Disenfranchisement, Desert, and Political Wrongdoing

(2838 words)

Many critiques of the practice of criminal disenfranchisement focus on its concrete effects on voting patterns and on specific marginalized groups. In the United States, where the practice is most widespread, over 6 million individuals (about 2.5% of the voting age population) are denied the right to vote on the basis of criminal conviction. More than 7 percent of African Americans, and about one in six African-American males, are banned from voting due to criminal convictions.¹ Such disenfranchisement likely has discernible electoral effects, suppressing the support for liberal or progressive causes and candidates at the local, state, and national levels.² Some studies even find that such disenfranchisement tends to discourage political participation on the part of non-felons.³

Such effects are troubling. However, disenfranchisement would not be morally home free even in their absence. For it could still be true that disenfranchisement fails a basic test for criminal punishment, namely, that it be deserved. And indeed, philosophers and legal theorists have struggled to identify a credible “desert basis”⁴ to lend positive support to denying convicted criminals (or at least those convicted of serious crimes or felonies) the right to vote. Many desert-based rationales have been explored. But it is far from obvious how the putative facts that criminals gain unfair advantage from their crimes, show a lack of

² Christopher Uggen and Jeff Manza, Locked Out: Felon Disenfranchisement and American Democracy (Oxford: Oxford University Press, 2006).
⁴ Joel Feinberg, Doing and Deserving (Princeton: Princeton University Press, 1970), p. 55, characterizes a desert basis in these terms: “if a person is deserving of some sort of treatment, he must, necessarily, be so in virtue of some possessed characteristic or prior activity.”
respect for the law, forfeit certain rights otherwise protected by the social contract, incur a social debt, etc., provide desert-based reasons for disenfranchisement sufficient to outweigh a right central to democratic citizenship.⁵

Part of the difficulty in identifying a plausible desert basis is that actual disenfranchisement is usually indiscriminate, applied both to the most serious crimes and crimes that, while felonies, do not rise anywhere close to the same level of seriousness (felony drug possessors are disenfranchised along with serial murderers, say). But perhaps a more tenable account of how disenfranchisement could be deserved emerges if the desert basis in question is more tailored, i.e., if disenfranchisement is reserved only for those crimes that undermine democratic processes. Such is the strategy recently pursued by Annette Zimmerman.⁶ She argues that disenfranchisement⁷ is justified (a) for political wrongs, criminal acts that undermine the “vital functions of well-functioning democratic institutions”⁸ and (b) “if and because it deters and temporarily incapacitates political wrongdoers” so as to protect and enforce democratic equality.⁹ Zimmerman’s position transects current debates about disenfranchisement by more subtly demarcating the class of offenders who may be permissibly disenfranchised. For if correct, it implies that typical disenfranchisement practices are overinclusive, insofar as they wrongfully disenfranchise those guilty of serious


⁷ Zimmerman, p. 380, includes the forfeiture of other “democratic participation rights” besides the right to vote (such as the right to run for office or the right to contribute to political campaigns) within the ambit of “criminal disenfranchisement.” I find this inclusion plausible and do not contest it here.

⁸ Zimmermann, p. 397

⁹ Zimmermann, p. 382.
but non-political crimes, and underinclusive, insofar as some individuals guilty of political wrongdoing manage to avoid disenfranchisement.

That only those whose offenses are “political” deserve to be disenfranchised has an attractive retributivist ring. My purpose here is to provide a friendly amendment to Zimmerman’s position. For while Zimmermann’s attempt to show that disenfranchisement is “fitting” or deserved may well succeed in justifying the sanction itself, it struggles to account for why the implied message of unequal status conveyed by disenfranchisement is also fitting or deserved. I argue that once political offenses are recognized as acts wherein offenders engage in small-scale acts of covert rebellion, it becomes plausible that the message of unequal status is fitting or deserved insofar as rebellion involves wrongfully arrogating to oneself the authority to make or enforce law at the expense of other democratic citizens.

