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Claremont McKenna College

Suffrage Over Suffering:

How Disenfranchisement Erodes the Legitimacy of Democratic Punishment

Submitted to

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Introduction

Whether you listened to Schoolhouse Rock like I did, or are just a history buff, you know that the preamble of the United States Constitution begins with three crucial words: We the People.¹ From the founding of the United States to almost every action since, the people (or some portion thereof) have held the reins of the nation. This arrangement has been made possible by representative democracy. When establishing the United States, the founders believed it to be of paramount importance that the public had the right to self-govern in order to prevent the taxing tyranny under which the colonies suffered. Unfortunately, this right is denied to millions of Americans today, resulting in a new, surreptitious but pernicious form of civic oppression. There is large number of U.S. citizens who are exempt from the founders' ideal of freedom from tyranny.

I speak of the U.S.'s 6.9 million prisoners and un-incarcerated felons who are barred from exercising their constitutional right to vote.² While it might seem clear to some that it is unjust to deny citizens their right to participate in their democracy, others have conflicting sentiments. After all, this specific group of society was not arbitrarily selected: they assailed either their fellow citizens, their democracy's dictates, or both. Extensive writings have been dedicated to responding to this argument, and I wish now to make a novel contribution. While countless authors before me have argued that felon disenfranchisement is unnecessarily harsh, I will argue something different: that it undermines the very exercise of punishment itself.

Why is my thesis necessary? Have not myriad philosophers already made my point? I contend that, although their arguments are strong, they have not defeated the case for disenfranchisement as punishment entirely. To support this contention and introduce my argument

¹ The Constitution of the United States of America. Preamble.

² Ibid, Article II Section I. Article XII. Article XIV.

against felon disenfranchisement, my thesis includes three chapters. Chapter One will lay the groundwork for an understanding of the major retributivist and consequentialist justifications for punishment. By understanding punishment, one can better understand the arguments of disenfranchisement's proponents; we must know what punishment is to accomplish and how disenfranchisement does so. Chapter Two will contain critiques of the case for disenfranchisement but will reveal that these critiques do not defeat it entirely. Seeing that disenfranchisement still stands, chapter three will offer my own argument with the hopes of knocking it down in the name of proper punishment. If a democratic government is to be of, by, and for the people as President Lincoln famously noted, then its punishment policies should reflect this. While felon disenfranchisement persists, it does not.

Chapter 1: Why Do We Punish?

Much of the discourse surrounding felon disenfranchisement has been centered around whether it can be justified as a form of punishment. Punishment in this paper refers to a burden or deprivation imposed with legitimate authority by a state in response to the commission of an action that has been deemed a crime by said state. To best understand how disenfranchisement can be imposed as a form of punishment, it is necessary for us to understand the principles which motivate punishment broadly. Because there are myriad justifications for punishment, we must explore those which dominate discourse: retributivism and consequentialism.

Within these two major schools there are several more specific bases for punishment. I will examine these bases individually, paying careful attention to the strengths and weaknesses of each. After exploring the shortcomings of both consequentialist and retributivist accounts, I will explore how best to ameliorate them. To do this, I will continue on to give a mixed account of the two in with the hopes of combining the best of both views. In doing so, I hope to yield one cohesive, plausible justification for punishment. With a full understanding of this mixed account, we can proceed to the second chapter, in which I will consider whether this stronger justification can countenance disenfranchisement.

Retributivism

Retributivists believe that punishment is inherently appropriate because criminals deserve to be punished. Positive retributivism is the theory that criminal action qualifies offenders for necessary punishment. This is to say that criminal action is sufficient to warrant punishment. Negative retributivism, on the other hand, is a constraint. It holds that nobody who is innocent deserves to be punished. Because they do not deserve punishment, innocent people should not ever

be punished. These two constraints taken together serve as a starting point from which to answer an important question for our normative framework of punishment: why should criminals be subject to unwelcome burdens? Retributivists answer: because they deserve it. Because there is a need to calculate much punishment a criminal deserves, retributivism is centered heavily on ensuring that punishments are proportionate to the crimes they address. Although this proportionality constraint does not have a moniker like the previous two constraints, it is intended to lend a helpful measure of even-handedness to retributivist accounts.

There are several different iterations of retributivism, all with distinct ideas of what acts deserve to be reprimanded and why doing so fulfils the deontological obligation to punish. I will discuss the unfair advantage account, the moral debt account, the appropriate emotions account, and the social contract account. I have chosen these because they are the most commonly discussed forms of retributivism. After discussing these accounts, I hope that we may better understand the prevailing schools of thought which underlie retributive punishment.

The Unfair Advantage Account

Why are criminals deserving of punishment? Michael Davis argues that, by breaking laws, criminals capitalize on the self-restraint of law-abiding citizens, giving them an unfair advantage.³ They reap the benefits of collective respect without shouldering the burden of self-discipline.⁴ It would be unfair for the people harmed not to correct this unfair advantage. The duty to correct this unfair advantage motivates the criminal justice system. This argument, it should be noted, does not invoke the inherent immorality of a criminal act as justification for punishment. In other words,

³ Davis, Michael. (1993). Criminal Desert and Unfair Advantage: What's the Connection?. *Law and Philosophy*. 12. 133-156. 10.1007/BF02346476 Pg. 134

⁴ Ibid Pg. 135

according to the unfair advantage argument, criminal acts are wrong not because they are harmful per se, but because they disrespect their subjects and violate the state's conception of fairness. Criminals deserve punishment because they have cheated, and punishment is a means of correcting the inequality created thereby.⁵

The Moral Debt Account

Still some, like Daniel McDermott, appeal to the idea of moral debt. In wronging a fellow citizen, a criminal incurs a moral debt which they are obligated to pay their victim and/or society.⁶ Similar to the unfair advantage account, this account holds that the wrongdoer is indebted to the one wronged. In the context of legal punishment, the criminal pays their debt by undergoing some hardship mandated by the state. In cases where both the individual and the society are harmed, the state claims the authority to mete out punishment and neutralize the debt. McDermott believes that moral goods cannot be given back to those from whom they are taken, and that a stolen moral good is undeserved.⁷ Because a criminal possesses a moral good that they do not deserve, they must be deprived of this moral good even if they cannot return it to the person from whom it was stolen.⁸

If a criminal steals from their victim, and their victim dies, they are not entitled to keep the stolen item even if they cannot return it. This is how moral debt and unfair advantage theorists see crime. Criminals have taken something (i.e. a moral good or an unfair advantage) that they cannot keep even if they cannot return it to its rightful owner. Punishment deprives criminals of the thing they have stolen; even if they cannot return it, they do not deserve to keep it.

⁵ Ibid Pg. 150

⁶ McDermott, Daniel, *The Duty to Punish and Legitimate Government*. The Journal of Political Philosophy: Volume 7, Number 2, 1999, pp. 147±171

⁷ Boonin, David. "The Consequentialist Solution." Chapter. In *The Problem of Punishment*, 37–84. Cambridge: Cambridge University Press, 2008. doi:10.1017/CBO9780511819254.003 Pg. 150

⁸ Ibid Pg. 151

The Appropriate Emotions Account

Another justification for retributivism can be found by consulting appropriate emotions. It is appropriate, under the view of Michael Moore, that people hunger for revenge and are sated by seeing justice served through punishment.⁹ These emotions are the only heuristic we have for understanding what acts are right and wrong or just and unjust. This adaptation of retributivism appeals not only to logic, but to intuition and does not aim at some further goal, but at punishment itself. Punishment may incidentally serve to quell anger, but that is not its goal; it is simply an insight into why it is intuitively justified.

The appropriate emotions account also maintains that righteous emotions can motivate us to act virtuously. If, for example, one were to place themselves in the shoes of a murderer, they could consult the amount of guilt they would feel at their actions to calculate what sort of punishment they deserved.¹⁰ Likewise, others can carefully consider the nature of a given crime and consult their intuition when deciding whether and how severely something ought to be punished. The view can be summarized thusly: although emotions are not always a perfect metric for determining whether or not something is punishable, they are the best guide we have. This guiding force can easily lead citizens to believe that those who commit heinous crimes ought to be reprimanded.

The Social Contract Account

⁹ Moore, Michael. (1988). "The Moral Worth of Retribution." In F. Schoeman (Ed.), *Responsibility, Character, and the Emotions: New Essays in Moral Psychology* (pp. 179-219). Cambridge: Cambridge University Press.
doi:10.1017/CBO9780511625411.008

¹⁰ Moore. "The Moral Worth of Retribution." Pg. 213

Another common form of retributivism draws upon the idea of a social contract for support. Philosophers like John Locke,¹¹ Thomas Hobbes,¹² and Corey Brettschneider¹³ have subscribed to the idea that all societies are, in a sense, a social contract between citizens, their state, and each other. Citizens give the state authority in exchange for a hand in crafting the state's policies. They also agree amongst themselves that they will respect one another's rights in exchange for having their rights respected in turn. Under this view, punishment is the consequence of breaking this social contract. While Locke's social contract theory allows for the imposition of punishment under the law of nature, the social contract compels citizens to surrender their right to punish to the state.¹⁴ According to a contractual account, criminals deserve to be punished not because they have taken an advantage or because intuition demands it, but because they are in breach of a sacred agreement.

Retributivism's Weaknesses

Although retributivism's reasoning is straightforward, it becomes complicated when disagreements arise about the details. With the simple precondition that only the guilty are to be punished, it is difficult to find consensus as to how severe punishment should be and what form it should take. While the proportionality constraint seeks to guide retributive accounts toward just outcomes, controversy still arises when retributivists attempt to determine what proportionality entails. Because each justification of punishment is unique, each account faces distinct challenges.

¹¹ Locke, John, and Peter Laslett. 1988. *Two Treatises of Government*. Cambridge Texts in the History of Political Thought. Cambridge England: Cambridge University Press. Pg. 140

¹² Hobbes, Thomas, and J. C. A Gaskin. 1998. *Leviathan*. Oxford World's Classics. Oxford: Oxford University Press. Pg. 89

¹³ Brettschneider, Corey (2007). The Rights of the Guilty: Punishment and Political Legitimacy. *Political Theory*, 35 (2):175-199. Pg. 176

¹⁴ Hobbes. *Leviathan*. Pg. 89

If we understand the shortcomings of each view, we can understand better how best to remedy them.

Unfair advantage seems straightforward in theory, but it can become difficult to understand in practice. It is easy to see how theft involves exploitation and confers undeserved benefits, but it is more difficult to see how a relationship of advantage is created in the case of murder. Yes, the murderer is advantaged over their victim, but over whom else do they hold leverage? It is also difficult to see how punishment corrects this advantage. It seems that, if a victim of a crime is in a disadvantaged position, that punishment only serves to correct the inequality by decreasing the criminal's level of utility. Not only does this result in net loss of utility, but it does not elevate the victim to a status of equal advantage with their fellow citizens. In many cases, there is no way to give the victim back the advantage that was stolen from them.

It also seems peculiar that a shoplifter would be advantaged over a CEO due to their act of theft. The employees and the company could likewise be in a position of unfair advantage over the criminal even after the crime. It would be difficult, therefore, to see who is victimized by shoplifting from a chain store if unfair advantage is the metric by which criminal desert is measured. Clearly, the criminal has broken shirked social obligation not to steal, but they could still be (and often are) still at a steep disadvantage compared to their fellow citizens even after they commit a crime.

The appropriate emotions account seems to be able to justify torture as a punishment for numerous crimes. It is easy to imagine how a population, whipped into a frenzy by their retributive impulses, could mandate overly severe punishment. If appropriate emotions are the sole metric for measuring whether and how something should be punished, a society could easily countenance puritanical witch burnings and ostracization of adulterers. After all, the population could look into

their hearts and find nothing but disdain for the very human criminals they seek to punish. This is to say nothing of the difficulty of disentangling pernicious biases from one's emotional calculus. Under the appropriate emotions account, a group of people could mistakenly believe that their emotions are appropriate and implement draconian punishments fueled by what they believe to be a properly proportional righteous rage.

