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Ex-offender Restrictions

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ABSTRACT *Individuals convicted of crimes are often subject to numerous restrictions — on housing, employment, the vote, public assistance, and other goods — well after they have completed their sentences, and in some cases permanently. The question of whether — and if so, when — ex-offender restrictions are morally permissible has received surprisingly little philosophical scrutiny. This article first examines the significance of completing punishment, of paying one's debt to society, and contends that when offenders' debts are paid, they should be restored to full standing as citizens. Thus all ex-offender restrictions are presumptively unjustified. Nonconsequentialist defences of these restrictions are ultimately unsuccessful in defeating the presumption against them. In a limited range of cases, consequentialist considerations — namely, of risk reduction — may be sufficient to override the presumptive case against these restrictions. The article concludes by suggesting a number of criteria for assessing whether particular restrictive measures are permissible on grounds of risk reduction.*

1.

When criminal offenders complete their terms of punishment, we often speak of them as having been held accountable for their wrongdoing, as having paid their debts to society. In practice, however, ex-offenders continue to be subject to numerous restrictions well after they have completed their sentences, and in many cases permanently. In the United States, numerous federal and state policies restrict ex-offenders' access to employment, housing, public assistance, the vote, student loans, and driver's licenses, as well as their opportunities to adopt or foster children, hold public office, or serve on juries. Similar restrictions can be found in other legal systems (employment restrictions are common, for instance, in England and Wales, as well as in Canada) although such policies are most pervasive and generally most severe in the United States.[1] These restrictions are not formally part of the criminal law: They are not typically found in criminal codes and are not handed down as part of criminal sentences.

Are restrictions on ex-offenders morally justified? The question has received relatively little philosophical scrutiny.[2] This is surprising for a couple of reasons. First, an enormous amount of philosophical consideration has been devoted to questions of whether, and why, criminal punishment itself is justified. It is uncontroversial that punishment — the state's imposition of intended burdens on certain individuals — stands in need of justification. But then so, too, do the various burdens that are imposed on individuals even after their formal sentences have ended.[3] Second, the potential impact of these restrictions is vast. Consider that, as of 2004, there were an estimated 11.7 million ex-felons in the United States.[4] That's a population roughly the size of Los Angeles, Chicago, Houston, Philadelphia, and Phoenix combined.[5] So if

restrictive policies targeting ex-offenders are unjust, the scale of the injustice is massive. Ex-offender restrictions thus merit much more theoretical scrutiny than they have received.

The article's central thesis is that, once we do scrutinise the arguments for various sorts of ex-offender restrictions, most turn out either to be unjustified or to be justified in a much narrower range of cases than we find in current practice. I begin in Section 2 by presenting a presumptive case for regarding those who have completed their punishments as restored to full standing in the political community, and thus as entitled to the same opportunities as everyone else. Sections 3 and 4 consider, respectively, various nonconsequentialist and consequentialist defences of ex-offender restrictions. Of these, only the consequentialist defence grounded in considerations of risk reduction offers any real promise as a justification. In a limited range of cases, considerations of risk reduction may be sufficient to override the presumptive case in support of equal opportunities for ex-offenders. In Section 5, I thus propose several criteria for determining whether and when particular restrictions are justified on risk-reductive grounds.

As a preliminary point, it is worth noting that although legal practice has tended to treat these restrictions not as criminal punishments but as civil disqualifications, some scholars have suggested that they should be understood as punishments.[6] This conceptual question bears on the normative issue: If we regard these bans as part of offenders' punishments, then the salient question is whether, in their mode and degree, they accord with whichever principles we believe should constrain punishment. If, instead, we regard them as civil disqualifications, then we must ask what considerations could justify the intentional imposition of these burdens on those who have completed their punishments. In this article, I set aside the important questions of whether ex-offender restrictions should be treated instead as criminal punishments, and also whether, as criminal punishments, they are ever justified. Here, I consider them as they have traditionally been treated by legal practice; thus I focus on normative evaluation of the restrictions considered as civil disqualifications.

2.

There are, as I noted, numerous ways in which ex-offenders are denied opportunities that are afforded to the rest of us: opportunities to secure housing, employment, welfare, and other important goods; or to participate in public life by voting, holding public office, and so on.[7] In some cases, laws *require* these restrictions, such as with policies imposed by several US states barring ex-offenders from voting. In other cases, laws *permit* others (employers, professional or trade associations, housing authorities, etc.) to restrict ex-offenders. And in other cases, laws serve to *facilitate* these restrictions, as with policies that make criminal histories publicly accessible.[8] They vary along other dimensions, as well: some apply only to sub-groups of offenders, whereas others apply generally; some are temporary bans, while others are permanent; some, but not all, allow ex-offenders to apply for removal of the restriction. As we will see in subsequent sections, our normative assessment may vary depending on the particular restriction we consider; some may be more reasonable than others. As a starting point, however, in this section I offer an argument that all such restrictions on ex-offenders are presumptively unjustified.

Critiques of ex-offender sanctions in the sociological and criminological literature often focus on the sanctions' harmful, and racially disparate, social effects.[9] These are important considerations, and I return to them in Section 5, in the context of the consequentialist case for ex-offender restrictions. But the presumptive case against ex-offender restrictions that I offer here does not depend on contingent empirical claims about social effects or racial disparities. Put simply, these restrictions deny ex-offenders equal treatment to which they are presumptively entitled. Thus, even if ex-offender restrictions could be crafted in such a way, or if social conditions were such, that the restrictions would not, say, facilitate recidivism or disproportionately affect racial minorities, they would still be presumptively unjust on the account I develop in this section.

