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A reply to Yaffe

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## **Equality, Self-government, and Disenfranchising Kids: A Reply to Yaffe**

### **ABSTRACT**

Gideon Yaffe has recently argued that children should be subject to lower standards of criminal liability because, unlike adults, they ought to be disenfranchised. Because of their disenfranchisement, they lack the legal reasons enfranchised adults have to comply with the law. Here I critically consider Yaffe's argument for such disenfranchisement, which holds that disenfranchisement balances children's interest in self-government with adults' interest in having an equal say over lawmaking. Here I argue that Yaffe does not succeed in showing that these two values need to be balanced, nor that disenfranchising children is a justifiable method of achieving this balance. In my conclusion, I sketch an alternative contractualist approach to disenfranchising children that, like Yaffe's, appeals to the implications that enfranchisement has for political relations among citizens, but unlike Yaffe's, rests on empirical claims about the influence of parents on children's voting patterns rather than on a priori claims regarding who has a rightful say over lawmaking.

**KEYWORDS:** disenfranchisement, children's rights, parental rights, equality, intergenerational justice

## Equality, Self-government, and Disenfranchising Kids: A Reply to Yaffe

### 1. Introduction

Most all legal systems hold juvenile offenders to lower standards for criminal liability, sentencing them more leniently than adults convicted of equivalent crimes or (in some cases) exempting them from punishment altogether. Typically, philosophical discussions of juvenile criminal liability suppose that such leniency is justified because of psychological differences between adults and juveniles, differences that render juveniles less blameworthy, accountable, or responsible for their criminal acts. On this picture, being (say) 18 years of age or younger is not grounds *per se* for treating juveniles' criminal acts more leniently. Rather, being 18 or younger is a proxy for some other mental property, such as impulsivity, susceptibility to peer pressure, lack of moral knowledge, or having character that remains under development, that merits juvenile criminals being treated more leniently.

In *The Age of Culpability*,<sup>1</sup> Gideon Yaffe argues —convincingly, in my estimation — that this picture will not do. For one, the putative psychological differences between adults and juveniles must in fact be relevant to criminal responsibility or liability. Why, for instance, does the supposed greater susceptibility of children to peer pressure make them less liable than adults? A juvenile who decides to rob a jewelry store because her peers pressured her into it is not obviously less responsible or culpable than an adult who commits the same crime from simple greed. Furthermore, appealing to any such property, Yaffe argues, will inevitably end up being overinclusive (some adults may have the property that merits lenient treatment), underinclusive (some juveniles may lack the property that merits lenient treatment), or both.

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<sup>1</sup> Unless otherwise indicated, all parenthetical references are to this work.

Yaffe proposes that criminal leniency for juveniles ('kids' as he calls them) is instead justified on *political* rather than psychological grounds: Every offender is presumptively subject to the same moral reasons to refrain from unlawful conduct. *Ceteris paribus*, an act of arson, for example, is no less morally objectionable if performed by a kid than if performed by an adult. But adults differ from kids in being politically enfranchised, in having the right to vote and thereby to influence the laws to which they are subject. Their enfranchisement thus gives adults an additional set of 'legal reasons' to abide by the law that kids lack. Adults, after all, violate laws whose authority is, however mediately, self-imposed. A person's degree of culpability for criminal wrongdoing, according to Yaffe, depends on the strength of the reasons she has for refraining from such wrongdoing. The weightier the reasons are a person has for abiding by the law, the more we are entitled to hold them responsible for its violation. Hence, because 'the strength of a legal reason for a particular person to refrain from criminal conduct is in part a function of the degree to which he has a say over the legal facts that are constitutive of that legal reason's weight' (158), kids are subject to less weighty legal reasons for conforming to the law's demands. It would, Yaffe proposes, be unfair to hold kids to adult standards of legal culpability, since their disenfranchisement entails that their unlawful conduct does not manifest the same failure to recognize, weigh, or respond to their reasons for foregoing criminal conduct as equivalent adult conduct manifests with respect to their (adults') reasons to forego criminal conduct. Kids should therefore be 'given a break' in comparison to the liability or sanctions that apply to adult criminals.

If Yaffe's argument for penal leniency rested on the premise that kids are routinely disenfranchised, this would be significant in its own right, inasmuch as it would justify penal leniency toward kids in jurisdictions that disenfranchise them. But Yaffe is not content for penal

leniency to rest on such a contingent empirical premise. Rather, he has the more ambitious aim of showing that penal leniency for kids follows from the normative premise that they ‘*ought* to be given the lesser say over the law that we actually give them.’ (171, emphasis added). And just as his argument for penal leniency appeals to political rather than psychological considerations, so too does his argument for disenfranchising kids have a decidedly political flavor.

