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Democracy Denied

The Racial History and Impact of Disenfranchisement Laws in the United States

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This report was compiled by Steven Carbó, Democracy Program Director, Ludovic Blain, Associate Director, Democracy Program, Ellen Braune, Communications Director and Tate Hausman.

This brief draws heavily on research from the new Dēmos publication, Punishing at the Polls: The Case Against Disenfranchising Citizens with Felony Convictions, by scholar Alec Ewald. For copies, see www.demos-usa.org/demos/pubs/punishing_at_the_polls.pdf.

Statistics are also drawn from research conducted by The Sentencing Project, the Mexican American Legal Defense and Education Fund, and Dēmos.

For more information, please contact
Steven Carbó, Director of the Democracy Program or
Ludovic Blain, Associate Director of the Democracy Program.

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A Wake Up Call

Florida 2000 was a wake up call for those who had not noticed the impact of felon disenfranchisement laws – laws that strip voting rights from people convicted of crimes. George W. Bush eked his way to a hotly contested, 537-vote margin victory amidst widespread accusations of fraud and manipulation. Later, investigative journalists found out that tens of thousands of citizens in Florida (mostly black, mostly poor) had been purged from voter rolls because a botched database said they had criminal records.

Florida election officials claimed it was an accident – only people who have actually been convicted of a felony should have been denied the vote, they said, not law-abiding citizens. For many, this begged a larger question: why bar citizens with felony convictions from voting in the first place? Even without the bungled voter-roll purges, Florida's disenfranchisement laws kept over 600,000 non-incarcerated citizens *with felony convictions* from voting in 2000 – more than a thousand times the margin by which Bush won the state.[1]

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Who were those 600,000 potential voters? Disproportionately, they were people of color, mostly black. Blacks made up 28 percent of those disenfranchised voters – double their rate in Florida's overall population. Latinos made up at least another 17 percent. About 31 percent of Florida's black men are banned from voting, *for life,* because of a criminal conviction in their past.

Predictably, the connection between felony disenfranchisement laws and race is not limited to Florida. Across the country, blacks are denied the vote because of criminal records five times more often than whites. Latinos face similar disenfranchisement rates. Neither blacks nor Latinos commit five times the number of felonies as whites, but *racial profiling, targeted law enforcement, incompetent counsel, jury bias and unequal sentencing provisions* have created a prison population with disproportionately dark skin. Consequently, communities of color suffer higher disenfranchisement rates.

It is not an accident that these laws target and disempower communities of color. Like poll taxes, literacy tests and grandfather clauses, felony disenfranchisement laws were intentionally manipulated during Reconstruction to exclude African Americans from the political process. White lawmakers in the Jim Crow era were not shy about their goal. "This plan," said one delegate to the Virginia Convention of 1906, which established strict felony disenfranchisement laws and other barriers to black participation, "will eliminate the darkey as a political factor in this State in less than five years, so that in no single county . . . will there be the least concern felt for the complete supremacy of the white race in the affairs of government."

"This plan will eliminate the darkey as a political factor in this State in less than five years..."

Carter Glass,
Delegate to the Virginia Convention of 1906

Understanding the connection between racism and felony disenfranchisement laws requires both an overview of current statistics and a historical perspective. This brief provides both. In the end, it argues that the disproportionate racial impact of these laws is one powerful reason – though certainly not the only one – to strike them from the books.

1 According to investigative journalist Greg Palast, 57,700 Floridian were purged from voter registries, 90.2% of whom had no criminal records, and 54% of whom were Black or Hispanic. See *The Best Democracy Money Can Buy,* Plume, 2003

Where the Criminal Justice System Meets State Election Law

Contrary to popular belief, felony disenfranchisement laws are not part of the criminal justice system. Instead, they are state election laws, enacted by state legislatures, governors, or hardwired into constitutions by constitutional conventions. Losing the right to vote is not in any way part of a criminal sentence – it is a "collateral consequence" dictated by state law.

What makes certain states adopt such harsh laws? A new study by sociology professors Christopher Uggen and Jeff Manza and law student Angela Behrens identifies race as the central factor.

