

Collateral Consequences of Conviction

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ABSTRACT

In addition to a formal term of punishment, people convicted of crimes are subject to numerous other burdens, which legal scholars and practitioners have termed ‘collateral consequences.’ Such consequences may be informal, such as social stigma or financial difficulties, or formal legal burdens, such as employment or welfare bans. Collateral consequences raise a number of challenging philosophical questions, including whether they sometimes constitute additional measures of punishment, and whether they can be justified either as forms of criminal punishment or as civil measures.

The justification of criminal punishment (see PUNISHMENT) has long been of interest to philosophers. But a formal sentence is not the only burdensome consequence of a criminal conviction. People with criminal convictions may face a host of other consequences, from social stigma to voting bans (see VOTING, ETHICS OF), from employer discrimination to restrictions on public assistance, from deportation to continued confinement. Scholars tend to refer to these as *collateral* consequences of a conviction, adopting the term used by U.S. courts to distinguish these consequences from the so-called *direct* consequences of a conviction, namely the formal sentence itself (although as discussed in sec. III, critics have challenged this legal distinction).

Especially (though not solely) in the United States, the impact of collateral consequences has grown substantially in recent decades, both because more people have criminal convictions and because the number and severity of collateral consequences have increased dramatically. Collateral consequences raise a number of questions with philosophical implications: Are they best regarded, and treated, as additional forms of criminal punishment? Are they ever justifiable as forms of punishment? Are they ever justifiable instead as civil consequences of a conviction? How do we reconcile collateral consequences with the notion that through serving terms of punishment, offenders pay their debts to society?

Despite the enormous impact of collateral consequences on people's lives, and the thorny normative questions raised by such policies, philosophers have devoted relatively little attention to this topic. Many of those who have written about it have focused on the moral permissibility of disenfranchisement (see, e.g., Sigler 2014; Bennett 2016; Karlan 2004; Bülow 2016; Reiman 2005; López-Guerra 2014). But the range of collateral legal consequences of a conviction extends well beyond voting restrictions, and the normative questions raised by such measures apply generally.

This article first examines and draws some distinctions among the various collateral consequences faced by people with criminal records. Next, it considers the question of whether collateral consequences should be regarded as additional measures of punishment. It then examines whether collateral consequences are justifiable, either as forms of punishment or as nonpunitive consequences of convictions. Finally, it considers objections to collateral consequences based on their connection to racial disparities in the criminal justice system.

Types of Collateral Consequences

As mentioned, the term *collateral consequences* has come to refer to all of the burdensome consequences of a conviction other than the formal criminal sentence itself: that is, term of incarceration or probation, the fine, or other sentence handed down by the judge. But the range of other burdensome consequences of a conviction is vast, and the consequences themselves differ in important respects, respects that bear on philosophical analysis of particular consequences. Thus it is useful at the outset to highlight various dimensions along which these consequences may be distinguished.

First, we can distinguish between formal, or legal, collateral consequences and informal ones. Collateral legal consequences are imposed by the state through positive law, such as via legal statutes. For example, most U.S. states, as well as the United Kingdom and some other legal systems, bar people with felony convictions from voting during their term in prison. Many states extend the ban to those on probation or parole; some states impose permanent felon voting bans. Various jurisdictions legally restrict people with convictions from working in certain professions, obtaining welfare assistance or access to public housing, adopting or fostering children, obtaining drivers' licenses, owning a firearm, or receiving government-sponsored student loans.

In addition, a wide range of informal (not legally imposed) collateral consequences follow from criminal convictions. People convicted of crimes face social stigma, discrimination by employers or landlords, financial difficulties, family tensions, or violence from other members of the community. Relatedly, criminal convictions create burdens for family members and friends of those convicted, as well as for members of the broader community (see Bulow 2014). Collateral legal consequences and informal consequences may interact in various ways. For example, laws making criminal records widely available may facilitate discrimination by

potential employers or landlords; similarly, various restrictive policies may contribute to financial difficulties and family tensions. Thus some have contended that normative analysis of collateral legal consequences should take account of the informal consequences of conviction as well (see, e.g., Logan 2013).