Disenfranchising kids, according to Yaffe, does not rest on the claim that kids lack the knowledge or psychological capacities needed to be competent voters.<sup>2</sup> After all, some disenfranchised kids have these, and some enfranchised adults lack them. (172-73) Rather, disenfranchising kids is a ‘good way’ to honor two key values: self-government, which exerts pressure to accord kids the right to vote, and equality, which exerts pressure to deny them this right the right to vote. More details on this defense will be provided in section 2; but Yaffe argues, roughly, that an age threshold for voting (a) ensures that kids come, at the time of enfranchisement, to have a say over the laws to which they are subject, while (b) limiting the rights of citizens who have children — children whose values and behaviors they are morally entitled to shape — to a **unequal and thereby unjust** say over the laws to which they and other adults are subject. An ‘age threshold’ defensibly balances these two values, according to Yaffe.

Here then is the overall argument of *The Age of Culpability*:

- [1] Kids should be treated leniently by criminal justice systems because they lack the legal reasons adults have for compliance with the law.
- [2] Kids lack the legal reasons adults have for compliance with the law because they ought to be (and nearly always are) disenfranchised.

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<sup>2</sup> For examples of recent scholarship that take psychological criteria to be central in grounding the right to vote, see Brennan (2011), Cook (2013), Priest (2016), and Peto (2018).

[3] Kids ought to be disenfranchised not due to psychological or developmental differences that render them incompetent voters but because disenfranchising kids is the best way to balance the values of self-government for kids and equality among adults.

QED. Therefore, kids should be treated leniently by criminal justice systems.

My main objective here is to show that this argument, while valid, likely falls short of being sound. At the very least, Yaffe's own defense of premise [3] is ultimately unsatisfactory. A satisfactory defense of premise [3] requires, first, showing that the two values in question in need to be balanced. In section 3 I show that Yaffe fails to demonstrate this because he does not show that parents are *entitled* to a greater influence over the law by virtue of having an entitlement to influence their kids' behavior and values, and there is good reason to suppose that the value of kids' self-government is much weightier than the value of equality among enfranchised adults, thus obviating the need to 'balance' these two values. But even supposing that there is a need for balance between these two values, a satisfactory defense of premise [3] requires showing that disenfranchising kids is a justifiable way of achieving this balance. In section 4, I argue that the value conflict in question is not uniquely remediable, or at least best remedied, by disenfranchising kids, and that disenfranchising kids would introduce intergenerational injustices as grave as the injustice it is designed to remedy.

In my conclusion, I note that despite Yaffe's apparent failure to vindicate [3], his approach to child disenfranchisement captures political dimensions of voting rights often overlooked in the literature. I sketch an alternative political approach to disenfranchising kids that turns not on *a priori* normative claims of the sort Yaffe relies upon but on empirical claims

regarding the influence of parents on kids' voting patterns and the ways in which societies subsidize procreation and parenthood.

## 2. Yaffe's Argument Sketched

Why should age be a legitimate, even obligatory, basis on which to deny individuals the vote? Yaffe argues that an age threshold for voting honors two important values.

On the one hand, by virtue of being subject to legal authority, kids appear to have a rightful claim to having a say over the law. In Yaffe's view, a state's authority to impose law rests on citizens having a say over the law such that they become 'complicit' in its establishment and enforcement. (176) Kids denied the right to vote are thus denied a key avenue with which to have a say over the law, and are thus *not* complicit in the fabrication of laws nevertheless presumed to have authority over them. To thereby subject kids to legal demands and punish them for unlawful conduct, Yaffe argues, is at odds with our presumed commitment to self-government. Indeed, that being a kid is a morally insignificant characteristic one cannot control makes their disenfranchisement reminiscent of racial apartheid. (172)

But considerations of equality amongst *adults* militate in favor of kids having a limited right of self-government, according to Yaffe. This worry arises because parents have two critical legal 'entitlements' with respect to their own kids that others lack, Yaffe observes. The first is a 'say over what their kids do,' including a right to demand that their kids comply with their directives, a right they may enforce with threats or coercion. Second, parents are entitled to have a 'say over their kids' values,' including rights to 'control their kids' educations, associations with peers, reading materials, and so on.' Crucially, Yaffe's claims about entitlements are not claims about parents' causal *efficacy* with respect their kids' choices and values. It may be that

others besides parents — siblings, teachers, peers, community leaders, etc. — in fact exert greater influence on kids' choices and values. Yaffe means instead to highlight that parents have a right to influence their own kids that excludes others having the same right. (174-75)

