Collateral Legal Consequences and Criminal Sentencing

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ABSTRACT

A criminal conviction can trigger numerous burdensome legal consequences beyond the formal sentence. Some charge that these "collateral" legal consequences (CLCs) constitute additional measures of punishment, which raises the further question of whether judges should consider these CLCs when making sentencing decisions, reducing the formal sentence in proportion to the severity of the CLCs the defendant will face. The idea that all CLCs constitute forms of punishment reflects a particular conception of punishment, which I call the "minimalist view." In this paper, I argue against the minimalist view. I contend that on a more adequate conception of punishment, some but not all CLCs constitute punishment. I also argue that whether judges should consider CLCs in sentencing decisions depends on whether the relevant CLCs constitute punishment.

I. Introduction

A person convicted of a crime is subject to some type of formal sentence: a prison or jail term, a fine, community service, or probation. But a conviction can also trigger a host of other burdensome legal consequences: restrictions on employment, the vote, housing, or other goods; deportation; publication of one's criminal record; and many others. Although these so-called *collateral* legal consequences (CLCs) of a conviction have traditionally been treated as distinct from the formal punishment, some critics of the measures contend that they actually constitute additional punishment. In 2016, U.S. District Court Judge Frederic Block reduced a defendant's sentence from the 33-41 months in prison recommended by sentencing

guidelines to a one-year term of probation, including six months of house arrest and 100 hours of community service. The judge's rationale was that the defendant would be subject to a range of collateral legal consequences due to her conviction, "consequences that serve no useful function other than to further punish criminal defendants after they have completed their court-imposed sentences" (*United States v. Nesbeth*, No. 15-cr-18 (E.D.N.Y May 25, 2016)). Thus, the judge reasoned, ensuring that the defendant received a proportionate overall amount of punishment required him to reduce her formal sentence correspondingly.

The judge's decision reflects a particular conception of legal punishment (call it the *minimalist* conception) as any burdensome treatment imposed by a legal authority on those believed to be criminal offenders as a consequence of their (supposed) unlawful conduct. We find essentially the minimalist conception articulated by U.S. Supreme Court Justice John Paul Stevens, who wrote, "In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment" (*Smith v. Doe*, 538 U.S. 84, 113 (2003) (Stevens, J., dissenting)). Similarly, Michael Cholbi describes punishment as "any deprivation, suffering, or constraint of liberty imposed on criminal offenders by the state or judicial authority as a direct legal consequence of those offenders' unlawful behavior" (Cholbi 2010, p. 87; similarly, see, e.g., Brooks 2012, pp. 1–2; Love 2011, p. 121). It is relatively uncontroversial that CLCs are burdensome measures, and that they are imposed by legal authorities on those believed to be criminal offenders as consequences of their unlawful behavior. Thus, on the minimalist conception of punishment, it appears that all CLCs fit the bill.

Many punishment theorists maintain, however, that not just any burdensome measure imposed by a legal authority on criminal offenders as a consequence of their offense constitutes punishment. To count as punishment, a measure must be intended to be burdensome and intended to convey censure (call this the *intentionally censuring and*

burdensome conception of punishment, or ICB for short). The ICB conception opens up the possibility that some CLCs — namely, those that are not intentionally burdensome or not intended to convey censure — do not constitute forms of punishment.

In this paper, I defend that the ICB conception of punishment. I first sketch the case for the ICB conception. Then I address some recent challenges to the *intended burdensomeness* and *intended censure* features. Next, I say more about what acceptance of the *intended burdensomeness* feature, the *intended censure* feature, or both implies for the question of whether CLCs are relevant in sentencing decisions. I contend that only those CLCs that constitute punishment should factor into sentencing decisions. Even if, as I argue, some (nonpunitive) CLCs should not factor into sentencing decisions, this is not to say that these consequences are morally unimportant; in the paper's concluding section, I say a bit about the moral challenges raised by nonpunitive collateral consequences.

II. The Case for the ICB Conception

Those who argue for the ICB conception of punishment as preferable to the minimalist conception typically contend that the minimalist conception is unable to differentiate punishment from other sorts of burdensome measures imposed by legal authorities. Here I discuss just three examples (for others, see, e.g., Boonin 2008, pp. 12–17, 21–23; Duff 2015, pp. 39–40; Hoskins 2019, pp. 45–51): First, in tort law, the court may order a defendant to pay damages to a plaintiff, and doing so will foreseeably often be burdensome to the defendant. But ordinary civil damages are not considered punishment, even if, as Antony Duff writes, "they are awarded by a legal authority against a person who has broken the law in the sense that he has failed to take the care that, according to the law, he ought to take" (Duff 2015, p. 35). The fact that civil courts sometimes award punitive as well as compensatory damages is further evidence of this: Notice that the minimalist account

