We Know It When We See It: The Tenuous Line Between "Direct Punishment" and "Collateral Consequences"

JOSHUA KAISER*

Despite their key role in the penal system, collateral consequences have been routinely relegated in importance by courts. This paper outlines the two areas of decisional law that serve to exempt collateral consequences from constitutional protection. Firstly, courts have ruled they are not "punishment," according to double jeopardy, ex post facto, bills of attainder, and Eighth Amendment jurisprudence. Secondly, they have created the so-called "collateral-consequences rule": that attorneys and judges need only inform defendants of the "direct" consequences of pleas and convictions, according to due process and Sixth Amendment jurisprudence. In outlining these doctrines, this article argues that both lines of decisions rest on shaky foundations and tautological assumptions, and that recent court opinions—especially the Supreme Court opinion, Padilla v. Kentucky—show that change is imminent. The paper then discusses what such doctrinal change might look like and how practitioners can adapt to the new realities of this field.

* Law and Social Science Fellow, American Bar Foundation, and Law and Science Fellow, Northwestern University.

INTRODUCTION

For most criminal defendants, the real stake of plea bargaining and trial is not a lengthy prison sentence but rather what comes *after* release back into their communities.[1] Following prison or jail terms, during probation and parole, and immediately after convictions that impose only fines, ex-offenders[2] are subject to *tens of thousands* of additional legal penalties: the so-called "collateral consequences of criminal convictions."[3] These sanctions impact every area of their lives, from restricting their political participation and judicial rights to banning them from welfare benefits and thousands of employment prospects, or requiring them to periodically register with local law enforcement and notify the public of their criminal backgrounds.[4] It is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences,"[5] creating "a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed."[6]

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1. Although numbers about less serious crimes are remarkably difficult to find, it is clear that most criminal convictions and arrests in the United States are not felonies, and of those that are, most do not result in serious incarceration terms. For instance, state criminal caseloads (which represent 95% of criminal cases in the U.S.) are only about 18.6% felonies, according to a study of sixteen states. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 23, http://www.courtstatistics.org/flashmicrosites/csp/images/csp2009.pdf (of the 7,498,453 in the general and limited criminal caseloads of those sixteen states, about 1,395,481 of them were for felonies). Likewise, of the 12,000,000 arrests each year in the United States, less than 20% are for crimes the FBI considers most serious—and even many of those would not yield a long prison term. *E.g.*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 2013 (Nov. 10, 2013).

2. A number of alternative terms could be used to describe a convicted criminal who has finished serving the official, court-mandated sentence ascribed to him. For the purposes of this article—and with the exception of more specific terms, such as "ex-prisoner"—the term "ex-offender" can be considered as interchangeable with any of these alternatives.

3. Currently, there are about 36,000 statutes and administrative rules across the fifty-two federal and state jurisdictions (including the District of Columbia) that include more than 42,000 collateral consequence laws. Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Purpose and Transparency to "Collateral" Punishment Policy*, 10 HARV. L. & POL'Y REV. 701, 734–37 (2016). Since ex-offenders are subject to these laws according to their jurisdictions of residence and citizenship—*not* according to their jurisdiction of conviction—they may each be subject to almost 1,000 federal collateral consequences *in addition to* an average of about 1,800 collateral consequences from each state and the District of Columbia. *Id.*

4. *E.g.*, Meaton v. United States, 328 F.2d 379, 380 (5th Cir. 1964); United States v. Okelberry, 112 F. Supp. 2d 1246, 1248 (D. Utah 2000); Kaiser v. State, 621 N.W.2d 49, 52–54 (Minn. Ct. App. 2001). For current reviews of collateral consequences law, see *id.*; MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2013 ed., 2013); Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT/LAW AS REGULATION 77 (Austin Sarat et al. eds., 2011).

5. Sibron v. New York, 392 U.S. 40, 55 (1968).

6. Fiswick v. United States, 329 U.S. 211, 222 (1946).

Despite collateral consequences' key role in the penal system, courts in the past have routinely relegated their importance in two key ways. Firstly, courts have ruled that collateral consequences are not "punishment" for the purposes of numerous constitutional protections. Most recently, in *Smith v. Doe*, the Supreme Court held that an Alaska sex offender registration and notification law was not subject to the protection of the *Ex Post Facto* Clause because it did not qualify as "punishment" under the Court's definition.[7] Similarly, the Court has ruled that being "non-punitive" makes collateral consequences exempt from the protections against bills of attainder, double jeopardy, cruel and unusual punishment, and excessive fines.[8]

Secondly, courts have created the so-called "collateral-consequences rule." Relying on a formalistic fiction that collateral consequences are separate from the criminal law process, circuit courts have ruled that attorneys and judges only have a duty to inform defendants of the "direct" consequences of plea bargains and trial convictions. Based on this distinction, the rule has been that both counsel's duty of effective assistance and a court's duty of ensuring due process can exist wholly absent notification and consideration of even crucially important penalties that are guaranteed to apply to the defendant. This rule supposedly found reinforcement from language the Supreme Court used in *Brady v. United States*.[9]

These two doctrines, however, have developed largely through circular logic, tautology, mis-citation of precedent, and bald assertion without any supporting facts or arguments. Many argue that the logical flaws supporting the fictional distinctions between collateral consequences and direct punishments only exist because of underlying (and unfounded) practical concerns: fears that the legislature could not protect public safety without being able to use multiple and retroactive punishments, fears of a flood of appeals if lack of notice of collateral consequences could prove ineffective assistance of counsel, and so forth.[10] The result in both lines of cases are formalistic definitional rules that are difficult to apply and nonsensical when compared with commonsense understandings of "direct" and "punishment."

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7. Smith v. Doe, 538 U.S. 84 (2003).

8. U.S. CONST. amends. V, VIII.

9. Brady v. United States, 397 U.S. 742, 755 (1970) ("[A] plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats . . . misrepresentation . . . or perhaps by promises that are by their nature improper . . . ."). *See infra* Part II.

10. *See infra* notes 156–69 and accompanying text.

Recently, the unstable foundation beneath these fictional lines has begun to break down, heralding a transformation in how courts treat collateral sanctions. In 2010, the Supreme Court analyzed the collateral-consequences rule for the first time in *Padilla v. Kentucky* where the Court ruled that deportation cannot be truly considered a collateral consequence of conviction, and that failing to inform a defendant of clear and certain deportation risks constitutes constitutionally incompetent counsel.[11] The opinion relies on the realization that deportation is not as divorced from the criminal law process as the collateral-consequences rule would have us believe; instead, its impact is so excessive and automatic that it must be considered an integral part of the criminal process.[12] As such, the Court ruled that constitutionally competent counsel must inform defendants of clear and certain deportation risks.[13] This article argues that *Padilla*'s logic shows that the distinction between direct punishment and collateral consequences likely will—and should—collapse in the near future, and it discusses what this new doctrine may look like.

The article begins in Part I by outlining the landscape of the Supreme Court's "punishment" jurisprudence, which often draws upon cases in multiple areas on constitutional criminal law. Part II then elaborates on the collateral-consequences rule constructed largely by the circuit courts regarding effective assistance of counsel jurisprudence. In both of these sections, this article highlights the logical flaws and mis-citations at the root of today's confusing doctrinal definitions. Lastly, in Part III, this article argues that *Padilla* and related opinions show that change is in the wind, discusses what that change might look like, and contends that it actually poses very little practical threat to legislative and judicial functioning.

I. THE DEVELOPMENT OF AN INCOHERENT DEFINITION OF "PUNISHMENT"

The Supreme Court's punishment jurisprudence originated in the wake of the Civil War with *Cummings v. Missouri* and *Ex parte Garland*.[14] According to these and subsequent cases, the bills of attainder, double jeopardy, e*x post facto*, cruel and unusual, and excessive fines clauses of the federal Constitution only apply to laws that consti-

11. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).
12. *Id.* at 366–67.
13. *Id.*
14. Cummings v. Missouri, 71 U.S. 277 (1866); *Ex parte Garland*, 71 U.S. 333 (1866).

tute punishment. Occasionally, the question of punishment also overlaps with the question of whether proceedings are criminal in nature—and therefore whether they must incorporate the procedural protections of the Fifth and Sixth Amendments. Although the Court's original definition of punishment was easily applicable and consistent with commonsense and philosophical definitions, a number of doctrinal mistakes created the much more vague and unstable definition that exists today.

In both *Cummings* and *Garland*—neither of which have been overruled—the Court considered whether collateral consequences that disqualify teachers, priests, and attorneys from employment based on post–Civil War oaths of loyalty and non-hostility toward the United States were unconstitutional bills of attainder or *ex post facto* laws.[15] Both cases held that these constitutional proscriptions only applied to laws that inflicted punishments, which the Court defined very neatly as (*a*) a deprivation or suspension that was (*b*) in response to past conduct.[16] The Court explicitly stated that a "deprivation of *any* rights, civil or political" could be punitive if applied due to past wrongful acts.[17] Based on this rule, the Court found in both cases that the collateral consequences at issue were unconstitutional bills of attainder and *ex post facto* laws.[18]

It was irrelevant to the *Cummings* and *Garland* courts whether the collateral consequences were severe or even just; the idea of an unconstitutional *ex post facto* law or bill of attainder hinged on whether the law was punitive (and then whether it was retroactive punishment or punishment without a trial), not whether it was proportionately harsh or advisable.[19] Moreover, the Court held that it was irrelevant that the form of the deprivations at issue were oaths required by civil rather than criminal law statutes.[20] The question of whether oaths were used as a permitted part of Congress's power to determine qualifications or as part of a state's police power was simply immaterial; the question at hand was "whether that power has been exercised as a means for the infliction of punishment."[21] All that mat-

15. *Cummings*, 71 U.S. at 317; *Garland*, 71 U.S. at 333.
16. *Cummings*, 71 U.S. at 322–23; *see also Garland*, 71 U.S. at 377–78.
17. *Cummings*, 71 U.S. at 320 (emphasis added); *see also Garland*, 71 U.S. at 377–78.
18. *Cummings*, 71 U.S. at 324–27; *Garland*, 71 U.S. at 377–78.
19. *Cummings*, 71 U.S. at 318.
20. *Id.* at 325.
21. *Garland*, 71 U.S. at 380 ("The question . . . is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of

tered was that those collateral consequences instituted a deprivation (disqualification from employment) based solely on their past actions (as tested by the requisite oaths).[22]

Following *Cummings* and *Garland*, two distinct lines of punishment cases developed: those that addressed punishment as compared to remedial action and those that compared punishment to regulatory action under states' police power. The key in both lines of cases remained the deprivation of a right in response to past conduct, though the latter distinction proved to be the problematic one.

