *id.* at 141–42.

[71] This includes convicted criminals *and* other persons held in prisons and jails—even those awaiting trial and not yet convicted. *E.g.*, Lucas v. Nichols, No. 97-2060, 1999 U.S. App. LEXIS 8151, at *4–5 (6th Cir. Apr. 23, 1999); Kerr v. Pucket, 138 F.3d 321, 323 (7th Cir. 1998). Similarly, the PLRA covers both claims that arise during incarceration—even if filed afterwards—and claims that are filed during incarceration—even if they arose beforehand. Zehner v. Trigg, 952 F. Supp. 1318, 1326 (S.D. Ind. 1997), *aff'd*, 133 F.3d 459 (7th Cir. 1997).

hausting all administrative remedies,[72] receive remedies that "extend . . . further than necessary" or longer than two years,[73] or file *in forma pauperis* after having three suits dismissed for various reasons.[74] Most importantly, the PLRA prevents incarcerated persons from pursuing *any* compensatory damages "without a . . . showing of physical injury."[75] It is still unclear to what extent this ban applies to non-psychological, non-physical claims—and therefore to virtually all civil, political, and social rights that can be claimed in federal court.[76]

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[72] 42 U.S.C.A. § 1997e(a) (West 2015). If the exhaustion requirement is unmet, courts are to dismiss claims when they consider jurisdictional requirements. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008). In other words, there is no fact-finding for administrative exhaustion; it is entirely up to prison officials to present it as an affirmative defense and to judges to rule on it. *See id.*

Exhaustion is required even when administrative procedures are irrelevant or ineffective. Porter v. Nussle, 534 U.S. 516, 524 (2002) ("[The] remedies need not meet federal standards, nor must they be 'plain, speedy, and effective.' Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit." (citations omitted)). Exhaustion also requires pursuing available administrative appeals. White v. McGinnis, 131 F.3d 593, 593 (6th Cir. 1997). Some courts have held that no judicial remedy is possible if administrative deadlines were missed. *See* Harper v. Jenkins, 179 F.3d 1311, 1312 (11th Cir. 1999); Pozo v. McCaughtry, 286 F.3d 1022, 1023 (7th Cir. 2002).

[73] 18 U.S.C. § 3626 (2012). Any party can terminate relief after two years of issuance or one year after denial of a motion to terminate. *Id.*

[74] 28 U.S.C. § 1915(g) (2012). This provision takes effect once a judge dismisses three claims as frivolous, malicious, or failing to state a proper claim. After "three strikes," prisoners cannot file another lawsuit without paying the entire filing fee up front. *Id.* A dismissed appeal is a separate strike in addition to an appealed dismissal. Jennings v. Natrona Co. Det. Ctr., 175 F.3d 775, 779 (10th Cir. 1999); Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 462 (5th Cir. 1998). This restriction is especially important because, before the PLRA, nearly all inmate claims were *in forma pauperis*. Darrell L. Ross, *Emerging Trends in Correctional Civil Liability: A Content Analysis of Federal Court Decisions of Title 42 United States Code Section 1983: 1970–1994*, 25 J. Crim. Just. 501, 509 (1997).

[75] 42 U.S.C.A. § 1997e(e) (West 2015). This requirement cannot be fulfilled by *de minimis* physical injuries. Siglar v. Hightow, 112 F.3d 191, 193 (5th Cir. 1997). To be justiciable under the PLRA, a harm must be such that a "free-world person" would have to seek medical attention for it. Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997).

This provision of the PLRA is thus the most criticized. *E.g.*, Deborah M. Golden, *The Prison Litigation Reform Act—A Proposal for Closing the Loopholes for Rapists*, 1 Advance 96 (2006) (berating the PLRA for preventing prisoners' claims of rape by guards and others, because courts have held rape does not constitute "serious, physical injury"); Robertson, *supra* note 70, at 106–07 (arguing that the PLRA "discriminates against inmates in violation of the equal protection provisions of the Fifth and Fourteenth Amendments").

[76] Specifically, "[n]o federal civil action may be brought . . . for mental or emotional injury" without such a showing. 42 U.S.C.A. § 1997e(e) (West 2015). It is unclear whether denials of rights or legal entitlements—*e.g.*, free speech rights—are mental or emotional claims. *See* Cassidy v. Indiana Dep't of Corr., 59 F. Supp. 2d 787, 791 (S.D. Ind. 1999). Some courts hold that the PLRA applies to all federal civil actions "regardless of the statutory or constitutional basis." Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998); *see also Zehner*, 952 F. Supp. at 1334 (suggesting that physical injury requirement applies to federal civil rights actions, and that there is little evidence otherwise); Garrett v. Hawk, 127 F.3d 1263, 1265 (10th Cir. 1997) (administrative exhaustion requirements apply to federal civil rights actions); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) (PLRA does not apply to *habeas corpus* actions because "Congress was focused on prisoner civil rights and conditions cases"). *But see* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) (injury caused by deprivation of First Amendment rights is separate and in addition to any physical, mental, or emotional ones); Warbuton v. Underwood, 2 F. Supp. 2d 306, 315 (W.D.N.Y. 1998) (consider-

Moreover, prisoners' rights to legal assistance and materials are no longer as expansive as they once were.[77] Law libraries and legal assistance must be provided,[78] but prisoners' rights to them are protected only so far as causing "actual injury"—that is, when a prisoner could have brought a non-frivolous, winnable claim if not for the lack of access.[79] Since it is unclear how knowing about such claims without legal assistance is feasible,[80] prisoners are effectively denied judicial access through this avenue as well. Lastly, procedural protections are limited in other settings: disciplinary and transfer procedures in prisons essentially lack any procedural protections,[81] loss of good-time credit is protected through only minimal due process,[82] and parolees have restricted due process rights for revocation and re-imprisonment.[83]

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ing an Establishment Clause claim "despite the fact that the only injury [one] could experience as a result [of such a violation] . . . would be mental or emotional").

[77] *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."); Smith, *supra* note 6, at 462–64.

[78] Legal assistance is limited by permitting prison inspection of attorney-to-client mail. Wolff v. McDonnell, 418 U.S. 539, 577 (1974) (such procedures cannot "chill such communications, since the inmate's presence insures that prison officials will not read the mail"). It also may be adequate to only provide assistance through other inmates. *Cf.* Walters v. Thompson, 163 F.3d 430, 435 (7th Cir. 1998) (implying use of other inmates as "legal runners" may be sufficient for prisoners housed in disciplinary segregation).

[79] Lewis v. Casey, 518 U.S. 343, 351 (1996) (An inmate "might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint."); *see also Walters*, 163 F.3d at 434 ("[I]n the case of a denial of access to the courts, the right infringed is so purely instrumental to the use of the courts to obtain legal relief—so entirely lacking in intrinsic value—that if the denial has had no effect on the legal relief sought by the plaintiff, no right has been violated.").

[80] To suffer actual injury due to lack of legal resources or assistance, an inmate must lack knowledge on some crucial substantive or procedural grounds that she would have discovered but for the deprivation. *Lewis*, 518 U.S. at 351. It is, however, unclear how an inmate can discover she lacked such knowledge if she is deprived the means of getting it. The only time such claims can be brought, then, is if resources or assistance were provided *post hoc*—and then mootness may be a problem.

[81] To receive protection of the Due Process Clauses, inmates must show that a deprivation constitutes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472, 484 (1995). Despite its punitive nature, "discipline in segregated confinement [does] not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest." *Id.* at 486; *see also* Mark Adam Merolli, Note, Sandin v. Conner*'s "Atypical and Significant Hardship" Signals the Demise of State-Created Liberty Interests for Prisoners*, 15 St. Louis U. Pub. L. Rev. 93 (1995). *But see* Westefer v. Snyder, 725 F. Supp. 2d 735 (S.D. Ill. 2010) (even under *Sandin*, transfers to supermax prisons without notice and hearing procedures implicate due process concerns).

[82] *E.g.*, *Wolff*, 418 U.S. at 556 ("The fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.").

[83] Morissey v. Brewer, 408 U.S. 471, 480 (1972) ("Revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.").

F. Government Benefits and Housing

A proportionately small but vitally important set of 1,180 hidden sentences limit public welfare and other government benefits.[84] State or federal employees can lose retirement benefits and become ineligible for workers' compensation or unemployment benefits.[85] Immigration rights, including eligibility for admission and to petition for relatives' status, can be sacrificed, and certain offenses can result in deportation.[86]

An additional 1,240 sanctions affect housing (only 80 overlap with benefits restrictions). Offenders can be barred from living in homes with foster or adoptive parents, in residences with respite or day care, and within certain distances of schools or other locations.[87] Landlords can be required or allowed to evict based on certain crimes or probation or parole status.[88] Prisoners' housing rights are limited, too: they have no right, for instance, to contest transfers or overcrowding without associated hardships.[89]

Drug offenses have especially broad penalties here, denying all access to public housing and all federal benefits for between one year and life.[90] Sometimes, federal policies even deny them state benefits that use federal funds—including, most notably, Social Security benefits and food stamps.[91]

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[84] Absent access to employment, education, government programs and financial aid, and various other property rights, offenders are particularly likely to need government benefits. Offenders are also more likely to come from lower-class, urban backgrounds, so restrictions on public welfare are likely to be particularly burdensome. *See, e.g.*, Loïc Wacquant, *Race as a Civic Felony*, 183 INT'L SOC. SCI. J. 128 (2000).

[85] *E.g.*, MASS GEN. LAWS ANN. ch. 32, §§ 6–7 (West 2012) (removing disability retirement benefits for imprisonment for a felony); MASS GEN. LAWS ANN. ch. 32, § 15 (West 2012) (forfeiting pension benefits for offenses related to abuse of office or position); 28 R.I. GEN. LAWS ANN. § 28-44-24 (West 2015) (ineligible for unemployment benefits upon defrauding the employment security fund); N.Y. WORKERS' COMP. LAW § 10 (McKinney 2016) (workers' compensation cancelled upon imprisonment for felony).

[86] 8 U.S.C. §§ 1154, 1158, 1160, 1182, 1184, 1227, 1229b (2012) (applying to various misdemeanors, felonies, crimes of moral turpitude, etc.).

[87] *E.g.*, ARK. CODE ANN. §§ 5-14-128, 5-14-131 (West 2015) (unlawful for sex offenders to reside near schools and victims; CONN. AGENCIES REGS. §§ 17a-126-3, 17a-145-152, 17a-150-110 (2015) (banning residence with adoptive/foster/guardian parents); CONN. AGENCIES REGS. §§ 17a-218-11 (repealed 2014), 19a-87b-7 (2015) (prohibiting residence with person providing respite or day care).

[88] *E.g.*, DEL. CODE ANN. tit. 25, § 5513 (2015) (authorizing remedy and eviction for tenant's conviction of class A misdemeanor or felony); UTAH CODE ANN. § 10-1-203.5 (West 2015) (requiring eviction of probationers and parolees); *see also* David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5 (2008).

[89] Olim v. Wakinekona, 461 U.S. 238, 245 (1983) ("Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular state."); Rhodes v. Chapman, 452 U.S. 337, 347 (1981) ("To the extent that [prison] conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society."); *see also* Amy Newman, Comment, *Eighth Amendment—Cruel and Unusual Punishment and Conditions Cases*, 82 J. CRIM. L. & CRIMINOLOGY 979 (1992).

[90] 21 U.S.C. § 862 (2012); 42 U.S.C. §§ 13661, 13663 (2012).

[91] 21 U.S.C. § 862a (2012). States may opt out of these provisions or place a time limit on them. *Id.*; *see also* Mukamal & Samuels, *supra* note 7, at 1506–08.

G. Family/Domestic Rights

Hidden sentences also severely curtail familial rights. The vast majority of states allow termination of parental rights due to a conviction—sometimes of offenses directly related to the child's welfare and sometimes of broader categories like crimes of violence.[92] Offenders may also be unable to adopt, maintain adoption, and withhold consent from others adopting their own children.[93]

Marital and other couples' rights are also limited for all offenders. Prison officials cannot completely prevent prisoners from marrying,[94] but they can restrict virtually all other aspects of marriage. Even outside prisons, mere existence of a conviction can be cause for divorce.[95] In some jurisdictions, the right to procreate has been ruled "fundamentally inconsistent with incarceration."[96] Prisoners are also not entitled to conjugal visits.[97] Some courts have even held that deprivation of the right to procreate can be a condition of probation,[98] based on the logic that if the court chooses not to impose imprisonment, it can still restrict rights that would be lost in prison.[99]

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[92] *E.g.*, N.C. Gen. Stat. § 7B-1111 (2014) (allowing termination of parental rights for abuse/neglect of the child, or murder/manslaughter of the child's sibling or other parent); 23 Pa. Cons. Stat. § 2511 (2015) (allowing termination for homicide, aggravated assault, and other offenses); *see also* Buckler & Travis, *supra* note 66, at 441.

[93] *E.g.*, Fla. Stat. § 63.089(4)(b) (2012) (terminating parental rights pending adoption for significant periods of incarceration or for being a violent career criminal); 9-200-201 Del. Admin. Code § 135 (2015) (automatically denying adoption for households that have anyone with convictions, indictments, or evidence of various crimes).

[94] *See* Turner v. Safley, 482 U.S. 78, 95–96 (1986) (at the least, prisons cannot categorically deny prisoners' ability to marry with exceptions only by administrator approval).

[95] *E.g.*, W. Va. Code § 48-5-205 (2001) (creating grounds for divorce upon felony conviction). This is currently true in twenty-nine jurisdictions. Buckler & Travis, *supra* note 66, at 442.

[96] Gerber v. Hickman, 291 F.3d 617, 623 (9th Cir. 2002). More startlingly perhaps, this ruling was made in the context of a male prisoner and his wife claiming only the right to artificial insemination. *Id.* at 619; *see also* Hernandez v. Coughlin, 18 F.3d 133, 137 (2d Cir. 1994) ("Rights of marital privacy, like the right to marry and procreate, are necessarily and substantially abridged in a prison setting"); Goodwin v. Turner, 908 F.2d 1395, 1399–1400 (8th Cir. 1990) (treating male and female prisoners equally was a legitimate penological interest, so the financial strain of allowing female prisoners to be artificially inseminated was enough to justify forbidding male prisoners from donating). *But see* Skinner v. Oklahoma, 316 U.S. 535 (1942) (prisoners cannot be subject to compulsory sterilization, because the right to procreate *subsequent* to a prison sentence survives incarceration).

[97] This is true whether the claim is brought under the rubric of due process, equal protection, or privacy. *See* Adam M. Breault, Note, *"Onan's Transgression": The Continuing Legal Battle Over Prisoners' Procreation Rights*, 66 Alb. L. Rev. 289, 295–98 (2002). Without constitutional protection, some prison systems have categorically denied prisoners conjugal visits for life. *E.g.*, *Gerber*, 291 F.3d at 619 (citing Cal. Code Regs. tit. 15, § 3174(e)(2) (2013)).

[98] *E.g.*, State v. Oakley, 629 N.W.2d 200, 211 (Wis. 2001).