has trouble explaining what makes some civil damages punitive and others merely compensatory, whereas the ICB account can make sense of this distinction, as punitive damages are intended as burdensome and intended to convey censure for the defendant's conduct. Second, if someone commits theft but then authorities confiscate the stolen goods and return them to their rightful owner, and if having the goods taken is onerous to the thief, this amounts to burdensome treatment imposed by a legal authority on a person as a consequence of her unlawful behavior. If this was the only legal consequence of the theft, however, it seems unlikely that we would regard the person as having been punished (see Hoskins 2019, p. 49). Third, suppose someone who commits a crime but is determined to be nonculpable due to some cognitive disorder is nonetheless subject to involuntary confinement as a public safety measure. Here again, we have an instance of burdensome treatment imposed by a legal authority on a person as a consequence of his unlawful behavior, but such treatment does not fit our standard conception of punishment (see Boonin 2008, 12; Duff 2015, p. 36). The minimalist account implies, counterintuitively, that each of these forms of treatment constitutes punishment.[1]

The ICB account, by contrast, can explain why none of these other burdensome legally imposed consequences of unlawful behavior constitute punishment. First, punishment is intended to convey societal censure, or disapproval.[2] As Joel Feinberg wrote:

> Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishment authority … or of those "in whose name" the punishment is inflicted. (Feinberg 1965, p. 400)

This feature of punishment, that it is intended to convey censure, distinguishes it from the other sorts of legally imposed burdens just mentioned. If a defendant in a civil suit is required to pay compensatory damages, the intention of the decision, at least in principle, is not to condemn the defendant but rather to see that those harmed by the defendant's actions, negligence, etc., are compensated.[3] If authorities confiscate stolen goods from a thief, the

intention is to return the goods to their rightful owner, not to convey censure; the thief's culpability in stealing the goods is irrelevant to the confiscation, and in fact if the person had come into possession of the stolen goods without knowing (and having no reason to believe) that they were stolen, the rationale for confiscating them and returning them to their rightful owner would remain. Similarly, if a person with a cognitive disorder is deemed nonculpable (and thus not warranting censure) for his behavior but nevertheless is determined to be dangerous, the rationale for involuntary confinement is unaffected by the fact that censure in such a case would be inappropriate. When the state punishes someone, by contrast, the punishment is intended to convey censure of the person for his unlawful conduct.

Second, punishment is intentionally burdensome. This, too, differentiates punishment from the other sorts of burdensome legally imposed measures cited; these other measures are foreseeably burdensome, but they are not intended as burdensome. Although being required to pay compensatory damages in a civil case may often be burdensome for defendants, these awards are not intended to be burdensome. If (counterfactually) no one regarded being required to pay civil damages as burdensome, this would be irrelevant to whether such awards could accomplish what they were intended to do. The same is true for the other cases: if no one regarded having stolen goods confiscated as a burden, or if no one regarded involuntary confinement of the sort imposed on the nonculpably dangerous to be burdensome, then this would be irrelevant to whether these measures achieved what they were intended to do.

By contrast, punishment is not merely incidentally or foreseeably burdensome; rather, the burdensomeness of punishment is integral to the practice in a way that the burdensomeness of nonpunitive legal measures is not. If people did not regard, for example, a prison term as burdensome (if, say, we lived in an odd society in which spending time imprisoned was regarded as a luxury), then this form of punishment would not be doing its

job. What's more, the burdensomeness of punishment is intended not for its own sake but for some supposedly legitimate reason(s): to maintain a credible deterrent threat, to mete out deserved suffering, to convey deserved blame, etc. Burdensome measures imposed by the state solely for the sake of imposing burdensome measures would not constitute punishment; rather, these would simply be gratuitous inflictions of suffering.

The *intended censure* and *intended burdensomeness* features also help to make sense of why punishment seems to present such a moral challenge, and why our legal system takes numerous steps to prevent, or at to least minimize, punishment of innocent people. Construing punishment merely as a burdensome legal response to crimes does not seem to provide a sufficient explanation for these concerns. Although punishment is by its nature burdensome, some criminal sentences are less burdensome than others. Indeed, some impositions of punishment — a short probationary sentence, for example, or a small monetary punishment — are arguably even less burdensome in some cases than various forms of treatment that the state imposes on people not convicted of a crime: compensatory damages in civil law, seizure of nonculpably acquired stolen property, pandemic lockdown measures, taxation, eminent domain, and so on. Why, then, do we worry so much about the prospect of innocent people being punished, extending various procedural safeguards (such as the right to a fair trial in which the burden is on the prosecution to prove its case beyond a reasonable doubt) to defendants even when the actual punishment at stake is comparatively modest? The *intended censure* and *intended burdensomeness* features offer an explanation: it is morally wrong for the state to impose intentionally condemnatory, intentionally burdensome treatment on those who are not guilty of an offense.[4]

Having sketched the ICB conception of punishment, I now turn to consider some recent challenges to the *intended burdensomeness* feature and the *intended censure* feature.

