

Collateral Consequences of Conviction: The Parallel Justice System

By Elsa Raker

The American criminal justice system faces more structural issues than we know how to count. From over-sentencing to dilapidated jails and prisons, a culture of racial discrimination and profiling, and the underfunding of public defense and institutions, our justice system has been called everything from a “genocide in slow motion” to a joke.¹ Often overlooked in the attempt to examine the more directly “structural” issues of our criminal justice system is a parallel justice system of “collateral consequences”. The ABA² have defined collateral consequences as the “opportunities and benefits that are no longer fully available to a person, or legal restrictions a person may operate under, because of their criminal conviction”.³ Put simply, a collateral consequence is any consequence of conviction that is not imposed directly by the court, but is instead “imposed on a person automatically upon conviction even if it is not included in the court’s judgment”.^{4,5} Upon review of an inventory of these collateral consequences created by the ABA, it seems that we need to refer to them not as “collateral” at all, but as integral to the vast growth of our prison population in recent years. Such “collateral consequences” are so pervasive and unknown to convicted people, lawmakers, lawyers, and the public that they actually contribute substantially to the overall injustice of non-transparency in our courts.

This parallel justice system of “collateral” consequences of conviction should be referred to instead as structural components, as there are a staggering 45,513 legal and regulatory sanctions and restrictions that apply to all categories of conviction and are often completely non-aligned with the category or severity of the conviction itself. Most of the components

last for life, ensuring that once someone has a criminal record, they can never escape it. As stated above, these structural components create a web of limitations that is one of the most effective mechanisms through which the prison-industry feeds back into itself, ensuring that people are re-incarcerated. So, what does this voracious prison-industry look like?

Currently, the United States makes up 5% of the world’s population and 25% of its incarcerated population.⁶ We lock up eight times as many people as we did in 1970, about 2.3 million per year.⁷ In short, we use jails and prisons as the repository for people who have either failed out of or are rejected by other public institutions. While the prison is a failing social space, it is a thriving economic one. The failures of our prisons ultimately only produce the need for more prisons, which can be demonstrated in the exponential growth of the punitive system over the past 40 years despite exorbitant expense to American taxpayers.

Other factors contributing to this growth include the use of mandatory minimum sentencing, the prevalence of racism and discrimination⁸, tough-on-crime policing policies, and broken window policies. This growth can also be attributed to the profitability for certain constituencies and corporations. Even before the business of incarceration turned into a privatized industry through companies like the Corrections Corporation of America, it could be said that the failures of our prisons ultimately created an industry that was successful in doing one thing: expanding.

In total, we spend about 85 billion dollars annually on prisons and jails. Both prisoners and prison guards have suicide rates “off the charts”⁹, and deplorable and violent prison conditions are the norm.¹⁰ The likelihood that someone is rearrest-

ed after spending just eight days in a jail is 51%, excluding all other factors that may contribute to their recidivism.¹¹ About 600,000 people annually return to homes (or homelessness) after being traumatized in prisons. These previously incarcerated individuals are then expected to adjust to normal life, but instead return to prisons at a rate of 30%-80%. This growth of prisons can therefore be attributed in part to a ruthless cycle of recidivism, which is partly explained by the parallel justice system of structural components highlighted above. While recidivism is usually seen as a re-entry and re-integration issue, and its high rates as unfortunate realities we must cope with, high recidivism rates and the structural components of conviction are in fact married at the very earliest stages of prosecution.

“Even before the business of incarceration turned into a privatized industry...it could be said that the failures of our prisons ultimately created an industry that was successful in doing one thing: expanding.”

It is a well known narrative that those who have spent time in prison are more likely to cause families to break up due to their absence and trauma, more likely to revert to drug-seeking habits due to similar reasons, and are often compelled back into a life of crime. Less considered is that this compulsion is actually guaranteed from the moment of conviction by the structural components which grossly expand the length and type of punishment. The consequences are always embedded in a complicated mess of federal, state, and private statutes which make them very difficult to trace and apply. This creates a scheme that hides the actual reality and extent of a particular conviction from view. In short, when a person is convicted of a crime, both they and their lawyer are usually unaware of the full extent to which they will be prosecuted. One may wonder, if a person is not privy to know the full extent of his conviction, how he is able to proceed through serving his sentence and later navigate the world lawfully? Ultimately, these structural components of conviction create another layer of injustice: non-transparency, which then contributes to increasing recidivism rates.

