

# Civil Penalties, Social Consequences



Edited by  
**Christopher Mele and Teresa A. Miller**

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For John, Laura, and Melissa, in memory of their mother, my sister Lisa.—CM

In memory of my mother, Dr. Henrietta T. Dabney, and her devoted employee, Carol Daniel. Carol perished unexpectedly on a dark, rainy road in rural Virginia making her way home from a correctional facility where she was visiting her long-incarcerated son.—TM



# Contents

Acknowledgments	ix
Introduction	
CHRISTOPHER MELE AND TERESA A. MILLER	1
1. Collateral Civil Penalties as Techniques of Social Policy	
CHRISTOPHER MELE AND TERESA A. MILLER	9
2. Race, the War on Drugs, and the Collateral Consequences	
of Criminal Conviction	
GABRIEL J. CHIN	27
3. By Any Means Necessary: Collateral Civil Penalties	
of Non-U.S. Citizens and the War on Terror	
TERESA A. MILLER	47
4. Disenfranchisement and the Civic Reintegration	
of Convicted Felons	
CHRISTOPHER UGGEN AND JEFF MANZA	67
5. Battered Women, Battered Again: The Impact	
of Women's Criminal Records	
AMY E. HIRSCH	85
6. A Practitioner's Account of the Impact	
of the Adoption and Safe Families Act (ASFA)	
on Incarcerated Persons and Their Families	
STEPHANIE S. FRANKLIN	99



7. Home Sweet Home for Ex-Offenders ELIZABETH CURTIN	111
8. The Civil Threat of Eviction and the Regulation and Control of U.S. Public Housing Communities CHRISTOPHER MELE	121
9. The Everyday World of House Arrest: Collateral Consequences for Families and Others WILLIAM G. STAPLES	139
10. Immigration Law as Social Control: How Many People Without Rights Does It Take to Make You Feel Secure? DANIEL KANSTROOM	161
11. A Vicious Cycle: Resanctioning Offenders NORA V. DEMLEITNER	185
12. Lawyering at the Margins: Collateral Civil Penalties at the Entry and Completion of the Criminal Sentence LUCIAN E. FERSTER AND SANTIAGO AROCA	203
13. Claiming Our Rights: Challenging Postconviction Penalties Using an International Human Rights Framework PATRICIA ALLARD	223
14. Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts DEBRA PARKES	237
15. Civil Disabilities of Former Prisoners in a Constitutional Democracy: Building on the South African Experience DIRK VAN ZYL SMIT	255
List of Contributors	273
Index	279

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# Introduction

CHRISTOPHER MELE AND TERESA A. MILLER

The impetus for publishing this collection surfaced in the final discussion of a two-day workshop on the subject of collateral civil penalties and consequences of felony convictions entitled “Locked Up, then Locked Out,” organized by the two co-editors through the University at Buffalo’s Baldy Center for Law and Social Policy in October 2002. Our purpose for holding the conference was to bring together sociologists, urbanists, criminologists, lawyers, legal scholars, and legal rights advocates in order to discuss the legal and social ramifications of collateral civil penalties.

We use the term *collateral civil penalties* to characterize a host of legal restrictions that have come to hinder, in very real ways, the life chances for a large number of disadvantaged individuals, their families, and communities in the poorest sections of U.S. cities. The term itself is both awkward and imprecise, as the “civil” and “collateral” nature of the penalties is contested by many, including ourselves. Nevertheless we use the term (1) because it is more accurate than other terms, such as *civil disabilities* or *collateral consequences*, that fail to adequately emphasize the punitive nature of the sanctions and (2) because it makes the irony inherent in the term that much more prominent.

As the terminology suggests, collateral civil penalties differ from the standard forms of punishment for criminal behavior, such as a prison sentence, probation, or parole, that are meted out by the criminal justice system; they are created and enforced by civil, not criminal, law and they are collateral in the sense that they apply to individuals, concomitant with a felony conviction. The penalties include sanctions on certain types of employment, housing, education, welfare eligibility, parental rights, and protections from deportation (for noncitizens). And although they legally apply to individuals,

their effects on earning an income and finding a place to live, among other basic necessities, are felt by entire families. Most of the new collateral penalties are tied to convictions for nonviolent drug-related crimes, and their effects are clustered within mostly poor, inner-city communities. Other penalties have since emerged or have been strengthened in the domestic version of the War on Terror, targeting particular immigrant communities.

In the recent past, the academic focus on this phenomenon has largely been the domain of legal scholars. Contemporary realities of mass imprisonment and the U.S. government's recent investment in internal security necessitate an interdisciplinary discussion that crosses the boundaries of law and social science. Since the advent of the Wars on Drugs and Terror, the volume of criminal convictions, incarceration rates, and the number of deportations have increased dramatically and the legislation imposing new collateral civil penalties or strengthening older ones has proliferated. As a result, collateral penalties have become not only more severe, but also "unhinged" from the traditional justifications for their imposition. Nonviolent, low-level drug offenders—the majority of those incarcerated under mandatory minimum and "three strikes" drug laws—are currently subjected to penalties upon release that more than hinder their ability to reenter society. Just as alarming, the consequences of these penalties have moved well beyond the individual ex-offender to families and entire communities. These developments demand an interdisciplinary perspective that this book seeks to provide.

