

AN “AGENDA FOR DEMOLITION”: THE FALLACY AND THE DANGER OF THE “SUBVERSIVE VOTING” ARGUMENT FOR FELONY DISENFRANCHISEMENT

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It is often said that Americans lean towards pragmatism in their policy deliberations. As commentators since Thomas Paine have assumed,¹ Americans are a practical people, ill-disposed towards excessive theorizing. Contemporary conservative politicians have been particularly adept at linking their policies to what they consider to be “common sense,” and enjoy ridiculing liberal positions as elitist nonsense. The ongoing debate over the last major restriction of the voting rights of adult U.S. citizens—felon disenfranchisement laws—has largely exhibited this pattern. While reform advocates parse federal voting rights law, uncover little-known and repugnant

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1. In *Common Sense*, Paine wrote, “[i]n the following pages I offer nothing more than simple facts, plain arguments, and common sense; and have no other preliminaries to settle with the reader, than that he will divest himself of prejudice and prepossession, and suffer his reason and his feelings to determine for themselves” Thomas Paine, *Collected Writings* 20 (Eric Foner ed., Library of America 1995) (1776). De Tocqueville famously observed that “in no country in the civilized world is less attention paid to philosophy than in the United States.” 2 Alexis de Tocqueville, *Democracy in America* 3 (Philip Bradley ed., Henry Reeve trans., Vintage Classics 1990) (1835). Half a century later, the American philosophical school known as pragmatism held that “the effective meaning of any philosophic proposition can always be brought down to some particular consequence, in our future practical experience” William James, *The Writings of William James* 349 (John J. McDermott ed., Modern Library 1968) (1898).

historical episodes, and quote from civil-liberties cases protecting the rights of unpopular citizens, disenfranchisement's defenders like to declare that barring offenders from voting is simply the obvious thing to do.

There is, however, a twist: in this debate, the anti-reform, status quo position actually relies mostly on theoretical, rather than practical, arguments. For example, disenfranchisement's defenders continue to claim that denying convicts the vote is necessary to protect something called the "purity of the ballot box";² that the "untrustworthy" must not be allowed to vote simply because they are "untrustworthy";³ that disenfranchising offenders is a "form of punishment,"⁴ without any evidence that the sanction has

2. This phrase appeared in the often-cited Alabama decision *Washington v. State*, 75 Ala. 582, 585 (1884), and reappears occasionally in the disenfranchisement debate. The California Supreme Court interpreted the phrase to be about preventing fraud in *Otsuka v. Hite*, 414 P.2d 412, 417 (1966); the U.S. Supreme Court subsequently agreed in *Dunn v. Blumstein*, 405 U.S. 330, 345 (1972). The Court called preserving the purity of the ballot box "a formidable-sounding state interest," but held that durational residence requirements were not necessary to prevent fraud. *Id.*

Reference to the "purity of the ballot box" in the context of disenfranchisement can also be understood as shorthand for classical-republican or communitarian theories of the body politic and political participation. According to this view, people who have committed crimes lack the civic virtue required by politics in a healthy republic; their presence in the voting booths might impair the strength of the polity, which is imagined to be a quite real entity. Barring them from participating, meanwhile, enables the community to express its respect for politics and its contempt for their antisocial conduct. For further explanation of how republican ideology supports disenfranchising people convicted of crime, see Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 Wisc. L. Rev. 1045, 1082–89 (2002); for challenges to disenfranchisement based on republican premises, see *id.* at 1109–19. For a comprehensive account of expressivist theories of law, see Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. Pa. L. Rev. 1503 (2000).

3. Testifying before Congress in favor of indefinite disenfranchisement, Roger Clegg of the Center for Equal Opportunity argued that "[c]riminals are, in the aggregate, less likely to be trustworthy, good citizens." See *Civic Participation and Rehabilitation Act of 1999: Hearings Before the Subcomm. on the Const., Comm. of the Judiciary*, 106th Cong. 16 (1999) [hereinafter *Civic Participation Act Hearings*] (prepared testimony of Roger Clegg).

4. Roger Clegg, *Who Should Vote?*, 6 Tex. Rev. L. & Pol. 159, 177 (2001). In congressional testimony, Todd F. Gaziano of the Heritage Foundation described disenfranchisement as "part of the sanction for a specified . . . crime." *Civic*

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retributive, deterrent, or rehabilitative power; and that because offenders violate the “social contract,”⁵ they forfeit political rights completely unrelated to the needs of incarceration.

But prominent defenders of disenfranchisement sometimes make an important practical claim. They declare that convicts and former inmates must be barred from the polls because they might well vote—presumably in concert—to weaken the criminal law, forming “an anti-law enforcement voting bloc.”⁶ As Thurgood Marshall put it in a dissenting opinion, the fear is that offenders would vote in a way “subversive of the interests of an orderly society.”⁷ Variations of this argument have appeared in the words of

Participation Act Hearings, *supra* note 3, at 41 (statement of Todd F. Gaziano). When the Massachusetts legislature voted in 2000 to amend the state constitution and deprive incarcerated felons of the ballot, one prominent state legislator said the loss of the vote “is part of the penalty—you are in jail, you don’t pass go, you don’t collect the \$200, you don’t vote until you get out.” Frank Phillips, *Lawmakers Push To Ban Inmate Votes*, *Boston Globe*, June 28, 2000, at B1 (quoting House Minority Leader Francis Marini). Massachusetts Governor Paul Cellucci said the new policy “had to do with punishing people for their crimes.” John McElhenny, *Legislature Votes to Bar Jailed Felons from Voting*, *Associated Press Newswires*, June 28, 2000.

5. This justification appears in numerous places. The Fifth Circuit held in *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) that felons “have breached the social contract and, like insane persons, have raised doubts about their ability to vote responsibly.” Other prominent examples include *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967), which quotes directly from John Locke; and John Silber, *Mass. Inmates Shouldn’t Vote*, *Boston Herald*, Oct. 24, 2000, at 33. For a comprehensive explanation, see Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 Va. L. Rev. 109 (2003).

Even some civil libertarians defend disenfranchisement on purely theoretical social contract grounds. See Jay A. Sigler, *Civil Rights in America 1500 to the Present* 383–84 (1998). Sigler endorses disenfranchisement, arguing that “[w]hen felons choose to violate societal laws, they break the social contract that guarantees their fundamental rights and freedoms.” *Id.* Sigler’s claim is remarkable because it follows a full explanation and endorsement of the “strict scrutiny” standard against which all proposed suffrage restrictions must be measured—a standard which Sigler simply abandons, without comment, in endorsing criminal disenfranchisement just one page later. *Id.* at 382.

6. Clegg, *supra* note 4, at 177.

7. *Richardson v. Ramirez*, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting). Other good explanations include Jeffrey L. Harrison, *Repentance, Redemption, and Transformation in the Context of Economic and Civil Rights*, in *Civic Repentance* 337 (Amitai Etzioni ed., 1999); and Note, *The Disenfranchisement of*

legislators, law professors, judges, and advocates from prominent think tanks—powerful people whose ideas merit close scrutiny.⁸

Proponents of felony disenfranchisement find the notion of criminal offenders claiming a “right to vote” to be intellectually repugnant, even nonsensical. Quoting or paraphrasing Hobbes, Locke, and Rousseau, they often contend that rights exist only among people who can “maintain a degree of regularity and predictability in their relationships.”⁹ Each crime breaks a piece of that predictability; criminals violate the most basic agreement making rights possible. How can they claim the right to make the polity’s laws?

However, advocates of the rights-based disenfranchisement theory encounter a difficulty here. They know—that is, those of them with at least a passing familiarity with constitutional principles know—that an erudite sense of indignation is not sufficient grounds for deprivation of a person’s rights in the modern United States. Ideas and theories are not enough—if the state wants to strip a right from a citizen, it must show *purposes*, legitimate and rational objectives which are reasonably linked to the proposed restriction. The subversive-voting specter purports to solve this problem. It claims a practical justification for disenfranchisement, while simultaneously evoking the basic philosophical reason for denying political power to offenders—the notion that doing so protects the very foundations of modern society. Meanwhile, it accomplishes the crucial political task of tapping into the public’s fear and loathing of convicts.

It is an elegant solution to the quandary facing disenfranchisement’s defenders. That is, it would be elegant, were it not so

Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,” 102 Harv. L. Rev. 1300, 1302–03 (1989).

8. As political philosopher Dennis F. Thompson has argued, the “reasons that political agents themselves give to justify or criticize political practices” are a crucial source for political theorists to investigate, and those reasons “*are to be found in the fragments of theories implied by the arguments* that citizens and their representatives present in public forums.” Dennis F. Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* ix (2002) (emphasis added). Thompson urges scholars to “broaden[] the content of political theory to include the arguments that citizens and their representatives present in public forums. . . .” *Id.* That approach is adopted here.

9. Richard E. Flathman, *The Practice of Rights* 65 (1976). Although Flathman was discussing rights in a different context, his reasoning best exemplifies the arguments of proponents of felony disenfranchisement.

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flagrantly fallacious, patently contrary to constitutional ideals, and dangerously atavistic in its approach to suffrage. This essay exposes the weaknesses in the theory that convicts should not be allowed to vote because they might use their votes for evil purposes. Part I shows that the subversive-voting hypothesis is alive and well in the contemporary debate over disenfranchisement. Part II demonstrates that the subversive-voting claim is profoundly antithetical to modern ideas about universal suffrage—and is, in fact, no different from what opponents of expanded voting rights have been arguing for hundreds of years. Part III turns to evidence from a generation of social science research to demonstrate that the theory that convicts would vote subversively is utterly without empirical support. Finally, Part IV argues that even if offenders did plan to pursue interests different than those of other voters, the idea that they can be stripped of voting rights *for that reason* violates essential American political and constitutional principles, and is contrary to current international human rights law.