The moral debt view is just as vague as unfair advantage in its measurement of criminal desert. It is very unclear how punishment has anything other than negative consequences. Perhaps the sight of the perpetrator in pain offers the victim the peace of mind that the perpetrator disrupted. It is morally repugnant, however, to revel in another's suffering, so to use this as a justification is excessive and unjust. More importantly, however, there is also no way to show that the debt has been repaid afterward. Moral debt is such an imprecise metric that there is no way to calculate what suffering must be borne for a moral debt to be repaid. Because of this ambiguity, a proponent of either moral debt or unfair advantage theory could claim that such a punishment is deserved. There is, of course, the constraint of proportionality in this view as well: a debt should not be overpaid in the same way that an advantage should not be overcorrected. This metric, however, can easily yield dubious punishments. One could argue that murderers ought to spend the rest of their lives in solitary confinement or receiving intermittent torture, since it is so difficult to calculate the cost of a human life. Likewise, if they have a change of heart and progress towards moral rectitude, they could not receive time-off for good behavior or the chance at reconciliation to society, since their debt could supposedly be too great.

The contractual argument, much like the appropriate emotions account, could justify torture. It might even seem to stipulate that, since the citizen presumably knew the terms of the social contract, they tacitly consented to their fate. Even though an express denial of consent is

enough to cancel tacit consent, and even though the criminal never explicitly signed anything or performed any action that expressed consent for the social contract, contractual retributivists still hold that the contract was breached, nonetheless. In response, any reasonable proponent of the contract theory would argue that the principles of the social contract are those that would be endorsed by rational persons, and that no rational person would advocate unjust punishment.¹⁵ But who decides what is rational? Much like in the appropriate emotions case, the authors of the contract can be misguided and vindictive.

It is clear that retributive bases for punishment face myriad unique challenges, with even more that I have not had the space to explore. Although proportionality and the prohibition against punishing the innocent are attractive principles, objections to retributivist theories are plentiful and powerful. What of consequentialist arguments? Could they offer solid justifications without the pitfalls of retributivism?

Consequentialism

Consequentialist arguments conceive of punishment not as a goal in itself, but as a means to an end. Under pure consequentialism, punishment is justified insofar as it is useful for securing a proportional and legitimate moral good for the state. Although any number of goals could be achieved by punishment, three other goals are widely recognized in modern discourse: rehabilitation, incapacitation, and deterrence. Because it presents a unique and popular rationale, I will also discuss one other multifaceted goal: moral communication and expression. By citing these justifications, I hope to illuminate the most common ways consequentialism is used to justify punishment.

¹⁵ Dagger, Richard. "Social Contracts, Fair Play, and the Justification of Punishment." *Ohio State Journal of Criminal Law* 8, no. 2 (2011):341-68.

Rehabilitation

Philosophers like Andrew von Hirsch believe that punishment can serve to rehabilitate criminals. In his article “Punishment, Penance, and the State,” von Hirsch lists resolving the offender’s psychological difficulties, confronting the them with their behavior, and encouraging them to reform their lives as a few of the facets of rehabilitation.¹⁶ The rehabilitative aspect of punishment itself lies mostly in moral communication. This communication differs from the one that will be discussed later in that it is not aimed at the citizenry, but at the criminal. By communicative censure, the state hopes to impress upon the criminal the wrongness of their action.

To some, it may not seem plausible that punishment will change the internal moral character of the punished for the better. To assuage this concern, one could imagine a view of rehabilitation that sees punishment (specifically incarceration) as incidental to rehabilitation. In this view, rehabilitation is not the goal of punishment, but rather, punishment is a means by which a state can receive the mandatory participation necessary for rehabilitation. Put simply, criminals must be confined so that they cannot avoid rehabilitative programming. In doing this, the state respects the citizen by investing in them and assuming them to be capable of self-improvement.

Incapacitation

Incapacitation aims at protecting society from those who would subvert its principles and harm its members. In her article “Incapacitation Theory,” Dr. Alana Barton describes proponents of incapacitation theory as those who believe “that offenders should be prevented from committing

¹⁶ Von Hirsch, Andrew (2003). Punishment, penance and the state: A reply to Duff. In Derek Matravers & Jonathan E. Pike (eds.), *Debates in Contemporary Political Philosophy: An Anthology*. Routledge, in Association with the Open University. Pg. 415-416

further crimes either by their (temporary or permanent) removal from society or by some other method that restricts their physical ability to reoffend in some other way.”¹⁷ Because humans are inherently incapable of living a society and maintaining perfect character, there will inevitably be persons who harm or seek to harm others. Contemporarily, we call such harms “crimes.” When crimes occur, societies are faced with the issue of what to do with their perpetrators. Naturally, for the sake of protecting law-abiding citizens, states inflict imprisonment, a form of unwelcome burden.

If incapacitation is achieved, would-be perpetrators of harmful acts are separated from those they would harm. Incapacitation also reinforces the legitimacy of both the law and the state. In modern political philosophy, there is a consensus that states are useful insofar as they are able to, among other things, protect their citizens’ rights. This is the basis for the United Nation’s widely recognized concept of Responsibility to Protect (R2P).¹⁸ Any state that fails to punish its criminals and enforce laws fails to protect its citizens is therefore of questionable legitimacy. Quarantining thieves reinforces citizens’ property rights. Isolating murderers protects citizens’ rights to life. Through incapacitation, states protect their citizens’ rights by neutralizing those who would impinge upon them.

Deterrence

When a state engages in punishment for the sake of deterrence, it measures the usefulness (and thereby, the quality) of punishment by its ability to deter future criminal acts. In his article

¹⁷ Barton, Alana. "Incapacitation Theory." In *Encyclopedia of Prisons & Correctional Facilities*, edited by Mary Bosworth, 464-465. Thousand Oaks, CA: SAGE Publications, Inc., 2005. doi: 10.4135/9781412952514.n174. Pg. 464.

¹⁸ “Responsibility to Protect.” *United Nations Office on Genocide Prevention and the Responsibility to Protect*. <https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml> (Accessed October 23, 2019)

“Deterrence, Punishment, and Respect for Persons,” Zachary Hoskins defends deterrence as a permissible goal of punishment. Hoskins claims that a perfectly deterrent law would be composed in such a way that it inspired citizens not to break it at all. “In fact,” Hoskins writes, “if the credible threat could be maintained without harming any offenders, then this would be entirely acceptable based solely on considerations of general deterrence.”¹⁹ But since such a law is impossible to craft, deterrence must be achieved by enacting punishment. Deterrence compels citizens to follow the law because they do not want to suffer the consequences of breaking it.

An important aspect of deterrent punishment is the public nature of criminal convictions. For deterrence to be achieved, it must be clear to citizens that lawbreaking will be punished. Deterrent reinforcement of the law’s importance is different from moral communication, which will be discussed shortly, because it only speaks prudentially (i.e. if one commits an offense they will suffer consequences) rather than morally (i.e. it is wrong to commit an offense.)

Moral Communication

Another goal of punishment is moral communication. A state has many opportunities to promote moral values through propaganda, education, civil discourse, community enhancing arrangements etc. A consequentialist could count punishment as one of these methods. Just as the creation of laws is an instance of reinforcing shared values, enforcing them, so too is enforcing them. When a criminal exhibits actions that seem to disregard the state’s socially prescribed morals, punishing that criminal is an opportunity to illustrate that neglect of such morals is not to be tolerated. This communicative act serves to reify society’s moral boundaries.

¹⁹ Hoskins, Zachary (2011). "Deterrent Punishment and Respect for Persons". *Ohio State Journal of Criminal Law* 8 (2):369-384 Pg.374.

Not only does punishment broadcast a message to the broader society, but it can convey a message to the criminal themselves. In his article “Punishment, Communication and Community,” Anthony Duff offers an account of moral communication that centers on the repentance it inspires in the criminal. It is in his account that we see notable overlap between moral communication and rehabilitation. Duff ranks moral communication among retributivist accounts, because he believes the relationship between punishment and communication is intrinsic rather than coincidental. To explain his classification, he writes, “...the end to be achieved (the offender’s repentant understanding of her crime) is such that punishment (the attempt to induce such an understanding by the communication of censure) is an intrinsically appropriate way to achieve it.”²⁰ I rank communication, however, among consequentialist accounts for two reasons. First, it seems that securing repentance is a goal rather than a deontological obligation. All the retributivist accounts above only serve goals related to cleaning the moral mess created by crime. Duff’s concept of communication, however, seeks to aim at rehabilitation, with the hopes that, through some form of “secular penance,” criminals will ascertain the error of their ways.²¹ Second, I rank moral communication among consequentialist accounts in order to accommodate the possibility that punishment can be used to communicate to the society at large rather than the criminal alone.

Moral Expression

Closely related but not identical to moral communication is moral expression. While the moral communication’s legitimacy relies partly on how clearly the message is received, moral expression must fulfil no such goal. Proponents of this view believe that, in the same way that a

²⁰ Duff, Antony (2003). “Punishment, communication and community.” In Derek Matravers & Jonathan E. Pike (eds.), *Debates in Contemporary Political Philosophy: An Anthology*. Routledge, in Association with the Open University

²¹ Ibid. Pg. 390

tree falling in the forest makes a sound, so an act of moral expression conveys a message. Communication implies one party, the state, encodes and delivers a message to another: the criminal and/or the citizenry. Moral expression, however, involves only that the message be encoded. In other words, punishment can serve the purpose of expressing a moral message regardless of whether or not the message is received.

For example, a CEO could fire one of her employees for sexually harassing a coworker, even if she knew he would only continue to commit injustices in another workplace without consequence. If we suppose that the firing was done in private and nobody would understand why it happened, such an act would be expressive rather than communicative. It would be important for the CEO to express her disgust for the immoral actions her employee perpetrated, even if her message was not clearly received. In his article “The Expressivist Theory of Punishment Defended,” Joshua Glasgow makes clear the complex nature of moral expression, explaining why it cannot be classified as purely retributivist or consequentialist. He writes, “Expressing condemnation is warranted on this account not because it, in turn, leads to good consequences like prospective offenders being deterred. Nor is expressing condemnation warranted on this account because it is what the offender deserves, where desert does the real justificatory work.”²² Moral expression relies on a moral obligation to denounce wrongdoing rather than on its positive effects. It could, therefore, be ranked among retributivist accounts. I have chosen to list it in this section because of its similarity to moral communication. I believe side by side comparison is more helpful in illuminating the differences between the two accounts.

²² Glasgow, Joshua. “The Expressivist Theory of Punishment Defended.” *Law and Philosophy* (2015) 34: 601. <https://doi.org/10.1007/s10982-015-9235-z> Pg. 602-603

Consequentialism's Challenges

Like retributivism, consequentialism seems to face several challenges. The first is that of unjust punishment for a utilitarian goal. It appears at first glance that one could justify grossly disproportionate punishment (torture, for example) in the name of the greater good. At first glance, this objection seems to challenge all of the accounts, since consequentialism seems to consider only the end goals of punishment without careful consideration for the means by which they are achieved. However, two of the communicative justifications for punishment, expression and moral communication, seem not to allow for torture. They hold that, although it is important not to overstate the state's disapproval, it is equally important not to overstate it. Disproportionate punishment does not express a morally coherent message; cutting one's hand off for stealing appears to be an overreaction. In a representative democracy, it is important that the censure communicated by the state mirrors public sentiment as closely as possible. One would be hard pressed to find a truly representative democracy today that promotes such draconian punishment. It is therefore difficult to drag down either expressivism or moral communication with the weight of the torture objection.

Still another objection faces these accounts: why should punishment be the mode by which society communicates and expresses its condemnation? One might argue that the added impositions of incarceration and disenfranchisement serve to strengthen the message, but one could just as easily contend that the censure might be lost in translation, appearing only incidental to the punishment. To this, one might respond that punishment is a unique form of communication that can transmit a more potent message than public shaming or some other measure. To maintain this argument, however, one must prove that the state's message would not be well conveyed any other way, and that the deprivation of rights is an acceptable price to pay for this goal. Since there

is scant evidence to support this claim, it seems that expression and communication are important, but that punishment is not the only way to achieve them.