The two co-editors come to this topic from very different academic backgrounds and experiences. As an urban sociologist studying mobilization among resident organizations in public housing projects in southeastern North Carolina, Christopher Mele routinely encountered collateral civil penalties in everyday fieldwork, thus seeing them "at work" but unaware of their legal or policy basis. As one example: a small number of African-American men would routinely assemble each morning at a street corner to wait for their girlfriends or wives, who were residents of a nearby housing project, to leave their apartments and cross the street to visit them. These men, who had been accused, arrested, or convicted of various criminal infractions, were barred from stepping foot on the project. For their female companions, the cost of permitting them to visit or stay the night was possible eviction under HUD's "One Strike and You're Out" regulations, which have since been expanded and toughened. In this case, a civil measure (the threat of eviction) was employed to reduce the risk of criminal re-offending. Yet its social consequences—divided families, the surveillance of intimacy, the stigma of past behavior, among others—were even more pronounced.

Teresa A. Miller first encountered collateral civil penalties in the late 1990s, researching the broader impact of mass incarceration and prison expansion.

As a legal scholar, she became interested in the vast proliferation of new penalties, and became increasingly intrigued by the emergence of a new regime of penalty that was linked, but not limited, to the already familiar “prison warehouse.” However, the transparency of these legal and regulatory penalties to the ex-offenders, families, and communities they so dramatically impacted only became apparent to Miller in extended discussions with prisoners and ex-offenders in Western New York. Even though social service providers and criminal defense attorneys in particular were keen to get as much information as possible about the operation of these new penalties, the response of ex-offenders was notably muted. When Miller questioned these men and women about their knowledge of new collateral civil penalties, it was clear that, from their perspective, there was nothing new about them. For these men and women who were enduring the stigma of criminal records, any newly enacted restrictions upon their ability to obtain housing and employment, to receive public assistance and federal financial aid, and obtain a driver’s license (among other things) were all part of the seamless barrier dividing the haves from the have-nots. In their eyes, these restrictions were just another facet of the exclusion, the “mark of Cain,” that they and their families would bear for the rest of their lives.

Although the co-editors’ paths to this work differ, both lead to the broader, and frankly chilling, reality that collateral civil penalties and their consequences reach far beyond their intended legal subject—the felony offender. To varying degrees and directly and indirectly, individuals, family members, associates, neighbors, and communities may feel the implications of such penalties. Barriers to employment, child rearing, and the choice of living spaces—though “attached” to the individual—have effects felt throughout the scales of social interaction, from immediate family to community. Collateral civil penalties are a means *to systematically regulate and control* the everyday lives of certain social groups—mainly women, minorities, and the urban poor. There is a need to study collateral civil penalties “from the ground up”; in other words, from the experiences of the people who must shoulder their effects daily, rather than from the perspective of lawmaking or legal categories.

### About This Book

In planning for the conference and eventual book publication, the co-editors invited contributing authors with different backgrounds and credentials, in order to explore multiple and different perspectives on collateral civil penalties and their consequences. The contributors include legal advocates, social service providers, lawyers, legal scholars, criminologists, sociologists, a journalist, and a public defender. They bring to this volume a diverse wealth of personal and professional experiences. Given that the intended

purpose was to invite dialogue among disciplines and between academics and practitioners, readers should not expect to find a single overarching definition or a consummate cataloguing of civil penalties and consequences. What the contributing authors do share is a fundamental interest (and concern) in bringing to the fore the mostly detrimental and unjust effects that these penalties have on particular populations.

In Chapter 1, Mele and Miller revisit the existing scholarship on collateral civil penalties, characterizing it as primarily the domain of legal scholars who have approached the subject from a top-down, legalistic standpoint. The War on Drugs and, later, the War on Terror brought unprecedented numbers of mainly poor minorities into contact with the criminal justice system and, hence, collateral civil penalties and their social effects. Taking the cue from more recent scholarship on civil sanctions, Mele and Miller argue that a more grounded approach to the subject is needed, one that sees collateral civil penalties as a means *to systematically regulate and control* the everyday lives of certain social groups—mainly women, minorities, immigrants and the urban poor.

Following the lead from the first chapter, Chapters 2 and 3 more fully examine the policies and associated collateral penalties and consequences of the Wars on Drugs and Terror. Jack Chin positions race in the center of his analysis of longer and harsher sentencing and the targeted civil penalties that follow incarceration. Such techniques follow a historical pattern of excluding and containing minorities. Hence, the War on Drugs, he concludes, is but the most recent occasion for the employment of traditional techniques of racial discrimination. Teresa A. Miller examines how the War on Terror capitalizes on the disproportionately harsh, “zero tolerance” regime of collateral civil penalties that emerged during the Drug War to manage the perceived risk that non-U.S. citizens, particularly Muslims and Arabs, pose to national security. Her analysis centers upon deportation, a harsh and potent collateral civil penalty to which non-U.S. citizens are uniquely vulnerable.

