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Felon Disenfranchisement

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Abstract

Crime control and prisons have featured prominently in electoral campaigns, yet currently and formerly incarcerated people are a profoundly disenfranchised constituency in the United States. This article examines the extent to which this population and its concerns have been excluded from American electoral politics. Starting with the philosophical debate on the extent of the right to vote, the article examines the scope of felon disenfranchisement in the United States, including comparative perspectives, policies in states that allow voting within prisons, and eligibility to run for office with a criminal record. The article also examines the problematic underlying issue of racial exclusion via felon disenfranchisement; the impact of disenfranchisement on civic engagement and recidivism; and the perspectives of disenfranchised, formerly incarcerated people. The article ends with thoughts on the prospects of bipartisan reform of voting rights.

PRISONS AND CRIMINAL JUSTICE POLICY IN ELECTORAL CAMPAIGNS

On July 15, 2015, President Barack Obama visited El Reno Federal Penitentiary in Oklahoma—the first visit of its kind by a sitting president. During the visit, the president said, "We have to consider whether this is the smartest way for us to both control crime and to rehabilitate individuals . . . There are people who need to be in prison . . . And I don't have tolerance for violent criminals." But he argued that it is time to change laws that impose lengthy mandatory sentences on nonviolent drug offenders, who are disproportionately black and Latino (Horsley 2015).

This historic prison visit was part of the Obama administration's effort to reverse some of the noxious effects of 40 years of mass incarceration from a perspective of both efficiency and social justice (Baker 2015). During those 40 years, multiple presidential candidates appealed to the electorate with proposed criminal justice policy, but none of them had engaged in conversation with prisoners.

Criminal justice policy as a focus of national concern preceded Richard Nixon's presidency. As Hinton (2016) explains, the Kennedy and Johnson presidencies were saturated in administrative work and legislation to address the perceived causes of street crime, attributed by professional advisors to the pathologies of the black family. Nonetheless, most chroniclers of mass incarceration point to Nixon's presidential campaign as the first time crime control was the focus of a candidate's appeal to the electorate (Beckett 1997, Miller 2010, Simon 2007). Nixon's successors repeatedly mentioned crime policy in the course of their campaigns—mostly promising punitive measures if elected for office. Gerald Ford (1979), for example, espoused more mandatory sentencing for the purpose of protecting the victims:

> Too many Americans had forgotten that the primary purpose of imprisonment was not to rehabilitate the convicted criminal so that he could return to society, but to punish him and keep him off the streets. The certainty of having to spend a specified time behind bars after being convicted of a serious offense, was more important as a deterrent than almost anything else . . . I do not seek vindictive punishment of the criminal but protection of the innocent victim.

Jimmy Carter (1976, pp. 220–21), an outlier in a string of presidents espousing punitivism, expressed a positivist belief that crime represented a societal illness:

> Every time a person goes back to prison as a repeat offender, it is a sign that our prisons have failed. I believe we can reduce the percentage of failures and at the same time reduce the amount of crime. Presidential leadership can make a difference.

An opponent of the death penalty and strong supporter of rehabilitation, Carter (1976, p. 221) said in a campaign speech, "We can make our existing crime-fighting programs more efficient and effective. We can have a stronger economy, and more jobs for our people, and that will lessen crime." His campaign speeches highlighted social inequities and the need to focus on white-collar crime: "Poor people aren't the only ones to commit crimes, but they seem to be the only ones who go to prison" (Carter 1976, p. 220). Carter's successor, Ronald Reagan, made the War on Drugs one of the focal points of his campaign and presidency (Beckett 1997, Hinton 2016). The Reagan administration bolstered the Federal Bureau of Investigation's drug investigation activity, created 500 additional Drug Enforcement Administration positions, and established 13 regional antidrug task forces, all of which led to increases in drug arrests and convictions (Cannon 1991, p. 813). Although Reagan is often remembered as having reduced California imprisonment during

his gubernatorial term (Gartner et al. 2011), his presidency saw the approval of three new prisons and a 6% growth in law enforcement (Cannon 1991, p. 153).

Crime and punishment were also a central theme in George H.W. Bush's campaign, which focused on ads featuring violent recidivist Willie Horton to defeat Michael Dukakis. Responding to later accusations that the ads were racially divisive, Bush (2006, p. 147) highlighted the focus on crime:

> I felt we did the right thing. It was definitely a crime issue. We got on Dukakis about having this lenient furlough program where he let people out of jail, and here was the best example—a man who was a convicted rapist who went out and raped again when he was on furlough.

Bush's administration redeclared the War on Drugs, starting with his inaugural address in 1989, in which he said that, despite his personal live-and-let-live approach,

> There are few clear areas in which we as a society must rise up united and express our intolerance. The most obvious now is drugs. And when that first cocaine was smuggled in on a ship, it may as well have been a deadly bacteria, so much has it hurt the body, the soul of our country. And there is much to be done and to be said, but take my word for it: This scourge will stop. (Bush 1989)

Punishment was a major focus of Bill Clinton's domestic policy as well—to the extent that Republican politicians felt that he was "carjacking" their traditional issues (Daley 1994, Holian 2004). Prioritizing the War on Drugs, he argued for more and tougher policing, complaining at the 1984 Democratic National Convention that Republicans were removing police officers from the streets (*CNN Politics* 2004). Perhaps attempting to avoid Michael Dukakis's political fate, Clinton publicly supported the death penalty, and he returned to his gubernatorial seat in Arkansas to personally approve the execution of a mentally retarded man, Ricky Ray Rector, in the midst of his presidential campaign (Klein 2003).

