

# Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice

Jesse Furman

Are there, perhaps, advantages which not only don't fit, but cannot be fitted, into any classification? . . . So that a man who would, for instance, openly and knowingly choose to act in opposition to this whole scheme would . . . be an obscurantist or a complete madman, wouldn't he? Yet there is something astonishing about this: how is it that, in calculating man's advantages, all these statisticians, sages, and humanitarians invariably omit one of them?

—Fyodor Dostoevsky<sup>1</sup>

[T]hey say we should not humanise the inhuman. But the point is they are not inhuman . . . and it is in their humanity that we must locate our collective guilt, humanity's guilt for human beings' misdeeds; for if they are just monsters—if it is just a question of King Kong and Godzilla wreaking havoc until the aeroplanes bring them down—then the rest of us are excused.

—Salman Rushdie<sup>2</sup>

The right to vote is arguably the most important totem of democratic citizenship. Groups throughout American history, from women to African Americans to the poor, have struggled to achieve the full membership in the political community that the franchise grants. The Supreme Court has declared that the right to vote is an “inalienable right,” debasement of which makes one “that much less a citizen.”<sup>3</sup> Yet despite its putative commitment to the inalienability of voting, the Supreme Court has, in fact, upheld the forfeiture of voting rights by a large number of American citizens:<sup>4</sup> In fourteen states,

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1. FYODOR DOSTOEVSKY, NOTES FROM UNDERGROUND 22–23 (Mirra Ginsburg trans., Bantam Books 1974) (1864).

2. SALMAN RUSHDIE, THE MOOR'S LAST SIGH 297 (1995).

3. *Reynolds v. Sims*, 377 U.S. 533, 565, 567 (1964).

4. See *Richardson v. Ramirez*, 418 U.S. 24, 41–56 (1974) (upholding disenfranchisement of felons).

persons convicted of a felony are disenfranchised for life.<sup>5</sup>

The Supreme Court's approval of felon disenfranchisement, in the context of its jurisprudence on voting and citizenship, presents a paradox: While it has held that voting is essentially equivalent to citizenship,<sup>6</sup> and that citizenship cannot be taken away as a form of punishment,<sup>7</sup> the Court has failed to close the syllogistic circle. The outcome is an uneasy tension, or ambivalence, between a rhetoric of toleration as expressed in the Court's citizenship jurisprudence and a discourse of exclusion as expressed in its approval of disenfranchisement.

In this Note, I attempt to untangle this paradox. My contention is not that the Supreme Court has simply fallen prey to a logical inconsistency that is easily remedied. The paradox of disenfranchisement, I argue, is a reflection of a much deeper inconsistency—an ambivalence deep within modern liberalism's normative ideals.

To examine these ideals, it is necessary to dig deeper than the legal opinions on disenfranchisement themselves; it is necessary to consider the political theory on which our liberal self-understandings are based. My analysis, therefore, is premised on an examination of the theoretical work of the most prominent and celebrated modern liberal thinker, "arguably 'the greatest [political] philosopher of our century,'"<sup>8</sup> John Rawls.<sup>9</sup> My aim is to show that Rawls's theory of justice, "justice as fairness,"<sup>10</sup> is characterized by the same ambivalence as that in the paradox of disenfranchisement, between toleration and exclusion. Indeed, this ambivalence lies at the very heart of liberalism as it is currently formulated.<sup>11</sup> For while consent—the linchpin of

5. See *infra* note 125. Conservative estimates indicate that there are as many as fifty million convicts in the United States, of whom almost fourteen million have been convicted of a felony. Of these fourteen million citizens, many have lost the right to vote. See Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52, 52; Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 n.17 (1993) (estimating that there are four million disenfranchised criminals and ex-offenders).

6. See *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); see also *infra* notes 110–24 and accompanying text.

7. See *Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967); *Trop v. Dulles*, 356 U.S. 86, 101–02 (1958) (plurality opinion); see also *infra* notes 142–46 and accompanying text.

8. Linda R. Hirshman, *Is the Original Position Inherently Male-Superior?*, 94 COLUM. L. REV. 1860, 1861 (1994) (misquoting Brian Barry, *Good for Us, but Not for Them*, GUARDIAN (London), Aug. 14, 1993, at 23).

9. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993) [hereinafter RAWLS, *POLITICAL LIBERALISM*]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971) [hereinafter RAWLS, *A THEORY OF JUSTICE*].

10. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 11.

11. I do not mean to suggest, of course, that Rawlsian liberalism is the only version of liberal theory, or even that it is somehow representative of all liberal theories. I focus on Rawls for two reasons. First, his philosophy bears a closer relationship to American liberalism than perhaps any other. See *infra* notes 13–17 and accompanying text. Second, he places more explicit emphasis on the goal of achieving toleration than many other liberal theorists, see, e.g., RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 10 ("[P]olitical liberalism applies the principle of toleration to philosophy itself."), so an accusation of intolerance or exclusion against his theory has more significance. All liberal theorists are committed to the principle of toleration in some respect, but "comprehensive" liberals (to use Rawls's term)—like Ronald Dworkin or

liberalism—arguably provides the most secure basis for toleration, it also has a significant drawback: In the search for consensus, it is virtually inevitable that some will be excluded.<sup>12</sup>

If such exclusion is truly inevitable, as I argue in this Note, the test of a liberal regime and its laws is only in part how exclusionary they are; the process through which they exclude, how permanent their exclusions are, and how they treat the excluded, are all of primary importance. From this perspective, I contend, the liberal natures both of Rawls's theory and of American law are jeopardized. For in both cases, consensuality and its exclusions are privileged over a more liberal form of toleration: In the case of American criminal law this privilege is illustrated by the practice of disenfranchisement; and in the case of Rawls's "justice as fairness" it manifests itself as a potent punitive tendency in his account of a stable, well-ordered society.

My argument does not rest on the claim that theory and practice are coterminous; nor, for that matter, does it rely on an assertion that Rawls's ideals *are* our ideals. Rather, my more modest claim is that Rawls's liberal

Robert Nozick—and "perfectionist" liberals—like Joseph Raz—give priority to other values, like "equal concern and respect," see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–78 (1977), the ability to "shap[e one's] life in accordance with some overall plan," see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 50 (1974), or autonomy, see JOSEPH RAZ, *THE MORALITY OF FREEDOM* 425 (1986). In doing so, I would argue, these theorists fall prey to even more significant problems of exclusion than does Rawls. For a critique of comprehensive liberalism and perfectionist liberalism along these and other lines, see William A. Galston, *Two Concepts of Liberalism*, 105 *ETHICS* 516, 523–24 (1995); Charles Larmore, *Political Liberalism*, 18 *POL. THEORY* 339, 342–46 (1990); and Chantal Mouffe, *Political Liberalism, Neutrality and the Political*, 7 *RATIO JURIS* 314, 323 (1994). In discussing disenfranchisement in Part II, I expand my analysis beyond Rawls's theory to explore the phenomenon of exclusion in the philosophical traditions of social contract theory and republicanism generally. See *infra* notes 155–78 and accompanying text.

12. For other observations and criticisms of the exclusionary nature of modern liberal theory and politics, see WILLIAM E. CONNOLLY, *IDENTITY/DIFFERENCE: DEMOCRATIC NEGOTIATIONS OF POLITICAL PARADOX* (1991); THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT: DISCIPLINARY ORIGINS OF THE UNITED STATES* (1987); BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* (1993); J. DONALD MOON, *CONSTRUCTING COMMUNITY* (1993); and Mouffe, *supra* note 11. My argument in this Note draws on each of these theorists' work, especially that of Bonnie Honig, see *infra* Part I, but it also differs in key ways. First, to a greater or lesser extent, each of these theorists argues for the abandonment of traditional liberal theories. See, e.g., CONNOLLY, *supra*, at 80 (calling for notion of politics called "agonistic democracy," embodying extreme politicization of identity); DUMM, *supra*, at 152 (calling for new "rhetoric of freedom, one grounded in a new right, a right to fear"); MOON, *supra*, at 8 (rejecting traditional conceptions of liberalism, including Rawls's, for his own "political liberalism"). In contrast, the premise of my argument is that Rawlsian liberalism itself can provide a secure foundation for a more tolerant, and less exclusive, version of liberalism. Where the above critics see only exclusion, I see ambivalence. Thus, while Rawls's reliance on consensus leads to exclusion, justice as fairness simultaneously provides the resources with which to overcome this reliance. The task, I argue, is to shift the theory so as to privilege toleration over consensus, rather than the reverse. See *infra* Part III.

The second way in which my analysis differs from those of the above critics is in its effort to explore the dynamics of exclusion not only in liberal theory but in liberal politics as well, through the "paradox of disenfranchisement." At least one other scholar has attempted to look at the role of felon disenfranchisement in American society, see Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 *HARV. L. REV.* 1300 (1989), and our analyses overlap in a number of ways. There are, however, crucial differences between that author's conclusions and my own. See *infra* note 179.

political philosophy is the theory most closely aligned with the way we live and view ourselves in America today; his ideals reflect and inform those ideals that American institutions attempt to fulfill.<sup>13</sup>

I am not the only one to hold this view of Rawls's stature. Indeed, Rawls has been cited in scores of legal opinions, more than perhaps any other contemporary political theorist.<sup>14</sup> In 1973, his first book, *A Theory of Justice*, was awarded the prestigious Coif Award by the Association of American Law Schools for the best "law book" written in the preceding three years.<sup>15</sup> In addition, other political theorists are quick to acknowledge Rawls's influence on American thought and politics: "For us in late twentieth century America," Michael Sandel writes, "[Rawls's liberal vision] is our vision, the theory most thoroughly embodied in the practices and institutions most central to our public life."<sup>16</sup> Or as Alan Ryan puts it: "Mr. Rawls' ideas have crept into the law of the land."<sup>17</sup> In any event, while there are surely differences between American politics and Rawlsian ideals, those differences are secondary for my purposes: I focus on the correspondence between theory and practice rather than the gaps.

Since my analysis of the paradox of disenfranchisement builds on my examination of the ambivalences inherent in liberal political theory, I begin in Part I by looking at Rawls's theory of justice, particularly as it appears in *Political Liberalism*. In this, his latest work, Rawls proposes a series of reformulations and reinterpretations of his original theory, designed principally to improve upon its claim to secure suitable grounds of toleration. The theory's very foundations, however, continue to favor consensuality over toleration, so that even in its new form, I maintain, these foundations undermine the tolerant nature of justice as fairness. After identifying the nature of the toleration-exclusion ambivalence in liberal theory, I shift focus in Part II to American criminal law and the paradox of disenfranchisement. The paradox, I argue,

13. In a constitutional democracy like the United States, the relationship between theory and practice is particularly close when one looks beyond day-to-day politics and (in Rawls's words) "ordinary law" to focus on matters of constitutional import and "higher law." See RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 231; see also *infra* Part II. The line between theory and practice in such cases—in legal opinions on constitutional matters, for instance—while not invisible, is certainly blurred.

14. See, e.g., *United States v. Lucas*, 2 M.J. 834, 838 (A.C.M.R. 1976) (Costello, J., concurring) (citing Rawls's view of punishment in well-ordered society as support for affirming criminal sentence); *Barnes v. Tools & Machinery Builders, Inc.*, 715 S.W.2d 518, 523–24 (Mo. 1986) (Donnelly, J., dissenting) (quoting at length from Rawls in products liability case); *K Mart Corp. v. Ponsock*, 732 P.2d 1364, 1368 n.4 (Nev. 1987) (citing Rawls in support of tort judgment); see also Peter F. Lake, *Liberalism Within the Limits of the Reasonable Alone: Developments of John Rawls' Political Philosophy, Its Political Positivism, and the Limits on Its Applicability*, 19 VT. L. REV. 603, 603 n.2 (1995) (citing over 40 cases in which Rawls has been invoked).

