Re-Enfranchising Felons: The Right Choice

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To Dr. Jack Johnson: eternal gratitude, respect, and admiration

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INTRODUCTION

Close to six million felons cannot vote in America in 2013. Their voices have been silenced. Marginalized, neglected, ignored, and feared, felons face seemingly insurmountable challenges to become re-enfranchised. The Supreme Court as well as lower courts refuse, or very rarely agree, to hear cases brought by plaintiffs combatting state disenfranchisement policies. State legislatures across the country have begun to ease voting restrictions, yet change moves at a slow, incremental pace, reminiscent of the story of the snail and the two steps forward, one step back rhythm of a most unforgettable dance. Felons do not have too many rights. They suffer from 'civil death'. The right to life, liberty, and happiness, a concept so enshrined in our mythic consciousness as Americans, eludes them. Felons carry about them the stigma and mark of the unwashed and the unwanted. Politicians, social scientists, philosophers, criminologists, and many a pundit, commentator and preacher galore decry the following: they cannot be trusted; they broke the social contract and now must pay; they may pollute the sanctity and purity of the ballot box, of the voting process; they cannot make reasoned judgments, an ability that is necessary for democracy to work. If felons could vote perhaps the political landscape may change color, may turn a bit bluer with more Democrats in office. The conservative, not so progressive Republicans may lose power and may have to regroup at the local Tea Party office. Proponents of disenfranchisement say the following: felons must be punished and disenfranchisement must be punitive; disenfranchisement serves as a deterrent; people contemplating committing a crime can learn from what has happened to others and will cease and desist from crossing the line. Are such conclusions accurate? This paper will examine the plausibility and accuracy of these assumptions. It will argue that felons must be re-enfranchised as soon as possible, not upon the completion of their term of sentence including incarceration, probation or parole and not after having fulfilled a financial requirement, such as paying for restitution, court fines, back child support or other legal financial

obligations. The only requirement for the restoration of voting rights must only depend on the behavior (law-abiding) and performance (managing his or her life well, possess a good support system) of the former offender in the community. This paper will further argue that Congress should pass blanket voting restoration policies applicable in each and every state. Individual states should no longer have the power to decide who may or may not vote.

Re-enfranchised felons will provide for more safety in local communities. Less angry men and women, now allowed to rejoin the human race, may feel less inclined to take out their wrath on the system which now works to exclude and victimize them in many ways. Perhaps more safety for families and kids will come through a bit of compassion and freedom, rather than building more prisons and lengthening prison sentences. Hope in the hearts of former criminals can transform lives; allowing felons to possess a shred of confidence that they can once again play a meaningful part in society sooner rather than later, that they can regain their voices, appears to be a worthy incentive and why not give it a try?

The several chapters in this paper will provide a brief glimpse into the status of reform efforts with regard to felon disenfranchisement occurring in the states of Florida, Virginia, Iowa, Washington, and Minnesota. The paper will also take a tour of the historical background to the practice of disenfranchisement. The tour will begin in Greece and will travel over the seas to the Colonies. The period of American Reconstruction after the American Civil War will receive important attention. The subject of the new penal policies related to the War on Drugs and the New Jim Crow with its continued effect of racism on black communities, ideas for possible prison reform, and the impact of felon disenfranchisement on the 2000 Florida Presidential election will receive an examination as well.

Why care about felons? What does it matter? Why not leave enough alone and not disturb the status quo? Jeff Manza and Christopher Uggen write "[disenfranchisement] represents a failure to make

good on the promise of universal suffrage . . . the right to vote is 'the essence of a democratic society '. . . one that 'makes all other political rights significant'."[1]

Reforming current felon disenfranchisement laws presents opportunities. America can actually begin the wholesome practice of universal suffrage, so often talked about, but rarely seen. American democracy could be strengthened and placed on a firmer foundation. Future decisions could reflect the views of more people than currently allowed in on the process. Re-enfranchising felons offers the opportunity to overturn outdated and outmoded thinking linked to the past. Re-enfranchisement places bridges to millions of felons to find their way back to acceptance, inclusion and a hand of welcome.

[1] Jeff Manza, Christopher Uggen. *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford: Oxford University Press, 2006), 8.

CHAPTER ONE

Felon Disenfranchisement: Reform Comes Hard

Effecting serious change with regard to the issue of felon disenfranchisement presents great difficulties to reformers intent on returning the vote to ex-offenders. Jeff Manza, Clem Brooks, and Christopher Uggen write that ever since the passage of the Voting Rights Act of 1965, the right to vote has ceased to be an important issue and has mostly disappeared "from the scholarly and popular literatures on American democracy." However, they add, the "rapid growth in incarceration and conviction rates with the criminal justice system over the past three decades" poses a challenge to such entrenched beliefs.[2] Despite a growing civil rights campaign across the country in support of felons regaining the vote in 2002, supporters of felon disenfranchisement "nonetheless succeeded in exerting sufficient pressure to encourage a number of states to adopt more *conservative* restrictions on voting rights in recent years. They state clearly that "since 1975 . . . 13 states have liberalized their laws, 11 states have passed further limitations on felons, and 3 states have passed *both* types of laws."[3]

Manza, Brooks, and Uggen indicate that "conflicts over felon disenfranchisement reflect an enduring tension in twentieth-century American political life: the clash between the desire to maintain social and political order versus the desire to extend civil rights and liberties to all citizens . . . . Public fear of crime coexists alongside broad support for basic civil liberties, democracy, and a right to due process for those accused of crimes."[4] Using data collected from a telephone survey Manza, Brooks,

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[2] Manza, Jeff, Clem Brooks, Christopher Uggen. "Public Attitudes Toward Felon Disenfranchisement in the United States." *Public Opinion Quarterly*, 68 No. 2, American Association for Public Opinion Research (2004): 275.
[3] Ibid., 276.
[4] Ibid., 276.

and Uggen found that between 52-80% of the respondents favor re-enfranchising ex-felons and between 60-68% believe that felons on either probation or parole should be able to vote.[5]

Mandeep K. Dhami, of the University of Cambridge, Faculty of Law, stresses that "the basic principles for electoral democracy are laid out in international law."[6] According to Article 25 of the International Covenant on Civil and Political Rights (ICCPR)

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions . . . .(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors. . . .; Article 2 sets out that this applies 'without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[7]

Dhami writes that while international law may not always form "part of a nation's domestic law, it does tend to influence domestic law and be used as a benchmark by which to evaluate these laws."[8] He adds that political scientists argue that "the democratic process should allow all adult members of a state to have an equal and effective opportunity to contribute to the policy agenda and vote on that policy such that every vote counts equally."[9]

Dhami argues in his article that excluding prisoners from the civil process is a threat to democracy and that exclusion can have a negative effect on the democratic ideals of equality and justice. In support of the disenfranchisement reform effort, he says that "franchising prisoners (and

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[5] Ibid., 283.
[6] Mandeep K. Dhami. "Prisoner Disenfranchisement Policy: A Threat to Democracy?" in *Analyses of Social Issues and Public Policy* 5, No. 1, (2005): 235-247, 235.
[7] Ibid., 235.
[8] Ibid., 235.
[9] Ibid., 236.

probationers, parolees, and ex-offenders) can promote their rehabilitation and social reintegration, and can have a real impact on the political climate of the nation."[10]

Dhami echoes the comments of Manza, Brooks, and Uggen. "State felon disenfranchisement laws have changed over time . . . in some cases these changes have been restrictive . . . however, there is a growing movement for reform that aims to restore the right to vote or expand it."[11] In the section of his paper concerning the benefits of enfranchisement he writes ". . .the right to vote could enable prisoners to perceive themselves as useful, responsible, trusted, and law-abiding citizens. This could encourage their rehabilitation and help them to reintegrate into society after their release."[12]

Pamela S. Karlan, writing in the Stanford Law Review, says "the tenor of the debate over felon disenfranchisement has taken a remarkable turn. . . ."[13] Appeals Courts have reinstated challenges to felon disenfranchisement laws and the understanding of voting as a fundamental right, not a state-created privilege, makes the punitive nature of criminal disenfranchisement "undeniable."[14]

Karlan suggests that the right to vote needs to be thought of in group, not individual, terms. Criminal disenfranchisement dilutes "the voting strength of identifiable communities and [affects] election outcomes and legislative policy decisions." Regarding disenfranchisement as punitive, and not regulatory, "opens an additional legal avenue for attacking such laws beyond equal protection and voting rights act based challenges that courts are now entertaining. . . ." She believes that Eighth Amendment challenges to criminal disenfranchisement laws - the idea that felon disenfranchisement

[10] Ibid., 236.
[11] Ibid., 237.
[12] Ibid., 243.
[13] Pamela S. Karlan. "Convictions and Doubts: Retribution, Representation and the Debate over Felon Disenfranchisement" in *Stanford Law Review* 56, No. 5, 2004 Stanford Law Review Symposium: Punishment and its Purposes (Apr 2004): 1147-1170, 1147.
[14] Ibid., 1147, 1149.

constitutes cruel and unusual punishment- possess the best chance of gaining success for plaintiffs in court.[15] She writes on the right to vote:

> It has come to embody a nested constellation of concepts: participation (the ability to cast a ballot and have it counted); aggregation (the ability to join with like-minded voters to achieve the election of one's preferred candidate); and governance (the ability to pursue policy preferences within the process of representative decision making). . .the public have come to see that any right to genuinely meaningful political participation implicates groups of voters, rather than only atomistic individuals.[16]

Karlan views criminal disenfranchisement as a form of collective sanction. Such a sanction penalizes both the individual wrongdoer as well as the communities from which he/she came and to which he/she will return. Criminal disenfranchisement reduces the relative political clout of any community and is consistent with the Eighth Amendment's prohibition against the 'excessive sanctions' of cruel and unusual punishment.[17] According to Karlan, criminal disenfranchisement "really can be justified only under a retributive theory of criminal punishment. Neither rehabilitation or deterrence plays any plausible role at all in justifying the disenfranchisement of former offenders." Thus, felon disenfranchisement is not a realistic deterrent to criminal behavior and,

> the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box. . .disinherited [,he] must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.[18]

[15] Ibid., 1149.
[16] Ibid., 1156.
[17] Ibid., 1161, 1164.
[18] Ibid., 1166, 1168.

Felon disenfranchisement, writes Karlan, is a relic of a bygone era "in which exclusion from self-government was the norm for most citizens". Today it serves only as a punishment. It punishes both the individual and the community and taints the political scene everywhere.[19]

Emily Bazelon, of *Slate Magazine*, wrote a most interesting article in April of 2007 concerning the right to vote. She notes that Florida Governor, Charlie Crist, in early April 2007 "persuaded fellow Republicans on the state clemency board to automatically restore the vote to nonviolent former felons who had paid any restitution they owed."[20] "Florida has 950,000 ex-offenders. Crist gave the vote back to upward of 750,000 of them."[21] Bazelon brings out some interesting facts pertaining to the impact of so many felons regaining the right to vote back in Florida and other efforts to help felons: felons, when allowed to vote (albeit at a lower rate of 35% as opposed to 52% for the general public), vote overwhelmingly Democratic; Christ's reform will harm the GOP in future elections; the country, overall, is in a "restore-the-vote-craze"; Maryland restored the vote to 50,000 former felons; Rhode Island approved a state referendum to restore vote to felons; in the last several years other states have removed lifetime voting bans or waiting periods for ex-offenders. New Mexico, plus 68,000 in 2001; Connecticut, plus 33,000 in 2002; Delaware switched from lifetime ban to five year waiting period in 2000; Texas eliminated two-year waiting period in 1998, plus 300,000; efforts are underway in both Kentucky and Virginia to eliminate the lifetime voting ban for felons. Bazelon remarks that the most surprising thing about all this is the "increasingly muted quality of the opposition. The argument for allowing ex-offenders to vote is that they've paid their debt and should be reintegrated: if we treat them like full citizens, they'll be more likely to act like full citizens."[22]

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[19] Ibid., 1169-1170.
[20] Emily Bazelon. "The Secret Weapon of 2008: Felons are getting the vote back – and Republicans aren't stopping them" http://www.slate.com/articles/news_and_politics/jurisprudence/ 2007/04/the_secret_weapon.
[21] Ibid., 1.
[22] Ibid., 1.

Christopher Uggen and Jeff Manza list reasons why reform of state felon disenfranchisement laws need to be reformed. The state of democracy in America remains weak. The citizenship status of criminal offenders reflects the persistent influence of race and racial inequality in American politics and in the criminal justice system. Returning the vote to felons weaves them back into the social fabric from which they have been torn. A reverse path, from punishment to democracy, must be found to help former offenders. Disenfranchisement represents a failure of the promise of universal suffrage. Disenfranchisement influences election outcomes and shapes public policy. Disenfranchisement can be the result of relatively minor drug offenses and the barriers faced by former inmates have been mostly ignored in public debate. They estimate 16 million felons of which number more than one in seven black men cannot vote.[23] How can reform and the re-enfranchisement of former felons help? Felons face legal restrictions with regard to employment, social benefits, public housing, educational benefits, the loss of parental right, and the possession of a public record; felons face branding, carry a stigma, and are at best partial citizens. They must behave as especially virtuous citizens.[24] Manza and Uggen suggest a three step process for ex-offenders: restoration, registration, and voting.[25]

In an earlier article published in the American Sociological Review (2002) Manza and Uggen, as always, stress the importance of universal suffrage, the cornerstone of democratic governance. They note that the levels of criminal punishment have risen and that more citizens have lost the right to vote as a consequence. They write "felon disenfranchisement constitutes a growing impediment to universal political participation in the United States because of the unusually severe state voting restrictions imposed upon felons and the rapid rise in criminal punishments since the 1970s."[26] The United States

[23] Jeff Manza, Christopher Uggen. *Locked Out: Felon Disenfranchisement and American Democracy*,vi,7, 9.
[24] Ibid., 9.
[25] Ibid., 83.
[26] Jeff Manza, Christopher Uggen. "Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States" in *American Sociological Review* 67, No. 6 (Dec 2002): 777-803, 778.

possesses in the year 2000 exceptional felony conviction rates: 686 per 100,000. The next three countries listed are Canada, 105 per 100,000; Germany, 95 per 100,000; and Japan, 45 per 100,000.[27]