[99] *Id.* at 201–02. Some commentators support this logic as "both constitutional and a viable alternative to prison." Kelly R. Skaff, Note, *Pay Up or Zip Up: Giving Up the Right to Procreate as a Condition of Probation*, 23 St. Louis U. Pub. L. Rev. 399, 399 (2004). Yet, this language may be particularly dangerous for defenders of offenders' rights. If it were repeated in other contexts, all offenders could be permanently subject to any restriction that

H. Privacy and Residency Restrictions

Finally, offenders can be subject to strict residency requirements and extensive privacy infringements. Courts incrementally delineated a right to privacy in the last half-century,[100] but that right was rapidly recognized as "virtually unknown . . . [for] incarcerated offenders."[101] In short, prisoners, probationers, and parolees cannot protect property through the Fourth Amendment, but only through the Eighth Amendment[102] and civil tort claims.[103] There is little reason to suspect courts will treat searches or seizures of prisoners themselves (e.g., strip searches) any differently.[104] Even persons not yet convicted but merely held pending trial can expect the same privacy limitations that prisoners face.[105]

Additionally, offenders and ex-offenders alike may be required to notify various parties of their criminal status.[106] Most importantly, all U.S. jurisdictions require some ex-offenders—often sex offenders, but sometimes felons, violent offenders, or even persons in arrears for child support—to register with local law enforcement.[107] These registries are the *only* penalties in the NICCC that activate upon release rather than at sentencing, conviction, or earlier.

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might be appropriate in a prison context. On the other hand, judges would be forced to disclose such sentences, so it does promote transparency.

[100] *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (privacy right to have an abortion is a liberty interest protected by the Due Process Clauses); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) (marital privacy exists under penumbra right of privacy).

[101] Gardner, *supra* note 23, at 75. Courts attempted to grant some semblance of privacy in the years of the Burger Court. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 557 (1979) (pretrial detainees and convicted prisoners alike possess at least "diminished expectations of privacy"). Yet, this quickly ended with *Hudson v. Palmer*, 468 U.S. 517 (1984).

[102] U.S. CONST. amends. IV, VIII.

[103] *Palmer*, 468 U.S. at 530. Palmer's cell was searched—supposedly to find banned materials—and many personal effects were destroyed, including letters and legal materials. *Id.* at 542 (Stevens, J., dissenting). He claimed the search was conducted entirely as a form of harassment. *Id.* at 529 (majority opinion). The majority held, however, that only the Eighth Amendment protects against harassment of prisoners. *Id.*; *see also* Hudson v. McMillian, 503 U.S. 1 (1992) (analyzing an excessive force claim under the Eighth Amendment); Whitley v. Albers, 475 U.S. 312, 313 (1986) (denying Fourteenth Amendment protection to an excessive force claim; applying Eighth Amendment instead); Sunny A. M. Koshy, *The Right of [All] the People to be Secure: Extending Fundamental Fourth Amendment Rights to Probationers and Parolees*, 39 HASTINGS L.J. 449 (1988).

[104] *See* Gardner, *supra* note 23, at 100–01. *But see* United States v. Robinson, 414 U.S. 218, 236 (1973) (in a non-prison context, greater protection granted to exterior searches of persons than to searches of their bodies).

[105] *See Wolfish*, 441 U.S. at 533 (presumption of innocence has "no application to a determination of the rights of a pretrial detainee"); Gardner, *supra* note 23, at 103 (arguing that *Wolfish* implies jails and prisons have identical privacy protections).

[106] *E.g.*, CONN. AGENCIES REGS. § 14-275c-53 (1994) (requiring bus/student transport drivers to notify employer of all motor vehicle violations and criminal convictions in preceding year); OKLA. STAT. tit. 56, § 240.24 (2011) (publishing information of individuals in child-support arrears).

[107] Buckler & Travis, *supra* note 66, at 443; *see, e.g.*, ALA. CODE §§ 15-20A-10 (2011), 15-20A-22 (2015) (sex offenders must pay for registration with local law enforcement); CAL. CODE REGS. tit. 15, §§ 3651, 3653, 3654 (2009) (requiring registration with law enforcement for convictions related to gang activity, arson convictions, and drug offenses).

The NICCC also classifies civil commitment statutes and GPS monitoring in this category, possibly because these restrictions are also likely to target sex offenders.[108] Between housing restrictions and requirements like these, offenders may find it particularly tough to maintain residence. These hidden sentences alongside those that affect civil and political rights, employment, property, and other rights and privileges, demonstrate that a criminal label can effectively sentence an offender to be "internally exiled," a "societal outcast" for life.[109]

II. Defining Features of the Hidden Sentence

Many terms have been used to try to differentiate the penalties described in Part I from a sentence of imprisonment, death, fine, or probation. The alliterative "collateral consequences of a criminal conviction" has attracted the most attention, but they have also been called "civil disabilities," restrictions on "offenders' rights," "incidents of imprisonment," "indirect punishment," and so forth.[110] Each term, however, inaccurately implies hidden sentences are secondary ("collateral"), accidental (another implication of "collateral"), or mere side-effects ("consequences") of punishment.

This section argues that hidden sentences are rather (*a*) primary, (*b*) purposive (*c*) punishments: direct *reactions to perceived wrongdoing* imposed *by law* that have a *longer and more comprehensive* impact on offenders than do visible sentences. Their only distinctions from visible sentences stem from typically being imposed by parties other than the court of conviction. Based on this distinction alongside the influential idea that they are merely collateral incidents of "real" punishments, extra-criminal sentences have become hidden.

A. The Hidden Sentence as of Primary, Not "Collateral," Importance

Prior labels for hidden sentences imply first and foremost that they are "incidental" or of secondary importance to the "real" punishments (typically while justifying or exempting them from constitutional and statutory protections).[111] In fact, hidden sentences have primary importance in both offenders' experiences and society's penological goals.

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[108] *E.g.*, Cal. Code Regs. tit. 15, §§ 3561 (2014), 3564 (2010) (GPS monitoring for high-risk parolees and sex offenders); *see also* Demleitner, *supra* note 9.

[109] Demleitner, *supra* note 7, at 157–58.

[110] *E.g.*, Grant et al., *supra* note 7; Pinard, *supra* note 24; Smith, *supra* note 6. Even the UCCCA discards restrictions on offenders' rights as "incidents and conditions of [visible sentences]." UCCCA § 2 cmt.

[111] *E.g.*, Smith v. Doe, 538 U.S. 84, 85 (2003); American Bar Ass'n, *supra* note 25, at 33–34.

TABLE 2
PERIODS OF THE PENAL PROCESS THAT INVOLVE HIDDEN SENTENCES

Periods
Through civil, administrative, or private[a] determination of criminality
After arrest
During pre-trial/pre-conviction proceedings
During bail/trial proceedings
During incarceration (including imprisonment and pre-trial detention)
During imprisonment (in jail or prison as a result of visible sentencing)
During community supervision (probation and parole)
During parole
During all kinds of formal supervision
After release into the community (with or without supervision)
After release from all supervision
Civil liability only

SOURCE: Based on legal provisions from the NICCC.
[a] Actors with discretion include civil law judges, administrative law judges, administrative/executive officials, civil and criminal law clerks, administrative/executive employees and clerks, prosecutors, law enforcement officers, corrections officers and officials, private employers, private benefit administrators, landlords, lenders, university/education administrators, and other private actors with access to criminal records or background checks.

For good or ill, virtually every aspect of offenders' and ex-offenders' daily lives are affected by hidden sentence law. Part I demonstrated that hidden sentences affect employment, property and contracts, financial and educational access, housing, parental and marital status, recreational and civil privileges, political participation, judicial protections, and personal privacy. Table 2 shows the periods during which they do so; a hidden sentence may have effect during certain phases (e.g., while imprisoned or while on bail) or across multiple phases (e.g., during parole and afterwards). They can apply as early as arrest or creation of a criminal record, or even before: some grant discretion to someone *other than* a criminal law judge to decide that a criminal act has been committed—and then apply a penalty.[112] Hidden sentences can thus control virtually all phases of an offender's (or *suspected* offender's) life.

The contemporary experience of imprisonment in America is largely a function of hidden sentence law. Medical access, daily activities, living situ-

[112] The most ready examples are hidden sentences for child-support arrears, which rarely require conviction by a criminal law court and instead are typically handled by a family court judge or even a clerk or other civil servant. In Wyoming, for instance, arrearage can result in (among other things) adoption of the child without parental consent, suspension of a driver's license, or suspension of *any* occupational, professional, or hunting/fishing license. WYO. STAT. ANN. §§ 1-22-110, 20-6-111, 20-6-112 (2015). Still other criminal acts can also result in hidden sentences without reaching the stage of conviction, trial, or even arrest. *E.g.*, *id.* §§ 1-40-106 (making any person determined to have performed a criminal act ineligible to receive crime victim compensation), 9-13-109 (any violation of the Ethics and Disclosure Act is sufficient for removal of public officials or members).

ations, and visitation rights all depend on hidden sentences.[113] So does the "fundamental" experience of limited privacy, absent which U.S. prisons could look more like those in other countries that grant far greater privacy rights.[114] Even pervasive sexual violence among prisoners (and guards) has been traced to the PLRA's judicial limitations: prisoners cannot bring civil rights claims without a "serious physical injury," and rape absent an accompanying injury apparently does not meet this standard.[115] Even especially harsh prison systems that treat prisoners as merely "body and appetite"[116] do so *precisely because of* hidden sentence law.

Likewise, the lives of parolees, probationers, and ex-offenders are controlled by hidden sentences. Employment and housing prospects are severely limited specifically because hidden sentences make criminal histories publicly available (while imposing outright bans on certain occupations and residences).[117] The resulting unemployment combined with extensive legal financial obligations—many of which are also hidden sentences—make offenders more likely to face massive debt.[118] This debt is worsened by hidden sentences that limit financial aid, restrict business and property rights, deny access to public welfare like Medicaid and food stamps, and make offenders ineligible to claim unemployment benefits or discharge debt in bankruptcy.

Offenders are thus more likely to live in low-income areas, and poor communities are likely to have higher proportions of offenders—setting the stage for perceptions of "second-class citizens" and the dangerous "underclass."[119] The modern model of parole came from these ideas, and its technocratic rules are comprised largely of hidden sentences.[120] The same is true of

[113] Katya Lezin, *Life at Lorton: An Examination of Prisoners' Rights at the District of Columbia Correctional Facilities*, 5 B.U. Pub. Int'l L.J. 165 (1995) (observations of prison life governed through decisional-law restrictions); *see supra* notes 40–41, 62–65, 94–105.

[114] *See* Hudson v. Palmer, 468 U.S. 517, 527–28 (1984) (right to privacy "fundamentally incompatible" with U.S. prison conditions). In some countries, however, prisons even can have private rooms with solid, lockable doors. John Pratt, *Scandinavian Exceptionalism in an Era of Penal Excess*, 48 Brit. J. Criminology 275 (2008).

[115] *See* sources *supra* note 75.

[116] James E. Robertson, *Houses of the Dead: Warehouse Prisons, Paradigm Change, and the Supreme Court*, 34 Hous. L. Rev. 1003, 1032 (1997).

[117] Licensing and disclosure requirements have been increasing, as have registration requirements and public access to record databases—seriously decreasing offenders' access to meaningful employment. Bill Hebenton & Terry Thomas, Criminal Records 109 (1993). Resulting lack of employment and access to sufficient housing is a severe problem for reentering offenders, leading to severe poverty and increased recidivism rates. *E.g.*, Weiman, *supra* note 36.

[118] Harris et al., *supra* note 51 (defining "monetary sanctions" as criminal fines, criminal restitution, civil fines, civil fees, and court fees and surcharges); Karin Martin, The Fairness of Fines: Monetary Penalties, Incarceration, and Discretion in Sentencing (2015) (unpublished manuscript) (on file with author). Civil fines, civil fees, and some of the other relevant costs are hidden sentences.

[119] *E.g.*, Jonathan Simon, Poor Discipline: Parole and the Social Control of the Underclass, 1890-1990 139–40, 252 (1993); *see also* Demleitner, *supra* note 7 (collateral consequences function to create second-class citizens, exiles within American society).

[120] Simon, *supra* note 119, at 9–16, 109.

the supportive, monitoring functions of probation.[121] The extensive systems of technical rules created by hidden sentences cause an influx of parole and probation revocations—which themselves are a primary driver of crime rates through the "revolving door" of prisons.[122] Hence, both rehabilitative/alternative and net-widening capacities of probation and parole rely on hidden sentence law.

In short, hidden sentences characterize the reach and functions of the American penal system and a shocking portion of American society itself. On any given day, about 1 in 134 American adults are imprisoned, while about 1 in 30 are in prisons, jails, on probation, or on parole.[123] Table 3, however, shows that hidden sentences on average last longer than do visible sentences,[124] while others last until some event, like release from imprisonment or payment of a debt.[125] The vast majority (more than 80% in the NICCC) are life sentences. Furthermore, Table 4 shows that most carry no option for relief and that general relief provisions are vastly outnumbered by sanctions (a ratio of 1:33). In many cases, then, the only way for ex-offenders to relieve themselves of hidden sentences is to seek a gubernatorial—or presidential, in the case of federal offenses—pardon.[126] Moreover, such re-

[121] Malcolm M. Feeley & Jonathan Simon, *New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 Criminology 449 (1992); Phelps, *supra* note 2, at 57–60. According to Phelps, though, the "paradox of probation" is that it serves a net-widening of the penal system beyond the reach of imprisonment while it simultaneously serves as a more rehabilitative alternative to incarceration—regardless of whether policymakers intended one or the other. *Id.* Both of these functions are largely fueled by hidden sentences. *See, e.g.*, Ga. Code Ann. § 42-9-20.1 (2015) (publicly publishing conviction information of parolees); N.M. Stat. Ann. § 33-9-5 (2015) (making public and private communities corrections programs mandatory for parolees within one year of release, and discretionary after that).

[122] Weiman, *supra* note 36, at 596–601; *see also* Todd R. Clear & Natasha A. Frost, The Punishment Imperative: The Rise and Failure of Mass Incarceration in America 92–113 (2013) (technical parole revocations were a prime driver of increased crime rates and the consequent failure of mass incarceration policies); Simon, *supra* note 119, at 206–08 (showing a marked increase in return rates of parolees beginning in the mid-1970s, the same period during which incarceration trends spiked).

[123] Pew Ctr. on the States, One in 31: The Long Reach of American Corrections (2009), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2009/PSPP1in31reportFINALWEB32609pdf.pdf [http://perma.cc/8N4B-Y6LL]; *see also* U.S. Dep't of Justice, NCJ 247282, Prisoners in 2013 (2014); U.S. Dep't of Justice, NCJ 248029, Probation and Parole in the United States, 2013 (2014).

[124] The average visible sentence in jail, prison, or probation is three years, two months. U.S. Dep't of Justice, NCJ 226846, Felony Sentences in State Courts, 2006 (2009). Hidden sentences can run simultaneously or start after release, creating an additional "term" of sentence, so that they naturally last longer than do visible sentences. *See infra* tbl.5. More importantly, though, Table 3 shows that the average hidden sentence is a life sentence, and even the 20% that have some fixed duration tend to last longer than three years. *See infra* tbl.3.

[125] *E.g.*, Ariz. Rev. Stat. Ann. § 32-2124 (2011) (making felons ineligible for real-estate broker licenses during incarceration, probation, and parole); Nev. Rev. Stat. § 485.326 (2015) (revoking driver's license for failure to maintain insurance until proof of financial responsibility for three years is established); Idaho Admin. Code r. 16.03.05.799 (2015) (ineligible for the Medicaid for Workers with Disabilities coverage group while child-support obligations unmet).

