

# CRIMINAL DISENFRANCHISEMENT

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■ **Abstract** Felon disenfranchisement has recently emerged as an issue of intense public concern and scholarly interest. This review highlights the broad range of socio-legal issues implicated by the practice of denying convicted felons the right to vote by considering the history, impact, and contemporary legal and scholarly debates surrounding the practice. Although race-neutral on their face, many U.S. laws stem from a history of racial discrimination and serve as an example of advantaged groups using the law as a mechanism to control disadvantaged groups. The practice of disenfranchising criminals has survived numerous legal challenges, raising questions about the fundamental nature of the right to vote in the United States and the representativeness of a democracy that systematically excludes a large group of citizens.

## INTRODUCTION

Felon disenfranchisement, the practice of removing the right to vote upon conviction for a felony-level offense, highlights a broad set of issues in socio-legal studies. The case of felon voting restrictions in the United States shows how one set of legal practices cuts across a wide range of topics. For example, felon disenfranchisement laws have played a role in the country's racialized history and in recent elections. Moreover, U.S. practices are distinct internationally for their severity. Disenfranchising criminal offenders is also linked to mass incarceration, and the practice exemplifies a larger set of collateral consequences that follow a conviction. Finally, these laws raise questions about the status of voting as a right of all adult citizens. Our review of recent developments in the law and social science literature on felon disenfranchisement emphasizes both legal and political implications of the practice.

In the United States, 48 states currently limit voting rights on the basis of a felony conviction, but states exhibit large variation concerning the length of their bar on voting. State laws range from indefinite disenfranchisement that extends beyond completion of any criminal sentence to no disenfranchisement whatsoever. Only Maine and Vermont currently allow all people convicted of felonies to vote, including those serving time in prison. At the other extreme, 13 states disenfranchise some or all ex-felons (people who have completed a sentence for a felony

conviction). The constitutionality and validity of these laws have been questioned repeatedly, primarily as an infringement upon the fundamental right to vote and as a mechanism that dilutes or denies the right to vote on the basis of race. While many other democratic countries have some form of disenfranchisement related to criminal convictions, the severity of American disenfranchisement laws stands as an anomaly against the international norm, both substantively and procedurally (Demleitner 2000, Rottinghaus 2003).

At present, felon disenfranchisement laws account for over 5 million people in the United States who cannot vote (Manza & Uggen 2005). This is the largest group of disenfranchised adult American citizens (Keyssar 2000). Of the estimated 5.3 million disenfranchised felons in 2004, only 26%, or 1.4 million, were actually in prison or in jail. The rest were either living in their communities as felony probationers (1.3 million or 25% of the total), parolees (477,000 or 9%), or as *former* felons who reside in states in which they are ineligible to vote (2 million, or 39%).

Together, these disenfranchised citizens represent more than 2% of the voting-age population and hold the power to affect election outcomes in close races (Uggen & Manza 2002). Historically, states have not always disenfranchised for a felony conviction with such zeal, as the key developments in these laws occurred during the late nineteenth century.

## THE INSTITUTIONALIZATION OF FELON DISENFRANCHISEMENT IN THE UNITED STATES

American felon disenfranchisement laws date to colonial times and have roots in European laws (Ewald 2002a, Iitzkowitz & Oldak 1973). Colonial disenfranchisement laws in the United States were limited in scope as to both the length of disenfranchisement and the range of offenses precipitating the loss of voting rights (Ewald 2002a). Rather than serving as a consequence to the equivalent of a modern-day felony, voting rights were generally restricted for “moral” violations, such as drunkenness. Offenses such as electoral bribery resulted in the permanent loss of voting rights in some states, whereas the loss was temporary for other acts (Ewald 2002a).

Throughout the nineteenth and early twentieth centuries, more states began to tie voting rights to criminal convictions (Behrens et al. 2003). These provisions, however, still limited the loss of voting rights, either by applying to few crimes or by only empowering the state legislature to pass a disenfranchisement law. It was not until the end of the nineteenth century that it became common practice for states to disenfranchise based solely on a felony conviction. The Reconstruction period was one of particular change. Between 1865 and 1900, 19 states adopted or amended laws restricting the voting rights of criminal offenders (Manza & Uggen 2005). Many states added provisions to new or revised state constitutions, while legislatures in other states passed new laws. Compared to the disenfranchisement

laws of the colonial period, these new laws were wide reaching, encompassing all felonies without attention to the underlying crime and disenfranchising indefinitely (Behrens et al. 2003).