15. See Richard B. Parker, *The Jurisprudential Uses of John Rawls*, in *NOMOS XX: CONSTITUTIONALISM* 269, 269 (J. Roland Pennock & John W. Chapman eds., 1979).

16. Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 82 (1984); see also *id.* ("[S]eeing how [Rawls's philosophy] goes wrong as philosophy may help us to diagnose our present political condition.").

17. Alan Ryan, *How Liberalism, Politics Come to Terms*, WASH. TIMES, May 16, 1993, at B8.

exposes the true cost of the ambivalence—the potential for illiberal practices to coexist with liberal principles—and demonstrates that American liberalism, like its Rawlsian relation, possesses strong illiberal tendencies. The Part concludes that disenfranchisement laws, though perhaps constitutional, should be repealed. Finally, in Part III, I conclude with an argument for a reconfigured conception of liberalism, for a shift away from the privilege of consensuality to a more “liberal” privilege of toleration.<sup>18</sup>

## I. JOHN RAWLS AND THE AMBIVALENCES OF JUSTICE

Rawls’s argument on behalf of justice as fairness, as it appears in both *A Theory of Justice* and *Political Liberalism*, can be roughly divided into two stages. In the first stage, where he develops the normative theory itself, Rawls introduces a hypothetical initial situation, the “original position,” incorporating certain procedural constraints designed to produce agreement on principles of justice. In the second stage, he attempts to illustrate how the two principles agreed upon in the original position define a workable conception of justice that approximates and improves upon our considered judgments. It is in this stage of his argument that Rawls considers the issue of stability and attempts to compose a picture of a well-ordered society regulated by justice as fairness. It is also here that the exclusionary element of the theory emerges. Since this is the consequence of features in the normative theory, however, I begin with an examination of the first stage.

### A. *From Consensus to Closure: Rawls’s Normative Argument*

As with all social contract views, Rawls’s theory of justice as fairness works from a concept of agreement. The intuitive appeal of this starting point lies in the liberal notion that cooperation ought to be based on individuals’ consent and ought to be for their mutual benefit.<sup>19</sup> Yet it would be virtually, if not actually, impossible to find principles of justice on which all individuals in society, with their radically differing conceptions of the good, could agree. Herein lies the role of Rawls’s original position, a “purely hypothetical

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18. In urging Rawlsian liberalism further toward toleration, my aim is to make the theory live up to its own ideals and commitments and to those of liberalism generally. As Rawls himself notes, liberalism and toleration are closely linked, both historically and conceptually. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at xxii–xxvii; see also Will Kymlicka, *Two Models of Pluralism and Tolerance*, 13 *ANALYSE & KRITIK* 33, 33–34 (1992) (arguing that modern liberalism is closely linked to individual-based view of toleration). Indeed, toleration is, in Will Kymlicka’s words, a “cardinal liberal virtue.” WILL KYMLICKA, *LIBERALISM, COMMUNITY AND CULTURE* 9 (1989).

19. See generally Samuel Freeman, *Reason and Agreement in Social Contract Views*, 19 *PHIL. & PUB AFF.* 122 (1990) (discussing role of consent in social contract theories).

situation” constructed so as to insure that the principles of justice agreed to are the “result of a fair agreement or bargain.”<sup>20</sup>

Rawls’s original position is a specially designed choice situation intended to guarantee the “desired solution.”<sup>21</sup> The grounds of choice are severely restricted<sup>22</sup> to ensure that the parties will reach identical conclusions on the fundamental principles of justice. Indeed, as a number of commentators have noted, the original position is less a situation of bargain or agreement than one of acknowledgment or acceptance.<sup>23</sup> Although a bargain or agreement presupposes a degree of difference between the parties, in the original position—where the parties are required to reach a unanimous decision—“the deliberations of any one person are typical of all.”<sup>24</sup> The two principles of justice as fairness are, in Rawls’s words, the “only choice”<sup>25</sup> that the parties can make: “It must make no difference when one takes up [the original position’s] viewpoint, or who does so: the restrictions must be such that *the same principles are always chosen*.”<sup>26</sup>

The unanimity requirement and the guarantee of perfect repetition combine to ensure that the principles chosen in the original position are foreclosed to further consideration or revision;<sup>27</sup> the demand for consensus leads to closure. If upon lifting the veil of ignorance, therefore, a party to the agreement finds that the principles of justice as fairness are not congruent with his or her conception of the good, the fault is placed squarely on his or her shoulders and he or she cannot complain. Upon taking up the “perspective” of the original position, such a subject will recognize the “truth” of justice as fairness and will

20. RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 12.

21. *Id.* at 141. The “desired solution” is the now famous two principles of justice as fairness: first, that each person is to have an equal right to the most extensive total system of basic liberties, including the right to vote; and second, that economic inequalities are to be arranged for the greatest benefit of the least advantaged. Priority is given to the first principle, so that greater social or economic advantages can neither justify nor compensate for a deviation from institutions of equal liberty. *See id.* at 60–61, 302; RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 5–6, 291.

22. The parties in the original position are mutually disinterested, rational, and know very little about themselves or their society. The parties know that they have some conception of the good and they know that the “circumstances of justice”—a conflict of interests and moderate scarcity—hold in their society. All other knowledge of their particular circumstances, including their places in society, their class or social status, their fortunes in the distribution of natural assets and abilities, their sex, race, religion, and ethnicity, is covered by a “veil of ignorance” on the grounds that it is “irrelevant from the standpoint of justice.” RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 18–19. To give the parties in the original position some theory of the good on the basis of which to deliberate, Rawls develops a “thin” theory based on a set of primary goods that it is “supposed a rational man wants whatever else he wants.” *Id.* at 92; *see also* RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 308–09.

23. *See, e.g.*, HONIG, *supra* note 12, at 132–33; MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 128–32 (1982); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 101 (1990). Rawls himself writes that “the parties have no basis for bargaining in the usual sense.” RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 139.

24. RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 263. A number of critics, notably feminists, have taken issue with Rawls’s exclusion of multiple perspectives from the original position. *See, e.g.*, SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 89–109 (1989); Hirshman, *supra* note 8, at 1860–97.

25. RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 121.

26. *Id.* at 139 (emphasis added).

27. *See* HONIG, *supra* note 12, at 135–36.

be compelled to alter his or her self-understanding to fit neatly within its restrictions.<sup>28</sup> The source of dissonance in society, according to this view, lies completely in the individual, not in the conditions of agreement or the principles chosen. Political action and resistance are displaced by introspection and self-adjustment.<sup>29</sup>

There are moments in *A Theory of Justice* when Rawls himself appears to recognize the implications of his emphasis on consensus and to retreat from this extreme view. For instance, his notion of “reflective equilibrium”—the mutual adjustment of principles and considered judgments about justice—suggests that he leaves some room for alteration of the principles after lifting the veil of ignorance.<sup>30</sup> In addition, the principles are not applied directly to society from the original position. Instead, Rawls posits a “four-stage sequence” (the original position, constitutional convention, legislative stage, and the application of rules to particular cases by judges and administrators), in which the principles are applied to progressively smaller aspects of society.<sup>31</sup> In each successive stage, the veil of ignorance gets thinner until it finally disappears in the fourth stage, a progression which suggests that political space for disagreement is gradually expanded until it is opened completely.

But these moments are ultimately overshadowed by the rest of Rawls’s argument. Since the original position is to be interpreted so as to guarantee perfect repetition, reflective equilibrium cannot involve the *mutual* adjustment of principles and considered judgments; after all, once they are agreed upon the principles cannot be changed. Any need for adjustment, therefore, will demand the alteration of judgments to fit the principles; the burden of congruence is again on the individual. Though the veil of ignorance does become thinner in each stage of the four-stage sequence, political space does not expand accordingly. While citizens gain new information on which to base their opinions in each successive stage, the contests and agreements of the previous stage are closed and rendered inaccessible to challenge or reformulation. Moreover, as the veil of ignorance grows weaker with each passing stage, the constraints of the reasonable grow stronger.<sup>32</sup> As a result, in the final stage, where disagreement and contestation might have appeared, politics is construed simply as administration and maintenance; a vigorous

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28. As I discuss *infra* in text accompanying notes 38–40, Rawls no longer justifies political liberalism on the basis of truth, but relies on reasonableness instead. *But see* Robert Justin Lipkin, *In Defense of Outlaws: Liberalism and the Role of Reasonableness, Public Reason, and Tolerance in Multicultural Constitutionalism*, 45 DEPAUL L. REV. 263, 284–85 (1996) (arguing that Rawls still relies on truth, though “camouflage[d]” by reasonableness).

29. For a similar observation, see HONIG, *supra* note 12, at 136–37.

30. *See* Stephen Mulhall, *Reply to Alain Boyer on “Democracy and Disagreement”*, 8 RATIO JURIS 9, 9–10 (1995).

31. *See* RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 195–201.

32. *See* RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 340.

citizenry, instead of being taken as the sign of democratic vitality, is seen as an indication of injustice and instability.

The original position, however, is not the source of the ambivalence between closure and openness—as Bonnie Honig, for example, seems to suggest in her analysis of justice as fairness.<sup>33</sup> The original position is, after all, only a device of representation; its ambivalences simply model the ambivalences of that which it represents. To locate the source of the ambivalence in Rawls's theory, therefore, one must go deeper than the original position and analyze the very foundations of his project. Rawls makes these foundations clear in his discussion of the idea of the reasonable in *Political Liberalism*.

Rawls's principal aim in *Political Liberalism* is to specify a "political conception of justice"<sup>34</sup> given the "fact of reasonable pluralism".<sup>35</sup> The fact that a democratic society is characterized "not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines."<sup>36</sup> The political conception is conceived as the focus of an "overlapping consensus" of these differing comprehensive doctrines. In formulating his argument, Rawls applies the idea of the reasonable "to various subjects: conceptions and principles, judgments and grounds, persons and institutions."<sup>37</sup> In fact, Rawls relies on the idea of the reasonable almost entirely, forgoing claims to truth.<sup>38</sup> The political conception of justice "does not criticize . . . [comprehensive] accounts of the truth of moral judgments and of their validity. Reasonableness is its standard of correctness . . ." <sup>39</sup> It is "the idea of the reasonable [that] makes an overlapping consensus . . . possible."<sup>40</sup> What, then, is the content of the reasonable?

Rather than directly define the idea of the reasonable, Rawls describes its two basic aspects as virtues of persons.<sup>41</sup> According to the first aspect,

33. See HONIG, *supra* note 12, at 131–37. Honig argues that the effectiveness of the original position lies in its drift "from a contractual situation, to a perspectival position . . . to a self-ordering mantra." *Id.* at 132. As I have suggested, see *supra* text accompanying notes 27–32, I do not think that the original position moves cleanly from any one formulation to another; ambivalence characterizes its very structure.

34. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at xvi.

35. *Id.* at xvii.

36. *Id.* at xvi. A comprehensive doctrine, Rawls explains, "includes conceptions of what is of value in human life, as well as ideals of personal virtue and character, that are to inform much of our nonpolitical conduct (in the limit our life as a whole)." *Id.* at 175.

37. *Id.* at 94.

38. Cf. Paul F. Campos, *Secular Fundamentalism*, 94 COLUM. L. REV. 1814, 1820 (1994) (arguing that, "for Rawls, 'reason' and 'reasonable' fill the lexical space that in many other discourses would be filled by 'God,' or 'the scriptures,' or 'moral insight'").

39. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 127. *But see supra* note 28.

40. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 94.

