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ARE COLLATERAL CONSEQUENCES DESERVED?

*Brian M. Murray**

While bipartisan passage of the First Step Act and state reforms like it will lead to changes in sentencing and release practices, they do little to combat the collateral consequences that ex-offenders face upon release. Because collateral consequences involve the state's infliction of serious harm on those who have been convicted or simply arrested, their existence requires justification. Many scholars classify them as punishment, but modern courts generally diverge, deferring to legislative labels that classify them as civil, regulatory measures. This label avoids having to address existing constitutional and legal constraints on punishment. This Article argues that although collateral consequences occur outside of the formal boundaries of the criminal system, they align with utilitarian, public-safety-based rationales for criminal punishment, such as incapacitation. Interpreting the nature of collateral consequences, their legislative justifications, and judicial doctrine confirms that utilitarian terrain underlies the creation and reform of collateral consequences. At the same time, these philosophical premises stunt broad reform because public-safety and risk-prevention rationales inspire only marginal tinkering and do not adequately respond to the general public's understanding of desert as crucial to the administration of criminal justice. The result is extra punishment run amok and in desperate need of constraints.

This Article suggests a different approach to reforming collateral consequences: subjecting them to the constraints of retributivism by first asking whether they are deserved. Retributivist constraints emphasize dignity and autonomy, blameworthiness, proportionality, and restoration, and impose obligations and duties on the state, suggesting many collateral consequences are overly punitive and disruptive of social order. This mode of analysis aligns with earlier Supreme Court precedent and accounts for retributivist constraints that already exist in present-day sentencing codes. Proponents of rolling back collateral consequences should consider how utilizing desert principles as a constraint on punishment can alleviate the effects of collateral consequences on ex-offenders.

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INTRODUCTION

The government denies a job application. Local authorities take away a driver's license. A budding student cannot qualify for a student loan to attend community college. A Licensed Practicing Nurse (LPN) loses her license. For most defendants, collateral consequences like these *are* the harshest sanctions because they limit opportunity, can be timeless, and inhibit full reentry.[1] They *feel* like punishment because they are enforced or permitted by the state and restrict liberty and opportunity by virtue of contact with the criminal justice system. The fact that many are unknown to criminal defendants when they plea makes them feel particularly unjust.[2] Especially for low-level offenders, short-term liberty deprivations pale in comparison to the stigma, restrictions, and lost privileges that result from encountering the criminal justice system.[3]

If state-authorized collateral consequences are punishment,[4] a position

1 There is a voluminous scholarly literature identifying the range of collateral consequences faced by defendants. *E.g.*, MARGARET LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY, AND PRACTICE, Westlaw (database updated Oct. 2018). Those efforts, as well as some actions by courts, have prompted organizations to attempt to catalogue the full range of consequences in a national inventory. *E.g.*, *State-Specific Resources*, COLLATERAL CONSEQUENCES RESOURCE CTR., http://ccresourcecenter.org/resources-2/state-specific-resources (last visited Feb. 4, 2020).

2 *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 671–72 (2008); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT 15, 17 (Marc Mauer & Meda Chesney-Lind eds., 2002), http://webarchive.urban.org/UploadedPDF/1000557_invisible_punishment.pdf.

3 *See* Joe Palazzolo, *5 Things to Know About Collateral Consequences*, WALL ST. J. (May 17, 2015), https://blogs.wsj.com/briefly/2015/05/17/5-things-things-to-know-about-collateral-consequences/.

4 This is undeniably a big "if." At present, scholars and courts diverge over the legal status of collateral consequences. Most scholars classify collateral consequences as punishment. Courts, however, while recognizing the punishment-like qualities of many collateral consequences, have attempted to preserve the line between criminal sanctions and civil regulations. *See infra* Section I.A. The case precedent is a case study in tortured interpretations, causing some to speculate that courts seek to preserve the distinction only as a practical matter in order to avoid having to apply the entire criminal procedure apparatus to collateral consequences. *See* Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences,"* 59 HOW. L.J. 341, 343 (2016). That has also led some scholars to delve more deeply into understanding the justification for collateral consequences if they are conceived as civil, predictive restraint measures regulating risk. *See generally* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301 (2015). While I offer my definition of punishment later, I recognize that firm resolution of this definitional question is larger than the scope of this Article. I view it as ancillary, and relevant, but not *necessary* to the argument in this Article, because even if collateral consequences are not *criminal* punishment by classification, they can still be punitive. This was recently confirmed by the U.S. Commission on Civil Rights. *See* U.S. COMM'N ON CIV. RIGHTS, COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 141, 150 (2019).

taken by the Supreme Court for nearly a century[5] before a change of course, but possibly on the horizon again after *Padilla v. Kentucky*[6] and other federal and state cases,[7] do some purposes of punishment allow them to expand more than others?[8] And if so, what do we make of that situation in an era of mass criminalization where collateral consequences enmesh defendants? There has been no shortage of scholarship highlighting the destructive effect of collateral consequences on reentry.[9] At the same time, the very basis of punishment in a liberal, democratic order remains in flux and controversial, causing some to revisit the role of retributivism in justifying or limiting punishment.[10] And while the passage of federal comprehensive criminal justice reform, known as the First Step Act,[11] addresses proper punishment in the incarceration context, the next step for comprehensive reform is a full-blown assessment of the collateral consequences that will inevitably affect offenders *after* release.

This Article brings these strands of scholarship and reform efforts into dialogue by addressing the punishment theory basis of collateral conse-

5 *See, e.g.*, *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867) ("[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 286 (1867).

6 559 U.S. 356, 382 (2010) (Alito, J., concurring) (recognizing how immigration consequences were part and parcel of the criminal case); *see also* Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to* Padilla v. Kentucky, CRIM. JUST., Fall 2010, at 21, 22 ("Imposing collateral consequences has become . . . part and parcel of the criminal case."); Wayne A. Logan, *Challenging the Punitiveness of 'New Generation' SORN Laws*, 21 NEW CRIM. L. REV. 426, 427 (2018) (referencing SORN laws as a method of social control).

7 *See, e.g.*, People v. Suazo, 118 N.E.3d 168, 182 (N.Y. 2018) (holding that the Sixth Amendment jury trial right applies to criminal offenses where conviction could result in deportation as punishment).

8 Another way of thinking about this question is like this: the primary justification for punishment and the purposes it purports to serve have serious consequences for the depth and breadth of the collateral-consequences regime.

9 *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (rev ed. 2012); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015); John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1 (2013); Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87 (2011); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753 (2011); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences of Criminal Convictions, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009).

10 *See* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 1 (2012); Kenneth W. Simons, *Retributivism Refined—Or Run Amok?*, 77 U. CHI. L. REV. 551, 557 (2010) (book review) (discussing affirmative retribution). *See generally* Mitchell N. Berman, *Rehabilitating Retributivism*, 32 LAW & PHIL. 83 (2013); Chad Flanders, *How Much Certainty Do We Need to Punish? A Reply to Kolber*, 2018 U. ILL. L. REV. ONLINE 149; Adam J. Kolber, *Punishment and Moral Risk*, 2018 U. ILL. L. REV. 487.

11 Bonnie Kristian, *Trump Signs the Bipartisan First Step Act*, WEEK (Dec. 22, 2018), https://theweek.com/speedreads/814262/trump-signs-bipartisan-first-step-act.

quences. It concludes that while their roots are fundamentally utilitarian and responsive to criminal behavior, they have been labeled otherwise in order to avoid legal constraints on punishment. Further, it suggests that current reform efforts exclusively focus on the wrong question: instead of concentrating on whether they are useful, contribute to public safety,[12] or properly guard against danger,[13] limiting collateral consequences may be easier if reformers first ask whether they are *deserved*.

This Article makes no claim as to whether certain collateral consequences, as components of a direct sentence, would be appropriately just punishment.[14] It is possible many would pass that test. What it does argue, however, is this: utilitarian purposes of punishment—think public-safety rationales—more easily allow collateral consequences to proliferate than retributive principles and, as a result, are less equipped to restrain them.[15] Their incapacitative- and deterrence-based rationales, and concerns for welfare maximization, allow for the convenient blurring of the criminal-civil line.[16] Designed to prevent future crime, many collateral consequences are

12 *See generally* U.S. COMM'N ON CIV. RIGHTS, *supra* note 4.

13 This has been the dominant mode of thinking in the wake of the new penology of the 1990s and the desire to fine tune risk-assessment measures.

14 Commentators have pointed out that the effects of collateral consequences may actually present more appropriate punishment. The certificates-of-relief movement arguably impliedly supports this idea by only allowing for the inapplicability of a collateral consequence only *after* the ex-offender has demonstrated rehabilitation and a need for the lifting of the restriction. More recently, Professor Eisha Jain has argued that collateral consequences should not exist in blanket form and should be subject to scrutiny for their penal rationales. *See* Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 976 (2018).

15 Of course, there are varieties of retributivism. *See* John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238 (1979) (noting different types of retributive theory exist). These varieties may be traced to moral or political premises. For example, retributivists focused on moral desert tend to fall into pre- and post-Kantian camps. *See* Peter Koritansky, *Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas*, 22 HIST. PHIL. Q. 319, 321 (2005). Some modern retributivists have sought to develop a theory of retribution grounded in political obligation and, in particular, cognizant of the demands of the liberal, democratic order. *See generally* Markel, *supra* note 10.

16 For example, at least one commentator has argued that only collateral consequences that advance of the purpose of public safety can be justified. *See* Milena Tripkovic, *Collateral Consequences of Conviction: Limits and Justifications*, CRIMINOLOGY CRIM. JUST. L. & SOC'Y, Dec. 2017, at 18 (reviewing Gabriel Chin's suggestion that collateral consequences meet a public-safety threshold). But pursuing public safety is not *exclusively a* regulatory goal. Rather, it underlies the theory of incapacitation, which is a traditional purpose for punishment. It also might be considered a secondary effect of deterrence and rehabilitative theory. As such, even if we label civil measures as pursuing that purpose, it actually *reinforces*, rather than severs, the underlying roots that are connected to utilitarian theories of punishment. Nevertheless, it is not unsurprising that scholars have come to the conclusion that classifying collateral consequences as merely the consequences of criminal behavior, rather than punishment, has useful value. *See* Hugh LaFollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 22 J. APPLIED PHIL. 241, 251 (2005). Similar to the way that Professor Erin Collins has persuasively argued that actuarial

blunt instruments that may actually inhibit full reentry, ultimately disrupting the social order aimed to be restored.[17] When the primary goals of punishment are safety, security, and minimizing future crime (or predicting dangerousness), the temptation to enact collateral consequences is harder to resist and more difficult to critique. They are perceived as low-cost interventions that can heighten public safety through minimizing risk, making them politically palatable, especially for the risk averse.[18] They isolate ex-offenders beyond what is just and necessary and counterproductively can incentivize more criminal behavior. And that is precisely today's predicament: a pervasive network of collateral consequences designed to control human beings and their relationships with others, all in the name of mitigating risk and deterring future criminal behavior.[19] Many are, in a phrase, undeserved *extra* punishment.

That conclusion may provoke a criminal law double-take: are collateral consequences not the logical outgrowth of the "tough on crime" era that allowed punitive measures to run amok? Are they not expressions of societal disapproval, recognizing past blameworthiness or, at the very least, outlets for vengeance unaccounted for by the direct sentence itself? Do they not exact just deserts for past behavior that connotes a lack of moral trustworthiness on the part of the offender? Are they not retributive because they express popular passions for desert, manifesting hatred, fear, or anger toward offenders? Some legislators understand them that way—using some strands of retributive thinking focused on shame and suffering as the starting point for a response to individual wrongdoing.[20] And there is an argument to be made

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risk assessment at sentencing represents an "off-label" use, collateral consequences might be conceived as "off-label" punishment. Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57 (2018). Interestingly, a core component of Collins's article is that "off-label" use can "justify an increase—rather than a decrease—in our use of incarceration, and in a way that undermines the fairness and integrity of our criminal justice system." *Id.* at 62.

17 The crux of the argument is that collateral consequences are *too socially disruptive* and *too easily rationalized* by utilitarian theories of punishment.

18 *See* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 715–16 (2015).

19 *See* Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 321 (2011); David Garland, *The Birth of the Welfare Sanction*, 8 BRIT. J.L. & SOC'Y 29, 41–42 (1981); Mayson, *supra* note 4, at 303; Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 211–12 (1996) ("Those most willing to blur the criminal-civil distinction are generally the consequentialists-utilitarians, who do not see 'doing justice' as an important value in itself and are happy to ignore desert in favor of a distribution of sanctions that might more efficiently reduce crime. As noted, they see crime and tort as just two similar mechanisms of behavior control through disincentives."). One might argue that collateral consequences are the *unintended consequence* (ironically) of prioritizing utilitarian theories of punishment in the administration of criminal law. The utilitarian theories bled across the criminal-civil line, as low-cost interventions.

20 *See* Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE 96, 100 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (noting how the carceral system, seemingly justified on familiar penological goals like retribution, is actually about separation through incapacitation during and after prison); Dolovich, *supra* note 19, at 265 (noting how individualist strains of political thought infuse penological language to justify

that some legislators thought as much during the rise of collateral consequences after the 1970s, which occurred at the same time as significant increases in the severity of punishment overall.[21] After all, some have said of an ex-offender seeking employment or a college education: Does she really deserve it?[22]

But that story confuses potential justifications with distributive principles of punishment, shortchanging the value of retributivism to reform efforts and misrepresenting retributivism for revenge. Retributivism, whether understood as grounded in moral or political-legal desert,[23] seeks only to properly restore the social order disrupted by the will of the criminal, carefully calibrating for proportionality and blameworthiness. It rejects using the guilty, and especially the innocent, to intentionally further other objectives.[24] Many collateral consequences undercut retribution's inherently restorative

harsh punishment). As I read Dolovich, this point underscores how the conflating of language traditionally associated with retribution has been coopted to justify incapacitation. *See id.* at 270–71 (noting how the *form* of punishment does not seem consistent with the retributive principles that are mindful of severity and proportionality); *id.* at 286 ("The discourse of personal choice and individual agency that dominates public and political thinking about crime and punishment justifies and thereby sustains the project of perpetual marginalization and exclusion.").

21 *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 816–17 (2006) (noting how sentencing regimes grew increasingly severe in the last three decades of the twentieth century); Michael Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America*, 47 CRIME & JUST. 119, 123 (2018) (discussing disjunction between retributive literature in the 1970s, which called for restraint, fairness, and equality in sentencing, with harsh punishment regimes that led to upticks in incarceration rates).

22 *See* Jonathan Simon, *Positively Punitive: How the Inventor of Scientific Criminology Who Died at the Beginning of the Twentieth Century Continues to Haunt American Crime Control at the Beginning of the Twenty-First*, 84 TEX. L. REV. 2135, 2135–36 (2006) ("Rhetoric consistent with retribution and other expressive themes in penality, combined with the dramatic repudiation of the rhetoric of rehabilitation by many of those who had long supported it, has covered over the enduring role of positivist criminology as a source domain for American penal law throughout the twentieth century and into the beginning of the twenty-first." (footnote omitted)).

23 It is crucial to the argument in this Article that a distinction be made between types of retributive theories. *See infra* Part III. The latter might be called Kantian retribution. Most modern criticism of retribution is directed at Kant's theory of punishment. However, retribution has a longer history than that. Retributive justice links back to ancient Greek and Judeo-Christian thought, from Aristotle to Augustine and Thomas Aquinas in the Middle Ages. *See generally*; PLATO, THE LAWS 241 (A.E. Taylor trans., J.M. Dent & Sons 1960); THE NICOMACHEAN ETHICS OF ARISTOTLE (F.H. Peters trans., Kegan Paul, Trench, Trübner & Co. 10th ed. 1906); Matthew A. Pauley, *The Jurisprudence of Crime and Punishment from Plato to Hegel*, 39 AM. J. JURIS. 97 (1994); Koritansky, *supra* note 15. This understanding of retribution, which Kant *reacted* to, contains more moderating components that modern-day critics of Kantian retribution do not usually account for when criticizing the theory overall.

