

ARTICLES

Liberal and Republican Arguments Against the Disenfranchisement of Felons

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In the United States today, 4.7 million citizens—more than two percent of the adult population—are deprived of the right to vote because they have been convicted of a felony. Of these, 1.7 million have completed their sentences and are no longer under any form of criminal justice supervision.¹ I shall argue that disenfranchisement of offenders who have completed their sentences is morally wrong, and that enfranchising all offenders—even those in prison—would be good social policy.

Arguments about felony disenfranchisement are often framed along the lines of classical liberal and classical republican theories of citizenship, and I will follow this practice. The standard classical liberal argument for disenfranchisement of convicted felons is that criminals violate the social contract, and thereby forfeit the political rights to which the contract entitles them. I will argue that social contract theory does not have this implication and that, in fact, social contract theory shows how fundamental the right to vote is and implies that it is wrong to deny the right to vote to felons who have completed their punishment. The standard classical republican argument for disenfranchisement is that convicted felons lack the civic virtue needed for proper exercise of the vote. I will argue that this claim rests on an

exaggerated notion of how different criminals are from law-abiding people, and that a concern for civic virtue—of criminals and non-criminals—supports granting voting rights to felons, even those who are still in prison.

In section I, “Depriving Felons and Ex-Felons of the Vote in the United States,” I sketch the current situation and some of its political implications as well as its historical background. In section II, “Philosophical Arguments for Disenfranchising Felons and Ex-Felons,” I consider and critique the liberal (social contract) and republican (civic virtue) arguments for the disenfranchisement of felons and show that they are unpersuasive. In addition, I give reasons for believing that disenfranchisement of felons is not sensible punishment policy. In section III, “Voting and the Social Contract,” I argue that the social contract doctrine shows that it is morally wrong to deny the vote to convicted felons who have completed their punishments. In section IV, “Voting and Virtue,” I conclude by arguing that it would both exercise and enhance civic virtue to allow convicted felons—even those still in prison—to vote. Section III’s argument is a classical liberal argument against disenfranchisement of felons who have served their sentences; section IV’s argument is a classical republican argument against disenfranchisement of all felons.² I regard these two arguments not as alternatives, but as cumulative in their force.

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I Depriving Felons and Ex-Felons of the Vote in the United States

I shall call those with felony convictions who have completed their sentences and thus supposedly paid their debt to society *ex-felons*. I shall call those who have been convicted of a felony and not yet completely served their sentences—whether they are in prison or on probation or parole—*felons*. State disenfranchisement laws vary considerably. “In 48 states and the District of Columbia, all incarcerated persons are ineligible to vote. In addition, 35 states prohibit parolees from voting, 31 states do not allow felony probationers to vote, and in 14 states, a felony conviction can lead to loss of voting rights for life.”³ Alec Ewald comments: “The United States is the only democracy that indefinitely bars so many offenders from voting.”⁴

Felony disenfranchisement must be viewed in the context of the enormous growth in arrests, convictions, and imprisonment that has taken place in the United States in the last few decades. Between 1980 and 2001, the number of persons incarcerated in state and federal prisons more than quadrupled, growing from 329,000 to nearly 1.4 million.⁵ Behind the increase in prisoners stands a significant increase in the number of felony convictions. For example, from 1988 to 1992, the number of felony convictions rose by 34 percent. For violent crimes, the rise in felony convictions was even greater, considerably outpacing the rise in arrests: while adult arrests for violent felonies increased by 15 percent between 1988 and 1992, convictions for violent felonies increased 45 percent in that same period.⁶

However, most of the new admissions to prison during this time of soaring conviction and incarceration rates were nonviolent offenders, a large number of them convicted of nonviolent drug-related crimes.⁷ It stands to reason, by the way, that a dramatic increase in imprisonment would translate into a greater increase in the incarceration of nonviolent offenders than violent ones, since violent offenders have always stood a greater chance than nonviolent offenders of being locked up.⁸

The vast increase in the number of convictions and prison sentences does not fall evenly across society. The Bureau of Justice Statistics reports that, if current incarceration rates remain unchanged, 6 percent of white men and 32 percent of black men can expect to serve time in prison during their lifetime.⁹ The high presence of black men in prison has numerous causes. On one hand, it is true that poor people and people of color (often one and the same) commit more of the crimes for which people are

sent to prison. On the other hand, decades of research show that, *for the same criminal behavior*, poor and/or non-white people are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; if sentenced to prison, more likely to be given long terms, than well-off and/or white people.¹⁰ However, even this does not show the full extent of bias in the system, because that bias begins earlier, in the very definition of what is a crime. The criminal justice system tends to label as crimes the ways in which lower-class people harm others, while the ways in which the members of the upper-classes harm others are generally treated as regulatory matters, or if as crimes, not as grave ones. For example, preventable occupational diseases kill far more Americans each year than ordinary homicide. Nonetheless, the intentional acts that leave workers prey to deadly occupational diseases are rarely treated as crimes, and, even when they are, those responsible are almost never treated as murderers.¹¹

The group that we label “felons” is shaped by all these unjust biases plus, of course, the various injustices that keep many of them at the bottom of society where crime is most tempting and most likely. It is important to keep this in mind when considering policy proposals aimed at “felons” as a group.

As arrest, conviction, and imprisonment fall more heavily on African Americans than whites, felony disenfranchisement falls more heavily on the black community as well. 1.4 million black men—roughly 13 percent of African-American adult males—are disenfranchised because of a felony conviction.¹² These nationwide statistics understate the problem, since voting takes place by state, and state practices vary. Thirty-one percent of African-American men are disenfranchised in Alabama and in Florida. In Iowa, Mississippi, New Mexico, Virginia, and Wyoming, 25 percent of African-American males are deprived of the right to vote due to a felony conviction.¹³ A number of studies have shown that, since high numbers of convicted felons tend to come from particular inner-city neighborhoods, the effect of disenfranchisement is to dilute the political voice of whole neighborhoods, including that of their law-abiding residents.¹⁴

Because the vast majority of convicted felons in the U.S., black or white, are from the lower classes, disenfranchisement works simultaneously to dilute electoral

representation of blacks and of poor people. This does not seem like a good idea for a democracy. It is surely not a good idea for the Democratic Party! The same ethnic and economic factors that make one a more likely subject of criminal justice sanctions make one more likely to vote Democratic. The 2000 presidential election was decided in favor of George W. Bush by a margin of 537 votes in Florida. At the time, a very large number of individuals were disenfranchised because of a felony conviction.¹⁵ Social scientists Christopher Uggen and Jeff Manza performed a statistical analysis to estimate how they would have voted. Based on existing trends, they assumed about a 27 percent turnout rate among the disenfranchised and that about 69 percent of them would vote Democratic. Uggen and Manza concluded that, if ex-felons alone among the disenfranchised had been allowed to vote, Al Gore would have won Florida by over 62,000 votes. Uggen and Manza applied the same techniques to other races that took place between 1978 and 2000. They found that six Senate races won by Republicans would have been won by Democrats if ex-felons had been permitted to vote. This would have resulted in there being 60 Democratic senators during the period, which could have had dramatic impact on the kind of laws enacted.¹⁶ Though studies like these are quite speculative, relying necessarily on numerous counterfactual assumptions (for example, that the same candidates would have run with the same campaigns if felons and ex-felons were included in the electorate), it seems nonetheless undeniable that felon disenfranchisement is having an effect on political outcomes. Thus, both the rights of our fellow citizens and the content of our laws are at stake in the issue of felon disenfranchisement.

Felon disenfranchisement laws came to America during the colonial period as part of the English legal system, which included numerous conditions under which a person could be deprived of normal legal rights: outlawry, attainder, and "civil death." As Jason Schall has observed, "disenfranchisement of felons was only a small slice of the suffrage restrictions that existed in the colonies and shortly after the American Revolution."¹⁷ Colonies and, later, states restricted voting on the basis of religion, property ownership, and race as well as gender. At the time of the ratification of the Fourteenth Amendment in 1868, twenty-nine states had felon disenfranchisement laws. Interestingly, in virtually all of these states, blacks had been legally denied the right to vote based on their race. Thus, the antebellum disenfranchisement statutes cannot be thought to have been racially motivated.¹⁸ This was soon to change.

