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Retributivist Reform of Collateral Consequences

Brian M. Murray

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Retributivist Reform of Collateral Consequences

BRIAN M. MURRAY

This Article applies retributivist principles to discussions about collateral consequences reform. Retributivist ideas relating to agency and responsibility, proportionality, personal and communal restoration, and the obligations and duties of the state, as well as the broader community, suggest suspicion of an expansive collateral consequences regime. A retributivist assessment, cognizant of realities within the criminal system, reveals that many are overly punitive and disruptive of social order. Legislatures that prioritize retribution as a justification for and constraint on punishment should think clearly about whether existing collateral consequences result in disproportionate suffering and, if so, reconsider them. This includes the outsourcing of punishment to private actors. Committed retributivist decision makers within the system, such as line prosecutors, should consider how to approach the imposition of collateral consequences when acting during various phases of a prosecution. Finally, retributivist constraints can inform whether the maintenance of criminal records by the state is justified, and for how long, as well as the scope of second-chance remedies like expungement. These limitations could allow for robust procedural protections for petitioners for relief, shifting the burden of persuasion to the state. In short, retributive principles can be a useful tool for reform, helping to restore to ex-offenders what they deserve.

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Retributivist Reform of Collateral Consequences

BRIAN M. MURRAY *

INTRODUCTION

When Jasmine Long¹ finally finished her probation and paid all of her fines and fees to the Philadelphia court system, she figured her experience with the criminal justice system was over. It had been a nightmare. Monthly meetings with her probation officer, extensive drug testing, and the constant feeling that someone—or something—was always watching kept her awake at night.² She had adjusted to the disruptions to her family life, as difficult as they were. While she had lost her job at the time of her arrest and managed to survive an eviction³ given the hospitality of family and friends, she was hopeful that not having to call out of work to go to the Criminal Justice Center as part of probation would help her find a new job. She was wrong on all counts.

* Associate Professor of Law, Seton Hall University School of Law. I would like to thank The Hon. Stephanos Bibas, Youngjae Lee, Rick Garnett, Dave Hoffman, John Kip Cornwell, Margaret Lewis, Amanda Bergold, Rick Greenstein, Ed Hartnett, Thomas Healy, John Stinneford, Joshua Kleinfeld, Alice Ristroph, and Charlie Sullivan for feedback on this project. Thank you to participants at the Law and Society Annual Meeting in Washington, D.C., the Junior Scholars Colloquium hosted by the Federalist Society in Annapolis, MD, CrimFest 2019 at Brooklyn Law School, and the Summer Workshop Series at Seton Hall Law School for feedback on the larger project associated with this Article. I would also like to thank my wife, Katherine, for her steadfast support and joy, and my children, Elizabeth, Eleanor, George, and John, for their inspiring curiosity, endless questions, unyielding sense of wonder, and love for life.

¹ The following account is a fictional scenario based on the Author's experience as a practicing attorney in both the criminal defense and employment law contexts. The plight of the ex-offender is all too common. See, e.g., Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> (noting that men with criminal backgrounds account for about thirty-four percent of nonworking men ages twenty-five to fifty-four in the United States and discussing the challenges they face to employment); *City Employee Credits Alumnus with Ending 20-Year Nightmare*, DREXEL U. THOMAS R. KLINE SCH. L. (July 22, 2014), <http://drexel.edu/law/about/news/articles/overview/2014/July/epps-expungement-project/> (describing the story of an African American female veteran with a mutual combat conviction stemming from self-defense that prevented her from developing a career for twenty years).

² See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292 (2016) (discussing modes of supervision in probation); Michelle S. Phelps, *Mass Probation: Toward a More Robust Theory of State Variation in Punishment*, 19 PUNISHMENT & SOC'Y 53, 55 (2017) (discussing the effects of mass probation in the United States).

³ See 42 U.S.C. § 13662(a) (2012) (allowing owner of federally assisted housing project to terminate tenancy of a tenant for illegal drug use); 35 PA. STAT. AND CONS. STAT. ANN. § 780-167(b) (West, Westlaw through 2019 Reg. Sess. Act 72) (detailing the impact of a final criminal conviction in a drug related offense on civil proceedings).

Not only could she not find a job, but her attempts to return to school were thwarted given her inability to qualify for a student loan.⁴ Without a steady income, and her ineligibility for public benefits⁵ exacerbating the financial burden, her kids' diets suffered. She was stuck, tangled in a web of restrictions with no clear way out.⁶ Unbeknownst to Long, a Supreme Court Justice had recognized as much over a century ago, stating that the ex-offender "is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty."⁷

A reality like this confronts most who come into contact with the criminal justice system, whether they were simply arrested⁸ or actually convicted. Whenever these individuals extricate themselves from the formal boundaries of the criminal system, the powers that be seek control in other ways, and collateral consequences step into the breach.⁹ Such consequences

⁴ See 20 U.S.C. § 1091(r) (2012) (prohibiting students convicted of drug offenses while receiving student aid from receiving such aid for a period of years after conviction).

⁵ See, e.g., 43 PA. STAT. AND CONS. STAT. ANN. § 802(g) (West, Westlaw through 2019 Reg. Sess. Act 91) (declaring ineligibility for compensation after conviction of illegal receipt of benefits); see also 21 U.S.C. § 862(a)(1)(A) (2012) (deeming offender ineligible for public benefits after a drug trafficking conviction); 42 U.S.C. § 1320a-7(a)(4) (2012) (mandating exclusion of persons convicted of felony drug crimes from government health care programs); 42 U.S.C. § 1320a-7(b)(3) (Westlaw through Pub. L. No. 116-91) (outlining implications of a misdemeanor conviction relating to controlled substances on eligibility for health care programs); 43 PA. STAT. AND CONS. STAT. ANN. § 871(b) (West, Westlaw through 2019 Reg. Sess. Act 72) (noting the implications of false representations in acquiring unemployment); 62 PA. STAT. AND CONS. STAT. ANN. § 432(9) (West, Westlaw through 2019 Reg. Sess. Act 91) (making offender ineligible for public benefits after conviction for misdemeanor or felony until penalty is satisfied).

⁶ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 140 (2010) (detailing the impact of collateral consequences on ex-offenders); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (recognizing collateral consequences as punishment because they result in the "diminution of the rights and privileges of citizenship and legal residency"); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (arguing that collateral consequences serve as a reemergence of the punishment known as "civil death"); Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 4 (2014) (describing collateral consequences at the municipal level).

⁷ *Weems v. United States*, 217 U.S. 349, 366 (1910).

⁸ See Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (arguing that arrests serve as a "source of regulation" that encumber the liberty of the arrestee regardless of whether she is subsequently convicted).

⁹ See Travis, *Invisible Punishment*, *supra* note 6, at 15 (noting that parolee and probationer populations have increased with prison populations over the past two decades); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 740 (2008) (arguing that "nonpenal consequences are anything but 'collateral' to a defendant").

openly restrict horizontal and vertical mobility,¹⁰ extending the reach of the criminal system despite their convenient label as civil, regulatory measures by legislatures and courts.¹¹ The result is an unrestrained network of restrictions with colossal implications for reentry into society.

In short, collateral consequences interfere with the lives of those who contact the criminal justice system more than is just. Although some consequences are justified in certain instances,¹² existing legal constraints have done little to restrain them.¹³ While redressing inequities with respect to measures of preventive restraint¹⁴ and dangerousness¹⁵ currently receives

¹⁰ There is a voluminous scholarly literature identifying the range of collateral consequences faced by defendants. *See, e.g.*, MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (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. *See, e.g.*, *State-Specific Resources*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/resources-2/state-specific-resources> (last visited Sept. 29, 2019).

¹¹ *See* Joshua Kaiser, *We Know It When We See It: The Tenuous Line Between “Direct Punishment” and “Collateral Consequences”*, 59 HOW. L.J. 341, 346, 365 (2016) (questioning the distinction between civil and criminal labels for punishment); Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 311 (2015) (noting that governments defend collateral consequences on the basis that they are regulatory rather than punitive).

¹² John G. Malcolm, *The Problem with the Proliferation of Collateral Consequences*, 19 FEDERALIST SOC’Y REV. 36, 37–38 (2018), <https://fedsoc.org/commentary/publications/the-problem-with-the-proliferation-of-collateral-consequences> (noting how some collateral consequences are legitimate and reasonable given narrow tailoring).

¹³ Modern courts tend to classify collateral consequences as regulatory measures rather than full-blown punishment. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 94 (2003) (holding that notice of sex-offender registration is “intended as a nonpunitive regulatory measure”); *Demore v. Kim*, 538 U.S. 510, 511 (2003) (holding that detention for deportable criminal aliens during removal proceedings does not violate the due process clause of the Fifth Amendment); *Hinds v. Lynch*, 790 F.3d 259, 267–68 (1st Cir. 2015) (holding that removal on the basis of conviction is not punishment); *Turner v. Glickman*, 207 F.3d 419, 429 (7th Cir. 2000) (holding that disqualification for food stamp and temporary assistance for needy families programs is not a criminal punishment); *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (upholding the Texas scheme of disenfranchisement of convicted felons).

¹⁴ *See, e.g.*, Megan Stevenson & Sandra G. Mayson, *Bail Reform: New Directions for Pretrial Detention and Release*, U. PA. FAC. SCHOLARSHIP 1, 1 (2017) (calling for reforms in pretrial detention).

¹⁵ *See* Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57, 58 (2018) (examining actuarial sentencing); 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 provide scientific support to the judgments already made clinically by judges); 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” through actuarial sentencing). 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. 2011). But some scholars have cautioned against its widespread use, calling for critical inquiry. *See, e.g.*, Collins, *supra*, at 60 (noting that scholars have questioned the use of actuarial sentencing); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE. L.J. 490, 490 (2018) (exploring the underlying question of statistical risk of reoffending in the pretrial context); Stevenson & Mayson, *supra* note 14, at 2 (criticizing justifications for pretrial detention); John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, 12 ANN. REV. CLINICAL PSYCHOL. 489, 508 (2016) (raising questions regarding the future of risk assessment in sentencing); Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 702–04 (2015) (criticizing the disconnect between actuarial risk assessment and punishment theories); Sonja B. Starr,

significant attention, the incapacitative logic underlying the existing collateral consequences regime is mostly subject to minor tinkering at the margins. This, despite the fact that the incapacitative logic underlying collateral consequences is the same as that underlying predictions about dangerousness.¹⁶ The result is a persistent arrangement of collateral consequences in desperate need of some pruning.

To date, reformers have tried to combat these restrictions on utilitarian grounds. Some have pointed to their criminogenic nature.¹⁷ Others have shown they undermine public safety, breed recidivism,¹⁸ and counteract the public welfare.¹⁹ Still others are critiquing the notion of accurately attempting to predict dangerousness. Recently, the United States Commission on Civil Rights doubled down on arguments like these, calling for reforming consequences that cannot be shown to enhance public safety.²⁰ Modern courts have largely ignored these arguments, instead allowing legislative classification of such restrictions as civil and non-punitive to carry the day,²¹ thereby resulting in little judicial scrutiny of legislative

Evidence-Based Sentencing and the Scientific Rationalization of Discrimination, 66 STAN. L. REV. 803, 809 (2014) (exploring the instruments, arguments for, and limited scholarly criticisms of evidence-based sentencing). For an especially strong criticism of risk assessment, see BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 111 (2007) (detailing and critically analyzing modes of actuarial sentencing).

¹⁶ Brian M. Murray, *Are Collateral Consequences Deserved?*, 95 NOTRE DAME L. REV. (forthcoming 2019–20) (manuscript at 5–6) (on file with author).

¹⁷ See Sharon Dolovich, *Creating the Permanent Prisoner*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 96, 117 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (noting how collateral consequences increase likelihood of re-incarceration); Collins, *supra* note 15, at 95 (detailing studies questioning the utility of risk assessment-based interventions, as well as their criminogenic effects for low-risk offenders).

¹⁸ See AM. BAR ASS'N, *ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS* 10 (3d ed. 2004) [hereinafter *ABA STANDARDS*] (noting that “collateral consequences may frustrate the chance of successful re-entry”); Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What Is Promising*, 49 CRIME & DELINQ. 360, 360 (2003) (assessing the efficacy of prisoner reentry programs); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 195 (2004) (questioning the relationship between voting and recidivism).

¹⁹ JOHN SCHMITT & KRIS WARNER, *CTR. FOR ECON. & POL'Y RESEARCH, EX-OFFENDERS AND THE LABOR MARKET* 14 (2010) (detailing and quantifying the economic effect of low employment rates for ex-offenders); Peter Leasure & Tia Stevens Anderson, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. INTER ALIA 11, 12 (2016); *Offender Reentry*, NAT'L INST. JUST., DEP'T JUST., <https://nij.ojp.gov/topics/corrections/reentry> (last visited Sept. 30, 2019) (providing information on reentry-related issues).

²⁰ U.S. COMM'N ON CIVIL RIGHTS, *COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES* 133–35 (2019) [hereinafter *U.S. COMM'N*].

²¹ See, e.g., *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997) (holding that civil commitment is non-punitive detention).

action. This is the current state of affairs, although legal history suggests that it need not be the case.²²

This Article advocates for a different tactic. Having reframed the question of reform from one of *utility* to one of *desert*,²³ this Article takes a deeper dive to ask whether collateral consequences stand up to retributivist scrutiny. Although critics of collateral consequences lament the “tough on crime” era as responsible for their rise, retributivist constraints on punishment can be sharp hatchets ready for trimming collateral consequences down to size. Building on a previously laid theoretical foundation,²⁴ this Article suggests that the punishment constraining aspects of retributivism could partner with current efforts to reform collateral consequences and supplement what has been tried and achieved over the past several decades.

Retributivist ideas relating to agency and responsibility, proportionality, personal and communal restoration, and the obligations and duties of the state, as well as the broader community, suggest suspicion of an expansive collateral consequences regime. This contrasts with public safety driven arguments, which leave more room for authorities to tinker with the lives of defendants, allowing for regulation that renders the line between criminal and civil restrictions murky.²⁵ This approach also has political viability given that many state codes prioritize retribution as a purpose of and constraint on punishment,²⁶ retributivist themes pervade how the broader

²² Previously, the Court did not rely on legislative classification of punishment; rather, the Court has defined punishment in response to past conduct. *See Cummings v. Missouri*, 71 U.S. 277, 331 (1866) (holding that states cannot punish citizens for actions that were not illegal when committed); *Ex parte Garland*, 71 U.S. 333, 377–78 (1866) (striking down an act of Congress that constituted an ex post facto law); *Weems v. United States*, 217 U.S. 349, 350 (1910) (overturning a sentence handed down by a Philippine court as cruel and unusual).

²³ Murray, *Collateral Consequences*, *supra* note 16, at 5–6.

²⁴ *Id.* at 1.

²⁵ 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.”); *see* David Garland, *The Birth of the Welfare Sanction*, 8 BRIT. J.L. & SOC’Y 29, 41–42 (1981) (discussing four ways in which theoretical compromises have collapsed various criminological schools of thought). 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 bleed across the criminal-civil line as low-cost interventions.

²⁶ PAUL H. ROBINSON & TYLER SCOT WILLIAMS, *Distributive Principles of Criminal Law*, in MAPPING AMERICAN CRIMINAL LAW: VARIATIONS ACROSS THE 50 STATES 3, 5–6 (2018) (noting that retributive justice serves as a guiding principle for thirty states).

public perceives justice in the criminal system,²⁷ and limiting collateral consequences accords with the notion of limited government.²⁸

In short, retributivist constraints breed skepticism of a vast collateral consequences apparatus. Legislatures that prioritize retribution as a justification for and constraint on punishment should think clearly about whether existing collateral consequences result in disproportionate suffering. Committed retributivists within the system, especially prosecutors, should consider how to approach the imposition of collateral consequences when acting in their respective roles. Finally, the incorporation of retributivist constraints in phases where blameworthiness is not at stake, but serious collateral consequences are, would allow for robust procedural protections for defendants and petitioners, particularly in certain phases, like those relating to expungement.

This Article continues to connect scholarship relating to the rise of collateral consequences and pervasive social and structural realities in the criminal system with retributivist punishment theory, ultimately providing a retributive accounting of the collateral consequences regime. Its contributions proceed in three parts. Part I identifies the need for constraints on collateral consequences, pointing to how public safety driven rationales, stemming from utilitarian purposes for punishment, allow for little more than tinkering around the margins. Reformers have fallen into the trap of arguing for reform on these grounds.²⁹ The interpretive story in this section draws from the theoretical foundation laid in a previous work.³⁰ Part II examines the components of retributivism that provide the tools for cutting the collateral consequences regime down to size: (1) a concern for dignity and human responsibility; (2) robust considerations of blameworthiness in light of modern day criminalization; (3) the proportionality principle; (4) the relationship between desert and the plea-bargaining norm; and (5) the inherently restorative components of some theories of retributivism.³¹ Part III lays out the system-wide implications of this critique, noting how

²⁷ Michael O'Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. (forthcoming 2020) (manuscript at 50–51) (on file with author).

²⁸ ROBINSON & WILLIAMS, *supra* note 26, at 8 (noting retributivist themes in law and the populace).

²⁹ See, e.g., U.S. COMM'N, *supra* note 20, at 133–35 (recommending the tailoring of collateral consequences to serve public policy).

³⁰ Murray, *Collateral Consequences*, *supra* note 16, at 1–2.

