

DISARMED, DISENFRANCHISED, AND
DISADVANTAGED: THE INDIVIDUALIZED
ASSESSMENT APPROACH AS AN ALTERNATIVE TO
KENTUCKY'S FELON FIREARM DISABILITY AND
OTHER ARBITRARY COLLATERAL SANCTIONS
AGAINST THE NON-VIOLENT FELON CLASS

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I. INTRODUCTION

There are few steeper divides in modern constitutional debate than the extent of an individual's right to own a gun. American proponents of gun ownership and use point to the Second Amendment of the United States Constitution to defend the inalienable right of a citizen to own a firearm,¹ as well as to many state constitutions that also grant their citizens the right to bear arms.² Firearms are desired by millions across the world for their defensive and offensive functionalities on both personal and national fronts,³ as well as for their symbolism of social identity,⁴ affluence,⁵ and even masculinity and rugged individualism.⁶ However, the harsh realities

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¹ See U.S. CONST. amend. II.

² For a survey of state constitutional "bear arms" provisions, see Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006).

³ See Laurel Loomis, *A New Look at Gun Control Legislation: Responding to a Culture of Violence*, 27 BEVERLY HILLS B. ASS'N J. 160, 164 (1994).

⁴ See generally Jeffrey Fagan & Deanna L. Wilkinson, *Guns, Youth Violence, and Social Identity in Inner Cities*, 24 CRIME & JUST. 105 (1998) (explaining the correlation between youth violence and the desire of young individuals to own firearms).

⁵ See Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 FORDHAM URB. L.J. 1727, 1801 (2012) (discussing historical English firearm possession as a right based on socio-economic status).

⁶ See generally Elizabeth C. Hirschman, *Men, Dogs, Guns, and Cars: The Semiotics of Rugged Individualism*, 32 J. OF ADVERTISING, no. 1, 2003, at 9, 9–22 (linking firearms possession with ruggedly adventurous lifestyles).

of offensive criminal firearm use have arguably made personal firearm ownership more necessary and simultaneously more difficult to support.

Firearm-related deaths in America totaled 31,672 in 2010,⁷ and more than 97% of those were killings committed during an act of violence.⁸ With many Americans still in shock from several decades of mass public shootings that have devastated thousands of families around the country,⁹ the national conversation has trended towards imposing increased restrictions on national gun control laws. Many believe that by changing eligibility qualifications for gun ownership, as well as by limiting the types of guns that one can own, federal and state governments could effectively reduce the violence.¹⁰ However, several recent Supreme Court decisions have hinted at expansion of gun rights rather than constriction, leading the nation into a reinvigorated debate over the fundamental nature of the right to firearm possession.¹¹

This Note surveys a class of citizens that Congress and the Commonwealth of Kentucky have already acted to exclude from the fundamental right to own a firearm—convicted felons.¹² Initially, this exclusion may appear rooted in a rational basis. After all, felons *did* commit a serious crime; do we really want them to have guns? However, when one considers that many felony convictions are the result of non-violent offenses, the purportedly logical basis upon which lawmakers have decided to retract a constitutionally guaranteed right quickly disappears.

This Note questions whether felons convicted of non-violent crimes are truly a class that society deems unworthy of the right to own a firearm. It argues that the exclusion of non-violent felons from lawful firearm ownership is not constitutionally sound, as it is a punishment imposed based solely on the status of the individual rather than on the dangerousness of the individual's crime, which is unconstitutionally discriminatory. Part II of this Note discusses the history of disparate treatment of convicted felons and traces the development of federal and state gun control laws in

⁷ *Fatal Injury Reports, National and Regional, 1999–2011*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_us.html (select the “Firearm” option under Question 2; then follow “Submit Request” hyperlink) (last modified Feb. 19, 2013).

⁸ *See id.* (select the “Violence-related” option under Question 1; then select the “Firearm” option under Question 2; then follow “Submit Request” hyperlink).

⁹ *See, e.g.,* Megan Garvey, Maloy Moore & Evan Wagstaff, *Timeline: Deadliest U.S. Mass Shootings*, L.A. TIMES (June 7, 2013), <http://timelines.latimes.com/deadliest-shooting-rampages/>.

¹⁰ *See Loomis, supra* note 3, at 163–64.

¹¹ *See, e.g.,* McDonald v. City of Chicago, 561 U.S. 742 (2010); District of Columbia v. Heller, 554 U.S. 570 (2008).

¹² *See* 18 U.S.C. § 922(g) (2012); KY. REV. STAT. ANN. § 527.040 (West 2006).

relation to felon firearm possession, including recent Supreme Court developments that may change the way that courts around the nation approach gun rights. Part III defines the modern concept of the “felon” class and looks to Kentucky case law to explain the current political climate of restorative rights in the state and elsewhere. Finally, Part IV examines measures implemented by interest groups to reverse collateral sanctions against convicted felons and proposes a resolution for restorative gun rights that balances public safety with state constitutional rights in Kentucky.

II. HISTORIC TREATMENT OF FELONS AND THE DEVELOPMENT OF EXCLUSIONARY GUN LAWS

A. Historical Overview: English Execution and Forfeiture Practices and the Influence on American Felony Laws

1. Non-violent offenses and the punishment of death

Early American felony laws crafted in the years following independence were designed as a response to “savage” English felony laws that continued to pervade the colonies of the New World.¹³ Historians believe that much of the common and statutory felony law of England was in operation in the colonies at the moment of American independence.¹⁴ Bradley Chapin observes, “[I]t would be difficult to find any other area where European thought had a more direct and demonstrable influence than the advocacy of humanizing the criminal law.”¹⁵

Economic and political power in eighteenth-century England was highly concentrated among a very small percentage of the population.¹⁶ At that time, only the rich were granted privileges like acting as justices of the peace or hunting wild game and less than 3% of adult English males qualified to participate in those activities.¹⁷ This ruling upper class dominated the reformation of English society by drastically altering the laws, such that “legal definitions of crime did not correspond closely to the

¹³ See Bradley Chapin, *Felony Law Reform in the Early Republic*, 113 THE PA. MAG. OF HIST. & BIOGRAPHY 163, 163 (1989).

¹⁴ *Id.* at 166; see also Joseph Smith, *The English Criminal Law in Early America*, in THE ENGLISH LEGAL SYSTEM: CARRYOVER TO THE COLONIES 1, 3 (1975).

¹⁵ Chapin, *supra* note 13, at 165.

¹⁶ Douglas Hay, *Crime and Justice in Eighteenth- and Nineteenth-Century England*, 2 CRIME & JUST. 45, 46 (1980).

