

POLITICS AND JUSTICE:

A CRITICAL LOOK AT THE DISENFRANCHISEMENT OF FELONS IN AMERICA

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One can only speculate how a victory for Al Gore in the 2000 presidential election may have affected American life. What would his reaction have been to the terrorist attacks of September 11, 2001? Would the United States be engaged in a war with Iraq? Would the American people still be able to boast their nation's first African American president? The close 2000 election with its infamous "hanging chads" sparked renewed interest in election law, and some scholars pointed to the disenfranchisement of felons in Florida as a determinative issue. A new wave of scholarship emerged as academics began to reevaluate this longstand-

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ing practice. Like their predecessors, recent scholars address the philosophical, political, and racial implications of felon disenfranchisement, and in most cases, they struggle to find justification for this widespread practice.¹ In light of the manipulations of disenfranchisement law for political advantage that mar America's history, this scholarship represents a salient reevaluation of current disenfranchisement law and the ideologies behind it.

The disenfranchisement of criminals for retribution and deterrence is well established in Western legal tradition.² Ancient Greek society, which prohibited certain types of convicts from appearing in court, delivering public speeches, and voting, set the precedent of disenfranchisement.³ Medieval England also deprived felons of many of their political rights, deeming them "civilly dead," and as a consequence of this loss of legal protection, offenders became vulnerable to assaults on their person or property.⁴ The United States has continued in the Western tradition of disenfranchisement, but the history of disenfranchisement

1 Katherine Shaw, *Invoking the Death Penalty*. 100 NW. U. L. REV. 1439, 1443 (2006).

2 Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States*, 109 THE AMERICAN JOURNAL OF SOCIOLOGY 559, 563 (2003), accessible at <http://www.jstor.org/stable/3568574>.

3 *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1301 (1989), accessible at <http://www.jstor.org/stable/1341296>.

4 Michael J. Cholbi, *A Felon's Right to Vote*. 21 LAW & PHILOSOPHY 543, 543 (2002), accessible at <http://www.jstor.org/stable/3505059>, and Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*. 2 PERSPECTIVES ON POLITICS 491, 492 (2004), accessible at <http://www.jstor.org/stable/3688812>.

in the United States suggests that the laws depend less on traditional philosophies such as retribution and deterrence, which are themselves vulnerable to challenge, than on the pursuit of political advantage, which often involves racial discrimination.

Excluding criminals from political participation has been an accepted practice in the United States from its beginning, though the prevalence and scope of felon disenfranchisement laws rose significantly in the 1840s and then again during the Reconstruction period, continuing to rise through the twentieth century.⁵ Several of the original colonies disenfranchised their felons, and some state constitutions of the eighteenth century explicitly prohibited felons from voting. Most state constitutions, however, simply permitted legislatures to disenfranchise felons, and a review of disenfranchisement history shows that an increasing number of state legislatures have taken advantage of this authorization.⁶

Prior to 1840, only four of the twenty-six states disenfranchised felons, but by 1850, over one-third of states prohibited even ex-felons from voting.⁷ This period saw an expansion not only of the quantity but also of the scope of voting restrictions, which included a wider range of offences and thus a greater number of

5 Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*. 2 PERSPECTIVES ON POLITICS 491, 492 (2004), accessible at <http://www.jstor.org/stable/3688812>, and Behrens, *supra* note 2, at 564.

6 Behrens, *supra* note 2, at 563.

7 *Id.* at 564.

individuals.⁸ On the surface, this first wave of disenfranchisement laws may have been a reaction to the expansion of voting rights to non-propertied and other white males, yet, as researchers Jeff Manza and Christopher Uggen note, “this era has not been systematically investigated by historians or other social scientists and thus relatively little is known about the reasons behind this first upsurge of disenfranchisement laws.”⁹ While the cause of this wave is uncertain, the reasons for the second wave are straightforward and generally agreed upon.

The Fifteenth Amendment, passed in 1870, extended voting rights to males of all races. Opposition to this amendment was fierce as several Northern, Democratically-controlled states initially refused to ratify.¹⁰ Fearing the political power of newly enfranchised African-Americans, states and municipalities responded with a flurry of Black Codes and Jim Crow laws, and many states passed their first laws restricting felon voting in the decades that followed. Some states responded while African-American enfranchisement was only a threat and disenfranchised felons while the Amendment was still being contested.¹¹

The tension over felon disenfranchisement in the twentieth century has been attributed to “the clash between the desire

8 Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*. 2 PERSPECTIVES ON POLITICS 491, 492 (2004), accessible at <http://www.jstor.org/stable/3688812>.

