



# Punishing at the Polls

**The Case Against Disenfranchising  
Citizens With Felony Convictions**

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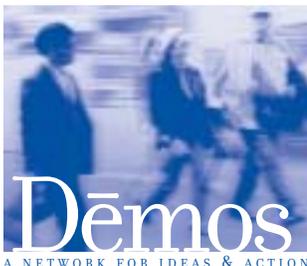
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Alec Ewald

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# About the Author

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# Preface

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In the wake of the contested election of 2000, many Americans were shocked to learn that up to 800,000 citizens in Florida were legally barred from voting because of a felony conviction. These citizens were disproportionately from communities of color, and were among some 4.7 million Americans nationwide who cannot participate in elections because of felony disenfranchisement statutes.

Further examination reveals an uneven patchwork quilt of state laws, ranging from some states that do not take away voting rights at all because of a felony conviction, to a number of states that permanently disenfranchise people with felony convictions, resulting in astonishing percentages of citizens deprived of the right to vote.

Over the last several years, an energetic movement has sprung up across the United States aimed at restoring voting rights to millions of citizens excluded from our nation's democratic process. Some states have changed their laws in the past two years to ease the voting rights restoration process. Dēmos is proud to be part of this continuing effort. We are currently part of a national collaborative effort of eight organizations, seeking to challenge the constitutionality of felony disenfranchisement laws, repeal or modify these laws through legislative action, and to educate citizens about their voting rights under current statutes. Our partners are the ACLU, the Brennan Center for Justice at NYU School of Law, the Mexican-American Legal Defense and Education Fund, the NAACP, the NAACP Legal Defense Fund, People for the American Way, and The Sentencing Project.

This report by political scientist Alec Ewald is an invaluable contribution to those who seek to understand felony disenfranchisement laws. Ewald examines the history of felony disenfranchisement laws, tracing their early development in liberal theory and their explicit racist heritage in the post-Civil War South. He outlines the arguments marshaled in favor of disenfranchisement, and presents a persuasive case that these laws are in conflict with America's best ideals and traditions of democracy, and do not further the goals of criminal justice either.

Dēmos is pleased to present this thoughtful work on a critical challenge for American democracy. We view changing these statutes as one important element of a broader agenda of eliminating barriers to participation in our election process, and, in so doing, helping to achieve a more vibrant and inclusive democracy. For action toolkits on this issue and additional research reports, please view our resource page at [www.demos-usa.org/votingrights](http://www.demos-usa.org/votingrights).



Miles Rapoport  
President



Steven Carbó  
Director, Democracy Program



# Executive Summary

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Almost 4.7 million U.S. adults are now barred from voting because of a criminal conviction. The majority of these disenfranchised Americans are no longer incarcerated, and over a million of them have completed their sentences entirely. The United States is the only democracy that indefinitely bars so many ex-offenders from voting.

The laws that determine whether citizens with felony convictions can vote — criminal disenfranchisement laws — vary widely across the country. In two states, convicted citizens retain their right to vote while incarcerated. In the thirteen harshest states, many criminal offenders are denied the vote even after they have completed their terms of incarceration, probation or parole.

This report offers a fresh assessment of criminal disenfranchisement law in the United States, based on a comprehensive explanation and analysis of arguments for and against the policy. After describing the state of U.S. disenfranchisement law today and the history of the practice in Western politics, *Punishing at the Polls* details the claims advanced by advocates and opponents of the policy today. *Punishing at the Polls* concludes that laws barring criminal offenders from voting should be repealed.

Defenders of felony disenfranchisement laws emphasize a few central points. They contend that felons should be deprived of the vote because they have violated the social contract, and so should lose the right to make society's rules; because they are not trustworthy, and may commit vote fraud; because they “pollute” the polity; or because barring felons from the polls expresses our respect for the civic process.

Arguments for criminal disenfranchisement also have roots in America's troubling history of racial discrimination. In the late nineteenth century, some state legislatures, especially in the American south, tailored criminal disenfranchisement laws to exclude blacks from the franchise. While the explicitly racist ideology which motivated those policies is almost universally discredited in American public life today, it has played an important role in shaping our country's disenfranchisement laws.

This report systematically critiques the case for felony disenfranchisement laws and examines the negative consequences of these laws. Key points include:

- **Disenfranchisement fails as a form of punishment.** It does not help achieve any of the four goals penal policies pursue: incapacitation, deterrence, retribution, and rehabilitation.

## Key rights can only be denied when a real and pressing danger to society exists. Criminal disenfranchisement does not meet this test.

- **Disenfranchisement is a hidden penalty, not a public one.**

These laws are located in state constitutions and suffrage statutes, not penal codes. Because disenfranchisement is technically not part of a criminal sentence, it occurs automatically, invisibly, and silently as a “collateral consequence” of conviction. It is almost never discussed by prosecutors, defense lawyers, or judges. Moreover, the sanction is not imposed by a judge considering individual circumstances, but is applied across the board with no flexibility or discretion during sentencing.

- **No evidence exists that offenders would vote in a “subversive” way, as some supporters of criminal disenfranchisement allege.**

In any case, the argument that we should bar 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 designed to prevent and punish fraud.
- **Disenfranchisement laws have an explicitly racist past.** After the Civil War, some American lawmakers openly employed criminal disenfranchisement law exactly as they used the literacy test and the poll tax: as a policy neutral on its face, but with the intent and effect of barring blacks, but not whites, from the polls. Understanding that history—together with the long record of overt, purposeful racial discrimination in American election law and criminal justice—should make us deeply skeptical of a policy that stands at the intersection of those two legal areas.
- **Disenfranchisement has an extraordinary impact on communities of color today:** in a few states, one-third of black men are indefinitely disenfranchised. Latinos also are disproportionately impacted, as are Native Americans in some states. Americans of varying political perspectives now agree that systemic biases in the “war on drugs” and the criminal-justice system punish non-whites in disproportionate numbers. Disenfranchisement has added a serious political dimension to this problem, one that has grown rapidly over the past two decades as incarceration rates have soared.
- **The argument for lifetime bans on voting is not much different from the case for temporary restrictions.** Indefinite disenfranchisement—also called “ex-offender,” “ex-felon,” permanent, or lifetime disenfranchisement—is the most extreme form of the policy. But temporary and indefinite disenfranchisement policies rest on fundamentally similar premises, and are equally vulnerable to challenge.

At the very least, advocates of any practice that prevents citizens from voting must describe precisely *how* the exclusionary policy works to make our democracy healthier: how it shapes individuals and their behavior, and how it protects the public from specific threats. Disenfranchisement’s defenders never make that case, relying instead on rhetorical abstractions and vague fears.

Conversely, permitting and even encouraging offenders to vote could strengthen American democracy in two real ways. First, it would publicly express American confidence in the robust nature of our elections and the inclusiveness of our political values. Americans have learned that we define and *strengthen* our core political beliefs by safeguarding the rights of all citizens—indeed, particularly those citizens whom many in the majority may regard with an instinctive contempt. Second, participation in those elections—our proud, formative civic rituals—could help offenders develop their sense of social responsibility and membership in the political community.

Americans believe deeply in protecting individual rights, especially the right of self government. “The right to vote in a democracy is among the most precious of all individual rights,” as George W. Bush and others argued in federal court in 2000. Most Americans understand that key rights can only be denied when a real and pressing danger to society exists, and only when a specific, necessary purpose is achieved by doing so. Criminal disenfranchisement does not meet this test.





# I. Introduction

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Prior to the Presidential election of 2000, laws barring criminals from voting had received only sporadic attention from legal scholars. George W. Bush won that election, of course, by virtue of a 537-vote margin in Florida. As the public soon learned, Florida's flawed attempt to purge convicted felons from voter rolls resulted in many non-felonious citizens being stricken from voting rolls.<sup>1</sup> But criminal disenfranchisement also shaped the election in other ways. Florida's indefinite-disenfranchisement policy currently bars well over half a million non-incarcerated citizens from voting — about a thousand times the margin by which Bush won the state.<sup>2</sup>

Nationally, almost 4.7 million U.S. adults are now barred from voting because of a criminal conviction, the majority of whom are not incarcerated, and well over a million of whom have completed their sentences entirely.<sup>3</sup> In thirteen states, many criminal offenders are denied the vote even after they have completed their terms of incarceration, probation, and parole.<sup>4</sup> The United States is the only democracy that indefinitely bars so many offenders from voting, and it may be the only country with such sweeping disenfranchisement policies.<sup>5</sup> So many Americans are now disenfranchised that our overall voter-turnout figures are distorted, because a significant percentage of the voting-age population is not eligible to vote.<sup>6</sup>

These facts have spurred advocates to launch efforts at reform—in statehouses, courthouses, the op-ed pages, and national and regional conferences examining felony disenfranchisement.<sup>7</sup> Reformers depict the policy as an affront to voting rights, and an obstacle to successful rehabilitation of ex-offenders. Proponents of the policy, however, vigorously defend the laws. They point to the policy's long history in the U.S. and to public support for laws barring convicted felons from voting, and describe the practice as a useful way to punish offenders while protecting American elections from corruption.

Criminal disenfranchisement draws on deep traditions in American political thought. Those roots help explain why policies barring inmates from voting seem to make sense to the public today. But defenders and opponents of disenfranchisement approach the policy from vastly different political assumptions, and the quality of debate over the practice has suffered as a result. Drawing on history, law, and political philosophy, this report tries to improve public understanding of disenfranchisement by anchoring arguments for and against the policy in the central ideologies of American politics. Appreciating the ideological foundations of criminal disenfranchisement leads us to a powerful critique of the practice.

## A Look at the Numbers in 2000

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

**Total** **4,653,588**

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

Source: Jeff Manza and Christopher Uggen, "The Political Consequences of Felon Disenfranchisement Laws in the United States," *American Sociological Review* 67:777–803.

The best way to understand the disenfranchisement debate is to approach it from the perspective of two concepts that are influential in American political thought: *liberal contractarianism* and *republicanism*. The thinking of most Americans today combines both concepts, and the arguments of both critics and defenders of disenfranchisement draw on these roots.

Briefly, advocates of liberal-contractarianism think that society's rules are simply an agreement among independent individuals. The government should not tell its citizens how to be "virtuous"—it should allow them as much leeway as possible to pursue happiness and the good life as they define it.

Proponents of republicanism do not agree with this. Instead, they emphasize that citizens should cultivate civic virtue – a devotion toward the public good. Strong laws are important for persuading self-interested citizens to act virtuously.

These two concepts—one drawing on individualism and the image of the social contract, the other on the importance of civic virtue—have been essential to the development of criminal disenfranchisement in the U.S., but they cannot provide a full understanding of the practice. A third ideology that has defined many aspects of U.S. history—belief in the superiority of the white race—also shaped American disenfranchisement law, and we cannot understand the policy's impact today without considering its racial dimension.

Before we can debate whether or not criminal disenfranchisement is a good or a bad thing, however, we need to understand how these laws operate and where they came from.

## II. Criminal Disenfranchisement in the U.S.: Past and Present

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Today, state disenfranchisement policies vary so widely that the Department of Justice recently described current law as “a national crazy-quilt of disqualifications and restoration procedures.”<sup>8</sup> According to the Sentencing Project, thirteen states disenfranchise some offenders during every stage of their sentence and thereafter; fifteen disenfranchise during incarceration, probation, and parole; four bar the vote during incarceration and parole, but not probation; sixteen states and the District of Columbia bar offenders from voting only during incarceration; and two states, and Puerto Rico, do not strip voting rights from convicts.<sup>9</sup> About three-fourths of disqualified voters are no longer in prison, but are on probation or parole or have completed their sentences entirely.<sup>10</sup>

Even as they are barred from voting, inmates are counted by the census as residents of the towns in which they are incarcerated. The rural areas where prisons are predominantly located, therefore, are often eligible to receive increased federal funds—particularly under programs which means-test, since inmates have very low incomes. Those increases often come at the expense of urban areas. Many argue that the prison census pattern also affects political redistricting.<sup>11</sup>

Various states disenfranchise tens of thousands of non-incarcerated citizens; Alabama, Florida, Kentucky, and Virginia each disenfranchise over one hundred thousand ex-offenders.<sup>12</sup> Each indefinite-disenfranchisement state establishes some procedure by which ex-convicts may petition to regain the right to vote, but restoration procedures often make regaining the vote extremely difficult—in some cases purposely so. In Alabama, for example, convicts must submit blood or saliva containing DNA to obtain the restoration of voting rights. Just four laboratories in the state participate in the program; DNA testing at one of the labs is conducted just one day a month, for one hour.<sup>13</sup> Relatively few former felons take the necessary steps—which range from administrative procedures to full gubernatorial pardon—and successfully regain the right to vote.<sup>14</sup>

The diversity among state laws has confusing effects. A former inmate may vote in one state, but his old cell-mate may not in a neighboring state, and a convicted felon who moves across state lines may gain or lose the right to vote. The voting rights of former felons, there-

## The loss of the vote is legally not part of an offender’s sentence. It is a “collateral consequence” of conviction.

fore, depend “solely on where a person lives,”<sup>15</sup> as a recent bill before the U.S. Congress put it. Most crimes punished by disenfranchisement, meanwhile, are not related to voting or to the electoral process.<sup>16</sup> And even the commonly used term “felon disenfranchisement” is not entirely accurate, because not all the states which permanently bar some offenders from voting use felony conviction as the cut-off point: some declare that “infamous” crimes, or infractions betraying “moral turpitude,” bring about loss of the franchise.<sup>17</sup> In practice, however, it is generally those convicted of felonies who lose the right to vote.

Indefinite disenfranchisement—also called “ex-offender,” “ex-felon,” permanent, or lifetime disenfranchisement—is the most extreme form of the policy, imposing on criminal offenders something akin to the medieval condition of “civil death.”<sup>18</sup> Some critics of disenfranchisement focus only on the voting rights of those who have completed their sentences and are back in society. But the fact is that the arguments for temporary and indefinite disenfranchisement are virtually identical, and are therefore equally vulnerable to challenge.

### **PUNISHING CONVICTS, OR DEFINING THE FRANCHISE?**

Disenfranchisement laws are located not in the penal codes, but in state constitutions and suffrage statutes. That means that the loss of the vote is legally not part of an offender’s sentence. Instead, it is a “collateral consequence” of conviction, as Velmer Burton and others have pointed out.<sup>19</sup> Courts have tended to deny that disenfranchisement is a punishment. In the language of the U.S. Supreme Court, disenfranchisement is designed not to punish wrongdoers, but to “designate a reasonable ground of eligibility for voting.”<sup>20</sup> Therefore, it is simply “a nonpenal exercise of the power to regulate the franchise.”<sup>21</sup>

The reality, however, is that these policies punish. Historical sources suggest that American disenfranchisement laws were designed with punitive purposes,<sup>22</sup> and today both defenders and opponents of disenfranchisement agree that the laws are punitive. Critics argue that the best explanation of disenfranchisement laws is that they “are penal in nature ... the deprivation of the franchise is yet another form of punishment that is imposed upon persons convicted of felonies.”<sup>23</sup> One federal judge called disenfranchisement “the harshest civil sanction imposed by a democratic society,” an “axe” by which a citizen is “severed from the body politic and condemned to the lowest form of citizenship.”<sup>24</sup>

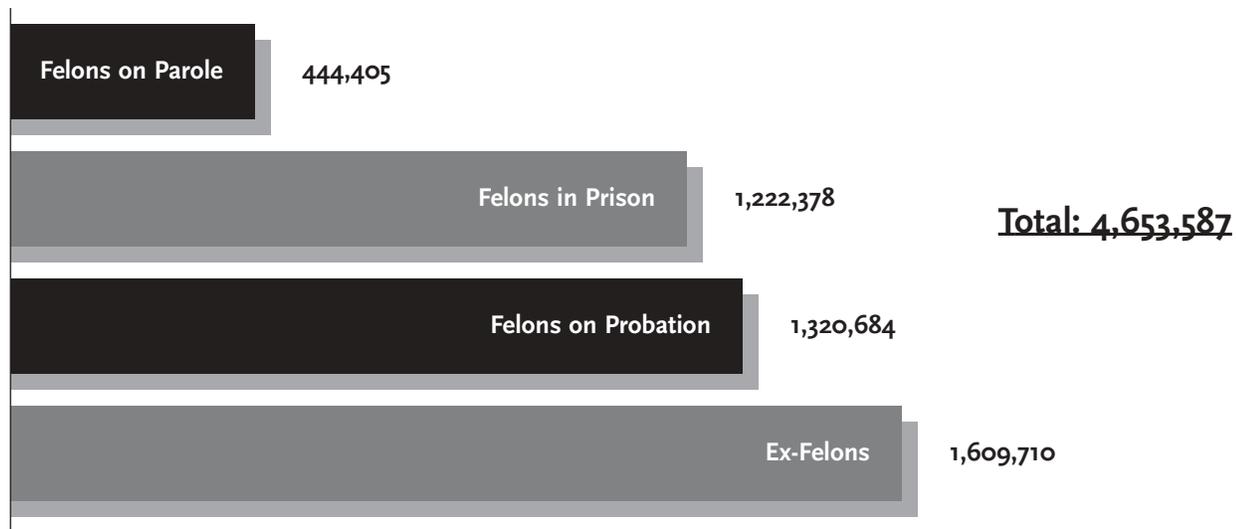
Advocates of the policy, meanwhile, argue frankly that “not allowing criminals to vote is one form of punishment.”<sup>25</sup> As a prominent Massachusetts state legislator recently declared, the loss of the vote “is part of the penalty—you are in jail, you don’t pass go, you don’t collect the \$200, you don’t vote until you get out.”<sup>26</sup> In assessing arguments for and against criminal disenfranchisement, then, we must examine the policy both as a form of punishment and a regulation of the franchise.

## ANCIENT AND MEDIEVAL ROOTS: “CIVIL DEATH”

The practice of barring criminals from the suffrage emerges from European history. In ancient Greece, those criminals declared to be “infamous” were unable to appear in court or vote in the assembly, make public speeches, or serve in the army. In Rome, the ability to hold office and to vote in the public assembly could be denied to those tagged with *infamia*.<sup>27</sup> During the Renaissance, peoples across Europe used the condition of “outlawry” to punish some criminals. The term meant what it said, since “outlaws” were literally considered to be outside the law, and could be killed with impunity.<sup>28</sup> European lawmakers later developed the concept of “civil death,” which “put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence.”<sup>29</sup> The convict declared “dead in law” lost civil protections and could not perform any legal function—including, of course, voting.