III. Intended Burdens and Failures

One might be motivated to challenge the *intended burdensomeness* feature insofar as some theorists regard it as the aspect of punishment in virtue of which the practice cannot be justified: there may be justification, critics argue, for the state to impose foreseeably burdensome measures on those who commit crimes, but there is no justification for imposing these measures with the intention that they be burdensome (see, e.g., Boonin 2008, pp. 61–62; Hanna 2008). Thus Bill Wringe (2013) argues for a conception of punishment that does not include the *intended burdensomeness* feature. Wringe contends that this feature has problematic implications, and that we can account for the distinction between punishment and other sorts of legally imposed, burdensome responses to unlawful behavior such as those discussed above in another way. I discuss each of these arguments in turn.

Wringe argues first that if punishment is intended to be burdensome, then this implies that attempts to punish that do not inflict burdens (perhaps the masochist enjoys the treatment or the wealthy person is indifferent to it) are failures:[5]

> If punishment must involve an intention to cause suffering, attempts at punishment which do not make offenders suffer are failures. It might then seem appropriate to object to a punitive regime visited on some individual that it does not make them suffer (or that it does not make them suffer enough), or to attempt to assess the degree to which a convicted offender has actually suffered, and to supplement the punishment if they have not. However, if punishment need not involve an intention to cause suffering, this need not be appropriate. (Wringe 2013, p. 864)

There is some ambiguity in the reference to failure: what has the state failed to do when its treatment is not actually a burden to the offender? It is not just that the state has failed to impose a burden on the offender, or the claim would be tautologous. We might instead read "failure" in the sense of having failed to punish *well*, or effectively, as when a person says "I'm a failure as a carpenter," meaning not that he is not a carpenter but that he is not a good one. But this interpretation presents no real problem for the idea that punishment is intentionally burdensome: defenders of the ICB conception can readily acknowledge that

sometimes the state's impositions of punishment are ineffective. Instead, I take it Wringe understands "failure" in the sense that if the treatment is not a burden to the offender, the state has failed to punish him, in the sense that it has not punished him. And presumably he regards the idea that the state has not punished in such cases — and, what he takes to follow from this, that it may be appropriate in such cases for the state to impose additional burdensome measures — as counterintuitive, which suggests that the *intended burdensomeness* feature is problematic.

Wringe's alternative characterization of the punishment's burdensomeness makes no reference to intentions: rather, it is "treatment which would normally be found burdensome by a typical individual of the kind on whom it is being imposed" (Wringe 2013, p. 867). On his characterization, if the state attempts to punish someone but the person does not find the treatment burdensome, then this does not indicate that the state has failed, insofar as it would normally be found burdensome by individuals like the person subject to the treatment. And because it did not fail, it would not be appropriate for the state to inflict some other burdensome treatment on the person in another attempt to punish him.

Notice that there are two relevant distinctions in play here: First, there is the distinction between punishment as intended to be burdensome and punishment as merely foreseeably burdensome. Second, there is the distinction between two interpretations of "burdensome": namely, "regarded as burdensome by the particular person on whom the treatment is inflicted" or "normally found to be burdensome by a typical individual of the kind on whom it is being imposed." Wringe endorses the second understanding of "burdensome." But if this is the more plausible understanding of burdensome, then his argument appears to give us no reason to reject the *intended burdensomeness* claim. After all, if we construe the claim as holding that the state intends that the treatment it inflicts would normally be found burdensome by typical individuals, then the state does not necessarily fail

to punish in instances when the person subjected to the treatment does not regard it as burdensome. As long as people would typically regard such treatment as burdensome, then the state succeeds at what it intends to do.

So, on Wringe's own preferred understanding of burdensomeness, I think his argument misses the mark. But what if we endorse the other understanding of burdensomeness, on which treatment is burdensome when it is regarded as such by the particular person on whom it is inflicted? Nathan Hanna argues for this understanding of burdensomeness:

> [I]t seems possible to determine whether an agent's treatment of a subject is a punishment just by considering facts about the agent and the subject such as the agent's motives and the effects of the treatment on the subject. And it seems that the treatment can be a punishment even if the subject is unique and no other subject would be harmed by being so treated. (Hanna 2017, p. 972; see also Rich 2016, pp. 110–11)

If we endorse the notion that treatment is burdensome when it is regarded as a burden by the individual subject to it, how then would Wringe's objection to the *intended burdensomeness* feature fare? The argument would be that if the state treats someone in a particular way with the intention that the person regard the treatment as burdensome and the person does not regard the treatment as burdensome, then the state has failed. Furthermore, if the state's goal is important enough, it may be appropriate to impose some other treatment on the person, again with the intention that it be regarded by the person as burdensome.

