Collateral Consequences of Conviction: Limits and Justifications

Tripkovic, Milena

VOLUME 18, ISSUE 3, PAGES 18–21 (2017)
Criminology, Criminal Justice, Law & Society

CRIMINOLOGY, CRIMINAL JUSTICE, LAW & SOCIETY

E-ISSN 2332-886X
Available online at
https://scholasticahq.com/criminology-criminal-justice-law-society/

Collateral Consequences of Conviction: Limits and Justifications

A Comment on Gabriel J. Chin's "Collateral Consequences of Criminal Conviction"

Milena Tripkovic

University of Birmingham

Collateral consequences of criminal conviction—the legal instruments which emanate from the conviction and limit offenders' rights beyond those already constrained by punishment—are increasingly being identified as an important source of offenders' hardship. Although it ultimately depends on individual perception and personal circumstances, it is reasonable to suggest that 'the greatest effect of [crime conviction] will not be imprisonment, but being marked as a criminal and subjected to collateral consequences' (Chin, 2017, p. 1). This claim resonates particularly well with U.S. practices, a problem that Chin and other authors (Pinard, 2010; Love, 2011) clearly expose. While there are slightly more than 9 million Americans who are currently either imprisoned, under probation, or on parole, it is estimated that more than 77 million have criminal records (Friedman, 2015) and are thus enduring at least some collateral consequences. To mention briefly the main conclusions of studies carried out in the United States over the past couple of decades, collateral consequences are rising in number and targeting a broadening area of convicts' private and social lives; they are oftentimes invisible since the offenders are unaware of the possibility of their imposition and they frequently last a lifetime (Olivares, Burton, & Cullen, 1996; Uggen, Manza, & Thompson, 2006).

Taking these findings into consideration, the ease with which such measures are oftentimes administered and the lack of justification for their imposition is striking. The legal stance taken in the United States is that collateral consequences are not punishment, but constitute regulatory measures—as such they do not fall under the Eighth Amendment protection against cruel and unusual punishment (Chin, 2017, citing *Byrne v. Sec'y U.S. Dep't of Homeland Sec.*, 2015; *People v. Rizzo*, 2016; *State v. Meadows*, 2014). But if their nature is not penal, some other theoretical ground for their imposition must exist—they should not be administered unless their aims are clear and legitimate.

From the many recommendations for reform of the system of collateral consequences in the United States that Chin proposes (Chin, 2017), this comment will focus on one: the proposal to reduce the number of collateral consequences by retaining only those that promote public safety. Chin argues that collateral consequences should only follow those crimes that "present elevated risks to public safety" or "particular danger to be avoided"; furthermore, "blanket"

Corresponding author: Milena Tripkovic, University of Birmingham Law School, Edgbaston, Birmingham, UK B15 2TT.
Email: m.tripkovic@bham.ac.uk.

restrictions ought to be avoided and we should aim to disqualify on a "case-by-case basis, looking at the relevant facts and circumstances" (Chin, 2017, p. 2).

If consistently applied, Chin's argument would reduce collateral consequences to the so-called "security measures," a form of legal sanctions regularly applied in many European jurisdictions. German criminal law, for example, provides for a number of sanctions that can be imposed along criminal punishment if a risk is present that the perpetrator will reoffend—the most important in this context concern the revocation of driving licence and prohibition to engage in a profession (GERMAN PENAL CODE §§ 69-69b, 70-70b). Security measures can therefore be imposed if two conditions are satisfied:

1. there is a clear link between the perpetrated crime and the sanction – the criminal act targeted by the sanction needs to constitute a breach of special obligations or norms that regulate the performance of specific activities (for instance, norms that prescribe how a physician ought to perform her job, or norms that determine parental duties); and

2. there is an expectation ('estimate of risk') that the perpetrator will reoffend unless the sanction is imposed.

Looking at the extensive list of collateral consequences in the United States (see Chin, 2017; Pinard, 2010; Uggen et al., 2006), it seems that some could plausibly be retained by using the "risk" or "danger to public safety" criterion—sanctions such as banning an offender from certain professions, depriving her of the right to keep or bear arms, losing custody of one's children, driving restrictions, prohibitions to obtain government licenses, and so on. In all these cases, it is plausible that these sanctions are necessary to reduce the risk or danger to individuals or the public. Two caveats should accompany this proposition—these collateral consequences would need to satisfy the two criteria developed above and, as Chin himself emphasizes, they should not be imposed in a blanket manner, but upon careful consideration of the facts of the case. While there is always a danger of over-inclusiveness when estimating risk, the danger greatly diminishes if the decision is made in line with suggestions spelled-out above.