[126] Kathleen M. Olivares et al., *Reducing the Legal Consequences of a Felony Conviction: A National Survey of State Statutes Ten Years Later*, 21 Int'l J. Comp. & Applied Crim. Just. 141, 143 (1997). Sometimes, expungement and annulment processes are available to the same

lief depends on state and local decision makers' discretion to expunge, seal, or pardon—discretion which is exercised extremely rarely.[127] Hidden sentences thus directly impact everyone with a criminal record and an uncounted number of others who are labeled criminal by decision makers outside the formal penal process. All in all, hidden sentences directly sanction *about one in three American adults*.[128]

TABLE 3
LENGTHS OF HIDDEN SENTENCES

	Frequency	Percentage
Less than 1 year	1,495	3.5%
1–2 years	634	1.5%
2–3 years	945	2.2%
3–5 years	2,247	5.3%
5–10 years	1,995	4.7%
10–15 years	119	0.3%
15–20 years	70	0.2%
20–75 years	30	0.1%
Conditional on status, not time	794	1.9%
Permanent/unspecified termination	34,305	80.5%
Total number of hidden sentences	42,634	100.0%

TABLE 4
RELIEF FROM HIDDEN SENTENCES

	Frequency	Percentage
No specified relief	35,572	83.4%
Relief specified in provision	7,062	16.6%
Total number of hidden sentences	42,634	100.0%
Number of general relief provisions	1,297	3.0%[a]

[a] In relation to total number of hidden sentences.

end. *Id.* In many cases, however, hidden sentences survive even these rare and extreme measures: pardons, for example, do not expunge the record and thereby prevent potential employers or landlords from using it. Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1720–26 (2003).

[127] *E.g.*, Demleitner, *supra* note 7 (arguing for reduction in and relief from hidden sentences); Love, *supra* note 15 (addressing the UCCCA's relief provisions).

[128] *See supra* note 5. By these numbers, 31–32% of American adults have a criminal record and may therefore be subject to at least one hidden sentence (e.g., background checks for employment or real property rental). Importantly, *even these figures are likely an underestimate of all persons subject to hidden sentences*, since some hidden sentences could legally apply to persons that have no criminal record and have not been arrested. *See infra* tbl. 5. These numbers also do not include the numbers of Americans who are *indirectly* impacted by hidden sentences (because their family members, roommates, friends, coworkers, employees, community members, and so forth are subject to them), which given the number of hidden sentences, could very reasonably be almost all Americans, whether they know it or not. This does not mean that one in three American adults are seriously impacted by the most severe hidden sentences—but it does mean that the scale of the penal system is shockingly larger than we have previously thought: it is now incontrovertibly a core American institution with serious repercussions for our way of life.

B. The Hidden Sentence as Purposive, Not "Collateral"

"Collateral" not only suggests hidden sentences are secondary in importance but also that they are unintended. At most, it implies acceptable damage in the course of completing a principal aim.[129] Moreover, many hidden sentences simply seem to make sense in contemporary American sentiments. Even so, that does not mean hidden sentences were enacted any less purposively.

Hidden sentences are all, by Part I's definition, imposed *by law*: constitutions, statutes, judicial precedents, and administrative rules—none of which can exist entirely by accident.[130] No comprehensive study has yet investigated the purposes of these laws, but they all do have some intended goal. For instance, the U.S. Supreme Court decision *Sandin v. Connor* expressly cited "prison management and prisoner rehabilitative goals" as justification for "the necessary withdrawal or limitation of many privileges and rights."[131] The Personal Responsibility and Work Opportunity Reconciliation Act limited drug offenders' access to food stamps specifically in order to reform the welfare system.[132] The PLRA was meant to combat increasing prisoners' rights claims (especially "frivolous" ones).[133]

Hidden sentences may still seem "collateral" from the perspective of the court of conviction, wherein judges and juries may be unconcerned with them and focused on visible sentences. From this vantage, hidden sentences also seem "indirect": emanating not from the convicting judges' decisions but from mandatory law or someone else's discretion. Yet, the question of a *collateral* outcome concerns the intentions of the person who implemented it. In the case of hidden sentences, the legislators, administrative agencies, and (non-convicting) judges who created them all did so purposively.

Moreover, hidden sentences are all, by definition, based *directly* on criminal status, in multiple senses of the word. Even if the convicting court does not impose them, every restriction and requirement is the specific result

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[129] The term "collateral," was used during World War II and popularized in the Vietnam War to signify acceptable damage to civilian populations as a result of military action against non-civilian targets. *Accord* ANTHONY H. CORDESMAN, THE IRAQ WAR: STRATEGY, TACTICS, AND MILITARY LESSONS 266 (2003). Thus, the term "collateral consequences of a criminal conviction," in addition to being alliterative, was designed to catch attention by resonating with public sentiments about the unjustness of collateral damage. *See, e.g.*, Grant et al., *supra* note 7. To that extent, "collateral consequences" did in fact gain some attention among certain circles of academics and activists. This article argues, however, that the term has now become a hindrance to further progress because it is empirically inaccurate.

[130] Laws do not have to be thoroughly planned, properly executed, or even well meaning, but they are intentional. Nobody trips, falls, and accidentally enacts a law or decides a case. Even if some legislators, for instance, vote for a bill but are unaware of a particular provision, there is still some person (another legislator, a lobbyist, a staffer, etc.) who intentionally created the provision.

[131] Sandin v. Conner, 515 U.S. 472, 477–78 (1995).

[132] 21 U.S.C. § 862a (2012); *see, e.g.*, JAMIE PECK, WORKFARE STATES 116–17 (2001).

[133] 42 U.S.C. § 1997e (2012).

of some decision maker's choice.[134] Similarly, hidden sentences do not punish offenders through their families, communities, or other persons; they apply to offenders without any intermediaries, and they do so expressly (and often solely) due to criminal status.

A truly "collateral" consequence of conviction or imprisonment would have to be one that is not enacted by law. Social stigma and cultural prejudices are responsible for many hardships faced by offenders in the community.[135] Children and families of offenders face serious financial, educational, and social struggles that *are* indirect effects of punishment or penal policy.[136] Whole communities face political disempowerment, extreme poverty, damaged collective efficacy, and severe cynicism about government and law enforcement, yielding a cycle of community disadvantage and escalating violence.[137] American society itself has been drastically impacted by mass incarceration trends and hidden sentences, changing our cultural logics and even determining a number of congressional and presidential elec-

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[134] From a different and no less valid perspective, the penalty may actually be the grant of discretion (to consider punishment and the tools to implement it). Simply being subject to background checks and reporting requirements, for instance, is a repeated reminder of criminalization, a constant stressor, and possibly a key part of societal punishment. *E.g.*, MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 160–61 (2005); Ewald, *supra* note 9, at 102–05; *see also* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992) (arguing that the major punishment involved in a criminal trial is being subjected to the lengthy and costly procedures of the trial itself). From this vantage, hidden sentences are even more clearly direct: upon some decision maker's imposition of criminal status, the law immediately and without additional requirements imposes additional judgment and process.

[135] *E.g.*, Devah Pager's well-known social experiments on ex-offenders' job prospects, for instance, applies exclusively to employment opportunities that are legally available to ex-offenders (though hidden sentences still play an important role by allowing employers to conduct background checks). PAGER, *supra* note 36, at 65, 156; Devah Pager, *Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003). Still, even social stigma might not truly be *collateral* in this sense, since employers may quite deliberately exclude offenders, and legal decision makers may assume or actively plan on them doing so.

[136] Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 179 (2009) (showing intergenerational effects of imprisonment can be severe, even given other factors that impact educational attainment and future opportunities); *see also* John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121 (1999).

[137] JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006) (neighborhoods with high levels of disenfranchised offenders are likely to develop norms of non-voting, leaving entire communities "locked out" of political processes); David Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190 (2011) (legal cynicism derives from law-enforcement supervision and violence, and predicts future neighborhood violence); Jeffrey D. Morenoff et al., *Neighborhood Inequality, Collective Efficacy, and the Spatial Dynamics of Urban Violence*, 39 CRIMINOLOGY 517 (2001) (concentrated disadvantage and low collective efficacy predict community levels of violence); Dina Rose and Todd R. Clear, *Incarceration, Reentry and Social Capital: Social Networks in the Balance*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES 314 (Jeremy Travis & Michelle Waul eds., 2004) (high levels of offenders decrease social capital and collective efficacy).

tions.[138] Hence, a key reason "collateral consequences" is a dangerous terminological choice is that it makes it difficult to sensibly discuss "collateral consequences of collateral consequences," that is, the collateral consequences of hidden sentences on offenders, families, communities, and society.

The question of *which* purposes hidden sentences aim to achieve—and whether they do achieve them—is separate. An action can be quite purposive without achieving its ends, and the ends at which it aims can be unjust, illegitimate, or unwise. Part IV confronts these questions, based on these laws' purposiveness.

C. *The Hidden Sentence as Punishment, Not Mere "Consequence"*

Lastly, "collateral consequences" inaccurately implies hidden sentences are mere consequences of punishment, not punishments themselves. The ideas of "civil disabilities," "offenders' rights," and so forth have similar connotations. Yet hidden sentences are just as punitive as are visible sentences.[139]

"Punishment" means the imposition of a deprivation or harm by an authority in response to some perceived transgression or wrongdoing. This definition corresponds with colloquial usage and conceptualizations developed by psychologists, philosophers, and lay dictionaries.[140] Whether a con-

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[138] The logics behind almost every system of government in the nation have become driven by fear and concerns with security, making the penal system the major centerpiece to the American state. SIMON, *supra* note 3, at 3–13 (2007). Similarly, virtually every successful political campaign in the latter third of the twentieth century has accepted and contributed to the "tough on crime" frame. *Id.* Moreover, statistical models suggest that if felons were allowed to vote, a shocking number of twentieth-century congressional and presidential elections would have turned out differently. *See generally* Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002).

[139] This article uses "punitive" to mean "concerned with punishment." It does not mean it as a synonym to "harsh" or even "retributive," which is a conflation that too many jurists, policymakers, and others use today. Many writers, for instance, claim the United States took a "punitive turn" when it began implementing mass incarceration policies. *E.g.*, NATASHA A. FROST, THE PUNITIVE STATE: CRIME, PUNISHMENT, AND IMPRISONMENT ACROSS THE UNITED STATES 1 (2006). This statement is *only* correct in that American society began punishing longer and more frequently, *not* that the punishments themselves or the logics behind them were more punitive than they were in the prior, "rehabilitative" era. When imprisonment was more focused on treatment and recovery, it was focused on *rehabilitation through punishment*. Our modern consciousness has become so inundated with punitive logics that we find it difficult to imagine what rehabilitation might look like if it were *not* punitive rehabilitation—but that does not change the meaning of "punitive."

[140] Perhaps the most relevant definition comes from H.L.A. Hart, who defined "punishment" through five elements that correspond to the definition used in this article:

> (i) It must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offense against legal rule.
> (iii) It must be of an actual or supposed offender for his offense.
> (iv) It must be intentionally administered by human beings other than the offender.
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

dition is punitive thus depends on whether it imposes (positive *or* negative) injury, whether it responds to prior actions perceived as wrong or prohibited, and whether the decision maker has authority to impose it.

Hidden sentences, by definition, all have these qualities. First, they each impose a restriction or requirement—most often exclusion from employment, welfare, housing, or financial aid, or another abridgment of legal rights and privileges.[141] They also each impose notification and registration requirements, civil liability, and other special obligations; one could consider such penalties positive duties or negative limitations on rights to privacy, property, etc. In any case, every hidden sentence inflicts a deprivation or harm.

Second, as Table 5 shows, each is in response to criminalized status of some kind. The status that most frequently triggers hidden sentences is a court's determination of guilt—hence collateral consequences of *conviction*. Yet, others apply upon imprisonment, probation, or other visible sentencing.[142] Still others actually activate before or without conviction, for instance, at arrest or indictment.[143] Given their text, some can even trigger before arrest, by allowing some private or public decision maker to determine that a person has violated the law.[144] Importantly, though, all of these statuses are forms of criminalization: application or perception of a criminal label.

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4–5 (2nd ed. 2008). Rawls defined it similarly:

> [A] person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense.

John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955). Other definitions correspond with these. *See, e.g.*, PAUL CHANCE, LEARNING AND BEHAVIOR (5th ed. 2003) (in psychology, punishment is any positive or negative change in surroundings after a given behavior that reduces the likelihood of that behavior's reoccurrence); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2011) ("The imposition of a penalty or deprivation for wrongdoing."); AMERICAN HERITAGE ROGET'S THESAURUS (2013) ("Something, such as loss, pain, or confinement, imposed for wrongdoing.").

[141] *See supra* Part I.

[142] *See, e.g.*, MONT. CODE ANN. § 39-71-744 (West 2009) (ineligibility for disability or rehabilitation compensation benefits during thirty-day or longer imprisonment).

[143] *E.g.*, ALA. CODE § 8-19A-5 (2006) (discretionary denial of commercial telephone licenses for conviction or indictment of racketeering or various financial offenses); WYO. STAT. ANN. § 31-7-138 (West 2007) (requiring surrender of temporary driver's license upon arrest and until disposition other than conviction).

[144] *E.g.*, ALA. CODE § 5-19A-13 (1996) (discretionary pawnshop license suspension/revocation after state banking supervisor's independent finding of violations of Alabama Pawnshop Act); MO. REV. STAT. §§ 30.962 (West 2013) (repealed 2015) (removing Missouri Investment Trust officers/employees upon any state treasurer determination of bribery acts, in addition to subjecting them to bribery charges), 149.025 (West 2006) (mandatory revocation of cigarette wholesale license upon department of revenue's finding of delinquency for deferred tax).

Third, hidden sentences are imposed, enforced, or sanctioned by law, making them authoritative.[145] Table 6 shows that about half are imposed automatically when the triggering conditions are met, and another 4% are automatic with a possible waiver by a (usually administrative) decision maker. The remaining 45% of hidden sentence laws are discretionary, either by explicitly granting to some public or private decision maker the power to impose a penalty, or by implicitly doing so through background check requirements. Moreover, 25% of hidden sentences have "supplemental" background checks in addition to the rest of the sentence that explicitly allow decision makers to check criminal histories. Presumably, these provisions are designed for enforcement of the sentence but they rarely specify for what purposes those background checks may or may not be used. Thus, quite apart from not being punitive, these discretionary provisions effectively disseminate the power to punish among various societal actors.[146]

TABLE 5

CRIMINAL STATUSES THAT TRIGGER HIDDEN SENTENCES

Civil, administrative, or private[a] determination of criminality
Existence of a criminal record
Arrest/pre-trial detention
Indictment/initiation of trial proceedings
Incarceration of any kind
Conviction/determination of guilt (or bail forfeiture)
Imprisonment (in jail or prison as a result of visible sentencing)
Visible sentencing of any kind

SOURCE: Based on legal provisions from the NICCC.

[a] Actors with discretion include civil law judges, administrative law judges, administrative/executive officials, civil and criminal law clerks, administrative/executive employees and clerks, prosecutors, law enforcement officers, corrections officers and officials, private employers, private benefit administrators, landlords, lenders, university/education administrators, and other private actors with access to criminal records or background checks.

[145] "Authority" could arguably require an element of legitimacy, such that some hidden sentence laws could claim legal authority but are not perceived as such; any injuries or deprivations they cause would simply be unjust injuries, not punishments. This debate would hinge on the question of whose perspective matters in determining authoritative legitimacy, but that concern is one for another time. This article assumes that U.S. laws have at least some perceived legitimacy and ascribed authority.

[146] From another perspective, disclosure of a criminal record is itself a harm (and therefore punishment), as is the grant of discretion to so disclose. In this view, the legislature, judiciary, or agency responsible for enacting or promulgating the sentence is the relevant legal authority who punishes (regardless of whether the sentence is mandatory or discretionary). This idea, however, is less consistent with our notions about visible sentencing; we say judges—not legislatures—impose imprisonment, probation, etc., even though statutes often outline their discretion to do so. *See, e.g.*, 18 U.S.C. § 3562 (2012); *see also* Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191 (2006).

