

JUSTICE DENIED



How Felony Disenfranchisement Laws Undermine American Democracy

Elizabeth Simson

John Kenneth Galbraith Fellow

March 2002

**AMERICANS FOR DEMOCRATIC
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Disenfranchisement is the harshest civil sanction imposed by a democratic society. When brought beneath the axe, the disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which govern him and his family.

- Federal Judge Henry Wingate, *McLaughlin v. City of Canton*, 947 F. Supp. At 971 (S.D. Miss. 1995)ⁱ

Men are so constituted that they derive their conviction of their own possibilities largely from the estimate formed of them by others. If nothing is expected of a people, that people will find it difficult to contradict that expectation. By depriving us suffrage, you affirm our incapacity to form intelligent judgments respecting public measures.

- Frederick Douglassⁱⁱ

The right to vote is not only a sacred testament to the struggles of the past. It is an indispensable weapon in our current arsenal of efforts to empower those who have traditionally been left out.

- President William Jefferson Clintonⁱⁱⁱ

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

- Joe Loya, disenfranchised ex-felon^{iv}

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EXECUTIVE SUMMARY

In the United States today, 4.2 million felons and ex-felons are stripped of the vote, constituting a full 2.1 percent of the American voting-age population. Felony disenfranchisement is governed entirely on the state-level, which creates a web of uneven laws with varying degrees of severity across the nation. In Maine and Vermont, for example, the state imposes no voting restrictions upon felons, even allowing incarcerated felons to vote. In the other forty-eight states and the District of Columbia, incarcerated felons cannot vote, with many of these states further disenfranchising felons during parole or probation sentences. Most harsh are the thirteen states that impose lifetime disenfranchisement on felons, permanently denying ex-offenders the full restoration of their civil rights.

Felony disenfranchisement is inconsistent with our modern notions of a punitive system which prioritizes rehabilitation over retribution. Denying already-marginalized individuals their political voice undermines the very democratic ideals which the United States strives to embody. And given the current crisis in our criminal justice system, with its ever-rising incarceration rates due to conservative “tough on crime” policies, the impact of felony disenfranchisement laws is profound.

Felony disenfranchisement laws themselves have their roots in the Jim Crow tradition which produced poll taxes, literacy tests, and other racially-biased schemes for diluting black voting power in the post-Reconstruction era. The 1965 Voting Rights Act mandated the end to overtly discriminatory practices. However, without an explicit proclamation of a right to vote in the United States Constitution, so-called “facially neutral” policies such as disenfranchisement laws are constitutionally permissible.

Over 6.3 million individuals are enmeshed in our criminal justice system as incarcerated felons, probationers, or parolees. According to Department of Justice data, black males have a 28.5 percent chance over their lifetimes of being convicted of a felony, much higher than for any other demographic group. The disparately high number of black felons means that currently 6.3 percent of the national black population is disenfranchised. Furthermore, in some states the size of the incarcerated population skyrockets beyond this rate, a politically significant occurrence given the electoral college system. Florida, for instance, has one of the nation’s highest felon populations coupled with harsh disenfranchisement laws which penalize ex-felons along with felons. To date, almost one in three black male Floridians has been *permanently* barred from voting.

The repercussions of this large-scale disenfranchisement were felt in Election 2000, when a mere 537 votes in Florida determined a victory for George W. Bush. Demographic statistical data show that because of their likely race and socioeconomic statuses, the vast majority of disenfranchised felons align themselves politically with the Democratic Party. Among other lessons learned in the wake of the 2000 presidential election was the power of every vote; this makes the fact that in Florida over 700,000 felons were unable to cast ballots simply inexcusable.

In a nation newly awakened to the delicacy of the democratic system, felony disenfranchisement laws have begun to fall under the spotlight of policymakers and the national media. The efforts to abolish disenfranchisement laws, however, have been underway for years. This issue has been addressed by various advocacy movements, including the prison reform, social justice, civil rights, and voting reform struggles.

Activists in support of various causes have set out to influence policymakers and educate the public about the injustice of felony disenfranchisement laws, albeit usually as a small part of larger political campaigns. Federal legislators have responded in small numbers, with four House bills introduced in the 107th Congress to date. Yet, questions have surfaced as to the ability of the federal government to determine felony disenfranchisement policies; except in cases of blatant discrimination, the states have jurisdiction over elections due to Constitutional mandate. Law scholars disagree on whether felony disenfranchisement constitutes a case of blatant discrimination which would trump the state's right to govern voting laws.