The George W. Bush presidency is remembered mostly in terms of its reaction to the World Trade Center and Pentagon attacks on September 11, 2001, but the presidential campaign that preceded the attacks featured law enforcement and street crime as central issues. The second presidential debate between Bush and Gore focused on police powers, racial profiling, and hate crime legislation (Comm. Pres. Debate 2000). Bush's opponent, Al Gore, not to be thought soft on crime, advocated a tough-on-crime stance relying on heavy drug testing (Dao 2000). Bush advocated an added expenditure of $2.8 billion for the War on Drugs, funding both treatment and punishment and arguing that the Clinton-Gore drug policy was "one of the worst public policy failures of the '90s" (Kornblut & Johnson 2000).

The Obama presidential campaigns against John McCain in 2008 and against Mitt Romney in 2012 represent a significant departure from this trend. Neither Obama nor his opponents addressed criminal justice policy, in general, and the War on Drugs, in particular; the domestic policy conversation was focused on improving the economy and some social issues, and the foreign policy conversation focused mostly on the threat of terrorism (Comm. Pres. Debate 2012a,b). Arguably, for the first time since Nixon's campaign, a different war, the war on the collapsing economy, drowned the symbolic potential and political cache of the war on crime—especially in light of low crime rates (Balko 2013).

Obama's visit to the federal penitentiary was a symbolic manifestation of his plans for criminal justice reform, both before and during his presidency. As an Illinois lawmaker, Obama had been a lead sponsor of criminal justice reform that included mandatory videotaping of all capital interrogations (Kuttner 2008, Wilson 2007). And throughout his presidential campaign, in

speeches and in brochures and other materials, he advocated reentry vocational training as a way to "break the cycle of poverty and violence" (Obama 2008a; see also McCain 2008). In a speech at a Chicago church, he highlighted poverty, addiction, and lack of support for families as causes of crime (Obama 2008b). Campaign materials targeted racial profiling (*New York Times Politics* 2007), sentencing disparities, and lack of opportunities for minorities (Obama for America 2008). Obama was particularly active in voicing concern about mass incarceration of people of color (*New York Times Politics* 2008), highlighting his personal experience dabbling in drugs (Mendell 2007, p. 202). The focus on racial justice was behind the initiative to reduce the crack/powder disparity in cocaine sentencing from 100:1 to 18:1 [Drug Sentencing Reform & Kingpin Trafficking Act, S. 1711, 110th Cong. (2007)].

What makes the Obama campaign and policies so unique is not only his administration's commitment to reducing incarceration, examining the need for mandatory minimums, and reducing reliance on private prisons, but his willingness to engage in direct dialog with currently and formerly incarcerated people about their challenges and needs. This was a laudable move and an extraordinary one: In the United States, people experiencing incarceration are routinely excluded from the electorate, and therefore not a constituency with a meaningful ability to support Obama (or any other president) in the ballot box.

FELON DISENFRANCHISEMENT: THE PROS AND CONS

In American colonial times, disenfranchisement was intended to prohibit members of society who made poor decisions from participating in their political system (Nunn 2005). The intent was to prevent these individuals from electing the leaders of the community (Feinberg 2011). These laws survive in various forms today, rooted in the same general principles.

Some supporters of disenfranchisement view individuals who have committed a crime as being in violation of the social contract (Clegg et al. 2008) who, as such, cannot be trusted to exercise their right to vote responsibly (Manza & Uggen 2008). Another argument in support of felon disenfranchisement perceives voting as a right, but also as a privilege (Clegg 2001). This rationale is premised on the argument that the right to vote is not universal: Society has deemed that this privilege does not extend to certain individuals, such as those who are under 18 years of age or noncitizens (Clegg 2001). Further, the ability to vote gives one the ability to change or make laws. The argument for disenfranchisement is based on the belief that those who do not follow the law should not benefit from the privilege of making the law (Clegg 2001). This argument relies on a presumption that those who have been convicted of a crime are less trustworthy and responsible than citizens who have not been convicted of a crime (Clegg et al. 2008).

Loss of a person's right to vote is one of a broad set of consequences stemming from a criminal conviction. Felons face a multitude of restrictions imposed on them after they are released from prison, such as being placed on parole or being prohibited from having a firearm. Proponents for disenfranchisement equate disenfranchisement with these collateral consequences (Clegg et al. 2008). Additionally, it can be argued that just because a felon has served his prison term, society is not required to forget what he has done or to be prevented from making judgments regarding his trustworthiness (Clegg 2001). Under that reasoning, felon disenfranchisement may extend well past imprisonment.