41. For an extensive consideration of Rawls's idea of the reasonable, see Lipkin, *supra* note 28, at 279–302. See also Miriam Galston, *Rawlsian Dualism and the Autonomy of Political Thought*, 94 COLUM. L. REV. 1842, 1846–48 (1994) (discussing Rawls's idea of the reasonable and its connection to political principle of toleration); Gary C. Leedes, *Rawls's Excessively Secular Political Conception*, 27 U. RICH. L.

[p]ersons are reasonable . . . when, among equals say, they are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so. Those norms they view as reasonable for everyone to accept and therefore as justifiable to them . . . .<sup>42</sup>

The second basic aspect of the reasonable is “the willingness to recognize the burdens of judgment and to accept their consequences for the use of public reason in directing the legitimate exercise of political power in a constitutional regime.”<sup>43</sup> “[M]any of our most important judgments,” Rawls writes, “are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all arrive at the same conclusion.”<sup>44</sup>

According to Rawls, the idea of the original position embodies the two aspects of the reasonable. Its result, the political conception of justice, is therefore reasonable itself. The two aspects, however, are in moderate tension. Whereas the first aspect—the willingness to propose principles on which all can agree—supports the idea that there are such norms, the second aspect—the willingness to recognize the burdens of judgment—establishes the realization that persons will often end up in disagreement.

It is the idea of the reasonable, therefore, which underlies the ambivalence in the original position between consensus and its exclusions on the one hand and toleration on the other. The first aspect of the reasonable, agreement on fair terms of social cooperation, is at the foundation of the theory’s emphasis on consensus and closure. In positing that there are norms that are “reasonable for everyone to accept,”<sup>45</sup> this aspect underlies the search for principles to which citizens should adjust themselves. In contrast, the second aspect of the reasonable, recognition of the burdens of judgment, establishes that citizens will not always agree and that they may not be forced to do so. This is the foundation of the theory’s emphasis on toleration and space for reasonable disagreement. While the first aspect of the reasonable informs the theory’s emphasis on consensus, however, it does not inherently require such consensus: The search for reasonable principles does not alone require that people agree to them. When taken too far, however, the first aspect functions as if consensus were required. The original position, faced with a unanimity

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REV. 1083, 1091–95 (1993) (arguing that Rawls’s idea of the reasonable does not adequately deal with problem of motivation).

42. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 49.

43. *Id.* at 54. By burdens of judgment Rawls means the “sources, or causes, of disagreement between reasonable persons so defined,” including conflicting or complex evidence, the indeterminacy of concepts and the consequent reliance on interpretation, and different citizens’ total experiences. *See id.* at 55. For a more comprehensive list, see *id.* at 56–57.

44. *Id.* at 58.

45. *See supra* text accompanying note 42.

requirement and structured so that there is not even the possibility of disagreement, takes the first aspect of the reasonable to this consensual extreme. The result is that justice as fairness, even in its narrower incarnation in *Political Liberalism* as a political conception of justice, privileges exclusion over space.

At first glance, this conclusion seems counterintuitive. After all, in *Political Liberalism*, consensus is no longer demanded on a comprehensive doctrine<sup>46</sup> but only on a political one: Citizens “individually decide for themselves in what way the public political conception all affirm is related to their own more comprehensive views.”<sup>47</sup> No longer is justice as fairness presented as the sole possible outcome of an original position of equality; there are, Rawls writes, “many liberalisms.”<sup>48</sup> “It is inevitable and often desirable that citizens have different views as to the most appropriate political conception [of justice] . . . . An orderly contest between them over time is a reliable way to find which one, if any, is most reasonable.”<sup>49</sup>

Upon closer analysis, however, it is apparent that exclusion still reigns. Since the principles are the outcome of a procedure considered reasonable, disagreement with them can be nothing other than unreasonable;<sup>50</sup> as in *A Theory of Justice*, dissonant subjects need only take up the “perspective” of the original position in order to realize that the fault for incongruence lies in their own self-understandings.<sup>51</sup> Indeed, at the core of political liberalism’s overlapping consensus is a conception of justice with which all are required to identify. While political liberalism does not impose “the unrealistic—indeed, the utopian—requirement that all citizens affirm the same comprehensive doctrine,” it does require that citizens affirm “the same public conception of justice.”<sup>52</sup> Though Rawls calls this conception “political”<sup>53</sup> and “freestanding,”<sup>54</sup> it must nevertheless at least be consistent with citizens’ self-understandings as informed by their comprehensive conceptions.<sup>55</sup> Thus, while Rawls tries to minimize the degree of consensus necessary for a well-

46. For definition of a comprehensive doctrine, see *supra* note 36.

47. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 38.

48. *Id.* at 223.

49. *Id.* at 227.

50. See Campos, *supra* note 38, at 1826; Galston, *supra* note 41, at 1859; Lipkin, *supra* note 28, at 300.

51. Though it is only “a device of representation,” Rawls writes, “the idea of the original position serves as a means of public reflection and self-clarification.” RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 26 (emphasis added).

52. *Id.* at 39.

53. *Id.* at 10.

54. *Id.*

55. See Galston, *supra* note 41, at 1849–51; Lipkin, *supra* note 28, at 289; see also Elizabeth H. Wolgast, *The Demands of Public Reason*, 94 COLUM. L. REV. 1936, 1941–42 (1994) (questioning belief that reasonableness is separable from comprehensive doctrine).

ordered society, the political conception still establishes a mandatory self-understanding to which all citizens must subscribe.<sup>56</sup>

Rawls is untroubled that this self-understanding is mandatory because he bases it on a normative conception of the person.<sup>57</sup> A society regulated by a public political conception of justice, Rawls argues, should “elicit an effective desire” on the part of persons to conform to—and also to be seen as conforming to—the “ideal of citizenship”<sup>58</sup> by being reasonable, rational, free and equal persons.<sup>59</sup> Individuals as reasonable persons “are not moved by the general good as such but desire for its own sake a social world in which they, as free and equal, can cooperate with others on terms all can accept.”<sup>60</sup> In a well-ordered society regulated by justice as fairness, in other words, individuals should desire on their own to realize the “ideal of citizenship.”

But what if this presumption does not hold? Is it “reasonable,” even, to expect it to hold? Since Rawls considers only ideal theory, he is not fully equipped to answer either of these questions.<sup>61</sup> Nonetheless, there are moments when he acknowledges the inevitability of dissonance, as when he discusses criminals and those who hold unreasonable or irrational comprehensive doctrines. How then does justice as fairness respond to such dissonance? What does it have to say to those who fail to subscribe to the ideal of citizenship or to those who fail to acknowledge the principles of justice as reasonable principles that all should accept? In order to answer these questions, it is necessary to look at the second stage of Rawls’s argument, at the application to society of the two principles agreed upon in the original position. The emphasis on consensus over toleration found in Rawls’s normative argument, I argue in the next Section, is the cause of a powerful punitive tendency that manifests itself in his account of a stable, well-ordered society. This tendency undermines the claim that justice as fairness is a truly tolerant conception.

56. Cf. Mouffe, *supra* note 11, at 321–22 (discussing exclusionary elements of political liberalism)

57. For an explication of Rawls’s conception of the person, see Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1818–20 (1994) (book review). See also WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE 118–39 (1991) (criticizing Rawls’s conception of the person).

58. RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 71.

59. See *id.* at 71, 81.

60. *Id.* at 50.

61. While Rawls presumes strict compliance with his principles of justice and considers almost exclusively issues of ideal theory, I base much of my argument on an application of his ideal theory to nonideal circumstances. There are two reasons for this. First, an essential part of my argument is that Rawls’s failure to consider partial compliance theory is one of the weaknesses in his account of justice as fairness. Cf. RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 575 (acknowledging lack of theory of punishment as weakness). On the rare occasions when he does consider it (for example, the few pages of *A Theory of Justice* devoted to discussion of punishment), Rawls fails to grasp the problems raised for his ideal theory. Second, the test of any ideal theory is how well it can explain and withstand the complexities of a nonideal world, that of everyday life.

### B. *The Fact of Dissonance and Punishment as a Stabilizing Device*

In the previous Section, I demonstrated the way in which Rawls's normative theory embodies a fundamental ambivalence between toleration on the one hand and exclusion on the other. This ambivalence is rooted in Rawls's conception of the reasonable, the first aspect of which lies behind the search for consensus, and the second aspect of which lies behind the recognition of difference. Due to structural elements of the theory, like the original position's unanimity requirement and the assumption of strict compliance, the first aspect is privileged over the second. In this Section, I explore the consequences of this privileging. In particular, I argue that it leads Rawls to rely on punishment as a stabilizing device in a way that he himself defines as illiberal.<sup>62</sup>

In *A Theory of Justice*, Rawls founds stability solely on the wager that citizens governed by nearly just institutions will suffer few if any "strains of commitment" and that they will acquire a "corresponding sense of justice."<sup>63</sup> In such a society, Rawls argues, there would be little if any punishment, since criminality would rarely, if ever, surface: "[M]en's propensity to injustice is not a permanent aspect of community life; it is greater or less depending in large part on social institutions, and in particular on whether these are just or unjust. A well-ordered society tends to eliminate or at least to control men's inclinations to injustice . . . ."<sup>64</sup> Stability, in this instance, presupposes what Rawls calls congruence—congruence between individuals' conceptions of the good and the institutions of a well-ordered society governed by the two principles of justice. The desire to act in accordance with these institutions, Rawls writes, is equivalent to "the desire to express our nature as free moral persons."<sup>65</sup>

This idea of stability as congruence appears again in *Political Liberalism* (along with a greater emphasis on the reasonable), only now it is supplemented by Rawls's idea of an overlapping consensus between reasonable yet incompatible comprehensive doctrines.<sup>66</sup> In *Political Liberalism*, however,

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62. My analysis in this Section of the punitive tendency in the second stage of Rawls's theory bears many similarities to Bonnie Honig's analysis, see HONIG, *supra* note 12, with two principal differences. First, she considers justice as fairness only in the context of *A Theory of Justice* (even though the ideas contained in *Political Liberalism* had appeared in essays prior to Honig's writing). Her analysis, therefore, does not take into account Rawls's revised version of stability or, for that matter, the introduction of his idea of the reasonable. More importantly, Honig does not identify an ambivalence in Rawls's theory; she sees only exclusion where I also see the possibility of toleration. It is on the basis of this ambivalence, I believe, that the liberal nature of justice as fairness can be redeemed. See *infra* Part III.

63. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 177.

64. *Id.* at 245. Rawls does think that even ideal theory should provide an account of a "public system of penalties." *Id.* at 240. The purpose of this system, however, is not to punish violations of the law (in ideal theory, after all, there are no violations of the law) but rather to solve an assurance problem. See *id.*

65. *Id.* at 572.

66. See George Klosko, *Rawls's Argument from Political Stability*, 94 COLUM. L. REV. 1882, 1883–89 (1994) (contrasting views of stability in *A Theory of Justice* with views in *Political Liberalism*).

