

## EG1900 . . . THE NUMBER THEY GAVE ME WHEN THEY REVOKE MY CITIZENSHIP: PERVERSE CONSEQUENCES OF EX-FELON CIVIC EXILE

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*Tolling for the rebel, tolling for the rake  
Tolling for the luckless, the abandoned an' forsaked  
Tolling for the outcast, burnin' constantly at stake  
An' we gazed upon the chimes of freedom flashing  
~ Bob Dylan, Chimes of Freedom<sup>1</sup>*

In a recent book review, Professor Gabriel J. Chin echoed the sentiments of many scholars by calling for research into the causal link between ex-felon civic restrictions and re-offending.<sup>2</sup> I am an ex-felon struggling as a marginal citizen without certain civic freedoms, and I have taken on the task of examining this single component of reintegration. Understanding that readjustment is a holistic concept, I do not presume that allowing ex-felons to participate in civic

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1. BOB DYLAN, *Chimes of Freedom, on ANOTHER SIDE OF BOB DYLAN* (Columbia Records 1964), available at <http://bobdylan.com/moderntimes/songs/chimes.html>.

2. Gabriel J. Chin, *Felon Disenfranchisement and Democracy in the Late Jim Crow Era*, 5 OHIO ST. J. CRIM. L. 329, 340 (2007) (specifically calling for “[m]ore research, . . . on the connection between the opportunity to vote and future offending.”). Other commentators have stated that

Much of the research literature has focused on socioeconomic . . . and family reintegration . . . of felons, rather than civic reintegration and citizenship . . . Yet crime itself is explicitly defined in relation to the state and its citizens . . . It therefore makes sense to ask whether political participation and community involvement, as well as work and family factors, are central to successful reintegration.

Christopher Uggen, Jeff Manza, & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, in 605 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 281, 303 (Robert W. Pearson ed., 2006).

processes will eliminate recidivism. However, I do propose that restoring civic rights is a necessary step toward criminal desistance.

There are currently sixteen million Americans marked with a felony conviction,<sup>3</sup> and we all have lost certain civic freedoms.<sup>4</sup> Voting, running for office, and serving on a jury are duties the State<sup>5</sup> no longer trusts us to perform. Without legitimate justification, the State indiscriminately excludes ex-felons, stigmatizing us in the process. Yet, it requires us to rebuild our lives while confiscating the civic tools needed to complete the task.

For many of us, the frustration of being an “outsider” marks our early days of freedom. Employers, landlords, schools, and even love interests tell us we are different because we have a criminal past. Though difficult, these obstacles are temporary. More significant are the laws that keep us marginal citizens—those promulgated by the State and spawned, in theory, to protect “them” from “us.”

As an ex-felon, mindful that my experiences may vary significantly from others with whom I share an unfortunate past, I view civic restrictions through a lens carved with mistakes. I argue that removing civic freedoms can lead to re-offending by first contributing to the stigma of being an ex-felon and then by reducing an ex-felon’s moral desire to remain lawful. Part I of this Article discusses the practice of restricting civic freedoms, challenging the State’s professed need to incapacitate ex-felons and concluding that civic restrictions are seemingly arbitrary. Part II establishes that civic restrictions help to create and reinforce the permanence of a felony conviction’s stigma. Part III reveals the collective cost of civic restrictions, noting that class stigmatization and the imposition of arbitrary sanctions each represent a separate catalyst for lawlessness. Finally, Part IV identifies the benefits of eliminating civic restrictions for both ex-felons and non-felons, concluding that promoting

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3. Uggen, et al., *supra* note 2, at 288 (explaining that the “felon class,” which is represented by those felons serving time, those on probation or parole, and those who have completed their sentences, comprises “7.5 percent of the adult population” in the United States); *see also* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 136 (2003) (“59 million Americans (29 percent of all adults) have a criminal record on file with state authorities, and 5 million (6.5 percent of all adults) have served a prison term, the effect of these restrictions has a profound effect on American democracy.”).

4. Though there are other sanctions that could be deemed to impact one’s civic life, I have chosen to examine only those that directly prohibit ex-felon admission into democratic processes.

5. “The State” is used throughout this Article as a general term referring to states that impose civic restrictions.

inclusive policies will not jeopardize civic processes and may help to curb recidivism by promoting reintegration.

### I. CIVIC RESTRICTIONS: JUSTIFYING EXCLUSION

Though a substantial period of incarceration almost always follows a felony conviction, the story does not end when the State opens the prison doors and releases the confined. Instead, the State metes out a host of additional restrictions once it sets an inmate free.<sup>6</sup> Termed by many as collateral sanctions,<sup>7</sup> these restrictions are “often unknown to the offenders to which they apply”<sup>8</sup> and vary jurisdictionally.<sup>9</sup> Included in this “national crazy-quilt of disqualifications and restoration procedures”<sup>10</sup> are laws—civic restrictions—which limit, and in some cases remove, an ex-felon’s right to vote, hold office, or sit on a jury.<sup>11</sup>

Currently, forty-eight states restrict an ex-felon’s right to vote,<sup>12</sup> forty-four states place some restriction on an ex-felon’s right to hold office,<sup>13</sup> and thirty-one states “subscribe to the practice of lifetime

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6. See PETERSILIA, *supra* note 3, at 105.

Convicted felons may lose many essential rights of citizenship, such as the right to vote and to hold public office, and are often restricted in their ability to obtain occupational and professional licenses. Their criminal record may also preclude their receiving government benefits and retaining parental rights, be grounds for divorce, prevent their serving on a jury, and nearly always limits firearm ownership.

*Id.*

7. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-1.1(a) (2004) (defining a collateral sanction as “a legal penalty, disability, or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.”).

8. PETERSILIA, *supra* note 3, at 106.

9. *Id.*

10. *Id.*

11. *Id.* (quoting MARGARET COLGATE & SUSAN KUZMA, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 3 (1997)). Though there are other sanctions that could be deemed to impact one’s civic life, I have chosen to examine only those that directly prohibit ex-felon admission into democratic processes; voting and candidacy restrictions and jury service prohibitions.

12. Andrea Steinacker, *The Prisoner’s Campaign: Felony Disenfranchisement Laws and the Right to Hold Public Office*, 2003 B. Y. U. L. REV. 801, 803 (2003) (surveying all fifty states in 2003 and describing the varying state imposed restrictions on an ex-felon’s right to vote).

13. *Id.* at 804–08 (surveying all fifty states in 2003 and describing the varying state imposed restrictions on an ex-felon’s right to hold public office).

felon exclusion” from jury service.<sup>14</sup> Pervasive in their enactment and enforcement, civic restrictions remove some “essential rights of citizenship”<sup>15</sup> and limit participation in democracy, long regarded by the U.S. Supreme Court as an “issue of the utmost import.”<sup>16</sup>

Traditionally, the State employed the “neo-contractarian”<sup>17</sup> justification for subjecting ex-felons to civic restrictions.<sup>18</sup> However, the more contemporary view is that ex-felons are somehow morally incompetent and unable to fulfill the requisite duties of civic participation.<sup>19</sup> This “communitarian” or “republican” justification for civic restriction holds that an ex-felon is a liability to civic processes because of an intrinsic flaw of character.<sup>20</sup> In this way, the State often permanently links negative character traits to a single act of deviance.<sup>21</sup>

#### A. Why Exclude Us?

The most common justification for imposing civic restrictions stems from the State’s desire to incapacitate ex-felons, presumably to protect its populace.<sup>22</sup> Imposing civic restrictions theoretically protects society from the assumed harms ex-felons would inflict if allowed to participate fully in democracy.<sup>23</sup> Specifically, the State does not allow ex-felons to vote or hold public office because it seeks

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14. Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 67 (2003).

15. PETERSILIA, *supra* note 3, at 105.

16. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

17. Green v. Bd. of Elections of City of N.Y., 380 F.2d 445, 451 (2nd Cir. 1967) (noting John Locke’s theory of the social compact in holding “[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.”).

18. See KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 130 (2005).

19. See *id.* at 140; Kalt, *supra* note 14, at 120 (noting that both disenfranchisement and jury exclusion laws “are often justified in the name of probity and propriety. Both voters and jurors play a part in democratic self-government, controlling the power to lead in one case and the power to punish or enrich in the other.”).

20. See PETTUS, *supra* note 18, at 140; Kalt, *supra* note 14, at 73–74.

21. Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality, and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1028 (2004) (“Current penal practices reflect the perception of criminals as a permanent caste of moral inferiors.”).

22. See Steinacker, *supra* note 12, at 820–27.

23. See Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box”*, 102 HARV. L. REV. 1300, 1307–10 (1989) (discussing the moral justifications for disenfranchisement laws); see also Kalt, *supra* note 14, at 100–18.

to “protect against voter fraud,”<sup>24</sup> to “prevent harmful changes to the law,”<sup>25</sup> and to maintain the “purity of the ballot box.”<sup>26</sup>

The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests. The exclusion must for this reason be adjudged a mere disqualification, imposed for protection, and not for punishment—withholding an honorable privilege, and not denying a personal right or attribute of personal liberty.<sup>27</sup>

Civic restrictions on jury service are predominantly justified by the communitarian belief that the character flaws of ex-felons would corrupt the fact-finding process.<sup>28</sup> Specifically, the majority of states and the federal government exclude ex-felons from jury service because they threaten probity,<sup>29</sup> either because character defects hinder proper decision-making or because ex-felons possess an “inherent bias” against the criminal justice system.<sup>30</sup>

As Professor Brian Kalt points out, “[t]he meaning of ‘probity’ is fairly clear: ‘[m]oral excellence, integrity, rectitude, uprightness; conscientiousness, honesty, sincerity.’”<sup>31</sup> Though Kalt suggests that “courts have been less clear as to whether the threat that felons pose

24. Steinacker, *supra* note 12, at 821 (citing Tanya Dugree-Pearson, Comment, *Disenfranchisement—A Race Neutral Punishment for Felony Offenders or a Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL’Y 359, 385 (2002)).

25. *Id.*

26. *Id.* at 822.

27. Washington v. State, 75 Ala. 582 (1884) (citing POMEROY’S CONST. LAW § 535; Anderson v. Baker, 23 Md. 531 (1865); Blair v. Ridgely, 41 Mo. 63 (1867); *Ex parte Stratton*, 1 West. Va. 305 (1866); Kring v. Missouri, 107 U.S. 221 (1883)).

28. See Kalt, *supra* note 14, at 102–07, 121–23 (noting that some also cite the contractarian justification for felon jury exclusion).

29. *Id.* at 102–04. See, e.g., United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (upholding the federal felon exclusion laws on probity grounds).

30. Kalt, *supra* note 14, at 74.

[A] person who has suffered the most severe form of condemnation that can be inflicted by the state . . . might well harbor a continuing resentment against “the system” that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils.

*Id.* (quoting Rubio v. Superior Court, 593 P.2d 595, 600 (Cal. 1979) (plurality opinion)).

31. *Id.* (quoting 12 OXFORD ENGLISH DICTIONARY 540 (2d ed. 1989)).

to jury probity stems from their degraded status or from their actual characteristics,”<sup>32</sup> he contends that the more credible justification for felon exclusion rests on intrinsic character assessments of ex-felons.<sup>33</sup> One such character trait of concern to those advocating for felon exclusion from jury service is “that felons remain adversarial to[wards] the government and will sympathize unduly with any criminal defendant.”<sup>34</sup>

### B. Making Character Assessments

When restricting civic freedoms to incapacitate ex-felons, the State must make three assumptions about character. First, it must assume that criminal acts reveal bad character. Next, it must assume that character is a fixed concept.<sup>35</sup> And finally, justifying civic restrictions as protective, the State must assume that good character is essential to making proper civic decisions.<sup>36</sup>

These popular ideas find historical support in the work of Aristotle, who contended (1) that “criminals who break laws cannot govern themselves”<sup>37</sup> and (2) “that every person chooses to develop good and bad character through autonomous actions. Once a person chose their character . . . he or she was not free to simply undo the choice.”<sup>38</sup> Thus, the State has not strayed far from Aristotle’s contentions.

When imposing civic restrictions to protect society, the State first assumes that a criminal act reveals bad character.<sup>39</sup> As Ekow N. Yankah points out, “[a] long list of contemporary scholars subscribe to this same conceptual tie between action and character.”<sup>40</sup> “Bad

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32. *Id.*

33. *Id.* at 104–05.

34. *Id.* at 105.

35. See Yankah, *supra* note 21, at 1027–28.

36. *The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1307. (“Fitness’ and ‘capability’ are central . . . ; political competence, according to republican theory, has a moral dimension. Ex-offenders are excluded because they are deemed unable to cast their ballots in accordance with the common good.” (internal citations omitted)).

37. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 25 (2006) (quoting Zravko Planinc, *Should Imprisoned Criminals Have a Constitutional Right to Vote?*, 2 CAN. J.L. & SOC’Y 153, 160 (1987)).

38. Yankah, *supra* note 21, at 1028 (citing ARISTOTLE, *The Nicomachean Ethics*, in THE BASIC WORKS OF ARISTOTLE 972–73 (Richard McKeon ed., 1941)).

39. See *id.* at 1034–35.

40. *Id.* at 1034.

acts are evaluated as providing evidence of bad character,”<sup>41</sup> and the “criminal offender is judged by the defect in character that his act betrays.”<sup>42</sup> Some simply feel that “acts are important because they tell us who belongs to the good guys and who belongs to the bad guys.”<sup>43</sup> By excluding ex-felons from politics and jury service, the State deems us “bad guys,” as evidenced by perhaps only a single instance of deviance.<sup>44</sup>

Next, the State assumes that character is generally consistent. It assumes that the “[i]mmoral character” revealed by a criminal act is “an inelastic concept”<sup>45</sup> or a “stable collection of traits.”<sup>46</sup> In this way, once ex-felons violate recognized law, we can never disprove the assumption that we are what the State asserts—flawed and immoral.

Finally, perhaps most essential to the protective principle underlying civic restrictions, is the assumption that good character is a necessary tool used to “understand the common good.”<sup>47</sup> Philosophers have long debated the role of individual morality in politics. Some, like Niccolo Machiavelli, hold that “the political imperatives are themselves part of morality and their clashing with more normal moral demands produces a crisis within the moral order.”<sup>48</sup>

[F]or a man who wishes to profess goodness at all times will come to ruin among so many who are not good. Hence it is necessary for a prince who wishes to maintain his position to learn how not to be good, and to use this knowledge or not use it according to necessity.<sup>49</sup>

Still others view “‘necessary’ political reasons to be themselves overwhelming moral considerations.”<sup>50</sup> Therefore, some utilitarians believe that political justifications swallow individual morality when

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41. *Id.* at 1033.

42. *Id.* at 1034 (citing ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 381 (1981)).

43. *Id.* at 1035.

44. JOHN BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 55 (1989) (maintaining that “disapproved behavior is transient, performed by an essentially good person.”).

45. Yankah, *supra* note 21, at 1027.

46. *Id.* at 1028.

47. *The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1308.

48. C.A.J. Coady & Onora O’Neill, *Messy Morality and the Art of the Possible*, in 64 PROCEEDINGS OF THE ARISTOTELIAN SOCIETY 261 (Supp. 1990).

49. *Id.* at 260 (quoting NICCOLO MACHIAVELLI, THE PRINCE 52 (Peter Bondanella ed., Oxford University Press 1984) (1532)).

50. *Id.* at 261.

"political reasons have overriding force because of the weight of consequences attached to following or disregarding them."<sup>51</sup>

Whether one believes that individual morality should dictate choices or that a collective morality concerned with the greatest good for the greatest number should principally guide decisions,<sup>52</sup> the result is a host of viewpoints about the role one's individual morals play in civic processes. Given these varied viewpoints, withholding an ex-offender's right to vote, run for office, or sit on a jury because of an apparent character flaw presumes—perhaps incorrectly—that individual morality is an absolute civic necessity.

### C. Challenging Incapacitation Rationales

While policy makers are right to concern themselves with the purity of democratic and criminal justice processes, presuming that ex-felons contribute to functional impurity is an oversimplification laden with misconceptions about our character.<sup>53</sup> No empirical evidence supports the notion that ex-felons threaten politics or the jury system, and laws that per se ban ex-felons from voting, holding office, and sitting on juries are both over- and under-inclusive.

Additionally, incapacitating ex-felons based on assessments of character is inconsistent with the State's own communitarian justification for imposing civic restrictions and contradicts fundamental federal evidentiary standards.

First, there is no empirical support for the conclusion that ex-felons somehow threaten the purity of democracy<sup>54</sup> or the function of the jury.<sup>55</sup> As researchers Jeff Manza and Christopher Uggen discovered recently, "there is little evidence that serial political offenders constitute a significant actual or potential threat," and "the claim that . . . [ex-felons] would 'band together' to loosen criminal

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51. *Id.*

52. *Id.*

53. Threats to the purity of democracy can be both instrumental/practical and symbolic. The challenges put forth in this section confront only the potential instrumental/practical harms of allowing ex-felons to partake in civic processes. I do not consider symbolic threats, like appearances of impropriety, as they are less consequential than instrumental/practical harms when the civic exclusion of sixteen million Americans is at issue.

54. MANZA & UGGEN, *supra* note 37, at 13 ("[E]mpirical evidence that criminal offenders would be more likely to commit voter fraud is essentially non-existent.").

55. See Kalt, *supra* note 14.

laws, elect weak-on-crime sheriffs, or generally ‘skew’ electoral results is clearly an unproved hypothesis.”<sup>56</sup>

There is also no empirical evidence to support the contention that an ex-felon juror would threaten the probity of a jury through general defect of character or through inherent bias.<sup>57</sup> Nor does the judiciary seem to take this claim seriously. When ex-felons do find their way onto a jury that renders a final judgment, “many courts are surprisingly ambivalent about rectifying these sorts of errors, allowing verdicts that ‘illicit’ juries rendered to stand despite supposed concerns about felons’ inherent bias or the threat they pose to jury probity.”<sup>58</sup>

Second, disenfranchisement laws<sup>59</sup> and prohibitions on jury service are both over- and under-inclusive. Disenfranchisement laws are over-inclusive<sup>60</sup> in that “[o]nly a small number of all offenders are convicted of offenses connected to election fraud.”<sup>61</sup> Disenfranchisement laws are also under-inclusive such that “in some states that permanently exclude ex-offenders from the ballot, a number of election offenses are grouped as misdemeanors and therefore do not lead to disenfranchisement.”<sup>62</sup>

Jury service restrictions, like disenfranchisement laws, are also over- and under-inclusive.<sup>63</sup> As Kalt points out, states do not bar misdemeanants from jury service even though their criminal behavior

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56. MANZA & UGGEN, *supra* note 37, at 13.

57. See Kalt, *supra* note 14, at 104–05.

58. *Id.* at 162 (citing *State v. Neal*, 550 So. 2d 740 (La. Ct. App. 1990)) (“holding that a juror’s failure to disclose a prior felony conviction was not cause for a new trial”).

59. The term “disenfranchisement laws” as used in this Article, refers to those State imposed restrictions on the ex-felon’s freedom to vote (voting disenfranchisement) and to hold elected office (candidacy disenfranchisement).

60. See Steinacker, *supra* note 12, at 820–26; see also *The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1303.

Supporters of disenfranchisement argue that, having shown a propensity to break the law, ex-felons are more likely to violate the particular prohibition against election fraud. Whether or not this characterization holds true, however, a blanket exclusion of all ex-offenders in order to protect society from those who would commit electoral offenses clearly is overinclusive.

*The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1303.

61. PETTUS, *supra* note 18, at 140 (citing Nora V. Demleitner, *Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 770 (2000)).

62. *Id.*

63. Kalt, *supra* note 14, at 74 (“[B]ecause many non-felons lack probity, and many felons may not, felon exclusion is under- and over-inclusive to a troubling degree.”).

reveals character similar to that of the ex-felon.<sup>64</sup> Similarly, the inherent bias theory of exclusion rests on the assumption that *all* ex-felons possess animosity toward the State.<sup>65</sup> The State does not per se bar police officers, crime victims, or corrections officials from sitting on juries, although each of these groups poses a high potential for bias. Instead, the State deems individual members of these groups distinct. Therefore, presuming the similarly situated ex-felon population to be homogenous is an inconsistent “gross overgeneralization.”<sup>66</sup>

Third, both prohibitions on jury service and disenfranchisement laws make assumptions about character that other areas of law prohibit.<sup>67</sup> For instance, the Federal Rules of Evidence state that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”<sup>68</sup> Further, “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.”<sup>69</sup> Civic restrictions contradict these federal rules of evidence by presuming that criminal acts reveal character and that character is a predictor of future propensities.

Finally, the most damning evidence against excluding ex-felons from the civic community based on character assessments is the discord it fosters under traditional notions of republicanism or communitarianism.<sup>70</sup> “[R]epublicanism seeks to nurture civic virtue in its citizens, and is premised on the notion that political participation is the path to moral growth.”<sup>71</sup> For instance, republicanism holds that by locking an ex-felon out of the democratic process, the State “guarantee[s] that his moral growth will not continue.”<sup>72</sup> As will be

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64. *Id.* at 105.

65. *Id.* at 74.

66. *Id.* at 105.

67. See FED. R. EVID. 404(a)–(b).

68. FED. R. EVID. 404(b).

69. FED. R. EVID. 404(a); see also FED. R. EVID. 609, 2006 Amendment, advisory committee’s note (limiting the admissibility of evidence of prior criminal acts for the purposes of impeachment “only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement.”).

70. *The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1309. For the sake of simplicity, the terms republicanism and communitarianism are treated analogously throughout this Article because each theory favors inclusive communitarian ideals.

71. *Id.* (citing H. ARENDT, THE HUMAN CONDITION 12–13, 22–31 (1958)).

72. *Id.*

discussed below, curtailing the moral development of ex-felons may have consequences that touch the non-felon population as well.

#### *D. Are Civic Restrictions Retributive?*

Though incapacitation is the most commonly cited reason for preventing ex-felons from performing their civic duties,<sup>73</sup> some might justify civic restrictions as retributive rather than protective. Theorists argue that restrictions premised only on a felony conviction are potentially criminal sanctions, rather than civil sanctions, and that the “primary legislative motivation” for such restrictions may be punitive.<sup>74</sup> Still, disregarding the State’s proffered reasons about the legitimacy of incapacitating ex-felons through civic restrictions, the retributive rationale also has its flaws.<sup>75</sup>

If civic restrictions are retributive, they should theoretically “counteract or ‘compensate’ for the harm inflicted by the wrongdoer.”<sup>76</sup> Retributivists contend that an “eye for an eye” is the only manner by which to “set right the moral balance.”<sup>77</sup> Retribution “demands a ‘proportional’ negative response”<sup>78</sup> to wrongful acts.

Civic restrictions cannot be justified by the theory of retribution. The over-inclusive nature of civic restrictions, discussed above, insures that punishment can never be proportional. If “all felonies, from the most trivial to the most serious” carry with them civic banishment, then the “degree” and “severity” of the crime, in some instances, is not matched by its punishment.<sup>79</sup>

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73. See Steinacker, *supra* note 12.

74. Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 (2003) (“[T]he single most important piece of evidence in the determination of whether a sanction is criminal or civil is whether the sanction is imposed based on conviction or conduct.”).

75. Not addressed in this Article are the possible constitutional limitations of imposing civic restrictions after a felon has served a sentence. For a discussion on these possible constitutional limitations see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). See also Morris Putnam Stevens, *State Police Power vs. Federal Constitution: The Distinction Between a Legitimate Moral Test Imposed Upon Physicians to Protect the Public and an Ex Post Facto Punishment*, 3 UNIV. L. REV. 228 (1897).

76. Toni M. Massero, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1891 (1991).

77. *Id.* (citing H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 233–235 (1968)).

78. *Id.* at 1892.

79. PETTUS, *supra* note 18, at 131; see also Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implication for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

Retribution also respects autonomy and is “uninterested in influencing the offender’s future behavior or the behavior of other community members.”<sup>80</sup> To respect autonomy, ex-felons must be “allowed to pursue their well-being.”<sup>81</sup> Without allowing ex-felons to take part in democratic functions after they have served their sentence, the State impinges on the autonomy of the former offender.<sup>82</sup> “Such an infringement of personal autonomy may be justified by the need to protect the autonomy of others. But when it is not justified by this need . . . then respect for the autonomy of the individual dictates a policy of toleration.”<sup>83</sup>

As A.I. Meldon explains, every person possesses a “moral right” that is “a fundamental human right” to “engage in conduct in pursuit of one’s interests.”<sup>84</sup> He goes on to discuss imprisonment as an infringement of this moral right and explains,

[f]or they have not forfeited this right even though it has been infringed, since they continue to be human beings, and, in compensation for the moral injury suffered by the infringement of their right through punishment they receive, benefit by being purged of their guilt and restored to good standing in the moral community.<sup>85</sup>

In colonial America, societies utilized this retributive principle of reward and sanction in punishing offenders while maintaining respect for autonomy.<sup>86</sup> “The offender often was forced to confess publicly to her congregation, sometimes dressed in a white cloth, and beg their forgiveness. This forgiveness, or redemption, effectively drew the offender back into the fold and further reinforced the moral order.”<sup>87</sup>

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80. Massero, *supra* note 76, at 1891.

81. Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 IOWA L. REV. 761, 785 (1989).

82. *Id.*

Criminalization and other repressive measures deny people, to a substantial degree, control over the course of their lives. By attaching the stigma of criminal conviction, by disrupting people’s lives through the processes of trial and conviction, and often through imprisonment, they affect not merely the ability to engage in one particular activity but the general control one has over the course of one’s life.

*Id.*

83. *Id.*

84. Herbert Morris, *The Status of Rights*, 92 ETHICS 40, 41 (1981) (citing A.I. MELDON, RIGHTS AND PERSONS (University of California Press 1977)).

85. *Id.* at 45.

86. Massero, *supra* note 76, at 1913.

87. *Id.* (citing A. EARLE, CURIOUS PUNISHMENTS OF BYGONE DAYS 20, 35–36, 111–

Today, Japan continues to respect the free will of the criminal actor “[b]y ‘following shaming ceremonies with ceremonies of repentance and reacceptance . . . the moral order derives a very special kind of credibility when even he who has breached it openly comes out and affirms the evil of the breach.’”<sup>88</sup> Consequently, “the stakes are high when one defies the moral order, but total social banishment is a rare consequence: the offender may humble himself and thereby be reintegrated into the social fabric.”<sup>89</sup>

Civic restrictions premised on a felony conviction cannot be retributive because they are over-inclusive, rendering just desserts incalculable. Banishing ex-felons from civic processes also does little to protect the autonomy of the ex-felon. Once punished, the ex-felon who the State banishes from civic processes has no opportunity to rejoin the moral order and reap the benefit of punishment. Thus, Civic restrictions have little to do with retribution and must be motivated by something else.

#### E. An Alternative Theory

Some contend that the State prohibits ex-felons from re-entering the civic realm to placate a more devious desire. The author of one Harvard Law Review Note proposes that “[b]ehind arguments for limiting participation to the virtuous stands the community’s urge to be reassured of its own moral purity and to find a target by which to define its own identity.”<sup>90</sup> Civic restrictions are therefore nothing more than the State engaging in a “sophisticated version of banishment . . . ‘society’s most primitive form of self-defense.’”<sup>91</sup>

As W.T. Root describes:

None is so repentant a sinner as to share the blame with the criminal. If we can localize the blame in the individual we can exact vengeance with precision and satisfaction. The more we can

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113 (1896)).

88. *Id.* at 1910 (citing J. BRAITHWAITE, CRIME, SHAME, AND REINTEGRATION 74 (1989)).

89. *Id.*

90. *The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1312 (The idea that character is a fixed concept is essential to this justification for civic restrictions. If an ex-felon is capable of atonement and morality, then the societal cohesion facilitated by individualizing blame disappears when the ex-felon’s sentence is complete).

91. ROBERT JOHNSON, HARD TIME: UNDERSTANDING AND REFORMING THE PRISON 3–4, (Wadsworth 2002) (citing M.E. SHERMAN & G. HAWKINS, IMPRISONMENT IN AMERICA: CHOOSING THE FUTURE 55 (University of Chicago Press 1981)); *see also* A.J. MANOCCHIO & J. DUNN, THE TIME GAME: TWO VIEWS OF A PRISON (Sage 1982).

make it appear that all the causes for delinquency have their origin within the individual victim the more we may feel self-elation, the less danger there is of negative self-feeling.<sup>92</sup>

By targeting perceived character flaws as the principal justification for excluding ex-felons, society exhibits a “tendency to localize the blame for crime in the individual”<sup>93</sup> so as to also “obscure the complexity of the roots of crime and their entanglement with contingent social structures.”<sup>94</sup> In this way, the idea that ex-felons are morally corrupt “follow[s] from, rather than explain[s], a preexisting sense that ex-felons cannot be members of the community.”<sup>95</sup> Civic restriction are therefore “based not upon what we believe, but . . . what [they] allow us to believe.”<sup>96</sup>

While cynical, this view seems relevant given the lack of existing evidence supporting the notion that ex-felons threaten civic processes. So why keep ex-felons from participating? Though noteworthy, this question gives rise to a more pressing concern about the societal damage inflicted by civic restrictions. As Professor Chin inquired, what is the likelihood that civic restrictions lead to re-offending? What impact do these rules have on conformity and lawfulness?

## II. REINFORCING STIGMA

The first consequence of this “symbolic” exercise of exclusion is the stigma of a felony conviction.<sup>97</sup> Though many forces inside and outside the “criminal justice continuum”<sup>98</sup> contribute to the stigma of a felony conviction, civic restrictions reinforce stigmatization by (1) linking attributes to negative characteristics, (2) separating the ex-felon from the rest of society, and (3) providing a legal framework for structural discrimination.

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92. *The Disenfranchisement of Ex-Felons*, *supra* note 23, at 1310–11 (citing W. ROOT JR., A PSYCHOLOGICAL AND EDUCATIONAL SURVEY OF 1916 PRISONERS IN THE WESTERN PENITENTIARY OF PENNSYLVANIA 10 (1927), *quoted in* F. TANNEBAUM, CRIME AND THE COMMUNITY 7 (1938)).

93. *Id.* at 1311.

94. *Id.*

95. *Id.* at 1310.

96. *Id.*

97. *Id.* at 1311 (“Disenfranchisement is a symbolic action, and its purported justifications are a part of that symbolism.”).

98. PETTUS, *supra* note 18, at 148.

Dr. Erving Goffman first defined stigma as “an attribute that is deeply discrediting,”<sup>99</sup> theorizing that a stigma “is really a special kind of relationship between attribute and stereotype.”<sup>100</sup> He characterized the stigma of imprisonment as a “blemish of individual character,”<sup>101</sup> noting that “[b]y definition, of course, we believe the person with a stigma is not quite human.”<sup>102</sup>

Since Erving Goffman’s work *Stigma: Notes on the Management of Spoiled Identity*, researchers have examined stigma in a variety of settings.<sup>103</sup> Using the “social cognitive approach to understand how people construct categories and link these categories to stereotyped beliefs,”<sup>104</sup> scholars have developed several working definitions of stigma.<sup>105</sup> As Bruce G. Link and Jo C. Phelan point out, some believe that stigma “is a characteristic of persons that is contrary to a norm of a social unit.”<sup>106</sup> Others hold that “stigmatized individuals possess (or are believed to possess) some attribute, or characteristic that conveys a social identity that is devalued in a particular social context.”<sup>107</sup>

Link and Phelan define stigma as a situation where “elements of labeling, stereotyping, separation, status loss and discrimination co-occur in a power situation that allows components of stigma to unfold.”<sup>108</sup> They contend that an economic or social power source must fortify these four “components” for a stigma to occur.<sup>109</sup> Examination of each component of this precise definition can reveal the portions of ex-felon stigma that are reinforced by state-imposed civic restrictions.

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99. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (Prentice Hall 1963).

100. *Id.* at 4.

101. *Id.*

102. *Id.* at 5.

103. Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma* 27 ANN. REV. OF SOC. 363 (2001).

104. *Id.* at 364.

105. See *id.* at 364–65.

106. *Id.* at 364 (citing Mark C. Stafford & Richard R. Scott, *Stigma, Deviance, and Social Control: Some Conceptual Issues*, in THE DILEMMA OF DIFFERENCE: A MULTIDISCIPLINARY VIEW OF STIGMA 80 (Stephen C. Ainlay, Gaylene Becker & Lerita M. Coleman, eds., 1986)).

107. *Id.* at 365 (citing Jennifer Crocker, Brenda Major & Claude Steele, *Social Stigma*, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 505 (Daniel T. Gilbert & Susan T. Fiske, eds., 1998)).

108. *Id.* at 367.

109. *Id.*

Two common criticisms of the study of stigma should be noted, however. First, critics have observed that those who “do not belong to the stigmatized group”<sup>110</sup> often “study stigma from the vantage point of theories that are uninformed by the lived experience of the people they study.”<sup>111</sup> A second criticism advocates for stigma research that focuses on “the sources and consequences of pervasive, socially shaped exclusion from social and economic life.”<sup>112</sup> As an ex-felon mindful of these criticisms, I examine stigma from the point of view of the stigmatized, emphasizing the macro-level consequences of keeping millions of Americans from performing their civic duties.

Therefore, working within the conceptual framework established by Link and Phelan, I establish the existence and “convergence” of the four “interrelated components” necessary for producing stigma, identifying the State as the power structure that “allows the components of stigma to unfold.”<sup>113</sup> While the State assuredly does not create stigma, it does contribute significantly to the process of stigmatization by imposing civic restrictions.

#### A. Arrest and Conviction—The Labeling Process

According to the conceptualization of stigma put forth by Link and Phelan, the necessary first component for producing stigma is labeling or distinguishing a group or an individual.<sup>114</sup> The “criminal justice continuum,” beginning with arrest and ending with post-incarceration sanctions,<sup>115</sup> creates the label “felon.” With such a broad classification, there is “enormous variability” within the category, requiring the State to engage in “oversimplification” when creating the class.<sup>116</sup>

Arrested, charged, and convicted in a two week jury trial, I fell victim to the labeling process. The sheriff handcuffed me, read me my constitutional rights, and then displayed me to the gallery during jury selection. When the trial ended, the judge in grand fashion slammed his gavel, proclaiming me guilty in front of a packed

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110. *Id.* at 365.

111. *Id.*

112. *Id.* at 366.

113. *Id.* at 367.

114. *Id.*

115. PETTUS, *supra* note 18, at 148.

116. Link & Phelan, *supra* note 103, at 367.

courtroom and a jury of my peers. This was the ceremony by which the State labeled me a felon for the world to see.

The State officially and simplistically labels all felons by assessing the gravity of criminal behavior and then affixing the appropriate label.<sup>117</sup> Misdemeanants are not the same as felons, but yet the serial killer and the habitual drunk driver share a common, overbroad label: both are felons. Some felons plead guilty in a less formal event, while others, like me, suffer distinction at a jury trial. Still, labeling occurs. Through the criminal process, the State legally distinguishes us from those who have no criminal record, *officially* making a felony conviction a salient trait.<sup>118</sup>

Recognizing the criminal justice system as the mechanism by which the State affixes labels, Jeremy Travis, a scholar in the field of prisoner reentry, first promulgated the idea of “reentry courts” that would serve to recognize offenders’ “milestones” once released.<sup>119</sup> Similarly, Joan Petersilia, another expert in prisoner reentry, echoed Travis’ sentiments concerning the usefulness of “graduation ceremonies” in the reintegration process.<sup>120</sup> These proposed reentry courts serve to counterweigh the ceremony the State forces one to endure when convicted of a criminal offense.<sup>121</sup> By advocating for recognition of the offender label, Travis and Petersilia hope to promote reintegration by formally fading the initial mark of a

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117. See Bruce G. Link, *Understanding Labeling Effects in the Area of Mental Disorders: An Assessment of the Effects of Expectations of Rejection*, 52 AM. SOC. REV. 96, 97 (1987) (noting the “official labelling” of those suffering from psychiatric disorders comes at the time of treatment).

118. Link & Phelan, *supra* note 103, at 368.

Because human differences are socially selected for salience, we have chosen to use the word “label” instead rather than “attribute,” “condition,” or “mark.” Each of these latter terms locates the thing that is being referred to in the stigmatized person and risks obscuring that its identification and election for social significance is the product of social processes.

*Id.*

119. JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 338–39 (2005) (reentry courts would serve to publicly acknowledge an offender’s positive steps towards successful reintegration, conversely diminishing the pejorative mark associated with a felony conviction).

120. PETERSILIA, *supra* note 3, at 205 (“At the end of the period of supervision, the judge would oversee a ‘graduation ceremony.’ These are actual ceremonies and are designed to celebrate the individual’s successful reentry into the community.”).

121. TRAVIS, *supra* note 119, at 338–39 (2005) (“The initial court hearing pronouncing guilt and imposing a sentence of imprisonment serves to diminish the convict’s status.”).

conviction,<sup>122</sup> but, perhaps more importantly, both note that an arrest and conviction is a method by which the State labels the offender.

### B. Justifying Civic Restrictions—Linking the Label to the Stereotype

“The second component of stigma occurs when labeled differences are linked to stereotypes.”<sup>123</sup> Discussing the distinction between master and auxiliary status traits, Everett C. Hughes explains that “most statuses have one key trait (a master trait) which serves to distinguish those who belong from those who do not.”<sup>124</sup> He goes on to say that those with certain master traits are “informally expected to have a number of auxiliary traits.”<sup>125</sup>

The State makes a felony conviction a salient master trait by publicly labeling a felon at trial. In doing so, the State signals that certain negative auxiliary traits accompany a felony conviction. As Howard S. Becker explains,

To be labeled a criminal one need only commit a single criminal offense, and this is all the term formally refers to. Yet the word carries a number of connotations specifying auxiliary traits characteristic of anyone bearing the label. A man who has been convicted of a housebreaking and thereby labeled criminal is presumed to be a person likely to break into other houses. . . . Further he is considered likely to commit other kinds of crimes as well, because he has shown himself to be a person without “respect for the law.” Thus apprehension for one deviant act exposes a person to the likelihood that he will be regarded as deviant or undesirable in other respects.<sup>126</sup>

Observable in Becker’s hypothetical, corrupt morality that leads to a propensity for crime is the overriding auxiliary trait associated with a felony conviction.<sup>127</sup> As shown above, the majority of states

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122. BRAITHWAITE, *supra* note 44, at 55 (distinguishing between “shaming that is reintegrative and shaming that is disintegrative (stigmatization),” and going on to explain that “[r]eintegrative shaming means that expressions of community disapproval . . . are followed by gestures of reacceptance into the community of lawabiding citizens. These gestures of reacceptance will vary from a simple smile expressing forgiveness and love to quite formal ceremonies to decertify the offender as deviant.”).

123. Link & Phelan, *supra* note 103, at 368.

124. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 32 (The Free Press 1963) (citing Everett C. Hughes, *Dilemmas and Contradictions of Status*, L Am. J. of Soc. 353 (March 1945)).

125. *Id.*

126. *Id.*

127. GOFFMAN, *supra* note 99, at 4 (discussing this link and noting that one type of stigma occurs where “blemishes of individual character perceived as weak will, domineering

that exclude ex-felons from civic processes justify exclusion based on the fear that this auxiliary trait will corrupt elections and taint juries.<sup>128</sup> By making character assessments about those who have a criminal past, the State links negative attributes to the label it affixes to felons. In this way, civic restrictions—or at least the justifications postulated for imposing civic restrictions—reinforce the second component of the stigma attached to being an ex-felon.

### *C. Labeling Felons and Imposing Civic Restrictions Post-Release—Separating “Us” from “Them”*

“The third feature of the stigma process occurs when social labels connote a separation of “us” from “them.”<sup>129</sup> Separating felons and ex-felons from the rest of society is a two-step process. First, as noted above, the State affixes the label of “felon” to an individual convicted of an offense in a grand proceeding. Next, the State imposes restrictions on the offender following his or her release from prison. These restrictions prevent the ex-felon from taking part in a host of processes open to those without criminal records. Thus, from the outset of the criminal justice continuum, the State constructs a wall—literally and figuratively—between law-abiding citizens (who it sees as “us”) and criminals (who it perceives to be “them”).

Distinctive labeling is the first step in separating “us” from “them.”<sup>130</sup> As Link and Phelan point out, “[e]vidence of efforts to separate “us” from “them” are sometimes directly available in the very nature of the labels conferred.”<sup>131</sup> For instance, ex-felons are not referred to as “those who have been convicted of a felony;” instead, ex-felons are “thought to *be* the thing they are labeled.”<sup>132</sup> In this way, ex-felons are not members of society who have made a mistake; instead, we are members of our own class, which exists outside of society and possesses negative attributes. Similarly, consider the adulterer, the paranoid schizophrenic, the cripple, and the traitor; by

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or unnatural passions, treacherous and rigid beliefs, and dishonesty, these being inferred from a known record of, for example, mental disorder, imprisonment, addiction, alcoholism, homosexuality, unemployment, suicidal attempts, and radical political behavior.”).

128. See *supra* Section I.A.

129. Link & Phelan, *supra* note 103, at 370.

130. *See id.*

131. *Id.*

132. *See id.*

virtue of their labels, all four are what others purport them to be—they are not part of “us.”<sup>133</sup>

The second step in separating “us” from “them” is the legal imposition of laws that limit or eliminate an ex-felon’s access to a social structure. In recent years, these laws have attracted much attention in both the legal and academic communities.<sup>134</sup> Much of the debate concerns the definition, impact, and usefulness of imposing restrictions on ex-offenders post-release. However, before the work of Manza and Uggen in 2006, there had been limited input from the population most affected.<sup>135</sup>

I am part of a stigmatized class of people, and accordingly, I am aware that a felony mark can have a negative impact on my quest to rejoin society.<sup>136</sup> Laws that separate me make this clear. Civic restrictions, for example, indicate that society does not consider me a full citizen.<sup>137</sup> Instead, as British sociologist T.H. Marshall has commented, citizenship is “a status bestowed on those who are full members of a community. All who possess that status are equal with respect to the rights and duties to which the status is endowed.”<sup>138</sup> Civic restrictions create an inequality between me and non-felons. By excluding me, the State reinforces stigma by constructing a legal wall between “us” and “them.”

#### *D. Restricting Civic Freedoms—Promoting Status Loss and Discrimination*

The fourth component of the stigma process occurs when the “labeled person experiences status loss and discrimination.”<sup>139</sup> Link

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133. *Id.* (noting other examples of this distinction).

134. See AMERICAN BAR ASSOCIATION, JUSTICE KENNEDY COMMISSION REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 64–86 (2004).

135. See MANZA & UGGEN, *supra* note 37, at 163 (seeking input from a number of individuals with criminal records).

136. BECKER, *supra* note 124, at 34 (citing Marsh Ray, *The Cycle of Abstinence and Relapse Among Heroin Addicts*, 9 SOC. PROBS. 132, 132–40 (1961)) (“Treating a person as though he were generally rather than specifically deviant produces a self-fulfilling prophecy. It sets in motion several mechanisms which conspire to shape the person in the image people have of him.”).

137. MANZA & UGGEN, *supra* note 37, at 163 (“Criminologists tend to use the term citizen narrowly and in opposition to criminal offenders. Criminals are placed on one side of the street, and law abiding ‘citizens’ on the other.”).

138. Uggen et al., *supra* note 2, at 296 (citing T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS (Cambridge University Press 1950)).

139. Link & Phelan, *supra* note 103, at 370.

and Phelan contend that “an almost immediate consequence of successful negative labeling and stereotyping is a general downward placement of a person in a status hierarchy.”<sup>140</sup> Additionally, those stigmatized face individual and structural discrimination as a result of their label.<sup>141</sup> While individual discrimination occurs when “person-A discriminates against person-B,” structural discrimination occurs when “stigma has affected the structure around the person, leading the person to be exposed to a host of untoward circumstances.”<sup>142</sup> Consequently, structural discrimination can exist independently of and often unaccompanied by instances of “individual prejudice or discrimination.”<sup>143</sup>

Examining the stigma of a physical disability, Link and Phelan point out that some researchers have proposed that physical “barriers to participation”<sup>144</sup> create a “disabling environment.”<sup>145</sup> These barriers “reside in architecture,”<sup>146</sup> making certain tasks impossible for those who suffer from physical limitations. Thus, constructing barriers and creating a disabling environment results in one form of structural discrimination.

Analogously, civic restrictions create another form of structural discrimination. Laws that exclude felons from voting, from running for office, and from serving on juries build legal barriers that block those with a felony conviction from civic processes. Constructed without bricks and mortar, legal barriers to civic participation create a civically disabling environment with which ex-felons must contend.

The untoward circumstance arising from structural discrimination of ex-felons is the requirement that we live outside the bounds of democratic processes, occupying a lower rung on the status hierarchy. In shaping the structure of civic processes with laws that exclude ex-felons, the State again contributes to the stigma of having a criminal record.

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140. *Id.* at 371.

141. *Id.* at 372–73.

142. *Id.* at 372 (“The concept of institutional racism sensitizes us to the fact that all manner of disadvantage can result outside of a model in which one person does something bad to another.”).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

### III. THE AGGREGATE COST OF STIGMATIZING WITH CIVIC RESTRICTIONS

Presumably to protect their non-felon constituency,<sup>147</sup> many lawmakers strive to promote criminal desistance.<sup>148</sup> For this reason, reentry policies center on reducing recidivism rather than on promoting reintegration.<sup>149</sup> However, the distinction between preventing recidivism and promoting reintegration is a case of semantics—without the latter, the former is unattainable.

As shown above, prohibiting ex-felons from taking part in the full complement of civic duties reinforces stigma. Thus, the negative consequences of stigmatization generally must, in part, be attributed to civic restrictions. Additionally, because civic restrictions do not foster protection, as the State hypothesizes, they are arbitrary limitations, negatively impacting the intrinsic morality of ex-felons by undermining confidence in authority.

#### A. *The Cost of Stigmatizing Ex-Felons*

By reinforcing the stigma of a felony conviction through imposition of civic restrictions, the State increases the likelihood that ex-felons will fail to successfully reintegrate.<sup>150</sup> These costs are evident in the work of sociologists concerned with the “stereotype threat model” and the interplay between amplified levels of anxiety and persistent ostracism.

The “stereotype threat model” suggests that when “individuals perform a difficult task in an area in which the ingroup is considered weak, they feel at risk of confirming the stereotype and this psychological pressure will lead them to underperform. In the long

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147. MANZA & UGGEN, *supra* note 37, at 7 (“No politician or elected judge of whom we are aware has ever lost their seat because they were *too tough* on criminals.”).

148. *Id.* at 107 (“With crime rates at historic lows in many parts of the country, the potential for a new mobilization of public fears remains substantial if rates were to again trend upward.”).

149. DAVID FARABEE, *RETHINKING REHABILITATION: WHY CAN’T WE REFORM OUR CRIMINALS?* 50 (describing the “Broken Windows” theory of crime prevention in which James Q. Wilson and George Kelling contended that “the failure to detect and punish relatively minor acts of deviance in a community can lead to conditions that foster more serious crimes.”).

150. BRAITHWAITE, *supra* note 44, at 55.

Disintegrative shaming (stigmatization) . . . divides the community by creating a class of outcasts. Much effort is directed at labeling deviance, while little attention is paid to de-labeling, to signifying forgiveness and reintegration, to ensuring that the deviance label is applied to behavior rather than the person . . .

term, these individuals may also disidentify from the threatening domain.”<sup>151</sup> Researchers studying “the role of expectancy as a potential mediator of performance”<sup>152</sup> studied racial minorities and found that “the level of expectation was found to partially mediate the decrease in performance only for participants for whom the minority category membership (Black) had been made salient.”<sup>153</sup>

For ex-felons, civic restrictions make clear that “the world expects less of them and they expect less of themselves when they are reminded of the ingroup weaknesses.”<sup>154</sup> As the above research indicates, when the State makes a felony conviction a salient trait by imposing civic restrictions on ex-felons, it increases the likelihood that we will lower ourselves to the moral standards it expects from us. A type of “self-fulfilling prophecy,”<sup>155</sup> such an occurrence can have devastating consequences for an ex-felon. Asked by society to adjust and to desist from crime, ex-felons face a “lowered level of expectation”<sup>156</sup> that can “lead to performance deficit,”<sup>157</sup> which, in the case of reentry, means failed readjustment and potential criminal activity.

The anxiety one feels when released from prison amplifies the psychological pressures of negative expectancy.<sup>158</sup> In prison, there is a common saying: “The world changes completely every five years.”<sup>159</sup> This statement illustrates the dilemma most ex-felons face when released. To reenter a world that you have not been a part of for

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151. Mara Cadinu, Anne Maass, Sara Frigerio, Lisa Impagliazzo, & Samira Latinotti, *Stereotype Threat: The Effect of Expectancy on Performance*, 33 EUR. J. OF SOC. PSYCHOL. 267, 267 (2003) (citing C.M. Steele & J. Aronson, *Stereotype Threat and the Intellectual Test performance of African Americans* in 69 J. OF PERSONALITY AND SOC. PSYCHOL. 797, 797–811 (1995)).

152. *Id.*

153. *Id.* at 282.

154. *Id.* at 283.

155. *Id.*

156. *Id.*

157. *Id.*

158. See, e.g., James M. Binnall, *Released from Prison . . . But Placed in Solitary Confinement: A Parolee Reveals the Practical Ramifications of Samson v. California*, 34 N. E. J. ON CRIM. AND CIV. CONFIN. 67 (2008) (discussing the stress of being released after a long period of confinement and the legal sanctions, like suspicionless searches, that contribute to this stress).

159. I first heard this phrase in my first year on the inside. The older men would describe the changes they saw in the world when released after serving long sentences. In one instance, I can remember a man telling me that while in prison he missed the entire Vietnam War.

years is extremely stressful, and social anxieties abound. These stressors lead many back to prison in short order.<sup>160</sup> Civic restrictions contribute to the anxiety of the newly-released by reinforcing the fact that as ex-felons, we are not a recognized part of democratic society.

Research has shown that “being ostracized poses a threat to four fundamental human needs: belonging, control, self-esteem, and meaningful existence.”<sup>161</sup> Additionally, “being ostracized . . . is a powerful experience, resulting in a number of negative reactions.”<sup>162</sup> In some situations the ostracized “are more likely to interpret ambiguous situations in a threatening way.”<sup>163</sup> Additionally, the “persistence of the aversive effects of ostracism” lasts longer in those with higher levels of anxiety.<sup>164</sup>

Long before this contemporary sociological research, Howard S. Becker explained “[o]ne of the most crucial steps in the process of building a stable pattern of deviant behavior is likely to be the experience of being caught and publicly labeled.”<sup>165</sup> Once the State catches and labels a criminal, that person attains a “new status,” and is “revealed as a different kind of person from the kind he was supposed to be.”<sup>166</sup> In this way, “being caught and branded as a deviant has important consequences for one’s further social participation and self-image.”<sup>167</sup> For an ex-felon, stigmatization by the State leads to a “drastic change in the individual’s public identity”<sup>168</sup> and is an important influence on the decision to remain law-abiding.<sup>169</sup>

Felons experience a high level of anxiety upon release, and the State makes being an ex-felon a salient societal trait. Thus, in light of past and present sociological research, the potential costs of

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160. Binnall, *supra* note 158, at 79 n.80 (citing PATRICK LANGAN & DAVID LEVIN, BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE: RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002)) (“[I]n 1994, 67.5% of all released inmates were rearrested within three years of release, 44.1% were arrested within the first year and 29.9% were arrested within six months.”).

161. Lisa Zadro, Catherine Boland, & Rick Richardson, *How Long Does It Last? The Persistence of the Effects of Ostracism in the Socially Anxious* 42, in 5 J. OF EXPERIMENTAL SOC. PSYCHOL. 692 (2006).

162. *Id.* at 696.

163. *Id.*

164. *Id.*

165. BECKER, *supra* note 124, at 31.

166. *Id.* at 32.

167. *Id.* at 31–32.

168. *Id.* at 31.

169. *Id.* (explaining that “whether one takes this step (towards a stable pattern of deviant behavior) or not depends not so much on what he does as on what other people do”).

stigmatizing ex-felons are quite high. Civic restrictions help establish these potential costs by contributing to the stigma of being an ex-felon.

#### B. Impacting Morality with Arbitrary Sanctions

Generally, human beings strive to obey the law.<sup>170</sup> Social scientists believe that people choose to comply with the law, "(1) because they fear the disapproval of their social group if they violate the law, and (2) because they generally see themselves as moral beings who want to do the right thing as they perceive it."<sup>171</sup> Though theorists differ as to the importance of each factor in promoting criminal desistance,<sup>172</sup> it is generally accepted that "fear of social disapproval and moral commitment to the law both inhibit the commission of illegal activity."<sup>173</sup>

Additionally, as Paul H. Robinson and Paul M. Darley point out, the law shapes the social norms of society, and thus shapes what behaviors individuals perceive as moral in their quest to do the right thing:

[T]he law is not irrelevant to the operation of these powerful forces. Criminal law in particular can influence the norms that are held by the social group and that are internalized by the individual. Criminal law's influence comes from being a societal mechanism by which the force of social norms is realized and by which the

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170. Paul H. Robinson & Paul M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 468 (1997).

171. *Id.* at 468–69 ("In social science, these two factors are referred to as (1) compliance produced by normative social influence, and (2) behavior produced by internalized moral standards and rules.").

172. *Id.* at 470–71.

Paternoster and Iovanni conclude that "the greatest effects on delinquent involvement are those from informal forces of social control." Meir and Johnson conclude: "despite contemporary predisposition toward the importance of legal sanction, our findings are . . . consistent with the accumulated literature concerning the primacy of interpersonal influence" over legal sanction. Tom Tyler's review of existing studies concludes, "Testing the ability of each of the attitudinal factors . . . to predict variance in compliance . . . the most important incremental contribution is made by personal morality . . . ."

*Id.* (citing Raymond Paternoster & Lee Ann Iovanni, *The Deterrent Effect of Perceived Severity: A Reexamination*, 64 SOC. FORCES 751, 769 (1986); Robert Meir & Weldon Johnson, *Deterrence as Social Control: The Legal and Extralegal Production of Conformity*, 42 AM. SOC. REV. 292, 302 (1977); Tom R. Tyler, WHY PEOPLE OBEY THE LAW 60 (1990)).

173. *Id.* at 470 (citing Harold Grasmick & Donald Green, *Legal Punishment, Social Disapproval and Internalization as Inhibitors of Illegal Behavior*, 71 J. CRIM. L. & CRIMINOLOGY 325 (1980)).

force of internal moral principles is strengthened. That is, the law has no independent force, the way social group norms and internalized norms do. It has power to the extent that it can amplify and sustain these two power sources; it has power to the extent that it influences what the social group thinks and what its members internalize.<sup>174</sup>

Specifically, the law fosters compliance to its own demands in two ways. First, laws themselves “nurture”<sup>175</sup> the social norms of society in that “enforcement and adjudication activities send daily messages to all who read or hear about them. Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender’s conduct and confirms its condemnable nature.”<sup>176</sup> In turn, “[p]eople obey the social norms of their groups because those groups have rewards to give for doing so and sanctions for failing to do so.”<sup>177</sup>

Additionally, “[i]f it has developed a reputation as a reliable statement of existing norms,”<sup>178</sup> the law also influences individual perceptions of morality because “people will be willing to defer to its moral authority in cases where there exists some ambiguity as to the wrongfulness of the contemplated conduct.”<sup>179</sup> Along these lines,

if one regards the law as a legitimate source of rules, if it has what we have called “moral credibility,” then one should be more likely to regard the law’s judgments about right and wrong actions as an appropriate input to one’s own moral thinking; in turn, one should be more likely to obey the law. Further, one should be more likely to support the authorities that promulgated the law.<sup>180</sup>

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174. *Id.* at 471.

175. *Id.* at 474 (“Perhaps more than any other society, ours relies on the criminal law for norm-nurturing. Our greater cultural diversity means that we cannot expect a stable pre-existing consensus on the contours of condemnable conduct that is found in more homogeneous societies.”).

176. *Id.* at 472 (however “laws can contribute to the formation and change of community norms and individuals’ moral reasoning; laws cannot themselves compel community acceptance.”).

177. *Id.* at 469.

178. *Id.* at 474.

179. *Id.*

This is referred to in social science as informational influence—influence produced by the information transmitted by a specific institution, in which one accepts the validity of the definition of right and wrong behavior conveyed by that institution, internalizes that definition, and expects other people to have internalized it as well.

*Id.*

180. *Id.* at 475.

To determine what contributes to the perception that a law is legitimate, Tyler, Casper and Fischer, in a study involving felony defendants,<sup>181</sup> examined the difficulty “political authorities” faced in maintaining “voluntary cooperation from citizens.”<sup>182</sup> They found that “two factors have been suggested as potentially affecting the impact of negative experiences on allegiance: the influence of prior views about law and government and the use of fair procedures during the experience itself.”<sup>183</sup> Researchers found that this perception that “the rules of the game” are fair affects a citizen’s behavior not only at the “national level” but also in their “reactions to their everyday experiences with legal and political authorities.”<sup>184</sup>

The Tyler study suggests that a criminal defendant’s perception of “procedural fairness” is the “crucial feature” in any “regime’s ability to maintain allegiance of citizens.”<sup>185</sup> Though “allegiance during childhood political socialization” represents a “cushion,” softening the blows of a negative experience with the criminal justice system, exercising procedural fairness could determine whether the government can actually maintain citizen loyalty.<sup>186</sup> In short, “the manner in which citizens are treated is a key factor in the impact of their experiences on views about law and government.”<sup>187</sup> In turn, a lack of procedural fairness negatively impacts one’s perception of the legitimacy of the law, reducing the intrinsic moral desire to obey.

### *1. Civic Restrictions as Arbitrary Sanctions*

To determine whether government action is arbitrary, one can look to the benefits of a particular sanction. Though they rarely use cost-benefit analyses when assessing the usefulness of criminal sanctions, policy-makers increasingly look to utilitarian formulas when examining other governmental action.<sup>188</sup> This more frequent

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181. Tom R. Tyler, Jonathan D. Casper, & Bonnie Fisher, *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. OF POL. SC. 629, 645 (1989) (“[R]espondents were marginal members of society, who entered the court system lacking highly supportive attitudes.”).

182. *Id.* at 629.

183. *Id.* at 643–45.

184. *Id.*

185. *Id.*

186. *Id.* at 647.

187. *Id.* at 645.

188. Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 333 (2004) (“[T]here has been a rise in the past two decades of several formal decision procedures, employed across a broad range of federal regulatory policy (with the exception of criminal

use of cost-benefit assessments may stem from “an increasing awareness of how government action reaches beyond its direct objects and goals.”<sup>189</sup>

Performing a social cost-benefit analysis of civic restrictions, “the efficiency objective can be restated as minimizing the total cost (in the broadest sense) of crime and punishment to society as a whole.”<sup>190</sup> Specifically, the analysis focuses on the cost imposed on the non-felon population.

As shown, given the lack of evidence supporting the likelihood that ex-felons would corrupt the integrity of civic processes, societal protection from ex-felons is unneeded. Therefore, the State miscalculates the benefits of imposing civic restrictions when it justifies exclusion by citing a need for protection while the costs of excluding ex-felons go unrecognized.

## 2. How Arbitrary Sanctions Contribute to Lawlessness

When perceived as arbitrary, civic restrictions represent unfair play for the ex-offender. For ex-felons, procedural fairness extends beyond our release from prison, and arbitrary sanctions that the State imposes post-release elicit severe feelings of betrayal.<sup>191</sup> This betrayal “reinforces the debasement so common in the institutional setting and hardens the resentment offenders commonly feel toward society in general.”<sup>192</sup>

In the context of reentry, unfair play leads to reluctance among ex-felons to defer to the moral authority of law.<sup>193</sup> As Herbert Morris

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law) as tools for crafting and choosing among policy options and improving the effectiveness of government action.”).

189. *Id.* at 334.

190. Jeffrey S. Parker & Michael K. Block, *The Sentencing Commission, P.M. (Post-Mistretta): Sunshine or Sunset?*, 27 AM. CRIM. L. REV. 289, 291 (1989).

191. TRAVIS, *supra* note 119, at 259 (citing CHRISTOPHER UGGEN & JEFF MANZA, LOST VOICES: THE CIVIC AND POLITICAL VIEWS OF DISENFRANCHISED FELONS IN IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 183 (Mary Pattillo, David Weiman, & Bruce Western eds., 2004)) One offender related his thoughts as: But I, hopefully, have learned, have paid for that and would like to someday feel like a quote “normal citizen,” a contributing member of society, and you know that’s hard when every election you’re constantly reminded, “Oh yeah, that’s right, I’m ashamed.” . . . It’s just like a little salt in the wound. *Id.*

192. Uggen et al., *supra* note 2, at 296 (quoting NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: REPORT ON CORRECTIONS 49 (Government Printing Office 1973)).

193. Robinson & Darley, *supra* note 170, at 474.

This is referred to in social science as informational influence—fluence produced

notes, arbitrary sanctions have a devastating affect on the morality of those subjected to them; “[a]ny punishment that has as its objective to destroy another’s character as a moral person would, I believe, violate an individual’s inalienable right to the status of moral being even if it were compatible with the retributionist principle of like for like.”<sup>194</sup>

Shown by Tyler to be a “crucial factor” in whether one obeys the law, procedural fairness is not served by arbitrary civic restrictions.<sup>195</sup> Instead, procedural fairness is lost when civic restrictions that serve no purpose prevent ex-offenders from rejoining society. Ex-felons are unlikely to view an unlawful decision as immoral when they view the law as less than legitimate. By contributing needlessly to the formation of stigma, civic restrictions are arbitrary, serve no purpose, and likely impact the decisions of many ex-felons.

#### IV. THE BENEFITS OF ELIMINATING CIVIC RESTRICTIONS

Though civic restrictions are not the sole cause of recidivism, neither are a host of other factors that make readjustment difficult.<sup>196</sup> Reentry is therefore a holistic endeavor. Efforts to promote readjustment and prevent repeated incidence of criminal behavior must center on broad campaigns to both reduce the stigma of a felony conviction and to restore faith in the government, promoting an intrinsic moral desire to remain lawful.

As Link and Phelan propose, changing stigma is a two-fold process. First, any solution “must be multifaceted to address the many mechanisms that can lead to disadvantaged outcomes, and it needs to be multileveled to address issues of both individual and structural discrimination.”<sup>197</sup> Second, and more importantly, efforts to reduce stigma must “address the fundamental cause of stigma” and “must change the deeply held beliefs of the power groups who stigmatize or limit the power of such groups to make their cognitions the dominant ones.”<sup>198</sup>

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by the information transmitted by a specific institution, in which one accepts the validity of the definition of right and wrong behavior conveyed by that institution, internalizes that definition, and expects other people to have internalized it as well.

*Id.*

194. Morris, *supra* note 84, at 46.

195. Tyler et al., *supra* note 181, at 645.

196. See PETERSILIA, *supra* note 3, at 135–37 (noting a multitude of factors that hinder readjustment).

197. Link & Phelan, *supra* note 103, at 381.

198. *Id.*

Just as the law “nurtures” societal norms, it can also have a “diluting” effect on “existing norms.”<sup>199</sup> Eliminating civic restrictions would constitute a significant State message saying, “ex-felons are citizens just like everyone else.”<sup>200</sup> Referring back to the factors for change enumerated by Link and Phelan, such a message would mark—at least superficially—a change in the “deeply held belief of the power group”,<sup>201</sup> that is currently contributing to the stigmatization of ex-felons. Further, allowing ex-felons to perform their civic duties would end structural civic discrimination and partially elevate our place in the hierarchy of citizenship. While eliminating civic restrictions will assuredly have little affect on the individual discrimination all ex-felons face, again, reentry is a holistic process dictating that no one measure will successfully remedy all readjustment issues.

Additionally, because civic restrictions serve no legitimate purpose and contribute to the formation of stigma, they are arbitrary, and their elimination could have a positive impact on an ex-felon’s desire to remain lawful.<sup>202</sup> As Tom Tyler suggests, “the most important incremental contribution” to one’s decision about whether to obey the law “is made by personal morality.”<sup>203</sup> Thus, allowing ex-felons to vote, run for office, and sit on juries creates a sense of procedural fairness that could contribute to an internal moral desire to act lawfully.

## V. CONCLUSION

Those critical of restoring civic freedoms will likely contend that the ability to perform civic duties does not in any way impact criminal behavior. They will undoubtedly point to the ex-felon’s past, noting the State did not civically restrict most of us when we committed the

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199. Robinson & Darley, *supra* note 170, at 473–74 (observing that, when the law serves to dilute existing norms, “it is difficult to untangle how much the criminal law reform followed and how much it led these shifts, it seems difficult to imagine that these changes could have occurred without the recognition and confirmation that comes through changes in criminal law legislation, enforcement, and adjudication.”).

200. *Id.* at 473–74 (noting that lawmakers make various statements by passing laws criminalizing or decriminalizing certain behaviors: “We have seen the process at work recently in enhancing prohibitory norms against sexual harassment, hate speech, drunk driving, and domestic violence. It has also been at work in diluting existing norms against homosexual conduct, fornication, and adultery.”).

201. Link & Phelan, *supra* note 103, at 381.

202. Robinson & Darley, *supra* note 170, at 470–71.

203. *Id.* at 471.

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crime that gave rise to our felon status. Proponents of civic restrictions worry that allowing ex-felons to exercise civic freedoms will cause harm to the large segment of our population without a criminal record. They believe that exclusion serves a legitimate purpose.

However, civic restrictions do not protect society, and they do not embody justice. Instead, civic restrictions exclude ex-felons arbitrarily and are justified by misconception and faulty theory. So what would the State lose by eliminating civic restrictions?

The removal of civic restrictions can only serve to benefit society as a whole. Ex-felons benefit by having to navigate one less obstacle to readjustment and non-felons benefit by living among those who respect the law. By eliminating civic restrictions, the State can welcome ex-felons back into the democratic process by *officially* denouncing stigmatization; thus enhancing the tenets of democracy as “[i]t is liberty alone that fits men for liberty.”<sup>204</sup>

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204. EDGARDO ROTMAN, THE FAILURE OF REFORM: UNITED STATES 1865–1965, *in* THE OXFORD HISTORY OF THE PRISON 180 (Oxford University Press 1995) (citing British Prime Minister W. E. Gladstone).

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