Take the second claim first, that in those cases in which the state's treatment is not burdensome to the person on which it is inflicted (that is, when it fails), it may be appropriate to inflict further treatment that will be burdensome to that person. This is a normative claim, not merely a conceptual one. Whether it is correct will depend on the normative theory of punishment we are considering. It might, for instance, be a *pro tanto* implication of theories (special deterrence accounts, some versions of moral education theory, etc.) on which punishment's fulfillment of its central rationale requires that it be regarded as burdensome by

the particular individual on whom it is inflicted. If such theories cannot find the resources to block this implication (perhaps by appeal to other countervailing considerations), then in my view this would be a strike against such theories. But the fact that a particular conception of punishment may have unappealing implications for certain normative theories does not tell us whether the conception itself is deficient.

What about the argument that if the state treats someone in a particular way with the intention that the person regard the treatment as burdensome and the person does not regard it as burdensome, then the state has failed? This argument, if it succeeds, appears to present a problem not solely, or even primarily, for the *intended burdensomeness* feature. One thing about which proponents of the minimalist conception of punishment and advocates of the ICB conception agree is that an essential feature of punishment is that it is burdensome (call this the *burdensomeness* feature, as distinct from the *intended burdensomeness* feature). Under the interpretation of "burdensome" as "regarded as a burden by the person subject to it," if the state imposes treatment that the person subject to it does not regard as a burden, then this will not count as punishment. But the reason for this is that the *burdensomeness* feature is not satisfied. Thus if we share Wringe's intuition that the state can be said to have imposed punishment even in cases in which the person subject to the treatment does not regard it as a burden, then this is a challenge to any conceptual account of punishment that incorporates the *burdensomeness* feature, at least on the interpretation of "burdensome" as "regarded as a burden by the person subject to it."

Various responses to this challenge are available. One option, as already mentioned, would be to endorse instead the interpretation of "burdensome" as "normally regarded as a burden by typical people." A second option would be to adopt an understanding of "burdensome" as meaning "objectively burdensome" (see Lee 2019, pp. 365–67).[6] A third option would be to endorse a disjunctive notion of burdensomeness: some treatment is

burdensome if either a) it is regarded as a burden by the person subject to it, or b) it would normally be regarded as a burden by typical members of the community of which the person subject to it is a member. A fourth option would be simply to assert that in particular cases when the treatment is not regarded as punishment by the person subject to it (in the case of the masochist, say), this is not an instance of punishment (see Boonin 2008, pp. 8–10). My aim here is not to defend any of these responses. But notice that whichever response we choose in defending the *burdensomeness* feature from the objection that a state may punish a person even if she does not regard the treatment as burdensome, the same defense will be available to the *intended burdensomeness* feature. For if we endorse a characterization of burdensomeness that is not dependent solely on whether the person subject to the treatment regards it as burdensome (that is, if we choose one of the first three options just mentioned), then the state does not necessarily fail in its attempt to punish, say, the masochist. Alternatively, if we accept the notion of burdensomeness that depends solely on whether the person regards the treatment as a burden, then we can accept that the masochist is not punished (primarily because the *burdensomeness* condition is not met) but deny that this implication is problematic.

Ultimately, then, I am not persuaded by this first of Wringe's objections to the *intended burdensomeness* feature. I turn now to his second objection.

IV. Intended Burdensomeness or Intended Censure Unnecessary

Notice that on Wringe's preferred conception of punishment — on which it involves treatment that will normally be regarded as a burden by typical people, but is not intended as burdensome — we are once again in need of some way to distinguish punishment from other legally imposed burdensome measures, such as those discussed earlier. These other legal measures consist in treatment that would normally be regarded as a burden by typical people;

in this regard, they are indistinguishable from punishment. Wringe acknowledges this worry, but he contends that there is another way to distinguish punishment from other forms of legally imposed burdensome treatment (he focuses on the examples of arrest, pre-trial detention, justifiable war, and some cases of self-defense and defense of others). Unlike punishment, he argues, these other forms of treatment are not intended to express societal disapproval. He writes:

> Even if we think that arrest, pre-trial detention, some forms of self- and other-defense and justifiable war should be regarded as forms of harsh treatment which are responses to wrongdoings imposed by appropriate authorities, expressivists — or at least expressivists such as Duff and Feinberg — need not be committed to regarding them as forms of punishment. For they can argue that none of these forms of behavior are supposed to have the kinds of expressive function which are essential to punishment. (Wringe 2013, p. 872)

Whereas I contended in section II that the *intended burdensomeness* feature and the *intended censure* feature both distinguish punishment from other legally imposed burdensome measures, Wringe claims that the *intended censure* feature is sufficient to do the job; thus the *intended burdensomeness* feature is unnecessary. We get a converse argument from Ambrose Lee: as a way of critiquing the *intended censure* feature, Lee offers an extended argument that a conception of punishment that incorporates the *intended burdensomeness* feature and what he terms the “response requirement” — namely, that punishment is imposed in response to, not merely as a consequence of, wrongdoing — is sufficient to “distinguish punishments from other kinds of non-punitive hard treatments” (Lee 2019, p. 384).

I do not aim here to evaluate the particular arguments offered by Wringe that the *intended censure* feature can distinguish punishment from other sorts of nonpunitive burdensome treatment, or those offered by Lee that the *intended burdensomeness* feature can do this work. I have already endorsed both of these claims, after all. Instead, I want to say a bit about what follows if Wringe or Lee is correct.

One thing to note is that the sufficiency of either of these features to distinguish punishment from other types of burdensome legal measures does not imply the insufficiency of the other feature. It may be that each of these features is individually sufficient to distinguish punishment from the other sorts of measures discussed. We would thus need reasons other than the sufficiency of the *intended censure* feature to conclude that the *intended burdensomeness* feature is not also a distinctive feature, and vice versa. A critic of one or the other feature might respond, of course, that if the feature in question is not needed to distinguish punishment from other, nonpunitive forms of treatment, then there is no reason to accept this feature in our characterization of punishment. But there are other reasons to accept the *intended burdensomeness* and *intended censure* features. These features not only account for the differences between punishment and other sorts of burdensome legal measures — that is, they not only draw the delineations in the intuitively correct places — they also do explanatory work. As discussed earlier, the *intended burdensome* feature helps to explain why it seems that compensatory damages in civil law, or confiscation of stolen goods, or involuntary confinement of the nonculpably dangerous could all do what they were intended to do even if (counterfactually) they were not at all burdensome, but if an imposition of punishment were (counterfactually) not at all burdensome, we would think that something had gone wrong, or that we were not in fact considering a case of punishment after all. They also help to explain why it seems that the other legal measures could be imposed even on someone who has not been found culpable for wrongdoing, but we think punishment is only legitimately imposed on those who are guilty of an offense. Relatedly, they help to explain why we worry especially about criminal conviction and punishment, putting various legal safeguards in place to protect against punishment of the innocent, even in contexts in which the punishment at stake is not especially severe.

In my view, then, there are reasons to accept both the *intended burdensomeness* and *intended censure* features even if, because each of these is sufficient to distinguish punishment from other forms of legally imposed burdensome treatment, neither is necessary for this purpose. Suppose this is wrong, though. Suppose that insofar as either of these features is unnecessary for drawing this distinction, we should reject it. Which, then, should we jettison? Wringe contends that the *intended burdensomeness* feature is unnecessary, but his argument depends on the notion that the *intended censure* feature can do the needed work. Conversely, Lee argues that the *intended censure* feature is unnecessary, but his argument for this claim just is a defense of the *intended burdensomeness* feature (coupled with a "response requirement"). It follows from either of their accounts, then, that we should endorse this disjunction: either the *intended burdensomeness* feature or the *intended censure* feature is a characteristic of punishment. Thus although both Wringe's and Lee's accounts imply that the ICB conception of punishment is incorrect (because punishment is not both intentionally burdensome and intended to convey censure), they also imply that the minimalist conception is mistaken (because it is either intentionally burdensome or intended to convey censure).

V. CLCs and Sentencing

Where does all of this leave us? I contended in section III that Wringe's objection to the *intended burdensomeness* feature fails. Then I argued in section IV that Wringe's and Lee's strategies of defending, respectively, the *intended censure* feature and the *intended burdensomeness* feature do not give us a reason for rejecting the other feature, as to say that punishment is distinctive in one respect is not to say that it is not also distinctive in the other respect. I have suggested that each feature is intuitively plausible even if it is not individually necessary (because the other feature is sufficient for the task) to distinguish punishment from nonpunitive legal burdens. But even if we think a feature's being unnecessary is a reason to

reject it, Wringe's and Lee's arguments for rejecting one feature each depend on our acceptance of the other. Thus whether Wringe is correct, Lee is correct, or the ICB conception is correct, it follows that we should reject the minimalist conception of punishment and accept that it is intentionally burdensome or intended to convey censure (or both).