The presumptive case against ex-offender restrictions begins with what is, I take it, an uncontroversial claim: These restrictions deny equal treatment to those who have been convicted and punished for crimes. In some cases, such as with voting bans, they deny ex-offenders a right that others enjoy. In other cases, policies deny — or permit employers, housing authorities, etc., to deny — ex-offenders the opportunity to be considered for valuable goods for which others are eligible. Such differential treatment is discriminatory unless it is grounded in morally relevant reasons.[10] Thus, for instance, policies that barred, say, left-handed people from public housing, the vote, etc., would be discriminatory because left-handedness is not morally relevant to eligibility for the sort of goods at issue.

The salient question, then, is whether the status of ex-offender is a morally justified ground for differential treatment. I contend that, at least presumptively, it is not. To see why, we should ask what is represented by the completion of punishment. What is the significance of serving one's time? We often speak of punishment as holding offenders accountable for their crimes. If, indeed, punishment functions to hold offenders accountable, then presumably the completion of punishment represents their having been held accountable. Similarly, we often speak of punishment as a practice by which offenders pay their debts to society. If punishment does serve to exact the debt that an offender incurs through commission of the crime, then presumably the completion of punishment represents that she has paid her debt.

One might object, of course, that although we do pay lip service to the notion that ex-offenders have 'paid their debts' or have been 'held accountable', we do not actually believe in these ideas. Indeed, the very concept of an 'ex-offender' may be misguided. As David Garland has put it, 'The assumption today is that there is no such thing as an "ex-offender" — only offenders who have been caught before and will strike again.'[11] Given the stigma that continues to attach to offenders after their terms of punishment end, perhaps we often don't truly accept that ex-offenders have paid their debts.[12]

But whether or not, as an empirical point, we commonly do regard the completion of punishment as signifying that an offender has paid her debt, we *should* regard it this way. To understand the proper significance of the end of punishment requires that we say a bit more generally about punishment itself. In a liberal state, the legal institution of punishment offers us, as citizens, certain assurances: It communicates an assurance that certain shared values, such as the safety and security of citizens, are important to the state, important enough that those who violate these values will not be allowed to do so with impunity. Similarly, as H. L. A. Hart pointed out, punishment assures us that if we constrain our behaviour to comply with the rules of the state, we will not 'be sacrificed to those who would not'.[13] Furthermore, limiting punishment to those found guilty of

criminal wrongdoing assures us that if we comply with the laws, we will not (unless mistakenly) be subject to punishment ourselves.[14]

The institution also offers assurances to us as potential offenders. It assures us that if we commit crimes, we will not be subject to potentially excessive and arbitrary private vengeance.[15] By the same token, it should assure us (though we might argue that current practice falls short in this regard) that our punishment under the rule of law will be reasonably proportionate and consistent in its application.

More basically, the institution of punishment should be understood as offering citizens the valuable assurance that if we do commit some criminal wrongdoing, there are steps we can take to make amends, at least in the eyes of the state. Consider an analogy: Suppose Jerry somehow wrongs Elaine, but then he apologises and asks how he can make amends. Rather than answer, Elaine hangs onto Jerry's transgression, using it as a sort of trump card whenever it suits her; whenever she wants leverage in an argument, for instance, or whenever she wants a favour from him, she simply reminds Jerry of his transgression. Eventually, we might expect Jerry to ask, understandably, how long he has to continue to pay for what he did — essentially, how much is enough? For present purposes, the relevant complaint is not that Elaine is exacting more of a price than Jerry's wrongdoing warranted. Rather, it is that Jerry is entitled to know what, if anything, would be enough to make amends for his wrongdoing, and to know that if he does what is required, Elaine will not continue to appeal to his transgression whenever it suits her purposes.[16]

Like Jerry, criminal offenders are entitled to know what is required of them to make amends for their crimes, to pay their debts — and to know that if they do what is required of them, then their debts will be paid, and the state will not simply continue to exact further payment whenever doing so suits its purposes. This is at least part of the role that the institution of punishment serves. In addition to the other assurances it offers us as citizens, it assures us that if we offend, then completing the required term of punishment will constitute our payment of the debt we owe to society.

When offenders pay their debts, there is a sense in which their status should return to what it was before incurring the debts. We need not go so far as endorsing Hegel's somewhat obscure claim that punishment functions to cancel, or annul, the crime. Once a crime is committed, once individuals are victimised, there's no undoing this. So, too, the offender's life — her personal relationships, her own psychology, etc. — may be forever, unavoidably altered when she commits a crime. In this sense, then, an offender will always be an offender; punishment cannot erase what she has done, or more precisely, that she did it. But if punishment is how our political community holds offenders accountable for their acts, how they pay their debts to society, then the state should treat those who complete punishment as individuals whose debts are paid.

Paying debts and being held accountable are retributive-sounding notions. But the point about the significance of completing punishment applies more generally. Consequentialist accounts of punishment defend it as a means to some valuable end, such as deterring potential offenders or incapacitating dangerous people. But valuable as such ends may be, if punishing to further such ends is permissible, it must be because offenders have somehow rendered themselves liable to such treatment. We would regard it as at least presumptively wrong, after all, to imprison law abiders even in cases in which doing so might, on balance, promote better consequences. Thus if punishing to promote some socially valuable end(s) is defensible, it must be because the offender has somehow

altered her moral circumstance such that treatment of her that would typically be impermissible is now permissible. But again, if an offender, by committing some crime, renders herself liable to punishment, then on completion of punishment she should no longer be liable to such treatment. To continue imposing burdens — even in the service of some valuable goals — on the person who has completed punishment would be, at least presumptively, as unjustified as imposing these burdens for the same reasons on those who have not committed crimes at all.