The first cases to distinguish punishment from remedial action were two *in rem* actions: *Coffey v. United States* and *Stone v. United States*. In *Coffey*, the appellant property owner challenged a collateral consequence that imposed civil forfeiture of liquor distillation property used to defraud the United States by failure to pay taxes, when the appellant had been acquitted of all criminal charges for the same acts.[23] The Court found such forfeiture was unconstitutional double jeopardy.[24] In *Stone*, however, the Court found an *in rem* action following acquittal for unlawfully cutting down trees was *not* double jeopardy when it sought to restore property and profit to its rightful owner.[25] The distinction between the two cases is whether the civil action was punitive or remedial; only the former activated constitutional protections: "The proceeding . . . against Coffey, although civil in form, was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited."[26] Put in the language of *Cummings*'s rule, the remedial action is not a deprivation of any right, because Stone never had any right to the trees at issue.

The Court confronted a similar question years later in *Brady v. Daly*, when addressing whether a statute that awards a fixed amount of damages for copyright infringement was a penal statute (for jurisdictional purposes).[27] Again, the Court found that a purely remedial

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punishment, against the prohibition of the Constitution."). Rejecting the civil/criminal divide as a measurement tool of punishment, the Court vehemently stated, "[i]f the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law [of the U.S. Constitution] was a vain and futile proceeding." *Cummings*, 71 U.S. at 325.

22. *Cummings*, 71 U.S. at 319–21.

23. Coffey v. United States, 116 U.S. 436, 437–40 (1886).

24. *Id.* at 443.

25. Stone v. United States, 167 U.S. 178, 187–89 (1897).

26. *Id.* at 187.

27. Brady v. Daly, 175 U.S. 148, 153 (1899).

action for damages is not punishment, even if a fixed amount is used because actual damages are impracticably difficult to determine.[28]

Next, *Helvering v. Mitchell* considered whether a tax assessment of 150% of deficient taxes could constitute punishment for the purposes of the double jeopardy clause.[29] The Court again relied upon the distinction between remedial action and non-remedial punishment, but this time, it permitted the remedial action to exceed actual damages. The opinion explained that the extra amount was designed to compensate the government for "the heavy expense of investigation and the loss resulting from the taxpayer's fraud," still a civil, remedial function.[30] The logic is one of unjust enrichment though property not rightfully owned, not of a deprivation of the defendant's property or other rights.

The distinction between punitive and remedial actions started unraveling in *United States ex rel. Marcus v. Hess*.[31] The case involved a statute that required the defendant electrical contractors of a *qui tam* action to pay double damages for defrauding the government for collusive bidding, and the Court again found that the law instituted no more than actual and consequential damages (especially since the government is only entitled to half of the damages recovered in a *qui tam* action).[32] The problem is that while the logic of the decision was consistent with the remedy–punishment divide, the opinion used the language of a "civil" and "criminal" divide to signify it—a distinction that even the *Hess* Court recognized that is less than clear, since civil actions can be partially punitive while criminal actions can be partially remedial.[33] *Cummings*, *Garland*, and other cases had explicitly re-

28. *Id.* at 156–58.

29. Helvering v. Mitchell, 303 U.S. 391, 398–99 (1938). As the Court states, "acquittal on a criminal charge is not a bar to a civil action by the Government, *remedial in its nature*, arising out of the same facts on which the criminal proceeding was based," but "[w]here the objective of the subsequent action likewise is *punishment*, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy . . . ." *Id.* at 397–98 (emphasis added).

30. *Id.* at 401.

31. United States *ex rel*. Marcus v. Hess, 317 U.S. 537 (1943).

32. *Id.* at 549–50.

33. *Id.* at 550–51. Actually, the civil-criminal division can be traced to the language of the ruling in *Helvering*. *Helvering*, 303 U.S. at 399 ("Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether [the statute in question] imposes a criminal sanction."). *Hess*, though, quoted this language and then used the terms "civil" and "criminal" throughout the opinion–unlike the *Helvering* opinion, which moved back to the clearer terminology of remedies and punishments after stating this unfortunately worded rule.

jected the civil–criminal divide as an indicator of punishment for that reason.[34] In fact, in his concurrence, Justice Frankfurter presciently recognized the problems that such "dialectical subtleties" would cause later courts.[35]

The problematic civil-criminal version of defining punishment solidified in *One Lot Emerald Cut Stones and One Ring v. United States*, in which the Court ruled that forfeiture of undeclared imported goods was not subject to double jeopardy protections.[36] The only resemblance to a remedy was the idea that the forfeiture helped to pay for enforcement of tariff policies—not for *any* actual or consequential damages.[37] The opinion nevertheless found that the statutory label of "civil" (compared to the correspondingly labeled "criminal" sanction) determined *prima facie* that the law was exempt from constitutional protections.[38]

The second line of post-*Cummings* cases dealt with the distinction between punishment and regulation. *Hawker v. New York* addressed a New York collateral consequence that retroactively declared it a crime for any person convicted of a felony to practice medicine—the question being whether a conviction under this statute was in violation of the Bills of Attainder and *Ex Post Facto* clauses.[39] The majority opinion held that the statute was a constitutionally appropriate exercise of the state's police power, specifically its power to regulate the professions in order to ensure public health and welfare.[40] In doing so, a state is permitted to require evidence of good character—and to use a past conviction as conclusive evidence of present bad character.[41] The logic of the decision is succinctly summarized:

> Though not an ex post facto law, [this collateral consequence] is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also ex-

34. *See also* United States v. Lovett, 328 U.S. 303, 316 (1946) ("The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal.").

35. *Hess*, 317 U.S. at 554–55 (Frankfurter, J., concurring).

36. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) (*per curiam*).

37. *Id.* at 236–37. This logic allowed later courts to hold that virtually any public interest goal is "plainly more remedial than punitive"—even when there is virtually nothing *remedial* about them. *E.g.*, United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984).

38. *One Lot Emerald Cut Stones*, 409 U.S. at 237.

39. Hawker v. New York, 170 U.S. 189 (1898).

40. *Id.* at 191–94.

41. *Id.* at 195; *see also* Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J., 1685, 1690–93 (2003).

> cluded from obtaining such a license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons as a class.[42]

The remarkable feature of the *Hawker* opinion is its drastic yet unrecognized shift from *Cummings/Garland*. Both the *Hawker* Court and subsequent commentators have treated these cases as consistent, despite the change in the scope of the question.[43] *Cummings* had *explicitly* stated that the question of the scope of a state's police power was irrelevant to the question of punishment, and it had explicitly chosen *not* to rely on the argument that the collateral consequence in question merely prescribed evidence of good character to practice a profession.[44] Even though the statute at issue in *Hawker* said nothing about character requirements and instead created a new crime that was based solely on evidence of a past conviction, the Court decided that any such statute should be read *as though* it imposes a character requirement and uses the past conviction merely as evidence of poor character.[45] It then distinguished *Cummings* and *Garland* by declaring they were based entirely on the idea that oaths of loyalty had no rational connection to professional qualifications.[46] Through this kind of faulty logic that ignores the bulk of the prior opinions, the question of unconstitutional punishment had become a question of permissible state regulation. Worse, the Court neglected to state a clear rule that defined either punishment or regulation—a mistake that would haunt subsequent cases on this issue.

The line between regulation and punishment became more unclear in *United States v. Lovett*, which also failed to state a clear rule.[47] In *Lovett*, the Court addressed the collateral consequences of denial of pay and effective removal from government employment positions

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42. *Hawker*, 170 U.S. at 197 (internal quotes removed).

43. *E.g.*, Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights for Youthful Offenders*, 35 VAND. L. REV. 791, 800–01 (1982).

44. *See Cummings*, 71 U.S. at 300 (brief for defendant).

45. *Hawker*, 170 U.S. at 196 ("All that is embraced in these propositions is condensed into the single clause of the statute, and it means that, and nothing more. The state is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character."); *see also* Chin, *supra* note 41, at 1695–98 (showing that the actual language of the statute in *Hawker*, which had nothing to do with character and conduct but was only concerned with punishing conviction, made sure the resulting doctrine was nonsensical and difficult to apply).

46. *Hawker*, 170 U.S. at 198. The *Cummings* Court did mention the issue of qualifications, but it explicitly stated that prior crimes bore no relationship to fitness to practice a profession; instead, it was clear that such statutes were punishment because they deprived persons of their rights as a sole consequence of prior acts. *Cummings*, 71 U.S. at 320.