Nora V. Demleitner, Douglas A. Berman, Marc A. Miller, and Ronald F. Wright combined to edit a book concerning, among other things, the case of disenfranchisement in America. They write "In recent years, the issue of felon disenfranchisement has received more public policy attention, and a few states have acted to ease restrictions on voting rights. . . ."[28] They list the reforms enacted (mentioned above) in Maryland: in 2007, the legislature repealed all provisions of the state's lifetime voting ban, including a three year waiting period after sentence completion for certain categories of offenses and instituted the automatic restoration policy upon completion of sentence. Florida, as indicated as well above, via the Office of Executive Clemency, amended the state's voting rights restoration procedure and the automatic reinstatement of voting rights for nonviolent offenses.[29]

A Huffington Post article from July 2012 references the work of the *Sentencing Project* and illumines the effect of race and racism in state disenfranchisement laws. The author/s of the piece write: "Punishing people with felony records hits African Americans harder than other races. Seven percent of blacks are disenfranchised compared with 1.8 percent of the rest of the country . . . . The numbers are more drastic in Florida and Virginia, political battlegrounds considered crucial in deciding the outcome of November's election. In Virginia, 20 percent of blacks can't vote. In Florida, that number is 23 percent. So, disenfranchisement of felons, especially in southern states, has its basis in race discrimination. The report cites the fact that the majority of felons and ex-cons who cannot vote reside

[27] Ibid., 778.
[28] Nora V. Demleitner et al., *Sentencing Law and Policy: Cases, Statutes, and Guidelines*, 2nd ed. (Austin: Wolters Kluwer, 2007), 635-636.
[29] Ibid., 636.

in Alabama, Florida, Kentucky, Mississippi, Tennessee, and Virginia. Restoration of voting rights in those states will be difficult.[30]

Ann Cammett, of the University of Nevada, Las Vegas, Law School, indicates that reform of criminal disenfranchisement laws may be hindered by what she calls "carceral debt." Not only is the practice of felon disenfranchisement harmful, but the requirement of former criminals to pay either user fees, restitution, and the costs of their incarceration perpetuates the loss of voting rights and risks permanent exclusion from society. She writes that "state appellate and federal courts . . . have affirmed the constitutionality of statutes that require ex-felons to satisfy the payment of all carceral debts in order to resume voting . . .those who cannot pay [are] perpetually disenfranchised . . .they become 'shadow citizens' . . . ."[31] Carceral debt can be better understood as user fees, legal financial obligations including fines, restitution, assessments/public-cost recovery (the criminal justice system passes on the costs of the criminal's incarceration to the criminal who is less likely to have the means to pay those costs), and back child support.[32] Cammett notes that ex-criminals are typically poor and chronically underemployed.[33]

Alec Ewald considers local officials the most important place to effect change in state disenfranchisement law. He writes ". . . fundamental matters of formal franchise inclusion rest on the decision of local officials. . . ."[34] In Ewald's view local control facilitates exclusions. Yet, local officials often seem overwhelmed with the task of administering state law and weeding out those who cannot vote. Local officials depend on the state to "coordinate their new computerized voter rolls with state agency records on felony status." State and corrections officials have been directed to share and

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[30] *Huffington Post* "Felon Voting Laws Disenfranchise 5.85 Million Americans With Criminal Records: The Sentencing Project", http://www.huffingtonpost.com/2012/07/12/felon-voting laws- disenfranchise-project.

[31] Ann Cammett. 2012 "Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt". Dickinson Law Review 117 (2): 349.

[32] Ibid., 356, 378-379.

[33] Ibid., 380.

[34] Alec C. Ewald. *The Way We Vote: The Local Dimension of American Suffrage* (Nashville: Vanderbilt University Press, 2009), 4.

centralize eligibility information.[35] The history of inaccurate purged voter lists from the 2000 Presidential election in Florida shows how difficult it is to make correct decisions at the local level. Ewald mentions that state disenfranchisement law is most complex: there is a failure to draw sharp lines of eligible and ineligible people; states lack clear procedures for suspending voters from the rolls; and states have confusing rights restoration processes and procedures. He writes that the process of voter disqualification and restoration varies by locality and who votes ". . . rests ultimately on the competence and knowledge of local officials."[36] Ewald concludes by saying: "Local staff err in administering criminal disenfranchisement laws, and they often err in an exclusionary direction, helping foster confusion among the public and the ex-inmate population about who is and is not eligible to vote."[37]

Christopher Uggen, Sarah Shannon, and Jeff Manza studied the 2010 census and came up with "new state-level estimates on felon disenfranchisement for 2010 in the United States."[38] They write that over 5.85 million Americans remained disenfranchised in 2010, the number used in the Huffington Post article quoted above. They say that "Public opinion research shows that a significant majority of Americans favor voting rights for probationers and parolees who are currently supervised in their communities, as well as for former felons who have completed their sentences. They ask: "How much difference would it make if state laws were changed to reflect the principles most Americans endorse? Voting rights would be restored to well over 4 million of the 5.85 million people currently disenfranchised."[39]

Nicolas L. Martinez, a 2013 J.D. candidate of Stanford Law School, writes an interesting note concerning the State of Washington and the remarkable nine year effort of State Representative Jeannie Darneille, a Democrat from Tacoma. On 22 January 2009, she introduced H.B. 1517, a bill designed to

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[35] Ibid., 139.
[36] Ibid., 139.
[37] Ibid., 140.
[38] Christopher Uggen, Sarah Shannon, Jeff Manza. "State Level Estimates of Felon Disenfranchisement in the United States, 2010", The Sentencing Project, www.sentencingproject.org July 2012, p. 15.
[39] Ibid., 15.

restore voting rights to felons, "so long as they were not under the authority of the state Department of Corrections (DOC)."[40] Darneille's original bill, the unqualified restoration of voting rights, failed to pass. House Republicans and conservative Senate Democrats in the Washington legislature, more concerned for victim's rights, demanded a compromise.[41] How did the compromise change the original bill and how will it impact felons? The compromise, as Martinez informs us, reads as follows: the new law qualifies the original bill by 'provisionally' restoring voting rights; the new law allows sentencing courts to re-revoke a felon's right to vote if he or she fails to pay at least three payments in a twelve month period on his or her legal financial obligations ("'willfully failed to comply' with the court's order to pay his or her LFO's). If a former felon cannot pay those three payments, then a prosecutor "must seek the revocation of the offender's provisionally restored voting rights from the court." This revocation remains in place until the offender has either paid the "principal amount in full or made twenty-four consecutive monthly payments on his or her LFOs."[42]

Martinez describes Washington's Voting Rights Restoration Act a "landmark achievement." Yet, he goes on to say that "the new law continues to impose repayment demands on even the most indigent of formerly incarcerated persons . . . . The fundamental right to participate in American democracy should never depend on a person's financial status."[43] He concludes his note by saying ". . . the compromise measure has thus far allowed lawmakers to claim a tough stance against crime while in practice restoring voting rights to formerly incarcerated persons on a permanent basis."[44]

Governor Thomas Vilsack of Iowa signed Executive Order 42 on Independence Day of 2005. On that memorable day Vilsack "granted a blanket restoration of citizenship rights for all offenders (either

[40] Nicolas L. Martinez. "Debt to Society? The Washington State Legislature's Efforts To Restore Voting Rights To Persons with Felony Convictions." *Stanford Legal and Policy Review* 329 (2011) p 333.
[41] Ibid., 334.
[42] Ibid., 335.
[43] Ibid., 339.
[44] Ibid., 341.

before or after 4 Jul 2005)."[45] The Vilsack 'blanket restoration' lived briefly. Upon regaining the Governor's office on 14 Jan 2011, former Iowa Governor (1983-1999) Terry Branstad issued Executive Order 70 which countermanded Vilsack's order and sent felons back to the old days of applying for their rights back via the Governor's office. Executive Order 70 mirrors the thinking of the Republicans and conservative Democrats in the Washington legislature. Meredith and Morse write that "one of the primary stated motivations for Executive Order 70 is that the payment of financial obligations owed to the State is a critical component in determining whether the restoration of citizenship is appropriate."[46] This is the rise of the 'carceral state'. As in Washington, now in Iowa, felons may have opportunity to regain the vote, but only if they pay. Thankfully, Executive Order 70 "only applies to future cases. . . ."[47]

Disenfranchisement reform has its foes in the otherwise progressive and liberal state of Minnesota. Joseph A. Camilli writes that when former Minnesota Governor, Tim Pawlenty, certified Al Franken on 30 Jun 2009, to be "'duly chosen by the qualified electors' as the United States Senator from Minnesota in the November 4, 2008 election. . . ."[48] The decisions of the Minnesota Supreme Court and Pawlenty did not please an organization called Minnesota Majority, "a self-styled conservative advocacy group, which has suggested that recent Minnesota elections have been riddled with felon voter fraud."[49] Other commentators, notes Camilli, also alleged that "the election [of Franken] was heavily influenced by the failure to effectively enforce Minnesota's felon disenfranchisement laws."[50] The Minnesota Majority, intent on opposing the right of convicted felons to once again participate in local, state, and national elections, went so far as to not only accuse over 1,300 felons of alleged illegal voting in the

[45] Marc Meredith, Michael Morse. "The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa", 2012 State Politics and Policy Conference 16-18 Feb, Houston, Texas, p 7.
[46] Ibid., 7-8.
[47] Ibid., 8.
[48] Joseph A. Camilli. "Minnesota's Felon Disenfranchisement: An Historical Legal Relic Rooted in Racism, That Fails to Satisfy a Legitimate Penological Interest." 33 *Hamline Journal of Public Law and Policy* 235 (2011) p 240.
[49] Ibid., 241.
[50] Ibid., 240.

2008 election, but also threatened over 30 county attorneys with misdemeanor charges and forfeiture of office if they did not investigate such crimes. [51]

Camilli points out that Michael Freeman, the Hennepin County Attorney, "issued a gentlemanly reminder that Minnesota has been a leader of expanding voter rights and destroying barriers to voter participation."[52] Camilli remarks on the legislative efforts to maintain election barriers to felons in Minnesota. He writes that the entrenched barriers and the efforts to enforce felon disenfranchisement undermines "Minnesotan's faith in the integrity of their electoral system . . . and fly in the face of Minnesota's rich democratic tradition . . . it is clear that felon disenfranchisement is not only an unconstitutional deprivation of a fundamental right, but also a veiled effort to suppress minority participation in the elections process, which should be anathema to Minnesota citizens."[53]

"Felon disenfranchisement runs contrary to the democratic ethos of the American ideal without offering a single legitimate penological benefit",[54] writes Camilli. He reminds the reader of his piece that none of the justifications for felon disenfranchisement: retribution, deterrence, incapacitation, and rehabilitation have any value and fail miserably. Felons who vote do not sully or make impure the voting process; felons who have regained the right to vote do not commit voter fraud; felon disenfranchisement has nothing to do with John Locke's theory of the social contract.[55]

Camilli concludes his thoughts by saying that the time has come for the United States Supreme Court to "strike down felon disenfranchisement as both discriminatory and ineffective policy in order to uphold the Constitutional ideals of equal protection."[56]

Dori Elizabeth Martin, writing in the University of Richmond Law Review on disenfranchisement in Virginia echoes the comments and findings of Joseph A. Camilli from Minnesota. Virginia, in 2012,

[51] Ibid., 241-242.
[52] Ibid., 242-243.
[53] Ibid., 243.
[54] Ibid., 259.
[55] Ibid., 259.
[56] Ibid., 266.

continues to be one of four states to "permanently bar citizens from voting if they have been convicted of a felony offense." And once again, John Locke's name and theory come up as the main support of denying criminals a right to vote. Locke's social contract theory "is simply an inadequate way of describing the complex relationships between a society and its citizens. A contract requires a bargain, yet if the citizenry were armed with complete information and actual bargaining power vis-à-vis their government, they probably would not consent to such a law."[57] Some say that felons lack reason and the ability to "comprehend the public good and therefore should not be allowed to influence the political process." Critics of such nonsense say that "the competence justification is based on a principle of exclusion, which is completely at odds with modern social norms of integration and equality . . . any theory that assumes the commission of a single transgression makes a citizen morally deficient per se, and therefore an undesirable voter for life, ignores the idea of rehabilitation upon which our criminal justice system is founded. Surely, the mark of success of any penal system is the ability of its criminals to become productive members of society after serving their sentences. Martin adds most eloquently and rightly, "Restoration of voting rights is one of the easiest ways to facilitate the reintegration of former delinquents into the community, and community involvement is crucial for preventing recidivism."[58]

Opposition to Felon Disenfranchisement: Legal Challenges

Opponents of felon disenfranchisement have brought legal challenges against the alleged constitutionality of the practice. Some have said the disenfranchisement violates the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause 'dictates that no state shall 'deny to any person . . . the equal protection of the laws', and plaintiffs thus argue that criminal disenfranchisement laws treat them unequally by denying them the right to vote."[59] However, the

[57] Dori Elizabeth Martin. 47 *University of Richmond Legal Review* 471 2012, accessed 5 Feb 2013, p 475.
[58] Ibid., 475-476.
[59] Ibid., 478.