¹⁷ *Id.*

norms of a large part, perhaps the majority, of the population,”¹⁸ also known as “the labouring poor.”¹⁹ Such changes involved sharpening prosecutions for poaching wildlife, redefining certain customary wage laws as theft, criminalizing trade unions, and suppressing popular entertainment as threats to worker productivity and social order.²⁰

From the earliest existence of felony law through the late nineteenth-century in England, the practices of felon execution²¹ and felony property forfeiture²² served as the primary punishments for most criminal activity. Prisons and other houses of correction were mostly used for holding inmates on a short-term basis, such as those awaiting trial, vagrants and petty thieves, or unwed mothers incarcerated on a temporary basis.²³ Extended prison sentences did not evolve as a common punishment in England until the late 1800s, when massive penitentiaries were designed and built to house long-term prisoners.²⁴

Felon execution practices in England had Christian biblical roots.²⁵ *Genesis* 9:6, part of the Noahic Covenant, guided supporters of the death penalty for murderers: “Whoso sheddeth man’s blood, by man shall his blood be shed.”²⁶ However, serious felonies and lesser offenses alike were capital in 1700, and the list of offenses punishable by death only grew over the course of the next two hundred years.²⁷ Eighteenth-century penal practices were theatrical in nature. One or two hundred citizens were publicly executed each year as “terrible examples” to others contemplating crime; a few thousand more were hanged, placed in public stocks or pillories, or publicly flogged.²⁸

In the absence of any protection by a regular police force, public executions were thought to be an essential instrument in maintaining societal order.²⁹ The act was largely crowd-responsive; when the flaring tempers of the watching public became too dangerous, a royal pardon was

¹⁸ *Id.* at 47.

¹⁹ *Id.* at 46.

²⁰ *Id.* at 47.

²¹ See Chapin, *supra* note 13, at 166.

²² K. J. Kesselring, *Felons’ Effects and the Effects of Felony in Nineteenth-Century England*, 28 *LAW & HIST. REV.* 111, 113–14 (2010).

²³ Hay, *supra* note 16, at 55.

²⁴ *Id.*

²⁵ Chapin, *supra* note 13, at 165.

²⁶ *Id.* at 165–66 (quoting *Genesis* 9:6).

²⁷ Hay, *supra* note 16, at 48.

²⁸ *Id.* at 49.

²⁹ *Id.* at 51–52.

granted.³⁰ “The prerogative of mercy was as important as the shock of terror in creating submission, and the more crimes that were punishable by death, the more readily was the theater of a hanging, or a reprieve and pardon, staged.”³¹

A multitude of non-violent crimes were punishable by death under the capital statutes of the late seventeenth through the early nineteenth centuries in England.³² A man could be hanged for committing simple horse thievery or for the forgery of banknotes.³³ The Waltham Black Act of 1723, later criticized as “a versatile armoury of death apt to the repression of many forms of social disturbance,”³⁴ enhanced the penalty to death for scores of offenses against rural property, from poaching hares to arson, if the criminal was either armed or merely disguised.³⁵

The earliest Englishmen to leave for the colonies of America were eager to reform the oppressive capital punishment practices in their new territories.³⁶ Puritan colonies, following Mosaic Law, enacted positive laws that abandoned the death penalty for all crimes against property.³⁷ Humanitarian and rational concerns prompted Quaker colonies to go even further with reforms. In the Quaker territories, the death penalty was limited to the offenses of murder and treason, and other Southern colonies soon followed their example.³⁸ By the 1720s these reforms were widely abandoned. Regular hangings for crimes against property were reinstated, as newer settlers embraced the formal reception of English felony law, overtaking the satellite pockets of reformers dotting the British colonial territories.³⁹

True reform of capital punishment began to take shape in America in the several decades following American independence. Felony law reform hinged on finding rational penalties for burglary, robbery, and counterfeiting—crimes that accounted for 72% of Pennsylvania’s hangings between 1779 and 1786.⁴⁰ During the 1786 Pennsylvania Assembly, Thomas Jefferson and James Madison drafted a bill that would lessen the

³⁰ *Id.* at 52.

³¹ *Id.* (citation omitted).

³² *See id.* at 50.

³³ *See id.*

³⁴ *Id.* at 51.

³⁵ *Id.*

³⁶ *See* Chapin, *supra* note 13, at 166.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 172.

penalties for burglary and robbery, but it failed to pass due to, as Madison later wrote, “rage ag[ains]st Horse stealers.”⁴¹ Others commented that it was likely the inclusion of the alternate punishments of castration and disfigurement that actually defeated the bill.⁴² Nonetheless, the Assembly enacted William Bradford’s similar reform bill that year, and finally, in 1794, a groundbreaking Pennsylvania statute was passed that limited capital punishment to first-degree murder.⁴³

This became a model for criminal law reform in other states, and soon New York, New Jersey, and Virginia enacted similar statutes,⁴⁴ with Maryland closely following.⁴⁵ Notably, North Carolina, South Carolina, and Rhode Island continued to mandate the death penalty for felony crimes against property into the nineteenth century.⁴⁶ By the 1830s, however, all states had prohibited capital punishment for all non-violent property related crimes.⁴⁷

2. Early English forfeiture practices and gun laws in relation to American firearm dispossession

English forfeiture practices bear a complex relation to modern American felon dispossession laws. The concept of the English forfeiture practice originated with medieval law, which held that felons lost all goods and chattel to the king, and their land to their lords, upon conviction.⁴⁸ The forfeiture of possessions was the consequence for the felon’s violation of his bond of fidelity to his feudal superior.⁴⁹ His loss of lands resulted from the ancient notion that a felony offender’s blood had become corrupt and should not be inheritable by his heirs but should instead default to his lords.⁵⁰ As a result of the forfeiture practice, centuries of kings and lords made significant financial and political gains from what they claimed to be

⁴¹ *Id.* at 173.

⁴² *Id.*

⁴³ *Id.* at 174.

⁴⁴ *Id.* at 180. In 1796 these three states enacted reform statutes restricting the death penalty to treason and murder. *Id.*

⁴⁵ *Id.* at 181. Maryland adopted the Pennsylvania Plan in 1809, with an exception relating to slavery. *Id.*

⁴⁶ *Id.*

⁴⁷ *See id.* at 183.

⁴⁸ Kesselring, *supra* note 22, at 115. Treason was considered an especially serious subset of felony offenses. Traitors forfeited all real and personal property to the king. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

“justice.”⁵¹ Corporations also profited from the practice of forfeiture through royal grants of the right to collect the seized property of felons.⁵² Mid-nineteenth century records kept by a London constable detail entire wardrobes, tools, boats, livestock, domesticated animals, and bankbooks as some of many items seized upon conviction of a felony.⁵³ Other receipt records indicate that, by that point in history, many individuals lost only what was on his or her person at the time of arrest.⁵⁴

Seventeenth- and eighteenth-century critics of forfeiture laws had argued that forfeiture was not only an ineffective deterrent, but also a “mis-seated” and “transitive” penalty inflicted upon families of the felon rather than on the offender alone.⁵⁵ Some claimed that forfeiture “not only failed to deter but also made recidivism more likely by leaving felons with nothing upon which to begin anew. A man emerged from prison ‘alike destitute of property and character, without any means of getting his first meal except by returning to his crimes.’”⁵⁶ Although forfeiture laws may not have adequately deterred crime, they certainly deepened the destitution of the poorest offenders.⁵⁷ Dispossession of goods, however, was never a permanent punishment under English law. Even though felons were stripped of their goods upon conviction, “it did not follow that one could not thereafter purchase and hold new personal property—including a gun.”⁵⁸

Kevin Marshall argues that early English dispossession and firearm laws do not logically support the broad American prohibition against felon firearm ownership.⁵⁹ The English medieval Statute of Northampton, enacted in 1328, was one of the earliest common law restrictions on firearm ownership. It provided that “no one could ‘go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere.’”⁶⁰ In practice, violations of the law

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 123.

