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Penal Disenfranchisement

1. Introduction

At present in the U.K., prisoners serving a custodial sentence do not have the right to vote for the duration of their sentence.¹ This disenfranchisement is part of a range of collateral sanctions attached to criminal conviction (such as ineligibility for jury service, requirement to state recent previous convictions on job applications, inability to get a clear Criminal Records Bureau check when applying to work with children (von Hirsch and Wasik 1997; Lafollette 2005; Hoskins 2014)). The U.K.'s approach to disenfranchising prisoners is significantly less harsh than that in operation in many U.S. states, where the vote may be removed for life from felons, as is the case in Iowa, or returned only on special application, as with Florida.² But many European countries (including, since 2007, the Irish Republic), give all prisoners the vote. In what follows I assess some of the main arguments that can be given in favour of prisoner disenfranchisement in order to discover whether an adequate rationale can be given and, if so, what practical policies it might imply.

The investigation looks at three main strategies. Firstly, I consider the claim that the removal of the right to vote from prisoners (or serious offenders) is necessary as a practical matter to protect the democratic process from those who have shown themselves to be untrustworthy. Secondly, I look at the claim that offenders have broken the social contract and forfeited rights to participate in making law. And thirdly, I look at the claim that the voting ban could be an important part of the justified punishment of serious offenders. These arguments have in common the feature that they attempt to articulate the sense in which rights imply responsibilities, particularly that voting rights should be conditional on one's having met one's civic responsibilities (Deigh 1988). I argue that the only interpretation of this view that could justify prisoner disenfranchisement is that which thinks of disenfranchisement as fair and deserved retributive punishment for crime. Against widespread opposition to, and confusion about, the importance of retributive punishment, I offer a brief explanation and defence. I attempt to show how disenfranchisement is at least the right sort of thing to be a punishment. However, I conclude that even if legitimate retributive purposes could in principle justify prisoner disenfranchisement, the significance of disenfranchisement is such that it should be reserved for the most serious crimes.

First of all, however, it is worth saying something about the importance of the right to vote. As Jeremy Waldron has noted, there are various ways in which having a say in the democratic process might be important (Waldron 1993). First of all, there might be the Aristotelian view that "participation in the public realm is a necessary part of a fulfilling human life." Secondly, we might say that voting rights serve each citizen's interest in being

¹ Though following the 2005 *Hirst* judgement of the European Court of Human Rights, this may be set to change.

² For an up-to-date account of U.S. state legislation on felon disenfranchisement, see: http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Nov2012.pdf

able to exercise some control over the laws of their political community, thus to further their own priorities and get their point of view taken seriously by decision-makers. Thirdly, having the right to vote and engage in democratic debate encourages a person to be open to other points of view and to see the need to justify their own perspective in terms that others could come to understand – this could be what Richard Lippke calls the “educative interest” in having the right to vote (Lippke 2001). Fourthly, and perhaps most fundamentally, having the right to vote is also a marker of an important status, shared equally with other fellow citizens: it marks a person as having the ability and right to govern her own life and to join with others in determining the government of the collective. It recognises the person’s right to govern her own life as important to the degree that, as Rousseau would have it, only a law in the formulation of which she has an equal say is fit to govern her. To turn these points around, the removal of the right to vote threatens to a) remove the person’s access to an important part of human fulfilment; b) remove a source of control that each person has over the laws that affect her; c) remove access to political and moral education; and d) remove her equal status as citizen.

As Lippke says, however, while we may accept all the items in the last paragraph as important benefits of having the right to vote, it is not clear that actual possession of the right to vote is necessary for a person to obtain those benefits. For instance, plenty of forms of political participation remain open even if one lacks the right to vote. A person loses control over the final decision made by the vote: but, it might be said, the control that any one person exercises over the final decision is small. This suggests that the major evil in the loss of the vote is an essentially symbolic one, and concerns a loss of status or equality.³ To say that the evil is essentially symbolic is not in any way to downgrade it. Failures of respect, including the failure to basic respect that we are due in virtue of being human, might be in part at least symbolic wrongs, and this does nothing to undermine their seriousness.