Because most states already had the most restrictive form of disenfranchisement in place by the early twentieth century, the development of felon disenfranchisement in this century was primarily an issue of numbers rather than legal changes. In fact, the tide had begun to turn by the Civil Rights era. Over the past 40 years, restrictions on the voting rights of felons have diminished significantly. A wave of liberalizing changes began in the early 1960s and stretched through the mid-1970s. In this period, 17 states eliminated their ex-felon disenfranchisement laws, restoring voting rights automatically upon completion of one's sentence (Behrens et al. 2003). Nevertheless, the development of the criminal justice system (Friedman 1993), the expansion of offenses deemed felonies (e.g., Itzkowitz & Oldak 1973), and the historically unprecedented escalation of criminal punishment in the United States in the past 30 years (e.g., Pettit & Western 2004) all contributed to increases in the size of the disenfranchised population even as the laws became less restrictive.

## WHY CONNECT VOTING TO CRIMINAL PUNISHMENT?

Explanations for stripping voting rights on the basis of a felony conviction vary, and many scholars question the legality of this long-standing practice. The loss of voting rights is not the only collateral consequence imposed for a criminal conviction (Mauer & Chesney-Lind 2002), and some supporters of felon disenfranchisement use this point to justify coupling punishment and voting rights; disenfranchisement, they argue, is no different than restricting the right to own a firearm or to work in certain occupations (Clegg 2004a,b; Ponte 2003; Sloan 2000). These arguments generally follow a social contract approach: A criminal act is a breach of the social contract, and a person should consequently lose the right to participate in electing the officials who make the law. Excluding those who have shown themselves to be untrustworthy thus protects the integrity of the ballot box (Clegg 2001). This rationale resembles that found in ancient Greece and Rome and later in medieval Europe in which "civil death" penalties accompanied criminal punishment (Ewald 2002a, Pettus 2005). Viewed in this light, the criminal code is a narrowly crafted expression of societal consensus against crime, whereby violation of that code justifies the loss of certain civil rights.

Alternatively, many scholars have viewed the connection between voting and crime as a product of group conflict rather than societal consensus. From this perspective, the history of felon disenfranchisement in the United States exemplifies a trend in which advantaged groups with powerful interests use law as a tool to maintain their dominant position. This has been argued particularly with respect to racial inequality, as evidenced by the disproportionate share of disenfranchised African American voters (Hench 1998, Shapiro 1993).

Opponents of disenfranchisement also argue that it is an unconstitutional practice that infringes upon the fundamental right to vote. Categorically denying the right to vote to former as well as current offenders is certainly out of step with the international consensus, and further, it may impede ex-felons' reintegration into society (Demleitner 2000, Fletcher 1999, Itzkowitz & Oldak 1973, Uggen et al. 2004, Uggen & Manza 2004b).

## The Penological Rationale for Disenfranchisement

Because it operates as a sanction tied to a criminal offense, felon disenfranchisement should serve some purpose related to punishment. Disenfranchisement appears to have been initially premised upon both retributive and deterrence theories. In earlier periods, small communities could impose disenfranchisement as a public sanction whereby all would see the stigma and exclusion resulting from unlawful behavior (Itzkowitz & Oldak 1973).

A recent *amici curiae* brief signed by 20 criminologists in a challenge to New Jersey's disenfranchisement law, however, rejects the idea that disenfranchisement serves any of the legitimate purposes of punishment (Brief for *Amici Curiae* 2004; see also von Hirsch & Wasik 1997). We consider felon disenfranchisement in light of four of the primary justifications of punishment: (a) to exact retribution or vengeance for the victims; (b) to deter offenders and others from committing crimes; (c) to incapacitate or prevent them from committing further crimes; and (d) to rehabilitate or reform offenders.

**RETRIBUTION** Retribution is based on the principle that those who have committed crimes should suffer for the harm they caused others. Proponents of retribution argue that punishment should fit the crime already committed rather than future crimes that the person or others might commit (von Hirsch 1976). Retribution thus demands sanctions proportionate to the seriousness of the offense and to the degree of the offender's culpability. More blameworthy offenders who cause greater harm should thus face greater punishment. Felon disenfranchisement is retributive because the denial of voting rights exacts some degree of vengeance from felons. The blanket disenfranchisement of all people convicted of felonies, however, calls into question the proportionality of the punishment. Moreover, losing the right to vote is a collateral sanction: It is imposed in addition to the criminal sentence. Particularly in states with lifetime disenfranchisement, this punishment extends far beyond the sentence for past criminal conduct. In most cases, disenfranchisement thus does not appear to fit the crime committed.