Such penalties were extreme, but modern critics of indefinite disenfranchisement have noted theoretical similarities between medieval punishments and “collateral” criminal penalties in the U.S. today.<sup>30</sup> Unlike contemporary disenfranchisement in the U.S., however, early European civil penalties seem to have been limited to the most serious crimes, and were implemented only by judges in individual cases. Certainly, they help to demonstrate the deep roots of policies placing some lawbreakers outside of political society.

## Number of People Disenfranchised in the United States, 2000



Source: Jeff Manza and Christopher Uggen, “The Political Consequences of Felon Disenfranchisement Laws in the United States,” *American Sociological Review* 67:777–803.

## The practice of barring criminals from the suffrage emerges from European history.

### AMERICAN COLONIAL LAW

As towns were settled and incorporated in seventeenth-century and eighteenth-century New England, new citizens required town-meeting approval, usually based on religious conformity, property ownership, and moral qualifications.<sup>31</sup> The Plymouth Colony refused to admit as a freeman “any opposer of the good and wholesome laws of this colonie,” and one could lose freeman status by behavior which was “grossly scandalouse, or notoriously vitious.”<sup>32</sup> Fearing that “some corrupt members may creep into the best and purest

societies,”<sup>33</sup> Plymouth in 1651 provided that any person judged to be ‘grosly scandalouse as lyers drunkards Swearers & C. shall lose their freedom of this Corporation.’<sup>34</sup> In Massachusetts Bay Colony, disenfranchisement was authorized as an additional penalty for conviction of fornication or any “shamefull and vitious crime.”<sup>35</sup> Further south, Maryland declared that a third conviction for drunkenness incurred loss of suffrage.<sup>36</sup> Some early colonial laws confronted directly the question of how long the loss of freeman status and the ballot was to last: in Plymouth the diminishment seems to have been permanent, but Connecticut law stated that “good behaviour shall cause restoration of the privilege.”<sup>37</sup>

Barring offenders from voting has a long history in America, then, but these examples illuminate important differences between colonial and contemporary policies. The removal of criminals from the suffrage in colonial times had a visible, public dimension; its purposes were explained in the law; it usually applied only to egregious violations of the moral code; and it was a discrete element in punishment, requiring judicial implementation in individual cases. Modern disenfranchisement laws—automatic, invisible in the criminal justice process, considered “collateral” rather than explicitly punitive, and applied to broad categories of crimes with little or no common character—do not share these characteristics.<sup>38</sup>

### DISENFRANCHISEMENT’S HISTORY IN THE UNITED STATES

After achieving independence from Great Britain, the American states rejected some of their English common-law heritage. Some did adopt “civil death” statutes for criminal offenders,<sup>39</sup> but the Constitution prohibited bills of attainder, forfeiture for treason, and “Corruption of Blood.”<sup>40</sup> Meanwhile, increasing numbers of citizens gained access to the polls, and Americans began to think of suffrage not as a privilege of the qualified few, but as a broadly-held right. Of course, most adult citizens were still excluded, because women and blacks were barred from voting almost everywhere.

Some early state constitutions required evidence of good character for balloting privileges, a test used to exclude those with criminal records.<sup>41</sup> Many constitutions disqualified felons explicitly, or directed their legislatures to do so: between 1776 and 1821, eleven state constitutions disqualified criminals from voting.<sup>42</sup> By 1868, 18 more states excluded serious offenders from the franchise.<sup>43</sup> Some of that increase may be attributable to class bias in a time of declining property tests, as elites sought to limit the political strength of lower-class groups.<sup>44</sup>

On the eve of the Civil War, states commonly barred from voting seven classes of citizens: women, men without extended residency, blacks, soldiers, students, the institution-

alized mentally ill, and criminals. Only the last two groups are still broadly disenfranchised today, and the ballot access of non-institutionalized mentally-ill citizens is improving rapidly.<sup>45</sup> It is important to recall that in 1860, blacks were only permitted to vote in six states. In almost every state where criminal offenders were disenfranchised, blacks were also denied the ballot by law.<sup>46</sup> Since blacks were already barred from voting because of their race, discriminatory intent does not appear to have been at the heart of antebellum criminal disenfranchisement.

That would soon change. After Reconstruction, several Southern states carefully re-wrote their criminal disenfranchisement provisions with the express intent of excluding blacks from the suffrage, a development explained in more detail below. Our history of the law encounters a long silence following those revisions, however, as scholars know very little about criminal disenfranchisement policies in the century after Reconstruction.<sup>47</sup> One major new study finds that while states' rate of adoption of disenfranchisement policies peaked in the post-Civil War decades, changes in state law have occurred regularly throughout the twentieth century.<sup>48</sup>

From a legal perspective, however, one of the most fateful single developments in the history of criminal disenfranchisement occurred in the aftermath of the Civil War: in 1868, the Fourteenth Amendment was added to the Constitution. Despite the liberating intent of the Amendment and the powerful language of its Equal Protection Clause, the Fourteenth Amendment has had the perverse effect of strengthening modern disenfranchisement law. This is because of a U.S. Supreme Court case—*Richardson v. Ramirez*—decided more than a century after the Amendment's enactment.



### **A TURNING POINT: RICHARDSON V. RAMIREZ**

“There are so many constitutional arguments against the disenfranchisement of felons,” one law professor has argued, “that one can only wonder at the survival of the practice.”<sup>49</sup> But the Burger Court’s 1974 decision in *Richardson v. Ramirez*<sup>50</sup> not only upheld state laws disenfranchising ex-offenders, but did so in a way that placed a significant hurdle in front of subsequent legal challenges.<sup>51</sup> The majority’s decision in the case, the highly unusual constitutional grounds on which the Court rested its ruling, and the flaws which critics have noted in the opinion all make understanding *Richardson* crucial.

In 1972, three California men who had been convicted of felonies and served their sentences attempted to vote in three different counties, and were denied by the respective county clerks because of their criminal records. California law then denied persons “convicted of infamous crimes” or any felony from voting. The men argued that under the exacting scrutiny to which the U.S. Supreme Court has subjected suffrage laws challenged as uncon-

## **Richardson is crucial to understanding why American disenfranchisement policies have survived the voting-rights revolution.**

stitutional, only a *compelling state interest* can justify limitation of the franchise: any proposed restriction must be both necessary and narrowly tailored to achieve that interest.<sup>52</sup> The California high court agreed, and struck down the state’s permanent-disenfranchisement law as a violation of the Fourteenth Amendment’s equal protection clause.<sup>53</sup>

In its decision, the California Supreme Court made no mention of an obscure part of the Fourteenth Amendment, Section Two. Section Two came about because Northern Republicans were unwilling to bar racial discrimination in voting in 1868—as the Fifteenth Amendment would do just two years later—but also did not want to allow resurgent Southern whites to simply abolish their Reconstruction-era universal-suffrage laws, outlaw black voting, and regain power in the national government.<sup>54</sup> Section Two of the Fourteenth Amendment solved the problem. It was designed

to *permit* Southern legislators to disenfranchise blacks, while laying out a stiff political *penalty* should they choose to do so. For the bulk of Section Two declares that a state which disenfranchises *any* adult males will face proportionate reduction in its Congressional representation: bar a third of your men from voting, lose a third of your representation. Buried deep within the long sentence explaining that rule, however, are two voting disqualifications exempted from the penalty in 1868: states may disenfranchise “for participation in rebellion, or other crime,” in the words of the Amendment, without losing representation in Congress.<sup>55</sup>

Of course, the idea that states can disenfranchise anyone they want to and merely face proportional reduction of their Congressional delegation was superseded and effectively made irrelevant by subsequent Amendments and Supreme Court decisions. Not surprisingly, that part of Section Two has been generally ignored by the Court,<sup>56</sup> and the California court ignored it in deciding *Ramirez*. Many observers were surprised, therefore, when the U.S. Supreme Court made Section Two central to its analysis of indefinite disenfranchisement’s constitutionality. Writing for the majority, Justice Rehnquist argued that there was simply no need to ask whether disenfranchisement fulfills a compelling state interest—as equal-protection analysis requires when a fundamental right like voting is at stake, and as the California Supreme Court had done. No such analysis was needed to satisfy equal protection in this context, wrote Rehnquist, *because* Section Two of the same Amendment that confers equal protection rights apparently permits states to bar convicts from voting.<sup>57</sup>

Critics have leveled several challenges at the majority’s logic in *Richardson*. Dissenting, Justice Thurgood Marshall insisted that criminal disenfranchisement “must be measured against the requirements of the Equal Protection Clause of Section One of the Fourteenth Amendment.”<sup>58</sup> As Marshall and others argue, the fact that the framers of the Fourteenth Amendment apparently accepted the policy should not turn us away from skeptical scrutiny

of any franchise restriction today. Professor Laurence Tribe notes that in important voting-rights cases, the Supreme Court has found that “the reach of the equal protection clause ... is not bound to the political theories of a particular era but draws much of its substance from changing social norms and evolving conceptions of equality.”<sup>59</sup> For example, the authors of the Fourteenth Amendment accepted long residency requirements for voting, but the Court has since found that such requirements violate the Constitution because they are not justified by any compelling state interest. As one federal appeals court held in a previous test of criminal disenfranchisement law, “constitutional concepts of equal protection are not immutably frozen like insects trapped in Devonian amber.”<sup>60</sup>

The Court’s previous disregard for Section Two—together with subsequent Amendments and the Court’s interpretation of those Amendments—had appeared to make Section Two a dead letter.<sup>61</sup> Scholars today refer to Section Two as “an obsolete and never-enforced provision,”<sup>62</sup> a “Reconstruction-era measure of no lasting significance”<sup>63</sup> which is “no longer operative”<sup>64</sup> and “has never had a practical impact.”<sup>65</sup> Indeed, it is largely because Section Two lays dormant—with its explicit endorsement of any and all state suffrage restrictions—that the Court has been able to protect voting rights.

The *Richardson* Court focused narrowly on what the Fourteenth Amendment meant in the nineteenth century, rather than the twentieth. But if the application of equal-protection analysis to voting rights were trapped in the “Devonian amber” of Section Two in *all* cases, states could conceivably disenfranchise *anyone*—for any reason except those prohibited by subsequent Amendments—and merely face proportionate reduction in their Congressional delegation.

In *Richardson*, the Court plucked a phrase from a long-slumbering sentence and breathed new life into it, reading Section Two of the Fourteenth Amendment in isolation from subsequent Amendments and constitutional jurisprudence.<sup>66</sup> The result was a ruling which cannot be coherently reconciled with a generation of Supreme Court decisions protecting voting rights—but which declares that all laws barring convicts from voting are constitutional.

*Richardson* is crucial to understanding why American disenfranchisement policies have survived the voting-rights revolution, and the decision has made litigation challenging such policies more difficult. But outside the courtroom, *Richardson* adds almost nothing to our understanding of the ideological foundations of criminal disenfranchisement, since it offers virtually no attention to political philosophy, constitutional principles, or social norms.

Other courts have not been so reticent, however. American judges have joined legislators and advocates to offer several principled defenses of laws barring convicts from voting. As explained above, such arguments have drawn on three broad strains in American political thought: liberal-contractarianism, republicanism, and racially-discriminatory ideology. While Americans today may find many of these arguments initially plausible—those based on republicanism and liberal-contractarian principles, anyway—they do not withstand sustained, critical analysis. That criticism, however, should not proceed without a full understanding of these arguments and their origins.



# III. Arguments for Criminal Disenfranchisement

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## THE LIBERAL-CONTRACTARIAN CASE FOR CRIMINAL DISENFRANCHISEMENT

It sounds simple, even intuitive—“if you break the rules, you don’t get to help make the rules.” John Locke’s famous analysis of the origins and purpose of government offers just this type of straightforward and familiar justification for the disenfranchisement of criminals. Locke argues that a person who commits a crime is also violating the social contract that underlies political society. In consequence, he should forfeit not only his right to participate in the political process, but also his rights to property and person. Locke waxes metaphorical in describing rule breakers. Sounding more medieval than modern, he writes that criminals “may be treated as beasts of prey,”<sup>67</sup> for the offender has “renounced reason ... [and] declared war against all mankind, and therefore may be destroyed as a *lion* or *tyger*, one of those wild savage beasts, with whom men can have no society nor security.”<sup>68</sup>

Diverse seventeenth- and eighteenth-century political philosophers would echo Locke’s approach, including Jean-Jacques Rousseau and John Stuart Mill.<sup>69</sup> It should not surprise us that in times when women, men without property, servants, and soldiers were generally barred from politics, criminals were precluded from voting. What is important is the reasoning behind the practice: political standing was understood as a privilege of membership in the compact, and the criminal forfeited all liberties and protections made possible by that contract. That logic would be adopted by important American thinkers.

**The Contract in America.** Numerous Americans of the Founding generation—including Thomas Paine and Thomas Jefferson—drew on Lockean ideas in their thinking about the suffrage.<sup>70</sup> And decades later, Alexis de Tocqueville found that Americans not only employed Lockean ideas in their view of crime and criminals, but took those principles more seriously than Europeans did. In Europe, Tocqueville observed, “a criminal is an unhappy man who is struggling for his life against the agents of power,” whereas in the young U.S., “he is looked on as an enemy of the human race, and the whole of mankind is against him.”<sup>71</sup>

If such an approach to crime was evident in the attitudes of the nineteenth-century American public, the influence of Locke on twentieth-century judges' views of criminal disenfranchisement law has been still more clear. In one influential decision, *Green v. Board of Elections*,<sup>72</sup> Judge Henry Friendly upheld the disenfranchisement of ex-felons in familiar Lockean terms. Friendly wrote, “[a] man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administration of the compact.”<sup>73</sup> In another well-known case, a federal appeals court held that felons “have breached the social contract and, like insane persons, have raised doubts about their ability to vote responsibly.”<sup>74</sup>

**“Subversive” Voting.** Today, some defenders of criminal disenfranchisement offer a practical reason to support the automatic removal of felons from the franchise. This is the concern that criminals will use the ballot as a tool for pursuing their illicit interests, and will vote in concert to weaken the criminal law and law enforcement—that is, they will vote in a way “subversive to the interests of an orderly society.”<sup>75</sup>

Prominent contemporary supporters of indefinite disenfranchisement heavily emphasize the subversive-voting hypothesis. Todd F. Gaziano of the Heritage Foundation told Congress in 1999 that allowing former inmates to vote “could have a perverse effect on the ability of law abiding citizens to reduce the deadly and debilitating crime in their communities.”<sup>76</sup> Roger Clegg of the Center for Equal Opportunity seconded Gaziano’s concern. Observing that “[m]uch has been made of the high percentage of criminals ... and ... disenfranchised people in some communities,”<sup>77</sup> Clegg testified that “this is an argument against reenfranchisement, because there accordingly exists a voting bloc that could create real problems by skewing election results.”<sup>78</sup>

The “subversive voting” hypothesis adds a practical dimension to the centuries-old liberal-contractarian approach to crime and politics, an approach that continues to supply the language in which many Americans think about the practice today.<sup>79</sup>

## **REPUBLICANISM AND THE CASE FOR CRIMINAL DISENFRANCHISEMENT**

The republican argument for barring convicts from the polls reaches the same conclusion as the liberal-contractarian one, but is based on very different ideas. This thinking can be traced back to colonial America. The American founders were heavily influenced by the French philosopher Montesquieu,<sup>80</sup> who articulated the need for civic virtue in a democracy. Because popular government rests on the people, Montesquieu wrote, it requires more virtuous citizens than does monarchy.<sup>81</sup> And the core of civic virtue lies in the insistence that citizens sacrifice private interest to advance the common good. In so doing citizens acquire a “purity of morals” that suffuses the polity.<sup>82</sup> The general acquisition of civic virtue is also the best way to establish good laws and to ensure that the government promotes the good of the whole community.

**Character and Citizenship.** The case for disenfranchisement based on this focus on civic-virtue and the common good is articulated most clearly in the 1884 Alabama case *Washington v. State*. In evocative language, the Alabama court declared that “the manifest purpose” of denying suffrage to ex-convicts is not to punish, but instead “to preserve the purity of the ballot box, which is the only sure foundation of republican liberty...” A person “rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude,” the court held, “is unfit to exercise the privilege of suffrage.”<sup>83</sup> *Washington* focuses not on punishing individual wrongdoers, but on “protection” of a *public thing*—the “ballot box,” the “community,” the “State.” This public body must be kept pure, free from “evil infection” by the “unfit,” or from “the invasion of corruption.”<sup>84</sup> Disenfranchisement was seen as a kind of political quarantine, a way of preserving the health of the political body.<sup>85</sup> In keeping with this concern to protect the polity against “evil infection,” crimes such as perjury, forgery, bribery, larceny, and dueling were most often singled out for the sanction of disenfranchisement in the nineteenth century.



Twentieth-century judges have continued to emphasize both public morality and the criminal character in evaluating criminal disenfranchisement law. As the Missouri Supreme Court put it in 1943, the ballot must be available to “only those who have lived up to certain minimum moral and legal standards.”<sup>86</sup> A 1971 decision specifically upheld the disenfranchisement of those “convicted of crimes of moral turpitude.”<sup>87</sup> And in 1966, the Supreme Court of California ruled that *only* “crimes involving moral corruption and dishonesty” warranted permanent disenfranchisement.<sup>88</sup> These opinions reflect a fear of particular kinds of “sickness”<sup>89</sup> which are held to be more dangerous than others to the body politic. Common to the earliest colonial laws barring convicts from voting, this idea continues to shape discussions of disenfranchisement today. When lawmakers single out sex offenders for disenfranchisement—as legislators in Delaware, Massachusetts, and Alabama have recently considered doing—they are drawing on these roots, and suggesting that some offenders are more *politically* dangerous than others.<sup>90</sup>

**Disenfranchisement as “Expressive Punishment.”** Some forms of punishment, advocates of “expressive” or “shaming” penalties point out, demonstrate society’s “moral condemnation” particularly clearly.<sup>91</sup> Bar criminals from voting, some may argue, and we express our great esteem for political participation. Allowing criminals to vote, conversely,

The average disenfranchisement rate is nearly five times higher for blacks than for non-blacks.



Source: Jeff Manza and Christopher Uggen, “The Political Consequences of Felon Disenfranchisement Laws in the United States,” *American Sociological Review* 67:777–803.

only further demeans the electoral process—and the polity itself. Embracing the punitive purposes of disenfranchisement, this argument can again turn to Montesquieu. “In countries where liberty is most esteemed,” wrote Montesquieu, “there are laws by which a single person is deprived of it, in order to preserve it for the whole community.”<sup>92</sup> Endorsing English bills of attainder, Montesquieu argued that “there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues

of the gods.”<sup>93</sup> Political participation should be our secular religion, says this view, and we ought to use our criminal penalties to convey our deep respect for the power of the ballot.