⁵⁴ *Id.* Such items included watches, knives, small amounts of currency, as well as the clothing being worn by the offender at that time. *Id.*

⁵⁵ *Id.* at 116.

⁵⁶ *Id.* at 119 (citation omitted).

⁵⁷ See *id.* at 123–24 (detailing the statements of three mid-nineteenth century prisoners who struggled to re-enter society due to the forfeiture of their goods).

⁵⁸ C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 715 (2009).

⁵⁹ See generally *id.* (articulating the incongruity of modern America's prohibition against felon firearm ownership and early English firearm laws).

⁶⁰ *Id.* at 716 (quoting Statute of Northampton, 1328, 2 Edw. 3, c. 3 (Eng.)).

occurred only when one rode in public “in such a manner as will naturally cause a terror to the people,” by arousing “suspicion of an intention to commit any act of violence or disturbance of the peace.”⁶¹ The punishment was dispossession of one’s armor and imprisonment by the king, but there was no ban on the subsequent purchase of new armor once released.⁶² In fact, there was no arms disability imposed by common law for carrying guns in public, even to the “terror of the people.”⁶³

Later, England’s 1689 Declaration of Rights granted subjects of all classes “a broad, individual right to have arms,”⁶⁴ revising earlier English game laws that had provided that only the rich were qualified to hunt game, and therefore only the rich could possess guns.⁶⁵ While the prohibition on game hunting remained intact for the non-elite, the Declaration recognized a core right to own and possess firearms to defend a person’s home and family.⁶⁶ Similar to the common law under Northampton, the penalty for illegal use of firearms was the seizure of one’s guns by the gamekeeper of the local lord, but there was no bar on future gun ownership for purposes of use in the home.⁶⁷ Even the terms of the mass disarmament that occurred during the 1689 Glorious Revolution, which deprived the entire English Roman Catholic population of their firearms, recognized their claim to self-defense, allowing them to keep defensive arms in the home, as “such necessary weapons for self-defense were distinguished from the home arsenals that seem to have been the real concern.”⁶⁸

In Marshall’s view:

[T]o the extent that one can distill any guidance from the English disability and the Revolutionary disarmament, it would seem at most to be that persons who by their actions—not just their thoughts—betray a likelihood of violence against the state may be disarmed. One might generalize from this to say that any move to define a class and restrict its arms rights should rest not on general distaste or prejudice, but rather on

⁶¹ *Id.*

⁶² *Id.* at 717.

⁶³ *Id.*

⁶⁴ *Id.* at 719.

⁶⁵ *Id.*; see also Hay, *supra* note 16, at 46.

⁶⁶ Marshall, *supra* note 58, at 719.

⁶⁷ *Id.*

⁶⁸ *Id.* at 721–23 (citation omitted).

credible grounds for fearing that a member of it would, if armed, pose a genuine present danger to others.⁶⁹

This interpretation of English legal practices certainly does not comport with the modern American practice of disarming non-violent individuals for non-violent crimes.

B. The Development of Gun Laws in the United States

If contemporary American gun restrictions were not imported from British rule, as was the vast majority of criminal law generally, from where did they come?

Prohibitions on gun ownership and use began in the Civil War era-South when many states were concerned with keeping guns from slaves or free blacks and curbing gun fights in the streets.⁷⁰ Even then, concealed carrying of weapons was the major point of focus; “[w]hile openly carrying weapons (‘open carry’) was considered legitimate and constitutionally protected, concealed carrying of weapons (‘concealed carry’) was viewed as something that would be done only by a person who was up to no good.”⁷¹

Gun control spread both north and west in the early twentieth century as California, Michigan, and New York enacted licensing and permitting systems in response to concerns about the large influx of immigrants, organized labor protests, and race rioting.⁷² The Prohibition Era created a criminal bootlegging underworld, leading to horrific rival gang violence and the first of many national calls for handgun prohibition.⁷³ The repeal of Prohibition in 1933 resulted in a substantial drop in gun crimes, but President Roosevelt’s administration was already poised to introduce major national gun control.⁷⁴

The National Firearms Act (NFA) was unveiled in 1934, a measure that would impose hefty taxes on machine gun, shotgun, and handgun possession, and require registration of all covered firearms.⁷⁵ The National

⁶⁹ *Id.* at 727–28.

⁷⁰ David B. Kopel, *The Great Gun Control War of the Twentieth Century—And Its Lessons for Gun Laws Today*, 39 *FORDHAM URB. L.J.* 1527, 1529 (2012).

⁷¹ *Id.*; see also Marshall, *supra* note 58, at 710 (“[E]ssentially every case in the first century after the Second Amendment’s adoption concerned just a regulation of the manner of carrying arms, and most just restricted carrying weapons concealed.”).

⁷² Kopel, *supra* note 70, at 1529.

⁷³ *Id.* at 1531.

⁷⁴ *Id.* at 1532.

⁷⁵ *Id.* at 1533. “As introduced, the NFA would have imposed a \$200 tax (in inflation-adjusted

Rifle Association (NRA), however, successfully lobbied for the removal of handguns from the bill before it became law that same year.⁷⁶ As President Roosevelt's attorney general pushed for a universal national gun registration law in 1936, the NRA again pushed back, giving its enthusiastic support for a different gun control law, the Federal Firearms Act of 1938 (FFA).⁷⁷

The FFA was essentially a dealer licensing law that required persons engaged in interstate gun sales to obtain a one-dollar license to do business⁷⁸ and to keep a record of all firearm sales.⁷⁹ Importantly, the FFA prohibited only those individuals who had been convicted of a "crime of violence" from shipping or transporting firearms or ammunition. "Crime of violence" was defined as "murder, manslaughter, rape, mayhem, kidnaping, burglary, housebreaking; assault with intent to kill, commit rape, or rob; assault with a dangerous weapon, or assault with intent to commit any offense punishable by imprisonment for more than one year."⁸⁰

The "crime of violence" disability in the FFA was upheld for over twenty years, notably by the First and Third Circuits in *Cases v. United States*⁸¹ and *United States v. Tot*,⁸² each of which invoked the collective-right view of the Second Amendment over the individual-right perspective to support their findings.⁸³ Meanwhile, courts in some states were adding their own limitations to gun ownership based on the condition of a person, such as popular bans on carrying a deadly weapon while intoxicated,⁸⁴ on carrying a firearm by "a tramp,"⁸⁵ and short-lived laws banning aliens from owning or possessing any firearms at all.⁸⁶

The federal "felon" firearm disability first appeared in a 1961 amendment to the FFA,⁸⁷ which prohibited felons from receiving any

dollars, equivalent to \$3,255 in 2010) for possessing any machine gun and short-barreled shotgun, plus a \$5 tax on handguns." *Id.*; see also *National Firearms Act of 1934: Hearings on H.R. 9066 Before the H. Comm. on Ways & Means*, 73d Cong. 11, 13, 19 (1934).