24 Of course, most retributive theories *recognize* how punishment can secondarily pursue other, more traditionally utilitarian ends, like public safety.

nature by redisrupting what had been restored.[25] Retributivism has built in safeguards by accounting for degrees of blameworthiness, treading cautiously around using human beings as examples for others, limiting punishment due to proportionality concerns, leaving room for mercy and recognizing humility, and asserting positive duties—for the state and fellow citizens—to refrain from perpetually enforcing collateral consequences and uncalled-for stigma. A retributive focus could surprisingly result in *less* room for a harsh system of collateral consequences.[26]

This Article advances this critique in three parts. Part I explains the history, purpose, and scope of collateral consequences, paying particular attention to the theoretical confusion about their punishment-like roots. It notes that while collateral consequences are not currently labeled *criminal* punishment by modern legislatures or courts, they are fundamentally akin to punishment, and were even recognized as such by earlier courts.[27] Deference to modern labeling has laid the seeds for an expansive regime of extra punishment justified by the functional demands of the criminal justice system.

Part II interprets the collateral-consequences regime to demonstrate how their origin, history, and purpose align with concerns about safety and security, and the philosophical presuppositions upon which many are based resemble the inner workings of utilitarian theories. In particular, the aim of many is to incapacitate and to deter. That contributes to their classification by courts as civil restraints rather than punishment: as engines for controlling risk, they sometimes do not appear to be enacted in response to blameworthiness.[28] But legislatures create them in response to social harm dealt with

25 Joshua Kleinfeld argues similarly about "reconstructivism," which he characterizes as a social theory of punishment that is distinct from modern forms of retributivism. I will discuss its relationship to retributivism in Part III. *See* Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1524 (2016).

26 Another way to think about the argument is as if the purposes exist along a spectrum, with retribution being the furthest from collateral consequences, followed by rehabilitation, deterrence, and incapacitation. That last category has more recently been rebranded the regulation of future risk—or dangerousness—in an effort to reinforce the criminal-civil distinction. But its roots remain in the same place: utilitarian purposes of punishment. The rebranding seems like a wolf in sheep's clothing, which scholars are now pointing out in the context of the actuarial risk assessment movement. *See* Collins, *supra* note 16, at 72–77 (assessing the normative merits of applying actuarial risk assessment during sentencing).

27 Notably, the first Supreme Court cases on the question of whether collateral consequences were punishment squarely answered in the affirmative. *See, e.g.*, *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867) ("[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 286 (1867).

28 Judicial and legislative classification of collateral consequences as civil has contributed to confusion, making the focus about whether a certain consequence fits into a labeling dichotomy rather than whether it is fundamentally punitive. *See generally* John Kip Cornwell, *The Quasi-Criminality Revolution*, 85 UMKC L. REV. 311 (2017) (discussing the features of quasi-criminal proceedings impacting liberty and their outgrowth from a culture of control).

by the criminal system, a position initially and correctly acknowledged by the Supreme Court,[29] only to be modified in the midst of the criminal procedure revolution when retaining such a definition would lead to serious practical concerns for the administration of justice.[30] In short, they are harms suffered by offenders by virtue of their contact with the criminal system and designed to curtail future activity by such ex-offenders. Their prevalence suggests they are in desperate need of restraint.

Part III reframes the reform question, and asks whether evaluating the collateral-consequences regime with retributivist premises can help reformers. Its intention is to begin a conversation and recognizes that while there is no single retributivist theory, basic retributive premises shared by most theories could operate as constraints on collateral consequences beyond what is currently thought possible.[31] Part III suggests the built-in components of retributive theories—whether fundamentally focused on moral or legal-political desert—would view existing collateral-consequences policy with skepticism. Retributive concepts relating to blameworthiness, proportionality, restoration, and affirmative duties on the part of the state and community undercut the logic of many collateral consequences in their current form.

In laying the groundwork for a deeper retributive accounting of collateral consequences,[32] the takeaway is this: reformers—especially in a moment when criminal justice reform is popular across the political spectrum—need to consider how retributive considerations are tools that can help. This line of thinking exists in earlier Supreme Court precedent that has no qualms about labeling collateral consequences punishment and builds on existing sentencing codes that aim to account for desert and the Model Penal Code that prioritizes it.[33] It also responds to the general public's desire to respond

29 Courts were thus open to the idea that collateral consequences were subject to retributive constraints given their punitive roots.

30 This synergizes with the Stuntzian thesis that the criminal procedure revolution announced by the Court may have had unintentional consequences on legislative behavior. *See, e.g.*, Stuntz, *supra* note 21, at 816–17 (noting how sentencing regimes grew increasingly severe in the last three decades of the twentieth century).

31 Of course, a comprehensive analysis of this point requires much more than occurs here because the depth and breadth of collateral consequences is vast. The primary objective here is to bring discussions about justifications and purposes for punishment into dialogue with the pervasive network of collateral consequences, and to note how reviving the constraints within retributivism might limit an ever-growing collateral-consequences apparatus.

32 This in-depth retributive accounting, which occurs in my companion paper titled *Retributivist Reform of Collateral Consequences*, suggests that retributivism can constrain the prevailing collateral-consequences regime, and that its components could reduce inequities stemming from the pervasive network of collateral effects resulting from contact with the criminal system. In particular, the article argues that retributivism as a constraint has significant implications for legislative reform, prosecutorial discretion, pre- and post-trial procedure, and remedies.

33 *See* PAUL H. ROBINSON & TYLER SCOT WILLIAMS, MAPPING AMERICAN CRIMINAL LAW 8 (2018). The goal here is a punishment theory accounting of the roots of the existing collateral-consequences regime; and second, a pivot to how retributive theories might view

to criminal justice questions in a fashion that is cognizant of desert. This approach could supplement recent reform efforts that have exclusively argued for precise tailoring based on calculated risk-prevention tools.[34] Whereas incarceration or other direct sentences attempt to already account for desert, collateral consequences may be undeserved punishment that perpetuate mass criminalization.[35]

I. History and Scope of Collateral Sanctions

There is a growing scholarly consensus that collateral consequences are punishment because they result in the loss of tangible rights that affect citizenship, resulting in a change in status based on a judgment about the offender's moral responsibility.[36] But what constitutes *criminal* punishment is a matter of controversy. Courts have not followed scholars in this regard, equivocating on whether collateral consequences are restraints, punitive disabilities, or real, criminal punishments.[37] Instead, they have been labeled regulatory, "civil," measures in many contexts.[38] This Part discusses the history behind collateral consequences, the motivations behind their legislative enactment, and how courts and scholars have understood them. It lays the groundwork for interpreting the relationship between collateral consequences and punishment theories, demonstrating connections between collateral consequences and all of the typical rationales for punishment.

The number of collateral consequences across federal and state jurisdictions is astounding. With estimates in the tens of thousands,[39] they come in a

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that regime given renewed interest in retributivism as a constraint on punishment over the past several years. This analysis occurs against the backdrop of realities within the American criminal justice system and mindful of the Supreme Court's changing understanding of collateral consequences. While the question of whether retribution or some other justification for punishment should be primary is beyond the scope of this Article, my position is that retribution is what makes punishment distinctive, and thereby relevant for assessing collateral consequences.

34 *See* U.S. Comm'n on Civ. Rights, *supra* note 4, at 135; Mayson, *supra* note 4, at 347 (arguing for reform on risk-prevention grounds).

35 I neither claim that retribution can never justify what currently exist as collateral consequences nor that there might not be secondary aims of punishment that allow collateral consequences. Rather, the claim is purely one of degree: that along the spectrum of punishment theory, retributive purposes are most likely to constrain collateral consequences.

36 *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1791–93 (2012); Travis, *supra* note 2, at 15 (recognizing collateral consequences as punishment because they result in the "diminution of the rights and privileges of citizenship and legal residency").

37 *See* Chin, *supra* note 36, at 1792.

38 *See* Tripkovic, *supra* note 16, at 18 ("The legal stance taken in the United States is that collateral consequences are not punishment, but constitute regulatory measures . . . .").

39 *See Collateral Consequences Inventory*, Nat'l Inventory Collateral Consequences Conviction, https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&conse

variety of forms and touch every aspect of life.[40] They can deprive individuals of civil rights and privileges related to citizenship (such as voting), impact areas of property or family law (such as custody of children[41] or housing[42]), affect eligibility for public benefits[43] (such as housing or medical assistance), impair the ability to obtain a license, and inhibit employment. Some are automatic and others, while potential, are enforced by both public and private actors.[44] Their duration can be for a lifetime.[45]

But where did they come from? American jurisdictions have built on a history that predates American law. Interestingly, there was a time when commentators thought that collateral consequences were a thing of the past. In 1983, the ABA Criminal Justice Standards on the Legal Status of Prisoners announced that the "era of collateral consequences was drawing to a close."[46] The thought was that the number of consequences would diminish and that those that remained would be more rational and narrowly tailored.[47] Instead, the number of consequences exploded.

Collateral consequences are the logical outgrowth of historical measures that were associated with criminal activity and conceived as punishment.

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40 Chin & Love, *supra* note 6, at 27 ("Based on conviction of a serious crime, a person loses civil rights, including political, property, and family rights, temporarily or permanently.").

41 *See* 55 PA. CODE § 3041.189(a)(1) (2019).

42 *See* 42 U.S.C. § 13662(a) (2012); 35 PA. STAT. AND CONS. STAT. ANN. § 780-167(b) (West 2019) (detailing the impact of a final criminal conviction in a drug-related offense on eviction proceedings).

43 *See, e.g.*, 43 PA. STAT. AND CONS. STAT. ANN. § 802(g) (West 2019); *see also* 21 U.S.C. § 862a(a) (2012); 42 U.S.C. § 1320a-7(a)(4), (b)(3); 43 STAT. AND CONS. STAT. ANN. § 871(b) (West 2019) (noting the implications of false representations in acquiring unemployment benefits); 62 PA. STAT. AND CONS. STAT. ANN. § 432(9) (West 2019).

44 Admittedly, some collateral consequences are inflicted entirely by private actors, with or without permission from the law. Some are purely social. The further a consequence from state enforcement, the harder it is to classify it as punishment.

45 *See, e.g.*, 35 PA. STAT. AND CONS. STAT. ANN. § 10225.503(a) (West 2019), *invalidated by* Nixon v. Commonwealth, 839 A.2d 277, 279 (Pa. 2003). Though invalidated, the law has not been amended and enforcement remains subject to the priorities of state agencies. Under the Pennsylvania Older Adults Protective Services Act (OAPSA), nursing homes, home health care agencies, and other workers in long-term care facilities could not have any theft convictions at any time. *See* 35 PA. STAT. AND CONS. STAT. ANN. § 10225.103 (West 2019) (defining "[f]acility" as including the following: a "domiciliary care home," a "home health care agency," a "long-term care nursing facility," an "older adult daily living center," and a "personal care home").

46 Chin & Love, *supra* note 6, at 30.

47 *Id.* ("[T]he ABA . . . predicted . . . : '[a]s the number of disabilities diminishes and their imposition becomes more rationally based and restricted in coverage, the need for expungement and nullification statutes decreases." (second alteration in original) (quoting AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS § 23-8.2, cmt. (1983))).

Greek infamy, outlawry, and Anglo "civil death" are their antecedents.[48] In those historical moments, stigma was enshrined in law through the loss of certain privileges after conviction.[49] A clear *legal* line was drawn between the noncriminal and criminal classes by controlling offenders through the loss of status under the law, foreshadowing modern-day, postincarceration incapacitation.

American courts picked up fairly soon after the nation's founding, with some referring to "disabilities . . . imposed upon the convict" as "part of the punishment,"[50] allowing convicted individuals to be "regarded as dead in law."[51] Loss of status was recognized at common law and as part of some statutory law.[52] American jurisdictions also initially allowed attainder before the Constitution regulated it.[53] As such, this resulting change in status was somewhat of an inherited trait associated with the administration of the criminal justice system, although American jurisdictions classified measures as part of the civil system.[54]

Legislative enactment of collateral consequences ramped up in the second half of the twentieth century. Interestingly, they increased rapidly during the "tough on crime" era that came in the wake of a penal system focused on rehabilitation.[55] This suggests these measures may have been designed to respond to sentencing trends viewed unfavorably by political actors: collateral consequences could achieve the punishment put on the back burner by rehabilitation.[56] There were broad disqualifications from social benefits, significant immigration consequences, and the rapid onset of sex-offender

48 *Id.* at 27; *see also* Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 STUD. L. POL. & SOC'Y 69, 72–73 (2019) (describing Greco, Roman, and German approaches to collateral consequences).

49 CARL LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 37 (Thomas S. Bell trans., 1916) (noting how infamy under Roman criminal law was formal punishment).

50 *See, e.g.*, Sutton v. McIlhany, 1 Ohio Dec. Reprint 235, 236 (C.P. Huron County 1848); *see also* Margaret Colgate Love, Essay, *The Collateral Consequences of* Padilla v. Kentucky*: Is Forgiveness Now Constitutionally Required?*, 160 U. PA. L. REV. PENNUMBRA 113, 114 (2011) ("While conventionally labeled as 'civil,' collateral consequences are increasingly understood and experienced as criminal punishment, and never-ending punishment at that.").

51 Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888) (quoting 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW *725 (Springfield, G. & C. Merriam 1836)).

52 *See generally* Chin, *supra* note 36, at 1790 (comparing collateral consequences, and the change in legal status that they bring to ex-offenders, to de jure civil death regimes from the past).

53 Corda, *supra* note 48, at 73.

54 *See id.* at 76 (noting how American lawmakers chose to classify collateral consequences as nonpunishment despite ancient classifications that leaned toward defining them as such).

55 Mayson, *supra* note 4, at 307.

56 In other words, collateral consequences increased as harsh sentences were replaced by rehabilitative priorities.

registration laws.[57] As such, collateral consequences are sometimes associated with retributive theories of punishment, and there is evidence that lawmakers enacting such measures considered them partially retributive in the sense that they were condemnatory.[58] But as will be shown below, their nature more closely resembles incapacitative measures, born from utilitarian logic about preventing risky individuals from committing future crimes.[59]

Courts have utilized nonretributive theories to justify classifying collateral consequences as regulatory rather than wholly punitive.[60] While courts have acknowledged the harsh effect of collateral consequences, most courts have classified collateral consequences as something other than punishment, and certainly not *criminal* punishment. Scholars have not been as equivocal,

57 *See* Logan, *supra* note 6, at 427 (referencing SORN laws as a method of social control); *see, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, tit. XVII, 108 Stat. 2038 (1994), *superseded by* Sex Offender Registration and Notification Act, Pub. L. 109-248, tit. I, 120 Stat. 590 (2006).

58 Dolovich, *supra* note 20, at 100.

59 *See id.* at 97 (describing American carceral system as embracing an approach focused on "permanent exclusion"). Indeed, collateral-consequences regimes expanded significantly around the same time as the actuarial risk tools were integrated into corrections. *See* Collins, *supra* note 16, at 58. Therefore, the rise of collateral consequences might be understood in a few ways: as a covert, retributive reaction to utilitarian emphases in *criminal* punishment, pursued by legislatures trying to account for both retributive and utilitarian justifications, or as the logical extension of those utilitarian emphases resulting in full-blown incapacitation, but placed within the *civil* system by legislatures to avoid extensive scrutiny. Dolovich, *supra* note 20, at 97 ("[T]hose fortunates who *are* released will face a host of state-imposed obstacles making it extremely difficult for them to construct stable and law-abiding lives on the outside."). Regardless of which historical legal explanation is correct, the core claim of this Article remains. *See also* Simon, *supra* note 22, at 2137–38, 2138 n.22 (noting incapacitation as the basis behind several legislative enactments).

