RACE, MEMBERSHIP, AND THE LIMITS OF AMERICAN LIBERALISM

PUNISHMENT AND INCLUSION

ANDREW DILTS
just ideas

transformative ideals of justice in ethical and political thought

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PUNISHMENT AND INCLUSION

RACE, MEMBERSHIP, AND THE LIMITS
OF AMERICAN LIBERALISM

Andrew Dilts

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The Los Angeles County jail system holds approximately twenty thousand inmates on any given day, and around a quarter of them are held in Men’s Central Jail. By some counts, it holds more people in custody than any other single facility in the world. Like most jails, its original purpose was to house pretrial inmates who were either denied or could not post bail and sentenced inmates who are back in LA County for court dates. But as the California prison system swelled after the 1970s, Men’s Central now also houses inmates serving long state sentences. There are more and more such inmates at Men’s Central and at local jails throughout the state since the U.S. Supreme Court ordered California in 2011 to reduce unconstitutional levels of overcrowding in the state prisons.

During a recent visit to Men’s Central with a group of students, a sergeant in the Los Angeles Sheriff’s Department who works in the jail’s Community Transition Unit spent a few hours showing us around the facility. He pointed out a set of color-coded lines painted along the floor. “It’s just like in the hospital,” he stated, showing how the different colored lines lead to different parts of the facility. Inmates walk single file along the lines, and many stop and turn to face the wall when visitors like us approach. This is not a firm rule any longer, the sergeant told us, but the men who have been here a while still turn away from us out of habit. Our guide told us that Men’s Central is one of the largest jails in the “free world” and that across the street—in the Twin Towers Correctional Facility, also a part of the county jail system—is the largest mental health facility in the “free world.”

Along the walls of the corridors of Men’s Central Jail are murals painted by inmates (a project run by a retired sheriff’s deputy who volunteers in the
jail, but one which is constantly under threat of cancellation), stenciled rules and warnings to inmates, and contact information for the American Civil Liberties Union of Southern California for inmates with complaints about the conditions of their confinement. The ACLU currently acts as a court-appointed monitor of jail conditions in Los Angeles, following a series of successful lawsuits against the county for inhumane and illegal treatment of inmates. I asked the sergeant about the ACLU oversight as we entered a “recreation yard”—nothing more than a windowless room with several small tables bolted to the floor—and he replied that most of the complaints are about the food. Since we entered the jail, we had not been in a room that has direct natural light. The sergeant told us that they used to use the roof of the jail as an exercise yard but had to stop doing so because of “security concerns.”

Along one of the corridors, a small flyer with a large American flag and the words “LA Votes!” caught my eye. It was from the Los Angeles County Registrar-Recorder’s office informing inmates of their voting rights. Inmates jailed at Men’s Central who are qualified California voters (i.e., citizens of the United States who will be at least eighteen years old at the time of the next election and have not been declared “mentally incompetent” by a court) may register to vote by mail if they are awaiting trial, are currently on trial, or are serving time for misdemeanor or traffic offenses. As defined in the California State Constitution, citizens are disenfranchised upon conviction of a felony until the completion of their sentences (including any time served on parole). California, like nearly every other state in the United States, disenfranchises convicted felons during the time of their punitive sentences as a collateral consequence of their conviction. Many other states disenfranchise felons long after their sentences are completed, and some for the rest of their lives, permanently barring felons from the franchise.

It is difficult to know how many inmates at Men’s Central Jail vote, but a two-week-long voter-registration drive inside the jail organized by the Community Transition Unit registered more than twelve hundred new voters before the 2012 presidential election. Across the rest of California, there are over 130,000 inmates incarcerated for felony convictions: not all of them would otherwise be eligible voters, but all of them are definitively barred from the ballot box. These inmates are still counted in census figures for purposes of political representation and government funding. California recently became one of only a handful of states that count inmates as residing in their last place of residence (at least for purposes of representation). In
contrast, the vast majority of states count inmates where they are incarcerated, a form of gerrymandering that gives localities with large prison populations increased political and economic power but does not require them to be electorally accountable to the prisoners they hold. Given the disproportionately nonwhite population of most state prisons and the relative whiteness of most prison towns, many of us who study and teach about mass incarceration in the United States point back to the original language of the U.S. Constitution to identify a precursor for the form of racial domination that felon disenfranchisement represents. In the United States today, felons appear analogous to the “three fifths of all other Persons” counted in addition to “free persons” in the antebellum period.

Men’s Central Jail sits just north of downtown Los Angeles, and along with the Twin Towers complex next door, it looms over the busy freeways that crisscross the city. I do not know how many of the hundreds of thousands of people driving by each day know what it is, or if they give it much thought. But even if they do not, this jail, along with all the prisons throughout the United States (including those intentionally hidden from sight and out of mind), shapes the world we live in, giving meaning and form to our practices and ourselves. The jail is also visible from the windows of an elementary school in Boyle Heights, a largely immigrant neighborhood in East Los Angeles that is one of the most heavily policed neighborhoods in the city. My students and I spent the night there after our visit to the jail and meetings with several groups working to reduce gang violence, police brutality, and mass incarceration. One group we met with had posters up in its offices that read, “Build Schools, Not Jails.” The group works to dismantle what has come to be called the “school-to-prison pipeline.” That phrase, capturing the way in which the lives of marginalized youth are criminalized, tracked, and policed such that their life chances are shaped with incarceration as their destiny, takes on renewed force as I sit in the classroom and look at the jail—one of the largest houses of confinement in the “free world.”

This book is about punishment and membership. It is about the meaning of the vote and the practice of voting under the conditions of felon disenfranchisement. It is about how we use punishment to both exclude and include people in the political body of the United States, and it is about how we use the rights of political membership to punish people. It is about how we violate deeply held public commitments to self-government, democratic equality, and liberal freedom and about how these violations nevertheless support those same commitments, operating through the pernicious
and persistent history of white supremacy as a political system. It is about how we come to be the persons we are through these violations and how we police the boundaries of whiteness, masculinity, ability, and normality through institutions and practices that are supposed to be blind to ascriptive differences. To that end, this book is about how we think about justice, the politics of inclusion, and how we organize our political lives in relation to others. It calls for policy changes, to be sure, but it also demands a frank confrontation with the reasons that policy is so difficult to change. Doing so asks us to confront how what we do to others shapes ourselves. The final question, to echo the words of Simone de Beauvoir, is whether we will allow this state of affairs to continue.
Acknowledgments

As I learned from my friend and teacher Patchen Markell, acknowledgment is a difficult practice. Trying to account for all the ways in which this book is the product of many years of work is a powerful and happy reminder of how deeply and widely connected to others I am fortunate to be. But as with any appearance of a thing in public, I also cannot possibly account for everything that has gone into this book; and any list of debts I owe will be necessarily incomplete, and any expression of the gratitude that I feel to so many others who have helped me and challenged me will be insufficient.

Nevertheless, I must first thank the teachers at the University of Chicago who directly helped to shape this project: Patchen Markell, Robert Gooding-Williams, Bernard Harcourt, Cathy Cohen, and Iris Marion Young. This project began in their classrooms and their offices, and I am eternally grateful for their mentorship, guidance, and friendship.