**Fear of Vote Fraud.** Another concern of thinkers influenced by the ideas of republicanism is that the flawed character of ex-felons will lead them to pollute the polity by committing vote fraud. As the California Supreme Court put it in 1966, a convict might “defile the ‘purity of the ballot box’ by selling or bartering his vote or otherwise engaging in election fraud; and such activity might affect the outcome of the election and thus frustrate the freely expressed will of the remainder of the voters.”<sup>94</sup> Where the subversive-voting theory predicts that criminals will exercise the right to vote in a lawful but destructive way, the vote-fraud concern says they can’t be trusted not to break the law *again* when they vote. Like the other premises, this argument emphasizes that the polity is a fragile thing, which must be protected from corrupt, immoral, and untrustworthy people.

### THE RACIALLY DISCRIMINATORY CASE FOR CRIMINAL DISENFRANCHISEMENT

The liberal-contractarian and republican philosophies have played central roles in the history of American criminal disenfranchisement, but they alone do not deliver a full understanding of the policy. For proponents of overtly racist political ideology have also used criminal disenfranchisement to pursue their vision of the healthy polity. If we cannot understand criminal disenfranchisement today without listening to what the Englishman Locke said in 1690, we must also understand what some Southern white Americans said in 1890.

The Fifteenth Amendment and Reconstruction together forced Southern states to permit blacks to vote, but only temporarily. Declaring proudly and explicitly their goal of white supremacy, southern whites rewrote their state constitutions to remove blacks from politics in the decades after the Fifteenth Amendment required enfranchisement of African-American men.<sup>95</sup> A variety of legal schemes were used to take voting rights away from blacks after the end of Reconstruction—grandfather clauses, literacy tests, poll taxes, white

primaries. This list is familiar to most Americans. What is less well known is that racially-motivated changes to laws disenfranchising criminals were prominent features of the post-Reconstruction white backlash in the South.

Mississippi's 1890 constitutional convention was among the first to take aim at the alleged "peculiar characteristics" of blacks. The 1869 state constitutional provision disenfranchising those guilty of "any crime" was narrowed to exclude *only* those convicted of certain offenses—crimes of which blacks were more often convicted than whites.<sup>96</sup> 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."<sup>97</sup> Other states followed suit. Many newly disenfranchisable offenses, such as bigamy and vagrancy, were common among blacks simply because of the dislocations of slavery and Reconstruction.<sup>98</sup> Indeed, the laws were carefully designed by white men who understood the discriminatory application of the criminal law in their states. The changes quickly achieved their goals: an 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.<sup>99</sup>

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 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.<sup>100</sup>

This understanding was not confined to the South. In evaluating Mississippi's all-white jury law, the U.S. Supreme Court considered *Ratliff* in 1897. Quoting extensively from the opinion, the Court explicitly endorsed Mississippi's discrimination against "the alleged characteristics of the negro race."<sup>101</sup> Arguments about the need to preserve the social contract and protect the body politic from corruption were superseded, and the desire to keep blacks from voting—by disenfranchising those convicted of certain "furtive offenses"—now became an explicit purpose of criminal disenfranchisement in several of the United States.<sup>102</sup>



# III. The Case Against Criminal Disenfranchisement

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## **DISENFRANCHISEMENT AND PUNISHMENT**

Some advocates of disenfranchisement—and probably many American citizens—don’t think it’s necessary to wade through volumes of political philosophy in order to understand why we bar convicts from voting. It is simply part of their punishment.

This claim begins a conversation, however, rather than ending it. Some Americans want harsher sentences for criminal offenders and some don’t, but we agree that punishment aims at some mix of four legitimate goals: incapacitation, deterrence, rehabilitation, and retribution. Barring offenders from voting does not achieve any of these purposes.

The argument for deterrence is very weak: it is hard to imagine that a man not deterred from crime by the prospect of a long prison sentence would stay his hand for fear of losing the vote.<sup>103</sup> Moreover, “collateral consequences” like disenfranchisement are even more unknown to would-be offenders than are the details of the penal code. Given the conditions in which crime tends to occur, the political alienation of many offenders, and the existence of serious criminal sanctions, it is extremely unlikely that the loss of voting rights forms a deterrent against crime.<sup>104</sup> Incapacitation—preventing an offender from repeating his transgression—may be a plausible purpose for disenfranchisement laws covering only those who break election law. But almost all offenders “incapacitated” at the ballot box are convicted of non-electoral crimes.<sup>105</sup>

What about retribution? Indefinite disenfranchisement defies one of retribution’s central metaphors: we often hear that convicts must “pay a debt to society,” but lifetime disenfranchisement treats them as “debtors” forever.<sup>106</sup> Advocates of temporary disenfranchisement may assume that retributive purposes justify the policy, particularly in a political climate which depicts any policy which further burdens or stigmatizes offenders as simply another form of just retribution. But it is very dangerous to use retribution as a handy catch-all category which legitimates any form of punishment. Society punishes prisoners by depriving them of various rights and privileges, of course—to assemble, enjoy privacy, and read whatever they wish, for example. But such restrictions are necessary to incarceration, and disenfranchising them is not. Finally, it is very unlikely that the policy has any

## There is nothing “tough on crime” about criminal disenfranchisement.

retributive, punitive effects at all on the many members of the offender population already estranged from political life—particularly when we take away the vote in an invisible, automatic way, as all American disenfranchisement law does.

Rehabilitative principles shine a particularly bright light on criminal disenfranchisement policies. If one emphasized rehabilitative goals, indefinite disenfranchisement would clearly be counterproductive, since denying ex-offenders the vote impedes their reintegration into society by stigmatizing them as second-class citizens.<sup>107</sup> But temporary disenfranchisement is difficult to justify on rehabilitative principles as well. In fact, citizens with a strong commitment to shaping convicts’ character—and a proud belief in the power and importance of American democratic politics—should consider *forcing* inmates to vote.<sup>108</sup> There is nothing “weak” or “soft on criminals” about this argument—quite the contrary. After all, trying to mold a person’s character and values exerts far more control over him than does the simple infliction of deprivation and discomfort.

Today, most Americans understand that effective punishment must try to help convicts become law-abiding, productive citizens, and we spend money and time on programs pursuing those goals. The web pages of many states’ corrections departments—including those of most indefinite-disenfranchisement states—describe literacy programs, job training, GED education, and college courses available to inmates, together with evidence of the increased civic awareness and reduced recidivism produced by such programs. Political education and participation in elections can serve the same functions. When government directs and controls completely the lives of citizens, it ought to seek to teach political virtues and values, and to develop “the sense of belonging that encourages compliance with the criminal law.”<sup>109</sup> With state budgets tight and more and more programs being subjected to strict cost-benefit analysis, it is worth pointing out that allowing convicts to vote could provide major benefits to the public—even if only some offenders are helped toward rehabilitation and a productive, crime-free life after prison—at virtually no cost.

If disenfranchisement’s defenders scoff at such arguments, they must understand that they are actually expressing contempt for our correctional institutions and our elections, not for criminals and their bleeding-heart advocates. Barring ex-offenders from voting declares clearly that we don’t believe correctional institutions have successfully prepared them to re-enter society. And mocking the notion that participating in elections can have powerful, formative effects on a person denies the experience of every American who has walked out of a voting booth with a proud sense of membership, responsibility, and civic accomplishment.

There is nothing “tough on crime” about criminal disenfranchisement. Symbolic and rhetorical content aside, being “tough” on crime can only mean pursuing policies which one believes will *reduce* crime. But glaringly, totally absent from the historical and legal literature on disenfranchising offenders—whether temporarily or permanently—is the claim

that imposing the sanction reduces crime. Proponents of the policy like to talk about disenfranchisement as a way to punish offenders, but they cannot link the deprivation of voting rights to any prominent theory or purpose of punishment, and they do not argue that it will do anything to make Americans safer.

**Proportionality in Punishment.** A long line of documents in the Western democratic tradition—from the Magna Carta into contemporary political philosophy—demand proportionality between the infraction and the punishment in criminal justice. We should hold “collateral” consequences of conviction to the same standard. By punishing the offender long after she has served her sentence, indefinite disenfranchisement clearly fails that test. The idea that a single criminal act repudiates the entire social contract—putting the offender forever outside the polity—might have made sense in the walled cities of medieval Europe, but today it is an anachronism.

Temporary disenfranchisement may seem intuitively to meet standards of proportionality. But the disenfranchisement of broad classes of offenders, while certainly a milder form of the penalty, is vulnerable to this challenge as well. It is not logically clear why the loss of voting rights is a proportional penalty for a first-time drug offender sentenced to probation, for example, as well as a murderer incarcerated for life, while the sanction is rarely imposed at all on those who violate the social contract and endanger the public by driving intoxicated.<sup>110</sup> Furthermore, the great variation among state laws—not to mention the many Western countries which protect the voting rights of inmates and ex-offenders alike—tell us that there is no “common sense” consensus on disenfranchisement’s proportionality.

Finally, disenfranchisement’s history in the U.S. confronts us with a deeply troubling question about its proportionality. After the Civil War, only a few former Confederates—those who had truly made war on the compact—were deprived of the vote even temporarily, and all soon regained it. Republicans wrestled with the issue: one wrote to a Texas colleague, “[i]t is expected that you will temporarily disfranchise a number of those who participated in the rebellion.”<sup>111</sup> But many considered disenfranchisement “vindictive [and] undemocratic,”<sup>112</sup> and some states disenfranchised few Confederates or none, even for a limited time.<sup>113</sup>

It is a striking fact in the history of American criminal disenfranchisement: organized, violent rebellion against the American government, bringing its very survival into doubt, brought at most temporary removal from the franchise. Former Confederates, of course, quickly regained political influence, while felons today are politically powerless—indeed, they have “negative political leverage,” as historian Alexander Keyssar puts it.<sup>114</sup>

Surely treasonous combination is a more serious crime than, say, larceny. But where American voting rights are concerned, the class of felonious thieves has been punished more severely than rebels. The story of the former Confederates teaches us this: it is political power, not ideas about proportional punishment, that has ultimately determined which wrongdoers lose the right to vote.

## The right to vote is today understood across the American political spectrum to be a fundamental right.

### DISENFRANCHISEMENT AND THE RIGHT TO VOTE

Despite its long history, the liberal-contractarian argument for disenfranchisement today suffers from two grave flaws. First, defenses of disenfranchisement based on contract theory fail to meet the tough standards Americans generally apply when fundamental rights are threatened. Second, the claim that convicts will vote subversively is implausible, empirically unfounded, and disturbingly vague.

**“Strict Scrutiny” and the Defense of Fundamental Rights.** As we have seen, some argue that offenders should lose the vote simply because they have violated the “social contract.” At first blush, this seems a plausible defense of the policy. But when Americans debate free speech, religious expression, or privacy issues today—on TV political-talk shows, or in courtrooms—we do not parse Locke and Rousseau, trying to capture the appropriate twenty-first-century implications of a political theorist’s “contract.” Instead, we talk about *rights*, and insist that government may limit rights only when it *must* do so to achieve specific, important purposes.

Today, Americans proudly apply the highest standards to any proposed restriction of fundamental rights. The idea that the state may limit rights only under extremely narrow circumstances—when some “clear and present danger” to society exists, as the Court famously ruled in the free-speech case *Schenck v. U.S.*<sup>115</sup>—long ago entered American popular language, even among those who have not studied constitutional law. Lawyers call that standard “strict scrutiny,” and understand it to mean that government may limit important rights only when it has a compelling, practical objective in doing so, a purpose which cannot be achieved by a less restrictive policy.

Though it has not always been so, the right to vote is today understood across the American political spectrum to be a fundamental right.<sup>116</sup> George W. Bush, challenging the Florida recount of 2000 in federal court, argued that “[t]he right to vote in a democracy is among the most precious of all individual rights, and is the crux of the democratic system.”<sup>117</sup> Americans who agree with President Bush must ask what essential objectives government cannot accomplish without depriving offenders of the ballot. Advocates of both temporary and indefinite disenfranchisement fail to answer.<sup>118</sup>

Other grave inconsistencies further weaken the liberal-contractarian argument. Judge Friendly wrote in *Green* that convicts forfeit the right to participate in the “administration of the compact,” but offenders retain other rights with far more potential to shape politics. A well-placed op-ed essay or letter to the editor—which either an inmate or an ex-offender may write—will influence an election much more than any single ballot, and former felons presumably use speech, assembly, property, and even religious rights to affect society and public opinion in numerous ways. This fact reveals the lack of clear principles behind the liberal-contractarian case.<sup>119</sup>

**The “Subversive Voting” Myth.** Defenders of criminal disenfranchisement often allege that prisoners—and former inmates—will vote together and weaken the criminal law. But advocates of criminal disenfranchisement have never offered any evidence for this hypoth-

esis, and it collapses under closer examination. First, for offenders to pool their votes and weaken criminal law, they would need a politician—indeed, several—to campaign to win “the criminal vote,” and then to advance convicts’ supposed “interests” in the legislature. This is an implausible scenario.<sup>120</sup> The concern that inmates at a given prison might make mischief in local politics, meanwhile, is easily solved by permitting them to vote by absentee ballot in their town of previous residence. This is the policy employed in Vermont, as well as in Canada.<sup>121</sup>

The subversive-voting notion is also wrong both as a matter of how voters choose and how convicts perceive the laws they’ve broken. A generation of political science demonstrates that very few voters cast ballots based on a single issue.<sup>122</sup> Moreover, research suggests that most convicts *support* the existence of the laws they’ve broken. Political scientist Jonathan D. Casper found through interviews with defendants that almost all “believed that they had done something ‘wrong,’ that the law they violated represented a norm that was worthy of respect and that ought to be followed.”<sup>123</sup> Casper’s interviewees “felt that laws against taking property from others were ‘good’ laws and that such behavior should not be tolerated but merited punishment.”<sup>124</sup> When asked what would happen without laws against the crime they were accused of committing, the defendants replied that the behavior would become rampant, and that this would be a bad thing.<sup>125</sup>

But what if inmates and ex-offenders *did* plan to vote for different laws? Do Americans really believe in barring citizens from voting because of the choices they might make? The Supreme Court has long held that we may not do so: in striking down restrictions on voting by members of the military, the Court ruled that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”<sup>126</sup> People who may vote in their own interest may not be excluded from the franchise *for that reason*, for the “exercise of rights so vital to the maintenance of democratic institutions cannot constitutionally be obliterated because of a fear of the political views of a particular group.”<sup>127</sup>

Proponents of disenfranchisement do not spell out precisely what it is they fear inmates or ex-convicts might vote for. Doing so lays bare the extreme weakness of their position. Surely no American would argue that it ought to be illegal to vote against “three-strikes” laws, mandatory minimum sentences, or the death penalty, for example, if a person believes those laws to be counterproductive. Holding such views is hardly subversive.



## Encouraging offenders to vote would demonstrate that ours is a strong democracy.

**Temporary or Indefinite? There's No Difference.** Many Americans today appear to support disenfranchising prisoners, while opposing the indefinite deprivation of voting rights.<sup>128</sup> But it is important to emphasize that there is not a clear, principled way to distinguish between these two policies. Both fail to offer a penal justification for the denial of voting rights, and both ignore the American commitment to rights, since neither offers a compelling governmental purpose that cannot be achieved without disenfranchising offenders. Americans today proudly

hold themselves to high standards in protecting the rights of unpopular, politically-weak groups, and advocates of disenfranchisement neglect that duty.

Those who advocate barring convicts from voting today may paraphrase Locke, but they really don't share Locke's assumptions about politics. The statement that a property-less, non-taxpaying, illiterate person has a right to vote—which Americans today would naturally endorse—would be gibberish not only to early contract theorists, but to the generations of American lawmakers who believed that one could not sign the contract, as it were, without a certain amount of property and a certain type of reason.<sup>129</sup> American political thought has left behind these elements of its past, and we only weaken our democracy by resurrecting them. Instead, we ought to renew our commitment to defending fundamental individual rights. Protecting such rights may not always be intuitive or comfortable, but it is a central part of the “hard work” we tell ourselves democracy requires.

### ARGUMENTS ROOTED IN REPUBLICANISM

As we've seen, supporters of disenfranchisement who invoke the ideas of republicanism focus on the lack of proper character among offenders, the symbolic nature of voting, and the need to keep the body politic free of infection and corruption. But these arguments also fail under principled challenge. First, confidence in the formative power of political participation—joined with a long-standing American belief that inclusion builds a stronger democracy than does exclusion—makes a forceful case for permitting convicts to vote. Meanwhile, disenfranchisement as punishment does not “express” at all what its advocates believe it does, and the argument that criminals must be prevented from committing vote fraud suffers from numerous flaws.

**A Core American Belief: The Formative Power of Politics.** Americans who draw on republican arguments today want to protect politics from corruption because they believe we form a real body when we engage in politics. Indeed, it may be because they feel this formative, communal dimension of politics so intensely—feel their *own* character is influenced and even defined by the character of the other people in the voting booths—that some Americans believe allowing criminal offenders to vote taints the polity.

But that premise—that participating in politics helps make us who we are, and makes us better—should lead Americans toward an inclusive policy, not an exclusive one. In American thought, the idea that politics *requires* virtue has always been closely linked to

the belief that politics can *make* virtue.<sup>130</sup> The American Founders, writes historian Gordon S. Wood, believed that in successful republics “virtue had flowed from the citizen’s participation in politics; government had been the source of his civic consciousness and public spiritedness.”<sup>131</sup> The question is not whether casting a ballot will perfect an offender’s personality—that is unlikely. But surely political participation will educate him towards a greater civic consciousness, and at very little public cost.

Those who claim criminal disenfranchisement strengthens our democracy must answer a simple question: *how?* Defenders of the sanction do not have a coherent reply. Enabling and even encouraging offenders to vote, however, would demonstrate that ours is a strong democracy, proud of the robust and formative character of its political rituals, and committed to fostering participation and helping citizens develop civic virtues.

**A Punishment That “Expresses” Only Fear and Weakness.** Despite the claims of its defenders, disenfranchisement does not convey Americans’ deep respect for politics. In fact, it may do just the opposite. First, as a collateral consequence imposed automatically on broad classes of offenders, disenfranchisement is no “speaking penalty.”<sup>132</sup> The policy certainly conveys a message to the politically-aware offender, and may effect private alienation. But the theory of “expressive” punishment emphasizes how penalties speak to the *public*.

American criminal disenfranchisement might once have qualified as an effective shaming penalty—in the colonial period. Two important conditions, neither of which exists today, made this possible. First, while precise numbers are impossible to come by, historians agree that only a small fraction of adults had voting privileges in early America.<sup>133</sup> Second, offenders were stripped of that privilege in a highly public way, since the penalty was part of the sentence pronounced in court. When voting was a closely-guarded privilege, the public removal of that privilege signified a great deal to the townspeople. But when half of eligible Americans do not vote, the silent disenfranchisement of felons does not send much of a public message.

