THWARTING A NEW START? FOREIGN CONVICTIONS, SENTENCING AND COLLATERAL SANCTIONS

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With almost 33.5 million foreign-born individuals in the United States in 2003,[1] foreign convictions play an increasing role in the U.S. criminal justice system. Intending immigrants, visitors and even returning permanent residents may be rejected at the border because of their criminal record, even if the conviction occurred abroad. Once citizens or non-citizens with a criminal conviction in their past enter the United States, the foreign criminal conviction may continue to play a role in their lives. It can be used to enhance a criminal penalty should they run afoul of the law. It may also trigger a host of collateral sanctions. These are sanctions that befall a criminal offender, either automatically or through an administrative process, after the conviction and independent of the sentence. Among such collateral sanctions are disenfranchisement, the denial of welfare benefits and public housing, sex offender registration, deportation, bars on employment, the denial of the right of serve on a jury, and the revocation of a driver=s license. The violation of these sanctions, which are often euphemistically called Acivil disabilities,@ may expose those with a prior criminal record to further criminal action.

Foreign convictions could be deemed merely one aspect of the role convictions obtained in another jurisdiction should play at sentencing and afterwards. Florida, for example, has disenfranchised individuals with convictions from other state jurisdictions upon their moving into the state, even though they had voted in their former home.[2] Collateral sanctions derived from convictions imposed by a different sovereign may highlight the potential unfairness of such provisions. In addition, they pose specific problems at a time the immigrant population has been growing and access to information about foreign convictions has improved. While the use of foreign convictions at sentencing may be acceptable, its role should be questioned when collateral sanctions are at issue. A discussion of foreign convictions highlights the unfairness of the scope and number of collateral sanctions currently in use in the United States.

Finally, foreign convictions crystallize the question of our self-conception. Why do we increasingly deny individuals the right to a fresh start? Why do we expand the scope and breath of collateral sanctions and apply them to an ever larger number of persons with criminal records? Ultimately, as a society we limit the ability of individuals to rehabilitate and reintegrate themselves. This is particularly jarring as the United States conceived of itself as a country of opportunity that was willing to take in even criminal offenders and allowed them a fresh start. That seems no longer true today.

This article begins by recounting America=s history as a country of immigration welcoming all, a concept that seems to run counter to increasing entry restrictions. In Part II, it focuses on the use of criminal convictions at sentencing and as a prerequisite for collateral sanctions. Part III proposes a Anew start,@ not only for immigrants but for all criminal offenders. The focus should be on restricting collateral sanctions to a small number, moving away from additional punishment and the denial of societal membership. A risk-based analysis should guide the selection and application of collateral sanctions.

I. Entry Restrictions: Collateral Sanctions and Civil Disabilities

Throughout its history the United States considered itself a country of immigration. Despite its reputation it had substantial restrictions on immigration, most of them race-based.[3] In the late 1800's, it added exclusion provisions for some criminal offenses. Initially those centered on morals offensesCprostitution. The restrictions focused not only on individuals who had prior criminal convictions for such offenses but also

extended to those who had engaged in such conduct without ever having been legally sanctioned. In addition, the law excluded those who planned to engage in prostitution. While prior convictions could serve as evidence of past conduct or future intentions, they were not necessary. For that reason, the exclusion provisions were more than collateral sanctions.

Collateral sanctions are considered to be only consequences arising directly from a criminal conviction. The ABA Standards on Collateral Sanctions distinguishes these from civil disqualifications which may flow from a criminal conviction and is imposed by a court, an administrative agency, or an official.[4]

By the early twentieth century, more criminal exclusion grounds were added. Today we have myriad provisions excluding non-citizens from the United States because of their past criminal record. Non-citizens ineligible for visas and admission include those who have been convicted of a so-called crime of Amoral turpitude@ or a controlled substance offense.[5] Multiple criminal convictions leading to five or more years of confinement also lead to inadmissibility.[6] In addition, numerous criminal and terrorist exclusion grounds focus on the non-citizen=s underlying activity. These include also individuals who Aha[ve] engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status@[7] and those Awho the consular officer or the Attorney General knows or has reason to believe@ engages or assists in human trafficking, money laundering, terrorist activities, and other select illegal activity.[8]

Criminal exclusion grounds, therefore, fall into three categories. First, those based on past criminal convictions, abroad or in the United States, are collateral sanctions as they flow directly from one=s criminal record. Second, those based on prior illegal conduct, abroad or in the United States, constitute disabilities, for which a criminal conviction would serve as proof. However, no such conviction is required. Exclusion is mandatory upon a finding of such conduct. Third, those based on future illegal conduct are specific risk-based exclusion grounds which rely solely on the threat a non-citizen poses once in the United States. While the first two grounds may be risk-based, they respond to additional concerns. Foremost among them is the state=s desire and ability to admit only those individuals with an unblemished past. The state may demand from those to whom it opens its borders that they are free of any serious criminal record.[9]

It has been impossible for those outside the United States to challenge a visa denial in U.S. courts, even though it constitutes a disqualification flowing from their foreign conviction. Exclusions based on a prior criminal record are mandatory, unless the non-citizen=s conviction is covered by an exception or the Attorney General grants a waiver. The grant or denial of a waiver, however, is entirely discretionary and not reviewable judicially.[10]

In a state-centered system, the United States has the right to exclude those it considers undesirable unless it runs afoul of its international obligations.[11] However, the existence of such a right does not justify it. While the United States has the right to protect its territory and residents from criminal activity, the exclusion provisions based on prior criminal records are not risk-based. They derive from a state-centered regime in which countries are assumed to have the right to choose its immigrant and visitor population. This is done largely positioning the non-citizen=s rights against those of the state, without consideration of the potential rights of those interested in having the non-citizen come to the United States. While a waiver provision exists for close relatives of U.S. citizens and permanent residents, it is very narrowly drawn.