TABLE 6
METHODS OF EXECUTION OF HIDDEN SENTENCES

	Frequency	Percentage
Mandatory/automatic	21,467	50.4%
Discretionary waiver	1,850	4.3%
Discretionary execution	15,361	36.0%
Background check only	3,956	9.3%
Total number of hidden sentences	42,634	100.0%
Supplemental disclosure of criminal record	10,679	25.0%

The definition of punishment is also significant in what it does *not* include: the authority's motive, the effectiveness of the injury or deprivation at achieving that motive, the magnitude of the injury or deprivation, the perception or response of the punished person, and the actual wrongness or acceptability of the action (including its existence or attribution to the perceived wrongdoer). These factors may determine the type of punishment, but not whether a condition *is* punishment.

Punishment requires an element of intent (i.e., the authority's deliberateness in imposing it as a response to wrongdoing) but not a particular motive.[147] Current Supreme Court doctrine defines legislation as "punishment" when it is (*a*) "intended primarily to punish" (a tautology) or (*b*) "so excessive in effect" that it must be considered punishment.[148] By legislative "intent," the Court means to interrogate the particular legislative purpose or motive behind a law, not its deliberateness (which would not be in question[149]). Fully analyzing this definition and its confusing precedent is itself an article-length project, but it is enough to note, first, that the Court's original definition of "punishment" was consistent with public and professional understandings—before it attempted *post hoc* to justify hidden sentences,[150] and second, that experts, including the courts, have recognized countless motives that can underlie punishment, some legitimate and some illegiti-

[147] *See* Hart, *supra* note 140, at 4–5; *cf.* Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) (Judge Posner differentiating between *accidental* and *deliberate* actions to define punishment).

[148] Smith v. Doe, 538 U.S. 84, 92 (2003); Kaiser, *supra* note 9, at 3–12 (elaborating the logical flaws behind this doctrinal history).

[149] *See supra* Part II.B.

[150] Cummings v. Missouri, 71 U.S. 277, 322 (1866) ("Any deprivation or suspension of any [political or civil] rights for past conduct is punishment."); *see also Ex parte* Garland, 71 U.S. 333, 378 (1866). This definition morphed over the nineteenth and twentieth centuries. Because courts assumed from the outset of certain cases that hidden sentences were deserved, justified, or otherwise not violations of various constitutional guarantees, they engaged in a judicial two-step to define them as something besides punishment. Kaiser, *supra* note 9, at 7, 9; *see, e.g.*, United States v. Ward, 448 U.S. 242 (1980) (assuming "civil penalties" cannot be punitive and conflating law on "criminal" and "punishment" definitions to create a circular definition of criminal penalties). The logic is not limited to post-release hidden sentences and instead has been extended to many "mere incidents of imprisonment," including even solitary confinement. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 485 (1995) (solitary confinement, "though concededly punitive, does not present a dramatic departure from the basic conditions of [a visible] sentence").

mate, none of which are required and none of which are simply "to punish."[151] For example, sanctions can aim to rehabilitate rather than deter or impose retribution, but they are still rehabilitative *punishment*. Punishment only for punishment's sake could be called *unproductive* (or sadistic) punishment.

Similarly, despite the Court's current doctrine, punishment need not be severe or excessive. A gas tax of two dollars per gallon is excessive but not punitive (unless applied only to wrongdoers), whereas a ten dollar fine in response to larceny is lenient and possibly ineffective, but still punitive. Similarly, punishment that is ineffective at impacting the punished person and achieving its motive would be punishment, albeit unsuccessful and poorly planned. As Parts III and IV show, punishment can even occur without the punished person being aware of it: ineffective, yes, but nonetheless punishment.

Lastly, it is important to emphasize that punishment need not be in response to *actual* wrongdoing—only an authority's perception or decision that a transgression has occurred. That decision can easily be erroneous. Punishment for such wrongful convictions or arrests may be unjust or unfortunate, but it, too, is punishment.

In recent years there has been a shift toward implicitly or explicitly recognizing that hidden sentences are punishments. Scholars and activists have begun using terms like "collateral *sanctions*" (without directly addressing why)—showing a discomfort with differentiating between hidden and visible sentences in the face of their simultaneously punitive realities.[152] Jeremy Travis and others have thus begun using "invisible punishment."[153] Travis explicitly argues that "[t]hese restrictions certainly constitute 'punishment': they are legislatively defined penalties imposed on individuals convicted of crimes, resulting in serious, adverse consequences," and he goes on to outline similar causes of invisibility/hiddenness addressed in Part

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[151] *See infra* note 214 and accompanying text. Well-known educational philosopher R.S. Peters did argue that punishment necessarily entails retribution. RICHARD STANLEY PETERS, ETHICS AND EDUCATION 110 (1966) ("'punishment' *must* involve 'retribution', for 'retribution' implies doing something to someone in return for what he has done . . . . Punishment, therefore, must be retributive—by definition."). Peters' definition of "retribution," however, is akin to a "reaction," which is not in line with what legal experts mean when they refer to retribution. Legally, and in the context of a justification for punishment, "retribution" refers to attempts to apply *just* deserts, a balancing of the scales—not to all reactions to wrongdoing with any goal. *See infra* notes 216–17 and accompanying text. Peters' "reaction" is precisely what this article means when it defines punishment as a deprivation *in response* to wrongdoing. Thus, *punishment no more entails retribution than it does any other purpose*. *See* Demleitner, *supra* note 9, at 1637 ("If courts were to acknowledge incapacitation as a traditional punishment goal, this would undermine the carefully crafted, albeit flimsy, distinction between civil and criminal sanctions."); Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights for Youthful Offenders*, 35 VAND. L. REV. 791, 805–06 (1982) (blurring definition of punishment with its justification as philosophical error).

[152] *See, e.g.*, UCCCA, *supra* note 13, at § 2; ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Stand. 19-1.1 (2003) [hereinafter ABA STANDARDS]; Demleitner, *supra* note 7, at 154.

[153] TRAVIS, *supra* note 9, at 64–65; INVISIBLE PUNISHMENT, *supra* note 19.

III.[154] This laudable logic aims to rectify some of the same fallacies this article does, and it certainly improves on prior terminology.

This article uses "hidden sentences" instead for three main reasons. First, Travis and others only used "invisible punishment" to capture post-release, codified hidden sentences (the same conceptual ground covered by "collateral consequences"), not yet taking the opportunity to recognize similarities between those penalties and the ones imposed on current offenders and by court rulings.[155] Second, "punishment" rather than "sentence" could include non-legal sanctions (e.g., by parents or community members), inviting some of the same confusion "collateral consequences" does.[156] Most importantly, "hidden" avoids the (overstated) criticisms of rigidity levied against "invisible."[157] The following section elaborates while explaining the mechanisms of hiddenness.

III. The Legal Production of Hiddenness

Since hidden sentences are each primary, purposive, and punitive, many may find it difficult to distinguish adequately between them and visible sentences. Yet, based on the relatively unimportant difference of who imposes the punishment, judicial and other legal decision makers have systematically separated them from one another—and prioritized knowledge and notice of visible sentences. This section clarifies four primary characteristics that obscure hidden sentences in contemporary legal doctrine: their scope, dispersion, variability, and inconspicuousness.[158] It also argues that "collateral consequences," "offenders' rights," and similar ideas are inadvertently damaging precisely because they contribute to and justify the latter inconspicuousness.

A. Scope

The most straightforward reason for widespread ignorance of these sanctions is their sheer scope: their considerable quantity and breadth of subject matter. Table 7 shows there are about 800 legislative and administrative codes across the United States that include post-relief hidden sentence laws. Ten are federal codes, and each state-level jurisdiction has on average eigh-

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[154] Travis, *supra* note 9, at 64.

[155] *Id.* at 63–71.

[156] *See supra* Part II.B.

[157] *See infra* notes 177–78 and accompanying text.

[158] This article discusses only *legal* sources of hiddenness, but they can only manifest as a public and professional knowledge through a number of other mechanisms. Legal barriers to knowledge and notice must translate into neglect in the courtroom and legal training, into gaps in scholarly and political knowledge of the penal system, and only then into public knowledge (still undoubtedly a simplification of the causal process). *See, e.g.*, Travis, *supra* note 9, at 65–66 (citing legal, political, and public types of invisibility/hiddenness). Since this article's concern is revealing legal solutions to the knowledge problem, it does not discuss these other sources, but they certainly have potential for future research and discussion.

teen more. Because hidden sentences do not differentiate between federal and state crimes, each applies to all offenders in a jurisdiction. In other words, to master hidden sentence law in a geographic location, a lawyer or other person needs to know all relevant federal and state codes—an average of twenty-eight codes. Even this number is an underestimate for offenders who move between jurisdictions; hidden sentences can apply based on residency or jurisdiction of criminal status.

All in all, *at least* 37,224 sections of federal and state constitutions, statutes, regulations, and judicial rules constitute hidden sentence law. Since each can include multiple sanctions, hidden sentence law overall spans *at least* 43,931 legislative and administrative provisions (less than 3% of which are general relief provisions). Over 1,100 are federal, and each state-level jurisdiction adds an average of 950—meaning *every offender in the United States may be subject to more than 2,000 hidden sentences*. Because the NICCC meant to exclude hidden sentences imposed on currently supervised offenders or by judicial precedent, even these counts are *underestimates*.

B. Dispersion

The size of a body of law does not alone make it unmanageable by experts or unfamiliar to the public. The federal tax code, for instance, is voluminous, but experts can navigate it and the public is well aware it exists. Table 7 also shows, however, that hidden sentence law is dispersed across and within virtually every area of federal and state legislative, administrative, and judicial law. Combined with its sheer volume, this dispersion of hidden sentence law makes it particularly difficult to know or understand.

Hidden sentences are scattered first throughout various areas of civil codes. The federal housing code, for instance, excludes drug offenders from public housing.[159] Two other areas of federal law bar drug offenders from receiving food stamps or educational loans.[160] Additionally, different areas of state codes control voting restrictions, mandatory registration requirements, and limits on holding public office.[161] California, for instance, includes hidden sentences in at least twenty-five areas of its civil code and its constitution.

Although scholars often overlook them,[162] criminal or penal codes are also crucial for hidden sentences. For example, criminal codes control employment options, property forfeiture, firearms licenses, and political rights.[163] Most civil provisions also use terminology defined in penal codes:

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[159] 42 U.S.C. §§ 1437d (Supp. I 2013), 1437f (Supp. II 2014), 1437n (Supp. II 2014).

[160] 7 U.S.C. § 2015 (Supp. III 2015); 20 U.S.C. § 1091 (Supp. III 2015).

[161] *See, e.g.*, Cal. Elec. Code § 2101 (West 2015); Cal. Penal Code § 290.46 (West 2015); Cal. Gov't Code § 1021 (West 2015).

[162] Likely because courts routinely gloss over the awkward ways civil and criminal law combine to create hidden sentences by calling them mere "civil" regulation. *E.g.*, Smith v. Doe, 538 U.S. 84, 102–03 (2003); United States v. Ward, 448 U.S. 242, 248–49 (1980).

[163] Md. Code Ann., Crim. Law § 3-702 (West 2002) (excluding bribery offenders from state employment); Md. Code Ann., Crim. Law § 9-601 (West 2002) (allowing seizure of

"felon," "conviction," "imprisonment," and so forth. Of course, judicial rulings play a role in interpreting these definitions, so in many instances, a particular civil provision cannot be understood without extensive knowledge of both civil and criminal codes and judicial rulings on each.

TABLE 7
POST-RELEASE HIDDEN SENTENCES LEGISLATION AND REGULATION

	Total count	Total count, federal law only	Average count, state & D.C. law	Cumulative average
Legal codes[a]	770	10	18.0	28.0
Including general relief	794	10	18.0	28.0
Sections of code	35,994	976	802.3	1,778.3
Including general relief	37,224	998	802.8	1,800.8
All hidden sentence provisions	42,634	1,135	949.5	2,084.5
Including general relief	43,931	1,157	949.9	2,106.9

[a] Includes constitutions, statutes, regulations, and rules. Figures may not be exact. They were derived from an algorithm that searched each NICCC citation for unique, non-numerical strings. A list of words (*e.g.*, "sec." or "appendix") were excluded, and the resulting list was evaluated for duplicate codes.

Courts also have important roles in limiting offenders' rights, both before and after release. Absent relevant legislation, for instance, federal courts have ruled that prisoners have no privacy rights and severely curtailed their rights against excessive use of force.[164] In fact, most protections in the U.S. Constitution have been similarly restricted.[165] Rules developed from court decisions have also restricted rights, for instance, to serve on juries or prevent publication of arrest records.[166]

Finally, administrative rule governs many hidden sentences. When courts abridge some right or privilege, penal officials can often implement that ruling as they see fit. Prisons, for instance, have used inmates' abridged freedoms of expression to restrict privileges from outgoing mail to fantasy gaming.[167] Agencies control offenders even after release; administrative

radio equipment used for transmission offenses); N.Y. PENAL LAW § 400.00 (McKinney 2015) (ineligibility to possess, carry, repair, or dispose of firearms for felony or "serious offense" conviction); TEX. CODE CRIM. PROC. ANN. art. 19.08, 35.16 (West 2015) (misdemeanor theft and felony convictions disqualify from jury service).

[164] *See* sources cited *supra* note 103.

[165] Courts have limited First, Second, Fourth, Fifth, Sixth, Seventh, and Fourteenth Amendment rights based on criminal status (especially imprisonment). *Accord* FLITER, *supra* note 6.

[166] *E.g.*, Paul v. Davis, 424 U.S. 693, 713 (1976) ("None of our substantive privacy decisions hold" that a "State may not publicize a record of an official act such as an arrest."); Dodys v. State, 37 S.E.2d 173, 175 (Ga. Ct. App. 1946) (discretionary jury disqualification for crimes of moral turpitude).

[167] *See* Wolff v. McDonnell, 418 U.S. 539, 542–44 (1974) (concerning prison officials' takings of good-time credits, inmate legal assistance program, and inspection of mail); Singer v. Raemisch, 593 F.3d 529, 531 (7th Cir. 2010) (prison officials banned "Dungeons & Dragons").

rules constitute a significant portion of the NICCC and cover the same areas of law as do legislative statutes.[168] Thus, because there are so many hidden sentences spread so thoroughly throughout state and federal codes and judicial doctrine, it is next to impossible for one person to learn or understand them.[169]

C. Variability

The third characteristic of hidden sentence law that makes it abstruse is its unsystematic variability. Hidden sentences fluctuate in every way imaginable. They each fit Part I's definition, but otherwise, their specifics are unpredictable. The extent to which a given offender's rights are curtailed by hidden sentences depends on the severity of the visible sentence, the classification of the offense, the phase of penal process the offender is currently navigating, the ruling jurisdiction, the penal institution within the jurisdiction responsible for the offender's punishment, and various other characteristics.

The most obvious variability is by triggering offense (Table 8). Some hidden sentences apply broadly to all felons, all misdemeanants, or even all offenders.[170] Others are quite specific, accruing based on violation of a single (often closely related) law or set of laws; employment and licensing restrictions are perhaps most likely to be narrowly tailored in this way.[171] There are a number of other categories, too: some hidden sentences (especially welfare restrictions) apply to drug offenses, others to child support arrearage, and others to corruption or fraud. Most importantly, as the percentages in Table 8 show, the typical hidden sentence is activated by multiple offense categories—making it even harder to predict which offenses trigger which penalties.

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[168] *E.g.*, Alaska Admin. Code tit. 7, § 26.110 (2015) (certain offenders ineligible to be emergency medical technician instructors); Ill. Adm. Code tit. 11, § 1800.1310 (2015) (providing conviction, indictment, and other information about any offense of a person with a video-gaming license to any person requesting it). Administrative and judicial rules often implement hidden sentences that are permitted by statute. *See, e.g.*, N.D. Admin. Code 7-13-08-01 (2015) (discretionary refusal of meat-inspection services for various offenses, according to N.D. Cent. Code § 36-24-19 (2015)).