Given these two parental entitlements, extending the right to vote to kids would undermine adults' rights to have an equal say over the law, Yaffe argues. These two entitlements are 'mechanisms through which parents with kids would have a say over the law,' and because adults vary in the number of children they have, allowing kids to vote would give parents say over the law proportional to the numbers of kids they have, thereby undermining adults' having an equal say over the laws to which they are subject. Unequal distribution in the number of one's kids thus generates unequal, and presumptively unjust, distribution in adults' say over the law. (175) To forestall misunderstanding: Yaffe does not propose that having more kids as a matter of fact results in greater influence over the law. The nature of the injustice that (say) childless adults would suffer if kids were enfranchised is not that their own influence over the law would be diluted. It might well be. But as I understand Yaffe, their equality-based complaint is one of status: that giving kids the vote will give their parents a disproportionate and unjust *entitlement* to influence the law, quite apart from whether that entitlement in fact results in their parents having an outsize influence on the law.

For Yaffe, an age threshold represents a solution to this tension between juveniles' self-government and equality among adults: With an age threshold in place, parents come eventually to *lose* their entitlement to have a say over their kids' behavior and values. A system that never enfranchised kids would fail to honor the value of self-government; a system that enfranchised kids from birth would result in differing, and presumably unjust, entitlements among adults with respect to having a say over the law. Only a system like that present in most societies, wherein

‘parents have a say over their children’s behavior and values *while they are kids*, and when they stop being kids they come to have a say over the law’ allows for children to enjoy self-government while also honoring our commitment to ‘equality in the degree to which each of us from whom the government draws its authority have equal say’ over the law. (175)

One initial worry about Yaffe’s position is that it generates no guidance as to *what* age enfranchisement should occur. If his worries about equality are correct, then it should probably be true that societies hold the age of enfranchisement relatively steady across generations so as to give each generation a roughly equal measure of self-government. Still, even if the demand to balance self-government and equality militates in favor of age restrictions on enfranchisement, it gives no indication of when that age might be. This suggests that Yaffe’s political approach to disenfranchising kids probably cannot prescind altogether from considering competency and the psychological capabilities thought to underpin voter competency.<sup>3</sup> This worry is genuine, but not (I think) fatal to Yaffe’s position. For it is not inconsistent for comparative, political considerations to ground our having an age of enfranchisement in the first place, but non-comparative, psychological considerations to fix the age of enfranchisement. As Rawls’ hybrid theory of punishment (1955) illustrates, it is possible to justify an overall practice by appeal to one set of normative considerations while the rules or standards operative within that practice appeal to a different set of normative considerations. In like fashion, the ultimate rationale for disenfranchising kids could be, as Yaffe contends, concerns about balancing self-government and equality while the rationale for disenfranchising *this* or *that* kid is their age and the assumed lack of whatever capabilities are necessary to vote competently. (We might also imagine a voting

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<sup>3</sup> More recently, Yaffe (2020) has acknowledged that competency should play some part in determining who has the right to vote.

system that combined age and competency, as many societies do when issuing driver's licenses.)

Alternatively, Yaffe could argue that competency tracks the property that ultimately grounds disenfranchisement, namely, the parental entitlement to a say over their kids' values. In other words, competency could be a marker of when that entitlement should come to an end. In any case, strategies wherein competency operates as a distributive criterion for enfranchisement without being itself the grounds for enfranchisement are available to Yaffe.

### 3. Yaffe's Call for 'Balance'

Premise [3] of Yaffe's argument holds that because the value of self-government, which militates in favor of enfranchising kids, and the value of adults having an equal say in the law, which militates against enfranchising then, are in conflict, an age threshold wherein kids are enfranchised is necessary to balance these two values. This section will raise two objections to Yaffe's assertion that these two values cry out for balance; the next section will raise two objections to his assertion that disenfranchising kids is a defensible way to balance them.