Active legislative efforts concerning felony disenfranchisement are underway on the state-level as well. In some states where harsh laws have governed felons' voting rights, these laws are being relaxed giving larger numbers of felons and ex-felons the vote. In other states, however, which have traditionally been lenient on such laws, a tide of conservatism has set into motion increasing restrictions on felon voting. These conflicting trends on the state level demonstrate the necessity for federal action if felony disenfranchisement is to ever be effectively abolished.

In addition to legislative activity on the issue, attorneys have taken state felony disenfranchisement laws to court. Utilizing evidence of historical discrimination and a disparate impact, attorneys are challenging these laws under the Fifteenth Amendment and the 1965 Voting Rights Act. The most significant of such cases, which takes on Florida's felon disenfranchisement policy, is set to begin trial in March.

The legislative or judicial procedure of ending felony disenfranchisement is unmatched in both its healing message and political effectiveness, for it can serve as the all-important first step in forging a renewed relationship of mutual respect between the government and those who feel oppressed by its policies.

As an issue, felony disenfranchisement stands at the intersection of many of the most significant causes in the American political landscape. Establishing the right to vote for all Americans should serve as one of the centerpieces of a new progressive political strategy which promotes an inclusive egalitarian democracy through social justice initiatives. Felony disenfranchisement laws are undemocratic and unjust in denying citizens their political voice. And in doing so, these repugnant laws not only strip these citizens of legitimate self-empowerment, but make a mockery of those of us who have faith that our democratic system can spawn a just society.

CHAPTER I

The American Criminal Justice System and Voting Rights

For most Americans, felony disenfranchisement does not jump to mind as one of the most pressing civil rights challenges facing our democracy today. In fact, many Americans do not even know that the right to vote is stripped from incarcerated convicted felons in 48 states and the District of Columbia, felons on parole in 32 states, felons on probation in 28 states, and ex-felons who have completed their sentences in 13 states.^v Due to the flourishing of harsh criminal justice policies, incarceration rates have skyrocketed over the past 20 years, particularly in communities of color. As a result, felony disenfranchisement rates have reached a level warranting public alarm. The urgency of this issue was vividly illustrated by our most recent presidential election, in which a mere 537 votes in the state of Florida decided the victory for George W. Bush. As a point of reference, Florida's disenfranchised felon and ex-felon population dwarfs this margin of victory: on November 7, 2000, in Florida, 647,100 citizens were unable to cast a ballot due to felony disenfranchisement laws, 436,900 of whom were ex-felons who had successfully completed their sentences.^{vi} The numbers demonstrate that this is a problem worth our careful examination before the next major election.

Even more important than the electoral consequences of this mass disenfranchisement is the disillusionment of the individual felons, their families, and their communities. For these individuals, America's grand democratic experiment has failed to deliver its promise of citizen empowerment. They have lost their most basic right as citizens of a democratic nation. Now is the time to address this critical issue. It is one which weaves together the modern civil rights struggle, the movement to strengthen our democracy through social justice initiatives, and the efforts to promote humanitarian reforms in our criminal justice policies and incarceration practices.

A. The Development of Felony Disenfranchisement Practices and Punishment Theory

"Man is born free, and everywhere he is in chains."^{vii} The bondage to which Rousseau referred in this oft-quoted line is the social contract of the body politic. In modern American

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political society, criminal justice theory often stems from a sense of the “broken” social contract. Invoked within this idea are notions of the perpetrator’s free will and his actions as a violation of the public good.^{viii} But what does it mean exactly to “break” the social contract? Does this merely translate into breaking a law? According to social contract theory, every law must necessarily exist for the express purpose of the public good. Given this, what are repercussions if and when we determine that our democratic system creates laws which are *not* necessarily in the best interest of society as a whole? Is breaking the law equivalent to breaking the social contract then? As to the notion of free will, this assigns every person the role of a free agent, putting him on equal footing with all of his fellow citizens in society. Yet, can we truly declare our society a haven of true equality by each of its members, a place where each individual has the capacity to act as a free agent? Or do we instead view our society as a place where the circumstances of an individual’s birth, his race, his regional location, his socio-economic status, and his gender, restrict the degree to which he can act as a free agent?