Chapters 4 through 10 each focus on types of collateral civil penalties and their wide-ranging consequences for increasing numbers of ex-offenders, their families, and communities. Christopher Uggen and Jeff Manza introduce perhaps the most widely known civil penalty: felony disenfranchisement. They estimate that the size of the disenfranchised population in the United States to be between 4 and 5 million people. They consider the broader effects that this exclusion of a startling number of persons has on civic life and outline the various disenfranchisement regimes across jurisdictions. In Chapter 5, Amy Hirsch takes us through the multiple and compounding sanctions and obstacles that confront women with felony criminal records. As an attorney with Community

Legal Services, in Philadelphia, Hirsch has grounded insight into the many ways that sanctions on employment, housing, and social welfare damage the life chances of women already abused by partners and, increasingly, by unfair legal and social policies. Stephanie S. Franklin continues this focus on the negative effects of civil penalties, focusing on barriers to family unity and reunification in Chapter 6. She brings her considerable experience as an attorney and activist to the analysis of the Adoption and Safe Families Act, demonstrating how its bureaucratic, rule-laden configuration unjustifiably separates families and keeps them apart, in spite of the Act's good intentions.

Among the more basic needs made difficult to attain by severe civil penalties is housing, as Elizabeth L. Curtin amply notes in Chapter 7. Curtin is an adult correctional services director whose work includes solving the housing problems of persons released from prison. The obstacles to housing for ex-offenders, she notes, are personal as well as social and market supply-related as well as bureaucratic. The presence of collateral sanctions serves only to worsen an already difficult situation. In Chapter 8, Christopher Mele turns to public housing, exclusively. He examines the Department of Housing and Urban Development's One Strike and You're Out policy, which allows for the eviction of leaseholders on the basis of the criminal behavior of their dependents, other tenants, or their guests. He asks what such a draconian policy means for tenants who conform to its underlying premise: that they monitor and control the behavior of their associates inside and outside their homes. The immediate, everyday effects of social control and surveillance upon offenders and their families are the focus of William Staples's contribution, Chapter 9. Drawing on his interviews with 23 individuals under house arrest, Staples explores how entire households become involved in surveillance and monitoring. The day-to-day disruptions (monitoring phone calls, visits, etc.) that house arrest entails have collateral consequences for entire households, including additional tension and stress within the home. Interestingly, family and friends who do not want the person under house arrest to fail the program, often end up functioning as additional monitors of his or her everyday behaviors. Like Mele, Staples concludes the social space of the household becomes fully implicated in systems of surveillance and social control.

Social exclusion and surveillance are two of the more pervasive effects that collateral civil penalties have on disadvantaged individuals, families, and communities. Following the passage of the USA Patriot Act in 2001 and the selectively tightened enforcement of certain existing immigration laws, increasing numbers of noncitizens accused of criminal conduct face another, more decisive civil sanction: deportation. With the subtitle, "How Many People Without Rights Does It Take to Make You Feel Secure?," immigration



law scholar Daniel Kanstroom maps out the contemporary legal and social terrain for noncitizens in which rights and tolerance are fast eroding. Kanstroom explains how immigration law has largely become a national regulatory system designed to manage the conditions of entry and residence of people defined as noncitizens. A key purpose of that regulation—including the use of deportation—is the social control of minorities, dissidents, and others deemed suspicious or dangerous.

Both Chapters 11 and 12 delve into the underlying legal problems associated with the implementation and enforcement of collateral civil penalties, albeit from different perspectives. In Chapter 11, Nora Demleitner challenges the claim that collateral sanctions are needed as precautionary measures to protect the public from the threat of ex-felons' re-offending. In her examination of deportation and weapons possession penalties, she finds the use of mandatory collateral sanctions excessive. An unnecessarily harsh application of sanctions is neither grounded in a rational calculation of risk to society nor in the interest of rehabilitation of offenders. The enforcement of deportation, for example, is currently justified for reasons of domestic security. Yet the laws in play were enacted in 1996 and connected to (and legitimized by) the War on Drugs. Demleitner calls for more discretionary approaches to deploying sanctions, which consider, among other factors, the severity of the crime and the ex-offender's immediate circumstances. Chapter 12 is co-authored by Lucian E. Ferster, an assistant public defender in Miami, and Santiago Aroca, a journalist and recent law graduate. In the first half of the chapter, Ferster outlines the legal bind that defendants find themselves in when negotiating pleas for alleged criminal offences. In short, defendants are typically unaware of collateral civil penalties that are attached to a conviction. If such a plea means avoiding jail time, collateral penalties, even when made known, become a distant and trivial concern. Yet, as Ferster makes clear, penalties do matter, sooner or later. This is made abundantly obvious in the second half of the chapter, in which Aroca recounts a Florida family's demoralizing and exhaustive attempts to overcome the nearly insuperable employment obstacles imposed by collateral civil penalties.