Among collateral legal consequences, we can distinguish three general ways in which they may be burdensome. Some policies, such as restrictions on voting or welfare assistance, *require* that people with criminal records be barred from certain goods or opportunities. Other policies may explicitly *permit* others, at their discretion, to bar people with criminal records from certain opportunities: laws allowing employers to deny jobs to ex-offenders are an example. Still other policies, notably those making criminal histories widely available, *facilitate* discrimination against people with criminal records by employers, licensing agencies, housing authorities, or community members generally.

We can distinguish among collateral measures along other dimensions, as well: First, some collateral legal consequences are triggered by a conviction (voting bans, restrictions on receiving welfare, and so on), whereas others may be triggered merely by arrests: many U.S. states, for example, permit employers or licensing agencies to consider arrests that never led to conviction in making hiring and licensing decisions. Second, we can distinguish between the consequences of conviction (or arrest) for offenders themselves and the consequences for their loved ones or for the community more generally. Although most of the scholarship on collateral consequences focuses on the burdens borne by offenders, the impacts on loved ones or the broader community are morally relevant, as well. Third, we can distinguish economic restrictions, such as housing and welfare bans, from political restrictions, such as voting bans. Fourth, some collateral measures apply only to certain classes of offenders (typically, those

convicted of violent, sexual, or drug-related felonies), whereas others apply more generally. And finally, some measures apply only to offenders currently in prison, whereas others also apply to those on parole or probation, and still others apply indefinitely. Because collateral legal consequences differ along so many dimensions, moral considerations that count against some measures may not count against others. For example, teaching bans for those convicted of child sex offenses are often defended on public safety grounds, but it is less clear that appeal to public safety could justify, for example, restrictions on obtaining government-subsidized student loans.

Civil Measures or Criminal Punishment?

In considering whether collateral legal consequences are justified, an initial question is whether these measures are civil restrictions or criminal punishment (see LaFollette 2005: 243). Traditional legal practice, particularly in the United States, has tended to treat the measures as civil restrictions. One practical consequence is that courts have ruled that various legal protections that apply when punishment is at stake — proportionality requirements, protection against double jeopardy and *ex post facto* laws, and the requirement that defendants be notified of the consequences of a guilty plea — do not apply to collateral legal consequences.

Legal theorists have in recent years raised two lines of objection to traditional legal treatment of collateral measures. First, some scholars have argued that collateral legal consequences should be treated not as civil measures but rather as forms of punishment (Travis 2003; Lippke 2016: ch. 9). Restrictions on voting, employment, housing, and so on are burdensome legal consequences of a conviction, say critics, and thus they constitute punishment. But if courts have traditionally been mistaken to treat all collateral legal consequences as civil measures, it may also be too quick to treat them all as forms of punishment. Legal philosophers

have typically accepted as distinctive features of punishment that it is not merely burdensome but *intended* to be burdensome, and that it is intended to convey societal condemnation of an offender for her crime (see, e.g., Boonin 2008: ch. 1; Feinberg 1970). Thus in determining whether collateral legal consequences constitute forms of punishment, we should ask whether these measures are intended to be burdensome and convey societal condemnation (Hoskins 2016, and forthcoming: ch. 2).

A second critique of the traditional legal practice of treating all collateral legal consequences as civil measures and thus not extending various legal protections to these measures is that it is overly formalistic. Rather than adhere slavishly to the criminal-civil distinction as a basis for determining whether double jeopardy or other legal protections apply, perhaps the state should instead recognize such protections whenever measures (civil or criminal) are at stake that could impair people's capabilities in important ways (see Chiao forthcoming: ch. 6; for other arguments that collateral measures in general should be subject to due-process restrictions, see, e.g., Fellmeth 2005; Roberts 2008).