According to a national telephone survey conducted in 2002 (Manza et al. 2004), support for voting rights for felons varies with the specific details. Between 60% and 68% of respondents supported enfranchisement for probationers (depending on the phrasing of the question); 60% supported enfranchisement for parolees; and only 31% expressed support for enfranchising prisoners. The type of crime was also correlated with the level of support: Whereas 66% of

respondents supported enfranchisement for those convicted of violent crime, the support level dropped to 63% for white-collar criminals and to 51% for sex offenders (also see Brooks et al. 2004). The reasons for support or opposition varied as well: As Bilotta et al. (2003) found in a similar survey, public attitudes toward felon disenfranchisement are complex and unclear. Of those surveyed who were in support of disenfranchisement, 32.7% based their opinion on the rationale that "felons have proven that they should not be treated as citizens." However, the second largest given rationale was "None of the above/some other reason." The authors opined that members of society who support disenfranchisement might be unable to articulate their reasoning.

This inability to articulate support for felon disenfranchisement may be due to an innate bias against felons. Desmarais et al. (2016) analyzed 19 studies published between 1996 and 2013, each of which discussed public attitudes toward formerly incarcerated people. Although the studies did not address enfranchisement in particular, the authors found that those with politically conservative ideologies tend to have negative attitudes toward felons.

Conservatives are also less receptive to liberalizing state disenfranchisement laws than their left-wing counterparts (Bilotta et al. 2003). Those who subscribe to conservative politics suggest that enfranchisement is a political move by Democrats to bolster their voting bloc (Manza & Uggen 2008). It is true that those who have been incarcerated are more likely to identify as Democrat than as Republican (Manza & Uggen 2008). Political partisanship therefore contributes to the fact that felon disenfranchisement is a source of contention.

Another aspect of this partisan approach is the argument, made by proponents of disenfranchisement, that if felons were allowed to vote, they would elect lenient judges and prosecutors (Haase 2015). However, it is unconstitutional to exclude voters on the basis of how they might vote. Arguments against disenfranchisement emphasize that revoking an individual's right to vote serves only one purpose—retribution (Haase 2015). Because retributive punishment must "fit the crime," opponents of disenfranchisement argue that the loss of the right to vote is disproportionate punishment (Bennett 2016). According to this view, if the punishment must truly encompass "an eye for an eye," then disenfranchisement may be better suited for crimes involving political offenses—such as electoral fraud. At any rate, those against disenfranchisement argue that losing the right to vote serves no other punishment goals, such as deterrence, rehabilitation, or restoration (Haase 2015).

Opponents of felon disenfranchisement base their belief on the premise that the right to vote is an inalienable right guaranteed to American citizens (Manza & Uggen 2008). The fundamental right to vote is considered inherent to every citizen (Feinberg 2011). Those who have been disenfranchised have suffered dilution of their constitutional personhood (Robinson 2016). The disenfranchisement of certain citizens sends a message of inequality and stratification: Those who have committed crimes are less equal and do not have a right to be included in the civic collective (Bennett 2016).

Evidence supports the notion that disenfranchisement does not deter crime or lower recidivism (and, as we explain below, there is some evidence to the contrary). In fact, the ability to vote can be considered an essential aspect of belonging to a community—something felons find difficult to achieve postincarceration (Bennett 2016). Disenfranchisement fosters feelings of alienation, which may impact an individual's respect of social norms and the law (Zaman 2015). The American Probation and Parole Association described voting as a prosocial activity for those on community supervision (Zaman 2015). Further, a 2011 report by the Florida Parole Commission (2011–2012) found that those who kept their voting rights had recidivism rates of 11% compared with 33% for individuals who were disenfranchised. These findings, however, are tentative, because in Florida the voting rights of those convicted of certain crimes were automatically restored, whereas people

convicted of other crimes had to actively apply to have them restored, and the report therefore did not exercise careful experimental controls.

Perhaps the most cited argument against disenfranchisement is that it disproportionally affects communities of color (Fla. Parole Comm. 2011–2012). Former US Attorney General Eric Holder stated that felon disenfranchisement "echo[es] policies during a deeply troubled period in America's past—a time of post–Civil War repression" when "many Southern states enacted disenfranchisement schemes to specifically target African Americans and diminish the electoral strength of newly-freed populations" (Sharpless 2016, p. 741). Mass incarceration is connected to the disenfranchisement of nonwhites and devastates the voting power of minorities (Lopez 2010). Indeed, as Mazza & Uggen (2008) find, states in which African Americans make up a larger percentage of the prison population are more likely to have laws disenfranchising felons.

More than 7% of the adult African American population is disenfranchised (Zaman 2015, p. 237). Of those who are disenfranchised, more than 40% have completed their sentence (p. 237). With the increase in incarceration rates of Latinos, the impact of disenfranchisement on minority communities is likely to expand (Zaman 2015). Although the underlying reasons for this disproportionate racial impact are convoluted and contentious, the fact remains that minority communities are disenfranchised at a greater percentage than their white counterparts.

THE SCOPE OF FELON DISENFRANCHISEMENT IN THE UNITED STATES

As of 2015, approximately 6.1 million people in the United States have lost the right to vote owing to a felony conviction (Natl. Conf. State Legis. 2016, Uggen et al. 2016). This number has been steadily increasing in recent decades: An estimated 1.17 million people were disenfranchised in 1976, which grew to 3.34 million by 1996 and was up to over 6.1 million in 2016 (Uggen et al. 2016). The federal government's determination that franchise for felons is within the provenance of the states has created considerable variation in state regimes, ranging from full rights to vote (in Maine and Vermont), through disenfranchisement for incarcerated people or people under parole, to lifetime voting bans on people with criminal records (Manza & Uggen 2008, p. 11).