Rawls also presents two ways in which a political conception of justice may approach the issue of stability. In the first view, stability is seen as a “purely practical matter”.<sup>67</sup>

[I]f a conception fails to be stable, it is futile to try to realize it. Perhaps we think there are two separate tasks: one is to work out a political conception that seems sound, or reasonable, at least to us; the other is to find ways to bring others who reject it also to share it; or failing that, to act in accordance with it, if need be prompted by penalties enforced by state power. As long as the means of persuasion or enforcement can be found, the conception is viewed as stable.<sup>68</sup>

But, Rawls continues, “as a liberal conception, justice as fairness is concerned with stability in a different way.”<sup>69</sup> It “aims at being acceptable to citizens as reasonable and rational, as well as free and equal, and so as addressed to their public reason. . . . If justice as fairness were not expressly designed to gain the *reasoned support* of citizens who affirm reasonable although conflicting comprehensive doctrines,” Rawls writes, “*it would not be liberal.*”<sup>70</sup> He goes on:

The point, then, is that the problem of stability is not that of bringing others who reject a conception to share it, or to act in accordance with it, by workable sanctions, if necessary, as if the task were to find ways to impose that conception once we are convinced it is sound. Rather, *justice as fairness is not reasonable in the first place unless in a suitable way it can win its support by addressing each citizen's reason . . .*<sup>71</sup>

Although Rawls demands less from his citizens in *Political Liberalism*, he nevertheless continues to base the stability of his order on the wager that “just” institutions will offer “sufficient motivation of the appropriate kind” for citizens to comply voluntarily with the principles of justice.<sup>72</sup>

The problem with this wager is that Rawls himself admits that it is a bad bet. The account of stability that Rawls favors as liberal is, after all, only addressed to “citizens who affirm reasonable although conflicting comprehensive doctrines.”<sup>73</sup> The definition of a reasonable comprehensive doctrine is one that allows it to affirm the political conception of justice. Yet, as Rawls notes throughout his book, society is filled not only with reasonable

67. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 142.

68. *Id.*

69. *Id.*

70. *Id.* at 143 (emphasis added).

71. *Id.* (emphasis added).

72. *Id.* at 142–43.

73. *Id.* at 143.

and rational citizens, but with their opposites as well. The "fact of reasonable pluralism," as Rawls calls it, characterizes only *part* of democratic society; *taken as a whole*, a democratic society is actually characterized by the broader fact of pluralism.<sup>74</sup> The existence of "unreasonable and irrational, and even mad, comprehensive doctrines,"<sup>75</sup> Rawls admits, "is itself a permanent fact of life, or seems so."<sup>76</sup>

With the inevitability of individuals holding such doctrines, what might be called (following Rawls's own terminology) "the fact of dissonance," Rawls's emphasis on consensus becomes significantly problematic. Given his acknowledgment of the inevitability of dissonance, it would make sense for Rawls to revert back to the idea of the reasonable, appealing this time, however, to its second aspect, which emphasizes toleration.<sup>77</sup> Recognizing that dissonant citizens are as much a part of a society regulated by justice as fairness as those who comply, the second aspect of the reasonable would seem to demand that justice as fairness recognize at least a minimal debt to these individuals: a recognition that the content of justice as fairness is as much the cause of dissonance as is the behavior or self-understanding of the individuals in question.<sup>78</sup>

Yet Rawls fails to revert back to the aspect of the reasonable which supports toleration. Instead, he continues to emphasize consensus and chooses not even to address justice as fairness to the individuals who fail to accept it. "In their case," he writes, "the problem is to contain them so that they do not undermine the unity and justice of society."<sup>79</sup> Rawls calls this task of containment "practical" and he compares it to the containment of war and disease.<sup>80</sup> When extended to include the fact of pluralism rather than simply the fact of reasonable pluralism, therefore, Rawls's account of stability in justice as fairness bears a striking resemblance to the "purely practical" account that he disavowed as illiberal. Society, Rawls had explained, has "two separate tasks" according to the purely practical view of stability: "one is to work out a political conception that seems sound, or reasonable, *at least to us*; the other is to find ways to bring *others* who reject it also to share it . . . or . . . to act in accordance with it, if need be prompted by penalties . . . ."<sup>81</sup>

74. See Galston, *supra* note 11, at 518–19 (criticizing Rawls for focusing on fact of reasonable pluralism rather than fact of pluralism).

75. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at xvi–xvii.

76. *Id.* at 64 n.19.

77. It is important to note that the second aspect of the reasonable is itself biased toward exclusion in that Rawls defines the burdens of judgment as the "sources, or causes, of disagreement *between reasonable persons so defined*." *Id.* at 55 (emphasis added); see *supra* text accompanying note 43.

78. Cf. CONNOLLY, *supra* note 12, at 80 (arguing that modern liberals fail to acknowledge cruelty in forcing human beings to conform to liberal conception of individual because liberals presume—wrongly—that humans do so naturally).

79. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at xvii.

80. See *id.* at 64 n.19.

81. *Id.* at 142 (emphasis added); see *supra* text accompanying notes 67–68.

It may be argued in response that unreasonable persons or criminals are not themselves motivated by liberal principles and that justice as fairness therefore owes them nothing. However, such an objection applies to the conception of justice, particularly to the principle of legitimacy, only one aspect of the idea of the reasonable: that favoring consensus. In viewing the principles of justice as fairness and the principle of legitimacy as reasonable on that basis alone, the citizens of a well-ordered society are entirely justified in using “coercive power backed by the government’s use of sanctions” against those who do not fit.<sup>82</sup> Defined as “reasonable,” the citizens of justice as fairness are licensed to deal with these dissonant individuals, without remorse or doubt, in ways that would otherwise be inconsistent with justice as fairness as a liberal conception—by containing, excluding, or punishing them to enforce compliance. Since *they* are unreasonable, this treatment is *by definition* reasonable.<sup>83</sup>

This displacement can be seen clearly in Rawls’s description of criminal law in *A Theory of Justice*.<sup>84</sup> The purpose of criminal law, he writes,

is to uphold basic natural duties . . . . [Criminal law is] not simply a scheme of taxes and burdens designed to put a price on certain forms of conduct and in this way to guide men’s conduct for mutual advantage. It would be far better if the acts proscribed by penal statutes were never done. Thus a propensity to commit such acts is a *mark of bad character*, and in a just society legal punishments will only fall upon those who display these faults.<sup>85</sup>

Although punishment is inflicted only on those who commit criminal actions, its *justification* is based on the “bad” character of the individual who commits them; while it is action that is punished, it is character that is criminalized.<sup>86</sup> Once an individual has committed a crime, his or her character becomes, in Honig’s words, a “thoroughly juridical concern”<sup>87</sup>—or, to put it in Rawls’s

82. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 136.

83. See Mouffe, *supra* note 11, at 321–22.

84. Rawls does not consider the institutions of punishment and criminal law in *Political Liberalism*. For a discussion of punishment in a Rawlsian liberal state, see Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 132–35.

85. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 314–15 (emphasis added) (footnote omitted)

86. Some critics, notably Honig and Sandel, argue that passages like the one quoted above contradict Rawls’s earlier rejection of moral desert. See HONIG, *supra* note 12, at 138–39; SANDEL, *supra* note 23, at 82–90. As Honig writes, “From Rawls’s perspective, the bad character is so bewilderingly deviant that Rawls is forced back into a discourse he disavowed: the discourse of antecedent moral worth” HONIG, *supra* note 12, at 138. I do not believe that this criticism is correct. The moral worth that Rawls rejects is *antecedent*: It is based on criteria outside of or prior to the selection of a conception of justice. The judgment of moral worth at issue in the case of criminals is not antecedent in the sense that it is determined *after* the selection of principles of justice, not before. Honig and Sandel seem to be suggesting that Rawls’s rejection of desert means justice as fairness may not make moral judgments about individuals at all; this is clearly not the case and simply weakens Rawls’s theory unnecessarily.

87. HONIG, *supra* note 12, at 139.

own words, the criminal becomes a “medical or psychiatric” case “to be treated accordingly.”<sup>88</sup>

Faced with the fact of pluralism (the pluralism of both reasonable *and* unreasonable comprehensive doctrines) and the inevitability of “bad characters” (individuals who reject arguments on behalf of the principles of justice as fairness), Rawls is forced to consider the justice of “requiring [those for whom affirmation of their sense of justice is not a good] to comply with just institutions.”<sup>89</sup> “[U]nder what conditions,” Rawls asks, “would the persons in the original position agree that stabilizing penal devices can be employed?”<sup>90</sup> Rawls answers unequivocally that citizens of justice as fairness may force dissonant individuals to comply with the principles of justice, and may exercise this power without any remorse, doubt, or ambivalence. Not only do the citizens’ own senses of justice and emphases on maintenance and stability justify such action, but in addition, those “who find that being disposed to act justly is not a good for them cannot deny” the rationality or the reasonableness of their own punishment.<sup>91</sup>

Perversely enough, therefore, the dissonant individuals themselves are considered participants in their own treatment or punishment. Indeed, this insight forms the basis of a brief critique of social contract theory by the French philosopher Michel Foucault: “In effect the offense opposes an individual to the entire social body; in order to punish him, society has the right to oppose him in its entirety. It is an unequal struggle: on one side are all the forces, all the power, all the rights.”<sup>92</sup> The criminal in such circumstances faces a penalty that “seems to be without bounds,” while because he is a part of the social body that is bound by the contract, he cannot object—he wills his own punishment.<sup>93</sup>

The consequences for justice as fairness are profound: All elements of doubt and ambivalence having been removed from the exercise of penal power, there is arguably no maximum level of societal punishment beyond which the citizens of justice as fairness will doubt the reasonableness or the justice of their institutions.<sup>94</sup> Rawls himself writes:

88. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 185 (discussing those with incapacitating tastes and preferences).

89. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 575.

90. *Id.*

91. *Id.* at 576.

92. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 90 (Alan Sheridan trans., 1979). In shifting the right to punish from the sovereign to the defense of society, Foucault argues, social contract theory had aimed to limit and control the possible exercise of coercive power. *See id.* But paradoxically, it achieved just the opposite: The right to punish “finds itself recombined with elements so strong that it becomes almost more to be feared. . . . It [becomes] a terrible ‘super power.’” *Id.*

93. *See id.*

94. For an observation of this phenomenon in the context of American politics, see *infra* note 183. If there is a maximum level of punishment in Rawls’s society, it is extremely high: It must threaten the compliant citizens’ own senses of liberty or be of excessive cost. *See RAWLS, A THEORY OF JUSTICE*, *supra* note 9, at 240–41 (“The establishment of a coercive agency is rational only if these disadvantages are less

It can even happen that there are many who do not find a sense of justice for their good; but if so, the forces making for stability are weaker. *Under such conditions penal devices will play a much larger role in the social system.* The greater the lack of congruence, the greater the likelihood, other things equal, of instability with its attendant evils. Yet none of this nullifies the collective rationality of the principles of justice . . . . [T]he choice of the principles [therefore] . . . need not be reconsidered.<sup>95</sup>

It is easy to imagine such citizens abusing the power they are granted as members of a constitutional regime, namely “the power of free and equal citizens as a collective body.”<sup>96</sup> Considering the seamless justification they have been given for using such power to guarantee compliance, they would hardly recognize it as power at all.

Rawls is not altogether blind to the exclusions in his theory. He recognizes that the ideal of citizenship and the two principles of justice as fairness are normative constructions and that they “impose restrictions”: “[T]he basic institutions [that the] principles require,” he writes, “inevitably encourage some ways of life and discourage others, or even exclude them altogether.”<sup>97</sup> Yet Rawls resigns himself to this inevitability by declaring that “[n]o society can include within itself all forms of life. . . . [T]here is no social world without loss.”<sup>98</sup> While conceding that for dissonant individuals, “[i]t is, of course, true that . . . just arrangements do not fully answer to their nature, and therefore, other things equal, they will be less happy,” Rawls concludes, in a most telling turn of phrase, “*here one can only say: their nature is their misfortune.*”<sup>99</sup>

Thus it seems that justice as fairness is voluntary and liberal only up to a point: only for those whose self-understandings would have them voluntarily comply with it in the first place,<sup>100</sup> or whose self-understandings are easily adaptable to the mandatory self-understandings prescribed by justice as fairness. For all others, Rawls can only say: “Your nature is your misfortune.”<sup>101</sup>

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than the loss of liberty from instability.”). The reasonableness of such a system is conspicuously absent as a consideration.

95. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 576 (emphasis added) Based on his argument in *Political Liberalism*, Rawls would call incorrect an appeal that solely referred to the “collective rationality of the principles.” See RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 53 n 7 This does not affect my immediate point, however, which is that the principles, whatever their origin, would not be reconsidered even in the face of a reliance on widespread punishment to enforce stability For a kindred observation, see HONIG, *supra* note 12, at 144.

96. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 136–37 (discussing “liberal principle of legitimacy”).

97. *Id.* at 195.

98. *Id.* at 197.

99. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 576 (emphasis added).

100. Cf. Heidi M. Hurd, *The Levitation of Liberalism*, 105 *YALE L.J.* 795, 819 (1995) (book review) (criticizing Rawls for preaching to converted and excluding those who hold “unreasonable” views).

101. As Honig rightly concludes: “Rawls comes as close as he ever does to admitting that justice as fairness is built on an ineliminable moment of arbitrariness: some will feel at home, completed and realized

### C. Rawls's Political Illiberalism

In sum, Rawls's failure to incorporate into his theory what I have termed the fact of dissonance makes him unaware of his reliance on punishment to maintain the stability of justice as fairness. The citizens of justice as fairness, defined as reasonable based on their congruence with the principles of justice, are licensed to deal with those who lack such congruence in ways that Rawls himself defines as illiberal: by punishing or excluding them. The fault for dissonance having been displaced solely onto the shoulders of these individual "bad characters," the citizens of justice as fairness avoid introspection into their own exercises of power, whether normative or penal.

The ultimate point is not that Rawls is wrong in assuming that social worlds have limited space but rather that his resignation is illiberal.<sup>102</sup> For indeed, as I argued at the outset of this Note, given the limited space of social worlds, the test of a liberal regime should extend to the process of exclusion, this exclusion's permanence, and how the regime treats those it excludes. Subjected to such a test, the liberal credentials of Rawls's theory are severely challenged. Its emphasis on consensus at the normative level results in a punitive tendency that undermines the basis of the theory as a liberal political conception and impairs its potential for radical toleration. Instead of a duty to engage in dialogue, Rawls provides the "reasonable" citizens of justice as fairness with only the task of containment, making sure that "dissonant" individuals do not pose a threat to the stability of their norms. The result is a regime inclined toward limiting political space and curbing contestation: When a threat is perceived, Rawls licenses his citizens to respond with the stabilizing device of punishment.<sup>103</sup> To the individuals receiving punishment, his citizens can only say: "Your nature is your misfortune."

## II. "THE PARADOX OF DISENFRANCHISEMENT" AND THE AMBIVALENCES OF AMERICAN PENAL JUSTICE

Having identified the ambivalence within liberal political theory between toleration on the one hand and closure or exclusion on the other, I now return to American practice and the paradox of disenfranchisement. The paradoxical nature of the Supreme Court's jurisprudence reflects an ambivalence in American legal and political life similar to that in Rawls's theory of justice in

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by the constructions of justice as fairness, and others will not." HONIG, *supra* note 12, at 141.

102. Cf. Mouffe, *supra* note 11, at 322 ("No state or political order, even a liberal one, can exist without some form of exclusion . . . . But it is very important to acknowledge those forms of exclusion for what they are and the violence that they imply, instead of concealing them under the guise of rationality.").

103. The punitive tendency in justice as fairness belies a fundamental insecurity in the theory: If "just institutions" truly offered "sufficient motivation of the appropriate kind" for persons to comply voluntarily, as Rawls argues, the stabilization of society through punishment would be unnecessary. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 142-43.

Part I.<sup>104</sup> The inalienability of citizenship manifests the toleration prong of this ambivalence, while the approval of disenfranchisement evidences the power of the exclusionary element.

I begin this Part with an elaboration of the judicial paradox of disenfranchisement itself, based primarily on legal opinions (although I consider elements of Rawls's theory when the issues I discuss parallel elements of justice as fairness).<sup>105</sup> After discussing the paradox, I then review the conventional explanations—both practical and philosophical—for the practice of disenfranchisement. I argue that these putative explanations, far from resolving the paradox, actually deepen it, justifying illiberal practices in an otherwise liberal order. Finally, I end with a reconsideration of justice as fairness, illustrating the parallels between the ambivalence in Rawls's theory and that behind the paradox of disenfranchisement.

#### A. *The Right to Vote and the Paradox of Disenfranchisement*

It may be recalled from Part I that the first principle of justice as fairness is that each person is to have an equal right to the most extensive total system of basic liberties.<sup>106</sup> This principle is defined as prior to the second principle, meaning that greater social or economic advantages can neither justify nor compensate for a deviation from the institutions of equal liberty. In *Political Liberalism*, Rawls elaborates on the first principle by adding that “the equal *political* liberties, and *only* those liberties, are to be guaranteed their fair value.”<sup>107</sup> This guarantee, he argues, means that the “worth of the political liberties to all citizens . . . must be approximately equal, or at least sufficiently equal, in the sense that everyone has a fair opportunity to hold public office and to influence the outcome of political decisions.”<sup>108</sup> Principal among all the basic liberties, therefore, are the political liberties; principal among the political liberties is the right to vote. As Rawls writes in *A Theory of Justice*: “[A]ll citizens are to have an equal right to take part in, and to determine the

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104. My argument is not that Rawls supports disenfranchisement; in fact, he does not mention it at all. See *infra* note 109. Rather, it is first that the ambivalence in Rawls's theory can be seen in American law, and second that this ambivalence permits actions like disenfranchisement that are contradictory with other elements of both Rawls's theory and American liberalism, including the strict protection of basic rights and liberties.

105. I focus in this Part on the case of *permanent* disenfranchisement, not disenfranchisement during time spent in prison. Citizens in 47 states lose the right to vote while serving time for a felony conviction, whereas felons lose the right to vote permanently in only 14 states. See *infra* note 125. My analysis could easily extend to the case of disenfranchisement in prison, but the loss of one's voting rights for life makes the issues I am discussing clearer. For a discussion of voting rights while in prison, see generally Shapiro, *supra* note 5.

106. See *supra* note 21.

107. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 5 (emphasis added).

108. *Id.* at 327.

outcome of, the constitutional process that establishes the laws with which they are to comply.”<sup>109</sup>

As in Rawls’s scheme, the right to vote has been interpreted in American political and legal discourse as one of the most fundamental rights of democratic citizenship. Judith Shklar, in her short work entitled *American Citizenship: The Quest for Inclusion*, cites voting as one of only two rights that constitute the value of American citizenship: “To be a recognized and active citizen at all,” she writes, one “must be an equal member of the polity, a voter.”<sup>110</sup> In the words of Supreme Court Justice Abe Fortas, the right to vote “is the sacred and most important instrument of democracy.”<sup>111</sup>

What is so important about political rights, and the right to vote in particular? Rawls offers two reasons for their priority. First, the political liberties are “essential . . . to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality.”<sup>112</sup> Second, they are crucial “in order to establish just legislation.”<sup>113</sup> As a result, “it is not implausible that these liberties alone should receive the special guarantee of fair value. This guarantee is a natural focal point between merely formal liberty on the one side and some kind of wider guarantee for all basic liberties on the other.”<sup>114</sup> This argument is based principally on pragmatic concerns: Political liberties are crucial because they provide access to the process that determines the value of all the basic liberties.

The Supreme Court has relied on this pragmatic argument in many of its decisions involving the franchise. In *Yick Wo v. Hopkins*,<sup>115</sup> for example, the Court noted that the right to vote is “fundamental” because it is “preservative of all rights.”<sup>116</sup> In *Wesberry v. Sanders*,<sup>117</sup> it held (in language like Rawls’s): “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good

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109. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 221. If Rawls has an opinion on disenfranchisement, this passage suggests that it is in opposition to the practice. On the other hand, at another point in *A Theory of Justice*, Rawls writes that “[a]ll sane adults, with certain generally recognized exceptions, have the right to take part in political affairs.” *Id.* at 222 (emphasis added). Rawls does not specify the exceptions but it is not inconceivable that criminals are among them. In any event, as I have mentioned, Rawls’s actual views on disenfranchisement are incidental to my analysis. See *supra* note 104. It is more than enough to point out that his relevant views are ambiguous.

110. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 64 (1991). The other right that Shklar cites is earning. See *id.* at 63–101.

111. *Fortson v. Morris*, 385 U.S. 231, 250 (1966) (Fortas, J., dissenting) (arguing that state constitutional provision, providing that legislature select governor from two candidates receiving most votes where no candidate receives majority, violates Equal Protection Clause).

112. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 330.

113. *Id.*

114. *Id.* at 329.

115. 118 U.S. 356 (1886) (holding city ordinance unconstitutional where official is empowered to deny arbitrarily permission to conduct lawful business).

116. *Id.* at 370.

117. 376 U.S. 1 (1964) (holding that disparity among congressional districts presents justiciable claim under Fourteenth Amendment).

citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."<sup>118</sup>

The priority of the right to vote can, however, be justified in an even more fundamental way, one which connects the right directly to citizenship itself. Shklar presents such a view in her book on American citizenship, in which she focuses on citizenship as "social standing."<sup>119</sup> The right to vote is essential, in her view, because it establishes one's status as an equal citizen in a democracy. It is the franchise, she points out, that those excluded from citizenship (principally black slaves) demanded more than any other right: "The ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity."<sup>120</sup> Indeed, while he does not make the relationship explicit, Rawls allows for a similar connection between voting and citizenship, based on "the fundamental importance of self-respect."<sup>121</sup> Self-respect, Rawls writes, "is rooted in our self-confidence as a fully cooperating member of society capable of pursuing a worthwhile conception of the good."<sup>122</sup> It is "secured," he argues, "by the public affirmation of the *status* of equal citizenship for all," a status guaranteed by the fair value of the political liberties.<sup>123</sup>

Whether it is justified instrumentally or intrinsically, it is clear that the right to vote is a central component, if not *the* central component, of democratic citizenship. History has also confirmed this conclusion: Legislatures and courts in the United States have gradually extended the right to vote to virtually all groups previously denied the suffrage.<sup>124</sup> Yet, despite the theoretical and historical priority of voting, there remains a class of otherwise eligible American citizens who cannot vote: In fourteen states, persons who have committed felonies are disenfranchised for life.<sup>125</sup> Disenfranchisement

118. *Id.* at 17.

119. SHKLAR, *supra* note 110, at 2.

120. *Id.*; see also Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330 (1993) (arguing for view of voting as meaningful participatory act as opposed to "instrumental" view espoused by Supreme Court).

121. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 318.

122. *Id.*

123. RAWLS, *A THEORY OF JUSTICE*, *supra* note 9, at 545 (emphasis added). One advantage of this over the pragmatic justification is its emphasis on the importance of the *right* to vote rather than of its *exercise*. The pragmatic justification does not account adequately for the fact that so many citizens regularly fail to vote. See SHKLAR, *supra* note 110, at 27 ("It was the denial of the suffrage that made the right to vote such a mark of social standing. . . . [O]nce one possessed the right, it conferred no other personal advantages. Not the exercise, only the right, signified deeply.")

124. See, e.g., U.S. CONST. amend. XV (granting blacks right to vote); *id.* amend. XIX (granting women right to vote); *id.* amend. XXIV (prohibiting poll tax in federal elections); *id.* amend. XXVI (granting 18-year-olds right to vote); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (prohibiting poll tax in state elections).