Most of this book was written while I lived in Chicago. The “city on the make” and its people will always have a hold on me. I owe much to the Department of Political Science and the Society of Fellows in the Liberal Arts at the University of Chicago, which supported me materially and surrounded me with teachers, colleagues, and friends at the university and beyond its walls. Many of these people read pieces of this book and gave me frank and helpful advice. And everyone single one of them supported me with their thoughts and their patience. The argument of this book and my ability to make it is directly indebted to Bethany Albertson, Kathy Anderson, Greg Beckett, Jeremy Bell, John Brehm, Chris Buck, Zachary Callen, Rob Campbell, Craig Carson, Jon Caverley, Jamila Celestine-Michener, Anita Chari, Katie Chenoweth, Bertram Cohler, Gabriella Coleman, Chris Deis, John
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Several people deserve special and repeated thanks. Thank you to Chris Buck and Emily Meierding for their particular roles as cofounders of Harper House. Bethany Albertson and Deva Woodly have mentored me since I began graduate school, and I continue to aspire to be like them in everything that I do. Greg Beckett displayed the courage of a true friend throughout the editing of this book. Keally McBride (and her wonderful family) provided a physical space to finish revisions to this book, and she has been an incredible intellectual guide and friend throughout. Perry Zurn guided me through difficult questions of translation and interpretation, and his own work inspires me to try to write more like him. Anne and Jon Dilts have read every page of this book with a critical eye that only teachers and newspaper editors have and the patience only parents possess.

I cannot write these acknowledgments without reflecting on the loss of Iris Young and Joel Olson. I originally came to Chicago to study with Iris. I can only hope that these pages reflect a little bit of her wisdom, passion, and dedication to justice. She always asked the hardest questions, and I hope that I have begun to come up with answers for her. I was never close to Joel Olson, but reading his work and learning about his dedication to antiracist action changed how I think. Both Iris and Joel worked tirelessly inside and
Acknowledgments

outside the classroom to fight for justice, putting their bodies on the line and always insisting on the connection between thought and action. Their thought runs through this book, and their deaths have left the world a far poorer place.

The final stages of preparing this book for publication were marked by the sudden and devastating loss of Helen Tartar. I am beyond fortunate to have been able to work with Helen as my editor, and I am honored to have been able to call her my friend. This book, like so many others, would never have come to be without her careful guidance and unfailing support. The depth of our loss is as immeasurable as the reach of her gifts to us all.

I close with the most difficult debt to acknowledge, because there are no words to express it. Sina Kramer is my first and last interlocutor. She is my partner in thought and life. I cannot imagine thinking or writing without her in mind, and I hope to someday be able to think and write as clearly and passionately as she does about philosophy, politics, and justice. This book is for her, and it is for us.
A Note About the Cover

The photograph on the cover of this book is a close-up of the windows of the Metropolitan Correctional Center, Chicago. This federal jail facility was built in 1975, at the very start of the era of mass incarceration. It is located in the middle of downtown Chicago, just around the corner from the Chicago Board of Trade, the Federal Reserve Bank of Chicago, and the Harold Washington Library. It is hyper-visible with its triangular shape and distinctive window slits (each window is without bars and measures 5 inches wide by 7 feet tall). But it is also a building that hides in plain sight. When I lived in Chicago, I often passed this building without a thought, not realizing at all what it is. And it is precisely for this quality that I find it to be a fitting image for the cover of this book. The U.S. punishment system is a part of our built environment, a constant force in the lives of those who reside in the United States, and yet typically also an afterthought. This detail view of MCC Chicago, made by Markus Hardtmann and used with his kind permission, captures for me the way in which what we “see” of this system is always a matter of perspective, and requires a multiplicity of views if we are to understand it, let alone if we hope to change it.
PUNISHMENT AND INCLUSION
A Productive Injustice

It might be helpful to start with some numbers. At the start of the twenty-first century, roughly 1 percent of the population of the United States is in jail or prison. Roughly 3 percent of the population of the United States is “on paper,” that is, on parole or probation. In forty-eight states and the District of Columbia, incarcerated felons cannot cast a vote; in thirty-five states, parolees cannot vote; in thirty of these, felons on probation cannot vote. In nine states, disenfranchisement may be permanent for certain offenses. And in three states—Kentucky, Virginia, and Iowa—disenfranchisement is for life. There are an estimated 5.3 million adult Americans who cannot vote because of a felony-class criminal conviction. Of these, over 2 million have completed their sentences in their entirety, while only about 1.3 million are actually incarcerated. In total, this is a little more than 2 percent of the voting-age population. A full third of the disenfranchised are African American, effectively disenfranchising nearly 8 percent of all adult African Americans in the United States. In Alabama, Kentucky, and Florida, one in every five adult African Americans cannot vote.
The constitutionality of these restrictions on the right to vote is largely a settled question. On October 7, 2010, the full Ninth Circuit Court of Appeals ruled that the Voting Rights Act of 1965 does not prohibit criminal disenfranchisement, absent a showing of discriminatory intent in the adoption of disenfranchisement provisions. Should this case be appealed and heard by the Supreme Court, there is little reason to expect it to disagree. The 1974 standard set by the Court in *Richardson v. Ramirez* expressly rejected a similar Voting Rights Act claim, noting that Section 2 of the Fourteenth Amendment to the U.S. Constitution allows the abridgment of voting rights for “participation in rebellion, or other crime.” Provided that a disenfranchisement provision was not drawn up with explicit discriminatory intent, the courts have routinely insisted that a technically “color-blind” provision is entirely constitutional.

It is difficult to speak in generalities about felon disenfranchisement in the United States, as each state sets its own voting qualifications, governed only by a few federal mandates. As such, there is great variation among states as to which classes of persons (ex-felons, probationers, parolees) are allowed to vote. To an important degree, it is misleading to refer to this form of exclusion as specifically “felon disenfranchisement” as if it were a unified form of criminal disenfranchisement. This has led Department of Justice officials to characterize the mix of state laws as a “crazy-quilt” of policies. Nevertheless, a recent series of policy changes in Iowa is illustrative of how precarious the right to vote is for persons with felony convictions.

In 2005, former governor Thomas Vilsack of Iowa made national headlines when he issued Executive Order 42 on the Fourth of July that year. The order restored the voting rights of nearly eighty thousand Iowans who had completed criminal sentences. Prior to this moment, Iowa was one of only five states that permanently disenfranchised felons. The state’s first constitution, enacted in 1846, barred any person convicted of a felony or an “infamous crime” from holding office or casting a ballot. Vilsack’s order was heralded by voting rights activists and, in particular, was seen as a major advancement of African American voting rights. Iowa has one of the most racially disproportionate incarceration rates in the country. While constituting less than 3 percent of the state population, African Americans represent a full quarter of the state’s prison population. Prior to Vilsack’s order, the disenfranchisement rate for African Americans in the state was above 30 percent, the highest in the nation. What was perhaps more important was that Order 42 effectively ended ex-felon disenfranchisement in Iowa. The Iowa
Department of Corrections was ordered to submit monthly lists of persons completing their sentences to the governor's office for automatic and immediate voting rights restoration. As a result, an additional twenty thousand Iowans have regained their right to vote since then.

Yet within hours of Governor Terry Branstad's inauguration on January 14, 2011, he fulfilled a campaign promise by rescinding Order 42, effectively ending automatic rights restoration. The estimated one hundred thousand Iowans who had been reenfranchised will not be affected, and so-called ex-felons are still eligible to apply to have their rights restored on a case-by-case basis. Such applications, however, can only be filed after an individual has fully paid all court costs, fines, and fees owed to the state. Such debt can easily reach tens of thousands of dollars, leading the Iowa-Nebraska State Conference of the NAACP to liken the process to a "modern day poll tax." It is not alone in making such a comparison. Civil rights lawyer and author Michelle Alexander recently pointed to felon disenfranchisement as a key component of the "New Jim Crow" in the United States. "We have not ended racial caste in America," she writes; "we have merely redesigned it."

The central question motivating this book is deceptively simple: what is the meaning of all this? What does it mean that Americans have, largely since the colonial period and most expansively during the later half of the nineteenth century, insisted again and again that the right to participation in collective self-government should be limited to people without criminal convictions? What does it mean to cast a vote under such conditions? What, to borrow a turn of phrase from Frederick Douglass, does it mean to be an American under the terms of felon disenfranchisement?