47. *Lovett*, 328 U.S. at 304.

as a result of "subversive," "disloyal," or "un-American" activities.[48] Ignoring the *Hawker* idea that past acts could be evidence of bad character and lack of qualification for a position (in fact, the majority neglected to cite *Hawker* at all), the Court instead baldly asserted the contradictory idea that "a legislative decree of perpetual exclusion from a chosen vocation . . . is punishment, and of a most severe type."[49] Absent a clear rule, perhaps the only sense that can be made of the distinctions between *Cummings*, *Garland*, *Hawker*, and *Lovett* is that removal from public employment is punishment, but removal from private employment is mere regulation.[50]

Trop v. Dulles then created a new problem by ignoring the *Cummings*/*Garland* rule and divining a new, much more vague one.[51] The Nationality Act of 1940 made the loss of U.S. citizenship a collateral consequence that military tribunals could apply under court-martial for various offenses, and plaintiff Trop was denationalized as a result of a conviction of wartime desertion.[52] Firstly, without citing a single case as precedent, the Court abruptly declared: "In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute."[53] Prior to *Trop*, actually, the Court had *explicitly* considered the actual effects of a statute in question rather than delving into issues of legislative intent.[54] Then, the *Trop* opinion announced that a penal statute is one that imposes a deprivation in order to effect one of the purposes of punishment (*e.g.*, retribution or deterrence); if it has instead some other purpose, it is non-penal.[55] The majority cited precedent for this second part of the rule, but none of the cases cited mentioned retribution, deterrence, or any other purpose of punishment.[56] Ultimately, the Court found that denationalization is unconstitutional, cruel and unusual punishment,[57]

48. *Id.* at 305–08.
49. *Id.* at 316 (internal quotes removed).
50. *See* United States v. Brown, 381 U.S. 437, 468–70 (1965) (White, J., dissenting).
51. Trop v. Dulles, 356 U.S. 86 (1958).
52. *Id.* at 88–89.
53. *Id.* at 96.
54. For instance, the only places *Cummings* or *Garland* mention legislative purpose or intent are in a hypothetical example and in the dissent. *Cummings*, 71 U.S. at 325; *Garland*, 71 U.S. at 395–96 (Miller, J., dissenting). *But see* Gardner, *supra* note 43, at 799–800 (arguing that the *Cummings* Court's investigation into the functions and effects of the oaths at issue was an unstated inquiry into the legislative purpose). *Helvering* also explicitly directs the inquiry to statutory construction rather than legislative purpose. *Helvering*, 303 U.S. at 399.
55. *Trop*, 356 U.S. at 96.
56. *E.g.*, *Lovett*, 328 U.S. at 304; *Hawker*, 170 U.S. at 189; *Garland*, 71 U.S. at 333; *Cummings*, 71 U.S. at 277.
57. *Trop*, 356 U.S. at 102–03.

but it is unclear why the new rule was necessary, since the extant *Cummings*/*Garland* rule would have more easily achieved the same result.[58]

In practice, the *Trop* rule—which is still the core of the contemporary punishment inquiry—is remarkably difficult to apply, because it boils down to tautology: an act is punishment if it is intended to punish.[59] This kind of circular logic cannot define punishment in any way other than assumption, the "gut instinct" that we simply know punishment when we see it, and that we can explain that instinct *post hoc* by referring to the intent of the punishment. The bottom line is that, in practice, the *Trop* definition of punishment "has become something of an 'interpretive fact' . . . : a conclusion for which judges need no evidence."[60]

Two years later, *Flemming v. Nestor* introduced new considerations and a new burden of proof into *Trop*'s legislative purpose test. Considering whether retroactive denial of Social Security benefits to aliens deported for past membership in the Communist Party violated the *Ex Post Facto* Clause, the Court focused on (1) whether the collateral consequence was focused on a person or class (rather than an activity or status), (2) whether it imposed an "affirmative disability or restraint," and (3) how closely it resembled the traditional punishment of imprisonment.[61] The first factor was developed from dicta in *Cummings*[62] and the latter two from entirely new rules in order to differentiate *Flemming* from a prior case of imprisonment without due

58. The new rule was likely the result of the *Perez v. Brownell* case, decided on the same day as *Trop*, in which the Court ruled denationalization as a response to voting in a foreign election a proper and constitutional exercise of legislative power. Perez v. Brownell, 356 U.S. 44, 62 (1958). Although *Perez* neglected to rule on the issue of punishment, it is probable that the *Trop* test was created to differentiate the two cases. *See Trop*, 356 U.S. at 105 (Brennan, J., concurring) ("It is, concededly, paradoxical to justify as constitutional the expatriation of the citizen who has committed no crime by voting in a Mexican political election, yet find unconstitutional a statute which provides for the expatriation of a soldier guilty of the very serious crime of desertion in time of war."). The more coherent *Cummings*/*Garland* test would have very simply found both acts punitive, and then left open the question of whether they were both cruel and unusual.

59. *See also* Kaiser, *supra* note 3, at 732–34 (distinguishing *intent* to impose a deprivation, which all statutes have by definition, and the *motives* or purposes for doing so). The only alternative formulation of *Trop* is perhaps more troubling: an act is punishment if its motive is to achieve a *legitimate* purpose of punishment—thereby exempting sadism, hatred, vengeance, exclusion, and other *illegitimate* motives from constitutional protection.

60. Ewald, *supra* note 4, at 90 (discussing the ambiguity of the criminal–civil divide regarding collateral consequences).

61. Flemming v. Nestor, 363 U.S. 603, 614–17 (1960).

62. *Cummings*, 71 U.S. at 320.

process.[63] Next, the majority created a wholly novel presumption that only the "clearest proof" could determine a statute was subject to constitutional protections for punishments, by which it easily determined that deprivation of welfare benefits is permissible.[64] No less than three dissents (with four dissenters) warned of the dangers of departing so thoroughly from the *Cummings*/*Garland* rule.[65]

In *Kennedy v. Mendoza-Martinez*, the Court again addressed provisions of the Nationality Act, this time amendments introduced in 1944 and 1952 that denationalized persons who left the country in order to evade wartime military service.[66] The question was whether such a collateral consequence could be levied absent procedural due process—which also only applies to criminal proceedings.[67] The plurality applied the *Trop* rule that punishment requires the legislative intent to punish, and combined *Flemming*'s factors with four others to develop a seven-factor test for determining the weight of whether that intent (when it is not clearly stated) is penal or regulatory:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to

63. Wong Wing v. United States, 163 U.S. 228 (1896) (addressing whether imprisonment of illegal aliens constituted punishment for the purposes of due process).

64. *Flemming*, 363 U.S. at 617–18. As support for this contention, *Flemming* cited the ancient case of *Fletcher v. Peck* for the proposition that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void"—which could be considered dicta or a statement of a much more lenient standard than the one *Flemming* devised. Fletcher v. Peck, 10 U.S. 87, 128 (1810). Ironically, given the *Flemming* holding and many of the cases that use its standard, *Fletcher* held unanimously that forfeiture of contract and property rights was a punishment subject to the *Ex Post Facto* Clause.

65. *Flemming*, 363 U.S. at 628 (Black, J., dissenting) ("It is true that the Lovett, Cummings and Garland Court opinions were not unanimous, but they nonetheless represent positive precedents on highly important questions of individual liberty which should not be explained away with cobwebbery refinements. If the Court is going to overrule these cases in whole or in part, and adopt the views of previous dissenters, I believe it should be done clearly and forthrightly."); *Id.* at 630 (Douglas, J., dissenting) (citing the clear *Cummings* rule that "[p]unishment . . . includes the 'deprivation or suspension of political or civil rights'"); *Id.* at 635, 640 (Brennan, J., dissenting) ("The common sense of it is that he has been punished severely for his past conduct . . . Today's decision is to me a regretful retreat from Lovett, Cummings and Garland.").

66. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 146–49 (1963). A slight difference between *Trop* and *Mendoza-Martinez* is that the plaintiff in the latter had dual citizenship with Mexico, so that denationalization would not make him a stateless person—which was and is customarily illegal under international law. *Id.*; *Trop*, 356 U.S. at 101–03. Moreover, a *dis*ability is by definition a negative concept, contrary to an affirmative restraint, so it seems quite unclear how this rule could ever clearly determine an outcome.

67. *Mendoza-Martinez*, 372 U.S. at 164.

> which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.[68]

Despite creating this new test, the Court neglected to use it and instead found the denationalization provisions to be *prima facie* punitive without any detailed analysis.[69]

The *Mendoza-Martinez* (and *Flemming*) factors were an attempt to clarify the *Trop* test of punitive intent, but they moved even further from a coherent rule and an accurate understanding of prior cases. For instance, the idea of a disability or restraint was correctly taken from *Cummings* and subsequent cases, but nowhere did those cases require the deprivation to be an *affirmative* one.[70] The ideas of historical consideration and excessiveness (which are also tautological) were entirely from dicta in earlier cases—and the same cases had often expressly rejected the idea that punishments *had* to be traditional or severe.[71] The ideas of scienter and application to criminal act came out of a line of jurisdictional and tax cases that prior courts had considered irrelevant to constitutional questions—not from the more relevant *Cummings*/*Garland* rule that punishment had to be in response to past acts regardless of their character.[72]

Finally, the ideas of punitive and non-punitive/regulatory purposes accurately came from *Trop*'s tautology, but in perhaps the worst problem of the new test, the *Mendoza-Martinez* court arbitrarily limited those purposes to only retribution and deterrence—despite *Trop*'s recognition that other legitimate purposes of punishment exist.[73] These two factors would prove to be the most determinative of future cases of punishment, since they help to avoid *Trop*'s tautology

68. *Id.* at 168–69.

69. *Id.* at 169.

70. *E.g.*, Cummings v. Missouri, 71 U.S. 277, 320 (1866); United States v. Lovett, 328 U.S. 303, 316 (1946). Moreover, a *dis*ability is by definition a negative concept, contrary to an affirmative restraint, making the meaning of this factor perpetually unclear in every case.