125. The states that continue disenfranchisement are: Alabama (ALA. CONST. art. VIII, § 182), Arizona (ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. §§ 13-912(a), 16-101(a)(5) (West 1989)), Florida (FLA. CONST. art. VI, § 4; FLA. STAT. ANN. ch. 944.292 (Harrison 1991)), Iowa (IOWA CONST. art. II, § 5), Kentucky (KY. CONST. § 145), Maryland (MD. CONST. art. I, § 4; MD. ANN. CODE OF 1957 art. 33, §§ 3-4 (1993)), Mississippi (MISS. CONST. art. 12, § 241), Nevada (NEV. CONST. art. II, § 1), New Mexico (N.M.

laws in these states vary widely. Whereas in some, conviction for a felony automatically results in disenfranchisement, in others, conviction for any one of a number of enumerated offenses or conviction for an "infamous crime" leads to disenfranchisement.<sup>126</sup> Whether and how an ex-felon's right to vote can be restored also varies depending on the state.<sup>127</sup>

The Supreme Court has considered the constitutionality of these laws on only a few occasions, most recently in the 1985 case *Hunter v. Underwood*.<sup>128</sup> Although the Court in *Hunter* struck down the "moral turpitude" section of Alabama's 1901 disenfranchisement law, it did so only because the law's original intent was to prevent blacks from voting;<sup>129</sup> the Court explicitly declined to reconsider earlier decisions which found the actual practice of disenfranchising ex-felons to be constitutional.<sup>130</sup> In its most direct consideration of the issue, the Court upheld a California statute disenfranchising ex-felons in *Richardson v. Ramirez*,<sup>131</sup> basing its decision on a rarely cited clause in Section 2 of the Fourteenth Amendment that explicitly mentions the disenfranchisement of those convicted of crimes.<sup>132</sup> In neither case did the Court offer a justification for disenfranchisement or consider the practice's theoretical implications; the Court focused instead on the narrow question presented of whether or not disenfranchisement is permissible under the Constitution.<sup>133</sup>

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CONST. art. VII, § 1), Tennessee (TENN. CONST. art. I, § 5; TENN. CODE ANN. § 2-19-143 (1985), § 40-20-112 (1990)), Utah (UTAH CONST. art. IV, § 6), Virginia (VA. CONST. art. II, § 1; VA. CODE ANN. § 24.1-42 (Michie 1985)), Washington (WASH. CONST. art. VI, §§ 1, 3), and Wyoming (WYO. STAT. ANN. § 6-10-106 (Michie 1977)).

126. In addition to losing the right to vote, those convicted of crimes suffer a whole range of other civil disabilities, from the right to serve on a jury, to the right to hold public office, to parental rights. These laws vary widely from state to state (in no state is the number of disabilities zero) as do the procedures by which one's rights are restored. In some, rights are automatically restored after prison, parole or probation while in others restoration comes only after explicit pardon by the governor or state legislature. See OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1992); Burton et al., *supra* note 5, at 54-58.

127. See Burton et al., *supra* note 5, at 54-55.

128. 471 U.S. 222 (1985).

129. See *id.* at 229-32.

130. See *id.* at 233.

131. 418 U.S. 24 (1974).

132. *Id.* at 41-56. Section 2 of the Fourteenth Amendment reads in relevant part: "[W]hen the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced . . ." U.S. CONST. amend. XIV, § 2 (emphasis added).

133. Arguments have been made that the Court's decision in *Richardson* is flawed on the constitutional question itself. See, e.g., David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303 (1976) ("[T]here is not a word in the [F]ourteenth [A]mendment suggesting that the exemptions in section two's formula are in any way a barrier to the judicial application of section one in voting rights cases, whether or not they involve the rights of ex-convicts."). Disenfranchisement has also been criticized on Eighth Amendment grounds. See, e.g., Gary L. Reback, Note, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845, 858-60 (1973). The constitutional question is secondary for my project, however, as I am more interested in the theoretical foundations of the practice of disenfranchisement.

If this were all that the Supreme Court had to say about issues related to disenfranchisement, then the matter would be interesting but straightforward. This is not, however, all that the Court has had to say. Many of its other rulings—on the issues of voting and citizenship, for example—make its stance on disenfranchisement paradoxical and contradictory.

Beginning with voting, the Court throughout its history has drawn an explicit connection between the franchise and citizenship. The franchise, the Court has held, is the ultimate right of citizenship: It is a symbolic and tangible demonstration of one's full membership in the national political community.<sup>134</sup> Indeed, although resident aliens, for instance, are granted almost all the rights of citizenship under the Constitution,<sup>135</sup> they are excluded completely from a whole set of rights guaranteed in the document: political rights.<sup>136</sup> Chief among these rights is the right to vote. Chief Justice Earl Warren, for example, wrote in *Reynolds v. Sims*<sup>137</sup> that it is a citizen's "inalienable right" to participate in elections<sup>138</sup> and debasement of that right makes one "that much less a citizen."<sup>139</sup> Similarly, in *Dunn v. Blumstein*,<sup>140</sup> the Court commented that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens."<sup>141</sup>

While the Court has drawn a direct connection between voting and citizenship, it has also held that citizenship is, for all intents and purposes, an inalienable right that cannot be taken away as a form of punishment. The Court first enunciated this rule in *Trop v. Dulles*,<sup>142</sup> in which a native-born American was stripped of his citizenship and declared stateless for wartime

134. In 1875, the Supreme Court did actually reject the claim, made on behalf of women, that voting was connected to citizenship. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875). The Court stated that the "Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage." *Id.* at 177. This conclusion flowed from the "separate sphere" argument regarding women's correct place in society: Motherhood, not political participation, was thought to be the appropriate activity of a woman. This confirms the thesis that suffrage is the sign of membership in the political community. Women were not extended the right to vote because they were not considered to be a part of that community. See Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 658 (1996); Jennifer K. Brown, Note, *The Nineteenth Amendment and Women's Equality*, 102 YALE L.J. 2175, 2178–81 (1993). Furthermore, *Minor* is in conflict with *Ex parte Yarbrough*, also known as the Ku Klux Klan Cases, which "made it clear that the right to vote . . . is a privilege of national citizenship derived from the Constitution." *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 353 (E.D. La. 1965) (citing *Ex parte Yarbrough*, 110 U.S. 651 (1884)).

135. See, e.g., *Sam Andrews' Sons v. Mitchell*, 457 F.2d 745, 749 (9th Cir. 1972) ("Any person within the United States, citizen or alien, resident or non-resident, is protected by the guarantees of the Constitution.").

136. At one point during the nineteenth century, 22 states or territories actually did grant the right to vote to aliens, a practice that continued in some places until 1926. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U PA L. REV. 1391, 1397–417 (1993).

137. 377 U.S. 533 (1964).

138. *Id.* at 565.

139. *Id.* at 567.

140. 405 U.S. 330 (1972).

141. *Id.* at 336.

142. 356 U.S. 86 (1958) (plurality opinion).

desertion.<sup>143</sup> Writing for a plurality of the Court, Chief Justice Earl Warren declared such denationalization unconstitutional as a violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.<sup>144</sup> The Chief Justice wrote:

Citizenship is not a license that expires upon misbehavior. . . . [C]itizenship is not lost every time a duty of citizenship is shirked. And the deprivation of citizenship is not a weapon that the Government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be. As long as a person does not voluntarily renounce or abandon his citizenship . . . his fundamental right of citizenship is secure. . . .

. . . .

[Denationalization constitutes a] total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.<sup>145</sup>

Nine years later, in a case involving a naturalized citizen who lost his citizenship for voting in a foreign election, the Court extended its rule, prohibiting denationalization through any means other than voluntary renunciation.<sup>146</sup> These cases are motivated by the view that citizenship cannot be taken away because it forms the basis of one's status as a free and equal person in democratic society.

Taken on their own, the Court's rulings on disenfranchisement, voting, and citizenship do not raise significant questions. But taken together, the jurisprudence seems incoherent: The Court's rulings, as a whole, present a flawed syllogism. Roughly speaking, voting is equivalent to citizenship; citizenship, in turn, is inalienable; but, for some reason, voting is not inalienable. A equals B equals C, but C does not equal A. This is the paradox of disenfranchisement.

The two competing elements of this paradox are parallel to the two aspects of the ambivalence in Rawls's theory of justice. While disenfranchisement is the outcome of a desire for the maintenance of consensus (those who violate the terms of social cooperation are excluded or contained so as not to threaten

143. *Id.* at 87 (plurality opinion). Trop had been gone for less than one day and willingly surrendered when met by an army vehicle while walking back in the direction of his station. *See id.* at 87–88 (plurality opinion).

144. *See id.* at 101 (plurality opinion). In dicta, the Court distinguished denationalization from disenfranchisement on the ground that the latter is permissible as a "nonpenal exercise of the power to regulate the franchise." *Id.* at 97 (plurality opinion) (citing *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885)).

145. *Id.* at 92–101 (plurality opinion).

146. *See Afroyim v. Rusk*, 387 U.S. 253, 267–68 (1967). This rule extends only to citizenship procured lawfully; naturalization obtained through fraud or other illegal means may be stripped. *See id.* at 267 n.23; *Knauer v. United States*, 328 U.S. 654, 673–74 (1946).

the “consensus” of the others), the inalienability of citizenship follows from a commitment to radical toleration (no matter what act a person commits, “however reprehensible,”<sup>147</sup> his or her status as an equal member of society is secure).

### B. *(Un)Justifying Disenfranchisement*

The parallel between the actual practice of disenfranchisement and the treatment of dissonant individuals in Rawls’s theory is more striking when one considers the theoretical underpinnings of disenfranchisement. Analyzing the offered philosophical justifications helps to connect the practice of disenfranchisement to the treatment of criminals and other dissonant individuals in justice as fairness. In both cases, the emphasis of penalty is on the individual nature of crime and criminality, shielding the overall order from reconsideration or doubt. This emphasis is what allows a practice like disenfranchisement to persist despite its fundamental inconsistency with the aspect of American political discourse protecting basic rights.

Before considering the philosophical justifications of disenfranchisement it is necessary to examine the two commonly offered pragmatic arguments on behalf of the practice. The first such practical justification is the fear that ex-convicts will use their votes inappropriately to influence elements of criminal law. As Judge Friendly of the Second Circuit wrote in *Green v. Board of Elections*:<sup>148</sup>

[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.<sup>149</sup>

The second common practical justification, cited by the court in *Kronlund v. Honstein*,<sup>150</sup> is the state’s “interest in preserving the integrity of her electoral process,” which might include protecting against the possibility of voter fraud, “by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society’s aims.”<sup>151</sup>

Neither of these justifications withstands close scrutiny.<sup>152</sup> It is unlikely that ex-convicts would differ from the average voter and make decisions based

147. See *supra* text accompanying note 145.

148. 380 F.2d 445 (2d Cir. 1967).

149. *Id.* at 451.

150. 327 F. Supp. 71 (N.D. Ga. 1971).

151. *Id.* at 73.

152. For similar criticisms of the policy justifications for disenfranchisement, see Note, *supra* note 12, at 1302–03.

on any single criterion, let alone on the content of the criminal law. Moreover, given the relatively small proportion of the electorate that is ex-convicts, any influence on the administration of criminal law that they might have would be negligible.<sup>153</sup> As to the risk of voter fraud, there is no reason to believe that modern technology for voter registration and laws specifically dealing with voter fraud are insufficient to protect against the tampering that disenfranchisement is ostensibly intended to prevent.<sup>154</sup>

The two philosophical justifications for disenfranchisement, each of which appeals to a longstanding tradition of political philosophy, are more revealing and complex than the practical ones.<sup>155</sup> The first draws directly on the social contract tradition; the second, on the tradition of civic republicanism. In an example of the former, the Court of Appeals for the Fifth Circuit wrote:

A state properly has an interest in excluding from the franchise persons who have manifested a fundamental antipathy to the criminal laws of the state or of the nation by violating those laws sufficiently important to be classified felonies. . . . [S]uch persons have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly.<sup>156</sup>

In some instances, appeal is made directly to the forefathers of social contract theory themselves. In *Green*, for example, Judge Friendly appealed directly to John Locke:

The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due."<sup>157</sup>

Following from this premise, the decision asserts: "A man who breaks the laws he has authorized his agent to make for his own governance could fairly have

153. This justification is also constitutionally questionable given the Supreme Court decision in *Carrington v. Rash*, which declared that "'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." 380 U.S. 89, 94 (1965); see also *Dunn v. Blumstein*, 405 U.S. 330, 355-56 (1972).