2. Do we need to defend the democratic process against the participation of prisoners?

It is sometimes claimed that, through their crime, serious offenders have shown an irresponsible attitude to the law and its values, and to the demands of social cooperation. This is combined with the claim that, for democracy to flourish, citizens have to have a level of commitment to the value of the process, and respect for their fellow deliberators. The conclusion is drawn, then, that those who commit serious offences ought to be disqualified

³ This claim should be interpreted as a tentative one, and not something on which the argument of the paper rests. Two points might be made against the argument put forward in the text here. First of all, it might be said that having a vote makes one’s other forms of political participation more effective since political representatives have a reason to pay more attention to one’s views if there are votes behind them. And secondly, it might be argued that the discussion in the passage rests on an over-individualistic view of the relation between interests and rights: if prisoners in general have legitimate interests qua prisoners that will be ignored in public policy-making as long as they have no vote, this might speak in favour of their having the vote as a way of getting these interests on to the agenda, even though the control interest any particular individual has in having a vote is slight. I am grateful to Daniel Viehoff for discussions on both of these points.

from having the vote because they have shown themselves to be irresponsible (Clegg 2007; cf. Ewald 2002; Reiman 2005). There are two challenges for this view. The first is that an argument would have to be given to the effect that a polity is justified in removing the right to vote from those it deems untrustworthy. At present the right to vote is presumptive in the sense that one need not earn it: no qualification – even a very minimal one such as, for instance, passing a literacy test – is necessary (Manfredi 1998). Whereas if we accept this argument it might also follow that we should introduce other restrictions on the franchise: to introduce basic competence tests for voters; and to be far more serious than we currently are about citizenship education (Mauer 2011; Demleitner 2000). Some may think that, on the contrary, such a policy would conflict with the values of inclusiveness and commitment to open-ended debate that ought to characterise democratic society; also problematic would be the question of who would be given the authority to decide when a person is untrustworthy or not. Others may think that this is not a significant problem: perhaps it is a bullet we ought to be willing to bite. After all, even if we accept that the democratic process is important and should be reserved for those who appreciate its importance, it need not follow that we should test people to ensure that they qualify. The good society will have various concerns, not just that of upholding the integrity of its democracy. It will want to avoid intrusive procedures such as competence tests. So just as one has a presumptive right to walk freely down the highway without having to prove to anyone that one's intentions in doing so are permissible, so we might have a presumption that one is competent to vote until one shows otherwise. Offenders, though, it might be said, have flagrantly shown that they do not respect the law. They have presented the authorities with clear evidence that does not need to be collected in an intrusive way. In that case, it might be argued that the right to vote can permissibly be withdrawn. On the other hand, though, we might point out that voting is not the only form of political activity that prisoners or other allegedly irresponsible citizens might engage in – and certainly not the most powerful in terms of its outcomes. Should offenders – and others – also be banned from other potentially subversive political activity such as letter-writing, campaigning, reading political material (Lippke 2001: 558)?

However, even if this first challenge can be met, a second challenge remains for those who wish to appeal to justify the disenfranchisement of offenders on these grounds. This is that this strategy does not justify the disenfranchisement of all and only prisoners (or serious offenders). It does not justify the disenfranchisement of only offenders because it is not only through the commission of a criminal offence that one might give evidence of one's disrespect for the democratic process, the rule of law, the values underpinning the way of life of the polis, etc.. And it does not justify removing the right to vote from all prisoners because it is not the case that the commission of all criminal offences, even all serious ones, necessarily shows that one rejects the authority of the law or its substantive values. Many offences are committed in the heat of the moment or under emotional pressure, by people who deeply regret what they have done and would not claim to have been justified in so acting (Reiman 2005). Therefore any removal of the right to vote on these grounds would need to be discriminating as opposed to the blanket ban we have at present.

We have not shown that this defence of disenfranchisement is altogether unworkable. But its proponents clearly have some bullets to bite.

3. Breaking the social contract?

The problem with the argument we have just been considering is that it is not the offending action itself that counts in favour of losing the right. Rather the offending action is seen as a sign of something else, such as irresponsibility, that does, so it is argued, count in favour of losing the right. But as we have seen, both steps of this argument are problematic, or in need of further defence: both that the irresponsible should lose the right to vote, and that criminal action is a reliable indicator of the relevant sort of irresponsibility.

Thus another way of defending disenfranchisement would be to argue that rights and responsibilities are non-contingently connected, and that if one doesn't fulfil one's responsibilities one will *thereby* forfeit one's rights. Notice that the idea of forfeiture does not make the loss of rights contingent. It is not (as with the argument considered in section 2) that failure to fulfil one's responsibilities is a reliable indicator that one is not the sort of person to whom it is advisable to afford rights if one wants to end up with a flourishing community. Rather the claim is now that in breaking the law one thereby forfeits one's right to be a joint author of that law, just as one who continually flouts the rules of a game might forfeit the right that others include her in the game.