³¹ I am mindful that there is disagreement about this last point. Some scholars argue that restorative components are not essential to retributivism. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1522–23 (2016) (suggesting that restorative components are part of another punishment theory, namely reconstructivism). As I understand it, reconstructivism emphasizes the social utility of the criminal law, making solidarity the focal point of the analysis. Reconstructivists classify retributivists in deontological terms. My sense is that non-deontological retributivists are extremely close to reconstructivist theory, given that social restoration is a byproduct of individual desert. Peter Koritansky, *Two Theories of Retributive Punishment: Immanuel Kant and Thomas Aquinas*, 22 HIST. PHIL. Q. 319, 321, 323, 330 (2005).

viewing collateral consequences through a retributivist lens would affect some notable collateral consequences, as well as lesser-known ones. It also has ramifications for discretionary decision making by retributivist actors within the system, legislative reform efforts, and the procedural protections afforded to defendants and petitioners in a phase-like expungement. It then concludes, suggesting that reformers that leave retributivism behind do so at their own peril.

I. THE NEED TO CONSTRAIN COLLATERAL CONSEQUENCES

The tentacles of collateral consequences are nearly impossible to break free from. One estimate puts the total number of collateral consequences at just under *forty-five thousand* restrictions.³² They exist at the federal, state, and municipal level.³³ They take away civil rights, privileges associated with citizenship such as the ability to vote,³⁴ property rights,³⁵ and family interests.³⁶ Some are automatically imposed upon mere contact with the system, whereas others are tied to conviction. Both state and private actors can enforce them. And in some instances, they can last a lifetime.³⁷

³² See Nat'l Inventory of the Collateral Consequences of Conviction, *Collateral Consequences Inventory*, JUST. CTR., <https://niccc.csgjusticecenter.org/database/results/> (last visited Oct. 6, 2019) (listing 44,605 collateral consequences of a criminal conviction in the United States from various jurisdictions).

³³ See, e.g., 42 U.S.C. § 13662(a) (Westlaw through Pub. L. No. 116-91) (outlining a collateral consequence for defendants in federally assisted housing); 35 PA. STAT. AND CONS. STAT. ANN. § 780-167(b) (West, Westlaw through 2019 Reg. Sess. Act 72) (detailing the impact of a final criminal conviction in a drug related offense on eviction proceedings); see also Meek, *supra* note 6, at 4–5 (describing the collateral consequences of criminal convictions found in municipal policies that prevent individuals from living, working, or participating in their local communities).

³⁴ *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (noting that many states have laws that make felons ineligible to vote).

³⁵ See, e.g., 35 PA. STAT. AND CONS. STAT. ANN. § 780-167(b) (West, Westlaw through 2019 Reg. Sess. Act 72) (detailing the impact of a final criminal conviction in a drug related offense on eviction proceedings).

³⁶ See, e.g., 55 PA. CODE § 3041.189(a)(1) (Westlaw through 2019 legislation) (stating that the parent is disqualified from participating in the subsidized childcare program if a court finds the parent guilty of fraud in applying for subsidized childcare).

³⁷ See, e.g., 35 PA. STAT. AND CONS. STAT. ANN. § 10225.503(a) (West, Westlaw through 2019 Reg. Sess. Act 72), *invalidated by* Nixon v. Commonwealth, 839 A.2d 277, 290 (Pa. 2003) (holding that the statute violated employees' due process right to pursue a specific occupation by prohibiting nursing homes, home health care agencies, and other long-term care facilities from hiring anyone with a theft conviction). Though invalidated, the law has not been amended and enforcement remains subject to the priorities of state agencies. See 35 PA. STAT. AND CONS. STAT. ANN. § 10225.103 (West, Westlaw through 2019 Reg. Sess. Act 72) (defining "facility" 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[,] . . . a personal care home").

While some restrictions existed at common law,³⁸ in addition to shaming and shunning tactics by the community, the resulting loss of status that persists today is a new phenomenon.³⁹ These consequences exploded onto the scene and grew exponentially in the latter half of the twentieth century.⁴⁰ In the mid-1980s, there was a glimmer of hope that they were headed for demise; the ABA Criminal Justice Standards on the Legal Status of Prisoners announced that the “era of collateral consequences was drawing to a close.”⁴¹ That hope was permanently dashed by Congress with a number of measures in the mid-1990s that broadly disqualified ex-offenders from a host of social benefits and privileges.⁴²

The roots of these restrictions are fundamentally utilitarian, which has led to confusion as to their purpose and whether they should be classified as punishment or not.⁴³ That confusion has resulted in modern judicial classification of such measures as largely civil and regulatory, despite their incapacitative and condemnatory intent and effect.⁴⁴ It also has resulted, unintentionally, in criticism of the restrictions on only *utilitarian* terms. Reform efforts have been slow.

While the recent Supreme Court has recognized the harsh effects of collateral consequences, it has stopped short of declaring them to be criminal punishment despite the fact that its own earlier definition of punishment would seem to encompass them. Earlier Court precedent had no qualms

³⁸ See, e.g., *Sutton v. McIlhany*, 1 Ohio Dec. Reprint 235, 236 (1848) (noting that all offenses were pardonable under common law with a few exceptions).

³⁹ Chin, *supra* note 6, at 1790–91; see also Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, 25 CRIM. JUST. 21, 27 (2010) (“Based on conviction of a serious crime, a person loses civil rights, including political, property, and family rights, temporarily or permanently.”).

⁴⁰ Mayson, *supra* note 11, at 307.

⁴¹ Chin & Love, *supra* note 39, at 30.

⁴² See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 501–10, 572–77, 110 Stat. 3009-546, 670–73, 684–87 (1996) (restricting benefits for aliens); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 408(9), 202, 821, 903, 110 Stat. 2105, 2139, 2185, 2321, 2348 (1996) (denying social security benefits, food stamps, housing assistance to fugitive felons); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101–02, 110 Stat. 1214, 1217–18 (1996) (restricting the number of appeals a defendant can make for a habeas claim and limiting the statute of limitation to one year for habeas claims); Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (requiring sex offenders to register a current address) (superseded by the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 102, 120 Stat. 587, 590 (2006)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 5101, 102 Stat. 4181, 4300 (1988) (containing sections that sanction drug-related crimes with punishments, such as termination of public housing benefits); see also Wayne A. Logan, *Challenging the Punitiveness of “New-Generation” SORN Laws*, 21 NEW CRIM. L. REV. 426, 426–27 (2018) (referencing sex offender and registration (SORN) laws as a method of social control).

⁴³ Murray, *Collateral Consequences*, *supra* note 16, at 4.

⁴⁴ Dolovich, *supra* note 17, at 97 (describing the American carceral system as embracing an approach focused on “permanent exclusion”).

about recognizing collateral consequences as punitive. The Court has defined punishment as a deprivation in response to past conduct,⁴⁵ which seemingly would encompass many collateral consequences—certainly those imposed automatically by virtue of conviction. After all, something like a license restriction or denial of eligibility for a public benefit qualifies as a deprivation and would not occur for many ex-offenders had they not been convicted. That is a position once held by the Supreme Court.⁴⁶ Nevertheless, resting on the utilitarian roots of collateral consequences, which also underlie many civil laws, the Court has emphasized legislative labeling as crucial to the analysis.⁴⁷ Laws that are not expressly based on retribution or deterrence will be labeled non-punitive, and not *criminal* punishment.⁴⁸ As *Smith v. Doe* held at the beginning of this century,⁴⁹ as long as a consequence is labeled non-punitive or civil by the legislature, it likely will not be considered punishment.⁵⁰ This conflates the definition of punishment with its legislatively assigned justification, arbitrarily excludes incapacitation as a purpose and trait of punishment, and conflicts with other Court precedent that recognizes that the Constitution refrains from mandating any one penal theory.⁵¹ This approach also insulates collateral consequences from concerns about punishment being too harsh.⁵² The practical result has been judicial classification of collateral consequences as

⁴⁵ *Cummings v. Missouri*, 71 U.S. 277, 286 (1866); *Ex parte Garland*, 71 U.S. 333, 337 (1866) (“[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.”). See also *Rummel v. Estelle*, 445 U.S. 263, 273–74 (1980) (referencing “‘accessories’ included within the punishment”).

⁴⁶ See *Cummings*, 71 U.S. at 286 (noting that deprivation of a privilege is a punishment); *Garland*, 71 U.S. at 377 (stating that an exclusion from any professions for past conduct is a punishment).

⁴⁷ *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 236–37 (1972) (per curiam); *Trop v. Dulles*, 356 U.S. 86, 96 (1958); *United States v. Lovett*, 328 U.S. 303, 316 (1946); *Hawker v. New York*, 170 U.S. 189, 196 (1898); Julia L. Torti, Note, *Accounting for Punishment in Proportionality Review*, 88 N.Y.U. L. REV. 1908, 1940 (2013) (“[T]he punishment *cadena temporal* in *Weems* included a permanent loss of political and civil rights.” (footnote omitted)).

⁴⁸ *Trop*, 356 U.S. at 96 (“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)).

⁴⁹ 538 U.S. 84, 92 (2003).

⁵⁰ See *id.* (holding that only if the “regulatory 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 (alteration in original)); see also 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) (noting that “*Trop*’s view of collateral consequences remains the consensus among American courts (though not without exception)”).

⁵¹ *Ewing v. California*, 538 U.S. 11, 25 (2003).

⁵² Kaiser, *supra* note 11, at 354–55 (detailing how the Supreme Court, over the past century, has leaned too heavily on legislative labeling and has confused definitions with justifications for punishment, thereby resulting in a test that renders it nearly impossible for a collateral consequence to be labeled punishment).

civil regulatory measures and not punishment,⁵³ with legislatures and administrative agencies reaffirming this logic.⁵⁴

There are two problems with this doctrine. First, it departs from prior Supreme Court precedent that recognized collateral consequences, even if labeled civil, as fundamentally punitive. In other words, the threshold issue as to the definition of punishment—and whether collateral consequences fit it—has been answered differently in American history, both at the federal and state judicial level. Second, the Court’s current doctrine, by restricting the definition of punishment to only those measures where the legislature has stated retribution or deterrence as its purpose, arbitrarily excludes incapacitation as a purpose behind punishment.⁵⁵ In short, the Court’s narrow definition of punishment in *Smith v. Doe* ignores the utilitarian-punitive roots of collateral consequences, thereby simultaneously requiring reform on exclusively utilitarian grounds (because retributivism’s constraints *only* apply to “punishment”).

So why have reform efforts failed? The answer is the social impulse underlying collateral consequences: control.⁵⁶ The measures are not calibrated to blameworthiness or desert; rather, they are variations of utilitarian interventions, designed to protect against dangerousness,

⁵³ See, e.g., *Hudson v. United States*, 522 U.S. 93, 95–96 (1997) (holding that the “Double Jeopardy Clause of the Fifth Amendment is not a bar to the later criminal prosecution because the administrative proceedings were civil, not criminal”); *United States v. Ursery*, 518 U.S. 267, 292 (1996) (ruling that *in rem* forfeiture of property involved in crime is not classified as a punishment governed by the Double Jeopardy Clause). 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, 160 (1960) (stating that legislation that prevents a felon from holding office in any waterfront labor organization is not punishment); *United States v. Parks*, 698 F.3d 1, 5 (1st Cir. 2012) (holding that a law mandating the registration of sex offenders is a civil regulatory measure, rather than punitive, because the statutory scheme is consistent with a preventive goal); *United States v. Stock*, 685 F.3d 621, 627 n.4 (6th Cir. 2012) (noting that the sex offender registration laws did not punish the defendant for his past sex offenses and that the law is nonpunitive); *Johnson v. Bredesen*, 624 F.3d 742, 752–53 (6th Cir. 2010) (ruling that a law conditioning the restoration of felons’ voting rights on certain obligations was not a punishment because it had legislative, non-punitive intent and did not promote the traditional goals of punishment).

⁵⁴ See Ewald, *supra* note 50, at 83–84, n.41, 91, n.86 (explaining that (1) the Denial of Federal Benefits Program permits courts to deny certain benefits to people convicted of drug offenses in order to deter drug crime; and (2) courts define most collateral consequences as regulatory and preventive); Milena Tripkovic, *Collateral Consequences of Conviction: Limits and Justifications*, 18 CRIMINOLOGY CRIM. JUST. L. & SOC’Y 18, 18 (2017) (“The legal stance taken in the United States is that collateral consequences are not punishment, but constitute regulatory measures”).

⁵⁵ See *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997) (referencing “civil” incapacitation and overlooking the fact that incapacitation is a justification for punishment).

⁵⁶ Murray, *Collateral Consequences*, *supra* note 16, at 25 (“[C]ollateral consequences . . . reflect two different social impulses: control through incapacitation and the maximization of social welfare.”).

categorize the risky, and prevent future bad acts and crimes.⁵⁷ As creatures of cost calculation, they are prone to endless tinkering by policymakers.⁵⁸ Historically, and prior to the age of big data, they promised public safety at little structural or social cost given the Court's punishment doctrine, making them intuitively appealing at the policy level.⁵⁹

In other words, the punitive impulse inspiring dangerousness and risk control measures took root in collateral consequences.⁶⁰ As crime increased, the need for more and more control was enacted into law through incapacitative measures that used criminal behavior as proxy for future dangerousness.⁶¹ This coincided with the prioritization of utilitarian thinking within the Model Penal Code⁶² and data-driven welfare maximization within the administrative state.⁶³ Legislatures could account for perceived shortcomings in direct sentences with collateral consequences. In short, the pervasive network of collateral consequences aligns with utilitarian goals for punishment, and the willingness of courts to de-classify such consequences as punitive helped the process.⁶⁴

⁵⁷ Dolovich, *supra* note 17, 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 50, 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’ . . .”).

⁵⁸ Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 1015 (2016) (“Instrumentalists like to flatter themselves that their rationalism is more humane than moralistic approaches, and sometimes it is . . . 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.’” (footnote omitted)).

⁵⁹ 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”).

⁶⁰ Dolovich, *supra* note 17, at 100 (mentioning how recent scholarship shows that the alleged rehabilitative ideal during the latter half of the twentieth century was actually contingent on regional differences in approach); WILLIAM R. KELLY ET AL., FROM RETRIBUTION TO PUBLIC SAFETY: DISRUPTIVE INNOVATION OF AMERICAN CRIMINAL JUSTICE 177 (2017) (emphasizing movement away from retributive principles towards anti-recidivism measures); Paul H. Robinson, Commentary, *Punishing Dangerousness: Clocking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1433–34 (2001) (describing how rising crime after the 1950s led to the prioritization of deterrence).

⁶¹ Ewald, *supra* note 50, 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.”).

⁶² 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 MPC § 1.02 omitted retribution).

⁶³ Travis, *supra* note 6, at 19 (“The principal new form of social exclusion has been to deny offenders the benefits of the welfare state.”).

⁶⁴ A quick word about method. This argument is *not* contingent on causation. Rather, it is interpretive, aiming to explain the interior logic of collateral consequences and how they resemble the pursuit of utilitarian purposes for punishment.

In fairness, states have begun to reform their collateral consequences regimes over the past two decades. Some of this reform has occurred in the wake of litigation challenging the rationality behind collateral consequences laws.⁶⁵ Other rollbacks have been the result of criticism of the social utility of such laws given that they might be criminogenic⁶⁶ and in fact undermine public safety.⁶⁷ Concerns about excessive stigmatic harm have also been articulated, but usually along the lines that the harm breeds recidivism.⁶⁸ In other words, reform efforts are operating along utilitarian lines.⁶⁹

The pace of reform has been exceedingly slow. While forty-one states passed over one hundred and fifty laws in total to limit employment-related barriers between 2009 and 2014, the quality of the reforms left much to be desired.⁷⁰ They are narrow in scope and do little to incentivize reentry-style action on the part of third parties that might enforce collateral consequences.⁷¹

These developments lead to two observations. First, that the terrain for assessing collateral consequences remains fundamentally utilitarian, both due to their roots and their classification by courts as non-punishment. Second, if the last two decades have shown anything, reforms are occurring slower than many would like. While some collateral consequences have been reformed or altered to be less expansive, thousands remain on the books for relatively minor crimes. Furthermore, reformers have focused more on

⁶⁵ Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 254, 258–59 (2018).

⁶⁶ RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009-2014, at 1, 30 (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-report-v4.pdf (referencing state legislation designed to *improve* public safety).

⁶⁷ See, e.g., U.S. COMM’N, *supra* note 20, at 133–35 (finding that restrictions on public housing and public benefits can “lead the formerly incarcerated person towards unlawful means to earn subsistence money”).

⁶⁸ See Matthew Makarios et al., *Examining the Predictors of Recidivism Among Men and Women Released from Prison in Ohio*, 37 CRIM. JUST. & BEHAV. 1377, 1387 (2010) (“Thus, the data indicate that a large portion of parolees (one fourth were rearrested for a new felony) commit new crimes within their first 12 months in the community and that this is influenced in part by difficulties that inmates face when adjusting to life in the community.”); see also Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 330 (2009) (discussing the lingering effects of a criminal record on employment prospects and comparing the risk of arrest between individuals with prior criminal records and the general population).

⁶⁹ Murray, *Collateral Consequences*, *supra* note 16, at 37–38; STEPHEN SLIVINSKI, CTR. FOR THE STUDY OF ECON. LIBERTY AT ARIZ. STATE UNIV., TURNING SHACKLES INTO BOOTSTRAPS: WHY OCCUPATIONAL LICENSING REFORM IS THE MISSING PIECE OF CRIMINAL JUSTICE REFORM 1, 2 (2016) (presenting evidence that states with restrictive occupational licensing laws have higher rates of recidivism); SUBRAMANIAN ET AL., *supra* note 66, at 33 (discussing how reform efforts have been designed to pursue public safety).

⁷⁰ SUBRAMANIAN ET AL., *supra* note 66, at 4.