154. Cf. *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting) ("[D]isenfranchisement provisions are patently both overinclusive and underinclusive. The provision is not limited to those who have demonstrated a marked propensity for abusing the ballot by violating election laws.").

155. For a detailed elaboration of the two philosophical arguments used to justify disenfranchisement, see Note, *supra* note 12, at 1304-09.

156. *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (emphasis added).

157. *Green v. Board of Elections*, 380 F.2d 445, 451 (2d Cir. 1967) (quoting JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT ¶ 89 (1698)).

been thought to have abandoned the right to participate in further administering the compact."<sup>158</sup>

In relying on contract theory to justify disenfranchisement, courts have emphasized the deliberate nature of the offender's action. As the court in *Wesley v. Collins*<sup>159</sup> wrote: "Felons are not disenfranchised based on any immutable characteristic, such as race, but on their *conscious decision* to commit an act for which they assume the risks of detection and punishment."<sup>160</sup> The commission of a crime is interpreted as a declaration by the individual of his or her rejection of the terms of the social contract. The criminal becomes, in Foucault's words, "the common enemy": "Indeed, he is worse than an enemy, for it is from within society that he delivers his blows—he is nothing less than a traitor, a 'monster.'"<sup>161</sup> Subsequently, the criminal loses all claims to the contract: "How could society not have an absolute right over him?"<sup>162</sup> Or as Locke writes, "[If a citizen] disclaim the lawful Government of the Country he was born in, he must also quit the Right that belong'd to him by the Laws of it . . . ."<sup>163</sup>

Curiously, even as courts continue to cite social contract theory, they no longer apply the doctrine to its logical extreme. Jean-Jacques Rousseau, in *On the Social Contract*, indicates what such an extreme would be:

[E]very offender who attacks the social right becomes through his crimes a rebel and traitor to his homeland; he ceases to be one of its members by violating its laws, and he even wages war against it. . . . [H]e has broken the social treaty, and consequently is *no longer a member of the State*.<sup>164</sup>

If a criminal by his or her action is no longer considered a member of the state, he or she should consequently lose all rights, not a select few. At one point in American history, this was in fact the case. As late as the late nineteenth century, courts held that a prisoner was for all intents and purposes a slave of the state.<sup>165</sup> Today, however, courts no longer hold such a view.

158. *Id.*

159. 605 F. Supp. 802 (M.D. Tenn. 1985).

160. *Id.* at 813 (emphasis added).

161. FOUCAULT, *supra* note 92, at 90.

162. *Id.*

163. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 394 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

164. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 65 (Roger D. Masters ed. & Judith R. Masters trans., St. Martin's Press 1978) (1762) (emphasis added). Similarly, Locke writes:

In transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common Equity, which is that measure God has set to the actions of Men, for their mutual security: and so he becomes dangerous to Mankind, the tye, which is to secure them from injury and violence, being slighted and broken by him.

LOCKE, *supra* note 163, at 272.

165. *See, e.g.,* Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871) ("[D]uring his term of service in the penitentiary, [a prisoner] is in a state of penal servitude to the State. . . . He is for the time

While “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,”<sup>166</sup> a prisoner today “retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.”<sup>167</sup>

Courts, therefore, have settled on what Foucault calls a “principle of moderation” to prevent the application of social contract theory to its full extreme.<sup>168</sup> Yet Foucault’s critique of the theory is still valid and the privileging of the exclusionary impulse over toleration remains evident. First, there is still “an unequal struggle: on one side are all the forces, all the power, all the rights.”<sup>169</sup> It is only in its beneficence that the state grants the offender any rights; the state is depicted as generous rather than cruel and all ambivalence is removed from the exercise of its power. Second, society still places full blame on the individual, shielding itself from a reconsideration of its own norms and laws; “the defense of society”<sup>170</sup> justifies excluding criminals or treating criminality as a form of dissonance rather than answering to it. Finally, while the “offender” no longer loses all rights guaranteed by the “contract,” he does lose the right that is fundamentally connected to his equal membership in society, the vote. Perhaps it is to close the circle on the depoliticization of crime and the criminal, that once crime is depoliticized by placing blame fully on the individual, society also seeks to depoliticize the criminal himself.

In emphasizing the deliberate nature of a criminal action, social contract theory points implicitly to the character of the criminal as its justification for disenfranchisement. As in Rawls’s justification of punishment, once the individual has committed a crime, it is his or her character which becomes the matter of juridical concern. If this connection is only implicit in contract theory, it is made thoroughly explicit in republicanism, the basis for the second justification of disenfranchisement.<sup>171</sup> No longer is focus even said to be on the criminal’s action; it is unambivalently directed at his or her nature.

Rawls’s explanation in *Political Liberalism* of civic republicanism (or classical republicanism, as it is sometimes called) is sufficient for the current

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being the slave of the State.”). In at least one instance, disenfranchisement was (unsuccessfully) challenged as a violation of the Fifteenth Amendment on the theory that imprisonment was a “previous condition of servitude.” See *People v. DeStefano*, 212 N.E.2d 357, 361 (Ill. App. Ct. 1965) (quoting U.S. CONST. amend. XV).

166. *Price v. Johnston*, 334 U.S. 266, 285 (1948).

167. *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944).

168. See FOUCAULT, *supra* note 92, at 90; cf. text accompanying notes 92–93.

169. FOUCAULT, *supra* note 92, at 90.

170. *Id.*

171. The line between social contract theory and republicanism is in fact not so clear. Rawls himself writes that “justice as fairness as a form of political liberalism has no fundamental opposition” to civic republicanism. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 205. Civic republicanism simply renders the exclusionary tendency in liberalism even more explicit. See Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1495 (1988) (arguing that republicanism is tainted with “legacy of excluding from the political community all those whose voices would . . . threaten disruption of a community’s normative unity”).

analysis: It is, he writes, “the view that if the citizens of a democratic society are to preserve their basic rights and liberties . . . they must also have to a sufficient degree the ‘political virtues’ . . . and be willing to take part in public life.”<sup>172</sup> Emphasis, therefore, is placed on the moral character of citizens; actions are relevant insofar as they reveal the content of character. Ex-offenders lose the right to participate, according to this view, because they have shown themselves to lack the political virtues on which the stability and welfare of a just order depends. A criminal act is taken to be, in Rawls’s words, “a mark of bad character.”<sup>173</sup>

As with justice as fairness and social contract theory generally, civic republicanism functions to convert dissonance from an institutional, political problem to an individual, psychological problem. It remains, in Foucault’s words, “an unequal struggle,” and attention is still focused entirely on the dissonant individual. As in Rawls’s scheme, this closure begs an important question: Is society so insecure about its own stability or that of its laws and norms that it must oppose in its entirety and with all of its power one lone individual?<sup>174</sup> The legal opinions on disenfranchisement that rely on civic republicanism implicitly suggest that this is the case. For instance, in a widely cited decision on disenfranchisement, *Washington v. State*,<sup>175</sup> the court ruled:

The manifest purpose is to preserve the *purity* of the ballot box, which is the sure foundation of republican liberty, and which *needs protection* against the *invasion of corruption*, just as much as against that of ignorance, incapacity, or tyranny. The *evil infection* of the one is not more *fatal* than that of the other. 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, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes *hazard the welfare* of communities, if not that of the State itself, at least in close political contests. *The exclusion . . . [is] imposed for protection, and not for punishment . . .*<sup>176</sup>

The focus here is not simply on the individual’s lack of requisite moral fortitude, but on the potential for this lack of moral fortitude to spread to others, like an “evil infection.” Criminality, like disease, the court seems to

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172. RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 205. Rawls defines the political virtues as “the virtues of fair social cooperation such as the virtues of civility and tolerance, of reasonableness and the sense of fairness.” *Id.* at 194.

173. RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 315

174. *See supra* note 103.

175. 75 Ala. 582 (1884).

176. *Id.* at 585 (emphasis added).

say, must be contained so as to prevent contagion. It is probably not coincidental that Rawls invokes the same image of spreading disease in discussing those with unreasonable comprehensive doctrines.<sup>177</sup> The fear of sickness in both cases betrays a certain frailty or insecurity of the social body.<sup>178</sup> In Rawls's case—where the argument rests on the assertion that *everyone* should find compliance with the two principles reasonable—this insecurity is particularly ironic.

### C. *The Politics of Political Illiberalism*

Whether or not they are rooted in a similar insecurity, it is clear that the justification for disenfranchisement and Rawls's reliance on punishment as a stabilizing device both follow from the impulse to protect society's standards from contestation.<sup>179</sup> In Rawls's case, one's ability to contest society's standards is closed off by the imposition of the label "unreasonable"; in the case of disenfranchisement, this labeling is complemented by the explicit loss of one's political status. The criminal, in each instance, is created as the "other" to ward off the potential contestation of society's norms.<sup>180</sup> For Rawls, the assumption of strict compliance and the emphasis on consensus lead citizens of his well-ordered society to view the criminal as a "bad character" deserving of punishment, even if such punishment is illiberal from the standpoint of justice itself. With disenfranchisement, the act of creation is even clearer: The revocation of the right to vote itself differentiates the criminal as abnormal—it is a permanent mark of a lower status. "The process of making the criminal," Frank Tannenbaum writes, "is a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are complained of."<sup>181</sup> The emphasis on the

177. See *supra* text accompanying note 80.

178. The origin of Section 2 of the Fourteenth Amendment suggests that there is a strong connection between the practice of disenfranchisement and feelings of insecurity on the part of the body politic; after all, it was passed in the wake of America's most profound domestic crisis, the Civil War.

179. In recognizing that both the opinions on disenfranchisement and liberal theory function to protect society's standards from contestation, my argument differs dramatically from that in the Note cited above. See Note, *supra* note 12. Its author makes similar observations to mine about the "true impulse" behind disenfranchisement. But the author fails to recognize that the exclusionary impulse afflicts liberal theory as well. In fact, the author cites Rawls in arguing that disenfranchisement runs counter to liberal principles. See *id.* at 1306. But see *id.* at 1306 n.35 (noting Rawls's reference to "certain generally recognized exceptions" to universal suffrage discussed *supra* in note 109). In essence, the author does what I have argued liberalism itself does: displace blame for the "dissonance" of disenfranchisement onto the practice itself, shielding liberalism from blame. My argument is that the existence of disenfranchisement stems from a problem immanent to liberalism, from an ambivalence in the theory itself.

180. Justice Marshall, dissenting in *Richardson*, came close to recognizing the depoliticizing implications of disenfranchisement when he wrote: "The ballot is the democratic system's coin of the realm. To condition its exercise on support of the established order is to debate that currency beyond recognition." *Richardson v. Ramirez*, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting).

181. FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* 19-20 (1938).

individual nature of the criminal's act or character makes it appear as if the criminal brings this process and the resulting lower status on himself, but society imposes it, acting to prevent a threat to the maintenance of its established standards.<sup>182</sup>

In assigning to the criminal an identity whose nature sets him apart from the rest of society, the justificatory arguments for disenfranchisement, like those for justice as fairness, license treatment that is otherwise inconsistent with liberal principles. This explains how the practice of disenfranchisement has persisted despite its fundamental inconsistency with one of the main elements of American political and legal discourse: the defense of basic liberties generally and political liberties particularly. By isolating the blame for dissonance on the individual, society signals that the criminal deserves his fate, if not wills it upon himself; as a result, it matters little that his punishment may be illiberal from the standpoint of justice.<sup>183</sup> Since the citizens on whom such punishment is inflicted are defined as abnormal, the inconsistency between their treatment and society's larger principle of toleration is not perceived to undermine the liberal bases of mutual respect. In fact, as the paradox of disenfranchisement reveals, the inconsistency is often not perceived at all.