An inventory was created to begin answering these types of questions and navigate the complex web of collateral consequences. Following the 2007 Court Security Act, Congress granted the National Institute of Justice and the ABA the task of creating a National Inventory of the Collateral Consequences of Conviction in an effort to provide for more court transparency and to address the lack of knowledge among lawmakers, attorneys, and defendants about the actual consequences of conviction. The hope was that the database would enable lawyers to provide exact legal counsel in regard to the collateral consequences resulting from pleading guilty to a particular charge, which are not fully understandable through the court outlined conviction.¹² The ABA began constructing the database in 2012, just two years after *Padilla v Kentucky*, during which it was determined that criminal defense attorneys must provide their non-US citizen clients with information about removal proceedings (deportation) they would face from pleading guilty to charges. As in the case of Jose Padilla, a US legal permanent resident and Honduran citizen who pled guilty for a charge of transporting marijuana without having been given information about the deportation order that would result from a guilty plea¹³, many US citizens and non-US citizens alike are under threat of life-altering and unforeseen consequences. These are then referred to as “collateral”. The database outlines the many “collateral” consequences that persist beyond the actual designated sentence. It distinguishes between “collateral” consequences and “direct” consequences of conviction, which are “imposed directly by the court”.¹⁴

While non-US citizens are effected in grossly disproportionate ways, US citizens also face hardship as a result of these expanded conviction practices. On December 6, 2014, NPR’s Monica Haymond aired the story of 61 year old US citizen Maurice Alexander who was convicted of a misdemeanor and served 10 days in jail. Upon using the NICCC database to track down what collateral consequences Alexander faced, she found that “he can be evicted from low-rent housing and is automatically barred from a host of jobs, including security officer and barber”. Sure enough, Alexander remained homeless for the seven months following his conviction, despite 2012 efforts by Attorney General Eric Holder to encourage public housing authorities “to develop policies and procedures that allow ex-offenders to

rejoin the community”. Particularly notable in Alexander’s case is that even when consequences are not “mandatory and automatic” but “discretionary”, this usually results in the consequences still playing out automatically, partly due to rampant social stigmas surrounding criminal records that dissuade any potential discretion in favor of the person with the record.¹⁵

Alexander’s story is not unique, and upon closer inspection of the inventory it becomes clear that there are consequences that effect every aspect of life, ensuring that formerly convicted people are never truly free of the system. The vast consequences apply nationally in many cases, but in the case of New York state alone there are 78 entries just on collateral consequences pertaining to motor vehicle licensure. In Texas, there are 300 automatic collateral consequences of misdemeanors. Added to the complexity of the inventory is the notion that many types of crimes can lead to the same collateral consequence. For instance, under Vermont’s 10 V.S.A. § 6605f, one can lose their waste management certificate for up to ten years after committing any one of nineteen “disqualifying offenses”, which includes the “alteration of motor vehicle identification numbers as defined in 23 V.S.A. § 1703”.¹⁶ As stated before, some of the measures at least correlate with the crime committed, by category of offense, severity of crime, or length of sentence. However, according to the ABA, “many others apply across the board to people convicted of crimes, without regard to any relationship between crime and consequence” and “frequently without consideration of how long ago the crime occurred or what the individual has managed to accomplish since.”¹⁷

Author and activist Michelle Alexander highlights collateral consequences in a paragraph that outlines the transformation of old fashioned Jim Crow discrimination into the new system of race based “discrimination, exclusions, and social contempt”. Alexander’s argument is that now we “use the criminal justice system to first label people of color ‘criminals’ and then engage in all the practices we supposedly left behind.” While Alexander says that the problem is still race, and that the criminal justice system is being used to perpetuate racism, she points out very important realities about collateral consequences.