In *Self-Rule: A Cultural History of American Democracy*, Robert H. Wiebe contrasts the oldest limits on citizens' rights with those put in place later:

[E]xclusions that existed at the outset . . . carry a meaning different from later exclusions that stripped citizens of rights they once had. In terms of democracy's historical development, disenfranchisement is much deadlier than an initial failure to enfranchise. Call the one an agenda for challenge, the other an agenda for demolition.¹⁰

Some states' disenfranchisement laws are so old that they may constitute merely a “failure to enfranchise,” and pose only “an agenda for challenge.” But the policy is now being challenged and defended in contemporary terms throughout the United States, and has been implemented for the first time in Massachusetts¹¹ and Utah.¹² Other arguments for disenfranchisement—such as the vague

10. Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* 8 (1995).

11. See Mass. Const. art. III; Mass. Ann. Laws ch. 51, § 1 (Law. Co-op. 1990 & Supp. Mar. 2004). In November 2000, Massachusetts voters approved a constitutional amendment that prohibits incarcerated felons from voting. See Mass. Prisoners Assoc. Political Action Comm. v. Acting Governor, 435 Mass. 811, 816 n.6, 761 N.E.2d 952, 957 n.6 (2002).

12. See Utah Const. art. IV, § 6. The people of Utah voted to amend their

and unsupported notion that barring those convicted of crimes from voting is an effective way to punish them—may appear more often. But the subversive-voting premise is important because it alone claims to be practical, and because it states so baldly that votes may be suppressed because of their content. It is indeed “an agenda for demolition.”

I. IN THEIR OWN WORDS: THE SUBVERSIVE-VOTING HYPOTHESIS TODAY

A. “A Real Danger:” Theories of Subversive Voting

In court, congressional testimony, and the occasional scholarly essay, defenders of disenfranchisement have articulated and supported the subversive-voting hypothesis. Two of the most blunt statements came in congressional testimony delivered in 1999 by Todd F. Gaziano, Director of Legal and Judicial Studies at the Heritage Foundation, and Roger Clegg, Vice President and General Counsel at the Center for Equal Opportunity. Both testified against a bill which would have secured voting rights only for offenders who had completed their sentences. Nevertheless, Gaziano told the subcommittee on the Constitution that allowing people who have served prison sentences to vote “could have a perverse effect on the ability of law-abiding citizens to reduce the deadly and debilitating crime in their communities.”¹³ Clegg agreed, observing that “[m]uch has been made of the high percentage of criminals—and, thus, disenfranchised people in some communities,”¹⁴ and contending that “this is an argument *against* re-enfranchisement, because there accordingly exists a voting bloc that could create real problems by skewing election results.”¹⁵ Clegg continues to argue in print and

Constitution to deny convicted and incarcerated felons the right to vote in 1998. Voters also approved a statute that automatically restores voting rights when felons are discharged from prison. Utah Code Ann. § 20A-2-101.5 (2003).

13. *Civic Participation Act Hearings*, *supra* note 3, at 44 (statement of Todd F. Gaziano). Gaziano argued that “[c]riminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed either to be less trustworthy or to have waived their right to participate in those decisions.” *Id.*

14. *Civic Participation Act Hearings*, *supra* note 3, at 17 (prepared testimony of Roger Clegg).

15. *Id.*

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public testimony that if indefinite disenfranchisement laws did not exist, “there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections.”¹⁶

Other scholars have used the same reasoning. Defending the disenfranchisement of former inmates, University of Chicago Law Professor John R. Lott, Jr. contends that these citizens might “lack the proper social concerns when exercising the decision to vote.”¹⁷ Like Clegg and Gaziano, Lott emphasizes the threat of former offenders *as voters*. “[T]here are benefits,” Lott explains, “to having voters who care about the well-being of others.”¹⁸ Conservative columnist and radio talk show host Lowell Ponte imagined the effects of allowing offenders to vote, asking his readers, “[d]o we want our politicians pandering for the votes of felons? Or making government policy designed to win their votes . . . ?”¹⁹ That possibility also concerns Thomas J. Miles, who writes that “reports of felons attempting to organize politically” suggest that disenfranchisement laws “may be necessary to prevent periodic instances of criminal enterprises using the political system to promote their ends.”²⁰ Illinois lawmaker Edward Petka, arguing for the disenfranchisement of sex offenders undergoing post-sentence treatment, said, “I don’t think the public would be too happy to know their votes were canceled out by sex offenders. . . . They’re going to be voting in school board races for gosh sakes.”²¹ Of course, Petka here evokes an emotional response. But like other proponents of the subversive-voting claim, he instructs the public to feel imperiled by offenders’ *political* activity—having one’s vote “canceled out.” Petka raises the

16. Clegg, *supra* note 4, at 177.

17. John R. Lott, Jr., *Should convicted felons be allowed to vote after they leave prison?*, in *Issues in Law and Society* 73 (CQ Press 2001).

18. *Id.*

19. Lowell Ponte, *Jesse Jackson: A Real Con Man*, Frontpagemagazine.com (July 18, 2003), at <http://frontpagemag.com/Articles/Printable.asp?ID=8979>.

20. Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 *J. Legal Stud.* 85, 120 (2004). Miles proceeds to emphasize a concern with keeping felons out of public office, rather than out of the voting booths, *id.* at 21, but the citations supporting his initial description of felons “using the political system to promote their ends” focus on policy. *Id.* at 120 n.61. Miles’ article is ultimately agnostic as to the wisdom of disenfranchisement as policy, but he does here articulate a plausible rationale.

21. John Patterson, *Senator Looks to Curtail Voting Rights*, *Chicago Daily Herald*, Apr. 7, 2003, at 11.

specter of offenders threatening not the schoolyard, but the schoolboard ballot box.

A less explicit but no less important version of the subversive-voting argument appears in a wide variety of statements against the voting rights of offenders. Typically, this argument depicts voting as a self-interested, instrumental act through which citizens control each other. One supporter of disenfranchisement wrote that “the exercise of the vote is understood not merely as conferring the right to govern oneself, but a right to share in the governing of others. When felons demand the right to vote, they demand the right to govern others while rejecting the right of others to govern them.”²² This argument concludes that offenders are properly denied the right to govern others, and therefore the right to vote, when they have rejected the right of others to govern them. These ideas only rise to the level of practicality necessary to justify depriving citizens of rights in a modern democracy when the assumption of “perverse” voting behavior is included.

More prosaically, another supporter of felony disenfranchisement argues that a felony conviction should “end your right to vote to use state power against millions of people.”²³ Massachusetts legislator Francis Marini put the point succinctly when he argued that convicts “are incapable of running their own lives” and “should not be allowed to run ours.”²⁴ Of course, political philosophers and legal theorists debate the ways in which the franchise expresses the community’s norms and identity, regardless of how (or even whether) people actually vote.²⁵ But practically speaking, the only way anyone “runs” anyone else’s life with a ballot is by shaping policy, an effect which is slight and indirect, of course. In the real world of elections and politics, then, the idea that people convicted of crimes should not “govern us” must mean that offenders ought to be stripped of suffrage to prevent the formation of that “anti-law enforcement voting bloc.”

22. Silber, *supra* note 5, at 33. See also Clegg, *supra* note 4, at 172 (arguing that “those who would make the laws for others . . . [must] be willing to follow those laws themselves”).

23. Ponte, *supra* note 19.

24. Michael Crowley, *Lawmakers Favor Ban of Felons’ Voting Rights*, Boston Globe, June 29, 2000, at B3.

25. See, e.g., Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 Fla. L. Rev. 545 (1989); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443 (1989).

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B. “Mafiosi” and the Ballot: Judicial Application of Subversive-Voting Theory

The fear of a lurking bloc of voters out to wreck the criminal law lies behind one of the most prominent judicial opinions endorsing felony disenfranchisement. In *Green v. Board of Elections*,²⁶ Judge Henry Friendly argued:

[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing these legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. . . . A contention that the equal protection clause requires [a state] to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.²⁷

Judge Friendly does not characterize the subversive-voting specter here in the same way as have advocates like Clegg, Gaziano, Lott, Ponte, and Petka, but it is clear that this is precisely what he has in mind. Indeed, prominent legal scholarship identifies Friendly’s *Green* opinion as the best example of the “asserted state interest”²⁸ in “prevent[ing] felon bloc voting that brings about harmful changes in the law.”²⁹ Judge Friendly’s reasoning is often cited in subsequent cases, including the important Voting Rights Act test case *Baker v. Pataki*, which quoted the “mafiosi” passage directly and called Friendly’s words “eloquent.”³⁰

26. *Green v. Bd. of Elections*, 380 F.2d 445 (2d Cir. 1967).

27. *See id.* at 451–52.

28. *Johnson-Parris*, *supra* note 5, at 121.

29. *Id.* at 122; *see also* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *Stan. L. Rev.* 1147 (2004), at 1153 n.25; Miles, *supra* note 20, at 119 (citing *Green* as the best articulation of the argument that disenfranchisement is necessary because of the felons who might “use their votes to retaliate against the authorities who convicted them or to weaken the substance and administration of the criminal law”).