Supreme Court found a way to support the exclusion of felons from participation in local, state, or national elections: Section 2 of the Fourteenth Amendment allows states to deny the right to vote to those guilty of rebellion, or other crime." Thus, felon disenfranchisement laws "are patently constitutional and not subject to strict scrutiny like other voting restrictions."[60] Some supporters of felon re-enfranchisement bring Eighth Amendment challenges against the practice of disenfranchisement. Criminal disenfranchisement constitutes cruel and unusual punishment. Yet, convincing any court, let alone the Supreme Court, that disenfranchisement is penal in nature, and not regulatory, is most difficult. The authors write "Given the fact that courts have yet to entertain the notion that felony disenfranchisement provisions are more akin to punishments than regulations, such a case [Eighth Amendment: the fact that disenfranchisement is cruel and unusual] would be difficult to make."[61]

The Richmond Legal Review states that "the restoration process has become more easily navigable, thanks to the efforts of Virginia governors throughout the past decade."[62] Even in restoring rights, Virginia continues to differentiate, to label, and to categorize its offenders: non-violent and non-drug-related offenders get a shortened voting rights application (from thirteen pages to one), and a shortened waiting period (from five years to three), and they can skip the earlier requirement of three letters of reference thanks to Governor Mark Warner in 2002; Governor Bob McDonnell did a bit more. He reduced the waiting period to two years and required a sixty day administrative response time to restoration applications. (2010)[63]

Violent offenders in Virginia have a different experience and face a most difficult challenge to have their voting rights restored. They must submit: a completed, notarized twelve-page application; certified copies of all felony convictions and proof of payment of all fines, restitution, and court costs; a

[60] Ibid., 479.
[61] Ibid., 488.
[62] Ibid., 489.
[63] Ibid., 489.

letter from a parole or probation officer; a signed petition letter; three letters of recommendation; a letter to the governor with offense and sentencing information and reasons why voting rights should be restored; and wait five years upon completion of sentence remaining crime free.[64]

Dori Elizabeth Martin encapsulates the effort of challenging felony disenfranchisement laws in Virginia. Her summation can easily be applied to many other states in the union. There must be "balance between available resources, ease of implementation, and chances of success. Court challenges are costly, and litigation could take years . . . mounting a successful challenge would likely be an uphill battle . . . any successes in the courts would have greater chances of providing lasting benefits, as legislative enactments or executive orders can be easily overturned."[65]

Christopher Mele and Teresa A. Miller place felon disenfranchisement, along with other disabilities, in a whole pantheon, an overarching structure, of the way in which society uses "penalties as techniques deployed as part of a default social policy that has evolved from the demise of the social welfare state and the rise of carceral regulation of the poor."[66] They write that ever since the 1980s and the declared wars on both drugs and terror a new penal management of the poor (minorities, immigrants) and new criminal justice policies "have brought historically unprecedented numbers of persons in contact with the U.S. criminal justice system."[67] Mele and Miller add that there now exist numerous laws involving "harsher collateral civil penalties that are grossly disproportionate and noticeably disconnected from the felony crimes committed . . . Disenfranchisement is a prime example of disproportionality between crime and civil sanction."[68] Collateral civil penalties, such as the "denial of

[64] Ibid., 489-490.
[65] Ibid., 492-493.
[66] Christopher Mele, Teresa A. Miller. "Collateral Civil Penalties as Techniques of Social Policy," In *Civil Penalties, Social Consequences*, ed. Christopher Mele, Teresa A. Miller (London: Routledge, 2005), 9.
[67] Ibid., 10.
[68] Ibid., 10.

welfare benefits, federal student aid, and subsidized housing, among others . . . function to continue criminal punishment in civil form."[69]

> Collateral civil penalties, of which disenfranchisement is part, have, contend Mele and Miller matured as techniques of management and social control under the War on Drugs . . . collateral civil penalties broaden and extend social regulation emanating from the criminal justice system to poor, minority populations as a whole . . . hence collateral civil penalties further connect and simultaneously expand the coherent collaboration of an expanded criminal justice system, civil laws, and statutes
>
> and shrinking social welfare into a new social policy – not articulated as such but acting as default urban policy bent on management, regulation, and social control of disadvantaged and undesirable groups. Civil penalties redefine the status 'offender' to apply beyond the prison (and the purview of the criminal justice system) to include civil society and beyond the sentence to a permanent condition . . . the use of civil measures as a means of social control is effective because a larger portion of the population is administratively targeted . . . as such, the extension of collateral civil penalties is a legal element of the state's replacement of social-welfare treatment of poverty with penal management. Civil penalties act in tandem with the twin processes of social welfare contraction and mass incarceration which have vilified poor, mostly urban communities.[70]

More will be written in this paper on the impact and the ramifications of the change in the criminal justice system and in the continuing negative attitudes towards criminals in America. Mele and Miller write that civil penalties affect rights. And rights derive from human dignity of which Patricia Allard has important things to say.

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[69] Ibid., 11.
[70] Ibid., 19-21.

Allard writes, "The present trend of punishing beyond prison walls through post-conviction penalties is incompatible with human dignity . . . . Under the current U.S. system of so-called rights, citizens do not have actual rights but rather have privileges that can be taken away at the will of state agents. Rights grounded in the principle of human dignity ensure that each and every person is endowed with rights simply by virtue of being human, and under no circumstances can these rights be taken away."[71] Post-conviction penalties, including felon disenfranchisement, need to be reframed or thought of as "infringements of fundamental human rights." Perhaps, only then will felons ever receive the right to vote.[72]

Richard K. Scher offers ideas as to why America disenfranchises so many. He writes that those who control "the election machinery" in the country do not like unpredictability. How will marginalized groups or people vote? Republicans cannot accept felons voting for Democrats and Democrats "don't want to be known as the party of felons."[73] And then, Scher adds, marginalized "groups are viewed as different, separate, pariahs, even freakish."[74] Voting is for regular people. The odd people, the criminals must pass tests: character, maturity, judgment, physical tests, or means tests. Felons, immigrants, the mentally and the physically impaired, and the homeless (those without utilities in their name as proof of residence) "hardly enjoy the fruits of citizenship"[75]

Voting and citizenship go together. Can one be considered a citizen when voting is not possible? A fine, ideal marriage consists of two members committed to the other, a relationship involving give and take, respect, admiration. Wives and husbands and citizens speak and listen, respond and decide, and then live with the results. Disenfranchisement takes away not only a full sense of citizenship from

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[71] Patricia Allard. "Claiming Our Rights: Challenging Post-Conviction Penalties Using an International Human Rights Framework", in *Civil Penalties, Social Consequences* (New York, London: Routledge, 2005), 228.
[72] Ibid., 234.
[73] Richard K. Scher. *The Politics of Disenfranchisement: Why is it so Hard to Vote in America?* (Armonk, NY; London: M.E. Sharpe, 2011), p 71.
[74] Ibid., 71.
[75] Ibid., 71.

those who have done wrong, but also makes them powerless in all things political. Unlike the ideal marriage and the model citizen, they listen, but no one listens to them. They cannot express their opinion at the ballot box. Perceived as untrustworthy and irredeemable, their knowledge, insight, and wisdom cannot help the common good. As indicated above, disenfranchisement will continue to exist in all its examples throughout the many states of the nation. Sure, advocates fight for felons. Legislatures authorize limited changes. Governors both grant the vote and then take it back. Yet, disenfranchisement persists. The radical restructuring of the legal system, of jurisprudence, of the criminal justice and prison complex, of state disenfranchisement laws is not just urgent, but overdue. The time has come for politicians to stop exploiting the fear of crime for their own ends. The time has come to stop governing by or through crime. Disenfranchisement has structural causes. Economics plays a central part. Those convicted of new drug crimes, new felons, perhaps did not finish school, lacked diplomas or credentials to obtain a decent job. Dealing or using drugs came to be the way to survive in the jungle. Disenfranchisement can also be attributed to racism, an issue that Michelle Alexander discusses below.

Felon Disenfranchisement: Attitudes Must Change

Attitudes concerning disenfranchisement and felons must change. The work of Christopher Uggen and Jeff Manza, of the Sentencing Project of Marc Mauer indicate that more people support re-enfranchising felons, and many felons have regained their voice. Yet, attitudes remain in place across the country. People agree with John Locke that felons messed up. They violated the social contract and now must suffer punishment, the more the merrier. Society will never trust felons. Victim's rights have more value and trump any effort to help felons re-enter society. Re-enfranchising felons re-victimizes their victims, revisits the scene of the crime. Yet, harsh, unforgiving attitudes towards former criminals will lead to more victims, more crime, less safety.

Prisons release 650,000 former convicts each year. The path of re-entry must overcome barriers erected by people with bad attitudes towards people branded for life with a mark, a stain. Recidivism rates depend on former criminals having hope, of gaining a seat in class, of getting that job to support themselves and their families, of not feeling powerless, meaningless, or insignificant. Re-enfranchising felons supplies a full measure of light: we can see; we have a part and we can act responsibly and we will, they say.

Many felons sought housing today, but found rejection. Many felons asked for financial aid for college, but did not get it. Many felons have lost their parental rights. Their kids are but a memory and a dream. Some felons sought to vote in the last Presidential election in November 2012, but marking their choice remained a fantasy. Those felons who did vote, those who had regained the right, faced charges of voter fraud.

Disenfranchisement, at least the practice of it in the United States, has links to a distant past. Greece and Rome, medieval Europe, and the American colonies have seen fit to carry on the idea of punishing and not rehabilitating wrongdoers. The censors of Roman times and the computers of our day never sleep in their untiring efforts to mark out those who made a mistake. The censors made a black mark by a name; computers spread that black mark to anyone who can read. The following chapter will traverse a vast time, but will mention similar themes: a wrongdoer labeled, marked out; a wrongdoer punished disproportionately and unjustly; and a wrongdoer disenfranchised from the body politic.

CHAPTER TWO

Disenfranchisement: Links to the Past

Aristotle and Greece start the story of disenfranchisement as practiced in America in the year 2013. Every state is a community of some kind, believed and wrote Aristotle in the year 330 B.C.E. or B.C. Everyone in the community sought to get or obtain some good. The state is a creation of nature and man by nature is a political animal. And individuals, when alone remain isolated and lack self-sufficiency. Thus, "he who is unable to live in society . . . must be either a beast or a god: he has no part in the state . . . A social instinct is implanted in all men by nature . . . For man, when perfected, is the best of animals, but, when separated from law and justice, he is worst of all . . . wherefore, if he have not virtue, he is the most unholy and the most savage of animals, and the most full of lust and gluttony."[76]

Who is a citizen in Aristotle's world view? A citizen "shares in the administration of justice, and in offices." He adds: ". . . he who has the power to take part in the deliberative or judicial administration of any state is said by us to be a citizen of that state; and, speaking generally, a state is a body of citizens sufficing for the purposes of life."[77]

Disenfranchised felons of our day fare rather poorly with Aristotle. In his construction, felons represent the beasts of the forest. They are the savages of which he writes, lacking the necessary virtues and self-control to take part in administering the state for the common good of all. How can a man full of lust and a glutton reasonably decide the affairs of state? Banish them, he would recommend.

[76] Aristotle. *Politics* (New York: Barnes and Noble, 2005), p 3-4.
[77] Ibid., 56-58.

Aristotle wrote of determining what is the most "eligible life." Only those eligible could create the best form of a state.[78] Aristotle reasons on:

> Let us assume then that the best life, both for individuals and states, is the life of virtue, when virtue has external goods enough for the performance of good actions…two points here present themselves for consideration: first(1), which is the more eligible life, that of a citizen who is a member of a state, or that of an alien who has no political ties…since the good of the state and not of the individual is the proper subject of political thought and speculation, and we are engaged in a political discussion . . . .[79]

Aristotle believed that the wise man, like the wise state, "will necessarily regulate his life according to the best end."

Katherine Pettus writes that ". . . the modern American practice of felon disenfranchisement (state enforced but federally sanctioned) had its origins in the classical conception of citizenship invented and practiced in Athens more than two millennia ago."[80] Pettus offers key insights into the Athenian practice of punishing their wrongdoers. The Greek model citizen possessed honor, or "timḗ." "Honor was a concept used to designate a specific political or legal status assigned to the different classes in the city . . . . To have political rights was to be *epitimos;* to have none -- or to be deprived of some – was to be *atimos."*[81] Punishment of citizens that resulted in atimia (the loss of honor) was a form of collective 'forgetting" of an individual: it required that the citizen "disappear" from the polity so that his act would cease to pollute its collective honor. . . . Therefore, when citizens punished one of their

[78] Ibid., 171.
[79] Ibid., 173.
[80] Katherine Irene Pettus. *Felony Disenfranchisement in America: Historical Origins, Institutional Racism, and Modern Consequences* (New York: LFB Scholarly Publishing LLC, 2005), p 1.
[81] Ibid., 15.

own, they redistributed equality – or justice . . . such that the atimos forfeited both his honor and his political equality."[82]

Offenders in Greece, called atimos, resemble felons in that: ". . . they were socially, physically, legally and economically vulnerable in ways that *non-dishonored* citizens were *not."* Felons, like their forbears in Athens, possess a negative status, one of 'degraded inferiors'."[83]

How did one come to be considered 'atimos' in Aristotle's Greece? A brief list Pettus writes of include: not appearing for military service, disobeying a general's order, desertion, cowardice, abstaining from naval battle, failing to serve as an arbitrator in one's sixtieth year, for failure to care for elderly parents, for dropping a public action, and for non-payment of debts, giving false evidence, making unconstitutional proposals to the Assembly, or for habitual idleness. Other reasons given are: treason, attempts to overthrow the democratic constitution, bribery, theft of public property, and offering proposals to abolish certain laws.[84]

Atimia meant, says Pettus

> that the citizen lost his timȅ, because his status honor as a citizen consisted in his right to go to the assembly and vote, to serve on a jury, worship at the temple, bring any type of civil or criminal prosecution, fight in the army . . . . atimia was never inflicted on persons guilty of acts of violence (homicide, assault, rape, etc.) or offenses against property (theft, burglary, robbery, etc). . .'atimia was the penalty *par excellence* which an Athenian might incur in his capacity of a citizen, but not for offenses he had committed as a private individual'.[85]

[82] Ibid., 21.
[83] Ibid., 22.
[84] Ibid., 23-24.
[85] Ibid., 24-25.

