New York State Judicial Institute

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Collateral Consequences of Criminal Convictions: Do We Mean What We Do?

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April 2005

I've become a fan of HBO's series "Deadwood," which is set in the 1880's, in the eponymous, famously lawless, town in Dakota territory. The discovery of gold has brought a flood of fortune seekers into the Deadwood mining camp. One of the earliest and most powerful settlers is one Al Swearengen, owner of the Gem saloon. Often homicidally ruthless where his interests are involved, possessed of a byzantine intelligence, Swearengen is an especially complex and interesting character, who orders an execution one minute and creates a kind of de facto camp government the next. Although Swearengen says little about his past, it has emerged that he was abandoned by his mother at a very young age, and that there is a warrant out for his arrest in Chicago.

As the second season began, plans were afoot to bring Deadwood under the jurisdiction of the state, and Swearengen and other citizens are now plotting and negotiating with corrupt legislators about if and on what terms Deadwood will be annexed. Last week, vaguely thinking about this colloquium and collateral consequences, I began to imagine the residents of Deadwood, and Swearengen in particular, 125 years in the future – that is, under a typical state law regime.

The Chicago warrant would surely have caught up with Swearengen. If he was not actually incarcerated, he would not own the Gem saloon – he would be ineligible for a liquor license, and the premises may well have been seized in a forfeiture action. Guns would be licensed, and Swearengen, unable to obtain a license due to his conviction, would be stripped of his six-shooter. Since he openly ran a string of prostitutes, some of them clearly underage, he would be a registered sex offender, with his status as such publicized to the community. His DNA profile would be permanently lodged in state and national databanks. Swearengen is also one of the major suppliers of opium to Deadwood's many eager consumers – if convicted of a drug offense, he would be subject to enhanced sentencing as a repeat offender. Having lost all his businesses and income, he would nonetheless be disqualified for public housing and many health and welfare benefits. Even if he wanted to train for another career, he would be ineligible for government educational aid, and would also be barred from joining the military. Despite his loss of income, he might be subject to thousands of dollars in fees and surcharges, including paying for his own parole supervision and mandated treatment. Should he decide to supplement his income by selling his colorful life story to the press, his profits could be taken under a Son of Sam law. As an American citizen, Swearengen would not be deported, but in many states, he would not be able to vote or serve on a jury. In short, though he has both talent and ambition, Swearengen would be almost completely boxed in by his criminal record, and exiled from much of civic life.

My point is not that a Deadwood-like state of lawlessness is a lost Eden, or that I believe the Swearengen character can be redeemed.[1] Rather, two things regularly strike me as I get my Sunday Deadwood fix. One is that it has become impossible, in the words of Huck Finn, to "light out for the Territory." Today, we are unavoidably fettered to a past embedded in linked government databases. But even apart from the history that now follows us everywhere, it seems that we no longer really encourage fresh starts. When the past includes a criminal conviction, the "collateral consequences" (sanctions, penalties, disabilities and disadvantages that result

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[1] The real life Swearengen died in Denver, shot while boarding a train.

from the conviction but that are not part of the sentence) can be broad and far-reaching. Paying the penalty for a criminal offense is no longer a matter of a sentence or fine, with the possibility of then moving on to productive citizenship – the real consequences stretch far into, and may forever limit, the former offender's future. What is the cause of this change, which – intentionally or not – is a dramatic undermining of a rehabilitative model of punishment? Have we really lost our belief in rehabilitation? And if we have not become utter cynics about the potential of those who among us have committed a crime to lead a different life, how can we best address the issue of the crippling collateral consequences of a criminal conviction?

The ever-growing number of potential collateral consequences of a criminal conviction have been the subject of considerable attention in recent years. In 2003, the American Bar Association responded to the phenomenon by adopting a specific set of "Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons." While the Standards touch on the respective roles of defense counsel and the court in advising a defendant of collateral consequences of a conviction, that is not their focus. Instead, the ABA Standards opt for a more sweeping approach. The essence of the Standards is a requirement that all collateral consequences of a conviction be codified in the penal code and made an explicit part of the sentencing process, with the court having the power to waive or modify them – thereby ensuring that all actors in the process are aware of collateral consequences and take them into account when negotiating a disposition and imposing sentence.