**DETERRENCE** Whereas retribution redresses crime already committed, deterrence focuses on preventing future crime by either the offender or others. Specific deterrence seeks to deter the individual offender from committing another crime. General deterrence, on the other hand, seeks to dissuade the general public from engaging in crime. Felon disenfranchisement could hypothetically serve either

deterrent purpose, especially because some people attach great significance to the right to vote (Uggen & Manza 2004a). For a deterrent to be effective, however, the consequences must be known to would-be offenders when they are contemplating committing a crime. In the case of felon disenfranchisement, this seems improbable for several reasons. First, most people are uncertain about when and where voting restrictions are imposed (Manza & Uggen 2005). Second, the marginal deterrent value of disenfranchisement over and above that of more immediate and severe penalties may be insufficient to significantly alter the criminal calculus. Even if people know they will forfeit voting rights if apprehended and convicted, this loss likely pales in comparison to the wholesale deprivations that accompany incarceration (see, e.g., Sykes 1958).

**INCAPACITATION** Incapacitation involves reducing or eliminating the opportunity to commit subsequent offenses by restraining or isolating offenders (Cohen 1987). Today, this typically involves institutional confinement, although in the past bodily mutilation and death were also widely used. It is difficult to justify felon disenfranchisement with the argument that it incapacitates ex-felons from committing general crimes or election crimes specifically. First, disenfranchisement affects only a narrow range of activities. Thus, removing the right to vote cannot prevent people from committing other crimes unrelated to voting. Second, even for the few convicted of political crimes such as electoral fraud, the ability of felon disenfranchisement to prevent repeat offending is questionable. People convicted of making illegal campaign contributions, for example, would not be restrained from doing it again by restricting their right to vote on election day. In short, although disenfranchisement prevents individuals from voting, it cannot incapacitate them from committing crime. It prevents political participation, but not criminal activity.

**REHABILITATION** The final major goal of punishment is to rehabilitate offenders so that they will not commit crimes in the future. During the “get tough” period in penology that began in the mid-1970s, critics successfully challenged the legitimacy and effectiveness of rehabilitation as a correctional philosophy (see, e.g., Martinson 1974). More recently, however, criminologists have reaffirmed rehabilitation, challenging the “nothing works” dictum and developing new evidence that certain treatments, such as cognitive-behavioral therapy, reduce recidivism (Cullen 2005, Lin 2000). Disenfranchisement might be rehabilitative if reenfranchisement served as a reward for good behavior. Yet restoration of voting rights is rarely conditioned on good behavior. Instead, it is triggered automatically when a sentence is completed or a waiting period has passed. The reward logic is perhaps most plausible in states disenfranchising offenders indefinitely (such as Florida), but in many such states restoration procedures are so cumbersome as to diminish any possible rehabilitative goal.

More generally, there are several reasons to conclude that restricting voting rights hinders rehabilitative efforts to bring about positive changes in offenders and their behavior. Indeed, it is likely that invisible punishments such as

disenfranchisement act as barriers to successful rehabilitation (Travis 2002). It is much more plausible to think that participation in elections as stakeholders might reduce recidivism. As a fundamental act of citizenship, voting may foster respect for laws, criminal and otherwise, and the institutions that make and enforce them. One Minnesota study considered the relationship between voting in 1996 and subsequent criminal history. Among people with an arrest history, about 27% of nonvoters were rearrested, relative to 12% of voters in the sample. These results suggest that there is at least a correlation between voting in 1996 and recidivism in 1997–2000 among people who have had some official contact with the criminal justice system (Uggen & Manza 2004a).

In short, disenfranchisement is only loosely related to the justifications of punishment typically associated with criminal sanctions. Although critics find little justification for felon disenfranchisement, however, proponents offer numerous defenses of the practice.

## Other Justifications for Disenfranchisement

One set of arguments in support of felon disenfranchisement relates to maintaining what is sometimes referred to as “the purity of the ballot box” (*Washington v. State* 1884). In the philosophical arguments associated with the republican tradition, for example, the political community remains viable only insofar as it consists of citizens who respect the rules of democratic procedure and can be expected to live within the norms those rules generate. In contemporary variants of these arguments, the presence of criminals within the polity potentially erodes confidence in elections by contaminating clean votes with “dirty” ones. Kentucky Senator Mitch McConnell invoked this idea during a 2002 debate in the U.S. Senate over disenfranchisement: “States have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of representative democracy. . . . [T]hose who break our laws should not dilute the votes of law-abiding citizens” (*Congressional Record* 2002, p. S802).