Although the risk-based criterion for determining the justifiability of collateral consequences provides grounds for retaining some of the sanctions currently applied in the United States, it also makes many others redundant. If Chin's suggestion is applied diligently, these sanctions should be discarded. But could it be that Chin's proposal is under-inclusive? Are there reasons other than risk which could justify the existence of such collateral consequences?

By taking risk as the only justified reason to impose collateral consequences, Chin essentially suggests that all collateral consequences (should) have the same legal nature: the only way to understand and justify them is to perceive them as sanctions which purport to incapacitate dangerous offenders by removing crime-enabling tools or situations. But incapacitation need not be the only penal aim they could be pursuing—other penal and even non-penal aims could also be considered legitimate. Although it is true that collateral consequences are exceptionally diverse and eclectic, and even if there seems to be "little conscious policy" behind them (Damaska, 1968, p. 347), this does not necessarily mean that they cannot be justified, if not as a group of similar sanctions, then each in its own vein.

A helpful way to understand such sanctions is to try to comprehend what each of them targets. By employing this approach, we can observe that collateral consequences aim at diverse components of offenders' private and social lives. Subsequently, we can divide them into three groups—those that target civil, political, or social rights (Demleitner, 1999; Uggen et al., 2006). The distinction is important because by looking at the domain that they impact, we may to some extent infer *why* this domain is targeted. Although this falls substantively short of validating the sanction, it does at least provide a frame within which we can look for justifications.

In this sense, collateral consequences that target the civil component of one's status—the most important of which concern prohibitions to engage in a profession or the right of employers to obtain records on previous convictions—clearly seek to remove "unsuitable" (potential) workers. The estimate of risk is, of course, crucial here—a physician who malpractices or a pilot who intentionally endangers the safety of a flight would clearly qualify for these restrictions. However, there could be reasons other than those of risk which could justify such sanctions—holding a public office, such as being a judge or a prosecutor—may warrant excluding people with previous convictions (or previous convictions of specific kind) to secure that these offices are occupied by individuals whose moral qualities cannot be doubted *a priori*. Although we can certainly debate the normative desirability of such restrictions, we cannot deny that judges and prosecutors ought to have specific moral qualities and that some instruments to secure this need to be in place.

When it comes to collateral consequences that target the political component of one's status—these most notably pertain to criminal disenfranchisement

and the ability to serve on jury—their apparent aim is to sanction offenders in their role as members of self-governing political communities. Estimates of risk or danger seem to fare badly as justifications for such sanctions. What kind of danger do we avert by preventing an offender from voting or being on the jury? What harm would the expression of their opinion in these situations cause? But again, there may be reasons other than those of risk for imposing such sanctions. A polity, for example, may decide that it no longer wishes to extend rights of full political participation to those that have wronged it gravely. A U.S. example is pertinent here—was the United States not justified in removing electoral rights, and thus denouncing as a bad citizen, Timothy McVeigh who, in the 1995 Oklahoma bombing, killed 168 of his co-citizens? A comparison with European criminal disenfranchisement practices may also provide some context. A recent study uncovered that approximately three-quarters of European democracies employ some sort of electoral ban (Tripkovic, 2016). Looking at specific policies, one finds little evidence that they were devised with estimates of risk in mind; they rather seem to be reproaching various kinds of criminals for their apparent lack of desirable citizenship qualities. In terms of criminal offenders whose rights are removed, all countries may be divided into three groups:

1. those that target *serious offenders* by providing restrictions only for those imprisoned or imprisoned for a particular time;

2. those that pertain to "*bad" offenders* by reserving restrictions only for those who have perpetrated "immoral" or "dishonorable" crimes; and

3. those that concern "*subversive" offenders* by disenfranchising offenders sentenced for "political" or "anti-state" crimes (Tripkovic, 2016).

European countries thus seem to have a clear idea why they disenfranchise particular groups of convicts—and as it can be seen from this brief overview, such reasons are not connected to the estimate of risk, at least not risk to public safety. Again, as in the case of sanctions that target civil rights, we may debate the legitimacy of restricting political rights to downgrade one's citizenship status, but we cannot in principle deny that citizens have duties towards their polities and that *some* (even if not these) sanctions could viably be imposed for failing to perform these duties.