Section two of the Fourteenth Amendment sought to prevent states from barring blacks from voting, while not infringing on the Constitutional right of states to regulate elections. Instead, then, of simply guaranteeing the right to vote to all citizens, it held that "when the right to vote . . . is denied to any of the male inhabitants of [a] State . . . , or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."¹⁹ After Reconstruction, Southern states were quick to take advantage of the Fourteenth Amendment's apparent acceptance of felony disenfranchisement statutes as a method of keeping the vote from the newly freed black slaves. They passed laws denying the right to vote to people convicted of crimes believed to be committed primarily by blacks. For example, in 1890, Mississippi amended its constitution to disenfranchise people convicted of burglary, theft, and arson, but not of robbery or murder.²⁰ Commenting approvingly on these provisions in 1896, the Mississippi Supreme Court noted that the Mississippi constitutional convention "swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which" resulted in "its criminal members [being] given rather to furtive offenses than to the robust crimes of the whites."²¹ So, among the harmful consequences of slavery, it apparently also lowers the quality of crime in a society!

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South Carolina, Louisiana, Alabama, and Virginia quickly adopted Mississippi's strategy, amending their constitutions to include disenfranchisement provisions targeted at blacks.²² Some of these provisions were subsequently overturned because of their link to racism; however, where states reaffirmed or reenacted them without explicit racist intent, they have generally survived judicial review. Today, all southern states have restrictions on voting by people with felony convictions.

In the late nineteenth century, disenfranchisement laws were treated as part of the state's authority to regulate voting. In an 1884 Alabama court decision, disenfranchisement laws were upheld as "preserving the purity of the ballot box" against corruption by morally unfit voters. That same court saw disenfranchisement not as a punishment, but as a legitimate regulation of the voting process, that is, as "withholding an honorable privilege, and not denying a personal right or attribute of personal liberty."²³ In the twentieth century, voting came to be seen more as a basic right, and limits on it were subjected to stricter judicial scrutiny.²⁴ As courts increasingly swept away other restrictions on voting, however, felon disenfranchisement was retained. It was finally justified constitutionally by the words of the Fourteenth Amendment,²⁵ and it has often been justified philosophically by appeal to the social contract.

In the 1960s, disenfranchisement of felons was challenged in the name of the Equal Protection clause of the Fourteenth Amendment. Rebuffing such a challenge to New York's disenfranchisement law in 1967, Second

Circuit Judge Henry Friendly wrote in *Green v. Board of Elections of the City of New York*,

The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society, every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.²⁶

In what follows, I shall argue that the social contract doctrine does not have this implication and, moreover, what it does imply is that disenfranchisement cannot rightly be imposed on ex-felons. Consequently, while the last two centuries have seen a change from viewing voting as a privilege granted by the state to viewing it as a basic right, the survival of laws disenfranchising ex-felons shows that the right to vote is still not viewed basically enough.

II Philosophical Arguments for Disenfranchising Felons and Ex-Felons

Three kinds of philosophical justifications are offered for disenfranchisement. Disenfranchisement is either aimed at "preserving the purity of the ballot box," that is, protecting the electoral process from morally unsuitable voters; or it is viewed as criminals' rightful punishment; or it is viewed as ratifying the criminal's own surrender of his right to vote by violating the social contract. I shall consider these three arguments in this section.

(1) *Preserving the purity of the ballot box*

This kind of argument represents a classical republican approach because republicans believe that a good political system requires a virtuous citizenry. Though he does not identify it as republican, Christopher Manfredi makes this argument.²⁷ Manfredi claims that, in addition to Aristotle, "liberal theorists as diverse as Locke, Mill, Madison and Rawls have articulated the importance of at least some minimal level of civic virtue among citizens."²⁸ According to Manfredi,

The nexus between criminal disenfranchisement and the preservation and promotion of liberal democratic virtues is thus found in the exclusion from political participation of individuals who have manifestly demonstrated that their character is predominantly self-regarding, present-oriented, and impulsive. In short, disenfranchisement is reasonable

because criminal offenders are in general less empathetic and more impulsive than other citizens.²⁹

There can be no doubt that when people commit crimes they often manifest impulsive, self-centered, and present-oriented behavior. How we get from this near-truism to the claim that their characters are "*predominantly* self-regarding, present-oriented, and impulsive," or that they are "*in general* less empathetic and more impulsive than other citizens," Manfredi does not explain. Nor does he explain how he got from the proposition that some minimal degree of civic virtue is needed for liberal democracy to the idea that criminals lack that particular degree—or even if they do lack that degree, why *everyone* must have that degree of civic virtue. Maybe we already have enough civic virtue to have a decent liberal democracy. The leap from the need for some degree of civic virtue to the disenfranchisement of felons—made commonly in republican defenses of the policy—is a non sequitur.

Another writer who argues that criminals lack sufficient moral virtue to vote is Roger Clegg. In an article entitled "Who Should Vote?," Clegg maintains: "We currently require only two characteristics of voters: trustworthiness and loyalty. For different reasons, children

and aliens do not possess these qualities, and neither do felons.”³⁰ Clegg offers no evidence that these traits are required for voters, beyond his claim that the requirement is the best explanation of the exclusion of children and aliens. But those exclusions can be explained as based on the reasonable belief that some minimal level of maturity is necessary to exercise the vote, and on the fact that aliens who would like to vote have the option of seeking naturalized status.³¹ Clegg can cite no law or constitutional provision that requires trustworthiness or loyalty as a condition of the right to vote. In fact, the law seems to point in the opposite direction. A federal statute prohibits denying citizens the right to vote because they cannot demonstrate that they “possess good moral character.”³²

At a deeper level, both Manfredi and Clegg fail to see just how normal the vast majority of criminals are. They seem to think that criminals are people who manifest criminal personalities twenty-four hours a day, seven days a week. But this is a false impression. In *Delinquency and Drift*, a classic text of criminology, David Matza writes:

Delinquency is after all a legal status and not a person perpetually breaking laws.... [A person] is a delinquent by and large because the shoe fits, but even so we must never imagine that he wears it very much of the time.

Delinquency is a status and delinquents are incumbents who *intermittently* act out a role. When we focus on the incumbents rather than the status, we find that most are perfectly capable of conventional activity. Thus, delinquents intermittently play both delinquent and conventional roles.... The novice practitioner or researcher is frequently amazed at “how like other kids” the delinquent can be when so inclined.³³

Since young men commit most crimes, Matza’s point applies to a very large number of criminals. Moreover, most youthful offenders outgrow crime—as Manfredi recognizes when he supports his claim about criminals’ lack of self-control by saying that “this explains why criminal behavior is so highly correlated with age.”³⁴ Matza says that “from 60 to 85 percent of delinquents do not apparently become adult violators,” and criminological research continues to confirm a significant falling off of criminal behavior as people get older, in particular as they pass beyond adolescence and early adulthood.³⁵

For another indication of how normal most criminals are, recall that a large number of felony convictions are for nonviolent drug dealing. The motives of drug dealers are very much like those of other merchants, or of people working an extra job to make ends meet. Many of the people currently in prison for drug dealing already had

low-paying legitimate jobs, and they engaged in a bit of dealing on the side to supplement their legal incomes.³⁶ One does not have to approve of this activity to recognize that its motives are as American as apple pie.

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The flip side of failing to see how normal criminals are is failing to see how normal criminal behavior is, and how many noncriminal endeavors manifest the same “vices” as crimes do. Studies of self-reported crime show that crime, even serious crime, is quite widespread throughout the so-called “law-abiding” population. One study asked 1,020 adult males and 670 adult females (mostly from New York state) which of forty-nine offenses they had committed. “Ninety-one percent of the respondents admitted they had committed one or more offenses for which they might have received jail or prison sentences. . . . Sixty-four percent of the males and 27 percent of the females committed at least one felony for which they had not been apprehended.”³⁷ In a recent survey of 522 professional criminologists, 25 percent admitted to committing battery, and 22 percent to burglary, at some point in their lives. Nineteen percent admitted to committing tax fraud at some point, 7 percent in the past year.³⁸ There is no reason to think that criminologists are specially crime-prone, since they face neither the pressures of living in poverty nor the temptations of being around wealth. Thus, they are probably a good indication of the normality of criminal behavior in the wider population. Moreover, playboys, gamblers, professional daredevils, quick-buck investors, callous landlords, and manipulative political operatives—not to mention members of the “me-generation”—all engage in legal activities that manifest the vices of selfishness, impulsiveness, and present-orientedness that Manfredi and other republican theorists think distinctive of criminals.