An initial objection to Yaffe's 'balance' claim is that the purported need to balance these two values rests on a fallacy concerning one of them, namely, equality among adults with respect to having a say over law. Yaffe argues that because parents are entitled to a say over their kids' behavior and values, procreation thereby gives them a disproportionate entitlement to influence the law. Unfortunately, the latter claim seems not to follow from the former. It may well be true that in exercising their entitlement over their kids' behavior and values, parents in fact exert indirect and disproportionate influence on the law. (I return to this matter in my conclusion.) But as we noted earlier, Yaffe does not rest premise [3] on claims about parents' causal efficacy with respect to lawmaking. (174-75) Parents' having a say about their kids provides them an

entitlement to ‘exert’ influence but these are not entitlements to actually ‘have’ influence (160), and parties with equal entitlements over some state of affairs may in fact have unequal influence over that state of affairs. (167) Parents are instead entitled to a greater say over the law because they have an entitlement to a say over the kids’ behavior and values. Yet their being entitled to that say, and that say in fact leading to disproportionate influence over the law, does not entail that parents are *entitled* to that disproportionate influence. As I suggest in my conclusion, the complaints of non-parents may be more plausibly captured in terms of parents, by way of their say over their kids, exerting disproportionate influence over the law, an influence *to which parents are not entitled*. There may therefore be a need for ‘balance’ between kids’ right to self-government and the disproportionate influence parents come to have over the law. But irrespective of whether disenfranchisement might properly address this imbalance, it is not the imbalance inscribed in Yaffe’s premise [3].

Suppose however that an independent argument is available to show that parents are in fact entitled to a greater say over the law thanks to being parents. The task of ascertaining whether balance between the two values is called for still remains. Evaluating Yaffe’s claim that kids’ self-government and adults’ equality in their say over the law need to be balanced thus requires further consideration of the relative weight of both values.

Premise [3] asserts a need to balance one non-comparative value with a comparative value. Disenfranchising kids, for Yaffe, is the solution to a clash wherein kids claim a right to self-government, a right presumably asserted non-comparatively, whereas adults assert a comparative claim to *equal* say over the law. A resolution of this clash should avoid unjust outcomes that fail to accord these values their respective dues. Admittedly, morally evaluating tradeoffs between comparative and non-comparative injustices is far from straightforward,

especially when distinct goods are involved. If a policy provides some individuals a good to which they are entitled but comes at the cost of rendering the distribution of some other good among another set of individuals unequal and less just, what is the morally best course of action? I cannot hope to answer such intricate questions here. But enfranchising kids versus maintaining adult's equal say over the law does not strike me as an especially difficult case. For if kids have a right of enfranchisement, this non-comparative injustice could simply be much greater than the comparative injustice among adults that (Yaffe argues) requires disenfranchising kids in order to be adequately alleviated. Or to return to Yaffe's language of value: Why not think that kids being denied the right to vote undermines a value, self-government, to a greater extent than kids being allowed to vote would undermine another value, equality among adults regarding their say over the law? Or: Why not suppose that being enfranchised matters more than having an equal say over the law, such that, *ceteris paribus*, undermining the former is a greater injustice than undermining the latter?

To use a comparison gestured at by Yaffe's comparison of disenfranchising kids to racial apartheid: Suppose that the enfranchisement of some racial group R would dilute or render less equal the authority of individuals outside that group (call these non-R's) to influence law. For instance, the R population could be heavily concentrated in particular geographic regions so that the non-R votes would be less determinative in deciding elections, etc. I venture that few would take the non-R's complaints of being treated unequally as having much gravity. For if R's are entitled to vote as a matter of right, denying them the vote appears to be a graver injustice than the inequalities that would result among those *who already have the right in question*. Similarly, then, for denying kids the franchise. That kids must bear the moral costs of adults having unequal say over the law by having *no say over it* hardly seems plausible.

This suggests even if parents possess a greater entitlement to a say over the law than non-parents, the wrong thereby done to the latter does not measure up to the wrong of the remedy — disenfranchising kids — Yaffe offers as a solution. This raises the bar Yaffe’s defense of premise [3] must meet: It must be the case that the magnitudes of the injustices in question do not already tilt so heavily in the direction of disenfranchising kids that calls for ‘balancing’ this injustice with the injustice wherein some adults have a lesser say over the law are inapt.

Thus, we have reason to doubt that equality among adults’ entitlement to a say over the law, one of the values invoked in Yaffe’s premise [3], is in fact at odds with enfranchising kids, inasmuch as that entitlement cannot be vindicated (as Yaffe attempts to) by appeal to parents’ entitlement to a say over their kids. In addition, the magnitude of the injustice involved in denying kids the right to vote is evidently larger than the magnitude of the injustice involved in some adults having a greater say over the law, suggesting that whatever tension exists between these two values, kids and their right to self-government exert the greater normative pull. There may not therefore be two values calling for balance here.

