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I. ABSTRACT

In the 1954 case of *United States v. Morgan*, the Supreme Court revived the ancient writ of coram nobis by making it the sole mechanism for post-incarceration judicial review of federal convictions. It appeared that coram nobis was well on its way to taking its place as a vital part of the American system of collateral review. Where the writ of habeas corpus provided unlawfully convicted prisoners with a way to challenge their conviction, coram nobis offered a similar avenue of relief for those who were no longer in federal custody. But the promise of modern coram nobis has been held in check by a restrictive doctrine known as the civil disabilities test. In most federal circuits today, a coram nobis petitioner must show that he or she is suffering a distinct and ongoing legal harm—a "civil disability"—before a court will review the underlying conviction. The Seventh Circuit, Judge Easterbrook in particular, led the way in creating the now-prevalent civil disabilities test by arguing that such a test is necessary to promote the values of finality and judicial economy. But the test means that many people who were unlawfully and erroneously convicted never have a chance to challenge their convictions in court. This Article argues that the civil disabilities test is inconsistent with the essential nature and important function of post-*Morgan* coram nobis relief. The test does very little to promote the values of finality and judicial economy, and its application leads to grave departures from the fundamental norm of

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accuracy. Moreover, the test disregards the devastating reputational, professional, and social consequences of conviction. Those who are stigmatized by an unlawful conviction should be able to obtain collateral relief. And coram nobis, a form of relief which the Court recently re-affirmed in *United States v. Denedo*, should not be weighed down by the overly restrictive civil disabilities test.

II. INTRODUCTION

In 1942, the United States prosecuted Gordon Hirabayashi and Fred Korematsu for failing to follow orders aimed at removing all people of Japanese ancestry from the West Coast of the United States. Hirabayashi and Korematsu challenged the legality of those

orders, and they have become part of American legal history thanks to the Supreme Court cases that bear their names. In those cases, the Court accepted the government's position that military exigency, rather than racial animus, motivated the relocation of all West Coast Japanese Americans, and the Court affirmed their convictions.[1] Those convictions stood on the books for over forty years, until 1984 in the case of Korematsu[2] and 1987 in the case of Hirabayashi.[3]

An obscure post-conviction writ called coram nobis played an important part in the vindication of Korematsu and Hirabayashi. The writ of coram nobis, like habeas corpus, empowers a court to vacate the petitioner's conviction upon a showing that such conviction was unlawful.[4] The difference between the two writs is that habeas is available only to those who are "in custody"—that is, in prison or other forms of supervision deemed "custody"—while coram nobis is available only to those who are no longer, or never were, in custody.[5] As Korematsu and Hirabayashi had long since left federal custody when they filed for collateral relief, coram nobis was the only writ available to them and their only hope for vacating their convictions.[6]

Fortunately for Korematsu and Hirabayashi, federal courts in the Ninth Circuit granted their coram nobis claims and vacated their Internment-era convictions—allowing "the judgments of the courts [to] conform to the judgments of history."[7] But those convictions would still be on the books today had they faced the restrictive coram nobis jurisprudence favored by a majority of federal courts. In

1. *See* Korematsu v. United States, 323 U.S. 214, 223 (1944); Hirabayashi v. United States, 320 U.S. 81, 100–01 (1943).

2. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting writ of coram nobis).

3. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (granting writ of coram nobis). The story of how the country came to recognize the injustice in those convictions, and how the federal courts finally and belatedly vacated those convictions, is a great narrative of personal vindication, national reconciliation, and systemic self-correction. *See generally* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1993).

4. *See, e.g.*, United States v. Kwan, 407 F.3d 1005, 1009–10 (9th Cir. 2005) (describing nature of writ of coram nobis).

5. *See, e.g.*, United States v. Sandles, 469 F.3d 508, 517–18 (6th Cir. 2006) (rejecting petition for writ of coram nobis, among other reasons, because litigant was still "in custody" and thus should have petitioned for habeas relief pursuant to 28 U.S.C. § 2255).

6. *See Korematsu*, 584 F. Supp. at 1412; *Hirabayashi*, 828 F.2d at 604.

7. *Hirabayashi*, 828 F.2d at 593.

most circuits today, a petitioner wishing to vacate what he believes to be an unlawful conviction must first prove to the court that he is suffering a distinct legal harm—a civil disability—as a result of the allegedly unlawful conviction.[8] Civil disabilities range from disenfranchisement to loss of professional licenses to ineligibility for certain welfare benefits.[9] But by the mid-1980s Korematsu and Hirabayashi were no longer suffering from any distinct civil disabilities, and the chance that they would face any such consequences in the future was negligible. Korematsu was a self-employed draftsman living in San Leandro, California,[10] and Hirabayashi was a professor emeritus of sociology at the University of Alberta.[11] They could not point to any specific and ongoing legal barriers that they faced as a consequence of their Internment-era convictions. On the majority view, then, they had no business coming to court and demanding review of their old cases.

This Article will critique the majority approach to coram nobis, which demands that the petitioner prove an ongoing "civil disability" before a court will review the conviction. The civil disabilities test employed by the majority of circuit courts denies individuals and society the benefits of "setting the record straight" and thus cripples an important mechanism for systemic self-correction. As the Japanese internment cases demonstrate, coram

8. *See* United States v. Hernandez, 94 F.3d 606, 613 n.5 (10th Cir. 1996) (citing United States v. Bruno, 903 F.2d 393, 396 (5th Cir.1990)) (noting requirement of "civil disabilities"); Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993) (requiring continued suffering of "significant collateral consequences from the judgment"); United States v. Drobny, 955 F.2d 990, 996 (5th Cir. 1992) (requiring a demonstration "that [petitioner] is suffering civil disabilities as a consequence of the criminal conviction"); Nicks v. United States, 955 F.2d 161, 167 (2d Cir. 1992) (deeming the writ appropriate where "subsequent disabilities" or "legal consequences" persist); United States v. Craig, 907 F.2d 653, 658 (7th Cir. 1990) (emphasizing the need to show "lingering civil disabilities" from a wrongful conviction); United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989) ("The petitioner must show that he is suffering from continuing consequences of the allegedly invalid conviction."); Stewart v. United States, 446 F.2d 42, 43–44 (8th Cir. 1971) (requiring "present" or "continuing adverse consequences"). *But see* United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988) (affirming a grant of the writ without considering continuing harm to the petitioners).

9. *See generally* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–39 (2006).

10. Richard Goldstein, *Fred Korematsu, 86, Dies; Lost Key Suit on Internment*, N.Y. TIMES, Apr. 1, 2005, at C13, *available at* 2005 WLNR 5085604.

11. *Hirabayashi*, 828 F.2d at 592.

nobis serves a necessary function for both personal vindication and social rehabilitation.[12] But it can do so only if the courts follow the Ninth Circuit approach and jettison the civil disabilities test. In this Article, I argue that unlawfully convicted petitioners should not be denied coram nobis relief simply because they cannot prove an ongoing civil disability; rather, these petitioners should receive relief whenever they can show that their conviction was unlawful.

A properly functioning writ of coram nobis will become even more vital in the coming years due to a combination of technological advances and social changes. Information technology makes criminal records instantly and easily accessible to anyone with an Internet connection, and thus practically precludes escape from the stigma of criminal conviction.[13] At the same time, forensic technology is becoming more powerful and cheaper and will allow more people the chance to challenge the factual basis for their convictions long after trial.[14] Additionally, information-savvy citizens increasingly understand that one's reputation needs to be guarded, in the physical world as well as online. Together, these trends are likely to lead to an increase in meritorious attacks on old convictions, both in habeas and coram nobis, and the court system will need to respond in a fair and practical way. As the number of petitions for coram nobis begins to rise, the flaws of the civil disabilities test will be cast in stark relief, and the circuit split over the issue ought to attract the attention of the Supreme Court. I argue that the Court should resolve the split decisively in favor of the Ninth Circuit's minority approach and rid coram nobis of this impediment to remedial justice.[15]

12. Indeed, in the extraordinary cases of *Korematsu* and *Hirabayashi*, coram nobis also allowed for national reconciliation and proof of America's capacity to recognize its errors and correct them.

13. *See infra* Part V.B.

14. *See, e.g.*, Fredrick R. Bieber, *Science and Technology of Forensic DNA Profiling: Current Use and Future Directions*, *in* DNA AND THE CRIMINAL JUSTICE SYSTEM 23–24 (David Lazer ed., 2004); Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1659 (2008) ("Assuming that genetic science and technology continue to improve, innocence claims will continue to be important, particularly as the cost of testing falls and the speed of testing increases."); Samuel R. Gross et al., *Exonerations in the United States: 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 528 (2005) (finding that the rate of exonerations nationwide climbed sharply between 1989 and 2003 due in part to "the growing availability and sophistication of DNA identification technology").

15. The Supreme Court's current attitude toward coram nobis is difficult to read. The Court recently affirmed the jurisdiction of Article I military courts to entertain coram nobis

In Part III of this Article, I briefly review the development of the writ of coram nobis from its Medieval origins to its contemporary function in federal criminal procedure. I also detail how the promise of the contemporary writ of coram nobis was strangled in the overwhelming majority of federal circuits due to the emergence of the civil disabilities test in the late 1980s.

In Part IV, I argue that the creation of the civil disabilities test relied on a misreading of two relevant legal sources—namely, the landmark Supreme Court case of *Morgan v. United States*[16] and the federal habeas statute of 1948.[17] Neither the *Morgan* case nor the federal habeas statute suggested the development of the restrictive civil disabilities test; rather, those sources support a more expansive view of collateral review in the federal courts.

In Part V, I contend that the civil disabilities test overlooks the severity of the non-legal results of conviction. In particular, I argue that the reputational and professional consequences of unlawful conviction require redress on their own and that righting reputational wrongs is a long-established function of the judicial system.

Finally, in Part VI, I analyze the core clash between the values of accuracy and finality that underlies and animates the debate over the civil disabilities test. I argue that the civil disabilities test constitutes a serious deviation from the norm of accuracy without any significant countervailing gain in finality or judicial economy. The judicial system would not be over-burdened by a "flood" of coram nobis cases in the absence of the civil disabilities test. Coram nobis already requires a threshold showing that valid reasons exist for failing to challenge the conviction earlier; district courts can thus deny, without hearing, redundant and abusive coram nobis petitions.

The sum of my argument is this: no court, presented with incontrovertible evidence of an unlawful conviction, should dismiss a coram nobis petition on the grounds that the petitioner does not suffer from an ongoing civil disability. Being branded a convicted

petitions, United States v. Denedo, 129 S. Ct. 2213 (2009), and in doing so, confirmed the vitality of coram nobis as a "tool" to correct legal and factual errors in otherwise final convictions. *Id.* at 2221. At the same time, the Court stressed that coram nobis is an "'extraordinary remedy'" that "'should not be granted in the ordinary case.'" *Id.* at 2224 (quoting Nken v. Holder, 129 S. Ct. 1749, 1762 (2009) (Kennedy, J., concurring)).

16. 346 U.S. 502 (1954).

17. Judiciary and Judicial Procedure Rules of Decisions Act, Pub. L. No. 80-773, 62 Stat. 869 (1948) (codified as amended at 28 U.S.C. § 2255 (2006)).

criminal is, in virtually every case, a significant reputational and professional injury, and it is never too late for the judicial system to correct its errors, set the record straight, and vacate unlawful and erroneous convictions.

III. A BRIEF HISTORY OF FEDERAL CORAM NOBIS

A. The Writ at Common Law

Coram nobis has a long history in the common law, stretching back to sixteenth-century England.[18] Created at a time when appellate review of criminal judgments was generally unavailable and when court cases conclusively ended at the end of a defined term, traditional coram nobis provided a narrow opportunity for a court to reconsider a final judgment that it had rendered in a previous judicial term.[19] The traditional writ was available primarily to address the problem of new facts coming to light—facts that were unavailable to the petitioner and unconsidered by the court in the earlier case.[20] Application of the traditional writ did not depend on whether or not the petitioner was in custody and, in fact, did not depend on whether the case was criminal or civil.[21] Common-law courts developed the writ of coram nobis for certain extraordinary circumstances where equity appeared to require review of an otherwise final or non-appealable judgment.[22]

The traditional writ of coram nobis migrated to the United States along with the common law, appearing in both state and federal courts and in both civil and criminal matters.[23] In the federal courts, coram nobis maintained its traditional function as a means for trial courts to correct factual errors in previously decided cases from

18. *See* Daniel F. Piar, *Using Coram Nobis to Attack Wrongful Convictions: A New Look at an Ancient Writ*, 30 N. KY. L. REV. 505, 506–07 (2003); M. Diane Duszak, Note, *Post-*McNally *Review of Invalid Convictions Through the Writ of* Coram Nobis, 58 FORDHAM L. REV. 979, 981–82 (1990).

19. *See* United States v. Bush, 888 F.2d 1145, 1147 (7th Cir. 1989) (discussing the historical origins of the coram nobis writ).

20. *See id.*; Piar, *supra* note 18, at 506–07; Duszak, *supra* note 18, at 981–82.

21. *See* Duszak, *supra* note 18, at 981.

22. *See* sources cited *supra* note 18. Other such extraordinary writs included audita querela, certiorari, coram vobis, and habeas corpus. *See* BLACK'S LAW DICTIONARY 126, 220, 338, 715 (7th ed. 1999).

23. *See* Piar, *supra* note 18, at 509–29; Duszak *supra* note 18, at 982.

earlier judicial terms.[24] As courts crafted other mechanisms for correcting factual and clerical mistakes, the issuance of coram nobis became more and more rare, until the Federal Rules of Civil Procedure, originally issued in 1937, explicitly abolished the writ in civil actions.[25] The availability of coram nobis in criminal cases remained a subject of some confusion in the ensuing years, and neither the promulgation of the Federal Rules of Criminal Procedure in 1946 nor the adoption of federal "statutory habeas" in 1948 cleared up the matter.[26] The use of coram nobis in federal courts had all but died out until the Supreme Court resurrected and refashioned the writ in the landmark case of *United States v. Morgan*.[27]

B. United States v. Morgan*: The Refashioning of Coram Nobis*

In 1939, Robert Patrick Morgan pled guilty to eight federal criminal counts related to the theft of three pieces of mail from the U.S. Postal Service.[28] He was nineteen years old, did not retain counsel, and apparently never waived his right to retain counsel.[29] The U.S. District Court for the Northern District of New York sentenced Morgan to four years in prison.[30] Eleven years later, in 1950, Morgan was convicted of attempted burglary in a New York state court, and, pursuant to New York's Multiple Offenders Law, the state court sentenced Morgan to a longer term than it otherwise would have on account of the previous federal conviction.[31] Facing a longer state sentence, Morgan filed a motion for a writ of coram nobis in the U.S. District for the Northern District of New York seeking to vacate his federal conviction of 1939, which formed the basis for his extended state sentence.[32]

The federal court thus squarely faced the question of whether the writ of coram nobis was available in federal criminal cases at all, and

24. *See* Piar, *supra* note 18, at 511–12.

25. FED. R. CIV. P. 60(e).

26. *See* United States v. Morgan, 346 U.S. 502, 517–19 (1954) (Minton, J., dissenting) (arguing that the Federal Rules of Civil Procedure and the adoption of 28 U.S.C. § 2255 abolished the writ of coram nobis in criminal cases).

27. 346 U.S. 502 (1954).

28. United States v. Morgan, 202 F.2d 67, 67 (2d Cir. 1953), *aff'd*, 346 U.S. 502 (1954).

29. *Morgan*, 346 U.S. at 511.

30. *Id.* at 503.

31. *Id.* at 503–04.

32. *Id.* at 504.

if so, whether Morgan's circumstances qualified. The district court tried to side-step the issue by treating Morgan's motion as one for relief under 28 U.S.C. § 2255, the federal habeas statute.[33] It thus denied the motion, reasoning that it did not have jurisdiction because Morgan was no longer "in custody" as required by § 2255.[34] The Second Circuit, however, insisted that coram nobis would be proper "[i]f Morgan can establish that he was deprived of his common law right to be represented by counsel."[35]

The Supreme Court affirmed the court of appeals judgment, concluding that federal courts have the power to grant motions "in the nature of the extraordinary writ of coram nobis."[36] Writing that "[i]n behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief,"[37] the five-justice majority revitalized the ancient writ and placed it on a firm footing.