A second set of arguments concerns the impact of allowing people convicted of felonies to vote. Having exhibited a propensity to violate the social contract on at least one previous occasion, these arguments suggest, felons cannot be trusted to exercise the franchise responsibly. In the Senate debate over proposed legislation to reenfranchise people who had completed their sentences, Senator McConnell argued that, among other things, removing disenfranchisement could lead to “‘jail-house blocs’ banding together to oust sheriffs and government officials who are tough on crime” (*Congressional Record* 2002, p. S802).

A related justification concerns fraud, which might be expected among those convicted of political crimes (e.g., vote fraud, campaign finance fraud). These offenders represent a very small proportion of all convicted felons, however, and it is hard to find systematic evidence that serial political offenders constitute a significant actual or potential threat. For the great bulk of criminal offenders who have not been convicted of political offenses, the claim that they could or would

“band together” to use the ballot improperly to scale back criminal laws, elect weak-on-crime sheriffs, or generally skew electoral results is, to put it charitably, an unproved hypothesis. There are two possible interpretations of these claims: (a) Nonpolitical offenders are more likely to commit vote fraud than nonoffenders, or (b) offenders would band together to vote a certain way that would produce an improper outcome of some kind. To our knowledge, no empirical evidence supports either interpretation. Moreover, such arguments are problematic in a democratic polity, where the right to vote is not premised on how one plans to vote.

Defenses of disenfranchisement laws based on states’ rights arguments are probably the most widely deployed approaches. The argument is straightforward: The Constitution vests the states with the right to decide who can vote, and but for the explicit exceptions spelled out in various constitutional amendments, states are free to decide which criteria they want to use. Supporters of these arguments are on firm legal ground based on judicial decisions to date. As discussed below, the Supreme Court has held that states can restrict the right to vote on the basis of a felony conviction. Supporters have pointed to the diversity of state felon disenfranchisement laws to assert that in practice each state adopts laws consistent with the political ideology of its citizens. For example, Alabama Senator Jeff Sessions asserted in a U.S. Senate debate, “I think this Congress, with this little debate we are having on this bill, ought not to step in and, with a big sledge hammer, smash something we have had from the beginning of this country’s foundation—a set of election law in every State in America. . . . To just up and do that is disrespectful to them” (*Congressional Record* 2002, p. S803). Critics challenge this view by noting that states’ rights arguments have historically been invoked to justify continuing racially discriminatory practices. In fact, many commentators have suggested that the origins and persistence of felon disenfranchisement in the United States are tied to their racial origins and contemporary racial impact (Harvey 1994, Hench 1998).

## Race and Disenfranchisement

Felon disenfranchisement laws are race-neutral on their face; anyone convicted of a felony faces disenfranchisement. Although this fact is key for some scholars (e.g., Clegg 2001, 2004a) and central for many courts [e.g., *Wesley v. Collins* (1986); *Johnson v. Bush* (2004); *Farrakhan v. Locke* (1997)], the historical and social circumstances surrounding felon disenfranchisement indicate that the practice is closely linked to race (Behrens et al. 2003, Harvey 1994, Hench 1998). That felon disenfranchisement laws began to flourish in the late nineteenth century is unsurprising to many given the disparate impact of the laws on racial minorities, particularly African Americans. In the 2004 presidential election, for example, over 8% of the African American voting-age population was disenfranchised because of a past felony conviction (compared to less than 2% of the non-African American voting-age population) (Manza & Uggen 2005).

Until the adoption of the Fourteenth and Fifteenth Amendments, states were generally free to impose conditions on the right to vote or even to wholly exclude

particular groups from voting (Keyssar 2000). In 1868, the Fourteenth Amendment extended citizenship to all persons born in the United States, regardless of race, thus nullifying the Supreme Court's infamous holding a decade earlier in *Dred Scott* (*Scott v. Sandford* 1856). The Fifteenth Amendment, added two years later in 1870, eliminated states' right to disenfranchise on the basis of race. Thus, during this period, states potentially lost significant power with respect to controlling access to the ballot.