When I ask, "what does all this mean?" it is necessary to be clear what I do not mean. I do not mean, first of all, that this is about whether felon disenfranchisement is just or unjust under some specific terms of normative evaluation, although this is necessarily a question with which we will have to grapple. I do not mean to ask what social, economic, or political variables predict which states are most likely to disenfranchise felons. Nor do I mean to discover the estimated electoral effects of disenfranchisement provisions. And while there is a great deal to be said about the recent developments in Iowa and Florida and at various levels of the U.S. appellate court system, I do not mean narrowly to explain why various governors have issued the orders that they have or why various courts have issued the opinions that they have.
I mean something else, something that intentionally steps back from the expressly normative and empirical questions about felon disenfranchisement and asks what this practice tells us about American liberalism as an organizing public ideology and, in particular, what it reveals about the relationship between punishment and citizenship under the terms of American liberalism. To ask the question in this way, focusing on the social and political meaning of felon disenfranchisement, is to ask about the work of felon disenfranchisement, for those whom it directly affects and also for the subterranean but no less important work it does for those who remain identified as free and upstanding citizens. In the end, it is necessarily a way of asking what the practice tells us about the American political condition generally and about the productive limits of American liberalism's reliance on specific understandings of justice, inclusion, punishment, and membership.

I argue that felon disenfranchisement does not tell us very good things about living in the United States in the early years of the twenty-first century. This kind of academic focus tells us (if we limit “us” to those persons who have not been barred from the ballot box) that we continue to live in a racial caste system, that we fail to live up to our liberal ideals, that we trip over our commitments to civic republicanism, that we criminalize others who are different, that we treat each other as means toward our own ends of social and political equality, and most troubling of all, that we do so through one of our most cherished and sacred institutions: the franchise. Yet the deeper paradox of disenfranchisement is that it is a productive failure, in that it is symptomatic of liberalism's typical refusal to address the foundational tension between state punishment and political membership. Both the standard normative and empirical approaches to disenfranchisement reflect this symptomatic blindness as well, as they are caught up in justificatory frameworks that inhibit a consideration of how disenfranchisement produces and maintains the same subjects that are excluded from the franchise. For all of our failings, we continue to restrict access to the ballot box not simply because we have fallen short of our ideals (which we may surely have) but also because such failings are productive of those ideals, offering a sense of identity, security, and meaning.

To this end, *Punishment and Inclusion* tells a peculiar story about felon disenfranchisement. This practice, rooted in the history of political thought, contemporary social theory, postslavery restrictions on suffrage, and the contemporaneous emergence of the modern American penal system, reveals the deep connections between two American political institutions often
thought to be separate: the boundaries of membership and the terms of
criminal justice. I treat disenfranchisement first and foremost as a symptom,
rather than as the disease itself. In this case, it points us to a deep tension
and interdependence that persists in democratic politics between who is
considered a member of the polity and how that polity punishes persons
who violate its laws. The account given here reveals the work of member-
ship done quietly by our criminal justice system and, conversely, the work
of punishment done by the electoral franchise.

The story of criminal disenfranchisement told in this book is also par-
ticular to the United States and, as such, grapples with the broader structure
of white supremacy as a political system. I follow the philosopher Charles
Mills’s account of white supremacy as “itself a political system, a particular
power structure of formal or informal rule, socioeconomic privilege, and
norms for the differential distribution of material wealth and opportunities,
benefits and burdens, rights and duties.” As Mills argues, white supremacy
is the “unnamed political system” that has produced the world we live in and
the United States in particular. Criminal disenfranchisement plays an im-
portant role as a productive technique of race-making in the United States.
From at least the nineteenth century until today, criminal disenfranchis-
ment has worked to establish and maintain the color line as a marker of
domination and control. As historical and empirical studies have already
documented, the adoption of criminal disenfranchisement provisions and
their continued popular support cannot be explained without reference to
the racial history of the United States. But my claim goes further: at the
core of the American liberal project, a system of racial subordination and
domination is continually reestablished and maintained through the current
electoral system that operates under the terms of felon disenfranchisement.

Ultimately, I want to tell a story about how legal techniques, punitive
practices, and political discourses have been routinely deployed to manage
this internal tension between punishment and membership by displacing it
onto the bodies of criminalized others. Disenfranchisement helps to pro-
duce the figures of the innocent citizen and the dangerous felon that it is
supposed to manage or constrain. In doing so, it attempts to alleviate a set of
broader anxieties of living in a social world where harm may come from our
own hands and our own failings, rather than simply from others. If liberal
theories of justice rely on such displacements, we must rethink the meaning
of justice itself, refiguring it in a way that is sensitive to the contingency of
one’s political and legal standing, the production and fabrication of criminal
kinds, and the social, political, and epistemological work done by the very practices we seek to adjudicate.

I absolutely think the practice of felon disenfranchisement must end in this country. Yet it is also my worry that this will not be sufficient if we continue to miss the connections between punishment and political membership as they define the American polity. The quest for inclusion will necessarily be incomplete if we fail to acknowledge the mutual constitution of punishment and citizenship. To end the practice of felon disenfranchisement without attending to its roots may simply displace the problem, producing a new symptom at a different border. This process is arguably already under way in the expansion of new techniques of punitive control that manage real and imagined American borders, such as the expansion of criminal background checks for employment, sex-offender registration requirements, and the massive proliferation of immigration detention centers—that is, prisons. It is better for us to confront the overlap between punishment and citizenship than to disavow the work that “criminals” do for us.

This book takes its title, in part, from Iris Young’s *Inclusion and Democracy*. As will become clear throughout my argument, her work greatly influences my thinking about disenfranchisement in particular. More generally, Young’s work shapes my thinking about the meaning of justice, inclusion, deep democracy, and the importance of critical theory for understanding our situation. Part of our collective difficulty, Young notes, is that when we think about the boundaries of civil society and its political associations, we tend to assume in advance who members are and what kinds of activities and actions are acceptable. When such assumptions take the form of exclusion—blocking or preventing persons from the self-determination of their social and political lives—we are usually right to call this injustice and turn to inclusion as an obvious remedy. But as Young reminds us, we must be very careful to think about the terms on which inclusion operates, such that it does not produce what she calls “internal exclusions.” Young’s analysis reminds us that it is necessary to account for forms of exclusion and domination that have become built into our political environment, our language, and our theories of justice. This is difficult work, but it is important if we want to do more than simply end an unjust practice but also address the underlying reasons that make it so difficult to end.

Ending disenfranchisement—and the conditions that allow it to be so productive—requires us to first frankly diagnose the work it does for us and to take seriously “radical” proposals such as prison abolition, an investment
in politics far beyond the ballot box, or the complete political inclusion of all stakeholders in democratic processes. It also calls for a reorientation of our everyday practices as political and ethical ones, as practices necessarily caught up in a shared life with others. There is therefore something perverse about this book. It reflects an obsession with voting rights and the meaning of voting, and yet it is ultimately a call to get past voting rights, to get past voting itself, and to push far beyond the limited—yet necessary—terms of political inclusion that voting represents.