The Court conceded "a difference of opinion as to the availability of the remedy" among the lower federal courts[38] and noted that "*coram nobis* is not specifically authorized by any statute enacted by Congress."[39] Indeed, the writ had been abolished in civil cases by Rule 60(b) of the Federal Rules of Civil Procedure.[40] Tracing its long history in common law,[41] however, the Court found sufficient statutory authority for the "ancient writ of coram nobis" in the All Writs Act of 1789, which authorizes federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[42]

Writing for the majority, Justice Reed forcefully rejected the dissent's position that promulgation of § 2255 superseded any remedy in the nature of coram nobis in federal courts.[43] The majority

33. *Id*.

34. *Id*. Morgan was serving his state sentence at the time that he filed his coram nobis claim, but the "in custody" requirement of § 2255 refers only to federal custody. *See* 28 U.S.C. § 2255(a) (2006); United States v. Lavelle, 194 F.2d 202 (2d Cir. 1952).

35. United States v. Morgan, 202 F.2d 67, 68 (2d Cir. 1953), *aff'd*, 346 U.S. 502 (1954).

36. *Morgan*, 346 U.S. at 512–13.

37. *Id*. at 505.

38. *Id*. at 509.

39. *Id*. at 506.

40. *Id*. at 505 n.4.

41. *Id*. at 507–08.

42. *Id*. at 506 & n.6 (quoting All Writs Act, 28 U.S.C. § 1651(a)).

43. *Id*. at 510–11.

explained that the purpose of § 2255 was "'to meet practical difficulties' in the administration of federal habeas corpus jurisdiction," not to "cover the entire field of remedies in the nature of coram nobis."[44] Reiterating that "[n]owhere in the history of § 2255 do we find any purpose to impinge upon prisoners' rights to collateral attack upon their convictions," the Court concluded, "We do not think that the enactment of § 2255 is a bar to this [coram nobis] motion."[45]

The Court went on to sketch out the circumstances under which the writ may be available. Coram nobis relief "should be allowed . . . only under circumstances compelling such action to achieve justice"—namely, (a) curing of "errors 'of the most fundamental character'" when (b) "no other remedy [is] then available" and (c) "sound reasons [exist] for failure to seek appropriate earlier relief."[46]

The key move in *United States v. Morgan* was the Court's holding that the violation of Morgan's right to counsel constituted an error of the most fundamental character.[47] This holding transformed coram nobis from its traditional function as a means for curing *factual* errors, unknown to the trial court, to a new function of curing any error of "the most fundamental character," including legal error. The majority did not even attempt to argue that the basis for Morgan's motion was an alleged error in fact, unknown to the sentencing judge.[48] Rather, the Court ignored that issue entirely and, relying on language from *United States v. Mayer*, held that coram nobis may be applied to cure "fundamental errors."[49] By focusing on

44. *Id.*

45. *Id.* at 511.

46. *Id.* at 511–12. The Court explained how Morgan's case fit the first two conditions it laid out: the denial of Morgan's right to counsel constituted the fundamental error of his state conviction, and no other remedy for that error was currently available. *Id.* However, the Court did not explain what "sound reasons" Morgan may have had for not seeking appropriate relief earlier, e.g., on direct appeal or in the form of a habeas motion. After all, the constitutional right to counsel, to which Morgan appealed, was available as a ground for habeas relief at least since *Johnson v. Zerbst*, 304 U.S. 458 (1938), a case decided before Morgan's 1939 conviction in federal district court.

47. *Morgan*, 346 U.S. at 512 ("[A] federal trial without competent and intelligent waiver of counsel bars a conviction of the accused.").

48. The dissent took the majority to task for its novel interpretation of what constitutes fundamental error in coram nobis. "The sentencing court must have known that respondent did not have an attorney and was not advised of his right to counsel, if such are the facts. What then was it that the court didn't know which if it had known would probably have produced a different result?" *Id.* at 516 (Minton, J., dissenting).

49. *Id.* at 512 (majority opinion) ("In the Mayer case, this Court said that coram nobis

the phrase "errors of the most fundamental character" and ignoring the phrase "errors of fact,"[50] the Court not only rescued coram nobis from legal "limbo,"[51] but also revitalized the writ by creating a new function for it. Rather than an obscure writ only good for correcting factual errors, coram nobis became a collateral remedy available in federal court to correct fundamental *legal* errors when alternative avenues of relief are unavailable. Moreover, while the Court limited its applicability to cases in which habeas relief was unavailable, by dubbing a petition for coram nobis as "of the same general character as one under 28 U.S.C. § 2255,"[52] the Court effectively created a companion writ to habeas corpus. Coram nobis became, in essence, habeas for those not in federal custody.

The greatest point of contention between the majority and the minority—which still sets the terms of debate surrounding coram nobis today—is the proper weight assigned to the values of accuracy and finality. The majority held that coram nobis should be available only in extraordinary cases, but that finality must bow to accuracy where the "record makes plain a right to relief."[53] "Otherwise," wrote Justice Reed, "a wrong may stand uncorrected which the available remedy would right."[54] The majority noted that the "wrong" of an unlawful conviction is not only an abstract injustice in the system, but also that "the results of the conviction may persist" for the convicted person himself.[55] "Subsequent convictions may carry heavier penalties," the Court wrote; "civil rights may be affected."[56] In other words, unlawfully convicted people may suffer ongoing harm from their unlawful convictions; the effects of a past conviction may persist to the present.

included errors 'of the most fundamental character.'") (quoting United States v. Mayer, 235 U.S. 55, 69 (1914)).

50. In context, the *Mayer* Court's "most fundamental character" language itself referred to "errors of fact . . . where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *Mayer*, 235 U.S. at 69.

51. *See Morgan*, 346 U.S. at 513 (Minton, J., dissenting) ("I am unable to agree with the decision of the Court resurrecting the ancient writ of error *coram nobis* from the *limbo* to which it presumably had been relegated . . . .") (emphasis added).

52. *Id.* at 506 n.4 (majority opinion).

53. *Id.* at 505.

54. *Id.* at 512.

55. *Id.*

56. *Id.* at 512–13.

The minority was also sensitive to the clash between accuracy and finality: "The important principle that means for redressing deprivations of constitutional rights should be available often clashes with the also important principle that at some point a judgment should become final—that litigation must eventually come to an end."[57] According to the minority, federal courts "traditionally"—and Congress statutorily via § 2255—have drawn the line "by permitting collateral attacks on judgment only during the time that punishment under the judgment is being imposed."[58] In other words, the law allows for collateral review only during incarceration. The dissent recognized that "the record of a conviction for a serious crime is often a lifelong handicap,"[59] but rejected the proposition that relief should be available for an unlawful conviction throughout the wronged party's lifetime. Coram nobis should not be available, argued the dissent, if a person is merely suffering "a stain on his reputation."[60] As for those who, like Morgan, "have returned to crime and want the record expunged to lessen a subsequent sentence," the minority found such relief "unwarranted."[61] In sum, the minority argued that there are *no* cases in which collateral relief is due to an ex-convict who has already served his or her time. "If that is to be changed," the dissent concluded, "Congress should do it."[62]

The dissent's basic argument—that traditional coram nobis would not extend to cases such as Morgan's—was formidable as far as it went. But the majority opinion succeeded in filling a gap in post-conviction relief and in firmly anchoring the newly revitalized writ of coram nobis in the All Writs Act and in Supreme Court precedent.[63] *Morgan* was an appropriate response to an untenable

57. *Id*. at 519–20 (Minton, J., dissenting).

58. *Id*. at 520.

59. *Id*. at 519.

60. *Id*.

61. *Id*.

62. *Id*. at 520.

63. The D.C. Circuit and the Ninth Circuit have both explicitly referred to *Morgan* as an exercise in gap-filling. *See* United States v. Valdez-Pacheco, 237 F.3d 1077, 1079 (9th Cir. 2001) ("Morgan stands for the proposition that the common law writs, such as *coram nobis* and *audita querela*, are available to fill the interstices of the federal post-conviction remedial framework." (internal quotations omitted)); United States v. Ayala, 894 F.2d 425, 428 (D.C. Cir. 1990) ("The teaching of *Morgan* is that federal courts may properly fill the interstices of the federal postconviction remedial framework through remedies available at common law."); *see also* Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on*

situation—that is, the absolute unavailability of relief to a person not in custody who stands convicted of a crime despite errors "of fundamental character" in the conviction.[64] The Supreme Court's decision in *Morgan* correctly signaled that the American justice system would not ignore manifestly unlawful convictions as a matter of course.

Morgan marked a dramatic point in the history of coram nobis. Before *Morgan*, coram nobis was dying in the federal courts. After *Morgan*, coram nobis became a vital part of the post-conviction legal landscape. Before *Morgan*, coram nobis was primarily a writ for the correction of factual errors, errors that were unknown (and unknowable) to the convicting court. After *Morgan*, coram nobis became a writ available to correct any error "of the most fundamental character," including constitutional and other legal defects, in the original conviction.

*C. Post-*Morgan *Coram Nobis and Federal Collateral Review*

After *Morgan*, it was not immediately obvious which legal errors would be deemed "fundamental" enough to merit relief by coram nobis, but the trend has been clear: the same errors that are deemed grounds for § 2255 habeas relief give rise to coram nobis relief.[65] In *United States v. Doe*, for example, the Seventh Circuit wrote that a coram nobis petitioner must allege an error in the underlying conviction that is "the type of defect that would have justified habeas corpus relief pursuant to 28 U.S.C. § 2255."[66] The Sixth Circuit has noted that "the standards for granting relief under a writ of error *coram nobis* and under a § 2255 motion are substantially the

Collateral Review, 96 NW. U. L. REV. 1413, 1495 (2002) (arguing that federal courts have a legitimate "interstitial, gap-filling role" in collateral review).

64. In his treatise on post-conviction procedure, Professor Yackle wrote, "In a real sense, coram nobis for federal petitioners, like habeas corpus for state prisoners, is a remedy of convenience—developed by judicial decision to do service in meritorious cases." LARRY W. YACKLE, POSTCONVICTION REMEDIES § 36 (Publisher's Editorial Staff et al. eds., 2008) (Supp. 2008).

65. This is consistent with the Supreme Court's statement in *Morgan* that a motion for coram nobis is "of the same general character as one under 28 U.S.C. § 2255." 346 U.S. 502, 506 n.4 (1954). *See also* YACKLE, *supra* note 64 ("The lower courts have . . . assumed that coram nobis is available to raise any claim cognizable under section 2255.").

66. 867 F.2d 986, 988 (7th Cir. 1989); *see also* Strauss v. United States, 516 F.2d 980, 985 n.9 (7th Cir. 1975) ("It is insignificant that the writ in *Travers* was one for *coram nobis*, rather than *habeas corpus*.").

same."[67] And the Eighth Circuit has held that "[t]he two remedies are . . . substantially equivalent."[68]

A comprehensive catalogue of all errors deemed sufficient to trigger § 2255 relief and, thus, coram nobis relief, is beyond the scope of this Article, but there are essentially two broad types of claims that appear repeatedly in collateral review cases. The first is a claim that new facts have emerged showing a "fundamental error" in the underlying conviction. The second is a claim that, after the final disposition of the case, the Supreme Court or the court of appeals substantively narrowed the interpretation of the relevant criminal statute so as to decriminalize the actions for which the defendant was convicted. Upon collateral review, the question becomes whether the reviewing court will apply the interpretation of the statute at the date of conviction or at the date of the collateral review.

This question turns on the tricky area of retroactivity jurisprudence, but the answer has been clear since the Supreme Court decided the case of *Davis v. United States* in 1974.[69] In *Davis*, the Court held that the interpretation of the criminal law at the time of collateral review, not the interpretation at the time of conviction, would govern.[70] As the Court stated emphatically, "conviction and punishment . . . for an act that the law does not make criminal . . . results in a complete miscarriage of justice."[71] Thus, collateral relief is appropriate in those circumstances when a subsequent interpretation of a criminal statute has decriminalized the predicate conduct.[72] And while many aspects of the Supreme Court's retroactivity

67. Pitts v. United States, 763 F.2d 197, 199 n.1 (6th Cir. 1985).

68. United States v. Little, 608 F.2d 296, 299 (8th Cir. 1979); *see also* United States v. Travers, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974) (explaining that the standards applied in federal coram nobis are "similar" to those in § 2255 cases). *But see* United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989). Although the Third Circuit has suggested that the standards for obtaining relief in coram nobis cases are "even more stringent" than the standards for habeas relief, it has never identified a type of legal error that would elicit habeas relief but not coram nobis relief. *Id.* In other words, there is no identifiable class of error that is "fundamental" enough to warrant habeas corpus relief but not fundamental enough to warrant coram nobis relief.

69. 417 U.S. 333 (1974).

70. *Id.* at 346–47.

71. *Id.* at 346 (internal quotations omitted).

72. *Davis* also makes clear that the change in interpretation need not come from the U.S. Supreme Court. It was the Ninth Circuit and not the Supreme Court that narrowed its interpretation of the statute under which Davis was convicted. *Id.* at 339–40. And it was the new Ninth Circuit law—i.e., the law of the Ninth Circuit at the time of collateral review—that the Supreme Court held should govern Davis's § 2255 motion. *Id.* at 346.

jurisprudence have changed dramatically since 1974,[73] the Court has not changed its view on the question presented in *Davis*. The Court's 2004 opinion in *Schriro v. Summerlin* confirmed that post-conviction decisions creating new substantive rules of law generally apply retroactively on collateral review.[74] "This includes," wrote the Court, "decisions that narrow the scope of a criminal statute by interpreting its terms as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."[75]

The Second Circuit explicitly extended the retroactivity holding of *Davis* to cover petitions for coram nobis in the case of *United States v. Travers*.[76] In *Travers*, a man who had already served his sentence for federal mail fraud brought a petition for a writ of coram nobis, claiming that a Supreme Court opinion post-dating his release from prison now made his conviction invalid.[77] The government argued that the subsequent case should not be given retroactive effect,[78] but the court of appeals cited *Davis* for the proposition that "fundamental notions of fairness" require that the court apply the most recent interpretation of a criminal statute.[79] And the court noted that, "[a]lthough the *Davis* case arose under 28 U.S.C. § 2255, the standards applied in federal *coram nobis* are similar."[80] Thus, because "Travers was convicted and punished 'for an act that the law does not make criminal,'" he "is entitled to relief."[81]

73. *See generally* Lyn S. Entzeroth, *Reflections on Fifteen Years of the* Teague v. Lane *Retroactivity Paradigm: A Study of the Persistence, the Pervasiveness, and the Perversity of the Court's Doctrine*, 35 N.M. L. REV. 161 (2005).

74. Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004).

75. *Id.* (citations omitted). The Court reiterated the rationale for the retroactivity of new substantive rules as follows: "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"' or faces a punishment that the law cannot impose upon him." *Id.* (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

76. 514 F.2d 1171 (2d Cir. 1974).

77. *Id.* at 1172.

78. *Id.* at 1173.

79. *Id.* at 1175–76.

80. *Id.* at 1173 n.1. The court did admit that "*Davis* depended to some extent on a parsing of the ambiguous language of § 2255," but still held that the standards for § 2255 and coram nobis are interchangeable in this area. *Id.*

81. *Id.* at 1176. In finding for Travers, the Second Circuit noted "'the familiar principle that *res judicata* is inapplicable in habeas proceedings,'" *Id.* at 1175 (quoting Fay v. Noia, 372 U.S. 391, 423 (1963)), and that it could "see no reason why this same principle should not be applicable in *coram nobis*." *Id.* The *Travers* Court expressly limited its decision to petitioners

Travers is the natural product of *Morgan* and *Davis*. *Morgan* resuscitated coram nobis as the functional analog to § 2255 relief for those not in custody, and *Davis* held that § 2255 relief is available to those convicted for behavior that the law, according to the latest authoritative cases, does not make criminal. Therefore, coram nobis is available to those who were convicted for behavior that the law does not (or does not any longer) criminalize. The conclusion makes sense both as a logical doctrinal outcome and as a necessary function of the justice system. After *Travers*, the inequities caused by gaps in § 2255—that is, the lack of a remedy for illegally convicted individuals not in custody—would appear to have been filled. Through the refashioning of an obscure and ancient writ, and the evolution of that old-new writ in tandem with the Great Writ of habeas corpus, federal courts saw to it that convictions for "phantom crimes" would no longer go uncorrected.

D. The Emergence of the Civil Disabilities Test

By the mid-1970s, then, it appeared that coram nobis represented a viable means for collateral review, equivalent in scope to habeas corpus, for convicted persons out of custody. But the story does not end with *Travers*, for although it remains good law, a new controversy erupted in the field of coram nobis in the late 1980s. The controversy concerned what kind of harm (if any) a coram nobis petitioner must show as a threshold matter in order to attain a hearing on his or her petition.