60 *See* Mayson, *supra* note 4, at 311 ("Governments defending this kind of challenge typically assert that the measure at issue is not punishment at all, but rather a regulatory measure with a non-punitive aim—sex offender registration laws, to protect the community; voter disenfranchisement provisions, to protect the integrity of the franchise; immigration consequences, to 'protect[ ] the public from dangerous criminal aliens' and limit residence to people of good character; bars to government benefits, to prevent fraud and allocate scarce resources to the most deserving." (footnotes omitted) (quoting Demore v. Kim, 538 U.S. 510, 515 (2003)) (first citing Smith v. Doe, 538 U.S. 84, 94, 105 (2003); then citing Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978); then citing *Demore*, 538 U.S. at 515; then citing Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952); then citing Hinds v. Lynch, 790 F.3d 259, 267–68 (1st Cir. 2015) (concluding that removal on basis of conviction is not punishment); and then citing Turner v. Glickman, 207 F.3d 419, 428–31 (7th Cir. 2000)).

resting fairly comfortably for the past several decades on the idea that such consequences amount to punishment.[61]

The Supreme Court has acknowledged the range of consequences associated with a conviction for several decades at this point, suggesting that imposing such consequences is within the interests of the state.[62] The Court has also said that the Constitution's prohibition of bills of attainder implies consideration of collateral consequences as punitive.[63] Other pronouncements by the Court have suggested similar thinking,[64] including justifying the extension of the right to counsel, although the Court stopped short of declaring deportation a *criminal* punishment in *Padilla v. Kentucky*.[65] While the Court has defined punishment as a deprivation in response to past conduct,[66] its recent precedent has been less than clear in drawing lines and now almost certainly leads to classifying collateral consequences as civil, nonpunitive, regulatory measures.[67]

Originally, the Court was willing to consider the substantive effects of laws when determining if they were punitive.[68] In fact, the Court had no qualms labeling collateral consequences as extra punishment prior to *Trop v.*

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61 *See id.* at 314 (noting how scholars and commentators "have uniformly argued that CCs *are* punishment, and that the courts have erred in finding otherwise").

62 *See* North Carolina v. Rice, 404 U.S. 244, 247 n.1 (1971) (per curiam) ("A convicted criminal may be disenfranchised, lose the right to hold federal or state office, be barred from entering certain professions, be subject to impeachment when testifying as a witness, be disqualified from serving as a juror, and may be subject to divorce." (citations omitted)); Estep v. United States, 327 U.S. 114, 122 (1946) (acknowledging the "loss of substantial rights"); *see also* Chin, *supra* note 36, at 1822–23 (citing Daniels v. United States, 532 U.S. 374, 379 (2001)).

63 *See* Chin, *supra* note 36, at 1816 (citing Johnson v. Rockefeller, 365 F. Supp. 377, 380–81 (S.D.N.Y. 1973), *aff'd mem. sub nom.* Butler v. Wilson, 415 U.S. 953 (1974)).

64 *See* Reno v. ACLU, 521 U.S. 844, 872 (1997) (recognizing opprobrium and stigma); Turner v. Safley, 482 U.S. 78, 96 (1987) (denying marital rights to inmates is a "punishment for crime").

65 For example, Justice Powell noted the fact of collateral consequences when the Court extended the right to counsel beyond felony charges. *See* Argersinger v. Hamlin, 407 U.S. 25, 48 n.11 (1972) (Powell, J., concurring); *see also* Chin, *supra* note 36, at 1826. Of course, *Padilla v. Kentucky*, 559 U.S. 356, 382 (2010), considered deportation as part and parcel of the criminal case.

66 *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867) ("[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 286 (1867).

67 *See* Kansas v. Hendricks, 521 U.S. 346, 361 (1997); One Lot Emerald Cut Stones & One Ring v. United States, 409 U.S. 232 (1972) (per curiam); Trop v. Dulles, 356 U.S. 86 (1958); United States v. Lovett, 328 U.S. 303 (1946); Hawker v. New York, 170 U.S. 189 (1898).

68 *See* Kaiser, *supra* note 4, at 355–56 (referencing how, in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), the Court did not look at "substantive effects" at all). Also, the Supreme Court has considered collateral consequences when conducting proportionality analysis. Julia L. Torti, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. Rev. 1908, 1940 (2013) ("[T]he punishment *cadena temporal* in *Weems* included a

Dulles,[69] when the Court had no problem trafficking in effects.[70] But recently the Court has leaned heavily on the intent behind laws that create collateral consequences.[71] Only deprivations connected to retribution or deterrence that were intended by the legislature would be labeled criminal punishment.[72] A line of cases grafted considerations onto considerations,[73] with legislative labeling front and center, thereby tautologically blurring the definition of punishment.[74] This culminated in *Smith v. Doe*,[75] where the Court held that only if "the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil' " will the Court consider classifying the statute as a punitive measure.[76] Now courts are tasked with a two-part inquiry that prioritizes labeling but allows for consider-

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permanent loss of political and civil rights."); *see also* Rummel v. Estelle, 445 U.S. 263, 274 (1980) (referencing " 'accessories' included within the punishment").

69 356 U.S. at 96 (plurality opinion).

70 *See* Kaiser, *supra* note 4, at 350 ("Prior to *Trop*, actually, the Court had *explicitly* considered the actual effects of a statute in question rather than delving into issues of legislative intent.").

71 *See, e.g.*, *One Lot Emerald Cut Stones & One Ring*, 409 U.S. at 235 (holding that statutory label of "civil" exempted law from constitutional protections relating to punishment); *Trop*, 356 U.S. at 96 (plurality opinion) ("In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute.").

72 *See Trop*, 356 U.S. at 96 (plurality opinion) ("In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose." (footnotes omitted)); Kaiser, *supra* note 4, at 358–59. Interestingly, the Court seems to restrict the punishment label to those consequences related to retribution and deterrence. So the Court interestingly has labeled nonretributive collateral consequences "civil" and not punishment. Noticeably, the Court seems to disregard the idea that an incapacitative purpose could resemble punishment.

73 *See, e.g.*, United States v. Bajakajian, 524 U.S. 321 (1998); Kansas v. Hendricks, 521 U.S. 346 (1997); United States v. Ursery, 518 U.S. 267, 270–71 (1996); United States v. Halper, 490 U.S. 435, 447 (1989); *One Assortment of 89 Firearms*, 465 U.S. 354; United States v. Ward, 448 U.S. 242 (1980); *One Lot Emerald Cut Stones & One Ring*, 409 U.S. 232; Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963) (listing factors relating to statutory disabilities or restraints, the history of the restrictions, how they relate to the goals of punishment, and if they are excessive); Helvering v. Mitchell, 303 U.S. 391 (1938).

74 *See* Kaiser, *supra* note 4, at 354–55 (detailing how the Supreme Court, over the past century, has leaned too heavily on legislative labeling and confused definitions with justifications for punishment, thereby resulting in a test that renders it nearly impossible for a collateral consequence to be labeled punishment).

75 538 U.S. 84 (2003).

76 *Id.* at 92 (alteration in original) (quoting Kansas v. Hendricks, 521 U.S. at 361); *see* Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT / LAW AS REGULATION 77, 91 (Austin Sarat et al. eds., 2011) (" *Trop*'s view of collateral consequences remains the consensus among American courts (though not without exception).").

ation of effects.[77] This has amounted to a rule without teeth, as legislative labeling has ruled the day, rather than the substance of the deprivation.

The hesitation on the part of courts to recognize collateral consequences as criminal punishment is likely due in part to the fact that it would have direct consequences for several aspects of the administration of justice. The right to counsel, due process of law, the Ex Post Facto Clause,[78] and other substantive and procedural rights would immediately be implicated, thereby requiring courts to develop another set of doctrines.[79] More bluntly, classifying collateral consequences as criminal punishment would result in serious practical challenges in the administration of the criminal justice system because it would force courts to critically assess plea-bargaining doctrines and the responsibilities of the parties involved.[80] A similar thread runs through *Padilla*; when considering the consequence of deportation, the Court did not label it punishment.[81] Instead, it opted for recognition of how the consequence was intimately associated with the criminal justice system.[82] Notably, that suggests the consequence could be punishment, even if it not formally labeled *criminal* punishment.

The practical result has been the classification of most collateral consequences as regulatory measures.[83] Despite multiple opportunities, the post-

77 *See Smith*, 538 U.S. at 92 ("'[O]nly the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." (citations omitted) (quoting Hudson v. United States, 522 U.S. 93, 100 (1997))).

78 *See* Logan, *supra* note 6, at 429 ("[A]n important shift has occurred in the views of state and lower federal courts, which have increasingly found fault with 'new-generation' SORN laws . . . ."). Notably, state courts and federal courts are coming to different conclusions about SORN laws even when the ex post facto provisions in the state constitutions at issue are similar to the U.S. Constitution.

79 *See* Corda, *supra* note 48, at 81 (noting the fiction perpetuated by courts that labels collateral consequences civil regulations in order to avoid constitutional constraints on punishment); Ewald, *supra* note 76, at 92 ("If defined as punishment, a penalty imposed on people convicted before that restriction was enacted may violate the Ex Post Facto [C]lause . . . . Moreover, a defendant must be made aware of all criminal penalties to which he is subject before he can plead guilty . . . ."); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 698–99 (1999) ("The fact is . . . the Court is no longer trying to define punishment, . . . but is instead giving the government free reign to circumvent constitutional criminal procedure altogether.").

80 *See* Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213, 229–37 (2016) (discussing how conceiving of collateral consequences as punishment would require an assessment of prosecutorial disclosure obligations under the logic of *Lafler v. Cooper*, 566 U.S. 156 (2012); *Missouri v. Frye*, 566 U.S. 134 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010); and *Brady v. Maryland*, 373 U.S. 83 (1963)); Roberts, *supra* note 2, at 672 ("By strictly circumscribing the category of direct consequences, courts promote finality and efficiency in the plea bargain process.").

81 *See Padilla*, 559 U.S. at 365.

82 *See id.* at 365. Kaiser notes how the definition-of-punishment doctrine was on "unstable ground" prior to *Padilla*. Kaiser, *supra* note 4, at 366.

83 *See* Tripkovic, *supra* note 16, at 18 ("The legal stance taken in the United States is that collateral consequences are not punishment, but constitute regulatory measures . . . .").

1950s Supreme Court and lower federal courts have refrained from labeling many collateral consequences equivalent to criminal punishment.[84] And other courts have followed suit, concluding that collateral consequences are meant to manage public welfare.[85] The Bureau of Justice Assistance within the Department of Justice did the same when describing the Denial of Federal Benefits program as designed to prevent crime.[86] And the federal government delegated pursuit of this purpose when it allowed states to administer components of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which controlled the provision of cash assistance and food stamps.[87] Courts understand collateral consequences as measures to "'protect society from the [ex-offender's] corrupting influence,' and to prevent the commission of future offenses by ex-offenders."[88]

One area that seems to be changing slightly involves sexual-offender registration laws. Conceived as risk-assessment measures that would allow for tracking dangerous offenders, they were initially upheld by the Supreme Court and lower courts on those grounds.[89] But some recent decisions at the state and federal level have emphasized the punitive nature of these restrictions, analogizing them to forms of historical banishment and shaming punishments.[90] Furthermore, the actual administrative regime that supports sex-offender laws was considered similar to probation and parole supervision, which are traditionally considered associated with criminal punishment.

Despite judicial classification in one direction, scholars have tended to go the other way. There has been extensive discussion of collateral consequences for several decades, recognizing the punishment-like qualities of

84 *See, e.g.*, Hudson v. United States, 522 U.S. 93, 95–96 (1997); United States v. Ursery, 518 U.S. 267, 297 (1996) (Kennedy, J., concurring). The Court did, however, clarify that framing punishment discussions in terms of "criminal" and "civil" labels was not entirely useful. United States v. Halper, 490 U.S. 435, 447–48 (1989) ("The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law . . . ."). Other federal courts have refrained from labeling sex-offender registration and other collateral consequences, such as disenfranchisement or employment restrictions, as punishment. *See, e.g.*, De Veau v. Braisted, 363 U.S. 144, 158–60 (1960) (plurality opinion) (employment disqualification); United States v. Parks, 698 F.3d 1, 6 (1st Cir. 2012) (sex-offender registration requirement); United States v. Stock, 685 F.3d 621, 627 n.4 (6th Cir. 2012) (same); Johnson v. Bredesen, 624 F.3d 742, 753 (6th Cir. 2010) (felon disenfranchisement).

85 *See* Ewald, *supra* note 76, at 78 ("[M]any jurists and some commentators conclude that collateral sanctions are fundamentally regulatory: meant to ration scarce resources or ensure that only certain citizens are eligible for a given profession . . . .").

86 *Id.* at 113 n.41.

87 *Id.* at 86.

88 Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 161 (1999) (alteration in original) (footnote omitted) (quoting Note, *Civil Disabilities of Felons*, 53 VA. L. REV. 403, 406 (1967)).

89 *Parks*, 698 F.3d at 6.

90 *See* Does #1–5 v. Snyder, 834 F.3d 696 (6th Cir. 2016); Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017).

these measures.[91] Professor Alec Ewald considers them punishment given that their "purpose, effect, public meaning, [and] mode of administration" are punitive.[92] Professor Joshua Kleinfeld links them to the concept of banishment, and argues that formal classifications belie reality.[93] Scholars have emphasized how collateral consequences institute a legal status comparable to "civil death."[94]

Some scholars have argued that the Supreme Court has failed to rigorously apply its own doctrine, thereby resulting in mistaken classifications. For example, following *Doe*, scholars complained that the Court did not utilize the "effects" portion of the doctrine to zero in on the punitive nature of sex-offender registration requirements.[95] Numerous scholars make the same arguments for a range of collateral consequences.[96] Further, older Supreme Court precedent—such as *Weems v. United States*,[97] *Cummings v. Missouri*,[98] and *Ex parte Garland*[99]—acknowledges the punitive nature of such consequences, even if not formally labeled *criminal* punishment.

The gist of the scholarly argument comes down to the following principles about collateral consequences: (1) they result from a conviction, which involves a judgment of culpability about social harm; (2) they are imposed by the state (especially automatic ones); (3) they inflict suffering or deprive former offenders of some good; and (4) most former offenders would prefer them to be lifted.[100] In other words, collateral consequences are punishment because they result in suffering inflicted by the state, in response to wrongdoing, against the will of the offender. These realities led scholars to conclude that even if, given blurred justifications, collateral consequences cannot formally be labeled criminal "punishment," taken as a whole they are punishment-like.[101] Scholars have persuaded the American Bar Association

91 *See supra* note 4.

92 Ewald, *supra* note 76, at 97.

93 *See* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 965–69 (2016).

94 *See* Chin, *supra* note 36; Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060–61.

95 *See, e.g.*, Wayne A. Logan, *Populism and Punishment: Sex Offender Registration and Community Notification in the Courts*, CRIM. JUST., Spring 2011, at 37, 38–39; Andrea E. Yang, Comment, *Historical Criminal Punishments, Punitive Aims and Un-"Civil" Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U. CIN. L. REV. 1299, 1301–03 (2007).

96 Mayson, *supra* note 4, at 310, 314; *see also supra* note 73.

97 217 U.S. 349 (1910) (describing, in detail, "the perpetual limitation on his liberty" that the criminal endures after finally finishing his sentence).

98 71 U.S. (4 Wall.) 277, 320 (1867) ("The disabilities created by the constitution of Missouri . . . constitute punishment.").

99 71 U.S. (4 Wall.) 333, 340 (1867) (stating that, in preventing a convicted—but pardoned—criminal from holding office, "Congress [is trying] to punish" the criminal).

100 Interestingly, the attributes are shared by many punishment theorists who justify punishment on different grounds, ranging from Thomas Aquinas to H.L.A Hart to Herbert Packer, as well as contemporary theorists.