Insofar as they reject the minimalist conception of punishment, Wringe's and Lee's accounts each open the door to the possibility that some CLCs, despite clearly being burdensome legally imposed consequences of a conviction, may not constitute forms of punishment: Wringe endorses the intended censure feature of punishment, so on his account, if some CLCs are not intended to convey censure, then they do not constitute punishment. By contrast, Lee defends the intended burdensomeness feature, so on his account, if some CLCs are not intentionally burdensome, then they do not constitute punishment. Alternatively, if the ICB conception is correct, and punishment is both intentionally burdensome and intended to convey censure, then CLCs that do not have either of these features will not constitute punishment.

Determining whether CLCs meet these conditions would require considering each particular CLC individually, and this undertaking is well beyond the scope of this article. Here I make a few general remarks, however. First, I think the most likely candidates for CLCs that are not intentionally burdensome or intentionally censuring are those aimed purely at protecting public safety by keeping potentially dangerous individuals away from situations in which they would pose a significant risk to others (that is, incapacitative measures): for example, measures that bar someone convicted of fraud from working in jobs where he will be responsible for other people's money, or that prohibit someone convicted of child sex crimes from working as a schoolteacher (here I make no claims about whether such measures are ever justifiable; on this question, see Hoskins 2019, chs. 5–7). Purely incapacitative

measures will often be burdensome to those subject to them, but their burdensomeness is not related to their risk-reductive rationale. Consider, for example, a measure designed to prevent people convicted of embezzlement or fraud from holding jobs in which they are responsible for others' money. If such a restriction were not at all burdensome to those subject to it, this would make no difference to whether the measure could do what it was designed to do. The fact that their burdensomeness is irrelevant to the incapacitative rationale suggests one of three possibilities: (a) that the burdensomeness is merely foreseeable but unintended; (b) that the burdensomeness is intended but for some other reason (deterrence, retribution, etc.), in which case the CLC is not, after all, a purely incapacitative measure; or (c) that the burdensomeness is inflicted gratuitously (and thus the CLC is unjustified). In addition, the rationale for purely incapacitative measures is independent of the function of censuring offenders for their past crimes. The state might sentence an offender to a term of prison or probation that conveys proportionate censure for his offense, censure that thus ends when he completes his sentence, but nevertheless believe incapacitative public safety measures are warranted for some further period of time. If some CLCs are designed purely as incapacitative measures of the sort I have described, and are not intended as burdensome or intended to convey censure, then these should not be regarded as forms of punishment.

By contrast, many CLCs do seem to meet the *intended burdensomeness* and *intended censure* conditions. Voting restrictions, for example, serve no plausible risk-reductive purpose, but they have been defended as a way of signifying that an offender, by committing his offense, has violated the civic trust (Sigler 2014) or failed to meet the minimal standards for full membership in the polity (Altman 2005). But to signify these violations or failures is to convey disapproval of the offender for what he has done; and the burdensomeness of disenfranchisement is not merely incidental to it, as if it was not regarded as burdensome it would not be an appropriate means of signifying the violation or failure. Thus voting

restrictions on these accounts appear to be intended to convey censure and intentionally burdensome; that is, they look like forms of punishment (see Hoskins 2019, pp. 158–63). Other types of CLCs for which there is no clear incapacitative rationale — such as restrictions on public welfare support or government-subsidized student loans — also look to be good candidates to count as forms of punishment.

In my view, CLCs that constitute forms of punishment should factor into sentencing decisions, whereas CLCs that do not constitute punishment should not factor into such decisions. One might argue, instead, that all CLCs, whether punitive or not, should factor into sentencing decisions in virtue of the burdensomeness of these measures. I offer two, related reasons for distinguishing between punitive and nonpunitive CLCs in this regard. First, the notion of proportionality that is relevant to purely incapacitative risk-reductive measures differs from the notion of proportionality that governs punishment. Measures designed to promote public safety by keeping dangerous people away from situations in which they would pose risks to others are essentially forward-looking: for them, assessing proportionality is a matter of weighing the seriousness and likelihood of the risk to be averted against the severity of the restrictive measure. By contrast, punishment is centrally a response to a prior offense. Assessing proportionality in punishment requires weighing the severity of the punishment against the seriousness of the offense and the offender's degree of culpability. As these are distinct considerations, it would be merely a coincidence if they happened to indicate roughly the same severity of punishment in a given case.