Entry restrictions based on criminal records have become of greater salience with the institution of more efficient screening devices at the border, deployed in the wake of the terror attacks of September 11, 2001. While so far unable to spot any terrorists, as the immigration service has greater access to criminal databases, more non-citizens with prior criminal records who have left the country may be turned back at the border or be held for deportation.[12] Increasingly, the immigration services will also be able to query the criminal databases of foreign countries. The Justice Department has indicated that the current database systems have already discovered a number of individuals with foreign convictions that make them unable to enter the United

States.[13]

Entry restrictions thwart the assumption that the United States welcomes Athe huddled masses@Cat least not those with certain criminal convictions. Even if a non-citizen makes it into the United States with a criminal conviction, it may be used against her at a later point. Some of such uses may be justifiable while others, namely those tied to collateral sanctions, are dubious.

II. The Use of Foreign Convictions in the U.S. Criminal Justice System

With the increasing number of immigrants and the large number of Americans who travel abroad, foreign convictions are no longer unique.[14] They may impact an offender upon further criminal conduct in the United States. If made known to the sentencing judge, they may enhance a sentence she might impose in the absence of a prior criminal record. In addition, restrictions on benefits and rights otherwise available may flow from an offender=s foreign criminal record. A violation of such restrictions may in turn form the basis for criminal prosecution in the United States. In light of greater access to foreign convictions, such consequences have become more likely.

A. Foreign Convictions at Sentencing

1. Justifications for the Use of Prior Record at Sentencing

Prior criminal record plays an important role at sentencing. In the United States there is consensus that a prior criminal record should enhance one=s sentence. The rationales have traditionally differed: Some argue that a prior record implies that a recidivist deserves harsher punishment because he has continued to defy societal norms even after being put on notice of the unacceptability of such behavior and the imposition of a penalty. Others, however, claim that first offenders deserve a mitigated sentence because it is their first infraction. Subsequent offenses are then punished at the base level.[15] Under either rationale, recidivists receive harsher sentences than first-time offenders.

A relatively new approach evaluates the future risk an offender poses, in part based on her prior criminal record. A minor criminal record may counsel, for example, for earlier release than that suggested for individuals with a more substantial record indicative of a greater likelihood of future criminal conduct.[16] Virginia is currently using such a regime which would necessitate need for an individual=s global criminal record so as to allow for an accurate risk assessment score.

In general, commentators and sentencing commission have concluded that foreign criminal records should be considered just like domestic ones. The argument parallels that mandating the consideration of a prior criminal record from another state. Fairness concerns are paramount.[17] After all, it seems inappropriate to sentence an offender more harshly who committed all of his offenses in Michigan, as compared to an offender who committed some of his offenses across the border in Wisconsin. Why should a third offender who committed prior offenses in Canada be treated differently? State laws frequently capture such inherent fairness arguments by requiring that crimes be treated like they would be in their jurisdiction had they occurred there.[18]

Fairness-based justifications seem to allow for a facile argument in favor of considering a foreign sentence. Problems arise, however, once one compares accessibility of prior criminal records. Databases within the United States now allow for relatively easy access to an individual=s prior criminal record.[19] More difficult is access to criminal history databases or the record of an individual criminal offender abroad. First, in some cases, it might be impossible to determine in which countries an offender has spent time, and therefore where he may have acquired a criminal record. Generally, requests for prior criminal history data would be sent to the offender=s country of citizenship and/or of prior residence. This approach may be of lesser concern if offenders are rewarded for a crime-free past rather than punished for a criminal record. Most problematic would be

insufficient information in a risk-based system.

Second, not all foreign countries are equally able and willing to cooperate with requests for such information. [20] For example, in Arizona, probation officers tend to be more successful in providing a complete picture of an offender=s prior criminal record if the person hails from a (Western) European country than from Mexico. [21] Therefore, some offenders who have spent a substantial period of time abroad may be advantaged or disadvantage as compared to others who commit crimes abroad, depending on the country in which they engaged in criminal activity. This leads to unexplored inequity[22] which may be camouflaged by the argument that foreign offenders should be treated like those with a prior record anywhere in the United States. This tracks the manner in which criminal records from different U.S. jurisdictions were exchanged. In the past state criminal records were not centrally located, and it would have often been difficult by prosecutors or probation officers to detect them.[23] Even at that time, however, any criminal record that was found was used in the criminal record calculation.

2. Prior Record and the Determination of a Specific Sentence

Courts in states with indeterminate sentencing regimes have permitted courts to factor prior record into the setting of a specific sentence within a broad range. While the courts are not given specific guidance, they are likely to consider prior sentences. If foreign convictions are brought to their attention by the probation officer or the prosecutor, they are also likely to factor those into a sentence. To what extent this is done is unknown, however, since courts in such sentencing systems are not required to provide any reasoning for their decisions.

Even in indeterminate sentencing regimes, specific convictions may be used to lengthen a base sentence by a certain amount. Many such statutes have been construed so as to allow foreign convictions to trigger such enhancements.[24]

In addition, parole boards when determining the release date are likely to consider an individual=s prior record, especially as a measure of likelihood of future criminal conduct. The U.S. Parole Commission, for example, explicitly included an offender=s prior record in its release decisions.