Most of the law review and journal articles I have read about collateral consequences take a much narrower tack. Typically, they treat the subject as a client counseling issue. They recommend better defense training or more resources, or a "holistic" approach to counsel's role. They advocate for judicial recognition that attorney failure to inform the client about collateral consequences may give rise to a claim of ineffective assistance, a view that courts have thus far almost universally declined to adopt, although some courts have agreed that providing affirmative misinformation may be ineffective. To a more limited extent, they suggest that the court may have an enforceable obligation to notify a defendant at plea or sentence of the most draconian collateral consequences, such as deportation.

Defendants *ought* to be aware of all of the results of a conviction, or at least of all of the consequences that may be important to them, when deciding whether to plead guilty or go to trial. There *are* lawyers who, out of ignorance or haste to reach a disposition or a single-minded focus on penal consequences, fail to advise their clients about them, or to seek a resolution of the case – such as a plea to a charge with fewer or less harsh consequences – that minimizes their impact. Training, resources and a holistic approach to representation can help solve this part of the problem.

Law schools and clinics can play an important role in this effort, particularly in providing or supplementing resources that have not traditionally been a part of the criminal defense repertoire, such as immigration and government benefits expertise. Conviction and even arrest may result in a series of deleterious effects – for instance, school suspension or loss of critical family income or housing – as to which there may not be a right to assigned counsel, and with which underfunded and overworked public defenders are ill-equipped to deal. Clinics that work with defense counsel to focus on these issues are a valuable asset. More broadly, because they are part of a larger academic community, law schools may be well situated to recruit non-legal

assistance from other disciplines, such as social work programs, or teachers' colleges or business students, to work with court-involved clients and their families.

Nonetheless, viewing the collateral consequences problem primarily as a lawyering issue masks its true nature. The reality is that even the best trained, most sensitive, most holistically-oriented lawyer will, in the end, often have nothing but some very hard choices to offer a client facing criminal charges. Awareness and disclosure of the collateral consequences of a conviction does not make them go away. All too often even the best lawyer – even the best lawyer working with the best social worker – can mitigate them little, if at all.

While I doubt that the ABA's Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons will ever be adopted wholesale in any jurisdiction, their approach reveals collateral consequences as, first and foremost, a social or political issue rather than a lawyer training or resource issue. The ABA begins with the deceptively simple-sounding notion of gathering all of the penalties and disabilities associated with conviction of a crime into a jurisdiction's criminal code and, for each type of offense in the code, specifying the collateral consequences applicable to it. In fact (and New York is representative in this respect), it is notoriously difficult to keep abreast of the myriad of penalties and disabilities that may result from a conviction, because they are typically enacted piecemeal and frequently in non-criminal legislation, for instance in a budget bill or professional licensing law. Collecting them in one place would, even standing alone, be a real informational advance.

But the ABA goes further in attaching the collateral consequences to the offenses themselves, and in empowering the sentencing court to waive, modify or otherwise grant relief from them. Thus, they become what they really effectively are – part of the sentence. This would obviously ensure that the prosecutor, too, was aware of all the actual consequences of the charge, and would result in a genuine ability to negotiate them as part of a disposition, as well as to make specific mitigation arguments to the prosecutor and court.

More broadly, surfacing or exposing collateral consequences during sentence could represent the beginning of a true public discourse or debate about the wisdom of the actual disabilities that we impose on persons convicted of crimes. That is explicitly the intention of the ABA Standards, which also provide that legislation imposing a collateral sanction on a person convicted of an offense should not be enacted without an express determination "that the conduct constituting the offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified."