[169] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 376 (2010) (Alito, J., concurring); Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963); UCCCA, *supra* note 13, at § 4 cmt.

[170] *E.g.*, La. Admin. Code tit. 46, § 4709 (2015) (allowing suspension/revocation of marriage and family therapist license for conviction of all felonies, or any misdemeanor "related to their qualifications or functions"); 10A N.C. Admin. Code 70H.0405 (2006) (petitions for adoption must consider all crimes besides minor traffic offenses).

[171] *E.g.*, Ala. Admin. Code r. 220-3-.03 (2015) (revoking fish and game licenses for illegally possessing certain nets aboard certain boats); Fla. Stat. Ann. § 390.012 (2014) (allowing suspension/revocation of abortion clinic license for failure to appropriately dispose of fetal or human remains or tissue).

TABLE 8
TYPES OF OFFENSES THAT TRIGGER HIDDEN SENTENCES

	Frequency	Percentage
Any felony	17,481	41.0%
Any misdemeanor	8,600	20.2%
Any offense	4,083	9.6%
Child support offenses	847	2.0%
Controlled substances offenses	7,114	16.7%
Crimes of moral turpitude	4,066	9.5%
Crimes involving fraud/dishonesty/money-laundering	11,135	26.1%
Crimes of violence, including person offenses	7,513	17.6%
Election-related offenses	282	0.7%
Motor vehicle offenses	3,904	9.2%
Public corruption offenses	2,461	5.8%
Recreational license offenses	1,026	2.4%
Sex offenses	5,572	13.1%
Weapons offenses	1,895	4.4%
Other triggering offenses	8,914	20.9%
Total number of hidden sentences	42,634	100.0%

Jurisdictional differences complicate matters further. Every feature of hidden sentence laws illustrated in Tables 1–8 fluctuates by jurisdiction. Table 9 shows some of this variation. Jurisdictions have as many as 1,723 hidden sentence laws (in California) or as few as 315 (in Vermont). Availability of specific relief built into hidden sentences ranges from less than 1% of provisions to almost 7%; general relief provisions vary similarly. It is also difficult to predict the percentage of hidden sentences per jurisdiction that activate automatically, the percentage that are permanent, and the average length of time that non-permanent ones tend to last.

Similar variation exists with activating offenses. Felonies trigger 41% of the average jurisdiction's hidden sentences, but this figure can vary from 32% to 54%. Some jurisdictions focus more on crimes of violence (up to 35% of hidden sentences) or sex crimes (up to 31%), and others have more broad penalties affecting all misdemeanants (up to 36%) or all offenders (up to 21%). These trends are also not likely predictive of the severity, number, or type of hidden sentences that affect currently supervised offenders or are implemented by judicial decisional law—creating even more variation.

Finally, some offense types are particularly opaque, even with guiding judicial interpretations—making it difficult to understand how they work absent comprehensive knowledge of legislative, judicial, and administrative law. Many hidden sentences, for instance, apply to "crimes of moral turpitude," a term sometimes defined by statute and sometimes by judicial interpretation, depending on the jurisdiction and even the context within the jurisdiction.[172] Similar variation exists for "sex offenses" and "crimes of

[172] They typically involve fraud, dishonesty, and some severe offenses. *E.g.*, ARK. RULE OF PROF. CONDUCT r. 17 (disbarring and disciplining attorneys for crimes of moral turpitude and other serious misconduct).

violence," which trigger some of the most severe hidden sentences.[173] Even the definition of "felon" changes depending on whether the statute uses the legislative classification of the crime or the length of incarceration (e.g., imprisonment for more than one year).[174]

In short, the hidden sentence can "range from losing virtually no rights, to losing rights only while incarcerated, to losing all rights unless pardoned, and everything in between."[175] This variability impedes understanding by creating unpredictability and uncertainty. It is thus unusually difficult to cognitively organize knowledge of this body of law.[176] It would be easier to remember rules or shortcuts if, for example, employment limits typically came from employment-related offenses or if violent offenses yielded a standard set of residency and property restrictions. Absent such consistent expectations, knowledge of hidden sentence laws is individualistic and idiosyncratic.

Moreover, because of their variability at law, the extent of each penalty's hiddenness ends up varying (*a*) in degree, (*b*) depending on the viewer, (*c*) in its sources or causes, and (*d*) in the extent to which it can be known and understood. For this reason, hidden sentences are not entirely "invisible," which implies a complete and unchanging type of obscurity.[177] Different persons (e.g., ex-offenders who experience a particular extra-criminal sentence or judges who must enforce it) are more likely to *discover* a hidden sentence than are those more insulated from it.[178] Some hidden sentences, such as sex offender registration statutes, are thus more prominent overall than others are—though even these "less" hidden sentences are obscured because they are legally inconspicuous.

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[173] *E.g.*, TENN. CODE ANN. § 33-6-804 (West 2009) (requiring psychological examination of sex offenders prior to release from confinement, and civil commitment of that offender upon determination of dangerousness).

[174] *Accord* Grant et al., *supra* note 7, at 952–60.

[175] Susan M. Kuzma, *Civil Disabilities of Convicted Felons,* 60 CORRECTIONS TODAY 68, 69 (1998).

[176] *See* Pinard, *supra* note 24.

[177] This criticism is vocalized often but only rarely written down. *See* Ronald F. Day, Collateral Consequences of Criminal Conviction, Paper Presented at the 3rd Annual Prison Studies Group Graduate Student Conference, (Apr. 12, 2013); *cf.* Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1 (2010) (interrogating visible public/political knowledge versus invisible administrative knowledge). This criticism is greatly overstated; invisible does not necessarily imply static. The only true weakness of "invisible punishment" is that it has been used only as rhetoric (often for actual collateral consequences), not as a subject for inquiry itself. *See* INVISIBLE PUNISHMENT, *supra* note 19.

[178] Which actors are more likely to discover hidden sentences in which situations are subjects for future empirical investigation.

TABLE 9
VARIATION IN POST-RELEASE HIDDEN SENTENCE LAWS, BY JURISDICTION

	Number of hidden sentences	Percent with specific relief provisions	Percent with mandatory/ automatic execution	Average non-permanent sentence (in years)	Percent permanent/ life-long sentences	Number of general relief provisions
Federal	1,135	2.9%	45.4%	6.9	83.1%	22
Alabama	776	2.6%	50.3%	3.6	83.4%	26
Alaska	549	2.1%	43.2%	7.0	69.9%	12
Arizona	835	1.3%	49.8%	5.7	82.0%	24
Arkansas	946	1.6%	54.0%	4.0	81.4%	15
California	1,723	4.2%	47.2%	5.4	83.9%	85
Colorado	652	1.1%	48.3%	4.8	83.4%	19
Connecticut	567	1.6%	46.7%	4.1	79.2%	28
Delaware	757	2.9%	52.3%	5.1	75.6%	18
District of Columbia	597	1.3%	46.9%	5.0	76.4%	21
Florida	1,050	2.9%	51.1%	5.6	84.9%	75
Georgia	832	2.2%	55.5%	5.7	80.5%	27
Hawaii	404	1.7%	54.2%	5.2	79.7%	14
Idaho	654	1.2%	50.0%	4.4	79.2%	15
Illinois	1,382	1.7%	55.9%	5.5	82.2%	57
Indiana	802	1.6%	58.1%	5.8	80.8%	19
Iowa	557	1.0%	43.4%	4.0	83.5%	22
Kansas	575	1.0%	54.4%	5.6	83.0%	14
Kentucky	853	2.2%	57.6%	5.1	80.9%	38
Louisiana	1,233	1.5%	59.0%	4.5	83.1%	31
Maine	667	2.2%	54.6%	5.8	64.2%	14
Maryland	932	1.9%	38.6%	4.4	86.4%	8
Massachusetts	757	1.5%	41.7%	5.1	84.7%	31
Michigan	750	1.8%	57.3%	7.0	73.1%	19

Minnesota	458	1.1%	57.6%	4.5	70.5%	21
Mississippi	891	2.2%	52.9%	3.3	79.5%	12
Missouri	830	1.2%	46.1%	4.7	77.3%	22
Montana	532	1.0%	53.0%	4.0	81.2%	15
Nebraska	715	1.5%	54.5%	6.3	75.7%	11
Nevada	719	1.1%	45.5%	5.7	85.3%	32
New Hampshire	1,070	3.3%	56.3%	5.7	76.3%	14
New Jersey	1,001	2.2%	43.4%	5.0	87.6%	27
New Mexico	648	1.8%	46.1%	5.6	83.2%	23
New York	1,250	2.7%	37.3%	4.7	84.1%	36
North Carolina	972	1.9%	50.0%	4.2	79.5%	26
North Dakota	495	1.1%	39.0%	5.3	84.8%	13
Ohio	1,634	6.7%	54.9%	6.3	77.8%	37
Oklahoma	1,154	1.8%	57.0%	5.6	84.1%	23
Oregon	1,085	2.6%	39.6%	5.7	83.3%	20
Pennsylvania	835	1.9%	53.4%	5.7	80.1%	25
Rhode Island	667	1.2%	52.6%	4.1	79.0%	13
South Carolina	657	2.2%	59.5%	4.0	71.7%	18
South Dakota	421	0.7%	50.1%	4.3	77.4%	10
Tennessee	888	2.3%	58.0%	5.6	83.0%	28
Texas	1,090	2.3%	46.4%	5.3	77.3%	42
Utah	660	1.2%	50.3%	4.6	78.6%	19
Vermont	315	0.8%	47.3%	4.8	77.5%	17
Virginia	755	1.7%	44.9%	4.8	84.0%	40
Washington	945	2.7%	46.6%	4.9	75.7%	48
West Virginia	817	1.6%	57.2%	5.2	81.2%	12
Wisconsin	682	1.9%	53.5%	5.2	80.1%	12
Wyoming	463	1.4%	44.5%	4.2	80.1%	27

Table 10
Types of Post-release Hidden Sentences across U.S. Jurisdictions

	Frequencies by jurisdiction (mean in parentheses)	Percentages by jurisdiction (mean in parentheses)
Business license and other property rights	115–721 (330.8)	24.3–44.6 (35.6)
Education	0–86 (16.2)	0–5.8 (1.6)
Employment	158–1,252 (512.8)	23.7–76.6 (55.6)
Family/domestic rights	11–129 (40.9)	1.3–9.2 (4.4)
Government benefits	3–175 (26.5)	.5–15.4 (2.8)
Government contracting and program participation	4–207 (41.3)	.6–18.2 (4.4)
Government loans and grants	0–91 (7.0)	0–8.0 (.7)
Housing	0–97 (27.3)	0–7.4 (2.9)
Judicial rights	6–66 (31.2)	.9–6.6 (3.4)
Motor vehicle licensure	9–88 (42.3)	.8–9.5 (4.9)
Occupational and professional license and certification	125–723 (335.4)	16.3–50.9 (36.6)
Political and civic participation	23–196 (100.3)	4.5–16.2 (10.7)
Recreational license, including firearms	7–80 (29.7)	.9–15.0 (3.4)
Registration, notification, and residency restrictions	30 – 179 (76.4)	4.4 – 12.3 (8.2)

TABLE 11
OFFENSES THAT TRIGGER HIDDEN SENTENCES ACROSS U.S. JURISDICTIONS

	Frequencies by jurisdiction (mean in parentheses)	Percentages by jurisdiction (mean in parentheses)
Any felony	138–679 (377.8)	32.0–54.2 (41.0)
Any misdemeanor	56–473 (187.6)	7.4–36.1 (20.2)
Any offense	18–228 (87.6)	4.2–21.0 (9.6)
Child support offenses	0–63 (16.8)	0–8.0 (2.0)
Controlled substances offenses	45–503 (154.8)	8.3–30.8 (16.7)
Crimes of moral turpitude	8–183 (86.7)	1.2–24.6 (9.5)
Crimes involving fraud, dishonesty, misrepresentation or money-laundering	78–651 (244.3)	14.8–39.8 (26.1)
Crimes of violence, including person offenses	48–577 (167.9)	9.4–35.3 (17.6)
Election-related offenses	0–32 (5.7)	0–3.2 (.7)
Motor vehicle offenses	24–148 (78.9)	2.8–20.0 (9.2)
Public corruption offenses	13–168 (55.3)	1.7–13.9 (5.8)
Recreational license offenses	0–76 (21.7)	0–12.4 (2.4)
Sex offenses	28–501 (127.9)	4.6–30.7 (13.1)
Weapons offenses	1–334 (46.5)	.2–20.4 (4.4)
Other triggering offenses	43–354 (191.1)	7.7–38.0 (20.9)

D. Inconspicuousness

The final way the law is structured to make hidden sentences difficult to understand or notice is through institutionalized inconspicuousness. In other words, the law does not systematically require penal officials and employees to know about, actively consider, or even provide notice of hidden sentences. Thus, court cases encourage the exact opposite, and even contemporary reform efforts do not do enough to alleviate the problem. As a result, even without problems of scope, dispersion, and variability, the law creates and perpetuates hiddenness.

Throughout the vast body of law that enacts, interprets, and enforces hidden sentences, no provision requires judges, lawyers, juries, police, prison officials, or other penal officials to be familiar with or even bear in mind hidden sentences' role in offenders' punishment and the penal system as a whole. Despite the creation of sentencing guidelines and recommendations in twenty-one states and the federal system, none of them incorporate hidden sentences into the process of weighing the appropriate prison or jail term.[179] The federal guidelines go perhaps the furthest, recommending that judges consider post-release hidden sentences at least when imposing a criminal fine.[180] This consideration comes into play, however, *only* when the hidden sentences are "punitive."[181] Since the Supreme Court has found virtually no hidden sentence punitive since the early twentieth century,[182] there is a clear argument that this provision of the guidelines likely has little practical impact.

Similarly, virtually no law requires these actors to notify arrestees, criminal defendants, or convicted offenders that hidden sentences exist—much less the extent and nature of the penalties they face.[183] In fact, extant judicial precedent holds the exact opposite. Prior to the Supreme Court's ruling in *Padilla v. Kentucky*, it was clear in eleven federal circuits and the vast majority of state courts that neither judges *nor* defense attorneys had *any* duty under the Fifth, Sixth, and Fourteenth Amendments to inform criminal defendants of *any* post-release hidden sentences prior to a guilty plea.[184] It goes without saying that a guilty verdict would not be invalidated because the defendant received no notice at conviction or sentencing, nor do defendants have any right to receive information about restricted rights after arrest, upon creation of a criminal record, or during imprisonment and probation.

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[179] Michael A. Wolff, *Incorporating Collateral Consequences into Sentencing Guidelines and Recommendations Post-*Padilla, 31 St. Louis U. Pub. L. Rev. 183, 187 (2011).

[180] U.S. Sentencing Guidelines Manual § 8C2.8(a)(3) (2014).

[181] *Id.* at § 8C2.8 cmt. 2.

[182] *See* Kaiser, *supra* note 9, at 3–12. The Court has considered even sex offender registration and civil commitment "remedial" and "non-punitive." Smith v. Doe, 538 U.S. 84, 94 (2003); Kansas v. Hendricks, 521 U.S. 346, 368–69 (1997).