The baseline requirements for coram nobis set by the Supreme Court in *Morgan* did not speak explicitly to the issue of a threshold showing of harm. The Court had properly presumed that Morgan had a sufficient stake in the outcome of his petition to meet the requirements of standing, and the Court did not demand any

"like Travers, [who] fully pursued their appellate remedies"—that is, petitioners who had directly appealed their convictions. *Id*. at 1176. The Court left to "another day the determination of the proper result when less has been done." *Id*. at 1177.

That day came in 1976 when the Second Circuit decided the case of *United States v. Loschiavo*, 531 F.2d 659 (2d Cir. 1976). In *Loschiavo*, the court ruled affirmatively that collateral relief is due when a subsequent decision decriminalizes the conduct underlying an earlier conviction, even if the defendant did not pursue available appellate remedies. *Id*. at 665. The court wrote that if it let stand a conviction for behavior that the statute did not criminalize, then "the frustration and defeat of justice would be glaringly apparent to the most myopic and obtuse." *Id*. at 667.

further, special showing of harm.[82] So the Court did not explicitly say whether some threshold showing of harm, traceable to the underlying conviction, was necessary to bring a coram nobis petition. The question, then, emerged: must a petitioner for coram nobis prove to the court that he or she is actually suffering an ongoing collateral consequence of conviction, and if so, what kind of collateral consequences qualify? In response to this question, the Seventh Circuit developed the civil disabilities test,[83] and the majority of circuits followed suit.[84]

The development of the civil disabilities test begins with a case that itself had nothing to do with coram nobis, *McNally v. United States*.[85] Prior to *McNally*, many convictions of public officials for mail fraud relied on the so-called "intangible right" theory of the crime, which held that the federal mail fraud statute protected the intangible right of the citizenry to have public officials perform their duties honestly.[86] In *McNally*, the Supreme Court rejected the "intangible right" theory of mail fraud and interpreted the mail fraud statute to protect only property rights, not an intangible right of the citizens to good government.[87] As a consequence, a number of people convicted of mail fraud under the old "intangible right" theory—among them, many former politicians—brought coram nobis petitions to vacate their convictions.

82. Indeed, it would have been odd if the Court had dwelt on the question of whether Morgan had a sufficient stake in the litigation, for the extended length of his state sentence was based on his federal felony conviction. Thus, vacating his federal felony conviction would almost certainly lessen his state sentence.

83. United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988).

84. *See* United States v. Hernandez, 94 F.3d 606, 613 n.5 (10th Cir. 1996); Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993); Nicks v. United States, 955 F.2d 161, 167 (2d Cir. 1992); United States v. Drobny, 955 F.2d 990, 996 (5th Cir. 1992); United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989); *see also* Stewart v. United States, 446 F.2d 42, 43–44 (8th Cir. 1971) (remanding to district court to determine whether petitioner "is suffering from present adverse consequences" sufficient to justify remedy). *But see* United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988) (affirming grant of coram nobis because "petitioners . . . would face the remainder of their lives branded as criminals").

85. 483 U.S. 350 (1987).

86. *Id*. at 355.

87. *Id*. at 356. The key text of the mail fraud statute at the time of *McNally* criminalized use of the mails to execute "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id*. at 352 n.1.

The first of the *McNally* cases to reach the Seventh Circuit was *United States v. Keane*,[88] in which a former Chicago city councilman argued that his 1974 indictment for mail fraud should be vacated because it relied on the discredited "intangible right" theory.[89] The Seventh Circuit conceded that "*McNally* knocked out the prosecution's principal theory in Keane's case."[90] But the court refused to grant relief because it held that Keane was not entitled to "a fresh adjudication" of his case.[91]

Judge Easterbrook, writing for the court, began his analysis of Keane's petition by asserting that "[t]he norm of finality, with an exception while custody or another deprivation of liberty continues, is the background for understanding the writ of error coram nobis."[92] Thus, even if "§ 2255 permits relitigation if the defendant is in custody and there is an intervening change of law[,] . . . [t]he reason to bend the usual rules of finality is missing when liberty is not at stake."[93] This line of reasoning echoed the *Morgan* dissent and called into question the very *raison d'etre* of coram nobis—that is, to provide collateral relief to they who are no longer in federal custody.

But the Seventh Circuit could not, of course, overturn *Morgan*. Instead, Judge Easterbrook's emphasis on the value of finality served as a rhetorical prelude to the next step in the opinion. Those pursuing coram nobis, he wrote, "must demonstrate that the judgment of conviction produces lingering civil disabilities (collateral consequences)."[94] Moreover, these civil disabilities must be "unique to criminal convictions."[95] Such disabilities, according to Easterbrook, "include loss of the rights to vote, hold occupational licenses (including law licenses), and bear arms."[96] But the court made clear that it would strictly construe this list, and it rejected financial penalties (fines) and reputational injury as civil disabilities

88. 852 F.2d 199 (7th Cir. 1988).

89. *Id*. at 200. The underlying indictment led to a sentence of two years imprisonment and a fine of $27,000. *Id*.

90. *Id*. at 205.

91. *Id*. at 202.

92. *Id*. This is a strange way to introduce a writ whose function is precisely to allow "an exception" to the norm of finality in cases other than those involving custody.

93. *Id*. at 203 (citations omitted).

94. *Id*.

95. *Id*.

96. *Id*.

because, it noted, "[c]ivil judgments frequently have the same effects."[97]

The court conceded that Keane's conviction constituted "a black mark" on his record.[98] But, the court continued, a reputational black mark "is not a civil disability . . . . [A]nd a blot on one's escutcheon, divorced from any particular entitlement to a 'clean record,' does not even involve a liberty interest."[99] Keane should not be able to "obtain coram nobis just to bask in the satisfaction of having his position vindicated."[100] In a closing flourish, Judge Easterbrook wrote the following:

> [W]e live in a world of scarcity, one in which that most inflexible commodity, time itself, sets a limit on our ability to prevent and correct mistakes. Every legal system tolerates a risk of error. It tries to find procedures that will hold error to a minimum, but then it must move on. Bygones are beyond recall.[101]

The court thus held that Keane's petition could be dismissed without hearing, for he suffered no ongoing legal consequence as a result of his conviction.[102]

Judge Easterbrook expanded his views on coram nobis the next year in *United States v. Bush*.[103] In *Bush*, Judge Easterbrook noted that "[h]istory limits the writ [of coram nobis] to factual questions that have not been litigated before."[104] Therefore, the court reasoned, "to the extent the contemporary writ goes further, the principles underlying the 'custody' requirement of § 2255 call for

97. *Id*.

98. *Id*. at 204.

99. *Id*. (citations omitted).

100. *Id*. As for the fact that Keane was assessed and paid a fine of $27,000, Judge Easterbrook agreed that the fine gave Keane "a stake sufficient to produce a 'case or controversy.'" *Id*. But, he went on, "the fine is no different from the award of damages in civil litigation. It is a sunk cost rather than a continuing disability producing additional injury as time passes." *Id*. This bit of reasoning reveals a couple of points. First, the *Keane* court expressly created an obstacle to coram nobis relief substantially higher than Article III standing. Second, by rejecting the payment of a $27,000 fine as an adequate basis for redress, the court arrogated for itself the power to determine what is and is not a "continuing disability" of conviction. Surely a loss of money in the past constitutes a continuing disability in the present, insofar as one is worse off now without it.

101. *Id*. at 206.

102. *Id*.

103. 888 F.2d 1145 (7th Cir. 1989).

104. *Id*. at 1146.

some ongoing legal disability as a custody-substitute."[105] The right substitute, according to Judge Easterbrook, was a showing by the petitioner that he was "suffering civil disabilities unique to criminal convictions" at the time of the coram nobis proceeding.[106] In other words, Easterbrook crafted the civil disabilities test for coram nobis petitioners as a substitute for the custody requirement of habeas corpus.[107]

Under the civil disabilities test, Easterbrook reasoned, the petitioner in *Bush* should be denied coram nobis relief because the only harm he had alleged on appeal was that "the conviction prevented him from holding high-visibility public relations jobs," and "[d]ifficulty in obtaining a desirable job is not a legal disability."[108] According to Easterbrook, while the law recognizes some liberty interest in being able to choose one's profession or occupation—for instance, nursing—liberty of occupation does not extend to "ranks within an occupation—head nurse versus rank-and-file nurse, for example."[109] Because "[u]nwillingness to hire someone for mouth-watering jobs is not a legal disability 'unique to criminal convictions,'" the court held that it was not sufficient to trigger coram nobis review.[110]

> Loss of this kind is not a satisfactory substitute for the "custody" requirement of § 2255 because (a) it is not a legal disability, and a judgment therefore may be ineffectual in redressing it, and (b) it is different in degree, and not in kind, from the reputational injury accompanying all convictions.[111]

105. *Id.*

106. *Id.* at 1148.

107. Easterbrook wrote that "reputational injury from conviction . . . does not suffice—civil judgments, too, cause loss of money and reputation." *Id.*

108. *Id.* at 1148–49. Incidentally, Easterbrook noted that, at trial, Bush had claimed that the record of his conviction also limited his ability to own weapons. *Id.* at 1148. And the district court held that the inability to carry a weapon did not constitute an ongoing "civil disability," *id.*, despite the fact that the Seventh Circuit in *Keane* had explicitly recognized the loss of the right to bear arms as one of the few civil disabilities unique to criminal conviction. United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988). Having been rebuffed on the right-to-bear-arms claim at the district court level, Bush apparently abandoned it on appeal, and the circuit court opinion does not address the issue of whether a diminution in one's legal right to own weapons as a result of a conviction is a continuing civil disability or not.

109. *Bush*, 888 F.2d at 1150 (citation omitted).

110. *Id.*

111. *Id.*

And again, Judge Easterbrook ended his opinion with a paean to "the doctrines of finality that pervade the legal system."[112] "[I]n a costly legal system," he wrote, "correction is a luxury. . . . Ongoing custody justifies relaxation [of the finality doctrine], but the duration of reexamination is fixed by the duration of custody."[113]

A year after *Bush*, the Seventh Circuit revisited coram nobis in *United States v. Craig*.[114] Four defendants—three Illinois state legislators and a trade association lobbyist—had been convicted in the mid-1970s for their role in a political bribery scandal.[115] All four were convicted under the "intangible right" theory and served their sentences before the Supreme Court rejected that theory in *McNally*.[116] The three living individuals and the estate of the fourth all subsequently moved for coram nobis relief in the late 1980s.[117] The circuit court reviewed the "lingering civil disability" requirement first announced in *Keane* and expounded in *Bush* and discerned three conjunctive requirements: (1) "the disability must be causing a present harm; it is not enough to raise purely speculative harms or harms that occurred completely in the past," (2) "the disability must arise out of the erroneous conviction," and (3) "the potential harm to the petitioner must be more than incidental."[118] As an example of a situation in which all three requirements are met, the court offered the case of a person serving an enhanced sentence for a crime because of an earlier (unlawful) conviction.[119] According to the Seventh Circuit, such a person meets all three requirements: he is suffering a "present harm" because he is "languishing in jail," the earlier conviction is the "cause[]" of the enhancement, and an enhanced prison sentence is "certainly more than incidental harm."[120]

The petitioners in *Craig* did not meet the Seventh Circuit's

112. *Id.* at 1151.

113. *Id.* at 1150–51.

114. 907 F.2d 653 (1990). This time, Judge Easterbrook was not on the panel, and Judge Wood wrote the opinion.

115. *Id.* at 654.

116. *Id.* at 655.

117. *Id.*

118. *Id.* at 658. The court also noted in a footnote that "if an indictment states one valid offense, then no coram nobis relief is available, 'for a single felony conviction supports any civil disabilities.'" *Id.* at 658 n.2 (citation omitted).

119. *Id.* at 658.

120. *Id.*

threshold requirements for lingering civil disabilities.[121] The court did not reach the merits of the deceased individual's petition because it held that his estate lacked standing.[122] The lawyer-lobbyist who was disbarred subsequent to his conviction failed the test because he "[had] not shown either that his conviction [was] a direct cause of his disbarment or that he [had] a present desire to apply for reinstatement to the bar."[123] Turning then to the two former members of the Illinois legislature who were still alive, the court addressed their complaint that their convictions deprived them of their pension benefits.[124] The court accepted that their convictions did, in fact, cause their removal from the legislators' pension plan, but held that "[a]ny harm . . . for their removal from the pension plan occurred entirely in the past" and therefore constituted "a sunk cost, much like a criminal fine."[125] The court wrote, "just as the possibility of recovering a fine is insufficient to justify the issuance of the writ, so is the possibility of recovering lost pension benefits."[126]

Finally, the court disposed of the arguments made by all of the petitioners that various Illinois statutes impose unique burdens on convicted felons, ranging from the "possibility of impeachment as a witness to possible ineligibility for a cigarette distributor's permit."[127] The court dismissed these burdens as "speculative possibilities at best."[128] As for the risk that petitioners would face enhanced sentences should they be convicted of a crime in the future, the court echoed the *Morgan* dissenters in substance and in tone: "Recognition of possible future criminal sentence enhancements as grounds for coram nobis relief would be tantamount to judicial recognition that the petitioners intend to commit more crimes—a

121. *Id*. at 660.

122. *Id*. at 657. The court held that a decedent's estate by law "fail[s] to satisfy the court-imposed prudential limitations on the exercise of jurisdiction." *Id*. As the court put it, "the writ belongs to the wrongfully convicted individual and dies with that individual." *Id*.

123. *Id*. at 659. According to the court, the Illinois disciplinary rules for lawyers do not discipline lawyers "solely for a conviction; they punish for the conduct underlying the conviction." *Id*. Thus, even if the petitioner could show that his conduct did not constitute mail fraud, per *McNally*, the Illinois bar might still choose to keep him disbarred because of the underlying conduct and his "role in the scandal." *Id*.

124. *Id*. at 660.

125. *Id*.

126. *Id*. (citation omitted).

127. *Id*.

128. *Id*.

possibility we absolutely refuse to acknowledge until it occurs."[129] In sum, the Seventh Circuit rejected coram nobis for all of the petitioners, holding that none could meet the three-part civil disabilities test.

By 1991, then, the Seventh Circuit had developed a strict civil disabilities test, requiring a coram nobis petitioner to show an ongoing civil disability traceable uniquely to the conviction that she seeks to vacate. The Seventh Circuit view quickly became the dominant one in the federal courts, with the notable exception of the Ninth Circuit.[130]

E. Hirabayashi *and the Ninth Circuit's Minority Position*

The Ninth Circuit settled on its coram nobis doctrine in the late 1980s, just before the Seventh Circuit began developing the civil disabilities test. The occasion for the Ninth Circuit's more liberal position was the re-opening of the landmark case of *Hirabayashi v. United States*[131]—part of the larger movement for recognition and redress for Japanese Americans interned en masse during World War II. The Ninth Circuit's 1987 opinion vindicated Hirabayashi, vacated his two Internment-era convictions, and, as the court put it, made "the judgments of the courts conform to the judgments of history."[132] The legal mechanism by which the court vacated Hirabayashi's forty-year-old convictions—the only legal mechanism available—was the writ of coram nobis.[133]

The Supreme Court of 1943 had affirmed Hirabayashi's conviction and explicitly upheld the constitutionality of the wartime curfew and internment orders that Hirabayashi was convicted of violating.[134] And, despite the fact that those wartime decisions "have

129. *Id.*

130. *See supra* note 84. The Fourth Circuit position appears to be closer to the Ninth Circuit than it is to the Seventh Circuit, United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988), but the Fourth Circuit has never opined in detail on the propriety of a civil disabilities test. Additionally, a footnote in the Fourth Circuit's opinion in *United States v. Mandel* suggests (without holding) that only felony convictions are serious enough to warrant coram nobis review, *id.* at 1075 n.12, while the Ninth Circuit has held unequivocally that misdemeanor convictions are also eligible for coram nobis review. Hirabayashi v. United States, 828 F.2d 591, 606–07 (9th Cir. 1987).

131. 320 U.S. 81 (1943), *vacated*, 828 F.2d 591 (9th Cir. 1987).

132. *Hirabayashi*, 828 F.2d at 593.

133. *See id.* at 604 (noting the absence of alternative relief).