30. *Baker v. Pataki*, 85 F.2d 919, 929–930 (2d Cir. 1996). *See also id.* at 922 (finding that felony disenfranchisement does not violate the Voting Rights Act, and focusing on what is known as the “plain statement” rule: if a law would have the effect of altering the fundamental constitutional balance between federal and state governments, Congress needs to have made a “plain statement” of its intent

Eloquence is a matter of style, and Judge Friendly's opinion is indeed admirably sharp, witty, and politically-savvy—who could side with those “perpetrators” and “convicted mafiosi?” But if his argument is more than a tautology—people convicted of crime can't vote because letting them vote would be ludicrous—it must rest on the premise of subversive voting. When the reader asks for a *reason* why offenders must be stripped of voting rights, Judge Friendly points to only one: the possible effects on the elected members of the criminal justice system, writ large—including “the executives who enforce” the laws. The assumption underlying his logic is that of the “anti-law enforcement voting bloc.”

Finally, it is worth remembering that *Green* was an extraordinary case—that is, that Gilbert Green was an extremely unusual type of offender. Green was among those convicted, in *United States v. Dennis*,³¹ of conspiring to advocate the overthrow and destruction of the U.S. government by force and violence.³² In other words, Green actually *had been* a political subversive as the American legal system then defined the term—not in his imagined future voting behavior, but in his past actions. Having decided to endorse disenfranchisement, Judge Friendly could have based his opinion on these facts—arguing, for example, that barring *this type* of offender from voting was a penalty reasonably linked to his infraction. Instead, Friendly went out of his way to justify his decision by arguing that disenfranchisement “is not a punishment.”³³ The result was that the opinion in a case involving the voting rights of a man convicted of an offense charged to only an infinitesimal number of people is now used overbroadly to justify the disenfranchisement of millions—on the grounds that they too might threaten social order by casting their ballots.

in that regard, and it made no such statement. In *Baker*, the court found no such statement).

31. *United States v. Dennis*, 183 F.2d 201 (2d Cir. 1950).

32. The convictions were upheld by the U.S. Supreme Court in *Dennis v. United States*, 341 U.S. 494 (1951), which held that the government may punish speech which is directed to inciting or producing imminent lawless action and which is likely to produce that effect.

33. *See Green*, 380 F.2d at 450.

II. DOWN THE SLIPPERY SLOPE: RESTRICTED SUFFRAGE IN AMERICAN THOUGHT

Some supporters of felony disenfranchisement probably believe the restriction is the exception that proves the universal suffrage rule. Everyone should be allowed to vote, they might argue, except those who have proven themselves dangerous, unworthy, and disqualified. But when one places the subversive-voting claim next to older arguments for limited suffrage, it becomes clear that they share important characteristics. In fact, to the extent that it is supported by one version or another of the subversive-voting hypothesis, disenfranchisement today *undercuts the modern universal suffrage rule itself* and endorses the most fundamental premise of a limited electorate. When we hear the argument that convicts should be barred from voting because of their alleged interests, we need to understand that we are listening to a very old idea. The argument consists of two elements. First, the right to political participation should be conditioned on some kind of behavior or contribution. Second, allowing people lacking the requisite qualities to participate threatens the social order. Opponents of suffrage expansion in Anglo-American politics have trotted out this argument, again and again, for the last three hundred and fifty years.

John Adams, like most of the Founders, believed that only those who owned a given amount of real estate should vote. Adams' letters and essays clearly express "the ruling class conviction of the time, that government is, and ought to be, founded on property, and that only those who have sufficient property to ensure their support of the established order can with safety be allowed to vote."³⁴ Adams believed that extending the franchise to those without property would bring "an immediate revolution," as he wrote in 1817.³⁵ James

34. J. Allen Smith, *The Growth and Decadence of Constitutional Government* 29 (1930). For the most comprehensive and authoritative explanation of this common view, see Alexander Keyssar, *The Right To Vote: The Contested History of Democracy in the United States passim* (2000). Early American elites, Keyssar shows, worried about the leveling legislation which the enfranchised poor would enact. *Id.* at 11. In later periods, arguments for the property test would shift somewhat. *See id.* at 9, 46, 133 (explaining arguments for property qualifications in the eighteenth, nineteenth, and twentieth centuries).

35. Letter from John Adams to James Madison (June 17, 1817), *quoted in* Smith, *supra* note 32 at 29.

Madison called voting rights a matter of “peculiar delicacy” and worried that without some restrictions, “the rights of property or the claims of justice may be overruled by a majority without property, or interested in measures of injustice.”³⁶

Thomas Jefferson took a more expansive position, but endorsed the same principle: every man who paid his due to society, whether he “fights or pays,” should “exercise his just and equal right in . . . election.”³⁷ Over the next generation, popular pressure slowly made taxpaying the most common standard for inclusion, but the premise remained the same. At Massachusetts’s 1820 constitutional convention, Daniel Webster recommended that only those who “contribute[] to the support of government shall be entitled to vote”;³⁸ another delegate argued that the taxpayer limitation could not be removed “without danger to the State.”³⁹ In the same year, *Niles’ Register* called the taxpayer qualification “a bulwark against social instability and radicalism.”⁴⁰

By the mid-nineteenth century, most advocates of an expanded franchise argued that the right to vote could be earned by paying taxes, serving in the militia, or working on public roads.⁴¹ But not all the “contributions” driving suffrage expansion were so benign.

36. James Madison, *Note to his Speech on the Right of Suffrage*, in 3 *The Records of the Federal Convention of 1787*, 450 (Max Farrand ed., rev ed. 1966). Farrand concludes that this note “seems to have been written about 1821, when Madison was preparing his *Debates* for publication.” *Id.*, at 450 n.2. Madison’s “Note” concludes that some kind of mixed system is best, allowing those without property to have a voice in selecting one house of the legislature, but not both. *Id.* at 454–55.

37. *Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816)*, in *Political Writings of Thomas Jefferson* 210, 212 (Joyce Appleby & Terence Ball eds., 1999). In 1777 Vermont became the first state to formally abolish any taxpaying or property-holding qualification for the suffrage, although it maintained a required oath and religious restrictions. See Chilton Williamson, *American Suffrage: From Property to Democracy, 1760-1860* 98 (1960). Other states followed suit only gradually.

38. *Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts* 553 (Da Capo 1970) (1853) [hereinafter *Journal of Debates and Proceedings*].

39. *Id.* at 248.

40. Williamson, *supra* note 37, at 187. At some point, the view that only taxpayers should be allowed to vote acquired the clever slogan “no representation without taxation.” *Id.* at 221.

41. Keyssar, *supra* note 34, at 44.

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In the antebellum South, demand for citizen patrols to pursue runaway slaves and militias to confront feared slave revolts "compelled Southern states to expand the suffrage to whites too poor to own slaves themselves."⁴² North Carolina and Virginia militiamen demanded the right to vote as the price of working on slave patrols in the 1820s, and other states began to enfranchise white men during this period in order to strengthen white unity and secure the slave system.⁴³ As one Senator argued, "We ought to spread wide the foundation of our government, that all white men have a direct interest in its protection."⁴⁴

If exclusionary premises receded briefly during the Civil War and Reconstruction, they surfaced again almost immediately. Doubts about universal suffrage appeared in the work of many late nineteenth-century political, social, and literary figures,⁴⁵ and by the turn of the century the U.S. saw "a recrudescence of antidemocratic theorizing on the question of who was entitled to vote."⁴⁶ Such

42. Matthew A. Crenson & Benjamin Ginsberg, *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public* 55 (2002).

43. *Id.* Chilton Williamson confirms this history: "In combination with intermittent criticism from the north, [Nat Turner's rebellion] led some Virginians to consider democratic suffrage doctrine as a means of creating greater unity among all whites, and achieving greater security for slavery. Unenfranchised white men in Virginia and South Carolina had already declared that if they could be trusted with membership in the white patrols they could be trusted with the vote. Nevertheless, the union of pro-slavery and suffrage democracy as a deliberate policy did not develop formally until [the Virginia convention of 1829-1830." Williamson, *supra* note 37, at 231-32. As Williamson writes, "[t]he Jeffersonian emphasis upon the justice and utility of a militia requirement [for the suffrage] was thereby given a pro-slavery twist." *Id.* at 232.

44. Williamson, *supra* note 37, at 232.

45. *Id.* at 283, 285. Williamson calls these doubts "an indication of the stubborn strain of criticism of universal manhood suffrage which had always existed in America." *Id.* at 283.

46. J. Morgan Kousser, *The Shaping of Southern Politics* 251 (1974). See also Eric Foner, *The Story of American Freedom* 119 (1998) (finding that "[a]mong elite thinkers, a retreat from the previous consensus in favor of manhood suffrage was among the most remarkable developments of the late nineteenth century"). Historian Daniel T. Rodgers agrees, noting that the new discipline of political science displayed "an extraordinary fertility of imagination" in developing new arguments aiming "to elevate and purify the suffrage." Daniel T. Rodgers, *Contested Truths: Keywords in American Politics since Independence* 174 (1998). "To a man," he writes, "they insisted that suffrage was not a right, but a gift of the State." *Id.* Writing of the "consensus on literacy" as threshold test for

theorizing was not at all confined to white racists; many authors and politicians worried that European immigrants to the newly-industrializing U.S. “would lose patience with the inequalities in the distribution of wealth and overthrow the existing order.”⁴⁷ By 1930, one scholar observed that

[w]e have largely discarded the opinion, more or less prevalent in the first half of the nineteenth century, that suffrage is one of the natural rights of the citizen, and have returned to the old conservative position which holds that it is a privilege which the state may or may not confer.⁴⁸

competency in voting, Michael Schudson concludes that “the concept of universal suffrage had lost hegemony.” Michael Schudson, *The Good Citizen: A History of American Civic Life* 184 (1998). G. Alan Tarr describes registration requirements and waiting periods for naturalized citizens as part of a nationwide “late-century movement to restrict the franchise.” G. Alan Tarr, *Understanding State Constitutions* 108 (1998). *See also* Michael E. McGerr, *The Decline of Popular Politics: The American North, 1865-1928* 214 (1986) (describing “liberal reformers’ hostility to universal suffrage after the Civil War”). Finally, Albert O. Hirschman writes that “[f]rom the last third of the nineteenth century to the First World War and beyond, a vast and diffuse literature—embracing philosophy, psychology, politics, and belles lettres—amassed every conceivable argument for disparaging the ‘masses,’ the majority, parliamentary rule, and democratic government. Even though it made few proposals for alternative institutions, much of this literature implicitly or explicitly warned of the dire dangers threatening society as a result of the trend to democratization.” Albert O. Hirschman, *The Rhetoric of Reaction* 5 (1991) (discussing European writers writing about Europe). *See also id.* at 19–26 (discussing aforementioned literature).