⁷⁶ Kopel, *supra* note 70, at 1533.

⁷⁷ *Id.* at 1534; see also Federal Firearms Act, ch. 850, 52 Stat. 1250 (1938).

⁷⁸ See Federal Firearms Act § 3(a), 52 Stat. at 1251.

⁷⁹ See *id.* § 2(d).

⁸⁰ *Id.* § 1(6), 52 Stat. at 1250.

⁸¹ *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942).

⁸² *United States v. Tot*, 131 F.2d 261 (3d Cir. 1942).

⁸³ Marshall, *supra* note 58, at 699–700.

⁸⁴ See, e.g., *State v. Shelby*, 2 S.W. 468 (Mo. 1886); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921).

⁸⁵ See, e.g., *State v. Hogan*, 58 N.E. 572, 572 (Ohio 1900). The court defined a "tramp" as a man, not in "the county in which he usually lives or has his home, found going about begging and asking subsistence by charity." *Id.* at 575–76.

⁸⁶ See, e.g., *People v. Nakamura*, 62 P.2d 246 (Colo. 1936) (striking down a 1921 law banning aliens from owning or possessing a firearm); *People v. Zerillo*, 189 N.W. 927 (Mich. 1922) (striking down part of a 1921 law banning aliens from owning or possessing a firearm without a permit).

⁸⁷ An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961).

firearm in interstate commerce by simply deleting the phrase “crime of violence” and replacing it with the words “crime punishable by a term of imprisonment exceeding one year.”⁸⁸ As it reads today, federal gun controls under 18 U.S.C. § 922(g) prohibit nine classes of individuals, including felons, from possessing, shipping, transporting, or receiving any firearm or ammunition.⁸⁹

C. *The Contemporary Voice of the Supreme Court: District of Columbia v. Heller and McDonald v. City of Chicago*

Two recent decisions by the United States Supreme Court have altered the status quo regarding individual rights to gun possession. In *District of Columbia v. Heller*, the Court held that the Second Amendment⁹⁰ protects an individual’s right to possess a firearm unrelated to service in the military, and that its protection extends to use of that firearm for traditionally lawful purposes, such as self-defense within the home.⁹¹ Decided in 2010, *McDonald v. City of Chicago* took that right one step further when the Court held that the right to keep and bear arms is a fundamental right, incorporated and made applicable to the states by the Due Process Clause of the Fourteenth Amendment.⁹²

These two decisions have quickly changed the landscape of the national firearm debate. Some critics have denounced the Court for relying too heavily on a historical theory, referred to as the “Standard Model” right to arms, calling the theory “circumstantial at best.”⁹³ But whatever precedential force these decisions will have going forward, the Supreme

⁸⁸ *Id.*

⁸⁹ See 18 U.S.C. § 922(g)(1)–(9) (2012). Classes of persons prohibited from firearm possession under the statute include (1) felons, (2) fugitives from justice, (3) an unlawful user or addict of a controlled substance, (4) the mentally ill or those who have been admitted to a mental institution, (5) unlawful aliens in the United States, (6) persons dishonorably discharged from the United States Armed Forces, (7) renounced citizens of the United States, (8) persons subject to certain court-ordered violence related restraining orders, and (9) persons convicted of a misdemeanor crime of domestic violence. *Id.*

⁹⁰ U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

⁹¹ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

⁹² *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (“In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

⁹³ Charles, *supra* note 5, at 1728–29 (“Under this Model, the Second Amendment provides an individual right to possess and use arms, divorced from government sanctioned militias, as a means to (1) check government tyranny through an armed citizenry, (2) provide the means to repel force with force should one be assailed in private or public, and (3) provide for the common defense.”).

Court made clear that this newly recognized individual right was not intended for the felon class.⁹⁴ In *Heller*, the Court declared that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”⁹⁵ The Court was careful to renew that limitation in *McDonald*, stating: “We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as ‘prohibitions on the possession of firearms by felons and the mentally ill’ [and] [w]e repeat those assurances here.”⁹⁶

Despite the Court’s limitation on the application of the individual right to bear arms, it has nonetheless paved the way for future challenges to firearm bans for non-violent felons on the grounds that the bans violate non-violent felons’ fundamental rights.

III. ANALYSIS: EXPLORING THE FELON CLASS, STATE LAWS, AND THE IMPLEMENTATION OF A PROHIBITION ON FELON FIREARM OWNERSHIP

A. Defining the “Other”: Separation of the Modern “Felon” Class from Normative Society

In twenty-first century America, the “convicted felon” status group includes all individuals who have been pronounced guilty of committing some type of serious crime.⁹⁷ The term “felony” is generic, and has been “historically used to distinguish certain ‘high crimes’ or ‘grave offenses’ such as homicide from less serious offenses known as misdemeanors.”⁹⁸ Researchers estimate that in 2010 nearly twenty million individuals living in the United States had a felony conviction on their criminal record, a figure that comprises around 8.6% of the total adult population in America.⁹⁹ This “convicted felon” classification crosses many social and community barriers that traditionally has separated its members.

⁹⁴ See *Heller*, 554 U.S. at 626–27; *McDonald*, 561 U.S. at 786 (plurality opinion).

⁹⁵ *Heller*, 554 U.S. at 626.

⁹⁶ *McDonald*, 561 U.S. at 786 (quoting *Heller*, 554 U.S. at 626).

⁹⁷ See BLACK’S LAW DICTIONARY 743–44 (9th ed. 2009).

⁹⁸ Christopher Uggen, Jeff Manza & Melissa Thompson, *Democracy and Criminal Justice: Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 283 (2006).

⁹⁹ See Sarah Shannon, Christopher Uggen, Melissa Thompson, Jason Schnittker & Michael Massoglia, *Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948–2010* (2011) (unpublished manuscript), available at <http://xa.yimg.com/kq/groups/1624843/1140387168/name/Uggen%20%20Growth%20in%20the%20U.S.%20Ex-Felon%20Population%202010>.

Formative anthropologist and sociologist Max Weber notes that “status groups are normally communities . . . [of] an amorphous kind Both propertied and propertyless [sic] people can belong to the same status group, and frequently they do with very tangible consequences.”¹⁰⁰ No subset of our society goes unrepresented in felony crime statistics. Because of the breadth of the “convicted felon” definition, the individuals that comprise this particular class include all socioeconomic, racial, ethnic, and gender categorizations, constructing a potpourri of individuals with a wide variety of criminal histories.