134. *Hirabayashi*, 320 U.S. at 81.

never occupied an honored place in our history,"[135] they had never been overturned either. So, unlike the petitioners in the Seventh Circuit cases detailed above, Hirabayashi could not argue that a subsequent Supreme Court decision had changed the substantive law applicable to his earlier case. Rather, Hirabayashi's legal strategy rested on the more traditional coram nobis ground that a new fact, unknown to the defendant and the judges during the original proceedings, came to light after the final conviction. The new fact, Hirabayashi alleged, was the discovery in 1982 of a suppressed early draft of a World War II–era military report.[136] The long-suppressed draft made clear that the real rationale behind the curfew and exclusion orders aimed at Japanese Americans was racial prejudice and not military exigency.[137] Thus, it undermined the factual premise of the Supreme Court's decision in *Hirabayashi* (and *Korematsu*) that "military exigency" justified a deviation from the general norm against race-based government action.[138]

The Ninth Circuit accepted Hirabayashi's argument that the suppressed draft report constituted a new fact that, if known to the courts at the time of original trial and appeal, would have likely changed the outcome of the case.[139] The government argued, however, that the issue Hirabayashi sought to litigate was moot because Hirabayashi had already served his three-month sentence pursuant to the convictions and was suffering no current legal disability.[140] Emphasizing that Hirabayashi's convictions were both for misdemeanors, rather than felonies, the government contended that "ordinary misdemeanors have no 'collateral consequences' and

135. *Hirabayashi*, 828 F.2d at 593.

136. *Id*. at 598.

137. *Id*. Known as the DeWitt Report, the early draft "declared that because of traits peculiar to citizens of Japanese ancestry it would be impossible to separate the loyal from the disloyal." *Id*. The suppressed report also stated, "[i]t was not that there was insufficient time in which to make such a determination [separating the loyal from the disloyal]; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the 'sheep from the goats' was unfeasible." *Id*. (internal quotations omitted).

138. *Id*. at 599.

139. *Id*. at 603–04.

140. *Id*. at 605. The government did not dispute that the Internment-era convictions were "part of an unfortunate episode in our nation's history," but vigorously objected to the grant of coram nobis relief. *Id*. at 597 n.9. The government asked that the convictions be vacated via Federal Rule of Criminal Procedure 48, which permits termination of prosecution and dismissal of the indictment. *Id*. at 607. After losing in the Ninth Circuit, the government did not petition for certiorari.

therefore are not subject to post-conviction attack absent some special legal disability."[141] In other words, the government asked the Ninth Circuit to adopt a civil disabilities test for coram nobis petitions.

The Ninth Circuit, however, rejected the government's argument that the petition was moot and expressly rejected the idea that some special disability is required to attain coram nobis.[142] The court started from the premise that the petitioner need only show that "adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III."[143] Then, relying on the Supreme Court case of *Sibron v. New York*,[144] the court of appeals held that there is a "presumption that collateral consequences flow from any criminal conviction."[145] Rather than placing the burden on the petitioner to show some "special legal disability,"[146] as the Seventh Circuit would later do, the Ninth Circuit wrote that the government had the burden of showing that no possible collateral consequences flow from the petitioner's conviction.[147] The Ninth Circuit noted the "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences"[148] and held that "[t]he mere 'possibility' that this will be the case is enough to preserve a criminal case from ending 'ignominiously in the limbo of mootness.'"[149]

As for the fact that Hirabayashi's convictions were for misdemeanors, rather than felonies, the court wrote, "[n]o court to our knowledge has ever held that misdemeanor convictions cannot carry collateral legal consequences. Any judgment of misconduct has consequences for which one may be legally or professionally

141. *Id*. at 605.

142. *Id*. at 606.

143. *Id*. at 604.

144. 392 U.S. 40 (1968).

145. *Hirabayashi*, 828 F.2d at 606.

146. *Id*. at 605 (internal quotation marks omitted) (describing the government's position).

147. *See id*. at 606 (quoting *Sibron*, 392 U.S. at 57) ("[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.").

148. *Id*. (quoting *Sibron*, 392 U.S. at 55).

149. *Id*. (quoting *Sibron*, 392 U.S. at 55).

accountable."[150] In sum, the *Hirabayashi* court had three holdings: (1) every criminal conviction gives rise to potential collateral consequences, (2) such potential is enough to establish standing for coram nobis, and (3) no showing of harm beyond ordinary standing is required to trigger coram nobis review.

The Ninth Circuit confirmed this doctrine two years later in a case that exactly paralleled the Seventh Circuit cases detailed above. In *United States v. Walgren*, a former politician from Washington State named Gordon Walgren sought to vacate his mail fraud conviction on the basis of the Supreme Court's *McNally* decision.[151] The Ninth Circuit agreed that "Walgren's mail fraud conviction rests upon the commission of a fraud that was not a crime" and ordered the district court to grant coram nobis.[152] Most significantly, the Ninth Circuit panel reiterated "'the presumption that collateral consequences flow from any criminal conviction.'"[153] The court noted that any future sentencing decisions regarding Walgren may take into account the total number of felonies on his record and that Walgren "may be impeached should he ever testify in court because the mail fraud conviction was based on a scheme to defraud."[154] For the *Walgren* court, these possibilities—remote as they might be—were sufficient to grant Walgren standing to bring his petition for a writ of coram nobis.

150. *Id.* at 606–07. This last sentence is particularly significant, for it suggests that (a) the government can never, in practice, meet the burden of showing that there are no possible collateral consequences so long as the person convicted remains alive, and (b) the potential for adverse professional consequences alone, without "legal" consequences, is sufficient to generate standing for coram nobis review. In any event, the Ninth Circuit wrote, "Hirabayashi's conviction was for no ordinary misdemeanor. . . . A United States citizen who is convicted of a crime on account of race is lastingly aggrieved." *Id.* at 607.

151. 885 F.2d 1417, 1419–20 (9th Cir. 1989). Gordon Walgren was the former Senate Majority Leader of the Washington State Legislature, and he had been convicted of mail fraud, RICO, and Travel Act violations after a long FBI investigation into gambling and political corruption in Washington State. *Id.* at 1419. The so-called Gamscam scandal led to the resignation and, ultimately, the conviction of both Senate Majority Leader Walgren and the Washington State Speaker of the House, John Bagnariol. Both men were accused of conspiring with California mobsters (in fact, undercover FBI agents) to help legalize certain kinds of gambling in Washington State in exchange for a share of the profits. *See generally* Kit Oldham, *Legislative Leaders John Bagnariol and Gordon Walgren Are Charged in Gamscam Case on April 2, 1980*, *in* HISTORYLINK.ORG Essay 8515 (Mar. 3, 2008), http://www.historylink.org/index.cfm?DisplayPage=output.cfm&file_id=8515 (last visited Nov. 2, 2009).

152. *Walgren*, 885 F.2d at 1424.

153. *Id.* at 1421 (quoting Hirabayashi v. United States, 828 F.2d 591, 606 (9th Cir. 1987)).

154. *Id.* at 1422.

Walgren signaled that the Ninth Circuit's coram nobis doctrine was not limited to sympathetic litigants such as Hirabayashi, and that the same liberal standards would apply to litigants who requested coram nobis relief based on an intervening change in the interpretation of the statute under which they were indicted.[155] The Ninth Circuit did not, however, grapple explicitly with the reasoning of the majority of circuit courts supporting the civil disabilities test. In its trio of opinions developing the civil disabilities test, the Seventh Circuit offered a number of legal and policy arguments in its defense. And while the Ninth Circuit pointed the way to a better doctrinal outcome, it failed to articulate a compelling counter-argument to critique and supplant the approach championed by Judge Easterbrook and adopted throughout the country. For the remainder of this Article, I aim to offer precisely such a counter-argument.

IV. THE CIVIL DISABILITIES TEST AS A MISREADING OF *MORGAN* AND A MISINTERPRETATION OF THE FEDERAL HABEAS STATUTE

There are three broad themes to my critique of the civil disabilities test. First, the civil disabilities test developed out of a misreading of *Morgan* and the federal habeas statute, § 2255. Second, the reputational and professional consequences of criminal conviction are so great that they not only satisfy doctrinal standing requirements but actually make it imperative to provide some form of redress for all those who suffer unlawful convictions. Finally, the use of the civil disabilities test constitutes an inexcusable departure from the systemic norm of accuracy while providing little in the way of finality and judicial economy.

In this Part, I will argue that the Seventh Circuit's creation of a civil disabilities test for coram nobis relief was not required by any legal source and represented a significant misunderstanding of the nature of coram nobis. The Seventh Circuit opinions sought textual support for the civil disabilities test in the language of *Morgan* and in the text of § 2255. But neither of these sources, alone or in combination, calls for the creation of the civil disabilities test, and a

155. In a subsequent case, *United States v. McClelland*, the Ninth Circuit confirmed that an intervening substantive change in the interpretation of a criminal statute by the court of appeals should also be applied retroactively to a coram nobis proceeding. 941 F.2d 999, 1001 (9th Cir. 1991).

proper understanding of those sources would instead militate against the adoption of the test.

A. Misreading Morgan

The majority opinion in *Morgan* had very little to say about standing or threshold requirements for a coram nobis petition. Indeed, the sum total of the Court's discussion of the adverse collateral consequences of conviction consisted of the following two sentences: "Although the term [of federal custody] has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected."[156] Judge Easterbrook relied on this language to support his contention that "coram nobis may be employed if and only if the petitioner is suffering civil disabilities unique to criminal convictions."[157] But the two sentences from *Morgan* simply do not suggest the "if and only if" test that Judge Easterbrook created. They merely state the truism that criminal conviction may have adverse results aside from incarceration.

The Seventh Circuit's insistence that *Morgan* requires an "if and only if" test based on these two lines is implausible. First, even if we accept as a premise that the Court's discussion of possible adverse consequences of conviction was a necessary part of its justification for recognizing coram nobis powers, then the only conclusion that logically follows is that coram nobis requires the *possibility* of adverse consequences, not the actuality of such consequences. But, more importantly, the discussion of possible adverse consequences of conviction was not part of the *ratio decidendi* of the case at all. The holding of the Court in *Morgan* is that federal courts have the power, pursuant to the All Writs Act, to provide relief in the form of coram nobis to vacate criminal convictions that are, upon proper showing, invalid.[158] The Court reached that conclusion based on the history of the writ of coram nobis and its relation to modern rules of procedure and § 2255.[159] The brief discussion of adverse

156. United States v. Morgan, 346 U.S. 502, 512–13 (1954).

157. United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988); *see also id.* ("When holding in *Morgan* that coram nobis may be used to avoid federal criminal convictions, the Supreme Court observed that the writ is valuable to bring an end to what may be substantial civil disabilities attached to criminal convictions." (internal citation omitted)).

158. *Morgan*, 346 U.S. at 506–07.

159. *Id.* at 507–11.

consequences is better understood as a rhetorical appeal to remember the interests of the petitioner in relief from the collateral consequences of conviction. In other words, the Court did not write those lines to create a new barrier to coram nobis relief; rather, it wrote them to underscore the importance of providing collateral relief to convicted persons who are no longer in federal custody.

In addition, the Court merely mentioned the "results of the conviction," not results that are necessarily "unique" to criminal conviction, as the Seventh Circuit test requires. Judge Easterbrook held that monetary or reputational harm may not serve as the basis for coram nobis relief because such harms are not unique to a criminal conviction.[160] But the *Morgan* Court did not state that only results unique to criminal conviction are cognizable as harms. Being adjudged guilty of a crime may result in a host of harms, and it is quite plausible that the *Morgan* Court saw coram nobis as a remedy for some or all of those harms. But there is no evidence that the *Morgan* Court meant to restrict judicial cognizance to only those harms that can never be experienced except by way of criminal conviction.

Judge Easterbrook's argument is that a monetary penalty (e.g., a fine) is not unique to criminal conviction because one may be forced to pay a monetary penalty if one is held liable in a civil case. But there is a difference between a damages award in the civil context and a fine in the criminal context. In the former, the payer is liable for some harm he or she caused to another and pays damages to make the other person whole. In the latter, the payer is guilty of breaching the criminal code and pays the fine as a punishment. Even in the case of civil (or administrative) penalties owed to the government, there is a difference between being found liable under a preponderance of the evidence standard for a civil violation and being convicted of a crime under a "no reasonable doubt" standard. A fine pursuant to a criminal conviction is a unique incident of criminal conviction; one who pays an award pursuant to a finding of civil liability suffers a different and lesser ignominy.

A similar analysis pertains to reputational injury. Judge Easterbrook's argument is that one may suffer negative reputational effects from a variety of factors, including a civil judgment or even

160. Easterbrook's argument is that one may be forced to pay damages as a result of a civil (rather than criminal) judgment, and one may suffer a "black mark" on account of losing a civil (rather than criminal) case. *See Keane*, 852 F.2d at 203–04.

simply the exposure of embarrassing facts. He finds nothing unique in the reputational loss one suffers as a result of criminal conviction. As I will argue more fully below in Part V, this view is profoundly wrong; judges should—and already do—understand that criminal conviction brings with it a unique stigma and that a person who suffers a reputational injury as a result of criminal conviction suffers a qualitatively different kind of injury than someone injured by gossip or a judgment of civil liability. Just as a criminal fine is different from a civil award, so too is the stigma of criminal conviction different from the reputational harm of a civil judgment.

B. Misinterpreting § 2255

In *Keane*, Judge Easterbrook attempted to locate the justification for the civil disabilities test in the federal habeas statute, § 2255.[161] Passed in 1948, § 2255 established the procedures for federal courts to vacate federal criminal convictions,[162] and it is generally considered coextensive with the traditional writ of habeas corpus.[163] Relief pursuant to § 2255 is limited to those "in custody" under the terms of their conviction, and there is a long line of cases that establish the contours of the "custody" requirement.[164] Referring to coram nobis, Judge Easterbrook wrote, "the principles underlying the 'custody' requirement of § 2255 call for some ongoing legal disability as a custody-substitute."[165] The principle of § 2255 demands a custody-substitute, according to Judge Easterbrook, in the following way:

> Because a person still "in custody" suffers a *continuing* deprivation, § 2255 authorized collateral review for federal prisoners . . . . When the custody ends so does the justification for this review—not only the justification based on policy, but also the justification based on statute. . . . A court could not say that review ought to be available perpetually, treat the "custody" requirement of § 2255 as a

161. *See id.* at 203.

162. 28 U.S.C. § 2255 (2006).

163. Hill v. United States, 368 U.S. 424, 427 (1962) (holding that § 2255 provides a remedy "exactly commensurate" with habeas corpus).

164. *See, e.g.*, Peyton v. Rowe, 391 U.S. 54, 67 (1968) (holding that a prisoner serving consecutive sentences was "in custody" for purposes of challenging any of his convictions); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (holding that parole terms were sufficient to satisfy the "in custody" requirement of habeas).

165. United States v. Bush, 888 F.2d 1145, 1146 (7th Cir. 1989).

> mistake, and go ahead with collateral review under the flag of *coram nobis* whether the defendant is in custody or not. There has to be a substitute for the "custody" requirement.[166]

It is not clear exactly what Judge Easterbrook meant to say about § 2255 in the passage above. If his point was that § 2255 covers only convicted persons "in custody," he is undoubtedly correct and is simply restating the terms of the statute. But he seemed to be suggesting that when Congress drafted § 2255, it started from a blank slate and decided, for particular policy reasons, to limit post-conviction review only to those "in custody" while denying it to those no longer in custody. The policy rationale for this decision, on this account, was that only those still "in custody" were suffering an ongoing deprivation.

Were § 2255 conceived from scratch and enacted as a comprehensive statute on collateral review in federal criminal cases, and were Judge Easterbrook able to point to compelling legislative history to that effect, then this account might be plausible. However, § 2255 was not meant to set up a comprehensive and exclusive regime for all collateral review; to the contrary, it was conceived and enacted to solve a particular problem in the implementation of the common-law writ of habeas corpus.[167] In particular, § 2255 vested jurisdiction for such review in the court that sentenced the criminal, rather than in the court of the jurisdiction of confinement.[168] It thus solved the problem of certain courts, such as those located in the same jurisdiction as large federal prisons, receiving an unfairly large portion of habeas claims.[169] Section 2255 did not purport to eviscerate the writ of coram nobis, much less provide a comprehensive and exclusive remedy for all post-conviction reviews.

If there was any doubt about the scope of § 2255 with respect to coram nobis, the Supreme Court resolved the issue conclusively in *Morgan* when it explicitly wrote,

166. *Id.* at 1147.

167. United States v. Morgan, 346 U.S. 502, 511 (1954) ("In *United States v. Hayman*, 342 U.S. 205, 219 [1952], we stated the purpose of § 2255 was to 'meet practical difficulties' in the administration of federal habeas corpus jurisdiction. We added: 'Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions.'").

168. *See generally* United States v. Hayman, 342 U.S. 205, 213–22 (1952) (discussing the legislative history of § 2255).

