Collateral Restrictions on Offenders

Zachary Hoskins

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When a person is convicted of a criminal offense, what follows from this? Most obviously, the person is subject to some formal sanction: incarceration, probation, community service, a fine, etc. But a formal sentence is not the only burdensome legal consequence of a criminal conviction. Convicted offenders are subject to a host of other legal burdens, as well. Many US states as well as many other countries make criminal records widely accessible to potential employers, landlords, or the public generally.[1] In the United States, various states restrict certain offenders' access to a range of jobs, including teacher, chiropractor, accountant, police officer, architect, and beautician; other jurisdictions, such as England and Wales, have similar (albeit generally less extensive) employment bans.[2] Federal US law permits, and in some cases requires, public housing authorities to deny housing to certain classes of offenders.[3] Sex offenders, in particular, are often denied housing near parks, schools, or other areas where children are frequently present.[4] Federal US law imposes a lifetime ban on welfare benefits for

[1] For US criminal record policies, see "After Prison: Roadblocks to Reentry (2009 update)" Legal Action Center report (2009), p. 8. Available online at www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry--2009.pdf (accessed June 3, 2015). For England and Wales, see Jessica Abrahams, "What can't you do with a criminal record," *Prospect* (May 22, 2013).

[2] For US laws, see National Inventory of the Collateral Consequences of Conviction (NICCC), a project of the American Bar Association, online at www.abacollateralconsequences.org/ (accessed June 3, 2015). For a list of barring offenses in England and Wales, see "Factsheet 5A: Relevant Offences England and Wales," Disclosure and Barring Service, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208203/dbs-factsheet-05a.pdf (accessed June 3, 2015).

[3] See 42 U.S.C. § 1437d (q)(1); 24 C.F.R. § 982.553(a)(2); and 42 U.S.C. § 13661 (c).

[4] See Corey Rayburn Yung, "Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders," *Washington University Law Review* 85 (2007).

people with felony drug convictions (some states have opted out of the law; many others have not).[5] And many countries, as well as many US states, impose voting bans of varying lengths on people with criminal convictions.[6] There are also restrictions on drivers' licenses, adoption of children, travel, and many other goods.

There are other, informal consequences of a legal conviction: social stigma, family tensions, and so on. My focus in this chapter, however, is on the formal legal restrictions imposed by the state. As the examples above suggest, although such measures can be found in various legal systems, they are more prevalent and typically more severe in the United States. The measures constitute significant burdens for those subject to them; indeed, they are in many cases more burdensome than the formal sentence itself. And although they are typically consequences of a conviction, some follow even from arrests that did not lead to conviction.[7]

What should we make of these restrictions? Traditional legal practice typically treats them as civil measures, and thus as distinct from the criminal sanction, the punishment, itself. On this view, punishment is handed down by a sentencing judge on a particular defendant, whereas these other measures are created by legislative or regulatory bodies and imposed on entire classes of individuals. They often are referred to as *collateral* legal consequences of conviction, to distinguish them from conviction's *direct* consequences (the punishment).

A number of legal scholars and practitioners have challenged this view, however. Whatever we choose to call these restrictions, say the critics, they actually constitute additional

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[5] 21 U.S.C. § 862a (a).

[6] For US states' laws, see ProCon.org, "State Felon Voting Laws," available online at http://felonvoting.procon.org/view.resource.php?resourceID=000286 (accessed Sept. 5, 2013); for other countries' laws, see, e.g., Isobel White, "Prisoners' Voting Rights," Standard Note SN/PC/01764, House of Commons Library (July 4, 2013), pp. 47-57; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (Can.); *Roach v. Electoral Commissioner*, (2007) 233 C.L.R. 162.

[7] As of 2009, 38 US states allowed employers and occupational licensing authorities to deny jobs or licenses to people with arrests that never led to a conviction. Similarly, public housing authorities in the United States are legally permitted to deny housing to applicants based on arrests. See "After Prison: Roadblocks to Reentry (2009 update)," supra note 1.

forms of punishment. Jeremy Travis termed them "invisible punishment" to underscore that although they are not part of the formal sentencing process and have not traditionally figured prominently in debates about sentencing policies, they are punishment nonetheless.[8] US Supreme Court Justice John Paul Stevens echoed this sentiment, writing, "In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment."[9] Many scholars and activists, perhaps motivated to make visible what they believe has for too long been invisible, refer to the various measures straightforwardly as "collateral punishment."[10]

This chapter examines whether so-called "collateral" restrictions should be treated as civil measures or as forms of punishment. The point is not to provide a taxonomy of existing restrictions as falling into one category or the other, but rather to examine which sorts of considerations are appropriate to making such determinations. In what follows, I first say a bit about what's at stake in whether we treat the restrictions as forms of punishment or civil measures. I then flesh out and critically assess two general approaches to thinking about the question: an approach that appeals to the practical implications of treating them one way or another, and an approach that looks to the functions of punishment and asks whether the various restrictions are punitive in their function. I argue that we should opt for the second approach. If we do, we'll find that traditional legal practice's blanket treatment of these restrictions as civil measures is untenable, but we should equally find problematic the view that all burdensome legal