All of these, and many other questions, lead us to critically examine a criminal justice system based upon the social contract. In the tradition of John Locke’s view that natural rights are a “sanction” on the terms of the social contract, modern liberalism includes the notion that there exist fundamental rights and liberties which a person cannot ever legitimately give away. Thus, we must monitor our system of punishment, censoring those practices which violate fundamental rights as simply too severe for our criminal justice system to legitimately inflict.^{ix}

It is time to reevaluate our modern system of felony disenfranchisement laws, those regulations which take the voting rights away from individuals who have committed felonies. This practice has its roots in ancient Greece and Rome, where criminals were given “moral censure” as part of their punishment.^x By the Middle Ages, this practice had spread throughout Europe, evolving into a physical banishment of criminals from society, in effect a “civil death.”^{xi} As this tradition traveled from Europe to the North American colonies, and later became incorporated into the American democratic system, the notion of “civil death” easily translated into exclusion from participation in the democratic system.^{xii} In this way, today’s felony disenfranchisement laws are a vestige of archaic justice systems.

The theoretical justifications for this form of criminal punishment begin with the broken social contract. This necessarily hinges on the free will of the criminal and his choice to defy the contractual agreement of his citizenship. And once this violation of the social contract is established, there are various rationales for the ensuing punishment. Criminal justice attorneys

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Howard Itzkowitz and Lauren Oldak have organized these rationales into four categories: deterrence, rehabilitation, retribution, and incapacitation.

This first is a rationale based upon deterring further criminal activity in the society as a whole. In this sense, the punishment is viewed as a preventative measure that promotes the well-being of the society. The concept of deterrence is oftentimes used to rationalize the need for harsh penalties for those who engage in illegal activity. Criminal justice studies have demonstrated, however, that stiff penalties rarely deter future crime. There is no evidence that felony disenfranchisement acts as an effective deterrent to would-be criminals. The threat of incarceration or probation, both limitations on one's physical liberty, constitute much more plausible deterrents than the non-corporal restriction of disenfranchisement. Those states which utilize harsh forms of felony disenfranchisement laws often have higher recidivism rates than those states which utilize more lenient forms of disenfranchisement laws.^{xiii} In this way, the institution of felony disenfranchisement fails the test of effectively stymieing criminal activity. Thus the punishment rationale of deterrence does not justify felony disenfranchisement laws.

A second rationale for punishment within the criminal justice system stems from the desire to rehabilitate the offender. This rationale is based on benefits for both the offender and his community, as the process of rehabilitating criminals will result in a safer living environment for everyone. The very label of "correctional," given to prison facilities and government departments which coordinate incarceration activities, indicates the central role that rehabilitation plays in American criminal justice theory. Ironically, felony disenfranchisement laws are entirely counterproductive to rehabilitating offenders.^{xiv} Excluding individuals who are incarcerated from the political society sends a message of isolation and indifference, indicating the government's lack of faith in individuals who may already feel betrayed by the system. Gradually giving offenders increased responsibility and ensuring that they feel part of a greater community is rehabilitative; taking away their right to vote clearly is not.

A third rationale for punishment is retribution. The desire to seek revenge upon criminals clearly defined earlier systems of punishment. In our modern system, however, we realize the anti-rehabilitative nature of such medieval practices, and we frown upon vengeance as morally reprehensible. Theories rationalizing retribution range from the desire to restore a community's "social equilibrium" to attempts to teach moral responsibility.^{xv} In addition to the moral questionability of these notions of revenge and the counterproductive nature of such

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punishment in rehabilitating the offender, retribution as a rationale for punishment leads to another complication. In the words of criminal theory scholar Michael Tonry:

Whatever the rationale, all retributive theories presume equal opportunities for all to participate in society. When some are prevented from full participation by discrimination, disability, or exclusion, by denial of access to public goods, or by the burdens of social and economic disadvantage, it is difficult to claim that they enjoy the benefits of autonomy that produce obligation.^{xvi}

Unlike the punishment theories of deterrence and rehabilitation, which are legitimate rationales for punishment and are merely ineffective in the case of felony disenfranchisement laws, retribution as a punishment theory fails our modern-day sensibilities of morality. In terms of felony disenfranchisement laws, stripping felons of their voting rights for reasons of pure retribution appears at face value to be immoral, anti-rehabilitative, and even unjust.