Now there are two ways of understanding this view. On the first, the violation of the law means the forfeiture of all civic rights outright. On the second, the violation means the forfeiture rather of those specific rights that one has oneself violated. Let us deal with the first interpretation first. In order to back this argument up, one would have to find similar moral situations in which certain transgressions lead to the loss of rights. And an obvious case is that of having made a contract or mutual promise. Where a contract has been made, the violation of the terms of the contract by one party releases the other party from any obligation to honour their side of the bargain. Therefore if it could be argued that the moral relationship between citizen and state is like that of the relationship between two parties to a contract then the violation of the contract by the citizen would release the state from its obligations towards the citizen. In breaking the law the citizen loses civil rights like the right to vote. However, this argument has three main flaws. Firstly, even if it were successful, it would only show that society is permitted to remove rights from the offender, not that it positively ought to (Cholbi 2002: 553). Secondly, there is the familiar concern that this agreement is a fiction: it doesn't actually happen that there is a moment in which obligations on either side are voluntarily assumed. The common move by contract theorists is to say that consent or agreement is tacit or implied; but where the consequences of violating the alleged contract are so drastic as to imply the outright loss of civic rights it might seem that tacit consent is not enough to make the contract binding. The third flaw concerns the implication of the contract model that it would be legitimate to treat the offender as without civic rights. The state – or society as a whole – is the provider of the basics of life. Little in the way of a decent life is possible outside it. Therefore the idea of removing all social rights and effectively imposing civic death is unacceptable (Kleinig and Murtagh 2008: 228).

This leads us to the second way of understanding the forfeiture view, on which the moral effect of a violation is not the forfeiture of all rights but rather the forfeiture of one's right

to claim the protection specifically of that right that one failed to respect. On this interpretation the loss of rights would be limited and proportionate to the offence; it would speak to the sense that one might have about the first interpretation that the loss of all rights on the basis of a violation is disproportionate. Nevertheless, this interpretation is also problematic. The first problem is that it is pretty hopeless as a justification of offender disenfranchisement since the forfeiture of the right to vote would only come about for those who had committed some sort of electoral fraud or other offences specifically to do with the democratic process. The second problem is that the general principle that this interpretation claims to be valid – namely that violation of someone’s rights leads to the loss of those rights in one’s own person – has unacceptable implications, such as that a rapist forfeits the right not to be raped.⁴

What I have offered here, with the social contract interpretation, is another way of thinking about the idea that rights are conditional on responsibilities. I have suggested that this is not a satisfying interpretation: both that there are problems with it, and that it won’t help us to justify prisoner disenfranchisement. Yet something about that idea might still appear attractive, even if the reader agrees that the interpretations we have encountered so far are unattractive. So I now want to suggest a third interpretation, which reads the idea that rights are conditional on responsibilities not as the claim that offenders literally lose rights if they fail to keep up the corresponding responsibilities, but rather as the claim that those subject to responsibilities ought to be held *accountable* for the exercise of those responsibilities. This is the thought that we cannot simply ignore the violation of basic social responsibilities, and that we ought to take action against those who commit such violations in a way that reflects the gravity of those violations. Furthermore, action that reflects the gravity of those violations will normally involve doing something to the offender that he would otherwise have a right that we not do. (Hence there is indeed a loss of rights; a forfeiture if you like. However, the difference from the social contract explanation is that on the punishment view the notion of forfeiture is not doing the explanatory work; rather it is the notion of deserved condemnation that explains why the rights are lost.) In other words, I would like to explore the thought that we interpret the claim that rights imply responsibilities as the claim that those who have rights are accountable for meeting their responsibilities, and that a failure to meet one’s responsibilities will be met with punishment. Therefore this interpretation claims that disenfranchisement is fair punishment for the offence.

4. Disenfranchisement as retributive punishment

Common rationales given for punishment include: deterrence; retribution; incapacitation; and rehabilitation. It is only retribution that deserves serious consideration here as a rationale for removing voting rights for prisoners. Removing voting rights would appear to be contrary to rehabilitative purposes, since inclusion in voting and democratic activity more generally may be one small way in which offenders learn to take on the image of themselves as responsible players in a cooperative self-governing society. It might be proposed that the removal of voting rights is incapacitative in the sense that it removes the

⁴ For a recent attempt to defend the forfeiture view, see Wellman (2012).

possibility that those who are a danger to the health of democracy could affect democratic outcomes; this is effectively the argument considered in Section 2 of this paper, and its problems have already been highlighted. The threat of voting rights being removed seems unlikely to have any strong deterrent effect, partly since for such an effect to come about potential offenders would have to know and care about the loss of such rights, neither of which is particularly likely. Which leaves us with the retributive thought that offenders who have flouted the law deserve to lose the right to be joint authors of the law as part of their punishment for the crime.

Two main problems, or sets of problems, face the 'retributive punishment' interpretation. One is the common concern that, despite its presence on official lists of the goals of punishment, retribution (at least as "positive retributivism") is not a morally defensible aim of state action. And the other is that, even if retribution is defensible, retributive punishment must "fit the crime," and loss of the right to vote is a disproportionate punishment for most, if not all, offences.