47. Williamson, *supra* note 37, at 288, 292.

48. Smith, *supra* note 34, at 183–184. Smith continues, “[t]hat voting is not a right of the citizen as such is now generally stressed in American books on political science, especially in those used in connection with high school and college instruction in politics. A foundation is thus being laid for a conception of the state which is directly opposed to the political philosophy of the Declaration of Independence.” *Id.* at 184. More recently, Walter Dean Burnham has argued that similar assumptions may support the survival of personal-registration laws in the U.S., particularly among those Americans who still believe “that voting is not a right but a privilege for which individuals must demonstrate their worthiness.” Walter Dean Burnham, *The Turnout Problem, in Elections American Style* 97, 109 (A. James Reichley ed., 1987). Penn Kimball made the same connection in 1972, contending that the American system of requiring voters to figure out how to register themselves to vote belies the very notion that voting is a right and not a privilege: “[t]he assumption that voting is a privilege to be selectively earned has left the most fundamental act of citizenship at the mercy of a whole series of discretionary obstacles.” Penn Kimball, *The Disconnected* 7 (1972).

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Proponents of disenfranchisement today make the same point.

By the time men like John Adams articulated these premises, they had already been in circulation for over a century. As Judith Shklar has pointed out, the conservative argument has not changed much in over three hundred fifty years, since the English “Levellers” sought to enfranchise poor soldiers in the 1640s and were met with the claim that they lacked a proper “stake” in society. These arguments “were repeated over and over again whenever yet another group of Americans demanded the right to vote.” The Levellers’ opponents had effectively given “a permanent structure to the arguments of all opponents of universal suffrage, and to all who saw it as a threat to property, and who feared men who had no stake in their country.”⁴⁹ Generation after generation, century after century, that “threat” has proven nonexistent, but the argument seems too strong to die.

Part of the reason the argument survives today may be that ironically, some supporters of offenders’ voting rights reinforce the key assumptions behind the subversive-voting theory. In their analysis of the movement for ex-felons’ voting rights, Mary Katzenstein and Kate Rubin identify a recurring idea in reform arguments, which they call the “trope of the meritorious ex-felon.”⁵⁰ Arguments built on this theme typically make the case for former inmates’ right to vote by describing a former felon who is many years out of prison, married, paying as many taxes as possible, and productively employed—perhaps as an entrepreneur or religious leader—but nonetheless cannot vote. The powerful implication is that the former felon’s good works have redeemed him and made him worthy of the ballot. This seems an innocent enough argument, yet it feeds the assumption that citizens must *qualify* for the vote: this individual deserves to vote *because* he participates in social institutions and contributes visibly to our material well-being. It also

49. Judith Shklar, *American Citizenship: The Quest for Inclusion* 46 (1991); see also Hirschman, *supra* note 44, at 86–110 (identifying similar themes in England in opposition to suffrage expansion in the nineteenth and twentieth centuries).

50. Mary Fainsod Katzenstein & Katherine Davison Rubin, *How different? A Comparison of the Movement Challenging Ex-Felon Disenfranchisement with Suffrage Politics of an Earlier Time* 19–22 (Aug. 2002) (unpublished paper presented at the Annual Meeting of the American Political Science Association in Boston) (on file with author).

implies that the offender's sentence alone was not sufficient "payment" to society.⁵¹ The paradox here runs deep: many of those working at the forefront of voting rights today inadvertently invoke the oldest premises for *limited* suffrage—arguments which may receive a friendly hearing because some Americans have never relinquished them.

III. THE ANATOMY OF A FALLACY: SUBVERSIVE VOTING, SOCIAL SCIENCE, AND THE MODERN UNDERSTANDING OF ELECTIONS

A. The Myth of an Anti-Law Enforcement Voting Bloc

The notion that prisoners and former inmates would vote together to weaken the criminal law is a thoroughgoing fallacy, wrong in all its particulars. First, it is wildly implausible. As Marc Mauer of the Sentencing Project explained in congressional testimony, thieves planning to vote subversively

would have to find a candidate running on a platform that calls for lowering the penalties for burglary, then find 51 percent of the electorate that wanted to vote for that candidate, and then have that candidate convince his or her fellow legislators to also lower the penalties for burglary.⁵²

Such a sequence is wholly unimaginable, particularly in the United States's "tough on crime" political climate. Meanwhile, the concern that inmates in rural prisons might distort local politics is easily solved by classifying inmates as residents of their town of previous residence, as Canada and Vermont do.⁵³

51. These two ideas combined in a proposal floated as a "compromise" way to resolve a dispute over former felons' voting rights in Alabama by a news columnist in August of 2003. Offenders who had completed their sentences entirely would be allowed to demonstrate their rehabilitation and win back the ballot either by holding down a job for a year or doing 200 hours of community service. See Kyle Whitmire, *To: Governor Bob Riley, Re: Vetoes, Voting Rights & the Great Compromise*, Birmingham Weekly, Aug. 7–Aug. 14, 2003, at 4, available in part at http://www.votelaw.com/blog/archives/2003_08.html.

52. *Civic Participation and Rehabilitation Act of 1999: Hearings Before the Subcomm. on the Const., Comm. of the Judiciary*, 106th Cong. 11 (1999) (testimony of Marc Mauer, Assistant Director, The Sentencing Project).

53. See Vt. Stat. Ann. tit. 28, §§ 807(a)–(b) (2003); Canada Elections Act, Pt. I, Div. 5, § 245(3) (2000) (specifying that an incarcerated elector "is entitled to vote under this Division only for a candidate in the electoral district in which his

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But this improbability is the tip of the proverbial iceberg. Very few voters cast ballots based on any single issue, and there is no reason to think offenders are so "overwhelmed by criminality"⁵⁴ that they would do so either. Disenfranchisement's defenders have never mustered any proof at all that those convicted of crime would use their electoral power to rewrite the criminal law, and we have good evidence to the contrary. One journalist concluded after interviewing voting inmates in Maine and Vermont that prisoners' political concerns "mirror those of other Americans."⁵⁵ Another journalist concluded that "[o]ne might think that criminals would be a solid liberal constituency," but "interviews suggest there are a number of conservatives behind bars."⁵⁶ Interviewing criminal defendants, political scientist Jonathan D. Casper found that, with few exceptions, all "believed that they had done something 'wrong,' that the law they violated represented a norm that was worthy of respect and that ought to be followed."⁵⁷ Those charged with property crimes "felt that laws against taking property from others were 'good' laws and that such behavior should not be tolerated but merited punishment."⁵⁸ Moreover, Casper's defendants showed that they understood "the idea of reciprocity upon which the law is based."⁵⁹ When asked what they thought would happen without laws against the crime they were accused of committing, Casper's subjects answered that the behavior would become rampant, and that this would be a bad thing.⁶⁰ People convicted of crime, it seems, are far

or her place of ordinary residence is situated as shown on the application for registration and special balloting made by the elector").

54. Adam Winkler, *Note, Expressive Voting*, 68 N.Y.U. L. Rev. 330, 387 n.242 (1993); see also Jonathan D. Casper, *Criminal Courts: The Defendant's Perspective* 80 (1978) (demonstrating that criminal defendants evaluate their experiences in court by means of factors "that are common to all of us: a strong dose of self-interest, a concern for face-to-face contact and a sense that one has been listened to . . . [and] a sense of equity").

55. Vanessa Gezari, *Go To Jail, Get to Vote—in Maine or Vermont*, St. Petersburg Times, Aug. 6, 2004, at 1A.

56. Pam Belluck, *When the Voting Bloc Lives Inside a Cellblock*, N.Y. Times, Nov. 1, 2004, at A12.

57. Jonathan D. Casper, *American Criminal Justice: The Defendant's Perspective* 146 (1972).

58. *Id.* at 147.

59. *Id.* at 148.

60. *Id.* at 149–51.

more likely to endorse the laws they've broken—to “accept them as desirable guides for life”⁶¹—than to join together and lobby for abolition of the criminal code. Research examining felony defendants' evaluations of their treatment in court, meanwhile, concludes that such assessments are influenced by defendants' ideas about how well their trial matched their conceptions of procedural justice and fairness—not simply by the severity of their sentences.⁶² Such findings soundly refute the theory that people convicted of crimes want to simply open up the jails.