The “convicted felon” classification can be divided into two sub-categories.¹⁰¹ The first category includes current felons—those who have not yet satisfied all the requirements of their sentences and who are either incarcerated, on probation, or on parole.¹⁰² The second group includes “ex-felons”—those who are no longer under the control of the criminal justice system due to completing their sentences.¹⁰³ This is essentially where the categorizations end. In terms of their social, civil, and political branding and exclusion, both violent and non-violent felons are considered equals within the current and ex-felon groups under the felon class model.¹⁰⁴

The “felon” label, along with the negative social and legal implications that accompany it, is essentially blind to the severity of the underlying crime. Though many current felons will eventually become ex-felons, in many jurisdictions countless ex-felons never regain their civil rights, regardless of whether they were convicted of felony murder or felony tax evasion.¹⁰⁵

To be a convicted felon is to be “branded with a symbolic scarlet letter” that deprives the individual of a multitude of civil and social benefits.¹⁰⁶ In most states, these convicted criminals are subjected to multiple indirect consequences for wearing the “felon” brand. These consequences will endure long after they have served out their sentences and transitioned from “current” to “ex-felon” status. Criminal justice researcher Margaret Colgate

¹⁰⁰ Max Weber, *Class, Status and Party*, in *ESSAYS IN ECONOMIC SOCIOLOGY* 24 (Richard Swedberg ed., 1999).

¹⁰¹ S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 *FORDHAM URB. L.J.* 833, 835 (2007).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *THE NEGRO AMERICAN* 716 (Talcott Parsons & Kenneth B. Clark eds., 1965) (describing these three core elements of American citizenship).

¹⁰⁵ Cherish M. Keller, Note, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 *CHI.-KENT L. REV.* 199, 224 (2006).

¹⁰⁶ Mitchell, *supra* note 101, at 862.

Love observes that “[i]t is this semi-outlaw status more than any prison term or fine that is frequently a criminal defendant’s most serious punishment.”¹⁰⁷ Due to modern developments such as the proliferation of the Internet, a person’s felony status has become increasingly available to the public, and thus increasingly damaging to their prospects for re-integration into civil society after leaving incarceration.¹⁰⁸ Love observes that “[i]t is now surprisingly easy to delve anonymously into other people’s past: a ‘Google’ name search may bring up an uninvited offer from a private screening company to do a criminal background check on the person for a nominal fee.”¹⁰⁹

This Note primarily addresses a convicted felon’s right to possess a firearm, but, depending on the jurisdiction, a felon relinquishes many other rights based on his or her felon status. One of the most contested rights a felon loses is the right to vote,¹¹⁰ regardless of whether the individual is a current or ex-felon.¹¹¹ Felons also automatically lose the privilege of serving on federal and state juries,¹¹² the ability to hold public office,¹¹³ and the ability to receive certain types of professional licenses.¹¹⁴ Even their eligibility to receive public assistance, educational benefits, and public burial benefits is at risk post-conviction.¹¹⁵ Most felons leave prison unaware of these and other collateral sanctions associated with their conviction.¹¹⁶

¹⁰⁷ Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 754–55 (2011).

¹⁰⁸ *See id.* at 772.

¹⁰⁹ *Id.* at 772 n.85.

¹¹⁰ *See generally* Andrea Steinacker, Note, *The Prisoner’s Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 BYU L. REV. 801 (2003) (surveying and describing the various state imposed restrictions on an ex-felon’s right to vote).

¹¹¹ *See id.* at 803–04.

¹¹² Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003).

¹¹³ Steinacker, *supra* note 110, at 804–08 (surveying and describing the various state imposed restrictions on an ex-felon’s right to hold public office).

¹¹⁴ *See generally* Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People With Criminal Records*, 7 J.L. SOC’Y 18 (2005).

¹¹⁵ *See, e.g.*, Sara M. Caudill & Ashley England-Huff, Note, *Collateral Consequences of Felony Convictions Established in the Kentucky Administrative Regulations*, 35 N. KY. L. REV. 543, 570–75 (2008).

¹¹⁶ Amanda L. Kutz, Note, *A Jury of One’s Peers: Virginia’s Restoration of Rights Process and Its Disproportionate Effect on the African American Community*, 46 WM. & MARY L. REV. 2109, 2134–35 (2005) (“After completing their sentence, most felons are unaware of the collateral sanctions associated with their conviction. For example, a young first-time offender is more likely to accept a guilty plea in order to avoid a prison sentence. Only later when he is denied from serving on a jury or turned away at the voting booth may he become aware of the full extent of his guilty plea.”).

In sum, the modern felon class in America is a heterogeneous mixture of individuals from any and all social backgrounds and origins, each convicted of crimes that range widely in “moral turpitude,” but all of whom may be legally excluded from civic and social participation for a potentially indefinite term.

B. Why Exclude Felons from Full Civic and Social Participation?

One traditional justification historically used to exclude felons from the benefits and rights the rest of society enjoy was based on a “neo-contractarian” justification. This Lockean approach to social interaction justified moral principles and political choices through dependence on an idealized, hypothetical social contract between individuals.¹¹⁷ Under this theory, individuals willingly accept the rules of society; therefore, when they break society’s rules, they voluntarily forfeit their rights to participate in society.¹¹⁸ In other words, if the felon had truly valued the right to fully participate in society, he would not have risked losing it by breaking the law. It is no one else’s fault but his own. Additional justifications are based on theories of retribution, punishment, or deterrence, while others take a more protectionist view.¹¹⁹

One modern argument against the exclusion of felons from social and civic participation charges state politicians with making arbitrary character assessments in order to incapacitate ex-felons.¹²⁰ In his poignant article on felon reintegration, criminal law researcher and ex-felon James M. Binnall argues that states make three misguided assumptions about criminal character when restricting civic freedoms.¹²¹

First, the state assumes that criminal acts reveal bad moral character.¹²² This rationale provides a “conceptual tie between action and character” through which “[b]ad acts are evaluated as providing evidence of bad character, and the criminal offender is judged by the defect in character that

¹¹⁷ James M. Binnall, *EG1900 . . . The Number They Gave Me When They Revoked My Citizenship: Perverse Consequences of Ex-Felon Civic Exile*, 44 WILLAMETTE L. REV. 667, 670 (2011).

¹¹⁸ *Id.* at 670 n.17 (“A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.”).

¹¹⁹ See, e.g., Love, *supra* note 107, at 770 (“For twenty years after the passage of the Sentencing Reform Act of 1984, the official position of the federal government was that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven.”).

¹²⁰ Binnall, *supra* note 117, at 672.