The final three chapters speak to the possibilities of reforming or abolishing collateral civil penalties. Patricia Allard sets the tone in Chapter 13. In order for meaningful and comprehensive reform to take place, we need first to institute a rights-centered framework, in which basic human needs (housing, employment, healthcare, etc.) are, indeed, elevated to the status of rights, not privileges. In doing so, the already-thin legitimation for the existence of collateral civil penalties evaporates, making way for a more-just postpenal reintegration of offenders, their families, and even entire communities. The final two chapters deal with civil sanctions in Canada

and South Africa, partly to provide U.S. law makers, practitioners, academics, and other readers a real (and achievable) sense of difference elsewhere. Debra Parkes takes us through the Canadian experience in banning prisoners from voting in Chapter 14. In 2002 the Supreme Court of Canada rejected prisoner disenfranchisement, and Parkes uses this ruling to ask larger questions about the relationship between offenders and society. By adopting a perspective based on the unassailable rights of individuals, Parkes calls for a notion of citizenship that includes, rather than excludes, offenders. The benefit of this inclusiveness is an improved reintegration of offenders, one in which communities accept the premise that ex-offenders can be returned to the mainstream and that it is desirable to do so. In Chapter 15, Dirk van Zyl Smit presents the case of the civil disabilities of former prisoners in South Africa. A prominent feature of the apartheid era was the systematic legal exclusion of segments of the population from participation in civil society. Van Zyl Smit points out that, with the demise of apartheid, many of old legal disabilities remain intact. The fundamental basis for change and the improvement of conditions for ex-prisoners, however, is the South African Constitution, which provides the legal means for former prisoners to assert rights. Again we see reform efforts cast not in piecemeal fashion but in an overarching declaration of human rights. Without overtaxing a comparison with the current situation in the United States, one can see the lessons of South Africa's past as foreboding or its future as promising.



# 1

## **Collateral Civil Penalties as Techniques of Social Policy**

CHRISTOPHER MELE AND TERESA A. MILLER

In this chapter, we describe first the ways in which collateral civil penalties were originally conceived as “disabilities” and how scholars have since examined their unstated purpose as an extension of punishment, their seemingly official invisibility, and their unfairness toward individuals who suffer under them. Following, we put forward a more sociological approach in which we examine penalties as techniques deployed as part of a default social policy that has evolved from the demise of the social welfare state and the rise of carceral regulation of the poor. This perspective informs our understanding of the more recent penalties linked to the Wars on Drugs and Terror, to which most of the authors in this volume refer. Finally, we address the limitations and possibilities of efforts to reform or undo collateral civil penalties in the United States and abroad.

### **From Civil Disabilities to Collateral Civil Penalties**

In their original conception, collateral civil penalties served limited, focused purposes. The older term, *civil disabilities*, broadly referred to civil sanctions that denied certain categories of people, including ex-felons, participation in certain activities that define civic life, such as voting, holding public office, or serving on juries. Although sanctions presented obstacles to individuals attempting to reenter civil society, most were acknowledged as a “deserved” consequence of and as proportional in severity to an individual’s breach of

the social contract. Other disabilities were largely precautionary measures, employed to protect the public from the possibility of ex-felons further breaching laws. These penalties tended to be explicitly connected to the original criminal culpability of the offender. Hence, individuals who committed crimes linked to their professions were denied the licenses to resume practice. Most states continue to revoke licenses for a number of occupations and businesses for persons convicted of certain categories of felonies. Attorneys, for example, are automatically disbarred for felony convictions in New York and several other states (Morvillo 1999). The Securities and Exchange Commission routinely revokes the registrations of investment advisors, brokers, and other securities industry personnel who have been convicted of securities violations. Physicians, accountants, and other licensed professionals, may have their licenses revoked at the state level (Morvillo 1999). In some states, public employment is denied to convicted felons (Olivares, Burton, and Cullen 1996).

The idea of civil sanctions as simply “disabilities” became unsustainable in light of drastic changes in the social welfare and criminal justice policies enacted since the late 1970s. The shift toward penal management of poor, mostly minority and immigrant populations and the concomitant criminal justice policies emanating from the Wars on Drugs and Terror since the early 1980s have brought historically unprecedented numbers of persons in contact with the U.S. criminal justice system.<sup>1</sup> In addition, legislation linked to the Wars on Drugs and Terror have put into practice new and harsher collateral civil penalties that are grossly disproportionate and noticeably disconnected from the felony crimes committed (as discussed later in this chapter). These developments have prompted legal scholars, criminal justice scholars, activists, and social service practitioners to reconsider the more benign “disabilities” as civil penalties with collateral consequences. This conceptual shift is reflected in more recent analyses of the punitive aspects of collateral civil penalties for individuals, their seeming “invisibility” at various stages of the criminal justice process, and the lamentable consequences of these penalties for poor, mostly minority individuals.<sup>2</sup>

The proportional relationship between the type of felony and the severity of civil disability that follows has always been tenuous at best.<sup>3</sup> Disenfranchisement is a prime example of disproportionality between the crime and the civil sanction. The growth of mass incarceration and the highly contested U.S. presidential election in 2000 have made this fact even more apparent to scholars, activists, and practitioners. The traditional rationale for disenfranchisement, such as fear of ex-felons corrupting the “purity of the ballot box” through electoral fraud or the questionable moral probity of felons as jurors, has always been specious.<sup>4</sup> The state-by-state proscriptions against the ex-felon vote challenge the legitimizing principle

that disabilities are proportionally linked to the types of crimes committed. As a practical matter, mass incarceration has made the issue of felony disenfranchisement more salient and visible, affecting election outcomes and electoral representation of particular communities and not simply the constitutional rights of individuals (see Chapter 4).