A final category of punishment rationales is that of incapacitation. This consists of stripping from the offender the ability to take part in an aspect of society for the benefit of the community. Thus, incapacitation seems to be a legitimate rationale for incarcerating felons who have committed violent crimes, as this serves to protect the community from potential violence. In terms of removing the ability to vote, however, the legitimacy of incapacitation is less logical. The rationale rests upon a claim to uphold the “purity of the ballot box.”^{xvii} Usage of this terminology is explained in a 1972 Ninth Circuit decision, *Dillenburg v. Kramer*:

Courts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crime. . . Search for modern reasons to sustain old governmental disenfranchisement prerogative has usually ended with a general pronouncement that a state has an interest in preventing persons who have been convicted of serious crimes from participating in the electoral process or a quasi-metaphysical invocation that the interest is preservation of the “purity of the ballot box.”

This “purity of the ballot box” encompasses both an attempt to prevent voter fraud and a desire to exclude from the democratic participatory process those who have “proven their immorality.” There is a fear that criminals may pollute the outcome of elections. This first claim of voter fraud might plausibly be applied, if anywhere, to individuals who have been convicted of the specific crime of voter fraud, only a tiny percentage of those incarcerated. The second claim of exclusion from the democratic process was declared illegal by the Supreme Court. In terms of a fear that ex-felons would influence electoral outcomes, particularly

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effecting lenient criminal justice laws, no evidence exists that ex-offenders would vote for candidates with such policies. In addition, this theory presupposes that there will be candidates supporting such policies who would receive a large percentage of the non-ex-felon vote, a highly unlikely scenario.^{xviii}

In terms of the legal justification for “protecting the purity of the ballot box,” this rationale exhibits the exclusionary tendency of what political scholars terms “civic republicanism.” Today, we have moved away from this mentality with its emphasis on moral competence and civic responsibility, instead embracing notions of equality and inclusiveness. Ultimately, the question of “purity” in terms of voter qualification and the electoral system translates to the “fencing out” of citizen groups because they lack civic virtue or because of the way they may vote.^{xix} This was the very exclusionary argument used against the poor, blacks, and women at various points in American history.^{xx} And in 1973, the Supreme Court wrote in *Carrington v. Rash*: “‘Fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”^{xxi} With this background, the rationalization of felony disenfranchisement laws through incapacitation is as untenable as those rationalizations through deterrence, rehabilitation, and retribution.

B. Rehabilitation as a Lost Priority

Certainly, a society has the right to punish those who break the social contract. This follows from an Enlightenment theory, explored by Michel Foucault in *Discipline and Punish*, in which society takes on the role of the offended when a criminal violates the trust and insults the dignity of the community’s civil code.^{xxii} Yet, as Marc Mauer and Jamie Fellner warned in their 1998 report on felony disenfranchisement laws, each society must be careful to reevaluate its punishment practices according to the “standards of moral decency or political rights” of the current time. These scholars condemn the practice of disenfranchisement as “a political anomaly in the United States. It may not have been so inconsistent with prevailing political culture when the vote was a privilege from which most Americans were barred on grounds of property, race, education or sex.”^{xxiii} But since such disenfranchisement laws have been put on the books, our society has evolved with remarkable speed toward an equitable democracy for all its citizens. In this current climate, felony disenfranchisement laws are now out of place. In the words of Supreme Court Justice Thurgood Marshall, disenfranchisement “doubtless has

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been brought forward into modern statutes without fully realizing the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.^{xxiv}

Disenfranchisement laws are out of place in our current punitive system that is focused on incarceration. Felony disenfranchisement is not conferred by a judge as part of a sentence, and thus co-opts power from the judicial branch and unfairly penalizes all convicted felons without regard to the severity of their offenses or any mitigating facts brought out in their trials.^{xxv} Furthermore, a felon does not relinquish all of his rights upon incarceration. While incarcerated, prisoners are not denied their freedom of religion, speech, or due process, nor are they unprotected against cruel and unusual punishment.^{xxvi} And in terms of appropriateness, the preservation of one's civil rights seems less potentially destructive to the prison system than the preservation of such sacred constitutional guarantees as the freedom of speech, right to due process, and protection from cruel and unusual punishment.^{xxvii} One legal scholar of felony disenfranchisement laws, Andrew Shapiro, points out, "we narrow these [fundamental] rights only to the extent that they interfere with legitimate objectives of incarceration. It's not at all clear how allowing felons to vote disrupts imprisonment."^{xxviii} As it is reasonable to restrict such rights only insofar as the restriction promotes the safety of the community and the prison system, the need for felony disenfranchisement laws is particularly unclear.^{xxix}