THE “FAILURE” OF FELON DISENFRANCHISEMENT

There are clear predecessors for criminal disenfranchisement as far back as ancient Greece and Rome as well as medieval Europe. From being given the status of *atimia* in ancient Greece to being deemed an “outlaw” in medieval Germany and England to the declaration of “civil death” in feudal law, there have been numerous ways that authorities have stripped individuals of political standing, protections, or rights. Such practices, importantly, were understood as overtly punitive, based primarily on the logic of retribution. Criminal disenfranchisement in the United States, however, sits powerfully within two distinctively “modern” forces: the rise of the rehabilitative ideal and figuration of citizenship as a birthright. As sociologists Jeff Manza and Chris Uggen put it succinctly in their empirical study of disenfranchisement, “The problem [of dismissing political rights for criminal offenders] becomes fundamentally different in a world in which mass participation—and citizenship rights defined by birth—emerges alongside notions of the possibility of rehabilitating criminal offenders.” Under classical and medieval conditions, the notions of political and participatory rights were already dramatically limited by today’s standards. The shift toward the ideal of rehabilitation alongside ever-increasing franchise rights seems to give criminal disenfranchisement a new form, if not a new meaning.

This is largely to say that the meaning of disenfranchisement is always situated in relation to the historically specific and contingent basis of membership already established. Early American colonial law, for instance, carried over criminal political exclusions from English common law, primarily in the form of restrictions of participation in public deliberations, the ability to hold public or honorific office, and the eligibility to act as a public witness. But given how restricted suffrage was in the colonial and postrevolutionary periods before the Jacksonian-era expansion of the franchise, what we
would understand as criminal restrictions—removal from the electorate—simply did not exist in the United States until the early nineteenth century. Only Kentucky and Vermont had constitutional provisions for the disenfranchisement of criminals before 1800. By 1821, however, eleven states had added some form of restriction or had authorized their legislatures to draw up some restriction on criminals. Property qualifications on the franchise in nearly all these states (including ten of the original thirteen colonies) had already reduced the actual electorate. The two key periods of growth for disenfranchisement are the years leading up to about 1850 and the period following the Civil War. In each period, the meaning of criminal disenfranchisement was necessarily linked to broader expansions of the franchise: the inclusion of white workingmen and former slaves, respectively.

During this first period, most criminal disenfranchisement restrictions were implemented in the Northeast beginning in the 1840s, directly following white manhood suffrage. Manza and Uggen argue that white workingmen’s suffrage directly drove this first wave of criminal disenfranchisement and was maintained alongside persistent restrictions on women, African Americans, and immigrants as roughly coequal groups of “undesirable voters.” That is, in addition to the continued denial of the vote from these groups as groups, criminal exclusions emerged to police the franchise among persons recently given voting rights. As Manza and Uggen note, “Between 1840 and 1865, all 16 states adopting felon disenfranchisement measures did so after establishing full white male suffrage by eliminating property tests.” The two driving factors were the expansion of a criminal justice system and workingmen’s suffrage, revealing disenfranchisement as embedded within the social and political context.

Provisions enacted during this period (like nearly all disenfranchisement provisions throughout U.S. history) made no explicit or overt mention of race. During the pre–Civil War period, suffrage was largely restricted to white men through separate eligibility requirements. Yet concern increased throughout northern and border states about the status of “free Negroes” within their jurisdictions. Free blacks were a source of anxiety, particularly in terms of labor competition with white and immigrant workers and the public standing of whites in relation to former slaves. The question of how to deal with the “Negro problem” prompted numerous proposed “solutions,” including mass deportation. The same period in which white workingmen won the right to vote was also a period of increasing support of state funded and managed colonization efforts in Liberia to remove blacks from...
the United States. Moreover, to assume these restrictions were not racialized because they were seemingly color-blind does not mean they were not part of redefining what it meant to be both white and a citizen. In fact, criminal disenfranchisement provisions did not need to be explicitly racialized in order to maintain and support a white vision of citizenship and innocence.

The second wave of disenfranchisement, immediately following the end of the Civil War, was far more openly racialized and concentrated in southern states, with nineteen states increasing restrictions on criminal exclusions. While the most pernicious voting rights exclusions that emerged during this period were not linked to criminal convictions (e.g., poll taxes, grandfather clauses, etc.), the use of criminal disenfranchisement directly assisted the widespread project in southern states to resist the effects of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution, which banned chattel slavery and extended citizenship, due process, and voting rights to (some) freed slaves. Post-1870, the single strongest predictor of criminal disenfranchisement provisions has been the relative proportion of African Americans incarcerated in a given state.

Following the massive expansion of disenfranchisement after Reconstruction, little movement occurred until the civil rights era brought with it a period of general liberalization during the 1960s and early 1970s, focused primarily on removing lifetime voting bans but leaving disenfranchisement itself intact. The high point in liberalization came during the early 1970s, in which twenty-three states made some substantial reform to their disenfranchisement provisions. Nevertheless, these reforms were focused on the specifics of disenfranchisement and did not reflect a challenge to the practice itself. Popular sentiment and the difficulty of amending state constitutions further hampered reform in this period. This “reform” period was also the same period in which heated rhetoric regarding crime policy reached a fever pitch, indicated by calls at federal, state, and local levels for a “war on crime” and a “war on drugs,” which perniciously targeted nonwhite persons and has exacerbated racial inequality in the United States. While there was some liberalization in the harshness of disenfranchisement provisions, the sheer number of persons who became subject to these provisions began to expand dramatically because of the rise of mass incarceration. According to David Garland, two features define mass incarceration (or mass imprisonment): first, the sheer number of persons imprisoned became identifiably large in historical or comparative terms, and second, there was a “social concentration of imprisonment’s effects.” The United States has met these
criteria since the early 1970s, when incarceration became normalized for young black men concentrated in urban areas. In terms of the franchise, Alexander Keyssar nicely sums up the difficulties of reform in the face of mass incarceration:

At the beginning of the twenty-first century, convicted felons constitute the largest single group of American citizens who are barred by law from participating in elections. . . . That this group remains disfranchised despite the transformation of voting laws in the 1960s and 1970s reflects not only its racial composition but also its utter lack of political leverage. Indeed, convicted felons—mostly minority males, many of them young—probably possess negative political leverage: it would be costly to any politician to embrace their cause.

In the past two decades, however, a new wave of reform has taken shape, and disenfranchisement provisions remain in flux. This is in part due to the increased attention on the issue after the 2000 election and the highly publicized question of inaccurate felon lists in Florida. Additionally, several social movement organizations have emerged in the past decade, alongside professional policy organizations (such as the Sentencing Project), that agitate on behalf of disenfranchised persons. Between 1997 and 2006, sixteen states substantially reformed their disenfranchisement provisions, leaving far fewer states with permanent exclusions.

At the same time as this reform, however, there have also been revealing reversals. Since 1998, Utah, Massachusetts, and Kansas each substantially restricted voting rights for felons. Utah and Massachusetts (which previously had no restrictions on felon voting whatsoever) disenfranchised inmates, and Kansas disenfranchised probationers. Of the states where rights restoration has become automatic upon completion of sentence, many states routinely fail to provide this information to former inmates. In Florida, the state’s executive clemency office established an automatic restoration process for nonviolent offenders in 2007, but this decision was reversed in 2011. And in Iowa, as already noted, the sweeping clemency offered for released prisoners in 2005 was overturned by executive order in 2011. Perhaps most importantly, there is still a strong barrier to allowing currently incarcerated felons the right to vote. Even some of the strongest critics of felon disenfranchisement continue to take the exclusion of incarcerated persons as self-evident. To a great degree, the disenfranchisement reform movement has (either for strategic or substantive reasons) solidified support for
the disenfranchisement of currently incarcerated felons, focusing campaigns primarily on reducing “ex-felon” restrictions. And given the sheer number of people incarcerated in the United States, this is not a trivial number of persons categorically barred from franchise. More important, however, is the question of what it means that the United States continues to be so willing to link a foundational right of political membership with the punishment of incarceration.