Anecdotal evidence also supports these conclusions. Touring American penitentiaries, Beaumont and de Tocqueville marveled that “[t]here is a spirit of obedience to the law, so generally diffused in the United States, that we meet with this characteristic trait even in the prisons.”⁶³ After South Africa's Constitutional Court ruled in 1999 that inmates could vote in an upcoming election, one man serving time told a reporter “[i]t may be strange coming from me, but I'm looking for a government that will cut down on crime.”⁶⁴

61. *Id.* at 151. Casper concludes that offenders accept the norms of laws and can articulate their purposes, but have not internalized those norms at a psychological level sufficient to regulate their own conduct consistently. *Id.* Elsewhere, Casper reports that the idea “that defendants have undifferentiated and critical views of criminal courts” is “false”, since many defendants have opinions “quite favorable to various aspects of criminal courts”; see Casper, *supra* note 54, at 1.

62. Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 L. & Soc'y Rev. 483, 503 (1988) (concluding that defendants' evaluations “do not appear to depend exclusively upon the favorability of their sentences,” but to have been “substantially influenced” by “their sense of fairness—in terms of both procedural and distributive justice,” even though half of their subjects received terms of incarceration); see also *id.* at 489 (diagram illustrating how “Defendant Attributes,” “Case-Processing Variables,” “Procedural Justice,” “Distributive Justice,” and “Sentence” interact to affect a defendant's evaluations of treatment in court).

63. Gustave de Beaumont & Alexis de Tocqueville, *On the Penitentiary System in the United States and its Application in France* 121 (Francis Lieber trans., 1964) (1833). The Frenchmen continued, “[w]ithout being obliged to indicate here political reasons for this fact, we only state it as such; but the spirit of submission to the established order does not exist in the same degree with us.” *Id.*

64. Daniel J. Wakin, *Prisoners Register to Vote*, *Montreal Gazette*, Apr. 17, 1999, at A25.

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B. The Myth of the Self-Interested, Policy-Minded Voter

The notion that those convicted of crime will vote to advance their dark interests rests on a broader myth about modern politics: that voters are self-interested, well-informed policy-makers in the voting booths. For better or worse, it isn't so. As Hanna Pitkin wrote, the typical voter “is not, of course, the rational, informed, interested, politically active citizen our formula seems to require.”⁶⁵ In fact, most people are neither highly knowledgeable nor narrowly self-interested in their voting behavior. As one somewhat disappointed political philosopher summarized the literature, citizens “are little involved in the voting decision and expect from it no immediate, personal consequences for which they feel responsible.”⁶⁶ Most voters “do not know much about the candidates for whom they vote, and even less about the issues on which the candidates disagree.”⁶⁷ Indeed, majorities of voters are ignorant of simple political facts, including the partisan positions of competing parties, and take no consistent position on important issues. Voters often support parties with whom they have very serious policy disagreements.⁶⁸

Part of the explanation for such behavior lies in the difference between “reason,” the ordered workings of a logical mind, and “opinion,” which is something less clear. In her assessment of the eighteenth-century conservative Edmund Burke's ideas about representation, Pitkin offers a vital clarification on this point. Burke believed—like many opponents of suffrage expansion before and after—that elections were driven by “knowledge and reason.” In fact, however, voting choices had long since (if not always) been a matter

65. Hanna F. Pitkin, *The Concept of Representation* 219 (1967). Voting decisions, wrote Pitkin, are determined far more by “habit, sentiment, and disposition” than by calculations of self-interest. *Id.* Another authority concludes after a lengthy study of political activity in one city that “there is very little evidence of the intellectual processes in voting behavior—that is, open-minded, unprejudiced examination of each case in itself . . . and the coming to a cognitive decision on the merits of the matter.” David Wallace, *First Tuesday: A Study of Rationality in Voting* 272 (1964).

66. Dennis F. Thompson, *The Democratic Citizen: Social Science and Democratic Theory in the Twentieth Century* 121 (1970).

67. Thompson, *supra* note 8, at 87. *Id.* at 88 (noting that *most* voters “cannot recall the name of their current representatives, and many hold contradictory opinions about major political issues”).

68. Thompson, *supra* note 66, at 123, 131–32.

of “opinion and will.”⁶⁹ More recently, empirical political scientists have reached a similar conclusion, articulated in slightly different language. As Larry M. Bartels puts it, “citizens have attitudes but not preferences.”⁷⁰

Many political scientists today are more sanguine than their predecessors about the implications for democracy of these findings, and have developed sophisticated theories in which political parties, opinion leaders, heuristic devices and other “cues,”⁷¹ “easy-issue” voting,⁷² “rational ignorance,”⁷³ and “low-information rationality”⁷⁴ explain how we manage to think and vote at the same time.⁷⁵ But the fact that voters are widely ignorant of policy specifics is uncontested. Not surprisingly, such voters have a very difficult time coordinating with their fellows to form any kind of effective voting “bloc.”

C. Voting: An Inherently Conservative Thing To Do

If not classical, enlightened self-interest, then, what does motivate voters’ participation and choices? A massive literature in political science, history, sociology, and law wrestles with this question. Not surprisingly, the consensus is that a multitude of factors influence election behavior. Disagreements often center on how those factors fit together into a “complex causal structure”⁷⁶ and

69. Pitkin, *supra* note 65, at 189.

70. Larry M. Bartels, *Is ‘Popular Rule’ Possible?*, 21 *Brookings Rev.* 12 (2003).

71. See Arthur Lupia & Mathew D. McCubbins, *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* 206 (1998).

72. Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 *Am. Pol. Sci. Rev.* 78 (1980).

73. Lupia & McCubbins, *supra* note 71, at 20 n.7 (citing Anthony Downs, *An Economic Theory of Democracy* (1957)).

74. Samuel L. Popkin, *The Reasoning Voter: Communication and Persuasion in Presidential Campaigning* 7 (1991).

75. For scholarship that explores the link between thinking and choosing in the context of political behavior, see *id.*; *Elements of Reason: Cognition, Choice, and the Bounds of Rationality* (Arthur Lupia, Mathew D. McCubbins, & Samuel L. Popkin, eds., 2000); Glenn C. Altschuler & Stuart M. Blumin, *Rude Republic: Americans and Their Politics in the Nineteenth Century* 268-69 (2000); Kim Ezra Shienbaum, *Beyond the Electoral Connection: A Reassessment of the Role of Voting in Contemporary American Politics* 18-22, *passim* (1984).

76. Warren E. Miller & J. Merrill Shanks, *The New American Voter* ix

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what types of social influences, reasons, and values combine to deliver a voter to the polls and determine her choices.⁷⁷

The one crucial value that unites democratic principle with self-interest is what Thompson calls the “procedural general interest:” a common desire for democratic government to continue to function.⁷⁸ By casting a ballot, citizens “actively renew their commitment to the legitimacy of the whole system.”⁷⁹ Voting, writes Thompson, is therefore “not exclusively a matter of exercising a choice but is also an activity which helps sustain the feeling that the system is legitimate.”⁸⁰ Similarly, Kim Ezra Shienbaum concludes, after a lengthy review of the political science literature, that “elections in America have become essentially symbolic rituals, during which those who have benefited from the system in more direct ways vote to express their political support for the status quo”⁸¹

(1996) (stating that their substantial book is only able to provide a “skeleton of a complex causal structure.”)

77. See generally Angus Campbell et al., *The American Voter* (1960) (examining factors and contextual influences affecting voting preferences); Miller & Shanks, *supra* note 76 (also examining factors and contextual influences affecting voting preferences). For a survey of material on the decision to vote as “rational,” see Daniel Hays Lowenstein & Richard L. Hasen, *Election Law: Cases and Materials* 46–55 (2d ed. 2001).

78. Thompson, *supra* note 66, at 140.

79. *Id.*

80. *Id.* Thompson quickly notes that such support for the procedural general interest “implies very little about the quality of citizenship.” *Id.* Even “[c]riminals,” he acknowledges, “can accept most of the ‘rules of the game.’” *Id.* This does not detract from the applicability of Thompson’s insight here, however, because voting can still function as an *endorsement* even among people who don’t score very high on a given measurement of citizenship “quality.” See also Nelson Polsby & Aaron Wildavsky, *Presidential Elections 10* (2000) (noting that political science shows voting is not best understood as an act of rational calculation but rather “an act of social participation or civic involvement.”).

81. Shienbaum, *supra* note 75, at 110. Shienbaum concludes, “[t]he evidence suggests that those able to benefit from (or at least live comfortably within) a political system in which tangible benefits are obtained for the most part outside the electoral process tend to make a rational choice to give the political system symbolic support by voting—and that those who are miserable and unable to use the system to better their state refrain from such a symbolic act, also rationally.” *Id.* at 1. Judge Learned Hand drew a more optimistic conclusion from similar premises, when he wrote: “I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction

These insights turn the subversive-voting hypothesis on its head. They remind us that when citizens convicted of crime vote, they are doing what all voters do: actively *endorsing* the political system. By definition, therefore, *voting cannot be subversive*, since each ballot broadly legitimates the status quo. During the civil rights movement of the 1960s, many members of the business community understood this, and supported expanded voting rights for African Americans because they believed doing so would curb radicalism. Helping African Americans to see voting as a good way to pursue their interests would encourage them to seek “to achieve their ends by voting rather than demonstrating.”⁸² This was not a newfangled idea. In the 1820 Massachusetts constitutional convention, one advocate of enfranchising laborers without property argued, “[b]y refusing this right to them, you array them against the laws; but give them the rights of citizens—*mix them with the good part of society, and you disarm them.*”⁸³

Voter ignorance, symbolic rather than interested choices, and the mysterious workings of willful opinion rather than informed preferences—this may feel like soft ground on which to build a strong case for expanded voting rights today. But the reverse is true. In a modern democracy, the burden of proof, as it were, falls on those who advocate exclusion. Virtually every aspect of the subversive-voting case for disenfranchisement—its predictions, premises, and implications—is demonstrably false.