[8] Jeremy Travis, "Invisible Punishment: An Instrument of Social Exclusion," in Marc Mauer and Meda Chesney-Lind (eds.), *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: The New Press, 2003).
[9] *Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting).
[10] See, e.g., Jill S. Levenson, Ryan T. Shields, and David A. Singleton, "Collateral Punishments and Sentencing Policy Perceptions of Residence Restrictions for Sex Offenders and Drunk Drivers," *Criminal Justice Policy Review* 25: 2 (March 2014): 135-158; Brian K. Pinaire, Milton J. Heumann, and Jennifer Lerman, "Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders," *Virginia Journal of Social Policy and the Law* 13 (2005-2006): 290-330 , on pp. 294 and 296.

consequences of a criminal conviction constitute punishment. Instead, if we focus on the distinctive features of criminal punishment itself, then we should expect that whether restrictive legal measures constitute punishment will depend on the particular measure, its purpose(s) and social meaning. In the final section, I address various implications of this conclusion for legal practice and the philosophy of criminal law.

II. What's at stake

How we think of collateral restrictions — as civil measures or as forms of criminal punishment — matters in at least two senses. First, if collateral restrictions are best understood as forms of punishment, then we should treat them as such: we should make these forms of "invisible punishment" visible by bringing them into the formal criminal process. If we did so, then this would mean that certain legal protections would attach to collateral restrictions that do not currently apply.[11] Because punishment has traditionally been regarded as such a serious exercise of state coercion, a number of legal safeguards exist to help protect the rights of those facing criminal prosecution and punishment: protection against double jeopardy, the right to be informed of the punishment that may follow from a guilty plea, and protection against ex post facto laws, among others. If we treat collateral restrictions as forms of punishment, then these safeguards would constrain their imposition as they now constrain the imposition of traditional forms of punishment.

[11] See Jenny Roberts, "The Mythical Divide between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of 'Sexually Violent Predators'," *Minnesota Law Review* 93 (2008-09): 670-740; Michael Pinard, "An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals," *Boston University Law Review* 86 (2006): 623-690; Gabriel J. Chin, "The New Civil Death: Rethinking Punishment in the Era of Mass Conviction," *University of Pennsylvania Law Review* 160 (2012): 1789-1833.

One general implication, then, of treating collateral restrictions as forms of punishment is that they should be subject to the same sorts of legal protections that govern other impositions of punishment. This would also mean that current restrictions, insofar as they are not governed by these safeguards, would be unjustified.

But there is a second, normatively more fundamental sense in which it matters whether we treat these restrictions as punishment. Suppose that we did incorporate the various collateral restrictions formally into the criminal process, recognizing them as forms of punishment and attaching the same legal safeguards that govern the imposition of punishment generally. There would still be a question of whether restrictions on employment, housing, etc., are justified as forms of punishment. Thus we would need to ask whether such restrictions are consistent with whatever aims are appropriate to punishment, and also consistent with whatever considerations we believe should constrain the pursuit of these aims. If these restrictions are forms of punishment, in other words, then the questions relevant to their justification will be the same as the questions we must ask about incarceration, community service, capital punishment, or other forms of punishment: Are these kinds of response to crime appropriate?

If, however, restrictions on employment, voting, housing, and so on are best treated not as forms of punishment but rather as civil measures, then we must instead ask what would justify these additional, nonpunitive exercises of coercive state power. Theorists of punishment have long debated whether and why punishment is justified. Despite persistent disagreement about the answers to these questions, most theorists have at least agreed that to justify punishing someone is to justify subjecting her to burdensome treatment (involuntary imprisonment, for example) that would typically be impermissible. Collateral restrictions are also burdensome (again, sometimes more burdensome than the punishment itself), but if they are not forms of punishment, then they

cannot draw justification from whatever considerations ostensibly justify punishment. We would need to ask, then, what would justify the state in imposing these additional burdensome measures beyond the scope of punishment itself.

Given that criminal punishment and civil restrictions represent distinct forms of state coercion, it should not be surprising if different normative considerations govern whether various collateral restrictions would be justified as forms of punishment or as civil measures. If this is so, then some sorts restrictions might be justifiable as civil measures but not as forms of punishment, or vice versa. Also, some policies might be justifiable both as punishment and as civil measures, but for different reasons or in different circumstances.

Whether we treat collateral restrictions as forms of punishment or as civil measures thus has implications both for whether and why the restrictions are justified and for what sorts of legal protections attach to these measures. On what basis, then, should we determine how these restrictions are to be treated in practice? In what follows, I consider two candidate approaches.