I contend, then, that there is a presumptive case for regarding those who complete punishment as having regained full, equal standing as citizens, with the same rights as everyone else. In committing a crime, an offender makes permissible certain forms of treatment of her that would have been impermissible before she committed the crime. When she completes punishment, however, her standing in the state's eyes should be restored to what it was before she committed the crime.[17] That is, the person who commits a crime but is held fully accountable for it should regain the same legal standing as those who have not committed crimes in the first place. The status of ex-offender is therefore not a morally justified basis for differential treatment. Policies that specifically target offenders even after they complete their punishments, that continue to restrict their access to important goods to which the rest of us have access, are presumptively unjustified.

In the face of the presumptive case against ex-offender restrictions, how might proponents defend them? The next section addresses various possible nonconsequentialist defences, and then Section 5 considers the consequentialist case for such restrictions.

3.

Generally, a nonconsequentialist defence of ex-offender restrictions will hold that such restrictions constitute an intrinsically appropriate response to what the offender has done, or perhaps to who she is. Perhaps the most commonly cited nonconsequentialist account is a version of the rights forfeiture view.

Rights Forfeiture

One way to defend treating ex-offenders in ways that seem to violate their rights (e.g. to vote, or to equal consideration for various public goods) is to argue that they have forfeited these rights. Although rights forfeiture accounts are typically offered in defence of criminal punishment itself,[18] some advocates of voting restrictions have employed the forfeiture thesis to support disenfranchising ex-offenders. The argument is that if a person breaks the law, she thereby violates the social contract and thus forfeits her right to participate in the electoral process. In a 1967 decision upholding ex-offender disenfranchisement, for instance, US District Court Judge Henry Friendly wrote, 'A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.'[19]

If plausible, this argument might actually justify much more than lifetime voting bans. If criminals demonstrate their rejection of the rule of law and thereby forfeit their right

to participate in the law-making process, maybe they also forfeit their right to the benefits made possible by the rule of law — to opportunities for public housing, public assistance, or other goods. As Locke (to whom Friendly alluded in his decision) wrote, if a man 'disclaim the lawful Government of the Country he was born in, he must also quit the Right that belong'd to him by the Laws of it.'[20]

There are two related objections to this sort of forfeiture argument as a defence of ex-offender restrictions. First, it is not clear why a violation of the social contract's terms should result in one's no longer being able to participate in the contract, as Friendly suggests. Perhaps if an offender demonstrated contempt for the terms of the contract — essentially, for the rule of law — then we might see her as having removed herself as a party to the contract. But do offenders reject the rule of law?

It is doubtful that by violating some particular law, an offender thereby rejects the rule of law generally. She may, on the given occasion, be reckless, self-interested, or weak-willed; that is, she may accept the rule of law, but her commitment may be inconsistent or less than wholehearted. Consider the tax cheat who also diligently repays her federal student loans, promptly renews her car registration, does not exceed the speed limit, etc. It seems too strong to say that by violating a particular law, an offender shows an unwillingness to accept the rule of law generally.

Perhaps instead, an offender demonstrates her rejection of the particular law she violates — although not necessarily a stable or persistent rejection even of this law. On this account, though, we should ask why rejection of some particular law thereby forfeits the right to participate in making laws generally, or to reap the benefits of the rule of law. It seems implausible that anyone would agree, or reasonably should agree, to such a social contract.[21] Thus the violation of some particular law, by itself, appears insufficient to render one no longer a party to the contract.

More plausibly, perhaps persistent repeat offenders demonstrate their contempt for the rule of law, and so reject the social contract. If so, then we might think such chronic offenders give up their rights to have a voice in democratic law-making, or to enjoy various benefits that accrue from the rule of law. Even considering the repeat offender, though — and this is the second objection — it is unclear why whatever forfeitures accompany the violation should extend beyond the term of punishment. Repeat offenders may demonstrate their rejection of the social contract, but surely they do not demonstrate (how could they?) that their rejection of it is permanent, i.e. that they will never come to have respect for the rule of law. If punishment is the polity's way of holding offenders accountable for their wrongdoing, then why should whatever rights forfeitures result from the wrongdoing persist beyond the term of punishment?

Rights forfeiture views need not appeal to the social contract in the way that supporters of disenfranchisement have done.[22] But note that the question of the forfeiture's duration poses a challenge for forfeiture views generally. Put simply, if people do forfeit rights when they commit certain offenses, how long do these forfeitures last?[23] In the context of forfeiture defences of punishment itself, one might simply reply, as Christopher Heath Wellman has put it, that 'a criminal forfeits a right against an appropriate or proportionate punishment'.[24] Whether or not this response is persuasive, however, it is not useful to those who would defend restrictions on ex-offenders. To my knowledge, no forfeiture account has plausibly explained why whatever rights forfeitures ostensibly result from a criminal violation should persist even after the offender has been held responsible, through punishment, for what she has done.

Distributive Justice

One might instead appeal to considerations of distributive justice in defence of ex-offender restrictions. For goods such as public housing, jobs, and welfare funding, the current supply is insufficient to meet the demand. Perhaps, then, in such cases of scarce resources, justice permits that priority be given to law abiders, and that criminals go to the back of the line, so to speak.

In response to this sort of defence, we should ask *why* distributive justice ostensibly justifies disadvantaging ex-offenders. On one hand, it might be because of their past criminal offenses. But again, ex-offenders have already been held accountable for their crimes. They have already paid these debts, and it is unjust to continue exacting a debt that has already been paid.

On the other hand, one might defend the distributive disadvantage not based on what ex-offenders have done, but on who they are. They have shown themselves to have bad character and thus do not deserve the various goods as much as needy law abiders.