In 1850, 11 of the 32 existing states disenfranchised for a felony conviction. In contrast, by the time of the Fifteenth Amendment in 1870, 28 of the then 38 states had done so (Behrens et al. 2003). States' attempts to undermine the Fourteenth and Fifteenth Amendments by effectively preventing African Americans from voting have been well documented (e.g., Kousser 1974; Perman 2001; US Comm. Civil Rights 1975, 1981; Valley 2004). Felon disenfranchisement can therefore be viewed as yet another attempt to limit the pool of eligible voters to advantaged groups (e.g., Chin 2002a, Fletcher 1999, Harvey 1994, Hench 1998, Shapiro 1993). In keeping with this view, a study of historical changes to state felon disenfranchisement laws between 1850 and 2002 found that the percentage of nonwhite persons incarcerated in a state's prison system was a strong and consistent predictor of passage of a more restrictive disenfranchisement law (Behrens et al. 2003).

## LEGAL CHALLENGES TO FELON DISENFRANCHISEMENT LAWS

Felon disenfranchisement in the United States thus developed in a way that saw powerful groups taking a narrowly defined practice in ancient Europe and colonial America and broadening it to suppress perceived threats to power as historically disadvantaged groups gained legal rights. Following the Civil War, the Fourteenth Amendment forced states to choose between extending suffrage to all males or losing some congressional representation. In creating this choice, Section Two of the amendment made an exception for states that disenfranchised males "for participation in rebellion, or other crime." It is this phrase that the Supreme Court relied upon to uphold the practice of excluding persons with felony convictions from voting.

In *Richardson v. Ramirez* (1974), the principal Supreme Court case addressing felon disenfranchisement, the Court held that Section Two of the amendment amounted to an "affirmative sanction" of felon disenfranchisement. Despite upholding the practice, the Supreme Court carved out an exception a decade later in *Hunter v. Underwood* (1985). In *Hunter*, the Court invalidated Alabama's disenfranchisement law because of the clear record evidencing a racially discriminatory intent when an all-white constitutional convention passed a restriction in 1901 (State of Alabama 1901).

In the 1960s, the Warren Court repeatedly expounded the fundamental nature of the right to vote and invalidated numerous restrictions on that right [e.g., *Kramer*



*v. Union Free School District* (1969), *Reynolds v. Sims* (1964), *South Carolina v. Katzenbach* (1966)]. Despite this strong precedent, felon disenfranchisement has eluded the same fate as other restrictions on the right to vote. The legality of the entire practice rests primarily on the *Ramirez* decision. The decision has been the subject of much criticism, and the jurisprudence and scholarship that have developed in the area continue to raise a key question: How do these laws persist when they limit a fundamental right, they are the product of a racially discriminatory history, and they are markedly out of step with international practices and American public opinion?

### Challenging Disenfranchisement Under the Equal Protection Clause

Challenges to felon disenfranchisement laws since *Ramirez* have been mostly unsuccessful, as courts have found the topic to be a settled issue. In cases using the equal protection clause and the status of voting as a fundamental right to challenge the overall validity of disenfranchising, courts generally cite *Ramirez* and *Hunter* with little additional analysis [e.g., *Cotton v. Fordice* (1998), *Owen v. Barnes* (1983), *Woodruff v. Wyoming* (2002)].

Other challenges have attempted to use *Hunter* and allege a discriminatory intent on the part of the state actors who enacted a felon disenfranchisement law. These challenges, however, have not been successful since *Hunter* because discriminatory intent is difficult to prove and few cases provide a record as clear as that of the Alabama law adopted in 1901 (e.g., *Wesley v. Collins* 1986). Further, despite acknowledging the existence of a discriminatory intent at the time a felon disenfranchisement law was originally passed, a few courts have held that the taint of such an intent was removed because later legislatures had retained the law (e.g., *Cotton v. Fordice* 1998; cf. Chin 2002b).

### Challenging Disenfranchisement Under the Voting Rights Act

Race-based challenges to felon disenfranchisement laws have produced more variation in judicial analysis but have also yielded few changes to the laws thus far. These challenges are generally based on the Fifteenth Amendment or Section Two of the Voting Rights Act (VRA) of 1965 and assert that disenfranchisement laws serve either to dilute or to deny the right to vote on the basis of race. Congress passed the VRA with the intent to enforce the Fifteenth Amendment and “banish the blight of racial discrimination in voting” (*South Carolina v. Katzenbach* 1966). The VRA, as amended in 1982, requires courts to analyze all voting-related claims of racial discrimination using a results-based test that considers the “totality of the circumstances.” The original VRA required evidence of a discriminatory intent (*City of Mobile v. Bolden* 1965), but the ineffectiveness of this standard (e.g., US Comm. Civil Rights 1975, 1981) prompted the 1982 amendment.