III. Practical implications

One way to think about whether to treat collateral restrictions as forms of punishment would be in terms of what the practical implications would be of one approach or the other. In the United States, courts have pointed to the practical difficulties that would arise in attempting to inform defendants of the full range of restrictions to which they might be subject as the result of a guilty plea. As Michael Pinard explains:

> Some have asserted that it is simply too impractical for trial courts to first gather the relevant consequences attendant to each individual conviction, and then inform defendants of the consequences. The task is particularly burdensome given the expansive dockets that stifle criminal courts. It is made even more complicated by the fact that collateral consequences are not centralized, but rather

> are scattered throughout federal and state statutes, state and local regulatory codes, local rules, and local policies.[12]

We might see such practical considerations as constituting compelling reasons to maintain the distinction between collateral restrictions and punishment — and thus reasons to maintain that defendants are entitled to be notified about the range of punishments to which they may be subject but not about collateral restrictions they may face. Other courts have contended that treating collateral restrictions as among the direct consequences of conviction (i.e., as punishment) could lead scores of defendants to appeal their convictions on grounds that they pleaded guilty without being sufficiently informed of the consequences of the plea.[13] Each of these arguments points to certain supposedly undesirable consequences that it is argued would be promoted by treating collateral restrictions as forms of punishment; thus distinguishing collateral restrictions from punishment is instrumentally justified insofar as it allows us to avoid these bad consequences.

There is something troubling about this sort of approach. It seems to get things the wrong way around. That is, it begins with the prospect that treating collateral restrictions as punishment will create certain practical difficulties and takes this as a reason not to treat them as such. But if collateral restrictions do share the essential features of punishment, if they function as additional punitive measures, then the fact that treating them as punishment would create practical difficulties does not by itself constitute a compelling reason to treat them as something else. The potential difficulties in informing defendants considering guilty pleas might instead give society reason to impose fewer collateral restrictions, or make them easier to identify, so that defense attorneys would have a reasonable chance of advising their clients. Similarly, the prospect that

[12] Pinard, ibid., p. 646. See also Gabriel J. Chin, "Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction," *The Journal of Gender, Race & Justice* 6 (2002): 253-76 , p. 254.
[13] Pinard, ibid., p. 647.

people who previously pleaded guilty might challenge their convictions if we began to treat collateral restrictions as punishment is less worrisome if we believe that these restrictions do function as additional punishment. If so, then rather than being troubled by the prospect of numerous appeals, we might think this is precisely what should happen: These defendants offered guilty pleas without being properly informed about the full range of punishment they might face, and so they are justified in appealing their convictions.

Attempting to settle whether collateral restrictions should be treated as forms of punishment by appealing solely or primarily to certain practical consequences is thus unsatisfying; it appeals to the wrong sort of reasons. (It would be like making decisions about the moral or legal status of nonhuman animals on the basis of what implications this would have for our diets.) What we need to ask, instead, is whether restrictions on employment, voting, and so on do function as additional forms of punishment. What implications there are for legal practice will then depend on how we answer this question, not the other way around. In the next sections, I consider whether collateral restrictions in fact constitute forms of punishment.

Before moving to the next section, though, it's worth noting that those who endorse treating collateral restrictions as punishment might also be motivated by practical considerations. For them, the motivating consideration might be that if the various measures were brought under the umbrella of criminal law as forms of punishment, then individuals potentially subject to these measures would be afforded the sorts of protections we discussed before: rights to make an informed plea, against double jeopardy, against ex post facto laws. Here again, the thought is that treating collateral restrictions as punishment is justified insofar as doing so has the desired practical effects: namely, that those subject to collateral restrictions enjoy the various protections. As before, this approach seems to get things the wrong way around. It elides a host

of more fundamental questions: What are the distinctive features of punishment in virtue of which we believe special protections are warranted? Do collateral restrictions share these features? In my view, we do better to begin with these sorts of questions; once we sort out whether collateral restrictions actually constitute forms of punishment, then we can address the various implications for legal practice.

IV. Do collateral restrictions function as punishment?

Suppose, then, that we focus on the question of whether collateral restrictions in fact function as forms of punishment. To sort out the answer, we need an understanding of punishment itself: What are its distinctive features? And do collateral restrictions share these features?

Legal and moral theorists are not univocal in their definitions of punishment. As a starting point, however, we can consider the well-known account offered by H.L.A. Hart. Building on the work on Antony Flew and Stanley Benn, Hart wrote that the central case of punishment consisted of five conditions:

(i) It must involve pain or other consequences normally considered unpleasant.

(ii) It must be for an offense against legal rules.

(iii) It must be of an actual or supposed offender for his offense.

(iv) It must be intentionally administered by human beings other than the offender.

(v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.[14]

[14] H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), pp. 4-5. See also Antony Flew, "The Justification of Punishment," *Philosophy* 29 (1954): 291-307; S.I. Benn, "An Approach to the Problems of Punishment," *Philosophy* 33 (1958): 325-41.