In other words, ex-prisoners lose their voting rights because of the intersection of two systems – the election law system and the criminal justice system. *Both systems have been used independently to discriminate against people of color for much of American history.* Together, they create a "perfect storm" of forces that politically weaken communities of color. Law professor David Cole points out that "together, the drug war and felony disenfranchisement have done more to turn away black voters than anything since the poll tax."

The war on drugs does indeed help to explain why the incarceration rate among blacks has superseded the rate among whites. Scholars estimate that 14 percent of illegal drug users are black, yet blacks make up 55 percent of those convicted and 74 percent of those sentenced for drug possession. According to the U.S. Sentencing Commission, 65 percent of crack cocaine users are white, but 90 percent of those prosecuted for crack crimes in federal court are black – and are subject to greater penalties than powder cocaine offenders.

Unequal application of the law is not limited to drug offenses, but stretches through every aspect of the criminal justice system. In some cities, half of young black men are under the supervision of the criminal justice system at any one time, two-thirds will be arrested by age thirty, and more are in prison than in college. The public is increasingly aware of this bias. Even conservatives such as President Bush, Attorney General John Ashcroft, and Senator Orrin Hatch describe racial profiling as a serious problem plaguing our criminal justice system.

The other half of the "perfect storm" – the election law system – varies widely from state to state. The Department of Justice recently described state-level felony disenfranchisement rules as "a national crazy-quilt of disqualifications and restoration procedures." Some states extend full voting rights to all eligible citizens, regardless of their criminal records. Others take away voting rights forever, even in the case of a first conviction.

What makes certain states adopt such harsh laws? A new study by sociology professors Christopher Uggen and Jeff Manza and law student Angela Behrens identifies race as the central factor. After extensively studying felony disenfranchisement laws from the 1850s to today, Uggen and Manza conclude that "States with larger proportions of nonwhites in their prison populations were more likely to pass restrictive laws, even when the effects of time, region, economic competition between whites and blacks, partisan control of government, and state punitiveness (as measured by overall incarceration rates) were statistically controlled."[2] In other words, it is no coincidence that states with more nonwhite prisoners have harsher disenfranchisement laws.

Some states ostensibly allow ex-prisoners to regain their voting rights, but throw incredibly

2 See "Ballot Manipulation and the Menace of Negro Domination: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002" by Christopher Uggen, Jeff Manza and Angela Behrens, *American Journal of Sociology* (November 2003).

labyrinthine procedures in their path. Alabama makes some ex-prisoners submit DNA samples to regain their rights. Other states make ex-prisoners fill out forms with details like their children's birthdays and the cause of their father's death. Still others require a 2/3 supermajority of the state legislature for a pardon. Even when ex-prisoners jump through all these legal hoops, the restoration of their rights is neither speedy nor guaranteed. In 2002, Florida's Board of Clemency estimated that they had a backlog of at least 35,000 ex-prisoners who had applied for restoration of their voting rights.

Despite wide differences in disenfranchisement laws, one common thread ties them together: In nearly all states, a disproportionate number of nonwhite citizens have been excluded from the democratic process.

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- Nationally, about 7.5 percent of black adults (men and women) are disenfranchised, compared to 1.5 percent of whites.
- Some 13 percent of black men, or 1.4 million citizens, have forever lost their right to vote.
- Black men make up 36 percent of the disenfranchised population, though they make up only 6 percent of the general population.
- Given current rates of incarceration, three in ten of the next generation of African-American men will lose the vote at some point in their lifetimes.
- In six states – Alabama, Florida, Iowa, Mississippi, Virginia, and Wyoming – at least one in four black men has already become permanently disenfranchised.
- In Florida and Alabama, 31 percent of black men are barred from voting for life.

Statistics about disenfranchised Latinos have been hard to aggregate, due to inconsistent reporting and conflicting data sources. However, a recent study by the Mexican American Legal Defense and Education Fund (MALDEF) found that in six of ten sampled states, Latinos are more likely to be disenfranchised than the overall population. The most striking disparity is in New York, where preliminary data indicates that Latinos are overwhelmingly more likely than whites to have lost the vote. Given that 16 percent of Latino men in America will enter prison in their lifetime, compared to only 4.4 percent of white men, this higher percentage of disenfranchised Latinos is not surprising.