⁷¹ *Id.* at 33.

remedies designed to remediate the effects of such consequences rather than go after the consequences themselves.⁷² This lack of success stems from the misclassification of collateral consequences as non-punitive and the unwillingness to take retributivist constraints on such consequences seriously, coupled with cost-benefit logic driving policy debates in the criminal field. Goalpost shifting, the epistemic shortcomings underlying that logic, and the structural inequities already present within the system—lack of awareness of collateral consequences,⁷³ the burdens on defense counsel, and the realities of the plea-bargaining norm—exacerbate the problem.⁷⁴ A broader critique than social disutility is necessary, which is where retributivism and its constraints come into play.⁷⁵

II. RETRIBUTIVISM, SYSTEMIC REALITIES, AND COLLATERAL CONSEQUENCES

This Section offers a retributivist assessment of the collateral consequences regime in light of legal and social realities within the criminal system. Building from the core premises of the critique presented in prior work, it analyzes collateral consequences through the retributivist lens in light of the prevalence of prosecuting misdemeanor and order-maintenance offenses, plea bargaining, and some form of liberty deprivation (either incarceration or probation) persisting as the direct sentence. These social realities affect the implications of retributive justice for collateral consequences.⁷⁶ In particular, they interact with notions of blameworthiness, proportionality, and restoration, and the social relationships at the core of retributivist thought.

⁷² *Id.* at 21.

⁷³ Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1157–58 (2015); Roberts, *The Mythical Divide*, *supra* note 9, at 702.

⁷⁴ Brian M. Murray, *Prosecutorial Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213, 214–15 (2016) (“Where bargaining is the norm, the contents of the bargain should be clear. But for the majority of criminal defendants, aided or unaided by counsel, the full force of a criminal conviction is only felt and known after the most immediate consequences—probation, prison, and possibly fines—are in the rear view mirror. Many criminal defendants who plead guilty know very little, if anything, about the long-term and wide-ranging consequences of their willingness to confess guilt.” (footnotes omitted)).

⁷⁵ As mentioned in *Collateral Consequences*, retributivism is not a panacea here. Rather, it allows for a sharper and bolder critique of collateral consequences given its non-negotiable, built-in constraints. See Murray, *Collateral Consequences*, *supra* note 16, at 39 (noting how retribution contains “built in safeguards . . . [that] caution against an expansive number of interventions in the form of collateral consequences” (footnote omitted)).

⁷⁶ Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 32–33 (2012).

A. *The Essence of Retributivism*

There are numerous retributivist theories that have manifested throughout legal history.⁷⁷ They have their differences; they also have their similarities. For purposes of this Article, it is worth pointing out the renewed interest in retributivism that emerged in the wake of inequitable outcomes in the rehabilitative era and the harsh sentencing characterized by the incapacitative “tough on crime” era.⁷⁸ As mentioned elsewhere, this resulted in the Model Penal Code reviving retribution as the primary goal of and constraint on punishment.⁷⁹ This section aims to advance the conversation one step further by noting how the shared premises of many versions of retributivism would view collateral consequences.⁸⁰

What are those shared premises? There are a few: (1) recognition of the dignity, responsibility, and autonomy of offenders; (2) a concern for moral, or at least political-legal blameworthiness; (3) proportionality; (4) restoration of individual and communal equilibrium; and (5) state and communal duties vis-à-vis the accused and convicted *after* the exaction of punishment.⁸¹

Retributive theories assume human responsibility for human actions, although how that responsibility manifests itself in measured desert differs

⁷⁷ See Murray, *Collateral Consequences*, *supra* note 16, at 40–41 (tracing the various thinkers putting forth retributivism as the primary justification for punishment).

⁷⁸ 48 Michael Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First-Century America*, in *AMERICAN SENTENCING—WHAT HAPPENS AND WHY?* 119, 122–23 (Michael Tonry ed., 2019). For discussions of the meaning and ethical basis of the retributive theory and punishment, see JOHN KLEINIG, *PUNISHMENT AND DESERT* (1973) (analyzing the concept of desert and examining its role in the justification of punishment); Max Atkinson, *Justified and Deserved Punishments*, 78 *MIND ASS'N* 354, 354–55 (1969) (discussing different justifications for punishment and the difference between a “just” and a “deserved” punishment); Sidney Glendon, *A Plausible Theory of Retribution*, 5 *J. VALUE INQUIRY* 1 (1970). See also H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 230–37 (2008) (describing a basic model of the retributive theory and its variants); Donald Clark Hodges, *Punishment*, 18 *PHIL. & PHENOMENOLOGICAL RES.* 209, 214–18 (1957) (discussing the disagreement among philosophers concerning the meaning and just function of punishment); John Laird, *The Justification of Punishment*, 41 *MONIST* 352, 355–56 (1931) (discussing theories to which punishment is said to be justified); C.S. Lewis, *The Humanitarian Theory of Punishment*, 13 *ISSUES RELIGION & PSYCHOTHERAPY* 147, 148 (1987) (discussing the humanitarian theory of punishment and how it “removes from [p]unishment the concept of [d]esert”); Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 476 (1968) (arguing that there is right to punishment by contrasting a system of punishment with a system of therapy); C.W.K. Mundle, *Punishment and Desert*, 4 *PHIL. Q.* 216, 221 (1954) (commenting on different theories of punishment and proposing another version of the retributive theory); Lisa H. Perkins, *Suggestion for a Justification of Punishment*, 81 *ETHICS* 55, 61 (1970) (arguing “that legal punishment is justified if and only if the possibility of extralegal revenge is, in general, present”).

⁷⁹ Cotton, *supra* note 62, at 1320 (referencing how MPC § 1.02 omitted retribution).

⁸⁰ My goal is not to reconcile retributive theories with nuanced differences. Rather, it is to point out baselines generally shared by retributivist theories that emphasize desert as the organizing principle behind punishment.

⁸¹ Murray, *Collateral Consequences*, *supra* note 16, at 42.

across theories.⁸² But at their core, retributivist theories recognize human agency and the dignity it implies.⁸³ This means punishment regimes have to account for human dignity by avoiding the instrumentalization of persons. Retributivists are skeptical of benefits that come at the cost of punishing needlessly those who do not deserve it.⁸⁴

This underlying principle supports retributive constraints relating to blameworthiness and proportionality. Wrongdoing is a precondition for punishment and the quantity of wrongdoing (the desert basis) informs the measure of punishment. Calibration of the moral blameworthiness of the act to its disruption of the baseline societal situation is necessary.⁸⁵ That can imply a contextual analysis of the situation surrounding the wrongdoing, including the political order in which the offense occurs.⁸⁶ Other demands of justice and structural and social realities constrain retributive justice.⁸⁷

The dignity roots of retributivism implicate individual dignity and communal relationships. Because members of a community share claim to certain basic goods, disruptions to that order require redress as a matter of justice.⁸⁸ As Jeffrie Murphy emphasized, “punishment implicates the

⁸² See *id.* at 43 (discussing different conceptions of desert).

⁸³ See Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand David Schoeman ed., reprt. 1988) (“Retributivism is the view that punishment is justified by the moral culpability of those who receive it.”); John Finnis, *Retribution: Punishment’s Formative Aim*, 44 AM. J. JURIS. 91, 96 (1999) (“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.”); Michael S. Moore, *A Tale of Two Theories*, 28 CRIM. JUST. ETHICS 27, 31 (2009) (“The theory is retributivist in its justification of punishment and punishment institutions: we justly punish because and only because offenders deserve to suffer for their culpable wrongdoings.”); Jeffrie G. Murphy, *Retributivism, Moral Education, and the Liberal State*, 4 CRIM. JUST. ETHICS 3, 7 (1985) (“The criminal is a *parasite* or *freerider* on a mutually beneficial scheme of social cooperation He must thus suffer punishment as a ‘debt’ he owes to his fellow citizens”).

⁸⁴ Emad H. Atiq, *What Unconditional Credence in Individual Desert Claims Does Retributivism Require?*, 2018 U. ILL. L. REV. ONLINE 138, 139, <https://illinoislawreview.org/uncategorized/what-unconditional-credence-in-individual-desert-claims-does-retributivism-require/> (“[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.” (footnote omitted)).

⁸⁵ Koritansky, *supra* note 31, 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).”).

⁸⁶ Murray, *Collateral Consequences*, *supra* note 16, at 45 (“Put simply, an offender’s blameworthiness, situated against the broader social situation, matters for both justifying punishment and the nature of the sanction.”).

⁸⁷ Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2207 (2001) (“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.”).

⁸⁸ See, e.g., *id.* 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

maintenance of the political situation inherent to human existence and specific to a political regime.”⁸⁹ Murphy emphasized this point throughout his work, recognizing how the disruption of political and social equality warrants punishment.⁹⁰ For some, that puts Murphy in the reconstructivist camp, which focuses on the social functions of punishment, with solidarity across the moral culture as the key to punishment.⁹¹ For Murphy, retribution aims to restore order through punishment, leaving room for some versions⁹² of retributivism to contain forward-looking components through their built-in constraints.⁹³ Punishment should go no farther than necessary to equalize liberty under the law.⁹⁴ Otherwise it becomes disruptive, amounting to *extra*, unjustified punishment.⁹⁵

Retributivism also imposes limiting principles on the actions of state and private actors. It recognizes that the state is the *only* legitimate punisher given its primary responsibility as facilitator of the equilibrium mentioned

political superiority); Markel, *Retributive Justice*, *supra* note 76, 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.”).

⁸⁹ Murray, *Collateral Consequences*, *supra* note 16, at 48.

⁹⁰ Murphy, *supra* note 83, at 6–7.

⁹¹ Kleinfeld, *Reconstructivism*, *supra* note 31, at 1492.

⁹² Murphy, *supra* note 83, 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 83, at 97 (citation omitted). 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.

⁹³ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 38 (1968) (recognizing reconciliation with the social order as the concern of the retributivist); 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.”); Morris, *supra* note 78, at 478 (“[I]t is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burden of self-restraint, he has acquired an unfair advantage.”); Markel, *Retributive Justice*, *supra* note 76, 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).

⁹⁴ Markel, *Retributive Justice*, *supra* note 76, at 27. Reconstructivists would argue that modern-day retributivism does not prioritize this social component. That may be true, although it probably depends on the type of retributivism. If desert is all that justifies punishment, then that seems likely. But if individual desert plus maintenance of the social order are twin goals, then it is difficult to see how reconstructivism is *not* similar to older forms of retributivism that emphasize reinstalling the order of just equality, the latter two concepts being social terms.

⁹⁵ Murphy, *The State’s Interest in Retribution*, *supra* note 93, at 296–97. 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 towards 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?

before.⁹⁶ Further, the limits of retributivism suggest extra-judicial suffering inflicted by non-state actors—such as decision makers imposing collateral consequences whether legally permissible or not—could be overstepping their bounds depending on the context.⁹⁷ This is one way that retributivism accounts for communal attempts at revenge or the infliction of extra desert.⁹⁸ It also should breed humility on the part of the state, meaning caution as to going overboard with direct sanctions, or with giving license to private parties to enforce them.⁹⁹

These core concerns—individual and communal dignity, restoration, proportionality, and the limits of authority to exact punishment—animate the following sections that identify potential retributivist contributions to mitigating the existing collateral consequences regime.

B. *Blameworthiness and Modern-Day Crime*

That misdemeanor and order-maintenance crimes comprise a large number of criminal prosecutions has significant implications because the but-for cause of many indirect consequences—the arrests and convictions themselves—have a tenuous relationship with the understandings of blameworthiness underlying retributive thinking. Retribution is only directed at wrongs, which could be construed as moral or socio-political wrongdoing depending on the retributivist camp.¹⁰⁰ That distinction has important consequences for whether collateral consequences might be viewed as properly reflective of blameworthiness.

There are really two issues with notions of blameworthiness and collateral consequences. The first involves whether blameworthiness can possibly be attributed to the crime precipitating imposition of the consequence, and the second involves a proper notion of gradations of blameworthiness. Although there are many different kinds of retributive

⁹⁶ Of course, different retributivist theories locate authority in the state for different reasons, usually related to the underlying social, political, and moral philosophy.

⁹⁷ 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).

⁹⁸ Finnis, *supra* note 83, 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 31, 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.”).

⁹⁹ Mary Sigler, *Humility, Not Doubt: A Reply to Adam Kolber*, 2018 U. ILL. L. REV. ONLINE 158, 162, <https://illinoislawreview.org/uncategorized/humility-not-doubt/> (noting that because retribution is based on certain moral claims, without 100% certainty, it “entails humility”).

¹⁰⁰ ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 366–68 (1981); Lewis, *supra* note 78, at 148 (“It is only as deserved or undeserved that a sentence can be just or unjust.”).

theory, they *all* share the view that blameworthiness is crucial to determine the justice of a punishment.¹⁰¹ The Supreme Court has affirmed the same principle;¹⁰² the concept ran through several common law doctrines from the time of the Founding and inheres within the procedural protections afforded to criminal defendants in the Constitution.¹⁰³ For *malum in se* offenses—like homicide, sexual offenses, or violent crime—the classical retributivist would seem to have less of a problem. After all, the moral wrongdoing seems clear, such that imposition of a penalty that attempts to communicate and reiterate the wrongfulness of the activity seems appropriate. The same would be true for the political retributivist as those same crimes are cardinal violations of the underlying political contract.

The real problem relates to the consequences that stem from crimes that are not so clearly *malum in se*, or are affirmatively *malum prohibita* (full blown creatures of positive law). There, social pathologies relating to crime, the nature of the crime itself,¹⁰⁴ and ignorance of law problems¹⁰⁵ can make blameworthiness seem more questionable. And when direct sentences already exist for these crimes, collateral consequences, especially those imposed automatically by the state, seem to be inverting the typical blameworthiness calculation. The same is true for arrests that result in collateral consequences.¹⁰⁶ It could be the case that existing collateral consequences could justifiably replace the current direct sentence to serve as a consequence that is more appropriately calibrated to blameworthiness, but that is not the norm today.

For example, misdemeanor prosecutions might involve fairly common conduct, but due to policing priorities, racial disparities, or a range of other circumstances, do not all share the same quantum of blameworthiness.¹⁰⁷ Minor offenses, like petty retail theft, turnstile jumping, possession of a

¹⁰¹ Tonry, *supra* note 78, at 128. Concededly, some retributivists might define blameworthiness according to social harm caused.

¹⁰² *Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

¹⁰³ John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 963–64 (2011); see generally Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958) (emphasizing how criminal procedure provisions mirror the criminal law's purpose to express condemnation when blameworthiness has been proven).

¹⁰⁴ Joseph E. Kennedy et al., *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race, and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729, 732 (2018) (highlighting how a significant portion of drug arrests involve a gram or less of an illegal substance).

¹⁰⁵ Hugh LaFollette, *Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment*, 241 J. APP. PHIL. 251, 255 (2005) (describing how the fact that many collateral consequences are barely public suggests nonculpable ignorance of the law).

¹⁰⁶ Jain, *Arrests as Regulation*, *supra* note 8, at 812.

¹⁰⁷ Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 956 (2018) (“Misdemeanors often involve common conduct—driving with a suspended license and other traffic offenses, marijuana possession, minor assault, and minor theft.” (footnote omitted)).

small amount of marijuana, or graffiti in a public park can result in significant penalties, including something like deportation.¹⁰⁸

In short, these extremely low-level crimes suffer from what Josh Bowers has labeled a “normative innocence” problem.¹⁰⁹ According to Bowers, offenders are normatively innocent when unlawful activity is undeserving of communal condemnation for some reason.¹¹⁰ Murphy said something similar, noting how retribution is cognizant of particularized considerations.¹¹¹ Important moral differences between cases are relevant because the criminal code—especially the most questionable *malum prohibita* crimes—does not track normative guilt perfectly.¹¹²

But, collateral consequences that apply in a blanket fashion to all convictions—with questionable degrees of normative blameworthiness—would seem to cut too broadly. Public order violations come to mind first; these are the work of municipal prosecutions, ensnaring tons of defendants on a daily basis. But each public order violation—even if the charge listed on the plea deal is the same for two defendants—might contain a different gradation of blameworthiness. In some instances, blameworthiness might be absent entirely. But because many collateral consequences use arrests or convictions as proxies for blameworthiness across the board, they may overreach in this regard.

Collateral consequences are also notoriously vague. Many statutes restrict the ability to obtain a license of some sort to those who have not been convicted of a “felony” or “crime of moral turpitude.”¹¹³ Denials of public benefits operate along similar lines. While some collateral consequences have become more specific in the wake of litigation, blanket collateral consequences undermine the concern for individualized punishment, tailored to a robust notion of blameworthiness that accounts for human complexity in wrongdoing.¹¹⁴ Retribution is designed to treat human beings

¹⁰⁸ Max Rivlin-Nadler, *Yes, New Yorkers CAN Be Deported for Jumping a Turnstile*, VILLAGE VOICE (Feb. 27, 2017), <https://www.villagevoice.com/2017/02/27/yes-new-yorkers-can-be-deported-for-jumping-a-turnstile/>.

¹⁰⁹ Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1678 (2010).

¹¹⁰ *Id.*

¹¹¹ *Id.*; Jeffrie G. Murphy, *Mercy and Legal Justice*, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 162, 171 (1988) (“This demand for individuation—a tailoring of our retributive response to the individual natures of the persons with whom we are dealing—is a part of what we mean by taking persons seriously as persons and is thus a basic demand of justice.”).

¹¹² Bowers, *supra* note 109, at 1679 (“[W]hen determining appropriate punishment, adjudicators must take account of salient moral differences between one case and another.”).

¹¹³ DEP’T OF LEGISLATIVE SERVS., COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION 3 (2009), available at http://dlslibrary.state.md.us/publications/OPA/I/CCOACC_2009.pdf (describing statutes restricting licensing and employment on the basis of criminal convictions related to moral turpitude).