There are at least two reasons to be sceptical of this line of argument: First, it is not clear that a potential recipient's moral fibre should be a relevant factor, much less a decisive one, in decisions about allocating at least some of the goods at issue, such as welfare assistance. Second, and more importantly, having committed a crime is neither a necessary nor a sufficient condition of bad character. Not all crimes demonstrate an offender's bad character; some may be products of a lapse in judgment, an uncharacteristic moment of weak will, or merely unfortunate circumstances. Even if some offenders can be said to demonstrate bad character in committing crimes, this still is not sufficient to ground a verdict about their character after they complete their punishments. Ex-offenders may, indeed often do, come to regret their past wrongdoing, and commit to reforming themselves. Thus, having committed a crime does not imply bad character. Conversely, many law abiders may demonstrate bad characters: They may lie and cheat when it furthers their ends, psychologically torment family members, show callous disregard for others in need, etc. So even if character is an appropriate consideration in distributing goods such as public housing, jobs, or welfare assistance, this fact does not provide a reason to treat ex-offenders as a class differently from everyone else.

Retributive Justice

Proponents of ex-offender bans might instead ground their claims in considerations of retribution rather than distribution. Those who have committed crimes deserve to suffer (or be censured, or lose their unfair advantage, etc.), and ex-offender restrictions serve this function. This retributive argument, however, ultimately fails for the same reasons as the distributive rationale: if ex-offenders purportedly deserve retribution because of their past criminal acts, then this may justify punishing them but will not justify continuing to impose burdens after they complete their sentences. If, instead, these policies are said to be deserved retribution for those who demonstrate bad characters, then they should not target all or only ex-offenders.

There may, of course, be other nonconsequentialist arguments available in support of ex-offender restrictions. But the problems that arise with respect to the rights forfeiture, distributive justice, and retributive justice defences considered here equally threaten other nonconsequentialist arguments for these restrictions. In general, such

arguments need to establish why various restrictions are appropriate — not instrumentally appropriate, as effective means of securing some valuable end, but rather intrinsically appropriate, either in virtue of what ex-offenders have done or in virtue of who they are. On one hand, imposing restrictions on ex-offenders in virtue of their criminal acts appears unjustified given that ex-offenders have already been held accountable for these acts through criminal punishment. On the other hand, imposing restrictions in virtue of bad character provides insufficient basis for differentiating ex-offenders from everyone else. Either way, we have reason to doubt that nonconsequentialist rationales can justify ex-offender restrictions. In the next section, I consider the consequentialist alternative.

4.

A consequentialist defence views ex-offender restrictions not as intrinsically appropriate responses to some offense or offender but rather as instrumentally valuable as means of bringing about some socially beneficial end, typically risk reduction.[25] Public housing restrictions in the United States, for instance, emerged from concerns about the dangers posed by drug dealers and gang members to the safety of residents of the housing projects. Likewise, restrictions on various vocations have been defended on risk reduction grounds: it must be permissible, after all, to bar people from holding jobs in which they constitute a threat to their patrons, colleagues, or others. Defenders of voting bans have appealed to the somewhat obscure notion of protecting 'the purity of the ballot box',[26] or to concerns about preventing ex-offenders from committing electoral fraud or voting for corrupt officials.[27] And architects of the US welfare ban cited a desire to prevent wasteful or dangerous spending by drug felons.[28]

On any of these accounts, the restrictions are defended as means of preventing ex-offenders from making choices that would harm others. The rationale is essentially that of incapacitation. Rather than allow ex-offenders to live in housing projects, or hold certain jobs, etc., and thus run the risk that they will choose to act in harmful ways, these restrictions prevent them from being in the situations in which they might make the bad choices.

Incapacitation has also been cited, of course, as a justification of punishment. And it has been criticised in this context as inconsistent with respect for individuals as autonomous moral agents. Respect, say critics of incapacitation, requires treating ex-offenders according to what they have actually done, not according to what they might do (or are believed likely to do). R. A. Duff puts it this way:

> Respect for another as an autonomous agent does not preclude the attempt to persuade her to behave as we think she should behave. . . . Nor does it preclude preventing her, if necessary by force, from carrying through a crime on which she has already embarked. . . . But it does preclude an attempt to *incapacitate* her from *future* wrongdoing. Apart from the fact that incapacitation will also typically incapacitate the person from quite legitimate activities, it deprives her of the ability to determine her own conduct in the light of her own grasp of reasons for action — an ability that is crucial to autonomous agency.[29]

If Duff is right, if punishing to incapacitate offenders is inconsistent with treating them with respect as autonomous agents because it deprives them of the ability to determine

their own conduct in light of their own grasp of reasons, then presumably incapacitating ex-offenders is similarly objectionable. Bans on public housing, public assistance, various jobs, the vote, etc., are straightforwardly attempts to incapacitate ex-offenders from future wrongdoing. They may not be as comprehensively incapacitative as incarceration, which restricts offenders' autonomous choices not just in some aspects but in virtually every aspect of their lives. But ex-offender bans are nevertheless incapacitative in that they take choices out of ex-offenders' hands and thereby restrict their autonomous agency.

We might disagree with the claim that punishing to incapacitate fails to respect offenders as autonomous agents. Perhaps offenders have rendered themselves subject to incapacitative treatment by committing their crimes.[30] Earlier, I wrote that if punishment is justified, it seems that offenders must somehow alter their moral circumstance such that it becomes permissible to treat them in ways that would normally be impermissible. Maybe, then, incapacitation is permissible as an aim of punishment as long as punishment is limited to those who have rendered themselves subject to it by committing criminal acts.