There are three main categories of disenfranchisement regimes. The first disenfranchises felons only while they are inmates, currently incarcerated by the judicial system. The second disenfranchises felons while they are inmates and while they are parolees. The third most common variation disenfranchises felons while they are inmates, on parole, or even on probation. The outlier states are those that do not subscribe to one of these three methods. Those include, as mentioned above, Vermont and Maine, which do not disenfranchise any felons, and on the other side of the spectrum, those states that continue to disenfranchise some or all prior felons even after all parole and probation obligations have been fulfilled (Manza & Uggen 2008).

Approximately 50% of disenfranchised felons have completed their prison or jail time and/or all required probation and/or parole periods (Uggen et al. 2016, p. 3). Although some states are beginning to change their laws regarding disenfranchisement, such as Maryland, where the lifetime ban on felony voting was lifted in 2007, as of 2010 11 states still had lifetime bans (Uggen & Shannon 2012, p. 2). The majority of states—19 of them, to be exact—have felon disenfranchisement laws that prevent felony inmates, probationers, and parolees from voting (p. 3). Moreover, some states "impose disenfranchisement for five years after release from supervision, some states only disenfranchise recidivists, and some only disenfranchise those convicted of violent offenses" (p. 4).

As of 2010, only approximately one-fourth of disenfranchised felons are currently incarcerated (p. 5). The remaining three-fourths are "living in their communities": working, following the law, paying taxes, and contributing to American society, just not through voting (p. 5). The

disenfranchised populations vary from 0.5% of the voting-age population in states such as Massachusetts, New Hampshire, and North Dakota to more than 7% of the voting-age population in Florida, Alabama, and Kentucky (p. 6). In particular, Florida's disenfranchised population is over 10% of its voting-age population (p. 6).

For the states that disenfranchise those persons convicted of a felony who are on probation or parole, there are generally two limited means by which a person's voting rights may be restored. Some states have an automatic restoration of rights once a person convicted of a felony is no longer on probation or parole, or after a statutory waiting period. Others, like Florida, allow for clemency hearings to judicially determine whether a person deserves to have his or her voting rights restored (Manza & Uggen 2008, p. 90). In fact, Florida uses both a waiting period for restoration and a clemency hearing system that forces ex-felons to jump through years of legal hoops to restore voting rights (p. 91). Even then, for a 12-year period between 1999 and 2011, only approximately 16% of the over one million ex-felons living there had their voting rights restored (Uggen & Shannon 2012, p. 14).

Florida is a particularly interesting case study, first and foremost because of the sheer volume of disenfranchisement: By the end of 2004, the size of Florida's disenfranchised population exceeded 1.1 million people, including approximately 957,000 who had completed their sentences (Manza & Uggen 2008, p. 90). In 2010, more people were disenfranchised in Florida owing to felony convictions than were disenfranchised anywhere else in the country (Uggen & Shannon 2012, p. 12). However, Florida also has the largest number of formerly incarcerated people "whose civil rights have been restored by a Board of Executive Clemency" (Manza & Uggen 2008, p. 90). These boards exist in many states throughout the country, but none seems to be as effective at reenfranchising ex-felons as the Florida board; this can be attributed to the overall numbers of formerly incarcerated people, as at least a percentage of them can count on getting their voting rights restored. Unfortunately, however, that percentage is only approximately 16 (Uggen & Shannon 2012, p. 14).

Some crimes do not require a clemency hearing but rather just an application by the formerly incarcerated person that is then reviewed and ruled upon (Manza & Uggen 2008, p. 90). However, in 1999, when Jeb Bush took office as the governor of Florida, it became much more difficult to have one's voting rights restored without a full hearing (p. 91). At that time, approximately 200 new crimes were added to the list of crimes that required a hearing (p. 91). People attempting to have their voting rights restored must go through a complicated and protracted process in which an application for automatic restoration is first submitted to the Florida Parole Commission (p. 91). Just this initial procedural step can sometimes take up to a year, and it is estimated that owing to recent crime laws, fewer than 15% of applicants are eligible for restoration without a hearing (p. 91). If the Commission finds that the applicant is ineligible for automatic restoration, then the case must go to the clemency board for a hearing (p. 91).

If a hearing is required, "further long delays can be expected" (p. 91). For example, at the end of October 2004, there were over 4,000 people awaiting a hearing with the clemency board, which, as noted at the time by the *Miami Herald*, was "triple the number heard by the board in all of the last 16 years" (p. 91). The board is not required to give reasons for its rulings. The governor and the board have utter discretion, and if an application is denied, it cannot be resubmitted for at least two years [Florida Amended Rules for Executive Clemency §§ 4, 14 (2011)].

FELON DISENFRANCHISEMENT: A COMPARATIVE VIEW

To shed more light on felon disenfranchisement in the United States, we include some international comparators. Although our survey of voting rights is far from exhaustive, it illustrates the extent of variation in felon disenfranchisement.