¹¹⁴ Interestingly, this logic applies to constitutional challenges to overbroad collateral consequences that have been conducted at the state level. *See, e.g., Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003).

as moral agents who are responsible for their actions. Some collateral consequences mean more to some than others. Further, these statutes are often interpreted by institutional actors, disconnecting blameworthiness evaluations from the broader community.

It is important to recognize that the normative innocence problem that Bowers identifies is really only a *huge* problem for the moral retributivist, and even there, important distinctions could be drawn between Kantian retribution and other types. The political-legal retributivist only has to test for moral wrongdoing born from the underlying political-legal project. This can result in presumptive blameworthiness even for offenses that would be viewed as questionable by a moral retributivist as long as they are legitimate offspring of the regime itself.¹¹⁵

Of course, the legitimacy of many low-level offenses—meaning whether they are logically connected to the presuppositions underlying the liberal, democratic project—is a complicated question. The public order crimes that Bowers wants to run by normative grand juries¹¹⁶ could go either way. On the one hand, they seek to instill baseline order, a primary objective of liberal politics *and* retributive justice itself. On the other hand, some of these crimes do seem rather “dumb,” to quote one commentator.¹¹⁷ And given recent statistics showing that prosecution of such crimes may not actually enhance public safety, and might actually breed future crime,¹¹⁸ their ability to re-instill the order so desired by retribution seems questionable.

In sum, many collateral consequences have a blameworthiness problem. They are imposed after arrest or prosecution for crimes that are lower, or even questionably on the blameworthiness scale at all, however calculated. The social realities behind these prosecutions add another layer to the calculation; their initiation can stem from over-policing. Plea bargains resulting in convictions do not always reflect blameworthiness,¹¹⁹ and legal guilt may not match factual guilt, meaning existing collateral consequences are not properly calibrated.¹²⁰ And over-inclusive statutory language runs the risk of making blameworthiness about group identity—all of those who commit a crime have the same quantum of blameworthiness—irrespective

¹¹⁵ Markel, *Retributive Justice*, *supra* note 76, at 15. Interestingly, this ends up sounding a lot like strict Kantian retributivism.

¹¹⁶ Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 319 (2012).

¹¹⁷ Markel, *Retributive Justice*, *supra* note 76, at 39–40.

¹¹⁸ Michael Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First Century America*, 47 CRIME & JUST. 119, 134 (2018) (“[A]n empirically grounded argument can be made that prior convictions should mitigate rather than aggravate punishments for subsequent crimes. Collateral social and legal effects of convictions make it foreseeably more difficult for former offenders than non-offenders to live law-abiding lives.”).

¹¹⁹ Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 861 (2019).

¹²⁰ Anna Roberts, *Convictions as Guilt*, 88 FORDHAM L. REV. (forthcoming 2020) (manuscript at 33–34) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3389597).

of the circumstances underlying the crime and the prosecution. As such, blameworthiness as a constraint on punishment is lost in the shuffle.

C. Proportionality

Moving from the justification side of retribution to the distributive side reveals proportionality concerns for many collateral consequences. The reality is that these consequences, for the most part, occur *after* the direct sentence, however defined, is complete (or while it is ongoing, in the case of probation or parole). Because many of these consequences are then *extra* acts of coercion by the state in response to crime, they have the potential to disrupt the equilibrium sought by the direct sentence, especially if they are not coordinated with the direct sentence. In a word, they might end up being disproportionate.¹²¹

1. Generally

The lack of proportionality seems to have three components: duration, over-inclusivity, and status-based harm. First, collateral consequences are often of exceedingly long duration—either by design or due to the inability of the offender to move beyond them for some reason or another. Restrictions on the books involve bans for significant amounts of years, and sometimes even a lifetime. Offenders might be ineligible for benefits for half a decade, unable to obtain loans for a stretch of time, or disallowed from pursuing a license of some sort.¹²² Recently, revisions to expungement codes and the opportunity to obtain certificates of relief have responded to this reality.¹²³

Proportionality also goes in the other direction, given that many collateral consequences are grossly over-inclusive. Despite the nature of the crime, whether minor or major, the same result might occur. For example, low-level felons might lose the right to vote in the same fashion as the serial

¹²¹ See Jain, *Misdemeanor Myths*, *supra* note 107, at 977 (“From a retributivist perspective, the criminal sanction is meant to be the sum total of the punishment. Yet, with misdemeanors, the formal sanction is just one aspect of the harm. Even low-level penalties risk imposing far more harm than is retributively justified, given the impact of the record.” (footnote omitted)); Torti, *supra* note 47, at 1937 (“Collateral consequences should be considered part of the punishment during proportionality analysis because they dramatically affect its severity.”).

¹²² The sad story of Dwyane Betts, Yale law grad unable to immediately gain admission to the bar because of his felony conviction and time-served, is just one example. See Vinny Vella, *State Bar Committee Approves Jail-to-Yale Lawyer*, HARTFORD COURANT (Sept. 29, 2017, 2:15 PM), <http://www.courant.com/news/connecticut/hc-news-dwayne-betts-approved-20170929-story.html> (discussing how the Connecticut Bar Examining Committee gave Dwayne Betts’s application pause because of his criminal history).

¹²³ See generally Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361 (2016) (evaluating state laws governing expungement).

murderer, and the drug possessor might be evicted in the same fashion as the kingpin.¹²⁴ A more complex spectrum of proportionality could exist.

There is still another reason retributivists might consider collateral consequences disproportionate: they result in undue shame given their ability to inflict ongoing status harm. While shame itself may not undermine retributive justice, excessive shame or misplaced shame could.¹²⁵ As mentioned in Part I, the incapacitative theory underlying many collateral consequences essentially identifies an individual as a bad actor.¹²⁶ This immediately goes beyond the dictates of the consequences of one act. This is why some label them status penalties. The status, usually confirmed by a public criminal record that cannot be erased,¹²⁷ involves perpetual shame, amongst other disabilities.¹²⁸ Although not perfectly analogous, this is similar to the recidivist premium problem faced by retributivists.

At first blush, shame might seem consonant with retributive justice given that it connotes moral blame. Indeed, moral desert impliedly involves shame because punishment is warranted in order to reorient the offender after his or her claim to legal superiority. Retribution communicates that one should feel ashamed at disrupting the social order. But a closer look demonstrates that shame run amok—confirmed in second-class legal status for an extended period of time, and after a direct sentence—brings punishment closer to vengeance than retribution. This is because punishment built on perpetual or enduring shame undermines human dignity and perverts the relationship between the community, state, and individual.¹²⁹ Shaming too much through a collateral consequence inhibits the offender, an equal citizen after the direct sentence, from moving beyond the initial “retributive confrontation.”¹³⁰ Furthermore, it caters to emotions in the community, which can be disruptive in their own right. It can breed a cycle that lends itself to private infliction of harm.

¹²⁴ Travis, *supra* note 6, at 35; LaFollette, *supra* note 105, at 245 (“[T]he recreational user receives only a slightly smaller penalty than a dealer.”).

¹²⁵ See Markel, *Shaming Punishments*, *supra* note 87, at 2172 (quoting Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 737 (1998)) (“What makes something a shaming punishment is that the penalty ‘expose[s] the offender to public view and heap[s] ignominy upon him in a way that other alternative sanctions to imprisonment, like fines and community service, do not.’”).

¹²⁶ See Kleinfeld, *Two Cultures of Punishment*, *supra* note 58, at 949 (referencing how banishment measures devalue offenders and mark them as worthy of exclusion).

¹²⁷ See Markel, *Shaming Punishments*, *supra* note 87, at 2172 (discussing the permanence of online criminal records).

¹²⁸ See Kleinfeld, *Two Cultures of Punishment*, *supra* note 58, at 949 (“Banishment’s significance is that it tracks this exclusionary aspect of punishment . . . and says to all: ‘There is something wrong with this offender—not just with what he has done but with the kind of person he is—that makes him morally unfit or simply too dangerous to live among law-abiding people.’”).

¹²⁹ See *id.* (“[B]anishment is for people society has given up on.”).

¹³⁰ Markel, *Shaming Punishments*, *supra* note 87, at 2221.

Indeed, the latter point has arguably been an unintended consequence of the *Ban the Box* movement, which is a policy commitment designed to straddle the line between state and community enforcement of punishment.¹³¹ In some respects, *Ban the Box* has simply shifted the infliction of punishment to non-state actors, who use race as a proxy for criminality. Unfortunately, some studies show that private employers have had no problem continuing to inflict harms on the community the initiative is designed to protect.¹³² In other words, community actors have continued to shame ex-offenders beyond the original sentence, running up against traditional notions of proportionality and the sole responsibilities of the state.

2. Constitutional Considerations

Concerns about proportionality also may implicate constitutional norms. A closer look at the meaning of proportionality within the Eighth Amendment indicates the stakes. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹³³ While the question of whether the Eighth Amendment contains a proportionality limitation is controversial,¹³⁴ the Supreme Court has ruled that application of an otherwise permissible punishment is excessive or disproportionate in particular contexts.¹³⁵ Assuming that remains the case, then examining how the last clause of the Eighth Amendment might conceive of some collateral consequences is

¹³¹ *Ban the Box* is a campaign aimed at the removal of questions about criminal history on hiring applications. BAN THE BOX CAMPAIGN, <https://bantheboxcampaign.org/> (last visited Nov. 4, 2019).

¹³² Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 CRIMINOLOGY & PUB. POL’Y 371, 396–97 (2008).

¹³³ U.S. CONST. amend. VIII.

¹³⁴ For example, the late Justice Scalia and Justice Thomas have questioned whether the Eighth Amendment contains a proportionality restriction. *See, e.g., Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment) (stating his belief that “cruel and unusual” in the Eighth Amendment only refers to “modes of punishment”). Justice White’s dissent in *Weems v. United States* was similar. 217 U.S. 349, 382, 385 (1910) (White, J., dissenting); *see also* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1517 n.183 (2001) (“Justices and scholars continue to disagree as to whether the Framers . . . had proportionality in mind.”). As Youngjae Lee has argued, the Court has held that since *Weems* some measure of proportionality, in both capital and non-capital contexts, has existed within the Eighth Amendment. Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 679–81 (2005).

¹³⁵ *See, e.g., Ewing*, 538 U.S. at 12 (holding that a longer sentence was appropriate because prior strikes were for “serious felonies”); *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) (holding that a sentence of two consecutive terms of twenty-five years to life was deemed an appropriate punishment for petty theft due to California’s three-strikes law); *Atkins v. Virginia*, 536 U.S. 304, 304 (2002) (holding that the Eighth Amendment prevented the execution of criminals with mental disabilities because such a punishment is cruel and unusual); *United States v. Bajakajian*, 524 U.S. 321, 321 (1998) (holding that the forfeiture of a large sum of currency was improper because the government’s ability to collect it was limited by the Excessive Fines Clause); *Weems*, 217 U.S. at 371 (holding that a fifteen-year prison sentence was cruel and unusual because the sentence involved forced, painful labor). For a detailed analysis of Supreme Court jurisprudence in this area, *see* Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835, 1840–51 (2012).

significant, especially if the Eighth Amendment contemplates a retributive notion of proportionality.¹³⁶

Although some might argue that the Supreme Court's current proportionality doctrine suggests otherwise, there is reason to believe that retributive justice is worth considering. Youngjae Lee has argued that the Supreme Court's holdings, suggesting that a punishment cannot be excessive as long as at least *one theory* of punishment can serve as the rationale behind the measure, misunderstand the proportionality guarantee within the Eighth Amendment.¹³⁷ "Excessiveness" at the time of the Founding was defined in relation to justice, implying that "justice" had boundaries.¹³⁸ That definition arose in a political context deeply concerned with limiting the power of the state.¹³⁹ It was also a context when the state was viewed as the sole punisher.¹⁴⁰ The history behind the constitutional prohibition also suggests a concern with punishments beyond the direct sentence, such as fines.¹⁴¹ That accords with the Supreme Court's recent decision in *Timbs v. Indiana*,¹⁴² which traced proportionality back to the Magna Carta.

In this sense, the constitutional norm grew out of the retributivist concern about punishment not exceeding the gravity of the crime.¹⁴³ Some have emphasized the "fittingness" of punishment, which has roots in Joel Feinberg's theory of the expressive functions of punishment.¹⁴⁴ A punishment "fits" if it expresses the society's condemnatory attitude toward the criminal conduct, as long as it does not detract from the significance of that suffering applied in other contexts.¹⁴⁵ A punishment does not fit if it undermines the seriousness of the punishment for other offenses.¹⁴⁶ This also

¹³⁶ See Stinneford, *Rethinking Proportionality*, *supra* note 103, at 925 (noting how the Supreme Court, by embracing a mistaken notion of proportionality review, has restricted review to .001% of cases); Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 101 (2008).

¹³⁷ Lee, *supra* note 134, at 683.

¹³⁸ Stinneford, *Rethinking Proportionality*, *supra* note 103, at 914–15.

¹³⁹ *Id.* at 928 ("[Proportionality] played a direct role in constitutional struggles to limit the power of the sovereign . . .").

¹⁴⁰ *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909) ("[T]he prohibition of the 8th Amendment to the Federal Constitution against excessive fines operates to control the legislation of the states.").

¹⁴¹ Stinneford, *Rethinking Proportionality*, *supra* note 103, at 931.

¹⁴² 139 S. Ct. 682, 695 (2019) (noting how, in colonial times, fines were viewed as punishment).

¹⁴³ Lee, *Excessive Punishment*, *supra* note 134, at 683. As Lee carefully points out, this understanding of proportionality does not touch the antecedent issue that allows legislatures to determine *which goals to pursue*. It merely restrains the legislature in the pursuit. *Id.*

¹⁴⁴ *Id.* at 709 (citing Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970)).

¹⁴⁵ *Id.* at 709.

¹⁴⁶ *Id.* (citing Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 100, 114 (1970)) ("[A] corollary to this is that not every form of suffering or loss is an acceptable form of punishment in every society, depending on the symbolic significance the particular form of suffering or loss has in the society.").

resembles reconstructive theories of criminal punishment.¹⁴⁷ The degree of condemnation must be calibrated properly to blameworthiness and the gravity of the offense. While a utilitarian theory of proportionality can be built from basic utilitarian premises, its results depend significantly on the probability of detection and conviction, which are difficult to ascertain and could lead to divergent results.¹⁴⁸ A retributivist understanding of proportionality within the Eighth Amendment suggests that otherwise justifiable punishment is not acceptable if it would be cruel and unusual in *a particular context*.

The meanings of the words in the Eighth Amendment support the idea that retributive proportionality concerns about punishments are legitimate. As John Stinneford has demonstrated, “[p]unishments are unconstitutionally excessive if they are harsher than the defendant deserves as a retributive matter,” and “proportionality should be measured primarily in relation to prior punishment practice.”¹⁴⁹ This stems from the text of the Amendment itself, which suggests that the focus is not on whether a punishment is “cruel and rare,” but on whether the punishment is “cruel and new.”¹⁵⁰ Cruelty refers to the effect of the punishment rather than its intent,¹⁵¹ meaning a punishment that is inconsistent with longstanding prior punishment practice and results in heightened suffering implicates the Eighth Amendment.¹⁵²

As Stinneford points out, the “unusual” nature of a punishment was understood with reference to the common law, which operated as a check on the state.¹⁵³ This motivated proponents of the Bill of Rights at the time of the Founding.¹⁵⁴ If a punishment was “contrary to long usage,” it would be considered excessive.¹⁵⁵ “Contrary to long usage” meant beyond the

¹⁴⁷ See Kleinfeld, *Reconstructivism*, *supra* note 31, at 1543–44 (discussing origins of reconstructivism, which emphasizes socio-moral functions of the criminal law).

¹⁴⁸ Lee, *Excessive Punishment*, *supra* note 134, at 738–39 (outlining how a utilitarian theory of proportionality is possible but also likely to lead to unacceptable results). In particular, Lee notes that while the Supreme Court has held that life imprisonment for a parking ticket would be unconstitutionally excessive, a utilitarian argument could be made to justify the practice. *Id.* at 740 (“[I]n situations where a particular type of crime that is extremely difficult to detect is causing a lot of damage, a well-publicized punishment is considered a reliable device to induce deterrence, and the difficulty of detection is so extreme that . . . the utilitarian theory may justify punishing an innocent person with an extreme sanction.”).

¹⁴⁹ Stinneford, *Rethinking Proportionality*, *supra* note 103, at 899.

¹⁵⁰ *Id.* at 907 (suggesting that the Eighth Amendment is designed to protect criminal offenders “when the government’s desire to inflict pain has become temporarily and unjustly enflamed”).

¹⁵¹ John F. Stinneford, *The Original Meaning of “Cruel”*, 105 GEO. L.J. 441, 441, 444–45 (2017).

¹⁵² Stinneford, *Rethinking Proportionality*, *supra* note 103, at 909.

¹⁵³ *Id.* at 942.

¹⁵⁴ See *id.* at 944 (noting that George Mason and Patrick Henry were concerned about congressional abrogation of the common law).

¹⁵⁵ See *id.* at 942 (noting how “[v]irtually every case interpreting the . . . Clause or an analogous state provision between 1791 and 1865 read the Clause to contain [a] prohibition” on excessive punishments).

boundaries of the common law tradition.¹⁵⁶ Early courts used this as the standard when judging punishments, especially when they implicated traditional rights.¹⁵⁷ The primary concern was that heightened state hostility to criminal offenders in response to some event, societal panic, or other outcry, would manifest through increasing the severity of punishments.¹⁵⁸ That sounds like the tough on crime era dominated by incapacitative logic.

