Criminal Disenfranchisement and Institutional Racism in the United States

Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath its axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . the disinherited must sit idly by while others elect his civic leaders and while others choose the fiscal and governmental policies which will govern him and his family. Such a shadowy form of citizenship must not be imposed lightly.

— Federal judge Henry Wingate in a ruling reinstating the rights of a citizen who had been permanently barred from voting and running for office simply because he passed a bad check١

Is voting a fundamental right or a condition of public trust? Should we guarantee the right to vote to all citizens in our democracy? Should we strip the right to vote from incarcerated people or people with past criminal convictions as a punishment for violating the public trust? How does the ideology of white supremacy interact with conceptions of prison, citizenship, and criminal disenfranchisement? These are some of the questions that lie behind debates over criminal disenfranchisement laws. In this research paper, I will examine the intersection of criminal disenfranchisement and institutional racism in the United States using an interdisciplinary approach that draws on history, law, political science, philosophy, and critical race theory.

In the first section of the paper, I will lay out the scope of the problem of criminal disenfranchisement and provide an overview of criminal disenfranchisement laws by state. In the second section, I will examine the history of criminal disenfranchisement in Roman civil law and English common law and the adoption of criminal disenfranchisement laws in the United States. In the third section, I will examine the legal, political (ideological) and sociological justifications for criminal disenfranchisement laws. Through these different lenses, I seek to explore the role of race in discussions over criminal disenfranchisement. Finally, in the last section, I will offer my research conclusions and offer recommendations for further research.

I. Overview of Criminal Disenfranchisement in the United States

Scope of the Problem

According to the most recent data available from The Sentencing Project, an estimated 6.1 million Americans cannot vote because of a felony conviction, a figure that has risen dramatically from 1.17 million people in 1976, 3.34 million in 1996, and 5.85 million in 2010. Approximately 2.5 percent of the total U.S. voting age population – 1 out of every 40 adults – is disenfranchised. People currently incarcerated represent less than one-fourth – 23 percent – of those who are disenfranchised. The overwhelming majority – 77 percent – have returned to their communities after serving their sentences with some remaining under supervision on probation or parole.

Criminal disenfranchised laws disproportionately impact African-American communities. One in 13 African-Americans of voting age is unable to vote due to felony convictions, a rate

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that is four times higher than that of other populations, with over 7.4 percent of the
African-American voting population being disenfranchised compared to just 1.8 percent of the
rest of the American population.\textsuperscript{4} The impact of criminal disenfranchisement laws on
African-American communities also varies state by state. In four Southeastern states – Florida
(21 percent), Kentucky (26 percent), Tennessee (21 percent), and Virginia (22 percent) – more
than one in five African-Americans is disenfranchised.\textsuperscript{5}

\textit{State-by-State Laws}

As of 2016, there are only two states in the United States that have no criminal
disenfranchisement laws: Maine and Vermont. The remaining 48 states and the District of
Columbia have some form of voting restrictions. 12 states prohibit people with criminal
convictions from voting even after they have completed their sentences. 18 states prohibit people
on probation and parole from voting. 14 states prohibit only people who are currently
incarcerated from voting.

\textit{Table 1. Summary of State Criminal Disenfranchisement Laws in 2016}

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<thead>
<tr>
<th>No Restrictions (2)</th>
<th>Prison Only (14)</th>
<th>Prison &amp; Parole (4)</th>
<th>Prison, Parole &amp; Probation (18)</th>
<th>Prison, Parole, Probation &amp; Post-Sentence (12)</th>
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II. History of Criminal Disenfranchisement Laws

Criminal Disenfranchisement in Roman Civil Law and English Common Law

Criminal disenfranchisement laws date back to Roman civil law and English common law. In Rome, subjects could be declared “civilly dead” after being convicted of serious crimes such as treason against the community, homicide, severe wounding, and heresy (Pettus 2004, 29). The concept of “civic death” derives in part from Roman feudal law of loss of “respons en cour,” “infamia” and the “dominatio in metallum.” Civic death “sunders completely every bond between society and the man who has incurred it.” The person “cease[s] to be a citizen” yet

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“cannot be looked upon as an alien, for he is without a country” and “does not exist save as a human being . . . [which] has no source in law.”  In England, a citizen was pronounced “attainted” after being convicted of a felony or treason. They faced three penalties: forfeiture, corruption of the blood, and loss of civil rights.  