The second problem echoes one of the main criticisms of this "retributive" defence of penal disenfranchisement found in the literature: that retributive punishment must be in some way proportionate to the crime; that prisoner disenfranchisement is a blanket imposition on all prisoners; and that it is therefore not tailored to "fit" the individual characteristics and seriousness of the particular crime (Demleitner 2000: 788-792; Reiman 2005: 9). This source of criticism of the retributive defence of disenfranchisement can itself be split into three important objections. First of all, it is sometimes said that, like the forfeiture view, the idea of retributive punishment is hamstrung by a failure to generalise. This is the concern that, on the basis that the punishment, as proportional, must have something to do with the crime, disenfranchisement as a punishment only works for political offences, or at any rate politically motivated offences, or perhaps even that it would only be a just punishment for electoral offences (Reiman 2005: 9; Cholbi 2001: 545-547). Secondly, there is a problem concerning the relative indeterminacy of retributive sentencing theory: in particular, that it cannot explain why disenfranchisement should be carried out as well as imprisonment (or why would it be carried out rather than imprisonment). After all, even though offenders who are detained in prison lose some important rights, there are many important rights that they retain. How does the retributivist determine which crimes merit the loss of which rights (Cholbi: 2001: 548)? There is an interaction (of the horns of a dilemma type) between this objection and the last one, since one way to avoid the last objection is to widen out the notion of proportionality – which will, according to the current objection, lead to indeterminacy; whereas if we seek to avoid indeterminacy by narrowing down the notion of proportionality being used in order to avoid the current objection, the first objection recurs, that removal of political rights is fitting only for those whose crime is in some way political. If a retributivist defence of disenfranchisement is to be plausible it would have to be shown, either that more crimes than previously thought have a 'political' element; or that there is a respectable notion of proportionality that shows why disenfranchisement is fitting and proportional to crimes other than political ones. The third objection is that retributive disenfranchisement involves depriving the offender of a right that should be held unconditionally. For instance, Michael Cholbi argues that the possession of the right to vote is grounded in a basic right to self-determination. This right

to self-determination, he thinks, cannot be lost because it derives from our fundamental moral status. But in that case, the right to vote cannot be lost either (Cholbi 2001: 549-550).

Cholbi's insight about the fundamental status of the right to vote has been expressed by others. For instance, we might find something importantly right about the view of South African Supreme Court judge Albie Sachs, whose opinion in the South African Constitutional Court judgement, in favour of extending the franchise to all offenders, is widely quoted:

“The vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.”⁵

What seems right about Sachs's view is that the equal possession of the vote by all adult citizens declares that the state belongs to all citizens equally, that each should have an equal say in the use of coercive political power. If we think about the removal of the right to vote from an ethnic group, even a group that rarely participated in elections, such disenfranchisement would be wrong in part because it would be to say that those people were not equal to those who were citizens and had no right to be involved in decision-making. It would say that they are only to be subjects of law and not authors of that law. This is the symbolic evil of disenfranchisement that we discussed earlier in the paper.

The question is, however, whether this evil would be visited on offenders if their vote is removed by way of punishment for some serious crime. In what follows, I will suggest that the objections to the retributive defence of penal disenfranchisement that we have just looked at rest on a narrow and inadequate view of what retribution and retributivism involve, and an associated inadequate and narrow view of proportion, such that retributive punishment involves visiting like harm on the offender, or like infringement of rights. In order to decide whether removing voting rights is a legitimate aspect of retribution, therefore, we now need to broach some of the fundamental questions in the philosophy of punishment. We need to know something about what retribution involves and why (or if) it is important. This will help us understand the importance of proportionality to punishment. And it might then help us address the question of how to determine whether the removal of voting rights is proportionate response to certain crimes, and if so which ones.

5. What is retribution?

Although it is an official rationale for criminal punishment in many countries, many people find it hard, on reflection, to agree that there is anything of value in pursuing retribution. For some, retribution is ultimately barbaric, and its incorporation into criminal justice

⁵ August and Another v Electoral Commission and Others (CCT8/99) [1999] ZACC 3; 1999 (3) SA 1; para 17 [<http://www.saflii.org/za/cases/ZACC/1999/3.html>].

policy is, like the provocation defence in criminal law, merely “a concession to human weakness.” However, over the past forty years or so, philosophers have found fertile new ways to breathe life into retributive ideas, and it is now a respectable opinion that something important would be lost if retribution were abandoned altogether in a brave new world of criminal justice.