Thus, atimia, like the Roman practice of infamia which followed, "involved the citizen's degradation and relegation to the ranks of the civilly dishonored [and] served to sharpen and clarify the boundaries and principles of justice that defined the honorific qualities of the citizen status group."[86]

Disenfranchisement History: How the Romans Did It

The Romans adopted and adapted the practice of the Greek atimia. Roman citizens who violated the law, or some social norm, or those who simply worked in the wrong profession faced the consequence of infamia, the loss of honor or status. Marcus Tullius Cicero, commonly called just Cicero, focused his work and writings on all things Roman on the principle of duty. Cicero writes "in the observance of duty lies all that is honorable, and in the neglect of it all that is dishonorable."[87] Cicero located the highest good, like Aristotle before him, in virtue and honor. The central question of a life concerned the quality of duty rendered for the sovereign good. Practical rules were to govern conduct and the honorable trumped the expedient. A wide gulf exists between man and beast. Beasts can only sense things: cold, hot, good or bad. Man, however, came endowed with reason and "perceived the connection of things, marks their causes and effects, traces their analogies, links the future with the past, and, surveying without effort the whole course of life, prepares what is needful for the journey."[88]

Anticipating the work of John Locke, Cicero finds in man's ability to reason another difference from the life of a beast. He writes "How precious should we deem the gift of reason since man is the only living being that has a sense of order, decorum, and moderation in word and deed . . . .honor even when cast into the shade loses none of its beauty; honor, I say, though praised by no one, is praiseworthy in itself."[89] Reason can be employed in investigation, sagacity, perception of the truth, in

[86] Ibid., 22.
[87] Marcus Tullius Cicero. *The Basic Works of Cicero*, ed. Moses Hadas (New York: Random House, 1951), 6.
[88] Ibid., 7-9.
[89] Ibid., 9-10.

the maintenance of society, in the respect for the rights of others, in the faithful observance of contracts, in maintaining the lofty, invincible spirit, and in order, temperance, and self-command. Reason strengthens the bonds of human society.[90]

A.H.J. Greenidge, writing in the early 1890s, explores the practice of the Roman infamia in great detail. He lets the reader know that "the Roman state and the Roman jurist always looked on existimatio as a condition of which the citizen was already in enjoyment."[91] The word "dignitas" joined "existimatio" as key concepts in the ancient world. Greenidge says "Both of these convey the notion of the outward respect in which a man is held, which is based upon his deserts and measured by his position in society. As a rule, the only authority which can thus take the measure of a man and assign him his fit and proper place is society itself, and the conception is merely one of 'positive morality'.[92]

Seemingly contradicting what he just said, Greenidge notes that if the state or the authorities step in to regulate the position of an individual with reference to his state functions it always diminishes a person's position and rarely did the state intervene to restore a citizen to his former place.[93]

The Roman censor, writes Greenidge, one of the many authorities "who wielded at Rome the power of lessening the civil honor of the individual"[94], could and did ". . . on moral grounds, [suspend] for a time the individual citizen's right of voting (jus suffragis).[95]

Reasons for the Roman infamia varied and are difficult to pin down or understand. Greenidge writes that infamia was "largely directed to the punishment of breaches of trust." The political evils caused by the growth of the Roman Empire and Roman domination led to corruption and misconduct

[90] Ibid., 10.
[91] A.H.J. Greenidge. *Infamia: Its Place in Roman and Public Law* (London: Clarendon Press, 1894), 2, 4.
[92] Ibid., 2.
[93] Ibid., 2-3.
[94] Ibid., 3.
[95] Ibid., 6.

charges. Infamia threatened those who engaged in misconduct in family and political life, in the trades or professions, and in politics.[96]

Elizabeth A. Hull adds her thoughts to the subject of disenfranchisement and the ancient practices of Greece and Rome. She writes "At least as far back as ancient Greece and Rome, polities engaged in *infamia* ('ignominy' or 'disgrace'), subjecting members who committed 'infamous' crimes to 'civil death'. These malefactors were denied the perquisites of citizenship, such as the right to vote, participate in court proceedings, or defend the homeland."[97]

Felon Disenfranchisement: Europe and England

Kathleen Pettus describes the condition of outlawry, attainder, and civil death practiced in medieval and feudal Europe. Offenders in Europe during this time (outlaws) feared for their lives and property, their safety and for their descendants. Serious crimes such as: treason, homicide, severe wounding, and heresy led to a person declared "civilly dead." And just how can one define civil death? Pettus writes:

> civic death means the absolute loss of all civil rights (…) it sunders completely every bond between society and the man who has incurred it; he has ceased to be a citizen, but cannot be looked upon as an alien, for he is without a country; he does not exist save as a human being, and this, by a sort of commiseration which has no source in law.[98]

The English version of outlawry, attainder, imposed civil disabilities on the 'attainted', people convicted for a felony or for treason. Such unfortunates faced forfeiture, corruption of the blood, and the loss of civil rights.[99]

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[96] Ibid., 62-63.
[97] Elizabeth A. Hull. *The Disenfranchisement of Ex-Felons* (Philadelphia: Temple University Press, 2006), 16.
[98] Pettus, 29-30.

Thomas Hobbes, John Locke, and Jean-Jacques Rousseau: The Social Contract

Thomas Hobbes, the writer who described life to be a state of perpetual war and the condition of man as "'solitary, poor, nasty, brutish, and short'"[100], argues that men "were naturally self-centered creatures who stood in need of authorities to tame them."[101] Thus begins the Hobbesian secular theory of absolutism and the birth of Leviathan, the origin of states and their justification. Someone has to rein in man and how better to do it than through a social contract. In Hobbes' system people "agree to participate in rational government or at least the type of political order that would decrease the possibility of social breakdown such as that seen in England. . . . In order to avoid the inconveniences of the system of each for himself, with no external control, human beings would make a social contract, or an agreement to form a civil society where all people subjected their personal desires and judgments to those of the ruler . . . this ruler would have the backing of all the people and would then be able to protect citizens from foreign or domestic threats."[102] "Leviathan was empowered by necessity to prevent anarchy. This meant that his power was completely absolute . . . ."[103]

Hobbes' social contract and the Greek and Roman atimia and infamia made sure that an offender met his punishment. Hobbes writes

> A punishment, is an evil inflicted, by publique authority, on him that hath done, or omitted that which is judged by the same authority to be a transgression of the law; to the end that the will of men may thereby the better be disposed to obedience. . . exile (banishment) is when a man is for a crime, condemned to depart out of the dominion of the Commonwealth. . . not to return into It . . . for a banished man, is a lawful enemy of the Commonwealth that banished

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[99] Ibid., 30.
[100] Thomas Hobbes. *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (New York: Barnes and Noble, 2004) xi.
[101] Ibid., xii.
[102] Ibid., xiv.
[103] Ibid., xiv.

him; as being no more a Member of the same.[104]

John Locke, in his Second Treatise of Government, joins the chorus of those who believe and say that wrongdoers must suffer punishment.

Locke believed that the preservation of property and the defense of the Commonwealth, with its public good, justified the establishment of laws (death or lesser penalties) which removed offenders from society. The natural state of man, one of perfect freedom and equality, constituted a condition of liberty not of license. Citizens possessed a duty to love others. He writes "If I do harm, I must look to suffer."[105] Man cannot either destroy himself or any other creature and, because the Law of Nature presupposes peace and the preservation of mankind, ". . . everyone has a right to punish the transgressors of that law to such a degree, as may hinder its violation."[106] He writes,

> For the Law of Nature would . . . be in vain, if there were no body that in the State of Nature, [who] had a Power to execute that law, and thereby preserve the innocent and restrain offenders . . . . Power [was] . . . only to retribute to him, so far as calm reason and conscience dictates what is proportionate to his Transgression, which is so much as may serve for reparation and restraint. For those two are the only reasons, why one Man may lawfully do harm to another, which is what we call punishment. In transgressing the Law of Nature, the offender declares himself to live by another rule, than that of reason and common equity . . . so he becomes dangerous to Mankind, the tye [sic], which is to secure them from injury and violence, being slighted and broken by him.[107]

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[104] Ibid., 201, 205.

[105] John Locke. *Locke: Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), 268-270.
[106] Ibid., 271.
[107] Ibid., 271-272.

Locke defines crime as ". . . violating the law and varying from the Right Rule of Reason, whereby a Man so far becomes degenerate, and declares himself to quit the principles of Human Nature and to be a noxious Creature. . . "[108] He adds,

> . . . Each Transgression may be punished to that degree, and with so much Severity, as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie [sic] others from doing the like. . . God hath certainly appointed Government to restrain the partiality and violence of man.[109]

Locke strengthens his classical theory of the social contract by saying "God having made Man such a Creature, that, in his own Judgment, it was not good for him to be alone, put him under strong Obligations of Necessity, Convenience, and Inclination to drive him into society."[110] The beginning of a political society in Locke's conception can be described, then, as follows: "Wherever therefore any member on Men are so united into one society, as to quit everyone his Executive Power of the Law of Nature, and to resign it to the public, there and there only is a Political, or Civil Society."[111] Hobbes' Leviathan, necessary to tame and control the lawlessness of man, found its justification in Locke. God put lonely man into society and gave that man obligations: surrender his freedom and liberty he possessed in the Law of Nature, remember his duty to care for the property and lives of his fellow man, and ensure that he punished to the uttermost, for restraint drove the urge to commit retribution, those offenders who seemed unable to live by the rule of reason. The writer and philosopher, Jean Jacques Rousseau -- influenced, no doubt, by the work of Aristotle, Hobbes, and Locke -- contributes to the discussion of the relationship between man and society at large.

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[108] Ibid., 273.
[109] Ibid., 275-276.
[110] Ibid., 318.
[111] Ibid., 325.

Rousseau writes in Chapter Six of his famous work, *On the Social Contract*, that the obstacles man faces in the state of nature have more power of resistance than man can overcome. Hence, man, in order to survive, must unite and direct his joint forces to defeat nature. The social compact or Contract can best be understood when "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."[112] Rousseau goes on to say that replacing the state of nature with a civil state creates "a very remarkable change in man." He substitutes justice for the prior instinct of the jungle; man gains a morality to his actions and a new found duty to rise above his former animal impulses.[113]

Disenfranchisement, a collateral consequence of a felony conviction, severely affects those who wish to vote. Judges and politicians continue to quote the work of Aristotle, of Thomas Hobbes, of John Locke, and of Jean-Jacques Rousseau in their decisions and in their legislation in the year 2013. Felons, allegedly, display a lack of reason, a lack of control over their behavior and impulses; they commit grave injustices in offending against society and they violate their obligatory duty to honor the sacred social compact. As a consequence, Hobbes' banishment continues to harm felons with regard to efforts to re-enfranchise them. The ancient and medieval practice of punishing offenders with atimia, infamia, outlawry, attainder, and civil death can be seen in the laws regarding who can and cannot vote in the varied states of the United States ever since its creation many years ago.

Disenfranchisement: The American Version

Alexander Keyssar adds important information to the discussion of disenfranchisement of felons and any possible re-enfranchisement in American history. He frames the issue in terms of "a far-

[112] Jean Jacques Rousseau. *On The Social Contract* (Mineola, New York: Dover Publications, 2003) 8-9.

[113] Ibid., 12.

reaching public debate about the nature and sources of legitimate governmental authority. The issue of suffrage was always near the center of that debate: if the legitimacy of a government depended on the consent of the governed . . . then limitations on suffrage were intrinsically problematic, since voting was the primary instrument through which a populace could express or withhold consent."[114] He writes presciently

> The conflict over the franchise that erupted during the revolution involved – as such conflicts always would – both interests and ideas. The planters, merchants, and prosperous farmers who wielded power and influence in late eighteenth-century affairs had an unmistakable interest in keeping the franchise narrow: a restricted suffrage would make it easier for them to retain their economic and social advantages. Conversely, tenant farmers, journeymen, and laborers (not to mention African-Americans and women) had something to gain from the diffusion of political rights. Landowners would maximize their political power if the franchise were tied to freehold ownership, while city dwellers, shopkeepers, and artisans had a direct interest in replacing freehold requirements with taxpaying or personal property qualifications.[115]

Keyssar notes that the time of the American Revolution represented an era of political experimentation. "Received notions were being looked at with fresh eyes, held up against the backdrop of changed circumstances; new ideas had to be tested against models of history and human nature."[116] He writes that political leaders of the time sought to justify the retention of restrictions of the franchise. Voting was a privilege, not a right, a right "that the state could legitimately grant or curtail in its own interest. Indeed, in early English usage, the word *franchise* referred to a privilege, immunity, or freedom

[114] Alexander Keyssar. *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 8.
[115] Ibid., 8.
[116] Ibid., 9.

that a state could grant, while the term *suffrage* alluded to intercessory prayers."[117] Originally, "only men with property. . . were deemed to be sufficiently attached to the community . . . and affected by its laws to have earned the privilege of voting . . . in order to vote a person had to be independent . . . the poor, or the propertyless, should not vote because they would threaten the interests of property", writes Keyssar. He quotes John Adams who said that if men without property could vote, "'an immediate revolution would ensue'."[118] Thus, the original restrictive rules granting the vote were designed to "defend the material interests of the propertied."[119]

Keyssar writes that another idea arose to challenge the conservative view of who could vote. The notion of voting as a natural right (not a privilege) emerged from its Pandora type box. And, Keyssar notes, "If voting was a natural right, then everyone should possess it . . . How could one justify denying anyone his or her natural – or socially acknowledged- rights?"[120] Granting all the right to vote did several things: it allowed society to function smoothly, it permitted the social contract to operate as theory said it should, and it gave people the opportunity to consent to or to oppose laws.[121] Keyssar informs the reader that "forming new governments inescapably brought the issue of suffrage to the fore. Who should be involved in creating a new government for an ex-colony? For a new government to be legitimate, who had to consent to its design and structure? And how broad should suffrage be in a republic?"[122] Keyssar, in his work on the history of voting and suffrage in America, begins to tell of the spirit of exclusion negatively affecting the natural right of every American citizen to cast his or her ballot.

Keyssar writes that states withheld the right to vote from men "who violated prevailing social norms, those who had committed crimes, particularly felonies or so-called infamous crimes . . . . Disenfranchisement for such crimes had a long history in English, European, and even Roman law, and it

[117] Ibid., 9.
[118] Ibid., 9-11.
[119] Ibid., 11.
[120] Ibid., 12-13.
[121] Ibid., 13-14.
[122] Ibid., 15.

was hardly surprising that the principle of attaching civil disabilities to the commission of crimes appeared in American law as well."[123] Such punishment, as stated above, served "as retribution for committing a crime and as a deterrent to future criminal behavior."[124] Eleven states disenfranchised wrongdoers between 1776 and 1821 and by the "eve of the Civil War, more than two dozen states disenfranchised men who had committed serious crimes."[125] Keyssar adds that by 1920 "all but a handful [of states] had made some provision for barring from suffrage men who had been convicted of a criminal offense, usually a felony or 'infamous' crimes . . . ."[126]

Support for such disenfranchisement laws "is noteworthy because . . . there has never been a particularly persuasive or coherent rationale for disenfranchising felons and ex-felons . . . these laws were primarily punitive in nature . . . Yet the efficacy of disenfranchisement as a punishment was always dubious, since there was no evidence that it would deter future crimes; nor . . . did disenfranchisement appear to be an appropriate form of retribution, writes Alexander Keyssar in his excellent book.[127]

What other means did states use to punish offenders in their midst? States found another compelling reason to disenfranchise its felons: protect the integrity of elections and the 'purity of the ballet box'. A voter "ought to be a moral person . . . the idea persisted that there were moral boundaries to the polity . . . Full membership in the political community therefore depended on proper behavior and perhaps even proper beliefs . . . . Disenfranchising felons in effect was a symbolic act of political banishment, an assertion of the state's power to exclude those who violated prevailing norms.[128]

Keyssar writes that criminal disenfranchisement, as practiced in the various states of the Union, lacked a compelling rationale. As a penal measure disenfranchisement "did not seem to serve any of the

[123] Ibid., 62.
[124] Ibid., 63.
[125] Ibid., 63.
[126] Ibid., 162.
[127] Ibid., 162-163.
[128] Ibid., 163.

four conventional purposes of punishment: there was no evidence that it deterred crimes; it was an ill-fitting form of retribution; it did not limit the capacity of criminals to commit further crimes; and it certainly did not further the cause of rehabilitation. Indeed, many critics argued that it did just the opposite, preventing ex-felons from resuming a full and normal position in society."[129] Jeff Manza, Christopher Uggen, and Elizabeth Hull add important insights to the history of felony disenfranchisement in the United States.