Since there is clearly no rehabilitative element to torture, one can disregard the torture objection, but this account faces unique challenges as well. Is it not unjust, one might challenge, that criminals would receive care rather than punishment for crimes? It seems that a purely rehabilitative account does not mete out punishment at all. It seems too lenient that a murderer would receive no more than mandatory counseling for their crime. On a rehabilitative account, this is exactly what would happen; punishment is only justified here insofar as it serves to achieve the goal of improving the criminal's character so that they may reenter society. It is intuitive that a person who commits murder should be punished, but a rehabilitative account is not able to immediately align with this reasonable position. It must first prove that punishment serves a rehabilitative purpose, which is not always true. It seems, then, that rehabilitation alone is an incomplete justification for punishment.

Unlike moral expression or communication, the torture objection challenges the deterrent account. Again, at first glance it appears that harsh punishment would be an effective deterrent for almost any crime. In a society committed to deterrence, statistics would be the only way to measure whether torture was a just punishment. If the state communicated its pragmatic message to abstain from crime well, crime rates would ideally drop. This means that deterrence cannot rely on the overcommunication response as a defense. It can, however, rely on the argument that patently unjust punishment would delegitimize the criminal justice system and thereby decrease its effectiveness. If the criminal justice system is not seen to be representative of the people's will vis a vis law enforcement, it cannot be a properly democratic institution. If it is not seen as sufficiently democratic, it will be altered to fit the public conception of justice and will no longer be plagued

by the torture issue. State differently, disproportionate punishment would, ideally, be changed so that a deterrent system does not remain committed to torturing criminals. In the worst-case scenario, however, unjust punishment could inspire citizens to foment insurrection and decry their unjust government. To avoid being altered or overthrown, a deterrent system of criminal justice will avoid unpalatable forms of punishment to keep the public's faith. In short, it is usually in the criminal justice system's practical interest to be just.

Consequentialist government could, however, maintain only the appearance of justice without actually exacting it. For example, if there was a citizen whom the society was convinced was a criminal, but who was actually innocent, it would behoove a consequentialist system to punish them regardless of their innocence. So long as the punishment of this innocent person served to deter crime, and so long as the people would not be upset by this miscarriage of justice, consequentialism would endorse it. The "pretend punishment" objection is a similarly troubling inversion of this dilemma. A deterrent system could achieve its goals while only pretending to punish offenders. Hoskins acknowledges but does not fully address this objection in his article. He offers the counterargument that false punishment would be found out and would therefore not be utility efficient, but this could just as easily not be the case.²³ If the state's deception is never revealed, deterrence could justify pretend punishment, but such an arrangement would still be unjust. If the only calculation one must do before punishing is whether the benefits of the action would outweigh the harms, one can endorse myriad unjust but utility-efficient punishments. Deterrence, without some non-consequentialist constraints, therefore, can be perverted to justify injustice.

²³ Hoskins. "Deterrent Punishment and Respect for Persons". Pg. 373

Incapacitation is plagued by the disproportionate punishment objection as well. It seems that, if incapacitation is punishment's main goal, there is no reason why every crime should not be punishable by death or lifelong imprisonment. Removing criminals from society to completely is the most surefire way to prevent them from harming the law-abiding citizenry, but such an arrangement seems inordinate. Perhaps a life-sentence for murder seems appropriate, but what of armed robbery? What of fraud? Perhaps a more nuanced approach to incapacitation could limit the scope of the punishment to restrictions on things relevant to the crimes committed. It is difficult to advocate death sentences of for financial crimes, but it seems more intuitive to prevent white-collar criminals from engaging in finance after their imprisonment. A single count armed robbery may not be serious enough to merit a lifetime in prison, but it seems intuitive that such criminals ought to not be allowed to purchase guns. Nonetheless, it could be just as incapacitative to cripple shoplifters and to prevent white collar criminals from handling money altogether. While considerate consequentialists would implore states not to adopt such harsh measures, incapacitation could be perverted to promote them in praxis.

Immanuel Kant raises another objection to consequentialism. As one of the preeminent founders of modern ethics, Kant formulated several categorical imperatives, including the famous "mere means" principle. In *Groundwork of the Metaphysics of Morals*, Kant implores his audience to "act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."²⁴ This influential ethical principle underscores a problem common to all consequentialist accounts except rehabilitation: they seem to deny the humanity of the persons they punish. Deterrence and moral communication specifically violate

²⁴Kant, Immanuel, and Allen W. Wood. *Practical Philosophy*. Edited by Mary J. Gregor. The Cambridge Edition of the Works of Immanuel Kant. Cambridge: Cambridge University Press, 1996. doi:10.1017/CBO9780511813306. Pg. 80

Kant's imperative: they treat criminals as mere canvases on which the state might illustrate its messages. Because consequentialism focuses on the ends, it may seem blind to the unjust means it applies to achieve them. It seems intuitive that punishment should befall criminals. They are not being used as merely a means; they are being punished, and their punishment happens to serve other goals. But this is where consequentialism alone falls short. The only thing consequentialism can justify is the pursuit of the goals, not the punishment itself.

Even in their more mature forms, consequentialist arguments, like retributivist ones, face formidable objections. While one might be able to defend consequentialism on purely consequentialist grounds, doing so is both difficult and unnecessary. It appears that some of the strengths of the two accounts can be merged to create a stronger, even more plausible account of punishment. I will describe a mixed account of retributivism and consequentialism next in hopes of finding the most airtight justification for punishment.

A Mixed Account

Purely retributive and consequentialist accounts have weaknesses. A mixed account of the two, however, may nullify these weaknesses entirely. Retributivism's proportionality principles can curb excessive injustice under consequentialism, and consequentialism can give retributive impulses helpful metrics to aim for besides vague ideas of debt, advantage or betrayal of society. In mixing retributivism and consequentialism, we may draw the strongest parts of each argument and synthesize them into one account. We may hold commitments to deterrence and rehabilitation as well as protecting the social contract and fulfilling moral debts.

Kant's mere-means objection finds little purchase on a mixed account, since criminals are being punished rather than used as merely pawns. Likewise, the objection that innocent people

could be punished under consequentialism is disarmed by negative retributivism. Because only deserving criminals are to be punished, innocent people will (ideally) not be subject to punishment. Likewise, because these people deserve to be punished, any goal their punishment serves will relegate them to the status of an incidental means rather than a mere means. Retributivism's constraint that all forms of punishment should fit the crimes they address also prevents the incapacitation and deterrence accounts from overreacting in all circumstances. It also justifies the use of punishment in the communicative accounts: while moral communication and expression can be achieved by means other than punishment, retributivism requires that it be accomplished through punishment because punishment is deserved. There may be cognitive dissonance when one considers the rehabilitative account, since on that view punishment is only just insofar as it rehabilitates the criminal. If the criminal would not be rehabilitated by the punishment, rehabilitation cannot justify it. Retributivism, however, can; while it may be noble to try and rehabilitate rapists, such efforts could be only incidental to the punishment rather than its goal.

Retributivism is constrained by its myopic focus only on desert. This can cause a state to inflict punishments that cause far more harm than good simply because they are deserved. If a retributivist is allowed to measure the benefits and harms of a given act of punishment, the resulting ruling will be far more holistic. A retributivist, confused by how to calculate moral debt, could instead turn to communication or rehabilitation to measure how best to formulate a punishment. While the grounds for punishment in, say, a contract view, are clear, it seems incomplete to say that punishment only serves one goal. By adding consequentialism, it becomes easier for retributivists to measure how punishment should be formulated. It also allows punishment to aim at multiple goods rather than only the satisfaction of a deontological mandate. Because the mixed account is so strong, opponents of disenfranchisement cannot attack

disenfranchisement by attacking punishment itself. The mixed account offers more comprehensive and compelling reasons to punish individuals. Opponents of disenfranchisement must therefore contend that, although the bases for punishment are legitimate, they do not support disenfranchisement. It is for this reason that I have introduced and mixed all the rationales for punishment; we may now move forward to discuss whether disenfranchisement is in line with this thorough account. The next section will address the different justifications for disenfranchisement that a mixed account brings forward and will detail objections from Richard L. Lippke and other philosophers.

Chapter 2: Does a Mixed Account Justify Disenfranchisement?

After a cursory survey of all the of the major justifications for punishment, the question arises: do any of the previous accounts justify disenfranchisement? If they do, then they are potentially justifiable under a mixed account of punishment? To answer this question, we will turn to the work of Richard Lippke. His article *The Disenfranchisement of Felons* is a clear representation of the major arguments against disenfranchisement, which is why I have chosen it to represent the anti-disenfranchisement school of thought. Lippke systematically attacks both consequentialist and retributivist arguments for disenfranchisement. Because he addresses each justification individually, I have structured this chapter accordingly. I will exposit his position against each basis for punishment. Where Lippke's arguments are weak or silent, I will offer different authors' arguments against disenfranchisement. In this chapter it will become apparent that although Lippke's and others' arguments serve as a solid foundation for the case against disenfranchisement, they are vulnerable to counterarguments. I hope to assist Lippke in his opposition of disenfranchisement in the final chapter, but to do so we must first understand which arguments he faces and how they manage to survive scrutiny.

Rehabilitation

The justification for rehabilitation for punishment is as follows: punishment is a form of "secular penance"²⁵ that inspires felons to change their actions. Although rehabilitation is a legitimate aim of punishment, Lippke argues that there is no reason to believe that disenfranchisement accomplishes it. Disenfranchisement, he claims, actually takes away their incentive to act morally and respect the law. If the goal of rehabilitation is to allow criminals to re-

²⁵ Duff, Anthony. "Punishment, Communication, and Community." Pg. 390

enter society as responsible citizens, it seems counterproductive to bar them from crucial public exercises. Democracies draw their legitimacy from the consent of the governed. Citizens, therefore, have less moral reason to respect the law as legitimate if they did not consent to it by participating in its creation. Lippke calls this investment in the franchise “outcome interest” because, in the democratic process, “...the outcomes reflect the interests of the participants.”²⁶

As a side note, I find that one can make an intuitive logical step from Lippke’s arguments thus far. One could posit that disenfranchised citizens may have prudential incentives to follow the law, but that their respect for the it will not stem from their ownership thereof. Some may argue that coerced observance of the law is enough, but it is clear that disenfranchisement does not give citizens any extra reason to respect democratic outcomes. Where respect for legislation is concerned, disenfranchisement seems benign at best but damaging at worst.

Lippke also contends that civic participation has numerous benefits that can improve the character of its participants.²⁷ Extolling the educative benefits of democratic participation, Lippke writes, “By participating actively in democratic processes, individuals are encouraged to notice, acknowledge, and respond constructively to the diverse lifestyles, projects, and concerns of others in the body politic.”²⁸ Being forced to see issues from another’s perspective, contemplating the goals of the community, and shaping opinions about how to improve society can all be byproducts of electoral participation. To restrict felons’ opportunities in this way is actually anti-rehabilitative.

This point is not only intuitive, but empirically supported. One study by Guy Padriac Hamilton-Smith and Matt Vogel, the only study of its kind, explores the effect disenfranchisement had on recidivism. In *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on*

²⁶ Lippke, Richard L. "The Disenfranchisement of Felons." *Law and Philosophy* 20, no. 6 (2001): 553-80. <http://www.jstor.org/stable/3505156>. Pg. 556

²⁷Ibid Pg. 557

²⁸ Ibid

Recidivism, Hamilton-Smith and Vogel analyze the United States Department of Justice’s 1994 study “Recidivism of Prisoners,” and find a correlation between disenfranchisement policies and recidivism. Although the study was unable to analyze all the factors that contribute to recidivist behavior, this was still the most comprehensive recidivism study in the United States, controlling for both state level unemployment and offenders’ criminal history. Through the use of multi-level logistic regression models, the researchers found that “...individuals who are released in states that permanently disenfranchise are roughly ten percent more likely to be rearrested than those released in states that restore the franchise post-release.”²⁹ The study concluded that “Taken as a whole, these findings indicate that states which permanently disenfranchise ex-felons experience significantly higher repeat offense rates than states that do not.”³⁰ This study exemplifies that disenfranchisement seemingly fails to rehabilitate; these criminals were not counseled out of their criminal habits.