101 *See* Chin, *supra* note 36, at 1832; Murray, *supra* note 80, at 223.

(ABA) and American Law Institute (ALI), which have suggested that sentencing courts consider them as part of the punishment for an offense.[102] Certificates of relief seemingly imply this as well, aiming to lift sanctions otherwise automatically imposed by virtue of conviction.

The contemporary scholarly consensus classifying collateral consequences as punishment is not without its critics and theoretical confusion remains. The reason stems from the complexity of collateral-consequences regimes themselves: some consequences seem to be imposed due to the culpability of defendants and in order to inflict harm, making them condemnatory.[103] Others seem to be entirely about preventing future behavior by those otherwise judged to be risky, which is a premise shared by "civil" regulations.[104] The latter is especially confusing in the case of arrests resulting in collateral consequences. The distinction between automatic and potential collateral consequences creates similar confusion as the actor inflicting harm is less clear.[105] The Supreme Court signaled this confusion when it emphasized the nonretributive components of collateral consequences as indicative of why they were not to be viewed as punitive.[106] But that also infused more confusion as it conflated the definitions of punitive and retributive. In other words, the Court has simultaneously adopted these positions: (1) that if *a* nonpunitive purpose exists, the Court will not label the measure punishment; and (2) the Constitution does not mandate any one penal justification, thereby implying more than one can exist.[107] Thus, collateral consequences exist along a legal spectrum and the reason for their existence is not uniform, something *Padilla* intimated but did not explicitly declare. Any overlap

102 *See Introduction to* MODEL PENAL CODE: SENTENCING, at xxi (AM. LAW. INST., Tentative Draft No. 3, 2014).

103 *See* ZACHARY HOSKINS, BEYOND PUNISHMENT?: A NORMATIVE ACCOUNT OF THE COLLATERAL CONSEQUENCES OF CONVICTION 45 (2019) (describing condemnation as a crucial component of the meaning of punishment).

104 *See* LaFollette, *supra* note 16, at 243 (noting three ways to classify collateral consequences: (1) as punishment in all "relevant respects"; (2) not punishment but direct consequences of criminal behavior; and (3) measures designed to protect citizens from risks posed by ex-offenders).

105 *See, e.g.*, Kleinfeld, *supra* note 93, at 969 (describing confusion relating to the public-private distinction).

106 *See* Kaiser, *supra* note 4, at 358. Kaiser makes a point that the Court restricted the punishment label to those consequences related to retribution. *Id.* So the Court interestingly has labeled nonretributive collateral consequences "civil" and not punishment. My argument is that this is incorrect, but entirely foreseeable: retribution justifies them the least; utilitarian theories justify them more, but allow them to seem nonpunitive and merely regulatory given that utilitarian calculations also underlie traditionally civil measures.

107 *See* Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion); United States v. Halper, 490 U.S. 435, 448 (1989).

in purposes reflects the elusive relationship between retributive and utilitarian theories that has confounded scholars before.[108]

The confusion in this debate arises from conflation of the definition of what punishment *is* and what its purposes *might be*, the Court's decision to emphasize legislative classification above other considerations, and the fact that utilitarian purposes for punishment closely resemble utilitarian purposes for what has been classified as civil regulation. Hence, collateral consequences might exist along a spectrum of penal purposes relating to both retributive and utilitarian theories, and a spectrum of utilitarian regulatory purposes.[109] Even the most fervent and loyal punishment theorists have conceded that there can be primary and secondary aims of punishment.[110]

For example, an evaluation of sex-offender registration regimes illustrates the point. Ask a layperson, and she might say that a convicted sex offender "deserves" to be labeled for his entire life as a predator (retribution). Ask someone else, and he might reply that the label is purely instrumental, designed to put the public on notice of that individual's propensity for risky behavior and prevent the individual from acting on it (communication and incapacitation).[111] Ask a third person and the conclusion might be that the label operates to deter future offenders, minimizing the risk of future criminal behavior by others (deterrence). And perhaps a fourth would say the measure is designed to protect the offender from himself and reform his behavior (rehabilitation). A fifth person might say none of the above, and instead articulate that the measure is designed to regulate risk (preventative detention theories), which is typically labeled civil.

My own view is that given that many collateral consequences (especially automatic ones) involve the deprivation of a good or the imposition of some form of suffering against the will of the offender, due to past wrongdoing, and are inflicted by the state, they belong in the punishment camp, or very close to it.[112] They also signal ongoing moral condemnation by sorting peo-

108 H.L.A. Hart, Punishment and Responsibility 210–38 (1968); Herbert L. Packer, The Limits of the Criminal Sanction 35–58, 62–71 (1968). *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. Rev. 453 (1997).

109 *See* LaFollette, *supra* note 16, at 243 (describing how collateral consequences can be classified as full-blown punishment, attendant consequences of criminal behavior, or protection measures).

110 *See, e.g.*, Gerard V. Bradley, *Retribution and the Secondary Aims of Punishment*, 44 Am. J. Juris. 105, 105 (1999).

111 Simon, *supra* note 22, at 2139 (discussing sexual-predator civil-commitment laws as incapacitation in practice).

112 This is undoubtedly truer for automatic collateral consequences than potential ones. This definition is not my own and builds from others. *See, e.g.*, Kent Greenawalt, *Punishment*, *in* 3 Encyclopedia of Crime and Justice, Juvenile Justice: Juvenile Court—Rural Crime 1282, 1282–83 (Joshua Dressler ed., 2d ed. 2002).

ple into camps and perpetuating stigma.[113] This is a position in line with prior Supreme Court precedent and allowed by current precedent.[114]

But if collateral consequences are *not* criminal punishment because legislative classification remains central to their definition, and merely regulatory measures (perhaps with punitive attributes) designed to minimize risk and protect against the dangerous, the argument is subject to one minor tweak. Those measures are the logical outgrowth of the pursuit of utilitarian purposes of punishment, but the legal system has conveniently classified them as civil, regulatory measures in order to escape the direct consequences for the administration of justice had they been classified as *criminal punishment* by the courts.

In either instance, their relation to utilitarian punishment theory warrants examination because whereas determining whether collateral consequences share retributive and utilitarian *justifications* might not be fully possible, it can still hold, as a distributive matter, that they more easily pursue utilitarian *purposes*. In other words, collateral consequences could have retributive *and* utilitarian *justifications*, making their classification as *punishment* hard to decipher given that the doctrine conflates *retributive* with *punitive* at times. Nevertheless, it is still the case they more easily pursue utilitarian *purposes* as a matter of distribution. In this sense, the doctrinal grayness could be interpreted this way: retributive distributive principles of punishment could not fully support them so they had to be rationalized in another way.[115] Avoidance of the full restraining components of desert,

113 Christopher Bennett makes a similar argument when he labels collateral consequences "supplementary harms." Christopher Bennett, *Invisible Punishment Is Wrong—But Why? The Normative Basis of Criticism of Collateral Consequences of Criminal Conviction*, 56 HOW. J. CRIME & JUST. 480, 484 (2017) (labeling collateral consequences punishment because they are "a sanction that is intentionally imposed by the State as a way of causing a disability or harm in response to some criminal behaviour, which is in some way supplementary to the headline sentence and hence in some way hidden, yet which has a significant and lasting detrimental impact on an offender's life in society"); *see also* Robinson, *supra* note 19, at 206 ("Criminal liability signals moral condemnation of the offender, while civil liability does not."). Collateral consequences communicate moral disapproval and, in the case of potential collateral consequences, allow community members to act on that moral disapproval.

114 *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867) ("[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 286 (1867); *see also* Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) (acknowledging "incapacitation, deterrence, retribution, or rehabilitation" as possible justifications for punishment); Rummel v. Estelle, 445 U.S. 263, 273–74 (1980) (referencing " 'accessories' included within the punishment"); Weems v. United States, 217 U.S. 349, 366–67 (1910).

115 Kaiser, *supra* note 4, at 358 (noting how the Supreme Court seemed hesitant to classify collateral consequences as punishment given their nonretributive basis); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1432 (2001) ("While increasingly designed to prevent dangerous persons from committing future crimes, the system still alleges that it is doing criminal 'jus-

despite legislative desire otherwise, might underlie the persistence of the criminal-civil distinction in this regard. The next two Parts illustrate why collateral consequences align with utilitarian purposes for punishment, labeled that way or not by courts.

II. Utilitarian Purposes and Collateral Consequences

On the surface, collateral consequences might seem retributive given that passions for desert could support them, but they also reflect two different social impulses: control through incapacitation and deterrence and the maximization of social welfare.[116] Both are the logical outgrowth of utilitarian approaches to punishment. Jeremy Travis has argued harsh sentencing over the past four decades has been criticized as the result of "tough on crime" measures that amount to the reemergence of retribution in the form of long periods of incarceration.[117] But the indirect consequences associated with or after incarceration are primarily designed to protect the public, categorize risky individuals, and prevent future crime.[118] Stigmatization, actuarial justice, and economic analyses of the administration of justice all can be said to underlie collateral-consequences policy.[119] And their unduly harsh nature reflects traditional utilitarian cost calculations that seek high returns in public safety for little cost.[120]

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tice' and imposing 'punishment.' . . . One can 'restrain,' 'detain,' or 'incapacitate' a dangerous person, but one cannot logically 'punish' dangerousness."). If the alternative as presented above is true, then fewer collateral consequences would be *punishment*, and thereby retributive constraints would be applicable to fewer collateral consequences.

116 The implications of this point actually go beyond this Article. For if the primary feature of collateral consequences is that they are utilitarian, then no wonder determining the difference between the criminal and the civil spheres is so difficult, or arguably mired in tautology.

117 Travis, *supra* note 2, at 27; *see also* Simon, *supra* note 22, at 2140 ("Throughout the 1980s and 1990s retributive themes were combined with appeals to increase preventive controls.").

118 *See* Dolovich, *supra* note 20, at 98 ("The logic of this organizational system is simple: those who are judged undesirable or otherwise unworthy lose their status as moral and political subjects and are kept beyond the bounds of mainstream society."); Ewald, *supra* note 76, at 95 ("[M]any collateral sanctions are said to pursue classic regulatory aims, reducing risk and protecting the public's 'health, safety, or right to peaceful enjoyment' . . . .").

119 *See* Ewald, *supra* note 76, at 80 ("Several core concerns of the criminological literature, such as the contemporary desire to denigrate and stigmatize offenders, the move toward 'actuarial justice,' and the pervasive desire to reduce costs, do capture important elements of American collateral sanctions policy.").

120 *See* Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 Yale L.J. 315, 321 (1984) (noting how the utilitarian model "suggests that the balance between punishment and enforcement levels should be heavily tilted toward punishment").

While modern-day access to previously unobtainable data has allowed the impulse to control risk to take criminal justice by storm,[121] the logic behind collateral consequences was there first. Antirecidivism measures, risk assessments,[122] big data collection of criminal record history information,[123] and the explosion of probation and parole supervision[124] are all manifestations of the same impulses pursued in policy. These developments illustrate the move toward public-safety-based rationales over the last half century.[125] In the purest philosophical sense, collateral consequences preceded these modern policy interventions as legislatively enacted, low-cost interventions that incapacitated ex-offenders.[126] They operated to prevent occasions for crime by those judged to be risky by disallowing the risky (or dangerous) from acting in certain arenas. The judgment might not have been as scientific, but legislatures were operating on philosophical cost-benefit analysis

121 *See generally* J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1336–37 (2011) (noting the desire to sentence "smarter").

122 *See* Jordan M. Hyatt et al., *Follow the Evidence: Integrate Risk Assessment into Sentencing*, 23 FED. SENT'G REP. 266, 266 (2011) (noting how risk-assessment tools merely put science behind the judgments already made clinically by judges). Actuarial risk assessment has gained steam in a number of ways, including with an endorsement by the American Law Institute and its enshrinement in the Model Penal Code. MODEL PENAL CODE: SENTENCING § 6B.09 (AM. LAW INST., Proposed Final Draft 2017). But some scholars have cautioned against its widespread use, calling for critical inquiry. *See, e.g.*, Collins, *supra* note 16, at 59–60; Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490, 490 (2018); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489, 505 (2016); Sidhu, *supra* note 18, at 702–04 (criticizing the disconnect between actuarial risk assessment and punishment theories); Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 817 (2014); Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail*, *in* 3 REFORMING CRIMINAL JUSTICE 21 (Erik Luna ed., 2017). For an especially strong criticism of risk assessment, see BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE (2007) (lamenting how efficiency has replaced traditional theories of punishment as the first principle of criminal law).

123 *See generally* JAMES E. JACOBS, THE ETERNAL CRIMINAL RECORD (2015); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1 (2016).

124 *See generally* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016); Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53 (2017).

125 WILLIAM R. KELLY WITH ROBERT PITMAN & WILLIAM STREUSAND, FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 176–77 (2017) (emphasizing movement away from retributive principles toward antirecidivism measures); Dolovich, *supra* note 20, at 100 (mentioning how recent scholarship shows that alleged rehabilitative ideal during the latter half of twentieth century was actually contingent on regional differences in approach); Robinson, *supra* note 115, at 1433–34 (describing how rising crime after the 1950s led to prioritization of deterrence).

126 Dolovich, *supra* note 20, at 99 (noting how collateral consequences purposefully burden newly released offenders, reflecting "society's commitment to permanent exclusion proves to reach beyond the prisons"); *id.* at 115 ("In the American context, however, far from working to alleviate the burdens of reentry, the state instead exacerbates them.").

principles, using past crimes as a proxy for future dangerousness.[127] Ex-offenders were sorted into classes, which resulted in *de facto* incapacitation.[128] Collateral consequences allowed the risky to be monitored directly or, at the very least, by a pervasive network of restrictions that restrict the ability to "move" or cause damage in society.[129] The fact that many collateral consequences, enacted with long-term or lifetime bans, mirrored the rise in mandatory, but judicially regulated sentencing, illustrates this point.[130]

Notably, reforms to the Model Penal Code that emphasized utilitarian purposes for punishment, with only a limited role for retribution, occurred around the same time.[131] State legislatures added collateral consequences while adopting the Model Penal Code, affirming support for utilitarian theories of punishment. Some legislative efforts were thwarted by state courts in the criminal context when courts sought to judicially reinject retributivist principles into the state criminal codes.[132] The same type of judicially driven application of retributivist constraints did not occur with respect to collateral consequences though, leaving them largely unrestrained and too popular to resist.[133]

The other policy underlying collateral consequences is welfare maximization, which also rests on cost-benefit analysis. The rise of collateral consequences coincided with the rise of the social welfare state. As the opportunities and benefits afforded by the state grew, the social disruption caused by an offender against the welfare state grew as well, which required even more policies to stabilize the disruption. Again, while this might sound

127 As Erin Collins has argued, this is exactly what actuarial risk assessment does. Collins, *supra* note 16, at 82 ("For parole purposes, actuarial risk assessment identifies recidivism risk as a proxy for public safety risk."). Interestingly, certificates of relief as a remedy for the negative effects of having a public criminal record seem to impliedly do the same thing.

128 *See* Ewald, *supra* note 76, at 100.

129 *See id.* at 99–100 ("[R]ather than focusing on close and direct examination of a unique person, actuarial justice tries to reduce risk by classifying people based on 'virtual identity stored in dossiers and databases.'" (quoting David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5, 26–27 (2008))).

130 *See* Dolovich, *supra* note 20, at 103–04 (noting how logic behind mandatory sentencing involved permanent moral judgment about the offender); *id.* at 119 ("[T]he collateral consequences of felony convictions are frequently imposed across the board regardless of the precise nature of the felony . . . .").

131 *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1320 (2000) (referencing how section 1.02 of the Model Penal Code omitted retribution).

132 *See id.* at 1319.