Manza and Uggen write that "criminal disenfranchisement has an extensive history."[130] The road to felon disenfranchisement in 2013, they write, travels through ancient Greece, Rome, medieval Europe, England, and colonial America. The practices of the Greek atimia and the Roman infamia, both meant as a loss of honor, serve as "precursors to modern disenfranchisement laws. These were among the most severe punishments available in ancient regimes as they entailed not only the loss of the right to participate in politics but also loss of many other rights associated with full citizenship."[131]

Manza and Uggen tell the reader that "The scant evidence we have indicates that criminals in the colonial era were subject to disenfranchisement . . . exclusion of deviants was possible because political participation occurred in small face-to-face meetings."[132] Several states enacted laws as well: Connecticut disallowed anyone who had been fined or whipped for a scandalous offense to vote; Plymouth disenfranchised those horrible people who opposed the 'good and wholesome laws of this colonie' {sic}; public drunkenness in Maryland resulted in the loss of political rights."[133] Manza and Uggen write that because of the "long history of restrictions on the political rights of criminal offenders, it is hardly surprising that political philosophers have sought to develop justifications for disenfranchisement . . . philosophers as diverse as Aristotle, Locke, Rousseau, Montesquieu, Kant, and

[129] Ibid., 303.
[130] Manza and Uggen. *Locked Out, 22.*
[131] Ibid., 22-23.
[132] Ibid., 23-24.
[133] Ibid., 24.

Mill converged on the view that criminal offenders should not be entitled to full participation in political life or civic life."[134] Ancient political theory, especially Aristotle's conception of it, sought to relate citizenship to the governance of the city-state. Accepted citizens in the polis displayed the capability of rational deliberation. Criminals, who could not govern themselves, contained "innate defects precluding membership in the polity . . . ."[135]

Manza and Uggen write that such theories and philosophical thought gave way to the "beginnings of the modern democratic polity" in the late nineteenth century. Now mass participation based on citizenship rights possessed from birth and "notions of the possibility of rehabilitating criminal offenders . . . threaten[ed] the performative logics of citizenship, replacing them with a view of citizenship as entitlement."[136] Manza and Uggen cite the work of T.H. Marshall, who wrote that modern citizenship evolves through stages. Societies first grant the masses civil rights, then political rights (the right to vote), and finally social rights. Such a functionalist approach is debatable, say our authors. Yet, Marshall's ideas provide "a useful narrative of what actually transpired. Once political rights are made universal, each exclusion becomes harder to justify."[137]

The influence of ancient political theory, that of Aristotle, and the work of the early modern theorists such as Hobbes, Locke, and Rousseau lost much of their force and importance thanks to the Enlightenment. Two ideas came to the forefront during the late nineteenth century in America: proportionality and rehabilitation. Citing the work of Cesare Beccaria, and his book *On Crimes and Punishment* (1764), Manza and Uggen say that a legislator's task was to craft punishments sufficient to deter or prevent crime. Any punishment beyond this standard, however, would be an unjust abuse of power, breaching the contract between the state and its citizens."[138]

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[134] Ibid., 24-25.
[135] Ibid., 25.
[136] Ibid., 25-26.
[137] Ibid., 26.
[138] Ibid., 26.

The rehabilitative philosophy of the late nineteenth century, write Uggen and Manza, "requires that the punishment, or treatment, reform the offender. Rehabilitation models fundamentally reject the presumption that criminal offenders are inherently corrupted."[139] Uggen and Manza write:

> The classical view of disenfranchisement was undermined as penal philosophy moved from simple vengeance to a system of deterrence, and finally to one of rehabilitation in modern penal institutions. Once a criminal sentence is completed, the offender gets a 'second chance', or opportunity to 'start over'. In a polity in which the right to vote is universal, restoration to citizenship means, among other things, having the right to vote.[140]

Why then does felon disenfranchisement persist in the United States? Uggen and Manza discuss the work of the political scientist, Alec Ewald, in an attempt to find some answers.

Ewald argues that "the foundations of felon disenfranchisement strongly resonate with the core intellectual traditions of American political culture . . . felon disenfranchisement echoes each of three major civic traditions: liberalism, republicanism, and racialized conceptions of identity . . . . For classical liberalism, disenfranchisement serves to prevent the illegitimate use of the ballot by individuals who break the law; for republicans, disenfranchisement screens out morally unworthy individuals; and for racists, disenfranchisement laws can be used to target undesirable racial or ethnic groups and reduce their political power."[141]

Uggen and Manza write that "no leading political theorist in either the liberal or republican traditions has stepped forward to explicitly defend these laws . . . both present sharp theoretical and empirical problems . . . the liberal case ultimately requires some demonstration that offenders would use their voting rights to do bad things . . . .[and] the liberal case is at best unproved . . . the republican justification requires evidence that felons' participation would negatively influence the polity as a whole

[139] Ibid., 26.
[140] Ibid., 26.
[141] Ibid., 27.

. . . the republican claim is based on symbolic, or moral, considerations, and it is essentially nonfalsifiable . . . there is no evidence that democratic political communities are debased in places where offenders can vote, either in the United States or elsewhere."[142] They add that "modern liberal and republican theorists have not, for the most part, stood up to defend the practice of disenfranchisement. And it is not clear how they would, if they did."[143]

Uggen and Manza stress that felon disenfranchisement laws find their firm foundation in law, constitutional and statutory. They write that as far back as 1882 offenders of the Edmunds Act, a law which outlawed bigamy and polygamy in the West, found themselves disenfranchised. The Supreme Court upheld the law in 1885. The justices at the time considered such punishment "a constitutionally viable test for voting eligibility."[144] Later, in 1890, the Supreme Court approved Idaho's anti-bigamy oath and bigamists lost their right to vote as well.[145]

Richardson v. Ramirez, write Uggen and Manza, represents the main Supreme Court decision concerning felon disenfranchisement. The 1974 ruling "affirmed the right of the states to disenfranchise felons.

> The case concerned three California men who had completed their criminal sentences, were denied the right to register to vote, and then sought to challenge the state's law disenfranchising ex-felons. The plaintiffs made two arguments. First, they argued that felon disenfranchisement laws required the same strict standard of review as other voting restrictions. A 'compelling state interest' was required to restrict a fundamental right such as voting. Second, they argued that extending the right to vote would serve the goal of rehabilitation by helping to reintegrate offenders back into society. The California

[142] Ibid., 27.
[143] Ibid., 28.
[144] Ibid., 28-29.
[145] Ibid., 29.

Supreme Court sided with the plaintiffs.[146]

The United States Supreme Court disagreed and "reversed and upheld the state's law . . . . The majority opinion . . . was based on a passage of section 2 of the Fourteenth Amendment, which says: 'when the right to vote . . . is denied to any of the male inhabitants of such State . . . or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced' . . . . The Court held that the 'express language' of 'participation in rebellion, *or other crime*, contemplated and permitted states to disenfranchise criminals with felony convictions."[147] Uggen and Manza write that no court "has completely abolished a state's practice of disenfranchising convicted felons. The Supreme Court, however, carved out one limitation in 1985. In *Hunter v. Underwood*, the Court struck down a state disenfranchisement law on the basis of discriminatory racial intent."[148] They add that the "Hunter decision potentially opened the door to challenges to felon disenfranchisement on the basis of race . . . . The Supreme Court's *Hunter* decision, however, only addresses intentional racial discrimination, which is very difficult to prove in legal proceedings."[149] The penological foundation or basis for felon disenfranchisement, as mentioned above, consists of four elements, much in evidence in both the writing of political philosophers and in society's practice of dealing with offenders. Retribution, write Uggen and Manza, consists of "institutionalized vengeance . . . those who have committed crimes should suffer for the harm they have caused others . . . the blanket disenfranchisement of all felons . . . violates the principle of proportionality"; deterrence . . . endeavors to prevent future crimes . . . specific deterrence punishes to reduce future recidivism among people convicted of crimes, and general deterrence punishes criminals to influence others who might otherwise be tempted to engage in crime . . . felon disenfranchisement serves both deterrent purposes . . . but effective deterrents require that the

[146] Ibid., 30.
[147] Ibid., 30.
[148] Ibid., 33-34.
[149] Ibid., 34.

consequences be known to offenders when they are contemplating criminal acts; incapacitation removes criminals from society and eliminates their capacity to commit new offenses; and, rehabilitation hopes that the criminal will not commit future crimes.[150]

Uggen and Manza write that "there are reasons to conclude that disenfranchisement hinders rehabilitative efforts. Disenfranchisement cannot help to foster the skills and capacities that will rehabilitate offenders and help them become law-abiding citizens . . . It is much more plausible to think that *participation* in elections as stakeholders might reduce recidivism, at least for those offenders who participate. As a fundamental act of citizenship, voting may foster respect for laws, criminal and otherwise, and the institutions that make and enforce them."[151]

With the help of Angela Behrens, Christopher Uggen and Jeff Manza explore the racial origins of felon disenfranchisement. Race has played a large factor in the history of disenfranchisement in American history. Uggen, Manza, and Behrens write that the earliest efforts to "disenfranchise African Americans frequently invoked racial disparities in criminality as evidence that blacks were unworthy of assuming the full rights and duties of citizenship."[152] Blacks were too degraded "'to estimate the value, or exercise with fidelity and discretion this important right'; their minds . . . are not competent to vote'."[153]

Uggen, Manza, and Behrens write that the elite, primarily white property owners, feared the spread of mass democracy. "The most notable of these concerns was the fear of fraud . . . the integrity of the ballot box would be tainted by the participation of unworthy electors This included, most obviously, all women, African Americans in most states, and, increasingly, immigrants . . . in 1790, only 3 of the 13 states excluded nonwhites from voting, but by 1840 20 of the then 26 states had removed nonwhites from the rolls, either by directly specifying that African Americans could not vote or by

[150] Ibid., 35-37.
[151] Ibid., 37.
[152] Ibid., 41.
[153] Ibid., 41-42.

indirectly disenfranchising them through the implementation of onerous property requirements applicable only to African Americans."[154]

Criminal disenfranchisement expanded greatly not only due to the race factor, but also because of the "spread of suffrage to the (white male) masses . . . and, the expansion and growth of the criminal justice system", write Uggen, Manza, and Behrens.[155] 19 states "adopted or amended laws restricting the voting rights of criminal offenders, between 1865 and 1900."[156] Despite the passage of the Fourteenth and Fifteenth Amendments to the Constitution: the Fourteenth (1868), "mandating equal protection of the races, and giving states a strong incentive to grant all men the right to vote", and the Fifteenth (1870), "enfranchising African American males, expressly declaring that states could no longer deny the right to vote based on race . . . many African Americans remained practically disenfranchised as a result of concerted efforts to prevent their exercise of these rights."[157]

White opponents of enfranchising African American men used the following effective means, write Uggen, Manza, and Behrens, to keep blacks from the ballot box: violence, intimidation, poll taxes, literacy tests, 'grandfather clauses', white-only primaries, and discretionary registration requirements. The measures taken relegated blacks "to the status of nonvoters . . . until the combination of a series of Supreme Court decisions in the 1960s and the passage of the VRA that these barriers began to fall . . . the explicit use of felon disenfranchisement contributed to preventing African Americans and other 'undesirable' groups from voting. Disenfranchisement based on a criminal conviction provided a useful, and potentially permanent, way to eliminate voters . . . ."[158]

Behrens, Manza, and Uggen believe that although "modern defenders of the practice [of disenfranchisement] certainly draw upon nonracial reasons for their position . . . felon

[154] Ibid., 53.
[155] Ibid., 55.
[156] Ibid., 55.
[157] Ibid., 56-57.
[158] Ibid., 57.

disenfranchisement . . . has to be viewed as one of the many side effects of the peculiar history of racial politics in the United States."[159]

Eric Foner recounts the visit of Alexis de Tocqueville, "the French writer who visited the United States in the early 1830s, [and who] returned home to produce *Democracy in America*, a classic account of a society in the midst of a political transformation."[160] Originally desiring to study prisons, Tocqueville came to focus on the state of democracy at the time. Democracy in America, as Tocqueville discovered, "erected impenetrable barriers to the participation of women and non-white men . . . as democracy triumphed, the intellectual grounds for exclusion shifted from economic dependency to natural incapacity . . . the negro is and always will be, to the end of time, inferior to the white race, and, therefore, doomed to subjection . . . the limits of American democracy rested on the belief that the character and abilities of non-whites and women were forever fixed by nature."[161]

Reconstruction (1865-1877): A Time to Vote

The Reconstruction period of American history, the crucial period after the American Civil War, seemed to change such thoughts pertaining to the capabilities and capacities of the African American. Foner writes that "In a society that had made political participation a core element of freedom, the right to vote inevitably became central to former slaves' desire for empowerment and equality. He quotes Frederick Douglass who once said, "'Slavery is not abolished until the black man has the ballot' . . . 'where universal suffrage is the rule' excluding any group meant branding them with 'the stigma of inferiority'."[162]

[159] Ibid., 68.
[160] Eric Foner. *Give Me Liberty: An American History* (New York: W.W. Norton and Company, 2006) 306.
[161] Ibid., 307-308.
[162] Ibid., 479-480.

For a short time blacks did not feel inferior. The political changes resulting from Reconstruction allowed black voters to provide "the bulk of the Republican Party's support . . . the fact that some 2,000 African-Americans occupied public offices during Reconstruction represented a fundamental shift of power in the South and a radical departure in American government."[163]

Such dramatic change led to a most extreme reaction from the conservative elites who once "dominated southern government from colonial times to 1867. . . ."[164] The South's traditional leaders, the planters, merchants, and Democratic politicians could not "accept the idea of former slaves voting, holding office, and enjoying equality before the law . . . Reconstruction must be overthrown . . . violence remained widespread in large parts of the postwar South . . . blacks were assaulted and murdered . . . in the South, secret societies sprang up with the aim of preventing blacks from voting."[165]

The Ku Klux Klan, the military arm of the Democratic Party in the South, founded in 1866 in Tennessee, "committed some of the most brutal criminal acts in American history. In many counties, it launched what one victim called a 'reign of terror' against Republican leaders, black and white."[166]

The End of Reconstruction: Voting Rights End

Eric Foner describes the Reconstruction period as a "remarkable chapter in the story of American freedom." He adds "Blacks continued to vote and, in some states, hold office into the 1890s. But as a distinct era of national history – when Republicans controlled much of the South, blacks exercised significant political power, and the federal government accepted the responsibility for protecting the fundamental rights of all American citizens – Reconstruction had come to an end."[167]

[163] Ibid., 499.
[164] Ibid., 502..
[165] Ibid., 502-504.
[166] Ibid., 504.
[167] Ibid., 508.