Given the history of felon disenfranchisement, the VRA test would at first appear to provide a good fit for felon disenfranchisement laws. Using it, however, has thus

far proved to be an uphill battle. Courts have either held that Congress did not intend for the VRA to apply to felon disenfranchisement and it therefore cannot be used to challenge the laws (e.g., *Muntaqim v. Coombe* 2004) or they have been unsympathetic to arguments considering historical racial discrimination and continuing discrimination in state criminal justice systems (e.g., *Wesley v. Collins* 1986).

A 2003 decision by the Ninth Circuit recognized the importance of considering historical and social circumstances when evaluating felon disenfranchisement. In *Farrakhan v. Washington* (2003), the plaintiffs asserted that the combination of disenfranchisement and racial disparities in Washington's criminal justice system served to deny the right to vote on the basis of race. The district court refused to consider the disparities as part of the totality of the circumstances. Instead, the court looked only at the text of the state's law, which prohibits people who have completed their sentences from voting. This, the Ninth Circuit held, was an error (*Farrakhan v. Washington* 2003). The court noted that a VRA analysis must consider "how a challenged voting practice *interacts with* external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color" [*Farrakhan v. Washington* (2003) at 1011–12, quoting *Thornburg v. Gingles* (1986)]. The legal consequences of this type of analysis remain to be seen. Although a panel of the Eleventh Circuit agreed with the Ninth Circuit in a challenge to Florida's disenfranchisement law, that decision was vacated, and, en banc, the court ultimately upheld Florida's disenfranchisement of people who have completed their sentences (*Johnson v. Governor* 2005).

Felon disenfranchisement has also been challenged under a host of other constitutional provisions. For the most part, however, these claims have been unsuccessful. The practice has been challenged under the First Amendment as an infringement upon the right of political speech (e.g., *Johnson v. Bush* 2004; Winkler 1993), under the Eighth Amendment as cruel and unusual punishment [e.g., *Woodruff v. Wyoming* (2002) at 201; *Farrakhan v. Locke* (1997) at 1307; *McLaughlin v. City of Canton* (1995); Karlan (2004); Thompson (2002)], and under the Twenty-Fourth Amendment as a poll tax [for states charging an application fee to apply for restoration of voting rights; *Johnson v. Bush* (2004) at 1292; Mondesire (2001)].

## Critiquing Judicial Review of Felon Disenfranchisement

Courts' approaches to analyzing felon disenfranchisement laws elicit two main critiques: First, the Supreme Court's reliance on Section Two of the Fourteenth Amendment in *Richardson v. Ramirez* (1974) was wrong, and its interpretation of the provision is problematic; and second, with regard to race-based claims, courts are incorrect to insist that the laws bear no relation to race. This latter critique exemplifies differences between legal and sociological understandings of causality. Whereas the legal field often disengages law from historical and social circumstance, sociologists draw upon probabilistic notions of causation and look to patterns of statistical associations in populations.

Because of the basis on which the *Ramirez* Court upheld the constitutionality of felon disenfranchisement, the validity of the practice (from a legal perspective) hinges on the meaning of Section Two of the Fourteenth Amendment. Voting is considered a fundamental right, and laws that limit the right to vote are generally subjected to a strict scrutiny standard of review, which requires a compelling state interest and narrowly tailored means to attain that interest (e.g., *Reynolds v. Sims* 1964). Thus, without Section Two, laws limiting the right to vote on the basis of a felony conviction would be subjected to the same analytical scrutiny as other voting rights cases.

The *Ramirez* Court's reliance on Section Two has been heavily criticized, with most following Justice Thurgood Marshall's dissent, which accused the Court of an "unsound historical analysis" [*Richardson v. Ramirez* (1974) at 56, J. Marshall, dissenting; Fletcher (1999), Tribe (1988)]. The Court used a narrow textualist approach in reaching its conclusion that the reference to "other crime" encompassed felonies. The Court commented that "how it became part of the Amendment is less important than what it says and what it means" [*Richardson v. Ramirez* (1974) at 26]. The Court therefore took the phrase "or other crime" on its face to support felon disenfranchisement laws and to remove them from a traditional voting rights analysis. The Court also pointed to extant state felon disenfranchisement laws at the time the Fourteenth Amendment was passed; if states were admitted to the Union with these laws intact, the Court reasoned, then the laws must not have been contrary to the meaning of the Fourteenth Amendment [*Richardson v. Ramirez* (1974) at 48–49].