Guideline systems carefully consider the amount of a sentence increase due to prior convictions. The federal regime, the most rigid of all guidelines systems, for example, meticulously details how prior convictions should be treated, depending on their age, the length of time imposed, and offender=s status at the time she commits the crime at issue. While the federal guidelines system requires this very detailed assessment of prior convictions before they can be tallied up, it explicitly excludes foreign convictions from figuring into an offender=s criminal record score.[25] However, the court may consider such foreign convictions in deciding where to sentence within the otherwise prescribed guideline range and whether to sentence outside that range.[26] The sentencing court may depart upward or downward if the criminal history category Adoes not adequately reflect the seriousness of the defendant=s past criminal conduct or the likelihood that the defendant will commit other crimes . . . .@[27] The guideline provision mentions foreign sentences specifically as the type of additional information that may justify an upward departure.[28]

State guideline regimes also permit the increase of a sentence based on a prior conviction. Some of these regimes explicitly permit for consideration of sentences imposed by non-US jurisdictions.[29] Others allow for *** [what do NC, PA, VA, say on this score?].

In the jurisdictions that explicitly mandate the consideration of foreign convictions, or at least permit for their consideration, questions arise over how such convictions should be counted. Two possibilities exist: First, one can treat them like the analogous state convictions. This means that the label of the conviction rather than the sentence imposed determines the points an individual offender should be assessed in the criminal history matrix.

[30] Alternatively, one can focus on the length of the sentence previously imposed as a way to weigh the gravity of the prior conviction.[31] Neither approach, however, seems fully satisfactory in the context of foreign convictions.

Foreign convictions may be labeled in a manner incompatible with the comparable state regime. They may encompass different mental state requirements or be based on substantially different underlying assumptions. In addition, the sentencing structure in many foreign countries differs dramatically from our own. In some Western European countries, for example, fines are substantially more dominant, and will be assessed for the types of offenses for which state and federal systems routinely impose prison terms.[32] Therefore, neither approach seems fully satisfactory. For that reason, some states have recommended a hybrid approach, allowing for consideration of Athe nature and definition of the foreign offense, as well as the sentence received by the offender.@[33] Such an approach grants trial judges discretion, and requires them to engage in comparative analysis to assess the gravity of the prior offense.

Even if one allows for the use of foreign convictions at sentencing, this does not necessarily imply that foreign convictions should also be used to trigger collateral sanctions or that the violation of such sanctions should allow for the imposition of additional criminal sanctions.

B. Collateral Sanctions and Foreign Convictions

Collateral sanctions and discretionary disqualifications are manifold in the United States.[34] In their totality they amount to a denial of citizenship.[35] Among the restrictions that flow automatically from a criminal conviction are those that restrict political participation through the ballot-box or jury service.[36] Depending on the state, the restrictions may be more comprehensive and permanent than applying only during imprisonment.[37] Potentially groupable in the same category is the denial of the right to possess firearms or ammunition which flows from a criminal conviction.

A second category of collateral sanctions denies benefits granted to others based on economic need, such as welfare benefits and public housing.[38] Similarly, the denial of educational grants and loans based on a prior drug convictions fits into this category. A third set of collateral sanctions does not imply automatic denials of rights and benefits but instead attaches reporting requirements to sex offenses. Frequently, indirect restrictions flow from the publication of such a prior record.

Fourth, some employment restrictions are the direct consequence of a criminal conviction. Most, however, are discretionary. Finally, one of the most punitive collateral sanctions is the denial of the right to remain in this country. Deportation has become a substantial threat for the large number of non-citizen criminal offenders.[39] Above list encompasses only the most dramatic restrictions on an ex-offender=s life but is not meant to be comprehensive.[40] While some of the restrictions are federally mandated, many of the others are state imposed. Some make federal funding contingent on the denial of certain benefits.

Any conviction, or any felony conviction may trigger some collateral sanctions. Other collateral sanctions follow upon a certain types of conviction, with drug convictions and sex offenses triggering the most post-sentence restrictions.

Neither at the time they plead guilty nor at the time of sentencing are criminal offenders informed of the whole host of collateral sanctions that may befall them. In some cases defense attorneys may inform their clients of collateral sanctions or even discretionary disabilities likely to occur upon conviction. This is particularly likely the case for white-collar offenders whose employment may be endangered through an administrative license revocation. Many offenders are surprised and shocked to find out about the rights and benefits they have lost,

especially if they are sentenced to probation or a fine rather than incarceration

Ex-offenders may be restored to their full rights. This may happen automatically, for example, once an offender has served her full sentence, including parole.[41] In other cases, offender are barred from certain benefits for a certain amount of time after having served any sentence.[42] Finally, some benefits and rights can only be restored once the ex-offender undergoes an administrative or judicial process to restore her rights. This may occur through expungement of a criminal record, sealing of records, restoration of civil rights, or a pardon. However, not all of these procedures are equally effective at restoring all rights and benefits. For example, state offenders may continue to suffer from federal disabilities even after their state rights have been restored. In addition, civil disqualifications may not depend on the conviction itself but rather be based on the underlying conduct. In that case only a restoration of rights based on a finding of innocence would help the offender. Finally, the immigration service continues withe deportation proceedings as long as an offender has a criminal conviction, independent of later state action expunging the criminal record.[43]

Some offenders are less likely than others to have their rights and benefits restored even if the crime committed and their criminal record are similar. The disparity depends on their state of conviction. Some states make it more difficult than others to arrange for the restoration of rights of persons with prior criminal records.[44]

Even though the Supreme Court has declined to hold collateral sanctions to be punishment,[45] many collateral sanctions function effectively as an additional penalty. Their violations, moreover, allows for the imposition of a criminal punishment. It is in that context that the use of foreign criminal convictions as the prerequisite for a collateral sanction has been litigated most frequently.