[183] In 2010, twenty-six states required courts to notify defendants of potential deportation before accepting guilty pleas, and two required notification of restrictions on firearm possession and federal welfare benefits. UCCCA, *supra* note 13, at § 5 cmt. Yet by implying no other hidden sentences exist, "advising a defendant of some collateral sanctions without addressing all of them may be misleading." *Id.*

[184] 559 U.S. 356, 376 (2010); *see, e.g.*, Hutchison v. United States, 450 F.2d 930, 931 (10th Cir. 1971); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964); Meaton v. United States, 328 F.2d 379, 380–81 (5th Cir. 1964); United States *ex rel.* Durante v. Holton, 228 F.2d 827, 830 (7th Cir. 1956); *see also* Kevin O'Keefe, Comment, *Two Wrongs Make a Wrong: A Challenge to Plea Bargaining and Collateral Consequence Statutes Through Their Integration*, 100 J. Crim. L. & Criminology 243 (2010); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 Minn. L. Rev. 670 (2008); Gabriel J. Chin & Richard W. Holmes Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697 (2002).

In *Padilla* the Supreme Court ruled on the issue of notice for the first time.[185] The case dealt with the validity of a guilty plea that relied on defense counsel's erroneous advice that deportation was unlikely to result—despite deportation being virtually automatic upon conviction of transporting marijuana, the offense at hand.[186] The Court circumvented addressing the validity of the rule that hidden sentences require no notice, and instead found deportation to be a clear exception to it. Deportation, it said, is so severe, mandatory, and linked to visible sentencing that defendants must be informed of it.[187] This rule is not limited to misadvice but rather creates an affirmative duty for attorneys to inform their clients of potential deportation risks. Moreover, the information provided must be as clear as the instantly relevant immigration law; if the law clearly states deportation is automatic and definite, for instance, counsel must so state as well.[188] However, even *Padilla* did not deconstruct the long-standing rule that hidden sentences more broadly require no notice by counsel or the judge, nor did it directly question the rule's logical foundation.

At the root of this institutionalized inconspicuousness is the *idea*, the basic assumption, that hidden sentences are unintended side effects of "real" punishment. When federal circuit courts rule that constitutionally effective defense counsel need not inform clients about hidden sentences, they almost always do so through tautology, mis-citation of precedent, bald assertion, and other kinds of flawed reasoning that reveal such notions.[189] In the first such case, the Second Circuit simply proclaimed that requiring notice of hidden sentences would be "palpably unsound" in the absence of precedent to the contrary (though neither was there precedent differentiating visible and hidden sentences for such notice requirements).[190] The D.C. Circuit used nearly identical logic a decade later.[191] Later, a number of circuits used the Supreme Court's language in *Brady v. United States* that guilty pleas must be made by one "fully aware of the direct consequences" as precedent for the idea that hidden sentences require no notice[192]—even though *Brady* had

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[185] *Padilla*, 559 U.S. at 366–68; *see also* Chaidez v. United States, 133 S. Ct. 1103, 1107–11 (2013) (*Padilla* establishes "new rule" of criminal procedure).

[186] *Padilla*, 559 U.S. at 359–60.

[187] *Id.* at 369–70.

[188] *Id.* at 369.

[189] *See also* Kaiser, *supra* note 9.

[190] United States v. Parrino, 212 F.2d 919, 922 (2d Cir. 1954). The dissent argued, "The most my colleagues can show is that there are no precedents, on this point, adverse to defendant. I think we should not create one." *Id.* at 924 (Frank, J., dissenting).

[191] Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963).

[192] Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)). Circuit courts simply "presume[d] that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences." United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971); *see also* United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985); Armstrong v. Egeler, 563 F.2d 769, 800 (6th Cir. 1977); Nunez Cordero v. United States, 533 F.2d 946, 948 (9th Cir. 1976); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365–66 (4th Cir. 1973).

nothing to do with hidden sentences, and there is no reason to suspect that the "direct" comment was more than dicta.[193]

The empty rhetoric and absence of valid logical support for the rulings in these cases reveals that inconspicuousness is based only on the a priori assumption that hidden sentences are unimportant and undeserving of notice requirements. Likewise, when courts cite practical concerns that informing defendants of hidden sentences would place an unfair burden on judges and attorneys,[194] it shows they already presume hidden sentences are exempt from constitutional protections, because such protections are designed entirely toward justice for the offender and society at large. Convenience for attorneys and judges is a secondary problem that can only be justified when such core constitutional questions are already (unconsciously) resolved. Legalized inconspicuousness is thus a clear result of the assumption that hidden sentences are not primary, purposive punishments.

It is for this reason that the terminology of "hidden sentences" as opposed to "collateral consequences," "indirect consequences," "incidents of the sentence," "civil disabilities," and so forth is so important. *Words matter*. Anyone who studies the text of the law ought to know that it has real effects on both judges' interpretations and real-world impressions.[195] Even neutral-seeming language results from and reifies ideas.[196] Absent a change in the language that implies hidden sentences are merely accidental side effects of punishment, it is remarkably difficult to think of them otherwise. Even scholars and activists concerned directly with hidden sentences have rarely considered them as part and parcel of the penal system. They have instead used them only to bolster arguments against mass imprisonment or as a reentry problem. As a result, these scholars and activists have drawn little direct attention to the issue of hidden sentences.[197] Thus, quite apart from being a mere academic pursuit, renaming the laws at issue "hidden sentences" (or "extra-criminal sentences") is key to revealing them.

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[193] Multiple reasons support this conclusion. *See* Kaiser, *supra* note 9, at 13. For instance, *Brady* ruled valid pleas must be both voluntary and knowing, but the issue at bar was voluntariness (notice of hidden sentences concerns the knowledge prong). *Brady*, 397 U.S. at 748–50; *see also* Roberts, *supra* note 184, at 685–86. Likewise, *Brady*'s dicta on the knowledge prong was unlikely carefully chosen to distinguish between visible and hidden sentences: it was quoting a Fifth Circuit case that *also* had nothing to do with hidden sentences. Shelton v. United States, 246 F.2d at 572 n.2.

[194] *E.g.*, *Fruchtman*, 531 F.2d at 949 (hidden sentences "are so manifold that any rule requiring a district judge to advise a defendant of such a consequence . . . would impose an unmanageable burden on the trial judge"); United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963) (requirement to warn defendants of hidden sentences "would impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws").

[195] *E.g.*, H.L.A. Hart, The Concept of Law 292–93 (3d ed. 2012); Shlomith Rimmon-Kenan, Narrative Fiction: Contemporary Poetics 67–68 (1989).

[196] *E.g.*, Jeremy Bentham, Of Laws in General (H.L.A. Hart ed., 1970); Elizabeth Mertz, The Language of Law School 5–6 (2007). It is important, however, to note while words matter, so do the social and cultural contexts in which they are interpreted. John M. Conley and William M. O'Barr, Just Words 10–11 (2005).

[197] *See supra* note 23 and accompanying text.

It is important to note that there was eventually (sixty years after the first case on point) some resistance to the legislatively, administratively, and judicially sanctioned neglect that this subsection discusses. The American Bar Association promulgated a new set of standards recommending that both judges and defense counsel ensure defendants are aware of pertinent post-release hidden sentences before entering a guilty plea and after the court's issuance of a visible sentence.[198] Although the ABA Standards also encouraged legislatures to authorize judges to consider hidden sentences when imposing their own punishment, they simultaneously asserted that failure to notify defendants of or consider hidden sentences should never be grounds for later withdrawing a plea.[199] Other standards and commentators have issued similar recommendations.[200]

Moreover, 2010 witnessed *Padilla v. Kentucky* and the new Uniform Collateral Consequences of Conviction Act, both of which have promise for changing how defendants receive notice of hidden sentences and how judges consider them in relation to the visible sentence they impose. Although *Padilla* did not outright overrule the federal circuit courts' rule that competent counsel never need to inform defendants of hidden sentences, it carved out a remarkable exception due to the "unique nature" of deportation.[201] Because deportation (*a*) has a severe effect on offenders, (*b*) was linked to visible sentencing throughout the twentieth century, and (*c*) is now virtually a mandatory result of countless convictions, effective counsel must provide notice that it is a potential result of conviction.[202]

The key is that *Padilla*'s logic could be broadly applicable to many hidden sentences that are also (*a*) serious, (*b*) linked to visible sentencing, and (*c*) mandatory. The flexible nature of the notice required also suggests that hidden sentences with even one or two of these characteristics could trigger some sort of constitutional duty for counsel to provide notice. Likewise, the reasoning could easily be extended to the judge's duty in ensuring a plea is knowing and voluntary.[203] As such, a number of commentators have suggested that *Padilla* signals a potential change in the way the courts treat all post-release hidden sentences.[204]

As for the UCCCA, the new uniform law that proposes changes in collateral consequence policy, it focused primarily on reducing the impact of hidden sentences during reentry (by reducing their severity and number, by

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[198] STANDARDS FOR CRIMINAL JUSTICE THIRD EDITION: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, Standards 19-2.3, 19-2.4 (AM. BAR ASS'N ed., 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf [http://perma.cc/9KRP-DRYT].

[199] *Id.* Standard 19-2.4.

[200] *E.g.*, NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (2010); Chin & Holmes Jr., *supra* note 184, at 713–15.

[201] Padilla v. Kentucky, 559 U.S. 356, 365 (2010).

[202] *Id.* at 365–66.

[203] *Cf.* Brady v. United States, 397 U.S. 742, 748 (1970).

[204] *E.g.*, Kaiser, *supra* note 9; Love, *supra* note 15, at 756.

providing relief, etc.).[205] Three sections of the UCCCA, however, take laudable steps in addressing the knowledge problem itself. First, at arraignment or other notice of charges, defendants would be required to receive notice from a government representative (e.g., a prosecutor) of the existence of post-release hidden sentences and some important examples, and courts would be required to ensure defendants understand those penalties.[206] Like the ABA Standards, however, this UCCCA provision asserts that the "technical deficiency" in criminal procedure of failing to provide notice of hidden sentences ought not usually provide grounds for reversal. Second, during sentencing procedures, the judge must inform an offender that post-release hidden sentences exist, how more information on them can be found, and how relief might be obtained.[207] Upon release from prison, government officials must provide the same information. Third, the UCCCA requires a state to construct and publish a free, internet database of all of its post-release hidden sentence laws, addressing not only inconspicuousness but also the difficulties created by scope and dispersion.[208]

Unfortunately, both *Padilla* and the UCCCA are in danger of not living up to their promise. After five years, the UCCCA has been enacted only by one state.[209] Circuit and state courts are side-stepping *Padilla* and interpreting its rule as narrowly applicable only to deportation advice.[210] Some courts have even narrowed *Padilla*'s scope in the deportation context itself.[211] Moreover, no states have even adjusted their sentencing guidelines to take *Padilla* into account, much less apply it to other hidden sentences.[212] In effect, there are a number of disconcerting signs that contemporary reforms will follow the same path as earlier efforts that are now barely remembered.[213]

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[205] *See* UCCCA, *supra* note 13, at *Prefatory Note*.

[206] *Id.*, at § 5.

[207] *Id.*, at § 6.

[208] *See id.*, at § 4.

[209] Vt. Stat. Ann. tit. 13, §§ 8001–8017 (eff. Jan. 1, 2016).

[210] *E.g.*, United States v. Nicholson, 676 F.3d 376, 382 (4th Cir. 2012) (finding no requirement in *Padilla* to notify defendant of termination of government benefits); Brown v. Goodwin, No. 09-211 (RMB), 2010 WL 1930574, at *13 (D.N.J. May 11, 2010) (concluding that *Padilla* is "not importable" to hidden sentences beside deportation, like civil commitment); Webb v. State, 334 S.W.3d 126, 131 n.8 (Mo. 2011) (declining to rule as to whether *Padilla*'s notice requirement is applicable to parole evidentiary hearings); People v. Gravino, 928 N.E.2d 1048, 1055–56 (N.Y. 2010) (sex offender registration requirements not subject to *Padilla*'s rule); Commonwealth v. Abraham, 62 A.3d 343, 348 (Pa. 2012) (finding that *Padilla* did not require notice of pension forfeiture); State v. Trotter, 330 P.3d 1267, 1272–75 (Utah 2014) (concluding that *Padilla* should be narrowly construed and not applicable to sex offender registration).

[211] For instance, some courts found evidence that the defendant was aware of deportation consequences through the judge's notification or other means, so that counsel's non-advice was harmless. *See* United States v. Hernandez-Monreal, 404 F. App'x 714, 715 (4th Cir. 2010); State v. Martinez, 729 S.E.2d. 390, 392 (Ga. 2012).

[212] Wolff, *supra* note 179, at 187.

[213] For instance, there was a movement beginning in the 1950s and culminating in the late 1970s to recognize the detrimental effects of hidden sentences. *See* Love, *supra* note 126, at 1707–11. There were also reforms made to § 306.6 of the Model Penal Code, which actually recognized hidden sentences and provided means for courts to both relieve them and vacate

The problem is that *Padilla* and the UCCCA make laudable strides but are ultimately based on the old logics of "collateral consequences" and similar concepts. Absent a change in perspective that recognizes hidden sentences as primary, purposive punishment, there is little reason to address inconspicuousness—meaning hiddenness would persist even without problems of scope, dispersion, and variability. Hence, even contemporary progress on hidden sentences is ultimately in danger of perpetuating the exclusion of the hidden sentence from discussions of punishment "proper" and thus the problems identified in Part IV.

IV. The Detrimental Effects of Hidden Sentencing

Having established the importance of hidden sentences to both offenders' lives and the penal system as a whole, their essential nature as purposive punishment, and the ways that the law ensures they remain hidden, it is now possible to intelligently discuss the problems that such hiddenness poses. First, hiddenness contravenes any legitimate purpose of punishment that extra-criminal sentences could reasonably pursue. Second, hiddenness is fundamentally at odds with the democratic process and the rule of law. Thus, for extremely good reason, the knowledge problem ought to be urgently addressed.

A. Transparency as Necessary for the Purposes of Punishment

Judges and jurists have traditionally recognized four legitimate goals for punishment: retribution, rehabilitation, deterrence, and incapacitation.[214] Extra-criminal sentences as a whole and individually could theoretically

convictions based on them. This section, too, had little effect after its promulgation. Love, *supra* note 126, at 1711–13. Even the ABA Standards that advise attorneys to consider and notify clients of hidden *and* visible sentences have questionable effect in practice. *Id.* at 1713. Some reformers in the 1980s even exclaimed that collateral consequences would soon be extinct. *See* Gabriel J. Chin, *New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1797–98 (2012). However, the idea of "civil death" did not die as expected, instead it was transformed into the modern, more severe form of collateral consequences. *Id.* at 1798–82.

[214] *See Gerber*, 291 F.3d at 621–22 (considering prisoners' right to procreate through lens of all four purposes); Sanford H. Kadish, et al., Criminal Law and its Processes: Cases and Materials 79 (8th ed. 2007). *But see* James Fitzjames Stephen, 2 A History of the Criminal Law of England 81–82 (1883) (punishment is a healthy, advantageous expression of community hatred); Émile Durkheim, Division of Labor in Society 62–63 (W. D. Halls trans., 1984) (1893) (punishment is a necessary reaction of social solidarity symbolizing unchanged collective judgments); John Braithwaite, Crime, Shame and Reintegration 71–75 (1989) ("reintegrative shaming" as a fifth paradigm). Each of these, however, can be categorized underneath the four primary purposes. Hate and vengeance are simply a (fanatical) subset of retributivist goals. Durkheim's ideas, too, fall within retribution. Reintegrative shaming is a technique that can fulfill rehabilitation or specific deterrence, ensuring the offender successfully reenters society (and disintegrative shaming is retributivist). The important point, however, is that even if we break the purposes of punishment up into more than four categories, no alternative penological goals suggest that *hidden* sentencing is desirable.

serve all of these purposes, and this article assumes that some are in fact justified through such reasons (and many are justifiable but poorly tailored to meet their ends). For example, denying all felons the right to own and possess firearms does seem to serve the goal of incapacitation, may also provide just retribution, and could even deter and rehabilitate. That is a discussion beyond the scope of this article. The key point here is that as long as extra-criminal sentences are *hidden*, they can *never* effectively fulfill any of the legitimate purposes of punishment.[215] This subsection addresses each purpose of punishment in turn, and shows that each one counsels revealing the hidden sentence.