While it is clear that permanent punishment gives felons little inspiration to improve, one could argue that temporary disenfranchisement is, in theory, a valid rehabilitation tool. While irreversible disenfranchisement gives felons nothing to work towards, it could be argued that temporary disenfranchisement would give felons an opportunity to earn their right to vote back on the condition that they exhibit civic responsibility. Following the same logic that inspires prisons to shorten sentences for good behavior, a state could allow felons to show themselves worthy of the right to vote through community service or a certain period of time without legal infractions. To this counterargument, Lippke has no response.

²⁹Hamilton-Smith, Guy Padraic and Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 Berkeley LA RAZA L.J. (2015) <https://doi.org/10.15779/Z38Z66F> Pg. 427

³⁰ Ibid, Pg. 429

Incapacitation

Lippke argues that criminals are hardly incapacitated by disenfranchisement. They are prevented from engaging fully in civil society, but they are not prevented from causing others harm. It seems bizarre that criminals are deemed safe enough to purchase goods, attend public gatherings and move throughout the country, but too dangerous to cast their single vote. If the state was truly dedicated to incapacitating criminals, it would recognize that they could do far more damage on the highway or at the movies than at the polls. Acknowledging this peculiarity, Lippke writes, “It is hard to see how disenfranchising serious offenders would serve any incapacitative function, unless doing so would somehow make it more difficult for them to engage in electoral fraud or other crimes associated with voting.”³¹ In the case of electoral fraud, I will not debate that disenfranchisement might be reasonable, but for all other crimes, disenfranchising felons serves to incapacitate citizens in a meaningless way. Felon voting does not endanger anyone. Felons are able to commit other crimes but not to vote, a practice Lippke believes does not guarantee one’s desired outcome to begin with. Lippke cautions the reader not to overestimate the importance of voting, explaining that, “While [voting] may play an important, or even leading, role in securing realization of the status, outcome, and educative interests, it seems we cannot say that, by itself, its retention ensures their realization or its loss ensures their diminishment.”³² Still, he maintains that the right to vote is of great importance nonetheless.

While Lippke is right that disenfranchisement does not incapacitate criminals vis a vis most crimes, one could object that it does serve to civically incapacitate them to a degree. If a felon could cast a dangerous vote, or if a felon voting bloc would be an immoral power broker which would negatively influence elections, it seems reasonable to incapacitate them in this respect.

³¹ Ibid Pg. 568

³² Ibid Pg. 558

Indeed, some people argue that ballot-box incapacitation for felons is crucial for maintaining electoral purity. Some argue that a felon voting bloc “could have a perverse effect on the ability of law-abiding citizens to reduce the deadly and debilitating crime in their communities.”³³ Simply put, some fear that a felon voting bloc could taint the electoral process and result in immoral or dangerous outcomes. To this argument Lippke offers no reply.

Deterrence

Lippke successfully argues that disenfranchisement does not deter crime. “If the threat of imprisonment,” he says, “with all of its attendant terrors and degradations is not sufficient to deter serious offenders, then it stretches credulity to argue that adding disenfranchisement will suddenly do the trick.”³⁴ This point seems to hold true for serious crimes, since their sentences are already severe, but what of minor crimes? As it stands in the United States today, only felonies are punishable by disenfranchisement, but could disenfranchisement serve as a deterrent for minor crimes?³⁵ Infractions like jaywalking or disturbing the peace are not punishable by imprisonment in the United States, but it appears that the threat of disenfranchisement could discourage citizens from committing them.

If one would lose their right to vote as a consequence for littering, perhaps they would think twice before discarding their trash nonchalantly. Any reasonable proponent of deterrent punishment, however, would balk at this argument. Such an arrangement violates the proportionality requirement for punishment established by the mixed account. Lippke makes a

³³ Sigler, Mary. “Defensible Disenfranchisement.” *Iowa Law Review*, 99(4), 1725-1744. (2014). supra note _ at 12 (quoting Graziano 293). <http://dx.doi.org/10.2139/ssrn.2252958>

³⁴ Ibid

³⁵“Infractions. *FindLaw.com* <https://criminal.findlaw.com/criminal-law-basics/infractions.html> (Accessed October 28, 2019)

compelling point that disenfranchisement is not likely to deter serious crimes, since their punishments are already severe. Lippke's point is intuitive, and there is no empirical evidence to suggest otherwise. I add that, in the case of minor crimes, disenfranchisement seems far too severe a punishment. This leaves proponents of deterrence in a difficult position: either their punishment is too severe, or ineffective. The only thing that can save the case for disenfranchisement as deterrence would be an empirical study showing that disenfranchisement does in fact deter crime. I have been unable to find such a study, though, and I expect that none exists. There is, however, evidence that suggests disenfranchisement only results in more crime (see again, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*). It seems that the case for disenfranchisement as deterrence is the only case which Lippke definitively defeats.

Moral Communication

When a society punishes criminals, it communicates the morals of the public. Disenfranchisement, one could argue, is one way to do this. While Lippke does not argue against disenfranchisement as moral communication, George P. Fletcher does. In his article *Disenfranchisement as Punishment: Reflections on the Racial Issues of Infamia*, he argues that citizenship without voting rights is second class citizenship, and that, by disenfranchising felons, the state advertises that this arrangement is acceptable. On Fletcher's view, disenfranchisement is just one of the many collateral measures aimed at "creat[ing] a permanent undercaste of people who are once in prison, who are stigmatized as felons..."³⁶ At first, this assertion may seem hyperbolic. After all, felons are still allowed to participate in free speech and (limited) free assembly; in what ways are they relegated to an inferior social tier?

³⁶ Fletcher, George P. "Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia," *UCLA Law Review* 46, no. 6 (August 1999): Pg. 1897

This objection will be addressed in the next chapter, but I will offer a short response here. Voting is incredibly symbolically important. Activists from the women's suffrage movement and the civil rights movement demonstrated, petitioned, and suffered imprisonment for the right to vote. Self-governance is the foundational ideal of democratic society, and the right to vote is indispensable thereto. To be denied the right to vote is to be imprisoned as a rider in a nation driven by others. Disenfranchisement communicates that this status is deserved. It also communicates that the interests of this group are less important than the fact that they committed a crime.

It may also seem that disenfranchisement as punishment both overcommunicates and communicates wrongly. The act of punishing criminals expresses, among other things, that criminals are to respect their fellow citizens' rights, that they are to behave morally, and that the state is a legitimate and protective authority. The act of disenfranchising citizens after their criminal sentence is complete, however, communicates something further: that they are now unfit to participate in democratic society. Because of past indiscretion, the disenfranchised now bear a permanent mark of their inferior status as citizens. As Fletcher notes, "It reinforces the branding of felons as an 'untouchable' class and thus helps to prevent their successful reintegration into our society."³⁷

As a counter-objection, one might note that it is completely reasonable for murderers and rapists to be relegated to an inferior social tier. After all, most of the injustice of a tiered society lies in its arbitrary nature. Disenfranchisement, however, is the result of a felon's conscious choice. If one chooses to do something that communicates intense disrespect for fellow citizens, there seems to be no reason that those citizens could not communicate their disrespect in turn. In fact, many would agree that murderers and rapists deserve to occupy an inferior social tier. This

³⁷ Ibid

argument, however, does not hold as much force when applied to the majority of felons if one uses felony prisoners as a proxy for the total felon population. The overwhelming plurality of prisoners in the United States are drug offenders, but the case for disenfranchising rapists and murderers is the strongest, which is why I have chosen them as the example.³⁸ In the cases of heinous crimes moral communication actually seems to actually encourage disenfranchisement. Under moral communication, then, it seems that some forms of disenfranchisement can be acceptable.

Unfair Advantage

The unfair advantage view holds that when one commits a crime, they create an imbalance that must be corrected. It is the job of the state, therefore, to deprive the criminal of this unearned asset, be it corporeal or conceptual. To attack this view, Lippke claims, “It is possible to remove or cancel the unfair advantages gained by offenders in a variety of ways.”³⁹ He then challenges the relevance of disenfranchisement to unfair advantage, asserting, “There are numerous penal losses or deprivations that might be imposed, and it is not at all clear why or whether disenfranchisement should be one of them.”⁴⁰ Indeed, the advantage felons take of their victims almost never has anything to do with voting. If the state wished to disallow armed robbers from carrying weapons for fear that they would take advantage of others’ restraint and commit crimes, such an arrangement would be reasonable. But it does not seem reasonable, Lippke believes, to hold that criminals might take advantage of the inherently benign act of voting to somehow exploit their fellow citizens.

³⁸ “Offenses” Federal Bureau of Prisons. *Bop.gov*
https://www.bop.gov/about/statistics/statistics_inmate_offenses.jsp (Accessed December 1, 2019)

³⁹ *Ibid*

⁴⁰ *Ibid*

To this one might reply that denying a felon the right to vote still eliminates some of their advantage. At base, disenfranchisement disadvantages its subject. Whether or not their crime was related to voting, they lose an advantage, and are reduced to a lower level of total advantage. Likewise, just because an arrangement is bizarre does not make it unacceptable. Furthermore, if this is the method by which a society seeks to correct a moral debt or unfair advantage, Lippke offers little argument as to why this is unacceptable rather than just confusing.

Moral Debt

The moral debt view, like the unfair advantage view, holds that in committing a crime, a criminal incurs a debt to their victim and to the state. Punishment, then, is the method by which this debt is collected. Could disenfranchisement repay such a debt? While Lippke does respond to this view, George P. Fletcher also offers salient critique. Fletcher's issue with the moral debt view is that that permanent disenfranchisement treats all debts as unpayable. He claims it is difficult to see how a criminal ought to be disadvantaged in perpetuity after serving their sentence. "There is no point," he contends, "in the metaphor of paying one's debt to society unless the serving of the punishment actually cancels out the fact of having committed the crime. The idea that you would pay the debt and be treated as a debtor (felon) forever verges on the macabre."⁴¹ On Fletcher's view, the only use for framing punishment in terms of debt is so that it can be aimed towards repayment. If repayment is impossible, then debt is a poor method for measuring how one must be punished.

But when one considers the fact that the debt a murderer owes their victim cannot be repaid, few punishments seem disproportionate, and disenfranchisement certainly does not. A proponent

⁴¹ Fletcher. "Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia." Pg. 1907

of the moral debt view could agree that some debts are indeed unpayable but respond that this does not mean that society ought not to try and mandate their payment to whatever extent it can. Likewise, Fletcher's argument could countenance temporary disenfranchisement. If felons could pay off their debts by forfeiting their right to vote for a period of time, then such disenfranchisement would be acceptable, even necessary. But is disenfranchisement specifically the best way to ameliorate moral debt?

Lippke argues that, because there are numerous burdens that could be opposed, it is unclear why disenfranchisement should be the one chosen, especially since voting is completely unrelated to most felonies.⁴² There is no intuitive reason why disenfranchisement ought to be the method by which society collects moral debt. It seems to Lippke that this flimsy, almost nonexistent rationale for imposing disenfranchisement, crumples under the weight of voting's importance. One could argue, however, that so long as a society democratically decides to disenfranchise some of its members with the reasonable rationale that they committed a crime there seems to be no reason they could not do so. If, again, society decides that this is the method by which unfair advantage is to be corrected, Lippke does not offer an argument as to why this is unjust.

Appropriate Emotions

To justify disenfranchisement under the appropriate emotions account, one must answer yes to the question: can we disenfranchise people just because some people feel it is just? Because this question is fraught, this section will differ in structure from the previous sections in this chapter. Disenfranchisement, according to appropriate emotions, is difficult to disentangle from the validity of the account itself. Therefore, this section will begin with a defense of the appropriate

⁴² Lippke. "The Disenfranchisement of Felons." Pg. 571

emotions account as a whole. It will then move on to address the account's justification of disenfranchisement in particular.