Felony disenfranchisement's firm rooting in the American punitive system exemplifies how far away from its rehabilitative goals it has grown. And yet, throughout the world there are many prison systems that make wholehearted efforts at rehabilitation. Some prison employment programs are a particularly productive and proven form of rehabilitation, although sadly in the United States, there are some prison employment programs that are punitive, and far more eligible and willing prisoners than constructive jobs to go around. A steady complaint among prisoners is the lack of access to prison employment. In Denmark, for example, inmates are given budgets to purchase their own food and often pool their money to work together cooperatively. Here in the United States, a Utah penitentiary provides money for prisoners to purchase food from the prison canteen through checks, thus training inmates to spend wisely and balance their checkbooks. Other simple examples of rehabilitative exercises involve preparing resumés for post-release employment.^{xxx} However, far too many American prisoners have a much bleaker existence, lacking these rehabilitative experiences. From the perspective of one inmate inside the prison's walls, the current system sponsors sanctioned cruelty with little effort placed on rehabilitating criminals into humane citizens:

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Mix in solitary confinement, around-the-clock lock-in, no-contact visits, no prison jobs, no education programs by which to grow, psychiatric treatment facilities designed only to drug you into a coma; ladle in hostile, overtly racist prison guards and staff; add the weight of the falling away of family ties, and you have all the fixings for a stressful psychic stew designed to deteriorate, to erode one's humanity. . .^{xxx}

Felony disenfranchisement laws stand today without the support of either a legitimate theoretical or practical rationale; for this reason alone, their place within the American punitive system is highly questionable.

C. "Tough on Crime" Campaigns

The most significant trend in the criminal justice system in recent years has been the rise in conservative criminal justice policies. Felony disenfranchisement laws fall squarely within this so-called "tough on crime" policy stance. The first presidential candidate to campaign heavily on a "tough on crime" platform was arch-conservative Barry Goldwater in his unsuccessful 1964 presidential bid. In his campaign, Goldwater proposed harsh crime control measures as a response to the liberalism of the 1960s. His successor in terms of advocating a harsh brand of criminal justice was Richard Nixon, a proponent of strict crime control policies and initiator of the now-infamous War on Drugs.

By the 1988 presidential race between Massachusetts Governor Michael Dukakis and Vice President George H. W. Bush, the partisan nature of the "tough on crime" label was evident. Republicans had not only successfully marketed themselves as "tough on crime," but had cultivated a fear within the American voter of Democratic liberals who were "soft on crime."^{xxxii} This Republican strategy was crystallized in the "Willie Horton" advertisement of the 1988 campaign. The television ad featured the mug shot of incarcerated Massachusetts felon Willie Horton, who, as a result of Governor Dukakis' "soft on crime" policy of weekend release for felons, murdered a white woman. By many political analysts' assessments, this ad served as the turning point in the 1988 election, successfully tainting Dukakis' campaigning efforts. Since then, most successful Democratic candidates, persuaded by the mantra of the Democratic Leadership Council (DLC), have internalized the fear of being painted "soft on crime," going to great lengths to prove to the voting public their harsher than thou criminal justice policies.

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In this way, according to criminologist Steven R. Donziger, member of the National Criminal Justice Commission, politicians “have measured our obsession [with crime], capitalized on our fears, campaigned on ‘get tough’ platforms, and won.”^{xxxiii} In the past twenty-plus years, this has resulted in the election of politicians who have created harsher penalties, such as stricter disenfranchisement laws, longer sentences, higher bails, and mandatory minimums for sentencing. Mandatory minimums, which restrict the discretion of judges in sentencing offenders, have been found to be unsound by ninety percent of federal judges, seventy-five percent of state judges, and even Supreme Court Justice William Rehnquist.^{xxxiv} The results of such practices are arresting—although crime rates have stabilized in recent years, incarceration rates have skyrocketed due to harsh sentencing, three-strikes laws, truth-in-sentencing laws, and mandatory minimums.^{xxxv} Although on its face this might seem to be a cause of concern for politicians, most have shied away from the issue, instead playing on public fears in order to reap the benefits of their own “tough on crime” stances.^{xxxvi}