What message *do* Americans send by disenfranchising criminals? Comparative perspective poses useful questions here. Why do other countries—Israel, Canada, Sweden—not seem to feel threatened by their inmates’ votes? Why is virtually *no* democracy as worried about *former* inmates’ votes as are many American states? Do supporters of disenfranchisement have *less* confidence in the American people—in the health of the body politic, the electorate’s ability to make good choices, and in the formative power of our elections—than do the citizens of other countries?

By depicting ballot-wielding convicts as a grave threat to the body politic, we express not strength and confidence, but fear, weakness and doubt in the health of American politics.

**The Vote-Fraud Theory.** The allegation that offenders and ex-offenders must be disenfranchised lest they commit vote fraud suffers from numerous weaknesses. Of course, fraud is itself criminalized, and laws are in place to prevent and punish it.<sup>134</sup> In fact, Americans have perhaps the most burdensome registration requirements in the democratic world, supposedly aimed at preventing fraud. It mocks those mechanisms—and the officials who enforce them—to argue that the only way to prevent fraud is to bar people from voting altogether.

## Three in ten of the next generation of black men may lose the vote at some point in their lifetimes.

Finally, there is no evidence at all that felons are more likely to commit fraud than other voters.<sup>135</sup> Because the vast majority of crimes which cost the vote have nothing to do with elections, fraud, or conspiracy, disenfranchisement is severely overinclusive. But ironically, by the logic of the vote-fraud argument, felon disenfranchisement is also *under*inclusive, because in some states election crimes and other public frauds are misdemeanors.<sup>136</sup>

**“Trust” and Voting Rights.** Some prominent defenders of disenfranchisement—even the lifetime variety—contend that offenders have revealed that they are not “trustworthy,” and should be prohibited from voting for that reason alone.<sup>137</sup> This is a remarkable argument. Not only does it completely ignore American law’s well-established doctrine of the *right* to vote, but it makes no claim at all about subversive voting, fraud, or anything else that convicts’ character might lead them to actually *do* with the ballot, and it draws no conclusions whatsoever about *how* such a policy might strengthen the polity. It is simply exclusion for exclusion’s sake.

At some level, it may be true that we don’t want “untrustworthy” people to vote. But then, all of the following statements are equally true: “we do not want ignorant people voting;” “we do not want racist people voting;” “we do not want religious bigots (or anti-religious bigots) voting;” “we do not want slothful and greedy people voting.” The point of such a list is obvious: this is no longer how Americans think about the suffrage. If we proposed, say, a simple literacy test for voters—as a baseline measurement of ignorance—or a bland anti-discrimination pledge, to weed out only those most consumed by prejudice—critics would not challenge the way we *measured* ignorance or prejudice. They would reject the *very idea* of denying ballot access based only on such an abstract value.

To contend that we bar convicts from voting simply because they are “untrustworthy,” however, makes precisely this argument. Americans long ago abandoned such a vague and exclusionary approach to political participation.

Some may feel that we do not express firmly enough our esteem for elections if we allow the incarcerated to participate. But permitting, facilitating, and even encouraging offenders to vote is neither weak nor inconsistent with our principles. On the contrary, it declares not only that the American republic is strong enough to withstand the presence of wrongdoers in the voting booths, but also that our election rituals can hold transformative, even redemptive force. Many Americans wish that were so, and long for their fellow citizens to take voting more seriously. Disenfranchisement has done nothing to elevate the American public’s belief and participation in elections; advocating the formative power of politics in this context might well contribute to the cause.<sup>138</sup>

Finally, the commitment to a strong, unified polity ought to turn us away from a practice which formally alienates a large and growing number of citizens from the political community—particularly one which reinforces the great fractures of class and race in the American polity.

## RACE AND CRIMINAL DISENFRANCHISEMENT

When public attention has turned to criminal disenfranchisement in recent years, the practice's racial impacts have drawn the most attention.<sup>139</sup> Startling statistics are one reason. In six states—Alabama, Florida, Iowa, Mississippi, Virginia, and Wyoming—at least one in four black men is now indefinitely disenfranchised; in Florida and Alabama, approximately 31 percent of black men are barred from voting indefinitely. Overall, 1.4 million black men, or about 13 percent of the black adult male population, are either temporarily or permanently disenfranchised—a rate seven times the national average. Given current rates of incarceration, three in ten of the next generation of black men may lose the vote at some point in their lifetimes; forty percent may be disenfranchised in some states.<sup>140</sup>

Disenfranchisement polices also disproportionately affect Latinos and other non-whites. An estimated 16 percent of Latino men will enter prison in their lifetime, compared to only 4.4 percent of white men. In New Mexico, where restrictions on voting by convicted felons date back to 1911, Latinos make up 40 percent of the state's overall population – but 60 percent of the state's prison population, and Latino communities have suffered disproportionately from the disenfranchisement law. (New Mexico recently modified its law to end the lifetime voting ban for ex-felons. However, other restrictions remain.) Native Americans are another group that are especially affected by these laws. For example, in Alaska, which bars voting by felons during parole or probation, Alaska Natives make up 16 percent of the state's population and over thirty percent of the prison population. In Wyoming, with an indefinite ban on voting by convicted felons, Native Americans make up 2 percent of the state population, but 7 percent of the prison population.<sup>141</sup>

But as with so many other policy disputes, racial questions have had a polarizing effect on debates over criminal disenfranchisement. Some view the racial dimension of the policy—its explicitly discriminatory use in the late nineteenth century, and its heavy impacts on African Americans and other non-whites today—as its central characteristic, and the most important strike against it. Prominent defenders of the policy, however, totally dismiss challenges based on race, either simply ignoring or describing as “irrelevant”<sup>142</sup> the policy's disparate impacts and the overtly racist chapter in its past.

But criminal disenfranchisement exists at the intersection of two systems—electoral politics and criminal justice—that have been purposefully discriminatory for much of American history. Racist laws barred blacks from voting in most states deep into the nineteenth century, and blacks were kept from the polls by facially-neutral but intensely discriminatory means such as the literacy test and poll tax well into the twentieth. The criminal law, meanwhile, punished blacks more severely than whites for similar offenses in many states, both before and after the Civil War. Today, the nation's drug laws have created an explosion in black incarceration, despite similar rates of drug uses among whites and blacks. Latino rates of incarceration are also extremely high. Moreover, most Americans now accept that systemic discrimination exists in the criminal-justice process—even conservative white politicians such as President Bush, Attorney General John Ashcroft, and Senator Orrin Hatch describe “racial profiling” as a serious problem.<sup>143</sup>

**“The drug war and felony disenfranchisement have done more to turn away black voters than anything since the poll tax.”**

**—David Cole**

Awareness of our history of racial discrimination in voting and criminal justice ought to make Americans of all ideological persuasions look with great skepticism on criminal disenfranchisement today. The discriminatory dimension of the policy’s past and present in the U.S. may not be a “trump” against it, but neither can we responsibly declare that criminal disenfranchisement is simply “not about race.”<sup>144</sup> The straight-line connection between racial discrimination and disenfranchisement—the post-Reconstruction targeting of the “furtive offenses” of blacks, while exempting the “robust crimes” of whites—is only part of the practice’s racial dimension. In order to understand this, consider some of the terms employed in legal challenges to disenfranchisement today.

**Discriminatory Intent, “Vote Dilution,” and “Vote Denial.”** Where its origins show clear racist intent, the Supreme Court has held that criminal disenfranchisement violates the Equal Protection Clause of the Fourteenth Amendment.<sup>145</sup> In *Hunter v. Underwood*,<sup>146</sup> a case involving two men permanently disenfranchised under Section 182 of the Alabama Constitution for writing bad checks—a crime of “moral turpitude”—the Supreme Court held in 1984 that the law was “intentionally adopted to disenfranchise blacks on account of race,” would not have been adopted without that discriminatory purpose, and was achieving its intended effect.<sup>147</sup>

What of cases where proof of racist intent is “not accessible,” as a federal judge recently put it? Here, legal challenges to criminal disenfranchisement turn to the Voting Rights Act (VRA).<sup>148</sup> The VRA was enacted in 1965 for the purpose of ending racial discrimination in voting. In 1982, the Supreme Court held that Section 2 of the VRA provided for challenges to facially neutral voting restrictions only when they were enacted with discriminatory intent. But Congress quickly amended the Act to clarify that plaintiffs do *not* carry the burden of proving discriminatory intent.<sup>149</sup> The language of the VRA’s Section 2 now prohibits any voting qualification that “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.” Under this so-called “results test,” the statute explains, a violation “is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation” by a racial group.<sup>150</sup> As the Supreme Court has held, the essence of a Section Two claim “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”<sup>151</sup>

Generally, two types of claims are made under Section Two of the Voting Rights Act: “vote denial” and “vote dilution.” Vote denial—in the form of literacy tests, for example—was the initial target of the Act, but vote dilution—particularly involving electoral districts—has increasingly been challenged under the VRA.<sup>152</sup> Critics of disenfranchisement have alleged both vote dilution and vote denial in court.<sup>153</sup>

The argument that disproportionate disenfranchisement of African-American convicts violates the Voting Rights Act has not yet succeeded in the federal courts (although a July 2003 decision by the U.S. Court of Appeals for the Ninth Circuit stands as a recent posi-

tive development.)<sup>154</sup> But outside the courtroom, examining disenfranchisement in the context of “the totality of the circumstances,”<sup>155</sup> as the Act suggests we do, should compel Americans to consider racism in the criminal justice system. Such discrimination, one historian wrote recently, is now a matter of “well-documented empirical findings.”<sup>156</sup> Numerous studies show that black criminality does not explain the disproportionate number of racial minorities under criminal supervision, and that disparate targeting by law enforcement and disparate treatment in the criminal justice system are its significant causes.<sup>157</sup> For example, first and second time offenders who are non-white are more likely to receive prison time than white offenders, and non-white offenders also are likely to receive longer prison sentences.

The war on drugs in particular explains why the incarceration rate among blacks today has “exponentially superseded” the rate among whites.<sup>158</sup> Scholars estimate that 14 percent of illegal drug users are black, yet African Americans make up 55 percent of those convicted and 74 percent of those sentenced for drug possession.<sup>159</sup> The U.S. Sentencing Commission estimates that 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 are those convicted of crimes involving cocaine in the powder form.<sup>160</sup> One authority calculates that one half of



young black men in some cities 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.<sup>161</sup> In light of such statistics, law professor David Cole contends that “[t]aken together, the drug war and felony disenfranchisement have done more to turn away black voters than anything since the poll tax.”<sup>162</sup>

The public is increasingly aware of bias in the criminal justice system today. What is less well understood is that the drug war’s disparities are only the latest chapter in a long history. Free blacks in the north received more severe punishments than whites as early as the colonial period.<sup>163</sup> Differential treatment for similar infractions continued up to the Civil War, with the most degrading punishments reserved for blacks.<sup>164</sup> The South’s infamous postwar “Black Codes” declared in some states that all previous penal laws specifying crimes for slaves now applied to free blacks.<sup>165</sup>

Clearly, the discriminatory practices of American criminal justice today do not exist in a vacuum. They must be understood in terms of our history, and that history compels us to be deeply skeptical of policies that disproportionately punish blacks and other non-whites.

## Criminal disenfranchisement is connected in numerous ways with our nation’s discriminatory tradition.

In examining criminal disenfranchisement’s survival in the U.S.—long after other suffrage restrictions have been dismantled—Americans need to ask whether this policy has endured in part because of whites’ racialized perceptions of criminals. To put it bluntly, some white Americans may be less protective of the rights of convicts in part because they imagine those offenders to be African American. As numerous authors have pointed out, crime is a key “racial codeword”<sup>166</sup> in American politics, one which elicits racially-charged responses

from the public. Opinion polls repeatedly find that many Americans believe blacks are more prone to commit violent and criminal acts than whites,<sup>167</sup> and the “Willie Horton” political advertisements<sup>168</sup> were only the most recent successful exploitation of that connection by twentieth-century politicians.<sup>169</sup>

Today’s discrimination in criminal justice may be *de facto* rather than *de jure*, its causes “systemic and organic,” rather than “the crude race-hate of older days.”<sup>170</sup> But by adding a political prohibition to the other consequences of a felony conviction, disenfranchisement compounds and magnifies the effects of such systemic bias.

American criminal disenfranchisement is connected in numerous ways with our nation’s discriminatory tradition. In the language the Supreme Court has used to analyze other voting-rights violations, disenfranchisement “interacts” with the long history of discrimination in American elections and criminal justice. And while its causes may be murky—bound up in everything from legislatures’ choices of which crimes qualify as felonies to how jurors perceive defendants—most Americans now agree that systemic racial discrimination exists in law enforcement and the administration of justice. One result is that blacks and Latinos are far more likely than whites to lose the right to vote.

A policy so closely linked to our prejudicial past should survive only if we have an overwhelming need for it: when it alone fulfills a specific, extremely important social purpose, and only when its supporters meet the burden of demonstrating precisely how it will strengthen the democratic character of our society. Criminal disenfranchisement policies fail that test.

## IV. Conclusion

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According to several recent polls, majorities of Americans support disenfranchising the incarcerated, but oppose barring convicts from voting indefinitely. Abolishing ex-felon disenfranchisement where it survives would be a step in the right direction. But because the argument for depriving inmates of the ballot shares far more common ground than is commonly understood with the case for indefinite disenfranchisement, virtually all the problems identified here apply to both policies. Still, the apparent popularity of temporary disenfranchisement indicates that change will not be easy, whether through litigation or legislation.

Perhaps many Americans feel that the nation's long history of disenfranchising criminals justifies the practice today. But that history alone is no reason to perpetuate the policy. As Tocqueville famously observed, the "philosophical method of the Americans" is "to accept tradition only as a means of information, and existing facts only as a lesson to be used in doing otherwise and doing better."<sup>171</sup> Meeting the promise of democratic politics, as the Progressive Herbert Croly argued a century later, means that we "must be prepared to sacrifice to that traditional vision even the traditional American ways of realizing it."<sup>172</sup> Americans proudly pursue this promise, and understand that doing so sometimes means choosing a new path.

The history of freedom and self-government in the U.S. is largely a story of traditional, common-sense policies being overturned, particularly those regarding the franchise. For centuries, Western political thinkers regarded universal suffrage as a truly lunatic notion—when they gave it any thought at all.<sup>173</sup> Everyone knew that those who didn't own land lacked the "stake in society" necessary for political participation; that women simply didn't have the right kind of reason to practice politics; and that it's utter nonsense for people who can't read and explain their own Constitution to claim a role in lawmaking. These ideas were common sense for a long, long time, but Americans scrutinized them and found them unpersuasive. It is now time for Americans to re-evaluate the wisdom of barring criminal offenders from voting.

A profound revision of American criminal disenfranchisement law would strengthen our democracy and renew the best elements in our guiding political traditions. Confirming that offenders remain members of the polity would reinforce our commitment to protecting fundamental rights—the rights of any person, no matter how much contempt they may inspire in the majority—and simultaneously express our confidence in the robust, transformative power of the American civic ritual.



# Notes

1. See Bob Herbert, *Keep Them Out*, N.Y. TIMES, Dec. 7, 2000, at A31; Sasha Abramsky, *A Growing Gap in American Democracy*, N.Y. TIMES, July 27, 2002, at A11; *Alpharetta firm accused in Fla. Voting rights suit*, ATLANTA CONST., Jan. 11, 2001, at A3; *Black Voters in Florida deserve some real answers*, USA TODAY, January 11, 2001, at A14. See also *Felons lose bid to alter vote ban*, MIAMI HERALD, July 19, 2002, at 1B (noting that despite the ban on voting by ex-felons, “more than 1,200 felons cast ballots in that election, according a Herald analysis.”); John Mark Hansen, *Disfranchisement of Felons: Task Force on the Federal Election System*, in TASK FORCE REPORTS TO ACCOMPANY THE REPORT OF THE NATIONAL COMMISSION ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS ch. 8 (Aug. 2001) (recommending the repeal of law disenfranchising ex-felons). A muckraking journalist’s account of how Florida “fixed the vote” is in GREG PALAST, *THE BEST DEMOCRACY MONEY CAN BUY* 6-43 (2002); for a critical response to Palast by former Florida Secretary of State Katherine Harris, see *A Florida Makeover*, HARPER’S MAG., July 2002, at 4.
2. The most sophisticated recent analysis estimated that 613,514 ex-felons are disenfranchised in Florida. See Christopher Uggen and Jeff Manza, “Democratic Contraction? The Political Consequences of Felon Disfranchisement Laws in the United States,” 67 *American Sociological Review* 777 (Dec. 2002), at 797. The Sentencing Project and Human Rights Watch estimated in 1998 that Florida disenfranchised over 400,000 citizens. See JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES* at 7-8 (1998) [hereinafter HRW/TSP]. *Id.* at 7-8. Florida Governor Jeb Bush has questioned the results of the HRW/TSP study. See Jeb Bush, *In Florida, Ex-Felons Can Regain the Right to Vote*, SARASOTA HER. TRIB., January 12, 2001, at A14. However, both estimates are based on Florida’s own official criminal-justice figures. The Uggen & Manza data has been employed in court papers challenging Florida’s criminal-disenfranchisement law.
3. See HRW/TSP I. This study estimated that about 3.9 million people are temporarily or permanently disenfranchised, of whom “over one million” have completed their sentences. Sociologists Chris Uggen and Jeff Manza, however, estimate that almost 4.7 million Americans are now disenfranchised because of a criminal conviction, of whom about 1.6 million have completed their sentences. See Uggen & Manza, at 797.
4. See note 8 below (listing states which disenfranchise incarcerated convicts and ex-offenders).
5. HRW/TSP, at 17. Evidence strongly suggests that no other democracy disenfranchises indefinitely criminals who have not committed voting-specific infractions. In a 1999 decision protecting South African inmates’ right to vote, the South African Constitutional Court noted that “in Denmark, Ireland, Israel, Sweden, and Switzerland, all prisoners can vote.” *August v. Electoral Comm’n*, 1999 (8) SALR 23 n.30 (CC). South Africa’s legislature restricted prisoners’ voting rights in the following year. See Section 93 of the Local Government: Municipal Electoral Act, 2000, Section 7 (3) (b).  
Countries such as France, Greece, and Germany, meanwhile, disqualify only some classes of incarcerated offenders from voting, and countries including Sri Lanka, Canada, New Zealand, and Australia limit the voting rights only of those serving sentences of a specified length. See the South African Court’s ruling in *August*, above. Another authority shows that in Germany, post-sentence disenfranchisement is never automatic, may only be applied by the sentencing judge for certain serious infractions, and can last only two to five years following incarceration. See Nora V. Demleitner, *Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 760-761 (2000). Moreover, German law requires the government to facilitate voting by eligible inmates. See HRW/TSP, at 18. Canadian prisoner-voting law currently varies among provinces, but the Canadian Supreme Court in October 2002 ruled that federal law disenfranchising prisoners violates the Canadian Charter of Rights and Freedoms and must be struck down. See *Sauvé v. Canada*, 2002 SCC 68 (Oct. 31, 2002); available at <<http://lexum.umontreal.ca/csc-scc/en/rec/html/sauve2.en.html>>. This ruling is the latest in a decade-long struggle. See Christopher P. Manfredi, *Judicial review and criminal disenfranchisement in the United States and Canada*, 60 REV. POL. 277, 281-284 (summarizing Canadian decisions).
6. See Michael P. McDonald and Samuel L. Popkin, “The Myth of the Vanishing Voter,” 95 *American Political Science Review* 963 (2001); Christian R. Grose and Antoine Yoshinaka, “Electoral Institutions and Voter Participation: The Effect of Felon Disenfranchisement Laws on Voter