These statistics translate directly into the loss of political power. With far fewer voters among their ranks, communities of color have less influence than their population numbers should dictate, and much less control over the policies that most affect their lives – a contradiction of the fundamental American ideal of self-governance and a major impediment to truly representative democracy.

Disenfranchising Voters Saps Power from their Communities

Another way the criminal justice system disempowers people of color is it's impact on the process of redistricting. Every ten years, states redraw their electoral maps based on population changes. During this process, states count prisoners where they "reside" (rural, prison-hosting areas) rather than where they come from (urban, low-income areas). This makes rural areas seem more populous, so they get a disproportionate share of government funds for roads, schools and social services, as well as more legislative districts – even though the phantom "residents" in prison cannot vote. This increases the political power of rural, often white communities, while robbing that power from urban communities of color.

A History of Discrimination

Felony disenfranchisement laws date back to the earliest days of the U.S. republic, and to Europe before that. Early European disenfranchisement laws seem to have been limited to the most serious crimes, and were implemented by judges in individual cases. As American states drew up their constitutions, many of them incorporated some form of disenfranchisement laws into their statutes.

At the end of the Civil War, however, lawmakers found new uses for felony disenfranchisement laws. The newly adopted Fifteenth Amendment allowed African Americans to vote – in theory. In practice, Southern whites soon began to rewrite their state constitutions to remove African Americans from politics. Declaring proudly and explicitly their goal of white supremacy, these lawmakers used a variety of legal schemes to disempower African Americans, including literacy tests, poll taxes, grandfather clauses and all-white primaries. Most of these laws have been called out as racist and unconstitutional, and have been wiped from the books. Felony disenfranchisement laws are the notable exception.

"What is it we want to do? Why, it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."

– John B. Knox, President of the Alabama Constitutional Convention of 1901

Mississippi's 1890 constitutional convention was among the first to use felon disenfranchisement laws against African Americans. Until then, Mississippi law disenfranchised those guilty of any crime. In 1890, however, the law was narrowed to exclude only those convicted of certain offenses – crimes of which African Americans were more often convicted than whites. The Mississippi Supreme Court in 1896 enumerated these crimes, confirming that the new constitution targeted those "convicted of bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy."

Other states followed suit. Many newly disenfranchisable offenses, such as bigamy and vagrancy, were common among African Americans simply because of the dislocations of slavery and Reconstruction. Indeed, the laws were carefully designed by white men who understood how to apply criminal law in a discriminatory way: the Alabama judge who wrote that state's new disenfranchisement language had decades of experience in a predominantly African-American district, and estimated that certain misdemeanor charges could be used to disqualify two-thirds of black voters.

"What is it we want to do?" asked John B. Knox, president of the Alabama convention of 1901. "Why, it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."

The laws worked. A historian later hired by Alabama state registrars found that by January 1903, the revised constitution "had disfranchised approximately ten times as many blacks as whites," many for non-prison offenses.[3]

Such schemes would soon be approved by the highest courts in the land. In 1896, the Mississippi Supreme Court endorsed with devastating clarity the discriminatory intent of disenfranchisement laws after Reconstruction. The Mississippi constitutional convention of 1890, wrote the court,

> … swept the circle of expedients to obstruct the exercise of the franchise by the negro race. By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain particularities of habit, of temperament

3 These state schemes to deny the vote to black residents were not confined to the South. Plaintiffs in *Hayden v. Pataki* allege that in a series of constitutional conventions convened in New York beginning in 1821, delegates adopted voter disqualification provisions that denied the vote to residents convicted of "infamous crimes" in order to disenfranchise blacks. *Hayden v. Pataki,* ooCiv. (S.D.N.Y.) (Pl.Compl).

> and of character, which clearly distinguished it, as a race, from that of the whites – a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and *its criminal members given rather to furtive offenses than to the robust crimes of the whites.* Restrained by the federal constitution from discriminating against the negro race, the convention *discriminated against its characteristics and 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 in which violence was the principal ingredient, were not.