169. *Id.*

> The contention is made that § 2255 . . . should be construed to cover the entire field of remedies in the nature of *coram nobis* in the federal courts. We see no compelling reason to reach this conclusion. . . . [T]he purpose of § 2255 was "to meet practical difficulties" in the administration of federal habeas corpus jurisdiction.[170]

Indeed, the Court knew "of nothing in the legislative history that indicate[d] a different conclusion."[171] Thus, § 2255 was not meant as a comprehensive regime for collateral review; rather, it was a statutory fix to a practical problem. Its limitation to prisoners "in custody" is thus not the result of a deliberate policy decision to limit all collateral review to those still incarcerated, but rather an accurate codification of traditional habeas corpus requirements. The Seventh Circuit's conclusion—"[w]hen the custody ends so does the justification for this review"[172]—is trivially correct if it is meant to refer only to § 2255 review but meaningless if it is meant to refer to coram nobis.

The "custody" requirement of § 2255 reflects the traditional scope of the writ of habeas corpus; it tells us nothing about the scope of coram nobis. To say as much is not to "treat the 'custody' requirement of § 2255 as a mistake," as Judge Easterbrook suggested,[173] but rather to treat the custody requirement as it plainly is: limited to § 2255 review. Judge Easterbrook's pronouncement that "[t]here has to be a substitute for the 'custody' requirement"[174] is no more than his own innovation, without basis either in statute or in the history of coram nobis jurisprudence.[175]

170. *Morgan*, 346 U.S. at 510–11 (quoting *Hayman*, 342 U.S. at 219).

171. *Id.* at 511.

172. United States v. Bush, 888 F.2d 1145, 1147 (7th Cir. 1989).

173. *Id.*

174. *Id.*

175. The Fourth Circuit got this issue exactly right back in 1966 when it decided *Mathis v. United States*, 369 F.2d 43 (4th Cir. 1966). There, the court had to decide whether *Morgan* and § 2255 required that a coram nobis petitioner suffer from a "present imposition" (analogous to a civil disability) in order to qualify for a hearing. The court wrote,

> While in *Morgan* the defendant's status as a second offender constituted a "present imposition" flowing from the prior conviction, the Court did not expressly or impliedly lay down such a requirement for the granting of the writ. Indeed, to the extent that the "present imposition" doctrine is analogous to the "in custody" proviso in section 2255, the Court implicitly rejected it as a prerequisite to the grant of coram nobis by holding that Congress did not intend to restrict other post-conviction remedies by enacting section 2255.

Indeed, to demand that the limits of habeas review apply to coram nobis review is to completely misunderstand the import of the *Morgan* decision, which was to establish coram nobis as a form of post-conviction review precisely for those not in custody. The *Morgan* Court retrofitted the ancient writ of coram nobis to fill a gap in post-conviction review. That gap was the lack of a well-established procedure for attaining collateral review for those *not covered* by § 2255. So to argue that § 2255 compels the courts to create impediments to post-conviction review for those not covered by § 2255 is to fundamentally misunderstand the limited scope of § 2255 and the explicit holding of the Court in *Morgan*.[176]

V. THE REPUTATIONAL CONSEQUENCES OF CONVICTION

In the trio of opinions that laid down the civil disabilities test, the Seventh Circuit held that reputational injury and professional harm do not rise to the level of harm necessary to invoke coram nobis. Such harms, the court argued, were not unique to criminal conviction and thus not amenable to redress by vacating a criminal conviction.[177] The Seventh Circuit also flirted with the idea that such harms are not weighty enough to trigger a real case or controversy or to give a coram nobis petitioner legal standing.[178] I will argue against these views and contend, to the contrary, that the civil disabilities test severely undervalues the reputational, professional, and social consequences of criminal conviction, and, as a result, denies

Id. at 47. Or, as the D.C. Circuit recognized as far back as 1959, "The net of the situation is that while Congress, in Section 2255, was affording a new remedy for post conviction attacks on a federal sentence, no congressional purpose can be divined to exclude ancient remedies where the new one does not reach the particular problem." Thomas v. United States, 271 F.2d 500, 504 (D.C. Cir. 1959).

176. One might defend the Seventh Circuit position by arguing that Judge Easterbrook spoke of "the *principles* underlying the 'custody' requirement of § 2255," not the explicit text of § 2255. *Bush*, 888 F.2d at 1146 (emphasis added). But once we understand that the "custody" requirement of § 2255 was not based on some abstract principle about the necessity of ongoing deprivation, but rather reflected the uncontroversial limits of habeas relief, then we see that there are no congressionally-endorsed "principles underlying the 'custody' requirement"—and thus no congressionally-endorsed principles that would demand a "custody-substitute" in the context of coram nobis review.

177. *Bush*, 888 F.2d at 1148 ("[R]eputational injury from conviction . . . does not suffice—civil judgments, too, cause loss of money and reputation.").

178. United States v. Keane 852 F.2d 199, 204 (7th Cir. 1988) ("A strong emotional interest is not enough to produce an Article III case or controversy.").

collateral relief to deserving petitioners.[179] Indeed, conventional standing doctrine and common-law defamation are two well-established areas of law that already recognize reputational harm as real, weighty, and deserving of legal redress.[180]

Many judges and commentators have discussed the unique "stigma" of criminal conviction and its distinct shaming function in our system of criminal justice.[181] Others have noted the stiff barriers that ex-offenders face in the job market.[182] Criminal convictions may carry fines or other monetary penalties that can bankrupt or impoverish their targets for years to come or, indeed, for the rest of their lives. These are not trivial consequences of conviction, and they last a lifetime. They do not end when "civil disabilities" end, and they impact the day-to-day wellbeing of convicted persons just as severely as formal disabilities, if not more so.

Of course, not every conviction leads to every potential negative collateral consequence, and many convicted persons would face difficult professional paths and dubious reputations regardless of their on-the-record conviction. The courts do not have a freestanding obligation to help out every ex-offender in vindicating his or her reputation and smoothing his or her career path. But the courts do have an obligation to remove the one source of stigma

179. By "deserving petitioner," I mean a petitioner who suffers from the collateral consequences of unlawful conviction but cannot prove a "disability" of the kind recognized by the civil disabilities test.

180. *See, e.g.*, Meese v. Keene, 481 U.S. 465, 472–77 (1987) (potential distributor of foreign films had standing to challenge Justice Department's characterization of films as "political propaganda" because it would affect "his personal, political, and professional reputation" and impair his ability to practice his profession); RESTATEMENT (SECOND) OF TORTS § 559 (1977) (defining a defamatory statement as one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him").

181. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 872 (1997) (noting the "opprobrium and stigma of a criminal conviction"); Rutledge v. United States, 517 U.S. 292, 302 (1996) (quoting Ball v. United States, 470 U.S. 856, 864–65 (1985)) (referring to the "societal stigma accompanying any criminal conviction"); *see also* Chad Flanders, *Shame and the Meanings of Punishment*, 54 CLEV. ST. L. REV. 609, 632 (arguing that stigma is inherent to criminal conviction).

182. *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME 112–20 (2003) (discussing "employment barriers and workplace restrictions" facing released prisoners); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER RE-ENTRY 151–85 (2005) (discussing employment challenges of released prisoners); Marlaina Freisthler & Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-incarceration Employment, and Recidivism in Ohio*, 36 U. TOL. L. REV. 525, 532–40 (2005).

over which they have exclusive control—a judgment of conviction—if it turns out that the person so stigmatized did not commit a crime.

In this Part, I will first summarize the literature on the "non-legal" collateral consequences of criminal conviction and explain why the reputational harm of conviction is more salient now than in the past. Then, I will show that our courts have consistently recognized reputational injury both as a threshold basis for litigation and as a type of injury susceptible to judicial redress. Thus, I argue, granting coram nobis relief to those bearing an unjust conviction and suffering reputational injury would be entirely consistent with general legal norms regarding reputational injury.

A. Non-legal Collateral Consequences of Conviction

The wide-ranging extent of civil disabilities triggered by criminal conviction is receiving increased scrutiny in the legal literature, and rightly so.[183] Depending on the jurisdiction and the type of conviction, a single conviction may result in a plethora of adverse legal consequences apart from custody, ranging from disenfranchisement and inability to serve in the Armed Forces to ineligibility for welfare benefits, student loans, and public housing.[184] These disabilities are deemed "civil" in nature by the courts and not part of the proscribed punishment of the criminal law—hence, they are referred to as "collateral," as opposed to direct, consequences of the criminal process. Defendants, even those contemplating plea-bargains, are often unaware of these collateral consequences.[185] And even savvy defense counsel would have great difficulty in explaining the full range of civil disabilities to their clients because such disabilities are scattered throughout the law, nowhere codified or

183. *See, e.g.*, A.B.A. STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2004) [hereinafter A.B.A. STANDARDS]; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705 (2003); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006).

184. *See* Pinard & Thompson, *supra* note 183, at 586–87.

185. *See id.* at 590 ("Not only offenders, but many participants in the criminal justice system remain wholly unaware of these consequences."); *id.* at 592 ("Typically, though, these collateral consequences do not surface in counseling sessions between lawyer and client or in the course of a guilty plea colloquy in court.").

centralized.[186] But as problematic as these civil disabilities are, particularly for low-income ex-offenders, they are at least on the books and thus subject to criticism and debate. Moreover, the civil disabilities test recognizes the bite of these collateral consequences and holds out the possibility of coram nobis relief to a petitioner who can show present, non-trivial harm as a result of such official civil disabilities.

In addition to the formal civil disabilities affecting the rights and privileges of a convicted person vis-à-vis the state, we must also consider the non-legal collateral consequences of conviction. Criminal conviction is not only a process leading to direct sentencing and collateral legal consequences—it also represents a serious social stigma, one of society's most effective ways of broadcasting that a particular individual engaged in deviant conduct. Some sociologists liken conviction to a "Mark of Cain," a stigmata perhaps less cruel than branding but serving the same function in a bureaucratic vein.[187] The important point is that a conviction has social meaning and changes a person's social *status*. We have words such as criminal, convict, ex-con, offender, etc., each of which suggests the negative social status resulting from conviction. Conviction is part of a process of "tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious"[188] the criminal element in society. The economic, social, and domestic consequences of conviction can be severe.

The most tangible of the non-legal consequences of conviction is the loss of employment prospects. Upon conviction, a whole range of public-sector and regulated occupations become immediately off limits. These include a vast array of government, military, transportation, medical, legal, and even real estate positions, among others.[189] More importantly, the lack of private-sector opportunities is correspondingly severe. Many studies have detailed the (understandable) reluctance of employers to hire ex-offenders.[190] In

186. *See* Demleitner, *supra* note 183, at 154.

187. SHLOMO SHOHAM, THE MARK OF CAIN: THE STIGMA THEORY OF CRIME AND SOCIAL DEVIATION 9 (1970).

188. *Id*. at 155.

189. *See* Demleitner, *supra* note 183, at 156–57.

190. *See, e.g.*, Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL'Y 261, 269 (2006).

one Urban Institute study "examining the willingness of employers to hire from disadvantaged or stigmatized groups, convicted felons placed dead last, with only 40% of employers saying they would 'definitely' or 'probably' hire someone with a criminal record for an unskilled position."[191] Another "study conducted in five major cities showed that two-thirds of employers would not knowingly hire a former offender."[192] Very often employers' standard application forms ask whether the applicant has ever been convicted of a felony,[193] and background checks have become "standard operating procedure" at many businesses, up to 80% in one estimate.[194] As online record searches become ever more available, it is nearly costless and trivially easy for an employer to check the conviction record of any applicant.[195]

Even putting aside the explicit actions of employers to keep ex-offenders off their payrolls, ex-offenders face a more difficult task finding a job than others because their conviction and incarceration break up the normal social support systems through which many people find their jobs. Research has shown that many, if not most, people actually find employment through established social networks, including family, friends, classmates, and colleagues.[196] It is not surprising that criminal conviction often severs or downgrades one's relationships with family, friends, colleagues, and other acquaintances, and ex-offenders find their pre-conviction social networks shrunken upon release from incarceration. Whatever new networks they have established since prison are likely to promote criminality and isolate the ex-offender even more from licit

191. *Id.* (citing TRAVIS, *supra* note 182, at 164).

192. 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, 22 (2005) (citing JEREMY TRAVIS, AMY L. SOLOMAN & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31 (2001)).

193. This formulation has entered the popular culture as well. *See, e.g.*, ICE CUBE, *What Can I Do?*, *on* LETHAL INJECTION (Priority Records 1993) ("Have you ever been convicted of a felony? Yes.").

194. Aukerman, *supra* note 192, at 23.

195. *See* Brad Stone, *If You Run a Red Light, Will Everyone Know?*, N.Y. TIMES, Aug. 3, 2008, at BU4, *available at* http://www.nytimes.com/2008/08/03/technology/03essay.html (detailing availability of free online criminal searches).

196. *See generally* MARK S. GRANOVETTER, GETTING A JOB: A STUDY OF CONTACTS AND CAREERS (2d ed. 1995).

employment.[197] This pattern holds true whether the convicted person comes from a low-income area with few employment opportunities or from a prosperous professional suburb. Criminal conviction can devastate the already-dicey employment prospects of an inner-city youth as well as those of an otherwise accomplished professional.[198] The stigma of conviction makes potential contacts less likely to offer leads, make recommendations, put in a good word, or otherwise help in finding a job.

The normal workings of the risk-management market also play a role in reducing employment opportunities for an ex-offender. For instance, many employers purchase fidelity bonding as a matter of course to insure against fraud, theft, and embezzlement by employees. But "many private insurers will not issue bonds for former inmates. Indeed, hiring a convicted felon in a bonded position may place the coverage of an entire business at risk."[199]

Finally, tort law itself provides private employers with an incentive not to hire ex-offenders. The tort of negligent employment or negligent hiring opens employers up to liability for the acts of their employees even outside of traditional *respondeat superior* liability.[200] If a company fails to investigate the criminal history of an employee, it may be liable for injuries resulting from that employee's actions even if the conduct occurs outside the scope of employment.[201] The tort of negligent hiring has become increasingly popular and "tends to result in plaintiff's verdicts large enough to destroy a small business."[202] It goes without saying that many prudent employers make it a policy to steer clear of convicted persons entirely. And the available statistics bear out the common-sense proposition that convicted persons face a more difficult job

197. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 134–37 (1999).

198. Indeed, to the extent that a professional or conventional businessperson operates in an environment in which criminal conviction is relatively rare, its reputational consequences may be even starker.

199. *See* Stafford, *supra* note 190, at 270 (internal footnotes omitted).

200. 27 AM. JUR. 2D *Employment Relationship* § 395 (2004) ("Generally, an employer who hires an employee with knowledge of the employee's prior criminal record may be held liable, on a direct-negligence theory, for the latter's tortious conduct."); *see also* Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 197 (2004).

201. *See, e.g.*, Tallahassee Furniture Co. v. Harrison, 583 So. 2d 744 (Fla. Dist. Ct. App. 1991).

202. Stafford, *supra* note 190, at 270.

market than their non-convicted peers. One widely-quoted study showed that four out of five people who are convicted and incarcerated are unable to resume stable employment after release from prison.[203]

B. Information Technology and the Spread of Stigma

The reputational consequences of conviction are already substantial, but the ongoing explosion of information available over the Internet, particularly the marriage of record-keeping databases and the World Wide Web, greatly exacerbates the reputational damage of conviction.[204]

Thanks to record-keeping requirements and information technology, the American criminal justice system has created an elaborate, if diffuse, "information infrastructure." Starting from law enforcement and local court records, a "rap sheet" is created for virtually every person who is ever arrested or processed. Each rap sheet contains, at a minimum, a chronological description of the individual's interactions with the criminal justice system, from arrest to judgment to sentencing, plus the individual's fingerprints.[205] Every state maintains a database of rap sheet information, and the Federal Bureau of Information maintains a virtual national database through the National Crime Information Center. Though the NCIC database is directly accessible to law enforcement agencies only, "[a] large percentage of criminal background checks is carried out on behalf of public and private employers, landlords, and other agencies, organizations, and associations."[206]

Direct access to state-level "rap sheet" information differs from state to state, but the clear trend is toward increasing accessibility to those outside of traditional law enforcement.[207] Some states treat individual criminal history records as public documents and make them available for free online. Oklahoma, for instance, maintains a website with a searchable database including "the records on file of

203. *See* Hagan & Dinovitzer, *supra* note 197, at 137.

204. For an intelligent discussion of the general consequences of the Information Revolution on our concept of reputation, see DANIEL J. SOLOVE, THE FUTURE OF REPUTATION (2007).

205. *See* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 392–96 (2006).

206. *Id.* at 394.