Once you’re labeled a felon, the old forms of discrimination-- employment discrimination, housing discrimination,

“If someone who is the most effected can’t know the full extent of his own conviction, how are we as a society supposed to determine whether or not we are proportionally convicting people?”

denial of the right to vote, denial of educational opportunity, denial of food stamps and other public benefits, and exclusion from jury server-- are suddenly legal. As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow [...]”¹⁸

While Alexander completes this statement with a statement that we have merely “redesigned” our racial caste system, particular attention should be paid to the loss of rights she discusses above, all of which are connected to a particular federal, state, or private restriction. There is no doubt in Michelle Alexander’s mind that these “collateral consequences” are structural pillars in the perpetuation of injustice in this country.

According to Margaret Colgate Love, the former director of the NICCC, the condition of conviction designates “a legal status that is more consequential than every other status in our country besides citizenship”.¹⁹ One might say that this makes the consequences that spring from a conviction not “collateral” at all in essence, but contributors to an overall imposed criminal condition on American society itself. Despite the vast scale of this system of collateral consequences, the only comprehensive study done to define it before the NICCC started in 2012 was a study from 1951.¹⁹ Why, then, do we know so relatively little about this web of sanctions and regulations, particularly when they define the second most consequential legal status in our country?

Perhaps one answer to this question is that collateral consequences are mired in other criminal justice issues, often not receiving the recognition they are due. For some, collateral consequences might be less-urgent than sentencing reform, and perhaps this is true in a certain sense. Yet I would encourage us to see them as an issue of sentencing reform, not apart from it. This is because the legal status of a person who is serving time in prison with a conviction is not so differ-

ent from a person who has already served time and is re-entering into society, given the likelihood that he will return to prison due to the structural components of conviction.

The hidden insidiousness of the parallel justice system makes it impossible for any one person to really be an expert in them, given that they range in all different fields of legal expertise. The culture of non-transparency in our courts that derives from this ignorance about the parallel justice system makes it an even more pressing issue for de-carceration advocates. If someone who is the most effected cannot know the full extent of his own conviction, how are we as a society supposed to determine whether or not we are proportionally convicting people? It appears that we lost track of the answer to that question in between the years of 1951 and 2012, when we stopped keeping track of collateral consequences. In short, our lack of understanding of these structural components has proven to contribute to a non-transparent criminal justice system which is then able to punish people well beyond any sense of justice and proportionality.

Increasingly it becomes clear that without a complete understanding of the collateral consequences of conviction by all parties involved in giving and receiving the conviction, a lawful conviction cannot be made, as the defendant is likely to receive incomplete legal counsel. However, even if the information in the inventory was made readily accessible to people being convicted of crimes, it does not seem particularly useful to think that it will contribute as a deterrent to crime (contrary to what a recent Harvard University policy paper on the issue stated).²⁰ This is because the collateral consequences are so inescapable and over-convicting so normalized. On the top of it all, the likelihood they would still be convicted applies. The system of racial and class inequality, as well as the failures of other public institutions still exist, making it impossible for the most highly incarcerated populations to respond to any advice the database might offer them.

In the end, the NICCC inventory does help us understand the punitive reality of America, one that extends punishment well beyond the actual timeframe through which “justice” could be seen to have been exacted through the direct conviction and sentence. While it is incredibly important for the NICCC to be distributed as a resource, we must also recognize that we have

created a monstrous system too big to examine as one entity. The most important step towards de-carceration in regards to collateral consequences would be a complete legislative overhaul that discards overly punitive measures. As they remain, these components are yet more evidence that our criminal justice system has strayed from justice in a way that can only be reversed by calling injustice by its real name: unconstitutional punishment. As it stands, the current system serves only to create more prisons. As Marc Mauer pointed out, “Not only do we put people in cages, but we label them by the worst thing they’ve ever done.”²¹ Given the large fractures this type of logic places in society between brothers and sisters, sometimes it is easy to forget that we could create a system that is able to make us whole, yet that is exactly what justice should mean.