Foner informs his readers that "Between 1890 and 1906, every southern state enacted laws or constitutional provisions meant to eliminate the black vote."[168] How did Southern legislatures end black voting? The poll tax required the payment of a fee in order to vote; literacy tests and an 'understanding' of the state constitution had to be surmounted; grandfather clauses, which exempted from the new requirements any descendent of persons eligible to vote before the Civil War (only whites) were adopted in six states; disenfranchisement, a 'good government' measure, purified politics by ending fraud, violence, and [the] manipulation of voting returns regularly used against Republicans and Populists. The aim of all of these requirements, notes Foner, quoting a Charleston newspaper, "was to make clear that the white South 'does not desire or intend to ever include black men among its citizens'."[169]

Foner writes that the "Progressive era also witnessed numerous restrictions on democratic participation, most strikingly the disenfranchisement of blacks in the South . . . . Taken as a whole, the electoral changes of the Progressive era represented a significant reversal of the idea that voting was an inherent right of American citizenship."[170] The Progressive era, not so progressive really in the minds of blacks, continued to see brutal violence directed against African Americans. Foner reports the following: "In one of hundreds of lynchings during the Progressive era, a white mob in Springfield, Missouri, in 1906 falsely accused three black men of rape, hanged them from an electric light pole, and burned their bodies in a public orgy of violence. Atop the pole stood a replica of the Statue of Liberty."[171]

Disenfranchisement: America Gets Tough on Crime

Foner captures a theme that will be explored in the balance of this paper. He writes that beginning in the 1970s the nation's prison population began to grow exponentially. Politicians,

[168] Ibid., 560.
[169] Ibid., 561.
[170] Ibid., 606-607.
[171] Ibid., 647.

concerned about the rising crime rates in urban areas "sought to convey the image of being 'tough on crime'. In attitudes discussed at length by Jonathon Simon, politicians demanded that the judicial system no longer seek the rehabilitation of offenders, but simply lock them up for longer periods of time. Drug addiction was to be considered a crime and not a disease. "State governments greatly increased the penalties for crime and reduced the possibility of parole . . . . As a result, the number of Americans in prison rose dramatically . . . in 2000 it reached nearly 2 million, ten times the figure of 1970. Several million more individuals were on parole, probation, or under some kind of criminal supervision."[172]

Foner tells of the rise of the 'prison-industrial complex'. Prisons became a chief source of income and jobs for once thriving communities. Prison construction during the years 1990 to 1995 added 200 new prisons. Foner writes that California "spent more money on its prison system than its state universities . . . convict labor revived in the late twentieth and private companies in Oregon 'leased' prisoners for three dollars a day."[173] The burden of imprisonment fell, of course, on the members of racial minorities, especially on African Americans. "The percentage of the black population in prison stood eight times higher than the proportion for white Americans", writes Foner. And what of the consequences: "Over one-quarter of all black men could expect to serve time in prison at some time during their lives. A criminal record made it very difficult for ex-prisoners to find jobs . . . blacks had a significantly lower rate of marriage . . . children became 'prison orphans' . . . twenty-nine states [denied] the vote those on probation and seven barring ex-felons from voting for their entire lives, an estimated four million black men could not cast a ballot at the end of the twentieth century."[174]

Eric Foner's *Give Me Liberty: An American History* summarizes in brief the story of race and class division in America that continues to this day. The felon disenfranchisement practiced in the United States ever since its creation continues to deny the right to vote to felons, especially African Americans,

[172] Ibid., 951.
[173] Ibid., 951.
[174] Ibid., 951-952.

who face daily exclusion from participation in the issues and concerns that affect them. Aristotle determined that those lacking in reason did not constitute an eligible life. Cicero consigned those who could not fulfill their duty and who may have violated the social contract to the status as outcasts deserving of civil death. Thomas Hobbes' Leviathan rose to prominence and power to punish and banish those who had the temerity or foolishness to violate their part in the social compact. People, those guilty of a felony conviction, give philosophers such as John Locke a convenient excuse to question their suitability and capability to exercise sound judgment in the ballot box. Felons, in Jean-Jacques Rousseau's estimation, deserve expulsion from the community, of which, in theory, they agreed to be a wholesome part.

Unfortunately, the civil death of ancient, medieval, and modern times, the loss of honor and status in the community, continues. In a country allegedly devoted to the principles of liberty, freedom, democracy, and human rights felons remain outsiders. They cannot vote. They face legal discrimination as collateral consequences for what they once did. Their punishment can be construed as cruel and unusual. It exceeds the principle of proportionality; as it stands now, their debt to society can never be repaid.

Politicians, generally no friend of convicted criminals, hesitate to make amends for the harm that disenfranchisement has done and continues to do. Their focus lies on the next election, not on how they can facilitate the rehabilitation and re-entry of former offenders into the community. The Founders of the American experience of democracy, the Southern whites who made up the Democratic Party during Reconstruction, and their military arm, the Ku Klux Klan, did all they could to deny to African-Americans one of the most fundamental human rights imaginable, the right to vote.

Man seems beholden to power, to comparing himself to others, to creating racial hierarchies. There are the elites of any time: the rich, the factory or plantation owners, the merchants, the politicians; they hold the superior position. And then there are the masses, the non-propertied white

man, the yeoman farmer, the slave, the woman, the immigrant of many colors, and the felon. History comes replete with examples, some listed above, that illumine man's cruelty to man. The following chapter provides information on the changes in penal policy, their consequences and offers at least some ideas of how the number of the disenfranchised can be reduced. The final four chapters will discuss the New Jim Crow racial policies prevailing in America in 2013, ideas for prison reform, and the impact of felon disenfranchisement on the 2000 Presidential election in Florida. A brief conclusion will bring into sharp focus the issue of felon disenfranchisement along with a plea for the early return of voting rights to felons and a demand that Congress enact true universal suffrage through the passage of a Constitutional Amendment.

CHAPTER THREE

The New Penal Policy: Governing Through Crime

Jonathan Simon discusses how crime, and the fear it engenders, has transformed American democracy and American culture. Crime has become "the central feature of contemporary American law and society."[175] Politicians and government authorities continue to reorient fiscal and administrative resources away from the 'welfare state' to the new 'penal state'. Some features of this new phenomenon consist of a more authoritarian executive, a more passive legislature, a more defensive judiciary, and the portion of the general population in custody lying well beyond historic norms.[176] Simon writes that the penal state in which we live has come to reverse "key aspects of the Civil Rights revolution. He adds that "a definable group of Americans lives, on a more or less permanent basis, in a state of legal non-freedom . . . ."[177]

Simon declares that the fear of crime has come to infect middle class families and that crime "actively reshapes how power is exercised throughout hierarchies of class, race, ethnicity, and gender."[178] Quoting Loic Wacquant, Simon writes that the issue of race is a "more tempting global explanation for America's growing penal state."[179] Blaming African-Americans for the increased levels of inner city crime allows for "growing demands for substantial social reform in the name of racial justice."[180] Two processes are at work, according to Simon. Minority communities experience both the

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[175] Jonathan Simon. *Governing Through Crime: How the War on Crime Transformed Democracy And Created a Culture of Fear* (Oxford, New York: Oxford University Press, 2007), 4.
[176] Ibid., 6.
[177] Ibid., 6.
[178] Ibid., 6, 18.
[179] Ibid., 19.
[180] Ibid., 19.

power of the punitive state and the removal of healthy-working age adults. Governing through crime punishes, represses, and confines.[181]

The old, New Deal, 'welfare state', and its more humane prison system, dealt with crime a bit differently. Simon writes "Rehabilitative penal policies promoted a kind a solidarity project by legitimizing a balance of risks between convicted criminals and society. Institutions like parole, probation, and juvenile justice all reflected a willingness to take a risk on offenders, and reduce the risk that adult imprisonment would do them more harm."[182] The 1980s saw the spread of new penal policies: pragmatic risk management of a presumptively dangerous population combined with a populist punitiveness; the creation of a new political order; a steady flow of laws (since the 1970s) to combat the criminal justice system's decisions perceived to be favorable to criminals (i.e. bail law, insanity defense, sentencing law, and corrections law); the curtailing of judicial discretion; and the introduction of zero tolerance. A judge's discretion to deviate from sentencing guidelines shifted in favor of prosecutors. The law "should reflect loyalty to the victim of crime."[183]

Simon says that the 1980s brought into existence a historically unique penal form: 'mass imprisonment', containing three distinct characteristics of scale, categorical application, and a warehouse-like, waste management-like flavor. More uniform application of prison sentences, as a result of less discretionary power in the hands of judges, added to the number of those imprisoned.[184]

Nineteenth and twentieth century prisons, per Simon, took the form of either 'coercive monasteries' or correctional institutions. The monastery type of lockup sought to cause penitence among those convicted. The means to this end included solitary confinement, locked factories, mills, mines, silence, and group labor. The correctional version offered group therapy and college education. Conversely, prisons today can be defined as 'space of pure custody', a human warehouse or social waste

[181] Ibid., 20.
[182] Ibid., 23.
[183] Ibid., 23, 101-102.
[184] Ibid., 141.

management facility, or human toxic waste dumps. Prisoners are not to be transformed through penitence, discipline, intimidation, or therapy. Security and managing 'intolerable risk' people have become the watchwords of community safety.[185]

Simon writes of the "Criminogenic effects of prisons that send back into society inmates who not only are not rehabilitated, but who have been made more dangerous or rendered dysfunctional by imprisonment."[186] Such a massive prison buildup delegitimizes the political order, writes Simon. It mass produces prisoners, eventual internal exiles, who can neither be governed adequately nor eliminated permanently. The fiscal costs to both states and the federal government of an aging prison population and the economic losses of a heavily criminalized underclass both continue to grow.[187]

Marie Gottshalk expounds further on Jonathan Simon's key book. She writes "The war on crime has created imbalances in the political system. The Department of Justice and the office of the attorney general have swollen at the expense of other parts of the federal government. The power of the prosecutor has expanded at the expense of judges, defense attorneys, and other actors in the criminal justice system."[188] Gottshalk, in her review of Simon, says that even "criminal analogies are wielded in many diverse settings, from homes to schools to the workplace. Principals, teachers, parents, and employers all gain authority…if they can redefine family, education, or workplace issues as criminal matters."[189]

Jonathan Simon, writing in an earlier book, informs his readers that "The massive growth in custody over the 1980s is much discussed today . . . Corrections has become the Pentagon of the state

[185] Ibid., 142-143.
[186] Ibid., 174-175.
[187] Ibid., 175.
[188] Marie Gottschalk. "The Long Reach of the Carceral State: The Politics of Crime, Mass Imprisonment, and Penal Reform in the United States and Abroad", in *Law and Social Inquiry* 34, Issue 2, 439-472 (Spring 2009) 447.
[189] Ibid., 447.

budgets, pushing other service priorities to the side and sending ostensibly conservative governments into a massive buildup of debt."[190]

Simon writes that "From the 1880s to the 1950s, during America's industrial era parole operated largely through the mechanisms of private life: work, family, community . . . today the economy of parole power is the reverse. A large apparatus attempts to focus its power on a population of parolees who are largely unconstrained by private networks of social control.[191] Simon writes that the "normative and normalizing potential of community life is determined . . . by structural economic conditions . . . The growth of an industrial economy in the late nineteenth century and the first half of the twentieth century allowed for the disciplinary organization of social life . . . This social discipline in turn made a strategy of suppressing crime by reinforcing the disciplinary logic of normal social practices through prisons and community supervision techniques like probation and parole."[192]

As noted above, the new penal system, having abandoned the idea of using social discipline to control crime, has become a toxic waste dump for its inhabitants. "It is distasteful to an extreme to use such an expression [the waste management model]. Yet, in a culture for which work remains the overriding source of personal worth, the fate of a class excluded from the labor market is to be treated as a kind of toxic waste. Waste management, however, is not meant simply as a polemical label: it names a whole set of technologies that have arisen primarily around the control of environmental pollution . . . Expensive techniques of discipline, training, or normalization are not warranted if the basic assumption is that there is no realistic potential to alter the offender's status as toxic waste."

Simon stresses the following concerning the new penal harshness towards criminals:

> We must be clear about the potential class consequences of this strategy. The containment sites of this 'toxic waste' will be communities of the underclass. That is where parolees and

[190] Jonathan Simon. *Poor Discipline: Parole and the Social Control of the Underclass,* 1890-1990 (Chicago, London: University of Chicago Press, 1993), 2.
[191] Ibid., 138.
[192] Ibid., 138.

> probationers will be required to live. That is where the drug treatment centers, the halfway houses, and other quasi prisons will be built. This will, of course, help ensure that underclass communities are perceived as dysfunctional and dangerous communities.[193]

Simon adds important thoughts to combatting the get tough on crime effort via the new penal code:

> There is little reason to believe that corrections can remedy a situation driven by the very absence of the infrastructure of social discipline on which it has historically depended. At best, corrections can bring a measure of good government to the poor, but it cannot, at least within the constraints of the larger American political economy, substitute for the regulation and security provided by the private labor market. A solution in any comprehensive sense awaits reinvestment of social capital in institutions or enterprises that allow for the creation of networks of social control.[194]

Simon writes (in the early 1990s) that efforts were undertaken to "build a larger infrastructure of control options like drug treatment and job training."[195] Simon adds, "While the waste management model stresses containment and isolation, the enrichment choice looks toward discipline and self-governance . . . . The primary vehicle for doing more within corrections is to reinvigorate the role of work within punishment . . . . One of the most intractable problems of contemporary parole supervision is simply the huge wasteland of empty time in the lives of so many underclass men." [196]

[193] Ibid., 260.
[194] Ibid., 261.
[195] Ibid., 262.
[196] Ibid., 262-264.

Felon Disenfranchisement: A Growing Underclass

Further thoughts on the underclass, those living in poverty in urban areas, seem necessary and right. Simon's work helps clarify the links between the new penal policies since the late 1970s and early 1980s, the lack of gainful employment, increased idle time, the war on drugs, broken families, the exponential increase in mass incarceration over the last thirty years, and the subsequent increase in the number of felons disenfranchised. Simon briefly discusses some causes of the underclass, citing noted authorities on the issue.