Even without this restriction, however, openly making collateral sanctions part of the actual sentences for the convictions from which they result would bring to light harshness, unfairness and disproportionality that is now hidden. Authorizing the sentencing court to deal directly with the "collateral" consequences of a conviction would also eviscerate the rationale courts have employed to avoid finding ineffective assistance of counsel when an attorney fails to discuss important consequences with her client before entry of a plea. Though less than clear, the reasoning behind refusal to recognize a claim of ineffective assistance is generally premised on notions a defendant need not be informed of that consequences that occur without court

involvement.[2] With direct court involvement in the decision whether to waive or modify a collateral sanction, it would plainly constitute ineffective assistance for defense counsel not to advise about or address the issue. This would not only serve as further incentive for counsel to be aware of and deal with collateral consequences, but vacatur of convictions on that ground would be yet another avenue for raising awareness of these penalties.

As in many states, it has proved easy in New York for the Legislature almost annually to enact another round of new laws and amendments to old laws that further burden those convicted of crimes, many of them already among the most economically and socially vulnerable New Yorkers. Except for an occasional (and no doubt "predictable") protest from a handful of defense advocacy groups, it passes unnoticed. As the ABA Standards suggest, it is questionable whether legislators themselves even know the cumulative effect of their own handiwork.

Judges and the court system have been silent when such legislation is under consideration, and are likely also unaware of much of it. By the time these consequences fall on a defendant, the case is over. It has become one aspect of a criminal justice system that, in effect, is remarkably hostile to recognizing and fostering the ability of court-involved persons to function in the community. At the front end, the "collateral consequences" of a mere arrest can be shocking. As well as time (and occasionally employment) lost, they may range from suspension of much-needed professional licenses, to loss of child custody, to homelessness while temporary orders of protection are in effect. Courts, especially crowded and busy Criminal Court, can appear quite indifferent to the high costs of frequent court appearances and of delay in resolving a case. At the back end, New York's parole system is likewise notorious in the defense community for its evident insistence on keeping many defendants locked up long past the point that further incarceration serves any but a purely punitive purpose. The collateral consequences of a criminal conviction are but a part of this depressing picture. Law schools have a part to play here, too, in teaching about criminal law and procedure in such a way that these policy and social justice issues are presented and debated.

I believe that judicial and public knowledge of collateral consequences would have enormous benefits. I do not believe that this is a system that most people would, in fact, endorse if they were aware of its extent and its ramifications. I think it is in large part an inadvertent creation, and in part it is the reflexive output of legislators and politicians seeking some perceived benefit from a "tough on crime" stance. Because it is experienced primarily by people and families and communities that may have difficulty making themselves heard, we have paid little systematic attention to it. My guess is that most of us still have faith in the idea of helping those who have erred, even seriously, to start over. Hundreds of thousands of Americans tune in along with me to Deadwood. The attraction is not the violence and the profanity, which in its

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[2] Gabriel Chin and Richard W. Holmes, Jr., Ineffective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697 (March, 2002). The authors point out that even if one accepts that courts themselves need not advise a defendant of the "collateral" consequences of a plea, judicial decisions have failed to explain why it follows that a lawyer has no obligation to do so; they argue that an attorney's failure to inform a client about an important consequence of a plea easily meets the well-known Strickland test of deficient performance and prejudice.

repetitiveness has the character of a background chorus. I suspect that many viewers, like me, watch for the far more deeply satisfying narrative strand that concerns a group of misfits and outcasts and losers and people who have been or still are seriously bad, finding a way – because they must – to support each other and function anew as a community even as some of its members continue to stray.

Today, as even a single offense generates ever more disqualifications, registration and public notification requirements and economic sanctions, we are in danger of creating a regime that one author (whom I would credit if I could recall where I read the phrase) called "internal exile." The immediate cost to the affected individuals and communities is high, but if we cannot live with all our members in their full humanity, in their struggles and in their failures, it also represents a sorry diminution of our vision of community.