Some theorists have objected to one or more of the conditions set out in the Flew-Benn-Hart account of punishment. For instance, some have argued that (ii) and (v) are too limiting. Punishment can happen outside of legal contexts: Parents punish children, friends may punish friends, vigilantes might even be said to punish those who escape legal punishment. Considering these extralegal instances of punishment might help to shed light on the justification of punishment in the legal context.[15] Our central question, however, is whether collateral restrictions are forms of legal punishment. Those on both sides of this debate presumably agree that these measures are imposed by legal authorities as a consequence of legal violations.

Collateral restrictions appear to meet the other conditions, as well: They are undeniably unpleasant, or burdensome. They are imposed on actual or supposed offenders. And they are intentionally administered by people other than the offenders. Thus the Flew-Benn-Hart account appears to lend some support to the view that collateral restrictions are in fact forms of punishment.

Notice, though, that conditions (ii) and (iii) both tell us that punishment is *for* an offense. We sentence a man to prison *for* murdering his brother, or to a term of probation *for* shoplifting. The punishment is a response to the offense. Some collateral restrictions, although we may say they are triggered by an offense or are a consequence of an offense, may not seem to be for the offense. In particular, for measures intended as purely preventive — laws that prohibit child sex offenders from living near schools or parks, for example — the prior offense might be argued to function only as evidence that the offender is dangerous; the offense itself may not be seen as the reason for the restriction. So there may be some collateral restrictions that do not meet all of the Flew-Benn-Hart conditions for punishment.

[15] See Leo Zaibert, *Punishment and Retribution* (Ashgate, 2006).

In addition to this, the Flew-Hart-Benn account itself appears incomplete in two key respects: First, punishment is not merely a burdensome response to a supposed offense — it is characteristic of punishment that it is *intended* to be burdensome. Other state policies may inflict burdens on people. Paying taxes is, by many accounts, a burden. Taxation isn't intended to be burdensome, however; the point of taxation is to generate revenue to pay for public goods. Although it is a foreseeable consequence of maintaining a taxation scheme that many citizens will regard it as a burden, the scheme is not intended to be burdensome. Rather, burdensomeness is a side effect; it is incidental to the goal of taxation. In other words, a tax scheme could still do its job even if no one subject to it regarded it as a burden.

Punishment is different. If people subject (or potentially subject) to punishment did not regard it as a burden, then punishment would not be doing its job: For those who contend that the aim of punishment is to deter potential offenders, the burdensomeness of punishment is an essential feature of the practice — if it weren't burdensome, it would be ineffective as a deterrent. Similarly, on the retributivist view that punishment inflicts deserved suffering on wrongdoers, it is obviously essential that punishment be burdensome. Other accounts characterize punishment as a deserved expression of societal condemnation, an attempt to morally educate offenders, a means of removing an offender's unfair advantage, or something else. On any of these accounts, the burdensomeness of punishment is not merely incidental to the goal to be achieved; it is not a mere side effect. Punishment is intended to be burdensome.

Note that punishment's burdens aren't *merely* intended; they are intended in the service of some supposedly justifiable end. Prison terms, fines, community service, or other forms of punishment are intended to be unpleasant because they thereby help to maintain a credible deterrent threat, or inflict the suffering offenders deserve, or express society's condemnation of

the wrongdoing, etc. If the state imposed intentionally harsh measures on offenders simply for the sake of imposing harsh measures — that is, with no reference to their being deserved, or useful to some valuable end, etc. — then such measures would not constitute punishment. Rather, they would merely be gratuitous state inflictions of suffering.[16]

In addition, at least since the publication of Joel Feinberg's seminal article "The Expressive Function of Punishment," it has widely been held to be a distinctive feature of punishment that it serves to express society's *condemnation* of a criminal for her wrongdoing.[17] Some accounts take this condemnatory element to play a crucial role in the justification of punishment[18]; others disagree, but it is generally accepted that one of punishment's distinctive features is that it expresses condemnation. This condemnatory element is not central, for example, to compensation in tort law. Thus if a defendant in a civil suit is required to pay compensatory damages, the aim of the decision, at least in principle, is not to censure the defendant but rather to see that those harmed by the defendant's actions, negligence, etc., are compensated.[19]

Not everyone accepts that burdens, to count as punishment, must be intended to be burdensome and must express societal condemnation. Michael Cholbi, for example, defends something closer to the Flew-Benn-Hart account. For Cholbi, punishment is "*any deprivation, suffering, or constraint of liberty imposed on criminal offenders by the state or judicial authority*

[16] As David Boonin puts it, "That would reduce punishment to sadism." Boonin, *The Problem of Punishment* (Cambridge University Press, 2008), p. 14.
[17] Joel Feinberg, "The Expressive Function of Punishment," *The Monist* 49:3 (1965): 397-423.
[18] For two seminal examples, see Jean Hampton, "The Moral Education Theory of Punishment," *Philosophy & Public Affairs* 13 (1984): 208-38; and R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001).
[19] See R. A. Duff, "Repairing Harms and Answering for Wrongs," in John Oberdiek (ed.), *Philosophical Foundations in the Law of Torts* (Oxford: Oxford University Press, 2014). We need not deny, of course, that in practice defendants may often feel a required compensatory payment as a condemnatory burden; but this is not, in principle, the purpose of civil damages.