Simon writes that "Some experts have suggested that increasing economic and geographic isolation of inner-city communities since the 1970s has created a profoundly new form of poverty in America."[197] Mainly, "the deindustrialization of American cities has placed the stability of traditional working-class life out of reach for the inner-city poor."[198] Simon adds that "the declining power of the labor market to structure the lives of many in the communities of the urban poor has dire consequences for the criminal justice system and corrections in particular."[199]

"The hardening of urban poverty over the last two decades has paralleled an unprecedented increase in the percentage of Americans in the criminal justice system"[200], writes Jonathan Simon. The lack of jobs has impacted the African-American community the most. 1989 saw one in four black men in custody. Those not in custody faced lives of "forced idleness, deprivation, and exposure to criminal violence . . . . The resulting sense of despair leaves many vulnerable to the attraction of drugs, unsafe sex, and involvement in criminal lifestyles."[201]

The cycle Simon mentions, the "cycle of crime and joblessness profoundly challenges the capacity of corrections to influence the behavior of offenders released to the community. Without the

[197] Ibid., 139.
[198] Ibid., 139.
[199] Ibid., p 140.
[200] Ibid., 141.
[201] Ibid., 141-142.

labor market community supervision has little framework of social discipline to which it can enforce adherence."[202]

Manning Marable, a professor of Public Affairs History and African American Studies and Director, Center for Contemporary Black History, Columbia University, provides more information regarding the condition of blacks in relation to the continued racism of American society and its criminal justice system. Marable writes that the United States, over the course of its entire racial history, has used a "series of state-sanctioned institutions . . . that have 'regulated' the African American population for the purpose of preserving white power and privilege."[203]

First blacks suffered slavery, Marable writes. "Blacks as a group were relegated to life outside of civil society; they were legally defined as private property, not citizens, and were largely excluded from legal and constitutional rights."[204] After the Reconstruction period (1865-1877), blacks "were relegated to a subordinate economic and social status through the Jim Crow segregation . . . the majority of blacks found themselves tethered to the land by sharecropping, debt peonage, 'convict-leasing', and other forms of penury . . . in the twentieth century . . . they quickly confronted a newer form of racial exclusion and stigmatization – the urban ghetto. . . ."[205] Blacks in the ghetto endured redlining, a practice designed to deny blacks credit and capital "needed to purchase their own homes and businesses . . . . They continued to encounter fierce discrimination in employment and suffered from substandard schools, health facilities, and housing . . . ."[206] Marable writes that despite some political victories won due to the combined efforts of groups such as the National Association for the Advancement of Colored People (NAACP), the Congress of Racial Equality (CORE), the Southern Christian

[202] Ibid., 142.
[203] Manning Marable. "Racializing Justice, Disenfranchising Lives: Toward an Antiracist Criminal Justice" in *Racializing Justice, Disenfranchising Lives: The Racism, Criminal Justice, and Law Reader*, ed Marable Manning, Ian Steinberg, and Keesha Middlemass (New York: Palgrave, Macmillan, 2007), 1.
[204] Ibid., 1.
[205] Ibid., 1.
[206] Ibid., 2.

Leadership Conference (SCLC), and the Student Nonviolent Coordinating Committee (SNCC) during the Civil Rights era (1954-75), victories such as the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the establishment of the principles of 'affirmative action' and 'equal opportunity', blacks, in the 1970s, still underwent a "rapid growth of an urban class of black unemployed and low-wage workers whose material conditions were becoming increasingly worse. Millions of blacks and Latinos, trapped inside the rotting central cores of America's deindustrialized cities, lacked meaningful avenues of economic survival."[207] Marable writes that in the mid-1980s, the Reagan administration began to take a 'more aggressive' attitude combatting urban crime. "Municipalities began initiating "'massive street sweeps, 'buy and bust' operations' in predominantly black, brown, and poor neighborhoods." Marable adds that because of this effort, "by 1990 black Americans made up 53 percent of all prisoner admissions."[208]

Felon Disenfranchisement: Prisons Cannot Keep Up

Marable informs the reader that "In almost every state, the numbers of prisoners grew beyond the capacities of the correctional officials and facilities intended to manage them." And Marable offers the example of New York State as an example.[209] "From 1813 to 1981 New York State constructed 33 state prisons . . . . In the following two decades, the state was forced to build another 38 correctional facilities . . . . To pay for this massive prison expansion, New York's legislature reallocated hundreds of millions of dollars from the state's traditional subsidies to the State University of New York system (SUNY) and the City University of New York (CUNY) system."[210] Marable reports, that the operating budgets for New York's public universities decreased 29 percent between 1988-1998, according to

[207] Ibid., 2-3.
[208] Ibid., 4.
[209] Ibid., 5.
[210] Ibid., 5-6.

statistics provided by the Correctional Association of New York and the Washington D.C. based Justice Policy Institute. Funding for prisons increased by 76 percent over that time, writes Marable.[211]

How did the severe cut to funding to New York State universities affect black, Latino, and other low-income New Yorkers? CUNY introduced its own severe budget cuts and increased tuition significantly, "placing education beyond the means of thousands of working-class students."[212]

Manning Marable writes:

> By the initial years of the twenty-first century, there was growing recognition among broad sectors of the American public that the two-decade-long campaigns promoting the mandatory minimum sentences; the eradication of educational, drug treatment, and vocational training programs inside prisons; and other repressive policies were counterproductive and wasteful, both in terms of dollars and in human lives.[213]

The new penal code or policies discussed above have added millions to the rolls of the disenfranchised in America. Michelle Alexander adds her important thoughts to the foregoing discussion through her new book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.

[211] Ibid., 6.
[212] Ibid., 6.
[213] Ibid., 10.

CHAPTER FOUR

Felon Disenfranchisement Meets the New Jim Crow

Michelle Alexander, a civil rights lawyer, advocate, legal scholar, and current associate professor of law at Ohio State University, identifies and defines the practice of the 'New Jim Crow' in her book referenced above. The New Jim Crow can be defined as a racial caste system denoting a "stigmatized racial group locked into an inferior position by law and custom."[214] The criminal justice system, as it is for Jonathan Simon, is the gateway into a larger system of racial stigmatization and marginalization, writes Alexander. Mass incarceration not only locks people up in vast numbers, but also creates invisible, 'virtual' walls, bars, and barriers once an offender has been released from prison. Mass incarceration, especially for people of color, creates a status of 'second-class citizenship', legalized discrimination, and permanent social exclusion. Mass incarceration also, with reference to this paper, expands the number of felons unable to vote because of their disenfranchisement.[215]

Alexander uses the term 'undercaste' in lieu of Jonathan Simon's 'underclass', but the terms remain interchangeable. A person of undercaste rank remains "barred by law and custom from mainstream society."[216]

The new penal policies, or the New Jim Crow, if you will, found support among the public through both racialized images of the poor and a conservative led law and order rhetoric. Alexander writes that the drug war hit its stride in 1985 "when the Reagan administration hired staff to publicize the emergence of crack cocaine . . . Almost overnight, the media was saturated with images of black 'crack whores', 'crack dealers', and 'crack babies'."[217]

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[214] Michelle Alexander. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012), 12.
[215] Ibid., 1, 12-13.
[216] Ibid., 13.
[217] Ibid., 5.

Alexander writes that in the late 1960s and early 1970s two schools of thought, one conservative and one liberal, sought to explain to the public the issues regarding race, poverty, and the social order. The conservative school blamed black culture and black character for their poverty. Liberals thought that social conditions were to blame for the plight of the black community. Conservatives, using Daniel Patrick Moynihan's idea of the 'tangle of pathology' of the black family, utilized images of street crime, illegal drug use, and delinquency, and black 'welfare cheats'. The ideas and images competed, as Alexander writes, and the Conservatives succeeded in "using law and order rhetoric in their effort to mobilize the resentment of white working-class voters, many of whom felt threatened by the sudden progress of African Americans."[218]

Alexander reinforces the discussion of the labor woes of the inner-city black ghettoes in the 1980s reported above. She writes that just as the drug war, the entrance of many into the jaws of the new mass incarceration, was beginning, inner-city communities were suffering from economic collapse. Blue-collar factory jobs disappeared. Globalization, technology, and deindustrialization all combined to seriously affect black families. Alexander writes "Those residing in ghetto communities were particularly ill equipped to adapt to the seismic changes taking place in the U.S. economy; they were left isolated and jobless."[219]

"The decline in legitimate employment opportunities among inner-city residents increased incentives to sell drugs – most notably crack cocaine . . . Crack hit the streets in 1985, a few years after Reagan's drug war was announced, leading to a spike in violence as drug markets struggled to stabilize, and the anger and frustration associated with joblessness boiled"[220], writes Alexander. The news magazines *Newsweek* and *Time*, and other news media, ran "thousands of stories about the crack crisis .

[218] Ibid., 45-46.
[219] Ibid., 50.
[220] Ibid., 51.

. . and the stories had a clear racial subtext . . . Between October 1988 and October 1989, the *Washington Post* alone ran 1,565 stories about the 'drug scourge'."[221]

Alexander talks about the 'Silent Minority'. Former prisoners have had their voting rights taken away. State disenfranchisement laws vary as to who can vote while in prison, on probation or parole and what must be done to achieve restoration. Payment of fees and fines, as indicated above (LFOs), must be paid prior to a former offender receiving his rights back.[222]

Michelle Alexander summarizes her views succinctly. The War on Drugs has led to mass incarceration that affects the entire black community. The War on Drugs has redefined the relationship between poor people of color and the white mainstream society, writes Alexander, and such a relationship ensures blacks subordinate and marginal status. The criminal and civil sanctions due to drug convictions control and oppress non-whites in many communities. Echoing Jonathan Simon, Alexander says that "The nature of the criminal justice system has changed. It is no longer concerned primarily with the prevention and punishment of crime, but rather with the management and control of the dispossessed."[223]

Ryan Scott King reminds or informs his readers that Jim Crow is alive. He writes:

> The sheer volume of African Americans who are legally disenfranchised underscores the point that Jim Crow is alive and well and that its modern face is felony disenfranchisement. Disenfranchisement is grounded in no solid legal principle and achieves no policy goal that speaks to the greater social good. Rather, it is retribution and fear that fuel its support. In the twenty-first century, it seems difficult to believe that this country still permits character tests as a means of gaining admission to the voting booth. However, as long as disenfranchisement results from the receipt of a felony conviction, then the United States will fail

[221] Ibid., 52-53.
[222] Ibid., 158-159.
[223] Ibid., 188.

to meet its founding principle of a government 'for the people, of the people, and by the people.[224]

Jonathan Simon, Marie Gottshalk, Manning Marable, Michelle Alexander, and Ryan Scott King all speak for those who have been silenced. The frenzied drive to build and stuff more prisons with more bodies has caused irreparable harm not only to black families, but also to America. The world looks with dismay and little understanding at a country which pretends to be the bastion of liberty, democracy, and freedom, yet finds convenient justifications to deny the most basic human rights to its citizens. Many remain indifferent to the impact of the new racial caste system, of the new penal policies, of the reality of lives lived as second-class citizens by the many millions of new felons, disenfranchised thanks to the War on Drugs begun in 1985. Law and order seems paramount. The criminal paradox says that for all the prisons newly constructed and staffed, America is no safer than before. Throwing lives away in countless cells, depriving prisoners of opportunities to educate and better themselves while in prison, depriving former inmates of compassion, forgiveness, and trust, of chances to achieve rehabilitation when released, erecting virtual walls, bars, and barriers through civil collateral consequences, refusing to allow former convicts full citizenship, and denying felons the right to vote, gives away the lie that America is a land of opportunity and second chances.

Efforts proceed to reform prisons and penal policy. Serious mistakes have been made. Only time will tell on how successful advocates and states will be in turning the tide back to human decency and respect in the care of prisoners. Several authors discuss possible ideas available for the future. Imagine a prison deconstruction boom and subsequently more funding for schools, colleges,

[224] Ryan Scott King. "Jim Crow is Alive and Well in the Twenty-First Century: Felony Disenfranchisement and the Continuing Struggle to Silence the African American Voice", in *Racializing Justice, Disenfranchising Lives: The Racism, Criminal Justice, and Law Reader*, ed. Manning Marable, Ian Steinberg, and Keesha Middlemass (New York: Palgrave Macmillan, 2007), 261.

universities, and health care. Without so many prisons and thousands of incarcerated prisoners one can even imagine safer communities where productive citizens reside full of pride and purpose.