Some countries, such as Germany and the Republic of South Africa, have changed their laws in the last few decades to allow felons, even currently incarcerated felons, to vote (Allard 1999, p. 14). These countries have taken the same view that some states in America have by acknowledging "the unfairness of exclusion from the ballot box in a democratic society and have also recognized that such unfairness creates the potential for inequality" (Demleitner 2000, p. 755). Canada and Australia have allowed inmates to vote while incarcerated since 2002 and 2007, respectively (Ewald & Rottinghaus 2009, p. 1). Australian High Court Justice Michael Kirby lauded the Canadian model for its adherence to the principles of democracy in his decision in *Roach v. Electoral Commissioner*, the case that struck down the law that prohibited all incarcerated people from voting in Australia (p. 1). Justice Kirby contrasted the Canadian model to the state of felon disenfranchisement in the United States, saying that unlike the latter, Australia "would never tolerate excluding millions (or thousands) of citizens from the vote because of past convictions" (p. 1).

Currently only two countries—Canada and South Africa—have found that any type of conviction-based restriction on the rights of citizens to vote violates their constitution (p. 7). However, "all foreign constitutional courts that have evaluated disenfranchisement laws found the automatic, blanket disqualification of prisoners to violate basic democratic principles" (p. 26). Although these findings necessarily require judicial interpretation, in many countries around the world, including the Netherlands and Scandinavian countries, courts have "simply not shaped prisoners' voting rights" (p. 26). Many countries allow inmates currently serving sentences to vote, including Israel, Japan, France, Sweden, and Denmark (Mauer 2000, p. 248).

In her review of the German model of felon disenfranchisement, Nora Demleitner (2000, pp. 755–56) explains that disenfranchisement in Germany attaches only to "serious, legislatively enumerated offenses, must be assessed directly by the sentencing judge at the time of sentencing, and can be imposed only for a limited and relatively short period of time." Demleitner (2000, p. 756) also argues that the German system could actually mitigate the "currently existing racial imbalance" of felon disenfranchisement in the United States, and thus recommends adopting it.

Although not flawless, the German system is an example of a democracy with much lower rates of felon disenfranchisement than in the United States, with almost all felons being reintegrated after a shorter period of time (Demleitner 2000, p. 756). As in the United States, there are both active and passive voting restrictions on felons; active refers to the ability to vote, and passive refers to the ability to run for office and be elected (p. 760). Under the German Criminal Code, no one convicted of a crime will automatically lose his or her active voting rights (p. 760). If the crime in question is one of the enumerated few to carry the possibility of loss of voting rights, then it is up to the judge's discretion to choose to impose that penalty, unlike in places in the United States where a conviction carries an automatic voting restriction (p. 760).

In the United States, inmate voting is a nonstarter in most contexts simply owing to the real or imagined costs of facilitating it. These international examples show that inmate voting can be achieved efficiently and in a cost-effective manner. In the next section, we address how the three US states that do allow inmate voting have structured those systems.

ELECTORAL POLICIES WITHIN AMERICAN PRISONS

As explained above, one of the common arguments in support of felon disenfranchisement is that implementing inmate voting will be too costly and inefficient. It is therefore of value to examine the policies in the three US states that allow inmates the right to vote while incarcerated: Maine, Vermont, and California (Natl. Conf. State Legis. 2016). The California law, however, allows only inmates in county jail facilities to vote, not those in state or federal prisons, and was enacted in 2016 (Natl. Conf. State Legis. 2016). Thus, we have only anecdotal descriptions of how the

voting process functions in Maine and Vermont. In these prisons, voting is done through absentee ballots. Officials who are running for office are encouraged to visit the prisons to educate the voters on the issues there and to campaign for themselves.

Journalist Spencer Woodman (2016) visited a Vermont prison to interview inmates on their right to vote and how the voting system works behind bars. He found that a majority of inmates were actively seeking information about the upcoming election and that many were taking pride in registering to vote. They could vote by absentee ballot before the election and had to register ahead of time, just like all US voters. One of the prisoners Woodman interviewed stated that politics can lead to informative debates behind bars and can close the cultural gap between inmates and guards. Unsurprisingly, almost all of the Vermont prisoners interviewed supported their local senator, Bernie Sanders, in his bid for the presidency. Moreover, when Woodman went to Southeast State Correctional Facility, he was presented with a group of voting inmates who were voting only for Bernie Sanders or Hillary Clinton. Woodman reports that one prisoner pointed out that there were Donald Trump supporters in the prison, but that none were present at the group because none of them had bothered to register to vote—offering anecdotal support of Uggen & Manza's (2002) findings, according to which inmates tend to vote Democrat.

POST-CONVICTION ELIGIBILITY TO RUN FOR PUBLIC OFFICE

In the 2002 congressional election in Ohio, the recently ousted former congressman James A. Traficant ran for a congressional seat from his cell at a federal prison in Pennsylvania (Steinacker 2003, p. 801). He lost the election, but his bid for Congress raised the question: If he had been elected, could he have served? There is Supreme Court precedent to suggest that although Traficant could not have held any state public office, he could rightfully serve in the federal government (Steinacker 2003, p. 802). This is specifically due to the Supreme Court's interpretation of the Qualifications Clause in the Constitution, as well as the fact that felon voting rights and the lack thereof are issues and penalties imposed and controlled by the state (p. 802). Although the precedent and legal issues say that Traficant could have served in Congress, practicalities of daily life and common sense tell us that realistically, he could not have served from his cell in Pennsylvania on behalf of the state of Ohio.