133 As Cotton illustrates, state legislatures clearly chose utilitarian theories of punishment when adopting the Model Penal Code. But pushback from courts suggests the relevance of retribution, something both Paul Robinson and Dan Markel have written about extensively. This Article attempts to advance the conversation further, noting the relevance of retributivism to collateral-consequences regimes.

like some modern forms of retributivism,[134] it is actually social tinkering to ensure that the offender's advantage does not have ripple effects on law-abiding citizens.[135] Like in ancient times, two camps were created, justified by past criminal activity, to properly allocate resources. Unsurprisingly, hyperactive policing, followed by a movement for efficient policing, has coincided with a rise in collateral consequences.[136]

The philosophical underpinnings of these policies stem from utilitarian purposes of punishment. As Jeremy Bentham put forth, the primary purpose of punishment is crime prevention to maximize public safety.[137] Bentham's concern was maximizing happiness for the community by reducing crime.[138] Prescriptions built on consequentialist understandings of welfare follow, purportedly justifying deterrence, incapacitation, and rehabilitation. There is no limiting principle, other than the internal calculations of pleasure and pain, to prevent against widespread instrumentalization of offenders.[139] Punishment is justifiable as long as it can be shown that more good will come than harm from the punishing.[140] Criminal sanctions are contingent on social utility.[141] And this should be accomplished by minimizing the quantity of costs to result in efficient administration of the system.[142] The most well-known purposes are deterrence and incapacitation. Rehabilitative and communicative purposes also have utilitarian roots, although they are less connected to collateral consequences.[143] It is perhaps ironic that collateral consequences are named as such given their consequentialist roots. For they

134 *See, e.g.*, Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 478 (1968) (unfair-benefits theory).

135 *See* Travis, *supra* note 2, at 19 ("The principal new form of social exclusion has been to deny offenders the benefits of the welfare state.").

136 *See generally* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761 (2012).

137 *See* JEREMY BENTHAM, *Principles of Penal Law*, *in* 1 THE WORKS OF JEREMY BENTHAM 365, 396 (photo. reprint 1962) (John Bowring ed., Edinburgh, William Tait 1843) ("General prevention ought to be the chief end of punishment, as it is its real justification.").

138 *See* Tonry, *supra* note 21, at 128 (describing Bentham as concerned with maximizing happiness for the community by reducing mischief and crime).

139 *See* Kleinfeld, *supra* note 93, at 1015 ("Instrumental rationalism has no source of constraint, no counterbalancing force, except better instrumentalism, which is unreliable, especially in particular cases. The principle of instrumental punishment with respect to the worst offenders is 'more, cheaper.'").

140 *See* PACKER, *supra* note 108, at 39 ("Its premise is that punishment, as an infliction of pain, is unjustifiable unless it can be shown that more good is likely to result from inflicting than from withholding it.").

141 *See* Sidhu, *supra* note 18, at 678.

142 Seidman, *supra* note 120, at 320 ("[U]tilitarians have begun with the premise that the criminal justice system should minimize the sum of the costs of crime and crime prevention.").

143 A common philosophical criticism of rehabilitation is whether it is rehabilitation for the *defendant's* or the *community's* sake. In the sense that collateral consequences frustrate reentry, it might be argued that time-based collateral restrictions are designed to allow the defendant to rehabilitate himself for the community's sake.

relate *directly* to utilitarian purposes of punishment and a superficial imposition of desert-based theories.[144]

The utilitarian justifies punishment by pointing to its effects: deterring others and the defendant, reformation of the defendant, and its overall reduction of crime, manifested in heightened safety, fewer crimes, and overall cost savings to authorities. Those are goods to be pursued by punishment. As such, punishment is entirely instrumental, pointing toward the prevention or reduction of future crime, which is perceived as a greater evil than the punishment itself.[145] Bentham admitted that the immediate "end of punishment [was] to control action."[146]

Deterrence aims to prevent future crimes by signaling how crime results in severe punishment. The idea is that punishment—whether actual or simply threatened—will prevent others and the person being punished from committing crimes.[147] It presumes rational actors who "weigh the qualities and probabilities of punishment before acting."[148] The hope is that either threatened or real punishment will inhibit future actors from committing crimes.[149] It operates according to the following principle: the value of the sanction must be greater than the apparent value of the pleasure that might be obtained by the offender.[150] In practice, this means that punishments should be severer for more serious crimes to induce, at worst, offenders to commit less severe crimes. Those punishments should be heightened if the probability of detection is low.[151] Harsh sentencing regimes for crimes that are not easily detectable (e.g., possession of controlled substances) can result.[152]

This means that deterrence has two sides: specific and general deterrence. Specific deterrence aims to prevent future crimes by a particular offender or type of offender. General deterrence optimistically takes aim at the general population. The effectiveness of deterrence hinges on the would-be offender's knowledge of the potential sanction, ability to calculate the probability of detection, and to weigh the severity of the potential sanc-

144 *See* Robinson, *supra* note 115, at 1432.

145 *See* PACKER, *supra* note 108, at 39.

146 *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 n.1 (Clarendon Press 1907) (1789) (referring to control for "*reformation*," for "*disablement*," or for "*example*").

147 *See id.*

148 Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 181 (2008).

149 *See* PACKER, *supra* note 108, at 39; Fagan & Meares, *supra* note 148, at 175.

150 *See* BENTHAM, *supra* note 137, at 396 ("If the apparent magnitude, or rather value of [the] pain be greater than the apparent magnitude or value of the pleasure or good he expects to be the consequence of the act, he will be absolutely prevented from performing it.").

151 *See* Tonry, *supra* note 21, at 128.

152 *See* Arit John, *A Timeline of the Rise and Fall of 'Tough on Crime' Drug Sentencing*, ATLANTIC (Apr. 22, 2014), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/.

tion.[153] It also hinges on informal, social actors to help with the control.[154] Actors will refrain from engaging in crimes after calculating that doing so will result in a bad outcome or, to use traditional philosophical language, pain.[155] Although the psychological underpinnings of deterrence have been studied at length,[156] resolution does not matter for this Article. Whether deterrence theory presumes a rational or impulsive actor, or some other calculation on the part of the would-be criminal,[157] the intervention is designed to control behavior (autonomous or not) to minimize the possibility of future crime.[158] As such, the law is designed to steer outcomes based on whatever the human condition is.

Deterrence has been criticized on several grounds. A common knock against deterrence is that it is ineffective due to underreporting of crime.[159] More foundationally, there are epistemic issues relating to utilitarian thought that undermine the ability to truly know the effect of deterrent measures. In particular, should calculations of pleasure and pain account for objective or subjective notions of pleasure?[160] Additionally, many measures lack the ability to compare with a counterfactual. For example, while recidivism rates may say something about *specific* deterrence, with only *incomplete* data showing what crime rates would be like without the measure, it is impossible to know the broader efficacy of the measure.[161] Further, discretion within the American criminal justice system makes calculating the probability of punishment difficult, which could require severe penalties to maximize deterrence.[162] It also could lead to the off-loading of punishment to private actors in the form of collateral consequences.[163] That sounds familiar.[164]

153 *See* Fagan & Meares, *supra* note 148, at 181.

154 *See id.* at 182.

155 *See* PACKER, *supra* note 108, at 40.

156 *See id.* (describing how deterrence has been criticized for assuming rational, rather than impulsive, actors).

157 *See id.* at 42 ("[I]t is not only Bentham's rational hedonists who are touched by the power of deterrence, but all those who are sufficiently socialized to feel guilty about breaking social rules and whose experience has led them to associate feelings of guilt with forms of punishment.").

158 *See id.* at 44 (describing how the criminal law reinforces social stigma, such that its deterrence value relates to shame and fitness).

159 Robinson & Darley, *supra* note 108, at 458–60.

160 *Id.* at 455.

161 PACKER, *supra* note 108, at 39–40; *see also* Fagan & Meares, *supra* note 148, at 181–82 ("[M]odern deterrence research has failed to find consistent evidence of the deterrent effects of punishment. Empirical evidence . . . remains speculative and inconclusive . . . ."). Professors Fagan and Meares make a forceful argument that informal sources of social control are necessary to make deterrence fully effective and that the decline of such forces is one reason why deterrence has been less successful than originally intended. *See generally id.*

162 Robinson & Darley, *supra* note 108, at 463.

163 *See generally* Douglas Husak, *Does the State Have a Monopoly to Punish Crime?*, *in* THE NEW PHILOSOPHY OF CRIMINAL LAW 97 (Chad Flanders & Zachary Hoskins eds. 2016).

Incapacitation is a justification for punishment that responds to predicting dangerousness. Its obsession is ensuring public safety through the prevention of reoffending.[165] Professor Herbert Packer called it the dark underside of rehabilitation.[166] It rests on the "prediction that a person who commits a certain kind of crime is likely to commit either more crimes of the same sort or other crimes of other sorts."[167] Like rehabilitation, it is offender-centric. Incapacitative logic underlies many collateral consequences that restrict the ability of offenders to work in certain fields, join certain professions, or enter certain physical spaces. The offender has shown her cards and, as a dangerous individual, might play them again, in the same fashion.[168] Never mind that the predictive models are less than stellar.[169] What results is what Professor Gabriel Chin has referred to as punishment based on one's *status* as being labeled dangerous.[170]

That is why incapacitation is currently the topic of much debate in the bail and sentencing contexts, as scholars are trying to devise ways to accurately predict dangerousness.[171] Doing so would in theory mitigate status harms that currently touch too many people. Similar arguments could apply to those trying to determine who is worthy of rehabilitation. However, previous efforts at refining prediction models have not been very good.[172] High false-positive rates run counter to the idea that the innocent should not be punished, not to mention punished preemptively.[173] The potential effect of such models on exacerbating racial disparities already present within the system is particularly distressing.[174] Perhaps most importantly, incapacitation based on prediction could remove blameworthiness from the equation entirely because it would seem to be most justified for those with the least amount of control.[175] Put another way, incapacitation and rehabilitation

164 *See* Stuntz, *supra* note 21 (discussing how constitutional law provides subsidies for severe punishment).

165 *See* Dolovich, *supra* note 19, at 271–72; Jessica M. Eaglin, *Against Neorehabilitation*, 66 S.M.U. L. Rev. 189, 197 (2013).

166 Packer, *supra* note 108, at 55.

167 *Id.* at 49.

168 *Id.* ("Incapacitation . . . is a mode of punishment that uses the fact that a person has committed a crime of a particular sort as the basis for assessing his personality and then predicting that he will commit further crimes of that sort.").

169 *Id.* ("It is an empirical question in every case whether the prediction is a valid one.").

170 *See generally* Chin, *supra* note 36.

171 *See generally, e.g.*, Collins, *supra* note 16.

172 *See* Robinson & Darley, *supra* note 108, at 465–66.

173 *See id.* at 466 ("Among those who look to incapacitation as a panacea for what they see as crime out of control, this is likely to lead to a dynamic in which, seeking to avoid letting out of prison those who offend again, we increasingly move to assign incapacitative sentences to those for whom the prediction of dangerousness is weaker and weaker, a fact that arouses concerns for justice in many who think about the issue.").

174 *See* Collins, *supra* note 16, at 106; Sidhu, *supra* note 18, at 709; Sandra G. Mayson, *Bias In, Bias Out*, 128 Yale L.J. 2218 (2019).

175 *See* Packer, *supra* note 108, at 51.

seem to result in state actions that lead to questions about encroaching autonomy beyond reasonable limits because the focal point of the measure is what is best for everyone but the offender. And it is not clear that constraints can be found in the penal theories underlying the measures in the first place,[176] in existing legal doctrine,[177] or in policy given risk aversion amongst decisionmakers.[178]

The motivation behind some collateral consequences indicates the link to public-welfare concerns. Although they came about in the "tough on crime" era, which has retributive connotations, arguments behind the laws also emphasized incapacitation and deterrence given the social benefits that would be lost by the offender.[179] When enacting prohibitions on federal benefits for drug felons, Senator Phil Gramm stated: "[I]f we are serious about our drug laws, we ought not to give people welfare benefits who are violating [the] nation's drug laws."[180] Intervention to take away an otherwise existing benefit will cause individuals thinking about offending to refrain from offending. Even if the law rests on impulse-driven deterrence theory, the premise is simply modified so that it reflects that the *loss* of benefits will result in greater pain than the use of drugs. In either instance, the draconian antidrug collateral consequences are supported by deterrence theory.[181]

Licensing restrictions on the ability of ex-offenders to enter a profession might be conceived of the same way, as well as in line with incapacitation. States bar violent criminals from becoming barbers because scissors could be a weapon, or from working in nursing homes because vulnerable patients could be especially hurt. Nurses cannot have drug convictions because they might abuse patients or themselves when handling drugs. Drivers with too many DUIs, or other criminal, vehicular offenses, lose the ability to drive in order to hopefully prevent future accidents. All of these measures signal to would-be offenders that the consequences of wrongdoing are stark.

176 *See id.* at 57–58 ("I am impelled to ask whether a theory of punishment that requires acquiescence in compelled personality change can ever be squared with long-cherished ideals of human autonomy.").

177 *See* Corda, *supra* note 48, at 82 (noting how not one civil regulation has been struck down under the *Mendoza-Martinez* factors).

178 GABE MYTHEN, UNDERSTANDING THE RISK SOCIETY: CRIME, SECURITY AND JUSTICE 52–57 (2014).

179 *See* LaFollette, *supra* note 16, at 248 ("These collateral consequences were adopted in the mid 1990s as on instantiation of the 'get tough' approach to crime that emerged in the 1970s. The most common argument for these penalties was that they would deter people from committing drug crimes." (footnote omitted)).

180 *Id.* (quoting Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, *in* INVISIBLE PUNISHMENT, *supra* note 2, at 37, 42)

181 However, there is significant empirical evidence to suggest that this theory has not been validated. *See id.* at 249 (discussing how drug crimes *increased* after collateral consequences were increased). Of course, whether offenders are aware of these consequences prior to deciding to commit crimes could undermine the value of such empirical evidence. But after almost twenty-five years, the word has gotten out.

Further, they are designed in response to perceived risk of future behavior that will cause harm, using convictions or even arrests as proxies for riskiness. This has led some to classify them as risk-prevention regulations rather than punishment. But it is misleading to refer to these restrictions as exclusively "addressed to the offender's future behaviour."[182] That is because assessments about risk of future behavior, by using a conviction as a proxy for dangerousness, are by definition inextricably linked to past behavior. These measures might be justified as specific and general deterrents, combined with other justifications. The barber, facing the prospect of losing his coveted license, will not physically act on his rage, which resembles specific deterrence in action. General deterrence causes the barbers in training to refrain as well. But if she does act out, the collateral consequence is justified by incapacitation, as the offender has shown her hand: that she cannot be trusted not to cause harm in the future.[183] Hence, licensing restrictions relate to deterrence and incapacitation premises.

Other collateral consequences with deterrence- and incapacitation-based roots relate to political participation or the forfeiture of constitutional rights: felon disenfranchisement and the ability to judge one's peers by serving on a jury. These measures effectively strip rights possessed exclusively by citizens. Felon disenfranchisement laws do just that: they signal that some acts are so serious that they warrant the forfeiture of rights associated with citizenship. While retributive concerns could certainly motivate such a measure, the utilitarian motivation goes like this: think twice before committing a felony that will take away the ability to vote. The utilitarian policy, in action, more easily results in permanent disenfranchisement because once the offender is labeled dangerous, or in need of incapacitation, any length for the ban is justifiable. The thought of being governed by a system without a say, where one cannot judge one's peers, should make the would-be offender think again. In a liberal society that views citizenship as the vehicle to privileges, the measure is designed to deter, and is justified by incapacitation as the felon has shown that he cannot be trusted to participate in self-governance.[184]

The authority to enact such measures comes from the belief that the state has an obligation to protect the public from future harm.[185] The state makes a judgment about which types of crimes and harms it would like to prevent and which types of offenders it would like to impair moving for-

182 Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 608 (1997).