- Turnout in the U.S. Southern States, 1984-2000,” paper presented at the Annual Meetings of the American Political Science Association, Aug. 29 – Sept. 1, Boston, MA, 2002.
7. In the years 2000-2002, dozens of state legislatures enacted or considered legislation regarding felon disenfranchisement. Some bills pushed for more restrictive laws, but most sought to liberalize disenfranchisement policies, either through restoring the vote automatically upon release from prison, streamlining the restoration application process, or simply compelling authorities to notify released inmates of their right to vote. For a summary of recent developments, see *Dēmos*’ “Voting Rights for Citizens with Felony Convictions Policy Wrap-Up, 2001-2002,” available at <[http://www.demos-usa.org/votingrights/state\\_update.pdf](http://www.demos-usa.org/votingrights/state_update.pdf)>
  8. OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY I (1996) [hereinafter DOJ/OPA]. As another authority put it, state laws disenfranchising criminals “are so diverse that they are difficult to categorize.” Walter M. Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 975 (1970).
  9. Eight states provide for automatic, indefinite disenfranchisement of first-time felons: Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia, and Wyoming. (The Alabama legislature in the summer of 2003 passed legislation restoring most felons’ voting rights at the completion of their sentences, but Governor Bob Riley vetoed the bill.) Those convicted of a second felony in Arizona and Maryland are subject to indefinite disenfranchisement; Tennessee and Washington remove voting rights indefinitely from those convicted prior to 1986 and 1984, respectively. Delaware does not permit ex-felons to vote for five years after the completion of their sentence; those convicted of certain enumerated offenses, including murder, manslaughter, sexual crimes, and crimes against public administration are not eligible for restoration. The states which bar voting during incarceration, probation and parole are Alaska, Arkansas, Georgia, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Oklahoma, Rhode Island, South Carolina, Texas, West Virginia, and Wisconsin. Those which remove voting rights from offenders in prison and on parole, but not on probation, are California, Colorado, Connecticut, and New York. Those barring voting only during incarceration are the District of Columbia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, and Utah. Convicts do not automatically lose the right to vote in Maine and Vermont; Vermont does

remove voting rights from those convicted of election-related offenses. See The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, available at <<http://www.sentencingproject.org/brief/pub1046.pdf>>.

Current data from The Sentencing Project are supported by previous scholarly analyses of state constitutional provisions and statutes disenfranchising criminal offenders. See, for example, Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998), at 790-798 (listing constitutional and statutory disenfranchisement provisions as of 1998); DOJ/OPA 1996 (describing state laws as of 1996); Alice E. Harvey, *Comment: Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look* 142 U. PA. L. REV. 1145 (1994), at 1146 n.6 (listing constitutional disenfranchising provisions as of 1994); Andrew Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L. J. 537 (1993), at 538 n.14, 538 n.15, n.16 (listing constitutional and statutory provisions of states which did not disenfranchise offenders, disenfranchised only those under sentence, and disenfranchised many ex-offenders, respectively, as of 1993); Howard Itzkowitz & Lauren Oldak, *Note: Restoring the Ex-Offender’s Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 695 (1973), at 758-765 (tables listing duration of disenfranchisement and crimes which resulted in the sanction in each state as of 1973), 766-774 (notes listing constitutional and statutory provisions of each state as of 1973); Elizabeth and William Du Fresne, *The Case for Allowing ‘Convicted Mafiosi to Vote for Judges:’ Beyond Green v. Board of Elections of New York City*, 19 DEPAUL L. REV. 112 (1969), at 298 n.14, n.15, n.16, n.17 (listing states disenfranchising no offenders, disqualifying felons only, disqualifying those convicted of “infamous crime,” disqualifying those convicted of specified crimes, and disqualifying those convicted of a combination of general and specific offenses, respectively, as of 1967).

For a summary of significant state and federal legal activity in 1999 and 2000, see Patricia Allard and Marc Mauer, The Sentencing Project, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, <<http://www.sproject.com/test/news/regainvote.htm>>. For comprehensive legal analysis of recent activity concerning criminal disenfranchisement in state legislatures and federal courts, see *One Person, No Vote: The Laws of Felon Disenfranchisement*, in *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1939 (2002), at 1942-1957.

Actual practices do not necessarily align with statutory declarations. Indeed, the U.S. Department of Justice found in 1992 that “in a number of jurisdictions there was no general agreement as to how the law [regarding civil dis-

abilities of convicted felons] should be interpreted and applied, and that the law in any event was continually being amended and/or reinterpreted.” OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY, at “Disclaimer” (1992). Two decades earlier, the California Supreme Court found that former felons’ voting rights effectively depended on which county they lived in and on the decisions of county registrars, who alone chose whether or not to register them. See *Ramirez v. Brown*, 507 P.2d 1345, 1347 n.2 (1973), which found that “[o]nly those who wish to vote and who live in counties which refuse to register them” were relevant to a challenge to the permanent disenfranchisement of criminals then before the court.

10. See HRW/TSP, at 8.
11. See Lani Guinier, *Locking Up the Vote*, AMERICAN PROSPECT, Mar. 12, 2001, at 30. Peter Wagner has found that this policy tilts political power in New York towards Republican legislators from rural, northern districts. See Jonathan Tilove, *Minority Prison Inmates Skew Local Populations as States Redistrict*, Newhouse News Service, Mar. 11, 2002, available in LEXIS, Newhouse wire.
12. See Uggen & Manza, 2002.
13. See Brian J. Hancock, *The Voting Rights of Convicted Felons*, 17 J. ELECTION ADMIN. 35, 39 (1996). Asked about Alabama’s burdensome procedure, Alabama state representative Bob McKee said, “Why not put that criminal through a little more grief and make him jump through a hoop or two? If he is really serious and wants to get back into society, then I’d like to see him show a little initiative.” See Jesse Katz, *For Many Ex-cons, Voting Ban Can Be For Life*, L.A. TIMES, Apr. 2, 2000, at A1. In Mississippi, restoration of voting rights occurs only after two-thirds votes in both houses of the legislature or full pardon by the governor. DOJ/OPA at 81. Nevada convicts need to wait five years to regain voting rights, but a letter sent to them about the waiting period instructs them to wait ten; drug offenders need to wait seven years in Virginia, other felons only five. 2000 Va. Acts ch. 969 (codified at VA. CODE ANN. § 53-1-231.2. Felons who move to Virginia from one of the two states where felons retain the right to vote must wait five or seven years to vote, while those barred from voting while incarcerated may register immediately. See Allard and Mauer at 3. For a comprehensive summary of state restoration procedures, see CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, RESTORING YOUR RIGHT TO VOTE (Dec. 2000), <http://www.usdoj.gov/crt/restorevote/restorevote.htm>, listing restoration procedures in each state.

Nevada and Kentucky—both of which indefinitely disenfranchise felons—have recently made it easier for ex-

offenders to restore their voting rights. Nevada law does not automatically restore voting rights to convicts, but requires that any former felon who applies for such restoration will receive it. 2001 Nev. Stat. 358. Kentucky retains gubernatorial discretion in the restoration process, but has simplified its standards.

Critics have pointed out that these restoration procedures themselves may violate equal-protection standards, since most allow great discretion to the governor or other officials in deciding whether ex-offenders will possess fundamental rights. See DuFresne, at 133; *One Person, No Vote*, at 1960.

14. For example, Virginia—with over two hundred thousand disenfranchised ex-offenders—restored voting rights to 404 ex-offenders in a recent two-year period. See Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENT. REP. 248 (2000). This may be a high number relative to other indefinite-disenfranchisement states, since Virginia offers an administrative procedure for the “removal of political disabilities” separate from an official pardon, which is generally much more difficult to obtain. DOJ/OPA at 133. *But see* Jeb Bush’s op-ed in the *Sarasota Herald-Tribune*, cited above, contending that “156,325 [Florida] felons had their rights restored from 1964 to 1996” and that 1,893 felons had their rights restored in 1999.
  - Persons convicted of a federal felony usually fall under the disenfranchisement policies of the state in which they live. This practice has a long history: a federal circuit court held in 1876 that a person convicted in federal courts of a federal crime was not disenfranchised under New York law. See *U.S. v. Barnabo*, 24 F. Cas. 1007 (1876). However, in at least 16 states, federal convicts now cannot take advantage of state restoration procedures, and must win a presidential pardon if they wish to regain the vote. See Mauer, FED. SENT. REP. 2000, at 248.
15. H.R. 906, 106th Cong. (1999), at 2. Many ex-felons therefore are effectively forced to choose between the right to interstate travel and the right to vote. See DuFresne, at 132.
16. *Ex-Offenders’ Voting Rights Act: Hearings on H.R. 9020 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 93rd Cong. (1974) [hereinafter *Ex-Offenders’ Voting Rights Act Hearings*], at 11.
17. In Alaska, Alabama, Georgia, Iowa, Maryland, Mississippi, New Mexico, Tennessee, and Washington, “infamous crimes,” crimes involving “moral turpitude,” or offenses from a specific list bring about loss of the vote. See Hench, at 795-797.

18. The term “civil death” refers to the condition in which a convicted offender loses all political, civil, and legal rights. Civil death provisions have survived in American law. See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION, at 16 (1996) (showing that as late as 1996, four American states imposed civil death on some serious offenders.)
19. Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROB. 51, 52 (1987). See also BARBARA B. KNIGHT & STEPHEN T. EARLY, JR., PRISONERS’ RIGHTS IN AMERICA 289 (1986) (noting that “imposed deprivations rarely are part of an inmate’s sentence but are statutorily defined collateral consequences of conviction and/or incarceration.”)
20. *Trop v. Dulles*, 356 U.S. 86, 96-97 (1958). The Court in *Trop* denied Congress the power to withdraw an individual’s citizenship because of wartime desertion.
21. *Id.* See also *Green v. Board of Elections*, 380 F.2d 445, 450 (1967) (holding that disenfranchisement “is not a punishment”); and *Washington v. State*, 75 Ala. 582, 585 (holding that disenfranchisement is “imposed for protection [of the ballot box], and not for punishment.”)
22. The Missouri Supreme Court, surveying the history of criminal disenfranchisement in that state, found that the legislature clearly treated disenfranchisement as a “part of the punishment” for specified crimes throughout the nineteenth century. See *State ex rel. Barrett et al., Board of Election Commissioners, v. Sartorius*, Judge, 175 S.W. 2d 787, 788 (1943). See also *The Equal Protection Clause as a Limitation of the States’ Power to Disenfranchise Those Convicted of a Crime*, 21 RUTGERS L. REV. 297 (1967) at 309-310 (arguing that historically “the original purpose in depriving the criminal of certain civil rights appears to have been to ostracize and degrade him in the eyes of the community—a form of further punishment.”) Historian Alexander Keyssar writes of criminal disenfranchisement law that “the punitive thrust clearly was present for much of the nineteenth century.” ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 163 (2000).
23. BERT NEUBORNE & ARTHUR EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS: AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK 32-33 (1976). See also R. Singer, *Conviction: Civil Disabilities*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 243 (ed. Stanford Kadish, 1983) (arguing that collateral consequences of conviction are sometimes “the most persistent punishments that are inflicted for crime”); Itzkowitz and Oldak at 730 (arguing that because the sanction “occurs as a direct consequence of criminal conviction, and is not a mere qualification such as age or residency which may be met with the passage of time,” “disenfranchisement must be considered punitive”). Another authority writes that despite legal and theoretical arguments to the contrary, “disenfranchisement is treated as a form of punishment.” Jeffrey L. Harrison, *Repentance, Redemption, and Transformation in the Context of Economic and Civil Rights*, in CIVIC REPENTANCE 39 (Amitai Etzioni ed., 1999).
24. *McLaughlin v. City of Canton, Miss.*, 947 F. Supp. 954, 971 (S.D. Miss., 1995).
25. Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 160 (2001), at 177. In Congressional testimony, Todd F. Gaziano of the Heritage Foundation described disenfranchisement as “part of the sanction for a specified ... crime.” See *Civic Participation and Rehabilitation Act of 1999: Hearings Before the Subcommittee on the Constitution, Committee of the Judiciary*, 106th Cong., at 17 (1999) [hereinafter *Civic Participation Act Hearings*] (statement of Todd F. Gaziano).
26. Frank Phillips, “Lawmakers push to ban inmate votes,” *Boston Globe*, June 28, 2000, p. B1 (quoting House Minority Leader Francis Marini). Massachusetts Governor Paul Cellucci said the new policy “has to do with punishing people for their crimes.” John McElhenny, *Legislature Votes to Bar Jailed Felons from Voting*, June 28, 2000, available in LEXIS, AP state and local wire.
27. See Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and the Purity of the Ballot Box*, 102 HARV. L. REV. 1300 (1989) [hereinafter *Note*] at 1301; CARL LUDWIG VON BAR, A HISTORY OF CONTINENTAL CRIMINAL LAW 24-25 (1916). In medieval Germany, the condition of infamy “closed the doors to most of the honest occupations.” *Id.* at III.
28. Itzkowitz & Oldak at 723.
29. CARLO CALISSE, A HISTORY OF ITALIAN LAW 511 (1928).
30. See, e.g., *Civil Death*, CONG. Q’LY’S GOVERNING MAG., Dec. 1998, at 15 (story reporting the HRW/TSP study of 1998); Demleitner, at 775 (calling disenfranchisement a “modern day remnant” of “civil death statutes”).
31. ALBERT E. MCKINLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA 384-85. (1905); CORTLAND BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 53 (1893).
32. *Id.* at 55.
33. BISHOP at 55.
34. BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 1606-1660 54 (1983).
35. *Id.* at 56.
36. CHAPIN at 161.

37. BISHOP at 55. This 1650 statute merits quoting in full: “It is ordered by this Courte and decreed, that if any person within these Libberties have been or shall be fyned or whipped for any scandalous offence, hee shall not bee admitted after such time to have any voate in Towne or Commonwealth, nor to serve in the Jury, untill the courte shall manifest their satisfaction.” *Id.*
38. By contrast, modern German disenfranchisement law appears quite similar to the American colonial model. *See* Demleitner at 755-756 (showing that in Germany “deprivation of voting rights is limited 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.”)
39. Itzkowitz & Oldak at 725.
40. U.S. CONST. art. III, § 3, cl. 2.
41. *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997), at 529.
42. The eleven states which barred criminals from voting by 1821 were Virginia, Kentucky, Ohio, Louisiana, Indiana, Mississippi, Connecticut, Illinois, Alabama, Missouri, and New York. *See* Green v. Board of Elections, 380 F.2d at 450 n.4 (listing state constitutional provisions). *See also* KEYSSAR, Table A.7 (“Suffrage Exclusions for Criminal Offenses: 1790-1857”), Table A.9 (“Summary of Suffrage Requirements in Force: 1855”).
43. State constitutions disenfranchising criminals between 1831 and 1868 were those of California, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin. *See* Green v. Board of Elections, 380 F.2d at 450 n.5 (listing state constitutional provisions). *See also* KIRK HAROLD PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 148 (1971); KEYSSAR, Table A.15 (“Disenfranchisement of Felons and Others Convicted of Crimes: 1870-1920”).
44. *See* WARD E. Y. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY 43 (1974) (arguing that criminal disenfranchisement may have been implemented in response to the elimination of the property test, since “abolishing property tests revealed that they had served a number of indispensable functions, such as holding down the voting strength of free blacks, women, infants, criminals, mental incompetents, unpropertied immigrants, and transients”). In general, however, it is difficult to establish clear explanations for the development of the law in this period, because state laws and their execution varied so widely. As one early scholar of criminal disenfranchisement wrote, there was “great diversity of practice;” assessing one state’s history more recently, a federal court found that “[d]isenfranchisement of felons ... has had a curious history” characterized by “haphazard development.” PORTER at 147; *Stephens v. Yeomans*, 327 F. Supp. 1182, 1187, 1188 (D.N.J. 1970)
45. *See, e.g.*, Erica Goode, *Gentle Drive to Make Voters of Those with Mental Illness*, N.Y. TIMES, Oct. 13, 1999, at A1, A16 (showing that state and national advocacy groups are working successfully to educate, register, and motivate the mentally ill to vote, with funding from mental health professionals, pharmaceutical companies, and federal grants.)
46. The six states which allowed blacks to vote in 1860 were Maine, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont. Of these, only New York and Rhode Island also disenfranchised criminals. *See* PORTER at 148.
47. As one authority has written, there were “remarkably few court cases dealing with [criminal disenfranchisement] prior to the 1960s.” KEYSSAR at 303. There is virtually no scholarship on the practice in the late nineteenth and early twentieth centuries. *But see* DUDLEY O. MCGOVNEY, THE AMERICAN SUFFRAGE MEDLEY 54-56 (1949) (summarizing criminal disenfranchisement laws as of 1949.)
48. *See* Angela Behrens, Christopher Uggen, and Jeff Manza, “Ballot Manipulation and the ‘Menace of Negro Domination:’ Racial Threat and Felon Disenfranchisement in the United States, 1850-2000.” Available at <[http://www.socsci.umn.edu/%7Euggen/Behrens\\_Uggen\\_Manza\\_AJS.pdf](http://www.socsci.umn.edu/%7Euggen/Behrens_Uggen_Manza_AJS.pdf)>
49. George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895 (1999), at 1903.
50. 418 U.S. 24 (1974). The Court had indirectly endorsed criminal disenfranchisement before. *See, e.g.*, *Davis v. Beason*, 133 U.S. 333, 345-347 (1889) (stating that Idaho Territory statute which provided that “no person ... convicted of treason, felony, or bribery ... unless restored to civil rights ... is permitted to vote at any election” “is not open to any constitutional or legal objection”); *Lassiter v. Northampton Co. Bd. of Elections*, 360 U.S. 45, 51 (1959) (“[r]esidence requirements, age, and previous criminal record [are] obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters”), and *Harper v. Board of Elections*, 383 U.S. 663, 673, 663 n.4 (1966) (provisions barring “convicted felons or the insane” from voting are example of restrictions which may “result[] in treating some groups differently from others” without offending the Equal Protection Clause of the Fourteenth Amendment, and noting that states “have from the beginning and do now qualify the right to vote because of age, prior felony con-