Collateral Consequences as Punishment

Suppose some collateral legal consequences are best regarded as forms of punishment. Are they justified as such? This question is ambiguous in various respects. We might ask whether these measures as currently administered would constitute justified impositions of punishment. Here the answer is fairly straightforwardly "no," given that they typically are not subject to the various legal protections (discussed earlier) that attach to impositions of punishment. But we might instead ask whether, if collateral measures were incorporated into the formal sentencing structure, and thus were subject to the various legal constraints on punishment,

they would be consistent with these constraints. This second formulation of the question is still ambiguous, as we need to distinguish between types and tokens of collateral legal consequences. In other words, we might ask whether existing *tokens* of collateral measures, such as the U.S. federal felon welfare ban or the UK's blanket voting ban for prisoners, are consistent with the principles or values we believe should govern punishment. Or we might instead ask whether this or that *type* of collateral measure, for example a ban on welfare or voting, could be consistent with those principles or values. This distinction is relevant insofar as we might object to certain aspects of, say, existing voting restrictions in various U.S. states (their duration, or the classes of offenders subject to them, for example) but still believe that voting restrictions in a different form could be justifiable modes of punishment.

Whether collateral legal consequences, either types or tokens, would be justifiable if incorporated as formal criminal sentences depends on what principles or values one believes should govern punishment. For consequentialist accounts (see CONSEQUENTIALISM), according to which punishment is justified as a means to securing some valuable aims, we should ask whether the various measures, if incorporated as formal criminal sentences, would be effective means of securing these aims. Deterrence theorists (see DETERRENCE), for example, should ask whether the threat of such measures would help to dissuade potential offenders. For retributivist accounts (see RETRIBUTION), by contrast, on which punishment is justified as an intrinsically appropriate (because deserved) response to criminal wrongdoing, the question is whether collateral measures would be appropriate ways to mete out deserved suffering, or to communicate deserved censure.

Bennett (2016) has argued that felon disenfranchisement could in some cases be justified as a form of retributive punishment, insofar as it would be an appropriate means to convey the

state's dissociation from particularly serious offenses. By contrast, some scholars have argued that existing restrictions on social goods such as welfare and housing for drug felonies violate the retributivist proportionality requirement in various ways: on one hand, they attach to the most serious as well as the least serious drug felonies; on the other hand, they attach to all drug felonies but not to more serious felonies, such as murder (see Travis 2003: 35; LaFollette 2005: 244-46). Such objections apply to these restrictions in their current form, though the question remains of whether welfare or housing restrictions are the types of restrictions that could, in some other form, be appropriate forms of punishment. Hoskins (forthcoming: ch. 4) objects to restrictions on social or economic goods as types of punishment on grounds that they tend to undermine ex-offenders' abilities, and perhaps motivation, to rebuild their lives and redeem themselves.

Collateral Consequences as Civil Measures

Suppose instead that collateral legal consequences, or at least some of them, are properly regarded not as criminal punishment but, as courts have traditionally treated them, as civil measures. Are they justifiable? One might argue that insofar as punishment is the way in which offenders pay their debts to society, imposing additional restrictive measures on them is unjustifiable (see Lippke 2016: 221; Hoskins 2014, and forthcoming: ch. 5). But scholars have defended collateral legal consequences as civil measures on various grounds.

Several of these accounts have focused on felon disenfranchisement. Some have argued, for example, that disenfranchisement is justifiable by a political community's democratic right of self-determination. Citizens in a democratic polity should enjoy reasonably broad latitude to determine the nature of their democracy, and barring offenders from voting, at least during their

terms of punishment, falls within the scope of a democracy's legitimate discretion (Altman 2005). Critics have objected to this account on various grounds. One line of critique contends that voting is a right, not a privilege, and that denying people this right is best seen as punitive, not as a civil measure (see Karlan 2004; but see Altman 2005: 265). Another objection holds that this argument for disenfranchisement fails to provide a plausible explanation of why disenfranchisement on the basis of criminal conviction falls within a state's democratic right of self-determination whereas it is generally accepted that voting restrictions based on, for example, race or gender would uncontroversially be impermissible (see López-Guerra 2014; but see Altman 2005: 268-69; and Bülow 2016: 766-68).