as a direct legal consequence of those offenders' unlawful behavior."[20] Two things are worth noting about this definition: First, it is in one sense even friendlier than the Flew-Benn-Hart account to those who would classify all collateral restrictions as punishment, as instead of stating that punishment is *for* an offense — and thus possibly excluding purely preventive measures where the offense is taken merely as evidence of dangerousness — Cholbi's definition states only that punishment is "a direct legal consequence" of the offense. Second, and more importantly for present purposes, Cholbi's definition (like the Flew-Benn-Hart account) omits any requirement that punishment be condemnatory or intended as burdensome.

Cholbi counts it as one of the virtues of this definition that various collateral restrictions would constitute punishment: "On this definition, revocation of driver's licenses, … removal of children from the custody of criminally negligent parents, and the disenfranchisement of felons all count as punishments."[21] Given that our central question is whether collateral restrictions constitute punishment, however, it would be question-begging to count as a point in favor of Cholbi's preferred definition of punishment the fact that it implies that various collateral restrictions are forms of punishment.[22] Instead, we should ask whether his definition seems to get the right answer in other cases, or whether it is susceptible to counterexamples.

As Cholbi points out, his definition captures uncontroversial examples of punishment, such as incarceration, fines, and execution.[23] Of course, an account of punishment as condemnatory and intentionally burdensome response to an offense also captures these cases, so this is not a point in favor of his definition. He also points out that his definition can account for

[20] Michael Cholbi, "Compulsory Victim Restitution is Punishment: A Reply to Boonin," *Public Reason* 2:1 (2010): 85-93, on p. 87 (emphasis in original).
[21] Ibid.
[22] This is not to say that Cholbi begs any questions in his article. His central question is not whether collateral restrictions are punishment, so it begs no questions for him to count in favor of his definition of punishment that, according to it, collateral restrictions would count as punishment.
[23] Ibid.

why burdens such as the loss of a job due to incarceration are not punishment: it is not a direct legal consequence of unlawful behavior.[24] But again, a condemnatory, intended burdens account can also explain these cases: neither legal fees nor the loss of a job when one is imprisoned are condemnatory, intended burdens imposed by a legal authority in response to a crime.

Cholbi's definition doesn't fare as well in other cases. Consider this example: Peg steals a car. She is later apprehended, and the legal authorities take the car away from her and return it to the rightful owner. If this is as far as things go, it seems we'd be hard pressed to say that Peg was punished for her crime. Notice, though, that the legal authorities have imposed a deprivation on Peg as a direct legal consequence of her unlawful behavior. We may agree that the authorities are depriving Peg of something to which she is not entitled, but this is irrelevant to Cholbi's definition, as it counts as punishment *any* deprivation, suffering, or constraint of liberty imposed on offenders by legal authorities as a direct legal consequence of their crime. Thus on Cholbi's definition, it appears that Peg is thereby punished when authorities take the car.

In my view, however, confiscating the car would not count as punishment insofar as, although it may be burdensome to Peg to lose the car, the confiscation is not an intentionally burdensome, condemnatory response to her offense. Rather, the intent is simply to return the car to its rightful owner; whether this is burdensome to Peg is irrelevant. Similarly, that being required to return the car expresses no condemnation is evident when we consider that Peg would be required to return it even if she acquired it with no knowledge that it was stolen, and so was not blameworthy. Thus in the case where she has intentionally stolen the car, if legal authorities simply return it to the owner without imposing some further burden (incarceration, fines, probation), then we could object that society had not conveyed its condemnation of Peg's wrongdoing.

[24] Ibid., p. 88.

Consider another case: Steve suffers from a sexually transmitted disease. He is found guilty of intentionally trying to infect numerous sexual partners with the disease. Suppose that as a consequence of being found guilty, Steve is required by legal authorities to contact his previous sexual partners to inform them that they have been exposed to the disease. If we assume (plausibly) that Steve finds being required to contact his past partners extremely unpleasant, then on Cholbi's definition, it appears that this constitutes punishing Steve.

But here again, this seems to be the wrong answer. If this were the only legal response to Steve's wrongdoing, we could reasonably object that he was not punished for his offense. This is because, although being made to contact his past sexual partners might be burdensome for Steve, it is not intended to be burdensome; the intention is simply to ensure that people possibly infected with a disease are informed of this fact. Steve's behavior creates a public health risk, and thus he might be legally required to inform his previous partners even if he had been unaware at the time (and had no reason to believe) that he was infected — that is, even if his previous behavior did not merit condemnation. So, in the case where Steve did intentionally infect his partners, it seems that merely requiring him to inform them does not constitute punishment. Again, Cholbi's preferred definition apparently gets the wrong answer.