- viction, illiteracy, and various other reasons.”) (Black, J., dissenting). *See also* Green v. Board of Elections, 380 F.2d at 451 (listing Supreme Court opinions which “recognized” states’ power to deprive felons of the ballot).
51. One lower court interpreted *Richardson* “as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime.” Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981). The *ABA Journal* considers *Richardson* to have settled completely constitutional disputes over disenfranchisement, writing simply that the Fourteenth Amendment “allows states to disenfranchise criminals.” Terry Carter, “Cell Block to Voting Bloc?”, *ABA Journal*, Oct. 2002, 16.
  52. The Supreme Court has repeatedly declared the right to vote to be fundamental and applied strict scrutiny to legislation restricting suffrage. *See, e.g.*, Reynolds v. Sims 377 U.S. 533, 555, 561-562 (1964) (the right to vote is “the essence of a democratic society,” “a fundamental matter in a free and democratic society,” and that because the right to vote is “a fundamental right ... preservative of all rights,” any “alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964) (holding that the “individual’s constitutional right to cast an equally weighted vote” is among the list of “fundamental rights” which cannot be limited); Harper v. Board of Elections 383 U.S. 663, (1966) (calling the right to vote “precious” and “fundamental”); Carrington v. Rash 380 U.S. 89, 96 (1966) (“this [Supreme] Court has been so zealous to protect” the right to vote); Kramer v. Union Free School District No. 15, 395 U.S. 621, 626-627, 632 (1969) (holding that statutes distributing the franchise “constitute the foundation of our representative society” and therefore in any review of a state law restricting suffrage “the Court must determine whether the exclusions are necessary to promote a compelling state interest”); Dunn v. Blumstein, 404 U.S. 330, 335 (1972), (holding that durational residence laws are unconstitutional unless a state can demonstrate not only that a “substantial and compelling reason” exists for a “a challenged statute [which] grants the right to vote to some citizens and denies the franchise to others,” but also that such laws are drawn with “precision,” “tailored” to achieve compelling objectives. In *O’Brien v. Skinner*, the Court applied equal-protection analysis in striking down those provisions of New York state law which denied absentee ballots to incarcerated misdemeanants and pre-trial detainees. *See O’Brien v. Skinner*, 414 U.S. at 524, 531 (1974). However, the Court in *O’Brien* made clear that “the New York election laws here in question do not raise any question of disenfranchisement of a person because of conviction for criminal conduct.” *Id.* at 528.
  53. Ramirez v. Brown, 507 P.2d 1345. The California court examined disenfranchisement in light of the state’s need to “deter election fraud.” Ramirez, *id.* at 1349. The plaintiffs also claimed that the variation in county election officials’ enforcement of ex-felon disenfranchisement provisions constituted a denial of due process. Since the California Supreme Court agreed with their first claim, it did not reach the second. *Id.* Meanwhile, the California Secretary of State asked the court to affirm the constitutionality of statutes denying suffrage to incarcerated convicts, but the court refused to do so since the question was “not presented in the case at bar.” Ramirez, 507 P.2d at 1357 n.18. Federal courts had previously applied equal-protection analysis to laws disenfranchising former felons. *See Stephens v. Yeomans*, 327 F. Supp. 1182, 1187, 1188 (D.N.J. 1970); *Dillenburg v. Kramer*, 469 F. 2d. 1222 (9th Cir. 1972).
  54. *See* ELLIOTT at 57.
  55. The relevant passage of Section Two reads, “[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State .... But when the right to vote at any election ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.” U.S. Const., Amend. XIV, §2 (emphasis added).
  56. Historically, the Court has cast few glances at section two. *See, e.g.*, U.S. v. Reese 92 U.S. 214, 247 (1875) (dissenting opinion arguing that “[b]y the second section of the Fourteenth Amendment, each state had the power to refuse the right of voting at its elections to any class of persons, the only consequence being a reduction of its representation in Congress”) (Hunt, J., dissenting); Elk v. Wilkins, 112 U.S. 94, 102 (1884) (citing the phrase “excluding Indians not taxed” in section two of the fourteenth amendment in holding that Native Americans born in the U.S. are not automatically citizens); Reynolds v. Sims 377 U.S. 533, 612 (1964) (Harlan, J., dissenting).
  57. *Richardson*, 418 U.S. at 25. The second section of the Fourteenth Amendment refers to voters disenfranchised for “participation in rebellion, or other crime.” U.S. CONST., amend. XIV, §2.

58. *Richardson*, 418 U.S. at 77 (Marshall, J., dissenting). Such analysis, Marshall wrote, “properly begins with the observation that because the right to vote ‘is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,’ voting is a fundamental right.” *Id.* (quoting *Reynolds v. Sims*, 377 U.S. at 555).
59. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1094 (2nd ed. 1988). See *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966), holding that “[i]n determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights.” See also David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 303. As Shapiro points out, the Court had held in *Dunn v. Blumstein* that durational residency requirements popular at the adoption of the Fourteenth Amendment—and specifically authorized by Congress—were nevertheless invalid under Equal Protection analysis. See *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972). Shapiro contends that “there is not a word in the fourteenth amendment suggesting that the exemptions in section two’s formula are in any way a barrier to the judicial application of section one in voting rights cases.” Moreover, the Court held in *Harper v. Virginia Board of Elections* that “[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.” *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669 (1966) (emphasis in original).
60. *Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972).
61. The Court has used even literally defunct passages of the Constitution to help it interpret other sections. See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 14 (1824) (considering, in exploring whether states possess “a general right over the subject of commerce,” the meaning for that question of the ban in Art. I, §9 of the U.S. Constitution of any law by Congress prior to 1808 prohibiting the importation of slaves, as well as states’ power to regulate the slave trade prior to that date).
62. MCGOVNEY at 52.
63. DANIEL A. FARBER AND SUZANNAH SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION* 297 (1990).
64. MICHAEL J. PERRY, *WE THE PEOPLE: THE FOURTEENTH AMENDMENT AND THE SUPREME COURT* (1999) at 212 n.18.
65. LEE EPSTEIN AND THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 675 (2000).
66. Instead of explaining section two’s implications for voting rights, the Court focused on the lack of controversy surrounding the reference to criminal disenfranchisement in section two. The Court noted that “[t]he legislative history bearing on the meaning of the relevant language of 2 is scant indeed.” *Richardson*, 418 U.S. at 43. The Court was probably correct to interpret history’s relative silence surrounding the phrase “or other crime” to mean that permitting the disenfranchisement of criminals to proceed without penalty did not change the political status quo in 1868. *Id.* at 46. Five Congressmen and Senators spoke in favor of the criminal disenfranchisement phrase during drafting of the amendment, most of them indirectly. *Id.*
67. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett Pub. Co. 1980) (1690) at 14, §16.
68. *Id.* at 11, §11. Locke writes, “[i]n transgressing the law ..., the offender declares himself to live by another rule than that of reason and common equity ... and so he becomes dangerous to mankind.” *Id.* at 10, §8.
69. In *On the Social Contract*, Jean-Jacques Rousseau echoed Locke’s call for the expulsion of wrongdoers from political society:
- every malefactor who attacks the social right becomes through his transgressions a rebel and a traitor to the homeland; in violating its laws, he ceases to be a member, and he even wages war with it.... Thus one of the two must perish; and when the guilty party is put to death, it is less as a citizen than as an enemy.... [h]e has broken the social treaty, and consequently ... he is no longer a member of the state.
- JEAN-JACQUES ROUSSEAU, *THE BASIC POLITICAL WRITINGS* (Donald A. Cress trans., Hackett Pub. Co. 1987) (1762), 159. For his part, Mill wrote of the citizen, “[t]he suffrage is indeed due to him, among other reasons, as a means to his own protection, but only against treatment from which he is equally bound ... to protect every one of his fellow-citizens.” JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, AND REMARKS ON BENTHAM’S PHILOSOPHY* (Geraint Williams ed., 1993) (1861), at 324.
70. One of Paine’s arguments is particularly relevant here. In a sharply satirical passage attacking the property qualification for voting, Paine wrote,
- “[t]he only ground upon which exclusion from the right of voting is consistent with justice, would be to inflict it as a punishment for a certain time upon those who should propose to take away that right from others.... The right which I enjoy becomes my duty to guarantee it to another, and he to me; and those who violate the duty justly incur a forfeiture of the right.”

Thomas Paine, *Dissertation on the First Principles of Government*, in 3 *THE WRITINGS OF THOMAS PAINE* 267

(Moncure Daniel Conway ed. 1969) (1795). Paine's point may have been ironic—he would disenfranchise advocates of the property test, because *they* had threatened to deprive *others* of the right to vote—but his premise remains that those who failed to “guarantee” the rights of others should temporarily forfeit the ballot.

Jefferson's thoughts on the suffrage are also intriguing. Jefferson argued that every man who paid his due to society, whether he “fights or pays,” should “exercise his just and equal right in ... election.” Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in *POLITICAL WRITINGS OF THOMAS JEFFERSON*, (Joyce Appleby and Terence Ball, eds., 1999), at 212. This reasoning would seem to exclude the incarcerated, who neither “fight nor pay,” but not former offenders who either served in the army or paid taxes. When Jefferson named specifically those ineligible for the franchise, he singled out “infants,” “women,” and “slaves,” and did not see fit to name criminals. See Letter from Thomas Jefferson to Samuel Kercheval (September 5, 1816), *id.* at 218.

The full passage, however, illustrates that twenty-first century Americans cannot turn to Jefferson as an authority on the principles modern suffrage law should follow. Jefferson would prohibit the following persons from voting and from participation in the “deliberations” of government: “1. Infants, until arrived at years of discretion. 2. Women, who to prevent depravation [sic] of morals and ambiguity of issue, could not mix promiscuously in the public meetings of men. 3. Slaves, from whom the unfortunate state of things with us takes away the rights of will and of property. Those then who have no will could be permitted to exercise none in the popular assembly....” *Id.*

71. I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 95 (Bradley ed., Vintage Books 1990) (1835). Thomas L. Dumm has argued that Tocqueville's story helps us understand the profound relationship between American ideas of punishment and democracy. Dumm writes, “Tocqueville came to the United States to study the prison, and left to write *Democracy in America*. No irony need be made of that coincidence, nor should anyone be surprised. After all, the penitentiary was the ideal liberal democratic institution.” THOMAS L. DUMM, *DEMOCRACY AND PUNISHMENT* 140 (1987).
72. 380 F.2d 445 (2d Cir. 1967).
73. Green, 380 F.2d at 451.
74. Shepherd v. Trevino, 575 E.2d 1110, (5th Cir. 1978), at 1115.
75. *Richardson*, 418 U.S. at 81 (Marshall, J., dissenting). For explanations of this hypothesis, see also Harrison, at 37, and *Note*, at 1302-1303.

76. See *Civic Participation Act Hearings* at 44 (prepared statement of Todd F. Gaziano). Gaziano argued that “[c]riminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed either to be less trustworthy or to have waived their right to participate in those decisions.” *Id.*
77. See *Civic Participation Act Hearings*, at 17 (prepared testimony of Roger Clegg). Neither witness offered evidence to support this theory.
78. *Id.* Elsewhere, Clegg has argued that if indefinite disenfranchisement laws did not exist, “there would be a real danger of creating an anti-law enforcement voting bloc in municipal elections.” Clegg, *Who Should Vote?*, at 177.
79. Even some civil libertarians adopt the liberal-contractarian defense of criminal disenfranchisement. See, for example, JAY A. SIGLER, *CIVIL RIGHTS IN AMERICA 1500 TO THE PRESENT* 382-383 (1998). Sigler argues that “[w]hen felons choose to violate societal laws, they break the social contract that guarantees their fundamental rights and freedoms.” Sigler's example is striking because this statement follows a concise, committed explanation of how all proposed suffrage restrictions must be measured against the “strict scrutiny” standard—a standard which Sigler simply abandons, a page later, in endorsing criminal disenfranchisement. *Id.* at 380.
80. Bernard Bailyn has found that Montesquieu was the “chief authority” cited by the American founders, and that his name “recurs far more often than that of any other authority in all of the vast literature on the Constitution.” See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967), at 344-345.
81. See I BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 20 (Thomas Nugent trans., Hafner Pub. Co. 1949) (1748). Montesquieu writes, “[f]or it is clear that in a monarchy ... there is less need of virtue than in a popular government, where the person intrusted with the execution of the laws is sensible of his being subject to their direction.” *Id.*
82. MONTESQUIEU at 40
83. *Washington v. State*, 75 Ala. 582, 585 (1884).
84. *Id.*
85. Lawrence M. Friedman has written in another context of prisons as way to “quarantine” the criminal class. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 601 (2nd ed., 1985). The U.S. Supreme Court employed precisely this analogy in *New York v. Miln* when it held that it is as “necessary” for states to protect themselves with “precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence.” *New York v. Miln*, 36 U.S. 102, 142 (1837), *overruled by* *Edwards v. California*, 314 U.S. 160 (1941).

86. State ex rel. Barrett et al., Board of Election Commissioners, v. Sartorius, Judge, 175 W. 2d 787, 788 (1943).
87. Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga., 1971).
88. Otsuka v. Hite, 414 P.2d 412, 414 (1966). *Otsuka* involved the voting rights of plaintiffs convicted twenty years earlier of refusing to serve in the armed forces because of conscientious objections. *Id.*
89. Jacob Katz Cogan, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 YALE L. J. 473 (1997).
90. Delaware permits most ex-convicts to win restoration of voting rights five years after they conclude their sentence, but sex offenders—as well as those convicted of murder and manslaughter—are not eligible for restoration. 72 Del. Laws 356 (1999) (codified at DEL. CONST. art. 5, §2.) A proposed 1998 amendment to the Massachusetts state constitution eschewed felony conviction as the disenfranchisement cutoff point, instead singling out those incarcerated for murder, rape, “other sex related offenses or the possession or sale of controlled substances.” J. OF THE MASS. H. OF REPS., July 28, 1998, at 21. The proposal was defeated in favor of an amendment barring all incarcerated felons from voting. In Alabama, the state House and Senate both passed legislation in June 2003 automatically restoring voting rights to those felons who completed their sentences, but continuing to disenfranchise for life those convicted of “murder, rape, sodomy, sexual abuse, incest, sexual torture, enticing a child into a vehicle for immoral purposes, soliciting a child by computer, production or possession of obscene material, and treason.” See Phillip Rawls, *Voter ID, Felon Voting Rights Pass Alabama Legislature*, June 17, 2003, available in LEXIS, AP state & local wire. In these bills and laws we can hear an echo of the earliest American criminal-disenfranchisement laws: the content of the crime matters a great deal, with sex offenders and those convicted of drug crimes depicted as politically dangerous, while many other felons are not.
91. Dan M. Kahan, *What do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996). Kahan argues that “shaming penalties unambiguously express condemnation and are a feasible alternative to imprisonment for many offenses.” *Id.* at 594.
92. MONTESQUIEU at 199.
93. *Id.*
94. Otsuka v. Hite, 414 P.2d at 417 (1966). The same court would later overturn California’s lifetime felon-disenfranchisement law after finding that “the enforcement of modern statutes regulating the voting process and penalizing its misuse—rather than outright disfranchisement of persons convicted of crime—is today the method of preventing election fraud which is least burdensome on the right to suffrage.” See Ramirez v. Brown, 507 P.2d 1345, 1357. In another context, the U.S. Supreme Court also interpreted a state’s interest in preserving the “purity of the ballot box” to refer to preventing fraudulent elections. See Dunn v. Blumstein, 405 U.S. 330, 345 (1972). In an apparent spasm of sarcasm, the Court called preserving the purity of the ballot box “a formidable-sounding state interest,” but held that durational residence requirements were not necessary to prevent fraud. *Id.*
95. “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,” said John B. Knox, president of the Alabama convention of 1901. Quoted in Hunter v. Underwood, 471 U.S. 222, 229 (1985). “This plan of popular suffrage 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,” said Carter Glass, delegate to the Virginia convention of 1906. See PAUL LEWINSON, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 84-86. Glass told the delegates, “Discrimination! Why, that is precisely what we propose; that exactly, is what the convention was elected for.” J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS 39 (1974), at 59. Describing the evolution of white methods of disenfranchising blacks, Ben Tillman of South Carolina said, “[w]e took the government away. We stuffed ballot boxes. We shot them.... With that system ... we got tired ourselves. So we called a constitutional convention, and we eliminated ... all of the colored people whom we could.” Tillman made this statement to the U.S. Senate. See FRIEDMAN at 507. “Give me a convention, and I will fix it so that the people shall rule and the Negro shall never be heard from,” said Robert Toombs of the new Georgia constitution in 1890. ROCKEFELLER FOUNDATION, THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION CONFERENCE 9 (1981). Some changes occurred slightly earlier. Florida, for example, added a constitutional provision disenfranchising for all felonies in 1868, and also added larceny to the short list of enumerated crimes that triggered both disenfranchisement and disqualification from holding public office.
96. Ratliff v. Beale, 20 So. 865, 867 (1896).
97. Ratliff, 20 So. at 865.
98. The sale of slaves had broken up many marriages, and blacks often remarried without obtaining a divorce or confirming the death of a former spouse. See Demleitner at 777 n.124. Vagrancy was also a disenfranchisable crime of “moral turpitude.” See KEYSAR at 306.