FAILING JUSTICE, FAILING NORMATIVE THEORY

The puzzle of disenfranchisement runs far deeper than its reach. The scale of its impact is what often draws attention to it, something only possible in the past forty years of extreme incarceration rates. For instance, criminal disenfranchisement has always been a staggering failure as a form of punishment. “As a penal measure,” Keyssar notes, “disfranchisement did not seem to serve any of the four conventional purposes of punishment: there was no evidence that it deterred crimes; it was an ill-fitting form of retribution; it did not limit the capacity of criminals to commit further crimes; and it certainly did not further the cause of rehabilitation.”48 On its face, disenfranchisement is a violation of most justifications for punishment, in that it is fundamentally a disproportionate practice. It is a poor fit in the narrow sense, in that it is a paradigmatically “collateral” consequence to a criminal conviction, applied statutorily as an addition to a punitive sentence. And it has disproportionate aggregate effects, punishing predictable groups more than others. As noted already, a full third of those who are disenfranchised for a criminal conviction are African American, and also, as noted, in states with the most sweeping disenfranchisement provisions, one in three adult black men are unable to vote.49 As I argue at greater length throughout this book, this racial character is neither accidental nor trivial.

Traditional theories of just punishment understand punitive action as a necessary harm requiring specific justification, often constrained by the limitation that it must not inflict more harm than is right, good, necessary, or prudent. The adage that punishment must in some sense “fit the crime” appears in most philosophical literature dealing with the subject. Retributivists, utilitarians, classical liberals, and contemporary legal theorists (despite their substantial differences) typically all insist on a version of this principle. Some substantive concern for the proportionality of punishment can be found in otherwise diverse thinkers as Hobbes, Beccaria, Locke, Bentham,
Mill, Kant, and Hegel. While the frame of reference might be in dispute (e.g., as in Bentham, where punishment must be kept proportional to its usefulness, or Kant, where punishment is bounded by its ability to satisfactorily establish the moral standing of the criminal), there remains broad agreement that punishment must reflect the character or the quality of the crime in question. For legal theorists in the Anglo-American tradition, proportionality is a central concern of justifying punishment, and this basic premise is augmented with a distinction between actions and actors: punishment ought to fit the crime rather than the criminal. While punishment is meted out on a person (and as such may require some adjustment for a particular person’s situation), it is nevertheless meted out for a crime, requiring an additional justificatory step connecting the crime to the criminal in a way that proves the subject in question is deserving of punishment.

But as disenfranchisement is practiced across the United States, it cannot reasonably be said to apply to a crime. It applies, rather, to the criminal. Individuals are disenfranchised with reference to their status as convicted felons or as currently incarcerated and not by virtue of their particular criminal transgressions. This is a relatively recent development. The earliest provisions for disenfranchisement targeted specific offenses (such as public drunkenness, voter fraud, and larceny) but quickly gave way to categorical forms of disenfranchisement (focused on crimes of “moral turpitude” and “infamy”). The movement to wider categories of disenfranchisement, notably, tracks both the widespread adoption of sentencing guidelines as well as the broader expansions of the franchise. As a categorical “punishment,” disenfranchisement nevertheless focuses on the criminal rather than the crime. This is nowhere clearer then when disenfranchisement persists after a criminal sentence has been served, making its excessive character more visible. If it is a punishment, then, it is a definitive case of disproportionate and excessive punishment. From this perspective, there is wide agreement that disenfranchisement is not simply a punitive failure but also an overtly unjust practice.

Not surprisingly, there are a growing number of scholars making forceful normative objections to disenfranchisement on a variety of grounds, including its racial disparity, its unconstitutionality, its incompatibility with traditional theories of citizenship, and its failure as a form of punishment. The manner and history of these critiques are themselves interesting and indicate the limited terms of debate that have been available. A first wave of these criticisms emerged in the legal studies literature during the 1970s,
focusing primarily on the disproportionate character of felon disenfranchisement and the unsettled interplay between punishment, voting rights, and citizenship. Construed narrowly as a constitutional question, these theorists asked if the Fourteenth Amendment, which provides an explicit exception for the protection of voting rights in the case of “treason and other crimes,” trumps Section 2 of the Voting Rights Act of 1965, which states that a demonstration of racially discriminatory effect can overturn state-level restrictions. The doctrine laid down by the Supreme Court in 1974 in *Richardson v. Ramirez* states that disenfranchisement is a viable exception to the Fourteenth Amendment’s equal protection clause. So long as the Fourteenth Amendment remains as written, then, criminal disenfranchisement statutes are permissible unless it can be shown that they were devised with discriminatory intent. The Supreme Court has only once invalidated a criminal disenfranchisement provision, and this was because the proceedings of the Alabama Constitutional Convention clearly demonstrated that the provision intended to disenfranchise African Americans specifically. While a series of promising cases worked their way through the federal court system in recent years, cases that might have provided opportunities under the Voting Rights Act to overturn disenfranchisement provisions, courts have routinely denied them hearings. Even as the courts have held that citizenship cannot be revoked as a part of criminal punishment and that voting is “essentially equivalent to citizenship,” they have also allowed states to disenfranchise large groups of citizens as a result of their status upon conviction for crimes classed as felonies. The legal studies literature of this period has not produced a major legal victory, but by expressing repeated concern that felon disenfranchisement is at best a troubling practice, linking such restrictions to archaic legal practices inherited from Roman law and English common law, it did lay the historical groundwork necessary to begin shifting the debate to more explicitly normative theorizing.

Through the 1980s and 1990s, the normative philosophical literature on disenfranchisement continued to develop primarily in legal journals, continuing to question the logic of the Court’s ruling in *Richardson* (particularly by trying to assert that disproportionate effects provide the basis for a challenge on grounds of vote dilution). Though still largely restricted to legal analysis, a conceptual shift began, framing the question in philosophical debates over punishment, citizenship, and justice. This work draws primarily from social contract liberalism and civic republicanism, and nearly all of it reduces the question to one of *justification* under some set of ideal
In general, the question for liberals is whether felons should lose their rights because they have violated the social contract. For civic republicans, the concern is whether criminal actions indicate that an offender is unworthy of the rights and responsibilities incumbent on citizens, revealing the danger the offender poses to the so-called purity of the ballot box. Both of these justifications have been expressed in U.S. jurisprudence, most notably in *Green v. Board of Election*, in which the ruling states, “A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.” Earlier, in an 1884 Alabama Supreme Court decision, the court stated, “The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage.” What unites both approaches, however, is a theory of the criminal subject as irredeemable and therefore unfit for political membership. This viewpoint, what some scholars call “liberal republicanism,” is based on “the importance of *individual* virtue and moral character as the basis of a strong moral economy and stable polity.”

Not surprisingly, many arguments for and against disenfranchisement on these grounds often note that felon disenfranchisement cannot be justified as punishment (i.e., as a deterrent, rehabilitation, incapacitation, or retribution) and argue that it must therefore be evaluated on other terms, such as those involved in liberal or republican notions of citizenship or “public safety.” Disenfranchisement, nevertheless, is and continues to be directly connected to the state’s authority to punish individuals as well as its authority to exclude certain people from membership. It is a practice that sits at the intersection between these discourses, even if it is a failure of one or both of them. While the state derives its authority from particular liberal principles, it disregards these principles in order to punish a certain class of citizens with exile from the polity. This is done, so the argument goes, in order to protect the polity as it is constituted but not through the means which it has sanctioned for its constitution.