¹²¹ *Id.*

¹²² *Id.*

his act betrays.”¹²³ Second, in order to justify felon exclusion, the state must also assume that character is a fixed and generally consistent concept.¹²⁴ Speaking from his personal perspective and experience, Binnall states: “In this way, once ex-felons violate recognized law, we can never disprove the assumption that we are what the State asserts—flawed and immoral.”¹²⁵ Third, the state makes the assumption that good character is essential to both understanding the common good and making proper decisions about the protection of society.¹²⁶

These ideas are derived from and supported by the historical works of the philosopher Aristotle, who wrote that “criminals who break laws cannot govern themselves” and that “every person chooses to develop good and bad character through autonomous actions. Once a person chose their character . . . he or she was not free to simply undo the choice.”¹²⁷ Thus, under this character-based rationale, a felon may be perceived by the state as inherently flawed, incapable of correction, and undeserving of the restoration of his or her rights due to his own “bad” character choices. Even non-violent offenders are excluded from full re-entry based on their flawed character, because they have also broken their social contract with society by violating its laws.

*C. Rights of and Restrictions on a Convicted Felon Under Kentucky Law:
Felon Prohibitions and the Myth of the Pardon*

Felon exclusionary laws in Kentucky are codified under both the Kentucky Administrative Regulations (KAR) and throughout the Kentucky Revised Statutes (KRS).¹²⁸ Approximately 130 separate KAR provisions contain collateral sanctions pertaining to felony convictions, and 119 of those sanctions are in the employment context.¹²⁹ These employment-related sanctions include limitations on certain professional occupational licensing, certifications, and other public employment eligibility,¹³⁰

¹²³ *Id.* at 672–73 (citing Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality, and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1033–34 (2004)).

¹²⁴ *Id.* at 673.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 672 (citation omitted) (internal quotation marks omitted).

¹²⁸ See, e.g., 601 KY. ADMIN REGS. 13:110 § 5(1)(c) (2014); KY. REV. STAT. ANN. § 527.040 (West 2006).

¹²⁹ Caudill & England-Huff, *supra* note 115, at 545.

¹³⁰ *Id.* at 545–48 (hypothesizing that the requisite character component to Kentucky licensure in the fields of accountancy, real estate, nursing, architecture, psychology, occupational therapy, private

however, these restrictions do not formally extend to private employment.¹³¹ As an additional limitation, felons in Kentucky receive reduced access to public assistance.¹³² They are only eligible for programs such as the Kentucky Transitional Assistance Program (K-TAP), food stamps, and the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) if they satisfy certain conditions of post-sentence treatment and rehabilitation.¹³³

Like many other states, Kentucky does not allow members of the felon class, either current or prior, to own or possess a gun. Under KRS 527.040(1), “[a] person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony . . . in any state or federal court.”¹³⁴ The statute distinguishes between handguns and “other firearms” by limiting the restriction based on the date that the individual was convicted.¹³⁵ Presently, a person convicted of a felony in any state may never again possess, manufacture, or transport any type of firearm in the Commonwealth of Kentucky.¹³⁶

Kentucky’s felon firearm possession statute contains a slim avenue a felon can explore to restore his or her right to own or possess a firearm within the state. A convicted felon may request and be granted a full pardon from either the Governor of Kentucky or the President of the United States.¹³⁷ The federal government will honor either pardon and will not subsequently prosecute a former felon whose rights have been restored under the laws of his or her state.¹³⁸ The Kentucky Court of Appeals encountered this scenario in *Cheatham v. Commonwealth*, where an ex-felon received what he believed to be a full pardon from then-Governor Martha Layne Collins.¹³⁹ Unbeknownst to Cheatham, that pardon was only

investigation, and others has the potential to exclude those with felony convictions from participation).

¹³¹ *Id.* at 545.

¹³² *Id.* at 570.

¹³³ *Id.* at 570–73.

¹³⁴ KY. REV. STAT. ANN. § 527.040(1) (West 2006).

¹³⁵ *Id.* § 527.040(4) (“The provisions of this section with respect to handguns, shall apply only to persons convicted after January 1, 1975, and with respect to other firearms, to persons convicted after July 15, 1994.”).

¹³⁶ *Id.* § 527.040(1).

¹³⁷ *Id.* § 527.040(1)(a).

¹³⁸ See 18 U.S.C. § 921(a)(20) (2012) (“What constitutes a conviction of [a crime punishable by imprisonment for a term exceeding one year] shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any 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 for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”).

¹³⁹ *Cheatham v. Commonwealth*, 131 S.W.3d 349, 350 (Ky. Ct. App. 2004).

partial, yet Cheatham incorrectly believed that his full civil rights had been restored, including the right to own a firearm.¹⁴⁰

Seventeen years after receiving the Governor's pardon for his non-violent offense (theft of property valued in excess of \$100), Cheatham was arrested and indicted on several counts of possession of a handgun by a convicted felon, a violation of KRS 527.040.¹⁴¹ Cheatham entered a conditional guilty plea in the case, preserving his right to contest the charge on the ground that the earlier pardon had released him from criminal liability under the exclusionary statute.¹⁴²

The court of appeals looked to the plain language of the pardon issued by the Governor under Sections 145 and 150 of the Constitution of the Commonwealth of Kentucky to determine that Cheatham had been given merely a partial pardon under those sections, and only Cheatham's right to vote and to hold public office had been restored as a result.¹⁴³ The court looked to Kentucky precedent to explain that a pardon issued under Sections 145 and 150 of the Kentucky Constitution leaves an ex-felon ineligible for consideration as a peace officer,¹⁴⁴ fails to restore an ex-felon's right to sit on a jury,¹⁴⁵ and maintains the prohibition on felon firearm possession. The court determined that only a full pardon, granted under Section 77 of the Kentucky Constitution, could restore a felon's full civil rights, the issuance of which is a discretionary decision made by the pardoning governor.¹⁴⁶

Thus, even if an ex-felon is eligible to receive a governor's pardon for the underlying felony offense, the restoration of that individual's right to own a firearm does not automatically accompany the pardon. A pardoning governor has the discretion to decide to whom he or she will issue various types of full, conditional, or partial pardons in the Commonwealth of Kentucky.¹⁴⁷

The highly discretionary nature of this remedy does not provide an effective opportunity for ex-felons to regain post-conviction normalcy in their lives. To the contrary, it merely sets up a statutory game of chance in

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 351.

¹⁴⁴ *Id.*; see also KY. REV. STAT. ANN. § 61.300 (West 2006); Leonard v. Corr. Cabinet, 828 S.W.2d 668 (Ky. Ct. App. 1992).

¹⁴⁵ Cheatham, 131 S.W.3d at 351; see also Anderson v. Commonwealth, 107 S.W.3d 193 (Ky. 2003).

¹⁴⁶ Cheatham, 131 S.W.3d at 351.

¹⁴⁷ *Id.* at 350–51.

which an individual can only hope to win favor with the state's executive branch and thereby enjoy his or her full constitutional rights once again.