99. Hunter, 471 U.S. at 227. In Virginia, a newspaper declared that the petty-crimes disenfranchisement provision combined with the poll tax to effect “almost ... a political revolution” in cutting down the black vote. Kousser at 35.
100. Ratliff, 20 So. at 868 (emphasis added). Mississippi has permanently disenfranchised those convicted of many petty crimes since 1890; it did not bar rapists or murderers from voting until the state constitution was amended in 1972, when burglary was also removed from the list of disenfranchising offenses. See *Ex-Offenders’ Voting Rights Act Hearings*, at 7; MISS. CONST. art. XII, §241.
101. *Williams v. Mississippi*, 170 U.S. 213, 222 (1898). “There is an allegation,” the Court acknowledged, “of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the constitution or laws or by those who administer them.” *Id.* at 223. *Williams* was effectively superseded by the Civil Rights Act of 1964 and the Voting Rights Act of 1965.
102. In 1985, the U.S. Supreme Court would revisit this period and hand down a different ruling. See *Hunter v. Underwood*, 471 U.S. 222 (1985) (striking down the “moral turpitude” clause in Alabama’s constitutional disenfranchisement provision because it was adopted with discriminatory intent).
103. See Demleitner at 788 (arguing that “[i]f the primary sentences threatening the offender ... do not act as sufficient deterrents, disenfranchisement will not either.”); Itzkowitz and Oldak, at 734-735 (analyzing “possible explanations for disenfranchisement’s failure as a deterrent”).
104. Kirk Porter makes this argument in colorful fashion. Observing the preponderance of dueling in nineteenth-century disenfranchisement laws, Porter writes, “[i]t seems a little ridiculous to assume that fear of losing suffrage would deter a man from fighting a duel.... These laws are somewhat stultifying.” PORTER at 148-49
105. See Demleitner at 793 (arguing that U.S. disenfranchisement provisions are too broad to suit incapacitative goals, since “they include large numbers of offenses which cannot be construed as attacks on the democratic system”).
106. Fletcher, at 1907.
107. This claim was the central premise of one recent effort to enfranchise ex-offenders through federal law. See H.R. 906, 106th Cong. (1999). Jeffrey L. Harrison has argued that ex-offender disenfranchisement makes impossible the kind of meaningful “repentance” which some communitarian writers have emphasized. See Harrison at 39.
108. Compelling prisoners to vote, or offering them some incentive to do so, is not far-fetched. As J.G.A. Pocock writes, “[i]n the final analysis, the ideal of virtue is highly compulsive; it demands of the individual, under threat to his moral being, that he participate in the *res publica*....” J.G. A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975), at 551. Americans should not shy away from using incentives and even compulsion to induce prisoners to engage in an activity which will certainly not harm them and which might well develop their sense of social responsibility
- Visiting the nineteenth-century American “houses of refuge” for young offenders, Beaumont and Tocqueville observed a system in which the privilege of voting was used for formative purposes. The young people housed in the “houses of refuge” were classed by their conduct, and those in the top rank enjoyed “great privileges,” of which the first was that “they alone participate in the elections.” “Bad children,” meanwhile, suffered “privation of the electoral right, and the right of being elected....” GUSTAVE DE BEAUMONT AND ALEXIS DE TOCQUEVILLE, *ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE* 100 (Francis Lieber trans., Southern Ill. Univ. Press 1964) (1833), at 138. Clearly, this system used deprivation of the vote was intended to punish those who misbehaved. But its punitive force came from the fact that other institutionalized children were visibly enjoying the right to participate in elections—certainly, in the context, an activity that was expected to help develop their character.
109. DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 13 (1999).
110. No state classifies a first offense for driving while intoxicated as a felony. In most states, a person must be convicted of driving under the influence three or more times in order to be charged with a felony. The laws of only four states—Indiana, New York, Oklahoma, and Utah—permit a second-time drunk driver to be charged with a felony. See HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, *DIGEST OF STATE ALCOHOL-HIGHWAY SAFETY-RELATED LEGISLATION* (19th ed., 2001). However, some habitual offenders may be disenfranchised, if local and state officials decide their crime is one of “moral turpitude.” See *Jarrard v. Clayton County Board of Registrars*, 425 S.E.2d 874 (Ga. 1993). But Jarrard’s case merely proves that it is relatively difficult to lose the vote by driving drunk: in allowing his disenfranchisement, the Supreme Court of Georgia noted that Jarrard “had thrice before been declared a habitual violator.” *Id.* at 875.
111. LEWINSON, at 45. Some states did bar former Confederates from voting, but the Amnesty Act of 1872 removed most civil disabilities which had survived that long. See Smith, *CIVIC IDEALS*, at 275.
112. ERIC FONER, *RECONSTRUCTION* (1988), at 254. Foner writes, “a majority of [Congressional] Republicans considered disenfranchisement vindictive, undemocratic, and likely to arouse opposition in the North.”

113. *Id.* at 324. The states were Georgia, Florida, Texas, South Carolina, and North Carolina. Other states limited disenfranchisement to specific individuals, or to those who had committed atrocities. *Id.*
- Intriguingly, the debate among Republicans divided along racial lines: “disenfranchisement generated less interest among black delegates,” writes historian Eric Foner, “many of whom seemed uncomfortable with a policy that appeared to undermine the party’s commitment to manhood suffrage.” One former slave said “I have no desire to take away the rights of the white man. All I want is equal rights in the court house and equal rights when I vote.” Foner, 324.
114. See KEYSSAR at 308. See also Harrison at 39, arguing that “the relative political powerlessness of those who are convicted of crimes” has helped ex-felon disenfranchisement survive.
115. *Schenck v. U.S.*, 249 U.S. 47 (1919).
116. As one Representative reminded Congress, “[i]n the beginning, the only person uniformly assured of the right to vote was the white, 21-year-old male, propertied, literate, a fixed resident, and with means to pay any tax. Gradually these restrictions have fallen by the wayside, as custom and prejudice gave way to reason, or the coercion of law.” 114 CONG. REC. 8077 (daily ed. Aug. 1, 1968) (remarks of Rep. Schwengel). As an indicator of how much our understanding of voting rights has changed, consider a federal court ruling from 1873 which held that if they wished, states could declare “that no person should vote until he had reached the age of thirty years, or after he had reached the age of fifty, or that no person having gray hair, or who had not the use of all his limbs, should be entitled to vote....” *U.S. v. Anthony*, 24 F. Cas. 829 (No. 14459) (C.C.N.C. N.Y. 1873). The right to vote now holds a much stronger position in American constitutional law and political culture alike.
117. See Ned L. Siegel et al. and Governor George W. Bush and Dick Cheney, Plaintiffs, v. Theresa LePore et al., Defendants. Complaint for Declaratory and Injunctive Relief, U.S. District Court for the Southern District of Florida, November 10, 2000. The Fourth Claim for relief in the complaint reads, in part: “The right to vote in a democracy is among the most precious of all individual rights, and is the crux of the democratic system. The right to vote is clearly established under the First Amendment of the Constitution of the United States.”
118. Professor Laurence Tribe makes two particularly original points in arguing that no compelling state interest justifies disenfranchisement. First, the state’s interest in an informed electorate fails to legitimate the practice, since some convicts are far better-informed about policy than many law-abiding citizens. Second, while deterring crime and punishing criminals are surely compelling interests, disenfranchisement is not necessary to those interests given the availability of other sanctions. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1094 (2nd ed. 1988). Meanwhile, even if subjected to the lowest level of constitutional scrutiny, criminal disenfranchisement might very well be adjudged as “arbitrary and irrational” and overturned on those grounds. See Fletcher at 1903.
- Americans who support criminal disenfranchisement, whether temporary or indefinite, ought to consider the recent words of South Africa’s Constitutional Court. In holding that prisoners retain the right to vote, the South African Court declared that “[r]ights may not be limited without justification and legislation dealing with the franchise must be interpreted in favor of enfranchisement rather than disenfranchisement.” See August v. Electoral Comm’n, 1999 (8) SALR 14 (CC). Many Americans would endorse these principles, as they would the Court’s holding that “[u]niversal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race....” *Id.*
119. For a more full critique of the liberal-contractarian case, see Afi S. Johnson-Parris, *Note: Felony Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109 (2003).
120. See *Civic Participation Act Hearings* at 11 (statement of Marc Mauer) (noting that politically-minded burglars “would have to find a candidate running on a platform that calls for lowering the penalties for burglary, then find 51 percent of the electorate that wanted to vote for that candidate, and then have that candidate convince his or her fellow legislators to also lower the penalties for burglary”).
121. See Vt. Stat. Ann. tit. 28, §807(a), §807(b); Canada Elections Act, Part I, Division 5, § 245(3) (specifying that an “incarcerated elector” “is entitled to vote under this Division only for a candidate in the electoral district in which his or her place of ordinary residence is situated as shown on the application for registration and special balloting made by the elector”).
122. Citizens tend to vote not egoistically but “sociotropically,” favoring the candidate or party they think likeliest to benefit the economy or society as a whole. See Donald R. Kinder et al., *Sociotropic Politics: The American Case*, 11 BRIT. J. POL. SCI. 129 (1981); Gregory B. Markus, *The Impact of Personal and National Economic Conditions on the Presidential Vote*,

32 AM. J. POL. SCI. 137 (1988) (finding that broad macro-economic conditions are more important than personal finances in individuals' voting decisions). Meanwhile, there is no evidence that criminals are "so overwhelmed by criminality" that they will "prioritize criminal ends over every other political, economic, and social issue." Adam Winkler, *Note: Expressive Voting*, 68 N.Y.U. L. REV. 330, at 387 n.242.

Even if all convicts were to vote in concert, they would be far too few in number to carry a candidate to victory without the support of other "interest groups." One prominent recent study has shown that criminal disenfranchisement has helped Republican Senate candidates in several recent elections. See Uggen & Manza. This does not demonstrate, however, that offenders successfully vote in a "subversive" manner. Consider, for example, the 2000 Presidential election in Florida. If Florida automatically restored the right to vote to its approximately half a million ex-felons, some would have voted in that election; offenders come disproportionately from lower-income and minority groups, and it is very likely that they would have tipped the election to the Democratic candidate, Vice President Gore. But Gore supported the death penalty and other "tough on crime" measures.

123. JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 146 (1972).
124. *Id.* at 147.
125. *Id.* at 149-151. Casper's observations were preceded by those of Tocqueville. Touring American penitentiaries, Tocqueville marveled that "[t]here is a spirit of obedience to the law, so generally diffused in the United States, that we meet with this characteristic trait even within the prisons." BEAUMONT & DE TOCQUEVILLE at 92.
126. *Carrington v. Rash*, 380 U.S. 89, 94 (1965).
127. *Carrington*, 380 U.S. at 94.
128. Four recent polls have found such opinions. A 1999 survey by the Joint Center for Political and Economic studies found that while majorities of all races supported disenfranchising those under sentence, 70% of whites and 85% of blacks opposed lifetime disenfranchisement. See Mauer, *FED. SENT. REP.* (2000), at 251. A second national survey, conducted in 2001 by the Center for Survey Research and Analysis at the University of Connecticut, found that only about 15% of respondents supported lifetime disenfranchisement of felons. See Brian Pinaire et al., "Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons," 30 *Fordham Urban Law Journal* (Spring 2003). Poll results in a report published by the Open Society Institute indicate that 68% of respondents either "strongly favor" or "somewhat favor" "restoring the right to vote and

a driver's license to people with felony convictions after they have served their time and been released from prison." Fifteen percent were strongly opposed. See Peter D. Hart Research Associates, Inc. for the Open Society Institute, *Changing Public Attitudes toward the Criminal Justice System: Summary of Findings*, (New York), February 2002, at 14. And a telephone survey of 1000 Americans conducted by Harris Interactive in July 2002 found that 80% of respondents believe that all ex-felons should have the right to vote. When asked about particular categories of offenders, 66% supported allowing ex-felons convicted of violent crimes to vote, 63% supported allowing former inmates convicted of illegal trading of stocks to vote, and 52% supported allowing former inmates convicted of sex crimes to vote. See Jeff Manza, Clem Brooks, and Christopher Uggen, *Summary: Public Attitudes Towards Felon Disenfranchisement in the United States*, prepared for The National Symposium on Felony Disenfranchisement, Sept. 30-Oct. 1, 2002, Washington, D.C.

129. The history of property, residency, and literacy suffrage restrictions in the U.S. is complex. See, e.g., KEYSSAR, at 9, 46, 133 (explaining arguments for property qualifications in the eighteenth, nineteenth, and twentieth centuries); 63-64 (summarizing nineteenth-century arguments against allowing vagrants to vote); 142 (explaining the rise of literacy tests to reduce the "ignorance" of the electorate and connecting the use of the secret ballot to the literacy requirement); 226-227 (showing that into the 1940s, eighteen states excluded voters who could not demonstrate literacy in English).
130. The paradoxical nature of this idea is well illustrated by political theorist Michael Sandel, who writes that republican democracy "requires that citizens *possess, or come to acquire*, certain qualities of character, or civic virtues." MICHAEL SANDEL, *DEMOCRACY'S DISCONTENT* (1996), at 5-6 (emphasis added).
131. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969), at x.
132. As the legal anthropologist Sally Engle Merry has written, "the texts of the law must be made socially real: enacted, implemented, imposed." SALLY ENGLE MERRY, *COLONIZING HAWA'I: THE CULTURAL POWER OF LAW* 218 (2000).
133. The U.S. Commission on Civil Rights estimated that of the approximately two million Americans who were free at the time of the Revolution—not counting over a million slaves and indentured servants, and excluding native Americans—"perhaps no more than 120,000 could meet the voting qualifications of their states." UNITED STATES COMMISSION ON CIVIL RIGHTS, *WITH LIBERTY AND JUSTICE FOR ALL* (1959), at 24. Walter Lippmann estimated that voters were "less

than five per cent [of the population] when the Constitution was ordained.” WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 33 (Transaction ed., 1989) (1955). Lippmann quotes historian Allan Nevins, who wrote, “[a]nyone who writes about election figures in our early national history treads upon very unsafe ground. Trustworthy data ... are too scanty for any explicit statement of detailed conclusions for the country as a whole. ... *What we can say with absolute certainty, I think, is that in these early elections the vote was under 5 per cent of the whole population.*” *Id.* at 33 n.3 (emphasis in original). James Morone estimates that in the eighteenth-century colonies, between 50 and 70 percent of white adult males qualified to vote. MORONE at 36. Another authority estimates that in the 1770s 50 to 80 percent of white adult males could vote. Christopher Collier, *The American People as Christian White Men of Property*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY* (Donald W. Rogers ed., 1992). It is not difficult to reconcile Lippman’s low estimate with these higher figures, given that as of 1780, only about 20 percent of the American population consisted of adult white males. See CHILTON WILLIAMSON, *AMERICAN SUFFRAGE FROM PROPERTY TO DEMOCRACY* (1960), at 24.

134. As Laurence Tribe has written, disenfranchisement “is not needed to prevent voter fraud since registration provisions and criminal sanctions constitute less oppressive means of realizing that end even if convicted criminals are unusually prone to indulge in such fraud.” TRIBE at 1094.
135. Demleitner at 773.
136. *Richardson*, 418 U.S. at 79 (Marshall, J., dissenting). A New Jersey federal court found in 1970 that under state law, embezzlers and defrauders, including those convicted of income tax fraud, remained eligible to vote. The court concluded, “[h]ow the purity of the electoral process is enhanced by the totally irrational and inconsistent classification ... is nowhere explained.” *Stephens v. Yeomans*, 327 F. Supp. at 1188.
137. Roger Clegg, testifying before Congress in favor of indefinite disenfranchisement, argued that “[c]riminals are, in the aggregate, less likely to be trustworthy, good citizens.” *Civic Participation Act Hearings*, at 16 (prepared testimony of Roger Clegg). Another author contends that it is “reasonable that we might consider an ex-convict to lack the proper social concerns when exercising the decision to vote.” John R. Lott, Jr., “Should convicted felons be allowed to vote after they leave prison?” *Issues in Law and Society*, CQ Press (Washington, 2001), p. 73.
138. Alasdair MacIntyre has lamented that “[t]he notion of the political community as common project is alien to the modern individualist world.” ALASDAIR MACINTYRE, *AFTER VIRTUE* (1981), at 146. At a theoretical level, supporting

offenders’ voting rights on republican premises would emphasize elections not only as a “common project,” but as a powerful one.

139. See Fox Butterfield, *Many Black Men Barred from Voting*, N.Y. TIMES, Jan. 30, 1997, at A12; *Disenfranchised for life*, THE ECONOMIST, October 24, 1998, p. 30; interview with Marc Mauer (National Public Radio broadcast, *All Things Considered*, January 18, 2000); David Cole, *Denying felons vote hurts them, society*, USA TODAY, February 3, 2000, at 17A; Katz, L.A. TIMES; Sasha Abramsky, *How they played it*, COLUM. JOURNALISM REV., Mar./Apr. 1999, at 14 (summarizing media coverage of 1998 HRW/TSP report); Bob Davis, *Bradley Pushes Gore to Seek Racial-Profiles Ban*, WALL ST. J., Jan. 18, 2000, at A4 (Democratic Presidential candidates Al Gore and Bill Bradley briefly discuss ex-offender disenfranchisement at Martin Luther King Day debate).
140. HRW/TSP at 8; see also H.R. 906, 106th Cong. (1999), at 4.
141. *Debt to Society*, Foundation for National Progress, July, 2001; and “Behind Bars: Native American Incarceration Rates Increase,” *Toward Freedom*, August/September, 2001.
142. See Clegg at 176, (arguing that “the racial impact of these laws” is “irrelevant as a legal matter” and “should also be irrelevant as a matter of policy”). Florida Governor Jeb Bush has written that “there’s not a single felon in Florida who is disenfranchised because he is African-American. Any person, black or white, who could not legally vote in the last election due to his or her status as a felon could have retained the right to vote by simply not committing a felony in the first place.” Jeb Bush, *supra*. Arguing in favor of a felon-disenfranchisement amendment to the state constitution, Massachusetts lawmaker Francis Marini told the *Boston Globe*, “[i]t is not about race. It’s about crime and people who serve felony sentences. We ought to be less colorblind, not more [sic].” See Phillips, cited *supra*. Columnist Ken Hamblin called Marc Mauer, co-author of the 1998 Human Rights Watch/Sentencing Project 1998 study of disenfranchisement law, “a ruthless propagandist who is consciously attempting to mislead my people into believing it is racist to punish black crooks.” See Ken Hamblin, *Should criminals vote?*, THE DENVER POST, Oct. 27, 1998. In dismissing the relevance of the racist use of disenfranchisement after Reconstruction, Roger Clegg has observed that that not all the states which permanently disenfranchise ex-offenders today were members of the Confederacy, and that most former Confederate states currently allow ex-felons to vote. See Clegg, *Who Should Vote?*, at 170-171. This is true, but it is also irrelevant and misleading: the issue is racism, not the Confederacy. The racist alterations in disenfranchisement law, moreover, came two decades after the Confederacy ceased to exist.