A common critique of the Court's position is that Section Two of the Fourteenth Amendment itself no longer carries any force. Its purpose was to enfranchise African Americans, a feat accomplished with the addition of the Fifteenth Amendment just two years after the Fourteenth Amendment took effect (e.g., Chin 2004, Flack 1908). As one scholar has stated, the goal of Section Two was to create a dilemma for southern states, forcing them either to "give blacks the vote (an unthinkable choice) or lose representation in Congress (an unacceptable choice)" (Bond 1997, p. 123). The history concerning the addition of "or other crime" to Section Two is not well documented, but given the Civil War context, the most likely targets of the phrase were former Confederate soldiers (Itzkowitz & Oldak 1973).

In short, Section Two had a limited historical purpose that was accomplished by the adoption of the Fifteenth Amendment, an amendment that some argue repealed Section Two (Chin 2004, Flack 1908). Moreover, even during those two intervening years, Section Two's threat of reduced representation was rarely enforced: "[D]espite its sweeping language, Section 2 turned out to be toothless because neither Congress nor the courts ever showed themselves willing to pull the trigger, despite roughly a century of black disenfranchisement in the South" (Karlson 2001, p. 596, footnote 26).

Courts' dismissals of a connection between race and felon disenfranchisement have similarly garnered criticism. These criticisms charge that it is not difficult to link the two issues and that legal protections should bar this form of

disenfranchisement. From this perspective, the passage of the VRA and its 1982 amendments demonstrate that the Fourteenth and Fifteenth Amendments alone were not enough to eliminate discrimination in the voting context. States used a range of other tactics that operated to maintain a selective electorate, despite seeming racial neutrality (e.g., poll taxes and literacy tests). Felon disenfranchisement laws developed at the same time as many of these practices, and critics argue that the laws similarly do not operate in a race-neutral way (e.g., Behrens 2004, Harvey 1994, Hench 1998). Racial disparities exist at nearly every stage of the criminal justice system, ranging from stereotypes about who commits crime, to arrest rates, and, most notably, to incarceration rates (e.g., Mauer 1999, Pettit & Western 2004). Thus, when disenfranchisement results from a felony conviction, its primary effect is to disproportionately deny or dilute the voting power of minority groups.

## THE IMPACT OF FELON DISENFRANCHISEMENT

The effects of felon disenfranchisement are far reaching, and the practice has an impact on a wide range of social institutions beyond law. Changes within the criminal justice system, such as the trend toward greater incarceration and get tough approaches to crime, have resulted in the exclusion of an increasingly large segment of the population from the electorate. This exclusion, in turn, results in even further marginalization of those groups whose voting strength is diluted by the practice.

The size of the disenfranchised population has grown to a point such that it now holds the power to change the outcomes of closely contested elections. One study indicates that but for felon disenfranchisement laws, seven races for seats in the United States Senate would have turned out differently, which would have also changed the overall partisan composition of Congress during the 1990s (Uggen & Manza 2002). Similarly, the 2000 presidential election was decided by 537 votes in the state of Florida (Federal Election Commission 2001). If the state had permitted to vote only those persons who had completed their sentences and were no longer under any correctional supervision, Al Gore would likely have defeated George W. Bush by a margin of at least 30,000 votes (Uggen & Manza 2002), thus changing the overall outcome of the election.

The existence of felon disenfranchisement laws affects elections in other ways as well. Press reports suggest that many election officials are unaware of their state's laws and mistakenly believe that a felony conviction in any state permanently removes the right to vote (e.g., Hoffman 2003). Similarly, many people with felony convictions mistakenly believe they can never vote again (e.g., Frosch 2004, Manza & Uggen 2005, McCain 2004, Witkowsky 2004). These problems point to an additional aspect of disenfranchisement: The size of the disenfranchised population that is practically (as opposed to legally) disenfranchised may be much larger when accounting for misinformation and other practical concerns, such as people in jail (either awaiting trial or serving a misdemeanor sentence) who do not have ready access to a polling place or absentee ballots (Kalogeris 2003). Finally, removing

approximately 5 million mostly low-income citizens from the electorate is likely to have shifted the positions of the major parties on many issues. For example, it is easier to disregard the concerns of low-income voters on economic issues when millions of such voters are legally disenfranchised.