What does this mean for collateral consequences? It suggests that many deserve a second look in terms of whether they are consistent with the harms inflicted by the state *after* the direct sentence in earlier eras. This understanding of proportionality within the Eighth Amendment will not, itself, blow a hole through the prevailing collateral consequences regime. It does ask, however, whether existing collateral consequences had analogues at the time the Eighth Amendment was ratified and initially interpreted, how they were imposed, and for which offenses. And while American jurisdictions did bring collateral restrictions from Europe, they were mostly related to historical antecedents, like the categorical punishments of infamy or outlawry.¹⁵⁹ It was not until the regulatory state that collateral consequences touched nearly every facet of life.¹⁶⁰

The same analysis is relevant in the era immediately preceding the present. Some collateral consequences might be labeled “contrary to long usage” because they have been extended to less serious offenses than they were originally intended for,¹⁶¹ and others might be considered entirely new and without precedent. The complicated array of restrictions that exists nowadays is, for the most part, new, given the growth of civil law into a number of aspects of life.¹⁶² And the incapacitative logic underlying them could conflict with the Court’s statements about how incapacitation cannot

¹⁵⁶ *Id.* at 949.

¹⁵⁷ *Id.* at 968–69.

¹⁵⁸ See Kleinfeld, *Two Cultures of Punishment*, *supra* note 58, at 1021 (“[C]onfronted by a massive crime wave, Americans reached into their culture for ideas with which to understand what was going on and decide how to respond. They grabbed hold of the concept of evil and also grabbed hold of the instrumental approach.”).

¹⁵⁹ Alessandro Corda, *The Collateral Consequence Conundrum: Comparative Genealogy, Current Trends, and Future Scenarios*, 77 *STUD. L. POL. & SOC’Y* 69, 72–76 (2018) (describing how American jurisdictions adopted European approaches to collateral consequences, which were built on earlier historical antecedents that conceived of them as limited punishments).

¹⁶⁰ *Id.*

¹⁶¹ As Bill Stuntz argued, there are incentives built into the American system of criminal justice that lead to the expansion of the reach of the criminal law. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 519–23 (2001).

¹⁶² For example, sex offender registries are a relatively new phenomenon, as are certain categorical bans in employment, or measures relating to eligibility for public benefits. See, e.g., John Kip Cornwell, *The Quasi-Criminality Revolution*, 85 *UMKC L. REV.* 311, 316–18 (2017) (discussing the features of quasi-criminal proceedings impacting liberty and their outgrowth from a culture of control). Of course, analysis of a particular collateral consequence would require considering whether its goals were achieved by other types of measures prior to the onset of the administrative state.

override proportionality analysis.¹⁶³ In short, the Court has intimated that incapacitation or deterrence cannot be reason alone to uphold certain punishments, implying a retributive ceiling.¹⁶⁴

But that is not the end of the analysis under the Eighth Amendment, which still requires that the punishment not be “cruel.” A cruel punishment is one that is inconsistent with prior practice and not calibrated to blameworthiness.¹⁶⁵ Hence, the crucial question is “whether some change in circumstances relevant to the offender’s culpability justifies an increase in the harshness of [the] punishment” for altogether similar crimes.¹⁶⁶ Given that the collateral consequences state was not the fault of offenders, and its expansiveness is almost entirely a post-1970s phenomenon, it is hard to see how many collateral consequences would *not* be labeled cruel under this definition.

This understanding of proportionality within the Eighth Amendment, which Stinneford has persuasively argued for and applied to existing Supreme Court jurisprudence on proportionality review,¹⁶⁷ provides a glimmer of hope for challenges to some of the most egregious collateral consequences. Collateral consequences that exacerbate severe harm beyond prior practice would be suspect because they result in unjust suffering.¹⁶⁸ That seems especially so when the punishment is not transparent to the average citizen.¹⁶⁹ Given the Court’s recent willingness to entertain their significance, the time is ripe for more constitutional connections to be explored.¹⁷⁰

¹⁶³ See *Graham v. Florida*, 560 U.S. 48, 73 (2010) (“Incapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”).

¹⁶⁴ Lee, *Why Proportionality Matters*, *supra* note 135, at 1849.

¹⁶⁵ Stinneford, *Rethinking Proportionality*, *supra* note 103, at 972–73.

¹⁶⁶ *Id.* at 972.

¹⁶⁷ See *id.* at 976 (“Prior to 1978, there was no mandatory minimum punishment for the crime [first time offense for possession with intent to distribute cocaine] in Michigan, and the maximum punishment available for the crime was twenty years. No other state’s sentencing statute required a mandatory minimum sentence of more than fifteen years, and federal law required a mandatory minimum sentence of five years imprisonment.” (footnotes omitted)). A similar analysis might be conducted in relation to the slate of collateral consequences faced by low-level, misdemeanor offenders today.

¹⁶⁸ Stinneford, *Original Meaning*, *supra* note 151, at 447 (“When a given punishment is challenged as cruel and unusual, the question is not whether it inflicts pain that is unduly harsh as an abstract and absolute matter, but rather whether it inflicts pain that is unduly harsh in comparison to the traditional punishments it has replaced.”).

¹⁶⁹ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 155 (2d prtg. 2002) (noting how non-public punishment would probably have been viewed as tyrannical in earlier American eras).

¹⁷⁰ For example, last term the Supreme Court reviewed the constitutionality of deference to administrative agencies when it comes to interpreting sexual offender registry statutes, as well as the concept of excessive fines. *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019); *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). That comes on the heels of a decade of acknowledging the significance of collateral consequences, most notably in *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). Fusion of *Padilla* and other similar cases with a revised but more historical understanding of the Eighth Amendment leaves room for consideration of a number of collateral consequences. As Stinneford puts it, “a focus on prior

With all of the above said, the Eighth Amendment, in the short term, is unlikely to serve as a sharp sword to challenge collateral consequences for two reasons: (1) current doctrine defers greatly to legislatures; and (2) some collateral consequences, like disenfranchisement or loss of a license, have historical precedent. In short, constitutional proportionality analysis, even if it assumes retributive premises, is not a panacea for reforming the collateral consequences regime. Rather, the bulk of the work will still fall on legislatures and policymakers to recognize that the risk of collateral consequences running amok is greater when retributivist concerns, like proportionality, are ignored or relegated to the sidelines.¹⁷¹ This Article calls on legislatures to think more clearly about how collateral consequences relate to the retributivist limits within their existing state codes¹⁷² and how they are being reiterated by the judiciary, and whether they have any connection to historical practices. In short, legislatures need to take seriously the retributivist constraints they have built into their codes when considering the propriety of collateral consequences.¹⁷³

D. *Plea-Bargaining Realities*

As mentioned above, most prosecutions involve misdemeanor and low-level order-maintenance crimes. The overwhelming majority of these prosecutions end via plea deals.¹⁷⁴ The Court in the past decade has reiterated this systemic reality and developed its plea-bargaining jurisprudence. Most notably, in *Padilla v. Kentucky*,¹⁷⁵ *Lafler v. Cooper*,¹⁷⁶ and *Missouri v. Frye*,¹⁷⁷ the Court has discussed the importance of notice of extraneous consequences of plea deals, and expressed a desire to mitigate coercion. These concerns accord with the communicative components of retributive justice, as well as proportionality.

For example, some defendants plead to crimes that they did not commit, and for a variety of reasons.¹⁷⁸ Legal and factual guilt, as reported, diverge.

practice would significantly increase the scope of protection the Cruel and Unusual Punishments Clause provides to criminal offenders generally.” Stinneford, *Rethinking Proportionality*, *supra* note 103, at 977.

¹⁷¹ Lee, *Why Proportionality Matters*, *supra* note 135, at 1851 (noting how ambiguities relating to proportionality analysis weigh in favor of expecting legislatures to make determinations).

¹⁷² See ROBINSON & WILLIAMS, *supra* 26, at 5–7 (noting how many states recognize retributivist restraints within their existing code).

¹⁷³ See *infra* Part III.A (discussing systemic implications with a focus on legislatures, desert, and collateral consequences).

¹⁷⁴ Erica Goode, *Stronger Hand for Judges in the “Bazaar” of Plea Deals*, N.Y. TIMES, Mar. 23, 2012, at A12 (noting that ninety-seven percent of federal convictions and ninety-four percent of state convictions result from plea deals).

¹⁷⁵ 559 U.S. 356, 366 (2010).

¹⁷⁶ 566 U.S. 156, 157 (2012).

¹⁷⁷ 566 U.S. 134, 135 (2012).

¹⁷⁸ See Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 711 (2017) (describing how pre-trial detention

But the collateral consequences could be harsher for the crime pled to than the crime committed. This, coupled with concerns about notice and coercion, could result in an offender's unjustified placement in a group that is punished by a particular collateral consequence that is disproportionate to the punishment for the actual crime committed. This certainly occurs when prosecutors adopt policies that treat all charges similarly in terms of plea bargaining. The result is that the defendant gets punished for group identity assigned by the charge, not desert connected to the committed acts.¹⁷⁹

Another relevant consideration is that plea-bargaining undoubtedly saves the system serious costs and communicates that the defendant is not persisting in the rightness of the wrongdoing. A defendant's decision to plead guilty results in less disruption overall, in both a moral and practical sense. The defendant accepts responsibility, thereby refraining from persistence about the rightness of the wrongdoing. In a sense, the defendant has retracted the initial representation that the defendant was above the law. Yet the imposition of collateral consequences post-plea would seem to cut the other way, such that the defendant's decision to limit the number of resources required by the state to prosecute actually results in *more* punishment. The retributivist must confront whether acceptance of responsibility by the defendant has implications for how much punishment should occur, or at least the nature of the punishment. Here, the relationship between forgiveness and justice is significant.

A defendant's decision to plead guilty results in fewer costs for the system. In misdemeanor or low-level prosecutions where counsel is not immediately required, the lack of public lawyer staffing certainly leads to fewer costs. But even in more complicated cases that result in guilty pleas, the fact that the state does not have to proceed to trial, which necessarily entails significant quantities of pre-trial work inside and outside of courtrooms, means fewer costs. Nevertheless, these bargains can result in the same or worse collateral consequences for those who plead out. In some instances, prosecutors might seek to enforce otherwise discretionary collateral consequences. This would seem to invert the punishment calculus on the mind of some retributivists. The punishment should be calibrated to the *amount of disruption* caused by the offender. But an offender's decision to accept responsibility and release the state from having to prove the disruption could mean the defendant has decided to collaborate in the restorative retribution.¹⁸⁰ Arguably, it should mitigate the quantity of *desert*.

can result in more guilty pleas); Charles E. Loeffler, Jordan Hyatt & Greg Ridgeway, *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. QUANTITATIVE CRIMINOLOGY 259, 272–79 (2018) (providing findings from a study regarding wrongful convictions and guilty pleas).

¹⁷⁹ Sidhu, *supra* note 15, at 707–08.

¹⁸⁰ “Could” is a necessary qualification here because the motivation behind the plea determines whether the defendant is participating in the restoration aimed for by retributive justice.

In fairness, a critical response might suggest that a defendant's cooperation does not alter the initial desert basis. But that simply means that the relationship between forgiveness and retributive justice might be implicated.¹⁸¹ One concern is that forgiveness or mercy undercuts retributive justice by violating the equalized liberty desired by retribution. But a defendant's acceptance of his or her wrongdoing allows for a distinction between the offender and the act itself.¹⁸² This is because the offender is then *joining* the community's disapproval of the act, such that forgiveness by the community no longer unequivocally communicates leniency. In other words, accepting one's guilt—by pleading guilty—ensures that the original endorsement by the wrongdoer of the wrongdoing has been retracted. The offender seems to “get it.” The community can then “join the wrongdoer in condemning the very act from which he now stands emotionally separated.”¹⁸³ The plea begins the process of restoration built into retribution. The road to equilibrium, by starting with the offender, means the community is not getting hoodwinked. The offender's will is already in the process of correction. This internalized blame by the offender then requires *less external* punishment. In this sense, retribution would seem to allow for the exercise of mercy or forgiveness, although it might not be required, depending on the circumstances.¹⁸⁴ At the very least, this approach counters the incapacitative logic that assigns dangerousness based on group identity rather than careful scrutiny of the act and actor's blameworthiness.

Of course, that also leads to a separate question. Who comprises the community of actors mentioned previously? In other words, it could be the case that while the retributivist can concede that a defendant's plea factors into the type of punishment, what really is at stake is who should be restrained from inflicting the collateral consequence. Although retribution operates to constrain communal resentment at the offender, it does not necessarily follow that forgiveness or mercy must be a state act. The state

¹⁸¹ Jeffrie G. Murphy, *Forgiveness, Mercy, and the Retributive Emotions*, 7 CRIM. JUST. ETHICS 3, 6 (1988).

¹⁸² *Id.* (“But to the extent that the agent separates himself from his evil act, then to that extent forgiveness *of him* is possible without a tacit approval of his evil act.”).

¹⁸³ *Id.* at 7 (“But what if they come to separate themselves from their own evil act? Then the insulting message is no longer present—no longer endorsed by the wrongdoer. We can then join the wrongdoer in condemning the very act from which he now stands emotionally separated. Thus to the degree that the agent can be divorced from his evil act, forgiveness is possible without lack of self-respect.”).

¹⁸⁴ Others have written about this complicated relationship, noting how mercy might be considered necessary, in some instances, to perfect imperfect “legal justice.” Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 93, 97 (1993). It is important to realize that the richness of mercy as a moral and social concept stems from its connection to the dictates of desert rather than utilitarian calculations.

could still inflict direct desert. Private, non-official actors could then be tasked with exercising mercy or forgiveness.¹⁸⁵

E. *Restoration and Communal Responsibility*

Recall that retribution aims for the restoration of a baseline moral and political situation through imposition of what the offender deserved. This theme is present in some strands of retributivism more than others, and can closely align with what other scholars have labeled reconstructivism.¹⁸⁶ Given the amount of power that the government possesses, especially to brand offenders with lifelong stigma, the state must be careful to preserve legitimacy when exacting punishment.¹⁸⁷ Retributivism holds that the state is the only legitimate punisher, meaning private actors should not take the law into their own hands.¹⁸⁸ There are limits of state intervention and for other actors within the wrongdoer's community.¹⁸⁹ If those actors continuously inflict suffering after the original debt is paid, then the damaged relationship between the offender and the community can persist and the legitimacy of the state as a whole can be compromised.¹⁹⁰ Thus, important questions to ask about a collateral consequence are: (1) Will the measure inhibit restoration or disrupt the social order?; (2) Is the consequence necessary as part of the original desert?; and (3) Will the measure leave room for private actors to exact extra punishment-like suffering in a fashion that delegitimizes government's role as the sole punisher?¹⁹¹

¹⁸⁵ Murphy, *Forgiveness, Mercy*, *supra* note 181, at 13 (“There is thus room for mercy as an important moral virtue with impact upon the law, but it is a virtue to be manifested by private persons using the law—not by officials enforcing the law.”).

¹⁸⁶ See Kleinfeld, *Reconstructivism*, *supra* note 31, at 1486 (discussing similarities between retributivism and reconstructivism). Reconstructivism emphasizes the social function of the criminal law's ability to repair the moral culture, focusing on the solidarity between members of the community. Some versions of retributivism, especially non-deontological desert-based theories, do the same, but usually as byproduct of pursuit of imposing individual punishment. See Finnis, *supra* note 83, at 97 (discussing how retribution serves as functions for community).

¹⁸⁷ Lee, *Why Proportionality Matters*, *supra* note 135, at 1838.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* 127 (2010) (arguing for a “laissez-faire” conception of state intervention); Lee, *Why Proportionality Matters*, *supra* note 135, at 1839 (noting how the government, “as the exclusive agent of punishment, . . . has dual commitments”). [AQ]

¹⁹⁰ WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 285–86 (2011) (discussing crises of legitimacy).

¹⁹¹ See GEORGE P. FLETCHER, *A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL* 18 (1988) (“A legal system is possible only if the state enjoys a monopoly of force. When private individuals appeal to force and decide who shall enjoy the right to ‘life, liberty, and the pursuit of happiness,’ there can be no pretense of the rule of law.”).

There is no question that collateral consequences affect an offender's ability to act as a member of a political community.¹⁹² This relates directly to the respect for individual agency and human dignity underlying retribution. Many of these sanctions affect the ability to participate in democratic processes, actualize constitutional rights, or move between social situations.¹⁹³ They tinker with freedom *after* the direct sentence that was supposed to be calibrated to desert. Alec Ewald describes it like this:

[F]ormer prisoners under the weight of collateral sanctions find that a relationship of basic political equality is replaced by a line dividing full citizens (holding the power to govern) from former offenders (who are merely governed). To the extent that they cannot conduct autonomous economic life and engage in political activities such as jury deliberation, military service, and voting, it is not hyperbole to say they are converted into objects.¹⁹⁴

The retributivist must be concerned with how a collateral consequence subverts the respect for individual accountability that underlies retributive justice and is at the core of membership in a political community. In concrete terms, that means the retributivist must demonstrate why a particular collateral consequence that results in the loss of a benefit or otherwise existing right correlates precisely to the proper desert.¹⁹⁵ If collateral consequences unjustifiably limit an ex-offender's ability to act as a moral agent capable of doing good or wrongdoing, it would seem the collateral consequence has gone too far. What results is a division within society: those that the law treats as moral-political actors and those that it does not. In a liberal, democratic order like the United States, this concretely means an altered citizenship status.¹⁹⁶ But retribution, properly conceived, is not meant to divide. Once desert has been achieved, the potentiality for individual agency and accountability returns to the ex-offender. Put simply, retributive justice does not hold that the ex-offender remains marked after punishment. Ongoing punishment that is not justified would be conceived as wrongdoing by the *state*.