Let us begin, then, by distinguishing a number of things that might be meant by retribution. First of all, retribution might mean revenge or retaliation. This is what most people have at the forefront of their minds when retribution comes up in conversation. But our tradition of thinking about retribution also contains within it ideas about redemption, as in the idea of atonement or penance as the undertaking of punishment in order to cleanse oneself of sin. And a third tradition of thinking about retribution ties it to the moral need to express condemnation of serious wrongdoing.

Bearing these three aspects of retribution in mind, we could draw up three ways of thinking about proportionality in retributive punishment. On the first tradition, retaliation might require visiting like harm on the offender. On the second tradition, it is the offender undertaking punishment that is said to be necessary in order to expiate the crime, and thus proportionate punishment would be whatever is necessary for such expiation. And on the third tradition it might be said that proportionate punishment is whatever is necessary to express or do justice to the seriousness of the wrong. All of which is to say that a simple or over-literal understanding of *lex talionis* will not capture all that the retributive tradition can say about why we should punish and how much (for more on this, see Bennett 2013).

The criticisms of retributive defences of disenfranchisement are best seen as targeting the first tradition. Thus for instance the claim that retributive punishment could only be for political offences assumes that punishment must be fitting to the crime in a fairly literal way. But that would only be devastating to the retributive defence if this interpretation of retribution were the strongest one; and I doubt that it is. Of course, the idea that wrongdoing requires a response that like treatment should be inflicted on the wrongdoer has not been without its defenders: whether the development of Herbert Morris’s idea that like treatment is necessary to remove advantage unfairly gained by the wrongdoer (Morris 1968; Murphy 1973; Dagger 1993); the idea that like treatment is justified on the basis of equality in the way that the golden rule is justified (Reiman 1985); or the idea that like treatment is necessary in order to vindicate the victim and defeat the wrongdoer (Hampton 1988). However, many would agree that defenders of this view have not yet found a version of this view that explains how visiting like suffering on an offender a) brings about something morally important that b) can only be done by visiting suffering on the offender rather than in some other way. It seems to me that the idea of retribution as justified condemnation or as a necessary part of making amends is more likely to be successful.

To start with, I would like to put things in a slightly different focus. We have to challenge and reject the idea that “an eye for an eye” is the core of the retributive tradition, and that opponents are correct in rejecting retributive defences of disenfranchisement on the grounds that “an eye for an eye” will not provide a justification. I would also like to suggest that the idea that the core of retribution is about the wrongdoer’s desert of suffering harm

is, as well as morally questionable, too sophisticated to be the core idea of this tradition. It is unclear that our intuitions really support the idea that an offender deserves a like answering harm: many people who may have retributive tendencies do not.

What seems clearer is that the core retributive intuition is to do with the non-contingent necessity for *some* kind of response to wrongdoing, *just by virtue of its character as wrongdoing*. In other words, what I suggest is the core thought is that if one doesn't engage in retributive action in the face of the offence, one will be in some condoning or accepting or becoming complicit in it. This way of looking at it speaks rather in favour of *dissociation* from the offence, that is, doing something that brings it about that one doesn't go along with the offence, that one protests against it or refuses to acquiesce in it. What makes this retributive in the first place is that the actions responsive to wrongdoing are justified non-instrumentally: they are constitutive of something that is non-contingently required, namely, dissociation from the wrong. The idea is that dissociative actions are called for, not in order to bring about some further good end, but in their own right, as doing justice to or bearing witness to the gravity of the offence.

If we see non-instrumental dissociation as the heart of retributivism, we can distinguish two claims that any form of retributivism will have to make: first, the core claim that responsible wrongdoing calls inherently for some sort of dissociating action; and secondly, a further claim about what sort of action will bring about the relevant sort of dissociating. Retributivism understood as the idea that offenders deserve to have suffering imposed on them could then be understood as giving a particular interpretation of the second claim.

To put it another way, we can adapt a phrase of Joel Feinberg's and say that retribution revolves around "symbolic non-acquiescence" in the offence (Feinberg 1965). That is a nice phrase because it points out that, if we see the need for dissociation, we are faced with a question of getting the symbols right. It is only if we undertake the right sorts of symbolic action that we will successfully manage to dissociate ourselves from the offence. However, getting the right symbols is, contrary to Feinberg, not just a conventional matter (or at any rate, not if "conventional" is taken to mean that the content of the symbol is arbitrary). There is a symbolic need because getting the symbols wrong will not have the right kind of moral effect.