Pettus concludes that two millennia of history of criminal disenfranchisement in Roman and English law demonstrates two interesting points. First, people who were rendered atimos, infamis, attainted, or outlawed by the state were members of high-status groups. They were either citizens possessing civil rights or subjects who owned property that could be forfeited to the state. Lower-status groups, such as slaves, serfs, and peasants could not be rendered infamous or forfeit property. Instead, they were subject to corporal and capital punishment.  Second, the crimes that resulted in the loss of the right to vote were usually capital crimes, such as treason or murder, or crimes that compromised the integrity of the legal and political system and bribery, forgery, or perjury which prevented citizens and subjects from serving as witnesses or public officials. 

Criminal Disenfranchisement in the United States, Pre- and Post- Civil War

As English settlers colonized North America, they transplanted much of their common law heritage, including the imposition of civil disabilities and forfeiture of property that resulted from the procedure of attainder. In some American colonies, the concepts of infamy and outlawry were introduced into their criminal codes. Eleven American states disenfranchised offenders for “infamous crimes,” and four states - Idaho, New York, Rhode Island, and

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7 Ibid.
8 Ibid.
10 Ibid.
Mississippi - have “civil death” statutes on the books.\textsuperscript{11} In seventeenth- and eighteenth-century New England, “moral qualifications” were broadly used to limit voting rights. In Plymouth Colony refused to “admit as a freeman ‘any opposer of the good and wholesome laws of this colonie.’” Plymouth provided that “any person judged to be ‘grosly scandallouse as lyers drunkards Swearers & C. shall lose their freedome of this Corporation.’” In Massachusetts Bay Colony, disenfranchisement was an additional penalty for the conviction of “fornication or any ‘shamefull and vitious crime.’”\textsuperscript{12} After achieving independence from Great Britain, American states rejected some of their English common-law heritage. The United States Constitution barred ex-post facto laws and bills of attainder, as well as forfeiture and corruption of blood except during the life of a person convicted of treason. Nonetheless, eleven state constitutions between 1776 and 1821 denied voting rights to people with felony convictions or authorized their state legislatures to do so.\textsuperscript{13}

After Reconstruction, many Southern states enacted criminal disenfranchisement laws with the explicit intention of diluting the voting power of newly enfranchised free Black men.\textsuperscript{14} At their state constitutional conventions, South Carolina (1895), Louisiana (1898), Alabama (1901), and Virginia (1901-02) passed criminal disenfranchisement laws with the explicit intention of disenfranchising a disproportionate number of African-Americans. State officials believed that African-Americans were more likely to commit certain types of crimes than their white counterparts.

\textsuperscript{11} Pettus, \textit{Felony Disenfranchisement in America}, 29.
\textsuperscript{12} Pettus, \textit{Felony Disenfranchisement in America}, 30-31.
\textsuperscript{13} Pettus, \textit{Felony Disenfranchisement in America}, 29.
"It is not difficult to perceive how these elaborate regulations were designed to discriminate against the Negro," one historian wrote in 1944 about South Carolina. "Among the disqualifying crimes were those to which he was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man was as disposed as the Negro, were significantly omitted from the list.\textsuperscript{15} John Fielding Bums, who authored and introduced the Alabama criminal disenfranchisement law, estimated that "the crime of wife-beating alone would disqualify sixty percent of the Negroes."\textsuperscript{16}

John B. Knox, President of the Alabama Constitutional Convention of 1901, remarked in his opening address:

[In 1861], as now, the negro was the prominent factor in the issue. . . . And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State. . . The justification for whatever manipulation of the ballot that has occurred in this State has been the menace of negro domination. . . These provisions are justified in law and in morals, because it is said that the negro is not discriminated against on account of his race, but on account of his intellectual and moral condition.\textsuperscript{17}

State courts also upheld state disenfranchisement laws on the grounds that they were intended to enshrine white supremacy. In \textit{Ratliff v. Beale}, 74 Miss. 247 (1896), the Mississippi Supreme Court upheld the state’s disenfranchisement law. The Court wrote:

The [constitutional] convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, of temperament and of character, which clearly distinguished it, as a race, from that of the whites—a patient docile people, but careless, landless, and migratory within narrow limits, without aforethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal constitution from

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid.
discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker member was prone.\textsuperscript{18}