Other defenses of felon disenfranchisement have been offered. One such argument contends that felon disenfranchisement is sometimes justifiable as a way of signifying the breach of civic trust that a serious criminal offense represents (Sigler 2014). Another line of argument contends that those who violate the law thereby forfeit their right (see RIGHTS) to participate in the electoral process (for discussion, see Reiman 2005: 9-12; Hoskins forthcoming: ch. 6). Notice that if any of these three lines of argument — from democratic self-determination, civic trust, or rights forfeiture — is persuasive, it might justify more collateral measures than just disenfranchisement. If a democratic society is justified in defining the nature of its democracy, then perhaps it is justified in restricting those with criminal convictions from holding public office, receiving publicly funded goods, and so on. If disenfranchisement appropriately signifies a breach of civic trust, then perhaps other sorts of disqualifications could similarly convey this message. And if those who violate the law thereby forfeit their right to participate in the process by which laws are made, perhaps they also forfeit the right to the goods and opportunities made

possible by the rule of law. Thus any of these defenses of disenfranchisement need to give an account of how wide a scope of restrictive measures they justify.

Collateral legal consequences as civil measures are most commonly defended on consequentialist grounds: as risk-reductive measures (for discussion, see, e.g., von Hirsch and Wasik 1997: 606-11). The thinking is that it is permissible to keep offenders out of circumstances in which they might pose a risk to community members, for example, out of jobs at which they might threaten patrons or others, or out of public housing in which they might threaten other residents. Some collateral measures are difficult to justify on risk-reductive grounds: it is unclear, for example, what realistic risk is posed by allowing offenders access to welfare, or to government-sponsored student loans. Similarly, it seems doubtful that allowing those with criminal records to vote poses any real danger to the community (see, e.g., Sigler 2014: 1729-32; Kleinig and Murtagh 2005: 225-27; Reiman 2005: 6-8). Even when there is a genuine danger to the community that some collateral measures aim to address, such measures will only be justifiable on consequentialist grounds if in fact they effectively reduce the risk, and without overriding negative consequences, and if the risk cannot be effectively reduced by some less burdensome means (see Hoskins forthcoming: ch. 7).

Collateral Consequences and Race

In assessing whether existing collateral consequences are justifiable, it is important not to lose sight of the racial implications of these consequences, particularly in the United States (see RACISM). Racial disparities throughout the U.S. criminal justice system, from arrest to charging to conviction, mean that the class of people with criminal convictions is disproportionately composed of people of color. Thus the collateral consequences of conviction in turn

disproportionately affect people of color. Insofar as collateral measures deny to ex-offenders valuable goods or opportunities — indeed, in many cases the very sorts of opportunities that could help them to rebuild their lives — one could plausibly object to such measures in general on the grounds that they perpetuate racial injustice (see, e.g., LaFollette 2005: 257-58; Kleinig and Murtagh 2005: 231-32; and Karlan 2004; but see Altman 2005: 269-71). Notice, however, that this argument tells us, at most, only that collateral measures in their existing form are unjustified. It does not tell us whether, say, collateral restrictions on voting, housing, or employment are the types of restrictive measure that could, in principle, be justifiable. In other words, we should ask whether various restrictive measures are wrong in themselves or whether they are unjust only when imposed within a context of a racially disparate criminal justice system.

SEE ALSO Consequentialism; Deterrence; Punishment; Racism; Retribution; Rights; Voting, Ethics of.

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Suggested readings

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