This understanding was not confined to the South. In 1898, the U.S. Supreme Court implicity endorsed Mississippi's discriminatory disenfranchisment laws in *Williams v. Mississippi,* a case that legalized all-white juries. Disenfranchisement laws were challenged again in the Supreme Court in 1974. The Court's decision in that case, *Richardson v. Ramirez,* not only upheld the laws, but also made future legal challenges harder. It took until the 1985 case *Hunter v. Underwood,* brought by two men who lost their voting rights in Alabama due to a "crime of moral turpitude" – writing bad checks – for the Court to agree that racism was an explicit purpose of felony disenfranchisement laws. But the *Hunter* decision only struck down those laws motivated by racist intent – and only the most explicit, purposeful intent. Laws with less overt racist effects, like today's felony disenfranchisement laws, have been left standing.

Flawed Theories Supporting Disenfranchisement

The racially tainted history of felony disenfranchisement laws ought to make Americans of all ideological persuasions reconsider their value in our democracy. These policies, so closely linked to our prejudicial past, should survive only if we have an overwhelming need for them: when they alone fulfill a specific, extremely important social purpose. Felony disenfranchisement policies fail that test.

As Alec Ewald concludes in his "Punishing at the Polls" report, felony disenfranchisement runs counter to our democratic ideals. The arguments in favor of disenfranchisement are not supported by data, and in fact, disenfranchisement laws have a negative impact on the stated goals of our criminal justice system. And denying the vote to any citizen can only have negative consequences for a democratic society.

- *Disenfranchisement fails as a form of punishment,* because it does not help achieve any of the four goals penal policies pursue: incapacitation, deterrence, retribution, and rehabilitation.
- *No evidence exists that offenders would vote in a "subversive" way,* as some supporters of criminal disenfranchisement allege. Barring some citizens from the polls simply because they might vote to change our laws violates essential American principles.
- *No evidence exists that offenders are more likely than others to commit electoral fraud,* and states have numerous laws on the books that prevent and punish fraud.
- *Disenfranchisement laws have the perverse effect of encouraging recidivism,* since they make it harder for ex-prisoners to fully reintegrate into society. Restoring voting rights would speed the rehabilitation process and give ex-prisoners a meaningful stake in their communities.

- *Evidence domestically and from abroad shows that protecting voting rights for all citizens keeps a democracy healthy.* Nations as diverse as Israel, Canada, Macedonia and Sweden, and parts of the U.S. including Maine, Vermont and Puerto Rico even allow many citizens who are incarcerated to vote from their cells.

Action and Change

A growing coalition of voting rights advocates, criminal justice reformers and ex-prisoners have come together to challenge felony disenfranchisement laws. Victories have been scored in a number of states in recent years, and momentum is building to end felony disenfranchisement across the country.

At least 500,000 citizens have been re-enfranchised in the last five years due to policy changes:

- In New Mexico – where ex-felons were once disenfranchised for life – Republican Governor Gary Johnson recently signed a law to automatically restore the vote to qualified ex-felons.
- Connecticut upgraded its laws in 2001 to allow 36,000 people on probation to vote.
- In 2002, Maryland repealed a law that automatically and permanently disenfranchised people convicted of a second felony.
- In 2003, Wyoming and Alabama enfranchised some citizens after they complete their full sentence.

Riding the wave of success from these victories, an eight-member collaboration of advocacy and legal rights groups have launched Right to Vote, a national campaign to restore voting rights to ex-prisoners. Specifically targeting five states – Florida, Alabama, New York, Maryland and Texas – the coalition has launched a series of legislative, public education, voter mobilization and legal campaigns. The coalition includes the National Association for the Advancement of Colored People (NAACP), the NAACP Legal Defense Fund, Dēmos, the Brennan Center for Justice at NYU School of Law, The Sentencing Project, the Mexican American Legal Defense and Education Fund, People for the American Way, and the American Civil Liberties Union.