Cases such as Peg's and Steve's indicate that not every burdensome measure imposed by legal authorities on a convicted offender as a direct legal consequence of her offense thereby constitutes punishment. To count as punishment, the measure must be a condemnatory, intentionally burdensome response to the offense.

V. Assessing collateral restrictions

Returning, then, to our central question, do collateral restrictions constitute forms of punishment? This typically will depend on whether they are intended to be burdensome and whether they function to express societal condemnation of the offender's wrongdoing. (Notice that if a measure expresses condemnation of an offense, this implies that the measure is a response to the crime, not merely a consequence of it). Determining whether some restriction is intended to be burdensome and whether it expresses condemnation is no small task. How should we begin to assess whether various restrictions meet these conditions?

First consider the intentionality requirement: Punishment is intended to be burdensome — and not just intended as a gratuitous infliction of a burden, but intended as burdensome in the service of some supposedly justifiable end. One question to ask, then, in considering some given legal restriction, is what end, if any, its burdensomeness serves. Put differently, could the restriction do its job even if it weren't generally regarded as burdensome, or is its burdensomeness the means by which it serves its purpose? If the burdensomeness of the measure is the means by which it serves its intended purpose, then this is an indication that the burdensomeness is intended, too. Conversely, if the burdensomeness of some restriction is not the means by which it does its job — if it could, in principle, do its job even if it weren't burdensome — then this is an indication that the measure is either a) foreseeably but not intentionally burdensome, as when Steve is required to inform his past partners about his sexually transmitted disease; or b) intended to be burdensome, but not in the service of any ostensibly justifiable end (thus, an infliction of gratuitous suffering by the state).

To sort out whether a given restriction could do its job even if it weren't burdensome, we need to have an idea of what purpose it serves. As we've seen, if the point of some measure is to help reduce crime by deterring potential offenders, or to inflict deserved suffering, or effectively

to express societal condemnation, then burdensomeness is arguably an essential feature.[25] Other purposes, however, might be served by measures that are merely foreseeably burdensome, rather than intentionally so. For example, the state might impose policies requiring offenders to compensate their victims for the harms they caused.[26] Although it is likely that such policies often would be burdensome to offenders, the burdensomeness would not be essential to the policy. Rather, the point would be (as in tort law) to repair the harms done to the victim. Thus even if compensating victims typically did not constitute a burden for offenders, this would not undermine whether the compulsory compensation policies effectively did their job. This indicates that although such policies would be foreseeably burdensome to those subject to them, they would not be intentionally so.

As another example, state-mandated employment restrictions for certain classes of offenders are often defended (albeit controversially) on grounds that these policies help to ensure public safety by keeping offenders out of jobs where they might constitute a threat to their colleagues, patrons, or others. Such restrictions are undoubtedly burdensome for most individuals subject to them, but arguably they are not intentionally burdensome. If, counterfactually, offenders did not regard such restrictions as burdensome, this would not in itself undermine whatever effectiveness they have as community protection measures.

Not all measures aimed at reducing crime can be regarded as merely foreseeably rather than intentionally burdensome. In particular, deterrent measures also aim to reduce crime, but they do so by providing a compelling disincentive to potential offenders. Here, the burdensomeness is intended; deterrent measures cannot deter if potential offenders don't regard

[25] There has been a fair amount of debate about whether an expression of societal condemnation must be burdensome. See, e.g., Nathan Hanna, "Say What? A Critique of Expressive Retributivism," *Law and Philosophy* 27 (2008): 123-150. But see M. Margaret Falls, "Retribution, Reciprocity, and Respect for Persons," *Law and Philosophy* 6:1 (1987): 25-51.

[26] See, e.g., Boonin, *The Problem of Punishment*, supra note 16, chapter 5.

them as unpleasant. But restrictions that aim to keep potentially dangerous offenders away from vulnerable populations attempt to reduce crime not by deterrence but by incapacitation. Such restrictions are incapacitative in that they bar offenders from being in certain situations in which they might harm others. The effectiveness of such measures in reducing crime is not dependent on their being a burden to those subject to them. In this respect, then, collateral restrictions that aim to reduce crime through deterrence look more like punishment than do those that aim to reduce crime through incapacitation.

One might object that this analysis implies that incapacitation, one of the most widely cited aims of punishment, is not in fact a punitive aim. I accept this implication. In my view, locking people in prison with the sole aim of incapacitating them (rather than to deter, exact retribution, communicate censure, etc.) does not constitute punishing them. If this seems implausible, consider that the state could, in theory, incapacitate people effectively even if the conditions of confinement were so luxurious that neither offenders nor members of the public generally viewed being locked up as burdensome. Such confinement would not constitute punishment (as we've seen, punishment is burdensome), which indicates that incapacitation is not itself a punitive aim. In practice, however, central rationales for incarcerating offenders typically include not only considerations of incapacitation but also deterrence, retribution, censure, reform, etc., for which the effectiveness of incarceration depends on its being burdensome. Thus incarceration, at least in its standard cases, is properly regarded as punishment even if one of its frequently cited aims is nonpunitive.