1. A Trigger for Collateral Sanctions?

Much of the recent discussion about the use of a foreign conviction as a trigger for a collateral sanction has surrounded the federal statute which criminalizes the possession of a firearm by a person Aconvicted in any court of a crime punishable by imprisonment for a term exceeding one year.@[46] A number of circuit and district courts determined that the Ain any court@ language includes any foreign court.[47]

The Second Circuit, on the other hand, held that the provision does not include foreign convictions.[48] The court deemed the language ambiguous, an ambiguity that could not be resolved in light of the entire statute. Its reading of the legislative history led it to conclude that ACongress did not intend foreign convictions to serve as a predicate offense for 922(g)(1).@[49] The decision has been criticized,[50] and legislation has been introduced in Congress to overturn the Second Circuit=s decision and clarify the statutory language so as to include explicitly foreign convictions.[51]

In its decision the court focuses on legislative history, and barely discusses the larger issues surrounding the use of foreign convictions in this context. It used the only policy concern discussed to support its legislative analysis by noting that Congress is unlikely to have contemplated foreign convictions in the passage of the statute as it did not address issues of procedural and substantive fairness that may be raised in connection with such convictions.[52] The *Gayle* court highlighted the concern of other courts that foreign convictions may be procedurally flawed, as Aprocedures and methods [may] not [have] conform[ed] to minimum standards of justice . . . .=[53] Alternatively, the court finds it likely that Congress Awould have been troubled@ by convictions Aof crimes that are anathema to our First Amendment freedoms, such as convictions for failure to observe the commands of a mandatory religion or for criticism of government.@[54] In determining whether a foreign conviction should enhance the sentence itself, courts are generally granted discretion in assessing the

quality of that conviction.[55] On the other hand, the felon-in-possession statute triggers a mandatory sentence once the state proves that the defendant possessed a firearm that affects commerce and has a qualifying prior conviction. No judicial discretion would allow for a sentence adjustment based on the procedural or substantive components of a prior sentence.

The proposed legislation would account for the Second Circuit=s concern in part by mandating that the conduct considered criminal abroad must also Abe punishable in any court within the United States by a term of imprisonment exceeding 1 year had such conduct occurred within the United States.@[56] However, this limitation appears only to assure that the bill does not cover minor offenders, by U.S. standards, and those committing offenses for which there is no comparable U.S. offense.[57] It may treat more harshly those ex-offenders whose foreign convictions are of a more minor nature than the comparable state or federal law.

Courts have been able to assess the fairness of a foreign conviction, largely by focusing on Aconcepts of fundamental fairness.@[58] Such concepts may be derived from international documents such as the International Covenant on Civil and Political Rights or regional human rights guarantees, including the Inter-American Convention on Human Rights and the European Convention on Human Rights. Court have determined that some Constitutional protections are not required to guarantee fundamental fairness. Among those are the right to jury trial.[59]

In some cases it may be difficult for a court to assess the fundamental fairness of a past conviction. As courts are occasionally struggling in determining whether a past conviction obtained in another U.S. jurisdiction fulfills the fairness requirement, it is substantially more difficult to do so in a different linguistic, procedural and constitutional environment. Similar problems arise when a court is asked to considered applicable relief provisions.

2. Worth Considering? Foreign Expungements and Pardons

The possibly harshest collateral sanction of all is deportation. Since the immigration legislation of 1996 deportation grounds based on criminal convictions have been expanded dramatically.[60] In addition, Congress has mandated that the entry of a Aconviction@ trigger deportation, largely independent of subsequent state action in the form of expungements, sealing or other administrative set-asides. This was done with the goal of creating greater equity between those convicted under varying state laws. Curiously, federal firearms legislation, passed a decade earlier, explicitly permits state law, however, disparate, to provide relief that will lead to a removal of such federal disabilities.

As a consequence, federal courts have had to address the question under what, if any, circumstances a federal or state conviction will not trigger deportation if it otherwise qualifies based on the type of offense of which the individual is convicted. Generally, courts have held that they will not consider as convictions those expunged under the Federal First Offender Act (FFOA) or equivalent state provisions.[61]

The same issue has arisen in the context of foreign convictions. Foreign sovereigns may be more amenable to expunge convictions or grant pardons. How should courts deal with those convictions if they would otherwise constitute a basis for the imposition of a collateral sanction. In *Dillingham v. INS*, the Ninth Circuit treated a foreign expungement like a domestic one since it had the same scope as an expungement under the FFOA. Much of the focus of the majority opinion and the dissent addressed the difficulty of gaining information about foreign expungements and assessing their scope. While the majority determined that equal protection considerations could not trump administrative ease, the dissenter highlighted Athe difficulties that can be encountered in authenticating the accuracy of [expungement] records.@[62] He argued that there was no equal protection requirement to consider foreign expungements. AOne world is a fine concept, but it is not a constitutional imperative. Not yet anyway.@[63]

This exchange demonstrates a different conception of fairness, camouflaged in a discussion about the administrative difficulty in detecting and assessing foreign expungements. Interestingly, the court does not note similar problems, including possible equal protection concerns, about the discovery of foreign convictions themselves. Yet more importantly, the decision highlights disagreement over the conception of constitutional coverage which reflects a larger attitude toward consideration of foreign procedures. The dissent seems curiously eager to apply them to against the defendant but not in his favor, arguing that he had admitted his misdeeds. Underlying the dispute appears to be concerns about rehabilitation and the ability to restart a new life which is at stake in particular in deportation situations.