One major hindrance to registering in those states that allow inmate voting is that inmates have to provide a permanent address, and often the absentee ballot will mistakenly be mailed to that address (Woodman 2016). As such, inmates are encouraged to register as soon as possible to handle any logistical issues that may arise with their ballots.

If running for office from a jail cell lies at one end of the spectrum of conviction-based restrictions on the franchise, the other end deals with ex-felons who attempt to run for public office after they have served all prison or jail time as well as all probation or parole time. Some states do not place any restriction on running for public office; other states, like Hawaii, have laws in place that require any convicted person to have completed his or her jail or prison sentence before running for office and automatically restore that right as soon as the incarceration is completed (Steinacker 2003, p. 805). Still other states, like Florida, do not allow a felon or ex-felon to hold office until "restoration of civil rights" occurs for that individual.

EFFECTS OF DISENFRANCHISEMENT ON RECIDIVISM

Recidivism is a pervasive, widespread occurrence that plagues America's criminal justice system. Statistics show that a majority of formerly incarcerated individuals will be arrested after their release from prison. Specifically, 67.8% of all prisoners who are released from prison will be arrested within three years, and 76.6% will be arrested within five years (Tarwater 2016).

There is no singular reason for recidivism. There are a variety of reasons for why an individual may reoffend, but certainly disenfranchisement is among them. Studying the effects of disenfranchisement on recidivism proves difficult because of the numerous reasons for reoffending. Yet studies have demonstrated that disenfranchisement results in higher recidivism rates (Hamilton-Smith & Vogel 2012). Conversely, political participation is positively associated with a reduction in recidivism.

Data relating to disenfranchisement and recidivism are sparse. Currently, the most inclusive study of recidivism was released in 1994 by the Department of Justice. Although several states have done their own studies on recidivism since 1994, it proves difficult to compare between states because the variables differ across studies (Hamilton-Smith & Vogel 2012).

The data obtained from the Department of Justice's study were analyzed by Hamilton-Smith & Vogel (2012), who defined recidivism as rearrest within three years following release from prison. Their findings indicated that in states where ex-felons are permanently disenfranchised, the rate of repeat offenses is significantly higher than in states that do not have permanent disenfranchisement laws. The authors stated, however, that further research is needed to determine whether this relationship is correlational or causal.

Proponents of abolishing felon disenfranchisement argue that this relationship is indeed causal. Their argument is that allowing formerly incarcerated people to vote will provide them with a stronger connection to their community, making them less likely to recidivate (Ghaelian 2013). Along these lines, Michelle Alexander (2012, p. 60) argues,

> If shackling former prisoners with a lifetime of debt and authorizing discrimination against them in employment, housing, education, and public benefits is not enough to send the message that they are not wanted and not even considered full citizens, then stripping voting rights from those labeled criminals surely gets the point across.

Some argue that a person's ability to successfully and lawfully reintegrate into society is strongly related to their employment opportunities (Jones 2015). Disenfranchisement is, therefore, one of several mechanisms that communicate to a formerly incarcerated person that he or she has no stake in civic society. The degree to which an ex-felon is excluded from his or her community, such as in job opportunities, housing, or the right to vote, reinforces their pariah status and makes them more likely to recidivate (Jones 2015).

Eric Holder was the first attorney general to call for an end to felon disenfranchisement (Jones 2015). In February 2014, Mr. Holder spoke at Georgetown University, where he described felon disenfranchisement as a vestige of the racist policies enacted after the Civil War (Apuzzo 2014). Mr. Holder stated that those who were disenfranchised had the "full measure of their citizenship revoked for the rest of their lives" (Jones 2015). Additionally, Mr. Holder argued that the likelihood that an ex-felon will commit future crimes is directly related to the stigma and isolation they face when attempting to reintegrate into their community. Mr. Holder then called on states to eliminate their felon disenfranchisement laws (Harpster & Vaughn 2016).

Various scholars and researchers take the position that formerly incarcerated people who vote are less likely to recidivate. Zaman (2015) discovered that approximately 16% of nonvoting former felons were arrested compared with 5% of voting former felons. Although this could be due to educational differences between voting and nonvoting citizens, it can be argued that voting should be considered a prosocial behavior that encourages an individual to be part of a community and resist crime. Whereas the link between disenfranchisement and recidivism is not entirely clear, it is clear that voting in and of itself is associated with lower rates of recidivism (Zaman 2015).

THE RACIAL UNDERBELLY OF FELON DISENFRANCHISEMENT IN THE UNITED STATES

The pernicious effects of disenfranchisement on exclusion and marginalization are particularly problematic in light of the racial composition of the US prison population. As of 2016, approximately 6.1 million people are disenfranchised because of a felony conviction (Uggen et al. 2016). One in thirteen black adults of voting age is disenfranchised, a rate that is over four times greater than that of nonblack Americans of voting age (Uggen et al. 2016). Felon disenfranchisement has a disproportionate effect on communities of color. America's black population makes up just 12.2% of the entire population (Humes et al. 2011) but makes up 40% of the prison population (Cammett 2012). Although the reasons and theories behind these statistics may be up for debate, the numbers do not lie—communities of color are disproportionately impacted by felon disenfranchisement policies.