Even if this defence of incapacitative punishment is persuasive, though, it will not justify continuing restrictions aimed at incapacitating ex-offenders. As I contended earlier, whatever it is that changes about an offender's moral status such that punishment is justified of offenders but not law abiders, this change extends only through the term of punishment. When an offender completes punishment, when she has been held accountable for her crime, she should regain the same standing as everyone else. To continue to impose restrictions on her would be to deny her the equal treatment to which she is entitled. So even if offenders render themselves legitimately subject to incapacitative criminal punishments, they do not similarly render themselves subject to incapacitative civil restrictions extending beyond the term of punishment.

Still, proponents of these restrictions might respond that, whatever the significance of the completion of punishment, it remains the case that some offenders continue to be dangerous even after their formal sentences end. Some offenders may reform themselves, but many do not. Surely it is permissible for the state to protect its citizens against those who pose genuine threats to their safety. It must be permissible, for instance, to bar drug felons from the housing projects, or to prevent those convicted of sex offenses from teaching young children.

Notice, though, that our intuitions about these cases may differ depending on how we flesh out the details. We may think it makes sense to keep drug offenders and gang members out of housing projects. But should we deny housing to someone whose gang activity was decades ago, who has been held accountable through punishment and now just wants to get his life back on track? Similarly, we may think it makes sense to keep sex offenders out of teaching posts. But what about someone who was convicted 20 years earlier for statutory rape because, as an 18-year-old, he had sex with his girlfriend, who was 16? Not all ex-offenders continue to pose (or indeed, ever did pose) genuine threats to the community.

Predicting dangerousness is an imperfect science. Generally, risk assessment tools have tended significantly to overpredict recidivism, often generating false positives at rates of more than 50 per cent.[31] In particular, a prior criminal record tends to be a relatively poor predictor of recidivism.[32] Thus policies that permit or require the denial of housing, jobs, or other goods to those with a criminal background inevitably restrict

not only those who represent a genuine danger, but also others who pose no real threat. These policies cast too wide a net; that is, they are overinclusive.[33]

Sometimes overinclusive policies may be warranted — if we cannot tell the dangerous former sex offenders from the non-dangerous ones, for instance, then perhaps keeping students safe requires a teaching ban for former sex offenders generally. But it is important not to lose sight of the nondangerous ex-offenders who will inevitably be subject to the various restrictive policies. Earlier I contended that ex-offenders are presumptively entitled to the same opportunities as everyone else. According to the argument we are considering here, the dangerousness argument, this presumption is defeated in the case of ex-offenders who constitute genuine threats to the community. But the dangerousness argument cannot defeat the presumption in the cases of nondangerous ex-offenders. These individuals have been held accountable for their past wrongdoing, and they represent no threat to the community. They thus have rights to the same opportunities as everyone else, and ex-offender restrictions infringe these rights.

To acknowledge that ex-offender restrictions will inevitably infringe the rights of many nondangerous ex-offenders is not to say that such restrictions are never permissible. It is possible that a restriction may promote consequences so valuable as to override the presumptive injustice of infringing the rights of nondangerous ex-offenders. Still, given the fact that these restrictions will inevitably infringe ex-offenders' rights, we should be judicious in imposing them. In the next section, I suggest a number of general considerations that are relevant in determining whether and when particular civil restrictions on ex-offenders are justified on risk-reductive grounds.

5.

Compelling Interest

First, because restrictions infringe the rights of nondangerous ex-offenders, the interest to be served by a restriction should be morally compelling. Restrictions aimed at reducing the risk of insignificant or unlikely harms are unjustified. Reasonable people may disagree about whether a potential harm is sufficiently significant, or sufficiently likely to occur, to meet this condition. In my view, though, this condition would rule out, for instance, ex-offender bans on voting, student loans, and welfare. As mentioned before, some have argued that there is a danger in letting ex-offenders vote, because criminals may engage in election fraud, or vote to support corrupt government officials or weaker criminal laws. But ex-offenders are a relatively small portion of the overall population, and there is no plausible reason to think they would turn out to vote in higher rates than everyone else or would somehow coordinate their votes. Thus, the dangers posed by allowing ex-offenders to vote are likely to be insignificant.

Proponents of welfare restrictions have cited the danger that former drug felons will spend money they receive to support drug habits. But for these bans to be supported on risk-reduction grounds, it would have to be the case that enough former drug felons would otherwise spend their welfare benefits on drugs, and that the additional drug purchases facilitated by welfare benefits would result in sufficiently bad consequences for the community, to override the injustice done to the former drug felons who would otherwise use their benefits for legitimate purposes, such as to feed themselves and their

families. This strikes me as unlikely. Similarly, there is no compelling interest to be served by barring ex-offenders from receiving federal student loans.

Employment and public housing restrictions seem more plausible with respect to the compelling-interest condition. Public housing restrictions aim to protect residents of housing projects from violence associated with drug and gang activity. And in general, employment bans aim to protect vulnerable members of the community from being victimised in various ways. Of course, some interests served by employment bans may seem more compelling than others: It is easier, for instance, to recognise the significant threat that might ground ex-offender teaching bans than to articulate a significant threat posed by ex-offender cosmetologists.

Effectiveness

It is not sufficient that there be a compelling interest that a proposed restriction aims to serve; the restriction should also actually serve this interest. That is, even if the potential harm we seek to avert is uncontroversially significant and likely, the restriction will be unjustified if it is ineffective in reducing the risk of this harm. Again, reasonable people can disagree about how effective a restriction must be to meet this condition. But it is worth noting that some empirical research indicates that the inabilities to secure housing and employment are predictors of recidivism.[34] Thus restrictive policies that reduce ex-offenders' legitimate opportunities to rebuild their lives may lead some to return to crime who otherwise would not have done so. If this is so, then ex-offender restrictions on employment or public housing that aim at community safety may actually be counterproductive to these interests.