3. Beyond the Purview of Courts

Implicit in the judicial debates are numerous concerns about using foreign convictions to apply collateral sanctions or subsequent punishment. Since none of them were squarely before the courts or are beyond the courts= purview, the judiciary has not addressed them.

a. Notice

Since U.S. courts or other players in the criminal justice system in general fail to inform defendants of the collateral sanctions that will befall them, it might not be surprising that courts are not concerned about the lack of notice provided to those with foreign convictions. In criminal prosecutions subsequent to a violation of a collateral sanction, none of the courts have inquired, for example, as to whether similar collateral consequences attach in the country in which the conviction is imposed. The individual is implicitly charged with knowledge of the law even though players in the criminal justice system are not aware of many collateral sanctions.[64] If the same collateral sanctions applied in the country in which the offender was convicted, she may have been informed there. However, that may not lead the offender to conclude automatically that the same sanction applies in the United States, especially if the conviction was entered a long time ago.

The ABA Standards would demand notification of offenders before the time of guilty plea about the collateral consequences that attach.[65] This requirement cannot be extended to foreign courts. Moreover, the Standards would mandate that the court consider collateral sanctions at sentencing.[66] Whether foreign jurisdictions do this may depend on the country and may not always be easy to determine.[67] Alternatively, individuals coming to the United States could be informed of the existence of collateral sanctions as they apply for a visa or enter the country.[68] This approach would not be administratively burdensome as all visa applicants may be given the information as to federal collateral sanctions[69] and be put on notice as to state sanctions or even be informed as to where they could get further information.

b. Opportunity for relief from collateral sanctions

Standard 19-2.5 of the Standards discusses the need for the legislature to create a body that can grant effective relief from a collateral sanction based on a conviction obtained in another jurisdiction. However, neither the Standards nor their attendant commentary takes a position on whether states or the federal government should be able to impose collateral sanctions or discretionary disqualifications based on foreign convictions.[70] The commentary employs the term Aforeign@ but uses the state/federal situation as an example.[71] It suggests that Astates [] provide relief for resident federal offender for sanctions imposed by their laws.@ As long as a state imposes collateral sanctions for a conviction imposed by a different sovereign, it should provide appropriate relief mechanisms. This logic should extend to convictions imposed by non-US jurisdictions, though it can be expected that courts would view such action as more difficult.

The Standards would address the problem at issue in *United States v. Bean*.[72] A Mexican court convicted Bean, a U.S. citizen and gun dealer, for introducing ammunition into Mexico. After having served about seven

months of a five year sentence, he was released. Once his supervised release ended, Bean petitioned the Secretary of the Treasury for removal of the collateral sanction under 18 U.S.C. 922(g)(1) that prohibited him Afrom shipping, transporting, or possessing any firearms or ammunition@. Under 18 U.S.C. 925(c) the Secretary of the Treasury is authorized to restore firearms privileges Aif it is established to [the Secretary=s] satisfaction that the circumstances regarding the disability, and the applicant=s record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest.@[73] Since 1992, however, Congress has refused to fund this particular provision, making it impossible for the ATF to conduct investigations.

Based on his reading of the statute, Bean petitioned a Texas district court to issue him relief once the ATF declared itself unable to assist him. The Supreme Court overturned the grant of relief, stating that an inability of adjudicate the petition does not render it a denial. Therefore, the district court lacked jurisdiction. Akin to a state offender who can ask the state judiciary to expunge or set aside his conviction or petition the governor to pardon him or restore his civil rights, Bean may be able to request that a Mexican court order a similar action or petition the Mexican government for a pardon.[74] However, even assuming any of these avenues of relief are available to him, such relief may be difficult to obtain from abroad, so as to necessitate at least the help of local counsel.

The Standards would provide for effective relief within the system that imposes the sanction. This implies relief mechanisms that are accessible and presumably a reasonable rate of relief being granted as long as the applicants are deserving.[75] When collateral sanctions are sweeping, relief provisions for domestic and foreign convictions are crucial as they provide an avenue for those with Atechnical or unintentional violations@ and for those who have shown themselves rehabilitated so as to be restored to all their rights and privileges.[76]

Once the notice and relief issues are resolved, the consideration of foreign convictions for some collateral sanctions appears more equitable. Some collateral sanctions, however, should likely be also inapplicable.[77] As crimes against a foreign sovereign do not implicate any attacks on a sovereign within the United States, restrictions on the right to vote or to serve on juries should not apply. On the other hand, the individual may not qualify for re-entry assistance. While it is crucial to resolve these types of issues, the use of foreign convictions to impose collateral sanctions and subsequently invoke penalties for violations indicates a larger problem with this society=s current approach to all individuals with a criminal record.

III. Never A Fresh Start?

The United States was founded on the assumption that individuals should have the liberty and opportunity to develop themselves to the fullest. This assumption appears no longer to hold true with regard to offenders. Not only has the United States become among the most punitive countries in the world,[78] it has also developed a set of sanctions that are studiously defined as civil but continue an ex-offender=s punishment well beyond the end of her criminal justice sentence. The easy accessability of criminal records, even by private employers and organizations, no longer makes it feasible to hide one=s past.