Meanwhile, the relatively non-instrumental nature of the modern vote does not render possession of the ballot any less important as a component of citizenship. As Judith Shklar argues in *American Citizenship: The Quest for Inclusion*, the “deepest impulse for demanding the suffrage arises from the recognition that it is the

in the sense that we are all engaged in a common venture.” Learned Hand, *The Bill of Rights 73–74* (1958) (quoted in Kenneth L. Karst, *Belonging To America: Equal Citizenship and the Constitution* 93 (1989)).

82. Crenson & Ginsberg, *supra* note 42, at 66. Partly because elections have become democratic dogma today, it is easy to forget that many important political philosophers—including Aristotle, Rousseau, and Montesquieu—actually considered popular election to be an *aristocratic* way for a society to pick its leaders. Elections select a few distinguished men, based on whichever characteristics a particular society values. Thompson, *supra* note 8, at 130; see also *id.* at 232–34 (citing relevant passages in works by above authors).

83. *Journal of Debates and Proceedings*, *supra* note 36, at 253 (emphasis added).

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characteristic, the identifying feature of democratic citizenship in America, *not a means to other ends*.”⁸⁴ William H. Riker makes a similar point. Noting that despite the many “micro” studies demonstrating that voters’ choices are not classical calculations of interest,⁸⁵ we can still conclude that voting “provides a means of rational self-control in the larger society,” and is still, therefore, a source of self-respect.⁸⁶

It is abundantly clear that citizens convicted of crime would not vote for massive changes in the criminal law and that retaining the right to vote would in fact involve them in a symbolic reaffirmation of the status quo. But what if it were not so? If we assume—again, against ample evidence to the contrary—that offenders *do* have unique and articulable interests, and *would* try to use their ballots to advance their policy preferences, the subversive-voting case for disenfranchisement becomes still weaker.

IV. “FENCING OUT”: DISENFRANCHISEMENT AND MODERN CONSTITUTIONAL AND HUMAN RIGHTS LAW

A. “Fencing Out”: American Constitutional Principles

It would be a sick and stagnant democracy in which the majority simply disenfranchised those who preferred different policies. In *The Cost of Rights*, Stephen Holmes and Cass Sunstein note what must have seemed obvious: “[o]ur system of political liberty does not deprive people of the vote because incumbents fear how people will vote.”⁸⁷ In the court of democratic debate, they write, this is simply “inadmissible.”⁸⁸ In the same vein, Robert H. Wiebe argues that the “cardinal rule” of democratic politics is that “voting majorities can never be allowed to eliminate voting minorities from the electoral process.”⁸⁹

84. Shklar, *supra* note 47, at 56 (emphasis added).

85. William H. Riker, *Democracy in the United States* 47–49 (2d ed. 1965).

86. *Id.* at 49. Elsewhere Riker contends that “[t]he first care of the democratic conscience ought . . . to be the widest possible extension of the suffrage.” *Id.* at 35.

87. Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 105 (1999).

88. *Id.*

89. Wiebe, *supra* note 10, at 8; *see also id.* at 135 (Wiebe writes of “democracy’s fundamental principle that electoral majorities cannot eliminate

These authors may have had in mind the principles articulated in *Carrington v. Rash*,⁹⁰ when the Supreme Court held that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”⁹¹ People who might vote instrumentally in their own interest may not be excluded from the franchise *for that reason*. The “exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group.”⁹² In another case, the Court ruled that “differences of opinion’ may not be the basis for excluding any group or person from the franchise.”⁹³ Rejecting the argument that voters ought to share a “common interest in all matters,” the Court noted that “all too often, lack of a [‘common interest’] might mean no more than a different interest.”⁹⁴

By stating definitively that purposefully barring “a different interest” from the polls is unacceptable, the *Rash* Court clearly rejected earlier American understandings of voting rights. In two nineteenth century decisions—*Davis v. Beason*⁹⁵ and *Murphy v. Ramsey*⁹⁶—the Court upheld laws denying polygamists the ballot, allowing state governments to “withdraw all political influence” from people who might be “hostile” to family law and convention.⁹⁷ These decisions are relics of an era in which “virtually any restriction on

minorities from future contests.”).

90. *Carrington v. Rash*, 380 U.S. 89 (1965).

91. *Id.* at 94.

92. *Id.*

93. *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969)). In *Cipriano*, the Court held that allowing only property holders to vote in a special municipally-owned utility bond election violated the Equal Protection Clause. In striking down the Louisiana city’s restriction, the Court referred to non-property owners as “voters who are as substantially affected and directly interested in the matter voted upon as are those who are permitted to vote.” *Cipriano*, 395 U.S. at 706. The same would seem to be true of those convicted of crime, in that they are at least as “directly interested” in many policy questions as other citizens.

94. *Dunn*, 405 U.S. at 355 (quoting *Evans v. Cornman*, 398 U.S. 419, 423 (1969) (alteration in original)).

95. *Davis v. Beason*, 133 U.S. 333 (1890).

96. *Murphy v. Ramsey*, 114 U.S. 15 (1885).

97. *Murphy*, 114 U.S. at 45.

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eligibility for voting was legitimate.”⁹⁸ *Rash* is among many court decisions employing a more modern understanding of voting rights, and even the conservative Rehnquist Court recently observed that “[t]o the extent *Davis* held that persons advocating a certain practice may be denied the right to vote, it is no longer good law.”⁹⁹

There is more in Sergeant Rash’s story that weakens the subversive-voting claim. In denying Rash the right to participate in the 1964 Republican primary, the Texas Court had declared that the law’s “obvious purpose . . . was to prevent a *concentration* of military voting strength in areas where military bases are located.”¹⁰⁰ But as noted above, the alleged risk of an electoral “concentration” of offenders is easily avoided by permitting inmates to vote by absentee ballot in their place of previous residence. This fact further dismantles the subversive-voting theory.

B. “Separate Contempt For His Act From Respect for His Right”: Disenfranchisement in the High Courts of Israel, South Africa, and Canada, and the European Court of Human Rights

The United States Supreme Court has recently indicated its willingness to consider the views of other nations’ high courts, and recent international law indicates that the tide has turned against disenfranchisement. In *Lawrence v. Texas* (2003), the Court cited decisions of the European Court of Human Rights as evidence that discrimination against homosexuals is no longer a value Americans “share with a wider civilization.”¹⁰¹ The same is true of criminal disenfranchisement. Many countries, including most European nations,¹⁰² now permit most or all inmates to vote. No other

98. Karlan, *supra* note 29, at 5.

99. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)) (drawing an analogy between protections of speech and voting rights). The *Romer* Court did not explain the connection, but presumably had in mind *Brandenburg’s* rejection of “a statute which . . . purports to punish mere advocacy.” *Id.* Perhaps sensing that its decision might be employed by critics of felony disenfranchisement, the *Romer* Court hastened to add that “[t]o the extent *Davis* held that a convicted felon may be denied the right to vote, its holding is not implicated by our decision and is unexceptionable.” *Id.*

100. *Carrington v. Rash*, 378 S.W.2d 304, 306 (Tex. 1964) (emphasis added).

101. *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

102. See *Hirst v. United Kingdom* (No. 2), Eur. Ct. H.R. 14 (March 2004)

democracy bars so many formerly incarcerated citizens from the polls.

In the last eight years, the constitutional courts of Israel, South Africa, and Canada, as well as the European Court of Human Rights, have struck down criminal disenfranchisement statutes. Each decision has upheld the fundamental and essential nature of the right to vote, and none lend any support to the idea that those convicted of crime are politically dangerous.

Israel's case is particularly striking, since it involved the citizenship and voting rights of Yigal Amir, Yitzak Rabin's assassin. In *Hilla Alrai*,¹⁰³ the Israeli Supreme Court refused to revoke Amir's citizenship in order to punish him, and cited the U.S. Supreme Court's decision in *Trop v. Dulles* in doing so—quoting extensively from Chief Justice Earl Warren's opinion.¹⁰⁴ Faced with a man whose infraction made Gilbert Green's subversive speech look slight indeed, the Israeli Court ruled that we must “separate contempt for his act from respect for his right.”¹⁰⁵ Society had already punished Amir by putting him in prison, the Court decided, and disenfranchisement would not harm Amir but Israeli democracy itself.¹⁰⁶ The court declared that when the right to vote is taken away, “the base of all fundamental rights is shaken.”¹⁰⁷ Today all Israeli inmates retain the

(observing that, in Europe, “there are some 18 countries in which no restrictions are imposed on prisoners' rights to vote; in some 13 countries prisoners are not able to vote, due to operation of law or lack of enabling provisions; and between these extremes . . . loss of voting rights is tailored to specific offences or categories of offences or discretion is left to the sentencing court.”); see also August v. Electoral Comm'n, 1999 (8) SA 23 n.30 (CC) (noting that “in Denmark, Ireland, Israel, Sweden, and Switzerland, all prisoners can vote.”); Brandon Rottinghaus, *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform* (Internat'l Found. for Election Sys., Summer 2003) (on file with author) (providing an international overview of prisoners' voting rights).

103. H.C. 2757/96, *Hilla Alrai v. Minister of Interior et al.*, 50(2) P.D. 18 (1996). The author thanks Barbara Morgan for acquiring this opinion, and to Danielle Katzir, Sima Katzir, and Maya Singer for translating selections from Hebrew into English. Responsibility for inaccuracies in translation rests with the author.

104. *Id.* at 23 (citing *Trop v. Dulles*, 356 U.S. 86 (1958) (denying Congress the power to withdraw an individual's citizenship because of wartime desertion)).