183 *See* Dolovich, *supra* note 20, at 115–16 (describing how bans on public housing, education, employment, and access to benefits inhibit reintegration in order to further exclusion).

184 *See* Travis, *supra* note 2, at 19 ("[T]hese punishments have become instruments of 'social exclusion' . . . , a distancing between 'us' and 'them.'" (footnote omitted)).

185 *See* LaFollette, *supra* note 16, at 253.

ward.[186] It also makes a judgment about the utility of such interventions, which may be cause for criticism in its own right, given the empirical research showing that some interventions have criminogenic effects.[187] Nevertheless, this is where deterrence and incapacitation drive collateral-consequences policy. The state ultimately decides to restrict membership in a profession, the ability to obtain a license, or the power to freely move in and out of social institutions, to a smaller class of people.[188] The threat of intervention into family situations is designed to prevent domestic harm. The state is effectively communicating that committing this crime results in suffering. This signaling by the state operates to deter, and the restriction itself operates to mitigate risk by incapacitating offenders.[189] Both punishment purposes aim to maximize welfare and minimize harm. Collateral consequences are logically connected to utilitarian punishment theory, albeit conveniently classified under a different name.[190] The language of welfare maximization, also claimed by regulation, allows for the confusion.

But the roots are deep, which explains why the range of collateral consequences has increased significantly.[191] There are upward of forty thousand *different* collateral consequences nationwide, with an explosion of enactments from over the past half century.[192] Professors Katherine Beckett and Steve Herbert have shown how the state marks people and excludes them from

186 *See* Dolovich, *supra* note 19, at 271–72 ("To understand what motivates the American impulse to respond to all but the most minor infractions with prison, we must look to another theory of punishment that has taken center stage in recent years: the theory of incapacitation, according to which 'offenders are imprisoned . . . to restrain them physically' . . . . The concern is with possible future dangerousness . . . . [T]o punish with social exclusion makes perfect sense." (first omission in original) (quoting FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION 3 (1995))).

187 Deterrence certainly has *epistemic* issues that need to be resolved, especially in particular issues: Can it be conclusively shown that such preventative collateral consequences are warranted? Are risk assessments to be trusted? *See* Collins, *supra* note 16, at 95–96 (detailing studies questioning the utility of risk-assessment-based interventions, as well as their criminogenic effects for low-risk offenders); Dolovich, *supra* note 20, at 117 (noting how collateral consequences increase likelihood of reincarceration).

188 *See* Dolovich, *supra* note 19, at 274 (describing removing offending individuals from the "shared public space").

189 Dolovich, *supra* note 20, at 117 (noting how formal, postsentence impediments "consign[ ] to social marginalization"); Travis, *supra* note 2, at 26 ("They also operate as a form of selective incapacitation—for example, by keeping sex offenders away from certain locations and keeping drug offenders away from public housing.").

190 *See* Simon, *supra* note 22, at 2169 ("[A]t the same time retribution and deterrence were being emphasized in raising sentences for crimes in the 1980s, purely incapacitative measures like pretrial detention were also being instituted . . . .").

191 *See id.* ("The rapid proliferation over the last quarter century of laws that link long, and typically mandatory, incapacitative sentences to past felony convictions, in combination with otherwise legal activities (like being a felon in possession of a weapon) or relatively minor crimes, gives prosecutors enormous discretion to eliminate individuals from society in large numbers . . . ." (footnotes omitted)).

192 *See Collateral Consequences Inventory*, *supra* note 39.

physical spaces, creating "zones of exclusion."[193] Order-maintenance offenses and civil restrictions, like low-level forms of trespass[194] that prevent movement into public spaces, are incapacitative.

This is the logical outgrowth of the new penology, which prioritizes tinkering to minimize the possibility of harm.[195] In other words, once the state prioritizes public-safety rationales for punishment as the driving force behind interventions, there are endless opportunities because the lure of minimizing harm through the control of rational decisionmaking or by treating impulses breeds innumerable possible interventions.[196] It is always the *next* collateral consequence that will prevent future harm, either by deterring the rational potential lawbreaker or restraining the impulsive.[197] The law restricting employment in the name of preventing violence is characteristic utilitarian-based punishment.

Interestingly, even recent efforts to roll back collateral consequences operate along the same lines, prioritizing the protection of public safety, or pointing to studies showing that some consequences are criminogenic, to justify reform.[198] Many of these reforms have followed the Collateral Consequences in Occupational Licensing Act (CCOLA) model legislation, which suggests licensure denials are only justifiable if predictions about future behavior give rise to public-safety concerns.[199] New Hampshire's law allows disqualification upon "public safety" grounds or if the petitioner has failed to show she has been effectively rehabilitated.[200] Laws in Indiana and Wisconsin require evidence of rehabilitation;[201] Kansas's law references the general welfare.[202] All of these reforms operate along utilitarian cost-benefit calculation lines, emphasizing that licensing reform is necessary to limit recidi-

193 KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 8, 14–16 (2010).

194 *See* Dolovich, *supra* note 20, at 118 (describing municipal ordinances designed to restrict entry into public spaces).

195 Other scholars have made a similar argument, albeit in other contexts. *See, e.g.*, Eaglin, *supra* note 165, at 194; Eric J. Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 425 (2009).

196 *See* Eaglin, *supra* note 165, at 197 ("Incapacitation removes offenders from society, and the new penology approaches crime as something permanent and unpreventable."); Kleinfeld, *supra* note 93, at 1015 (referencing how instrumentalization has no constraints).

197 *See* Eaglin, *supra* note 165, at 198 ("The expansion of collateral consequences . . . illustrate[s] the theory of total incapacitation."); *see also* ALEXANDER, *supra* note 9, at 137–41 (recognizing how collateral consequences relate to exclusion).

198 *See* Stephen Slivinski, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform* 4 (Ctr. for the Study of Econ. Liberty at Ariz. St. Univ., Working Policy Report No. 2016-01, 2016) (presenting evidence that states with restrictive occupational-licensing laws have higher rates of recidivism).

199 *See Model Collateral Consequences in Occupational Licensing Act*, INST. FOR JUST., https://ij.org/activism/legislation/model-legislation/model-collateral-consequences-reduction-act/ (last visited Feb. 4, 2020).

200 N.H. REV. STAT. ANN. § 332-G:13 (2019).

201 IND. CODE ANN. § 36-1-26-4 (West 2019); WIS. STAT. ANN. § 111.335 (West 2018).

202 KAN. STAT. ANN. § 74-120 (West 2019).

vism.[203] More recently, the United States Commission on Civil Rights made several recommendations, almost entirely on public-safety grounds.[204]

This endless possibility for adjustment through policy interventions is endemic to utilitarian purposes for punishment given their own *epistemic* shortcomings: a lack of concrete, agreeable metrics for pleasure and pain (welfare or harm) and the inability to fully and conclusively determine risk and distinguish it from dangerousness.[205] It also frustrates the ability to reform collateral consequences because the grounds for constraint are not solid. And as Professor Sharon Dolovich points out, this approach fails to appreciate the connection between human complexity and criminal behavior, resulting in overbroad exclusionary measures.[206] Forty thousand collateral consequences show the fruits. Constraints are needed to rein in such punishment.

The next Part turns to that task, pivoting to an unlikely source: retributivism. Although retributivism has been fairly criticized for its own epistemic issues[207] and is often conflated with *punitive ends* to connote harsher punishment, it is worth engaging its built-in safeguards[208] to see if they caution against an expansive number of interventions in the form of collateral consequences. In doing so, it shifts the debate from whether collateral consequences are *useful* to whether they are *deserved*.

III. RETRIBUTIVISM AS A CONSTRAINT

Instead of asking whether collateral consequences are useful, what would happen if the question were whether they are deserved? As mentioned, existing state codes already conceive retributivism as a constraint on punishment. Coupled with older judicial conceptions of collateral consequences as punitive, and following scholarly developments over the past several decades arguing that retributivism could help reduce disproportionate sentencing, that reality suggests that the same argument might be applicable to assessing the validity of collateral consequences.

But conceiving retributivism as a constraint first requires recognition that there is no one theory of retribution and that some are in a better posi-

203 *See* Slivinski, *supra* note 198, at 4.

204 *See* Letter from Catherine E. Lhamon, Chair, U.S. Comm'n on Civil Rights, to Donald J. Trump, President, U.S., Mike Pence, Vice President, U.S., and Nancy Pelosi, Speaker, U.S. House of Representatives (June 13, 2019), *in* U.S. COMM'N ON CIV. RIGHTS, *supra* note 4.

205 *See, e.g.*, Robinson & Darley, *supra* note 108, at 463 (describing how based on current statistics penalties based on deterrence would have to be severely inflated, which would offend the moral sensibilities of the public).

206 Dolovich, *supra* note 19, at 294, 301 ("[W]hat might seem like overinclusivity and thus unfair and gratuitous punishment is in fact sensible and judicious preemptive action taken against people who, by their own criminal conduct, have already sufficiently demonstrated the inherent danger they pose." (footnote omitted)).

207 *See generally* Kolber, *supra* note 10.

208 By this I mean the distributive principles of punishment held by retributivist theories.

tion than others to undercut collateral consequences.[209] Retributive theories of justice have existed for millennia. They are older than Western culture and systems of law and are shared by philosophical thinkers from all parts of the world. In a sense, retributive theories represent an ongoing, perpetual dialogue amongst some of the most well-known thinkers in history, including Aristotle and other ancient philosophers, Jewish and Christian scholars,[210] Kant, Rawls, legal philosophers like H.L.A. Hart,[211] and others.[212] In fact, some have seen the constant reassessment of relevant moral considerations as a great strength of retributivism.[213] The twentieth century saw no shortage of scholars thinking about the relevance of retribution to modern punishment practices, including Professors Herbert Morris, Jeffrie Murphy, Andreas von Hirsch, Antony Duff, John Finnis, and Michael Moore.[214] More recently, legal scholars focused on the viability of retribution in a liberal political order.[215]

209 *See* Cottingham, *supra* note 15; Nigel Walker, *Even More Varieties of Retribution*, 74 PHILOSOPHY 595 (1999).

210 ANDREW SKOTNICKI, CRIMINAL JUSTICE AND THE CATHOLIC CHURCH 4 (2008) ("The ideal end at which punishment aims is the liberation of the offender from all forms of personal and social alienation, and a return to full participation within the community without stigma or further repercussion for the culpable offense."). Professor Skotnicki describes how Biblical teaching connects crime, law, and expiation, such that "once the debt of justice has been paid, full restoration to the community is mandated." *Id.* at 16 (citing Leviticus 5:20–26); *see id.* at 17 (citing Psalms 107:16). He ultimately argues that Catholic theory calls for the "reintegration of the offender" after retribution, with careful attention to the "kind of environment [that] best creates the conditions for the affirmation and inculcation of the virtues." *Id.* at 27. This notion of restorative retribution stems from two conditions: the state's moral obligation to punish and to cause individual and social renewal for the offender. *Id.* at 37.

211 *See* H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, 60 PROC. ARISTOTELIAN SOC'Y 1, 12 (1959), *reprinted in* PUNISHMENT AND RESPONSIBILITY, *supra* note 108, at 1, 12 (referring to retribution as a principle of distributive justice that limits punishment).

212 *See, e.g.*, HART, *supra* note 108, at 230–37; JOHN KLEINIG, PUNISHMENT AND DESERT (1973); Max Atkinson, *Justified and Deserved Punishments*, 78 MIND 354 (1969); Sidney Glendin, *A Plausible Theory of Retribution*, 5 J. VALUE INQUIRY 1 (1971); Donald Clark Hodges, *Punishment*, 18 PHIL. & PHENOMENOLOGICAL RES. 209 (1957); John Laird, *The Justification of Punishment*, 41 MONIST 352 (1931); C.S. Lewis, *The Humanitarian Theory of Punishment*, 3 TWENTIETH CENTURY, no. 3, 1949, at 5, *reprinted in* THEORIES OF PUNISHMENT 301 (Stanley E. Grupp ed. 1971); Herbert Morris, *supra* note 134; C.W.K. Mundle, *Punishment and Desert*, 4 PHIL. Q. 216, 221 (1954); Lisa H. Perkins, *Suggestion for a Theory of Punishment*, 81 ETHICS 55 (1970).

213 *See* Markel, *supra* note 10, at 24 ("What is important to see is that retributive justice is a contested concept, and may remain so in part because of its normativity and complexity."); Mary Sigler, *Humility, Not Doubt: A Reply to Adam Kolber*, 2018 U. ILL. L. REV. 158, 159.

214 Some scholars, such as Joshua Kleinfeld, label Murphy and Duff "reconstructivists." *See* Kleinfeld, *supra* note 25, at 1488, 1501 & n.40.

215 *See, e.g.*, Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157 (2001); Markel, *supra* note 10, at 24 (arguing that retributivism based on moral desert alone struggles to provide normative justification for punishment within a liberal democracy).

Retributivist ideas reemerged in response to concerns about democratic legitimacy, equality, arbitrariness, and proportionality in sentencing regimes.[216] This coincided with the emergence of Rawlsian political theory that articulated reciprocal obligations as central to political citizenship.[217] Feinberg, Morris, and Duff, who are sometimes labeled reconstructivists, then emphasized the communicative value of retributive punishment theory in its ability to project the wrongfulness of crime and its effect on law-abiding portions of the population. Importantly, Morris and von Hirsch articulated a theory of limited, or what might be called negative, retributivism to moderate punishment.[218] This followed H.L.A. Hart's idea of retribution as a limiting principle.[219] Nevertheless, a disjunction persisted between these emphases in the scholarly literature and overly severe, punitive sentencing policy, as well as in the rise of collateral consequences.[220]

This Part does not purport to represent all of the nuances[221] within retributive theories; instead, it aims to point out key retributive premises, in order to lay the groundwork for a retributive accounting of the existing collateral-consequences regime.[222] Those shared premises include recognition that preserving individual and communal dignity is relevant to punishment, that the purpose of punishment is the restoration of individual and communal equilibrium, that punishment should be contingent on desert and proportional, and that the blameworthiness associated with the wrongful behavior is extremely significant to whether and what type of punishment is appropriate. Underlying these premises is a robust recognition that human beings are free and responsible agents in perpetual relationship with the state.[223] This Part engages these components of retributive theories,

216 *See* Tonry, *supra* note 21, at 122.

217 *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

218 *See* Morris, *supra* note 212; Tonry, *supra* note 21, at 122–23.

219 *See* Hart, *supra* note 211, at 12. Hart's theory is not without its critics. *See, e.g.*, John Morison, *Hart's Excuses: Problems with a Compromise Theory of Punishment*, *in* THE JURISPRUDENCE OF ORTHODOXY: QUEEN'S UNIVERSITY ESSAYS ON H.L.A. HART 117, 125–27 (Philip Leith & Peter Ingram eds., 1988) (criticizing Hart for failing to recognize that restricting punishment on the basis of desert assumes some amount of desert is justified on nonutilitarian grounds).

220 *See* Stuntz, *supra* note 21, at 849–50 (noting rise of severe punishment following the constitutional criminal procedure revolution); Tonry, *supra* note 21, at 123. As mentioned above, reformers between the 1970s and 1990s often conflated retributive themes with incapacitative practice.

221 *See* Andrew Oldenquist, *An Explanation of Retribution*, 85 J. PHIL. 464, 474 (1988) (labeling retributive justice as a "cluster concept").

222 But this Article does argue that the shared premises almost certainly caution against the existing collateral-consequences regime.