When certain collateral civil penalties bear little or no relation to a criminal act either in kind or severity, it is no longer tenable to consider them simply civil consequences of criminal conviction. In the current period, multiple and compounding collateral civil penalties—denial of welfare benefits, federal student aid, and subsidized housing, among others—follow conviction for certain kinds of felonies, such as drug possession or sales. They function to continue *criminal* punishment (already heightened by federal sentencing guidelines and mandatory sentencing requirements) in *civil* form. In their penal function, collateral civil *penalties*, as opposed to *disabilities*, blur the boundaries between criminal law (required to abide defendants' constitutional procedural rights and traditionally concerned with individualized justice) and civil law (regulatory, administrative, and procedural) (Klein 1999). In the case of noncitizen criminal offenders, for example, the use of the government's deportation power (construed however dubiously as a civil sanction) to banish a noncitizen criminal offender from the United States by virtue of an "aggravated felony" or other criminal offenses, wholly avoids constitutional procedural protections that would otherwise be triggered if the criminal alien were a U.S. citizen. Even civil restrictions on professional employment licensing are increasingly disproportionate to the felony crime to which they are attached. In many states, licenses are required for automobile dealers, private security guards, boat pilots, stock salespersons, bail bondsmen, barbers and cosmetologists, nurses, midwives, embalmers, dental hygienists, social workers, and food inspectors, among many others (see, for example, Walter 1994). Civil licensing restrictions can effectively obstruct ex-felons from employment in a number of these professions.

Sociolegal and criminal justice scholars, as well as legal advocates and service providers, have also raised questions of individual justice and fairness regarding the expansive use of civil collateral penalties. In the criminal justice literature, collateral civil penalties are viewed as yet another barrier to successful reintegration of ex-prisoners and as a likely contributing factor to high recidivism rates among ex-offenders. Legal scholars have tended to focus on the manner in which these penalties abridge constitutional rights, which are inherently limited to individuals (and not groups at large). Advocates for legal reform have called for standardized procedures to notify criminal defendants of collateral civil penalties and their consequences in plea negotiations and deals (ABA Criminal Justice Standards 2002).

Other individual remedies include efforts to expunge criminal records, seek clemency, and obtain pardons on a case-by-case basis.

Another thread in the legal studies literature concerns itself with the concealed character of collateral civil penalties, of which there are several different aspects (Mauer and Chesney-Lind 2002; Travis 2002). First, judges, prosecutors, and defense attorneys are not required to inform defendants of collateral penalties and their consequences in criminal proceedings (as discussed more fully in the chapter by Ferster and Aroca).<sup>5</sup> As a result, the accused are often unaware of penalties and the harsh consequences to which they become subject after conviction. Second, these penalties tend to “kick in” automatically and without formal notice, often after criminal punishment. As such, they undermine the principle that an individual’s debt to society is paid upon completion of his sentence.<sup>6</sup> Third, collateral civil penalties are enacted in civil legislation, rather than the more high-profile criminal sentencing legislation (such as mandatory minimum sentences, “three strikes” laws, and federal sentencing guidelines) with its pronounced emphasis on punishment. Penalties tend to be enacted with limited public knowledge and virtually no public debate, thus enhancing their “invisibility.” Fourth, the forms that penalties take vary significantly from state-to-state (as statutes, regulations, administrative rules, court decisions, etc.). Consequently, a key policy motive of this scholarship is to require full disclosure of collateral civil penalties in criminal proceedings. Another notable research and policy focus is the substantial legal inconsistency across jurisdictions regarding the individuals to whom such penalties may apply and for how long (Kuzma 1998; Olivares, Burton, and Cullen 1996). Efforts to catalog the wide range of collateral civil penalties at both the state and federal levels expose the urgent need for reform of criminal plea bargaining and sentencing procedures (ABA Criminal Justice Standards 2002).

### **Seeing Collateral Civil Penalties at Work**

It should be noted that the apparent invisibility of collateral civil penalties can be partly attributed to the top-down analytical approaches (most) legal scholars have taken to date. Top-down, predominantly legalistic approaches necessarily emphasize the formal distinctions within the binaries of civil/criminal, legal sanction/social consequence, and citizen/noncitizen, in which the former (i.e., civil, legal sanction, and citizen) are analytically privileged over the latter in the pairings. While imperative, such approaches, alone, cannot capture how collateral civil penalties “adhere” to individuals, families, and communities, and that their consequences are neither *ad hoc* nor willy-nilly, but systematic and targeted.