In the aftermath of the Civil War, numerous laws were passed to limit voter participation based on race. There is a link between disenfranchisement laws enacted post Civil War and the rise of black political activity. As Ewald (2002, p. 1065) remarks, "After Reconstruction, several Southern states carefully rewrote their criminal disenfranchisement provisions with the express intent of excluding blacks from the suffrage" (also see Robinson 2016, p. 640).

The Black Codes, a series of laws enacted by Southern states after the Civil War, were meant to take away rights from former slaves, including the right to vote (Tolson 2014). Some of these disenfranchisement laws included limiting the right to vote in primary elections to white Americans "on the basis that political parties as private organizations were not subject to constitutional restriction," as well as poll taxes, literacy tests, disenfranchisement for those convicted of crimes of moral turpitude, and electoral boundaries drawn to minimize the influence of the black vote (Grey 2014).

In a Mississippi Supreme Court case, *Ratliff v. Beale* (1896, pp. 865–67), the court's opinion stated,

> Our unhappy state had passed in rapid succession from civil war through a period of military occupancy, followed by another, in which the control of public affairs had passed to a recently enfranchised race, unfitted by educational experience for the responsibility thrust upon it. This was succeeded by a semimilitary, semicivil uprising, under which the white race, inferior in number, but superior in spirit, in governmental instinct, and in intelligence, was restored to power.

Further, the court explained that because they were unable to disenfranchise former slaves directly, they discriminated against "the offenses to which its weaker members were prone . . . Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications, while robbery and murder and other crimes . . . were not" (p. 868). In essence, crimes eligible for disenfranchisement were of the type that the 1860 Mississippi Supreme Court believed were committed more frequently by African Americans.

It would be inaccurate to say that the entire concept of felon disenfranchisement was created as a tool to punish African Americans and former slaves. Indeed, criminal disenfranchisement has its origins in Ancient Greek and Roman cultures, and the United States inherited its disenfranchisement laws from England, with 11 of the 13 original colonies having felon disenfranchisement laws (Feinberg 2011). However, the intent behind post–Civil War disenfranchisement laws paints a different picture with severe consequences for communities of color. There is strong evidence of discriminatory intent in the former Confederate states (Alexander 2012).

In *Hunter v. Underwood* (1985), a unanimous Supreme Court invalidated Alabama's felon disenfranchisement law because it was designed to disenfranchise African Americans (Alexander

2012). Although the Alabama law was race-neutral on its face, trial testimony established that the Alabama Constitutional Convention drafted this law with the intent to disenfranchise African Americans (Feinberg 2011). To date, this is the only time the Supreme Court has declared a felon disenfranchisement law unconstitutional.

To understand the racial underbelly of felon disenfranchisement, it is important to widen the picture and discuss the racial underbelly of criminal justice policies in general, a task that exceeds the framework of this essay. However, a few data points should be mentioned. Recently, John Ehrlichman, an aide to President Richard Nixon, admitted that the so-called War on Drugs was meant to criminalize both hippies and African Americans because of their perceived threat to Nixon's policies (Baum 2016). As explained above, President Ronald Reagan continued Nixon's War on Drugs. The Reagan administration's focus on the crack epidemic is widely attributed to racial politics (Alexander 2012, Beckett 1997, Hinton 2016). The Anti-Drug Abuse Act, passed in 1986, punished individuals convicted of using or selling crack cocaine more harshly than those convicted of powder cocaine–related offenses (McGinley 2015). This disproportionally affected African Americans because crack cocaine was more commonly used in black communities, whereas powder cocaine was more frequently used in white communities.

The War on Drugs led to increased police presence in poor minority communities, which has not subsided today (McGinley 2015). The US prison population increased exponentially between 1980 and 2013, with a majority of these convictions for drug offenses and the offenders largely composed of African Americans and Latinos (McGinley 2015). Rather than representing a greater propensity to commit crime, these criminal justice outcomes represent stark racial disparities in policing, prosecution, and incarceration, which greatly disfavor black and Latino men (Baldwin 2015). The United States incarcerates 2,200 African Americans; 700 Latinos; and only 400 white people per 100,000 residents. As Baldwin (2015, p. 259) states,

> If societal structures have the ability to disproportionately impact high proportions of the community to the extent that they are denied participation in the political process, something has to be wrong . . . So then why do we strip convicted felons of their right to vote[?]

She then answers her own question, stating that the only possible reason is to suppress the right to vote in communities of color.

Although felon disenfranchisement is rooted in policy existing hundreds of years ago, it cannot be argued that it affects all Americans equally. Post–Civil War disenfranchisement policies have their beginnings in a racially discriminatory environment, and the War on Drugs punished African Americans and Latinos more harshly, resulting in hundreds, if not thousands, of felony convictions.