Even when theorists do take up felon disenfranchisement as a form of punishment, the approach tends to be strictly normative, following H. L. A Hart’s insistence that questions about punishment are *necessarily* questions of its justification or R. A. Duff’s assertion that justification is “the central question in philosophical discussions of punishment.” The central question posed (again and again) is whether disenfranchisement is justifiable...
under some set of agreed-on principles (typically the traditional retribution-versus-deterrence framework). And yet felon disenfranchisement routinely fails (again and again) to satisfy any standard justification for punishment. Versions of this argument repeat themselves so frequently that a standard form has emerged in the normative literature on felon disenfranchisement. First, it identifies a governing set of liberal or civic republican principles of membership or ideal justifications for a punishment. Second, it introduces the practice of felon disenfranchisement and demonstrates how it violates some or all of these principles. Finally, in light of our commitments to the stated principles, it concludes that we should abandon felon disenfranchisement. Felon disenfranchisement, the argument goes, should be eradicated by a renewed and deeper attachment to the liberal principles we all hold dear.67

There are several problems with this approach. First, the key quality of felon disenfranchisement—its excessive character—is both the driving reason why normative scholars tend to reject it as a practice and precisely what should make it such an interesting practice for political theory. As such, these analyses arrive at felon disenfranchisement’s most important feature, and yet it is at this moment that the discussion ends. Second, while the relationship between punishment and citizenship is nowhere more obvious than in practices of felon disenfranchisement, these two discourses are rarely theorized together. When the practice is approached as a question of citizenship, its punitive character is ignored, and when it is approached as a form of punishment, its relationship to citizenship is deemphasized. Part of this problem stems from the lack of attention theorists have given to the documentary evidence of deliberations over criminal disenfranchisement.68 Third, the persistent normative approach inhibits analysis of the practice. While it may be relatively easy to reject felon disenfranchisement under such justificatory frameworks, it is the frameworks themselves that have generally preempted a consideration of the meaning of the practice and its persistence.

Perhaps the most telling evidence of this preemption is that there has been little work questioning felon disenfranchisement itself. The standard form of the argument is limited to the case of ex-felons. Few theorists are willing to make the harder claim that currently incarcerated persons should be allowed to vote, largely because it would require a deeper analysis of the terms of justification.69 Few theorists consider felon disenfranchisement from a theoretical point of view that departs from the terms of liberalism
or civic republicanism and does not work within the standard justification framework, taking its disproportionate character as something meaningful in its own right. Approaching disenfranchisement as a purely normative question has obscured what we can learn about American politics (and the principles governing it) from the fact that we do engage in a practice that looks like a prima facie contradiction of our principles, and moreover we are not sure if the normative question is properly about punishment, citizenship, or both.

PRODUCTIVE FAILURES

We need to collectively redirect our vision and learn to see how liberalism succeeds by failing the felon. We need to understand how disenfranchisement is a productive failure. As Michel Foucault notes in *Discipline and Punish*, since the introduction of prisons in the early nineteenth century as a form of punishment, they have constantly been criticized as failures on their own terms: "The critique of the prison and its methods appeared very early on, in those same years 1820–45; indeed, it was embodied in a number of formulations which . . . are today repeated almost unchanged." As long as prisons have been used to punish, not only have they failed in this charge, but the solution to the prison’s failures has always been an improved version of the prison itself: “For a century and a half the prison had always been offered as its own remedy: the reactivation of the penitentiary techniques as the only means of overcoming their perpetual failure; the realization of the corrective project as the only method of overcoming the impossibility of implementing it.” Foucault notes that we are asking the wrong question when we inquire as to why we should keep the constantly failing prison. Rather we should “reverse the problem and ask . . . what is served by the failure of the prison.”

Likewise, versions of the standard argument have been appearing in law journals since the 1970s, since the beginning of the “reform” or “liberalization” period of disenfranchisement. Prior to this period, the documentary record reveals that for as long as disenfranchisement provisions have been written into state constitutions, opposition to them has been voiced claiming that we must be true to our founding principles of liberal proportionality, just punishment, and civic responsibility. When disenfranchisement is posited as a failure of liberal, republican, or punitive principles, the solution has been to reassert these same principles. If the boundaries of political
membership are actively produced and reproduced through the practice of punishment, and if this (re)production is particularly pronounced in the punishing of persons’ characters by disenfranchisement rather than their crimes, then we must begin posing the question of disenfranchisement differently.

That is to say, this book takes the practice of felon disenfranchisement and the theoretical confusion surrounding it as symptoms and asks what they reveal about the significance of felon disenfranchisement as a real (and troubling) practice. Rather than “Is disenfranchisement justified?” we should ask, “What is served by disenfranchisement?” Instead of asking, “Was this practice applied to a particular racial group in violation of liberal norms of equality?” we should ask, “How does the practice of disenfranchisement help produce and manage the unstable and changing conception of this particular racial group?” Turning away from expressly normative questions and empirical questions that center on causal rather than interdependent relations, we must ask, what does this practice, which sits on the boundary between discourses of punishment and of citizenship, do for us theoretically? What tensions or assumptions does it reveal in the liberal theory of punishment? Ultimately, what does disenfranchisement tell us about the relationships between punishment, citizenship, and the American state?

By changing the question, we can begin to provide answers that both explore the general logic of disenfranchisement in the United States and also point to its meaning as a practice of racial formation and domination. In particular, we can reformulate our questions in terms of the deployment of multiple discourses, of simultaneous exclusions, and we can move beyond causal models of explanation. To these ends, I center my analysis of felon and criminal disenfranchisement on questions of function and meaning, following the work of Nietzsche, Durkheim, Mead, and Foucault, each of whom eschews normative analysis in favor of a “social analysis” of punishment. In this way, I situate my work within the tradition of critical theory, grounded in skepticism of a clean fact/value distinction traditionally held in positivist approaches. Iris Young succinctly defines critical theory as “socially and historically situated normative analysis and argument.” To understand a practice such as disenfranchisement and to evaluate it normatively requires that we first “reject as illusory the effort to construct a universal normative system insulated from a particular society.” To this end, both the “facts” of history and the normative terms applied to those facts must be in question. A critical theoretical approach provides us with a far greater possibility of
both addressing the injustice of criminal disenfranchisement and making sense of why our current normative appeals for its end have both been repeated so frequently and failed so often. “A critical theory,” Young argues, “does not derive such principles and ideals from philosophical premisses about morality, human nature, or the good life. Instead, the method of critical theory . . . reflects on existing social relations and processes to identify what we experience as valuable in them, but as present only intermittently, partially, or potentially.”

From such a perspective, disenfranchisement and other seemingly punitive restrictions on freedom derived from status rather than action both produce and maintain the social order in ways we do not yet fully understand. As a practice, disenfranchisement reveals the liminal position that the felon occupies, defined and managed by both criminal and constitutional law. The emergence of the felon captures the intersection of theoretical discourses of punishment, law, identity, and race, ultimately revealing that the modern liberal state is formed and maintained through the joint punishment and exclusion of some of its own members and is not simply an aberrant departure from liberal principles. If punishment is necessary in liberal systems because it is a foundational part of that liberal order, rather than simply being a response to “bad acts” or “bad characters,” then any hope of arriving at “just” or “fitting” punishment requires facing the exclusions on which liberalism is founded.

If we understand the study of punishment as having two related methodological perspectives, an ideal typology on one side and an empirical or descriptive typology on the other, the goal of analysis about punishment seems to be (1) correctly specifying the ideal model with reference to some ethical principle and (2) identifying the way in which the “real world” instances of punishment either resemble or fail to resemble that model. This book traces an alternative perspective that seeks the implicit, unspoken, and disavowed characteristics of punishment that might be categorical violations of the ideal yet persist in punishment as it is practiced. In the case at hand, the implication is that if disenfranchisement is not rightly understood as punishment, it is not because it fails to live up to either an ideal or a descriptive sense of the term but instead because punishment as we have come to define and analyze it also fails to conform to either our theoretical or descriptive notions. I argue that excess is simultaneously integral to and in violation of the logic of punishment. The project of the state is subsequently to manage this excessive character.
Felon disenfranchisement, as a symptom, is enlightening because it brings this fact into relief and ultimately allows us to think more critically about the underlying conditions that give rise to that symptom. As such, before we can rightly evaluate felon disenfranchisement, we must understand it as an articulation of this problem: the inherent quality of excess that goes into punishment and how the management of that excess brings together the interdependence between civil membership and punitive justice.