9 *Id.*

10 Behrens, *supra* note 2, at 597.

11 *Id.* at 585-86.

to maintain social and political order versus the desire to extend civil rights and liberties to all citizens” (“Public Attitudes”). Americans have sought to reconcile these competing interests by drawing greater distinctions between felons serving time and ex-felons who have completed their sentences. As a result of another wave of restrictions beginning in 1889, three-fourths of states had disenfranchised ex-felons by 1920, with Hawaii (upon statehood in 1959) being the last state to do so.¹² This trend reversed in the 1960s and 1970s, the height of the civil rights movement, as seventeen states repealed voting restrictions on ex-felons.¹³ By 2002 five more states had followed in liberalization, though nation-wide suffrage was denied to ex-felons that same year with the defeat of a U.S. Senate measure that would have guaranteed their right to vote in federal elections.¹⁴ In contrast to the ballot rights afforded ex-felons in the twentieth century and as a result of efforts by politicians on both sides of the aisle to gain votes by keeping up a punitive image, every state except for Maine and Vermont had a broad felon disenfranchisement law in 2002, representing the highest percentage of states in United States history.¹⁵

12 *Id.* at 564.

13 Manza, *supra* note 8, at 493.

14 Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States*, 37 STATE & LOCAL GOV'T REV. 49, 50 (2005), accessible at <http://www.jstor.org/stable/4355386>, and Behrens, *supra* note 2, at 573.

15 Behrens, *supra* note 2, at 564, and Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AMERICAN SOCIOLOGICAL REVIEW 777, 795 (2002), accessible at <http://www.jstor.org/stable/3088970>.

Disenfranchisement of felons can be approached from several perspectives, including philosophical, political, and racial. The philosophical rationale rests on conceptions of justice derived from the liberal legal model and on perceived beneficial social consequences.¹⁶ These arguments rely heavily on the Lockean social contract and tend to lend stronger support for the disenfranchisement of current inmates than for those who have completed their sentences.¹⁷

The argument from justice, or desert, is represented by the intuitive view that because criminals have broken a community's laws, they no longer deserve to help shape the laws through voting.¹⁸ This intuition is theoretically justified through retributivism and forfeiture. According to retributivism, breaking laws is a political act and therefore demands a political consequence.¹⁹ Further, such retribution is seen as proportional since it is applied only to felonies, the most serious acts.²⁰ To counter these claims of retributivism, opponents of felon disenfranchisement argue that though criminal behavior breaks laws, the offence may not be political in nature and that proportionality can be, and in fact is, achieved by other means (variable severity of punishments) apart

16 Michael J. Cholbi, *A Felon's Right to Vote*, 21 LAW & PHILOSOPHY 543, 544 (2002), accessible at <http://www.jstor.org/stable/3505059>.

17 Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AMERICAN SOCIOLOGICAL REVIEW 777, 794 (2002), accessible at <http://www.jstor.org/stable/3088970>.

18 Cholbi, *supra* note 16, at 545.

19 *Id.* at 545.

20 *Id.* at 548.

from disenfranchisement.²¹

The concept of forfeiture is supported by arguments that contend that the moral status of criminals is altered by their criminal behavior such that they forfeit their standing as right holders.²² As a consequence of this forfeiture, society may permissibly treat criminals in a way that would otherwise be unjust.²³ To counter this claim, many appeal to the need for appropriate punishment, insisting that criminal behavior does not eradicate all rights and not all crimes specifically deserve the repeal of ballot rights.²⁴ Some scholars, considering the facts that criminals are obviously not deprived of the right to due process and that disenfranchisement is independent of the judge-imposed sentence, conclude that “it is very possible that the due process clause prevents a state from taking away the right to vote solely by legislative and administrative action, without an opportunity for a hearing.”²⁵

Emphasizing that permissibility does not equate with desirability, opponents of disenfranchisement insist that, according to Lockean social contract theory, of which criminal behavior constitutes a breach, to be justly implemented, disenfranchisement must serve some positive purpose in society, such as making crime “an ill bargain to the offender, [giving] him cause to repent, and [ter-

21 *Id.* at 546-48.

22 *Id.* at 550.

23 *Id.*

24 *Id.* at 553.