The impact of criminal justice sanctions goes well beyond the individual offender. As ex-offenders are excluded from housing and food stamps, are required to register, and are precluded from many employment opportunities, their plight has a dramatic effect on their families and their communities. Because of restrictions on voting rights, these communities are also denied a substantial voice in criminal justice reforms.

Improved international information exchange allows countries around the world easier access to an individual=s criminal record. Transparency is generally hailed as a positive development in globalization. This may be true when the ex-offender crosses international borders to commit further crimes, or when sentencing courts should consider past criminal record for a fair assessment of future criminality. On the other hand, transparency vitiates the opportunity for a fresh start.[79] No longer is it possible Ato move West@ for a fresh start; indeed, it is no longer possible to move anywhere without one=s criminal record.

This may be less controversial if the United States did not have a panoply of sanctions that applies to ex-offenders. These sanctions leave a perpetual mark on the ex-offender and restrict her from participating in free market activities and in public life. Collateral sanctions help destroy any aspirations an ex-offender may have to participate in the hallmarks of life in America.

This contradiction becomes particularly pronounced in the context of foreign convictions. Americans who have run afoul of the law abroad, may want to leave this aspect of their past behind, ready to reintegrate back into their law-abiding lives once they have served the sentence imposed abroad. Many immigrants may leave their home countries precisely to be able to start anew. The hopes of both groups are shattered when foreign convictions follow them around the globe, and present the basis for restrictions on their lives.

The facile argument would be to exclude foreign convictions from consideration at sentencing. However, this exception does not address the underlying philosophical problem that affects all ex-offenders. As currently employed, collateral sanctions are too broad. On the whole, they cannot be defended on grounds other than punishment. This does not mean that all collateral sanctions must be abolished but instead that a defensible collateral sanction must be reasonably grounded on a purpose other than punishment. The most obvious ground is risk-based. Only collateral sanctions that are based on a risk assessment can be continued. Therefore, sex offender registration is permissible if the sex offender fulfills a set of criteria that are considered indicative of a substantial danger to the life or health of others. Any sanction that is not risk-based or is too broad as currently enforced, should be abolished. Such a proposal would carefully weigh the public=s right to safety against an individual=s need for a fresh start.

IV. Conclusion

The use of foreign convictions as a trigger for collateral sanctions brings to a head our self-understanding. Are we a truly a nation that allows for a new start, or do we hold someone=s mistakes against them even after they have served their officially assessed sentence? If we make it impossible for an individual ever to regain standing within society, whatever actions they take, on what grounds should they abide by the rules we set up for them? [80]

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[1] U.S. Census Bureau, Foreign Born Population of the United States -- Current Population Survey, Tbl 3.1, at 1 (Mar. 2003), at www.census.gov/population/socdemo/foreign/ppl-174/tab03-01.pdf .

[2] *See, e.g.*, Abby Goodnough, *Policy on Felons and Voting is Still Unclear in Florida*, N.Y. Times, June 10, 2004, at A25. For more information on felon disenfranchisement in Florida, see West=s F.S.A. 97.041(2)(b) (Qualifications to register or vote); West=s F.S.A 944.292 (Suspension of civil rights); Fla. Const. Art. X, 10 (Felony, definition).

[3] *See, e.g.*, Gabriel J. Chin, N.C.L. Rev. (discussing Asian exclusion);

[4] Standard 19-1.1 (Definitions).

[5] INA 212(a)(2), 8 U.S.C.A. 1182(a)(2). The provision exempts non-citizens who have juvenile records that are five years or older or whose sentences expired prior to that time, or who have relatively minor convictions, comparable to misdemeanor convictions, and who have been sentenced to less than six months in prison. INA 212(a)(2)(A)(ii), 8 U.S.C.A. 1182(a)(2)(A)(ii). In addition, some waivers are available, largely for family-based immigrants and those with very old convictions. INA 212(h), 8 U.S.C.A. 1182(h).

[6] INA 212(a)(2)(B), 8 U.S.C.A. 1182(a)(2)(B).

[7] INA 212(a)(2)(D), 8 U.S.C.A. 1182(a)(2)(D).

[8] INA 212(a)(2)(H), 8 U.S.C.A. 1182(a)(2)(H); INA 212(a)(2)(I), 8 U.S.C.A. 1182(a)(2)(I); INA 212(a)(3)(B), 8 U.S.C.A. 1182(a)(3)(B). *See also* INA 212(a)(2)(E), 8 U.S.C.A. 1182(a)(2)(E) (covering non-citizens who engaged in serious criminal activity but were protected by immunity from prosecution); INA 212(a)(2)(G), 8 U.S.C.A. 1182(a)(2)(G) (barring foreign government officials who within the preceding two years engaged in Aparticularly severe violations of religious freedom@). Some provisions apply only prospectively. INA 212(a)(3)(A), 8 U.S.C.A. 1182(a)(3)(A) (barring those from entry who are believed to engage in espionage, sabotage or similar type unlawful activity).

[9] The only exception may be refugees since their admission is based on international treaties which mandate their admission. 1951 Refugee Convention, Art. 1F (no admission requirement if refugee has committed crime against peace, war crimes or a crime against humanity; a serious non-political crime; or acts contrary to the purpose and principles of the United Nations).

[10] INA 212(h); 8 U.S.C.A. 1182(h).