The upshot of these observations is that both criminals and noncriminals are morally mixed—neither are wholly immoral or wholly moral. What else should we expect from beings shaped from what Isaiah Berlin, following Kant, called “the crooked timber of humanity”?³⁹ To avoid misunderstanding, note that I am not claiming that there

are no moral differences between the criminal and noncriminal populations overall. It is to be expected that there will be some statistically higher incidence of immoral or antisocial attitudes in the population of offenders than in that of non-offenders.⁴⁰ My point, rather, is that, even with such statistical differences between these whole populations, those who have been convicted of felonies and those who have not are substantially overlapping groups with respect to morality. This, plus the role played by bias and injustice in shaping the pool of felons, argues strongly against thinking of this group as uniformly “other” than law-abiding folks in their moral nature. Since, as I shall argue, deprivation of the right to vote is a very grave measure, a statistical difference between whole populations is not sufficient ground for denying the vote to all or even most felons. And that argues against any automatic, across-the-board policy of disenfranchising felons.

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Another republican theorist, Thomas Pangle, proposes disenfranchisement as a form of civic education aimed at the general public as a means to foster responsible voting. Pangle would limit disenfranchisement to those guilty of *serious* felonies (those sentenced to at least two years in prison) and only for the period of their incarceration.⁴¹ This is a very moderate proposal, and I agree with a restricted form of it: Rather than starting with the across-the-board assumption that all felons—or even all who are sentenced to two or more years of prison—are specially immoral, we might identify those felons who are specially immoral and, for purposes of civic education, punish them with disenfranchisement for a period equivalent to their prison sentences. To my mind, this should be done rarely, only with exemplary criminals, and, rather than being an automatic consequence of conviction, it should be part of the sentencing decision.

This said, I contend that the wholesale form in which Pangle proposes that we disenfranchise serious felons, though more limited than most proposals, still rests on an overestimation of how morally different criminals are from law-abiding people, and it ignores the issue of how

bias and injustice contribute to determining who our felons are. Moreover, it relies on a version of the non sequitur of which Manfredi is guilty. We can all agree that voters should limit their selfishness and respect the dignity of their fellow citizens. But this does not entail *requiring* that they do, nor does it justify excluding a whole segment of the population from the political process as a means of educating the general public. I shall suggest in the final section of this paper that including felons in the political process might also provide valuable civic education to the general public.

George Fletcher finds disenfranchisement of felons objectionable because it “treats convicted felons as a special class,” or even a *caste*, whose members really can never pay their debt to society.⁴² Analysis of arguments like those of Manfredi, Clegg, and Pangle suggests that the republican case for disenfranchisement rests on assuming that felons are *already* a special class or caste, characterized by pervasive immorality. Later, I shall argue that one of the social benefits to be derived from allowing felons and ex-felons into the political process is that law-abiding citizens will have the opportunity to learn just how normal criminals are. The converse of this is a statement that republican theorists ought to heed, namely, that wholesale disenfranchisement of felons has a negative impact on civic virtue because it conveys to the general public the divisive message that criminals are “other,” that is, more different from “normal” people than (the vast majority of) criminals really are.

One other point is worth making before leaving the republican argument. In addition to believing that virtue is necessary for political participation, republicans also believe that political participation enhances virtue.⁴³ Thus, as strong as any republican case may be for felon disenfranchisement, an equally strong republican case can be made for the value of enfranchising felons.

(2) *Disenfranchisement as punishment*

Technically, disenfranchisement is not considered part of an offender’s sentence but only a “collateral consequence” of conviction. Consequently, one rarely sees judges defending disenfranchisement as punishment. Nonetheless, the reality, as Ewald observes, “is that U.S. criminal disenfranchisement policies are punitive, both in their design and in their results.”⁴⁴ And some have defended it as such. For example, Clegg quotes approvingly Francis Marini, Republican leader of the Massachusetts state house when the state’s constitution was amended to prohibit voting by felons in prison. Marini asked, “We incarcerate people and we take away their right to run their own lives and leave them with the

ability to influence how we run our lives?"⁴⁵ With regard to imprisoned felons, the argument implied in this rhetorical question has some force. Since we punish people with loss of liberty, that is, with substantial loss of the right of self-determination, disenfranchisement is at least consistent with such loss since voting is a form of political self-determination. But notice that, regarding ex-felons, the argument works in reverse. Since their right of self-determination has been restored, consistent with that, they should resume the exercise of political self-determination.

Pamela Karlan argues that, as punishment, disenfranchisement violates the Eighth Amendment's prohibition on cruel and unusual punishments. This is because it cannot reasonably serve any recognized penal goal: deterrence, incapacitation, rehabilitation, or retribution. It cannot serve as a deterrent since someone undeterred by the prospect of being caught and sent to prison is not going to hesitate to commit a crime because he might also be deprived of the right to vote. It cannot serve the goal of incapacitation except in the rare cases where the crime involved is some form of electoral fraud, such as vote selling. It cannot serve as rehabilitation since it affirms criminals' exclusion from society rather than inviting them to integrate themselves into it. And it cannot serve as retribution since it is not proportioned to the offense. It is the same penalty for small felonies and great ones and, at least in some cases, a lifetime penalty. Moreover, except in the rare cases of voting-related felonies, there is no "fit" between the punishment and the crime.⁴⁶

I agree with Karlan that disenfranchisement is not a credible deterrent, and I agree as well that it cannot serve as incapacitation or as rehabilitation. However, her argument that it cannot serve as retribution because it is disproportionate and does not fit most crimes is less successful. That argument works against only laws that mandate disenfranchisement for felons and ex-felons. It does not work against laws that prohibit voting by felons only, either in prison or on probation or parole, since, in these cases, prohibition lasts as long as sentences and thus would be, like sentences, proportioned to the crimes that were committed. The United Nations Human Rights Committee, commenting on Article 25 of the International Convention of Civil and Political Rights which affirms citizens' right to vote, stated that "if conviction for an offence is the basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence."⁴⁷ Moreover, since the standard punishments of prison, parole, and probation are all limits on self-determination, and since disenfranchisement is also a limit on self-determination, there is as

much fit between disenfranchisement and crime as between all the other common penalties and crime.⁴⁸

If there is no logical incompatibility between disenfranchisement and punishment, arguments against disenfranchisement as punishment must be practical rather than conceptual. Though it is compatible with just retribution, it is a futile form of retribution since most criminals do not even know that their crimes can result in loss of the right to vote and, given the young age at which most crimes are committed, most criminals probably do not care about voting at the time they commit their crimes. Consequently, I contend that disenfranchisement is not sensible punishment policy: it will not deter crime, nor will offenders see it as their just deserts. It is pointless as incapacitation, and it goes without saying that it serves no rehabilitative function.

Along with my differences with Karlan about disenfranchisement as retributive punishment, I do not accept her presentation of the alternatives. She thinks that disenfranchisement can only be justified as either regulation (preserving the purity of the ballot box) or as punishment. But the social contract argument made by Judge Friendly does neither. Friendly claims that, by violating the social contract, criminals *abandon* the right to vote. This is not punishment, since it is a voluntary surrender presumed implicit in the crime itself, not a response by others to the crime. For example, if, as some hold, by his act a murderer loses his right to life, it does not follow that anyone should or will kill him. The loss of the right is, on this view, a logical implication of the crime, not a political or legal response to it. This loss of the right may be the grounds upon which punishment becomes permitted, but it is not the punishment itself. Likewise, if the right to vote is abandoned, the loss of the right is not a punishment. Nor, on the other hand, is it regulatory, and for much the same reason. The criminal does it him- or herself and the state simply ratifies this; the state does not enter to change the situation in the interest of regulating eligibility for voting. Consequently, I take it that the social contract argument treats disenfranchisement as neither regulation nor punishment, and thus is not susceptible to the objections that I have raised thus far. The social contract argument is worthy of consideration on its own, to which I now turn.

(3) *Violating the social contract*⁴⁹

Is Judge Friendly right? Does a person who violates a law made by his "agent"—the state—thereby forfeit his right to further participate in the making of law by voting?⁵⁰

Two routes appear to lead to an affirmative answer. First, by committing an act that violates the very laws

that his entering the contract had authorized, the criminal seems to be taking back his agreement to the contract and thus forfeiting the role that the contract had given him in determining the law. Second, a person who commits a crime against another seems to put himself back into either the state of nature or the state of war. That force, otherwise prohibited, may be used by private individuals to defend themselves against a criminal supports this idea. And, then, since there is no political authority in the state of nature, and political authority is at least ineffective during the state of war, it would seem that the criminal, in returning to one or both of these conditions, is denying the authority of the state—and that in turn would amount to forfeiting his own right to participate in the direction of that authority. I shall take these two arguments up in order.