71. *E.g.*, *Cummings*, 71 U.S. at 318. These ideas are also nonsensical: A gas tax of two dollars per gallon is "excessive" and non-punitive (unless applied only to wrongdoers), whereas a ten-dollar fine in response to larceny is lenient and possibly ineffective, but still punitive. Similarly, it is doubtful that legislatures could devise an entirely new form of punishment to replace imprisonment and have the courts refuse to apply constitutional protections because the act was not "historically" a kind of punishment. Even *Flemming* rejected the idea that harshness was a factor relevant to punishment. Flemming v. Nestor, 363 U.S. 603, 614 (1960).

72. *E.g.*, United States v. Constantine, 296 U.S. 287 (1935); Helwig v. United States, 188 U.S. 605 (1903). Again, *Cummings* explicitly decried the idea that the act had to be a criminal one. *Cummings*, 71 U.S. at 318.

73. Trop v. Dulles, 356 U.S. 86, 96 (1958).

by focusing on a different question. Instead of defining punishment as anything that attempts to achieve punishment, the Court henceforth defined it as any penalty that aims to deter or exact retribution.[74] This is, of course, another logical fallacy: confusing the *definition* of something with its *justification*.[75] The motive of a legislature in enacting a collateral consequence is logically irrelevant to the consequence's substantive nature as a punishment, a tax, a regulation, a program, or any other ontological characterization—and using justification as a definitional tool arbitrarily limits constitutional protections, even if it avoids the circular logic of the *Trop* rule.

As if things were not confusing enough, *United States v. Ward* merged the remedy and regulation lines of cases without any recognition that it had done so.[76] *Ward* considered whether a "civil penalty" for an oil-drilling facility's illegal discharge of oil into navigable waters activated Fifth and Sixth Amendment rights applicable only in penal proceedings.[77] In deciding this issue, the Court created a two-step inquiry. Firstly, it relied on *Emerald Stones* to determine whether the legislature explicitly or implicitly indicated a preference for a "civil" or "criminal" label, and it held that since the statute used the phrase "civil penalty," it was clearly intended to be civil.[78] This holding blatantly ignored *Cumming*'s warning that courts should never simply accept a legislative label in applying constitutional protections lest they empty those protections of all meaning.[79] Secondly, *Ward* applied the *Mendoza-Martinez* factors to determine if the substantive effect of the act was "so punitive either in purpose or effect" as to override the "civil" label.[80] This second prong also incorporated the nigh-impassible *Flemming* "clearest proof" standard.[81] Based on this standard, the *Ward* Court easily found that all but one of the factors (that the un-

74. *United States v. Brown* recognized this problem and explicitly points out that incapacitation and rehabilitation were also valid purposes of punishment, and excluding them from the definitional test created an arbitrary line between punishment and regulation. United States v. Brown, 381 U.S. 437, 458 (1965). Subsequent cases, however, largely stuck to *Mendoza-Martinez*'s limitation.

75. *See* Kaiser, *supra* note 3, at 732–34; Gardner, *supra* note 43, at 805–06.

76. United States v. Ward, 448 U.S. 242, 247–48 (1980).

77. *Id.*

78. *Id.* at 250. The dissent, however, applied the old remedial–punitive test and found that the penalties at issue were clearly not designed to reimburse the government for any expenses, and were therefore a punishment. *Id.* at 257–58.

79. *See supra* notes 20–21.

80. *Ward*, 448 U.S. at 248–49.

81. *Id.*

derlying act was a crime) support calling the collateral consequence a civil, non-punitive regulation.[82]

Ward thus combined *Trop*'s tautology with a second one: a presumptively civil law is punishment if it is "so punitive" we must call it that. It also has apparently never struck the courts as odd that they are routinely forced to use "penalty" and "sanction," which are direct synonyms to "punishment," to describe "civil" actions that they define as exempt from constitutional protection perhaps because almost no other words ontologically describe a deprivation due to a past act.[83] Instead, *Ward* in practice has come to mean that no presumptively civil law will be considered punishment unless it is extraordinarily harsh or excessive in relation to its regulatory goals (a standard which no collateral consequence has ever met)[84]—despite *Cummings*'s and other cases' clear warning that severity and harshness bear absolutely no relationship to determining whether an action is punitive.[85] In other words, the *Ward*/*Mendoza-Martinez* test is a labyrinth of circular logic: "punishment" means intentional punishment or excessive punishment.

The strange results of this test are easily apparent. Unsurprisingly, while using it, the Court has *never* held that a collateral consequence activates constitutional protections for punishment.[86] "The fact is . . . the Court is no longer trying to define punishment, . . . but is instead giving the government free reign to circumvent constitutional criminal procedure altogether."[87] In doing so, it has manipulated or effectively abrogated all of the rules applied in earlier cases (to be expected, since most of the test came from mis-citations or utter absence of precedent). In *United States v. One Assortment of 89 Firearms*, for instance, the Court found that the location of a forfeiture provision in the civil code, its nature as an *in rem* proceeding, and the inclusion of administrative rather than criminal procedures were all indicative that the collateral consequence was civil rather than crimi-

82. *Id.* at 249–50.

83. Interestingly, the courts use "penal" to refer to actions that are "punishment," and after the rise of the civil–criminal divide, tend to use "punitive" as though it is unrelated to "punishment" and can appear in both civil and criminal actions. Commonsense definitions be damned.

84. *See infra* note 98 and accompanying text.

85. *See supra* note 19 and accompanying text.

86. The possible exception is *Mendoza-Martinez* itself, but that opinion never actually used the *Mendoza-Martinez* factors and took place before the *Ward*/*Flemming* strong presumption in favor of constitutionality. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

87. Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 698–99 (1999).

nal[88]—again despite earlier cases' vehement statements that the form of a law should never outweigh its substantive effects.[89] Then, in a "stunning disregard not only for modern precedents but for our older ones as well,"[90] *United States v. Ursery* effectively held that all civil forfeitures are by definition regulatory because they serve the "non-punitive" purpose of encouraging property owners to manage their property legally or abate nuisances (despite how much these purposes suspiciously resemble the deterrence and incapacitation rationales for punishment).[91]

Even the Supreme Court's subsequent use of each *Mendoza-Martinez* factor (with the *Ward* presumption of constitutionality) reveals the shakiness of this definition of punishment. Not one case has found that a collateral consequence resembles a historical punishment—including forfeiture of contraband or a residence used in the production of narcotics,[92] occupational debarment in response to financial fraud,[93] and registration and public notification for sex offenders.[94] Fines for white-collar criminals[95] and "civil" incarceration for

88. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364 (1984).

89. *See supra* note 19 and accompanying text. Moreover, *Coffey*, *Stone*, *Emerald Cut Stones*, and a number of other cases considered substantive issues despite being *in rem* proceedings; none of them accepted the idea that an *in rem* proceeding was *prima facie* non-punitive. *See* Stone v. United States, 167 U.S. 178, 187–88 (1897); Coffey v. United States, 116 U.S. 436, 440–41 (1886).

90. United States v. Ursery, 518 U.S. 267, 297 (1996) (Stevens, J., concurring in the judgment in part and dissenting in part). The dissent argued that all of the precedent the majority cited would actually counsel that there are three kinds of civil forfeitures—of proceeds from illegal acts, of contraband, and of property used to commit a crime—and only the first two can be considered punishment under the extant doctrine. *Id.* at 298. The logic here was akin to the original *Cummings*/*Garland* rule and consistent with the civil forfeiture cases that followed: forfeiture of illegal proceeds and contraband was not punitive because no deprivation exists (there was no right to the property in the first place that could be deprived), but forfeiture of property used in commission of a crime is a penalty because it is a deprivation of a civil right in response to a past act. *Id.* at 298–99. Finally, the dissent pointed out that *none* of the cases the majority cites as support for its rule that *in rem* forfeitures cannot be punitive actually said anything of the sort. *Id.* at 302–03.

91. *Ursery*, 116 U.S. at 290–91.

92. *Id.* at 290.

93. Hudson v. United States, 522 U.S. 93, 96 (1997).

94. Smith v. Doe, 538 U.S. 84 (2003). The *Smith* opinion did consider how closely registration and public notification are to colonial-era punishments that publicly shamed the offender, but it ultimately relied upon the non-punitive purpose factor in this case (public safety through information) to determine that there was no historical resemblance. *Id.* at 97–99; *see also* Kevin O'Keefe, Comment, *Two Wrongs Make a Wrong: A Challenge to Plea Bargaining and Collateral Consequence Statutes through Their Integration*, 100 J. CRIM. L. CRIMINOLOGY 255, 255–57 (2010). If this can be taken as precedent, the historical inquiry itself is also focused on the punitive or non-punitive intent of the statute.

95. *Hudson*, 522 U.S. at 95 (holding that a monetary penalty and occupational debarment for violation of federal banking statutes, does not prevent a later criminal prosecution for the same act under the Double Jeopardy Clause of the Fifth Amendment).

sex offenders following their sentence[96] seem especially to resemble historical punishments, but the Court held otherwise. Similarly, the Court found that none of these collateral consequences, including civil commitment based on past conviction for violent sex crimes, included an element of scienter.[97]

The Court has also failed to find that *any* collateral consequence promotes a purpose of punishment—the fourth *Mendoza-Martinez* factor. *Ursery* simply discarded deterrence by asserting that even civil actions can deter; henceforth, the only legislative motive valid for definitional purposes has apparently been retribution.[98] In *Hudson v. United States*, the Court likewise held that anything that promotes public safety or stability has a non-punitive purpose—the sixth factor.[99] Interestingly, after it seemed like deterrence (alongside rehabilitation and incapacitation) were no longer relevant to the inquiry, *Kansas v. Hendricks* used the *lack* of a deterrent purpose in civil commitment as proof of non-punitive intent.[100] Then, the most recent punishment case, *Smith v. Doe*, again ruled that deterrence is irrelevant[101]—suggesting even more strongly that courts are free to weigh the factors in favor of their "gut instincts." *Smith* and *Hendricks* also shifted the inquiry to whether only the "primary" purpose was non-punitive—and both easily found that it was.[102] Given this kind of approach, it should be no surprise that the Court has also never found a collateral consequence that appears excessive in the pursuit of its non-

96. Kansas v. Hendricks, 521 U.S. 346, 369 (1997) (holding that an Act which calls for confinement after a conviction and term of incarceration does not violate the Double Jeopardy Clause of the Fifth Amendment).