If this is along the right lines, the question is what symbols are the appropriate ones. This is where the argument against the "eye for an eye" approach is sharpest. The reason many people reject retributivism is that they are unpersuaded that a morally important task requires the infliction of harm on the offender. In other words, imposing harm on the offender is not an effective and proportionate way of dissociating from the offence. What seems essential, rather, is that the response to wrongdoing should symbolise the need for dissociation itself.⁶ Hence a more convincing basis for adequate symbolization, I suggest, is distancing or withdrawal – withdrawal of the treatment that the person could standardly expect in his position. Thus we might withdraw certain forms of respect that are normally

⁶ I have developed this view in Bennett (2002, 2008, 2012).

owed to someone in that position, or to whom we have that relation, or withdraw help that we might normally offer. Common expressions of moral disapproval might therefore be a refusal to shake hands with someone, or a refusal to be in the same room as the person. Of course, that might indeed cause a person to suffer, but if it failed to cause suffering it would not have failed in its purpose. The purpose of the action is dissociation.

It is important to notice at this point that what counts as actions of dissociation will be relative to the parties' positions within a particular relationship. What counts as effective withdrawal will depend *both* on what the person's offence is *and* what the relationship one has with the person is: for this relationship will determine what kind of respect or treatment the person can normally expect or be entitled to. Broadly speaking, it is not necessary to dissociate oneself from all wrongs as such. Dissociation becomes necessary when one would otherwise be implicated in (condoning or accepting of) the offence. When this is so is a highly contextual matter and I'm not sure I have a general theory about it. But being in certain sorts of relationship with the offender can make it the case that a failure to take certain actions implies condonation, and it is then those in such relationships who have standing, and indeed obligation, to engage in blaming, condemnatory, dissociative activity. It is the partial and temporary withdrawal of positive treatment (signs of recognition and care) that one could normally expect specifically as a member of that relationship that are the effective symbols of dissociation.

It is also important to note that the idea of dissociation also underpins the idea of feeling guilty and making amends: guilt is precisely the feeling of having been the person who (intentionally, responsibly) did something she needs to dissociate herself from; and making amends are the actions that bring about such dissociation. Therefore this idea has a good claim to be the core intuition in the retributive tradition.

A third thing to note: we need to understand the dissociative action of withdrawing or cutting off in a sufficiently context-sensitive, subtle and nuanced way. One thing that can be going on when one withdraws from someone is that one dismisses the person or wants nothing more to do with them: severing the relationship. The important thing about the retributive reaction to wrongdoing that I have in mind, however, is that it is not like this. It is rather that withdrawal is a way of holding the agent to account. Withdrawing is a way, not of ending, but of affirming the relationship, in light of what the person has done. This is because the person is being held accountable, and only someone who is "in" can be held to account. This person is not simply a wild beast or an outsider; she is one of us who should have known better, should have cared more. This is a point that will important further on in the argument. What looks like neglect or exclusion can actually be affirmation that the person remains a party to the relationship despite her offence.

If this is at all along the right lines then we might be able to see why it makes sense to claim that the partial and temporary removal of civic rights such as voting rights is indeed the sort of thing that *could in principle* be used by the state to express proportionate disapproval of wrongdoing. We can flesh this argument out briefly. When a wrong is committed, there is a question whether the state, or the polis whose state it is, has a retributive duty to dissociate itself from that wrong. It does not follow automatically that it

has such a duty, since it is not the case that all parties have a duty to dissociate themselves from all wrongs. Broadly speaking, however, the state has a duty to dissociate itself from this wrong if it is the case that the state has legitimately taken on the responsibility of determining how it is permissible for citizens to act towards one another within this domain of action. In other words, if the state legitimately promulgates a criminal law for that domain, the standards of which claim to be authoritative for citizens, then the state is in some way claiming to regulate or arbitrate upon the bounds of permissible action for citizens within that domain (Raz 1979). If an action is committed that is wrong, and which the state has declared impermissible, the state has a duty to dissociate itself from the wrong. Not to mark the action as impermissible would be to condone it or treat it as permissible. How is such dissociation to be brought about? We have no better grasp on this than the grasp we have on the same question in the interpersonal case, namely, that we have to get the symbols right, and that the symbols should have something to do with distancing or withdrawal. So the state is implicated in certain sorts of wrongdoing by its citizens, or within its jurisdiction, to the extent that it needs to do something to dissociate itself from those actions; and it dissociates itself by withdrawing, partially or temporarily, the kind of special treatment that those in a political relationship can usually expect as members of that relationship. In other words, dissociation is brought about by the partial and temporary withdrawal of civil rights and status. Perhaps most obviously, this withdrawal would concern civil rights of freedom of movement and association, such that it becomes legitimate to impose certain things on the offender that could not normally be required of a citizen. The removal of voting rights could also be part of this package. (Alternatively, disenfranchisement could be a punishment meted out *instead of* loss of freedom for some offences: the argument is simply that disenfranchisement has some retributive value as a sentence.⁷)