PERSPECTIVES OF THE FORMERLY INCARCERATED

Collateral consequences such as disenfranchisement can be devastating for individuals who have a felony conviction. Danielle Jones, supervising attorney of the Stanford Community Law Clinic, represents California clients in an effort to clear their criminal records through California's post-conviction expungement and felony reduction remedies. In an article in the *Stanford Journal of Civil Rights and Civil Liberties*, she writes that her clients wish to move forward with their lives after their convictions but find it difficult to do so because of the collateral consequences that curtail their freedom (Jones 2015). Jones argues that those with a felony record have a tough time reintegrating with the community because they are discriminated against in job interviews and housing applications and are denied the right to vote.

In support of her argument, Jones quotes from Alexander's (2012, p. 161) *The New Jim Crow*, in which a former offender describes his frustration with losing the right to vote:

> I have no right to vote on the school referendums . . . that will affect my children. I have no right to vote on how my taxes [sic] is going to be spent or used, which I have to pay whether I'm a felon or not, you know? So basically I've lost all voice or control over my government . . . I get mad because I can't say anything because I don't have a voice.

Another former offender, with marijuana possession charges from the early 1990s, learned that he could not vote until he paid a $900 debt to the court (Jones 2015). This individual, a veteran, was unable to vote because of this outstanding debt, despite serving his sentence and completing parole. In his words,

> I'm not able to vote. They say I owe $900 in fines. To me, that's a poll tax. You've got to pay to vote. It's "restitution," they say. I came off parole on October 13, 1999, but I'm still not allowed to vote . . . I know a lot of friends got the same cases I got, not able to vote. A lot of guys doing the same things like I was doing. Just marijuana. They treat marijuana in Alabama like you committed treason or something. I was on the 1965 voting rights march from Selma. I was fifteen years old. At eighteen, I was in Vietnam fighting for my country. And now? Unemployed and they won't allow me to vote. (Alexander 2012, pp. 159–60)

Formerly incarcerated people have to contend with the resulting stigma well past their sentence and parole. Those who are disenfranchised consider their disenfranchisement as a symbol that they do not belong and are outsiders in their own communities (Hamilton-Smith & Vogel 2012). Disenfranchisement can be considered an extension of the criminal label. If the process of political elections and voting is considered a fundamental right of a democratic society, losing the right to vote tells ex-offenders that they are no longer members of society on a basic level.

It is important to distinguish the difference between losing the right to vote and choosing not to vote when trying to understand the effects of disenfranchisement on ex-offenders (Hamilton-Smith & Vogel 2012). Many American citizens do not vote, even though they are able to. The difference, however, is when society tells individuals that they are not good enough to vote but does nothing in response to citizens not doing their civic duty. This distinction illustrates a message communicated by society to individuals who are disenfranchised, namely, that they are not part of their community.

Travis Spears, an attorney in Washington State, lost the right to vote 10 years ago (personal communication, October 27, 2016). With a felony conviction on his record, Mr. Spears was 23 and suddenly made to feel like a pariah of society. In his words, felon disenfranchisement creates a "caste system." Although his felony conviction turned him on to the idea of going to law school, he saw how a felony record and a perceived lack of options after incarceration lead others to recidivate (Spears 2014).

Felon disenfranchisement sends the message to ex-offenders that they are not part of society—they are not entitled to a right that every other American citizen of age is able to enjoy. To participate in the franchise is to be part of society.

OBAMA, TRUMP, AND BEYOND: THOUGHTS ON BIPARTISAN REFORM OF VOTING RIGHTS

Donald Trump's presidency and Jeff Sessions's policies reflected a 180-degree turn away from the Obama administration's approach toward criminal justice in general and attitudes toward currently and formerly incarcerated people in particular. These changes, manifesting themselves in tougher

federal prosecutorial and sentencing policies (Pfaff 2016, Tanfani & Halper 2017), raise important questions about the viability and vulnerability of rehabilitative reforms.

The extent to which changes in the federal government impact criminal justice in general, and voting rights of formerly incarcerated people in particular, is debatable. Although the president can have an influential role in criminal justice reform nationwide, and certainly in the federal system (Obama 2017), the vast majority of incarcerated people are in state institutions, and the state apparatus has the most influence on incarceration rates and conditions (Pfaff 2017). Similarly, voting rights in general, and felon disenfranchisement in particular, are within the ambit of state legislation, where local considerations and bipartisan coalitions are possible. Indeed, in May 2017, Alabama governor Kay Ivey signed legislation that significantly limited the reach of disenfranchisement by significantly narrowing the definition of "crimes of moral turpitude" (Ebenstein 2017). Such legislation is possible when political and financial conditions support bipartisan collaboration (Aviram 2015).

Another important factor is the extent to which courts will support challenges to voting restrictions on felons. The Supreme Court has varied in its approach to voting rights, ranging from its decision in *Shelby County v. Holder* (2013) to its decision in *Cooper v. Harris* (2017), and it will be interesting to examine its approach to voting rights cases involving felons that may arise in the future. Although the federal government may not prioritize the empowerment and civic reintegration of currently and formerly incarcerated people for quite some time, it is hoped that the states, which are primarily responsible for setting voting eligibility policies, will remember that our civic chain is no stronger than its weakest link.

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