1. The Nature of Political Wrongdoing

Negative retributivists hold that, while desert cannot provide a sufficient ground for punishment, desert imposes limits on who may be punished and how, namely, that only those who deserve punishment should suffer it and they should suffer it in proportion to their guilt or blameworthiness. Zimmermann rests her defense of disenfranchisement on negative retributivism: Only a particular class of criminals, those guilty of political wrongdoing, deserve to be disenfranchised.

Criminal acts differ from civil wrongs in that the former are “public” in the sense that they wrong the community as a whole rather than simply wronging particular members of the community. But according to Zimmermann, only some public wrongs are also political wrongs. She counts among these wrongs:10

- bribery of public officials (or the acceptance of bribes by public officials)

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10 Zimmermann, pp. 397-99.
- electoral wrongs, including the rigging of elections, voter fraud, voter intimidation, and spreading false information about election procedures
- silencing or harming one’s political opponents
- funding or participating in terrorism
- violating campaign finance law or other financial wrongdoing related to election funding

Political wrongs may also be ordinary criminal wrongs (destroying a voting booth is also criminal destruction of property, killing a political rival is also murder, etc.). But political wrongs are distinct among public wrongs in “wrongfully imposing a non-trivial risk of harm on the integrity of democratic institutions or procedures.”

2. Fittingness and Desert

In order for all and only political wrongdoers to be rightfully subject to disenfranchisement, Zimmermann must show that that desert basis (political wrongdoing) is “closely linked to the desert object (disenfranchisement) in an intuitively clear way.” She avers any appeal to lex talionis, that individuals forego the very same rights that their wrongs violate. Her central argument instead appeals, surprisingly, to a “lack of desert” claim concerning non-political public wrongs. She notes the oddity of inferring that individuals ought to lose their rights to influence the making of all laws because they have broken some of the laws. Wrongdoers guilty of non-political public wrongs do not seem to deserve to be disenfranchised, as it would not be “fitting to restrict some or all of the democratic participation rights of a criminal who is not a political wrongdoer,” for if that wrongdoer’s crime had nothing to do with democratic participation, did not inhibit the
democratic participation of others, and was not pursued with the primary

11 Zimmermann, p. 397
12 Zimmermann, p. 405.
intention of eroding central democratic procedures and institutions, and possibly—though not necessarily—benefitting personally from doing so, it would not be fitting to punish that wrongdoer by depriving her of democratic participation rights, the exercise of which is entirely unrelated to her criminal conduct. Otherwise, the connection between the substantive nature of the sanction and the nature of the criminal conduct at stake would simply be too tenuous.\(^{13}\)

Zimmermann would presumably concede that we cannot validly infer that

\[\text{It is fitting, as a matter of desert, that political wrongdoers be enfranchised}^{14}\]

from

\[\text{It is not fitting, as a matter of desert, that non-political wrongdoers be disenfranchised}\]

Political wrongdoing and ordinary public crimes do not after all stand opposed as contraries such that for most any property possessed by one, we could plausibly infer its absence in the other. As public wrongs, they presumably share much of their fittingness bases, so to speak, with non-political wrongs.

At the same time, these two claims are clearly logically compatible, and I take Zimmermann to be offering an abductive case: Given the strength of the intuition that non-political wrongs do not deserve disenfranchisement, the most plausible explanation of this intuition is that such wrongs are ‘apolitical’ and so lack whatever property would make a criminal act deserving of disenfranchisement. Since non-political wrongs lack, but political wrongs possess, the property of posing a risk to the functioning of democratic institutions and procedures, then that property grounds the claim that political wrongs, and political wrongs alone, deserve disenfranchisement.

\(^{13}\) Zimmermann, p. 404.

\(^{14}\) Even if temporarily: Zimmermann, p. 404.
Admittedly, Zimmermann’s explanation of the desert-based link does not provide an obviously non-circular account of why political wrongdoing deserves disenfranchisement. Political wrongdoers deserve to be disenfranchised because it is fitting that crimes that threaten the integrity of democratic institutions and procedures be met with disenfranchisement. But by appealing to the lack of such fittingness in the case of non-political wrongdoing, Zimmerman’s explanation does not dialectically beg the question.