¹⁹² Kleinfeld, *Two Cultures of Punishment*, *supra* note 58, at 965–71 (discussing how some collateral consequences, such as modern-day banishment, are primarily about citizenship).

¹⁹³ Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PA. ST. L. REV. 349, 370–72 (2012) (“[C]ivil sanctions are not collateral at all in at least one important sense: they *directly* limit participation in critical areas of life as the result of a criminal conviction.” (footnote omitted)).

¹⁹⁴ Ewald, *supra* note 50, at 105–06.

¹⁹⁵ LaFollette, *supra* note 105, at 244.

¹⁹⁶ AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 1–30 (2014) (noting formal and informal effects of collateral consequences on how citizens relate to the government).

And that ongoing punishment has effects on the relationship between the ex-offender and the community because it allows for persistent resentment that has not been resolved. Retributive justice asks the state to cease punishing once the threshold of restoration has been achieved. Anything beyond that is flirting with permitting a dangerous walking of the line between retribution and vengeance.

In other words, retributive justice assumes certain duties on the part of the state and community after the justified punishment. Christopher Bennett has made similar arguments, built from democratic values; they overlap with the core premises of retributive justice relating to restoring the state of equalized liberty that existed prior to wrongdoing.¹⁹⁷ As such, an expansive collateral consequences regime might be criticized on both retributive and democratic grounds.¹⁹⁸

Where is the overlap? It lies in a deep understanding of community duties that stem from the justification for punishment in the first place. Because retributive justice contains built-in limiting principles, it corresponds that those limiting principles imply certain duties not to go overboard.¹⁹⁹ It might be said that the community has duties to limit undue harm to ex-offenders, assuming imposition of the direct sentence was properly calibrated to what was deserved after the wrongdoing.²⁰⁰ This is especially so given that stigma can be criminogenic.²⁰¹

But frankly the discussion goes deeper than that. Recall that retributive justice presumes a *relationship* between the offender and the broader community.²⁰² This is the case whether a moral or political-legal retributivist is doing the punishing. Relationships are ongoing. They are a social reality. They are between actors with agency and dignity. The state's relationship and corresponding duties do not cease once desert is satisfied. Bennett calls this relationship "special,"²⁰³ and it would seem that retributive theories hold

¹⁹⁷ 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, 482 (2017) (arguing that responsibilities toward those with collateral consequences stem from the fact that the community is comprised of "fellow participants in a collective democratic enterprise").

¹⁹⁸ Lee, *Desert and the Eighth Amendment*, *supra* note 136, at 113 ("There is a difference between giving people what they deserve and stripping them of their citizenship . . .").

¹⁹⁹ Bennett, *supra* note 197, at 486 ("Those who punish are not morally free to do anything they like to the offender.").

²⁰⁰ *Id.* at 487 ("They are, therefore, violating duties to limit harm to offenders, and acting as though they had a morally free hand.").

²⁰¹ EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 42–43 (W.D. Halls trans., 1984); JOHN BRATHWAITE, *CRIME, SHAME, AND REINTEGRATION* 16–21 (1989).

²⁰² Markel, *Shaming Punishments*, *supra* note 87, at 2191.

²⁰³ Bennett, *supra* note 197, at 488.

the same, as most locate the state as the only proper punisher in order to avoid revenge or vengeance.²⁰⁴

If retributive justice implies a special relationship between the state, community, and offender, which continues after retribution, then what are the parameters of those relationships? For the state, the starting point must be the attempted maintenance of the equilibrium previously disrupted, cognizant of the presumed individual agency of the actors within the community. That suggests that collateral consequences that are criminogenic might be problematic.²⁰⁵ It also suggests that punishment that exceeds culpability is actually punishment given in the absence of culpability—which also implicates the Eighth Amendment.²⁰⁶ At the same time, it also leaves open the possibility that some collateral consequences might be necessary components of a justified punishment, something this Article does not dispute.²⁰⁷

As for individual actors within the community, as distinguished from the official state, the answer might lie in a concept of associational duties.²⁰⁸ Retributive justice, by locating punishing authority in the state, limits what individual community members can do in response to wrongdoing. These limitations suggest at least a duty *not to inflict additional punishment*. It is not clear that a positive duty to restore falls into the lap of the fellow citizen, although perhaps an argument can be made.²⁰⁹ But the infliction of additional punishment-like harms, even if formally allowed by the state, would seem to go too far as it would result in additional disruption to the order that was purportedly restored after the original punishment. Except this time, it is not the ex-offender doing the disrupting. Call it state-sanctioned disruption *after* state-inflicted punishment.²¹⁰

²⁰⁴ R.A. Duff, *Retrieving Retributivism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 3, 6–7 (Mark D. White ed., 2011).

²⁰⁵ Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT'L INST. JUST. J. 42, 44 (2012), <https://www.nij.gov/journals/270/pages/criminal-records.aspx>.

²⁰⁶ Stinneford, *Rethinking Proportionality*, *supra* note 103, at 908.

²⁰⁷ As mentioned in my previous Article, *Are Collateral Consequences Deserved?*, I do not disagree that retributivist principles can *justify* collateral consequences and that collateral consequences can *pursue* desert. Murray, *Collateral Consequences*, *supra* note 16, at 4. The thrust of the argument, fleshed out here, is that desert, as a *distributive principle*, can lead to suspicion of collateral consequences.

²⁰⁸ Bennett locates these duties due to the social position of the ex-offender vis-à-vis his fellow citizens. *See* Bennett, *supra* note 197, at 482.

²⁰⁹ *See, e.g.*, PETER KARL KORITANSKY, *THOMAS AQUINAS AND THE PHILOSOPHY OF PUNISHMENT* 193 (2012) (arguing that retributivism could lead to a deeper understanding of rehabilitation given that it is concerned with justice rather than preventing crime).

²¹⁰ In a liberal democratic state, this situation could be fragile given the autonomy of the non-offending decision maker in relation to the ex-offender. For example, can the state tell an individual that it cannot sanction an offender? This seems to hinge on whether individuals cede to the state the sole authority to exact punishment. Even if the state's role as punisher is primary but not absolute, the state should be able to enact reasonable restrictions on the actions of individuals who are, in a sense, usurping the state's preeminence. After all, that seems part of the social and political contract, although I concede

This type of disruption can have serious consequences that are anathema to retributive justice. A disproportionate punishment that disrupts socially and politically is particularly troubling given that it expands the reach of the effects of criminal law beyond its intended boundaries.²¹¹ Retributive justice is designed to prevent self-inflicted societal wounds after desert has been achieved. In a democratic society, this means that punishment that results in disrupted social and political equality, after desert restored it, undermines the democratic principle of inclusion.²¹² The communicative aspect of collateral consequences is then implicated. This is another reason why the American retributivist should view an expansive collateral consequences regime with skepticism.²¹³

III. SYSTEMIC IMPLICATIONS

These principles have significant implications for several components of the existing criminal system. This Section will highlight a few that immediately come to mind, but this Section is by no means exhaustive. First, it will provide examples of how retributive principles might assess some well-known collateral consequences, discussing how legislatures might view reform. Second, it demonstrates how these principles might affect decisions made by retributivist decision makers. Third, it explains how these principles might inform certain phases of the system where collateral consequences frequently arise.

A. Legislatures, Desert, and Collateral Consequences

Although Part II references possible constitutional arguments that might be aligned with retributive principles, most collateral consequences reform remains the province of state legislatures.²¹⁴ What should impel legislatures to act?

that resolution of this issue is difficult given other aspects of the American constitutional framework, such as the First Amendment. As such, this argument is geared more towards legislative action than constitutional norms.

²¹¹ LaFollette, *supra* note 105, at 257 (noting how collateral consequences regimes can result in the disenfranchisement of racial minorities); Bennett, *supra* note 197, at 492 (“[P]unishment regimes can play a significant role in denying individuals the benefits of social membership to which they are due.”).

²¹² Bennett, *supra* note 197, at 493 (“For democracy’s ideal of equality means that a society that aspires to be democratic cannot tolerate the idea of a semi-permanent body of second class citizens.”). A criticism of this position might ask how collateral consequences should be understood with respect to non-citizens. In my mind, the principles of retributive justice provide a stronger case for limiting such consequences than the associational duties put forth by Bennett.

²¹³ Bennett states, “[A] society cannot on the one hand claim to be democratic and on the other hand deny its citizens what they need to be independent and active participants.” *Id.* at 494. Similarly, a retributivist cannot on the one hand claim to be concerned with proportionate punishment, discharged by the state, and then deny the properly punished a return to the order.

²¹⁴ See ACLU et al., *State Reforms Reducing Collateral Consequences for People with Criminal Records: 2011-2012 Legislative Round-Up* 1, 2, 19 (2012) <https://www.sentencingproject.org/wp->

Some states already conceive retributivist constraints as worthwhile. This line of thinking returned after judicial rulings reinjected retributive concepts into state sentencing regimes²¹⁵ and due to the influence of the Model Penal Code, which references desert as a limiting principle in the sentencing context.²¹⁶

While state legislatures followed the Model Penal Code in the mid-twentieth century, expressly prioritizing crime prevention as the purpose for punishment,²¹⁷ the same legislatures either reversed course in the 1980s or corresponding state courts interpreted reform statutes as open to retributive principles.²¹⁸ Michele Cotton has demonstrated how legislatures adopted proportionality spectrums in the latter half of the century.²¹⁹ For example, Georgia, Oregon, Arkansas, Montana, North Carolina, and Washington, following Illinois, adopted language that limited punishment to “penalties which are proportionate to the seriousness of offenses”²²⁰ California prioritized retribution as “the” purpose for punishment²²¹ and Pennsylvania listed it as “primary” in 1982.²²² Arizona, North Dakota, Tennessee, Hawaii, and New York statutes referenced “just deserts” as crucial to punishment.²²³ These provisions emphasized limiting punishment based on the culpability of offenders and the degree of harm caused.²²⁴ Both are fundamentally retributive concepts.

content/uploads/2016/01/State-Collateral-Consequences-Legislative-Roundup-2011-2012.pdf (describing individual state measures to reform collateral consequences).

²¹⁵ Cotton, *supra* note 62, at 1319.

²¹⁶ ROBINSON & WILLIAMS, *supra* note 26, at 8.

²¹⁷ Cotton, *supra* note 62, at 1320 (referencing how the original Model Penal Code did not mention retribution).

²¹⁸ *Id.* at 1323 (noting how the Model Penal Code equivocated on whether retribution was a purpose of punishment).

²¹⁹ *Id.* at 1332.

²²⁰ *Id.* (quoting 720 ILL. COMP. STAT. ANN. 5/1-2(c) (West, Westlaw through P.A. 101-629)).

²²¹ CAL. PENAL CODE § 1170(a)(1) (West, Westlaw through 2019 Reg. Sess.).

²²² 204 PA. CODE § 303.11(a) (2019) (referencing “a primary focus on retribution”).

²²³ See, e.g., ARIZ. REV. STAT. ANN. § 13-101(6) (West, Westlaw through 2019 Reg. Sess.) (“To impose just and *deserved* punishment” (emphasis added)); N.D. CENT. CODE § 12.1-01-02(3) (West, Westlaw through 202 legislation) (noting how provisions of the title are intended to “prescribe penalties which are *proportionate* to the seriousness of offenses” (emphasis added)); TENN. CODE ANN. § 40-35-102(1) (West, Westlaw through First Extraordinary 2019 Legis. Sess.) (referencing “justly deserved” sentences); HAW. REV. STAT. ANN. § 706-606(2)(a) (West, Westlaw through 2019 Reg. Sess.) (directing courts to consider the seriousness of the offense “to provide *just* punishment”); N.Y. PENAL § 1.05(5) (McKinney, Westlaw through L.2019 c.752) (seemingly referencing harm caused when referring to “the consequences of the offense for the victim”).

²²⁴ See, e.g., ARK. CODE ANN. § 16-90-801(a)(1) (West, Westlaw through 2019 Reg. Sess.) (referencing “the nature and extent of the harm caused” and factors that might *diminish* the offender’s culpability); N.C. GEN. STAT. ANN. § 15A-1340.12 (West, Westlaw through 2019 Reg. Sess.) (stating that a primary purpose of sentencing is to impose a punishment “commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender’s culpability”); MONT. CODE ANN. § 46-18-101(2)(a) (West, Westlaw through 2019 Reg. Sess.) (referencing “nature and degree of harm caused”).

States who take such principles seriously must consider how the punitive nature of collateral consequences implicates retributive constraints. Resting on formalist classifications—which current judicial doctrine allows for the most part—allows legislatures and courts to shirk responsibility as the sole authority responsible for determining just punishment.

To be clear, legislatures do not need to abandon utilitarian principles when assessing the propriety of collateral consequences. In fact, many continue to retain utilitarian metrics, again following the Model Penal Code.²²⁵ But retributive distributive principles can serve as an additional tool for assessing whether a particular collateral consequence is appropriate or not. The constitutional system leaves to legislatures the decision whether to pursue desert or deterrence, or some other goal. But *if* a legislature states it is pursuing desert, or *prioritizing* it, then it should carefully scrutinize legislatively enacted collateral consequences according to the parameters of retributive justice in the jurisdiction.

B. *Retributivism and Specific Collateral Consequences*

How might this approach work for some specific, well-known collateral consequences? First, as mentioned earlier, most existing collateral consequences find their justification after the following question is posed: will this consequence keep *others* safe or prevent crime? If restraint can be rationalized, the consequence is presumptively permissible. The approach advocated in this Article steers in a different direction, instead asking: is this sanction deserved by those who commit the crime at issue?

Because desert implicates the distributive principles mentioned above, any collateral consequence would need to be precisely correlated to blameworthiness and be proportionate. It would also need to relate to the restoration at the core of retributivism, going no further than necessary to disrupt social order. In a democratic society, that suggests presumptive limits on the state, especially if direct, carceral sentences remain the norm. Of course, many collateral consequences could be justified, and might even do a better job than traditional methods of punishment—such as incarceration or probation—in accomplishing this objective.²²⁶

There are a few well-known collateral consequences that have received plenty of attention recently. Two include: (1) felon disenfranchisement; and (2) occupational license denials. This Section interprets these collateral consequences in light of the principles mentioned above.

²²⁵ Cotton, *supra* note 62, at 1325–35 (discussing the many states that retained utilitarian purposes in addition to reviving retributive principles).

²²⁶ For example, a short-term license denial might be a more appropriate punishment than several months incarceration for a mid-level offense, although it would be fact-specific.

1. *Disenfranchisement*

There is perhaps no collateral consequence—other than immigration—more in the news than felon disenfranchisement, a practice with a long history and constitutional permission.²²⁷ Approximately six million Americans are banned from voting.²²⁸ Florida recently passed a constitutional amendment, by a large margin, restoring the right to vote to over 1.5 million members of the state’s population.²²⁹ While that political result is somewhat unique and considered a resounding victory by many criminal justice reformers, it also was considered troubling by others elsewhere on the political spectrum.²³⁰

Felon disenfranchisement has a long history²³¹ and has been deemed within the authority of the states given the Fourteenth Amendment’s specific enforcement provisions.²³² Measures have involved short-term and lifetime bans.²³³ For example, in Florida, a lifetime ban ensued even if the felonies committed involved conduct that would normally be classified on the misdemeanor level by other jurisdictions.²³⁴ While state law allowed restoration for some types of felonies, and after a significant waiting period, several other states continue to retain measures like the initial ban that existed in Florida.²³⁵ The fact that the felony label has been applied to relatively minor crimes means that many more offenders potentially face the loss of the right to vote. Only fourteen states automatically restore some civil rights, including the right to vote, to felons.²³⁶

While current law does have a connection to historical practice, it bears mentioning that early colonial laws tended to strip the franchise after serious

²²⁷ E.g., George Will, *What Government Interest Is Served by Disenfranchising Felons?*, NAT’L REV. (Apr. 8, 2018, 6:30 AM), <https://www.nationalreview.com/2018/04/what-government-interest-is-served-by-disenfranchising-felons/>.

²²⁸ Jean Chung, *Felony Disenfranchisement: A Primer*, SENT’G PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [hereinafter THE SENTENCING PROJECT].

²²⁹ Janell Ross, *Amendment 4 in Florida Restored Voting Rights to Felons. Now That’s Back in Doubt.*, NBC NEWS (Apr. 5, 2019, 1:33 PM), <https://www.nbcnews.com/news/nbcblk/felon-voting-rights-back-jeopardy-florida-n991146>.

²³⁰ Roger Clegg & Hans A. von Spakovsky, *There Are Good Reasons for Felons to Lose the Right to Vote*, HERITAGE FOUND. (Apr. 10, 2018), <https://www.heritage.org/election-integrity/commentary/there-are-good-reasons-felons-lose-the-right-vote>.

²³¹ See ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 12–13 (2006) (contrasting American disenfranchisement policies with those of other countries); 3 CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 54 (1893) (describing the grounds for disenfranchisement in colonial New England).

²³² U.S. CONST. amend. XIV, § 2.

²³³ THE SENTENCING PROJECT, *supra* note 228, at 1.

²³⁴ See Will, *supra* note 227 (discussing how Florida “has a low threshold for felonious acts,” including driving without a license for the third time).

²³⁵ THE SENTENCING PROJECT, *supra* note 228, at 1.

²³⁶ *Id.*

malum in se violations.²³⁷ Post-Revolution, states expanded the restriction following the creation of more felony offenses.²³⁸ States continued to do so after the Civil War.²³⁹ The Supreme Court upheld this practice after an Equal Protection challenge, foreclosing many constitutional challenges.²⁴⁰ The Eighth Amendment arguments above are also unlikely to apply across the board given this long history.²⁴¹ As such, any argument against felon disenfranchisement must come from a policy rather than constitutional perspective, meaning legislative action.