97. *Id.* at 362 (explaining that the commitment decision was found to rely only upon "mental abnormality" rather than scienter—despite the relevance of a past).

98. United States v. Ursery, 518 U.S. 267, 312 (1996); *see also Smith*, 538 U.S. at 102; *Hudson*, 522 U.S. at 105. *But see Hendricks*, 521 U.S. at 362–63.

99. *Hudson*, 522 U.S. at 105.

100. *Hendricks*, 521 U.S. at 362–63 (arguing that the purpose of the "civil" incarceration procedure was to treat the sex offender and protect the public). *But see* Nora V. Demleitner, *Abusing State Power or Controlling Risk: Sex Offender Commitment and Sicherungverwahrung*, 30 FORDHAM URB. L.J., 1631–32 (2003) (arguing that the Court's comparison to treatment-oriented civil commitment statutes is strained).

101. Smith v. Doe, 538 U.S. 84, 102 (2003).

102. *Id.* at 93; *Hendricks*, 521 U.S. at 367–68.

punitive goals—the seventh factor.[103] These are the factors "most significant" to the punishment inquiry.[104]

Finally, of the two *Mendoza-Martinez* factors most relevant to the original *Cummings*/*Garland* definition of punishment—whether the statute imposes an affirmative disability or restraint, and whether it is response to a past criminal act—neither has been helpful in activating constitutional protections for a collateral consequence. *Hudson* made short work of the former, strangely construing "affirmative disability or restraint" to mean "similarity to the paradigmatic example of imprisonment" (effectively merging the first and second factors).[105] Given this limitation, the only case that has actually found an affirmative restraint was *Hendricks* (because civil commitment does seem an awful lot like imprisonment); still, the *Hendricks* Court sidestepped the problem by citing a pre-trial detention case for the idea that all affirmative restraints are not punishment.[106] As for the factor that considers whether a past criminal act is involved, *every single punishment case* since *Ward* found this factor did weigh in favor of punishment—and every single case then found it unpersuasive in determining the holding.[107]

In other words, as the Court most recently reaffirmed in *Smith*, a collateral consequence will never pass the second prong of the tautological *Ward*/*Mendoza-Martinez* test unless it closely resembles imprisonment and does absolutely nothing to promote public safety or

103. Actually, the Court failed to address this factor at all in any case except *Smith*. *Smith*, 538 U.S. at 105 ("The excessiveness inquiry of our *ex post facto* jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective."). In every other case, the Court simply implied that the collateral consequence was rationally related to its non–punitive purpose. *E.g.*, *Hendricks*, 521 U.S. at 365–66 (finding that a lack of treatment options does not negate a non-punitive purpose of public safety in civil commitment for sex offenders).

104. *Smith*, 538 U.S. at 102 (quoting *Ursery*, 518 U.S. at 290).

105. Hudson v. United States, 522 U.S. 93, 104 (1997). This formulation of the affirmative disability factor has been used as precedent multiple times in subsequent cases. *E.g.*, *Smith*, 538 U.S. at 100; *Hendricks*, 521 U.S. at 363.

106. *Hendricks*, 521 U.S. at 363.

107. The *Ward* majority, for instance, flatly discarded this *Mendoza–Martinez* factor through the circular logic that civil and criminal sanctions can often apply to the same conduct. United States v. Ward, 448 U.S. 242, 250 (1980). Other cases have cited *Ward* for this proposition. *E.g.*, *Hudson*, 522 U.S. at 105. Most recently, *Smith* simply discarded this factor and the scienter factor as completely irrelevant to the inquiry. *Smith*, 538 U.S. at 105 ("The regulatory scheme applies only to past conduct, which was, and is, a crime. This is [merely] a necessary beginning point, for recidivism is the statutory concern.").

stability.[108] It is remarkably difficult to imagine what such a punishment could look like, since even imprisonment itself pursues countless such "non-punitive" goals. As Part III of this article argues, however, it is also this kind of divergence from common sense and inconsistency with precedent that has made the current punishment doctrine unstable and likely to change in the near future.

III. THE FICTIONAL LINE BETWEEN "DIRECT" AND "COLLATERAL" CONSEQUENCES

Although the question of "punishment" is relevant to a number of constitutional protections concerning the nature of a legislative or administrative act, within criminal proceedings, both effective assistance of counsel and due process requirements for pleadings also involve the question of "directness" (as opposed to "collateral-ness") of the proceedings' consequences. The so-called "collateral-consequences rule" has held that competent counsel need only inform a criminal defendant of the *direct* consequences of a plea or conviction, with the *collateral* consequences being irrelevant to the inquiry. The rule also has held that courts have the same limited duties of notice for accepting a guilty plea. Unlike the original definition of punishment in *Cummings*/*Garland*, the definitional lines between direct and collateral consequences were never particularly clear, so the doctrine is even less stable today.

The collateral–consequences rule has a shorter, less complex history than the punishment doctrine does. Although many trace its origins to (mis)citations of *Brady v. United States*,[109] the circuit courts actually constructed it decades earlier. The earliest iteration of the collateral-consequences rule seems to be in *United States v. Parrino*, when the Second Circuit addressed the question of whether a guilty plea could be invalidated because defense counsel provided the misin-

108. For this reason, Justice Souter vehemently objected to the *Smith* majority's use of *Ward* and *Mendoza–Martinez*: "No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and on no one else as a result of their convictions are not part of their punishment." *Smith*, 538 U.S. at 113.

109. Brady v. United States, 397 U.S. 742 (1970). *E.g.*, Margaret Colgate Love, *Collateral Consequences after* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS PUB. L. REV. 87, 96–97 (2011); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators"*, 93 MINN. L. REV. 670, 684–85 (2008); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 726–29 (2002).

formation that the plea could not lead to the defendant's deportation.[110] The majority recognized that "a defendant should not be holden to a plea of guilty made without an understanding of the consequences."[111] Then, however, it ruled that *collateral* consequences were exempt from that rule for two reasons: (a) there was no precedent that included them in it (neither was there precedent to the contrary), and (b) it seemed "palpably unsound" to hold otherwise.[112] No principled analysis besides this obvious assumption was presented. The majority also failed to actually define "collateral" consequences except by contrasting the "sentence directly flowing from the judgment" with the examples of civil forfeiture, loss of employment or civil rights, ineligibility for military service, and deportation.[113] Thus was born the fictional collateral–direct distinction.

The rule spread quite slowly in the next two decades, often through the same sort of unsound logic. The Fifth, Seventh, Ninth, and Tenth Circuits addressed the judge's—rather than counsel's—duty under the Due Process Clause to inform the defendant of potential deportation, and each simply asserted with no analysis whatsoever that no such duty exists.[114] The D.C. Circuit, like the Second, simply took the lack of precedent to mean collateral consequences (in this case undesirable discharge from the Air Force) were not part of understanding a plea.[115]

The first actual analysis of the rule was by the Third Circuit in *United States v. Cariola*: "It has been stated broadly that out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. But the pertinent question is: what consequences?"[116] The majority considered the practical impacts on both judges and prison populations of

110. United States v. Parrino, 212 F.2d 919, 920–21 (2d Cir. 1954).

111. *Id.* at 921.

112. *Id.* at 922. The dissent found that the lack of precedent was just as good of a reason to find that the court *should* inform the defendant of collateral consequences. *Id.* at 924 ("The most my colleagues can show is that there are no precedents, on this point, adverse to defendant. I think we should not create one.").

113. *Id.* at 921–22.

114. Meaton v. United States, 328 F.2d 379, 380–81 (5th Cir. 1964); United States *ex rel.* Durante v. Holton, 228 F.2d 827, 830 (7th Cir. 1956); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964); Hutchison v. United States, 450 F.2d 930, 931 (10th Cir. 1971).

115. Redwine v. Zuckert, 317 F.2d 336, 338 (D.C. Cir. 1963). Although the opinion did not clearly state whether the duty in question was the defense attorney's or the court's, it implied the latter by orienting the question toward due process. *Id.* at 337.

116. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).

deciding that courts should warn defendants of collateral consequences,[117] and it cited *Parrino* for support that they need not be so warned.[118] In dissent, the Chief Judge argued sharply to the contrary, saying that the commonly understood, unquestioned principle is that a court should make a defendant fully aware of the consequences of a guilty plea.[119]

Only then did *Brady* come into the picture. While considering the standards for the voluntariness of a plea, the Supreme Court stated that a "plea of guilty entered by one fully aware of the direct consequences . . . must stand unless induced by threats . . ., misrepresentation . . ., or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business. . . ."[120] The D.C. Circuit was the first to simply "presume that the Supreme Court meant what it said when it used the word '*direct*'; by doing so, it excluded *collateral* consequences."[121] The other circuits followed suit.[122]

There are a number of problems with using *Brady* as Supreme Court endorsement of the collateral-consequences rule. Firstly, the case dealt only with the issue of the *voluntariness* of a plea, not the separate, due process requirement that the plea be knowingly.[123] The collateral-consequences rule addresses only the *knowledge* prong of the test.[124] Secondly, *Brady* had absolutely nothing to do with collateral consequences, instead presenting issues of impermissible pressure by defendant's counsel, a statutory allowance of the death penalty only absent a plea, and certain promises regarding a reduced sentence.[125] Thirdly, the language of "direct" consequences was merely

117. *See infra* notes 152–53 and accompanying text.