Increasingly, scholars and practitioners (including many whose writings appear in this volume) have addressed this topic from different angles, expanding the scope of inquiry to see penalties “at work” in the homes, neighborhoods, and communities of the growing numbers of persons who come in contact with the criminal justice system. These newer approaches track the implementation of collateral civil penalties and catalog their effects at the ground level, where they are made meaningful to everyday experiences of exclusion from employment, housing, social services, federal financial aid, and banishment from civil society and, for some, the nation’s borders. Indeed, it is no longer feasible to address collateral civil penalties from an exclusively formal, legal, top-down perspective; the contemporary realities of mass incarceration and the release of thousands of prisoners each year, which disproportionately involve certain populations, require grounded, interdisciplinary approaches.

It is no accident that legal rights advocates, practitioners, and social service providers were among the first to address the crucial social, political, and economic ramifications of collateral civil penalties for families and entire communities. At least 95% of all prisoners in state facilities will be released from prison at some point (BJS 2003). The demographic scope of the rhetoric and policies associated with the Wars on Drugs and Terror is clearly narrow and sharply focused. Between 1984 and 1999, for example, the number of defendants charged with a drug offense in federal courts increased from 11,854 to 29,306 (BJS 2002). Poor women of color, many of whom are heads of households, have been the target of severe drug-related criminal and civil laws and regulations enacted since the 1980s. Incarceration rates for women of color increased exponentially in the 1980s and 1990s (Goldfarb 2002; Mauer 1999:125). As a result, large numbers are being released from prisons only to encounter substantial impediments to their ability to find work, receive public benefits, secure housing, and have their parental rights recognized (see the chapter by Hirsch and the one by Franklin). As a comprehensive report issued by the Center for Law and Social Policy documents, individuals—particularly women of color—who have served prison time for certain (mostly drug-related) felonies face multiple and compounding collateral civil penalties with devastating consequences to family unification and stability (CLASP 2002). Others, such as Hagan and Dinovitzer (1999) and Hagan and Coleman (2001) have addressed the unprecedented numbers of ex-offenders who are reentering communities and the challenges collateral civil penalties pose to family life.

There is a clustering of collateral penalties and their consequences among poor, mostly minority, populations in core, inner-city communities, where the War on Drugs has been most focused and concentrated.



Hence, entire communities, not only individuals and families, are implicated directly and indirectly in an expansive criminal justice system. Released prisoners are concentrated in states with large prison populations: California, New York, Texas, Florida, and Illinois accounted for nearly half of all releases from state prisons in 2000 (BJS 2002). Within these states, returnees are concentrated in mostly impoverished neighborhoods within cities (Lynch and Sabol 2001: 16; Clear, Rose, and Ryder 2001). Given that the massive prison population generated by the War on Drugs is disproportionately drawn from these communities, the problems associated with the return of ex-offenders are amplified when collateral civil penalties are imposed (Travis, Solomon, and Waul 2001; Clear, Rose, and Ryder 2001; Lynch and Sabol 2001). Civil penalties negatively affect reintegration and contribute to high recidivism rates *at the community level* (Petersilia 2003; Travis and Petersilia 2001).

From angles other than atop, therefore, collateral civil penalties are quite visible in their implementation and in their effects: penalties affect poor, mostly minority populations who encounter them as yet another obstacle to basic necessities and participation in civil society. Ground-level approaches suggest that collateral civil penalties heighten and amplify many of the existing obstacles to securing housing and employment and to family reunification that an ex-offender faces. In the following section, we argue that this systematic and focused deployment of collateral civil penalties serves to regulate and manage the everyday lives of ex-offenders, their families, and communities.

### **Collateral Civil Penalties and Social Policy**

The chapters in this volume document the range of more recent and severe collateral civil penalties that were mostly enacted or strengthened in the 1980s and 1990s and have increasingly affected the families and communities of ex-offenders (and not the ex-offenders or people directly supervised by the criminal justice system, exclusively). In this section, we take the position that these penalties constitute a set of techniques used to manage, regulate, and isolate poor, mostly minority urban communities. We initially describe the recent drift in policy toward the urban poor, highlighted by the dismantling of social welfare and the intensification of criminal justice supervision and management as the foundation of social policy. We then discuss how this deliberate drift toward a carceral administration of the poor is enshrined in recent social policies—particularly drug and security policies—that affect mostly minority, disadvantaged, or at-risk populations. Finally, we enumerate the ways in which collateral civil penalties function as effective techniques for management and social control.

*Penal-Welfare Arrangements*

The expansion of collateral civil penalties and the reinforcement of existing ones since the 1980s are best understood within the framework of governance and social policy toward the poor and disadvantaged.

... both “penal” and “welfare” modalities have changed their meaning. The penal mode, as well as becoming more prominent, has become more punitive, more expressive, more security-minded. . . . The welfare mode, as well as becoming more muted, has become more conditional, more offence-centered, more risk conscious (Garland 2001: 175).