#### **4. Disenfranchising Kids as a Remedy**

The previous section cast doubt on Yaffe’s claim that there is a conflict of values necessitating balance. This section casts doubt on disenfranchising kids as the best method of addressing this conflict.

Yaffe proposes disenfranchising kids so as to balance these two values. But if the imbalance stems partially from inequities among adults with respect to their say over the law, these inequities can be addressed without (wholly) disenfranchising kids. Suppose that A and B are compatriots, and then A has a child, Z. This, Yaffe, contends, would result in an inequity

between A and B with respect to their say over the law were Z fully enfranchised from (or near) birth because A would have a say over two votes whereas B would have a say only over one, his own. Yet equity could be restored by rebalancing the electoral authority among the three parties. Suppose that rather than A, B, and Z each being given one vote, B retains one vote while A and Z are given the equivalent of one-half of a vote, until the time of Z's full enfranchisement at adulthood, at which time they are given a full vote. Such an arrangement does not disenfranchise Z, but also does not dilute B's authority over the law relative either to A or to A and Z combined. And one might argue for it on grounds for fairness inasmuch as it makes A, Z's parent, rather than B the bearer of the political 'cost' of bringing Z into existence, for A ends up having a lesser say overall after Z exists than she had prior. Granted, this arrangement seems at odds with the principle of 'one person, one vote,' since A and Z end up with only one-half of a vote. Nevertheless, it illustrates that there are viable alternatives for balancing self-government for kids with equality among adults that do not involve disenfranchising kids from birth, a possibility Yaffe seems to overlook due to an antecedent assumption that the inequality among adults that concerns him can only be alleviated on the backs of kids.

A final basis for doubt about Yaffe's justifying child disenfranchisement as a way to balance these two values is that his solution introduces an intergenerational injustice of its own at least as significant as the one it seeks to mitigate. To see why, we must return to Yaffe's own reasoning in support of his conclusions about inequality among adults resulting from procreation.

Yaffe's reasoning is difficult to make out, but here is what I take to be a faithful reconstruction (176-77): Let us imagine two successive generations existing at a given time  $t$ : a generation of adults, G1, and a generation of all of G1's offspring, G2. He writes: 'A dedication to self-government places us under pressure to arrange things so that we have a say over not just

today's law, but also tomorrow's. If our government is to persist, it must continue to be government *by us*. (176)' That self-government requires a say over future law is plausible: After all, the future is when we will be *subject* to laws established at *t*. There must therefore be 'mechanisms' in place at *t* to ensure that G1 can have a say over the laws subsequent to *t*.<sup>4</sup> Giving G1 parents a say over their G2 kids is such a mechanism. But members of G1 are entitled to an *equal* say over the laws at *t* and thereafter, an equality which is threatened if members of G2 — G1's offspring — are enfranchised; for then the magnitude of say over the laws enjoyed by individual members of G1 can be influenced by how many kids they have.

A weakness of this argument is that members of G2 seem to have a similar basis for an equality-based complaint as do those members of G1 with few or no children. Prior to their being enfranchised, they have no say over the laws either at *t* or at subsequent times while also being subject to the law's demands at those very times. During their minority, they lack a say over today's law and tomorrow's. Granted, enfranchising G2's members upon reaching a prescribed age will give them a say at that point and into the future. But they are not, so far as say over the laws goes, equal in status to members of G1, who have a say (a) over the laws at *t*, (b) when G2 reaches adulthood, and (c) thereafter. G2 only has a say at (b) and (c), despite the fact that they are subject to the law at (a), (b), and (c). The burdens that G2 bears in being subject to the law in comparison to their say is thus greater in proportion to the kindred burdens borne by G1.

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<sup>4</sup> Yaffe says that members of G1 must have a say even when they are *dead*. (176, 177) This is controversial: One might wonder both whether the dead continue to have interests and why they should have a say over laws to which they are no longer subject. Because this post-mortem extension seems unnecessary for Yaffe's argument, I omit it here.

And the only basis for G1's greater influence here is purely a matter of temporal sequence: G1 exists earlier in time than does G2. But it is hard to see how this is anything but an arbitrary justification for G1 exerting greater influence on G2 than G2 itself does.