143. See *The 2000 Campaign: 2nd Presidential Debate Between Gov. Bush and Vice President Gore*, N.Y. TIMES, Oct. 12, 2000. In the debate, then-Texas Governor George W. Bush declared “we ought to do everything we can to end racial profiling.” Bush also said “there is other forms of racial profiling that goes on in America. Arab Americans are racially profiled on what’s called secret evidence. People are stopped. And we got to do something about that.” *Id.* See also *Excerpts From Senate Hearing on Ashcroft Nomination for Attorney General*, N.Y. TIMES, January 17, 2001, at A18 (Sen. Orrin Hatch (R-Ut.) praises candidate John Ashcroft (R-Mo.) by saying that Ashcroft “held the first hearings ever on the issue of racial profiling”); and *Attorney General Seeks End to Racial Profiling*, N.Y. TIMES, March 2, 2001, at A20 (reporting that Bush Administration Attorney General John Ashcroft “urged Congress today to take up legislation that would end racial profiling”).
144. See Phillips (quoting Massachusetts lawmaker Francis Marini).
145. The first section of the fourteenth amendment reads, in relevant part, “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XV, §1 (1868).
146. 471 U.S. 222 (1985).
147. *Hunter*, 471 U.S. at 227. *Hunter* invalidated only that section of the Alabama constitution which disenfranchised those convicted of crimes of “moral turpitude,” but the decision demonstrates that despite *Richardson v. Ramirez*, not all criminal disenfranchisement law is constitutional. The Court in *Hunter* explicitly declined to reconsider its decision in *Richardson*. See *Hunter*, 471 U.S. at 233. By striking down only that narrow portion of Alabama’s disenfranchisement law which it could trace to express racist intent, the Court allowed more broadly-phrased provisions to stand; indeed, the State of Mississippi apparently responded to *Hunter* by initiating an effort to *expand* its list of disenfranchisable crimes, to prevent the invalidation of the practice as racially discriminatory. See *Note*, at 1302 n.8. However, *Hunter* may offer a way out from *Richardson*. As one authority interpreted the decision, the Court held that while Section Two of the Fourteenth Amendment allows states to disenfranchise felons without penalty, “it does not permit states to pick and choose among felons in a way that violates statutory protections of the right to vote.” Hancock at 38. As a federal judge recently observed, the Court in *Richardson* found that disenfranchisement is not *per se* unconstitutional, but it ruled in *Hunter* that “states cannot use disenfranchisement as a tool to discriminate on the basis of race.” See *Farrakhan v. Locke*, 987 F. Supp. at 1310. In other words, disenfranchisement is facially valid, but it may be used in ways which are unconstitutional, and Congress therefore “has the power to protect against discriminatory uses of felon disenfranchisement statutes through the VRA.” *Id.* However, another authority has pointed out that since *Hunter*’s legacy is that “a showing of intentional discrimination is the *sine qua non* of an equal protection claim,” it will serve to *limit* other challenges to discriminatory election laws “for which evidence is not so readily available.” Hench at 763-764.
148. The fifteenth amendment reads, in relevant part: “Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST., amend. XV, §1 (1870). A lack of political will to enforce the Reconstruction amendments, combined with the Supreme Court’s reluctance to effect the transformation of federal-state relations which the Reconstruction amendments implied, quickly drained the fifteenth amendment in particular of all force. A century passed before Congress, attempting finally to implement the Amendment against Southern resistance, passed the Voting Rights Act, “one of the most important and successful pieces of legislation of this century.” BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING RIGHTS* 137 (1992).
149. S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982), at 193. Section Two now reads, in relevant part: “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....” Pub. L. No. 97-205, 96 Stat. 131, 134 (1982) (emphasis added). Under the “results test,” if “the totality of the circumstances” show that political and electoral processes are “not equally open to participation” by members of a protected class, a violation has occurred. 42 U.S.C. §1973. As the Supreme Court has explained the results test, “the essence of a section 2 claim is that a certain electoral law, practice, or structure *interacts with social and historical conditions to cause an inequality*” in the voting rights of various racial groups. *Thornburg v. Gingles*, 478 U.S. 30, at 47, 92 (1986) (emphasis added).
150. 42 U.S.C. 1973. A violation has occurred, the statute continues, when members of the given racial group “have less opportunity” than others to participate in the political process and to elect representatives of their choice.”
151. *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986).

152. See generally GROFMAN ET AL. (showing that focus of dilution claims under the VRA has been drawing of district boundaries). Successful vote-dilution challenges to electoral districts include *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) and *Thornburg v. Gingles*, 478 U.S. 30 (1986). Districting dilution claims show that a black person who may vote has her vote's effect "diluted" by a rule or procedure which makes that vote count less than that of a voting white person. See Howard A. Scarrow, *Vote Dilution, Party Dilution, and the Voting Rights Act*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 46 (David K. Ryden ed., 2000).
153. See Shapiro, at 544; Harvey at 1145, 1149; Hench, at 730, 765.
154. *One Person, No Vote*, at 1954. The strategy failed in *Baker v. Pataki*, 85 F.3d 919 (2d. Cir. 1996). In *Baker*, the Second Circuit split five-to-five, effectively denying the challenge. In a 1997 motion hearing, a federal judge refused a defense motion by the state of Washington to dismiss a vote-denial claim. See *Farrakhan v. Locke*, 987 F. Supp. at 1312. However, the judge subsequently ruled that even if disproportionate incarceration and disenfranchisement were the result of "discriminatory animus on the part of prosecutors and judicial officials," Washington's felon-disenfranchisement law would not violate Section 2 of the V.R.A. "because it is discrimination in the criminal justice system, not the disenfranchisement provision itself, that causes the denial." See *Farrakhan v. Locke*, No. CS-96-97-RHW (E.D. Wash., Dec. 1, 2000) (Defs.' App. at 968). In late July 2003, the Ninth Circuit Court of Appeals breathed new life into legal challenges to disenfranchisement, reversing a federal district court's dismissal of a Voting Rights Act suit against Washington's disenfranchisement law. See: *Farrakhan v. State of Washington*, No. 01-35032, U.S. Court of Appeals for the Ninth Circuit, published July 25, 2003. In sending *Farrakhan v. State of Washington* back to the District Court, the Court of Appeals held that discrimination in the criminal-justice system may interact with disenfranchisement law in a way that denies minorities an equal chance to participate in elections. Disenfranchisement, the Court ruled, could be "shifting racial inequality from the surrounding social circumstances into the political process." *Id.* at 10146. The Ninth Circuit held that the District Court applied the wrong standard in evaluating Washington's felon-disenfranchisement law. The lower court had found that although the policy did disenfranchise a disproportionate number of African-Americans, Hispanic-Americans, and Native Americans, the cause of these disparate effects lay in the criminal-justice system, not in the disenfranchisement law "by itself." In reversing that judgment and sending the case back to the Circuit Court, the Ninth Circuit held that under the VRA, "factors external to the challenged voting mechanism itself" are relevant. *Farrakhan* at 10131-10132.

As courts grapple with the question of whether felon disenfranchisement restricts suffrage in a discriminatory way, they must consider "surrounding social and historical circumstances." *Id.* at 10145. The court explicitly took no position on the merits of the question (10148). But it instructed the lower court to examine "the way in which the disenfranchisement law interacts with racial bias in Washington's criminal justice system to deny minorities an equal opportunity to participate in the state's political process." *Id.* at 10136. This language seems sympathetic to the plaintiffs, and the court stepped slightly further in that direction when it held that "racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section Two [of the VRA] ...." *Id.* at 10147. Moreover, it reminded the court below that when Congress enacted and amended the VRA, Congress aimed to "provide courts with a means of identifying voting practices that have the effect of shifting racial inequality from the surrounding social circumstances into the political process." *Id.* at 10146.

155. The "totality of the circumstances" is not the only phrase in the VRA which shines critical light on the practice of criminal disenfranchisement. In amending the Act in 1982, the Senate Judiciary Committee described some of the factors which courts may take into account when determining whether "the totality of the circumstances" shows a violation of the Act to exist. A few of these factors loom large in the context of criminal disenfranchisement: "the extent of any history of official discrimination in the state;" "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment, and health, which hinder their ability to participate effectively in the political process;" "whether political campaigns have been characterized by overt or subtle racial appeals;" and "whether the policy underlying the state[s] use of such voting qualification ... is tenuous." S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. (vol.2) 177, 206-207.
156. *KEYSSAR*, at 307 (noting figures showing wide disparities in arrest rates and sentencing); see also Shapiro at 556-557 (summarizing state and national figures indicating that "minorities make up an inordinately large percentage of all convicted offenders and, consequently, of those who are denied the right to vote"); *id.* at 558 n.118 (noting study showing that as of 1990, 7.9% of the black adult population and 1.7% of the white adult population were on probation, in jail, in prison, or on parole). In almost every state, most of these people will lose the right to vote, so this figure means that blacks are up to five times as likely as whites to be disenfranchised because of a criminal con-

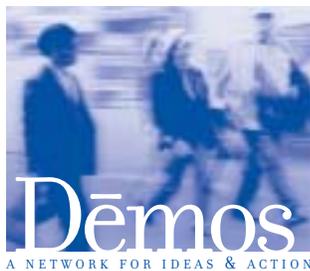
- viction. *See also* COLE, at 10. Cole links race- and class-based discrimination in criminal justice to “constitutional rules governing police practices, the provision of legal representation to those who cannot afford it, jury discrimination, disparities in sentencing, and legal challenges to discrimination in the criminal justice system.”
157. For evidence of disparate targeting, see Harvey, 1155-1157; on disparate treatment, *see id.* at 1157-1159. The Leadership Conference on Civil Rights, a coalition of 180 civil rights groups, found that although African Americans and whites have approximately the same rate of drug use, African Americans constitute more than a third of those arrested for drug offenses and 59 percent of those convicted of drug offenses. *See* Leadership Conference on Civil Rights, “Justice on Trial: Racial Disparities in the American Criminal Justice System” (Washington, 2000), at 7. Available at <<http://civil-rights.org/images/justice.pdf>> (accessed March 7, 2002).
- Another recent study found that when white and African American youths commit similar offenses, “minority youngsters are more likely to be arrested; when arrested, more likely to be jailed or sent to court; more likely to be convicted; and when convicted, more likely to be given longer prison terms.” *See* William Raspberry, *In a Troubled System*, WASH. POST, April 28, 2000, at A31.
- Over a recent three-year period, the federal government charged 2,400 persons with federal crack cocaine violations—*none* of whom were white. COLE, at 160. Such systemic bias should trigger deep concern among Americans of various ideological persuasions. As Lincoln Caplan has argued, because American law “embodies the country’s ideals about even-handedness, tolerance, and inclusiveness, bias associated with [legal] institutions is especially telling.” LINCOLN CAPLAN, *UP AGAINST THE LAW* 39 (1997).
158. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 351 (1997). Conservative economist Milton Friedman has argued that U.S. drug laws have “racist” effects because of their disproportionate impacts on blacks. *See* Milton Friedman, *There’s No Justice in the War on Drugs*, N.Y. TIMES, Jan. 11, 1998, § 4, at 19.
159. Cole, *Denying felons vote hurts them, society*, USA TODAY, Feb. 3, 2000, at 17A .
160. *See* COLE at 141-143. The crack/powder cocaine sentencing disparity highlights the importance to criminal disenfranchisement of the mundane, all-but-invisible statutory activity of classifying crimes. Felony conviction triggers disenfranchisement in most states, but the list of crimes classified as felonious varies considerably among states and is poorly understood by the public. In the twentieth century, many new offenses have been classified as felonies, dramatically broadening the effects of disenfranchisement provisions. Many of these crimes are not particularly “infamous,” especially in comparison with the offenses that were felonies at common law when the Fourteenth Amendment was added to the Constitution. *See* Demleitner at 780, 780 n.139. Typical nineteenth-century common-law felonies were “murder, manslaughter, mayhem, rape, arson, robbery, burglary, and larceny.” *See* Otsuka, 414 P. 2d at 421, n.10.
161. Paul Butler, *Racially-Based Jury Nullification: Black Power in the Criminal Justice System* 105 YALE L. J. 677, 690-691 (1995). The African American experience of these numbers, Butler writes, is that many black Americans may feel that they live not in a democracy but in a “police state.” *Id.* at 691. Elsewhere, Butler cites criminologist Jerome Miller’s calculation that if the incarceration of black men continues to increase at the current rate, the majority of African American men between the ages of 18 and 40 may be incarcerated by the year 2010. *See* Paul Butler, *Retribution, for Liberals* 46 UCLA L. REV. 1873, 1874 n.1 (1999). In a few cities, the percentage of young black men under criminal supervision already exceeds 50%. *Id.*
162. *See* Cole, USA TODAY. One study finds that those arrested for drug offenses were five times as likely to be sent to prison in 1992 as in 1980. *See* HRW/TSP, at 11.
163. MICHAEL GOLDFIELD, *THE COLOR OF POLITICS* 351 (1997); *see also* PHILIP KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* (1999), at 12.
164. By the 1850s, one authority observes, “the whipping post became the Negro’s exclusive preserve.” IRA BERLIN, *SLAVES WITHOUT MASTERS* 335 (1974). Indeed, it was seen as so improper for whites to be whipped—“a white man’s nature revolts at such degrading punishment,” one newspaper opined—that a Kentucky jury awarded six hundred dollars to a white thief who had been so punished. *Id.*
165. FONER at 200, 225. Many crimes were specific to the “free negro” alone, such as “mischief” and “insulting gestures.” *Id.* at 200. *See also* DAVID M. OSHINSKY, *WORSE THAN SLAVERY* 21 (1996).
166. DONALD M. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR* 227 (1996). “Crime,” writes Angela Y. Davis, is “one of the masquerades behind which ‘race,’ with all its menacing ideological complexity, mobilizes old public fears *and* creates new ones.” Angela Y. Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in *THE HOUSE THAT RACE BUILT* 266 (Waneema Lubiano ed., 1997) (emphasis in original). “The racialized figure of the ‘criminal,’” Davis writes, “has come to represent the most menacing enemy of ‘American society.’” *Id.* at 270. Whether its origins are economic or sexual, Davis contends, white fear of blacks

- “is rapidly gravitating toward and being grounded in a fear of crime.” *Id.* at 269. Thomas Byrne Edsall and Mary Edsall have found that in American politics “crime” has become a “shorthand signal, to a crucial group of white voters ... evoking powerful ideas about authority, status, morality, self-control, and race.” Thomas Byrne Edsall with Mary D. Edsall, *Race*, ATLANTIC MONTHLY, May 1991, at 77.
167. Polling over 1300 Americans between 1988 and 1991, the General Social Survey asked respondents if they believed whites and blacks, respectively, “tend to be violence-prone.” Respondents answered on a seven-point scale: if they strongly agreed that blacks, for example, are “violence-prone,” they checked one; if they thought blacks are “not violence prone,” they checked seven. Not surprisingly, four was the most common response given in regard to both races: about 31% of respondents checked the middle value when asked about blacks, and about 44% did so when asked about whites. But the responses at the ends of the scale are striking. When asked about blacks, over half of respondents—about 53%—checked one, two, or three—the “violent” end of the scale—while only about 16% checked five, six, or seven—the “not violent” end of the scale. At the extremes, the numbers one and two tallied about 26% of responses, while six and seven received only 7%. When asked about whites, however, only about 19% checked the three numbers on the “violent” half of the scale, and 38% chose the three highest numbers, at the “not violent” end. This time, the numbers one and two tallied about 6% of responses, while six and seven received 21%. See <<http://www.icpsr.umich.edu/GSS/rnd1998/merged/cdbk/violblks.htm>> and <<http://www.icpsr.umich.edu/GSS/rnd1998/merged/cdbk/violwhts.htm>>. See also CARL T. ROWAN, THE COMING RACE WAR IN AMERICA 187 (1996) (referring to a 1993 poll which found that one-third of Americans agreed with the statement that African Americans “were more likely to commit crime and violence”); Sam Vincent Meddis, *In a Dark Alley, Most Feared Face is a Teen’s*, USA TODAY, Oct. 29, 1993, at A6 (reporting a USA TODAY/CNN/Gallup poll finding that when asked “which group is more likely to commit crimes than others in society,” 37% answered “blacks” while only 6% answered “whites”).
168. The ads attacked the criminal justice policies of Massachusetts Governor and 1988 Democratic Presidential nominee Michael Dukakis, and included images of convicts leaving prison through a revolving turnstile, as well as mug shots of a young black man who had committed rape and assault while on furlough. As Kathleen Hall Jamieson reports, studies showed clearly that the advertisements “elicited racially based fear.” KATHLEEN HALL JAMIESON, DIRTY POLITICS 34 (1992).
169. In the early twentieth century, leaders such as Theodore Roosevelt argued that blacks were more susceptible to “vice and criminality of every kind,” and called for “relentless and unceasing warfare against lawbreaking black men.” Theodore Roosevelt, “The Negro Problem” (address to the Lincoln dinner of the Republican club of the city of New York, Feb. 13, 1905), in 43 THE WORKS OF THEODORE ROOSEVELT 445 (memorial ed., Charles Scribner’s Sons) (1925). Many prominent Southern white politicians of this period argued that black literacy and black criminality were “linked together like Siamese twins,” as one put it. See I.A. NEWBY, JIM CROW’S DEFENSE 178 (1965).
170. FRIEDMAN, at 378-379. See also COLE, at 9. Cole does not find “that the disproportionate results of the criminal justice system are wholly attributable to racism, nor that the double standards are intentionally designed to harm members of minority groups and the poor.” *Id.* Cole writes, “I think it more likely that the double standards have developed because they are convenient mechanisms for avoiding hard questions about competing interests, and it is human nature to avoid hard questions.” *Id.* Another study finds that “a ‘self-fulfilling’ set of assumptions about the criminality of blacks and Hispanics influences the decisions of police, prosecutors, and judges in a way that accounts for” disparities in criminal justice statistics. See Michael A. Fletcher, *Criminal Justice Disparities Cited*, WASH. POST, May 4, 2000, at A2 (summarizing Leadership Conference on Civil Rights report).
171. 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3 (Bradley ed., Vintage Books 1990) (1835). Elsewhere, however, Tocqueville also remarked that “once the Americans have taken up an idea, whether it be well or ill founded, nothing is more difficult than to eradicate it from their minds.” 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 188 (Bradley ed., Vintage Books 1990) (1835).
172. HERBERT CROLY, THE PROMISE OF AMERICAN LIFE 5 (Bobbs-Merrill ed., 1965) (1909). Echoing Croly, historian Alexander Keyssar urges us to understand democracy as “a project, a goal ... an ideal that cannot be fully realized but always can be pursued.” KEYSSAR at 323.
173. As Edmund Morgan has demonstrated, the concept of popular sovereignty itself had taken centuries to gain hold, and only a long process of fictionalization, invention, and myth-making embedded the idea in American ideology. The same is true of universal suffrage, long derided as an even more ridiculous idea than popular sovereignty itself. See EDMUND MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988).

# Notes

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