Felon disenfranchisement is a practice that both reveals and helps maintain a triangular relationship among the felon, the innocent citizen, and the state. The practices of excessive punishment and selective exclusion/inclusion from the political order define these three figures. At the practical level, I argue that felon disenfranchisement is productive of the same figures it seeks to negotiate—the felon, the citizen, and the state. It helps to bring into existence an order that is presumed to be stable because it offloads that stabilizing work onto one of its figures, that of the criminal. In the United States, it has done this in a racialized manner, and any critique of disenfranchisement (as with any critique of American punishment more generally) must directly grapple with its connections to white supremacy as a political system. Disenfranchisement does something that “we” might need but that our political commitments also expressly exclude. At the discursive level, I argue against reading punishment and citizenship as distinct spheres. In order to make sense of punishment, we must attend to our conceptions of citizenship, and vice versa. This deep connection is borne out in historical analysis through attention to the meaning of suffrage in the United States and its linkages to punitive institutions and practices.

This means that I necessarily must grapple with liberalism as arguably the central public philosophy in the United States. Of course, liberalism (especially in the United States) cannot be said to operate in a single or simplistic way, and any discussion of the relationship between a practice such as felon disenfranchisement and liberalism will necessarily run a bit rough over its nuances and various forms. Yet, as Mary Katzenstein, Leilia Mohsen Ibrahim, and Katherine Rubin rightly note in their analysis of disenfranchisement and liberalism, “Liberal arguments are the mainstay of much debate and policy-making,” and they figure most prominently in normative and policy arguments about disenfranchisement. Liberalism is the primary language in which disenfranchisement is discussed, and with good reason. Katzenstein, Ibrahim, and Rubin identify felon disenfranchisement as a problem that is internal rather than external to American liberalism as
its “dark side.” Pushing beyond Rogers Smith’s multiple traditions approach, they argue that felon disenfranchisement exposes the internal exclusionary logic at work within liberalism, writing otherwise illiberal theories of racial ascription, worthiness, and virtue into its conceptual core:

The felony disenfranchisement debate points to the ways that liberalism incorporates both republicanism and ascription. It is the hybrid character of liberalism with its exclusionary liberal-republicanism and its liberal ascription rather than the “helix” (intertwined but independent) of the multiple traditions thesis which best characterizes the history of felony disenfranchisement. . . . American liberalism, despite serving as a vital source of challenges to ascription, has paradoxically also provided justification for continued exclusion.87

Rather than simply existing alongside or being sometimes complicit with illiberal accounts of the subject, criminal disenfranchisement points out that such ascriptive accounts exist at the core of liberalism. The deep racial dimension of liberalism (especially in its contractarian forms) has been well documented both at the level of unstated assumptions as well as outcomes in practices of colonialism, domination, and political subordination.88 It is my contention that the “paradox” of liberalism’s tension with racial ascription ceases to be paradoxical if we take into account its conception of punishment. The core of liberalism’s exclusionary nature is observable in its use of punishment to manage the boundaries of political membership.89 Importantly, it does this not only through overt forms of exclusion (i.e., punishment through death, exile, banishment, etc.) but also through punishment’s production or fabrication of the liberal subject. This is apparent across multiple moments of liberalism: in the foundational exclusions of criminals in Lockean liberalism, in nineteenth- and twentieth-century forms of American liberalism driven by the practice and the legacy of chattel slavery, and in the ascendancy of economic and social neoliberalism, focused on universal assumptions of rational agents and normative “color-blindness.” And in the American context, this exclusionary nature has been linked to the formation of race and a racial caste system.

As an analysis of underlying political commitments, felon disenfranchisement ultimately exposes the foundations of liberalism itself, and a central part of my argument is that liberalism is insufficient to address the injustice of disenfranchisement. Jesse Furman writes in his critique of disenfranchisement, “The paradox of disenfranchisement . . . is a reflection of a much
deeper inconsistency—an ambivalence deep within modern liberalism’s normative ideals.” Furman is right to insist that the kind of problem disenfranchisement poses is not simply a failure to properly enact liberalism’s ideal set of conditions but rather that disenfranchisement is a revelatory practice that lets us get at the heart of a deeper tension between consensus and exclusion. Liberalism may be used to reject disenfranchisement, but it is also enabled by it, leaving it, in a sense, as a remainder of foundational exclusion or disavowal.

THE ARGUMENT OF THE BOOK AND ITS METHODS

As I noted earlier, a central goal of this book is to redirect our vision when we think about criminal disenfranchisement in particular and about punishment and political membership more generally. To this end, I rely on two methods throughout this book: textual interpretation and philosophical genealogy. These methods of reading social and political life are intertwined in my usage, and both point me to texts and archival sources as empirical artifacts of social and political meaning. I read such texts both contextually (attending to the specific conditions and situations in which they were written and problems which they sought to address) and rhetorically (attending to the way figures, tropes, and other literary devices are used to advance the author’s arguments). In both these senses, I assume there is no such thing as a “definitive reading” of a text, but I do assume there are better or worse readings. I therefore read texts sympathetically (to better understand how they work as texts) but also directed toward specific ends (to better understand pragmatic social and political phenomena). Put differently, the criteria for a “better” reading is twofold. First, does the reading shed light on the internal meaning or coherence of the text itself by bringing it into relief through some external phenomena? Second, does the reading shed light on external phenomena in a way that could not be seen absent that reading?

My argument is an attempt to rethink the general relationship between political organization and punitive practices but also to account for the way in which a particular political body has constituted and reconstituted itself through a specific punitive practice, one that professes itself to be both punitive and not punitive (i.e., simply regulatory of a state’s constitution and makeup). Felon disenfranchisement is read as an exemplary practice, as a political and social artifact of a broader discourse. The success of my analysis will hinge on its ability to provide a better understanding of this specific
practice as historically contingent and also on its ability to reveal something of this practice’s persistence within the American tradition of liberalism. Specifically, I seek to advance understandings of both the authors with whom I textually engage and the meaning and significance of felon disenfranchisement as a material practice. To be clear, an attention to the practice of criminal disenfranchisement and the attendant figures that are produced, managed, and simultaneously occluded by this same practice forces a harsh (yet also sympathetic) critique of American liberalism’s professions of progress, color-blindness, and moral rectitude. The chapters of this book seek to demonstrate that there can be no simple separation between how to think about the American self-construction of a citizen and white supremacy as a political system. Moreover, this means we must recognize the limits of any proposals for “reform” that do not also directly challenge the system of white supremacy itself.

To demonstrate this more difficult claim, I turn to the work of genealogy, following Foucault’s usage of the term. The term “genealogy,” as others have noted, is vastly overused and widely misused. I make no claims of settling those debates or to being completely faithful in my own usage. What I mean by it here is a method of material historical analysis that helps us to understand our present moment both by challenging the way we have arrived at this moment and by upsetting our confidence that this moment is transparent or known to us in advance. As Foucault puts it,

To follow the complex course of descent is to maintain passing events in their proper dispersion; it is to identify the accidents, the minute deviations—or conversely, the complete reversal—the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us; it is to discover that truth or being do not lie at the root of what we know and what we are, but the exteriority of accidents.