223 Markel, *supra* note 215, at 2194. Markel's project of justifying retribution in a liberal, democratic order is noteworthy. Although an in-depth treatment is beyond the scope of this Article, the distinction between moral and political retributivism (more traditionally labeled legal retributivism) is a significant one. It is my position that either approach to retributivism would view the existing collateral consequences regime skeptically, although some versions of moral retributivism might do so more sharply given their serious concerns

acknowledging the work of several prominent retributive theorists. It suggests retributivist skepticism of collateral consequences is warranted, concluding a full-blown retributive accounting is necessary to develop how retributive insights might benefit collateral-consequences reform.[224]

A. Responsibility and Blameworthiness

Retributive theory comes in many forms. One admittedly crude division might involve pre-Kantian and post-Kantian theories of retribution. Some scholars have distinguished theoretically and empirically between revenge-based retribution from desert-based retribution.[225] As Professor John Cottingham noted, retributive theories entertain notions of repayment, desert, the moral significance of blameworthiness, the role of satisfaction for the community, fairness, and communication about wrongfulness.[226] Professor Nigel Walker astutely added to Cottingham's classifications by recognizing that some theories relate to rights whereas others prioritize duties.[227]

Retributive theories, as offender-centric, presume human responsibility for human actions.[228] Repayment theories aim to make offenders pay the price for committing crimes.[229] Desert theories inflict punishment because it is deserved, although the relationship between desert and repayment is complicated.[230] Kantian thought pervades both, as well as the notion that

about calibrating blameworthiness to punishment. *See infra* notes 228–34. However, older versions of retributivism may go in different directions given certain political, moral, and social premises. *See, e.g.*, PETER KARL KORITANSKY, THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT 39–67 (2012) (critiquing modern theories of retributivism and explaining how they are contingent on certain philosophical first principles not shared by all retributivists).

224 The complete development of this theory can be found in a companion paper: Brian M. Murray, *Retributivist Reform of Collateral Consequences*, 52 CONN. L. REV. (forthcoming 2020).

225 *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); Monica M. Gerber & Jonathan Jackson, *Retribution as Revenge and Retribution as Just Deserts*, 26 SOC. JUST. RES. 61 (2013) (describing survey results indicating that community members conceive of retribution as either an outlet for retaliation or a means to restoration, and postulating the philosophical antecedents for both positions).

226 *See* Cottingham, *supra* note 15, at 238–45. Interestingly, some of the attributes listed by Cottingham seem to smuggle in utilitarian thinking. Herbert Packer makes this point as well, noting how satisfying the community's desire for revenge in order to mitigate the possibility of other, socially undesirable reactions is actually an argument from utility. PACKER, *supra* note 108, at 37 ("[P]unishment is justifiable because it provides an orderly outlet for emotions that, denied it, would express themselves in socially less acceptable ways."). Of course, the type of retributivism at issue, and whether it comprehends a role for cabining emotional responses to crime, is crucial to Packer's observation.

227 *See* Walker, *supra* note 209, at 604.

228 *See* PACKER, *supra* note 108, at 37; Markel, *supra* note 215, at 2194.

229 *See* Cottingham, *supra* note 15, at 238.

230 *Id.* at 239.

mere violation of a law justifies punishment.[231] Modern thinkers such as Michael Moore, building on earlier notions of retribution, emphasized how retribution imposes upper limits on punishment by focusing on moral desert.[232] This came to be known as negative retributivism. Guilt is a necessary condition for punishment, meaning it "is permissible but not obligatory to punish the guilty, and only the guilty."[233] The corollary is that punishing those who do not deserve to be punished is morally impermissible.[234] This is why modern theories are often referred to as deontological, although there are teleological theories of retributivism.

These ideas suggest that retributive theory would hold that a punishment regime has to account for human dignity and should refrain from the instrumentalization of persons. This relates directly to preventive restraints whether classified as criminal punishment or not by courts.[235] Second, a proper concern for blameworthiness, and innocence, is in order. And third, while consequentialist theories might be utilized in order to craft *precise* sentences, they cannot be overinclusive.[236] Utilitarian purposes might be utilized for crafting *specific punishment* so long as the justification for *punishment overall* is retributive, reflecting a precise blameworthiness calculation manifested by distributive limits (or a ceiling for punishment).[237] Whereas retribution justifies, other theories might be called upon to specify the punishment within that justification. In short, when it comes to collateral consequences, making the first question whether they are deserved alters the rest of the analysis.

The above concepts naturally flow into two very well-known components of retributive theories of punishment: the idea that punishment should be proportionate to the crime[238] and account for blameworthiness.[239] For many retributivists, intentional, or at least knowing, wrongdoing is a precon-

231 *Id.* at 240 ("[T]he breaking of a law is, in itself, a sufficient condition for just punishment.").

232 Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179 (Ferdinand Schoeman ed., 1987) ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it." (emphasis omitted)).

233 Walker, *supra* note 209, at 601 (referencing Cottingham).

234 *See* Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 31 (2009); Moore, *supra* note 232, at 179 ("Retributivism is the view that punishment is justified by the moral culpability of those who receive it." (emphasis omitted)).

235 Markel, *supra* note 10, at 12 n.28 (noting how Duff criticized the criminalization of dangerousness).

236 Emad H. Atiq, *What Unconditional Credence in Individual Desert Claims Does Retributivism Require?*, 2018 U. ILL. L. REV. 138, 139 ("[T]he retributivist will only pursue future crime prevention subject to a strict moral side constraint: the good consequences cannot be purchased at the cost of punishing those who do not deserve it.").

237 Koritansky, *supra* note 15, at 334 ("[T]he goals of rehabilitation, deterrence, and the protection of society are morally significant goals of punishment just as retribution is, even if retribution is the primary goal that gives punishment its defining character.").

238 Bradley, *supra* note 110, at 118 (noting how the punishment could be "limited to the disturbance created by this or that discrete criminal act"); Robinson & Darley, *supra* note 108, at 492.

dition for punishment. Some measure of moral blameworthiness is required, and some crimes require this more than others. More importantly, the commission of crimes occurs along a spectrum of voluntariness. So punishment should be calibrated to how much the will of the offender actually usurped the baseline situation of equality that was previously undisturbed.[240] This inquiry requires a proper appreciation for context, including the social and political backdrop. Because retribution leaves room for reasonable quantities of punishment, and accepts the pursuit of secondary aims of punishment, the theory contains generational flexibility.[241]

Put simply, an offender's blameworthiness, situated against the broader social situation, matters for both justifying punishment *and* the nature of the sanction.[242] As Dan Markel noted, "[a]ny commitment to fairness or proportionality in matters of punishment requires a broader understanding of two things: first, what the magnitude or size of a wrong is; second, how the desirability of addressing that wrong compares against other social needs in terms of pervasiveness, urgency, or cost."[243] In other words, retribution, as a social practice responding to antisocial behavior, must be cognizant of other justice concerns in other social contexts, and the political commitments of a democratic order.[244] Moral retributivists would focus on prepolitical wrongdoing instantiated in law when categorizing blameworthiness. But however desert is conceived, it is a significant limiting principle. Additionally, accounting for gradations of blameworthiness might leave room for mercy in conjunction with the administration of justice.[245] Without getting too far ahead, lifelong prohibitions or liberty constraints would probably be viewed skeptically for almost all but the most disruptive crimes.

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239 Tonry, *supra* note 21, at 128 ("There are many different kinds of retributive theory, but they share the view that moral blameworthiness is an important consideration in determining just punishments.").

240 Koritansky, *supra* note 15, at 335 ("Some crimes, however, are committed less voluntarily than others, and thus involve less of an overindulgence of the will. Under this principle . . . the law can impose more lenient penalties for crimes committed less voluntarily (and therefore less culpably).").

241 Markel, *supra* note 215, at 2206 ("Retribution does not claim that the features of a fitting punishment are absolutely consistent across time and place. . . . An obligation to punish neither entails nor specifies a code of sentencing that is impervious to the variations across history and culture.").

242 Koritansky points out how Aquinas avoids the Kantian problem of the *lex talionis* by appreciating mens rea and how it might inform punishment. Kant was only concerned with external acts. Koritansky, *supra* note 15, at 334.

243 Markel, *supra* note 215, at 2213.

244 *Id.* at 2207 ("Once we consider punishment as a social practice, we have to consider it ex ante, as one attractive practice among others. Once viewed as a social institution responding to a social problem, retributivism must consider the social cost dimension of the wrong and then calibrate the severity of the response.").

245 While the relationship between mercy and justice is a complicated one and certainly beyond the scope of this Article, it is at least worth flagging. By this sentence I mean to imply that focusing on blameworthiness rather than the external act justifying punishment might leave room for lenient treatment otherwise not considered.

Concerns about proportionality and blameworthiness also overlap with the constraint built into retribution that avoids instrumentalization of human beings for other ends. Because ex-offenders maintain moral status despite past wrongdoing, using their example to advance a goal other than restoration of equilibrium is problematic.[246] This marks the most important foundational distinction between retributive and utilitarian theories of punishment and suggests that collateral consequences that aim *first* to prevent risk are problematic under a retributivist account.

A few examples illustrate some of these points. Consider a young male convicted of possession of marijuana. His conviction might result in denials relating to public benefits, such as food stamps or health insurance, or prevent him from obtaining a loan for community college. Government or private employers might refrain from hiring on that basis. Whereas the utilitarian could conceivably justify such measures as part of an overall cost-benefit analysis, the retributivist must immediately ask whether such measures go beyond the desert calibrated for the offense itself. This necessarily involves an assessment of the offender's blameworthiness, which calls for a probing analysis. The retributivist also must ask whether the measure is proportionate, especially in light of an already inflicted direct sentence. But the proportionality question is asked relative to desert, not utility.

Of course, the discussion becomes more difficult with a more severe offense. But even with consideration of a felony—say larceny of significant amount of property or money—the retributivist begins from a starting point of constraint, whereas the utilitarian asks a fundamentally different question. The legislator concerned with incapacitation or deterrence asks: Will what we do with this person help others even if it hurts this person? The retributivist asks: Did this person receive the appropriate amount of punishment based on what he or she deserved? Whereas both questions might provoke a range of answers, and can potentially justify almost any measure, the latter suggests more caution because it focuses more on the thing done than what can be achieved. It might even be said that the retributivist—again operating from the assumption that a direct sentence has already been inflicted—starts from a position of skepticism, even if she could be persuaded that the collateral consequence in question should be conceived as part of the necessary desert.

B. Retribution, Dignity, Community, and Liberty

As mentioned above, retributive theories understand themselves to be dignity protecting.[247] Kant argued forcefully against using human beings as means to an end. Earlier thinkers emphasized individual and community

246 Atiq, *supra* note 236, at 143 ("A key animating principle behind retributivism is the idea that the certain forms of conduct involve objectionable instrumentalization of persons. Individuals with moral status should not be used as mere means." (capitalization altered)).

247 Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, CRIM. JUST. ETHICS, Winter/Spring 1985, at 3, 5 ("Only a theory of punishment built on these values, so a common argument goes, will respect persons as individuals of special worth—a worth

dignity claims underlying retribution.[248] Human beings, both individually and by virtue of being in community, share claim to certain goods that are intrinsically valuable, such that a disruption that results in a pilfering of those goods necessitates punishment in order to recapture and restore dignity across the board.[249] This basic principle has been developed by moral, legal, and political retributivists.[250]

Thus, punishment implicates the maintenance of the political situation inherent to human existence and specific to a political regime.[251] Jeffrie Murphy said as much, noting retributive theories take stock of how the political and social equality between citizens that is disrupted by a wrongdoer justifies punishment.[252] While this first principle has its critics,[253] it underlies

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that is compromised if we feel free to use persons . . . simply as resources for the common good."); Lewis, *supra* note 212.

248 John Finnis, *Retribution: Punishment's Formative Aim*, 44 Am. J. Juris. 91, 99 (1999) ("The debts from which just punishment liberates the offender are not debts to the victims who might be plaintiffs in a civil proceeding or might understandably but wrongly desire revenge. Rather, we may say, those debts are the advantage—the inequality—which, in the willing of an offense, is wrongly gained *relative to all the offender's fellows* in the community against whose law, and so whose common good, the offense offends: the advantage of freedom from external constraints in choosing and acting." (footnotes omitted)); Murphy, *supra* note 247, at 6–7.

249 Finnis, *supra* note 248, at 96 ("The intrinsic worth of what truly benefits me has the same worth in the lives of any other persons who do or could share in that kind of benefit. This truth and our primary understanding of it are the primary source of all human community, more decisive than any emotion of sympathy or subrational instinct of solidarity."); Murphy, *supra* note 247, at 6–7.

250 Markel, *supra* note 215, at 2191–2205 (discussing how his "Confrontational Conception of Retribution" treats human beings as moral agents who must be reprimanded by the state for claiming relational, legal, and political superiority); Markel, *supra* note 10, at 1 ("[O]nce we understand the basis for our presumptive political obligations within liberal democracies, a more capacious approach to establishing criminal laws can be tolerated from a political retributivist perspective." (emphasis omitted)).

251 This is the case whether one conceives of retributivism as built on moral or political desert. Markel, *supra* note 10, at 35 ("Comprehensive retributivists share a common view: they point to the moral wrongs that create a basis for the wrongdoer's just deserts. By contrast, political retributivists like myself point to the offense against a liberal legal order as grounds for punishment by the state."). The moral retributivists assume an inherent moral-political relationship. Moore, *supra* note 234, at 45 (criticizing legal retributivism). The political retributivists focus on the relationship between the "polity and the criminal." Markel, *supra* note 10, at 29. *Political retributivism* is a particular, qualified strand of older, Kantian *legal retributivism*, and focuses on the *moral* logic developed from the political situation. *Id.* at 30 (noting how political or legal retributivists differ in their focuses on relationship between offender and the state); *id.* at 36–37 (conceding that legal retributivism is connected to morality, albeit one that is "distinctly political, institutional, and relational," and then describing how these moral values grow out of the liberal system).

252 Murphy, *supra* note 247, at 6–7.

253 Flanders, *supra* note 10, at 156–57 ("The retributivist sees a continuity between our personal relations and our legal ones, with the legal system in a way mirroring our personal attitudes of praise and blame, and institutionalizing them. . . . [W]hat I want to say is that the retributivist is right about our personal lives, but wrong about our legal ones. The legal

several retributive theories of punishment, despite later differences. Retribution, at root, is a response to disruption of order,[254] whether that disruption is understood as a credit taken by the offender that needs to be paid back,[255] a matter of desert, or the mere act of wrongdoing, and whether classified as an offense against preinstitutional morality or legal-political institutional relationships.[256]

In fairness, some scholars have argued this social restorative component is different from desert-based punishment, instead referring to it as reconstructive.[257] Reconstructivists suggest that retributivism is wholly offender-centric, whereas reconstructivism contemplates the social aspects of punishment, focusing on the reconstruction of the violated normative order. Reconstructive theorists distinguish this theory from retributivism, claiming that the latter is wholly deontological and focused on desert, whereas the "lodestar" for the reconstructivist is solidarity.[258] Accordingly, the criminal law defends moral culture because it is "shared," not simply because it is "right." For purposes of the argument here, the distinction might not matter given that reconstructivism shares some traits with deontological-based retributivism, and even more with predeontological retributivism, meaning

system shouldn't be viewed as an institutionalization of our attitudes about praise and blame. The legal system should be about public safety . . . ." (emphasis omitted)). But personal relations have a de facto legal component because when one acts personally, that action may or may not violate legal rules or occur in a nonlegal space, which of course has legal implications. People are, by definition, in political-legal relationships that overlap with the personal, whether perceived by the persons in relationship or not. Markel makes a similar point when locating retributive values in the liberal democratic order. Markel, *supra* note 215, at 2196 ("Retribution . . . effectuates equal liberty.").

254 PACKER, *supra* note 108, at 38 (recognizing reconciliation with the social order as the concern of the retributivist).

255 Morris, *supra* note 134, at 478; Jeffrie G. Murphy, *The State's Interest in Retribution*, 5 J. CONTEMP. LEGAL ISSUES 283, 289–90 (1994) ("According to Morris, the criminal is a freerider on a mutually beneficial scheme of social cooperation and must be punished to annul the excess unfair advantage his wrongful failure to exercise self-restraint has given him over those citizens who have been law-abiding.").