Net Benefit

Even if ex-offender restrictions can be shown to serve effectively some compelling interest, they may be unjustified if they also generate significant negative consequences. It is perhaps obvious that these restrictions can have harmful effects on ex-offenders themselves. For ex-offenders with few financial resources, public housing may be their only realistic option. In the face of public housing restrictions, many turn instead to homeless shelters. Even staying with family members is often prohibited, if the family members are themselves in public housing; housing policies permit authorities to evict all members of the household if one resident has a criminal record.[35] This can create not only burdens for the ex-offender but also tension with her family members, who may be reluctant to welcome home a returning prisoner and risk their own eviction. Employment restrictions impose harms on ex-offenders, and their dependents, by reducing their options for finding legitimate means of support. And bans on welfare make it even more difficult for ex-offenders to provide for themselves and their families.

Beyond the effects of these policies on ex-offenders and their families, they can also affect their communities, which must grapple with higher levels of homelessness and unemployment as former prisoners return to their old neighbourhoods and are unable to secure housing and jobs. Because racial and ethnic minorities tend to be disproportionately affected by criminal justice policies,[36] it is their communities in which we can expect the effects of ex-offender restrictions, like the effects of incarceration itself, to be concentrated.[37]

These broader impacts matter to an evaluation of whether the benefits of ex-offender restrictions are sufficient to override the injustice done to nondangerous ex-offenders who inevitably are caught in their net. For such restrictions to be justified, given that they inevitably infringe the rights of nondangerous former offenders, they not only would need to be sufficiently effective at reducing a significant threat, but also would need to avoid producing such detrimental effects as to offset their benefits.

Least Burdensome

Even if a restriction effectively serves a compelling interest without generating offsetting negative consequences, it will nevertheless be unjustified if the compelling interest could be effectively served (and without offsetting negative consequences) by some less burdensome measure. Thus ex-offender bans on certain activities may be unjustified if their aims could be served as effectively (and without the offsetting consequences) by, say, a system of monitoring or supervision.

Minimal Overinclusiveness

Ex-offender restrictions, I have contended, are unavoidably overinclusive. We are not omniscient; our ability to predict riskiness is far from perfect. As a result, these policies will inevitably apply to some ex-offenders who pose no threat. Still, such policies should be tailored as much as is feasible to avoid overinclusiveness. This means, first, that policies should be narrowly tailored in terms of who is subject to them. Many US states, for instance, bar ex-offenders from being barbers. Presumably, the concern underlying such bans involves the danger of allowing a criminal to wield scissors or razors near a vulnerable customer. But if this is indeed the risk such bans aim to reduce, there is no clear justification for restricting ex-offenders whose convictions were for nonviolent offenses.[38]

Second, policies should be narrowly tailored in terms of the range of activities restricted. For example, if those convicted of bank fraud are deemed too untrustworthy to have access to clients' money, this may support a ban on jobs in which they would have such access. But it may not support a ban on bank employment generally, as not all bank jobs allow employees a level of access that could reasonably constitute a risk.

Third, restrictions should last only as long as the risk persists. Research on desistance from crime has found consistently that individuals' risks of re-offending diminish as time passes from their previous crimes.[39] One study found, for instance, that once seven years passed from an offender's previous arrest, her risk of future offending decreased to become indistinguishable from that of nonoffenders.[40] There is no justification for extending restrictions beyond the point at which our best empirical assessments indicate that ex-offenders no longer pose a significant risk. Similarly, restrictive policies should incorporate genuine, accessible avenues (much more widespread and accessible than in current practice) for individual ex-offenders to demonstrate that they no longer constitute dangers to the community, and thus that their rights should be restored.[41]

Arguably the most effective way to reduce the overinclusiveness of ex-offender restrictions would be to make individualised assessments about when such restrictions are warranted. Just as criminal juries make individualised determinations of guilt, or parole boards make individualised determinations of a prisoner's fitness to complete her

sentence in the community under supervision, perhaps the imposition of ex-offender restrictions could be determined on a case-by-case basis. In this scenario, being an ex-offender would not render one directly liable to restrictions; rather, being an ex-offender would render one liable to assessment of dangerousness, and a finding of dangerousness could in turn ground certain (appropriately tailored) restrictions. Individualising the process in this way seems an improvement over typical current practice, in which restrictions are imposed by statute as blanket disqualifications on entire classes of citizens. Still, it is important to bear in mind that, given our imperfect ability to predict dangerousness, individualising the process may mitigate overinclusiveness, but it will not eliminate it.

7.

In conclusion, when offenders' punishments end, they have paid their debts to society and should be restored to full standing as citizens. Ex-offender restrictions are thus presumptively unjustified. There may be a limited range of cases in which this presumption is overridden by considerations of risk reduction. For restrictions to be justified on risk-reductive grounds, however, they should effectively serve some compelling public interest; there should be no less burdensome way of serving this public interest as effectively; and they should be narrowly tailored to avoid being overinclusive, which recommends the incorporation of measures to allow ex-offenders to have the bans removed.[42]

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NOTES

1 See Michael Pinard, 'Collateral consequences of criminal convictions: Confronting issues of race and dignity', *New York University Law Review* 85 (May 2010): 457–534, at pp. 494–7.

2 There are notable exceptions. See, e.g., Hugh LaFollette, 'Collateral consequences of punishment: Civil penalties accompanying formal punishment', *Journal of Applied Philosophy* 22,3 (2005): 241–61 (part of a special issue about felon disenfranchisement); and Andrew von Hirsch & Martin Wasik, 'Civil disqualifications attending conviction: A suggested conceptual framework', *The Cambridge Law Journal* 56 (1997): 599–626.

3 To say that punishment and ex-offender restrictions both, on their face, stand in need of justification for essentially similar reasons — namely, that they are impositions by the state of intended burdens on certain individuals — is not to imply that the justifications will necessarily be the same. Indeed, as I argue in what follows, if we ask whether ex-offender restrictions are justified not as punishment but as civil disqualifications, then there is good reason to think that ex-offender restrictions will be justified, if at all, by distinct considerations from those that justify punishment.

4 Christopher Uggen, Jeff Manza & Melissa Thompson, 'Citizenship, democracy, and the civic reintegration of criminal offenders', *Annals of the American Academy of Political and Social Science* 605 (May 2006): 281–310, at p. 290. Although Uggen *et al.*'s research focuses on those with felony convictions, some collateral restrictions attach not only to felonies but also misdemeanors or even arrests.

5 2010 U.S. Census data. Available online at http://2010.census.gov/2010census/popmap/ (accessed 23 June 2012).

6 See, e.g., Jeremy Travis, 'Invisible punishment: An instrument of social exclusion' in Marc Mauer & Meda Chesney-Lind (eds) *Invisible Punishment* (New York: New Press, 2002); Pamela S. Karlan, 'Convictions and

doubts: Retribution, representation, and the debate over felon disenfranchisement', *Stanford Law Review* 56,5 (2004): 1147–70 (focusing specifically on disenfranchisement); Gabriel J. Chin, 'The new civil death: Rethinking punishment in the era of mass conviction', *University of Pennsylvania Law Review* 160 (2012): 1789–833; and Margaret Colgate Love, 'Collateral consequences after *Padilla v. Kentucky*: From punishment to regulation', *St. Louis University Public Law Review* XXXI (2011): 87–127.

7 For useful overviews of the various restrictions, see, e.g., Gwen Rubenstein & Debbie Mukamal, 'Welfare and housing — denial of benefits to drug offenders' in Mauer & Chesney-Lind op. cit., pp. 37–49; von Hirsch & Wasik op. cit.; Anthony C. Thompson, *Releasing Prisoners, Redeeming Communities: Reentry, Race, and Politics* (New York: New York University Press, 2008); Lena M. Lundgren, Marah A. Curtis & Catherine Oettinger, 'Postincarceration policies for those with criminal drug convictions: A national policy review', *Families in Society: The Journal of Contemporary Social Services* 91,1 (2010): 31–8; and Joan Petersilia, 'How we hinder: Legal and practical barriers to reintegration', ch. 6 in *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford: Oxford University Press, 2003), pp. 105–38.

8 'After Prison: Roadblocks to Reentry (2009 update)', Legal Action Center report (2009), p. 8. Available online at www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry–2009.pdf (accessed 28 February 2012). Note that the Legal Action Center report counts the District of Columbia as a state, and so cites 20 states, rather than 19, as making all conviction histories available on the Internet.

9 Cf., Jeremy Travis & Christy Visher (eds), *Prisoner Reentry and Crime in America* (Cambridge: Cambridge University Press, 2005); Pinard op. cit.; Thompson op. cit.

10 See Ben Geiger, 'The case for treating ex-offenders as a suspect class', *California Law Review* 94 (2006): 1191–242.

11 David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago, IL: University of Chicago Press, 2001), pp. 180–1.

12 I am grateful to Kevin Reitz for pressing me on this point.

13 H. L. A. Hart, *The Concept of Law*, 2nd edn. (Oxford: Oxford University Press, 1994), p. 194. See also Richard Dagger, 'Punishment as fair play', *Res Publica* 14 (2008): 259–75, at pp. 260–3.

14 See H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York: Oxford University Press, 1968), pp. 23–4.

15 Lisa H. Perkins, 'Suggestion for a justification of punishment', *Ethics* 81,1 (Oct. 1970): 55–61; John Locke, *Second Treatise of Civil Government*, § 13; John Hospers, 'Punishment, protection, and retaliation' in J. B. Cederblom & William L. Blizek (eds) *Justice and Punishment* (Cambridge, Mass.: Ballinger Publishing Co., 1977), p. 35; and Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988), p. 184.

16 As the clause 'if anything' implies, this argument is consistent with the idea that some offenses may be so serious that nothing would be sufficient to make amends. I doubt that most offenses (especially many of the drug-related offenses that trigger so many ex-offender restrictions) are of this sort. But my argument in this section is just that an offender is entitled to know what, if anything, would be sufficient to make amends for her crime, and to know that if she does what is required, that her debt will indeed be paid.

17 We might think that there is at least one sense in which an offender's standing in the state's eyes does not return to what it was before she offended: namely, her prior conviction will still matter in sentencing if she is convicted of another crime. As my discussion of the significance of completing punishment might suggest, I am actually sceptical about whether prior convictions should effect current sentencing decisions. Providing a full defence of my view on this point, however, is beyond the scope of this article.

18 See, e.g., Alan H. Goldman, 'The paradox of punishment', *Philosophy & Public Affairs* 9 (1979): 42–58; Christopher Morris, 'Punishment and loss of moral standing', *Canadian Journal of Philosophy* 21,1 (March 1991): 53–79; A. John Simmons, 'Locke and the right to punish', *Philosophy & Public Affairs* 20,4 (1991): 311–49; and Christopher Heath Wellman, 'The rights forfeiture theory of punishment', *Ethics* 122,2 (Jan. 2012): 371–93.