The resulting climate is one in which even liberal politicians are so terrified of the pernicious “soft on crime” label that they are paralyzed to address harmful conservative policies.^{xxxvii} Former President Clinton, a DLC founder, serves as an exemplar of a socially-principled Democrat who was no liberal in his criminal justice policies. Although by 1992 the nation had undergone a ten-year period of the largest increase in the number of prisoners and prisons in American history, Clinton’s policies, such as the Violent Crime Control and Law Enforcement Act of 1994, helped lead to the incarceration of an additional 673,000 prisoners (compared to the 448,000 prisoners added during Reagan’s eight years in office).^{xxxviii} By December 31, 2000, the U.S. rate of incarceration in federal and state prisons (excluding local jails) had risen to 478 inmates for every 100,000 residents (up from 292 in 1990).^{xxxix} In terms of federal incarceration policies, over which the President has direct control, the statistics are again staggering. Whereas during the Reagan and H. W. Bush presidencies the federal incarceration rates per 100,000 were 17 and 26, respectively, during Clinton’s presidency this rate jumped to 42 per 100,000.^{xl} With over two million men and women in prisons and jails, the U.S. incarceration rate has now reached the astonishing rate of 690 individuals per 100,000 residents, a rate unsurpassed anywhere in the world, with the possible exception of Rwanda, according to Human Rights Watch.^{xli}

In examining these and other criminal justice and incarceration statistics, it is imperative to keep in mind that in our system, not all crimes are created equal. Distinguishing between violent and non-violent crimes is a crucial part of understanding any criminal justice

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statistic or trend. Most Americans assume that rising incarceration statistics translate directly into safer communities; however, this is an incorrect deduction from our current criminal justice data.

A common myth is that U.S. incarceration rates reflect a violent crime rate higher than those of comparable Western nations. Not true. In the U.S. 2.2 percent of the population are victims of the crime of assault with force, whereas in Canada this rate is 2.3 percent, in Australia, 2.7 percent, and in England, 2.8 percent. These statistics are given not to discount or demean the concerns of Americans who fear for their safety, nor to undermine the efforts of those who hope to make our society safer. In light of the vastly greater American incarceration rate, these comparisons serve to illustrate that the recent U.S. trend of skyrocketing incarceration rates is overwhelmingly driven by the conviction of nonviolent offenders. With “three strikes and you’re out” policies, for example, there is no means by which to distinguish violent from non-violent crimes. The result in California is that only 30 percent of those “cast out” of society with a third strike in 1994 were violent offenders. Within the federal justice system, a mere 11 percent of inmates in 1996 had committed violent crimes.^{xlii} Thus, the vast majority of felons convicted, incarcerated, and subsequently disenfranchised under these laws do not in fact pose a security threat to their communities, which makes their long-term incarceration a needless and unproductive safety precaution.

D. The Racial Implications of Criminal Justice Policies

For many criminologists, even more disconcerting than the government’s tendency to gloss over the difference between violent and non-violent offenders is the way crime automatically becomes a racialized problem. Criminologist Steven R. Donziger has harsh words for “tough on crime” campaigns and the politicians who espouse them:

When politicians openly paint crime with an African-American face—as in the Willie Horton ad—or simply boast of getting ‘tough’ on law-breakers in urban areas, they exploit latent racial tension for political purposes. They also move our nation one step closer to a racial abyss that has little to do with the creation of a safe society.^{xliii}

As criminologist Michael Tonry describes these criminal policies, “the text may be crime, the subtext is race.”^{xliv} Masking public speech about race with a façade of criminal justice became necessary in the 1960s when political dialogue—although not necessarily personal views—

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began to lose some of its overtly racist tone. In President Nixon's 1968 acceptance speech, he avoided blatantly racist remarks, cloaking them in the following criminal justice rhetoric:

As we look at America, we see cities enveloped in smoke and flame. We hear sirens in the night For the past five years we have been deluged by government programs for the unemployed; programs for the cities; programs for the poor. And we have reaped from these programs an ugly harvest of frustration, violence, and failure across the land.^{xlv}

By 1969, there was a general recognition that law and order had disintegrated, at least in urban centers, and the blame for this catastrophe fell squarely on the shoulders of the black community. Although dramatic civil rights gains had been made by dedicated activists and liberal politicians throughout the 1960s, a backlash of conservative and moderate political leaders (such as Barry Goldwater, Richard Nixon, and New York Governor Nelson Rockefeller), began to advocate harsh criminal justice policies.^{xlvi} With such policies as New York's Rockefeller Drug Laws of 1973, the "race to incarcerate" (terminology of The Sentencing Project's Marc Mauer) began. This "race" continued at full speed in the 1980s during President Ronald Reagan's "tough on crime" campaign. Throughout Reagan's presidency, the White House unleashed propaganda to vilify criminals and to create a climate of panic about violence, thus winning public support for harsher criminal penalties.^{xlvii}