3. Equality of Status

Difficulties emerge for Zimmermann’s position if we extend the framework of fittingness to the judgments expressed by the practice of disenfranchisement, however. Some egalitarian critics of disenfranchisement have proposed that what renders the practice objectionable is the message that disenfranchisement conveys regarding the status of offenders. According to such critics, the message of disenfranchisement is at odds with the equal status that individuals in a democratic polity are presumed to have. Costanza Porro expresses this worry as follows:

Disenfranchisement cannot be justified as a response to crime because through this policy the state expresses a judgment and attitudes that are incompatible with the equal respect that it owes its citizens. While other acceptable types of punishment simply convey the judgment that some are guilty of a crime and liable to punishment, in removing voting rights from some of its citizens, the state portrays them as unfit for political participation, thereby sending the message that they are not full members of the community thus violating its obligation to treat all citizens as equals.\footnote{Similar themes are explored in Bill Wringe, “Are There Expressive Limits on Penal Disenfranchisement and Equality of Status,” Journal of Applied Philosophy, 2019 (doi: 10.1111.japp.12380), p. 7.}

For both historical and conceptual reasons, disenfranchisement conveys the thought that some offenders are not the equals of their peers. Porro observes that states that disenfranchise affirm the judgment that some members of the polity are “unfit” (!) for shared political life and invite members of the polity to hold the disenfranchised in lesser esteem.

Zimmermann is concerned about democratic equality and status, but for largely consequentialist reasons. Recall her (b): Disenfranchisement may be justified because, by incapacitating political wrongdoers from further threatening democratic institutions and procedures, it protects them from the risks posed by further political wrongdoing. Yet consistent with her emphasis on desert and judgments of fittingness, it is fair to ask whether political wrongdoers deserve to be subject to the messages of lower status or political ‘unfitness’ that disenfranchisement expresses. Is it fitting to endorse the apparently lesser status of political wrongdoers by disenfranchising them?

Zimmermann’s defense of disenfranchisement would seem to require an affirmative answer. But while I cannot conclusively establish this, my suspicion is that Zimmermann is ill situated to credibly defend an affirmative answer. Most centrally, her defense of disenfranchisement rests on the objectionable features of acts that intentionally pose sufficient risk to the functioning of democracies. In contrast, the egalitarian complaint about disenfranchisement, couched in terms of fittingness, is that it must also be the case that the implied judgment of the actor (that she is not our political equal) is fitting and so deserved. An argument parallel to the one Zimmermann uses to motivate the fittingness of disenfranchisement itself does not seem obviously available. For while it is plausible that non-political wrongdoing ought not be met with an expression of lesser or unequal status, the best explanation of this is not that it specifically lacks some property that would render such

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an expression fitting. Rather, an equally likely explanation is that no criminal wrongdoing has a property that renders it fitting to endorse the judgment that the wrongdoer has lesser status.

Again, Zimmermann may well be able to offer a rationale for the fittingness of ascribing to political wrongdoers a lesser political status. But sufficient scepticism about that policy is in order. What Zimmermann’s position requires in order to meet this objection is to show that political wrongdoing alters, albeit temporarily, the status of the political wrongdoer. Let us now briefly outline how that might be shown.

4. Political Wrongdoing as Covert Rebellion

The crimes that Zimmermann classifies as political wrongs threaten the functioning of democratic institutions. But they also share another morally significant property: In committing such wrongs, the political wrongdoer arrogates to herself a kind of sovereign authority over law or its enforcement. Bribing a public official amounts to inducing them to circumvent presumably legitimate law for one’s own purposes; the briber thus pretends to be sovereign over the enforcement of the law. Intimidating other voters aims to derail the legislative process in favour of one’s own view regarding what law ought to be; those who intimidate voters thus claim for themselves a disproportionate right to shape law. Funding or participating in violent terrorism bypasses the normal, peaceful means of influencing law and policy in the hopes of compelling others to govern as one wishes they would. Etc.