[11] Under the Torture Convention, the United States is obligated, for example, not to return an individual to his home country if he were threatened with torture there. This is the case even if the person himself is inadmissible because of a prior criminal record. *See also* 1951 Refugee Convention.

[12] Example: Jesus Collado [discussed in Anthony Lewis=s NYT=s editorials]. His detention following passage of the 1996 immigration legislation which expanded exclusion and removal grounds substantially was not based on a database search. Upon being questioned about prior criminal convictions when he returned from a short trip to Jamaica (?) to visit his mother (?), he freely admitted a conviction for statutory rape. His subsequent odyssey kept him in immigration detention for *** months.

10 www.dhs.gov/dhspublic/display?content=1067 (describing Operation Predator including goal of Aseek[ing] information from foreign governments on anyone with a history of sexual offenses seeking entry into the United States.@)

[14] [article on US citizens incurring criminal convictions abroad]

[15] *See* Andrew von Hirsch

[16] Richard Kern & ***, 16 Fed. Sentencing Rep. *** (2004)(discussing Virginia=s approach).

[17] *See, e.g.*, Minn. Sentencing Guidelines, II.B.502.

[18] *See, e.g.*, Fla. Const. Art. X, 10 (defining felony as Aany criminal offense . . . that would be punishable if committed in this state, by death or by imprisonment in the state penitentiary.@)

[19] *See, e.g.*, U.S. Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2001* (Aug. 2003)(detailing submission of data to central repository that maintains

criminal history records on all state offenders; discussing some shortcomings of data collection and submission)

[20] For an in-depth discussion of the difficulties in establishing a European criminal records database, see Gert Vermeulen et al, Institute for International Research on Criminal Policy, Ghent University, *Blueprint for an EU Criminal Records Database: Legal, politico-institutional & practical feasibility (2001).*

[21] Interview with Jon Sands, Federal Public Defender, District of Arizona, [date].

[22] *See, e.g.*, Quentin Brogdon, *Admissibility of Criminal Convictions in Civil Cases*, 61 Tex. B.J. 1112 (Dec. 1998).

[23]

[24] *See, e.g.*, New Jersey v. Williams, 706 A.2d 795 (N.J. Super. 1998).

[25] U.S.S.G. ' 4A1.2.

[26] U.S.S.G. ' 4A1.3; U.S.S.G. ' 4A1.2(h) (permitting foreign sentences to be considered for departure purposes).

[27] U.S.S.G. ' 4A1.3.

[28] For decisions in which courts have used foreign convictions to depart upward, see United States v. Simmons, 343 F.3d 72 (2d Cir. 2003); United States v. Korno, 986 F.2d 166 (7th Cir. 1993); United States v. Bon Levi, 229 F.3d 677 (8th Cir. 2000).

[29] *See, e.g.*, Minn. Sentencing Guidelines II.B.501 (Aug. 1, 2004) (including Aconvictions under the laws of other Nations@).

[30] Minnesota=s guidelines, for example, group offenses into severity categories. *See generally* Minn. Sentencing Guidelines II.B.

[31] *See, e.g.*, U.S.S.G., Ch. 4 (computation of criminal history based on lengths of prior sentences).

[32] *See, e.g.*, Thomas Weigend (describing the German sentencing system)[see casebook; law review article]; Richard Frase.(describing the French sentencing regime).

[33] Minn. Sentencing Guidelines, *supra* note *, at II.B. 504.

[34] The ABA Standards for Criminal Justice use this terminology in the new Chapter 19. *See* ABA Standards, *supra* note *. Others have used a variety of terms for the same phenomenon ranging from collateral consequences to civil disabilities. The focus of this terminology was on the civil character of the sanction to distinguish it from the penalty imposed. *See id*. at 12. The new terms, however, focus on the punishment-character of the sanction and distinguish between sanctions that are automatic and discretionary. *Id*. at 19-1.1

[35] [general discussion of rights of citizenship]

[36] *See, e.g.*, Nora V. Demleitner, *Continuing Payment on One=s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753 (2000); Alec C. Ewald, *ACivil Death@: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wis. L. Rev. 1045 (2002); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895 (1999); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 Stanford L. Rev. 1147 (2004); [jury service].

[37] *See, e.g.*, Jamie Fellner & Marc Mauer (1998); [updates on Maryland, Virginia; material on Florida 2000].

[38] *See, e.g.*, Nora V. Demleitner, *ACollateral Damage@: No Re-Entry for Drug Offenders*, 47 Vill. L. Rev. 1027 (2002); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* Invisible Punishment: The Collateral Consequences of Mass Imprisonment ** (Marc Mauer & Meda Chesney-Lind ed., 2002).

[39] *See, e.g.*, Nancy Morawetz ; Daniel Kanstroom.

[40] For a complete listing of collateral sanctions in Ohio alone, see Kimberly R. Mossoney & Cara A. Roecker, University of Toledo Law Review, *Ohio Collateral Sanctions Executive Summary* (2004). *See also* The Bronx Defenders, Civil Action Project, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (Sept. 2004). Both of these sets of materials have been compiled by non-governmental actors, outside the executive or judicial branch.

The ABA Standards ask that A[t]he legislature [] collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction=s criminal code.@ Standard 19-2.1. Legislators and the players in the criminal justice system are frequently unaware of the panoply of criminal sanctions applicable to an offender. *See, e.g.*, comment of Judge Robert Gorman, Ohio Court of Appeals, at the University of Toledo Law Review=s Conference on the ABA=s Standards on Collateral Sanctions (Sept. 2004).