118. *Cariola*, 323 F.2d at 186.

119. *Id.* at 189 (Biggs, J., dissenting in part).

120. Brady v. United States, 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

121. United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971). Even this case included no analysis besides this simple statement of "precedent."

122. *E.g.*, Nunez Cordero v. United States, 533 F.2d 723, 726 (1st Cir. 1976); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1365–66 (4th Cir. 1973) ("The law is clear that a valid plea of guilty requires that the defendant be made aware of all 'the direct consequences of his plea.' By the same token, it is equally well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea."); Armstrong v. Egeler, 563 F.2d 796, 800 (6th Cir. 1977); Fruchtman v. Kenton, 531 F.2d 946, 948 (9th Cir. 1976); United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985). Apparently, only fifteen states and two circuits (the Eighth and Twelfth) never accepted the collateral-consequences rule, but neither did they hold otherwise. *Cf.* Padilla v. Kentucky, 559 U.S. 356, 376 (2010).

123. *Brady*, 397 U.S. at 748–50.

124. *See also* Roberts, *supra* note 109, at 685–86.

125. *Brady*, 397 U.S. at 743–44.

dicta within an internal quotation of a Fifth Circuit case—and even that case had nothing to do with collateral consequences nor any indication that "direct" was meant to address them.[126] Fourthly, the Supreme Court had already indicated numerous times that, though it did not consider collateral consequences punishment, it did consider them highly important in and relevant to a criminal case for other questions.[127]

Another serious problem with the collateral–consequences rule is that the definitions of direct and collateral consequences are dangerously unclear (another signal that the rule exists only through assumption rather than careful analysis). Not one of the decisions that created the rule actually defined a "collateral" consequence.[128] The Fourth Circuit first presented a definition thirty years after *Parrino* created the rule: consequences are collateral if they do not have a "definite, immediate and largely automatic effect on the range of the

126. Shelton v. United States, 246 F.2d 571, 571–72 (5th Cir. 1957).

127. The most prominent use of collateral consequences by the Court is in order to address the mootness of a "case or controversy." If a defendant challenges a conviction after the full sentence has been served, the case is normally not justiciable. St. Pierre v. United States, 319 U.S. 41, 42 (1943). If the defendant can show, however, that even potential or minor collateral consequences are active due to the conviction, a continuing injury is at issue. Fiswick v. United States, 329 U.S. 211, 221–22 (1946) (potential deportation risks and other civil disabilities); *see also* Rutledge v. United States, 517 U.S. 292, 301–03 (1996) (at least a $50 fee for concurrent life sentences); Carafas v. LaVallee, 391 U.S. 234, 237–38 (1968) (business licenses, union membership, voting rights, and jury service); Ginsberg v. New York, 390 U.S. 629, n.2 (1968) (potential occupational licensing restrictions); United States v. Morgan, 346 U.S. 502, 512–13 (1954) ("civil rights" generally). Later, the Court also created a presumption that collateral consequences are always possible, so that a case is rarely moot after the sentence has been served even absent a showing of actual injury. Sibron v. New York, 392 U.S. 40, 56–57 (1968) ("[I]t is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action."); Pollard v. United States, 352 U.S. 354, 358 (1957); *see also* United States v. Juvenile Male, 131 S. Ct. 2860, 2864 (2011) (clarifying that the presumption only exists for the underlying *conviction*, not a completed *sentence* itself); Spencer v. Kemna, 523 U.S. 1, 14 (1998) (declining to apply the presumption to parole revocation).

The Court has also used collateral consequences to justify the "authorized imprisonment" doctrine, because "the authorized penalty is . . . a better predictor of the stigma and other collateral consequences that attach to conviction of an offense." *E.g.*, Scott v. Illinois, 440 U.S. 367, 382 (1979).

128. The Third Circuit gave examples: evidence of conviction in later civil actions, credibility as a witness, voting rights, public office, 'second offender' punishments, and deportation. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963). The Fifth Circuit simply used the blanket idea of "civic rights." Meaton v. United States, 328 F.2d 379, 381 (5th Cir. 1964). However, the lines between collateral and direct consequences are quite unclear through these formulations. *See, e.g.*, Hinds v. United States, 429 U.S. 1322 (1970) (considering the possibility of consecutive sentences as a collateral consequence); Munich v. United States, 337 F.2d 356, 361 (9th Cir. 1964) (considering eligibility for probation or parole as a collateral consequence); *see also* Roberts, *supra* note 109, at 676–78.

defendant's punishment."[129] This rule, of course, turns on whether the consequence is defined as punishment or regulation,[130] conflating the two doctrines and making the definition of collateral consequences circular (a consequence is collateral if it is not part of the punishment, assuming *a priori* that collateral consequences are not themselves punishment). Other circuits define directness according to whether the court itself has "control and responsibility" for the consequence,[131] but this test is just as circular (courts need not take responsibility for or control of those consequences for which they have no control or responsibility). Because of these ambiguities, courts often have trouble finding the line between direct and collateral consequences.[132] A practical translation of this tortuous rule is thus that only the criminal fines and tenure of prison, jail, or probation constitute "direct" consequences of the sentence; anything else is (probably) "collateral."

A final problem with the collateral–consequences rule is that it conflates the role of the *judge* in ensuring a guilty plea is voluntary and knowing with the duties of the *defense attorney* to effectively inform the defendant.[133] "[J]ust as defense counsel and the court have different duties of loyalty, investigation, and legal research as a result of their distinct roles as advocate and decision maker, there is no reason to assume that their obligations of advising the accused of the risks and benefits of pleading guilty should be identical."[134] Thus, some courts even created the rule in respect of the judge's duty of

129. Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir. 1973).

130. *Id.* at 1367; *see also* Barkley v. State, 724 A.2d 558, 560–61 (Del. 1999); Commonwealth v. Leidig, 598 Pa. 211, 216 (2008); Mitschke v. State, 129 S.W.3d 130, 135 (Tex. Crim. App. 2004).

131. *E.g.*, United States v. Gonzales, 202 F.3d 20, 27 (1st Cir. 2000); El-Nobani v. United States, 287 F.3d 417, 419–421 (6th Cir. 2002).

132. Some courts, for instance, hold that eligibility for parole is a direct consequence. *E.g.*, *Munich*, 337 F.2d at 360–61. Others, however, find to the contrary. *E.g.*, Trujillo v. United States, 377 F.2d 266, 269 (5th Cir. 1967). In another example, one court held that civil commitment is *neither* direct *nor* collateral. State v. Bellamy, 835 A.2d 1231, 1238 (N.J. 2003). Finally, it should be noted that even though sentencing judges themselves can sometimes determine welfare restrictions, and could in the past submit decisive recommendations for or against deportation, courts have found that these consequences are not direct. *But see* United States v. Littlejohn, 224 F. 3d 960, 965–66 (holding that certain federal welfare deprivations were direct because they were a definite and automatic result of conviction).

133. *Strickland v. Washington* firmly differentiated between the judge's and counsel's duties in this respect. Strickland v. Washington, 446 U.S. 668, 690 (1984). Under *Strickland*, effectiveness of counsel is a reasonableness inquiry "considering all the circumstances" in each case. *Id.* at 688. Even if counsel is shown to be incompetent under this standard, the defendant still must prove that actual prejudice resulted from counsel's error. *Id.* at 694 (stating that the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

134. Chin & Holmes, Jr., *supra* note 109, at 727.

notice under due process while nevertheless assuming or even expressly stating that such a duty is incumbent upon counsel.[135] Nevertheless, no circuit has ruled that counsel but not the judge has the duty to inform the defendant about collateral consequences.[136]

Possibly because of these inconsistencies, the Supreme Court finally did take a case on the direct–collateral distinction in *Padilla v. Kentucky*, when it considered whether constitutionally competent counsel must inform a defendant of potential deportation upon conviction.[137] The Court declined to rule on the validity of the collateral-consequences rule itself, instead focusing on the "unique nature" of deportation in this respect.[138] Because deportation is so serious of a consequence, because it has historically been closely intertwined with criminal proceedings, and because modern legal changes effectively make it a definite and automatic result of conviction, the majority found it is neither a direct nor a collateral consequence of conviction.[139] As such, *Padilla* ruled that competent counsel is required to inform a defendant of potential deportation consequences—and counsel's advice must be as specific as possible given the clarity of the immigration law in the case.[140]

As a result of the "groundbreaking" new ruling in *Padilla*, the collateral-consequences rule is in a state of flux.[141] *Padilla* recognized that some penalties do not fit neatly into the direct–collateral distinction, and it is unclear how far that logic extends. A few cases have already held that counsel must now inform clients when they may be subject to sex offender registration and notification statutes and civil commitment laws, because such statutes are also particularly severe,

135. *E.g.*, Michel v. United States, 507 U.S. 461, 465 (1974) ("Where his client is an alien, counsel and not the court has the obligation of advising him of his particular position as a consequence of his plea.").

136. *See* Chin & Holmes, Jr., *supra* note 109, at 730–32; Love, *supra* note 109, at 98–99. Recent rulings in response to *Padilla* indicate that this may be changing as courts resist *Padilla*'s fullest interpretation. *E.g.*, United States v. Delgado-Ramos, 635 F.3d 123 (9th Cir. 2011) (distinguishing the judge's duty of notice under *Brady* from counsel's duty of notice under *Padilla*).

137. Padilla v. Kentucky, 559 U.S. 356, 359–60 (2010).

138. *Id.* at 365.

139. *Id.* at 365–66.