25 *The Need for Reform of Ex-Felon Disenfranchisement Laws*, 83 *YALE L.J.* 580, 596-97 (1974), accessible at <http://www.jstor.org/stable/795357>.

rifying] others from doing the like.”²⁶ Proposed beneficial social consequences include “purity of the ballot box”, deterrence, and rehabilitation.

The main point of advocates of “purity of the ballot box” or self-defense justifications is that “felons have demonstrated their lack of virtue and are likely to vote to weaken existing criminal laws.”²⁷ The assumption that either felons or ex-felons are particularly likely to vote to weaken the criminal justice system or to otherwise abuse the ballot faces a marked lack of supporting evidence.²⁸ Squelching dissent by depriving a group of citizens the right to vote based on their likely voting preferences undermines the very purpose of elections in a free society.²⁹ Also worth noting, apart from silencing dissent, prohibiting felons from voting based on their likely voting patterns defies the principle that our “criminal justice system ... does not have the right to punish the ex-criminal in advance on a basis of probability.”³⁰

Another proposed social good resulting from felon disenfranchisement is deterrence, the view that disenfranchisement “plays a role in preventing crime, serving to deter both actual and potential lawbreakers from future criminal activity.”³¹ Aware of the many studies that show lengthy prison sentences to have no

26 Cholbi *supra* note 16, at 454.

27 *Id.* at 555.

28 *Id.* and *The Need for Reform*, *supra* note 25, at 590.

29 Cholbi. *supra* note 16, at 556.

30 Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1173 (1994), accessible at <http://www.jstor.org/stable/3312504>.

31 Cholbi, *supra* note 16, at 557.

significant deterrent effect on crime and skeptical that the threat of disenfranchisement would provide a stronger deterrent to potential criminals than harsh prison terms, many opponents of felon disenfranchisement deny deterrence as a reasonable justification for disenfranchisement.³² Perhaps the most convincing evidence of the ineffectiveness of disenfranchisement as a deterrent is the fact that the general public, including most potential criminals, is unaware of disenfranchisement as a potential consequence of conviction.³³

Proponents raising rehabilitation as a social good that justifies felon disenfranchisement may frame their argument as follows: “Perhaps by being disenfranchised, felons are reminded of their past criminal acts. Thus, they are more likely to commit themselves to being reformed and rehabilitated.”³⁴ Opponents argue that the benefit of this potential good is outweighed by the potential, and more likely, negative effects of disenfranchisement on felon rehabilitation. To them, reintegration into the community is essential to rehabilitation since alienation, a sense of helplessness, and disregard for authority are at the root of criminal behavior. Disenfranchisement only serves to confirm these destructive attitudes.³⁵ Research on the process of transitioning criminals from prison back into society has demonstrated the importance of successful reintegration to avoiding recidivism, and politi-

32 Harvey, *supra* note 30, at 1172.

33 *Id.* at 1172, and Cholbi, *supra* note 16, at 557.

34 Cholbi, *supra* note 16, at 558.

35 *Id.*

cal activity has been identified as a milestone of reintegration.³⁶ Thus, it is argued, disenfranchisement may actually contribute to increased repeat offences.³⁷ As a punishment that encourages recidivism, fails to deter crime, and silences dissent while being only questionably permissible as a form of appropriate, proportional forfeiture or retribution, felon disenfranchisement rests on a precarious philosophical foundation.

Since the number of those disenfranchised is generally perceived as being too small to exert significant political influence, it is often assumed that felon disenfranchisement may safely be relegated to philosophical or legal discussions.³⁸ Accordingly, studies addressing the politics of disenfranchisement often take a historical, descriptive approach.³⁹ However, scholars are noting an upsurge, perhaps initiated by the drama of the 2000 presidential election, in work investigating the political impact of disenfranchisement.⁴⁰ This new scholarship indicates a growing recognition that the political impact of disenfranchisement is not merely a fascinating historical phenomenon but rather a serious matter with present-day import.

Several studies have been conducted that apply estimates of felons' likely voting behavior to past elections to determine what

36 Manza, *supra* note 8, at 502.

37 Harvey, *supra* note 30, at 1171.

38 Uggem, *supra* note 17, at 780.

39 Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States*, 37 STATE & LOCAL GOV'T REV. 49, 50 (2005), accessible at <http://www.jstor.org/stable/4355386>.