Although Lippke does not object to the appropriate emotions account, Karen Horney does. In her article "The Value of Vindictiveness," Horney attacks appropriate emotions, describing how the hunger for vengeance can override logic when people decide to punish. She writes, "Often there is no more holding back a person driven toward revenge than an alcoholic determined to go on a binge. Any reasoning meets with cold disdain. Logic no longer prevails."⁴³ Horney holds that, while it is possible to temper vengeful emotions, it is difficult, especially in the case of violent crimes which arouse intense outrage and resentment. Friedrich Nietzsche offers a similar critique. He holds that a cocktail of fear, anger, hostility, cowardice, hypocrisy and more all brew within humans in an emotional class he calls "ressentiment."⁴⁴ On his view, this evil concoction is the primary driving force which underlies mankind's retributive urge. Any morality based on these emotions, Nietzsche and Horney argue, is nothing more than a thinly veiled thirst for revenge. Although the different justifications for punishment in the mixed account can save the appropriate emotions rationale, they cannot verify that the urge to disenfranchise does not fall prey to Horney and Nietzsche's attacks.

In his article, Michael Moore counters Horney and Nietzsche's argument. Moore argues that appropriate emotions are not the sole justification, but merely guide societies towards justice, stating, "The emotions are thus heuristic guides for us, an extra source of insight into moral truths beyond the knowledge we can gain from sensory and inferential capacities alone."⁴⁵ But can this

⁴³ Horney, Karen. 1948. "The Value of Vindictiveness." *The American Journal of Psychoanalysis* 8 (1): 3–12. doi:10.1007/BF01871591.

⁴⁴Nietzsche, Friedrich Wilhelm, and Walter Kaufmann. 1969. *On the Genealogy of Morals*. Vintage Books. No. V-401. New York: Vintage Books. Pg. 22

⁴⁵ Moore. "The Moral Worth of Retribution." Pg. 202

heuristic lead us astray? Although Moore describes “correct” emotions as “intelligibly proportionate,” it is easy to find cases where emotional responses are intelligible but questionable nonetheless.⁴⁶

Based on their emotions and moral convictions, puritan colonists in the pre-founding era found the death sentence to be a proportional punishment for blasphemy.⁴⁷ Is such a punishment intelligibly proportionate? To whom must this justification be intelligible? If all the members of a society are committed to unjust punishment based on excessive emotion, does this consensus therefore make the emotions appropriate? Moore counters that this line of questioning is a straw man, responding: “...it is surely not the case that the retributive urge always operates like this.”⁴⁸ It is not clear, for instance, that blind rage motivates disenfranchisement. Put differently: there could easily be punishments that are born from wrath, but disenfranchisement could easily be one of the instances where this is not the case. Likewise, he believes that cognizance of our negative emotions can help us avoid manifesting them. Moore suggests, “...if we recognize the dangers retributive punishment presents for the expression of resentment, sadism, and so on, we have every reason to design our punishment institutions to minimize the opportunity for such feelings to be expressed.”⁴⁹ In other words, the argument that punishment is underlay by an angry mob mentality is hyperbolic.

While Moore aptly defends the appropriate emotions account, one could still argue that it does not empirically support disenfranchisement. In the United States, recent public attitudes toward felon disenfranchisement have deemed disenfranchisement inappropriate. A public survey

⁴⁶ Ibid Pg. 190

⁴⁷ “Way More than The Scarlet Letter: Puritan Punishments.” *New England Historical Society*. <http://www.newenglandhistoricalsociety.com/way-more-than-the-scarlet-letter-puritan-punishments/> (Accessed September 19, 2019)

⁴⁸ Moore. “The Moral Worth of Retribution.” Pg. 191

⁴⁹ Moore. “The Moral Worth of Retribution.” Pg. 217

analyzed by Jeff Manza, Clem Brooks, and Christopher Uggen suggests that public sentiment only supports the disenfranchisement of current prisoners. The Harris Interactive Omnibus Telephone Poll of 2002 indicated that 60 percent of respondents favored re-enfranchisement for parolees and 68% favored re-enfranchisement for persons on probation.⁵⁰ If one wishes to use appropriate emotions as a basis for punishment at all, one cannot claim that such emotions support disenfranchisement in the United States. No survey can map public opinion in perpetuity, but these snapshots serve to undermine disenfranchisement under the appropriate emotions account.

To this public opinion objection, Moore has a defense readily available. One need only ask: what if public opinion swayed the other way? Although disenfranchisement does not hold public favor now, it very well could in the future. But Moore does not even commit himself to using emotions as the sole basis for morality; he only believes them to be an important guide.⁵¹

A proponent of the appropriate emotions account may also contend that the rectitude of a punishment is not determined solely by whether or not it is publicly supported, only whether the emotions which inspire it are reasonable and intelligible. In the case of disenfranchisement, this means that although disenfranchisement may not currently enjoy popular support, it is still not an intuitively disproportionate punishment. The argument can be summarized like this: 1. Our emotions tell us that criminals deserve to be punished. 2. For serious crimes, intuition dictates that disenfranchisement is a reasonably proportionate way of doing so. 3. It would be reasonable to disenfranchise felons based on this intuition. Put plainly, most agree that criminals deserve punishment, and disenfranchisement is merely one of the methods of punishing that feels (to the enfranchised populous) neither cruel nor unusual. Even if the method isn't currently endorsed, our

⁵⁰ Manza, Jeff, Clem Brooks, and Christopher Uggen. "Public Attitudes toward Felon Disenfranchisement in the United States." *The Public Opinion Quarterly* 68, no. 2 (2004): 275-86. <http://www.jstor.org/stable/3521593>. Pg. 281

⁵¹ Moore. "The Moral Worth of Retribution." Pg. 200

emotions tell us that it could still be acceptable even if unpopular. The appropriate emotions view, therefore, could justify disenfranchisement.

Social Contract

In its simplest form, social contract retributivism maintains that if criminals break the contract on which society is built, they ought not to participate in its administration through self-governance. Lippke nullifies this argument by pointing out that allowing felons to vote does not endanger the contract, and that the mere act of breaking the contract (by, say, jaywalking or speeding) is not a sufficient reason to bar a person from self-governance.⁵² But what of serious crimes? It does not seem unreasonable that citizens would wish not to stand next to a murderer or a rapist at the ballot box. It also seems as though one need not specifically endanger the social contract to be in breach of it.

Lippke explains that contract-based disenfranchisement only applies to a very limited subset of felons. Lippke contends that, perhaps for crimes that directly express disdain for the contract or democracy ought to be punishable by disenfranchisement (i.e. election fraud or treason), but otherwise appealing directly to contract breaking commits one to disenfranchising jaywalkers.⁵³ Jaywalkers are contract breakers just as much as murderers are. Likewise, Lippke argues, minor offenders often display clear disrespect for the social contract when they attempt to evade punishment. “This suggests,” he says, “that attempts to evade justice cannot, by themselves, be grounds for concluding that serious offenders are generally unwilling to comply with the law.”⁵⁴

⁵² Ibid Pg. 563

⁵³ Ibid Pg. 562

⁵⁴ Ibid Pg. 566

Lippke claims that if disrespect for the law is an offense punishable by disenfranchisement, then one must hold the untenable position that nearly all criminals ought to be disenfranchised.

As a counterpoint, one could argue that only severe instances of contract-breaking ought to be punished by disenfranchisement. When a crime rises to a certain level of seriousness, it is clear that the criminal is unfit for self-governance. Here the connection between the nature of the crime and its bearing on one's capacity to self-govern is still unclear. To disenfranchise a murderer is about as logical as suspending a jaywalker's driver's license: the offense and the punishment are entirely unrelated. It would seem even more absurd to bar that person from voting on traffic laws, and most absurd to prevent them from voting on all laws full stop due to their breach of contract. "Clearly," one could say, "they do not respect the rules of the road when walking, so they should not be trusted to drive." Social contract retributivists adapt this same absurd argument to justify disenfranchisement. If, in the sentence, "the road" was replaced by "society" and "drive" was replaced by "vote," this sentence would track the logic used by contractarians. Lippke contends that this logic is inconsistent, claiming, "Murderers, rapists, armed robbers, burglars, and the like do reprehensible things, but it seems a stretch to say that their offenses constitute direct assaults on democratic governments or the operation of democratic political processes."⁵⁵ Although this argument is persuasive, it fails to render contractarian arguments invalid. The punishment does not directly address the crime, but punishment is still deserved, and it is not yet clear whether disenfranchisement is disproportionate rather than puzzling.

One can write a contract as eccentrically as one wishes. For instance, a person could contract someone to paint their house and write into the contract a clause stipulating that the painter would need to shave their head if they got any paint on the windows. Such a contract would

⁵⁵ Ibid Pg. 562-563

certainly be strange, but assuming the painter entered into it willingly, such an arrangement would be just. Likewise, although revoking voting rights seems illogical, it is not automatically unjust under social contract theory. To establish why this is unjust, one must prove that the disenfranchisement clause of a given social contract is disproportionate or unjust in itself.

With this analysis complete, we have examined the preeminent justifications for disenfranchising criminals as punishment. Contrary to popular belief, we cannot yet rule out the possibility that these arguments survive their opponents' criticisms. While Lippke and others may have disarmed deterrence, they have not nullified the others. Is there another argument that can compensate for this shortcoming? In my next chapter I intend to draw upon the writings of Matt Whitt and Pamela S. Karlan to argue that, although disenfranchisement may seem to be an appropriate punishment, it is actually harmful to the idea of democratic punishment itself.

Chapter 3: Disenfranchisement Delegitimizes

Thus far, we have explored the most prominent justifications for punishment. After analyzing both retributivist and consequentialist accounts, it became clear that the weaknesses of the former could be assuaged by the latter and vice versa. This argumentative symbiosis became a mixed account. With this new, stronger account, I then considered whether disenfranchisement was a defensible form of punishment. I next analyzed the arguments of Richard Lippke and other authors against disenfranchisement as punishment. Because the first chapter gave us a multifaceted account of punishment, Lippke's and others' arguments took the form of objections to that account, attacking all the justifications listed therein. After scrutinizing these objections, I found that they provided significant but surmountable challenges to the mixed. Thus, we concluded Chapter two by recognizing that disenfranchisement could seemingly be justified under many of the bases for punishment.

This chapter will advance another argument: although disenfranchisement may achieve several of the goals of punishment, it must not be implemented because it erodes the foundation for punishment itself. Although there are arguments to be made in support of Lippke's preliminary claims, I will forego this vein to explore even stronger arguments based in democratic theory. In his article *Felon Disenfranchisement and Democratic Legitimacy*, Matt S. Whitt offers a novel argument against disenfranchisement: the practice itself degrades democracy. I will draw upon his and other philosophers' arguments to make my case: the practice itself degrades the validity of punishment as well. I will finally demonstrate that disenfranchisement is not necessary, and the damage it does to both democracy and punishment outweighs any benefits. My arguments stem from an appreciation for representative democracy, and the acknowledgement that only legitimate democracies can legitimately punish.

Whitt's Argument

In his article *Felon Disenfranchisement and Democratic Legitimacy*, Matt S. Whitt makes the case that commitment to representative self-determination, a precondition of democracy, prevents a state from refining its votership beyond competent adult citizens. In essence, his thesis is as follows: “If the demos is insufficiently inclusive, representative, or competent, then its decisions will lack legitimacy.”⁵⁶ This is to say that, when people argue for disenfranchisement as helpful for democracy, they advance a paradoxical position. I will first explore his argument on its own terms before adapting it to my ends.

Whitt begins his argument by clarifying the positions to which he hopes to respond. His article's goal is to critically examine the claim that “electoral exclusion is justified *in the name of democracy*.”⁵⁷ Whitt faces arguments from Mary Sigler and Peter Ramsay, two authors who believe that disenfranchisement can be justified not as punishment, but as a protective measure to safeguard democracy. Invoking democratic theory, they couch their arguments in terms of self-determination, contending that a state may be forced to disenfranchise some citizens in order to preserve the quality of civic participation.. This method of regulating the electorate, they maintain, is permissible because disenfranchisement is the state's prerogative. This point becomes clear when one considers other methods of regulating the electorate, including leaving visitors, non-citizens, and children unenfranchised. Additionally, these authors hold that the goal of democratic self-determination is more important than the claims of individual citizens.

⁵⁶Whitt, Matt S. "Felon Disenfranchisement and Democratic Legitimacy." *Social Theory and Practice* 43, no. 2 (04, 2017): 283. doi:<http://dx.doi.org.ccl.idm.oclc.org/10.5840/soctheorpract20172145>. Pg. 1.