Similarly, particular collateral restrictions may have more than one purpose. They may aim, for example, both to incapacitate supposedly dangerous individuals and also to deter potential offenders. In cases such as this, where one purpose of a restriction requires that it be

burdensome but the other purpose does not, should we regard the whole policy itself as intentionally burdensome? In my view, as long as at least one of the purposes of a restriction requires that it be burdensome, then we have good reason to count the restriction as meeting the "intentionally burdensome" condition.

What about the condemnatory aspect of punishment? How should we sort out whether the various collateral restrictions express condemnation? Here, I think, things get especially difficult. We might ask whether lawmakers who create the various restrictions intend them to express condemnation. But of course, what one intends to express and what one actually expresses are not always the same thing. Alternatively, we might ask whether those subject to the restrictions take them to express condemnation. The message received by offenders may not be the same as the message intended by lawmakers — and indeed, different offenders may interpret the restrictions differently.

Alternatively, maybe we should ask about the more general social meaning of the various restrictions. Legislators who create these restrictions, after all, are supposedly our representatives, acting in our name; and punishment, at least in principle, is typically thought to convey the condemnation of the political community generally. Thus perhaps, in considering whether particular restrictions express condemnation, we should focus not on the intentions of the particular legislators who created them, or even on the interpretations of particular individuals subject to them, but rather to the restrictions' broader social meaning.

We might make some headway with the question of whether some restriction expresses condemnation by asking, of a given measure, what noncondemnatory purpose it might serve. Think again of Peg, the car thief. Peg is blameworthy for what she did. But even if, counterfactually, Peg were blameless — perhaps because she came into the possession of the car

without knowing (and having no reason to believe) that it was stolen — the state would still have a plausible rationale for confiscating the car: namely, to return it to its rightful owner. Thus there is a clear noncondemnatory basis for the confiscation policy. The state would not, by contrast, have any plausible rationale for locking counterfactually blameless Peg in prison. Indeed, if after the state confiscated the car, it sentenced counterfactually blameless Peg to a prison term, she might complain that she had been wrongly condemned. If the state's purpose in confiscating the car is independent of Peg's blameworthiness, then this is at least some (albeit not decisive) indication that the policy is not condemnatory. In this respect, restrictions for which the purpose is tied to the subject's blameworthiness look like somewhat better candidates to be considered punishment. Restrictions for which the purpose is independent of the subject's blameworthiness look somewhat less likely to constitute punishment.

This analysis is admittedly too brief, and it raises many difficult questions: In particular, I acknowledge that the analysis hasn't provided anything like definitive guidance as to how we should determine in actual cases what purpose(s) some measure serves, whether it is intended to be burdensome, or what social meaning it carries. I don't have definitive answers to these questions. In the next section, though, I say a bit about why I don't believe this is a problem for my account.

VI. Objections

I have tried to defend a principled distinction between punishment and civil measures according to which punishment is intentionally burdensome and condemnatory. Other theorists have offered similar accounts. Some critics have argued, however, that attempts to carve out and maintain a distinction between criminal and civil measures, while perhaps laudable in principle,

are doomed to fail in practice. Attempting to distinguish these neatly into categories of criminal and civil is not tenable. Many policies are both punitive and regulatory in their function and cannot be neatly separated. Furthermore, asking judges or other legal officials to determine, in practice, whether some hybrid policy is *primarily* criminal or civil will lead to unpredictable, inconsistent results.[27] Perhaps, then, in the interests of consistency, simplicity, and fairness, we should stop trying to sort burdensome legal measures into categories of criminal or civil and simply treat all of these measures as punishment.

I confess I don't find this line of objection particularly compelling. The law employs any number of in-principle distinctions that are often challenging to maintain in practice. For example, theorists develop accounts of what capacities defendants must have if they are to be held responsible for their crimes. In practice, however, determining who falls on which side of the relevant lines will typically be a difficult endeavor and may not generate entirely consistent results. As another example, it is widely accepted, among both punishment theorists and members of the public generally, that punishment should not be more severe than an offender deserves given the seriousness of the crime. Desert doesn't lend itself, however, to clear, definitive prescriptions in particular cases. We shouldn't conclude from either of these cases, however, that the principled lines (between those who may and may not be held responsible, or between deserved and excessive punishment), because they are difficult to maintain in practice, should be abandoned.