40 *Id.* at 50.

the impact would have been. According to these models, enfranchised felon populations would have had determinative impact on both presidential and senatorial elections. Because felons are likely to be poor and racial minorities and individuals of this demographic profile are more likely to vote for the Democratic Party, most people expect that, overall, enfranchisement would be a political gain for Democratic candidates.⁴¹ For instance, a survey published in 2002 found that in fourteen out of the previous fifteen senatorial elections, approximately seven out of ten ballots cast by felons would have been for a Democrat.⁴² Several studies confirm that two presidential elections and seven senatorial elections may have been altered if felons had had the right to vote, and Democrats may even have maintained control of the Senate throughout the 1990s.⁴³

The presidential election of 2000 is the most dramatic example of the potential impact of disenfranchisement, for scholars believe that approximately 60,000 members of Florida's ex-felon population would have voted Democratic. Thus, even if only ex-felons had been allowed to vote in Florida, the additional votes for Gore would easily have provided the necessary votes to reverse Bush's victory.⁴⁴ The importance of felon disenfranchisement is recognized by politicians, as evidenced by an Alabama Republican Party Chairman's reaction to a bill that would restore

41 Uggem, *supra* note 17, at 777.

42 *Id.* at 786.

43 *Id.* at 789-90, and Manza, *supra* note 8, at 497.

44 Uggem, *supra* note 17, at 792.

some ex-felons' voting rights: "...we're opposed to it because felons don't tend to vote Republican".⁴⁵

The 2000 presidential election brought attention to the burdensome and potentially politically-driven restoration process that accompanies a system of permanent disenfranchisement. Permanent disenfranchisement denotes a "regime [where] convicted felons may not vote unless they obtain a pardon or other type of restoration order from the state's governor or from the state's parole or pardons board."⁴⁶ The Florida Department of Corrections drew criticism as word spread that it had granted approximately 50% fewer restorations in 2000 than it had a decade earlier.⁴⁷

In addition to permanent disenfranchisement, state policies on the disenfranchisement of felons in the United States can be categorized as modified permanent disenfranchisement or restoring disenfranchisement and may shift from one category to another with a single legislative act.⁴⁸ Modified permanent disenfranchisement states have limits on their disenfranchisement, such as Arizona and Maryland, which only disenfranchise felons after their second offence, and restoring states, such as New Mexico and Texas, have ceased to disenfranchise ex-felons.⁴⁹ Whether motivated by political self-interest or pressure from the continued

45 Yoshinaka, *supra* note 39, at 50.

46 *Developments in the Law: The Law of Prisons*, 115 HARV. L. REV. 1838, 1943 (2002), accessible at <http://www.jstor.org/stable/1342597>.

47 *Id.* at 1944.

48 *Id.* at 1943.

49 *Id.* at 1948.

civil rights movement, several state legislatures operating within each of these systems have recently expanded felon ballot rights.⁵⁰ Kentucky and Nevada, for instance, which, like Florida, practice permanent disenfranchisement, have significantly simplified their restoration processes in recent years.⁵¹ Not all recent state legislation has been liberalizing, however. Between 1975 and 2004, 11 states have adopted more restrictive disenfranchisement laws, while 13 have eased up on their limitations, and three have passed both kinds of legislation.⁵²

Reacting to state-imposed voting procedures and prerequisites that, in effect, undermined the intent of the 15th Amendment, the Voting Rights Act of 1965 officially ensured genuine equal suffrage to all United States citizens. Yet, many scholars who take a racial approach to the discussion of felon disenfranchisement are concerned that the largely ignored racial disparities in the prison system jeopardize the democratic rights of racial minorities.⁵³ Of particular concern are the possibilities of discriminatory intent in disenfranchisement legislation and unfair convictions. Where discrimination is found, the matter is often addressed through litigation in state courts.

Evidence of the discriminatory nature of current felon disenfranchisement laws includes the finding that changes to disenfran-

50 Manza, *supra* note 8, at 499.

51 *Developments*, *supra* note 46, at 1946.

52 Manza, *supra* note 8, at 499.

53 Uggen, *supra* note 17 at 780, and Marie Gottschalk, *The World's Warden: Crime, Punishment, and Politics in the United States*, DISSENT (Fall 2008).

chisement laws that increase restrictions on felon voting are correlated to the percentage of non-white prisoners within a state, or “racial threat.”⁵⁴ Racial threat’s influence on disenfranchisement law is not new in American practice and is still observable today. Recognition of the large Mexican and Asian populations in the Western territories during the nineteenth century, when considering the passage of felon disenfranchisement legislation by every Western state besides Utah and Montana within a decade of statehood, has lead contemporary scholars to propose that the actions of these states amount to “attempts to limit suffrage of the non-white population.”⁵⁵ Such racially motivated efforts were more blatant in the Reconstruction era, for many of the state laws adopted during this time appeared to target crimes for which African Americans were especially likely to be convicted.⁵⁶ Under these laws, Alabama’s non-white prison population swelled from 2% in 1850, to 74% in 1870, rendering the impact of disenfranchisement laws disproportionately heavy on the black population.⁵⁷