We can perhaps see how this proposal would escape at least some of the criticisms of the retributive justification of disenfranchisement that we considered earlier. To start with, I have at least gestured towards an account on which retribution is more than just the problematic notion of retaliation, and might start to look morally important, at least if we can make sense of the notion of dissociative actions. Secondly, the view presented here escapes the criticism that its notion of proportionality is so narrow that it can only be relevant to specifically political offences such as electoral fraud, or other politically motivated offences. On the view here, a specifically political response such as the removal of voting rights is appropriate, not because the crime itself is necessarily a political one but rather because the crime is a wrong that damages the political relationship (the relationship between citizens qua citizens, or the relationship between citizen and state) – in the sense that those involved in the political relationship with the offender cannot decently continue with the relationship as though nothing had happened. In other words, the sanction is a suspension of political status, not because the offence is a political one but rather because it is by virtue of their membership of the political relationship that the state has an interest in its citizens' actions, or at any rate the kind of interest which is such that it must dissociate itself from those actions when they are wrongful. Thirdly, although the

⁷ Thanks to [...] for pressing me on this point.

notion of proportionality is not as narrow as *lex talionis*, it does not make the corresponding error of becoming entirely indeterminate. The guiding thought is that there should be a suspension of civic status that is proportionate to the gravity of the offence. Although intuitions regarding cardinal proportionality are notoriously variable, that is not to say that there could not be an acceptable political mechanism for determining such proportionality. Of course, the argument here has simply been to show that disenfranchisement is the sort of thing that could be used for retributive purposes, and no argument has been advanced to show why it might be preferable to deploy disenfranchisement rather than imprisonment as a sentence, or vice versa, or to use both. Rather the implication of my argument is that we have to investigate the symbolism of the offence and the symbolism of the suggested sanction in order to judge the proportionality between them.

One important thing to stress, however, is that this view liberates us from the idea that retributive punishment should be thought of in terms of imprisonment, or that it aims specifically at causing suffering. Retributive punishment, on this view, will involve something burdensome, something that involves the offender not receiving what would normally be his due, or not avoiding burdens that he would normally be entitled to avoid; but it does not aim at suffering as such, and it might seem unlikely that imprisonment is the only, or even a particularly good way of doing justice in these terms. As such, this view gives us the opportunity to think of a wider range of responses to wrongdoing that might count as fitting punishments. And as a result we can begin to see how disenfranchisement is the kind of thing that might at least *resemble* the kind of withdrawal necessary to dissociate from an offence.

6. Temporary disenfranchisement for serious unmitigated offences?

I now want to turn to the question of whether disenfranchisement as a punishment should be ruled out in advance on the grounds of a fundamental right to self-determination, as Cholbi has argued. The first thing to note about Cholbi's concern is that the right to self-determination can be understood in two ways. First of all, it can be understood as a right to exercise certain sorts of control over one's life. Or it can be understood as a status right, a right to be regarded as a free and equal citizen who is not to be arbitrarily dominated by others. Now if we interpret the right to self-determination as a right to exercise control then the right, if it exists, would seem to guarantee something like an absolute sphere of negative liberty in which one can exercise one's own choices. However, it is not clear that such a right could be absolute and fundamental, since it is clearly permissible at least in some situations to invade negative liberty e.g. to prevent great harm to others (such as quarantining someone who has a serious communicable illness). It is more plausible to regard the fundamental right to self-determination as expressing one's equal status as a being entitled to live according to one's own lights. The difference between these two interpretations is that one's status as a being with an equal right to be the author of her own life can be respected even when one's control over one's own life is restricted, as long as those restrictions do not occur because of arbitrary preference, or arbitrary power, given to others. Thus a fundamental right to self-determination might be compatible with the restriction of one's control over one's life as long as those restrictions meet certain conditions – perhaps that they have been decided upon democratically, that they could be

reasonably justified to you, that they are compatible with the public recognition of the equality of your interests with others, etc. The question, then, is whether the temporary removal of voting rights is incompatible with the offender's status as a political equal.

This takes us back to the Albie Sachs objection. The Albie Sachs objection is that possession of voting rights is the basic status of citizenship, and that their removal is to treat someone as an outlaw, as unworthy to participate in democratic affairs. However, in response we might say that voting rights cannot be the only badge of citizenship. For there is a flip side to the right to make law, namely, accountability to law. When one is called to account one is treated as someone who should have seen the criminal law (or the values it expresses) as having compelling weight. One is called to give account to the law of which one is, as a democratic citizen, the joint author.⁸ Therefore, if the critic of disenfranchisement wants to explain what is wrong with that form of punishment, they will have to do more than to say that voting rights is essential to citizenship. Voting rights might temporarily be removed to express the seriousness of wrongdoing without citizenship being denied.