⁵⁷ Ibid Pg. 3. Emphasis in original.

Sigler and Ramsay's Arguments

Here, I will make a detour to explain the arguments Sigler and Ramsay make so that Whitt's counterarguments can be contextualized. To understand my primary argument, I must understand Whitt's, and to understand Whitt's we must understand these. I will first explain Sigler's argument, then Ramsay's.

In her article *Defensible Disenfranchisement*, Mary Sigler argues that, to preserve the integrity of democracy, those who have breached the social contract ought to wait and regain society's trust before exercising their right to vote. To introduce the aforementioned conclusion, Sigler first introduces the concept of citizenship as an office. As politically active members of a democratic state, citizens have "need for minimal civic virtue and a shared commitment to a set of public values that constitute the political community."⁵⁸ Sigler also relies heavily on the concept of "civic trust" which all citizens have an official responsibility to maintain.⁵⁹ Using these two concepts, Sigler argues that citizens who commit felonies show themselves to be temporarily incompetent to perform their civic duties by virtue of their untrustworthiness.⁶⁰ Sigler does not rely on any empirical evidence of untrustworthiness, citing the breach of civic trust created by the commission of a felony to be sufficient evidence.⁶¹ Felons ought to, therefore, be denied the privileges of their office until they can establish that they are committed once again to upholding the public good. The primary goal of "defensible disenfranchisement" is not to punish, but to "[affirm] normative identity through expression of values including the rights and responsibilities of citizenship."⁶²

⁵⁸ Sigler, "Defensible Disenfranchisement." Pg. 12

⁵⁹ Ibid Pg. 14

⁶⁰ Ibid Pg. 23

⁶¹ Ibid

⁶² Ibid Pg. 25

Ramsay's argument is couched in more practical terms. In his article *Voters Should Not Be In Prison*, he argues that incarcerated felons ought to be denied the right to vote because their other citizenship privileges have likewise been temporarily suspended. Ramsay begins his argument by explaining how many rights must be exercised interdependently. "The 'right to liberty'," Ramsay claims, "is the precondition for exercising several of the other civil liberties: the right to move, to associate and assemble for example."⁶³ Therefore, because criminals enjoy limited liberty, they have a limited capacity to engage in other practices like free expression. Voting, Ramsay believes, is no different; just as a prisoner's free expression is a shadow of a free person's so is their vote. Ramsay maintains, "without the freedom to innovate, communicate, debate and organize around political ideas there is no possibility of the people collectively ruling themselves by being the true authors of the laws that they will obey."⁶⁴ Because criminals cannot vote as effectively as free people can, they cheapen the exercise of voting as a whole. As a result, Ramsay claims next that voting should only be performed by free and law-abiding citizens. Anything less, he claims, would result in a "counterfeit democracy."⁶⁵

Whitt's Response

Whitt acknowledges that Sigler and Ramsay appear to be interested in disenfranchisement as a form of self-determination. Sigler wants to ensure that democracy is driven by citizens that exhibit civic virtues and respect for their station. Ramsay wants to ensure that policies are planned by citizens who are self-governing in the most robust sense. Neither of them seeks to enact disenfranchisement as a purely punitive measure. On their conceptions, disenfranchisement is not

⁶³ Ramsay, Peter. "Voters Should Not Be in Prison: The Rights of Prisoners in a Democracy," *Critical Review of International Social and Political Philosophy*, 16, no. 3 (2013): 421-438

⁶⁴ *Ibid* Pg. 9

⁶⁵ *Ibid*, Pg. 15

something an individual suffers because they committed a crime, it simply disqualifies them from civic participation. Being denied a loan is not a punishment for having a low credit score, it is simply a precautionary measure to ensure that loans are awarded wisely. In the same way, Sigler and Ramsay do not want to prevent individuals from voting, but rather wish to establish full freedom and civic responsibility as a prerequisite for voting. Seeing that both authors care deeply about effective self-rule, Whitt moves to address them on their terms.

Whitt's argument relies on the principle that "all persons subject to the law have a prima facie claim to participate in the decision-making processes that create, authorize, direct, and check that law."⁶⁶ This is what he calls the "all-subjected"⁶⁷ principle which underlies the democratic right to self-determination. Whitt spends the second section of his paper explaining how this principle is integral to democracy itself. He explains that if a government fails to allow those under its control to self-govern, even indirectly, it treats them not as citizens but as subjects. If only a select few are able to vote, he continues, then the society is more an oligarchy or aristocracy than a democracy.⁶⁸ Whitt asserts that, although voting is not sufficient for a true democracy, it is one of the necessary prerequisites. While some might argue that felons are given sufficient opportunity to politically participate through free speech and petition, their lack of formal decision-making status prevents them from truly engaging as part of the self-determining demos.

Whitt concedes that a state may forfeit validity in pursuit of other goals, saying, "In practice, some democracies may be willing to bear this cost to legislative and legal legitimacy."⁶⁹ He argues, however, that no argument that relies on democratic legitimacy can countenance such a trade-off. He asserts, "the 'new wave' defenses of disenfranchisement cannot accept this cost,

⁶⁶ Whitt. "Felon Disenfranchisement and Democratic Legitimacy." Pg. 14

⁶⁷Ibid " Pg. 13

⁶⁸ Ibid Pg. 16

⁶⁹ Ibid Pg. 29

because it drains normative significance from the political value on which their defense rests.”⁷⁰ In other words, democratic theorists like Ramsay and Sigler cannot argue that disenfranchisement is acceptable because it protects the character of democracy. It does exactly the opposite.

Next, when a democracy determines its norms, it must do so democratically. Because breaking laws (in Sigler’s opinion) makes citizens untrustworthy, laws are the standard by which all citizens are judged. By this logic, Sigler posits that it is appropriate for citizens who exhibit civic trustworthiness to determine what civic trustworthiness means. While this definition of civic trustworthiness may align more closely with some abstract idea of virtue, it is not democratic. In Sigler’s ideal arrangement, some citizens would make rules that all citizens are obligated to follow, even though not all of them were consulted in the process. This could potentially create a more “righteous” democracy, but it definitely creates a more exclusive one.

To drive this point home, Whitt makes an apt allusion to the Jim Crow era in the American south.⁷¹ In this indisputably ugly era of American history, black citizens were systematically excluded from electoral participation. As a result, numerous anti-black codes were implemented without black citizens having opportunity to electorally contest them. This allowed for intense, legal injustices to be perpetrated against black citizens. While this was a horrible result on its own, what compounded this injustice was the fact that the south was not acting in a true democratic fashion. A considerable number of persons subjected to the law were not consulted in its formulation. One might protest that the same could be said of children, and it makes sense that they should be disenfranchised. Does my case, therefore, commit me to arguing for the enfranchisement of children? I will address this inquiry later by contending that disenfranchising felons is completely different from disenfranchising children.

⁷⁰ Ibid

⁷¹ Ibid Pg. 16

Whitt concludes that disenfranchisement has catastrophic consequences for a state's democratic legitimacy. He describes disenfranchised individuals as “‘semi-citizens’ or internal outsiders who are locked out of the democratic process”⁷² This troubling underclass, he highlights, is only enlarged by the United States' propensity for mass incarceration. As it stands in the United States today, roughly 4.6 million people occupy the disenfranchised undercaste.⁷³ This figure does not include the 1.5 million formerly-incarcerated felons who were re-enfranchised pursuant to Florida's adoption of Proposition 4 in November of 2018n which.⁷⁴ While one could argue that the inferior status of these millions of second-class citizens is deserved, one can hardly contest that their exclusion makes democracy more representative. To this one might respond: “Yes, the democracy is made less legitimate, but it is still legitimate enough. Disenfranchisement's consequences are not as disastrous,” as Whitt argues. I will later respond to this argument by explaining that, if one weighs the positive good disenfranchisement accomplishes against the harms it causes, disenfranchisement is unjustifiable. Degraded democracy is one concern, but there are still others.

My Argument: Introduction

Whitt holds that disenfranchisement is unacceptable because it shrinks the demos, and that a smaller demos yields results that are inherently less representative. If they are inherently less representative, then they are fundamentally less democratically legitimate. Therefore, disenfranchisement is unacceptable because it degrades the quality of democracy. I will take this

⁷² Ibid Pg. 29

⁷³Gal, Shayanne, Panetta, Grace. “Floridians with Felony Convictions Are Now Beginning to Register to Vote After The State Restored Voting Rights for 1.5 Million Felons.” *Businessinsider.com*.
<https://www.businessinsider.com/felony-disenfranchisement-states-florida-amendment-4-voting-rights-2018-11>
(Accessed November 18, 2019)

⁷⁴ Ibid

argument one step further. I will argue that, in a representative government, a punishment is only just insofar as it is democratically supported. That means that punishing citizens who were not given a chance to decide which acts are punishable/how they should be punished is undemocratic and therefore unjust.

Although the benefits of democracy are manifold and obvious, I will enumerate some here. Not only do democracies entail the attractive benefit of freedom from tyranny, but they also aim at positive goods for their citizens. Namely, democracy ensures that society is organized as a community of peers. In giving its citizens equal votes, a democracy validates the inherent equal moral worth of persons. Likewise, giving voice to the interests of all citizens discourages unequal and exploitative dynamics. Democracy is valuable for its ability to facilitate self-governance, safeguard rights, promote freedoms, and inhibit dynamics of inequality.

I will first explain why democratic input is necessary for deciding what ought to be punished and how. I will then provide examples to illustrate how in a democracy, undemocratic punishment is unjust.

Why Democratic Input is Necessary for Legitimate Punishment

In the United States' Declaration of Independence, the founders wrote that governments are formed and made legitimate by "deriving their power from the consent of the governed."⁷⁵ This is to say that a democratic government is only legitimate insofar as it makes its decisions according to the will of its citizens. Put simply: consent of the governed is indispensable and essential for any democracy. Conversely, without the consent of the governed, also known as popular sovereignty, no democratic government is legitimate. The way all democracies worldwide

⁷⁵Jefferson, Thomas et al, "Copy of Declaration of Independence." 1776. Manuscript/Mixed Material. <https://www.loc.gov/item/mjtbib000159/>. (Accessed December 4, 2019)

choose to gauge the public's will is through voting. I will elaborate on the importance of voting later, and I will spend no time defending voting as an appropriate method for ensuring self-governance. My point is simply that when a state decides to operate based on non-coerced public consent, it must allow citizens to govern themselves. This allows the citizens to retain the ultimate prerogative to obey or overthrow a governmental structure; they hold the power.

Democratic governments have a responsibility to create laws. Thus, public consent is necessary for the formation and enforcement of laws. This means that citizens have a right to draft the laws by which they will be bound. Like all other actions the state takes, drafting laws must be done democratically in order for said laws to be legitimate. The same is true for democratic punishment: the people must decide whether and how to punish certain acts. If, however, there is an underclass of citizens who are prevented from deciding on these punishments, the punishments themselves are not truly democratic. If public input is properly secured, the individual citizens do not necessarily need to agree to any laws/punishments enacted thereby. It is only important that they were given a fair opportunity to participate in the process which resulted in the law/punishment. Because disenfranchisement creates an underclass of citizens who are subject to a nation's laws but able to participate in forming them, disenfranchisement undercuts the principle of public consent which makes democratic punishment legitimate. There is a whole section of the population whose consent is not secured. But one might object: why is it necessary that we punish democratically? Are not some crimes so clearly heinous that they deserve punishment regardless? This objection is understandable, but to claim that all punishments should be treated this way is wrong.

To discount the need for democratic punishment, one might argue that punishment can be just even if it is not democratically decided. This is to say that, even though criminals were not

given the opportunity to participate in the process which determined their sentence, they deserve that sentence regardless. For example, if a person commits an act of murder or rape outside of society, they are still deserving of punishment. Even if they do so within a society, it is intuitive that they would need to be punished regardless of whether such punishment was administered democratically.