Racial disparity is prevalent in the disenfranchised felon population to this day, with blacks being disproportionately represented.⁵⁸ Approximately one out of every six African- American men is presently disenfranchised because of a felony conviction.⁵⁹ Though no racial injustice is incurred by disenfranchisement if

54 Behrens, *supra* note 2, at 583.

55 *Id.* at 598.

56 Manza, *supra* note 8, at 492.

57 Behrens, *supra* note 2, at 598.

58 Harvey, *supra* note 30, at 1151.

59 Manza, *supra* note 8, at 499.

criminal justice is administered fairly across races, many scholars contend that the law, especially drug law, has been applied disproportionately and thus the disenfranchisement of felons constitutes an unlawful dilution of the black vote.⁶⁰ The huge disparity between the percentage of drug users that are black and the percentage of people arrested on drug charges that are black indicates that the drug law has been unfairly applied at the expense of blacks.⁶¹ The greater likelihood of drug sweeps to be conducted in urban neighborhoods and harsher sentences associated with crack rather than powder cocaine do little to waylay concerns about injustice.⁶²

While racist intent must be drawn through inference in the above examples, the history of many felon disenfranchisement laws is much more explicit. In 1901, for instance, Alabama's Constitutional Convention added crimes of "moral turpitude" to felonies meriting disenfranchisement, the convention's president arguing for the "manipulation of the ballot" to ward off "the menace of negro domination."⁶³ The Supreme Court struck down this measure in *Hunter v. Underwood*, 471 U.S. 222 (1985) as a violation of the Equal Protection Clause.⁶⁴

Although the Court defended citizens from this flagrant attack on their voting rights, it has not opposed felon disenfranchisement

60 Harvey, *supra* note 30, at 1155.

61 *Id.* at 1156.

62 *Id.* at 1157, and Marie Gottschalk, *The World's Warden: Crime, Punishment, and Politics in the United States*, DISSENT (Fall 2008).

63 Behrens, *supra* note 2, at 569.

64 Harvey, *supra* note 30, at 1166.

universally. While the Court has upheld the legal permissibility of disenfranchisement, lawmakers, questioning the social good of such laws, are liberalizing voting rights. The Supreme Court's ruling in *Richardson v. Ramirez*, 418 U.S. 24 (1974) is considered to be the controlling case in felon disenfranchisement cases because of its strong ruling that Section 2 of the Fourteenth Amendment allows states to disenfranchise ex-felons.⁶⁵ Because of this definitive legal precedent, state legislation has been more successful than litigation in reforming felon disenfranchisement policy.⁶⁶ Legislative changes may be sweeping, extending voting rights to large categories of criminals (as was the case in Connecticut, where felons on probation regained voting privileges due to the influence a coalition of community groups had on the Department of Corrections) or more narrow in scope.⁶⁷ Strategic litigation that focuses on specific aspects of policy and implementation, such as choice of disqualifying crimes and restoration conditions, has been modestly implemented in several states.⁶⁸

The disenfranchisement of felons threatens to impinge the very foundation of democracy, the right of citizens to voice their views through the ballot box. Contemporary academics challenge the widely accepted philosophical arguments of justice and social benefits that underpin disenfranchisement, skeptical that these arguments can rationally justify the practice in light of political

65 Harvey, *supra* note 30, at 1160.

66 Shaw, *supra* note 1, at 1444, and *Developments*, *supra* note 46, at 1955.

67 *Developments*, *supra* note 46, at 1958.

68 *Id.* at 1959.

and racial abuses. Spurred by the potential political impact of felon disenfranchisement policy evident in competitive elections and charged with the burden of ensuring the equal protection of the rights of citizens of all races, lawyers and policymakers must continue to wrestle through the difficult questions and implications of disenfranchisement. Laws that protect each citizen's right to vote, restricting it only, if at all, when honest philosophical analysis renders the restriction appropriate and proportional, must be developed and defended in state and federal legislatures and courts. For the good of society and the preservation of justice, disenfranchisement laws must be liberalized across America.