207. *Id.* at 395.

offenders sentenced to a term of probation or incarceration within the Oklahoma Department of Corrections."[208]

In addition to the information made available by courthouses and states themselves, there is a large and growing market for criminal record information, which is serviced by dozens and dozens of "information brokers."[209] From instantpeoplecheck.com to efindoutthetruth.com, these information brokers tout their ability to provide members of the general public with comprehensive nationwide searches to reveal any criminal records. These services are available on a fee-per-search basis, subscription basis, or for free.[210]

Even putting aside official criminal record searches, regular searches on Google can reveal convictions through reports in news stories, blogs, or other sources. As Professor Solove has written, "We're heading toward a world where an extensive trail of information fragments about us will be forever preserved on the Internet, displayed instantly in a Google search. . . . This record will affect our ability to define our identities, to obtain jobs, to participate in public life, and more."[211] While a criminal conviction on one's record may constitute only one factor in a person's general reputational profile, it is a uniquely stigmatizing piece of information. To the extent that information technology makes possible a digital "scarlet letter,"[212] convicted persons will likely bear a disproportionate brunt of such high-tech opprobrium.[213]

The upshot is that personalized criminal history information is easy to access for anyone with an Internet connection, and the trend is toward ever more accessibility and diminishing costs. Though there has been intermittent congressional recognition that dissemination of a person's criminal history constitutes an invasion of

208. Oklahoma Department of Corrections, Offender Lookup, http://docapp065p.doc.state.ok.us/servlet/page?_pageid=395&_dad=portal30&_schema=PORTAL30 (last visited Nov. 2, 2009).

209. *See* SEARCH: THE NAT'L CONSORTIUM FOR JUSTICE INFO. AND STATISTICS, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION (2005), *available at* http://www.search.org/files/pdf/RNTFCSCJRI.pdf.

210. Stone, *supra* note 195 (detailing availability of free online criminal searches).

211. SOLOVE, *supra* note 204, at 17.

212. *Id.* at 11.

213. And while it is true that a Google search may reveal a conviction that was subsequently vacated—coram nobis relief will not magically erase all record of the original conviction—the same Google search may very well reveal the vacation of the conviction.

privacy,[214] the U.S. Supreme Court held definitively in *Paul v. Davis* that there is no constitutional right to keep one's criminal record private.[215] And, as Professor Jacobs points out, the Sixth Amendment guarantee of public trials, coupled with the First Amendment right to publish information about crime, means that even good-faith efforts to restrict access to a person's criminal history are likely to fall afoul of other constitutional values.[216]

In short, so long as there is a demand for criminal background information, there will be a ready supply. And as bandwidth for data storage and data dissemination becomes ever more available, such information (like all information) will become even easier and cheaper to obtain.

C. The Law's Role in Righting Reputational Wrongs

All of the reputational and professional harm associated with criminal conviction may be perfectly appropriate if the object of stigma, in fact, committed the crime for which he was convicted.[217] But one who suffers the adverse consequences of conviction for a crime he did not commit suffers an obvious injustice. The Seventh Circuit, however, has claimed that courts have no business righting reputational wrongs or "vindicat[ing]" the honor of the unjustly convicted.[218] In *Keane*, Judge Easterbrook admitted that "conviction is a black mark" and, in more colorful language, "a blot on one's escutcheon."[219] But he "decline[d] to adopt the Ninth Circuit's apparent view that anyone may obtain coram nobis just to bask in the satisfaction of having his position vindicated."[220] Expanding on this reasoning in *Bush*, Judge Easterbrook argued that courts had no role in responding to the severe professional consequences of erroneous convictions because "[u]nwillingness to hire someone for mouth-watering jobs is not a legal disability . . . ."[221] The Seventh

214. *See* Jacobs, *supra* note 205, at 407–10 (discussing, *inter alia*, the Federal Youth Corrections Act of 1950, the Privacy Act of 1974, and the Fair Credit Reporting Act of 1970).

215. 424 U.S. 693, 713 (1976).

216. *See* Jacobs, *supra* note 205, at 410.

217. My personal view is that the range and scope of collateral consequences of conviction are much too large, and I support efforts to document, rationalize, and reduce such collateral consequences. *See, e.g.*, A.B.A. STANDARDS, *supra* note 183.

218. United States v. Keane, 852 F.2d 199, 204 (7th Cir. 1988).

219. *Id.*

220. *Id.* (citing Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987)).

221. United States v. Bush, 888 F.2d 1145, 1150 (7th Cir. 1989).

Circuit view has been that no amount of reputational, professional, or financial injury is enough to trigger coram nobis review unless it counts as a formal civil disability.[222] Indeed, the court's opinions have suggested that coram nobis petitioners suffering only reputational injury may lack legal standing entirely.

Asking courts to vindicate a litigant's reputation is, according to Judge Easterbrook, "to send them on a fool's errand, close to if not beyond the borders of the Article III 'case or controversy' given the uncertainty that the judicial declaration will redress the injury."[223] In an earlier case, he had written that a "strong emotional interest is not enough to produce an Article III case or controversy."[224] The implicit argument seems to be that a coram nobis petitioner cannot show the injury-in-fact necessary to establish standing, absent the specific civil disabilities that the Seventh Circuit has recognized.

Judge Easterbrook is probably correct that the "strong emotional interest" of the petitioner in vacating his or her conviction is not enough to satisfy the injury requirement of federal standing.[225] Constitutional standing requires that a plaintiff show that he is suffering a "distinct and palpable" injury-in-fact, and not merely a "conjectural" or "hypothetical" harm.[226] But he is wrong to suggest that reputational injury—a "blot on one's escutcheon"—does not meet the injury-in-fact requirement. To the contrary, the Supreme Court and other federal courts have consistently held that an injury to one's reputation satisfies the injury-in-fact standing requirement.[227] To take one example, in *Meese v. Keene* the Supreme

222. I think it goes without saying that the law generally treats unjust financial injury as a ground for legal relief. So this section will deal only with the Seventh Circuit's arguments to the effect that the courts have no role to play in righting reputational wrongs.

223. *Bush*, 888 F.2d at 1150.

224. *Keane*, 852 F.2d at 204.

225. *See, e.g.*, City of L.A. v. Lyons, 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions.").

226. Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). In addition to an injury-in-fact, a litigant must also be able to show that such injury is traceable or caused by the defendant, and that the court has the power to provide redress for the injury. *E.g.*, Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000).

227. *See*, *e.g.*, Meese v. Keene, 481 U.S. 465, 472–77 (1987) (potential distributor of foreign films had standing to challenge Justice Department's characterization of films as "political propaganda" because it would affect "his personal, political, and professional reputation" and impair his ability to practice his profession); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 139 (1951) (charitable organizations designated as "Communist" by Attorney General had standing to challenge their designations because of, *inter alia*,

Court squarely addressed the issues of standing based on reputational and professional injury.[228] The respondent sought to screen three films that the Department of Justice had designated "political propaganda" pursuant to the Foreign Agents Registration Act.[229] The Court accepted respondent's claim that the "political propaganda" designation meant that he "could not exhibit the films without incurring a risk of injury to his reputation and of an impairment of his political career."[230] Thus, "the Act 'puts the plaintiff to the Hobson's choice of foregoing the use of the three Canadian films . . . or suffering an injury to his reputation.'"[231] The Court held that the potential injury to the respondent's reputation—and, by extension, his political career—was sufficiently "distinct and palpable" to count as a "cognizable injury" for standing purposes.[232] Clear Supreme Court precedent thus precludes the argument that "mere" reputational or professional injury fails to satisfy the requirements of legal standing. And the civil disabilities test, insofar as it fails to recognize reputational and professional injury as grounds for relief, cannot justify itself on the basis of conventional standing doctrine.

But, to its credit, the Seventh Circuit never relied extensively on standing doctrine in creating the civil disabilities test. Rather, it developed a policy argument against extending coram nobis relief to those suffering reputational harm and loss of professional prospects. The reason why such harm should not be recognized in coram nobis,

"damage [to] the reputation of those organizations in their respective communities"); *accord* United States v. Accra Pac, Inc., 173 F.3d 630, 633 (7th Cir. 1999) ("[B]eing put on a blacklist . . . is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession . . . .").

228. 481 U.S. at 472–77.

229. *Id.*

230. *Id.* at 475.

231. *Id.* (citation omitted).

232. *Id.* at 472–73. The Court also held that the respondent's claim met the traceability and redressibility requirements of constitutional standing because the adverse party (the Department of Justice) was responsible for designating the films as political propaganda and because an injunction against the designation would "at least partially redress the reputational injury of which appellee complains." *Id.* at 476. In a coram nobis proceeding, the party adverse to the petitioner is the government, which is to say, the entity that prosecuted the petitioner, leading to his or her conviction. The injury alleged by the petitioner is thus "fairly traceable" back to the adverse party. Finally, the coram nobis petitioner's injury is "likely . . . [to] be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). That is, a favorable decision would vacate the conviction and thus remove the "blot on one's escutcheon" that provoked the suit in the first place.

Judge Easterbrook wrote, is because "(a) it is not a legal disability, and a judgment therefore may be ineffectual in redressing it, and (b) it is different in degree, and not in kind, from the reputational injury accompanying all convictions."[233] As to the first reason ("it is not a legal disability"), Judge Easterbrook is correct, in some sense, that loss of professional opportunities is not itself a distinctly civil—that is, legally applied—disability. But his worry that "a judgment therefore may be ineffectual in redressing it" flies in the face of our general understanding of what courts do. Most harms for which people petition the courts are not "legal disabilities" in the sense he means; people resort to the courts to make them whole for damage to their persons, property, liberty, finances, and reputation, among other interests. Courts do not tell someone suffering from a broken arm, "We're sorry, but your injury is not a legal disability, and therefore, a judgment of this court may be ineffectual in redressing it." Courts determine whether another party is legally liable for the injury, and if so, they do their best to figure out a proper amount of compensation ("damages"). The fact that reputational or professional injury is not a "legal" or "civil" disability is not a reason to eschew the task of determining whether the injury is one that deserves relief.

Second, the contention that reputational injury is not the kind of injury that a court can fruitfully investigate or redress is also misguided. Not only is reputational injury enough to establish legal standing, protecting a person's reputation is one of the most time-honored and vital functions of the judicial system.[234] The entire law of defamation[235] exists precisely to protect against reputational harm and to provide redress when one suffers from an injury to reputation. Defamation law goes back to the furthest reaches of the common law

233. United States v. Bush, 888 F.2d 1145, 1150 (7th Cir. 1989).

234. As the Supreme Court put it in the landmark case of *Gertz v. Robert Welch, Inc.*, "the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

235. Defamation law today consists of the twin torts of libel and slander. Libel is defamation where the defamatory words are written or printed; slander is defamation where the defamatory words are spoken. *E.g.*, Kennedy v. Children's Serv. Soc'y of Wis., 17 F.3d 980, 984 (7th Cir. 1994). In addition to libel and slander, the privacy torts, especially "false light," provide legal redress to those who have suffered a reputational injury, though there are complex disputes about the interests served by the privacy torts. *See* RESTATEMENT (SECOND) OF TORTS § 652E (2009).

and beyond.[236] And though no single definition can fully capture the entire concept, an Illinois appeals court helpfully defined defamation as "the publication of anything injurious to the good name or reputation of another, or which tends to bring him or her into disrepute."[237] The Restatement definition of a defamatory communication is one that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."[238]

Under defamation law, there is a class of statements that are called defamatory per se; these are statements deemed so manifestly injurious to a person's reputation that the plaintiff need not prove "special harm."[239] In particular, courts consider it defamation per se to impute to another person criminal conduct that is punishable by state or federal incarceration.[240] In other words, common-law courts have come to the conclusion that the mere allegation of serious criminal conduct is the kind of communication that is so harmful to one's reputation that it counts, as a matter of law, as a defamatory statement.[241] It should be clear, then, that an actual criminal conviction—that is, a public determination by a court that one is

236. One can trace the development of defamation law from ancient Rome to canon law to Medieval codes and finally to the establishment of the torts of libel and slander in the seventeenth century. *See generally* LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION (2007); Van Vechten Veeder, *The History and Theory of the Law of Defamation*, 3 COLUM. L. REV. 546 (1903). In the twentieth century, the great debates over defamation focused on the relationship between the protection of reputation and the Free Speech and Free Press clauses of the First Amendment. Those debates are beyond the scope of this Article. It suffices here to note that while the First Amendment places some constraints on defamation actions, particularly against public figures, it remains a robust cause of action. *See, e.g.*, Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) (discussing balance between values of free speech and protection of reputation); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that "actual malice" test is not appropriate for plaintiff who is not a public figure); Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (extending "actual malice" test to public figures); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that public official plaintiff must show "actual malice" in libel cases).

237. Marczak v. Drexel Nat'l Bank, 542 N.E.2d 787, 789 (Ill. App. Ct. 1989).

238. RESTATEMENT (SECOND) OF TORTS § 559 (1977).

239. *Id.* §§ 569–74.

240. *Id.* § 571. It is also per se defamatory to impute to another (a) a "loathsome disease," (b) serious sexual misconduct, or (c) a characteristic making one unfit for one's trade or profession. *Id.* § 570.

241. Of course, a successful defamation cause of action must also fulfill the other elements of the tort, which include at a minimum (a) falsity of the statement, (b) negligence or some higher degree of fault, and (c) publication. *See id.* § 558.

guilty of a crime—also carries a heavy reputational harm.[242] Such reputational harm may be fully deserved when the defendant is, indeed, guilty. But the point is that the same court system that makes the imputation of serious criminal conduct defamatory per se should have no trouble recognizing the real reputational harms of a false conviction.

Moreover, the right to recovery of money damages for defamation is not lost simply because determining the appropriate amount of damages is a difficult task. As one state supreme court put it, "The rule that damages, if uncertain, cannot be recovered, applies to their nature, and not to their extent. If the damage is certain, the fact that its extent is uncertain does not prevent a recovery."[243] Thus, a successful defamation claimant may recover both "general" damages for the reputational harm itself and "special" damages for concrete, pecuniary losses suffered as a result of the reputational harm.[244] For instance, a person who falsely imputes criminal conduct to another may be liable both for the injury to the latter's reputation (general damages) and for the loss of the latter's job ("special" damages) if the firing was a direct consequence of the false imputation.[245]

As standing and defamation law demonstrate, the legal system regularly recognizes reputational injury, has developed sophisticated doctrines for assessing it, and provides nominal, special, and general damages for redressing it. The law also recognizes that imputing serious criminal behavior to one who has not committed a crime counts as reputational injury—indeed, injury per se. The suggestion put forward by the creators of the civil disabilities test that a "blot on one's escutcheon" is not the kind of harm that courts should spend time or resources on is belied by the long history and vitality of defamation law, as well as the black-letter law of legal standing.

242. Needless to say, judges and prosecutors are immune from defamation suits insofar as they accuse or convict criminal defendants, and properly so. *Id.* §§ 585–86.

243. Am. Life Ins. Co. v. Shell, 90 So. 2d 719, 724 (Ala. 1956) (internal quotations omitted).

244. *See* 50 AM. JUR. 2D *Libel and Slander* § 357 (2006). If a plaintiff can show defamation per se, but no discernible injury, he may recover "nominal" damages for the purpose of vindication. *See id.* § 361.

245. Depending on the case, punitive or exemplary damages may be available as well. *See id.* § 362. It is generally up to the jury to decide how much money should be paid to the plaintiff to compensate for general and/or special damages, though the court may interfere if the amount is grossly excessive or inadequate. *See id.* § 373.

Reputational injury, especially the kind suffered when one is unjustly deemed a criminal, is a real injury, and it is a real injury that our court system is well-equipped to handle.

VI. FINALITY, JUDICIAL ECONOMY, AND THE CIVIL DISABILITIES TEST

Ultimately, the creators of the civil disabilities test sought to anchor the doctrine in the twin values of finality and judicial economy. By limiting the types of claims coram nobis petitioners can make, the civil disabilities test does indeed marginally reduce the caseload of some courts, and it also brings the litigation associated with some prosecutions to a definitive end.[246] But in this Part, I aim to show that the civil disabilities test fails in large part to deliver on its promise of promoting finality and judicial economy. On the other hand, it succeeds all too well in undermining the systemic value of accuracy.

"The norm of finality," Judge Easterbrook wrote, "with an exception while custody or another deprivation of liberty continues, is the background for understanding the writ of error coram nobis."[247] Finality, of course, is the principle that criminal cases must come to an end at some point, that there must be a final determination of guilt (or non-guilt) if the judicial system is to perform its core functions.[248] As Judge Easterbrook put it, "Everyone is entitled to a full and fair opportunity for litigation, and no one is entitled to multiple opportunities."[249] Rules favoring finality, he argued, "induce parties to concentrate their energies and resources on getting things right the first time."[250] And, in any event,

246. In other words, the civil disabilities test closes the last possible door to collateral relief for many claimants.

247. United States v. Keane, 852 F.2d 199, 202 (7th Cir. 1988).

248. These functions include, among others, distinguishing the guilty from the not-guilty, punishing the guilty, releasing the not-guilty, deterring potential wrongdoers, and beginning the healing process for victims and the rehabilitation process for criminals. For the classic argument in favor of privileging finality in collateral review, see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

249. *Keane*, 852 F.2d at 201.