Interpretation of these laws suggest they are fundamentally utilitarian and contractual, which perpetuates disagreement about classifying them as punishment.²⁴² One justification is that felons have shown that they cannot comply with the law, and therefore they cannot be part of the process that helps make the law.²⁴³ A breach of the social trust underlying the political process has occurred, triggered by the conviction. Non-compliance in the past serves as the basis for non-participation in the future, because otherwise there will be no incentive for the same individual, or others, to comply in the present. Additionally, offenders who vote might do so subversively, thereby further undermining the law.²⁴⁴

Second, the commission of serious crimes, in the words of one court, renders the offender “unfit.”²⁴⁵ Disenfranchisement, along these lines, is said to keep the electoral process untainted.²⁴⁶ This has informed how restoration of the franchise only occurs after proof that the person has not recidivated or been a repeat offender.²⁴⁷ This is basic incapacitative logic at work,

²³⁷ Alec C. Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1061.

²³⁸ THE SENTENCING PROJECT, *supra* note 228, at 3.

²³⁹ *Id.* See also Eli L. Levine, Note, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JUR. REV. 193, 196–201 (2009) (describing the history behind felon disenfranchisement).

²⁴⁰ *Richardson v. Ramirez*, 418 U.S. 24, 25 (1974). *But see* *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (suggesting disenfranchisement measures targeting individuals on the basis of race are problematic).

²⁴¹ For example, a third drunkenness conviction in Maryland resulted in the loss of voting privileges. See ANDREW DILTS, PUNISHMENT AND INCLUSION: RACE, MEMBERSHIP, AND THE LIMITS OF AMERICAN LIBERALISM 144 (2014).

²⁴² In other words, because utilitarian purposes for punishment can resemble utilitarian justifications for regulation, the line between the criminal and civil is difficult to decipher.

²⁴³ See Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1729 (2014) (“[A] ‘man who breaks the laws . . . could fairly have been thought to have abandoned the right to participate in further administering the compact.’” (quoting *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967))); see also 148 CONG. REC. S802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell) (arguing that those who break the law lose the right to make the law).

²⁴⁴ Ewald, *supra* note 237, at 1073–74.

²⁴⁵ *Washington v. State*, 75 Ala. 582, 585 (1884).

²⁴⁶ Sigler, *supra* note 243, at 1727.

²⁴⁷ Some states have processes for voting restoration. Many of these processes look at the length of time since the offense, any prior offenses, and whether there are any current concerns about the offender or accomplishments by the offender. See, e.g., COLLATERAL CONSEQUENCES RES. CTR., 50-STATE

suggesting first that participation by offenders will corrupt the process and second that offenders might engage in additional illegal behavior, a claim for which there is no proof.²⁴⁸ It is no secret that, as Mary Sigler argued, “[a] common theme in historical exclusions of criminal offenders from civic life is a concern that such persons will taint the body politic.”²⁴⁹ To be fair, Sigler understood this line drawing as fundamentally civil because the breach of the civic trust is doing the work, rather than a legislative desire to be punitive. But that reduces the punishment label to only the intentions behind the measure, rather than its nature and effects. That also would foreclose the applicability of retributive principles. But incapacitative line-drawing triggered by a conviction is fundamentally punitive given that the conviction is linked to wrongdoing considered morally blameworthy, and disenfranchisement resembles banishment-style isolation from the political-social community that is served by the criminal law.²⁵⁰ In a word, disenfranchisement based on conviction marks the condemned.

That last point would open the door to retributive concepts informing discussion about felon disenfranchisement. What might that discussion entail? First, concerns relating to blameworthiness could lead to suspicion about blanket bans, especially those based on lower-level crimes labeled as felonies. Given that low-level crimes do not always track normative guilt, or are the result of harsh plea-bargaining, lifetime bans risk being over-inclusive. Further, lifetime bans for crimes that are not egregious would not only be considered inconsistent with prior historical practice, but also disproportionate. The murderer and the low-level thief do not have the same degree of blameworthiness even if the legislature labels both crimes a felony.

Further, the effects on the individual and social restoration aimed for by retributivism cannot be forgotten. Given that a felony conviction already provides a scarlet letter, and in most states, a permanent one, how does enlarging its size and constantly etching the stain *not* disrupt what was supposed to be achieved via the direct sentence? The communicative nature of the punishment belies the very notion of desert; after completing a

COMPARISON: LOSS AND RESTORATION OF CIVIL RIGHTS & FIREARMS RIGHTS, <http://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/> (last visited June 9, 2020) (highlighting voter restoration processes in the applicable states).

²⁴⁸ George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899 (1999).

²⁴⁹ Sigler, *supra* note 243, at 1730.

²⁵⁰ Kleinfeld, *Two Cultures of Punishment*, *supra* note 58, at 949. This is a key distinction between my position and Sigler’s. Whereas Sigler would consider disenfranchisement regulatory because it relates directly to a breach of the civic trust, I would say the breach of the civic trust is one reason why punishment exists because the criminal law has a political-socio purpose by virtue of its connection to shared moral and social norms. In other words, punishment is about maintenance of the social order, of which voting is a part.

sentence, a felon who complied with a sentence remains barred from the political community purportedly served by the criminal law.

Of course, *some* disenfranchisement could be justified on desert-based grounds. For example, a retributivist might argue that for some egregious offenses, such as murder, the disruption caused by the offense was so grave that allowing the offender to vote would actually counteract the desert. Voting, in this regard, is taken away in order to illustrate the basic terms of the social fabric and what can happen if they are disregarded.²⁵¹ That is a position consonant with the voters and decision makers who have supported restoration efforts. Developed from these premises, disenfranchisement could also, for some duration, be defended. Some crimes violate the common political commitment underlying adherence to the criminal law, meaning the offender must show re-commitment to that order before regaining the ability to vote.²⁵²

But that is a far cry from applying permanent loss to individuals who have committed far less egregious crimes and done nothing to reoffend. Unconstrained disenfranchisement has the potential to re-disrupt the balance restored by other punitive measures that exist in the wake of a conviction. In other words, a retributive mindset rejects a complete commitment to the us-them mentality underlying permanent disenfranchisement. This is because retributive principles desire to communicate to the offender that a return to the political community is a goal and an expectation. Because desert is presumptively restrained, a time *will come* when the offender *should* be restored. Notably, this aligns with a liberal constitutional order that views class-based exile skeptically.²⁵³

In terms of practical administration, these principles suggest a strong look at which offenses should trigger *some* temporary disenfranchisement, for how long, and the processes required for restoration. A felony label, alone, no longer guarantees that a particular crime is grave enough to limit participation in the political community.²⁵⁴ Offenses that are particularly serious would provide the strongest grounds when considering blameworthiness and proportionality. Duration could also be linked to those concepts, bearing in mind the periodic nature of elections.

As far as the processes for restoration, this is a key difference between a retributive approach and a utilitarian one: the retributivist would likely

²⁵¹ Mary Sigler applies similar logic in her article mentioned above, although from a civil, regulatory background based on current doctrinal classifications by courts. *See* Sigler, *supra* note 243, at 1728 (referencing civic trust as underlying a regulatory approach to the franchise and emphasizing how withholding voting heightens a sense of civic responsibility).

²⁵² CHRISTOPHER BENNETT, *THE APOLOGY RITUAL: A PHILOSOPHICAL THEORY OF PUNISHMENT* 165 (2008).

²⁵³ Sigler, *supra* note 243, at 1738–39.

²⁵⁴ *Id.* at 1741 (referencing crimes considered serious enough historically, such as “murder, rape, arson, robbery, burglary, kidnapping, and prison escape”).

make that process simpler given that compliance with the law, during the period of disenfranchisement that was calibrated to the desert, reinforces the limits of such desert. That period might overlap with incarceration as well. In other words, a desert-based approach would not, in most cases, be open to extended disenfranchisement. On the contrary, the utilitarian would consistently ask the offender to prove non-riskiness, casting its lot with predictive indicators of future non-compliance with the law. This might take the form of more onerous requirements that force the ex-offender to prove worth. This is the existing reality in many states.²⁵⁵ The difference is primarily about who shoulders the burden and whether restoration would be presumptively obtainable. The retributivist approach begins to view persistent disenfranchisement skeptically after the desert has been meted out; the utilitarian approach views the offender skeptically until the offender proves otherwise.

2. *Occupational License Denials*

Reform of occupational licensing restrictions represents an area where legislatures have already incorporated some retributive-based principles. These restrictions came about in the second half of the last century, although some states reformed them relatively quickly, recognizing how they adversely affected rehabilitative efforts.²⁵⁶ However, many of these laws remained untouched for decades until reform-minded groups across the political spectrum generated model legislation.²⁵⁷

Many occupational license restrictions prevented offenders from obtaining licenses if they had committed crimes that were indicative of bad character. These laws reference crimes of “moral turpitude,” or use comparable labels.²⁵⁸ This statutory language resembles the incapacitative-based line drawing that underlies many collateral consequences. The idea is that commission of an offense indicates someone is a bad *person*, not someone who committed a bad *act*.²⁵⁹ The character judgment is about risk, not desert. Several state statutes indicate this logic themselves. For example, Arizona allows denial of a license on public safety

²⁵⁵ HULL, *supra* note 231, at 6–8; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 74 (2006).

²⁵⁶ COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, at 17 n.7 (2019) (referencing enactments of laws that limit the denial of employment opportunities in New Jersey, Colorado, Washington, Hawaii, Minnesota, New York, North Dakota, Pennsylvania, and Wisconsin).

²⁵⁷ *See id.* at 7 (discussing legislation advanced by the Institute of Justice and the National Employment Law Project).

²⁵⁸ *See* COLLATERAL CONSEQUENCES RES. CTR., LOSS AND RESTORATION, *supra* note 247 (describing the laws across all fifty states).

²⁵⁹ Kleinfeld, *Two Cultures of Punishment*, *supra* note 58, at 943 (referencing how banishment measures operate from the principle that the actor is akin to evil).

grounds.²⁶⁰ Arkansas and Minnesota are examples of states that require the petitioner to put forth evidence of rehabilitation.²⁶¹ Maryland allows denials when the offender “would [pose] unreasonable risk,”²⁶² and New Hampshire requires the licensing board to justify disqualification on the basis of public safety.²⁶³

The model legislation put forth by the Institute of Justice (IJ) and the National Employment Law Project (NELP) amplifies the aspects of criminal justice that the retributivist should be most concerned about. For example, both entities called for an emphasis on serious convictions, suggesting a desert threshold. They abandon vague standards like “good moral character.”²⁶⁴ Second, many states have eliminated the character-based language referenced above, instead opting for requirements that the offense in question have a direct relationship to the sought-after license.²⁶⁵ Notably, this is an example of blameworthiness and proportionality principles helping to narrowly tailor a licensing restriction.

For example, Connecticut now prohibits licensing authorities from disqualifying a person automatically, requiring the agency to consider the nature of the crime, how it relates to the job, information pertaining to rehabilitation, and the time elapsed since conviction.²⁶⁶ The District of Columbia has similar factors for public employment, including the person’s age at the time of the offense.²⁶⁷ Missouri prevents denial of a license “solely” on the basis of a conviction when the sentence has been fully served.²⁶⁸ These factors relate directly to the blameworthiness of the offender and the severity of the offense. They are expressions of considerations relating to desert.

Further, states that have modified statutes to require a reasonable relation between the offense and license or job sought²⁶⁹ are essentially

²⁶⁰ ARIZ. REV. STAT. ANN. § 41-1093.04(E) (Westlaw through 2019 Reg. Sess.).

²⁶¹ ARK. CODE ANN. § 17-1-103(d) (West, Westlaw through 2019 Reg. Sess.); MINN. STAT. ANN. § 364.03(Subd. 3) (West, Westlaw through 2020 legislation); *see also* N.M. STAT. ANN. § 28-2-4(2)–(3) (West, Westlaw through 2019 Reg. Sess.) (mentioning rehabilitation but not explicitly requiring evidence of such).

²⁶² MD. CODE ANN. CRIM. PROC. § 1-209(d)(2) (West, Westlaw through 2019 Reg. Sess.).

²⁶³ N.H. REV. STAT. ANN. § 332-G:13(b) (Westlaw through 2019 Reg. Sess.).

²⁶⁴ COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS, *supra* note 256, at 8.

²⁶⁵ *See, e.g.*, COLO. REV. STAT. ANN. § 24-5-101(1)(a) (West, Westlaw through 2019 Reg. Sess.) (declaring that offenses of “moral turpitude” alone cannot disqualify an applicant); *see also* COLLATERAL CONSEQUENCES RES. CTR., 50-STATE COMPARISON CONSIDERATION OF CRIMINAL RECORDS IN LICENSING AND EMPLOYMENT, <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/> (last visited June 9, 2020) (identifying states with comparable statutes).

²⁶⁶ CONN. GEN. STAT. ANN. § 46a-80(a)–(c) (West, Westlaw through 2019 Reg. Sess.).

²⁶⁷ D.C. CODE ANN. § 1-620.43 (West, Westlaw through 2019).

²⁶⁸ MO. ANN. STAT. § 324.029 (West, Westlaw through 2019 Reg. Sess.).

²⁶⁹ *See, e.g.*, FLA. STAT. ANN. § 112.011(1)(a)–(b) (West, Westlaw through 2019 Reg. Sess.) (stating that a person may be denied a job only where the crime is “directly related to the position of

attempting to calibrate the restriction to a precise quantum of risk, mindful of the initial degree of blameworthiness and proportionality. In other words, requiring a direct connection between the offense and the license or position amplifies blameworthiness and proportionality, limiting the potential for over-inclusion stemming from the use of *any* conviction as a proxy for riskiness. Some states, like Indiana, have supplemented these considerations by identifying only a limited window of time during which the state can actually intervene to restrict a license.²⁷⁰ Kansas has proposed legislation that prevents less serious convictions from being considered after five years, and non-conviction records cannot be considered at all.²⁷¹ That is an obvious example of the limitations of desert; once the state has punished, it cannot punish anymore. These reforms illustrate the utility of using retributive constraints to help cabin collateral consequences motivated by a desire for incapacitation.

C. *Retributivist-Minded Prosecutors*

There are various decision makers at notable points within the criminal system who might be retributively inclined. The prosecutor is front and center.

Given that collateral consequences are often felt in the wake of charging and bargaining,²⁷² their persistence implicates the actions of prosecutors. Others have highlighted the importance of prosecutorial discretion when it comes to the imposition of collateral consequences following guilty pleas.²⁷³ And while many larger prosecutors' offices—particularly in major metropolitan areas—have made policy changes to guide front line prosecutors, little attention has been paid to the penal attitudes of front-line prosecutors and how they might inform thinking with respect to collateral

employment sought" and denied a license where the crime is "directly related to the standards" for determining whether a license is appropriate); GA. CODE ANN. § 43-1-19(q) (West, Westlaw through 2019 Reg. Sess.) (proposing legislation requiring that no individual be denied a license on the basis of a prior felony or crime involving moral turpitude unless there is an offense directly related to the license sought); KY. REV. STAT. ANN. § 335B.020(1)–(2) (West, Westlaw through 2019 Reg. Sess.) (requiring that no person be denied public employment or a license "solely because of a prior conviction of a crime, unless the crime for which convicted directly relates to the position of employment sought or the occupation for which the license is sought" and giving guidance for determining whether there is such a relationship); IND. CODE ANN. § 25-1-1.1-6(e) (West, Westlaw through 2019 Reg. Sess.) (prohibiting an individual's denial of a license because of a criminal conviction unless that crime is directly related to the occupation for which the license is sought).

²⁷⁰ IND. CODE ANN. § 25-1-1.1-6(f) (West, Westlaw through 2019 Reg. Sess.).

²⁷¹ KAN. STAT. ANN. § 74-120(b)(2) (West, Westlaw through 2019 Reg. Sess.). Maine has similar provisions. ME. REV. STAT. ANN. tit. 5, § 5303 (West, Westlaw through 2019 Reg. Sess.).

²⁷² See, e.g., Murray, *Prosecutorial Responsibility*, *supra* note 74, at 214–15 ("[T]he full force of a criminal conviction is only felt and known after the most immediate consequences . . .").

²⁷³ Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1200 (2016).

consequences.²⁷⁴ But plenty of prosecutors on the front lines might be operating with a retributive mindset.

Many smaller jurisdictions prioritize desert in their prosecutorial mission statements.²⁷⁵ Additionally, the Model Rules of Professional Conduct arguably nod to retributive principles by referencing “justice” in the Comments to Rule 3.8, which tasks prosecutors with being “ministers of justice.”²⁷⁶ While the term is undefined, what follows implies prosecutors must be cognizant of what someone deserves: “[t]his responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”²⁷⁷ The rule itself is primarily concerned with the adjudication of guilt in a fashion that aligns with the truth, meaning that the “deservingness” of the defendant is front and center.

Further, the prosecutor’s role as agent for the state’s interests connects to the retributive notion that the state is the sole legitimate punisher. In other words, Rule 3.8’s reference to justice means the prosecutor must account for how state action implicates justice. And when that justice necessarily entails considerations of blameworthiness, it is hard to ignore other retributive concepts that might serve as limits on collateral consequences felt by defendants.

What does that reality mean for prosecutorial discretion and collateral consequences? First, reformers should recognize that a significant number of prosecutors might be operating from retributive premises when approaching the bargaining process. It also means that any front-line prosecutor who negotiates dispositions on a daily basis, and simultaneously is cognizant of retributive principles, could also apply those principles to the implications for collateral consequences for any given bargain. A retributive-minded prosecutor’s focus on achieving justice cannot stop with the disposition and immediate punishment. Assessments of blameworthiness and proportionality made by such a prosecutor are relevant to the effect of the plea beyond the direct sentence. This can manifest in other phases, including how prosecutors might approach the concept of mercy,²⁷⁸ pardons, or expungement.