We find additional support for considering CLCs that constitute punishment, but not those that do not, in sentencing decisions if we accept the *intended censure* feature of punishment. When the state imposes punishment, it is not merely responding to the prior offense, it is responding in a way that intentionally conveys censure. Thus the degree of punishment imposed should be proportionate in that it adequately conveys (to the offender

specifically or to the polity generally, or both) the polity's condemnation of the offender for what he has done. As von Hirsch and Ashworth explain:

> Once one has created an institution with the condemnatory implications that punishment has, then it is a requirement of justice, not merely of efficient crime prevention, to punish offenders according to the degree of reprehensibleness of their conduct. Disproportionate punishments are unjust not because they possibly may be ineffective or counterproductive, but because they purport to condemn the actor for his conduct and yet visit more or less censure on him than the degree of blameworthiness of that conduct would warrant. (von Hirsch and Ashworth 2005, p. 134)[7]

If a sentencing judge reduces the formal sentence to an extent corresponding to the likely burdensomeness of the various nonpunitive CLCs that will accompany the conviction, then the judge thereby reduces the degree of intended censure conveyed by the state's response. That is, she reduces the criminal sentence, which is intended to convey censure, in proportion to the expected burdensomeness of the nonpunitive CLCs, which are not intended to convey censure. As a result, the overall intended censure conveyed by the state's response will be less than is warranted by the blameworthiness of the offender's conduct.

By contrast, for CLCs that do constitute forms of punishment, the state should treat them as such, integrating them formally into the sentencing process. This would help to make these measures more visible (in their current form, they have been termed "invisible punishment" (Travis 2002)), not only to sentencing judges but to legislators, legal scholars, criminal justice officials and members of the public as well. It would help to ensure that these measures are acknowledged in debates about sentencing policy. And it would ensure that they are governed by the same legal protections that now govern formal sentences. Insofar as a state does not formally integrate punitive CLCs into the sentencing process, however, I believe judges are nonetheless justified in considering such measures, as Judge Block did, as they determine what constitutes a proportionate overall amount of punishment given the offender's culpability and the seriousness of the offense. The fact that the state fails to acknowledge these punitive measures as what they are does not justify the imposition of a

disproportionately harsh punishment on offenders (as would happen if a judge determined a proportionate sentence without accounting for the additional punishment the offender would face in the form of punitive CLCs).

One implication of this last claim, that judges are permitted to take punitive CLCs into account in their sentencing decisions despite these measures' not being formally recognized as forms of punishment, is that similarly situated offenders (i.e., those who are similarly culpable for similarly serious offenses, and who would be subject to roughly the same CLCs) might receive punishments of different severity. This could happen if some judges, such as Judge Block, were more familiar than other judges with the range of punitive CLCs that a given conviction would be likely to trigger. We might worry, then, that allowing judges to consider nonpunitive CLCs in their sentencing decisions would improve proportionality in one respect only at the cost of sacrificing it in another respect. I agree that this is a worry. This is why it would be preferable if the state recognized punitive CLCs as forms of punishment and integrated them into the formal sentencing process (if the "invisible punishments" were made visible, to use Travis's phrase). Unless or until states do this, however, we are left with a choice between two suboptimal options: One is that all offenders subject to punitive CLCs will effectively be punished more harshly than they deserve, insofar as judges will determine what constitutes a proportionate sentence without considering the full range of punitive burdens to which the person will be subject. The other option is that some offenders subject to punitive CLCs will be punished more severely than they deserve, and more severely than other similarly situated offenders, because some judges will be more familiar with the relevant punitive CLCs than other judges. Presented with these two options, I believe we should choose the second option as the less unjust of the two.

VI. The Moral Challenges of Nonpunitive Collateral Consequences

To argue that nonpunitive consequences of a conviction should not factor into sentencing decisions is not to deny that they raise important and challenging normative questions. In this final section, I briefly mention some of these issues.

First, even those CLCs that do not constitute forms of punishment are often very burdensome; they may be more burdensome than the punishment itself. We should be reluctant to impose such measures as consequences of a criminal conviction. A person convicted of a crime serves a term of punishment, and we should take seriously the moral work that this term of punishment does; by serving a term of punishment, we often say, an offender "pays his debt to society." But if punishment is the way in which a person pays his debt, then outside the context of this debt payment there should be a strong presumption against singling out those convicted of crimes to impose additional burdensome measures. Rather, a term of punishment should serve to restore a person to full standing in the political community, and thus he should be presumptively entitled to the same rights and opportunities as everyone else. This is not to say that purely risk-reductive, nonpunitive CLCs can never be justified, only that there should be a strong presumption against such measures. In my view, this presumption can be overcome only in cases in which there is a compelling public safety interest at stake, the CLC actually serves this interest (that is, the measure is effective at averting the risk), the CLC's expected benefits outweigh its expected burdens, and there is no less burdensome means of achieving the same ends. Many of the CLCs currently imposed do not meet these requirements, and thus they are unjustified as risk-reductive measures (see Hoskins 2019, ch. 7).