1. *Retribution*

Many believe criminal law exists because offenders deserve punishment, or because victims or society deserve their vindication. This is the retribution principle, the view that "punishment is justified by the moral culpability of those who receive it."[216] As H.L.A. Hart put it, retributive theories of punishment all share three characteristics: that persons may be punished if and only if they have committed a moral wrong, that the degree of punishment must match the degree of wrongfulness of the crime, and that such punitive suffering as a so-called "payment of one's debt to society" is itself just.[217] Thus, retribution is not vengeance, but rather the principle of proportionate, just deserts. This is the oldest and perhaps most commonly held notion of the purpose of the penal system. Even the idea of the criminal *justice* system embodies it.

Retributivist theory could clearly support some deprivations of rights for some offenders, insofar as the specific crime at issue justifies such abridgments. It is not clear, however, that it would support blanket rights restrictions for all offenders, all felons, or even all serious felons of a particular type. Retribution has the hardest time of all of the purposes of punishment when it comes to mandatory sentencing, precisely because it depends on the particularities of moral culpability and justice—and thus greatly relies upon mitigating and aggravating circumstances.[218] As such, true retributivists (rather than proponents of naked vengeance) would only support extra-criminal sentences that allow discretion and balancing compared to other punishments (for instance, punishing a libel perpetrator through a temporary abridgment of the freedom of the press).[219] In fact, incorporating such penal-

[215] *See* UCCCA, *supra* note 13, at § 4 cmt. ("Dispersal of these laws and rules defeats the purpose of having published codes in the first place.").

[216] Michael S. Moore, *The Moral Worth of Retribution*, *in* Responsibility, Character, and the Emotions: New Essays in Moral Psychology 179, 179 (Ferdinand David Schoeman ed., 1987).

[217] *See* H.L.A. Hart, *supra* note 140, at 231.

[218] *See* Grant et al., *supra* note 7, at 944.

[219] *See* Velmer S. Burton, Jr. et al., *Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 Fed. Probation 52, 60 (1987) ("[D]epriving offenders of rights, when no direct relationship exists between the conviction and the right which is re-

ties directly into judicial sentencing could greatly further proportionate justice that is closely tailored to each offense.

Nevertheless, there is very little reason for a retributivist to *hide* punishment. Exacting justice *in secret* from the punished simply makes no sense.[220] Imagine an example: a prisoner is forbidden to pray, and after trying, is physically restrained and forced into solitary confinement. While there, she has all of her religious possessions stolen or destroyed by the guards. She never receives a "serious, physical injury" that would allow her to bring a civil rights action under the PLRA, but since nobody informed her about the requirements of the PLRA, she files a case. It takes nearly a year to get to a judge, at which point it is dismissed, often without opinion. Only then—maybe two years after being incarcerated—does she discover that either her right to religious exercise or her right to access the courts has been abridged. Because the system provides no notice of either deprivation, she is left unsure exactly which right she lost, to what extent, and when she actually lost it. Such non-information serves no retributive purpose. Just as retribution turns upon knowledge of the offense committed—on the voluntary choice to commit a moral wrong[221]—it also requires knowledge of the punishment in order to be proportionate and just.[222]

2. *Rehabilitation*

Rehabilitation is, in many ways, a noble yet abandoned quest of an earlier age in this country. Before the "nothing works" movement of the 1970s, the penal system had focused for the majority of the century on rehabilitative goals.[223] The basis of rehabilitation is treatment of offenders and successful reintegration into society, without recidivism.[224] Despite its fall from grace, rehabilitation is still a central part of the U.S. penal system and a recognized purpose of punishment; prisons themselves were rehabilitative institutions that are adapted for other purposes in the modern era.[225]

Scholars and activists tend to assume or simply assert that extra-criminal sentences "do not serve a rehabilitative function and may even actively thwart attempts at rehabilitation by preventing the ex-offender's reintegration

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stricted, is an unnecessarily punitive approach that serves no legitimate state purpose."); Demleitner, *supra* note 7, at 160 (arguing that to be retributive, hidden sentences need to be designated during sentencing and applied proportionately to the crime).

[220] *Cf.* Gardner, *supra* note 23, at 108–09 ("Punished persons characteristically are aware of their suffering at the time the actions inducing the unpleasant feelings occur.").

[221] *See* HART, *supra* note 217.

[222] Consider also the scenario suggested by Gardner, *supra* note 220, regarding deterrence: What if the offender never discovers that certain rights have been abridged? The scenario is just as bad through a retributive lens, since it is debatable whether a punishment that is never experienced is retribution at all.

[223] *See* DAVID GARLAND, CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 150 (2001).

[224] *E.g.*, Leon Radzinowicz & J. W. Cecil Turner, *A Study of Punishment I: Introductory Essay*, 21 CAN. B. REV. 91, 91 (1943).

[225] *See* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 40 (2011).

into society."[226] The contemporary reentry movement is based almost exclusively on the idea that excluding ex-offenders from mainstream society unfairly creates second-class citizens.[227] Moreover, because it serves to isolate them and deny them opportunities afforded to other citizens (say, for public housing or productive opportunity), extra-criminal sentencing actually promotes recidivism.[228] By this logic, not only do extra-criminal punishments not further rehabilitative goals, they actively *increase* crime rates.

In some ways, this argument has merit—at least insofar as it refers to permanent and automatic deprivations or restrictions. Nonetheless, restrictions on offenders'—and even ex-offenders'—rights could serve a very simple and legitimate rehabilitative goal; it creates the opportunity to earn rights and privileges back (for instance, after imprisonment), offering a reason to improve behavior and engage with treatment programs. This notion has justified good-time credit in prisons for quite some time: if a prison rewards offenders for not breaking institutional rules or committing further crimes, they are far more likely to follow those rules.[229] Actually, the idea that reward is a stronger incentive than punishment is a basic principle of psychology.[230]

Yet, even if one accepts this rationale for restricting offenders' rights, it is not clear how *hidden* sentencing policies further rehabilitative goals in any way. In order to provide a reinforcing incentive for offenders to engage in lawful behavior, the offenders would have to be notified that they have lost those rights, would have to consciously experience the dissatisfaction with the rights' absence, and would have to be aware of the sorts of actions that have the potential to restore them. The current absence of information can serve no such function—hence so many scholars' and activists' assumptions that extra-criminal sentences are fundamentally at odds with rehabilitative purposes.

3. *Deterrence*

The penal system has long focused on deterrence as well. During the rehabilitative age of the early and mid-twentieth century, one of the major objectives of penal intervention was to ensure offenders learn that crimes are penalized (frequently and harshly) so that they will refrain from committing future crimes.[231] This goal of individualistic learning is commonly called "specific deterrence" and relates strongly to overriding concerns about reducing recidivism during the rehabilitative era.[232] In fact, the failure of ex-

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[226] Demleitner, *supra* note 7, at 160; *see also* Mukamal & Samuels, *supra* note 7, at 1516–18 (suggesting ways in which state and federal government can help lower barriers to reentry and offender rehabilitation).
[227] *E.g.*, Demleitner, *supra* note 7, at 158–59; Ewald, *supra* note 9, at 104–05.
[228] *Cf.* Clear & Frost, *supra* note 122.
[229] Garland, *supra* note 223; Simon, *supra* note 119.
[230] *See generally* B. F. Skinner, Science and Human Behavior (1953).
[231] *See* Feeley & Simon, *supra* note 121, at 454–55.
[232] *See id.*

isting treatment techniques to significantly reduce reoffending rates was a key motivator for declaring that "nothing works" in rehabilitation and specific deterrence, prompting a turn toward harsher punishment.[233]

Even after the advent of the "war on crime" and "law and order politics," though, deterrence remained a central goal of penological practitioners and researchers. Its form changed, however, focusing on "general" rather than "specific" deterrence.[234] The idea is that if members of society at large know crime brings a terrible penalty, they will conduct a rational, utilitarian calculus to avoid it because the costs outweigh the benefits: "When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him . . . from the commission of that act."[235] The essential goal of both kinds of deterrence, then, is to make potential offenders aware of the pain that results from criminal acts, so that they will refrain from committing them.

The foundational logic of deterrence, then, is reduced crime rates through *knowledge* of its consequences. Extra-criminal penalties could, in theory, play a key role in deterring crime, since potential offenders may frequently care more about, say, their parental or future employment rights than they do about spending time in prison. The key part of deterrence, however, is not the severity of the threatened punishment but rather the potential offender's *knowledge* of that punishment and the *expectation* that it will likely occur.[236] Hiddenness is therefore fundamentally contradictory to any deterrent logic.

4. *Incapacitation*

By the 1990s, the penal system had largely abandoned even the retributivist rationales of the political, "tough on crime" rhetoric; instead, it had come to focus on the actuarial management of dangerousness, on general deterrence, and above all, incapacitation.[237] It seems axiomatic that prisons and probation are designed to prevent convicted criminals from interacting dangerously with the world around them.[238] Originally, this was a goal while rehabilitative treatment could be practiced; now, however, incapacitation has become a goal in itself: protect the public at all costs.[239]

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[233] Robert Martinson, *What Works? Questions and Answers About Prison Reform*, ATLANTIC MONTHLY, Spring 1974, at 25.

[234] *See* Feeley & Simon, *supra* note 121, at 454–55.

[235] JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1843), *reprinted in* 1 THE WORKS OF JEREMY BENTHAM 367, 396 (John Bowring ed., 2001).

[236] Johannes Andenaes, *General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 965–70 (1966) ("[W]hat is decisive is not the actual practice but how this practice is conceived by the public.").

[237] Feeley & Simon, *supra* note 121, at 452–54.

[238] FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995).

[239] KATHERINE BECKETT & THEODORE SASSON, THE POLITICS OF INJUSTICE: CRIME AND PUNISHMENT IN AMERICA 57–60 (2000).

As one might expect, incapacitationists may support extra-criminal sentencing—especially those that are specifically designed to prevent access to future offenses and victims.[240] Disallowing felons from possessing firearms is clearly incapacitative of their ability to commit future gun violence, and preventing them from serving in public office also prevents them from committing future public corruption offenses. These types of penalties are overbroad and inefficient, since they target felons generally rather than, say, offenders convicted of prior gun or public corruption crimes.[241] Nevertheless, extra-criminal sentences can certainly incapacitate, leaving only the question of how to appropriately tailor them.

Yet, even without the concerns of fairness, rationality, and compassion that appear in other purposes of punishment, incapacitationist theory has little support for *hidden* sentences. It still makes more sense to *inform* offenders that they are incapacitated not only physically, but also civilly, politically, and socially.[242] Consider the earlier example: if a prisoner has no notice of restricted court access under the PLRA, he may bring suits that are destined for dismissal—which happens quite frequently.[243] Such behavior is quite wasteful because it forces courts and attorneys to take the time, money, and effort to address a meritless claim, and meanwhile, it allows the "dangerous" offender another way to interact with the world beyond the prison. Similarly, most voting fraud in the United States can be traced to felons who were never informed of their abridged voting rights, tried to vote, and were then re-arrested—while some actually succeed in voting.[244] Such senseless policy ultimately raises recidivism rates and thereby public fears, exacerbating the problems incapacitation is designed to fix. The same situation exists with extra-criminal sentences designed to address more serious safety concerns, such as with ex-offenders who come to illegally possess and use guns because either the offenders or the distributors are unaware that a restriction applies. In short, incapacitation, like the other legitimate goals of punishment, is plainly best furthered by providing notice of the hidden sentence.[245]

[240] *See* Demleitner, *supra* note 9, at 1625–30; Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 606 (1997). *But see* Weiman, *supra* note 36, at 599–600 (hidden sentences increase recidivism rates).

[241] *See* Ewald, *supra* note 9, at 99–100.

[242] *E.g.*, Lambert v. California, 355 U.S. 225 (1957); United States v. Bethurum, 343 F.3d 712 (5th Cir. 2003); Saadiq v. State, 387 N.W.2d 315 (Iowa 1986); *see also* UCCCA, *supra* note 13, at § 6 cmt. ("The point of notice is not fairness to the defendant in deciding how to proceed; the conviction by this stage is a fact. Rather, formal advisement promotes obedience to the law. If, for example, individuals convicted of felonies do not know they are prohibited from possessing firearms, they may violate the law out of ignorance when they would have complied with the law had they known.").

[243] Ethan Rubin, *Unknowable Remedies:* Albino v. Baca*, The PLRA Exhaustion Requirement, and the Problem of Notice*, 56 B.C. L. REV. E-SUPPLEMENT 151, 153–54 (2015).

[244] JUSTIN LEVITT, BRENNAN CENTER FOR JUSTICE, THE TRUTH ABOUT VOTER FRAUD 9–10 (2007); Demleitner, *supra* note 7, at 157.

[245] Even with incapacitative logic strained to its breaking point, with theoretically no concern for rationality or efficiency and therefore no particular reason to *reveal* hidden sentences, this logic still has no particular reason to *hide* them in the first place. In other words, even this

B. Transparency as Necessary for the Democratic Process and the Rule of Law

In addition to furthering each legitimate purpose of punishment, transparency is a basic condition for many democratic ideals. Representative democracy requires open information to a large extent, because such a system of government relies on the dual notions of public debate and political accountability.[246] The idea of public participation in voting relies on at least some informed discussion of policy alternatives, and the idea of elected representatives presumes a minimum level of accountability. Both are worthwhile ideals—hence the crucial First Amendment freedoms of speech, press, assembly, and petition.[247]

Policies that are hidden from the public eye necessarily contravene those ideals. As anyone familiar with tax policy knows, the public need not be aware of the intricacies of every law (though life might be better if it were[248]). Still, it is offensive to democratic sentiments to contemplate an entire body of law of which the public has not even heard. The same can be said of a vast system of 35,000 laws that are unfamiliar to a large proportion of judges, lawyers, legislatures, and penal officials. As James Madison himself said,

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[249]

Without public and professional knowledge on extra-criminal sentences—without transparency—there can be no in-depth research on the topic, no outside scrutiny, no consideration of best practices, no dialogue, no progress.[250]

Furthermore, lack of transparency is contrary to the principles of rule of law, another essential American ideal. The consistent and predictable laws of the land ought to supersede arbitrary action by government officials, and to do so, the laws must be transparent to both the public and the officials them-

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extreme form of incapacitation is neutral on the knowledge problem—so that fundamental American principles (*supra* Part IV.B) still clearly weigh for transparency.

[246] *E.g.*, Charles F. Bahmueller et al., Elements of Democracy: The Fundamental Principles, Concepts, Social Foundations, and Processes of Democracy 106–07 (2007).

[247] *See generally* Alexander Meiklejohn, Free Speech and its Relation to Self-government (1948).

[248] *See generally* Sidney Verba et al., Voice and Equality: Civic Voluntarism in American Politics (1995).

[249] Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison 103, 103 (Gaillard Hunt ed., 1910).