Systems of criminal justice and social welfare have been historically intertwined—in what David Garland (2001: 28) has termed the “penal-welfare arrangement”—for the purposes of governance of the poor. In the early-twentieth century, social welfare reforms were gradually implemented partly in response to the rapid growth of impoverished, so-called dangerous classes. The state expanded its obligations beyond punishment and control of the poor to include efforts at social reform and welfare as well (Garland 2001: 39). New Deal-era programs for the regulation of the poor, from Work Relief to Social Security, became progressively institutionalized in the post-World War II social welfare state. Civil Rights-era legislation removed some of the egregious formal barriers to racial equality and full citizenship, leading to desegregation (particularly of schools and public spaces). Antidiscrimination legislation facilitated class mobility for many Blacks, for example, yet the urban ghetto remained a space of class containment for mostly poor minorities. The War on Poverty arguably may have been the apogee of social welfare in the United States, given its considerable successes in areas of education, job training, and childhood poverty. Yet these gains and others have been downplayed in an unflappable revisionist critique in which the urban crisis, crime, and social disorder are touted as evidence of the failures of both the criminal justice system and the welfare state.

The root causes of the drift toward the more penal and away from the welfare side of the arrangement are many and complex and have been documented at length elsewhere (Garland 2001 and 2001a; Wacquant 2001; Beckett and Western 2001). Urban labor markets have undergone dramatic restructuring since the 1970s, with low-wage part-time employment replacing semiskilled unionized manufacturing jobs (Massey and Denton 1993; Wilson 1997). Urban political and fiscal crises accompanied the decline of decently paying jobs, further segregating and isolating mostly minority groups in impoverished enclaves within cities. Federal, state, and local governments, embroiled in their own financial crises and under the

increasing control of conservative politicians, declined to bail out cities and further enhanced the economic and social insecurity of their disadvantaged residents. Instead, the state embarked on the long trek to dismantle social welfare through a volatile mix of legislation and rhetoric. Federal spending on workforce education and job training for low-income people was drastically slashed in the 1980s and has not been anywhere near restored (Katz 1989); the federal curtailment of welfare funds, income benefits, and child welfare services has been steady over time.

In conjunction with the retrenchment of social welfare came the systematic expansion of criminal justice remedies to the intractable social problems plaguing cities. Whereas this expansion and its correlate of mass incarceration have been covered exhaustively by scholars from many disciplines, it is important to note here a few key points relevant to changes in how the urban poor came to be regulated and governed. In the wake of diminished social welfare programs, aggressive policing practices and the increased severity in the length of prison sentences and conditions of confinement have formed the basis for social policy bent on order-maintenance (Websdale 2001; Harcourt 2001). The warehousing of particular populations emerged as a strategic solution to the complex web of social and economic problems that afflict cities in particular (Mauer 1999). Loic Wacquant has convincingly noted the parallel between the prison and the urban ghetto in the era of mass incarceration, pointing out the porous boundaries and the increasing social and cultural similarities between the two (Wacquant 2001 and 2002). Prisons and ghettos have become more alike, not only in terms of nearly identical cohorts of inhabitants but also in the techniques of social control, denial of individual rights, and expansive surveillance. Both systems function to regulate the conduct of the urban, mostly minority poor, and incarceration, in particular, has taken on an “extra-penalological” function that was once the domain of social welfare (Wacquant 2001).

Jonathan Simon and other proponents of what has become known as the *new penology* characterize the shift toward heightened punitiveness within the criminal justice system and the retreat from social welfare-based modalities as a *severity revolution*, contrasting starkly with the humanity revolution out of which the idea of rehabilitation emerged in the late-nineteenth century (Simon 2001). The severity revolution marks a fundamental transformation in the discourse, objectives, and techniques of criminal justice, leading to contemporary penal practices that view crime as a problem of managing high-risk categories and subpopulations (Feeley and Simon 1992). In contrast to the traditional discourse of individualized justice and personal transformation, criminal justice professionals now speak in terms of managing risk. The objectives of criminal justice have moved

away from the rehabilitative ideal that once dominated the penal system toward the goal of managing high-risk subjects by containing and incapacitating them. The rehabilitative ideal was abandoned, and managerialism was embraced, as the public, inundated with crime discourse sanctioned by government and mass media, came to perceive the persistence of Black and Latino urban poverty (and criminal recidivism) both as relentless and as an indictment of a penal system premised upon personal transformation (Simon 1998).

Techniques, such as surveillance and containment, are grounded in the assumption that maintaining order among high-risk populations outweighs any deleterious consequences to individual constitutional rights or collective forms of social justice. Simon noted that the abandonment of transformational goals led to the displacement of evaluative norms rooted in real communities. In contrast to the old penal-welfare arrangement in which criminal justice decision makers (probation officers, parole officers, sentencing judges) were attuned to signals from members of the criminal offender's community with a stake in his past or future conduct (e.g., people in a position to either fear or control the offender), the operational parameters of the new managerial system are largely self-referencing (Simon 1998). The new managerialism takes its cues from internally generated measures such as drug tests and compliance with a technocratic web of administrative rules seemingly designed not to promote the reintegration of the ex-offender, but to frustrate her ability to stay out of prison (and, therefore, remove herself from the stigmatized category of "managed population").