With this singular solution, Kentucky joins the majority of states in offering “post-conviction mechanisms for relieving collateral sanctions” that consist of “a hodge-podge of inaccessible and over-lapping provisions, riddled with qualifications and exceptions, and of uncertain legal effect.”¹⁴⁸ Love observes that “[i]n almost every U.S. jurisdiction (including the federal system), post conviction mechanisms for relieving collateral sanctions—pardon, expungement, and certificates of good conduct—are inaccessible or ineffective or both, having been narrowed and neglected over the three decades in which crime has been a central part of American politics.”¹⁴⁹ Accordingly, pardons are nothing more than a “phantom remedy” in both state and federal systems.¹⁵⁰

To demonstrate the decline in use of pardons by the federal government, the Department of Justice tracked the number of presidential clemency actions between the Truman administration in 1945 and Barack Obama's first term in 2011.¹⁵¹ The study revealed that between 1945 and 1980 more than 30% of presidential pardon requests were granted.¹⁵² This totaled 6,160 people pardoned for both violent and non-violent felony crimes over a thirty-five year period.¹⁵³ In the thirty years following 1980, only 1,135 individuals received presidential pardons, representing only 8% of those who applied.¹⁵⁴

The number of pardons issued by state governors has also declined. The Restoration of Rights Project, sponsored by the National Association of Criminal Defense Lawyers, ranks twenty-one states (including Kentucky), the District of Columbia, and the federal system as issuing pardons on an “infrequent” or “rare” basis, meaning few or no pardons in the past twenty years.¹⁵⁵ Fifteen states are listed as sparing, irregular, or uneven in their

¹⁴⁸ Love, *supra* note 107, at 775.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 776.

¹⁵¹ See *Presidential Clemency Actions by Administration: 1945 to Present*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/pardon/actions_administration.htm (last updated Apr. 4, 2011).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Restoration of Rights Project: Pardoning Practices in the States*, NAT'L ASS'N OF CRIM. DEF. LAW., <http://www.nacdl.org/resourcecenter.aspx?id=25276> (last visited June 12, 2014). Other states listed as having infrequent or rare pardoning practices include Alaska, Arizona, California, Colorado, Kansas, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Vermont, and West Virginia. *Id.*

pardoning practices,¹⁵⁶ and only fourteen states frequently and regularly grant pardons, issuing them to over 30% of applicants.¹⁵⁷

Both governors and presidents may be reluctant to exercise their constitutional pardoning power for fear of losing votes if they are accused of being “soft on crime.” Because of this, they may be more likely to issue pardons at the end of their term when election concerns are no longer a factor.¹⁵⁸ Nonetheless, the utter failure of pardons as a means of restoration of rights for ex-felons lends even more weight to the argument for reform of all collateral consequences of a felony conviction.

IV. RESOLUTION

A. The Uniform Collateral Consequences of Convictions Act and Other Solutions from the Progressive Movement to Restore Felon Firearm Rights

Though a small number of states have taken a liberal view on rights reinstatement for convicted felons, many notable legal groups, including the American Bar Association (ABA), are pressing for more sweeping changes. In 2004, the ABA released the ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (ABA Standards),¹⁵⁹ a comprehensive set of standards addressing collateral consequences of felony convictions.¹⁶⁰ In releasing this proposal for uniform standards, the ABA concluded that:

The dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending. . . . If promulgated and administered indiscriminately, a

¹⁵⁶ *Id.* The states listed in the sparing and irregular categories include Florida, Hawaii, Indiana, Louisiana, Maine, Maryland, Minnesota, Mississippi, New Mexico, Ohio, Virginia, Texas, Washington, Wisconsin, and Wyoming. *Id.*

¹⁵⁷ *Id.* The states listed in the frequent and regular category include Alabama, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Iowa, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, and South Dakota. *Id.*

¹⁵⁸ Love, *supra* note 107, at 776.

¹⁵⁹ ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004).

¹⁶⁰ The ABA Standards define “collateral sanctions” as penalties that are imposed “automatically” upon a person’s conviction. *Id.* Standard 19-1.1(a).

regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.¹⁶¹

The ABA Standards seek to achieve several goals in alleviating unfair post-conviction sanctions. The first is to “ensure that defendants are fully aware, at the time of a guilty plea and sentencing, of all relevant collateral sanctions that will automatically come into play as a result of a conviction.”¹⁶² The ABA Standards also give the sentencing court the authority to “consider applicable collateral sanctions in shaping its own sentence,”¹⁶³ allowing a judge, who has the most intimate knowledge of the case and of the defendant, to determine which sanctions fit the crime. Further, the ABA Standards provide a uniform means of obtaining relief from sanctions through a court or an administrative agency.¹⁶⁴ The relief system is two-tiered: the first giving “timely and effective” relief from unreasonably burdensome sanctions,¹⁶⁵ and the second extending relief to someone convicted in an outside jurisdiction (including the federal system).¹⁶⁶

The ABA Standards also contemplate a more general procedure by which “a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.”¹⁶⁷ This more comprehensive relief “is intended to function as a kind of certification of rehabilitation that addresses issues of stigma and lost status as well as legal barriers,” and functions like a statutory pardon.¹⁶⁸ This pardon-like relief may be delivered in a number of different ways, but the ABA indicates it prefers the “transparent vacatur approach” of the Model Penal Code to

¹⁶¹ *Id.* at 8–10 (footnotes omitted).

¹⁶² Love, *supra* note 107, at 781; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standards 19-2.1, 19-2.3 (requiring a jurisdiction to create an inventory of its collateral sanctions, and requiring a court to ensure that a defendant has been informed by his attorney of “all applicable collateral sanctions” before accepting a guilty plea, respectively).

¹⁶³ Love, *supra* note 107, at 781; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.4(a).

¹⁶⁴ ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.5.

¹⁶⁵ *Id.* Standard 19-2.5(a) (providing for “timely and effective” relief as early as sentencing from any collateral sanctions that may unreasonably and inappropriately burden a criminal defendant).

¹⁶⁶ *Id.* Standard 19-2.5(b).

¹⁶⁷ *Id.* Standard 19-2.5(c).

¹⁶⁸ Love, *supra* note 107, at 782–83.

either expungement or sealing of a criminal record.¹⁶⁹ In a comment, the ABA stated that:

The Model Penal Code mechanism evidently seeks to accomplish an offender's reintegration into society not by trying to conceal the fact of conviction, but by advertising the evidence of rehabilitation. In vacating the conviction, the sentencing court is in effect declaring that the offender has paid the full price for his crime and has earned the right to return to responsible membership in society.¹⁷⁰

The Uniform Law Commission (ULC) has also been an advocate for nationwide uniformity in felony collateral consequences.¹⁷¹ In recognition of the recent promulgation of the ABA Standards, the ULC Governing Board developed a comprehensive framework for approaching collateral consequences with the goal of enactment by state legislatures.¹⁷² The project was a procedural-based reform insofar as the ULC was unwilling to take a uniform stand on the scope or substantive content of felony collateral consequences among the states.¹⁷³

The ULC encountered a different problem with this project than it typically dealt with in other scenarios.

The problem was not that states had varying approaches to the subject that could usefully be harmonized, as in the ordinary ULC project; the problem was that most states had no approach to the subject at all, only an unknown number of laws and rules imposing collateral consequences

¹⁶⁹ *Id.*

¹⁷⁰ ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS Standard 19-2.5(c) cmt.

¹⁷¹ See Love, *supra* note 107, at 783–89.