Referencing "tough on crime" policies, renowned criminologist and member of the National Criminal Justice Commission Norval Morris declared, "the whole law and order movement that we have heard so much about is, in operation, though not in intent, anti-black and anti-underclass—not in plan, not in desire, not in intent, but in operation."^{xlviii} And Morris is not alone in this opinion. From the Green Party to the United States Commission on Civil Rights (USCCR), this same sentiment echoes through assessments of many current practices, from disenfranchisement to capital punishment.^{xlix} For example, in condemning various practices within the problem-ridden 2000 presidential election, the *Draft Staff Report* from the USCCR assesses felony disenfranchisement laws with the following concern: "Advocates of stricter punishment of particular crimes . . . seldom acknowledge the diverse manner in which people of color receive more frequent convictions and harsher sentences than their white counterparts."¹

Certainly this point is hard to dispute. Department of Justice statistics indicate a hugely disproportionate number of convicted felons to be people of color. In the past ten years, the

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rate of incarceration of black men has risen ten times as quickly as for of white men, resulting in an incarceration rate eight times higher for blacks than for whites.^{li} In 2000, white males had an incarceration rate of 449 sentenced prisoners under state or federal jurisdiction for every 100,000 residents, compared to 3,457 for black males. By the end of 2000, although only 12 percent of the American population was black, 46.2 percent of prisoners under state or federal jurisdiction were black (35.7 percent were white, 16.4 percent were Hispanic, and 1.7 percent were classified as “Other”). According to the calculations of The Sentencing Project, if current incarceration rates remain steady, over 28 percent of all black men will have been incarcerated at one point in their lifetime. This figure is six times that of the lifetime likelihood of incarceration for white men.^{lii}

Even more worrisome, however, are the many studies which have shown that discrimination occurs at all steps of the criminal justice process. For example, although black populations have been proved to use drugs at approximately the same frequency to white populations, blacks constitute 38 percent of all drug arrests. This is a cause for concern in and of itself, but even more appalling are the statistics which show that 59 percent of those convicted for drug offenses are black, and a full 74 percent of those sentenced to prison for drug offenses are black. Thus, after starting on an uneven playing field due to racial profiling or law enforcement’s targeting of low-income inner-city neighborhoods, a black offender is likely to receive increasingly disparate treatment through his trial and sentencing; black offenders are often given less favorable plea bargains than their white counterparts.^{liii} And in inextricably linking the criminal justice system to the electoral system, felony disenfranchisement laws ensure that any of these discriminatory biases translate into political disempowerment, thus tainting the democratic system itself.

Citing this and other data, various civil rights and social justice advocates have claimed that racism lies within the structure of the criminal justice system. For many, the mere fact that such great numbers of people of color are impoverished and criminalized by our society, and subsequently tangled in the web of our criminal justice system, proves that racism persists today in devastating forms. Nonetheless, it is important to carefully examine the exact points within the criminal justice process, from racial profiling to drug laws, that reveal any underlying racist tendencies of the system.

The first step is to look at criminalization and the way this process works in our democratic nation. For the diverse citizenry of this country is governed primarily by

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Americans who are white, male, and middle to upper class. In our society, with its “us-them” mentality about power and criminal justice, it is natural for Americans to marginalize criminals and simultaneously assuage communal guilt and responsibility for the criminal behavior. This, as with all components of criminal justice, is additionally charged when speaking in a racial discourse. In our modern society, the “us-them” mentality is tainted by the tendency to paint “us” as white and “them” as black.