This attention to contingency, to the exteriority of accidents, means, as Ladelle McWhorter puts it, “Genealogy is a critical redescription of a dominant description.” That is, it gives a history we already know but which we have ceased to interrogate. Pragmatically, this requires that the work be material and both geographically and temporally specific. As with the tradition of critical theory noted earlier, genealogical work must resist universalization. Some abstraction is nevertheless a part of genealogy, and, for my purposes, I turn to discursive “figures” as anchors within space and time.
The figure of the felon, of the delinquent, of the thief, of the “free Negro laborer”—each of these figures will in the course of this book occupy the space between generality and specificity, in that each of them will direct our attention to the way in which they have been constructed and continue to shape our actions and thought.

Genealogical analysis at its best gives a disruptive history, pointing out the contingency of the world rather than its determinism. Colin Koopman succinctly notes the orthodox “standard answer” to what a genealogy does: “Genealogy denaturalizes, destabilizes, and renders (historically) contingent that which was assumed to be (metaphysically) necessary.” This answer, Koopman rightly continues, is correct yet insufficient and arguably misses the point. He writes, “The point of a genealogy is not just to denaturalize—though certainly it is that too. The more important point of a genealogy is to show how that which is so easily taken as natural was composed into the natural-seeming thing that it is.” What a good genealogy can do is not simply point out that the world might have been otherwise or that the world is filled with social constructions that shape our actions (something that is already widely accepted). A good genealogy describes how the present came to be, with particular attention to the question of subject formation and what that means for the possibility of reshaping ourselves as different subjects. Koopman writes, “Foucault’s primary aim is . . . to show how we have contingently formed ourselves so as to make available the materials we would need to constitute ourselves otherwise.” This means that insofar as this book takes itself to be within the tradition of critical theory and draws from a wide variety of texts, it does so ultimately with the aim of not simply rethinking the practice of disenfranchisement but rethinking ourselves, our ethical relations to others, and the politics entailed (and made possible) by that rethinking. In the case of the United States and its practice of restricting the rights of criminals to take part in self-government, this how entails confronting white supremacy as a political system and the complicity with which that system operates under “color-blind” liberalism.

Perhaps not surprisingly, this book continues by engaging Foucault’s thought on punishment, subjectivity, and liberalism. Chapters 2 and 3 give an extended rereading of Foucault’s analysis of two modern criminological figures, the delinquent and homo œconomicus. These chapters demonstrate how such figures come into existence in order to manage the tensions and contradictions between discursive spheres. The contemporary felon, by virtue of the practice of disenfranchisement, must be understood as such a
figure, managing the tensions that emerge in the unacknowledged overlap between discourses of punishment and citizenship. Yet the chapters also demonstrate the limits of Foucault’s analysis for understanding disenfranchisement and call for our own genealogy of felons, criminal disenfranchisement, and the phenomena of excess and proportionality.

Chapters 4 and 5 turn to the specific connection between punishment and political membership in liberal theory. First, in Chapter 4, I give a reading of John Locke’s *Second Treatise of Civil Government*, demonstrating the depth of connection between punishment and membership in the Western tradition. As a founding text of Western liberal thought centrally concerned with the role of punishment in defining and maintaining a contractual body politic, Locke’s account reveals the way in which punishment and membership are inextricably linked and shows that this connection has not always been disavowed. Focusing on Locke’s usage of the “thief” as a central figure of his political thought, this chapter demonstrates how the origins of liberal political orders are soundly rooted in the terms of punishment. Moreover, it reveals how the difficulty and instability of punishing transgressors is managed by producing subjects who can be so punished to make the foundational violence of civil society palatable.

Chapter 5 continues this reading of liberal thought through a critique of Judith Shklar’s theory of citizenship as standing, investigating the relationship between suffrage, slavery, and punishment in the United States. Shklar offers a powerful corrective to legal accounts of citizenship, arguing that citizenship is an expression of a relational public standing signified by the rights to work and vote, rather than a legal status. She does not acknowledge, however, that these rights are instrumental in producing the identities of groups within a polity, causing her to insist that universal suffrage has been achieved in the United States despite the longstanding exclusion of criminals. This “blindness” to criminal exclusions is symptomatic of a larger liberal blindness to the discursive fabrication of criminological figures. Through an examination of Shklar’s wider body of work, I demonstrate her presumption of an underlying “truth” to the moral standing of criminals. Given Foucault’s account of the discursive fabrication of criminological figures and Chapter 4’s reading of Locke, there is little reason to assume that categories of “guilty” and “innocent” are at all stable reflections of one’s actions. The perverse outcome is that voting becomes not simply a demonstration of membership and political standing but an expression of
innocence and of the “purity of the ballot box,” both of which continue to be purchased on the backs of felons.

Chapters 6 and 7 work in concert and take up the specific genealogical work of the book. They trace the history of suffrage restrictions in Maryland. As a border state with a fraught history of slavery, manumission, and emancipation from the colonial period onward, Maryland serves as an exemplary case to unpack Chapter 5’s account of labor, suffrage, and figures of black criminality. Most importantly, Maryland has held multiple constitutional conventions since becoming a state, including a series of conventions immediately before, during, and following the Civil War in 1851, 1864, and 1867. During these nineteenth-century conventions, the delegates debated the limits of political membership and the franchise in the context of a perceived crisis of “free Negro labor.” The suffrage restrictions that emerged from these debates persisted through the twentieth century and have only recently become the object of electoral reform during the past decade. Using the transcripts of these constitutional debates, these chapters explore the discursive nexus of labor, disability, and the morally inflected status of white supremacy that continues to ground felon disenfranchisement in Maryland and throughout the United States.

Chapter 6 turns to the specific nexus of criminality and blackness posited by convention delegates. The figure of the “free Negro” was persistently invoked to do this work: free blacks were figured as inherently criminal, irrational, and dependent to reduce the threat that their new freedom imposed on the standing of white workingmen. Moreover, the chapter explains how the nineteenth-century understandings of penality and citizenship have been reconfigured in the twentieth century. As it became increasingly impossible for white supremacist discourses to openly manage the internal liberal tension of punishment and membership, the language of the nineteenth-century convention debates paved the way for a pair of discursive shifts in twentieth-century disenfranchisement provisions: first, a move from “infamy” to “felony” as the primary marker of criminal exclusions; second, the movement of all disenfranchisement provisions from the state constitution to election law. These discursive shifts were attempts to manage the instability of punishment and membership through separation. They were attempts to split the discourses of punishment, ability, and citizenship and ultimately to rationalize disenfranchisement provisions. The ultimate effect of these changes has not been to undo racialized conceptions of citizenship
but rather to mask the continuing work of social and political differentiation performed by disenfranchisement: the maintenance of the ideal citizen as white and innocent. Chapter 7 focuses on the contradictory yet complementary logics of competence, responsibility, guilt, and dependency to show how civil and political disabilities have been constructed both within and against understandings of disability in general and mental disability in particular. I argue that the convention debates show that the delegates understood disenfranchisement as a practice that managed the boundaries of full citizenship through the courts’ power to determine criminal guilt and mental competence.

Chapter 8 calls for a turn away from the relatively moribund literature in the study of justice and instead toward communicative and deliberative theories of democratic practice that begin by theorizing injustice, difference, and subjectivity. Drawing on the ethical theories of Iris Marion Young, Michel Foucault, and Simone de Beauvoir, I argue that our normative evaluation of felon disenfranchisement (as well as the entire regime of collateral consequences of mass incarceration) must begin by recognizing what it is as a practice and that it is successful in managing the liberal punishment/membership paradox precisely because it is a seeming failure. We must accept the relationship between punishment and the boundaries of political membership and instead rethink our practical and institutional articulations of exclusion and punishment. There is, sadly, no getting punishment or citizenship “right.” Instead, we must confront the tension as a tension and manage it openly through a critical and self-reflective democratic practice.