Note that I have not disproven Yaffe's claims that enfranchising kids would be unequal and hence unfair to G1 adults. I have instead demonstrated that the same considerations show that *not* enfranchising G2 — kids — grounds inequalities and unfairness intergenerationally. In effect, Yaffe ends up endorsing an asymmetry between generations at odds with the very notions of self-government and equality to which he appeals. That parents (or adults) get the first opportunity at crafting the laws to which subsequent generations are subject ought not result in those subsequent generations having a comparatively lesser say in the laws to which they are subject.

Here Yaffe may respond that it is incorrect to ascribe greater burdens to G2 than to G1. G1, after all, did not come to be *ex nihilo*; it too is the product of a prior generation, Generation Zero. And just as G2 bears greater burdens than G1, G1 stands in the same relationship to G Zero, such that it does not have say over the law for the same timespans as G Zero does. If so, then G1 and G2 are equally burdened, albeit by different antecedent generations (G2 by G1, G1 by G Zero). Thus, G2 has no special ground for complaint on intergenerational grounds.

In response, I concede that G1 is encumbered by G Zero in a similar *way* as G2 is encumbered by G1. Indeed, only G Zero, a proverbial first generation, can avoid being so encumbered. But there are reasons to doubt that G1 and G2 are *equally* encumbered. Certain empirical realities tend to give prior generations a greater influence, even if not a greater legal say, than subsequent generations. Large modern societies change their laws slowly and cumbersomely. Indeed, constitutional regimes are often designed to generate legislative inertia.

Furthermore, material realities (a society's built infrastructure, for example) often exert an outsized influence on legislation; a society whose transportation system is automobile-based will find it difficult, perhaps due to the sunk costs fallacy, to replace that automobile-based infrastructure even if there is good reason to do so. We humans are also generally prone to status quo bias that leads us to overemphasize immediate costs and downplay long term benefits. Being a member of an earlier generation will therefore likely give someone greater legislative influence than being a member of a later one, and these effects are likely to concatenate: G Zero is likely to be more influential over the long run than G1, and G2 is likely to have its influence limited both by G1 and G Zero. But again, it is hard to see what justifies such asymmetries in influence. It rather seems to be an ethically unsatisfactory instantiation of a 'first come, first served' principle

Yaffe may respond that the intragenerational inequality that worries him and the intergenerational inequality I just outlined cancel one another out — that the injustice among existing adults that results from enfranchising kids is of roughly equal magnitude as the injustice between generations that results from disenfranchising kids. That conclusion is damaging enough to Yaffe's cause, since he can no longer assert the former injustice as grounds for disenfranchisement though. But even that conclusion is too hasty, for there are grounds for holding that the intergenerational injustice is the greater one. After all, there will be inequalities within any group of adults with respect to the say they may rightfully exert over the law. For example, some individuals will come to have a greater say over lawmaking. For example, within a representative democracy, legislators have a greater say over law than do ordinary citizens, as will high-ranking judicial officials. Conversely, some will come to have a lesser say. Disenfranchisement is sometimes used as a punishment for crime.<sup>5</sup> Non-citizen immigrants are

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<sup>5</sup> For a critique of disenfranchisement as a form of punishment, see Cholbi (2002).

disenfranchised inasmuch as they are subject to the laws of the nation to which they immigrated but, until citizenship is granted them, they only have a say over the laws of the nation from which they immigrated. In societies where registration is required to vote, many citizens forego their voting rights by failing to register.

All the same, these phenomena underscore that having a say regarding the laws to which one is subject is at least sometimes a matter of voluntary choices adults make. Whether and how one's having a say should be sensitive to one's choices raise complex questions about political justice that I cannot pretend to answer here. Yet they highlight how the disenfranchisement of kids results in *unchosen* inequalities, whereas the inequality that concerns Yaffe is by and large a chosen inequality. Again, **Yaffe emphasizes that** disenfranchisement of kids is particularly troubling because being a kid is not a characteristic one can control, making their disenfranchisement reminiscent of racial apartheid. (172) But whether to procreate is often a characteristic one *can* control, at least in contemporary societies. Those who, in a society where others procreate, opt to be childless end up with a lesser say over the laws to which they are subject, according to Yaffe. Yet it should not go unnoticed that this relative disenfranchisement will usually be self-disenfranchisement, and as the juridical dictum has it, *volenti non fit injuria*. It would probably be ill-advised to consider the effects on one's relative say over the laws to which one is subject when thinking about whether to become a parent. Still, within the parameters set by Yaffe's argument, this weakens the claim of those whose lack of procreation renders them less enfranchised than those who do. Disenfranchised kids are faultlessly disenfranchised, whereas those adults whose say over the laws is diluted by their choices not to procreate can only look to themselves to blame. Thus, in my estimation, the intragenerational

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inequality Yaffe cites is less of an injustice than the intergenerational inequality I have identified. If so, then his case for disenfranchising kids is correspondingly weaker.