140. *Id.* at 369. The Court considered the alternative rule that constitutionally effective counsel need only refrain from providing misinformation (which defendant Padilla had received in this case) but nevertheless rejected that ruling in favor of an affirmative duty to provide notice. *Id.* at 369–70.

141. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 756 (2011); *see also* Chaidez v. United States, 133 S. Ct. 1103, 1107 (2013).

mandatory, and intimately linked to the criminal-law process.[142] Other collateral consequences are less clear, however; courts seem unsure how far *Padilla*'s "sea change" will go[143]—the subject of the last section of this article.

IIII. RECOGNIZING "COLLATERAL CONSEQUENCES" AS DIRECT PUNISHMENT

Prior to 2010, both the definition of punishment and the collateral-consequences rule had become unstable. Both doctrines had been developing through tautology, circular logic, mis-citations of (and thus contradictions with) precedent, and above all, undefended assumptions that collateral consequences simply are not subject to judicial protection. With the advent of *Padilla v. Kentucky*, the gradual breakdown of these doctrines—or at least their radical change—is all but assured.

Because the results of the *Ward*/*Mendoza-Martinez* punitive versus regulatory/remedial test were so often contradictory to common sense and inconsistent with precedent, a string of Supreme Court cases in the late 1980s and early 1990s tried to redirect the punishment doctrine. In *United States v. Halper*, the Court recognized *Ward*'s unwise reliance on "civil" and "criminal" labels in assessing what constitutes punishment:

> In making this assessment, the labels "criminal" and "civil" are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.[144]

142. *E.g.*, Jackson v. United States, 463 Fed. App'x 833, 835 (11th Cir. 2012); People v. Fonville, 804 N.W.2d 878 (Mich. Ct. App. 2011); Taylor v. State, 698 S.E.2d 384 (Ga. Ct. App. 2010). *But see* People v. Gravino, 928 N.E.2d 1048, 1055–56 (N.Y. 2010) (rejecting the idea that sex offender registration—and also conditions of probation—are direct enough to require notice under *Padilla*).

143. For instance, worker's compensation forfeiture, pension forfeiture, and parole ineligibility have all been held to still qualify as a collateral consequence of conviction. United States v. Nicholson, 676 F.3d 376 (4th Cir. 2012); Webb v. State, 334 S.W.3d 126 (Mo. 2011); Commonwealth v. Abraham, 619 U.S. 293, 351–53 (2012). Future civil liability, on the contrary, has been considered a direct consequence. Wilson v. State, 244 P.3d 535 (Alaska Ct. App. 2010).

144. United States v. Halper, 490 U.S. 435, 447–48 (1989). *Halper* was later abrogated by *Hudson*, but it was unanimous, except for a single concurring justice, worried that a case-by-case analysis might lead to unpredictable results. *Id*. at 453 (Kennedy, J., concurring); *see also* Dep't of Revenue of Mont. v. Kurth Ranch, 511 U.S. 767, 777–79 (1994); Austin v. United States, 509 U.S. 602, 610 (1993); Klein, *supra* note 87, at 695–98.

Then, *Halper* apparently overruled *Ward*'s (and *Trop*'s) reliance on statutory structure and intent, stating instead that the proper double jeopardy inquiry is on a case-by-case basis.[145] *Austin v. United States* likewise explicitly recognized that "sanctions frequently serve more than one purpose," and that the proper inquiry is whether *any part of a statute* can be explained only as enacting punishment.[146]

Moreover, in *Halper*, *Austin*, and *Dep't of Revenue of Montana v. Kurth Ranch*, the Court implicitly recognized that the *Mendoza-Martinez* factors are incredibly difficult to apply in practice, and they often boil down to whether a judge "feels like" the sanction is punitive.[147] As such, these cases minimized *Mendoza-Martinez*'s scope to only the question of process due in criminal cases rather than to the question of punishment for other constitutional protections.[148] Although the Court changed its collective mind, quickly overruling or minimizing these three cases, they show the unstable ground of the punishment doctrine before *Padilla*.[149]

Then, of course, *Padilla v. Kentucky* shattered any semblance of clarity in the direct–collateral distinction, and lower courts are still reeling. Although *Padilla* did not explicitly change the punishment doctrine, its logic does suggest the Court's thinking has shifted and provides precedent for that change. The ruling relied on the fact that "deportation is an integral part—indeed, sometimes the most impor-

145. *Halper*, 490 U.S. at 447. In the instant case, a sanction of 220 times the government's loss simply did not further a remedial goal. *Id.* at 448–49.

146. *Austin*, 509 U.S. at 610; *see also Halper*, 490 U.S. at 447.

147. Indeed, in the Supreme Court, they have never once been applied unanimously by the justices in a case. *See* Flemming v. Nestor, 363 U.S. 603, 615 (1960). In *Ward*, for instance, the majority found that all but one of the factors weighed in favor of a civil determination, but the concurrence applied a different analysis and the dissent found that the *Mendoza-Martinez* factors weighed in the opposite direction. United States v. Ward, 448 U.S. 242, 249–70 (1980). Even two justices in *Mendoza-Martinez* found that the expatriation law was primarily regulatory in purpose despite the weight of other factors to the contrary. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 208–10 (1963); *see also* Demleitner, *supra* note 101, at 1632 ("Despite enormous effort to [distinguish between civil regulation and criminal punishment] in a principled manner, the Court has not been able to draw a clear line.").

148. *Kurth Ranch*, 511 U.S. at 804–05; *Austin*, 509 U.S. at 622 n.6; *Halper*, 490 U.S. at 447; *see also* Matthew Costigan, *Go Directly to Jail, Do Not Pass Go, Do Not Keep House*, 87 J. CRIM. L. CRIMINOLOGY 719, 724–29 (1997).

149. United States v. Ursery, 518 U.S. 267, 282–87 (1996) (narrowing *Halper* to apply only to civil fines, ruling that *Kurth Ranch* applied only to tax penalties, and limiting *Austin* to excessive fines cases, not other areas of constitutional criminal law); Hudson v. United States, 522 U.S. 93, 95–96 (1997) (officially disavowing *Halper*). *Hudson* even went so far as to inaccurately assert, "[o]ur opinion in United States v. Halper marked the first time we applied the Double Jeopardy Clause to a sanction without first determining that it was criminal in nature," even though almost all of the earlier cases on punishment explicitly rejected the civil/criminal divide as determinative of constitutional protections. *Id.* at 100.

tant part—of the *penalty* that may be imposed on noncitizen defendants who plead guilty to specified crimes."[150] In fact, the *Padilla* opinion recognized multiple times that deportation is a "severe 'penalty.'"[151] That a law is notably severe and integral to penal repercussions is specifically relevant to the second prong of the *Ward*/*Mendoza-Martinez* test: it shows both a punitive purpose and potential excessiveness compared to any non-punitive goals. Moreover, though the opinion still does not notice that "penalty" and "punishment" are direct synonyms, this language of *Padilla* does clearly indicate how linked deportation is to criminal punishment.

If deportation has so many qualities of direct punishment, the change in collateral-consequences doctrine "has no logical stopping-point"; countless collateral consequences share the same qualities to at least some degree.[152] Thus, *Padilla* likely heralds both the end of the collateral-consequences rule and a return to a more sensible definition of punishment. According to both commonsense and philosophical definitions, punishment is "a deprivation or harm by an authority [*e.g.*, courts or legislatures] in response to some perceived transgression or wrongdoing."[153] *Cummings v. Missouri* and *Ex parte Garland* effectively adopted this exact definition, assuming that (*a*) a deprivation or suspension that was (*b*) in response to past conduct is

150. Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (emphasis added).

151. *Id.* at 365. It did, however, assert that deportation was not "in a strict sense, a *criminal* sanction." *Id.* (emphasis added).

152. *Id.* at 390 (Scalia, J., dissenting) ("[W]hat would come to be known as the '*Padilla* warning' . . . cannot be limited to [particular] consequences except by judicial caprice."). The concurring opinion likewise recognized that numerous other collateral consequences besides deportation are "serious." *Id.* at 376 (Alito, J., concurring in the judgment); *see also* Kaiser, *supra* note 3, at 732 (stating that the majority of collateral consequences are automatic as a result of conviction, and many are quite severe).

There is also a clear reason why there *should* be no stopping point to *Padilla*'s logic: "if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled" because the advice implies other collateral consequences do not exist. *Padilla*, 559 U.S. at 381–82 (Alito, J., concurring in the judgment).

153. Kaiser, *supra* note 3, at 729–34. This definition corresponds neatly with the important factors that define punishment according to the great legal philosopher H.L.A. Hart, who considered "punishment" to involve five elements:

> (i) It must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offense against legal rule.
> (iii) It must be of an actual or supposed offender for his offense.
> (iv) It must be intentionally administered by human beings other than the offender.
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4–5 (2008).

punishment when enacted by law,[154] and their definition was overlooked but *never overruled* by later courts. Collateral consequences of conviction simply *are* direct punishments according to virtually every sensible definition.[155]

This sort of logical change in judicial doctrine, however, must come in the face of the fears that many judges and other commentators have of recognizing collateral consequences as direct punishment. *Hudson* outright admitted the Court's approach to collateral consequences is not based on true definitional logic but rather on *prima facie* apprehensions of coming to any other conclusions: "If a sanction must be 'solely' remedial . . . to avoid implicating the Double Jeopardy Clause, then no civil penalties are beyond the scope of the Clause."[156] In response, the Court simply assumed in circular fashion that plenty of non-remedial penalties must be exempt from constitutional protection, and then found a *post hoc* justification.