250. *Id.* This is a particularly strange argument to make with reference to Keane's case, for Keane, as the court conceded, concentrated very clearly "before, during, and after trial" on precisely the issue that formed the basis of his coram nobis proceeding—namely, the "'intangible rights' aspect of the indictment and the jury instruction." *Id.* There was no

there is no guarantee that continued review of a case is likely to lead to a better outcome. After all, "if hindsight shows the error of the first decision, it may show the error of the second in turn."[251] Worse yet, "[f]rom a systemic perspective, time consumed relitigating one case subtracts from the time available to litigate others."[252] These principles of finality and judicial economy, Judge Easterbrook reasoned, militated in favor of the civil disabilities test because, without such a test, the writ of coram nobis would stand as a limitless invitation to "relitigation" of old criminal cases.[253]

A. The Cost to Accuracy

What Judge Easterbrook's paean to the values of finality and judicial economy leaves out is our system's laudable commitment to accuracy—getting things right, not just getting things done. From the perspective of accuracy, the essential problem with the civil disabilities test is that it leads to the absurd situation in which a judge may concede that the person before him is not guilty of a crime and yet refuses to vacate an unlawful conviction on that person's record. This is essentially what happened in the Seventh Circuit *Bush* and *Craig* cases. In those cases, the defendants were convicted of mail fraud under a theory of the crime that had been conclusively rejected by the Supreme Court. There is little doubt that, if the court were to have reached the merits in those two cases, it would have found in favor of the petitioners and granted relief. It is hard to overstate the basic injustice here: the state prosecutes you, convicts you, imprisons or otherwise punishes you, all on a misreading of the criminal statute, and then the court refuses to vacate the conviction because, it claims, you are no longer suffering "lingering civil disabilities."

But an injustice of this sort is not a concern only to the individual who bears its brunt; it is a major failure of a *justice system*. Faced with incontrovertible evidence that it improperly or incorrectly convicted someone, a system seeking accuracy-in-justice must rectify the mistake by, at minimum, formally revoking the erroneous

argument to be made in *Keane* that he was precluded from arguing the "intangible right" issue in a collateral proceeding for lack of raising the issue at trial or on direct appeal.

251. *Id.*

252. *Id.*

253. *Id.* at 206.

conviction.[254] To do otherwise—to refuse to hear the case for extraneous reasons—is to signal that accurately distinguishing the guilty from the not-guilty is not, after all, the most privileged value of the system. This is worrisome for the intrinsic reason that justice systems should strive for accuracy, and for the extrinsic reason that the system loses legitimacy insofar as it is perceived to be indifferent to accuracy.[255]

Of course, no justice system can afford to bankrupt itself in an endless quest for perfect accuracy; the resources of the system are finite, and there are important values other than accuracy, e.g., the protection of constitutional rights and fundamental fairness. But taking accuracy seriously means recognizing the costs to the system of refusing to correct manifestly unlawful convictions. When incommensurable values clash, one of them has to give, and our system recognizes that sometimes accuracy must give way to other values.[256] But we should forthrightly take note of the loss of one value, even if we decide that another value trumps it in any particular case. The proponents of the civil disabilities test fail to recognize the systemic loss imposed by their preferred test.

The closest that Judge Easterbrook comes to acknowledging the difficult trade-off involved in the civil disabilities test is this comment in *Bush*: "Although in the best of all worlds every judgment would be subject to correction as new facts came to light and legal

254. I leave it to others to discuss what kind of compensation might be due to someone unlawfully convicted and imprisoned. *See, e.g.*, BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001); Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73 (1999); Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105 (2008); Lauren C. Boucher, Comment, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069 (2007).

255. The justice system's legitimacy depends, in part, on a public perception that it renders reliable and accurate results. *See, e.g.*, WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 32–43 (2d ed. 1992). A system that is seen as unresponsive to the legitimate petitions of unlawfully convicted persons is, all things being equal, a less legitimate system than one that takes such petitions seriously. It is true that an increase in post-conviction challenges may itself lead to a perception of unreliability of the criminal process. But the existence of mistakes—good-faith or otherwise—is a given in any criminal justice system; the question is whether the system is honest and self-confident enough to provide sufficient means of correction.

256. The exclusionary rule, which keeps evidence obtained unconstitutionally out of criminal trials, is an instance in which the value of accuracy bows to the value of protecting constitutional rights. The bar on double jeopardy is another.

principles were refined, in a costly legal system correction is a luxury."[257] This statement perfectly captures the misguided attitude that lies at the heart of the civil disabilities test. The idea is that finality is a necessity while correction (accuracy) is a luxury. Indeed, Judge Easterbrook wrote explicitly of "the finality doctrines that *govern* the legal system."[258] From the perspective of finality, then, the burden is always on collateral review procedures to justify themselves.[259] But the problem with posing the question this way is that finality is not the only background norm in the system; accuracy—getting things right—is just as important (if not more so), and from that perspective one might ask what special circumstances justify the refusal of a court to grant relief to a petitioner suffering from an unlawful conviction.

To that question—what justifies the court's refusal to correct an unlawful conviction?—the defenders of the civil disabilities test offer two broad arguments, the first based on finality and the second on judicial economy. The first argument holds that allowing collateral review beyond the imposition of civil disabilities allows for perpetual review of criminal convictions and thus prevents the system from bringing any criminal case to a close. The argument based on *judicial economy* starts from the premise of scarcity and emphasizes the costs to the system as a whole of "endless" collateral review. On this view, the costs in time and resources of post-civil disabilities collateral review outweigh the potential benefits, and in any event, collateral review misdirects precious judicial resources away from solving fresh and unsettled cases to reviewing old and already-decided cases. Worse yet, allowing for post-conviction review serves as a disincentive to resolve all issues at trial, which is the best possible forum for airing and resolving all factual and legal disputes. None of these arguments is ultimately convincing for the reasons I will explain below.

257. United States v. Bush, 888 F.2d 1145, 1150 (7th Cir. 1989).

258. *Id.* at 1151 (emphasis added).

259. Habeas, according to this view, is justified only because the petitioner is in state custody. Thus, coram nobis may be justified only if there is some "custody-substitute" such as a civil disability.

B. Assessing the Finality Argument

Finality is the value most often cited in favor of the civil disabilities test. Cases must come to an end; justice must be *done* in order for justice to be done. As Justice Harlan put it:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.[260]

A couple of points should be made at the outset of this discussion. First, the ability to reach a final decision is a desirable trait of a criminal justice system, but it loses much of its luster if we imagine it as a final, unalterable, and erroneous decision. Any rule that prevents further review of a criminal case by definition entrenches erroneous decisions just as much as correct ones. Second, we should be clear about what finality or a lack of finality actually implies. A person convicted and sentenced at trial will ordinarily be incarcerated immediately upon sentencing, or in some cases, after all direct appeals are exhausted. The existence of collateral review does not mean that the decision of the court and the imposition of punishment are delayed until all collateral review is completed. To the contrary, the state treats a defendant as guilty as soon as the court so declares. Collateral review, thus, does not prevent "final" judgments of guilt and does not stand in the way of prescribed punishments.[261] Collateral review provides a very narrow opportunity

260. Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting). This view was later adopted by a majority of the Supreme Court. *See* Engle v. Isaac, 456 U.S. 107, 127 (1982) (quoting *Sanders*, 373 U.S. at 24–25 (Harlan, J., dissenting)). *But see* Ashe v. Swenson, 397 U.S. 436, 464–65 (1970) (Burger, C.J., dissenting) ("[I]n criminal cases, finality and conservation of private, public, and judicial resources are lesser values than in civil litigation.").

261. Bryan A. Stevenson, Director of the Equal Justice Initiative of Alabama, put this point best:

> Between 1995 and 2004, ninety-nine percent of all federal habeas filings were made by prisoners not under a sentence of death. Accordingly, filing a habeas petition neither delays nor avoids a petitioner's sentence. Almost every habeas petitioner has a compelling incentive to achieve efficient and timely review of his claims because he contends that his detention or imprisonment is wrongful. Whether the punishment is five years of incarceration or fifty years, it is being fully implemented during the pendency of any collateral litigation.

to some convicted criminals to challenge their convictions after they have been found guilty. The grounds for vacating a guilty verdict are narrow; the petitioner does not enjoy the presumption of innocence, and the chances of success are slim.[262] It is only in this limited sense, then, that post-conviction review procedures can be deemed an affront to finality. Collateral review leaves open the possibility of correction—that is, vacating an erroneous conviction—but it does not stop or even "pause" the functioning of the criminal justice system.[263]

But the main problem with the finality argument as it relates to the civil disabilities test is that it both proves too much and offers too little. It proves too much because the argument that the doctrines of finality "govern" the legal system would suggest a much earlier end-point to collateral review than current doctrine allows. Under our current system, a criminal defendant may spend years and years exhausting his right of appeal upon criminal conviction, petitioning for Supreme Court review, and when that fails, petitioning for habeas and eventually coram nobis. Fealty to the value of finality would demand the evisceration of many appellate and collateral review procedures that come long before coram nobis. Proponents of the civil disabilities test might argue that incarceration and the imposition of civil disabilities are the only factors that justify the existing exceptions to the rule of finality. But these appellate and collateral procedures cannot be understood solely as exceptions to the otherwise dominant norm of finality; they have become important procedures for the promotion of the systemic value of accuracy, no matter their origin. Systemic accuracy does not suddenly become unimportant at the point when civil disabilities

Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 352 (2006).

262. A major 2007 empirical study of federal habeas review found that only seven out of 2,384 randomly-selected non-capital habeas cases resulted in any relief for the petitioner. Nancy J. King, Fred L. Cheesman II & Brian J. Ostrom, Final Technical Report: Habeas Litigation in U.S. District Courts 52 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (finding a "0.29%" rate of relief for federal habeas petitioners). A 1991 study of habeas petitions in New York showed that, on average, only three or four percent of prisoners seeking collateral review are successful. Richard Faust et al., *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 680–81 (1991).

263. Death penalty cases are an obvious exception, as collateral procedures may, in fact, delay the imposition of the prescribed penalty. But death is different, and finality concerns cut both ways in such capital cases.

disappear. If coram nobis review is worthwhile for accuracy's sake while civil disabilities are imposed, then it is also worthwhile after civil disabilities have ended.

At the same time, the civil disabilities test fails to deliver on its promise of promoting finality. True, it picks out a point at which all collateral review must end. But it is a point over which the federal judiciary has no control and which, in many instances, never comes. Whether a petitioner faces lingering civil disabilities is dependent on the federal, state, and local law (including administrative rules) applicable to that petitioner and on the petitioner's own actions and intentions. The extent of civil disabilities differs significantly from state to state and frequently from locality to locality. For example, in some states, such as Alabama, a felony conviction for a crime of "moral turpitude" results in automatic disenfranchisement.[264] There is no doubt that such disenfranchisement constitutes a civil disability even under the Seventh Circuit approach; consequently, a convicted felon in Alabama would enjoy practically "life-long" access to coram nobis under the civil disabilities test. To cite another example, one of the *Craig* plaintiffs' claims to coram nobis was rejected, in part, because there was no proof that he had a "present desire" to re-apply for bar membership.[265] Had there been such proof, then perhaps he too would have had access to the writ.

Indeed, the civil disabilities test requires such a significant legal and factual investigation—what civil disabilities are in force, and which did petitioner actually face?—that the putative benefits of finality are hard to come by. One could imagine a different rule that would better promote the value of finality uniformly across jurisdictions and with a much brighter line—for instance, a strict statute of limitations on post-custody collateral review of, say, four years. However harsh such a rule might be—and I would not support such a rule—it would at least have the virtue of providing a date certain for an end to collateral review, and it would be as easy to administer as counting days on a calendar. Moreover, it would allow the sentencing court to control the point at which all collateral review would end. In contrast, the searching legal and factual review

264. ALA. CONST. art. VIII, § 177(b) ("No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability.").

265. United States v. Craig, 907 F.2d 653, 659 (7th Cir. 1990).

required by the civil disabilities test results in uncertainty about when any particular individual's access to collateral review expires.

Thus, while the civil disabilities test provides a theoretical end-point for all collateral review, its proponents cannot claim that the test accomplishes much for the norm of finality. The test is difficult to administer, the federal judiciary has almost no control over the laws and circumstances upon which the test turns, and many petitioners will continue to enjoy "perpetual" access to coram nobis because they suffer perpetual civil disabilities. Thus, the argument from finality fails on its own terms to provide a cogent case for the civil disabilities test.

C. Assessing the Judicial Economy Argument

The judicial economy argument fails for the same basic reason that the finality argument fails: its proponents cannot show why the end of civil disabilities represents the magic moment at which further collateral review becomes inefficient. The basic form of the judicial economy argument is that, after civil disabilities no longer apply, the costs of the coram nobis procedure are greater than the benefits thereof. The idea is that the "stakes" are so low in post-civil disabilities collateral review that they are not worth the costs of the review itself.

But measuring the costs and benefits of coram nobis is a tricky proposition. While the litigation costs of the parties and of the court are relatively easy to measure, the value of vacating an erroneous conviction for the individual petitioner, or the value of accuracy for the society as a whole, is not. How much is personal vindication worth, and how shall we measure marginal units of systemic accuracy and legitimacy? Then, there is the even more difficult problem of measuring opportunity costs—are there alternative procedures which would be of more value to the system as a whole? Such questions reveal the poverty of a strictly utilitarian approach to collateral review. Concepts such as systemic accuracy, finality, and reputational harm do not lend themselves to easy measurement. Indeed, they are classically "incommensurable" values—there is no neutral, transcendent value by which we can measure their relative importance. It is thus practically impossible to measure with utilitarian precision all of the competing values and personal interests at stake in determining the availability of coram nobis.

But even if it were possible to measure the costs and benefits of a procedure such as coram nobis, the proponents of the civil disabilities test must show that the moment at which the net benefit of coram nobis goes negative—i.e., the moment at which the costs of the procedure become greater than its benefits—is precisely the moment at which civil disabilities no longer apply to the petitioner. This they have not even begun to show. It is true that, all things being equal, the benefit to the individual petitioner of coram nobis relief is greater if the individual suffers from a civil disability than if he does not. But every other factor in the cost-benefit analysis remains the same—the litigation costs, the reputational and professional benefits to the individual of relief, and the benefits to the overall accuracy and legitimacy of the system. As noted in Part V, the formal civil disabilities suffered by the petitioner may be a very small marginal harm compared to the reputational and professional damage that a conviction on his record brings. It is thus highly improbable that even a notional cost-benefit analysis would determine that coram nobis is efficient during the imposition of civil disabilities, but inefficient afterwards.[266]

One might also object to the whole premise of the judicial economy argument, for we do not ordinarily dismiss civil suits for being "inefficient." So long as the plaintiff can show a stake sufficient to maintain standing and a legitimate cause of action, the case proceeds. We do not demand of the plaintiff that he prove that his case is socially efficient and that its determination constitutes the best use of judicial time and resources.

Moreover, the argument that the federal courts would face a "flood" of coram nobis cases in the absence of the civil disabilities test fails to meet the evidence. The Ninth Circuit has offered coram nobis without a civil disabilities test since 1987 and has yet to meet with results that seriously hamper judicial economy. Since the year 2000, fewer than 100 coram nobis cases have been filed in the Ninth Circuit, hardly a "flood" preventing the Ninth Circuit from dispensing justice in other cases.[267] Moreover, to make a doctrinal

266. And if such a cost-benefit analysis were to show that coram nobis is inefficient both before and after civil disabilities, then it proves too much, for coram nobis during the imposition of civil disabilities is not in controversy.

267. A search of the Ninth Circuit combined dockets database on Westlaw yields fewer than 100 cases since January 1, 2000, with the "cause segment" identified as "petition for writ of coram nobis."

decision based on a vague fear of opening up the "floodgates of litigation" is to misconstrue the role of the federal judiciary, which is to decide the legitimate cases before it, not to manage its caseload through manipulation of doctrine.[268] Of course, judges may be mindful of the practical consequences of their decisions, but it is indefensible to limit collateral review on a misguided notion that a marginally more liberal standard would flood the courts.