While this point is compelling, it does not lend any support to pro-disenfranchisement arguments. Unregulated acts of vigilante justice may be acceptable or even morally necessary in cases where the state fails to punish clear wrongdoing. In a democratic society, however, such a system cannot obtain. If punishments were doled out by citizens based on moral rectitude rather than a democratic process, one could easily imagine a chaotic, eye-for-an-eye regime full of angry mobs and violent revenge. If, however, a state wishes to absorb its citizens' right to punish and deliver measured, democratic punishments, then such punishments must be formulated by all members of society. This is especially true for consequentialist accounts. If a democratic state decides to punish in order to achieve a goal, it ought to consult its citizens as to whether or not this goal is worth pursuing and whether punishment is the way to do so. Some punishments do not need to be democratically legitimate in order to be morally legitimate, but that is a distinction no democratic society can afford to make. If a state seeks to be democratic, it must rely on input from its populous rather than abstract but intuitive moral rules. After all, if those rules are so intuitive, the citizenry is likely to understand them and vote accordingly. Either way, punishments must be democratically decided.

Furthermore, even if a criminal deserves to be punished regardless of the society's conclusions, it is unclear why they should be punished by disenfranchisement. While it is generally undisputed that murderers ought to be quarantined off from society, it is less clear why their right

to vote ought to be suspended. It may feel right to do so, since one's penchant for vengeance may wish to see a criminal suffer as much as possible, but it does not make as much practical sense as incapacitation or rehabilitation. In other words, while morality may compel us to punish people regardless of whether the punishment is democratic, it is not clear that it compels us to disenfranchise.

Why Disenfranchisement Delegitimizes Democratic Punishment

Now that we have established how crucial democratic input is for legitimate punishment, I will advance my own case. I believe that once the principles behind Whitt's argument are adapted to make my point, the previous arguments for disenfranchisement as punishment can be defeated. Whitt argues that disenfranchisement undermines democracy. I argue that, by undermining democracy, disenfranchisement undermines the laws and punishments determined by that democracy. My position, although similar to Whitt's, is distinct. While Whitt focuses only on the harm disenfranchisement does to popular sovereignty, I will focus on the way in which damaged popular sovereignty damages punishment. This damaged legitimacy plagues all but one of the previously discussed justifications for punishment, a point I will shortly explore in a case by case analysis of each basis for punishment. In doing so, I will expose the self-defeating nature of disenfranchisement by way of example, illustrating how only incapacitation can avoid this objection.

In the previous section I defended the need for democratic input in all forms of punishment, and I wish to reiterate my points here before offering my case. In a self-governing state, policies must be decided democratically in order to be legitimate. Because punishment is an extension of government policy, it too relies on democratic input. Disenfranchisement drains all future

punishments of this input. In many cases, societal input is necessary to determine whether to punish certain actions. There are some cases, however, where crimes are so obviously heinous that they deserve to be punished regardless. In these cases, however, the state must still democratically decide how to do so proportionally. In the following paragraphs I will clarify how disenfranchisement prevents this from happening. As we explore the primary justifications for punishment, we will see how disenfranchisement undermines each of them.

Let us consider moral communication. If a democratic society wishes to draft a law that punishes people for the sake of moral communication, it could easily do so. It would write whatever prohibitions it desired into the law as well as how a citizen should be punished if they break violate the law. When Citizen X defies the law, the state can incarcerate and disenfranchise them for the sake of communicating the society's values. But in this communicative act, whose values are being communicated?

It cannot be the entire society's, since, in the United States, for example, up to 4.6 million citizens were shut out of the decision-making process. In the U.S., consent of the governed is theoretically given in exchange for a say in the decision-making process. If this significant number of Citizens X could not participate, then they cannot be said to have consented. And the case of Citizen X only gets worse. After they are released from their incarceration, Citizen X is prohibited from participating in further lawmaking. That means if Citizen X is punished for, say, breaking a law that was written during their disenfranchisement, they truly had no chance to voice their interests. They would be punished for breaking a law that they were explicitly forbidden from writing. Such an arrangement is patently undemocratic. This undemocratic arrangement undermines disenfranchisement not just on the moral communications account, but in all accounts of punishment.

If the state claimed that punishing people under this new law was justified because it morally expressed public values, it would clearly be omitting Citizen X from “the public.” When this happens, there is a sizeable portion of the citizenry which is prevented from expressing its morals through punishment. A society, therefore, cannot claim that its punishments are truly an expression of public morals. This is exactly the concern that Fletcher voiced in the previous chapter. While he contested that the formation of a “permanent undercaste”⁷⁶ was harmful to those within it, I argue further that it is doubly harmful to the validity of punishment in their society. All forms of punishment that rely on democracy for legitimacy, therefore, are undermined by disenfranchisement.

Social contract retributivists run into the same problem: they punish offenders who breach a contract that they have no part in writing. They are born into a contract and then lose the ability to negotiate its terms through voting. Furthermore, these citizens will be punished pursuant to a contract that they cannot edit. One can sidestep this argument by appealing to very natural intuition that some crimes deserve to be punished regardless of whether there is a contract mandating it. While this is true, there is still the question of proportionality. It may seem easy to delineate what crimes should be punished in extreme cases, but it is far more complex to determine how. When societies determine the means by which criminals are to be reprimanded, all forms of retributivism obligate them to doing so proportionally. A society could claim that their punishments fulfil this obligation, but one could ask: according to whom? When a large swath of the population is disenfranchised, they are disallowed from determining what punishments are proportional. In fact, those who have been subject to punishment likely have the best insight as to what punishments are

⁷⁶ Fletcher. "Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia." Pg. 1897

proportionate. With this crucial portion of the population being left out, any retributivist society can claim questionable proportionality at best.

Unfair advantage and moral debt retributivists are similarly challenged. Some argue, unlike social contractarianism and moral communication, moral debt and unfair advantage exist independent of legislation. While this could be true, the fact remains that the citizenry ought to calculate these debts to determine how they are to be repaid. If they are to be paid proportionally, then moral debt and unfair advantage face the challenge as well: they do not allow the proportionality of punishment to be determined in the way that democracy mandates.

The appropriate emotions account suffers the fate of both contractarianism and unfair advantage. Firstly, not everyone's emotions are being consulted to decide whether an action deserves punishment. Secondly, when it is decided that said action should be punished, not everyone is consulted to ensure that such punishment is proportional.

What of consequentialist justifications? In the previous section I established that consequentialist theories of punishment are only acceptable insofar as they are democratically decided. Although I discussed how Lippke already defeated deterrence in chapter two, it can be defeated differently in the same way that moral debt and unfair advantage are. Deterrence is an obvious benefit of punishment, but how much is an appropriate amount? Even deterrence must be tempered by proportionality. And who is to decide what punishments are proportional? It ought to be the people.

The rehabilitation account faces the same problem: the methods of rehabilitation are not democratically decided. This problem, however, does not completely disarm the case for disenfranchisement as rehabilitation. If society is able to counsel its criminals out of their bad habits, what does it matter that they do so by undemocratic means? Surely a more moral population

is a benefit that far outweighs the harm of disenfranchisement. Although permanent disenfranchisement for rehabilitation was defeated in chapter two, temporary disenfranchisement still seems an attractive option. I will illustrate, however, how unattractive this option is later in this chapter.

Incapacitation seems to be the only justification for punishment that requires less public input to be legitimate. It is intuitive that a prisoner need not have a say in whether or not they are incapacitated; murderers should be kept away from the public without a plebiscite condoning it. The safety concerns of those they would harm are far more important than their individual rights, especially since they have been shown to abuse those rights. This means that, although other bases of punishment lose some validity as a result of disenfranchisement, incapacitation does not. To this point I will later argue that disenfranchisement does not achieve the goal of incapacitation.

Disenfranchisement generates a self-defeating cycle. With each act of disenfranchisement, all subsequent laws become less legitimate. The punishment one incurs from breaking those laws will therefore also be less legitimate. When citizens are subsequently disenfranchised pursuant to these laws, it continues a vicious cycle in which the legitimacy of punishment is slowly eroded. Each act of punishment becomes less and less valid as the decision-making process which created them withers. This is true for all of the consequential justifications of punishment as well. The state can achieve deterrence, rehabilitation, and communication/expression, but by doing so, it degrades its own legitimacy.

Some might argue that sacrificing legitimacy is acceptable. When weighing the importance of legitimacy against the goals of punishment, or against one's duty to punish, the scales may seem to tip toward the latter. To this point, I will initially point out that there is no empirical evidence that disenfranchisement achieves any of the goals of punishment. Theoretically, it could, but

without the weight of statistical evidence, the former side of the scale is far lighter than it appears. I will spend the rest of my paper responding to this notion. First, I will highlight that on the latter side of the scale are the weighty combination of voting rights and the validity of democratic punishment itself. Next, I will respond to the objection that disenfranchisement is necessary to secure a right even more important than voting: safety. This argument draws its strength from the incapacitation account. Finally, I will respond to the argument that temporary, as opposed to permanent, disenfranchisement may still be acceptable. At the end, I hope to make it clear that achieving important goals through undemocratic punishment is unacceptable in a democracy, and that no justification of disenfranchisement offers an interest compelling enough to outweigh this principle.

Potential Objections

It is clear that democratic state must be representative. What is equally clear, however, is that a state must protect the rights and safety of its citizens. This theory has inspired political philosophers like Hobbes and Locke for centuries, and I find this line of thinking to be quite plausible. After all, there is no point boasting of a system which affirms secondary rights like voting but neglects to protect primary rights like life, due process and property. If disenfranchisement is necessary for securing citizens' safety, then it does not matter that it delegitimizes democracy. Put differently, one citizen's right to be safe is far more important than another citizen's right to vote. With this line of reasoning, one could say that disenfranchisement, while caustic to the democratic process and the legitimacy of punishment, is justifiable since it does more good than harm.

This line of argument requires further proof that enfranchising felons would endanger the general public. If this were the case, then incapacitation would be a bulletproof justification for disenfranchisement. I will argue this is not valid. One could argue that felons would create a dangerous voting bloc which would subvert public will and enact policies that run counter to the public good. After one concedes that disenfranchisement makes punishment itself less legitimate, one must prove the above in order to justify disenfranchisement. Protecting the public seems to be the only goal for which incapacitation can be reasonably adapted. In the next section, I will argue that disenfranchisement incapacitates felons, but that it does so in a way that does not protect the public. This is to say that it is just incapacitation for incapacitation's sake and can therefore not be justified under incapacitation as punishment.

The Threat of a Felon Voting Bloc

What if felons exercising their right to vote threatens the rights of other citizens? The intuition that inspires this objection is one that I value and share. If disenfranchisement cannot be justified as a punishment, then it must be justified under a broader concern for the protection of citizens. With this concern in mind, one can easily see why the threat of a felon voting bloc is a specter threatening enough to necessitate incapacitative punishment. Incapacitation survives my initial attack in this chapter because many reasonably believe that rights ought not to be granted if their exercise infringes upon the rights of others. To frame this in positive terms: one's rights can be unrestricted so long as they do not endanger the rights of others. Not only does my case for felon enfranchisement not run afoul of this intuition, it actively relies on it. I posit, however, that a felon's vote neither inherently nor effectively more dangerous than anyone else's. If all votes have the possibility of bringing about dangerous public policy there is no reason why felons should

be disqualified from voting and not others. The first part of this section, therefore, will address the empirical prediction that felon voting will endanger the general public. I call this the “felon voting bloc” argument.

One could object that if felons are enfranchised en masse, the moral foundations of public discourse will be slowly eroded. I hold that this worry does not outweigh a state’s responsibility to create a society of equals. Less than three out of every 100 citizens in the United States are disenfranchised due to a previous or current felony conviction.⁷⁷ This population is not spread evenly, with states including Alabama, Florida, Kentucky, Mississippi, Tennessee and Virginia having more than 7% of their voting-age population ineligible due to felony convictions. Even in these states, felons are far outnumbered in the voting pool. The assumption that felons could vote to sway public policy against the will of the unified non-felon population is empirically unreasonable. Even in locales with high felon populations like Chillicothe, Missouri, where X percent of the population has been charged with a felony, such an event is impossible.