## 5. Conclusion

Yaffe's argument for reducing the criminal liability of disenfranchised kids is highly innovative, as it appeals to political, rather than psychological or metaphysical, properties of kids. Nevertheless, I do not believe he has discharged the argumentative burdens needed to support premise [3], that kids ought to be disenfranchised. **It is not clear that there is a conflict between kids' self-government and adults' right to equal say over the law that calls for 'balance', nor is it clear that disenfranchising kids is the only way to provide that balance or that it does so without introducing comparable intergenerational injustice.**

My criticisms notwithstanding, I come not to bury Yaffe but (in part) to praise him. For it is worth noting that Yaffe's argument for disenfranchising kids is novel, and in my estimation, captures intuitively important concerns about voting rights and enfranchisement, concerns largely overlooked in the literature which approaches enfranchisement as a matter of psychological capabilities.

In deciding who may vote, societies are deciding who may influence electoral outcomes. They are thus allocating a good or an opportunity, indicating that enfranchisement can be seen as a matter for *comparative* justice. On the psychological approach Yaffe criticizes, enfranchisement is instead classified as a matter for *non-comparative* justice. For if the question of whether to enfranchise someone turns on whether she possesses some psychological capacity or other, then we seem to be appealing (broadly) to individual desert. If she possesses the relevant property, then she deserves the chance to vote and denying it to her wrongs *her*. Yaffe's

political rationale for disenfranchisement instead looks to how, by giving individuals the right to vote, we allocate goods in ways that affect the political relations citizens bear to one another. And it seems possible to allocate those goods in ways that generate comparative wrongs, i.e., wrongs based not on the absolute level of such goods that particular individuals enjoy but on relations between individuals rooted in or arising from allocations of such goods. Consider, for instance, the following scenario:

*Enhance to Enfranchise:* Within polity P, an individual must have property F in order to vote. Juveniles do not have F, but an enterprising neuroscientist invents an enhancement drug that, with a single administration to juveniles, causes them to have property F to the same degree that voting-eligible adults do. The drug is inexpensive, and thousands of parents immediately purchase the drug and administer it to their children. As a result, tens of thousands of juveniles are provided the right to vote in P ‘overnight’.

If psychological properties were all that were relevant to enfranchisement, then citizens of P could have no conceivable basis to complain about these newly enfranchised kids. That conclusion may be correct, but this scenario suggests that is it not obviously correct. That P’s citizens have somehow been wronged despite enhanced juveniles having property F has some intuitive pull. Of course, my discussion of Yaffe’s defense of premise [3] has concluded that his defense does not vindicate this intuitive pull. Nevertheless, that the complaints of P’s already enfranchised citizens cannot simply be dismissed out of hand implies that enfranchisement has a comparative or political dimension — that it cannot be settled entirely by psychological facts about would-be voters. Hence even if Yaffe’s *particular* version of this ‘political’ strategy for

defending child disenfranchisement falls short, he has introduced into the dialectic a promising new approach to the ethics of voter enfranchisement.

What might a more successful ‘political’ approach to disenfranchisement look like? I lack the space to fully articulate such an approach, but here is a sketch of an alternative that resembles Yaffe’s:

One oddity of Yaffe’s argument is that ‘having a say’ is a purely normative notion. Parents, he says, are entitled to shape their children’s behaviors and values, even if as a matter of fact they do not. Surprisingly, Yaffe does not appeal to the arguably less controversial claim that parents generally *do* influence their children’s behavior and values, especially when it comes to voting patterns. A wide body of research indicates that parents’ political leanings and voting patterns are frequently replicated in their children. For one, voting itself appears to be a habit in which children generally emulate their parents: Whether a person votes throughout their lifetime often depends on whether she votes in the first elections for which she is eligible, a fact in turn shaped by whether a person’s parents regularly voted when she was a child. (Franklin 2004) Children’s political leanings and voting patterns tend also to reflect those of their parents. (Ventura 2001, Jennings et al. 2009, Lyons 2016) Family socialization seems to play an important role here, with some researchers proposing that early family influence acts as a ‘funnel’ that determines subsequent factors that shape political leanings and voting patterns. (Campbell et al. 1960) But some researchers suggest heredity and biological factors also help to explain the similarities between parents’ politics and their children’s. Studies of genetically identical twins have concluded that about half of partisan identification is due to heredity. (Alford et al. 2005, Fowler et al. 2008, Settle et al. 2009) *Some caution is in order here. Individuals’ political leanings and behaviors cannot be straightforwardly inferred from their*