The first argument makes the erroneous assumption that breaking the law is tantamount to denying the authority of the law, or that the former implies the latter. To see that this assumption is false, consider that it entails that people cannot act in ways that they think are wrong, because their very act would deny the authority of the rule they violate. Breaking a promise is not the same thing as denying that the promise was binding, nor does the former imply the latter. Likewise, violating the contract is not denying that it was binding, and thus does not amount to taking back one's agreement to the contract.

Moreover, there is considerable evidence showing that felons recognize the immorality of their crimes. Jonathan Casper interviewed a large number of criminal defendants and found that almost all of them believed that what they had done was wrong, and that the law they violated was worthy of respect.⁵¹ Matza asked 100 delinquents in a reformatory how they would feel about a boy who committed one of eight crimes, including some that the delinquents questioned had committed themselves. Only 2 percent of the 800 judgments voiced by the 100 delinquents he questioned were positive.⁵² More than a century ago, Tocqueville reported that he found the spirit of obedience to law even in American prisons.⁵³ (Note that these facts are also additional evidence for the normalcy of most criminals.)

The second argument holds that, by his act, the criminal puts himself in the state of nature or of war, and thus effectively denies the authority of the state. Ewald finds support for this in Locke's *Second Treatise*. He quotes Locke asserting that the criminal has "renounced reason, the common rule and measure God hath given to mankind . . . , declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage

beasts with whom men can have no society nor security."⁵⁴ Ewald fails to mention that the statement is only about murderers, not all criminals.⁵⁵ In the section immediately following the one in which the quoted words occur, Locke poses the question of whether "lesser breaches of [the] law" may be punished with death, and answers that "Each transgression may be punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."⁵⁶ Thus, those who commit lesser crimes than murder are to receive proportionately lesser penalties. So, while the quoted passage authorizes killing murderers and treating them as without rights, like a lion or a tiger, *this does not apply to all felons*. I shall return to the special case of murderers shortly.

Violating the contract is not denying that it was binding, and thus does not amount to taking back one's agreement to the contract.

Further, the passage describes the criminal as declaring war on all mankind while in the state of nature, and each of these—the state of war and the state of nature—plays a different role in Locke's theory. Unlike Hobbes, Locke distinguishes sharply between the state of nature and the state of war: "Want of a common judge with authority puts all men in a state of Nature; force without right upon a man's person makes a state of war both where there is, and is not, a common judge."⁵⁷ So, there can be peace in the state of nature and, more importantly for our purposes, the state of war can exist within a polity. In a polity (where there is "a common judge with authority"), a state of war is a condition in which political authority is locally and temporarily ineffective. This accounts for the right of private individuals to use force in self-defense even in a polity: "a thief whom I cannot harm, but by appeal to the law, for having stolen all that I am worth, I may kill when he sets on me to rob me but of my horse and coat, because the law . . . , where it cannot interpose to secure my life from present force . . . , permits me my own defence and the right of war, a liberty to kill the aggressor, because the aggressor allows not time to appeal to our common

judge.”⁵⁸ From this it is clear that Locke does not hold that, once in a polity, criminal acts amount to returning to the state of nature.⁵⁹ In a polity, the criminal and his victim are still subject to a common authority, even if that authority cannot get to the scene of the crime soon enough to stop it while it is happening. What Locke does hold is that, in or out of the polity, the criminal initiates the state of war.

What then is the proper response to someone who initiates the state of war? Actually, Locke has two answers to this: self-defense and punishment. The right of self-defense is a “right of war,” that is, a right to do what is necessary to protect oneself, even killing someone who, like the thief mentioned above, would not qualify for death as punishment. But, in a polity, this right is short-lived. It ends “when the actual force is over.” Then, “the state of war ceases between those that are in society and are equally on both sides subject to the judge.”⁶⁰

In a polity, then, a criminal may rightly be the object of defensive violence, even lethal, during his aggression. But once his aggression itself is over, he is rightly the object only of punishment, which must be proportioned to his offense. Moreover, he is at that point neither in the state of nature nor in the state war, and thus he possesses all his rights save those that are taken away in punishing him in proportion to his crime. Consequently, the social contract doctrine does not imply that, simply by violating the contract, people who commit felonies thereby abandon all their political rights, and thus their right to vote.

Except, perhaps, for murderers. Locke holds that, if I have the right to kill someone, then I have the right to delay killing him and instead use him as a slave: “having by his fault forfeited his own life by some act that deserves death, he to whom he has forfeited it may, when he has him in his power, delay to take it, and make use of him to his own service; and he does him no injury by it.”⁶¹ But notice that, in a polity, this must be part of the right of punishment not of self-defense, since once the criminal is under control, “when the actual force is over,” the right of self-defense no longer applies.⁶² Instead, the murderer must be taken before a judge, who may sentence him to execution, but could instead impose penal servitude. In short, a criminal who deserves a punishment of death is, for Locke, *ipso facto* deprived of all rights, and that would include the right to vote. However, since Locke’s view here applies not to all criminals but only to those whose crimes merit loss of all rights, the loss of rights is due to the nature of the crime committed, not simply to violating the social contract, which all criminals

do. So, even for murderers, violating the social contract does not itself imply loss of political rights generally, or of the right to vote in particular.

That we do not regard criminals as losing all of their rights is shown in practice. When criminals are apprehended, they still have legal rights against certain forms of treatment, and they have the legal right to appeal to a judge to enforce those rights. It is not thought that all criminals may be killed like a lion or a tiger. Moreover, when they are imprisoned, they not only retain many of their rights, they also retain their legal duties. They are still subject to the criminal law in prison, and certainly after release from prison. Though criminals violate the social contract in committing crime, we do not thereby treat them as surrendering all the rights that they have under the contract.

But there is still more to be said against the contractarian argument for disenfranchisement. There is a critical dimension to the social contract. Because the social contract makes obligations conditional on receipt of benefits from the rest of society, the doctrine shows us a fact about criminal justice that criminal justice officials almost never acknowledge, namely that, as a form of justice, *criminal justice is a two-way street*. While criminal justice officials focus on the question of whether the criminal has fulfilled his obligation to society, they gloss over the correlative question of whether the society has fulfilled its obligations to the criminal. No doubt it would be hard, maybe impossible, to design a criminal justice system that would acknowledge the centrality of this question, but *we* are still entitled to acknowledge it. The social contract requires that we do.

*Locke does not hold that, once in a polity,
criminal acts amount to returning
to the state of nature.*

If obligations are conditioned on benefits, it follows that duties to obey the rules of criminal justice are conditioned on the justice of the society that those rules are meant to govern. I have less of an obligation to refrain from violence in a society that leaves me prey to violence. I have less of an obligation to respect property in a society that excludes me from the possibility of gaining my own property. Moreover, the obligations owed to one’s fellow citizens are owed by each to all. Thus, if one person is the

victim of injustice, there is at least someone else who is failing in his duty to that person. With this, we must face the implications of the fact that many of the people who find themselves convicted of felonies are victims of social injustice. The implications of this fact are two. First, many disadvantaged people who commit crimes are not violating their civic duties to the same extent as advantaged people who commit the same crimes would be, because injustice has weakened their civic duties.⁶³ Second, the law-abiding people who promote that injustice (for example, by discriminating on the basis of race), or benefit from it (for example, by earning more than they would if blacks were able to compete in the market without discrimination) but do not work to correct it, share some of the moral responsibility for those crimes.

I do not want to be misunderstood here. I am not saying that the poor and black individuals who figure so

prominently in crime statistics violated no moral obligation in committing their crimes. Those who have committed violence and theft usually have violated moral obligations because, among other reasons, their victims are almost always people in conditions similar to their own. Even the victims of injustice have obligations not to harm other victims of injustice. Being the victim of injustice is a mitigating, not an excusing factor. Though not eliminated, the moral responsibility of victims of injustice is lessened both because they receive less than their fair share of the benefits that are the basis of their duties, and because moral responsibility for their crimes is shared by those who benefit from injustice and do not work to correct it. As a result, those who benefit—and retain their voting rights—are in no position to demand that impoverished criminals give up theirs.