256 Markel, *supra* note 215, at 2198 ("The retributive encounter thus connects the criminal with the purpose of affirming equal treatment under law; it cannot therefore be claimed that the good of retribution is uncertain or external in character."); Markel, *supra* note 10, at 5 (noting how retribution is built on a belief in moral accountability, equal liberty under the law, and the obligations of the state in response to wrongdoing); Murphy, *supra* note 247, at 3 ("Retributive theorists claim that punishment makes sure that wrongdoers suffer in proportion to their moral iniquity and thereby give up any unfair advantage over others their wrongdoing may have won them."). Markel allows for state punishment when the crime is created through and "consistent with liberal democratic institutions." Markel, *supra* note 10, at 25.

257 Kleinfeld, *supra* note 25, at 1488–90 (referring to how criminal law relates to the shared ethical life, and the restitching of that fabric). My understanding of reconstructivism is that it contemplates the social function of the criminal law as restoration of the social fabric that was violated by the offender, the motivation being the shared moral culture underlying the criminal law.

258 *Id.* at 1492.

teleological or virtue-oriented retributivism that situates offenders in a cultural community. The latter leaves more room for communal restoration, recognizing it as a byproduct of individual punishment because the maintenance of just equality is the objective due to shared individual dignity.[259] In short, the noninstrumentalizing social components of both would view collateral consequences with suspicion. For the retributivist, the pursuit of just equality does the social work, and for the reconstructivist, it is done through the recognition of the link between criminal law and moral solidarity.

It is important to realize here that a significant distinction within theories of retribution will ultimately have a bearing on how one views a collateral-consequences regime. For some pre-Bentham thinkers, punishment was not conceived of as pain. The abovementioned principles contemplate punishment as correction of an individual will gone rogue rather than pure harsh treatment.[260] This has important implications for modern critiques of retributivism, which focus at times on how they result in unduly harsh sanctions. If punishment is wholly conceived of as pain, rather than primarily the rectification of an indulgence of the will, then retribution seems less forward looking. Older versions of retributivism, as well as Markel's political retributivism,[261] conceive punishment as inherently responsive to a will that was "followed . . . excessively,"[262] thereby understanding punishment as inherently restorative rather than just punishment for punishment's sake.[263] Again, as Murphy has articulated at length, the foundational root of retributive theory is the notion of individual and communal order.

As such, it might be said that some retributive theories possess inherently forward-looking components, despite their caricature as always backward looking. This is for two reasons: (1) they seek to restore the disruption,

259 Koritansky, *supra* note 15, at 332. Retributivism has restorative components, including a social one, given that it is response to a violation of the *shared* moral order. This is why some retributivists refer to the "order of just equality." Finnis, *supra* note 248, at 98. Equality is a social term. For a modern take on this, see Markel, *supra* note 215, at 2193 (noting how "retribution for unlawful wrongdoing is internally justifiable because it . . . achieves certain goods").

260 Finnis, *supra* note 248, at 98 (noting how for Aquinas the essence of punishment is that it "subject[s] offenders to something contrary to their wills" (emphasis omitted)).

261 *See* Markel, *supra* notes 10, 215.

262 Finnis, *supra* note 248, at 98 (quoting ST. THOMAS AQUINAS, SUMMA THEOLOGIAE, II-II, q. 108, a. 4c).

263 *Id.* at 98–99 ("Hence the proposition foundational for Aquinas' entire account of punishment: the order of just equality in relation to the offender is restored—offenders are brought back into that equality—precisely by the 'subtraction' effected in a corresponding, proportionate suppression *of the will which took for itself too much* (too much freedom or autonomy, we may say)." (footnotes omitted)). This is why an earlier retributivism would be confused by the language of paying back debts. Instead, punishment would involve the offender returning a credit, whether that was due to a claim of moral or political superiority. *See* Markel, *supra* note 215, at 2193 ("[R]etribution for unlawful wrongdoing is internally justifiable because it . . . achieves certain goods."). This distinction also shows up empirically in the work of Professors Monica Gerber and Jonathan Jackson. *See* Gerber & Jackson, *supra* note 225, at 62 (noting two dimensions to retribution).

both individually[264] and communally,[265] and (2) they allow for the usage of utilitarian thinking when crafting specific sentences, albeit tempered by other important principles built from retributive premises.[266] But at root, retributivism strives to reinforce foundational dignity and autonomy by moderating social, political, and legal relations.[267] Again, this is where some theories of retributivism and reconstructivism overlap; the communicative[268] and postincarceration implications allow for constraints.

Retribution has traditionally justified imprisonment because the taking of liberty corresponds directly to the usurpation taken by the offender at the time of wrongdoing. It's a liberty-for-liberty trade. Imprisonment paradoxically—so the argument went—restored through suppression of the will for a temporary period of time.[269] Professor Herbert Morris articulated this when describing the point of punishment as the restoration of equality between the wrongdoer and those who obey the laws.[270] Punishment, under the right conditions, legitimizes a state of equalized liberty under the law.[271] Of course, this leads to additional questions: how to determine the quantity of

264 Koritansky, *supra* note 15, at 326 ("[P]unishment . . . is an essentially retributive measure taken to *restore* justice by inflicting something contrary to the will of a criminal." (emphasis added)).

265 Murphy, *supra* note 247, at 6–7. Retributivists that draw largely on pre-Kantian thought to justify punishment acknowledge the restorative nature of retributive theory. John Finnis notes how "punishment has a medicinal value; as far as possible it should contribute to the correction of the offender." Finnis, *supra* note 248, at 97 (quoting CATECHISM OF THE CATHOLIC CHURCH para. 2266 (2d ed. 1997)). Further, by healing the disruption, it is medicine for the community. *Id.* In fact, this might be construed as value added, contra utilitarian theories of punishment, which only focus on prevention and do nothing with respect to restoration of the social imbalance. It also contrasts with Morris's unfair-advantages theory, which begs the question of whether the criminal has obtained an advantage when committing a crime or not. *See* KORITANSKY, *supra* note 223, at 148.

266 *See generally* Robinson & Darley, *The Utility of Desert*, *supra* note 108.

267 Markel, *supra* note 215, at 2205 ("For to do nothing in the face of unlawful wrongs grants plausibility to the claim by offenders of unequal liberty under law, leaves a lie about the moral reality of our social world uncorrected, and, by permitting the tyrannical usurpation of public decision making by rogue individuals, doing nothing causes the state to breach its quasi-contractual obligation to protect that order of decision making." (footnotes omitted)).

268 *See, e.g.*, R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1 (1996); Markel, *supra* note 10, at 26 ("An account like mine is fairly described as a form of *communicative* retributivism.").

269 Finnis, *supra* note 248, at 98–99 ("Hence the proposition foundational for Aquinas' entire account of punishment: the order of just equality in relation to the offender is restored—offenders are brought back into that equality—precisely by the 'subtraction' effected in a corresponding, proportionate suppression *of the will which took for itself too much* (too much freedom or autonomy, we may say)." (footnotes omitted)).

270 GEORGE SHER, DESERT 77 (1987); Morris, *supra* note 134, at 475–501. Morris's understanding of retributivism is not without critics, who accuse him of confusing retribution with rectifying free riding. Markel, *supra* note 10, at 32–34.

271 Markel, *supra* note 10, at 27.

liberty that should be lost to accomplish this restorative function, and whether incarceration should be the method of deprivation. These are questions Murphy spent considerable time on, and they require further exploration vis-à-vis specific collateral consequences that might come on the heels of a direct sentence.[272] Some retributivists would answer via in-depth examinations of blameworthiness, whereas others would follow Morris's lead and attempt to calibrate for advantages and disadvantages.[273] Furthermore, restoration must be understood in both *individual* and *social* terms, so that the reform of the offender is not presumed to occur with incarceration.[274]

But assuming that the liberty calibration question could be answered well (something most retributive theories do not purport to guarantee, but only some entertain humility about), once equality is restored, the ex-offender and fellow citizens would be on equal footing, such that any *additional* punishment would be inappropriate. Extra punishment would actually be disruptive and overcorrective after the baseline equilibrium was restored. The enhancement of safety by the proposed intervention would only matter to the retributivist as a secondary matter, but not at the expense of the requirements of justice and its constraints.[275]

The purportedly restorative components of retributive theory, sometimes reflected in modern negative retributivism, are designed to account for the popular passions for revenge, retaliation, or other negative actions by the community.[276] They also respond to the divergence in attitudes amongst citizens about what justifies punishment, reflected in the sex-offender examples above. Judge Richard Posner made this point persuasively when undertaking an economic analysis of retribution as a theory of punishment: "While retribution focuses on the criminal's wrong, retaliation focuses on the impulse of

272 *See generally* Murphy, *supra* note 255. This is a relevant point when thinking about the *expansiveness* of the collateral-consequences regime. It is possible that collateral consequences could operate as a disadvantage that aims toward the restoration talked about above. But if liberty is taken away first through incarceration, or some other liberty restraining measure (like probation), are collateral consequences (especially those that are automatic) *always* extra punishment?

273 *See* KORITANSKY, *supra* note 223, at 165.

274 As Professor Skotnicki demonstrates in his book, while incarceration was initially conceived as medicinal and penitential, the results have not always followed. *See* SKOTNICKI, *supra* note 210.

275 Starr, *supra* note 122, at 818 (noting how risk prediction is not relevant to the core retributive perspective). *But see* Youngjae Lee, *Recidivism as Omission: A Relational Account*, 87 TEX. L. REV. 571, 577 (2009) (making a retributivist case for enhancement statutes).

276 Finnis, *supra* note 248, at 102 ("Retributive punishment . . . is thus remote indeed from revenge. Punishment cannot be imposed by the victim as such. Indeed, it cannot rightly be imposed on behalf of the victim as such, but only on behalf of the community of citizens willing to abide by the law."). The pre- and post-Kantian split is most stark on this point. Whereas Kant struggled with the notion of the *lex talionis*, and has been rightly criticized for its potential savagery, early retributivist thinkers foreshadowed the idea that retribution contains limiting principles on punishment. Koritansky, *supra* note 15, at 329 ("[Punishment] does not long for the suffering of the criminal for its own sake, but for the equality of justice that will be restored by that suffering.").

the victim . . . to strike back at the criminal."[277] The dignity components of retributive theory are designed to counteract communal indiscretion and overreach. This is why retribution is *not* revenge. It is also why retribution is not *primarily* a crime control strategy. The first goal is desert-based restoration, born from return of a credit inappropriately gained by the offender, and taken back by the community through proper authority. The means to that restoration varies depending on the retributivist theory, but anything excessive should be viewed skeptically. Hence retribution, while first exercised to deny "the offender's claim of superiority," also by definition leaves room for the offender's transformation.[278] Collateral consequences arguably leave little room for an offender's transformation, and as shown above, control a lot of people.

In fact, retribution can caution a measure of humility when it comes to *precise* sanctions.[279] Put another way: retributive theory is about justifying punishment, but once the punishment is justified, the same principles justifying retribution as the dominant theory leave room for reasonable choices regarding interventions.[280] Some of this is due to moral uncertainty and difficulty and complexity associated with blameworthiness.[281] Professor Paul Robinson developed this in his work, and other scholars have sought to justify it by constructing mixed theories of punishment.[282] Negative retributivism, emphasizing upper limits on such measures, is operating in the same space.[283] And Robinson's work shows that opening the question to democratic deliberation is not necessarily sure to result in harsher situations for

277 Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 72 (1980) (analyzing social functionality of retribution from an economics lens).

278 Markel, *supra* note 215, at 2210.

279 Sigler, *supra* note 213, at 162 (noting that because retribution is based on certain moral claims, without one hundred percent certainty, it "entails humility").

280 Koritansky, *supra* note 15, at 335 ("What criminals deserve, in other words, is determined by estimating the seriousness of the criminal act and is realized by imposing a correspondingly serious penalty within the parameters of a reasonable determination of what will place the criminal back upon equal terms with the rest of the law abiding citizenry."). Some modern critics of retribution might be surprised by the idea that a strong proponent of retributivism, like John Finnis, leaves room for reasonable decisionmaking regarding the precise nature of sentences. Of course, Finnis is operating from a rich jurisprudential tradition that recognizes "*determinatio*" in the legal system. Finnis's theory of retribution has deep epistemological and ethical origins, recognizing the primacy of reason over will, so reason must determine *how* the will should be punished in a *reasonable* fashion.

281 Atiq, *supra* note 236, at 140.

282 Robinson & Darley, *supra* note 108, at 491 ("[O]nce judges ensure that the total amount of punishment is the amount deserved, they are free to select a sanctioning method that will maximize rehabilitation or incapacitation (or deterrence or any other worthwhile crime reduction strategy) without fear that their selection of method may endanger the criminal law's moral credibility."); Tonry, *supra* note 21, at 131 (discussing "mixed theories" of punishment that set boundaries).

283 Tonry, *supra* note 21, at 122–23 (analyzing Norval Morris's work).

offenders. Recent studies suggest it might depend on whether the predicate offense was violent or not.[284]

In short, retributivism asks whether collateral consequences reflect a proper understanding of the desert basis, deep questions about the role of blameworthiness and proportionality, and how a measure will calibrate to an offender's relationship to the community over the long term. It is not primarily concerned with their usefulness, which can beg for intervention after intervention. The road to long-term bans of employment, licenses, and other aspects of life in the community contains more off-ramps when desert writes the directions. These constraints suggest room for viewing collateral consequences skeptically, whereas utilitarian thinking prioritizes other objectives, losing the individual offender in the process.

Conclusion

This Article has attempted a two-fold argument: (1) that collateral consequences should be understood as closely associated with utilitarian purposes of punishment and are in desperate need of constraints; and (2) that retributivist theories may view an expansive collateral-consequences regime with great skepticism and therefore offer desired limitations. The indirect consequences of contact with the criminal system—whether through an arrest or conviction—represent, for the most part, deterrence or incapacitation in action. Legislative labeling and judicial classification for functional reasons has rendered potential constitutional protections for offenders inapplicable. Ironically, collateral consequences are the collateral effects of utilitarian punishment logic meeting practicality and functionality concerns, resulting in punishment seeping into the civil system.

In contrast, the core premises of many retributive theories suggest skepticism about an expansive regime of collateral consequences. In particular, the link between blameworthiness and punishment, notions of proportionality, restoration, and the social and political relationships underlying conceptions of retributive justice suggest caution. The retributivist should be concerned that many consequences operate as *extra* punishment or harm that disrupts the order restored after formal punishment. The crux of it is this: collateral consequences let criminal justice go farther than the retributivist should like. Because viewing collateral consequences through a retributivist lens—by asking whether they are deserved rather than useful—leads to concern, reformers of collateral consequences, officials involved in the administration of justice, and public participants should consider how a retributivist lens could provide sturdy ground for protecting the dignity of ex-offenders and furthering community restoration after the imposition of direct punishment.

With that said, more work remains to be done, addressing a number of questions: (1) When, if at all, should a collateral consequence be understood

284 *See, e.g.*, Michael O'Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 Marq. L. Rev. (forthcoming 2020).

as *extra* punishment? (2) What are the duties of the state and private parties if a collateral consequence *is* extra punishment? (3) Does the phase during which the collateral consequence comes about matter for purposes of state involvement? (4) What are the roles of the prosecutor, and other officials in the administration of justice, given this reality? (5) Are there implications for criminal procedure rights for defendants? (6) Are there constitutional constraints that may align with retributivist concerns, or is this primarily a matter for the legislature?

These questions warrant a full retributivist accounting of collateral consequences to explore the possible advantages of applying retributivism as a constraint to the network of collateral consequences.[285]

285 These questions are taken up in the second paper of this project, titled *Retributivist Reform of Collateral Consequences*, which is forthcoming in volume 52 of the *Connecticut Law Review*.