Second, it is important to recognize that the various legally imposed consequences are not the only burdensome consequences of a conviction. Those convicted of crimes face a host of *informal* collateral consequences, such as family tensions, financial strain, and social stigma (see Logan 2013). What's more, a conviction can create burdens for the family

members of those convicted (see, e.g., Manning 2011; Bülow 2014; Lippke 2017). These burdensome consequences are not part of the punishment and should not factor into particular sentencing decisions, but the question of what obligations the state has to mitigate such burdens, or perhaps to compensate those subject to them, warrants further philosophical attention.

In this paper, however, I have focused on legally imposed collateral consequences. I have contended that punishment is not simply any burdensome treatment imposed by a legal authority on those believed to be criminal offenders as a consequence of their (supposed) unlawful conduct. Rather, to constitute punishment, the burdens must be intentionally burdensome and intended to convey censure. This makes room for the possibility that some CLCs constitute forms of punishment and thus should factor into sentencing decisions, whereas other CLCs are best regarded as nonpunitive and should not factor into such decisions.

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Notes

I am grateful to Talia Fisher and Duncan Purves for useful feedback on a previous draft of this article. Also, I presented a draft of the article at Trinity College Dublin, and I appreciate the thoughtful feedback I received from participants at that session.

[1] It does not help to modify the minimalist conception to say that punishment is imposed as a consequence of a *criminal conviction*. Although this modification would exclude civil damages or the involuntary confinement of someone found not guilty by reason of insanity, it would still not get the right answer in the case of the confiscation of stolen goods from someone as a consequence of her criminal conviction. Also, the "criminal conviction" modification feels *ad hoc*; it does not explain why the criminal conviction is itself a relevant distinction. The ICB account, as we will see, can provide such an explanation.

[2] Different theories flesh out this feature in different ways: some write of communication of censure to some particular recipient(s), others write of expression of censure generally; some write of moral blame in particular, others write of condemnation more generally. I intend the characterization I offer of this feature to be neutral between these different accounts.

[3] See R.A. Duff, "Repairing Harms and Answering for Wrongs," in John Oberdiek (ed.), *Philosophical Foundations in the Law of Torts* (Oxford: Oxford University Press, 2014). In practice, defendants may sometimes feel a required compensatory payment as a condemnatory burden; but this is not, in principle, the purpose of compensatory civil damages.

[4] My point here is not that heightened procedural safeguards can only ever be explained by appeal to the intentionality features. Such safeguards are sometimes imposed in civil proceedings, as well, such as when civil

courts have held in certain cases that a higher standard of proof is required than the typical civil standard of "preponderance of the evidence" (see, e.g., Schneiderman v. United States, 320 U.S. 118 (1943); Woodby v. INS, 385 U.S. 276 (1966); Addington v. Texas, 441 U.S. 418 (1979)). In these cases, the rationale for the higher standard of proof was not that the burdens at stake were intentionally burdensome or intended to convey censure, but rather that the burdens were especially great and so there was concern to take special care to guard against mistaken imposition of these burdens. My point, however, is that protections such as a high standard of proof and numerous others are imposed in criminal cases even when the severity of the burden the defendant would face if convicted is relatively minor. The intentionality features offer us an explanation for why the legal system goes to such lengths to try to protect against false convictions even when the resultant burden would not be especially severe.

[5] Wringe often writes of "suffering" rather than "burdens," but he clarifies (2013, p. 867) that nothing in his argument hangs on the terminological distinction.

[6] I think we should reject this notion of "burdensome" as meaning "objectively burdensome." One reason is that it seems to imply that a person could be punished because the treatment legally imposed on him in response to his wrongdoing is objectively burdensome despite the fact that (to the vexation of the punishing authority) he and virtually everyone else in the community believe the treatment is pleasant. This seems to me an implausible implication, so I believe we should accept that punishment must be *regarded* as burdensome: I am inclined to say, although I do not argue for this claim here, that the *burdensomeness* condition is met if the measure is regarded as burdensome by the person subject to it or is normally regarded as such by typical people.

[7] Note that we need not regard censure to be the central rationale of punishment to endorse this point. Even if we believe the rationale of punishment is tied to crime reduction through, perhaps, deterrence or reinforcement of social norms, we can acknowledge that punishment is distinctive among the tools by which the state may try to reduce crime in that it is intended to convey censure and thus that it should be meted out only to a degree that is proportionate with the offender's degree of blameworthiness.

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