III Voting and the Social Contract

Thus far, I have argued that the social contract does not imply that those who commit felonies thereby forfeit their right to vote before or after they have completed their punishments. I do believe that disenfranchising felons as part of their punishment is compatible with social contract doctrine. Now, I want to argue positively that the social contract implies that it is wrong to deny criminals a vote for any reason other than punishment, and thus that it is wrong to deny ex-felons the vote.

Locke does not speak about citizens' right to vote, but the implications of what he does say for polities in which the vote plays the role it that does in the United States and other modern democracies are clear. He writes, for example,

The constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union under the direction of persons and bonds of laws, made by persons authorized thereunto, *by the consent and appointment of the people*, without which no one man, or number of men, amongst them can have authority of making laws that shall be binding to the rest.⁶⁴

Since we (in the United States and other modern democracies) appoint and thus authorize our lawmakers by voting, we can take this statement as implying (for us) that unless the legislature is chosen by the vote of the people, it cannot make laws authoritative for the people. Voting is (for us) the functional equivalent of "consent

and appointment."⁶⁵ Consequently, if the legislature is chosen while excluding the votes of some of the people, it cannot make laws authoritative for the excluded ones. Moreover, what Locke says of rulers who make laws "not being thereunto authorized, by the fundamental appointment of the people," would apply to lawmakers who make laws for particular people who have not been allowed a say in that "fundamental appointment," namely, they "bring back again the state of war."⁶⁶ And since Locke calls slavery "nothing else but the state of war,"⁶⁷ we can conclude that the relationship between lawmakers and disenfranchised citizens is like that of slavery—domination by force.

I say *like slavery* because it is not fully slavery—neither for Locke nor for us. For Locke, slavery is a condition in which the master has absolute and arbitrary power, and the slave has no appeal to any independent judge against the will of the master. This is a rather extreme view of slavery, since even under slavery in antebellum America, slaves had some legal appeal beyond their masters, even if they only rarely could take advantage of it. Nonvoting felons in modern-day America have even more rights than antebellum slaves had.⁶⁸ And, of course, no one thinks they may be bought and sold as slaves traditionally have been.

To capture the way in which disenfranchisement is like slavery but not quite slavery, I shall characterize it as *subjection*. When sane adults are deprived of the right to

vote they are subjected to those who can vote since the voters can impose rules of behavior on the nonvoters without consulting them, and those rules will be coercively enforced. This shows that the right to vote is a very special right. It is not simply one way in which a self-governing person might choose to govern himself, it is a central ingredient in self-government itself. To deny the right to vote is more like denying the right to speak than it is like, say, denying the right to drive. It reduces people from citizens to subjects.⁶⁹

In an op-ed piece supporting the disenfranchisement of felons but not of ex-felons, John Silber writes, "When felons demand a right to vote, they demand the right to govern others while rejecting the right of others to govern them."⁷⁰ We have already seen that felons do not, by their crimes, deny the state's lawmaking authority, and thus they do not reject the right of others to govern them. Moreover, the right to vote is not simply a right to govern others. It is that, of course; but, what Silber misses is that, precisely because it is a means of governing others, voting enables a citizen to be free though subject to collective decisions. For Locke—and for Rousseau and Kant as well—citizen participation in authorizing and appointing legislators (or directly in making the law, for Rousseau) is how political authority is rendered compatible with the citizens' natural right to self-determination.

What is important here is not so much that voting gives me power to govern others, but that voting gives me *as much power over them as they have over me*. Rousseau states the logic of the case clearly: "each man, in giving himself to all, gives himself to nobody; and there is no associate over which he does not acquire the same right as he yields others over himself, he gains an equivalent

for everything he loses."⁷¹ Locke's contract is different than Rousseau's, chiefly in that Lockean individuals give up less to the state than Rousseauian ones,⁷² but the logic is the same: *a free person can be subject to political authority and remain free only if that political authority is his own in the same measure as he is subject to it.*⁷³ With a right to vote, I own a fraction of the sovereign power equal to my fraction of the population subject to that sovereign power. Without a right to vote, I am subject only and not sovereign. Thus I am in subjection, like a slave.

Subjection may be acceptable as punishment, which is normally a loss of self-governance, and thus, in varying degrees, a kind of state-imposed slavery.⁷⁴ But subjection is certainly not compatible with the status of those who—their punishment having been completed—are entitled to have their liberty restored.⁷⁵ To continue to deprive ex-felons of the right to vote is, to use Locke's words, to continue the state of war against them. Since a criminal who has served his punishment has paid his debt to society and has been restored to normal liberty, neither self-defense nor continued punishment is justified against him, and thus it is wrong to continue the state of war with him. For Locke, "reparation and restraint . . . are the only two reasons why one man may lawfully do harm to another, which is what we call punishment."⁷⁶ It is, then, likewise wrong to keep a person who has completed his punishment in a condition like slavery. Consequently, according to the social contract, deprivation of the right to vote must stop when punishment is completed.

This is a classical liberal argument against disenfranchising convicted felons who have completed their punishment. I turn now to a classical republican argument for enfranchising both ex-felons and felons.

IV Voting and Virtue

There are numerous social benefits to be gained from including both ex-felons and felons, even those in prison, in the democratic process. The first is rehabilitative, and the second might broadly be called educational. Since both of these are ways of improving civic virtue—of felons and of law-abiding citizens—together they constitute a republican argument against disenfranchisement.

Among American states, only Maine and Vermont currently permit voting by prison inmates. However, this is widely practiced in other countries. Prisoners may vote in the Czech Republic, Denmark, France, Germany, Israel, Japan, Kenya, the Netherlands, Norway, Peru,

Poland, Romania, Sweden, and Zimbabwe. German law requires that public officials make special efforts to facilitate and encourage voting by prisoners.⁷⁷

I have already argued that depriving felons of the vote is not generally a sensible punishment policy. Here, I add that allowing, even encouraging, felons in prison and under supervision to vote would promote responsible engagement in society and have a rehabilitative effect. Silber writes of ex-felons, "It is in the interest of society at large that released prisoners embrace the social contract by recognizing their obligation to respect the rights of others. They are not as likely to respect their

obligations under the contract if they are denied the correlative rights.⁷⁸ Silber's belief in the rehabilitative potential of political participation is shared by numerous other commentators.⁷⁹ But notice that, though Silber means this only for ex-felons, there is nothing in the claim that implies that it would not have the same effect on felons. This fact, coupled with the idea that disenfranchisement is not sensible punishment policy, is an argument for giving the vote to felons even while they are still in prison—with the possible infrequent exception of those who have shown themselves to be specially immoral.

For the educational benefits of allowing both felons and ex-felons into the democratic process, I turn to the work of Iris Marion Young. In *Inclusion and Democracy*, Young contends that differences (social, ethnic, racial, physical, etc.), rather than a hindrance to arriving at a democratic consensus, should be viewed as a resource. She writes, "Speaking across differences in a context of public accountability often reduces mutual ignorance about one another's values, intentions, and perceptions, and gives everyone the enlarged thought necessary to come to more reasonable and fairer solutions to problems."⁸⁰ What I want to draw from this is that enfranchising convicted felons will do something not only for them, but also for us. By inviting felons and ex-felons into the political discussion as full voting members, we will begin to learn just how normal most criminals are. We will learn more about our own society as aspects of it seen from offenders' standpoints come into our view. In particular, we will learn that our society confronts some people with a set of options in which crime is a more reasonable choice than it is in the set of options facing other, better-off people.

While Young emphasizes difference, I think that the importance of difference points to the importance of commonality. It is not just any difference—say, between the color of a white chair and of a black one—that merits our attention. The difference between a white and a black human being is of significance because this is a difference

of and to *humans*. Differences between humans count because they are differences between creatures who share in common that their lives and fates matter deeply to them. Treating the differences between criminals and ourselves as a resource likewise points to our fundamental commonality with the criminals in our midst.

If we think that felons are somehow irretrievably evil, fundamentally different from law-abiding people—a kind of caste or even a unique species—then all we can learn from them is how better to protect ourselves from them. But, there is more than that to learn from criminals. Similar to how branding dissidents insane in the former Soviet Union was a means to defuse challenges to the justice of the Soviet system, so too, the belief that those who deviate from our rules are wholly different from us normal law-abiding people is a shield against thinking about the justice of our society. To face the fact that the great majority of criminals are normal folks in bad straits, people like ourselves who found themselves in situations with little hope and opportunity for change, is to face up to the question of the justice of our society.