## INTERNATIONAL PRACTICES AND PUBLIC SUPPORT FOR FELON DISENFRANCHISEMENT

The United States is not alone in disenfranchising people as a consequence for a felony conviction. American practices of disenfranchisement, however, are distinct for their scope and severity. Many nations specifically provide for the right of incarcerated persons to vote, but others restrict the voting rights of prisoners only under specific circumstances, such as conviction for election tampering or treason (Demleitner 2000, Ewald 2002b, Manfredi 1998, Rottinghaus 2003). Of the few countries that disenfranchise nonincarcerated persons, most automatically restore voting rights after a waiting period that commences upon release from prison (Rottinghaus 2003). With the exception of Belgium, the United States stands alone in disenfranchising large numbers of nonincarcerated persons for lengthy or indefinite periods (Rottinghaus 2003).

Within the United States, most forms of felon disenfranchisement do not enjoy widespread support. One survey found that 80% of people polled oppose disenfranchising people who have completed their sentences (Manza et al. 2004). Experimental manipulations varying the type of conviction have shown that support diminishes depending on the seriousness of the crime the person committed, but nevertheless a majority support reenfranchisement upon release, even for serious crimes. Similarly, a clear majority support voting rights for probationers and parolees. Approval diminishes, however, with respect to prisoners; less than one third responded that prisoners should be able to vote (Manza et al. 2004, Pinaire et al. 2003).

## CONCLUSION

Felon disenfranchisement laws have a long history and a continuing impact on electoral politics. In the United States these laws emerged from conflicts based on race and power as they presented an indirect but effective way to quell the threat of an expanded electorate. For many years, the practice went unquestioned, but a rising movement and burgeoning scholarly literature have critically examined this important exception to the taken-for-granted right to vote in the United States. Although social movements and legal reforms during the Civil Rights era led many states to amend their laws to a less restrictive regime, no state has ever wholly abolished a felon disenfranchisement law. Moreover, the widespread nature of the practice continues to exert dramatic and wide-ranging effects that change the tenor of the political climate in the United States.

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## CONTENTS

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COMING OF AGE: LAW AND SOCIETY ENTERS AN EXCLUSIVE CLUB, <i>Lawrence M. Friedman</i>	1
THE COMPARATIVE STUDY OF CRIMINAL PUNISHMENT, <i>James Q. Whitman</i>	17
ECONOMIC THEORIES OF SETTLEMENT BARGAINING, <i>Andrew F. Daughety and Jennifer F. Reinganum</i>	35
LAW AND CORPORATE GOVERNANCE, <i>Neil Fligstein and Jennifer Choo</i>	61
TRANSNATIONAL HUMAN RIGHTS: EXPLORING THE PERSISTENCE AND GLOBALIZATION OF HUMAN RIGHTS, <i>Heinz Klug</i>	85
EXPERT EVIDENCE AFTER <i>DAUBERT</i> , <i>Michael J. Saks</i> <i>and David L. Faigman</i>	105
PLEA BARGAINING AND THE ECLIPSE OF THE JURY, <i>Bruce P. Smith</i>	131
THE DEATH PENALTY MEETS SOCIAL SCIENCE: DETERRENCE AND JURY BEHAVIOR UNDER NEW SCRUTINY, <i>Robert Weisberg</i>	151
VOICE, CONTROL, AND BELONGING: THE DOUBLE-EDGED SWORD OF PROCEDURAL FAIRNESS, <i>Robert J. MacCoun</i>	171
LAW, RACE, AND EDUCATION IN THE UNITED STATES, <i>Samuel R. Lucas</i> <i>and Marcel Paret</i>	203
LAW FACTS, <i>Arthur L. Stinchcombe</i>	233
REAL JURIES, <i>Shari Seidman Diamond and Mary R. Rose</i>	255
FEMINISM, FAIRNESS, AND WELFARE: AN INVITATION TO FEMINIST LAW AND ECONOMICS, <i>Gillian K. Hadfield</i>	285
CRIMINAL DISENFRANCHISEMENT, <i>Christopher Uggen, Angela Behrens,</i> <i>and Jeff Manza</i>	307
AFTER LEGAL CONSCIOUSNESS, <i>Susan S. Silbey</i>	323
WHY LAW, ECONOMICS, AND ORGANIZATION? <i>Oliver E. Williamson</i>	369
REVERSAL OF FORTUNE: THE RESURGENCE OF INDIVIDUAL RISK ASSESSMENT IN CRIMINAL JUSTICE, <i>Jonathan Simon</i>	397
INDEX	
Subject Index	423