Chillicothe Correctional Center has 1640 inmates. Chillicothe, Missouri has a population of 9,668. If Chillicothe has the same number of children per capita as the rest of the country, then their eligible voting population would be 7,674. If every felon in Chillicothe was immediately granted the right to vote in that county, they could change the outcome of elections very significantly. They could sway races in favor of candidates that would not have otherwise won. In states like Florida where elections are historically close, felons could also shift voter demographics enough to elect a candidate that would not have otherwise won. There is nothing *prima facie* wrong, however, with a certain group swaying an election. Imagine this situation with recently

⁷⁷Manza, Jeff, Shannon, Sarah, Uggen, Christopher. *State Level estimates of Felon Disenfranchisement in the United States 2010*. The Sentencing Project: July 2012.
https://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf

enfranchised new adults. If, for some reason, 18-year-olds who could not vote in the previous election had an especially high voter turnout and influenced the outcome, intuition implies there would be no injustice. This is true even in battleground states like Florida, where close elections are a fact of political life. Although most elections would be mostly unaffected, there is a significant number of places that would be. To reiterate: it is empirically vacuous to claim that felon enfranchisement would significantly shift elections in most places, and in the places it would, there is no inherent issue with more citizens voting. Because felons are just citizens voting, it seems that the numerical increase in votes is not most people's primary fear. The true concern many have is not that enfranchised felons would cast votes: it is that they would cast *morally questionable* votes. Call this the argument of "ballot box purity."

The logic of the ballot box purity argument is easy to dismember when one considers what would need to happen for them to degrade the moral character of legislation. For felon votes to be dangerous, politicians would need to shift their proposed agendas to inspire felons to vote for them. If these policies were immoral, dangerous, or unpalatable to the rest of the electorate, other voters would likely be dissuaded from voting for this candidate. This could perhaps be the case in a world where there was a "morally sound" majority (non-felons) and an "immoral" minority of voters (felons). Felons would be unable to, through their concerted influence, elect a representative who was unpalatable for the un-incarcerated electorate. That representative would have to have had public support to begin with. Felons voting as a bloc could sway elections, but they would do so by joining with an existing bloc of voters. Even in Chillicothe, Missouri, the 1,640 inmates could not electorally trounce the other 7,674 eligible voters. They would only be able to exert influence over public policy by joining forces with an existing voting bloc. This bloc would not be subject to disenfranchisement based on the way they exercise their right to vote, so it seems illogical to

disenfranchise the felons who agree with them on the same basis. Furthermore, there are not enough felons anywhere in the United States to create a voting bloc capable of oppressing other voters.⁷⁸ Such a situation would also require felons to vote entirely as one bloc, which is unlikely, given that individuals felons have different political leanings and interests just as un-incarcerated citizens do.

Even Mary Sigler argues against the felon voting bloc justification, claiming that it is both empirically unfounded and anti-democratic. She contends, “But even if the assumption of anti-social voting were correct, the attempt to ‘fence out’ certain viewpoints from political representation is constitutionally untenable and, more fundamentally, antithetical to the democratic process.”⁷⁹ Even sophisticated proponents of disenfranchisement agree that preventing a subversive felon voting bloc is a poor justification for disenfranchisement.

Temporary Disenfranchisement

In his article “Should Felons Be Allowed to Vote? Yes But...,” Hans A. von Spakovsky echoes the sentiments found in Sigler’s article. He maintains that felons need “to prove they deserve their exercise their right to vote.”⁸⁰ Unfortunately, for von Spakovsky, his argument is nothing more than a thinly veiled appeal to ballot box purity. Since that argument has already been refuted, there might be another foundation for von Spakovsky’s position. In advocating only temporary viewpoint discrimination, perhaps von Spakovsky and others like him believe that they

⁷⁸ Ibid

⁷⁹ Karlan, Pamela S., “Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement.” *Stanford Law School*, Public Law Working Paper No. 75.
<http://dx.doi.org/10.2139/ssrn.484543> Pg. 8

⁸⁰ Von Spakovsky, Hans A. “Should Felons Be Allowed to Vote? Yes But...” *The Heritage Foundation*.
<https://www.heritage.org/election-integrity/commentary/should-felons-be-allowed-vote-yes> (Accessed September 19, 2019)

do not overstep, since punishment's weakened legitimacy will only be temporally limited. To this point I reply that even temporarily weakened democratic legitimacy is unacceptable. The laws written and the punishments administered during a limited period of widespread disenfranchisement will still suffer from weakened legitimacy, and so long as citizens continue to be disenfranchised, this will be the case. Even if one citizen regains their right to vote, another will take their place and self-governance will still atrophy.

This begs the question, what if a citizen is in jail? Should they still be allowed to vote? I argue yes. My argument strikes the same when aimed at the arguments against enfranchising prisoners. In fact, no extra legwork is necessary to debate this point. Prisoners' disenfranchisement damages punishment just as much as everyone else's. Whitt makes this point as well. Whitt's argument defeats Peter Ramsay's and Ramsay's argument advocates the disenfranchisement of prisoners. Therefore, both of our arguments advocate the enfranchisement of prisoners as well as non-incarcerated felons.

So, Should Everyone Vote?

From my previous line of argument, one may understandably infer that I am committed to truly universal suffrage. One could contort my argument to erroneously claim that I believe leaving children unenfranchised also degrades the legitimacy of punishment. This, however, is not the case. The rationale for disenfranchising children and visitors is different from that used to disenfranchise felons. In the United States, citizens under the age of eighteen are not allowed to vote in order to guard against the existence of a voter population that has not yet developed the same rational capabilities as the general public. In scenarios where some citizens are not mentally

competent to decide how state decisions are to be made, it may be reasonable to prevent such citizens from influencing public policy for the good of the society as a whole.

Felons, however, are not denied the right to vote because society believes them incapable of making rational decisions; they are competent adults. In fact, it is this same competence that makes them culpable for the crimes they commit. A society may disenfranchise them for many of the reasons above, but incompetence is not a valid one.

As a counterpoint one could argue that 14-year-olds, for example, are mentally competent enough to make rational decisions. Likewise, they are subject to laws and can even be tried as adults. One could argue that the state disenfranchises felons and children for the same reason: they do not trust them to make the right decision. But herein lies the difference: children are deemed to not have the mental capabilities for rational decision making, while felons have those capabilities and supposedly choose not to use them. This is to say that while one group is not capable of making fully rational choices, another is. It may be true that a state does not trust felons to make the right decision, but it is for a different reason than it distrusts children. It distrusts children because it does not believe they *can* make wise choices; it distrusts felons because it does not believe they *will* make wise choices.

And of course, the latter is a reasonable concern. It is intuitive that a state would want its citizenry to make only informed, reasoned votes. Holding this as the standard, however, commits one to disenfranchising more people than just felons. If anyone who will probably not vote responsibly deserves to be disenfranchised, then it is intuitive that fiscally irresponsible persons and misdemeanor offenders should be disenfranchised as well. They have shown themselves to be irresponsible as well. And if the concern is that they will not make the *right* decision then disenfranchisement could extend even further. Under this justification, a state could impose an

education requirement for voters, disenfranchising all those who have not completed a certain level of education. It seems, then, that only enfranchising those voters who one thinks will make the “right” or “responsible” decision could lead to incredibly widespread disenfranchisement. Some may be fine with this intensely restrictive arrangement, but I gather that most people who value democracy would not.

It is understandable that citizens do not trust felons to be responsible with their right to vote. This distrust, however, appears to be driven more by retributive emotions than reason. If citizens really wished to disenfranchise their fellow citizens solely on the basis of responsibility, they would support disenfranchisement for misdemeanor offenders. Even people who fail to vote could be disenfranchised, since they have chosen to shirk their civic responsibility. Indeed, even Sigler’s argument for disenfranchisement based on neglect for one’s civic office could support disenfranchising misdemeanor offenders and non-voters. Not only is this argument defeated by Whitt but, in examining it, one sees unacceptable consequences of responsibility-based disenfranchisement.

While one could object to individual examples I have given (e.g. disenfranchising non-voters) the principle is clear: a state ought not to disenfranchise people just because it has judged that they will vote irresponsibly. Even if one subscribed to the paternalistic mindset that some adults are mentally/morally unfit to vote properly, that judgement could easily extend beyond felons and into a less despised portion of the population. Once this occurs, disenfranchisement on this basis becomes intuitively unpalatable. A state must, therefore, understand that they can and hope that they will. Perhaps to ensure that voters make the right decision, a state can conduct voter education programs or emphasize civics in compulsory K-12 education. It should not, however, revoke a right as important as voting with such a broad brush.

To conclude, the state should not disenfranchise only those who are *incapable* of voting responsibly. It cannot defensibly disenfranchise anyone it simply deems unlikely to vote responsibly, or else it will continue to delegitimize the punishments it implements. One might argue that there exist some unusually precocious minors with the mental capabilities to cast informed, responsible votes. I do not disagree, and I would not oppose some sort of program through which minors could become certified as responsible voters ahead of time. But I am not committed to enfranchising all minors, nor am I committed to making adults prove they have the mental capabilities to vote. Nor will I spend time defending the 18-year-old voting age. I only make the uncontroversial statement that those who pass it have a prima facie right to vote. Society has deemed them capable of making the important decisions involved in civic life, and those capabilities, save for extenuating circumstances, do not simply disappear. If the state wishes its capable citizens to participate in self-governance, it must allow them to vote. If the state only wishes for its responsible citizens to vote, then it must disenfranchise a far greater portion of the population than just felons.

Conclusion

Felon disenfranchisement subverts the fundamental ideals of the United States. In preventing mentally capable citizens from self-governing, it creates an underclass of semi-citizens who do not enjoy the full benefits of membership in the polity. If this arrangement were validated through punishment, then such an injustice would seemingly be justified. I have shown however, that it is not; punishment cannot justify disenfranchisement because disenfranchisement undermines the validity of punishment itself.

In the first chapter, I explored many of the prevalent justifications for punishment. The retributivist school offered us rationales based on contract breaking, unfair advantage, moral debt, appropriate emotions. The consequentialist school argued that punishment could be used to deter crime, rehabilitate offenders, express and communicate social morals, and incapacitate dangerous offenders. Finding holes in the justifications on both sides, we merged the two accounts to create a stringer, pluralist justification. We then considered whether this mixed account could justify disenfranchisement as punishment. While Lippke, Horney, Fletcher and others offered arguments to the contrary, it seemed that their objections could not completely disarm disenfranchisement as punishment under the mixed account.

In the final chapter I invoked an argument which I thought could defeat the mixed account. Matt S. Whitt, in responding to new arguments for disenfranchisement, inadvertently defeated the old ones. I spent the middle of the final chapter explaining how Whitt's arguments could be adapted to unmask the self-defeating nature of punishment-based disenfranchisement. To conclude I explicated some of the other, non-punishment related justifications for disenfranchisement and showed how flimsy they were. I hope that in doing so, I have demonstrated that disenfranchisement is not an acceptable practice. It cannot be justified as punishment because it undermines the

legitimacy of punishment itself. It cannot be justified as regulation of voter franchise for reasons Whitt lists in his article. These arguments are beyond the scope of this paper, but for arguments based democratic theory and citizenship standards, one can consult Whitt's article to see that they too do not survive scrutiny. Finally, disenfranchisement cannot be justified as a measure to protect citizens because there is no proof that it does so. What is left to disenfranchisement's name is degraded democracy and improper punishment

I thus have added a new argument to the enfranchisement advocate's repertoire. One now can substantiate the claim that disenfranchisement harms not only its subjects and their society, but the legitimacy of democratic punishment itself. Government by popular consent, the concept at the very core of democratic punishment implores the United States to join Canada, the Czech Republic, Denmark, Finland, Ireland, Iran, Israel, Kenya, Laos, Latvia, Lithuania, Macedonia, Montenegro, Pakistan, Serbia, Spain, Sweden, Switzerland, Ukraine and Zimbabwe in enfranchising both former and current prisoners.⁸¹ If it does, its punishments can maintain legitimacy. If it does not, it is only punishing itself.

⁸¹ Rottinghaus, Brandon, and Gina Baldwin. 2007. "Voting Behind Bars: Explaining Variation in International Enfranchisement Practices." *Electoral Studies* 26 (3): 688–98. doi:10.1016/j.electstud.2007.02.001.

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