[250] Moreover, if they are punishments as Part II.C argues, they also violate separation of governmental powers: they are legislative punishments that can fairly be called bills of attainder.

selves.[251] For instance, before holding a defendant for a crime that is not "inherently" wrong, the prosecution must demonstrate that the person knew or should have known (e.g., because the public at large received notice) that the act was illegal by law.[252] Similarly, the primary reason *stare decisis* is so important is that fair justice and social order require consistent, predictable legal principles that citizens can learn and upon which they can rely.[253] Constitutional principles like due process and effective assistance of counsel revolve particularly around the idea that criminal defendants ought to know and understand the consequences that can result from criminal acts and convictions.[254]

Such lack of fundamental fairness is the major reason that courts and commentators have questioned whether defendants deserve to be informed of hidden sentences.[255] It is also the major concern of the notice provisions of the NICCC and the focus of *Padilla v. Kentucky*. Put simply, "[i]ndividuals charged with criminal offenses should understand what is at stake."[256]

Core democratic values are at stake as well. To the extent that freedom and equality are fundamentally part of a democratic society, it is difficult to imagine how a massive system of 42,000 punishments that permanently subordinate an enormous segment of the population can ever be democratic, whether those sentences are hidden or not.[257] Perhaps it is this fundamental conflict with their stated principles that keeps Americans in willful denial about hidden sentences' true nature.

V. Conclusion—Reconceptualizing and Revealing the Hidden Sentence

There are more than 35,000 laws across the United States that impose over 42,000 deprivations or harms on criminal offenders as a result of their

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[251] *E.g.*, A.V. Dicey, The Law of the Constitution (1885); Joseph Raz, *The Rule of Law and its Virtue*, 93 *L.Q.R.* 195 (1977).

[252] This is the commonly known distinction between *mala in se* and *mala prohibita*: acts that are inherently wrong and acts that are only wrong because prohibited by law. The latter require proof of notice, while the former are assumed to be known by all citizens. *E.g.*, Lambert v. California, 355 U.S. 225, 229 (1957). For both types of crimes, knowledge—actual or assumed—is fundamental to prosecution.

[253] *E.g.*, Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 Wash. & Lee L. Rev. 411, 414–15 (2010); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1995) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"). There is tension between *stare decisis* and the idea that law should change with the time—and the idea that judges sometimes rule incorrectly. *E.g.*, Oliver Wendell Holmes Jr., *The Path of the Law*, *in* Collected Legal Papers 167, 187 (1920). Even so, some legal consistency is fundamental to the current American system.

[254] *See, e.g.*, Brady v. United States, 397 U.S. 742, 747–48 (1970).

[255] *See, e.g.*, Chin & Holmes Jr., *supra* note 184; Roberts, *supra* note 184; *see generally* Nancy Morawetz, *Determining the Retroactive Effect of Laws Altering the Consequences of Criminal Convictions*, 30 Fordham Urb. L.J. 1743 (2003).

[256] UCCCA, *supra* note 13, at § 5 cmt.

[257] *Cf.* Ewald, *supra* note 9, at 102–04.

conviction, criminal record, or other criminalized status. That is an average of 2,100 laws per jurisdiction that are by definition punishments and that have serious impacts on offenders' rights and opportunities in all spheres of their lives. These penalties are what is truly at stake in countless penal proceedings. Yet, thanks to their sheer scope, their dispersion across legal codes, their substantial and unpredictable variability, and their institutionalized inconspicuousness at law, these primary, purposive punishments are hidden sentences.

By illustrating these points, this article has argued that there is no legitimate purpose of punishment that would justify such hiddenness. The simple fact is, no matter what purpose the penal system fulfills, no matter what penological goal we believe in, our policy should be to reveal the hidden sentence both publicly and at sentencing. Extra-criminal sentencing can and should serve the same goals we accept for the rest of the penal system. Simultaneously, this knowledge deficit has disastrous impact on the principles of American democracy and rule of law, so there is absolutely no justification for keeping part of an offender's sentence hidden.

The pertinent question, then, is how to fix this knowledge problem—how we ought to provide notice to offenders, penological experts, and the public that hidden sentences exist, what they are, and whom they impact.[258] The answer is plain: hiddenness can be remedied by resolving the problems of scope, dispersion, variability, and inconspicuousness.

A. *Require Public Notice and Active Judicial Consideration*

Even without a direct analysis of the knowledge problem, reentry activists interested in repealing or mediating hidden sentences have already implicitly recognized the difficulties it creates, so that many of the tools to resolve the causes of hiddenness already exist. An obscure provision of the Court Security Improvement Act of 2007, for instance, ordered the National Institute of Justice to conduct a study to identify all legislatively and administratively enacted hidden sentences in every U.S. jurisdiction.[259] The result was a single, comprehensible database: the NICCC. Although it only includes laws identified as collateral consequences rather than all hidden sentence laws,[260] the NICCC could significantly remedy the problems of scope and dispersion, and even help combat the variability in hidden sentences,

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[258] Answers for many such questions can be found by considering the approaches of our peer nations. Comparative law may be complex to apply because national history and legal context can differ so much, but the creative ideas that can be drawn from such comparison are often still quite productive. Unfortunately, to the author's knowledge, there is no such body of knowledge yet from which to draw. Based on a number of informal conversations with scholars from nations around the world, hidden sentences certainly exist but are similarly unrecognized in all of them—suggesting a number of areas of fruitful, future study.

[259] Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543 (2008).

[260] *See supra* notes 24–27 and accompanying text.

because it is a publicly available internet database that can be searched by jurisdiction, offense type, penalty type, and other characteristics. The UCCCA, too, has a section designed specifically to mediate the problems of scope and dispersion; if enacted, it would have created a searchable database similar to the NICCC in every jurisdiction.[261]

Meanwhile, other provisions of the UCCCA alongside *Padilla v. Kentucky*'s new ruling have begun to undo the legally sanctioned inconspicuousness that keeps attention away from hidden sentences. By these rules, criminal defendants must be made aware of at least some hidden sentences, and judges and lawyers must therefore consider them. These are crucially important efforts since, in many ways, inconspicuousness ensures that extra-criminal sentences remain hidden, regardless of whether issues of scope, dispersion, and variability are addressed. In fact, it may be the most important cause of hiddenness: the first three issues deal with the *accessibility* of knowledge on hidden sentences, while the fourth addresses its *actual usage* because it affects judges' and attorneys' awareness of hidden sentences, their incentives to apply that knowledge, and their habits of actually doing so.

Still, it is unlikely that the knowledge problem could be addressed only by reversing the doctrinal basis for inconspicuousness, since all four reasons for hiddenness are intimately linked. For instance, in creating inconspicuousness, courts explicitly or implicitly relied on the practical difficulties created by the scope, dispersion, and variability of hidden sentence law.[262] As *Padilla* recognized, though, it would actually be quite simple to inform criminal defendants of potential extra-criminal penalties that await them.[263] The UCCCA suggests that very simple lists be given to offenders that summarize the types of hidden sentences they may face and makes clear that they should seek specific information given their offense type, their jurisdiction, etc.[264]—the precise type of information now readily available via the NICCC. The proposed lists that provide notice are "modest," and could be given in quite economical ways: through pamphlets, mailings, recordings listened to by a group, and so forth.[265] One expert also suggests that jurisdictions could create "cheat sheets" that list the most relevant hidden sentences for the most common offenses.[266]

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[261] UCCCA, *supra* note 13, at § 4.
[262] *See supra* note 190.
[263] *See* Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010).
[264] UCCCA, *supra* note 13, at §§ 5–6.
[265] *Id.*
[266] For instance, a "cheat sheet for a particular state might contain the following lists:

> The immigration consequences of the twenty-five most common offenses of conviction.
> Other major collateral consequences of the twenty-five most common offenses of conviction.
> Crimes leading to loss of public benefits.
> Crimes leading to loss of parental or other family rights.
> Crimes leading to sex offender registration, notification, and incarceration.
> Crimes leading to the loss of the right to vote, serve on a jury, hold office or possess a firearm.

B. Reform Terminology to Recognize Primacy, Purposiveness, and Punitiveness

Unfortunately, these changes have had little on-the-ground impact. *Padilla* and the UCCCA are in serious danger of being minimized and overlooked, so that lawyers, judges, and public officials have little institutionalized reason to use and popularize the NICCC. In the face of the simple tools that already exist for learning and understanding hidden sentence law, the "practical concerns" that objectors cite belie the true problem: many simply believe or assume that hidden sentences are unworthy of attention—or perhaps that offenders are unworthy of receiving such mental effort.[267] Given current American attitudes that look down on offenders as unwelcome and often second-class citizens, such assumptions might be expected even among legal practitioners with the noblest of intentions. Thus, there is more work to be done to contravene those assumptions at a basic level.

The language and logic of "collateral consequences" and "incidents of punishment" permeate the NICCC, the UCCCA, *Padilla*, and related efforts to foster change. At its core, such logic inaccurately implies that hidden sentences are not "real" punishment and are rather simply accidental side-effects of it—the exact impressions that prevent judges and lawyers from taking responsibility for them and feeling that hidden sentences are as important as visible ones. Rooted in the language itself, this impression will be difficult to change no matter how many rational arguments are presented to prosecutors, defense attorneys, judges, and other legal actors that outline the benefits of understanding and paying attention to hidden sentences. For this reason, policy reforms must start using more ontologically accurate language to describe these penalties.[268] "Extra-criminal sentences" accurately identifies their primary, purposive, and punitive nature while acknowledging their frequent codification outside criminal codes (and it does so without inaccurately implying they are unintended civil disabilities), but other terms could theoretically pursue the same ends.[269]

C. Create Extra-Criminal Sentencing Sections Within Criminal Codes

Besides terminology, new changes need to reflect the more basic reality that hidden sentences ought to be considered punishments equal in importance to visible ones. The NICCC and UCCCA, for instance, aim to create

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Any available methods under state law for relieving collateral consequences."

Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 How. L.J. 675, 686–87 (2011).

[267] *See supra* note 190 and accompanying text.

[268] *See also* Travis, *supra* note 9, at 75, 77.

[269] Although empirically accurate for describing the current state of affairs, "hidden sentence" would ironically create some of the same problems as "collateral consequence" if used to codify a penalty. If we want to *fix* hiddenness, codifying "hidden" would be odd.

accessible databases that are not actually positive law, while the ABA Standards recommend all post-release hidden sentence laws in each jurisdiction be formally moved into their own separate section of legal code. The UCCCA (and presumably others) explicitly rejected this approach as both unnecessary and unproductive, because the penalties were originally written in such varied contexts and might be unintelligible collected into one place.[270] This shortcut misses an opportunity to confer legitimacy on the idea of paying attention to hidden sentences. Legislatures have recodified countless laws into their own, comprehensible sections of state and federal law (Government Codes and Housing Codes are good examples) that further both political and public understanding. Hidden sentences ought to be moved to their own section of federal and state penal codes, perhaps entitled the Extra-Criminal Sentencing Code.[271]

Such codes would need to include both post-release hidden sentences currently referenced by the term "collateral consequences" *and* hidden sentences that impact offenders before their release into communities. The same is true of the NICCC, the UCCCA, and other reform efforts. This article has shown that there is little practical difference between pre-release and post-release penalties regarding their status as primary, purposive, punishments.[272] If one can be considered part of offenders' punishment, so can the other. Indeed, this article has also shown that there is rarely if ever a clear defining line that allows categorization of hidden sentences in that way.[273] Similarly, the NICCC, the UCCCA, and other solutions to hiddenness could benefit from incorporating judicial decisional law that imposes hidden sentences independent of statutory and administrative rules.

D. Adjust Legal Education and Policymaking Approaches

Another necessary change is in the way judges, lawyers, and other practitioners are educated. Casebooks and courses on criminal law, constitutional criminal procedure, and criminal process should spend significant time on hidden sentences, their ramifications for offenders, their legal history, and contemporary changes in that law. The administrative arms of federal and state judiciaries ought to adjust their training programs to ensure that judges, prosecutors, probation officers, and other officials are familiar with hidden sentences and can adequately communicate their significance to offenders. Since the resources to do so already exist, all it would take is attention to them.

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[270] UCCCA, *supra* note 13, at § 4 cmt.

[271] This comment is not meant in any way to diminish the importance of the NICCC and its upkeep. Even recodifying hidden sentences would not create a searchable, publicly accessible database that would be useful for legal researchers, academics, offenders, and the public at large. The NICCC and such recodifications would be separately useful and mutually beneficial to one another.

[272] *See supra* Part II.

[273] *See supra* Part I.

Similarly, if hidden and visible sentences are of equal importance, then legislators, judges, and administrative policymakers ought to give them equal scrutiny. Many reformers flatly argue extra-criminal sentences are overbroad, unfair, and unproductive for any legitimate purpose of punishment and therefore that all or most should be repealed.[274] This article, to the contrary, is wary of such blanket claims. Many extra-criminal sentences are justifiable under some or all of the purposes of punishment, or would be if they were not hidden. Therefore, it is important to apply the same careful analysis of punitive ends to hidden sentences that we should for visible ones. Moreover, thoughtful consideration of which extra-criminal sentences most productively further punitive goals would have the important benefit of making hidden sentence law easier to know and understand, because it would replace variability with some predictability.[275]

E. Consider Modifying Judicial Sentencing Procedures

Finally, we could benefit from considering the most radical-seeming implication of this article's arguments. If hidden sentences are primary, purposive, and punitive, then perhaps all extra-criminal punishment should be incorporated into the judicial sentencing process, eradicating the difference between hidden and visible sentences. The justification for differentiating between them is certainly shaky given the actual qualities of hidden sentences. Although it is unclear whether this hypothetical policy change would be worth it, it is useful to consider how it would actually look in practice.

If extra-criminal sentences were incorporated into judicial sentencing procedures, judges would simply have the option to incorporate extra-criminal sentences into the punishment. All they would need is the jurisdiction's catalogue of potential penalties as a reference—a solution that already needs to be implemented given the UCCCA, *Padilla*, and the ABA Standards. The process would ultimately look remarkably like conditions of probation and therefore might be *even simpler* than other reform options in that way. Judges would likely develop a standard list of extra-criminal sentences for each type of crime, potentially sorted by severity and criminal history (as sentencing guidelines currently are), and these penalties would be formally incorporated into the court's sentencing procedures.[276] The real difficulty would be hidden sentences that accrue at pre-trial detention, creation of a

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[274] *See, e.g.*, Demleitner, *supra* note 7, at 153; *see generally* Love, *supra* note 15.

[275] *See also* Travis, *supra* note 9, at 76–77.

[276] Of course, it is possible that adding extra-criminal sentences into judicial procedures in this way would reintroduce levels of discretion that have not been seen since the pre-guidelines eras. Transparency, the key problem of this article, would be remedied while other problems would be seemingly created. However, it is not clear that arbitrariness (the key problem of high levels of discretion) does not already exist in hidden sentence law; in fact, the arbitrariness stems not just from judges but is spread throughout societal decisionmakers. *See supra* tbl.5 note and accompanying text. Revealing the hidden sentence would therefore not cause this problem but reveal it as well, to the extent that it exists.

criminal record, and other moments that do not require a determination of guilt. But that is a subject for another time. The point is that revealing the hidden sentence is not all that difficult.

Progress is being made, but we should not squander this moment of opportunity by allowing hidden sentences to once more recede into the shadows. It is a basic principle of criminal law that judges and attorneys have an affirmative duty to carefully consider the punishments offenders face and to ensure they are fully informed of them. It is a basic principle of jurisprudence that punishments ought to be tailored to pursue legitimate purposes of punishment. It is a basic principle of democracy that policymakers and the public should openly deliberate about those punishments and their goals. The key, then, is to recognize that those principles exist for *all* primary, purposive punishments—visible *and hidden*. Each and every reform suggested by this article—alongside many of the reforms proposed by the UCCCA, *Padilla*, and other commentators—makes perfect sense from that perspective. Extra-criminal sentences are primary, purposive punishments. They should be treated with the same transparency as are other punishments at law.