105. *Hilla Alrai*, at 24.

106. *Id.*

107. *Id.* at 26.

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right to vote—in fact, a government website explains that polling stations are set up inside the prisons themselves.¹⁰⁸

The South African Constitutional Court faced a challenge to prisoner disenfranchisement three years later, in 1999. Like their Israeli counterparts, the South African judges carefully separated their concerns about crime from the need to protect individual rights. Acknowledging that the country was “racked by criminal violence,”¹⁰⁹ the court nevertheless found that the state was “unable to point to any specific evidence” that allowing inmates to vote would create trouble—even if their electoral residences were the prisons.¹¹⁰ In strong language, the Court declared that values of equality must win out:

The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of 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. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.¹¹¹

The *August* decision’s impact was attenuated by a statute enacted in 2000 that effectively prevented inmates from voting by changing residency rules and restricting provision of mobile voting stations.¹¹² Subsequent amendments to the country’s electoral laws

108. See “Elections for the 15th Knesset,” at <http://www.knesset.gov.il/elections/eindex/html> (last visited Dec. 12, 2002) (noting that forty-two polling stations were set up inside “prisons and detention centers” for the 1999 parliamentary elections).

109. *August v. Electoral Comm’n*, 1999 (8) SA at 23.

110. *Id.* at 11.

111. *Id.* at 14.

112. The South African Court held in *August v. Electoral Comm’n* that disenfranchisement could not be implemented without legislative action. *Id.* at 23. It let stand until 2004 the statute enacted after *August* which disenfranchised most inmates. See Section 93 of South Africa’s Local Government: Municipal Electoral Act, 2000, Section 7 (3)(b); e-mail from Luyanda Tyibilika, Dept. of Correctional Services, South Africa, Aug. 16, 2002 (on file with author). Tyibilika

more explicitly denied the right to register and vote to prisoners sentenced without the option of a fine.¹¹³ However, in March of 2004 South Africa's Constitutional Court declared in *Minister of Home Affairs v. Nicro*¹¹⁴ that all inmates must be permitted to vote. While the *Nicro* ruling may lack the rhetorical force of *August*, its rejection of the state's justifications for restricting the vote is no less complete.

The Minister of Home Affairs tried to prove two key claims: (1) setting up secure, mobile polling stations in the prisons would waste scarce resources;¹¹⁵ and (2) it would send an "incorrect message to the public that the government is soft on crime."¹¹⁶ The Court rejected both claims, saving its sharpest language for the latter argument: the government could not "disenfranchise prisoners in order to enhance its image," nor "deprive convicted prisoners of valuable rights that they retain in order to correct a public misconception as to its true attitude to crime and criminals."¹¹⁷ The Minister of Home Affairs failed "to place sufficient information before the Court to enable it to know exactly what purpose the disenfranchisement was intended to serve."¹¹⁸ The Court ordered the government to create a supplementary voters' roll in time for the 2004 elections, adding those inmates who wished to register.¹¹⁹

wrote that "it is our interpretation that all detained prisoners . . . will effectively in future be prevented from voting (since 11 July 2000 when the amendment came into operation)." *Id.*

113. See *Minister of Home Aff. v. Nicro*, CCT 03/04, at 2, 7, 16, available at <http://www.sentencingproject.org/pdfs/southafrica-decision.pdf>.

114. See *id.* at 35 (concluding that "the attempt by the Minister to justify the limitation fails, and the challenge to the constitutionality of the legislation on the ground that it infringes the right to vote must be upheld"); and *id.* at 43 (ordering that the relevant provisions of the Electoral Act "are inconsistent with the Constitution and invalid").

115. *Id.* at 20–21, 22–23. The Court rejected the cost argument out of hand, noting that since unsentenced prisoners were already permitted to vote in all prisons, expanding the number of eligible voters would not unduly burden the government. See *id.* at 25 (stating that "issues such as cost are not relevant to an enquiry into the limitation of rights").

116. *Id.* at 24.

117. *Id.* at 28. Nine judges signed the majority opinion; two dissented separately, agreeing that denouncing crime was sufficient justification for disenfranchisement. See *id.* at 56, 64, 67.

118. *Id.* at 33, 35.

119. *Id.* at 43. See Françoise Gallet, *Prisoners Vote for Solutions to Crime*, iafrica.com, Apr. 14, 2004 (last visited September 13, 2004) (discussing how

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In *Nicro*, the South African Constitutional Court devoted considerable discussion¹²⁰ to a 2002 decision of the Supreme Court of Canada which protected the right of all inmates to vote. In *Sauvé v. Canada*¹²¹ (*Sauvé II*), the Canadian judges observed that, like that of South Africa, their government had “failed to identify particular problems that require denying the right to vote, making it hard to conclude that the denial is directed at a pressing and substantial purpose.”¹²² Mocking what it called the government’s “novel political theory”¹²³ that disenfranchisement would enhance “civic responsibility and respect for the law”¹²⁴ the court refused to “permit elected representatives to disenfranchise a segment of the population.”¹²⁵ The court ruled that such a policy has “no place in a democracy built upon principles of inclusiveness, equality, and citizen participation.”¹²⁶ Even the dissenters admitted that the government’s case was highly “abstract”¹²⁷ since “a causal relationship between disenfranchising prisoners and the objectives [“enhancing” civic responsibility, the rule of law, and the criminal sanction] is not empirically demonstrable.”¹²⁸

inmates voted in the 2004 election at polling stations set up in the prisons).

120. *Id.* at 28–34.

121. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519 (decision ending a decade of dialogue between Canadian courts and legislatures, in which the courts struck down laws disenfranchising incarcerated offenders despite the legislature’s revision of the laws to cover only certain serious crimes). *See generally* *Sauvé v. Canada* (Attorney Gen.), [1992] 7 O.R.3d 481 (Can.) (ruling the felon disenfranchisement law to be unconstitutional, as an unreasonable limit on right to vote); *Belczowski v. Canada*, [1992] 2 F.C. 440 (Can.) (holding felon disenfranchisement law was unconstitutional because it was not rationally connected to alleged objectives); Christopher P. Manfredi, *Judicial Review and Criminal Disenfranchisement in the United States and Canada*, 60 *Rev. Pol.* 277, 281–84 (1998) (summarizing Canadian decisions prior to 1998).

122. *Sauvé*, 3 S.C.R. at 521. Later, the Court’s majority reiterated this point, holding that “the government offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment.” *Id.* at 522.

123. *Id.* at 522.

124. *Id.* at 521.

125. *Id.* at 522.

126. *Id.* at 524.

127. *Id.* at 524.

128. *Id.* at 525.

Less than two years later, the European Court of Human Rights came to very similar conclusions in *Hirst v. United Kingdom*.¹²⁹ Responding to a challenge to the U.K. law barring all convicted inmates from voting, the European Court drew on the *Sauvé II* decision¹³⁰ and concluded that the automatic, blanket disenfranchisement of all convicted persons during incarceration violates the Convention for the Protection of Human Rights and Fundamental Freedoms.¹³¹ Hirst contended that barring prisoners from the polls “deprived a significant proportion of the population . . . of a voice or the possibility of challenging, electorally, the penal policy which affected them.”¹³² The U.K. did not address this charge head-on, but did justify disenfranchising inmates “because of the danger which they present,” a theory which the Court found unconvincing and unconnected to any legitimate government aim.¹³³ While expressing its “appreciation” for the power of national legislatures to govern the franchise, the unanimous Court rejected the U.K. policy and concluded that it “derive[d], essentially, from unquestioning and passive adherence to a historic tradition.”¹³⁴ While the *Hirst* Court did indicate that more narrowly targeted disenfranchisement might be permissible,¹³⁵ the decision offered

129. *Hirst v. United Kingdom* (No. 2), Eur. Ct. H.R., (March 30, 2004).

130. *See id.* at 6–8 (quoting from majority and dissenting opinions in *Sauvé II*); *id.* at 12 (referring to the judgment in *Sauvé II* as a “detailed, and helpful” assessment of disenfranchisement’s purposes, and observing that “the substance of the reasoning may be regarded as apposite in the present case.”).

131. *See id.* at 13 (concluding “that there has been a breach of Article 3 of Protocol No.1”); *id.* at 2 (summarizing procedure and noting that the applicant, Mr. John Hirst, “invoked Article 3 of Protocol No. 1 . . . of the Convention.”).

132. *Id.* at 9.

133. *Id.* at 13.

134. *Id.* at 11.

135. The Court left the door open to less automatic, more narrowly-targeted policies in various places in its opinion. *See, e.g., id.* at 12 (“Notwithstanding its doubts as to the validity of either aim in the modern day . . . , the Court notes the varying political and penal philosophies and policies that may be invoked in this context and for the purposes of the present case would refrain from ruling that these aims cannot be regarded as legitimate, even on an abstract or symbolic plane. It leaves the question open as it is unnecessary to decide it in the present case, for the reasons set out below.”) The *Hirst* Court also faulted the U.K. legislature for never having “sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners,” suggesting increased deference to legislatures which *had* done so. *Id.* at 13. It also made

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powerful support to critics of all forms of the restriction. Disenfranchisement, the judges ruled, “runs counter to the rehabilitation of the offender as a law-abiding member of community and undermines the authority of the law as derived from a legislature which the community as a whole votes into power.”¹³⁶ Furthermore, the Court could find “no rational link” between the punishment and the offender under the U.K. law, and no evidence that disenfranchisement served as a deterrent.¹³⁷

Two themes stand out in these decisions. First, none of the governments successfully made any claims about the *political* danger posed by the ballots of citizens convicted of crime, and no court found any evidence of this (or any other) real world threat. Instead, each government was forced to make those purely “abstract” arguments. Second, each court concluded forcefully that while punishing those who break the law is important, disenfranchisement is *not* a valid form of punishment. These repeated, eloquently articulated findings ought to give pause to those who advocate barring offenders from voting in the United States—a country which often congratulates itself for exporting the idea of fundamental, inalienable rights protected by an independent judiciary.