Similarly, it would be a mistake to conclude, because of the practical difficulty of differentiating between legal burdens that are condemnatory and intentionally burdensome and

[27] Susan R. Klein raises these sorts of worries about Carol Steiker's attempt at a similar sort of conceptual and normative analysis to the one I've engaged in in this chapter. See Susan R. Klein, "Redrawing the Civil-Criminal Boundary," *Buffalo Criminal Law Review, Symposium Issue on Criminal Procedure* 2:2 (Spring 1999): 681-723. See also Carol S. Steiker, "Foreward, Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide," *Georgetown Law Journal* 85:4 (1997).

those that are not, that we should give up trying to make such determinations. The alternative, a sort of blanket classification strategy of all burdensome legal measures as one or the other, admittedly has some appeal, not least because it allows us to avoid thorny questions about intentions, purposes, social meaning, and so on. But this strategy buys simplicity at the cost of ignoring part of what is truly distinctive, and distinctively challenging to justify, about punishment as a social practice. As we have seen, it is not just that the state imposes burdens on certain individuals (although this is undoubtedly significant) — it is also that the state intends punishment to be burdensome, and that in punishing it thereby expresses society's condemnation of these individuals. These features are relevant to consideration of how to classify collateral restrictions, even if they do not in practice lend themselves to simple, precise determinations. Sometimes messiness is warranted.

VII. Implications

To conclude, I want to highlight some implications of the account developed here for legal practice as well as for the philosophy of criminal law. First, given that considerations of intentions, purposes, and social meanings are relevant to sorting out whether or not some restriction constitutes punishment, we shouldn't be surprised if some restrictive policies, in some contexts, do qualify as forms of punishment and others do not. This indicates that the traditional legal practice of treating essentially any measure that is not part of an offender's formal sentence as a civil measure is unjustified. Courts faced with making determinations in particular cases would do well to avoid facile reliance on legislative claims that the measures are intended as regulatory rather than punitive. Legislatures have clear interests in keeping collateral restrictions on the civil side of the divide, as this allows them to exercise more control over individuals' lives

without having to worry about the range of due-process safeguards in place to protect criminal defendants.

By the same token, it would oversimplify things to conclude that collateral restrictions generally, insofar as they are legally imposed burdensome consequences of a conviction, are forms of punishment. Rather, what is needed from the courts in these cases is an exercise in practical reason. In their best estimation, are particular collateral restrictions burdensome to those subject to them? Are they intended to be burdensome? Is their burdensomeness essential to their purpose? Do they express societal condemnation of those subject to them? These are the sorts of questions that should ground the categorization of collateral restrictions as civil or criminal measures.

The prospect that not all collateral restrictions can plausibly be regarded as forms of punishment has implications for the philosophy of criminal law, as well. Philosophical discussions of criminal law traditionally have been dominated by the justification of punishment. Echoing the standard narrative, David Boonin describes "the problem of punishment" this way:

> Legal punishment involves treating those who break the law in ways that it would be wrong to treat those who do not. … How can the line between those who break such laws and those who do not be morally relevant in the way that the practice of punishment requires it to be? [28]

In recent decades, criminal law theorists have increasingly engaged with a broader range of philosophical questions: questions about what sorts of behaviors are properly criminalized, about criminal procedure, about criminal responsibility, about the authority and legitimacy of the state, and more. Still, the importance of these questions has often been characterized in terms of their relationship to punishment. We should worry about overcriminalization primarily because it

[28] Boonin, supra note 16, p. 1.

produces too much punishment[29]; our conception of responsibility matters because we need to know whether offenders can be held responsible for their crimes through punishment; the sort of state authority with which we are primarily concerned in this context is the authority to impose punishment. [30]

The centrality of punishment in these inquiries is understandable. Punishment is, after all, the paradigmatic example of the exercise of coercive state power over citizens. But as we have seen, it is not the only exercise of such power. Given the proliferation of collateral restrictions in recent decades, and the likelihood that not all of these can plausibly be characterized as forms of punishment, criminal law theory's preoccupation with punishment appears too limited. Boonin's question — of what justifies the state in treating people with criminal convictions in ways that it would be wrong to treat those who haven't been convicted — is not merely a problem of punishment. It is a problem of state responses to a criminal conviction more generally. Indeed, given that in current legal practice collateral restrictions may attach even to arrests, we should really be asking what (if anything) justifies the state in treating people with *criminal records* in ways that would be wrong to treat those without such records. Given the enormous number of people who have criminal records (an estimated 65 million U.S. adults, for example, and roughly 10 million people in the United Kingdom[31]), theorists concerned with the justification of state-sanctioned harsh treatment would do well to broaden their concern to consider the full range of legal restrictions that may accompany a criminal record, not just punishment itself.

[29] See, e.g., Douglas Husak, *Overcriminalization* (Oxford University Press, 2008), p. 14.
[30] See Christopher Heath Wellman, "Rights and State Punishment," *Journal of Philosophy* 106:8 (2009): 419-39 ; Douglas Husak, "State Authority to Punish Crime," this volume.
[31] See Michelle Natividad Rodriguez and Maurice Emsellem, "65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment," report of The National Employment Law Project (March 2011), pp. 3, 27 n. 2; and https://www.whatdotheyknow.com/request/figures_for_nominal_records_on_p.