Nevertheless, this does not by itself win the argument for the proponent of disenfranchisement. Any judgement about the proportionality of a punishment to a crime has to involve some view about serious the crimes are and how significant the deprivation is. And, if the view of sentencing theory that I have suggested here is plausible, one cannot do that without paying attention to what it means to suspend a person's civic status in certain ways. For one thing, if we aim to be guided by the meaning of retribution as I have defended it here, we should take it as a principle that punishments should be constructive rather than merely privatory.⁹ The meaning of the punishment should affirm rather than deny the offender's identity as a citizen, where this will generally involve the punishment in some way working to restore the offender to the community. For instance, community service is a punishment by which the offender is given a useful, meaningful task the performance of which will result in his return to normal life. Its imposition can be seen as asking the offender to make up for what he did. Removal of voting rights, on the other hand, is purely negative, and is not geared towards the expectation of the offender's resumption of an untroubled place in the community. Such a purely negative punishment, suspension of rights for its own sake, may be appropriate for some crimes, but only for particularly serious ones. For another thing, Sachs seems correct to say that voting rights are essential to citizenship; and although this may not explain why disenfranchisement could never be a suitable punishment, to remove voting rights even temporarily as punishment is to say that someone has done something that has placed their very citizenship in question to some degree. Many crimes, even serious ones, are committed by individuals who are not dead against the values underpinning the life of the polity. This fact should be recognised in the punishments offenders receive. Therefore suspension of such a fundamental aspect of citizenship should be reserved for those most serious crimes that

⁸ Of course, this rhetoric about being joint author of the law might give rise to scepticism, particularly in a society in which many may well feel that the only time in which they are properly treated as citizens is when they feel the force of the law.

⁹ In R. A. Duff's terms, they should be "inclusive" rather than "exclusive." See (Duff 2001: Ch. 5).

are in danger of undermining a person's status as a continuing member of the polity. Because even in the commission of serious offences there are often factors that mitigate the malice shown in the action, disenfranchisement should be reserved for aggravated offences committed with special callousness or lack of concern.

7. Conclusion

In this paper I have tried to find the strongest argument that might be given in favour of offender disenfranchisement. This strategy is important in part as a way of diagnosing the source of popular support for the voting ban. The strongest argument we have found sees disenfranchisement as deserved punishment. But even on this argument, the meaning of disenfranchisement as a punishment would have to be that the crime is something that has put one's very status as a citizen in a precarious position. Although disenfranchisement is something that should be an option for certain crimes at sentencing, it should be reserved for serious crimes aggravated by particular callousness.

Of course, one challenge for this position would be to explain how serious crimes need to be in order to require disenfranchisement. There is – surely – no magic point at which the seriousness of a crime becomes so great that it really merits disenfranchisement in a way that no crime of a slightly lesser seriousness does. Even if it is accepted that there is an element of arbitrariness and convention about drawing the precise boundary, there are two things worth saying: first, that the problem here does not seem any greater than it is with respect to other kinds of punishment (for instance, at what level of seriousness is it appropriate to introduce custodial sentences?); and secondly, the problem of the vagueness of boundaries should not deflect us from the recognition of an important scalar change in crime-seriousness that does need to be recognised by changes in punishments.

Another serious challenge for the view I have put forward is the extent to which its plausibility rests on an idealisation of conditions of punishment and social conditions more generally (Lippke 2001). Say it were not the case that the vast majority of offenders are drawn from socio-economic groups that are already less well off, marginalised from political processes and disaffected in their attitudes to institutions of political and economic governance. Say it were not the case that the dominant modes of punishment had a tendency to further alienate offenders rather than providing them with a vehicle for moral responsiveness to the significance of their actions. Say it were not the case that drugs play a significant role in much criminal behaviour. In that case, it might be accepted, the arguments put forward here would have some bite. But in the world as it is, does the removal of the right to vote, specifically the symbolism of the temporary removal of an equal status that I have said is the key aspect to the punishment, likely to add insult to injury? I don't have a simple or clear answer to these questions. One thing that would have to be taken into account is that, for all the problems inherent in punishment, there is also a kind of second class status attributed to a person when they are not held responsible for their actions as others are, and when they do not have to face up to the moral significance of what they have done. In which case there can be something unattractive in the idea of "making allowances" for the fact that certain people turn out bad through no fault of their own. On the other hand, though, it seems plausible that greater recognition should be given to the way in which challenging circumstances should affect the evaluation of the

seriousness of the offence at sentencing. And in addition, it may be that, even if I have made a prima facie case for disenfranchisement, when we take the predictable consequences of such a policy into account it is not something that, all things considered, we ought to enforce. However, these are considerations to deal with in another paper.¹⁰

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¹⁰ For discussions of this issue and comments on previous versions of this paper I am particularly grateful to [...].

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