Finally, collateral consequences that impact on social rights—most importantly, restricting access to welfare programs such as public housing, as well as to grants and loans—seem to target offenders that are considered unworthy of benefits that are intended to improve one's welfare. Imposing such restrictions severely impacts one's well-being. Yet, it seems that at least some of them may be justified by citing risk concerns. For example, preventing convicted drug offenders from living in public housing can reduce security risks associated with drug abuse which is a long-standing problem in such dwellings (Bryson & Youmans, 1990). Other reasons for the imposition of restrictions to social rights, however, seem more difficult to find than in the case of sanctions targeting the civil and political rights domain. This is mostly because restrictions to this area target an important and vulnerable part of offenders' lives as well as their propensity to secure conditions for the satisfaction of their everyday needs. It does seem that, in this domain, Chin's suggestion should not be considered under-inclusive.

The "risk to public safety" and the "danger to be avoided" therefore provide reasonable grounds for imposing many of the contemporary collateral consequences as Chin proposes. It is, furthermore, particularly significant that these grounds cut across distinctions between restrictions to various citizenship domains thus providing a solitary justification for their imposition. Nevertheless, as I have tried to demonstrate, there may be other possibly legitimate reasons to impose some of the collateral consequences that exist today. Although this short comment could only refer to a few such examples rather than build a defensible theory, this approach suggests that risk may not be the only valid justification for the existence of non-punitive sanctions. The examples prompt us to acknowledge that various collateral consequences may have diverse legal nature and to think imaginatively about their aims and justifications.

References

Bryson, D. B., & Youmans, R. L. (1990). Crime, drugs, and subsidized housing. *Clearinghouse Review*, *24*, 435–447.

Byrne v. Secretary U.S. Department of Homeland Security, 618 F. App'x 143 (3d Cir. 2015).

Chin, G. J. (2017). Collateral consequences of criminal conviction. *Criminology, Criminal Justice, Law & Society*, *18*(3), 1–17.

Damaska, M. (1968). Adverse legal consequences of conviction and their removal: A comparative study. *The Journal of Criminal Law, Criminology, and Police Science*, *59*(3), 347–360. doi: 10.2307/1141759

Demleitner, N. (1999). Preventing internal exile: The need for restrictions on collateral sentencing consequences. *Stanford Law and Policy Review*, *11*(1), 153–171.

Friedman, M. (2015, November 17). *Just facts: As many Americans have criminal records as college diplomas*. Retrieved from New York University School of Law's Brennan Center for Justice, https://www.brennancenter.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas

GERMAN PENAL CODE, §§ 69-69b, 70-70b. Retrieved from http://www.gesetzeim-internet.de/englisch_stgb/englisch_stgb.html

Love, M. C. (2011). Collateral consequences after *Padilla v. Kentucky*: From punishment to regulation. *St. Louis University Public Law Review*, *31*, 87–127.

Olivares, K. M., Burton, V. S, Jr., & Cullen, F. T. (1996). The collateral consequences of a felony conviction: A national study of state legal codes 10 years later. *Federal Probation*, *60*(3), 10–17.

People v. Rizzo, 61 N.E.3d 92 (Ill. 2016).

Pinard, M. (2010). Collateral consequences of criminal convictions: Confronting issues of race and dignity. *New York University Law Review*, *85*, 457–534.

State v. Meadows, No. A13-1023, 2014 WL 3396238 (Minn. Ct. App. July 14, 2014).

Tripkovic, M. (2016). The modern *cives sine suffraggio*: Dimensions of criminal disenfranchisement in Europe. *Howard Journal of Crime and Justice*, *55*(1-2), 4–24. doi: 10.1111/hojo.12163

Uggen, C, Manza, J., & Thompson, M. (2006). Citizenship, democracy, and the civic reintegration of criminal offenders. *The Annals of the American Academy of Political and Social Science*, *605*(1), 281–310. doi: 10.1177/0002716206286898

About the Author

Milena Tripkovic, Ph.D., is a Lecturer at the University of Birmingham Law School. She holds LL.B. and M.Phil. degrees from the University of Novi Sad, an M.Sc. in Criminology and Criminal Justice from the University of Oxford, and both an M. Res. and a Ph.D. in Political and Social Sciences from the European University Institute. During her doctoral studies, she was a Visiting Global Scholar at the New York University (United States) and a Visiting Doctoral Researcher at the Max Planck Institute for Foreign and International Criminal Law (Freiburg, Germany).

Dr. Tripkovic researches and teaches in the areas of criminology, criminal law, and political theory. Her forthcoming book *Punishment and Citizenship: A Theory of Criminal Disenfranchisement* (Oxford University Press), combines insights from these domains to develop an empirical and normative account of contemporary restrictions to electoral rights of criminal offenders. She has published on a variety of topics, including penal system and penal policy, prisoner rights, and restorative justice. Her articles have appeared in journals such as *Punishment and Society* and the *Howard Journal of Crime and Justice*.