CHAPTER FIVE

Prison Reform: End Mass Incarceration

Michael Jacobson, a former Probation and Correction Commissioner of New York City and former worker in the New York City Office of Management and Budget, writes about money, "the amounts of money used to fund the expansions of jails and prisons, not just in New York but nationally."[225] Jacobson relates the story of managing 60,000 adult probationers at $30 million yearly compared to the city jail which incarcerated 20,000 per day at a cost of $800 million a year. He writes "The per-month expenditure on a jail inmate was over $3,000, compared to just over $40 a month for a convicted felon on probation."[226] He subsequently argued to transfer $20 million from the jail budget to probation, with no avail. If the money had gone to probation, "It could lead to significantly more public safety in the form of less crime committed by those on probation supervision, who could be provided with a host of essential services."[227]

The story of parole and parole officers illumines another way the city of New York spent money. Jacobson writes that parole officers "were taking liberal advantage of the opportunity to violate parolees under their supervision . . . . New York parole officers were violating over 10,000 parolees each year."[228] Jacobson stood amazed that New York City paid $160 million every year to house parolees "who were not accused of committing a crime but rather had violated parole. On top of this expense, the state probably spent another $140 million to house most of these parole violators for another several months . . . . The public safety benefits of locking up for only months thousands of people who were not convicted of a crime completely eluded me." Jacobson came to learn how much money is

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[225] Michael Jacobson. *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (New York: New York University Press, 2005), 4.
[226] Ibid., 4.
[227] Ibid., 4.
[228] Ibid., 5.

wasted on the overuse of incarceration. His experience informed him that spending "fewer of the government's limited dollars could reduce prison populations and increase public safety."[229]

Jacobson writes that:

> Public safety is not the sole province of the criminal justice system. Providing accessible health care protects public safety. Having community-based mental health and child care protects public safety. Having reasonable school class sizes and well-trained teachers protects public safety. Well-funded environmental and transportation agencies protect public safety. If we want to maximize public safety in this country, then we need to shift some money away from the corrections system, where the benefits of locking up nonviolent offenders for longer and longer periods of time are negligible compared to other areas that will result in far greater public safety and healthier communities.[230]

Jacobson adds, "After all is said and done, the number of people in U.S. jails and prisons – almost 2.2 million at the time of this writing – reflects a public policy gone mad."[231]

Jacobson explores how states have reacted to the high costs of mass incarceration. He lists a long litany of mostly positive change: in 2002, 25 states reduced their correction budgets; 13 states closed prisons or otherwise reduced capacity; 9 states cut funding to drug treatment and education; several states laid off corrections officers; Illinois then-Governor Ryan vetoed legislation requiring longer sentences for drug crimes.[232]

Jacobson writes that thanks to deteriorating state economies, state law makers have become willing to reduce corrections budgets. The American public, polled as recently as 2003, seem to be more concerned with education, employment, the economy, and health care, to worry much about crime. He

[229] Ibid., 5.
[230] Ibid., 6.
[231] Ibid., 6.
[232] Ibid., 85.

writes "Given budget pressures and shifting public opinion combined, an opportunity now exists to alter correctional policy and to make long-term changes in how the United States devotes resources to preventing and punishing crime."[233]

Mary Louise Frampton suggests ways to affect penal policy and reject the concept of the 'war on crime'. She writes that fear, "particularly racialized fear of violence, governs most of our criminal justice policy and that public policy will not change until a vibrant constituency demands change."[234]

Frampton writes that such change has two prerequisites: "First, the public must be provided with information that encourages it to view the issue of crime through a less racialized and more accurate lens. Second, people must be informed about the successful alternatives to incarceration and be provided access to the tools necessary to develop such programs in their communities. An obvious place to provide this new lens is the media."[235]

Research shows, writes Frampton, that "people's views about crime are profoundly affected by what they read in the newspaper and see on television . . . . Those views then result in a criminal justice policy that perpetuates the fears and the stereotypes that were developed to justify both the old and the new Jim Crow. The studies show that the media can report on crime in a way that will change public perception. Frampton says that the way news organizations report violent crime both scares readers and viewers and causes them to feel helpless.[236]

Frampton identifies four patterns in crime reporting: violent crime is emphasized, the more unusual the crime, the greater its chances of being reported, even when rates of crime are declining, the

[233] Ibid., 104.
[234] Mary Louise Frampton. "Transformative Justice and the Dismantling of Slavery's Legacy in Post-Modern America", in *After the War on Crime: Race, Democracy, and a New Reconstruction*, ed. Mary Louise Frampton, Ian Haney Lopez, and Jonathan Simon (New York, London: New York University Press, 2008), 213.
[235] Ibid., 213.
[236] Ibid., 213.

coverage of crime remains constant or actually increases, and a disproportionate number of perpetrators on the news are people of color.[237]

The media can not only reduce the public's fear of crime, but it can also communicate and demonstrate "that ordinary citizens can both prevent crime and develop responses to crime that are more successful than incarceration"[238], writes Frampton. Lay people from all walks of life have helped create violence prevention and restorative justice programs throughout the United States. The media, says Frampton, should report that violence is a public health epidemic. Specialists like doctors who study heart disease or lung cancer, "analyze the interactions among the victim, the agent of injury, and the environment, and then define risk factors. Epidemiologists have identified the risk factors for violence as the ready availability of firearms and alcohol, racial discrimination, unemployment, violence in the media, lack of education, abuse as a child, witnessing violent acts in the home, isolation of the nuclear family, and belief in male dominance over women and girls."[239]

Frampton writes that the media can provide information about the success of restorative justice programs and other alternatives to incarceration. "The purpose of restorative justice – an ancient method of resolving disputes that is practiced in indigenous communities and in many countries around the world – is both to encourage accountability by the offender and to heal the wounds to victims, the community, and even the offender resulting from the crime. Crime itself is viewed not as a transgression against the government or the state but as a violation against people and relationships, a tear in the fabric of our society . . . a restorative justice model provides for participation by all parties affected by the crime in the resolution of the problem and the repair of the damage so that true healing can occur."[240]

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[237] Ibid., 213-214.
[238] Ibid., 214-215.
[239] Ibid., 215.
[240] Ibid., 216.

CHAPTER SIX

The 2000 Florida Presidential Election: The Impact of Felon Disenfranchisement

The controversial and contested 2000 Florida Presidential election brings into sharp focus the impact of felon disenfranchisement on American democracy. Representative John Conyers, Jr., writing in the foreword to Elizabeth A. Hull's book on the disenfranchisement of ex-felons, says, "In the state of Florida alone, an estimated 600,000 ex-felons were unable to vote in the 2000 Presidential election. Denying their voice may have literally changed the history of this nation."[241] Conyers says that disenfranchisement diminishes "the legitimacy of our democratic process . . . denying voting rights to ex-offenders is inconsistent with the goal of rehabilitation. Instead of reintegrating such individuals into society, felony voting restrictions only serve to reaffirm their feelings of alienation and isolation."[242]

Conyers writes that "We should honor the principle that once a felon has served his time, he is ready to be a functioning member of society. Voting must then be allowed, as the most basic constitutive act of citizenship."[243] In 2000 4.6 million felons were barred from the polls and until that election felon disenfranchisement remained a non-issue. The excruciatingly close 2000 Presidential election changed all that. Editorials, television, academic conferences, advocacy groups, and legislative reform all took up the cause as never before. Elizabeth Hull writes that legislators became uncomfortable with the thought of granting the right to vote to felons. "What are legislators to do if ballots are cast by too many 'undesirables' – classes of voters, say, whom they presume would support the 'wrong' sort of candidate?"[244]

Hull informs her readers that in November 2000, 7.48 percent of black men could not vote, seven times the national average, and in Florida of that year 16.02 percent of blacks could not

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[241] Hull, ix-x.
[242] Ibid., x.
[243] Ibid., x.
[244] Ibid., 1, 6.

participate in the election. She agrees with John Conyers Jr. that democracy is "dealt a blow whenever citizens are prohibited from voting, but the blow . . . is even more damaging when a disproportionate number of these citizens are racial or ethnic minorities…they have difficulty safeguarding their interests through the political process . . . ."[245]

Hull writes that "with respect to its disenfranchisement policies, the United States not only parts company with most other democracies, but aligns itself with many of the world's most authoritarian regimes."[246] Augusto Pinochet pushed through a constitutional amendment prohibiting ex-prisoners from voting for their lifetimes soon after gaining office after the coup on 11 Sep 1973 in Santiago, Chile.

So why was Florida so important in the 2000 Presidential election? Al Gore, the Democratic Party Presidential candidate of that year had received the majority of the national popular vote. In Florida he lagged behind his opponent, George W. Bush, the brother of then-Florida Governor, Jeb Bush. In the end George Bush won the Florida popular vote by 537 ballots and in so doing won all the 25 Florida Electoral College votes, giving Bush the White House.[247]

Elizabeth Hull writes "Disenfranchisement is not, at its core, about philosophy, electoral integrity, criminology, or judicial interpretation. It is about politics and power. Accordingly, there is one reason, beyond all others, why disenfranchisement laws stay on the books: incumbents are convinced that they preserve the political status quo from which they themselves are benefitting."[248] She quotes the work of Manza and Uggen who say that "disenfranchisement laws might have provided the scratch hit that allowed George W. Bush to score a disputed winning run in the 2000 contest for the White House . . . while they note that many factors could have affected the outcome of the 2000 election, they conclude that the participation of even a fraction of these former convicts would have enabled

[245] Ibid., 9.
[246] Ibid., 13.
[247] Ibid., 55.
[248] Ibid., 127.

Bush's Democratic rival, Al Gore, to overcome Bush's Florida margin (537 in the final count) and capture the State's electoral votes."[249]

Florida in 2000, Hull informs us, denied 600,000 ex-felons from casting a ballot. Republican officials, she writes, "were determined to prevent any of them . . . from blocking George W. Bush's victory in the state."[250] It seems that in November of 1998, the Florida Secretary of State, one Kathleen Harris, paid the firm Database Technologies, Inc. (DBT) a grand total of $4 million "to expunge from the state's voting rolls duplicate registrations, people who had died, and felons."[251] The purged or scrubbed lists turned out to be wildly inaccurate. Conviction dates were cited in the future, names were mistakenly expunged . . . DBT intended to strike out the names of anyone whose name, date of birth, and social security numbers matched those of a known felon . . . in May 2000, using a list provided by DBT, Harris's office also ordered counties to strike from eligibility lists any former inmates who had moved to Florida after their voting rights had been restored by other states. Harris was well aware that purging these people was unconstitutional . . . ."[252]

Maine: Enfranchising Felons, Showing the Way

The remarkable state of Maine confounds the imagination with regard to felon disenfranchisement. Unlike the experience of felons residing in Florida discussed above, Maine is one of two states in the United States which allows felons to vote, even in prison. Elizabeth Hull recounts the moving story of how the state of Maine came to allow those incarcerated to vote. She quotes Sarah Walton, the former president of Maine's League of Women Voters:

> In the midst of America's movement toward independence, back when Maine was a part of Massachusetts, the writers of the state constitution were all too aware of the state's

[249] Ibid., 130.
[250] Ibid., 134.
[251] Ibid., 134.
[252] Ibid., 135.

> ability to silence dissent with incarceration. Therefore, in the democracy they created those incarcerated retained their right to participate in our self-government despite their loss of physical liberty. When Maine became a state, its constitution also allowed Maine's citizens who were in prison to vote. And why shouldn't they? Inmates in Maine prisons are still human beings and Maine citizens, many with family and property. Their obligations as Maine taxpayers do not cease while they are in prison. Stripping prisoners of the right to vote will not deter crime, provide restitution to victims, nor promote rehabilitation. In fact, especially for those few who do exercise the right to vote, this move to take away their right to vote would only serve to further alienate and isolate these prisoners, the vast majority of whom will ultimately return to our communities.[253]

Maine shines as a wonderful example of what could happen in other states. Richard K. Scher issues a "call for thinking about voting rights in new, even revolutionary ways."[254]

"For Americans, the most revolutionary step would be to stop thinking of voting as a privilege. It has to be conceived as a right, because once it is, most of the blockades that we set up to keep people from voting will, like the walls of Jericho, come tumbling down . . . If voting is not really seen as a right – even a second-rate right – then it can be extended and withdrawn at will, depending on the wishes of those in power."[255] Scher asks, how do Americans begin to think of voting as a right? He proposes passing a constitutional amendment "that conveys, absolutely and without exception, the right to vote for Americans . . . the amendment should be designed for inclusion, not exclusion. The amendment must apply universally. Everyone sixteen or older can vote.[256]

[253] Ibid., 138.
[254] Scher, The Politics of Disenfranchisement, 181.
[255] Ibid., 181.
[256] Ibid., 182.

CHAPTER SEVEN

A Conclusion: Briefly Spoken

Felon disenfranchisement has a long history. For many years the powerful have found ways to justify depriving offenders of their civil rights. The reasons have varied, but the effects have been the same. Those who have lost their honor and status remain less than full citizens, excluded from the mainstream, from normality and stability. Philosophers down the ages have propounded all the reasons for such punishment: the offender did not use sound reason, cannot in fact use reason to conduct his affairs; the offender is immoral, may have engaged in some 'moral turpitude', and is incapable of doing his duty as a member of the polis; the offender violated the sacred social compact or contract and is now subject to just punishment from society; and offenders have lost their voice, cannot vote, cannot participate in how they are to be governed.

Any reform of felon disenfranchisement laws engages in a losing battle, it seems, with such historical foundations. Advocates for felons have made brief inroads to change in states such as Washington, Iowa, Virginia, Minnesota, and Florida. The road to re-enfranchising felons is strewn with boulders and large stones. Felons must pay all of their legal financial obligations, including full restitution and complete court costs prior to a voting rights restoration. Often the restoration process is too hard and cumbersome and many lose heart and don't even try. Groups such as the police, the criminal justice system, and victim's rights defenders stand in the way of re-enfranchising felons.

Felon disenfranchisement has roots in a harsh and persistent racism that infects our country today. Institutions such as slavery, Jim Crow, mass incarceration, and the new Jim Crow provide the cultural, social, and political structure to deny second-class citizens full acceptance into the community. A new penal code, based on a false war on drugs and a media created hysteria and fear of racialized violence, shows some signs of departure, but penal reform, caused mainly by budget restraints, will

come hard. Programs such as Restorative Justice and drug treatment offer promise of healthy alternatives to the present practice of mass incarceration.

Felons not only need re-enfranchisement, they need education and jobs. They need to have all the barriers of the virtual bars and walls confronting them taken down. Recidivism will stay low, if felons work and pay taxes. Recidivism will stay low if felons have little idle time in which to contemplate disaster. Recidivism will stay low, if society, like the marvelous people of Maine, will graciously accept former convicts back home.

Felons truly resemble the undercaste of Michelle Alexander's experience. The mark of Cain, the 'nota' of the Roman censor, who placed a mark by the name of offenders on the census, a mark that remained for life, haunts every ex-con. It appears easily on the internet, on job and housing applications, on applications for college financial aid, for welfare assistance, and on dating sites.

The felon disenfranchisement of this paper has traveled through the streets of Athens, Rome, Central Europe, England, the American colonies, through the remarkable time of the first Reconstruction, and through the thousands of cells of lonely felons, victims of deindustrialization, globalization, broken families, and a poor education. The felon disenfranchisement of this paper has traveled through varied attempts to re-enfranchise the silent until legislatures and governors think otherwise and turn back to supporting disenfranchisement policies.

Imagine felons regaining the right to vote based on their law-abiding behavior and not on completing their sentences. A probation or parole officer informs some bureaucrat in some office of some Department of Corrections of any one state of the union that John or Jane Doe Felon, has been doing well, is doing well, and deserves at least one reward: the early return of his or her voting rights. The Department of Corrections then dutifully notifies the judicial system or the elections commission and requests that they mail to John or Jane Doe their restoration of voting rights letter. Imagine Congress finding the political will to pass a Constitutional amendment guaranteeing the right to vote to

every American citizen, regardless of a criminal background. The principle of universal suffrage, the idea that voting is a right, not a privilege, put into practice through the action of the federal government through amending the Constitution, will go a long way to re-enfranchising our silent felons, who for far too long have remained outsiders to our not-so-wonderful story of democracy. The motto of the day stands: Re-enfranchise felons, for it is the right choice.

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