### *Drug and Security Policies*

The penal-focused, risk-conscious approach to social policy toward the poor has reached its apex in the Wars on Drugs and Terror, and most of the chapters in this volume focus on the recent, more severe collateral civil penalties that flow from drug and security policies.<sup>7</sup> Some of the harshest penalties emerged from the Anti-Drug Abuse Act of 1988.<sup>8</sup> The severity and sheer magnitude of collateral civil penalties that attach to nonviolent drug convictions exceeds that of any other category of crime (see Chapter 2), even crimes of violence such as murder, rape, and kidnapping (Demleitner 2002: 1033). The act created a host of grave consequences. It mandated the detention and deportation of non-U.S. citizens convicted of "aggravated felonies," and limited avenues of relief from these consequences that were traditionally available (see Chapter 11).<sup>9</sup> It authorized federal and state court judges to deny all or selected federal benefits to individuals convicted of drug possession or distribution (Musser 2000: 1). Another provision of the act created what has since become known as the *one strike* policy,

mandating that public housing authorities evict tenants whose household members or guests (or other persons under their control) engage in drug-related criminal activity (see Chapter 8).

The Anti-Drug Abuse Act's theme of civilly punishing individuals convicted of drug crimes was broadly embraced by subsequent civil legislation regulating aspects of civil society as diverse as education, parenting, and the receipt of welfare benefits. Under welfare reforms enacted in 1996, individuals with a felony conviction involving the possession, use, or distribution of a controlled substance became permanently banned from receiving welfare benefits, such as cash assistance and food stamps.<sup>10</sup> According to the Sentencing Project, the ban on Temporary Aid to Needy Families (TANF) assistance exacerbates poverty conditions for about 92,000 women, 70% of whom are mothers (Allard 2002). In 1998, Congress amended the Higher Education Act of 1965 to deny any student with a past conviction involving the possession or sale of a controlled substance eligibility from grants, loans, or work-study funds for a specified period of time ranging from one year to indefinitely (Musser 2000: 7). Not surprisingly, the penalty primarily affects low-income students and has little effect on individuals with the means to pay college tuition without financial aid.

Even where civil penalties are not triggered by a drug conviction *per se*, legislation passed within the Drug War's "get tough" era often restricts ex-offenders' basic abilities to maintain a family, earn a living, and put a roof over their heads (see Chapter 7). The 1997 Adoption and Safe Families Act (ASFA) modified existing child welfare law ostensibly to improve the welfare of foster children who languished in the system while the state made "reasonable efforts" to reunite these children with their parents (see Chapter 6). Eleven percent of the women incarcerated in the United States are forced to hand their children over to the foster care system. By drastically reducing the amount of time for reunification, and by mandating that states terminate the parental rights of a parent whose child has been in foster care for 15 or more of the last 22 months, ASFA virtually ensures that women sentenced to the lengthy terms required by mandatory minimum sentencing laws will permanently lose their children. The average term served by all women who are incarcerated is 18 months (Travis, Solomon and Waul 2001: 40). Furthermore, public housing laws require that public housing agencies and providers of Section 8 (and other federally assisted) housing deny housing to convicted sex offenders subject to sex offender registration, and permit such agencies and providers to deny housing to individuals with drug-related convictions, convictions for crimes of violence, or other crimes (Legal Action Center Fact Sheet, 2000). Housing authorities and private landlords who participate in subsidized housing programs, such

as Section 8, have the right to obtain the criminal records of all tenants and applicants (Travis, Solomon, and Waul 2001: 35).

Collateral civil penalties matured as techniques of management and social control under the War on Drugs. New penalties were legislated—and, more importantly, deployed—without obvious and proportional connection to the felonies to which they are tied. In the short term, penalties proved useful as civil measures to contain and manage segments of the urban poor alongside mass incarceration. Their utility as social management techniques has been further tested in the recent flurry of security policies stemming from the War on Terror (see Chapters 3 and 10).

Collateral civil penalties are undoubtedly linked to the War on Terror; but not because Congress passed a flurry of legislation after the attacks on the Twin Towers and the Pentagon, imposing collateral penalties on convicted terrorists. To the contrary, immigration legislation passed years before the attacks embraced the criminal justice system's severe treatment of drug offenders and the poor. As the criminal justice system created punishments that got tough on *all* convicted drug offenders, immigration law adopted harsh consequences for those convicted drug offenders who were not U.S. citizens. Under immigration reforms enacted in 1996, these so-called "criminal aliens" could be detained and deported (many retroactively), and denied relief from detention and deportation based upon individual mitigating circumstances. And because these harsh measures were characterized by courts as regulatory, rather than punitive, the U.S. Constitution did not stand in the way.

In the years between 1996 and 2001, the immigration system bought into the severity revolution that was occurring within the criminal justice system. Some describe it as the "criminalization" of immigration law, while others describe it as a convergence between the criminal justice and deportation systems (Kanström 2000). Either way, the two systems interacted in a manner that produced outcomes that were unprecedented (even unintentional at times) in their harshness. For example, criminal sentencing enhancements for past offenses combined with immigration law's enhanced "aggravated felony" designation to mandate the detention and deportation of non-U.S. citizens with mere misdemeanor convictions on their criminal records. These outcomes helped to advance not only the War on Drugs—a crime-fighting agenda—but the reform of the welfare state as well—a social reform agenda.

The most significant immigration reforms enacted by Congress during this era dramatically enhanced collateral civil penalties pertaining to non-U.S. citizens. Two major immigration laws enacted in 1996—the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal