Can post-incarceration restrictions on association be made ethical?*

Evan Misshula

PhD Candidate (Criminal Justice)

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Abstract

This paper constructs an ethical framework for ex-prisoners trying to cope with the sometimes contradictory demands of reentry. The proposal is inspired by the Center for Criminal Justice Ethics' Character Project and seeks to inform the development of character with recent revelations in the health impact of social networks.

1 Introduction

The importance of association with delinquent peers has been acknowledged as both an important predictor of criminal behavior for a long time (Agnew & White, 1992; Warr & Stafford, 1991) and remains an area of active research (Miller, 2010; Warr, 2007). Yet, an increasing body of scientific work has also shown that social networks provide important health benefits for those afflicted with common diseases such as depression (M. V. Smith & Lincoln, 2011; Gillath, Johnson, Selcuk, & Teel, 2011), HIV (Khan et al., 2011) and heart disease (Rod, Andersen, & Prescott, 2011). In the West, post-conviction, we force prisoners to live together in close quarters, often at considerable distance from their friends and family. In judicial circles, friends of the defendant are often called "associates". This separation and segregation essentially defines a prison sentence. Yet there is another critical component to prison sentences in the United States. Different jurisdictions use a variety of terms to describe it. In the federal courts it is called "supervised release" while state courts call this period "parole" or "probation." It is a period of restrictions on liberty where non-criminal violations may result in carcerel sentences.

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2 Timeline of punishment

It is worthwhile to briefly review the timeline of punishment in a typical judicial setting. Before probation/parole and release, there has generally been a period of incarceration. Incarceration (Tonry, 2000) is unpleasant and characterized by:

1. forced labor
2. confined space
3. military discipline
4. uncomfortable furniture and sleeping conditions
5. poor food
6. violence

Yet of all of the myriad of punishments which prison entails, there is no almost no circumscription of your ability to be friends with those around you. The freedom, however, is not absolute. Same sex romantic relations while common amongst both prisoners (Sylla, Harawa, & Reznick, 2010; Jenness & Smyth, 2011) and guards (Kupers, 2010) are, however, expressly forbidden. The rationale for prohibition amongst prisoners is that sexual relations among prisoners may be a security risk for a variety of reasons including the closeness of a sexual bond. The rationale for prohibition between guards and prisoners is that given the enormous difference in power there is no real way to make such a relationship free of coercion. From a practical point of view, prisoners are seen to retain few civil rights and those do not include the right to consent to sexual behavior (B. Smith, 2006).

At the end of the carcerel sentence, we typically have a period of court supervision, where an offender's rights are circumscribed. This period after release which lasts three to five years is called probation, parole or supervised release depending on the court of conviction. These aggregated populations are designated by the US Department of Justice (Glaze, Bonczar, & Zhang, 2010) with the euphemism of "people under community supervision." Common this supervision are the following restrictions:

1. forbidden to travel outside of a given region (*i.e.* NYC)
2. forbidden to take or quit a job without prior permission
3. forbidden to open a bank account or take out a loan without permission
4. forbidden to "associate" with anyone with a prior felony

It is during parole that courts first introduce restrictions on those with whom persons convicted of a felony can be "associated". They can no longer "associate" with anyone previously convicted of a felony without prior permission

from their parole officer. The state takes away the right to make friends as you choose. For thousands of years we have known that this diminishes life. Aristotle sums up the point nicely, "For without friends no one would choose to live, though he had all other goods," (Aristotle, 350 b.c.). Modern Science has confirmed the scientific basis the benefits of this assertion for a wide variety of disease including:

1. depression (M. V. Smith & Lincoln, 2011; Gillath et al., 2011)
2. HIV (Khan et al., 2011)
3. heart disease (Rod et al., 2011)

Yet, the penalties for violations can be quite severe. For example, in the Federal system released offenders are asked to sign forms each month that they have not violated the terms of their supervised release.[1] By making the releasee inform not only on him or herself, the forms introduce a new element. They potentially ask the releasee to inform on a peer. Yet both the officers and prisoners have strong cultural incentive not to inform on those similarly situated. In prison, one often learns that snitching is to be avoided at all costs because it may exact a heavy toll in ostracism or physical violence. Symmetrically guards too have powerful cultural incentives to not report on the behavior of peers (Kleinig, 2001). Those ex-prisoners who are caught violating the association clause can be incarcerated for up to two years for non-criminal violations of supervised release *and* have their term of supervised release extended. Yet, neither the harm to ex-prisoners health and well-being nor the asymmetry of penalties between prisoners (reincarceration) and parole officers (none) are *necessarily* unethical. They could be ethical if they have a benefit to society as a whole and their benefits could not be replicated by a far more judicious use of state power.

3 Problem

There is a large gap between the ideal situation of a restrained and benevolent state and the current state of the judicial system in the United States. First, there are an enormous number of people with a prior felony conviction in the United States. Specifically, there are 16 million working age people in the united states with a felony conviction (Uggen, 2006). This is roughly 8% of the US workforce. Secondly, policing and punishment is concentrated in poor and minority communities (Western & Pettit, 2010) so the burdens are not shared equally, which is a necessary condition for a moral law (impartiality). In Georgia, a court supervises 6.2% of the working age population (Glaze et al., 2010). In poor areas, such as Spanish Harlem in New York City where 5% of the men are under court supervision. This is more that 2.5x the national average (Moore, 2007; Glaze et al., 2010) and would imply almost one in six adults with

[1] The form contains an admonishment that non-disclosure of association can be considered perjury and is subject to a new prosecution with a five year statutory maximum sentence.

a prior felony conviction. Thus making it a statistical impossibility to have a robust social network and not be in violation of the terms of court supervision. These statistics lay bare the current patchwork of prohibitions on association and their haphazard enforcement as morally indefensible.

Moreover as an ethical problem the fact that those they are restricted from *associating* with are typically the same uncles, fathers and brothers and less frequently, mothers and sisters, the very people who have supported them throughout their incarceration, compliance with these restriction severs their relations with people who may well help them lead law-abiding and pro-social lives. It is my contention that parole authorities are fully aware of this problem and have devised *ad-hoc* methods to deal with this court imposed conundrum. For example, parole authorities in New York consistently refer parolees to community based organizations (CBO's) that are staffed primarily with former offenders. (Fortune Society, the Osbourne Association and Exodus Transitional Community are three prominent examples.) While they are being told explicitly not to *associate* with people previously convicted of a felony, at the same time they are being referred by those charged with enforcing compliance to an agency where more than 95% of the employees have a conviction. This presents a conflict and attendant morally ambiguous situation for newly released prisoners.

Parolees are asked monthly about their contact with former offenders. There are many anecdotes to the effect of "the parole authorities will only enforce the condition if they have evidence of other criminal activity." While such a policy may be useful, softening the implementation of a draconian and counter productive policy promulgated by yet another arm of the State. However, because parole officers are well within their rights under the relevant statutes to enforce such conditions more broadly with catastrophic effects for the former prisoner and their family, former prisoners remain at risk and suffer the stress that such a risk exacts. Instead of making it easy to do the right thing and follow the rules, the State has made doing so a virtual impossibility.

While this situation forfeits the value of friendship for both parolees and the previously convicted friend or relative by making the situation awkward from the onset. Imagine if you had the obligation to announce to any new acquaintance, potential friend, employer, colleague, fellow congregant, student, professor, mentor or romantic partner, "Hi (fill in the blank), I am currently under court supervision for a prior felony. Do you have any prior convictions I should inform my PO about?" It also forfeits the (hedonic, political, social or economic) value the friendship might provide to the person not under court supervision and all of the people that might be affected by that person in subsequent interactions. The serious argument in favor of such restrictions might be that a connected parolee is likely to make more problematic connections than a similarly situated non-convicted person and connected groups of ill-inclined individuals are capable of causing great harm. We will examine the important ethical limitations to this argument. Yet, even granting maximal power to the aforementioned argument, the situation on the ground is simply indefensible.

Parole and/or probation has existed in its current forms for more than a hundred years(Vanstone, 2008). Yet, the enforcement is of these provisions is

largely haphazard. Virtually all parolees and probationers violate them repeatedly (including those trying hardest "to go straight"). They violate them because "going straight" has largely come to mean obtaining legal employment and/or going to school. This inevitably puts those succeeding into contact with a wider social circle in entry-level jobs filled with and supervised by those previously convicted of a felony. It is sometimes convenient for authorities to ignore this fact.

We could not imagine the government saying, you are not allowed to be friends with anyone who is poor, black, homosexual or homeless because these are protected classes. Felons enjoy no such protection even though there are 16 million of them. Moreover if laws are not applied equally and virtually unlimited discretion is solely held by those charged with enforcement. It is simply impossible to follow the rules so violation becomes a proxy for, in the best case, being thought dangerous by your probation officer and in the worst, being considered annoying. It is even more cruel that the timing of this restriction on liberty comes at the end of incarceration. In prison, as in life, friends are an essential part of survival. They help one pass the time and allow one to mitigate the stresses of isolation. Yet just as the worst part of punishment ends this new insidious restriction is imposed. One interesting irony is that while both Aristotle amongst the ancients had a keen appreciation for the value of friendship and modern science has come to appreciate its power, many of the subjects of this punishment are unaware of the terrible difficulty and cost of compliance to this restriction.

Another interesting question, treated in the rest of the paper is, can these restrictions be changed so they are consistent with ethical principals. This would need to be done, despite having imperfect information about the nature of the friendships and familial relationships, the intents of the parolee and the potential connection and the reality that there will always be imperfect monitoring and recall in reporting. We begin by examining the ethical nature of friendship, briefly discussing the philosophy of supervision and then moving on to the duty of the state to protect the innocent from danger. Through careful examination of these competing arguments, we then construct both a measure of what such restrictions should achieve and how to accomplish this.

4 The ethical nature of friendship

The classic discussion of the philosophy of friendship begins with aa discussion of Aristotle's Nicomachean Ethics. There are several points that Aristotle makes that are of direct import to the arguments treated here. First, Aristotle asserts, "For without friends no one would choose to live, though he had all other goods." Here Aristotle argues for the intrinsic value of connection. We need not resort to instrumental arguments about health outcomes. Friendship has in itself, powerful hedonic worth. Yet, worth to the individual is only the first of friendship's virtues. Furthermore, as Aristotle develops the nature of friendship he classifies friendship and argues that "Perfect friendship is the friendship of

men who are good, and alike in virtue; for these wish well alike to each other qua good, and they are good themselves." It would seem irrelevant since we are talking about friendship amongst people who have already been convicted by the state and labeled not as good, but as bad. Yet we know that not all men and women convicted by the state are bad. Martin Luther King, saw the inside of many prisons in his protests for civil rights. How would the marches have been organized if all of the Southern Poverty Law Center could not talk to each other because of prior convictions? There is another flaw in Arisitotle's characterization of friendship that Schoeman (1985) most directly confronts,

> that it becomes us to be a friend, to exhibit the virtue of it means to a person to be a friend. It affects a person's essence to become a friend in two ways. It fulfills the person's social character, and it does this by fundamentally altering his sense of value in such a way as to create both meaning and conflict at the deepest levels. The potential for such conflict is at the very heart of friendship

We will return to this important conflict many times in the nature of friendship. Suffice it to say that I would argue that allows even less than perfect people an opportunity to exercise their better selves for Aristotle argues that, Friendship is a call to "wish well to their friends for their sake are most truly friends; for they do this by reason of own nature and not incidentally;" Or as Schoeman (1985) says "Friendship is a disposition to act and feel with another's good in mind and to do so on the basis of a sense of connectedness with the other." Schoeman also claims that the effects of friendship "contributes to a desirable state of character" are an important instrumental benefit of friendship, but since it is not concerned with the outcome of the friend it is not essential to friendship itself. I disagree with this characterization because the extent to which friends influence each other for good provides hedonic enjoyment to each other and a better world for those not directly affected. Sherman (1987) also comments on this point on how people become friends, "by giving each greater opportunities choice, and greater means for the realization ends. These means may include scarce of as material (perimachata) resources, as Aristotle suggests here,but they may non-material goods, such as support and esteem" No doubt these psychological goods also make us stronger as people in important ways. This view while popular, is not universally held. Kant particularly would see friendship as unecessary for moral life, but a pleasure with deep trouble lurking beneath(Sherman, 1987), "Kant is deeply skeptical about the practical possibility of such intimacy (how will we know what the other really thinks)." Here Kant (1971) concludes by urging distance and respect. It is deeply antithetical to an Aristotielian notion of friendship. In fact Wood (1999) argues that for (Kant, 1996) too much love, too much familiarity and too much openness are all threats to friendship.

This is not to argue that friendship is morally unproblematic. It like other virtues can present dilemas which Aristotle is hostile twoard. Ignoring them does neither resolves them nor eliminates them. However, Aristotle's argument here is that friendship is a good of an ethical nature. In this sense, I find Kant's

treatment unpersuasive. Friendship is both essential and problematic. The State denies the parolee's very human nature by legislating against friendship.

Yet we deny this private benefit based on a prior legal judgment whose punishment has ostensibly been paid.[2]

4.1 Friendship as a virtue

Unlike Kant, then, Aristotle does not merely permit attachment within theory morality constituted primarily by impartiality. Rather, he makes attachment essential the expression virtue. Living with friends is structural and a feature good living. Perhaps this is why the law chooses to treat friends as utterly fungible and disposable. Yet if friends are not a luxury but a necessity for life, we should no more deny a person friends than we would deny them medicine, food or education. Each one of these makes a person stronger and more effective. A healthy, educated and well-fed person can do more harm than a sickly and unskilled one. But the well-fed and skilled one has far less material motivation to do harm in society since they can reach reasonable goals with far less effort.

4.2 Friendship as a challenge to morality

However, it is not just noble associations that make demands on its members. There are also criminal networks and cliques that use loyalty and friendship to motivate their members to commit anti-social acts. In fact, there is much more to fear from criminal networks than a group of the same size of individual criminals. Financial conspiracies can cost the economy literally billions of dollars. Narcotics smugglers can bring tons of dangerous drugs across the border and protect their positions with literally thousands of murders. Finally, terrorists by virtue of their deep loyalty to eeach other and propelled by radical ideas were able to cause billions of dollars in damage and take more than 3,000 lives on 9/11. Yet, the state's current policy of banning all friendship between those convicted is not moral and does not impede those bent on doing harm. The question is how can we focus the effort of the state most directly on those willing and able to do harm.

5 The purpose of punishment

Many philosophers have treated punishment and its purpose. Kant famously defended retribution even if it is without any utilitarian point.

> Even if a civil society resolved to dissolve itself with the consent of all its members- as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world- the last murderer lying in the prison ought to be

[2] For an economic analysis advocating fines based on a rational expectations model of crime, one should consult Becker (1974).

> executed before the resolution was carried out. This ought to be done in order that every one may realize the desert of his deeds, and that blood-guiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.

While Bentham and others looked at the consequences of punishment. Would some use be served by either exacting or threatening punishment. Does punishment deter crime? Does it teach a moral lesson? Does it serve to separate us from the offender? In the end the United States has adopted no single philosophy of punishment. It defines the statutory purpose of sentencing as a bit of each (Commission, 2011):

> [S]tatutory purposes of sentencing, including promoting respect for law, providing just punishment for the offense, achieving general deterrence, and protecting the public from further crimes by the defendant.

It seems odd that respect for their own institution would trump the public they are meant to serve. The other objectives seem to be retribution, deterrence and consequentialism. However, the US Sentencing Commision argues the distinction scarcely matters because (Commission, 2011),

> Some argue that appropriate punishment should be defined primarily on the basis of the principle of "just deserts." Under this principle, punishment should be scaled to the offender's culpability and the resulting harms. Others argue that punishment should be imposed primarily on the basis of practical "crime control" considerations. This theory calls for sentences that most effectively lessen the likelihood of future crime, either by deterring others or incapacitating the defendant....however, this choice was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results.

Of course their claim is an exercise in pure sophistry. The Sentencing Commission is implicitly defining a complicated set of consequentialist and deontological notions. They are not making a clear argument what penalties would be the outcome of which set of opposing notions. They are simply stating that they would be the same. It is a proof by authority and the language suggests that it would be a fool's errand to try. I would argue that these distinctions matter a great deal and would produce vastly different penalties for the long term victim of domestic abuse accused of homicide or the small time drug offender. However, they at least acknowledges that punishment should have a purpose.

5.1 The rights of communities

One of the intrinsic moral problems include the diminution of relationships for those not under supervision, who have long ago served their sentence and their

own parole. They presumably have repaid their entire debt to society. Here, I am concerned with the rights of the father, uncle, brother who cannot interact with the releasee without endangering him or her. You see the ban works both ways. As a former offender *not* on supervision, they cannot associate with their recently released relation. This abridges former offender as a collateral consequence of incarceration. The sentence is implicit and *ex-post*. The penalty is not determined by my actions but by the number of my relatives arrested and prosecuted. The objector may state may counter that my rights are not violated because the state takes no action against me for the violation. This however ignores the essence of a beneficent relationship. I want to associate with my son, brother, nephew or mother because I wish to help her not harm her. If the state punishes her because of her association with me, then in the spirit of beneficence I will avoid her just as she needs me most. Because the punishment attacks the relationship, it necessarily punishes both of us.

On a related point, there is also a moral problem in the consequences for the children of the person under supervision whose freedom of association and material comfort is diminished as consequence of their parent's restriction on fully associating with their family. Children have a right to as full a family as the parent can provide without interference from probation officers. Here again, the objector may argue that any incidental problem could be cleared by petition to the supervising agency or as a last resort the court. This is to willfully ignore the enormous power gap between the officer and the releasee. It also misunderstands the nature of familial interaction which for many is not merely some long planned family reunion, but also the impromptu babysitting of a sick child.

Individual injustices also accumulate in an exponential rather than linear fashion. Here, the individual wrongs combine with the problematic effects of differential policing, whereby an out-sized number of those of ethnic and racial minorities are prohibited from having basic social and familial relations as a consequence of so many of their peers being ensnared in a system that disproportionately targets them. Though we should not pretend that this is the most severe problem poor people from racial minorities face in the United States today, it does work to diminish minority communities' important political rights. Also, at a macro level, the effect of so many families not being able to fully integrate their members who are under state supervision is diminished economic and political efficacy. Finally, the inability of the releasee to form and respond to non-criminal social interaction in natural way without fear of running afoul of the state is a plain moral wrong.

5.2 Anti-fraternization prohibitions

One of the little known collateral consequences of incarceration is the inablility to socialize with sworn officers and members of the intelligence community. Many police departments and sheriff's office (the administrator of jails and prisons) require that their officers refrain from associating with anyone previously convicted of a felony. These policies originated in armies. Although most may

recall prohibitions on "fraternizing with the enemy," (Goedde, 1999) there are a variety of other anti-fraternization policies common in the millitary. Officers and enlisted people are not allowed to fraternize. In some modern sense it has morphed into sexual harassment policy (Clemmitt, 2009) but its origin is to keep some seperation between the commanders and their subordinates. It is possible that commanders may have to command some soldiers to near certain death. Favoritism would clearly undermine morale and discipline in such a situation. Police forces sometimes consider themselves to be para-millitary rather than civilian organizations.

This presents several ethical problems. It may seem a remote possibility but many felons and officers of various types are related. Since the prohibition never ages, (it does not matter how long ago the felony conviction was) felons may be denied care because their relation either is an officer or lives with an officer. Although there are many cases available where police officers have sued with mixed success to reclaim their jobs ("Fired Miami Officer May Return to Work - AR15.Com Archive," 2007; "A new Dallas Police Officer may never again 'hit the streets' in uniform - Dallas City Buzz | Examiner.com," 2010; "Chattanooga Police Officer resigns over connection to biker gang," 2004), the more interesting cases may involve the suppression of important political and policy issues ("Council wants new rules for police conduct : News-Record.com : Greensboro & the Triad's most trusted source for local news and analysis," 2009). In this case the officer simply appeared alongside a political figure (previously convicted) arguing against systematic harassment of Latinos. Although this is common in large cities such as New York where police and prosecutors often appear in public forums with previously convicted persons.

The Greensboro police department then moved to have him fired for "cavorting" with a known felon. Yet most of the prohibitions on association have been upheld if the policy predates the incident, is specifically written and uniformly enforced. However that is a matter for practice ("American University: Policies prohibiting Staff-Felon Relationships," 2006). Our issue is slightly different. The issue is should they be? Courts have both in majority and minority opinions have agreed that it infringes on the rights of officers and ex-offenders but have weighed the benefits in favor of the governmental agency that employs the officer. I disagree. If officers are uniformly prohibited from interacting with a substancial percentage of the people they serve it is no wonder that the cultures of officers and minority communities are so of ten hostile.

It is also important to note that the intelligence agencies take the same attitude when evaluating top secret clearances. Maintaining such a clearance is a predicate for continued employment so any association with a felon subjects the holder of such clearance to loss of their livlihood. By prohibiting these relationships the State preempts the possibility of mutual understanding and instrumental assisstance. In fact in one case the *Bautista v. County of Los Angeles* (2010) 10 CDOS 15104, the court disregarded the material result of the relationship, that the officer helped a woman out of a life of crime. It instead found that the department suffered damage because it "lost prestige in the eyes of other law enforcement agencies" ("Rains Lucia Stern, PC - Recent Appellate

Court Decision Discusses A Police Officer's Right of Association With Others While Off Duty," 2010).

5.3 The purpose of supervision

Where community supervision is concerned there is at least more of a glimmer of coherence. In determining whether or not to impose the sentence, the court is apparently guided in a consequentialist direction (Commission, 2011):

(A) Statutory Factors.In determining whether to impose a term of supervised release, the court is required by statute to consider, among other factors:

(i) the nature and circumstances of the offense and the history and characteristics of the defendant;

(ii) the need to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

Here there are no references to the need to provide "just deserts." Retribution has already been taken. There is a requirement to look at the needs of the offender and weigh the potential harm to society from unfettered freedom. It is precisely this balance that an ethical restriction on association can weigh and still be a just law.

6 Instrumental problems caused by the ban on association

In addition to the intrinsic moral problems, there are a number of instrumental problems. Part of the reason that probation officers refer parolees to community based organizations staffed by ex-offenders is that it is no secret that they are far and away the best people to help newly released parolees; particularly with the difficult task in finding gainful legal employment. For this population an increasing number of companies perform background checks and use those as a way to exclude people from the labor force when they can which creates an additional burden. Finding those employers willing to take a chance on a newly released prisoner requires special knowledge and skill, not easily reproduced by the official probation agencies. Enforcing the prohibition on association against them would make the probation officers' jobs more rather than less difficult. As former commissioner Marty Horn has said,"A job is the best PO there is. I know where he is five days a week."

Another instrumental problem is that former prisoners know how to assemble other safety net resources of which probation offices are not aware for the releasee. These include medical care. Untreated medical conditions such as HIV and Hepatitis create additional burdens for the state not merely at emergency

rooms for treating the releasee but also the possibility of infection for those living with the released prisoner. In fact there are a number of CBO's (including the College Initiative) that have recieved funding for mentoring from the US Department of Justice itself to start mentoring programs between the formerly incarcerated and the newly released. Such a program, however wise, would seem risk causing a cascade of technical violations.

7 Actual revocation cases

However, as I have already stated many parole and probation officers frequently ignore these violations. So where is the need for more improvement? While many do, not all do. One interesting case is US v. Napulou[3] where the US tried to revoke the supervised release of a woman for associating with her "life partner." The district judge felt that because of her criminal justice history Napulou's life partner would lead their relationship to devolve into violence. From the facts of the case, their was surely some risk of this. However, both because of the preemptive nature of the ban and the determination by the apellate court that a life partner was a "particularly significant liberty interest," they vacated the judgement and remanded the case back to the district judge. Another continuing case is the case of case of community activist Freeway Ricky Ross. Ross after serving a long sentence for drug distribution[4] chose to work mentoring troubled youth ("Exclusive: Freeway Ricky Ross Facing Jail Time For Alleged Probation Violations AllHipHop.com," 2011). Ross has large following within the African American music community and retains a large net worth. In many ways, he may be the archtypical annoying parolee. His net worth is in excess of $20 million and he pals around with a variety of Hollywood celbrities looking for credibility with an urban audience. After his picture appeared in a local paper for his work, his probation officer began revokation proceedings against him. I believe these counterproductive cases could be avoided if we simply changed the rules by making them more situationally dependent.

8 The state's duty to protect the innocent

So why should we not abandon all post-incarceration restrictions on association? There is a danger posed by offenders that is statistically greater than the danger from those not convicted (Blumstein & Nakamura, 2009). This means that the State is well within its moral obligations to ameliorate such a threat. However, if it is going to curtail freedom based on the perspective risk to innocents it owes those who fall into that class to make the least intrusive abridgement of their freedoms. Again the restrictions are not because as an offender has transgressed. There is no claim that it is a just punishment that you lose the right to make

[3] US v. Napulou, No. 08-10190.

[4] He only avoided a life sentence because the sources of his cocaine were tied to the Iran-Contra affair(Webb, 1996).

friends. The argument implied is that the State needs "to protect the public." Obviously this is a just duty of the state. We raise an army to repel foreign threats and simmilarly we organize a police force to protect us from domestic threats. In this case the threat is preemptive. I would argue that the State owes a great duty to mitigate the harms from the singling out of one group. In fact, statistical evidence only shows that prior conviction is associated with a higher rate of future arrest. It does not prove causality. There are many other groups that have a persistent statistically significantly higher liklihood of being involved in future crime. None of these groups is subject to *de-jure* monitoring of their social connections. To be explicit, homicide rates for African American males in 2008 were 7 times that of white males (Cooper & E. Smith, 2011). Few would suggest that a serious premptive program be put in place to monitor the friendships of African American males. I would argue that such a program would not meet the test of benevolence and be overly broad. It fails to meet the test of benevolence because it offers a large punishment, presumably the same incarceration of up to two years for an offense without any simmilar benefit for those affected. It is overly broad because only 9% of people under community supervision exit their supervision with a new sentence and the rate of African American male homicide is much smaller than that (Cooper & E. Smith, 2011; Glaze et al., 2010).

9 Can we make it better?

If we accept the principals that any restriction on association must be made minimally invasive, we can begin to design a replacement for today's wholesale ban on association. As a starting point we begin by reviewing the literature on motivation for crime. Criminological theories take a wide variety of implicit moral stances on the actions of offenders. Some prominent theories see offenders as fundamentally morally inferior. These include self-control (Gottfredson & Hirschi, 1990) and biological theories (Wright & Beaver, 2005) while others see offender action as a normal and proper response to their disadvantaged situation (Wacquant, 2001). The most prevalent are a middle ground where the actions are seen as understandable if not excusable include labeling theory (Lemert, 1974), conflict (Hagan, 1988) and situational action theory (Wikstrom & Treiber, 2007). However there has been little philosophical work on the intrinsic and instrumental problems on state restrictions on association.

10 The proposal

The prior treatment of friendship has discussed some of the grave problems that are created by the current policies on association of persons under community supervision. However no serious paper on this question could end without a forming a potential solution to these problems. Any solution must acknowledge that administrators will never have perfect powers of observation or judgement.

That said, I believe that we can easily bifurcate friendships into pro and anti social types. We should not run from this. If the recent releasee is involved with an active target of an investigation they ought to be warned. This presumes that they can be without jeopardizing the investigation. Fundamentally, friendship comes with expectations. Releasees and others ought to be taught that friendships are easiest to maintain when the expectations of the participants are in accord. If you are making friends with someone who expects you not to tell about their illegal drug distribution business. That is a problematic friendship. Moreover, it is problematic whether or not the person you are friends with is an ex-prisoner or a police officer. The concept is ancient. It is Aristotle's notion of perfect friends. This should form the basis of our policy.

Specifically, friendships that encourage civic engagement and employment should be encouraged. The objector might argue that all relationships will appear beneficent but they are not so. If a relationship is not then it must show its nature through action not mere appearance. Detection should be based on behavior not mere existence of a relationship. If the non-releasee is actively involved in crime, then the State is able, obliged and funded to arrest and prosecute them. If not, then the relationship should be assumed to be beneficent. Moreover relationships have a context. Friends arise from shared locations and activities. Those are important. Is this friend from work or from a poolhall? A parole officer is charged with knowing. It is easier if they are told by there releasee but again, they are funded and charged with verifying independently. On the whole, friends made in pursuit of an honorable life should be encouraged.

(a) family

(b) employment

(c) church

(d) political

(e) education

Those friends should be encouraged even if they are prior offenders (maybe even more so). People need to be integrated into a community not ostracised. If the decision has been made that the releasee has paid their debt then treating them as a second class citizen does not serve to protect the public. It serves the interest of the police agency. If the friends are encouraging or leading the releasee to a criminal lifestyle then s/he should be prosecuted not simply violated.

11 Conclusion

The uncertainty and legal jeopardy created inhibits the newly released individuals non-criminal social and political interaction this serving as a burden to the individual directly and those of his community by extension. All of these arguments need to be balanced by the reality that social networks can create the

conditions for harmful crimes from which the State has a duty to protect the innocent. I simply argue that by carefully researching and weighing these conflicts the State can improve over than the *ad-hoc* muddling that occurs now. I believe that it is possible to develop a simple checklist whereby both the parolee and the officer can know if an interaction appears problematic, well short of a blanket prohibition. Association by itsellf may not be *moral rule breaking* but it is at times and for certain classes of people treated as a criminal violation by the state. Additionally, if this proposal is enacted it would give both sides of criminal justice system the chance to explore the reality each other faces. I believe that this essay clearly demonstrate the ethical problem with what the state is asking of its former prisoners. It is my hope that this essay may influence both the rule making institutions (courts and parole boards) and the enforcement agencies (parole and probation) to ask more subtle questions and perhaps clarify their policies. Specifically I hope this serves as an implementable policy that reduces uncertainty.[5]

[5]I completed a three year term of supervised release on July 17, 2011. During that time, I faced these issues both professionally and socially.

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