III. Legal, Political and Sociological Justifications of Criminal Disenfranchisement

A. Legal Justifications

\textit{Richardson v. Ramirez, Hunter v. Underwood, and the Question of Intent}

The United States Constitution ratified in 1787 neither granted nor denied anyone the right to vote. African-Americans were not considered legal citizens of the United States until 1868 when the Fourteenth Amendment defined a “national citizenship.” Section 2 of the Fourteenth Amendment specified that states would lose congressional representation if they denied the right to vote to men on the basis of race “except for participation in rebellion, or other crime.”\textsuperscript{19} Two years later in 1870, the Fifteenth Amendment prohibited the denial of suffrage to citizens “on account of race, color, or previous condition of servitude” which extended the franchise to newly freed Black men.\textsuperscript{20}

The U.S. Supreme Court has recognized that “the right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government.”\textsuperscript{21} The right to vote is a fundamental right and government restrictions have to withstand the highest levels of scrutiny to pass constitutional muster. To survive strict scrutiny, the government must successfully demonstrate that the law furthers a legitimate and compelling state interest and the law has been narrowly tailored to achieve that interest.

\textsuperscript{18} Ibid.
\textsuperscript{19} U.S. Const. amend. XIV. Sec. 2.
\textsuperscript{20} U.S. Const. amend. XV.
In *Richardson v. Ramirez*, 418 U.S. 24 (1974), the U.S. Supreme Court upheld criminal disenfranchisement laws as an “affirmative sanction” consistent with the intent of Section 2 of the Fourteenth Amendment. In that case, three men who were convicted of felonies and completed their respective sentences and paroles petitioned California election officials to register them as voters and were denied. They alleged that the California law which disenfranchised persons convicted of an "infamous crime" violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The Court evaded the question of whether criminal disenfranchisement could survive equal protection analysis and instead relied on a strict textualist interpretation of Section 2 of the Fourteenth Amendment and its history to uphold the California law. The Court concluded:

[T]he exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment, a sanction which was not present in the case of the other restrictions on the franchise which were invalidated in the cases on which respondents rely. We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court.  

In his dissent, Justice Thurgood Marshall, joined by Justice William Brennan, insisted that “the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of § 1 of the Fourteenth Amendment.” Marshall wrote that “there is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their daily lives are deeply affected and changed by the decisions of government.”

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Marshall was not persuaded by the state’s arguments that it had a legitimate and compelling interest in disenfranchising people with felony convictions in order to prevent election fraud. Marshall reasoned that the state’s criminal disenfranchisement could not be upheld because it was “patently both overinclusive and underinclusive.” The law applied to all people with felony convictions, not just those convicted of election fraud. Many of those who had been convicted of violating election laws were treated as misdemeanors and not prohibited from voting at all. In addition, there had been no empirical evidence to support the claim that people with felony convictions were any more likely to abuse the ballot box compared to the general population. Marshall also refuted the majority’s interpretation of the history of Section 2 of the Fourteenth Amendment. He instead argued that Section 2 “put the Southern States to a choice—enfranchise Negro voters or lose congressional representation,” and “because Congress chose to exempt one form of electoral discrimination from the reduction-of-representation remedy provided by Section 2 does not necessarily imply congressional approval of this disenfranchisement.”

Nearly ten years later, the Supreme Court revisited the issue of criminal disenfranchisement in *Hunter v. Underwood*, 471 U.S. 222 (1985) and held that state criminal disenfranchisement laws reflecting “purposeful racial discrimination” violate the Equal Protection Clause of the Fourteenth Amendment. In that case, Alabama residents who had been convicted of misdemeanors brought a class action against Alabama election officials challenging a provision of the Alabama state constitution that disenfranchised people convicted of “any

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26 Ibid.
27 Ibid.
crime . . . involving moral turpitude.” The Court distinguished its decision from its earlier
decision in Richardson v. Ramirez that Section 2 of the Fourteenth Amendment did not protect
criminal disenfranchisement laws that were intended to discriminate on the basis of race. The
clear distinction here being the intention of the legislators. The Court wrote:

The single remaining question is whether § 182 is excepted from the operation of the
Equal Protection Clause of § 1 of the Fourteenth Amendment by the "other crime"
provision of § 2 of that Amendment. Without again considering the implicit authorization
of § 2 to deny the vote to citizens "for participation in rebellion, or other crime,” we are
confident that § 2 was not designed to permit the purposeful racial discrimination
attending the enactment and operation of § 182 which otherwise violates § 1 of the
Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez suggests the
contrary.29

B. Political (Ideological) Justifications

Criminal Disenfranchisement and American Liberalism

In his article “Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law
in the United States,” Alec C. Ewald makes a compelling argument that criminal
disenfranchisement laws are deeply rooted in the political philosophy of the American founding.
He argues “at the heart of this argument lies a paradox: although [these] ideological traditions
have contributed to the development of criminal disenfranchisement law in the United States, the
modern commitments of both liberalism and republicanism should lead Americans to abandon
the practice.”30