²⁷⁴ One exception involves a study relating to prosecutorial perceptions of justice, although it does not focus on punishment theory or retributivism. See Jackie Chavez & Scott Mathers, *An Examination of How District Attorneys Perceive Justice*, 10 INT’L J. FOR CT. ADMIN. 35, 35 (2019) (focusing on perceptions of distributive, procedural, informational, and interpersonal justice).

²⁷⁵ This statement is supported by research I have conducted relating to state and local prosecutor mission statements.

²⁷⁶ MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983).

²⁷⁷ *Id.*

²⁷⁸ Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2865 (2018).

One example of this thought process in action is the New Jersey Attorney General's recent Guidance relating to marijuana prosecutions, which calls for an individualized analysis by municipal prosecutors when deciding how to approach low-level marijuana prosecutions.²⁷⁹ The Guidance references "circumstances or factors" that should be considered by front-line prosecutors; they include, "but are not limited to," the type of offense, personal characteristics of the defendant, and the adverse consequences that may result from a conviction.²⁸⁰ Many of these factors relate directly to individual blameworthiness, harm caused by the offense, and proportionality as applied to the particular defendant. Notably, the Guidance emphasizes several collateral consequences that might be said to implicate the ability to participate in the community, whether those consequences are automatically or potentially imposed by private actors.²⁸¹

D. *Public Criminal Records and Expungement*

Every state maintains a recordkeeping system that tracks the results of various phases of the criminal justice process. These records contain arrest, charging, bail, pre-trial, evidentiary, bargaining, trial, and post-conviction information.²⁸² While the maintenance of public criminal records is not inherently punitive, the dissemination of, and access to, such records implicates the collateral consequences that might be labeled punishment. States are routinely involved in either publishing the information or regulating access,²⁸³ implicating the state's role as the sole punisher.

The maintenance of criminal record history information has a long history, dating back to Continental practices prior to the development of a unique American approach.²⁸⁴ Its initial purposes were varied, and the recordkeeping and dissemination of the information certainly implicates the First Amendment.²⁸⁵ But the need to accurately identify recidivists was the

²⁷⁹ Gurbir S. Grewal, State of N.J. Office of the Attorney Gen., Guidance Regarding Municipal Prosecutors' Discretion in Prosecuting Marijuana and Other Criminal Offenses (Aug. 29, 2018), https://nj.gov/oag/newsreleases18/2018-0829_AG-Memorandum.pdf (discussing various factors for deciding whether to pursue or dismiss charges). Notably, none of these factors relate to crime control. They are focused on the nature of the offense, blameworthiness, proportionality, and reintegration. *Id.*

²⁸⁰ *Id.* at 7.

²⁸¹ *Id.*

²⁸² For example, the average docket sheet tracks each phase through a criminal prosecution. See generally *Docket Research*, YALE L. SCH. LILLIAN GOLDMAN L. LIBR., <https://library.law.yale.edu/guides/docket-research> (last updated July 2, 2018) (describing the information contained in a docket).

²⁸³ JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 6 (2015).

²⁸⁴ Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 8–11 (2016) (outlining the "continental roots" of "modern criminal history repositories" and describing French adoption of penal registers in 1850).

²⁸⁵ See, e.g., Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY.

primary motivation behind maintenance of criminal record history information.²⁸⁶ Other goals included the prevention of future crimes, line-drawing related to eligibility for public privileges such as voting, and stigmatization to promote “social moralization.”²⁸⁷ They also were intended to “amplify the imposed punishment and make future offending less likely.”²⁸⁸ These public registries heightened the state’s capacity for surveillance, allowing for partnership with private members of the community.²⁸⁹ These goals mirror deterrence and incapacitative-based theories.

American criminal recordkeeping began much later, and frankly involved a mixed bag of local and state practices.²⁹⁰ The American infrastructure was arguably less punitive initially, growing organically as a means to ensure accurate reporting of governmental action.²⁹¹ That aligns with First Amendment values. A patchwork approach dominated until the second half of the twentieth century, when the federal government began to streamline recordkeeping practices.²⁹² Now each state has its own criminal record repository, with support from the federal government, which has its own records.²⁹³ Most states maintain online databases that are largely accessible to the public via simple online search techniques.²⁹⁴ Alternatively, states publish or sell the information to private entities who then make the

U. CHI. L.J. 1, 6 (2017) (discussing the potential First Amendment implications of requiring online publishers to post corrections or addendums for criminal records); *see also* Corda, *supra* note 284, at 13 (“[L]abor and civil liberties organizations . . . feared that centralized and coordinated criminal history repositories could become ‘a step towards European-style national registration systems which would discourage the exercise of First Amendment rights.’” (quoting KENNETH C. LAUDON, DOSSIER SOCIETY: VALUE CHOICES IN THE DESIGN OF NATIONAL INFORMATION SYSTEMS 35 (1986))).

²⁸⁶ JOHN PRATT, GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW AND SOCIAL CHANGE 33–34 (1997).

²⁸⁷ Corda, *supra* note 284, at 10 (quoting ARNOULD BONNEVILLE DE MARSANGY, EXPOSÉ COMPLET DU SYSTÈME DES CASIERS JUDICIAIRES 648 (1848)).

²⁸⁸ *Id.* at 11 n.31 (quoting ARNOULD BONNEVILLE DE MARSANGY, EXPOSÉ COMPLET DU SYSTÈME DES CASIERS JUDICIAIRES 665 (1848)).

²⁸⁹ Corda, *supra* note 284, at 11 (“[Penal registries] were not meant simply to be an effective technical support for implementation of habitual offender laws. Two further goals were intended: encouraging mutual surveillance within communities and heightening the stigma of conviction in a way that would amplify the imposed punishment and make future offending less likely.”).

²⁹⁰ KENNETH C. LAUDON, DOSSIER SOCIETY: VALUE CHOICES IN THE DESIGN OF NATIONAL INFORMATION SYSTEMS 32 (1986).

²⁹¹ Corda, *supra* note 284, at 41 n.177 (citing SAMUEL WALKER, A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM 40 (1977)).

²⁹² *See id.* at 13 (describing the Law Enforcement Assistance Administration Act).

²⁹³ Corda, *supra* note 284, at 14.

²⁹⁴ For a comprehensive list of each state’s online database see *Designated Statewide Criminal History Repositories and Alternatives*, NAT’L SERV., https://www.nationalservice.gov/sites/default/files/documents/table-of-designated-state-repositories-and-alternates-2-23-2018_508.pdf (last updated Feb. 23, 2018).

information available through background checks.²⁹⁵ That degree of accessibility contrasts starkly with the period prior to the 1970s, when criminal history information was largely invisible to the public.²⁹⁶ Accessibility was not synonymous with immediate availability.

Nevertheless, public criminal record history information has serious consequences for those who encounter the system. A person's persona and reputation can be adversely affected, even if that person has complied with all requirements stemming from the encounter with the criminal justice process.²⁹⁷ Further, dissemination of the information can result in lost opportunities, whether relating to education, employment, or other privileges or benefits.²⁹⁸ These can amplify the effect of initial punishment or perpetuate it.²⁹⁹ They also can allow the state to more easily track those identified as dangerous.³⁰⁰

The traditional response to the harsh effects of criminal record history information has been to make it less public, through sealing and expungement remedies. These processes arose in the mid-twentieth century and were designed to allow for offender restoration.³⁰¹ They grew out of the rehabilitative focus on punishment at the time.³⁰² Expungement was reserved

²⁹⁵ JACOBS, *supra* note 283, at 56–58; *see also* Corda, *supra* note 284, at 6 (“The spread of the Internet boosted access to criminal records and led to the rise of a brand new industry: private vendors which collect criminal history information in bulk from state repositories and judicial system databases and sell it online.”).

²⁹⁶ Corda, *supra* note 284, at 30; Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1139 (2002) (“Finding information about a person often involved a treasure hunt around the country to a series of local offices to dig up records.”); Nancy S. Marder, *From “Practical Obscurity” to Web Disclosure: A New Understanding of Public Information*, 59 SYRACUSE L. REV. 441, 441 (2009) (“[D]ocuments [could] be public, and yet because they [were] held in different places and require[d] effort to locate, they [were], for all intents and purposes, ‘practical[ly] obscur[e].’” (citation omitted)). Notably, this historical reality—which is really a story of inaccessibility—suggests the argument against expungement and sealing on the basis of First Amendment access may be overblown.

²⁹⁷ Corda, *supra* note 284, at 16.

²⁹⁸ *Id.*

²⁹⁹ Corda, *supra* note 284, at 16 (quoting Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483, 484 (2006)).

³⁰⁰ WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 83–84 (2009) (describing criminal history information as a way to control “criminally risky individuals”); *see also* Corda, *supra* note 284, at 41 (“Criminal history information is mostly seen in contemporary America as a means to control ‘dangerous bodies.’” (quoting WAYNE A. LOGAN, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA 83–84 (2009))).

³⁰¹ MARGARET LOVE ET AL., COLLATERAL CONSEQUENCES RES. CTR., FORGIVING AND FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS 6 (2018).

³⁰² Murray, *Unstitching Scarlet Letters?*, *supra* note 278, at 2838–42 (discussing origin of expungement statutes).

for a small class of ex-offenders who had proved their worthiness.³⁰³ In this respect, expungement procedure was the logical outgrowth of utilitarian criminal purposes: the burden was on the petitioner, rather than the state, to put an end to the punishment-like effects of a public criminal record.

Examples of such regimes existed in a number of states. State legislatures passed expungement statutes that identified eligibility guidelines.³⁰⁴ While some of these guidelines overlapped with retributive considerations—like the gravity of the offense—many left administrative and decision making processes ambiguous.³⁰⁵ Courts filled the void, creating balancing tests that weighed state interests against those of the petitioner.³⁰⁶ In effect, courts were tasked with engaging in cost-benefit calculations about offender riskiness rather than contemplating whether the individual actually deserved to have a public criminal record after serving the initial sentence.

Retributivist principles can help counteract the stigmatization that can result from public criminal record history information. In other words, blameworthiness assessments and proportionality considerations are equally applicable to the stigma that derives from the initial punishment.³⁰⁷ A common objection is the notion that in a liberal, democratic society, the operation of the criminal law must remain public. That is certainly true, but the issue—as Dr. Alessandro Corda has asserted—is not whether such information should be public; rather, the central concern is for “*how long*.”³⁰⁸

³⁰³ See Corda, *supra* note 284, at 21 (“In most states, statutes allow some ex-offenders to request that certain convictions be sealed or expunged from their criminal history. The applicant must meet various requirements—usually a waiting period depending on the offense, and no subsequent arrest or conviction—and petition the sentencing court or an appellate court.” (internal citations omitted)).

³⁰⁴ *Id.*

³⁰⁵ See Brian Murray, *Retributive Expungement*, 169 U. PA. L. REV. (forthcoming 2020) (manuscript at 20–24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617875 (“The considerations in the early statutes or judge-made remedies suggested a connection to rehabilitative based logic when determining whether expungement was appropriate. In truth, some considerations—like the nature and gravity of the offense—were not strictly utilitarian in concern. But others, such as the damage that the petitioner has endured, the stigmatic effect of criminal record, the activities of the petitioner in spheres of life traditionally considered the domain of the productive (work, recreation, family, etc.), led to balancing interests.”).

³⁰⁶ See, e.g., *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Penn. 1981) (adopting multi-factor test weighing strength of Commonwealth’s case against petitioner).

³⁰⁷ Douglas N. Husak, “*Already Punished Enough*”, 18 PHIL. TOPICS 79, 95 (1990); see also Corda, *supra* note 284, at 43 (“Hard treatment and stigma represent ‘dependent components of punishment.’ . . . the stigma component of criminal punishment should not be disproportionately imposed. While social stigma is recognized as something an individual must deal with after being convicted of a crime, legislatures and policy-makers cannot justly or responsibly overlook the issues of the duration and intensity of stigma and related ramifications arising from indefinitely public [criminal conviction records].” (quoting Douglas N. Husak, “*Already Punished Enough*”, 18 PHIL. TOPICS 79, 95 (1990))).

³⁰⁸ Corda, *supra* note 284, at 44.

And that is where a retributive conception of proportionality can be useful in reconceiving public availability of such information.³⁰⁹

Permanent public criminal record availability, irrespective of the nature of the crime, harm caused, blameworthiness, or situation of the offender arguably ignores the retributive principles above.³¹⁰ It raises severity of punishment potentially above the desert basis related to the triggering conviction, and especially so in the case of arrest information. As one commentator puts it, “if the punishment ordered by the court is meant to be commensurate or proportional to the offence, any extra hardship resulting from stigma will distort the balance between the offence and the punishment.”³¹¹ Once the offender has paid the debt, and received the desert, the cause of that debt can be forgotten.³¹²

This also comports with the restorative component underlying retributivism: “expungement might be labeled the completion of the retributive process because it *stops* the informal, and perhaps unintentional, effects of formal punishment.”³¹³ By preventing extra punishment, expungement furthers the restorative components of retributivism.

In terms of expungement *procedure*, a desert-based approach would shift the burden of persuasion to the state. Instead of the petitioner having to justify elimination of the record, the state would have to justify why a public record is a necessary component of what was deserved. Whereas existing procedures might focus on the petitioner’s ability to demonstrate harm that outweighs the benefits to the state from maintenance of the record, a desert-based approach would force the state to clarify why this precise information is calibrated to the gravity of the offense and the blameworthiness of the offender. Notably, this would all but guarantee petitioner favorable policies for non-conviction criminal record history information, something not ensured if crime control and public safety rationales guide decision making. With respect to conviction information, it would require states to clearly identify how the blameworthiness of the petitioner informs the length of time that the record will remain public. It also would lead to more searching

³⁰⁹ It is important to mention that utilitarian concepts of proportionality might also be helpful here. The costs of public stigma almost certainly render rehabilitation more difficult. Whether they have deterrent value is probably harder to assess, but an argument could be made either way. Public criminal record history information might not be deemed useful on incapacitative grounds if it can be shown to be criminogenic.

³¹⁰ See Corda, *supra* note 284, at 44 (“Allowing criminal convictions to continue to stigmatize and haunt offenders for an indefinite time after the sentence has been fully served, irrespective of the gravity of the underlying offense—be it a felony or a misdemeanor, a violent or nonviolent crime—makes the overall punishment undeservedly severe.”). Of course, even if this is the case, it is an open question whether First Amendment interests override the state obligations relating to desert.

³¹¹ NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 161 (1980).

³¹² Murray, *Unstitching Scarlet Letters?*, *supra* note 278, at 2841.

³¹³ *Id.*

inquiries by judges as to the conduct underlying the conviction, especially in cases involving guilty pleas where the charges do not seem to match the conduct.

Interestingly, some recent expungement reforms have already gone this route. The most progressive expungement law in the country arguably exists in Indiana. Indiana's statute guarantees expungement after specific periods of time that are calibrated to the seriousness of the offense involved.³¹⁴ The length of the waiting period correlates with the gravity of the offense. In truth, Indiana's statute is a mix of retributive and utilitarian principles. In addition to the waiting periods, which establish baseline eligibility standards, petitioners also must be crime-free during that term of years.³¹⁵ It might be argued that this represents the best of both worlds: retributive parameters with utilitarian thinking in between the lines. Without those parameters, the utilitarian cost calculations, that can be rationalized by either side, can lead to odd results. Those constraints are an example of retributive principles informing expungement reform for the better, easing the road to restoration for petitioners who otherwise would not have had a chance. The retributive-minded constraints on the state's ability to maintain the record information paradoxically helps to open doors for ex-offenders.

CONCLUSION

This Article attempts a straightforward argument: retributivist principles are a useful tool for collateral consequences reform because they lead to suspicion that such measures go too far, inflicting punishment when it is no longer due. The corollary is that legislatures, reformers, and other actors in the system leave them behind at their own peril, exacerbating inequities endemic to a collateral consequences regime permeated by incapacitative logic. Respecting the agency and dignity of offenders, focusing on blameworthiness and proportionality, and appreciating the sole responsibilities of the state as punisher, suggests caution is warranted. This has implications for several components of the system that contribute to the existence of collateral consequences. Legislatures, prosecutors, judges, and other decision makers who incorporate desert into their decisions must account for these limiting principles. Furthermore, certain phases of the system, such as the charging, bail, plea-bargaining, and expungement stages might be reformed in light of these constraints.

This argument might seem paradoxical to some: although many collateral consequences are understood as in-line with retributive premises, and came to exist when retributive language reappeared in public debates

³¹⁴ IND. CODE ANN. §§ 35-38-9-2 to -4 (West, Westlaw through 2019 First General Session of the 121st General Assembly).

³¹⁵ *Id.*

about the criminal justice system, the reality is that the core premises of almost all retributive theories should provoke skepticism about an expansive regime of collateral consequences. Some are more useful than others given their precise content, and many align with other restoration-minded theories of punishment.³¹⁶

In sum, the retributivist should be concerned that many collateral consequences operate as *extra* punishment or punishment-like harm that disrupts the order restored after the direct punishment. In this respect, retributivism should not be left behind in the effort to reform collateral consequences. Rather, it can and should partner with other important arguments that aim towards reintegration for many offenders. It offers sharp tools to help reformers cut many collateral consequences down to size, helping to restore to ex-offenders what they deserve.

³¹⁶ See Kleinfeld, *Reconstructivism*, *supra* note 31, at 1516–18 (comparing retributivist and reconstructionist theories of punishment).