C. Partisanship and Policy: Disenfranchisement in the United States

Within the United States, debate over the disenfranchisement of people convicted of crime may be moving into a new stage, one in which partisanship plays an explicit role. Recent scholarship has demonstrated that in American politics,

explicit those aspects of any disenfranchisement policy it might consider most apposite: “In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether . . . the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote.” *Id.* at 13.

136. *Id.* at 12.

137. *Id.* at 15. The Court also noted that the actual effect of disenfranchising any particular prisoner depends more on *when* that person is incarcerated than for *how long* he is incarcerated: an offender serving a week during elections loses out, while a person serving several years between elections may avoid missing an election. *Id.* at 13

disenfranchisement helps Republicans.¹³⁸ Of course, the fact that many of those convicted of crime would vote for Democrats does not mean they would vote “against” law enforcement. By and large, leading Democrats no longer differ significantly from their Republican counterparts on criminal justice issues, since Democrats have adopted a “law-and-order” agenda in order to neutralize crime as a winning electoral issue for Republicans.¹³⁹ We know, for example, that if Florida did not bar hundreds of thousands of its non-incarcerated citizens from voting, Vice President Al Gore almost certainly would have carried the state in the 2000 Presidential election. But throughout the 2000 campaign, Gore fought then-Governor George W. Bush for the “tough on crime” label, supporting the death penalty and other measures.¹⁴⁰

138. See Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 Pers. on Pol. 491, 497 (2004) (concluding that “felon disenfranchisement has provided a small but clear advantage to Republican candidates in every presidential and senatorial election from 1972 to 2000.”); Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Sociological Rev. 777, 794 (2002) (concluding that felon disenfranchisement and high incarceration rates “may have altered the outcome of as many as seven recent U.S. Senate elections and at least one presidential election,” all in favor of Republicans); *But see* Miles, *supra* note 20, at 120 (concluding that “meager participation by ex-felons where they are eligible [suggests that] disenfranchisement will not systematically affect election outcomes.”).

139. Debate over the 1994 crime bill amply illustrated this point. Democratic Senator Joseph Biden responded to charges that the crime bill was a creature of the “liberal wing” of the Democratic Party by saying, “[t]he liberal wing of the Democratic Party is now for 60 new death penalties The liberal wing of the Democratic Party has 70 enhanced penalties The liberal wing of the Democratic Party is for 100,000 cops. The liberal wing of the Democratic Party is for 125,000 new State prison cells.” 103 Cong. Rec. S12427 (Aug. 24, 1994) (statement of Sen. Biden). See also Ann Chih Lin, *The Troubled Success of Crime Policy*, in *The Social Divide: Political Parties and the Future of Activist Government* 312 (Margaret Weir ed., 1998).

140. See, e.g., John Wildermuth, *Candidates Trade Fire Over Gun Control*, S.F. Chron., Oct. 10, 2000, at A1. Wildermuth reported that the two candidates “have been playing ‘Can you top this?’ when it comes to being tough on crime,” and noted Gore’s support for the 1994 crime bill, which expanded federal death penalty statutes. It certainly may be true that disenfranchising “those who have felt the sting of the criminal law . . . skews the politics of criminal justice towards one side of the debate”, as George P. Fletcher puts it. See George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46

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Nevertheless, some of disenfranchisement’s Republican defenders have adopted a new tack: they openly acknowledge the partisan implications of the policy, and employ a clever, *faux*-frank description of convicts’ projected voting preferences. Alabama Republican Marty Connors used the tactic nicely when asked why his party opposed a bill restoring voting rights to convicts who had completed their sentences. “There’s no more anti-Republican bill than this,” he told reporters. “As frank as I can be, we’re opposed to it because felons don’t tend to vote Republican.”¹⁴¹ If the implication of Connors’ confession is obvious—felons like Democrats, and vice-versa—the political benefits of linking felons with Democrats in the public mind are still clearer, given that convicts have “negative political leverage”¹⁴² in American politics today.

Conservative polemicist Lowell Ponte offers his readers further detail, informing them that partly because felons “have less education than most Americans,” they are “more likely to be Democratic voters.”¹⁴³ Ponte argues that Democrats support re-enfranchising convicts purely in order to win votes for their party, and urges his readers to oppose reform for the same reason. And in a rhetorical flourish that might make advocates like Clegg, Gaziano, and Lott blush, Ponte suggests that a vote for the Democratic candidate is itself tantamount to theft, since “those who vote for a political party that at gunpoint takes the earnings of productive citizens and transfers that wealth to buy the votes of unproductive welfare cheats are not significantly different from being thieves themselves.”¹⁴⁴

UCLA L. Rev. 1895, 1906 (1999). But that is not the same thing as saying that a vote *for Democrats* is a vote for major criminal-justice reform, since leading Democrats have largely abandoned that project.

141. Kim Chandler, *Felon Voting Bill Ensnarers Riley*, Birmingham News, June 22, 2003, at 15A. Political figures in other states have reached the same conclusion. For example, as New Mexico considered revising its disenfranchisement law in 2001 to restore voting rights to those who had completed their sentences, State Republican Party Chairman John Dendahl “worried that those eligible under the bill would register with the Democratic Party.” See Donovan Kabalka, *Felons Might Be Able To Vote Again*, Albuquerque Tribune, June 29, 2001, at A2.

142. Keyssar, *supra* note 34, at 308.

143. Ponte, *supra* note 19. Ponte offered this analysis of “[w]hite felons”; he did not explain why blacks would vote for Democrats.

144. *Id.*

This may sound like terminal silliness. But in fact, Ponte's anti-Democrat logic does not differ at all from the more mainstream argument that convicts might do damage with their ballots. The only difference—and the reason Ponte's language stands out—is that he does what no previous advocate has been brave enough to do: he tells us exactly *what it is he fears felons will vote for*. His comrades' silence is extremely important, and it lays bare the poverty of the subversive-voting position. For arguing that felons must be barred from voting lest they “skew election results” must mean that voting with criminal-justice reforms in mind skews democracy.¹⁴⁵ But does the Catholic who votes for an anti-death penalty candidate, the judge who votes against mandatory minimum sentences in a referendum, or the nurse who supports a ballot proposition prescribing treatment instead of incarceration for addicts act subversively? What of Supreme Court Justice Anthony M. Kennedy, who recently told the American Bar Association that “[o]ur punishments are too severe” and “[o]ur sentences are too long”?¹⁴⁶ To call such people members of a dangerous “anti-law enforcement voting bloc”¹⁴⁷ is both foolish and chilling, but that is the heart of the subversive-voting case for disenfranchisement.

V. CONCLUSION

The subversive-voting hypothesis has served disenfranchisement's defenders well. It evokes the alleged need to protect the very foundations of political society itself, while also trying to name a more practical evil which the state can legitimately act to prevent. In the court of public opinion, however, the most important attribute of the subversive-voting argument may be simply that it directs the listener to imagine the deeds felons have done and the nefarious desires they must have. Given the harshly punitive nature of American discussions of criminal justice today, framing the debate in those terms effectively wins it.

145. See Fletcher, *supra* note 140, at 1899 (rejecting the “mystical” or “fanciful” beliefs that banning felons from voting will protect the “purity of the ballot box” and asserting that such arguments cannot “withstand a minute of rational argument.”).

146. See Bob Egelko, *High Court Justice Crusades for Mercy*, S.F. Chron., Aug. 10, 2003, at A2. Kennedy also called for the repeal of federal mandatory-minimum sentences, which he said can be “harsh and unjust.” *Id.*

147. Clegg, *supra* note 4, at 177.

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But the voting booth is not a darkened alley, and implying that offenders must be kept from the polls lest their ballots imperil the public has very damaging consequences. It reinforces misleading myths about how voters choose, advances the dangerous idea that we may legitimately disenfranchise citizens because of the policies we think they might prefer, and explicitly attacks the foundations of modern universal suffrage.

How would the debate over felon disenfranchisement improve if the fallacious, atavistic nature of the subversive-voting argument were better understood? First, lawmakers and citizens might well view other arguments for barring those convicted of crime from voting with greater skepticism. Any conclusion resting on such an extraordinarily weak premise ought to be suspect—as should the credibility and, perhaps, the good will of those who support it. Second, it would become still clearer that the case for barring people convicted of crime from voting is not a practical one at all, but a jumble of conjectures, ill-informed fears, and mystical images of the body politic, all piled on top of social theories three hundred years in age. Disenfranchisement’s defenders should be forced to explicitly disavow the subversive-voting premise, and thereby to acknowledge that they are advocating an exclusionary, restrictive policy without even a theory of any actual harm that might occur without it. At a minimum, proponents of any restrictive policy in a modern democracy must explain *how* the proposed exclusion would strengthen our democracy and protect the public good. Advocates of disenfranchisement fail that test.

Half a century ago, Felix Frankfurter wrote, “[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people.”¹⁴⁸ In such controversies, our prejudices may direct us in one direction, our belief in liberty the other. Choosing rights over prejudice is an essential part of the “hard work” we often tell ourselves democracy demands, and it is the best tradition in American politics.

148. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).