The Framers of the Constitution were largely influenced by the traditional liberalism and
social contract theory of political philosopher John Locke in their conceptions of individual

30 Alec Ewald, “‘Civil Death’: The Ideological Paradox of Criminal Disenfranchisement Law in
rights and their relations to society. According to Locke’s view, one who commits a crime has violated their responsibilities under the social contract and has forfeited their right to participate in civic society. Locke wrote that the criminal “has renounced reason, the common rule and measure God hath given to mankind . . . declared war against all mankind, and therefore may be destroyed as a lion or tyger, one of those wild savage beasts, with whom men can have no society nor security.” In On the Social Contract, Jean-Jacques Rousseau echoes Locke’s call to exclude criminals from full citizenship: “[e]very malefactor who attacks the social right becomes through his transgressions a rebel and a traitor to the homeland; in violating its laws, he ceases to be a member, and he even wages war with it.”

In a case before the Second Circuit, Green v. Board of Elections, federal judge Henry Friendly appealed to this Lockean philosophy to uphold New York’s criminal disenfranchisement law:

[A] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering of the compact. 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 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.’

C. Sociological Justifications

Criminal Punishment

In the United States, a felony conviction carries collateral consequences separate from the punishment of fines or imprisonment. Offenders may lose the right to vote, to serve on a jury, or

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31 Ewald, Civil Death, 1072.
32 Ibid.
33 Ewald, Civil Death, 1076.
to hold public office, among other “civil disabilities” that may continue long after a criminal sentence has been served. The historical and current rationale for criminal disenfranchisement is twofold. First, disenfranchising criminals—whether permanently or for a specific period of time—is believed to be punitive. The argument is that people convicted of felonies committed a wrong and the denial of voting rights serves to punish that wrong. Second, criminal disenfranchisement is believed to be a deterrent to future criminal behavior. Although this reason has no empirical support, many proponents argue that disenfranchisement laws will deter criminal activity in those who fear to lose their voice in government.

_Criminal Disenfranchisement and Racial Threat_

Professors Angela Behren, Christopher Uggen, and Jeff Manza, who are some of the preeminent scholars on criminal disenfranchisement, conducted a research study to uncover how race might affect the adoption of state criminal disenfranchisement laws.\textsuperscript{34} They draw on existing sociological models of racial or ethnic threat and how racial dynamics shape policy-making processes. What the authors found in their research that states with greater non-white prison populations have been more likely to ban convicted people with felony convictions from voting than states with proportionally fewer nonwhites in the criminal justice system. Similarly, they found that states with fewer African-American prisoners have been quickest to restore voting rights to people with felony convictions.\textsuperscript{35}

Research Conclusions


\textsuperscript{35} Behrens et. al., Ballot Manipulation, 596.
My interpretation of the research I have done for this paper — from the current landscape of criminal disenfranchisement, to the history, to the legal, political and sociological justifications — is that criminal disenfranchisement is deeply rooted in the idea that incarcerated people and people with criminal convictions are second-class citizens without the full rights and responsibilities of citizenship like voting.

Historically, criminal disenfranchisement started out in America mostly as a practice carried over from English common law. However, after the Civil War and the Reconstruction era, Southern politicians rediscovered criminal disenfranchisement and used it as a tool to intentionally circumvent federal voting rights protections for newly enfranchised Black men that they viewed as a political threat to the South’s establishment of white supremacy.

Criminal disenfranchisement laws continue to disproportionately impact African-Americans as a result of mass incarceration and prevailing societal notions of Black criminality and racial threat. These laws have mostly withstood constitutional scrutiny in part because they are racially-neutral on their face despite the disparate impact they have on African-Americans. It is past time for us as a society to take a closer look at criminal disenfranchisement laws and re-examine our commonly-held notions of prison and citizenship with a keen eye toward racial justice.

**Recommendations for Further Research**

My recommendations for further research on the topic of criminal disenfranchisement and institutionalized racism in the United States are to (1) examine how the status of slave-holding and free states may have influenced respective states’ decisions to adopt criminal
disenfranchisement laws or efforts to amend or repeal such laws to restore voting rights to people with criminal convictions and (2) conduct an in-depth case study on Maine and Vermont’s laws allowing incarcerated people to vote and analyze whether the racial demographics of the general population and the racial composition of state prisons shaped their policy decisions.
Bibliography