I said earlier that republicans believe both that civic virtue is a necessary condition of political participation and that political participation is a means of instilling and strengthening civic virtue. The two-part argument of this final section exploits this two-way feature of republicanism. Allowing felons to vote offers the possibility of instilling and strengthening civic virtue in them. On the other hand, by opening ourselves to fellow citizens who have gone afoul of the law, by allowing ourselves to see their normalcy and to hear from them the way society looks to them, we enlarge our own social sympathies and social knowledge, and we exercise a civic version of the virtue of charity. In addition, by granting felons and ex-felons the right to self-government to which they are entitled as human beings, we exercise and strengthen in ourselves the civic virtue of justice. Enfranchising felons can make us all better citizens.

NOTES

[This essay is a revised version of a talk that I presented at the 2004 Bertram Morris Colloquium on "Realizing Equal Citizenship," at the University of Colorado at Boulder, October 15, 2004. I thank Alison Jaggar for recommending that I write on the topic of disenfranchisement of felons, and for her encouragement from then on. I thank, as well, A. John Simmons for his very helpful comments on the sections of the essay that deal with Locke.]

1. The Sentencing Project, "Felony Disenfranchisement Laws

in the United States," available online at <http://www.sentencingproject.org/pdfs/1046.pdf> (updated September 2004). See also Kevin Krajick, "Why Can't Ex-Felons Vote?" *The Washington Post*, August 18, 2004, A19. Bear in mind that a felony is simply a crime subject to a penalty of a year or more in prison. See George Fletcher, "Disenfranchisement as Punishment: Reflections on the Racial Uses of *Infamia*," *UCLA Law Review* 46 (1999): 1899.

2. Alec Ewald offers liberal and republican *legal* arguments

against disenfranchisement, whereas mine are liberal and republican *philosophical* arguments. For example, Ewald's liberal argument focuses on the need for *strict scrutiny* by courts on restrictions on fundamental rights such as the right to vote, whereas mine focuses on why the right to vote is so fundamental. Nonetheless, as is normally the case in legal and philosophical arguments, there are areas of overlap. For example, I follow him in urging, as part of my republican argument, that allowing felons to vote will serve a rehabilitative function. In such cases of overlap, I keep my argument brief and refer to Ewald; in other places, I critique his views. That notwithstanding, I am much indebted to Ewald's treatment of the issue and agree with many of his conclusions. See Alec C. Ewald, "'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States," *Wisconsin Law Review* (2002): 1045-1137.

3. Ryan S. King and Marc Mauer, "The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia" (The Sentencing Project publication, September 2004): 2, available online at: <http://www.sentencingproject.org/pdfs/atlanta-report.pdf>. See also The Sentencing Project, "Felony Disenfranchisement Laws in the United States."

4. Ewald, "'Civil Death'," 1045.

5. If those who are locked up in jails, juvenile or military facilities, as well as those currently being held by U.S. Immigration and Customs Enforcement, are also counted, there are today over 2 million people behind bars in the United States, a number equivalent to the total population of states such as Kentucky or Oklahoma. See Jeffrey Reiman, *The Rich Get Richer and the Poor Get Prison*, 7th ed. (Boston: Allyn & Bacon, 2004), 12; see also Bureau of Justice Statistics, *Prisoners in 2001* (July 2002; NCJ195189), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf>.

6. Patrick A. Langan and Helen A. Graziadei, *Felony Sentences in State Courts, 1992*, Bureau of Justice Statistics Bulletin (January 1995, NCJ-151167), 7; available at <http://www.ojp.usdoj/bjs/pub/pdf/felsent.pdf>.

7. "Prison admissions of drug offenders increased tenfold between 1980 and 1993" (James P. Lynch and William J. Sabol, *Did Getting Tough on Crime Pay?* [Urban Institute Crime Policy Report, August 1997], 5). From 1988 to 1992, convictions for drug trafficking increased 53 percent. See Langan and Graziadei, *Felony Sentences in State Courts, 1992*, 7.

8. Between 1979 and 1991, "the proportion of state prisoners incarcerated for violent crimes decreased from about 58 percent to about 47 percent" (Lynch and Sabol, *Did Getting Tough on Crime Pay?*, 4). It is worth noting that, though crime rates have declined over the last ten years, only a fraction—about a quarter—of the decline can be attributed to the recent imprisonment binge. William Spelman has calculated that "the crime drop would have been 27 percent smaller if the prison build-up had never taken place" (Spelman, "The Limited Importance of Prison Expansion," in *The Crime Drop in America*, ed. A. Blumstein and J. Wallman [New York: Cambridge University Press, 2000], 123). Getting even this fraction has been very costly. For example, a study by the Justice Policy Institute and the Correctional Association of New York found that, since 1988, New York's annual prison budget increased by \$761 million while funding for the city and state university systems declined by nearly the same

amount. See Reiman, *The Rich Get Richer and the Poor Get Prison*, 16.

9. Bureau of Justice Statistics, *Criminal Offender Statistics*, at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (revised December 28, 2004).

10. Documented in Reiman, *The Rich Get Richer and the Poor Get Prison*, 103-56.

11. Documented in Reiman, *The Rich Get Richer and the Poor Get Prison*, 55-102; see 75-81 for comparisons between ordinary homicide and fatal occupational disease.

12. The Sentencing Project, "Felony Disenfranchisement Laws in the United States."

13. Jason Schall, "The Consistency of Felon Disenfranchisement with Citizenship Theory," The Sentencing Project Publication, available online at <http://www.sentencingproject.org/pdfs/jschall-harvard.pdf>, p. 19 and notes.

14. King and Mauer, "The Vanishing Black Electorate," 15; a study of disenfranchisement in Rhode Island contends that "felon disenfranchisement does not only punish the felon, but the entire neighborhood. . . . It's not only felons who suffer a loss of political voice, but their neighbors as well"; and further, "Felon disenfranchisement dramatically reduces the political power of cities and neighborhoods" (Marshall Clement and Nina Keough, "Political Punishment: The Consequences of Felon Disenfranchisement for Rhode Island Communities" [Rhode Island Family Life Center, Special Report on the Impact of Incarceration and Reentry, September 22, 2004], 5, 8; available online at <http://www.ri-familylifecenter.org/index.php?name=politicalpunishment>).

15. See Schall, "Consistency of Felon Disenfranchisement," 21-22.

16. Christopher Uggen and Jeff Manza, "Democratic Contradiction? The Political Consequences of Felon Disenfranchisement Laws in the United States," *American Sociological Review* 67 (2002): 780-81, 783-92.

17. Schall, "Consistency of Felon Disenfranchisement," 6.

18. See Ewald, "'Civil Death'," 1064-65.

19. U. S. Constitution, amend. 14, sec. 2 (emphasis added).

20. Marc Mauer, "Disenfranchising Felons: The Modern-Day Voting Rights Challenge," *Civil Rights Journal* 6 (1) (Winter 2002): 40-4, available online at <http://www.usccr.gov/pubs/crj/wint2002/wint02.pdf>; Schall, "Consistency of Felon Disenfranchisement," 10.

21. *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896); see Ewald, "'Civil Death'," 1090-95, for other explicit statements of legislators' intent to exclude blacks from voting by means of disenfranchisement laws.

22. Schall, "Consistency of Felon Disenfranchisement," 10.

23. *Washington v. State*, 75 Ala. 583, 585 (1884).

24. "The Supreme Court has repeatedly declared the right to vote to be fundamental and applied strict scrutiny to legislation restricting suffrage" (Ewald, "'Civil Death'," 1067n86, citing recent cases in support).

25. The ruling Supreme Court decision on this issue is *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974). In the majority opinion, Justice Rehnquist held that section 2 of the

Amendment (which, as we noted, explicitly exempts disenfranchisement of criminals as a reason for reducing representation) affirmatively permits such disenfranchisement. Thus, section 1 of the Amendment (the Equal Protection clause) cannot be held to prohibit it. Justice Thurgood Marshall dissented vigorously. See *Richardson v. Ramirez*, 418 U.S. at 56 (Rehnquist, J.) and 75-76 (Marshall, J., dissenting).