genetic makeup, (Charney and English 2012, Charney and English 2013) and of course, children do not mindlessly or uncritically adopt their parents' political attitudes. How much children know about their parents' political attitudes, how frequent and consistent parents' expressions of their political attitudes are, and how supportive parents are also appear to matter in determining whether children's political attitudes reflect those of their parents'. (Ojeda and Hatemi 2015) And as people age, other factors (such as the political beliefs of one's spouse) begin to play a larger role. Nevertheless, parents and their political attitudes appear to have the single largest causal impact on our political attitudes and voting behaviors.

If this is correct, then we can imagine a different version of Yaffe's observation regarding the inequality that results from enfranchising kids, namely, those who procreate are very likely to create more voters who vote like themselves, so that the relative political influence of non-procreators is lessened. By itself, this may not be especially unjust, as my comments about the voluntariness of procreation in section 4 demonstrated. Nevertheless, the dilution of their political influence seems to ground a complaint on the part of non-procreators against the class of procreators. And one seemingly reasonable proposal on the part of procreators is that the likely dilution of their political powers be mitigated by disenfranchising kids until some age of presumed competence or psychological independence from their parents. Such a proposal would, in a Yaffe-like spirit, balance two values: One of these Yaffe invokes kids' having the opportunity for self-government. But the other value is not grounded in non-procreators' claim to equal political authority, but in the value of equal influence over the political process. This is not to suggest that disenfranchising kids would necessarily be the answer to the problem of unequal influence over the political process. Other benefits and burdens associated with procreation and parenthood would need to be considered: In the vast majority of societies, public resources are

provided to support procreation and parenthood, including public schooling, health care, tax exemptions, and the like. That adds to the costs non-procreators bear with regard to others' procreating. Of course, procreation and parenthood can have benefits to non-procreators too. Thus, the question of whether to disenfranchise kids would need to be put in a wider context of how societies might fairly distribute the benefits and burdens of procreation across procreators and non-procreators. Still, it is not difficult to envision a kind of hypothetical negotiation in which procreators and non-procreators seeking to find an equitable distribution of burden and benefit with respect to procreation and its material and political effects end up agreeing that disenfranchising kids is part of that distribution. Hence, it is possible to imagine that, in a contractualist spirit, the disenfranchisement of children could be a measure that no one could reasonably reject as the basis for an intra- and intergenerational compact regarding how to distribute the burdens and benefits of procreation within society.

Addressing the question of disenfranchising kids within an envisioned contractualist negotiation also enables some of the objections that beset Yaffe's solution to be addressed, at least in principle. For one, such a negotiation would not operate from the false presumption that parental entitlements to a greater say over their kids' behavior and values thereby gives them a greater say over the law. Moreover, it would allow the contracting parties to consider where kids' right to self-government fits within a larger nexus of values and concerns held by procreators and non-procreators. Such a hypothetical negotiation could acknowledge, as I argued in section 3, that kids' right to self-government is indeed a very weighty value, probably more valuable in the abstract than equality among adults with respect to their say over the law. But kids' right to self-government must be weighed against non-procreators' contributions to others' procreation, etc. In a similar vein, such negotiation could take into account the worries about

intergenerational justice I raised in section 4. Parents, acting as proxies for their children, could argue for political mechanisms that foster political dynamism rather than sclerosis (term limits for political leaders, etc.) so as to ensure that prior generations do not exert unfair influence over the politics of subsequent generations.

Again, this proposal is but a sketch, and much more would need to be said to defend the claim that disenfranchising kids would *necessarily* result from such bargaining. But by appealing to empirical premises, this strategy moves away from Yaffe's *a priori* defense of disenfranchising kids toward a more concrete, *a posteriori* political defense of their disenfranchisement that reflects the social realities of procreation and parenthood. As such, it retains the essential insight of Yaffe's political approach to enfranchisement: that considerations of relative political influence, not just psychological facts about voter competency, are fundamental to thinking about the right to vote.<sup>6</sup>

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<sup>6</sup> ACKNOWLEDGEMENTS

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