1. The House I Live In. Directed by Eugene Jarecki. United States of America: Charlotte Street Films, 2012. Film.
2. Acronym for American Bar Association
3. National Inventory of the Collateral Consequences of Conviction. Ed. American Bar Association Criminal Justice Section. National Institute of Justice, Aug. 2012. Web. 28 Jan. 2015. <<http://www.abacollateralconsequences.org/map/>>.
4. Ibid, According to the NICCC, the most well known collateral consequences are the loss of the right to vote, obtain licenses, or own firearms.
5. Glenn Martin. Just Leadership USA. Bennington College Incarceration in America Conference. October 2014. <https://justleadershipusa.org> <<http://vimeo.com/109660023>>
6. Marc Mauer. The Sentencing Project. Bennington College Incarceration in America Conference. October 2014. <http://www.sentencingproject.org/template/index.cfm> <<http://vimeo.com/109985765>>
7. We incarcerate a grossly disproportionate number of minorities, yet the wake of the Brown and Garner decisions have proven that so far, we do not prosecute racist cops in this country. More personally on the sub-municipal level in United Northwest, a neighborhood in Indianapolis, 216 out of every 1000 black male adults under 35 are incarcerated, which is well above the citywide average. Incarceration is also “the standing shared experience” of the majority African American neighborhood of French Town Tallahassee, something that can be said of countless neighborhoods across America. Marc Levin recently said that the average household in Ferguson, Missouri has 3 warrants and about \$324 in fines. He then pointed out the obvious: the unlikelihood that anyone would come forward in the event of an actual crime taking place, as there is no way to ensure that the person doing their civic duty of protecting public safety would not be incarcerated for outstanding charges. Across the nation, our “justice” system imposes criminal identities on communities of color and has done so since our nation’s inception.
8. Jonathan Gradess, New York State Defenders Association. Bennington

- College Incarceration in America Conference. October 2014. <http://www.nysda.org/> <<http://vimeo.com/110498139>>
9. Marc Mauer "Incarceration, Race, and Class." Todd Clear, Vivian Nixon, David Soares, Eric Cadora. Lecture, Panel Discussion from Bennington College, Bennington, VT. October 10, 2014.
 10. Peggy McGarry, VERA Institute of Justice. Bennington College Incarceration in America Conference. October 2014. <http://www.vera.org/> <<http://vimeo.com/110498139>>
 11. National Inventory of the Collateral Consequences of Conviction. Ed. American Bar Association Criminal Justice Section. National Institute of Justice, Aug. 2012. Web. 28 Jan. 2015. <<http://www.abacollateralconsequences.org/map/>>.
 12. PADILLA v. KENTUCKY, Certiorari to the Supreme Court of Kentucky, No. 08-651, Argued October 13, 2009, Decided March 31, 2010. Web <<http://www.supremecourt.gov/opinions/09pdf/08-651.pdf>>
 13. National Inventory of the Collateral Consequences of Conviction. Ed. American Bar Association Criminal Justice Section.
 14. Monica Haymond, "Should A Criminal Record Come With Collateral Consequences?" *National Public Radio* (December 6, 2014). <http://www.npr.org/2014/12/06/368742300/should-a-criminal-record-come-with-collateral-consequences>.
 15. National Inventory of the Collateral Consequences of Conviction. Ed. American Bar Association Criminal Justice Section.
 16. Ibid.
 17. Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York: The New Press, 2012.
 18. Love, Margaret Colgate. Bennington College Incarceration in America Conference. October 2014 <<http://vimeo.com/110104693>>
 19. Berson, Sarah B. "Beyond the Sentence: Understanding Collateral Consequences." *National Institute of Justice Journal*(September 2013): 25-28. <https://ncjrs.gov/pdffiles1/nij/241927.pdf>.
 20. Communication of Collateral Consequences: A Strategic Outreach Plan for the National Inventory of the Collateral Consequences of Conviction." Mass Incarceration Study Group (May 2013). http://www.iop.harvard.edu/sites/default/files_new/research-policy-papers/Mass%20Incarceration%20Policy%20Paper.pdf
 21. Marc Mauer "Incarceration, Race, and Class." Todd Clear, Vivian Nixon, David Soares, Eric Cadora.