The ULC (formally the National Conference of Commissioners on Uniform State Laws) was originally created in 1892 by state governments, with the encouragement of the American Bar Association, to determine areas of state law in which uniformity is desirable, and then draft uniform and model acts for consideration by the states. Included in its body of work have been such pivotal contributions as the Uniform Commercial Code, the Uniform Partnership Act, the Uniform Anatomical Gift Act, the Uniform Interstate Family Support Act, the Uniform Electronic Transactions Act, and the Uniform Prudent Management of Institutional Funds Act.

Id. at 784 n.130.

¹⁷² See *id.* at 784.

¹⁷³ *Id.*

scattered—one might say hidden—in disparate areas of their codes and regulations.¹⁷⁴

After six years of research and drafting, the result of the ULC Drafting Committee's efforts was the Uniform Collateral Consequences of Conviction Act of 2010 (UCCCA).¹⁷⁵ The UCCCA worked to give legislative form to three essential provisions of the ABA Standards: compilation, notification, and relief.¹⁷⁶

These relief provisions follow the same two-tiered structure as the ABA Standards, but under the UCCCA more complete relief may be crafted for an individual after a designated period of law-abiding conduct.¹⁷⁷ Under the first tier, an individual may be able to obtain relief from specific collateral sanctions as early as sentencing “if he can show that the relief would ‘materially assist’ in obtaining employment, housing, public benefits or occupational licensing, and that he has a ‘substantial need’ for the benefit to live a law-abiding life.”¹⁷⁸ In addition to his or her need for relief, the court or administrative board must find that “granting the petition would not pose an unreasonable risk to the safety or welfare of the public or any individual.”¹⁷⁹

The second tier provides an avenue for more comprehensive relief from all collateral sanctions, made available to an individual after a certain period of law-abiding conduct with a suggested period of five years.¹⁸⁰ Certification for relief under this tier is issued by a board, which looks to whether the individual is employed or has a lawful source of income, has not engaged in subsequent criminal acts, and does not pose a danger to the public.¹⁸¹ Under either relief section of the UCCCA, no distinction is made between a violent or non-violent offender or offense, and neither type of offender is disqualified from obtaining the relief offered.¹⁸²

An order or certificate issued for an offender under either tier essentially converts an automatic collateral sanction into a discretionary

¹⁷⁴ *Id.*

¹⁷⁵ UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010).

¹⁷⁶ *See id.* §§ 4–6 (dealing with the compilation of a jurisdiction's collateral consequences, notice of collateral consequences in pre-trial proceedings, and notice of collateral consequences at sentencing and upon release, respectively); *see also* Love, *supra* note 107, at 784–85.

¹⁷⁷ UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 10.

¹⁷⁸ *Id.*; *see also* Love, *supra* note 107, at 785–86.

¹⁷⁹ UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 10.

¹⁸⁰ *Id.* § 11.

¹⁸¹ *Id.*

¹⁸² *See id.* §§ 10–11.

“disqualification.”¹⁸³ This leads to the next phase in rights reinstatement: a “Decision to Disqualify” review.¹⁸⁴ It requires an “individualized assessment” before the decision-maker may deny a particular benefit, and the “particular facts and circumstances involved in the offense and the essential elements of the offense” may only be considered if they are “substantially related to the benefit or opportunity at issue.”¹⁸⁵ Under the UCCCA approach, “[t]he idea is that denial is not based upon the conviction, but rather upon the conduct that led to the conviction—though the conviction conclusively establishes that the conduct took place.”¹⁸⁶

B. The Uniform Collateral Consequences of Conviction Act as a Model Law for Kentucky Collateral Sanctions

The UCCCA solution to discriminatory and arbitrary collateral sanctions would function effectively in Kentucky, as it strikes a proper balance between the constitutional guarantee of a citizen’s right to bear arms and the state’s concern with gun violence. The individualized assessment approach provides non-violent felons the opportunity to be treated differently than violent felons in terms of their right to bear arms, by allowing a decision-maker to review the offender’s case and decide on the appropriate sanction rather than automatically apply a pre-fabricated set of restrictions. This approach also avoids unnecessary moral judgments about a felon based on “good” or “bad” character, and focuses instead on the

¹⁸³ See *id.* § 2(5) (“‘Disqualification’ means a penalty, disability, or disadvantage, however denominated, that an administrative agency, governmental official, or court in a civil proceeding is authorized, but not required, to impose on an individual on grounds relating to the individual’s conviction or offense.”).

¹⁸⁴ *Id.* § 8.

¹⁸⁵ *Id.* Section 8 provides in full:

In deciding whether to impose a disqualification, a decision-maker shall undertake an individualized assessment to determine whether the benefit or opportunity at issue should be denied the individual. In making that decision, the decision-maker may consider, if substantially related to the benefit or opportunity at issue: the particular facts and circumstances involved in the offense, and the essential elements of the offense. A conviction itself may not be considered except as having established the elements of the offense. The decision-maker shall also consider other relevant information, including the effect on third parties of granting the benefit or opportunity and whether the individual has been granted relief such as an order of limited relief or a certificate of restoration of rights.

Id.

¹⁸⁶ Love, *supra* note 107, at 787.

character of the misconduct as an indicator for what collateral sanctions may be appropriate in a particular case.

Under the UCCCA model, Kentucky offenders would also be able to circumvent the ineffective pardoning system by applying for relief directly to an established board that exclusively deals with the issue of reinstatement of felons' rights and alleviation of collateral sanctions. Such a system would greatly improve the efficacy and expediency of the restoration process. As an added incentive, Kentucky state officials would avoid bearing the political responsibility accompanying pardons. Instead, the administrative board would answer for any social backlash surrounding a reinstatement.

In terms of financial investment and other planning, Kentucky will need to evaluate and estimate how many felons it anticipates will apply for relief from sanctions in order to decide how it will implement the board review system. A review board could be centrally located in Frankfort, Lexington or Louisville, and, similar to Kentucky's appellate court system, could be made up of a single panel of three decision-makers reviewing each case. The system could start small and grow with added demand. If one board is not enough to manage the influx of cases, more boards could be established. Any implementation of the UCCCA model would, at the very least, open a window for non-violent offenders in Kentucky to receive restoration of their rights to own firearms, to vote, and to otherwise participate in society.

V. CONCLUSION

A look into the historical development of felon exclusionary laws reveals a systemic tradition of arbitrary collateral punishments levied against violent and non-violent criminals alike. The modern result is a massive population of disarmed, disenfranchised, disadvantaged, and disheartened Americans with limited opportunities to gain reinstatement of many basic rights, including the right to arm themselves for protection in their homes. Instead of abandoning these citizens without remedy, Kentucky and other states should embrace the individualized assessment approach designed by the Uniform Law Commission in their Uniform Collateral Consequences of Conviction Act. This approach would allow for a more narrowly tailored review of an individual's conduct when imposing criminal sanctions, and would avoid reliance on an overbroad "felon" label to impose sanctions based merely on a person's criminal status.