These fears and assumptions suggest that both the *Ward*/*Mendoza-Martinez* test and the collateral-consequence rule are based not so much on formalistic distinctions as they are on oft-unspoken practical concerns. The most prominent practical concern behind the collateral-consequence rule is involves the appropriate professional standards of knowledge for judges and lawyers. As Justice Alito stated in *Padilla*, "Criminal defense attorneys . . . are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience."[157] When first adopting the collateral-consequences rule, the Third Cir-

154. Cummings v. Missouri, 71 U.S. 277, 322 (1866); *Ex parte Garland*, 71 U.S. 333, 381 (1866).

155. For this reason, a number of commentators have even rejected the term "collateral consequences of criminal convictions" because, despite its alliterative attractiveness, it is simply inaccurate. *E.g.*, Unif. Collateral Consequences of Conviction Act, 2 (National Conference of Commissioners on Uniform State Laws 2011) [hereinafter UCCCA] (preferring the terminology of collateral "sanctions" and "disqualifications" because the only distinction between collateral consequences and direct punishment is the absence of the former from the formally recognized sentence of the court); Ewald, *supra* note 4, at 97–99 (arguing that collateral consequences are typically punitive in purpose, effect, public meaning, or mode of administration, but that they simply are not the same kind of *expressive* punishment that, say, imprisonment is); Kaiser, *supra* note 3, at 722–29 (using the term "hidden sentence" because it more accurately describes collateral consequences as punishment that is overlooked and marginalized compared to the formally recognized sentence); JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 64–65 (2005) (using "invisible punishment" for similar reasons).

156. Hudson v. United States, 522 U.S. 93, 102 (1997)

157. Padilla v. Kentucky, 559 U.S. 356, 376 (2010) (Alito, J., concurring in the judgment). The dissent shared similar concerns. *Id.* at 390 (Scalia, J., dissenting).

cuit likewise worried that the vast number of collateral consequences laws spread so unsystematically throughout legal codes (with unpredictable outcomes) means that any requirement to warn the defendant of collateral consequences "would impose upon the judge an impractical burden out of all proportion to the essentials of fair and just administration of the criminal laws."[158]

Even assuming *arguendo* that concerns about the burden of understanding all collateral consequences may have once been valid, they are no longer. Many professional standards recommended before *Padilla* that attorneys and judges ensure proper information about collateral consequences be given to defendants,[159] and as such, a number of resources now exist for understanding collateral consequences[160]—at least enough to fulfill *Padilla*'s standard of at least giving notice of potential penalties when their certainty is unclear. Moreover, the National Inventory of the Collateral Consequences of Conviction (NICCC) is complete and available for free online reference.[161] This database was collected by the ABA Criminal Justice Section in conjunction with the National Institute of Justice, and is a complete and current reference of all collateral consequences law in every jurisdiction, sortable by penalty type, offense type, and other categories. With these extensive resources, it is now a remarkably small burden for counsel and court to understand and relay basic information on collateral consequences. Options for simple notification include pamphlets, access to a website like the NICCC, or a simple oral summary that would take no more than two minutes to communicate.

A similar fear drives the strange logic of the *Ward*/*Mendoza-Martinez* formulation of criminal punishment: fear that using a more logical definition would prevent the legislature from pursuing important

158. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963); *see also* Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976) ("The collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence as that here involved would impose an unmanageable burden on the trial judge and 'only sow the seeds for later collateral attack.'").

159. ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons (American Bar Association 2011) [hereinafter ABA Standards].

160. Both the ABA Standards and the UCCCA encouraged states to collect and reference collateral consequences law in a single chapter of code. *Id.* at Standard 19-2.1; UCCCA § 4. As such, Ohio and North Carolina, at least, are already in the process of doing so. *See* Love, *supra* note 4, at 121 n.73. There are also now a good number of useful reviews of collateral consequences. *See* cases cited *supra* note 4.

161. *National Inventory of the Collateral Consequences of Conviction*, http://www.abacollateralconsequences.org/ (last visited June 18, 2014).

regulatory goals that are necessary to protect the public safety. The Supreme Court's obsession with validating the "non-punitive" purpose of protecting public safety—cited in virtually every single case following *Trop* in 1958—indicates its underlying concern that applying constitutional protections will frustrate the legislatures' attempts to safeguard the public from the "dangerous" or "immoral" people. This perspective was neatly summed by *Hawker*'s statement that "[i]n a certain sense such a rule is arbitrary" because past criminal acts is a poor proxy for both bad character and future dangerousness, "but it is within the power of a legislature to prescribe a rule of general application . . ."[162]

This fear, too, is unfounded. In fact, it has been for the punishment doctrine's entire history. *Ex post facto* punishments, for instance, have never been necessary to ensure public safety, and such an argument would have been blatantly offensive to the framers of the United States Constitution. In every case brought before the Supreme Court, a non-punitive law was not only readily available but also frequently would have been a *better* alternative. For example, the "need" to regulate the medical profession addressed in *Hawker* could have been better served with a statute that imposed a flexible, "good character" requirement—rather than using a prior conviction as a poor proxy for bad character.[163] Even indefinite incarceration of dangerous sex offenders was never necessary for public safety, both because the class of sex offenders is actually a terrible proxy for those likely to commit sex crimes[164] and because certain enforcement of the existing penal law is a ready, more effective alternative. In other words, *ex post facto* punishments are *never* necessary because a *proper, forward-looking* penal law will always be more productive. And they have the bonus of being just and constitutional.

Likewise, neither multiple punishments in violation of double jeopardy principles nor legislative punishment in violation of the bills

162. Hawker v. New York, 170 U.S. 189, 197 (1898).

163. Even the *Hawker* Court recognized that past conviction is not a good approximation for bad character, much less future criminal acts. *Id.* This author agrees with the *Hawker* majority that it may not be the place of the courts to determine whether legislatures have provided the best measure of character, dangerousness, etc. *Id.* In fact, it is this precise logic that would counsel *not* worrying about fears of dangerousness and the other regulatory concerns of a law. The question is simply whether the regulatory purpose *is properly pursued within constitutional principles*. *Ex parte Garland*, 71 U.S. 333, 380 (1866).

164. Contrary to popular belief, sex offenders actually have the *lowest* re-offense rates of all categories of criminal offenders. *E.g.*, PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, NCJ 193427, RECIDIVISM OF PRISONERS RELEASED IN 1994 1 (2002).

of attainder prohibition were ever necessary to protect public safety. Contrary to assumption, it would be quite a simple task to meaningfully incorporate collateral consequences into judicial sentencing procedures in a meaningful way, making it clear that all of those penalties are part of the single punishment. Providing notice before pleadings and at sentencing, consistent with the death of the collateral-consequences rule, would merely be the simplest way of doing so—though other options, such as allowing courts full or limited discretion in imposing or exempting defendants from these penalties, may be even more appealing to some.[165]

A third fear that tends to impede logical change in both doctrines is that it is too late to reverse these doctrines without causing disaster: "To hold that no valid sentence of conviction can be entered under a plea of guilty unless the defendant is first apprised of all collateral legal consequences of the conviction would result in a mass exodus from the federal penitentiaries."[166] As the Supreme Court found in *Chaidez v. United States*, this fear is patently untrue regarding the collateral-consequences rule, since a change to that law like *Padilla*'s, which announced a "new rule of criminal procedure," is never applied retroactively to provide new grounds for appeal.[167] A change in the definition of punishment could also be considered a procedural change for purposes of double jeopardy if the courts began to use the sentencing procedures suggested in the prior paragraph.

On the other hand, this fear may be accurate to the extent that a number of ex-offenders may be exempt to "civil penalties" in so far as those sanctions constitute *ex post facto* or cruel and unusual punishment. As this section has already argued, however, there are myriad ways of legitimately achieving public interest aims through forward-looking punishment and truly non-punitive regulations. We must not allow legislatures to circumvent the constitutional safeguards that were foundational to American rule of law simply because it is more convenient to enact punishment under another name.[168] Bills of attainder and *ex post facto* laws are simply "contrary to the first principles of the social compact, and to every principle of sound legislation."[169]

165. Kaiser, *supra* note 3, at 756–62.
166. United States v. Cariola, 323 F.2d 180, 186 (3d Cir. 1963).
167. *Chaidez*, 133 S. Ct. at 1107. *See also* Chin & Holmes, Jr., *supra* note 111, at 736–37.
168. *See* Demleitner, *supra* note 101, at 1638 (allowing *ex post facto* civil commitment for sex offenders undermines the integrity of the criminal law).
169. THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

Absent these instinctive fears, then, the formalistic distinction between direct punishment and collateral consequences loses any real justification. The collateral-consequences rule is apparently collapsing in favor of full notice to criminal defendants of the legal consequences of guilty pleas. The courts' punishment definition has become untenable and likely to change back to the more sensible *Cummings*/*Garland* one.[170] In other words, *Padilla v. Kentucky* shows that contemporary courts are simply coming to realize what the prevailing argument in *Ex Parte Garland* blatantly recognized in the mid-nineteenth century:

> Our statutes, indeed, are full of provisions showing that, in the judgment of Congress, similar consequences [to disbarment from the practice of law] *are punishments to be inflicted for crime*. Disfranchisement of the privilege of holding offices of honor, trust, or profit, is imposed as a punishment upon those who are convicted of bribery, forgery, and many other offences. And how crushing is such punishment! To be excluded from the public service makes the man virtually an exile in his native land; an alien in his own country; and whilst subjecting him to all the obligations of the Constitution, holds him to strict allegiance and denies him some of its most important advantages. Can the imagination of man conceive a punishment greater than this?[171]

170. Neither *Cummings* nor *Garland* have ever been overruled, and the proper formulation of their rule has been the basis for some subsequent cases. It would thus be a more simple matter for the courts to "reinterpret" *Ward*, *Mendoza-Martinez*, and other cases so that they are merely (incorrect and tortuous) restatements of the true definition.

171. *Ex parte Garland*, 71 U.S. 333, 366–67 (1866) (reply brief for petitioner) (emphasis added).