[41] [Example: restoration of voting rights once offender=s sentence ends.]

[42] [Example: denial of education grants and loans for one year upon a first-time drug conviction.]

[43] James Nafziger & ***, Mich. J. L. Reform (2004).

[44] [examples: Florida, Alabama] Governors may also grant pardons at different rates. Governor Allen of Virginia, for example, has restored the voting rights of over 1,000 persons with criminal convictions within the last nine months while his predecessors did not grant more than *** of such requests. [cite]

[45] *See, e.g.*, Smith v. Doe, 123 S. Ct. 1140 (2003); Connecticut Dep=t of Public Safety v. Doe, 123 S. Ct. 1160 (2003).

[46] 18 U.S.C. 922(g)(1).

[47] *See, e.g.*, United States v. Small, 333 F.3d 425 (3d Cri. 2003); United States v. Atkins, 872 F.2d 94 (4th Cir. 1989); United States v. Winson, 793 F.2d 754 (6th Cir. 1986); United States . Jalbert, 242 F. Supp.2d 44 (D. Me.

2003).

[48] United States v. Gayle, 342 F.3d 89 (2d Cir. 2004).

[49] *Id.* at 95.

[50] *See* Case Note, *Recent Case: Criminal Law -- Predicate Offenses Barring Possession of a Firearm -- Second Circuit Holds That Convictions in Foreign Courts Are Not Predicate Offenses Under 18 U.S.C. 922(g)* -- United States v. Gayle, *342 F.3d 89 (2d Cir. 2003)*, 117 Harv. L. Rev. 1267 (2004).

[51] To amend title 18, United States Code, to prohibit the sale of a firearm to a person who has been convicted of a felony in a foreign court, and for other purposes, S. 2102, 108th Cong., 2nd Sess. (Feb. 23, 2004) (introduced by Senators DeWine and Schumer).

[52] *Gayle*, 342 F.3d at 95-96.

[53] *Id*. at 95.

[54] *Id*.

[55] *See, e.g.*, Minn. Sentencing Guideline; U.S.S.G.

[56] *See* S.2102. The proposed bill exempts antitrust violations from its coverage.

[57] The example that appears to be used most frequently in this context is that of someone convicted by the Taliban for a morals offense. *See also* Christine Aubin, *Case Comment:* United States v. Gayle *(decided Aust 27, 2003)*, 48 N.Y.L. Sch. L. Rev. 847 (2003/2004).

[58] *See, e.g.*, United States v. Small, 183 F. Supp.2d 755, 765-770 (W.D. PA 2002) (assessing fairness of a Japanese conviction).

[59] *Id*. at 768. *See also* United States v. Kole, 164 F.3d 164 (3d Cir. 1998). [additional cases]

[60] AEDPA; IIRAIRA. *See also*

[61] *See, e.g.*, Dillingham v. INS, 267 F.3d 996 (9th Cir. 2001). The FFOA applies only to simple possession of illegal narcotics.

[62] *Id*. at 1012 (Fernandez, J., dissenting).

[63] *Id.* at 1013.

[64] The reason foreign convictions do not play a larger role with respect to collateral sanctions and

administrative disabilities may be because non-citizens who are likely to be disproportionately impacted often do not qualify for benefits and rights from which they would be barred because of the conviction. *See* IIRAIRA (barring even permanent resident aliens from certain welfare benefits unless they have worked for a certain period of time or are covered by specific exceptions).

[65] Standard 19-2.3 (notification may occur through the court or through counsel). *See also* Standard 19-2.4 (Athe court [should] ensure at the time of sentencing that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law.@)

[66] Standard 19-2.4(a).

[67] *See, e.g.*, Demleitner, *supra* note * (disenfranchisement is part of a judicially imposed sanction in Germany).

[68] Some have suggested informing so-called Amail-order@ brides of immigration law so as to provide them with an accurate and realistic understanding of their legal situation once in the United States. *See, e.g.*, Nora V. Demleitner, ***, *in* (Kelly Askin & ** eds., 1999). [check on whether Fed. Regs. include such a requirement].

[69] In the past, the Office of the Pardon Attorney has compiled a list of federally imposed collateral sanctions. *See*

[70] American Bar Association, ABA Standards for Criminal Justice (3d ed.), *Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (2004).

[71] *Id.*, commentary to Standard 19-2.5, at 33.

[72] 537 U.S. 71 (2002).

[73] The Secretary of the Treasury has delegated his authority to the Director of the Bureau of Alcohol, Tobacco and Firearms. 27 C.F.R. 178.144.

[74] For purposes of federal firearms privileges, A[a]ny conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction.@ 18 U.S. C. 921(a)(20).

[75] *Cf.* H.R. Rep. No. 99-495, at 1 (1986) (Judiciary Committee=s report on the ATF relief provision); *see also* S. Rep. No. 98-583, at 26 (1984) (earlier Senate Report).

[76] Quoting S. Rep. No. 98-583, at 26 (1984).

[77] Many of these collateral sanctions the Standards consider prohibited. *See* Standard 19-2.6.

[78] *See, e.g.*, U.S. Department of Justice, Bureau of Justice Statistics, [per capita incarceration rates].

[79] *See* Daniel J. Solove, *The Virtues of Knowing Less* 71 (manuscript -- ready for publication).

[80] Similar issues play out on the foreign-policy side when economic and political sanctions are imposed upon a country. When these sanctions have no clearly delineated end because full compliance appears out of reach, countries may lose any incentive to comply, making them further outlaws.