Judge Easterbrook made a related "efficiency" argument in *Keane*. He suggested that every additional collateral procedure disincentivizes the drive for accuracy at trial. "The prospect of relitigation," wrote Judge Easterbrook, "would reduce the effective stakes of the first case, leading to an erosion in accuracy."[269] The idea here is that parties to the criminal case should "concentrate their energies and resources on getting things right the first time."[270] By providing post-trial and post-appeal procedures to review the case, collateral review lowers the stakes of the trial and thus takes away from the effort and resources invested therein.

For a moment, let us assume the soundness of the argument. The trouble again is that the proponents of the civil disabilities test must show that the end of civil disabilities marks the crucial point in the balance between making collateral review available and incentivizing robust trials. In other words, proponents must show that the marginal increase in collateral review that would result from the absence of the civil disabilities test would decisively reduce the stakes of trial such that net systemic accuracy would fall. No such argument has been made.

Moreover, collateral review already exists, and it flies in the face of common sense to suspect that criminal defendants routinely choose to forego available defenses because of the availability of collateral review. Professor Yackle put it best:

> It would be nonsense for defense attorneys to hold potentially meritorious claims in reserve at trial, when the underlying facts and attendant arguments can be spread on the record and when the claims can either prevent the client's conviction or lay the groundwork for appeal, in order to call them into service later—

268. *See generally* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377 (2003) (criticizing arguments based on a fear of opening the floodgates of litigation).

269. United States v. Keane, 852 F.2d 199, 201 (7th Cir. 1988).

270. *Id.*

> when the claims will suffer from inadequate development in the record and, even at that, can be useful only to attack a conviction already in place.[271]

Simply put, to consciously increase the chances of conviction at trial in the hopes that one can prevail on collateral review would be highly irrational. Thus, as an argument in favor of the civil disabilities test, the theory that the availability of collateral review disincentivizes robust trials fails to persuade. It relies on an unsubstantiated and wildly implausible view of criminal defendant behavior, and it does not begin to explain why the end of civil disabilities marks the best moment at which to cut off collateral review.

There is one further incentives-based argument that proponents of the civil disabilities test might make. It is an elaboration of the "floodgates" argument, but rather than focusing on the potential flood of litigation, it worries about the backlash to such a flood. Appellate judges, on this account, are correctly concerned with the real-world consequences of their decisions, and they know that any decision holding a criminal statute unconstitutional (or substantively narrowing its scope) will inevitably increase the number of people eligible for collateral review.[272] The more collateral review procedures are available, the more fear judges will have that a liberalizing decision will result in a "flood" or disruptively large increase of collateral challenges.[273] Thus, insofar as dispensing with the civil disabilities test would increase the availability of collateral review in general, it would also lead to fewer liberalizing decisions in the criminal law.[274]

271. Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REFORM 685, 722–23 (1990).

272. This is because current retroactivity jurisprudence holds that collateral review petitioners receive the benefit of the latest authoritative cases on the constitutionality and substantive interpretation of criminal statutes. *See id.*; *supra* Part III.C.

273. As one commentator put it,

> The limited use of retroactivity is also necessary for the development of constitutional law. The Supreme Court is obviously reluctant to announce decisions that provide for greater protection of criminal procedure, which would create a substantial strain on the judiciary. By allowing the retroactive application of all decisions, the cost of change would be very significant.

Matthew R. Doherty, Note, *The Reluctance Towards Retroactivity: The Retroactive Application of Laws in Death Penalty Collateral Review Cases*, 39 VAL. U. L. REV. 445, 474 (2004) (citations omitted).

274. This is not an argument that Judge Easterbrook, or any other judge, has made in the context of coram nobis.

This argument shares the form of the "floodgates" argument, as well as its basic flaws. Judges should not, as a matter of course, take caseload considerations into account when determining the legal rules applicable to a given case. To do so is particularly objectionable when trying to determine the constitutionality of a criminal statute or its substantive scope. The question before the court in such cases is whether the legislature has the constitutional authority to criminalize particular conduct or whether the legislature actually criminalized the particular conduct at issue. It is not about the consequences for collateral review. If a court held a criminal statute constitutional on the basis of judicial economy concerns, it would permit that which the constitution forbids; and if a court broadly read a criminal statute due to such concerns, it would make criminal that which no legislature criminalized. In either case, the court would fundamentally violate its function and role in the separation-of-powers framework.[275]

Moreover, decisions that liberalize criminal doctrines (constitutional or statutory) put certain areas *out* of the reach of the criminal law. Thus, any increase in collateral challenges will be offset by the decisions' inherent docket-reducing tendencies, at least in the long run. Fewer or narrower criminal statutes mean fewer opportunities for prosecution which, in turn, mean fewer opportunities for litigation. It would be perverse, indeed, if a court purposely expended judicial resources in enforcing unconstitutional laws for the purpose of *reducing* its caseload.[276]

And yet it is fair to assume that some or many judges do, in fact, worry about the caseload implications of their decisions, particularly in the realm of collateral review where the number of habeas petitions is a perennial issue of concern. But it is highly implausible that the civil disabilities test does any real work in affecting appellate judges' calculations on these matters. It has long been the case that

275. *See* Stern, *supra* note 268, at 396–403 (discussing the separation-of-powers argument against judicial decisions based on caseload concerns).

276. In any event, the reason that collateral review concerns creep in here at all is the doctrine that constitutional and substantive criminal decisions should be "retroactively" applied to cases on collateral review. If one is worried about the collateral review consequences of constitutional and substantive criminal decisions, then the place to advocate change is not in constitutional and substantive decisions, but rather in our retroactivity jurisprudence. For a penetrating analysis of the flaws in current retroactivity jurisprudence, see Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075 (1999).

new substantive rules (constitutional or statutory) are applied on collateral review, and nobody has argued that this retroactivity has, in fact, had any discernible effect on constitutional or criminal statutory interpretation.[277]

D. Assessing Abuse-of-the-Writ Worries

But a nagging worry persists: even if the values of finality and judicial economy do not strictly compel the adoption of the civil disabilities test, without it what would prevent the lifelong abuse of the writ by petitioners who have no realistic chance of relief? The suggestion is that the civil disabilities test, whatever its origins, provides a necessary check on a writ that otherwise would be subject to perpetual abuse.

First, we should be careful to distinguish between a legitimate abuse-of-writ worry and a rhetorical jeremiad against "life-long" litigation.[278] The legitimate worry is that without the civil disabilities test there is no way to definitively prevent a petitioner from filing multiple and successive petitions for coram nobis, needlessly clogging a court's docket. But the "life-long" worry misses the point entirely. The fact that without the civil disabilities test coram nobis would theoretically be available for the duration of a convicted person's natural life is a feature of coram nobis, not a bug. Life-long accessibility is precisely what coram nobis should provide. The stain of a criminal conviction lasts a lifetime, and thus the chance to wash away an erroneous or unlawful conviction should also last a lifetime. The individual always deserves a chance for vindication, and the system should always have a way to correct the record.

The worry that coram nobis can and will be abused is serious and should not be discarded offhand. But the civil disabilities test simply does not prevent such abuses. Some of the Seventh Circuit's rhetoric

277. Moreover, the marginal increase in collateral review that would result from jettisoning the civil disabilities test would barely register with federal judges. We could look to the Ninth Circuit to see whether a more liberal coram nobis regime actually results in fewer liberalizing criminal decisions. There are no studies on point, but there is no reason to suspect that Ninth Circuit judges are any more reluctant than their peers to strike down criminal laws as unconstitutional or to narrowly interpret them.

278. The dissent in *Morgan* expressed the "life-long" worry when it wrote about coram nobis: "The relief being devised here is either wide open to every ex-convict as long as he lives or else it is limited to those who have returned to crime and want the record expunged to lessen a subsequent sentence. Either alternative seems unwarranted . . . ." Morgan v. United States, 346 U.S. 502, 519 (1954) (Minton, J., dissenting).

may have purposely confounded the issue, but in fact, the civil disabilities test cuts down on abuse of the writ only insofar as it makes the writ categorically unavailable to a certain class of convicted persons. The civil disabilities test does nothing to prevent abuse of the writ by those who "pass" the test. The test does not provide courts with any mechanism to throw out redundant petitions or successive petitions so long as the petitioner suffers from a civil disability. Thus, proponents of the civil disabilities test have to answer the abuse of writ worry just as much as civil disabilities test detractors.

Fortunately, courts are not powerless to prevent abuse of the writ, and they can and do craft doctrines to insure that collateral review petitions do not clog the system. Coram nobis has always been an extraordinary remedy for errors "of the most fundamental character," available only when "sound reasons [exist] for failure to seek appropriate earlier relief."[279] Thus, coram nobis comes with a built-in requirement that the petitioner prove that he could not have reasonably made the claims he is now making any earlier. This requirement *ipso facto* grants the court the right to dismiss petitions that repeat arguments already made in previous petitions or at previous points in the underlying litigation. Indeed, the Ninth Circuit refers to this threshold requirement that the petitioner show a genuinely novel claim as "a gate-keeping framework," reflecting its understanding of the importance of preventing abuse of the writ.[280]

In addition, the common-law doctrine of laches serves as a back-up reason to reject petitions from those who unreasonably delay

279. *Id.* at 512 (majority opinion); *see also* United States v. Sloan, 505 F.3d 685, 697 (7th Cir. 2007) (requiring "sound reasons for the failure to seek earlier relief"); United States v. Walgren, 885 F.2d 1417, 1420 (9th Cir. 1989) (requiring that "valid reasons exist for not attacking the conviction earlier").

280. United States v. Riedl, 496 F.3d 1003, 1007–08 (9th Cir. 2007). The Ninth Circuit recently summarized its holdings regarding "valid reasons for delay" as follows:

> [W]e have considered delay to be reasonable when the applicable law was recently changed and made retroactive, when new evidence was discovered that the petitioner could not reasonably have located earlier, and when the petitioner was improperly advised by counsel not to pursue habeas relief. We and our sister circuits have rejected coram nobis petitions as untimely when the petitioner took 25 years to challenge an undesirable army discharge that he had not previously tried to upgrade, when there was a seven-year delay during which the petitioner did not exercise due diligence, and when the petitioner waited 16 years to relitigate a claim that had been raised and then dropped on direct appeal.

Id. at 1007 (citations omitted).

filing their claims to the detriment of the prosecution. As the Ninth Circuit recently clarified, the general requirement that "valid reasons exist for not attacking the conviction earlier" is not a restatement of the doctrine of laches.[281] Rather, laches "constitutes a supplemental defense that the government may invoke when a petitioner seeks coram nobis relief."[282] That is to say, a petitioner first bears the burden of showing that valid reasons exist for not making his or her claims earlier. If the petitioner succeeds in this threshold showing, then the government may invoke laches and claim that it is unfairly prejudiced by the delay (e.g., because relevant witnesses and evidence are no longer around). Thus, any chance that jettisoning the civil disabilities test will increase "sandbagging"[283] to the disadvantage of prosecutors is (and can be) dealt with by the equitable doctrine of laches.

Finally, if the abuse of writ worry turns out to be more than a phantom problem, there is no lack of proposed ideas to rectify it. Judges, legislators, lawyers, and legal academics have paid great attention to "abuse of writ"-type worries in the context of habeas corpus,[284] and for better or worse, a variety of doctrines have developed to counter perceived abuse. The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) codified very strict rules regarding successive petitions such that a petitioner filing a second or third habeas writ must first file the writ with a special three-judge panel composed of appellate judges.[285] The three-judge panel must determine whether the writ satisfies the requirements of a successive petition, and only if it does so may the petitioner file the writ with the relevant district court.[286] The successive petition provisions of

281. *Id.* at 1004 (quoting Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir.1987)).

282. *Id.* at 1006.

283. Sandbagging refers to the purposeful holding back of arguments at earlier procedural points for use later on further appeal or collateral review.

284. *See generally* Kyle P. Reynolds, Comment, *"Second or Successive" Habeas Petitions and Late-Ripening Claims after* Panetti v Quarterman, 74 U. CHI. L. REV. 1475, 1475–83 (2007) (summarizing history of concerns about—and reactions to—abuse-of-writ problem).

285. 28 U.S.C. § 2244(b)(3) (2006).

286. *Id.* The requirements for successive habeas petitions are

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

AEDPA have been criticized as too harsh,[287] but there is no reason, in principle, why the "abuse of writ" rules now in force in the habeas context cannot be adopted in coram nobis. Already, the grounds for coram nobis are identical to the grounds for habeas, and it would promote consistency if the procedural rules were the same as well.[288]

The point here is that preventing abuse of the writ is hardly an impossible task. Courts reviewing coram nobis petitions already have adequate tools to dismiss abusive petitions, and if a significant "abuse of writ" problem arises, the courts will benefit from the long debates over the same issue in habeas law and may choose to craft even stricter rules. In no circumstance, however, does the civil disabilities test present itself as a good mechanism for addressing "abuse of writ" worries; it simply does not address the problem.

VII. CONCLUSION

The Supreme Court has acknowledged "the obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences."[289] It is now time to acknowledge the fact that most criminal convictions also entail reputational, professional, and social consequences that continue beyond, and may overshadow, the formal legal consequences. The function of modern coram nobis is precisely to provide collateral relief to those who were wrongly convicted but no longer face the direct punishment of criminal sentence. It is an "extraordinary" writ insofar as the circumstances that justify its issuance are rare and, one hopes, unusual. But it is a modest form of redress insofar as it serves only to vacate the unlawful

28 U.S.C. § 2255(h) (2006).

287. In particular, the AEDPA rules appear to keep out legitimate petitions based on a substantive change in the interpretation of a criminal statute. *See, e.g.*, Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699 (2002); Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115 (1998).

288. Indeed, Professor Yackle argues that over time there is a natural tendency for the procedural rules of habeas and coram nobis to converge, lest courts produce a new set of "shadow" rules unique to coram nobis. YACKLE, *supra* note 64, § 36. A comprehensive set of procedures for all collateral review does have some inherent appeal, though given all the criticisms of the AEDPA reforms, a more organic, common-law evolution of coram nobis procedures might result in a more just set of rules in coram nobis. Indeed, over time, habeas law may have much to learn from coram nobis, rather than the other way around.

289. Sibron v. New York, 392 U.S. 40, 55 (1967).

conviction. As the Second Circuit wrote of Robert Morgan's coram nobis petition:

> The passage of many years does not cure a void conviction. Morgan spent four years in a federal jail under a sentence unlawfully imposed. Those years cannot be undone, for we mortals are unable to enable him to relive them out of jail or to add equivalent years to his span of life. The least we can do is to wipe out the record of conviction and its consequences.[290]

Likewise, the Ninth Circuit of the late 1980s could not undo the totality of the injustice committed against Gordon Hirabayashi—the race-based curfew and evacuation orders and the months of hard labor that he endured in the Arizona desert,[291] to say nothing of the years of internment suffered by his family and other Japanese Americans. But what the court could do was vacate the original conviction—"to make the judgments of the courts conform to the judgments of history."[292] The Ninth Circuit wisely chose not to create an artificial barrier to doing justice in the case of Hirabayashi. Unfortunately, the overwhelming majority of other circuits have adopted a coram nobis jurisprudence that would have denied relief to Hirabayashi and, in fact, denies relief to deserving petitioners today.

The writs of habeas corpus and coram nobis, convoluted and technical as they may be, have become the mechanisms by which the American justice system can review final convictions, reconsider them, and—if necessary—vacate them. The civil disabilities test acts as a roadblock to the proper functioning of that mechanism, keeping out a whole class of post-conviction review cases for reasons that do not stand up to scrutiny. The damage that the civil disabilities test does to individuals denied justice and to systemic accuracy cannot be

290. United States v. Morgan, 222 F.2d 673, 675 (2d Cir. 1955).

291. After his conviction for violating the curfew order was upheld, Hirabayashi was sentenced to 90 days of labor at the Catalina Federal Honor Camp near Tucson, Arizona. *See 45 Years Later, an Apology from the U.S. Government*, A&S PERSP. (Univ. of Wash. Coll. of Arts & Sci., Seattle, Wash.), Winter 2000, *available at* http://www.artsci.washington.edu/news/Winter00/Hirabayashi.htm. Today the site of the prison camp has been designated the Gordon Hirabayashi Recreation Area inside the Coronado National Forest. *See* UNITED STATES DEPARTMENT OF AGRICULTURE, GORDON HIRABAYASHI RECREATION SITE: CORONADO NATIONAL FOREST: WHY THIS RECREATION SITE WAS NAMED AFTER A PRISONER (2003), *available at* http://ublib.buffalo.edu/libraries/e-resources/ebooks/images/eey5681.

292. Hirabayashi v. United States, 828 F.2d 591, 593 (9th Cir. 1987).

justified by the marginal work it does to protect the norms of finality and judicial economy.