19 *Green v. Board of Elections*, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 [1968]). See also Roger Clegg, 'Felons should not have an automatic right to vote' in Natasha A. Frost, Joshua D. Freilich & Todd R. Clear (eds) *Contemporary Issues in Criminal Justice Policy: Policy Proposals from the American Society of Criminology Conference* (Belmont, CA: Wadsworth, Cengage Learning, 2010), pp. 69–73, at p. 69.

20 Locke op. cit., §191.

21 See John Kleinig & Kevin Murtagh, 'Disenfranchising felons', *Journal of Applied Philosophy* 22,3 (2005): 217–39, at p. 221.

22 For instance, see Morris op. cit. for a different sort of contractarian account; Simmons op. cit., esp. p. 335, for a forfeiture view grounded in considerations of fairness; and Wellman op. cit., esp. pp. 376–7, for an intuitionist justification.
23 See Richard L. Lippke, 'Criminal offenders and right forfeiture', *Journal of Social Philosophy* 32,1 (Spring 2001): 78–89, on p. 82; and R. A. Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press, 2001), p. 15.
24 Wellman op. cit., p. 386.
25 See von Hirsch & Wasik op. cit., pp. 606–11.
26 *Washington v. State*, 75 Ala. 582, at 585 (1884).
27 See Note, 'The disenfranchisement of ex-felons: Citizenship, criminality, and "the purity of the ballot box" ', *Harvard Law Review* 102 (1989): 1300–17, at pp. 1302–3; Kleinig & Murtagh op. cit., pp. 225–7.
28 As former Texas Senator Phil Gramm said in pushing for the ex-offender provision in the 1996 US welfare law, 'Welfare shouldn't be used to support drug habits.' Quoted in Fox Butterfield, 'Freed from prison, but still paying a penalty', *The New York Times* 29 December 2002.
29 Duff op. cit., p. 78.
30 Even Kant (perhaps surprisingly given his reputation as the arch-retributivist) appears to have suggested that punishment might serve socially valuable ends as long as it was constrained by the standard retributive considerations. For instance, Kant wrote that an offender 'must first be found guilty and punishable, before there can be any thought of drawing from his punishment any benefit for himself or fellow citizens.' Immanuel Kant, *The Metaphysics of Morals* (1797), 6:331, in Mary J. Gregor (trans. and ed.), *Immanuel Kant, Practical Philosophy* (Cambridge: Cambridge University Press, 1996), p. 473. See also Hart 1968 op. cit., p. 244. Hart interprets Kant as committed to the idea that all citizens have a right 'to be left free and not punished for the good of others, unless they have broken the law when they had the capacity and a fair opportunity to conform to its requirements.'
31 See, e.g., Jacqueline Cohen, 'Selective incapacitation: An assessment', *University of Illinois Law Review* (1984): 253–90, esp. pp. 270–1; John Monahan, *Predicting Violent Behavior: An Assessment of Clinical Techniques* (Beverly Hills, CA: Sage Publications, 1981), pp. 73–80, 101–4; von Hirsch & Wasik op. cit., p. 607; Markus Dirk Dubber, 'Recidivist statutes as arational punishment', *Buffalo Law Review* 43 (1995): 689–724, at pp. 710–1. However, see Roxanne Lieb, Vernon Quinsey & Lucy Berliner, 'Sexual predators and social policy', *Crime and Justice* 23 (1998): 43–114, esp. pp. 94–100.
32 See James Q. Wilson, *Thinking About Crime* rev. edn. (New York: Basic Books, 1983), pp. 152–5; Peter W. Greenwood and Allan Abrahamse, *Selective Incapacitation* (1982), pp. 47–61 (report prepared for the US Department of Justice).
33 Cf., Douglas Husak, *Overcriminalization* (Oxford: Oxford University Press, 2008), pp. 154–7.
34 See, e.g., Center for Housing Policy, 'The housing needs of ex-prisoners', (1996). Available at http://www.jrf.org.uk/publications/housing-needs-ex-prisoners (accessed 21 March 2012); Herman Joseph & John Langrod, 'The homeless' in Joyce H. Lowinson *et al*. (eds) *Substance Abuse: A Comprehensive Textbook* 4th edn. (Philadelphia, PA: Lippincott Williams and Wilkins, 2005), pp. 1141–69; and Thompson op. cit., pp. 81, 86, 108.
35 See Rubenstein & Mukamal op. cit., p. 48.
36 See Michael Tonry, *Punishing Race* (Oxford: Oxford University Press, 2011); Bruce Western, Becky Pettit & Josh Guetzkow, 'Black economic progress in the era of mass imprisonment' in Mauer & Chesney-Lind op. cit., pp. 165–80.
37 Todd Clear, 'The problem with "addition by subtraction": The prison-crime relationship in low-income communities' in Mauer & Chesney-Lind op. cit., pp. 181–93.
38 See von Hirsch & Wasik op. cit., pp. 610–1.
39 See Shawn D. Bushway & Gary Sweeten, 'Abolish lifetime bans for ex-felons', *Criminology & Public Policy* 6,4 (2007): 697–706, on pp. 699–700; Alfred Blumstein & Kiminori Nakamura, 'Potential of redemption in criminal background checks', final report to the National Institute of Justice (2010), pp. 6–7, available online at https://www.ncjrs.gov/pdffiles1/nij/grants/232358.pdf (accessed 16 August 2012).
40 Megan Kurleychek, Robert Brame & Shawn D. Bushway, 'Scarlet letters and recidivism: Does an old criminal record predict offending?' *Criminology & Public Policy* 5 (2006): 483–504.
41 See Margaret Colgate Love, 'Paying their debt to society: Forgiveness, redemption, and the uniform collateral consequences of conviction act', *Howard Law Journal* 54,3 (2011): 753–94.
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