26. *Green v. Board of Elections of the City of New York*, 380 F.2d 445, 451 (2d Cir. 1967), quoting John Locke, *Second Treatise of Government*, section 89. Judge Friendly is not alone in appealing to the social contract; other court decisions refer to it as well. For example, in *Shepherd v. Trevino*, a 1978 case, the Fifth Circuit Court held that the state had a legitimate interest in denying the vote to individuals who, by violating the law, "have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly" (*Shepherd v. Trevino*, 527 F.2d 1110, 1115 [5th Cir. 1978]).

27. Christopher P. Manfredi, "Judicial Review and Criminal Disenfranchisement in the United States and Canada," *The Review of Politics* 60 (2) (1998): 277-305. Ewald comments that "Manfredi's essay is important because so few contemporary scholars have developed careful theoretical arguments for criminal disenfranchisement" (Ewald, "'Civil Death,'" 108In148).

28. Manfredi, "Judicial Review and Criminal Disenfranchisement," 295.

29. Manfredi, "Judicial Review and Criminal Disenfranchisement," 300.

30. Roger Clegg, "Who Should Vote?" *Texas Review of Law & Politics* 6 (2001-2002), 174.

31. In nineteenth century America, many states and territories did grant the vote to aliens. See Jamin B. Raskin, "Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage," *University of Pennsylvania Law Review* 141 (1993), 1397-417. Today, countries in the European Union have begun to allow residents from other EU countries to vote in local elections in the countries in which they work and reside.

32. 42 U.S.C. section 1973aa (1994). Note that Manfredi would probably not agree that such a statute conflicts with his claim that disenfranchisement can be justified because criminals lack moral virtue. He thinks that there is an important difference between making citizens prove that they are virtuous (which the statute forbids) and his proposal to disenfranchise citizens who, by committing crimes, have shown that they are not virtuous. I agree that there is a difference, but I doubt that it has the weight that Manfredi attributes to it. The spirit if not the letter of the statute runs against using moral evaluations as bases for voting rights, and I think that this runs against the republican case for disenfranchising felons. See Manfredi, "Judicial Review and Criminal Disenfranchisement," 297.

33. David Matza, *Delinquency and Drift* (New York: Wiley, 1964), 26 (emphasis in original).

34. Manfredi, "Judicial Review and Criminal Disenfranchisement," 300. For reasons like this, though Manfredi makes his case for disenfranchising both felons and ex-felons, he is clearly less comfortable with the latter. See, for example, 297, where Manfredi distinguishes temporary

from permanent disenfranchisement and finds the former more fully consistent with liberal premises than the latter.

35. Matza, *Delinquency and Drift*, 22. In 2001, 21 year-olds were the age group with the highest rate of arrests for violent crimes, people 35 to 39 were arrested for violent crimes at a rate less than half that of 21 year-olds; and those 50 to 54 were arrested at approximately one-eighth the rate for 21 year-olds (Office of Juvenile Justice and Delinquency Prevention, *OJJDP Statistical Briefing Book* [May 31, 2003], available online at <http://ojjdp.ncjrs.org/ojstatbb/html/qa276.html>).

36. Lynch and Sabol, *Did Getting Tough on Crime Pay?*, 8. Bear in mind that, since drug offenses are "victimless," arrest and prosecution are normally not instigated by a citizen complainant. Consequently, the number of drug arrests there are, and thus the number of felony drug convictions, is largely a matter of the discretion of law enforcement agencies (see King and Mauer, "The Vanishing Black Electorate," 8).

37. Cited in *The Challenge of Crime in a Free Society: A Report of the President's Commission on Law Enforcement and the Administration of Justice* (Washington, D.C.: U.S. Government Printing Office, 1967), 43.

38. Barbara H. Zaitzow and Matthew B. Robinson, "Criminologists as Criminals," in *Readings in Deviant Behavior*, ed. Alex Thio and Thomas C. Calhoun (New York: Allyn & Bacon, 2001), 231-33.

39. Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (NY: Alfred A. Knopf, 1991). Berlin took as the epigraph of this book, Kant's statement "Out of timber so crooked as that from which man is made nothing entirely straight can be built," from Kant's 1784 essay *Idea for a Universal History with a Cosmopolitan Intent*, Sixth Thesis.

40. Thus my thesis is not incompatible, for example, with Wilson and Herrnstein's claim that the criminal population shows a higher incidence of "deficient attachments to others and to social norms" (on the Minnesota Multiphasic Personality Inventory) and of "impulsiveness" (on other tests) than the larger population. James Q. Wilson and Richard J. Herrnstein, *Crime and Human Nature* (New York: Simon & Schuster, 1985), 189, 204-05. Note that Wilson and Herrnstein also recognize that crime declines dramatically with age and explain it in part by the fact that, due to "purely developmental changes in how people view right and wrong, the typical person passing into adulthood shifts from the egocentric and hedonistic focus of childhood to more abstract and principled guidelines to action" (147). This suggests that the differences that show up between criminal and noncriminal populations in the MMPI and other measures are not permanent.

41. Thomas L. Pangle, "Should Felons Vote? A Paradigmatic Debate Over the Meaning of Civic Responsibility" (unpublished manuscript, furnished by the author), 8, 12.

42. Fletcher, "Disenfranchisement as Punishment," 1906-07; see, also King and Mauer, "The Vanishing Black Electorate," 16.

43. See Ewald, "'Civil Death,'" 1110 (quoting experts on republicanism, Michael Sandel, J.G.A. Pocock, and Gordon Wood).

44. Ewald, "'Civil Death,'" 1058.

45. Quoted in Clegg, "Who Should Vote?" 172.

46. See Pamela S. Karlan, "Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement," *Stanford Public Law and Legal Theory Working Paper Series*, available online at <http://papers.ssrn.com/abstract=484543>, 21-26.

47. General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the ICCPR, CCPR/C/21/Rev.1/Add.7, August 27, 1996, Annex V (1); cited in Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Human Rights Watch and The Sentencing Project, 1998), chap. 8, "U.S. Criminal Disenfranchisement under International Human Rights Law," available online at <http://www.hrw.org/reports98/vote/usvot98o-06.htm>.

48. Ewald argues along the same lines as Karlan, writing that "It is not logically clear why the loss of voting rights is a proportional penalty for a first-time drug offender . . . as well as a murderer . . . , while the sanction is rarely imposed at all on those who violate the social contract and endanger the public by driving intoxicated" (Ewald, "'Civil Death,'" 1103). However, this is more about lack of proportionality in the entire sentencing structure than about disenfranchisement. If sentences were proportionate to crimes generally, then disenfranchising felons until their sentences were served would be equally proportionate.

49. In making my argument about the implications of social contract doctrine for disenfranchisement of felons, I rely primarily on the version of the doctrine that John Locke presents in his *Second Treatise of Government*, though I indicate in the text or the notes how other versions of the contract—Rousseau's, Kant's, Rawls's—likewise support my contentions. I focus on Locke partly because his is the version that has been used to defend disenfranchisement, and partly because I think his is a fitting model for American citizenship rights. To be sure, as Rogers Smith documents in detail in his important book *Civic Ideals*, the Lockean idea was not the only idea to influence American political culture, but it has always been an important one. See Rogers Smith, *Civic Ideals* (New Haven, CT: Yale University Press, 1997). Smith writes that, after years of subscribing to Louis Hartz's thesis ("that American thought has always been dominated by a liberal ideology resembling [that of] John Locke"), detailed study of laws and judicial decisions about the rights of citizens in nineteenth century America convinced him that "although many liberal . . . elements were visible, much of the history of America's citizenship laws did not fit with liberalism as Hartz described it." Those laws and decisions expressed "beliefs that America was by rights a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors" (Smith, *Civic Ideals*, 1-3). But, Smith also speaks of the "massive influence on educated Americans of Locke's *Essay Concerning Human Understanding* and writings on religious tolerance and education. . . . [W]orks [that] conveyed political themes consonant with his *Two Treatises of Government*," wherein Locke's social contract doctrine is presented. Smith also points out that Locke's ideas were widely present in influential sermons of the revolutionary era. Smith, *Civic Ideals*, 524-25n24. See also, Jerome Huyler, *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence, KS: University Press of Kansas, 1995).

50. "The only rationale for disenfranchisement that makes

sense is that felons, by virtue of their crime and their conviction, forfeit their right to participate in the political process" (Fletcher, "Disenfranchisement as Punishment," 1899).