Significant legal challenges to felony disenfranchisement laws are working their way through the courts. In New York, a self-educated prisoner filed *Hayden v. Pataki* in 2001, which challenges New York's felon disenfranchisement statutes and is now being ligitated by the NAACP Legal Defense Fund and two other organizations. In Florida, the Brennan Center is representing the plantiffs in *Johnson v. Bush,* which attempts to re-enfranchise the 600,000 citizens who have fully finished their sentences but are still denied their voting rights. Other actions are pending in Massachusetts, Virginia and Washington.

Eventually, voting rights advocates would like to see the abolition of all criminal disenfranchisement laws – a complete and final separation of state election rules from the criminal justice system. Like past struggles against racism – the abolition of slavery, *Brown v. Board of Education,* the freedom summers, the Voting Rights Act, environmental justice campaigns, and countless other fights – the battle against felony disenfranchisement laws will take a broad and determined campaign. As Dr. Martin Luther King, Jr. said, "the moral arc of the universe is long, but it bends towards justice."

Appendix

Resources

For toolkits, Alec Ewald's "Punishing at the Polls" report, and more up to date information, please visit **www.demos-usa.org.**

Demos' Felony Disenfranchisement Toolkit and Resource page
http://www.demos-usa.org/demos/votingrights/

MALDEF's"The Lost Latino Vote" report
www.maldef.org

The Sentencing Project's Resource Page
www.sentencingproject.or/issues_03.cfm.

Disenfranchisement Laws Vary from State to State

- Maine, Vermont and Puerto Rico never strip away voting rights due to felony convictions.
- Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Utah and the District of Columbia deny the vote to inmates, but grant the vote to citizens who are out of prison, on probation, or on parole.
- California, Colorado, Connecticut, and New York only allow people on probation to vote. Parolees, and those in prison are disenfranchised.
- Alaska, Arkansas, Georgia, Maryland, Minnesota, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin disenfranchise all citizens on probation, in prison and on parole.
- Alabama, Arizona, Delaware, Florida, Indiana, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Washington, and Wyoming effectively take away the vote for life from all or some citizens with felony convictions, including those who have fully completed the terms of their sentence. Some of these states may restore voting rights through a lengthy and difficult pardon, appeal, or clemency process.

A Look at the Numbers in 2000

State	Disenfranchised
Alabama*	225,095
Alaska	9,230
Arizona	147,340
Arkansas	50,416
California	288,362
Colorado	23,300
Connecticut*	49,864
Delaware	32,692
D.C.	7,598
Florida	817,322
Georgia	286,277
Hawaii	5,053
Idaho	16,064
Illinois	46,992
Indiana	21,458
Iowa	100,631
Kansas	12,599
Kentucky*	147,434
Louisiana*	37,684
Maine	0
Maryland*	129,836
Massachusetts*	0
Michigan	49,318
Minnesota	41,477
Mississippi	119,943
Missouri	83,012
Montana	3,265
Nebraska	9,427
Nevada*	66,390
New Hampshire	2,416
New Jersey	143,106
New Mexico*	78,406
New York	131,273
North Carolina	70,653
North Dakota	1,143
Ohio	47,461
Oklahoma	52,089
Oregon	11,307
Pennsylvania	36,847
Puerto Rico	0
Rhode Island	19,483
South Carolina	52,210
South Dakota	2,727
Tennessee	91,149
Texas	525,967
Utah	8,896
Vermont	0
Virginia	310,661
Washington	158,965
West Virginia	8,875
Wisconsin	54,025
Wyoming*	17,850
TOTAL	**4,653,588**

*These states have changed their laws since 2000, affecting the number of people who are disenfranchised.

"Without a vote, a voice, I am a ghost inhabiting a citizen's space."

Joe Loya, a disenfranchised former prisoner

civil death

The status of a living person equivalent in its legal consequences to natural death; specifically: deprivation of civil rights.

Taking away the right to vote for life is analogous, some commentators have suggested, to the medieval practice of "civil death," where severe violations of the social contract led to complete loss of citizenship rights.*

**"Civil Death or Civil Rights: Public Attitudes Toward Felon Disenfranchisement in the United States,"* Manza, Brooks, Uggen. March 2003

Dēmos: A Network for Ideas and Action
220 Fifth Avenue
5th Floor
New York, NY 10001
Phone: 212-633-1405
Fax: 212-633-2015
www.demos-usa.org