In democratic terms, then, political wrongdoers assume a sovereignty they do not have. Rather than permitting legitimate forms of lawmaking and governance to operate unimpeded, they assert a right to govern (or at least a right to influence governance) as they alone see fit. In so doing, they disrupt the equality essential to democratic self-governance. Unlike those engaging in civil disobedience, political wrongdoers violate the law not so as to protest its perceived injustice (though they make think specific laws concerning democratic
procedures — campaign contribution limits, say — are unjust). The civilly disobedient aim to catalyse the democratic process so as to change law and practice; they address leaders and other citizens in their role as sovereign co-legislators. Those who commit ‘ordinary’ criminal acts violate laws resulting from the churning of the democratic process. Political wrongdoers, on the other hand, violate the laws that enable that process to be legitimate in the first place. They are piecemeal but covert rebels, subverting this or that aspect of the democratic process in the service of their own ends. And their rebellion is itself an inegalitarian act; in claiming greater, or perhaps even exclusive, sovereignty for themselves, they consign their compatriots to a lesser status within the process of democratic rule.

That political wrongdoing violates the demands of democratic equality is a theme in philosophical writings whose scepticism about the right to rebellion rests on a priori or conceptual grounds. Kant, for example, viewed violent rebellion as contrary to the demand that any political authority be the product of omnilateral authorization by the general will. He who rebels against an existing sovereign, no matter the justice of his complaint, is claiming a right to impose his private will on the populace and so runs afoul of the demand for omnilateral authorization of public authority.\(^{16}\) We need not accept all of the implications that Kant (or others) took this view of rebellion to have in order to appreciate how political wrongdoing amounts to a covert form of rebellion. Rather than aiming to topple and supplant the sovereign power, as revolutionaries do, political wrongdoers reject its authority in favour of their own and in opposition to the joint and equal sharing of sovereignty characteristic of properly democratic communities.

If this egalitarian analysis of political wrongdoing is correct, plausible grounds for believing that disenfranchisement, as well as the message of lower status it ostensibly conveys, emerge. Having engaged in political wrongdoing, an offender has unilaterally

elevated his own status above that of other democratic citizens. He has attempted, on a small scale at least, to make his own will sovereign over others. Disenfranchising such an offender, particularly only temporarily, does not therefore convey that the offender is of lesser status. Applied equitably and universally to political wrongdoing, disenfranchisement instead conveys that the offender may not assert the primacy of his will over others’ in the political realm. Being disenfranchised does not place him below his compatriots in status. Rather it serves to symbolically return him to equal status with his compatriots by reminding him of his status as an equal co-legislator. It is fitting and deserved, I would suggest, for political wrongdoers to be subject to an egalitarian message conveyed through inegalitarian measures.

Of course, complications arise when the state in question is not itself legitimate. Nevertheless, that political wrongdoing deserves disenfranchisement with respect both to the sanction itself (the removal of the right to vote or to engage in other political activities) and with respect to the lesser status disenfranchisement represents or expresses is a claim, I submit, that Zimmermann and egalitarian skeptics (such as Porro) can embrace. In Zimmermann’s case, she allows that the importance of democratic equality militates against disenfranchisement “unless the criminal has broken laws concerning the integrity of democratic institutions, which ensure that everyone else can influence the making of all laws during legitimate democratic procedures, and that everyone’s right to do so is protected equally.”17 Zimmermann puts her point in terms of equal ability to influence the making of law. What she, and skeptics about disenfranchisement such as Porro, overlook is that crimes of an inherently political nature involve offenders asserting an unequal right to influence the making of law. A more defensible account of how disenfranchisement is deserved should acknowledge that fact.

17 Zimmermann, p. 405.
5. Conclusion

That disenfranchisement can be a fitting or deserved sanction for political wrongdoing narrows the scope of disenfranchisement considerably in comparison to current practice. And we may acknowledge that considerations of desert are not the whole justificatory story here: Negative retributivism does not require us to punish in accordance with desert, after all. Nevertheless, it seems likely that restricting disenfranchisement to political wrongdoing is justified all things considered. For not only can it be deserved, it will (in keeping with Zimmermann’s condition (b)) incapacitate political wrongdoers from further undermine the integrity of democratic procedures and institutions, and given the relative infrequency of criminal political wrongdoing, disenfranchising political wrongdoers will not have the adverse effects on the electorate and on electoral outcomes I mentioned at the outset.