51. Jonathan D. Casper, *American Criminal Justice: The Defendant's Perspective* (Englewood Cliffs, N.J.: Prentice Hall 1972), 146-51.

52. Matza, *Delinquency and Drift*, 48-50.

53. Cited in Ewald, "'Civil Death,'" 1101.

54. Locke, *Second Treatise of Government* (first edition, London: London: Awnsham Churchill, 1690), sec. 11; quoted in Ewald, "'Civil Death,'" 1073.

55. The whole sentence from which the quoted passage comes is: "And thus it is that every man in the state of Nature has a power to kill a murderer, both to deter others from doing the like injury (which no reparation can compensate) by the example of punishment that attends it from everybody, and also to secure men from the attempts of a criminal who, having renounced reason, the common rule and measure God hath given to mankind, hath, by the unjust violence and slaughter he hath committed upon one, declared war against all mankind, and therefore may be destroyed as a lion or a tiger, one of those wild savage beasts with whom men can have no society nor security (Locke, *Second Treatise of Government*, sec. 11 [I have emphasized the part quoted by Ewald]).

56. Locke, *Second Treatise of Government*, sec. 12. Interestingly, there is a strikingly similar sequence of statements in Rousseau's *Social Contract*. Rousseau writes, "every malefactor, by attacking social rights, becomes on forfeit a rebel and a traitor to his country; by violating its laws he ceases to be a member of it; he even makes war upon it. In such a case the preservation of the State is inconsistent with his own, and one or the other must perish; in putting the citizen to death, we slay not so much the citizen as the enemy" (Jean-Jacques Rousseau, *The Social Contract*, bk. 2, chap. 5, in *The Social Contract and Discourses*, trans. G. D. H. Cole [London: Dent & Sons, 1973], 190). But, eight sentences after the quoted passage, Rousseau writes, "The State has no right to put to death, even for the sake of making an example, anyone whom it can leave alive without danger."

57. Locke, *Second Treatise of Government*, sec. 19.

58. Locke, *Second Treatise of Government*, sec. 19.

59. Elsewhere, Locke writes that "Those who are united in one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society one with another; but those who have no such common appeal, I mean on earth, are still in the state of Nature" (sec. 87). So Locke supposes controversies and offenses to take place *within civil society*—within the polity—as long as there is a common law and judge to appeal to. Since felony disenfranchisement applies to people who were caught and convicted of a felony, they clearly committed their acts subject to a common law and judge, and thus did not return to the state of nature.

60. Locke, *Second Treatise of Government*, section 20.

61. Locke, *Second Treatise of Government*, section 23.

62. Things are different outside of a polity, when people make war, say, in the form of an attacking army. Since states are in the state of nature with respect to one another, political

authority is not merely temporarily ineffective, it is permanently absent. Then, the losing soldiers (if and only if their cause was unjust) forfeit all their rights: "And thus captives, taken in a just and lawful war, and such only, are subject to a despotical power, which . . . is the state of war continued" (Locke, *Second Treatise of Government*, sec. 172).

63. John Rawls asserts "that the duty to comply [with laws made by the majority] is problematic for permanent minorities that have suffered injustice for many years" (Rawls, *Theory of Justice* [Cambridge, MA: Harvard University Press, 1971], 355). See also Michael Walzer, "The Obligations of Oppressed Minorities," *Obligations: Essays of Disobedience, War and Citizenship* (New York: Simon and Schuster, 1970), 46-70; and Bill Lawson, "Crime, Minorities, and the Social Contract," *Criminal Justice Ethics*, 9 (2) (Summer/Fall, 1990): 14-24.

64. Locke, *Second Treatise of Government*, sec. 212 (my emphasis).

65. Since for Locke neither birth nor tacit consent gives full citizenship, the only way to apply Locke to the American situation is by treating voting as the functional equivalent of "consent and appointment." See Locke, *Second Treatise of Government*, sec. 118-22.

66. Locke, *Second Treatise of Government*, sec. 214, 226.

67. Locke, *Second Treatise of Government*, sec. 24.

68. In the late nineteenth century, courts held that a prisoner was effectively a "slave of the State" (*Ruffin v. Commonwealth* 62 Va. [21 Gratt.] [1871], 796); today, however, a prisoner "retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law" (*Coffin v. Reichard*, 143 F.2d [1948], 445).

69. Rawls writes that "citizens by their vote exercise coercive power over one another" (John Rawls, *Political Liberalism* [New York: Columbia University Press, 1993], 217; see also Rawls, "Reply to Habermas," *Journal of Philosophy* 92, (3) [March 1995]: 146). From this it follows that citizens without the vote are coerced non-reciprocally by citizens with the vote and thus, for Rawls as well, the nonvoters are in subjection to the voters. Cf. Jesse Furman, Note, "Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice," *Yale Law Journal* 106 (1996-97): 1197-231. Furman attempts to show that Rawls's contractarian theory of justice as fairness supports disenfranchisement of felons, but his argument is unpersuasive. Based on the fact that Rawls allows that justice may be enforced, Furman claims that Rawls's liberal theory has a repressive and thus illiberal dimension (Furman seems to think that a consistent liberal must tolerate everything). To make justice as fairness truly liberal, Furman proposes that it be altered—based on the Durkheimian view that crime is normal in society—to give up the idea that crime should be "eliminated altogether," and to accept instead that crime "be maintained at an acceptably low level" (Furman, 1229). Not mentioned is the fact that Durkheim's view is based on a very special—and not very liberal—sociological theory of the social function of crime. Why repressing any crime meets Furman's liberal standard is also not said. Nor does Furman point to any text of Rawls's where he says that crime should be eliminated altogether. What Furman does cite is Rawls calling for containing crime (Furman, 1210, 1226), which is compatible with Furman's proposal. Most disappointing of all, however, is that Furman makes his case untroubled by the fact that he can cite nothing

in Rawls that is explicitly sympathetic to disenfranchisement of felons.

70. John Silber, "Inmates Shouldn't Vote," *Boston Herald*, October 24, 2000, 33.

71. Rousseau, *The Social Contract*, bk. 1, chap. 6, 174.

72. Whereas contractors in Locke's theory retain in the polity all the rights and freedom they had in the state of nature minus what must be given up to form a polity, Rousseau's contractors give up all their natural rights and freedom to the state and receive back freedom in the form of an equal share in governance of the commonwealth. To my mind, it is because they are Rousseauians, that the French think they have the right to tell young Muslim girls that they cannot wear headscarfs in public schools, an idea that would scarcely occur to Lockean Americans.

73. Kant, too, recognized this logic. He wrote, "The legislative authority can belong only to the united will of the people. For since all right is to proceed from it, it cannot do anyone wrong by its law. Now when someone makes arrangements about another, it is always possible for him to do the other wrong; but he can never do wrong in what he decides upon with regard to himself (for *volenti non fit injuria* [no wrong is done to one who consents]). Therefore only the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the united will of the people, can be legislative"; and further, "one cannot say: the human being in a state has sacrificed a part of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a rightful condition, since this dependence arises from his own will" (Immanuel Kant, *The Metaphysics of Morals* [Cambridge, UK: Cambridge University Press, 1996], 91, 93). See also, Kant, "On the Proverb: That May Be True in Theory But Is of No Practical Use," in *Perpetual Peace and Other Essays* (Indianapolis, IN: Hackett Publishing Co., 1983), 75-76, where essentially the same thought is expressed. Note that, as with Locke, Kant does not take this thought to imply a right of all citizens to vote. So, as with Locke, I apply Kant's thought to voting because voting is how the people manifest their will in modern democracies.

74. In this context, it is interesting to note that Amendment Thirteen to the U.S. Constitution, the amendment that abolished slavery, allows only one condition under which "involuntary servitude" is permissible, namely, "as a punishment for crime whereof the party shall have been duly convicted."

75. "Without the vote, [ex-convicts] return to society still prisoners to some degree" (Silber, "Inmates Shouldn't Vote," 33).

76. Locke, *Second Treatise of Government*, sec. 8.

77. Fellner and Mauer, *Losing the Vote*, chap. 6, "Disenfranchisement in Other Countries," available online at http://hrw.org/reports98/vote/usvot98o-04.htm#P112_2733.

78. Silber, "Inmates Shouldn't Vote," 33.

79. See Ewald, "'Civil Death,'" 1112-16.

80. Iris Marion Young, *Inclusion and Democracy* (New York: Oxford University Press, 2000), 118.