As Part I of this Note indicated, Rawls is relatively unaware of the implications of treating dissonance as a purely individual problem—in particular, of the potential for illiberal practices like disenfranchisement to be justified within an otherwise liberal order. In discussing the content of a “fully adequate scheme” of basic liberties, however, he does illustrate clearly what the consequences of such practices are for liberalism as a whole:

If the equal basic liberties of some are restricted or denied, social cooperation on the basis of mutual respect is impossible. For we saw that fair terms of social cooperation are terms upon which as equal

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182. As if the connection between disenfranchisement and the defense of society's norms were not clear enough, the earliest Supreme Court decisions on disenfranchisement appealed directly to a threat against society's moral standards. See *Davis v. Beason*, 133 U.S. 333, 341 (1890) (upholding disenfranchisement for violation of laws against bigamy and polygamy because “[t]o extend exemption from punishment for such crimes would be to shock the moral judgment of the community”), *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885) (describing marriage as “best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement” in upholding disenfranchisement for bigamy and polygamy).

183. As I have argued repeatedly in this Note, the displacement of blame prevents introspection on the part of society into the cause of dissonance or the justifiability of its exercises of power. This dynamic can be seen in society's general response to crime. As William Connolly notes, the spread of crime in America rarely provokes introspection or arguments for the reform of society's institutions: “Rather, it constantly renews the cry for law and order, or, when that cycle has exhausted itself, for the rehabilitation of delinquents.” William E. Connolly, *Discipline, Politics and Ambiguity*, 11 *POL. THEORY* 325, 332 (1983). An ambivalence similar to the one I have discussed in the paradox of disenfranchisement, between toleration and exclusion, can also be seen in the recent welfare reform act, particularly in its provisions taking away benefits from *legal* immigrants. See *Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, §§ 400–51, 110 Stat. 2105, 2260–77.

persons we are willing to cooperate with all members of society over a complete life. When fair terms are not honored, those mistreated will feel resentment or humiliation, and those who benefit must either recognize their fault and be troubled by it, *or else regard those mistreated as deserving their loss*. On both sides, *the conditions of mutual respect are undermined*.<sup>184</sup>

This is certainly true of disenfranchisement: Society regards those mistreated as deserving their loss and thus remains untroubled. It is also true of punishment in justice as fairness, where criminals' "nature is *their* misfortune."<sup>185</sup> The problem is not that Rawls is oblivious to the fact that illiberal treatment undermines the conditions of mutual respect; it is that he fails to generalize this realization to include all society. The same can be said of American legal discourse and its gradual expansion to include *almost* everyone. It seems as if American democracy, like justice as fairness, is liberal—but only to a point.

### III. FROM CONSENSUS TO TOLERATION: LIBERALISM RECONFIGURED

How, then, is it possible to secure the conditions of mutual respect, so that political liberalism can be liberal and nothing else? As I have hinted throughout this Note, I believe the solution to this question lies in the aspect of the reasonable that is disfavored by both Rawls's theory and American criminal law: the second aspect, which favors toleration rather than consensus.<sup>186</sup> In essence, I have argued that the way in which the idea of the reasonable is understood and employed, in both settings, is itself *unreasonable*. It forms the basis of an unreasonable belief that those who fail to comply with society's principles of justice need not be addressed as equal citizens worthy of respect; that they can be punished or excluded to prevent them from posing a threat to the stability of the order. The task, therefore, is to alter the idea of the reasonable specifically and liberalism generally—both Rawlsian and American—so that toleration is the highest virtue. It is to apply the idea of the reasonable to the reasonable itself.<sup>187</sup>

Focusing for the moment on justice as fairness, I believe this task would call for at least two adjustments. First, it would require that one shift emphasis from the first aspect of the reasonable, the willingness to propose principles to which all can agree, to the second, the willingness to recognize the burdens of

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184. RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 337–38 (emphasis added).

185. RAWLS, A THEORY OF JUSTICE, *supra* note 9, at 576 (emphasis added).

186. American legal discourse, obviously, does not rely explicitly on the so-called second aspect of the reasonable; as I have attempted to show, however, the two aspects of the reasonable are implicit in this discourse.

187. *Cf.* RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 10 (describing task as "appl[ying] the principle of toleration to philosophy itself"). I am indebted to David Peritz for suggesting this phrase.

judgment, so as to halt the first aspect in its consensual drift. For it is only when the first aspect of the reasonable is understood to license *enforcement* of consensus that it becomes unreasonable. The roles of each aspect in the normative theory would remain the same: The first would still inform the selection of principles while the second would specify the limits to this selection; these limits, however, would be much more heavily emphasized. Next, the second aspect of the reasonable, the willingness to recognize the burdens of judgment, would need to be supplemented with a willingness to recognize the "fact of dissonance" as well: the fact that some individuals will simply not "fit," that some degree of crime or dissonance will exist regardless of the reasonableness of society's institutions.

These alterations would no doubt require changes in Rawls's normative theory itself. While I am not prepared to trace the consequences of these changes throughout the theory, I would suggest preliminarily that both the assumption of strict compliance and the requirement of unanimity would need to be removed from the constitutional and legislative stages of the four-stage sequence.<sup>188</sup> Abandoning these conditions would dramatically alter the perception of those in the constitutional and legislative stages of Rawls's ideal society. They could no longer presume the possibility of a well-ordered society, as Rawls defines it, and they would structure their expectations and institutions accordingly. The concept of a well-ordered society, therefore, would no longer be strictly ideal: Dissonance and crime would not be eliminated altogether, but would be maintained at an acceptably low level. This is not to say that participants in these stages would view dissonance or crime as reasonable, as surely most dissonance and crime is not; rather, they would view the drive to eliminate entirely all crime and dissonance from society as an exercise of power that is itself unreasonable.<sup>189</sup>

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188. It is beyond the scope of this Note to argue that Rawls's theory could sustain these changes, although I believe it could. It suffices here only to suggest a direction in which one might take Rawls's theory in order to address the problems analyzed in Part I.

I should note, in addition, that I do not think that the changes for which I have argued in the idea of the reasonable would necessitate a major revision of the original position itself, or of its outcome (i.e., the two principles of justice as fairness discussed *supra* in note 21). The purpose of the original position would remain the selection of principles that are "reasonable for everyone to accept and therefore justifiable to them." RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 49. The changes would, however, require Rawls to be more sensitive to the roles that ideal and nonideal theory play in his overall argument, this is more appropriately done in the constitutional and legislative stages.

189. Introducing the fact of dissonance into the constitutional and legislative stages of Rawls's argument, where the veil of ignorance is thinner but still present, would require the parties to engage in a process of self-reflection that would likely result in the elimination of such illiberal practices as disenfranchisement. The parties, authors of the criminal law, would know that crime is inevitable in any society, no matter how well-ordered, but would not know whether upon lifting the veil of ignorance they would be criminals, victims, or unaffected by crime. The structure of the theory would allow for consideration, not only of those who inevitably fail to "fit," but also of those harmed by such dissonant individuals, thus giving full meaning to the idea of reciprocity in justice as fairness. See *supra* text accompanying note 184. It would force the parties to consider what some theorists have called "the other." See, e.g., William Connolly, *The Dilemma of Legitimacy*, in *LEGITIMACY AND THE STATE* 222, 241 (William Connolly ed., 1984) ("The quest for legitimacy must open itself to the voice of the other, it must

The main point is that the knowledge required to construct an actual ideal society is different from that which Rawls grants the participants in the constitutional and legislative stages—not to mention different from that which motivates actual policymakers and jurists. A realization that a certain level of crime is simply ineliminable, even in a society which is as just as it can possibly be, requires a dramatic alteration of expectations. Emile Durkheim makes a similar point in *The Rules of Sociological Method* when he writes that “there is no phenomenon which represents more incontrovertibly all the symptoms of normality” than crime.<sup>190</sup> “[S]ince there cannot be a society in which individuals do not diverge to some extent from the collective type,” he explains, “it is also inevitable that among these deviations some assume a criminal character.”<sup>191</sup> Crime, Durkheim argues, is the necessary corollary of freedom:

For [moral consciousness] to evolve, individual originality must be allowed to manifest itself. But so that the originality of the idealist who dreams of transcending his era may display itself, that of the criminal, which falls short of the age, must also be possible. *One does not go without the other.*<sup>192</sup>

If Durkheim’s analysis is correct, as I believe the fact of dissonance suggests, then the only realizable just society is one with an ineliminable level of criminality. To eliminate criminality altogether would entail a power “unparalleled in history.”<sup>193</sup>

These observations present major problems for Rawls’s exclusive focus on ideal theory, exposing its fundamental flaw: its assumption that a society without crime is not only realistic, but reasonable or desirable. Durkheim’s observations present a similar challenge to American criminal jurisprudence with its underlying assumption that criminality is an abnormal condition that must be contained. “[C]rime must no longer be conceived of as an evil which cannot be circumscribed closely enough,” Durkheim writes. “Far from there being cause for congratulation when it drops too noticeably below the normal level, this apparent progress assuredly coincides with and is linked to some

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review itself from the vantage point of conceptualizations it finds alien, questions it tends to ignore, and answers it tends to exclude.”)

190. EMILE DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD* 98 (Steven Lukes ed. & W.D. Halls trans., 1982) (1938) [hereinafter DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD*]. I do not wish to suggest that I am in agreement with Durkheim’s analyses of crime and punishment as a whole. His argument that punishment serves a positive function as an “integrating element” reinforcing society’s moral consciousness is clearly inconsistent with my approach in this Note. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 57 (W.D. Halls trans., 1984) (1933). I seek instead to differentiate Durkheim’s view of the functionality of punishment, with which I disagree, from his analysis that suggests crime is an ineliminable component of any society, with which I agree.

191. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD*, *supra* note 190, at 101 (emphasis added).

192. *Id.* (emphasis added).

193. *Id.* Durkheim uses the term “collective sentiments” instead of “power.” *Id.*

social disturbance.”<sup>194</sup> Far from being viewed as “an utterly unsociable creature, a sort of parasitic element, a foreign, unassimilable body introduced into the bosom of society,” as the criminal is in Rawls’s theory and in American criminal law, the criminal “plays a normal role in social life.”<sup>195</sup>

The existence of a certain level of crime, therefore, should not be treated as a phenomenon to be cured; rather, it should be viewed as the sign of a healthy, well-ordered society with a degree of laxity in its social life and norms. No longer should criminals be told that their nature is their only misfortune or that they are like a sickness that needs be cured; in addition, they should be told that society’s norms contribute to their misfortune. Their assumptions suitably adjusted, the “reasonable” citizens of justice as fairness and the jurists who shape American law would be forced to acknowledge the responsibility to reflect on their own norms—the responsibility to reevaluate the reasonableness of those norms, not simply to evoke them or to defend them mindlessly. Until this happens, liberalism will remain illiberal, and addressing the true sources of crime and dissonance will remain an unrealizable goal.

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194. *Id.* at 102. Conversely, when the incidence of crime or punishment rises above a “normal” level—when, for example, one in three black men between the ages of 20 and 29 is either in prison or jail, on probation, or on parole, see MARC MAUER & TRACY HULING, *THE SENTENCING PROJECT. YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I* (1995)—society should not escape serious reflection on its own norms by displacing all blame for dissonance onto the individual.

195. DURKHEIM, *THE RULES OF SOCIOLOGICAL METHOD*, *supra* note 190, at 102.