This mentality even affects our shifting notions of criminal behavior. As Marc Mauer points out, in the first half of the twentieth century, marijuana was highly criminalized when it was solely associated with “them,” meaning primarily black urban youth. But by the 1960s, when this criminal substance came to be common on the college campuses of white middle-class youth, the drug shed much of its criminal aura, for “criminal” by definition lies with “them,” not with “us.” Subsequently a similar phenomenon occurred with the competing forms of cocaine: “black urban” crack cocaine is highly criminalized while “white suburban” powder cocaine carries much more lenient penalties. According to New York’s Rockefeller drug laws, for instance, trafficking 500 grams of powder cocaine yields the same criminal penalty as trafficking only 5 grams of crack cocaine.^{liv} And due to disenfranchisement laws, these discriminatory methods of criminalization directly impact the democratic functioning of our society as well. Creating a simplistic dichotomy of power by placing government officials vis-à-vis prison inmates, for example, illustrates the ease with which the dualistic categories of empowered and disempowered translate into those of white and black. In rendering “criminals” voiceless in our democracy, felony disenfranchisement laws cement the inequitable distribution of power and justice along racial lines.

CHAPTER II

A History of Exclusion: The Franchise in the United States

A. The “Right” to Vote

Most Americans believe that, as citizens, they are endowed with the right to vote. They are mistaken. Perhaps much of this confusion stems from the frequency with which the expression “right to vote” is used, even in policy documents. For instance, in Representative John Conyers, Jr.’s (D-MI) bill H.R. 906, the Civic Participation and Rehabilitation Act of 1999, which would have legislated the end to felony disenfranchisement, the first finding begins, “The right to vote is the most basic constitutive act of citizenship and may not be abridged or denied by the United States or by any State on account of race, color, gender or previous condition of servitude.”^{lv} While voting may well be “the most basic constitutive act of citizenship,” it is not a right guaranteed by either the federal government or the states. The Fifteenth Amendment, as H.R. 906 references, does forbid the government from discriminatory practices in granting the privilege of the vote, yet the Amendment in no way grants the vote to all American citizens. The Nineteenth Amendment functions in the same way with regard to women.

This grave difference between preventing discrimination and establishing a constitutional right strikes at the heart of many political issues today. For instance, residents of the District of Columbia are denied congressional representation, and the Supreme Court recently upheld a federal district court decision based precisely on this discrepancy. As Constitutional Law Professor Jamin B. Raskin points out in his August 27, 2001 article in *The American Prospect*, although the Constitution would prohibit the government from denying the vote to particular protected groups within the District, because the vote is denied to *all* residents of the District, this practice is constitutional. As the federal district court ruled, “the Equal Protection Clause does not protect the right of all citizens to vote, but rather the right ‘of all *qualified* citizens to vote.’”^{lvi} According to recent Supreme Court precedent, so long as the law that determines “qualification” is not on its face discriminatory, such a law is constitutional.

By this reasoning, the fact that disenfranchising the whole of the District of Columbia results in a disproportionate denial of the vote to citizens of color is irrelevant constitutionally.

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Similarly, in *Bush v. Gore*, a majority of the Supreme Court found constitutional sanction in dismissing the ballots in question, thus disenfranchising many Florida voters. Because this decision applied to all irregular and miscounted votes, without regard to the race or ethnicity of the voters, the majority of Justices found this decision in no way conflicted with protections against discrimination in voting practices. In the case of ex-felons, while a state cannot choose to disenfranchise only black ex-felons, there exists no constitutional barrier to disenfranchising *all* felons, even if the vast majority of these individuals are people of color.^{lvii}

To put this into international perspective, at least 135 nations guarantee the right to vote and to governmental representation to all of their citizens. In fact, in not explicitly providing its citizens with the right to vote, the United States blatantly disregards the United Nations' International Covenant on Civil and Political Rights, and joins only Azerbaijan, Chechnya, Indonesia, Iran, Iraq, Jordan, Libya, Pakistan, Singapore, and the United Kingdom in this practice.^{lviii}

Many Americans, both private citizens and public figures, have long considered the privilege to vote to have evolved into a basic right of citizenship. In the 1886 ruling *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), Supreme Court Justice Stanley Matthews mentioned the franchise specifically in his opinion, stating that “though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.”^{lix} Today, this topic enters the discourse surrounding voting reform ideas. During the 2001 National Commission on Federal Election Reform chaired by former Presidents Jimmy Carter and Gerald Ford (Ford/Carter Commission), Professor William Boone of Clark Atlanta University in Georgia addressed the “disrepair” of the electoral system. Boone based many of his suggested reforms upon the premise that there must be widespread acceptance that voting has fully evolved from a privilege to a right. He emphasized that at our nation’s founding, the privilege to vote was given solely to white, male property owners, as these individuals were deemed to have a vested interest in the governing process. And although today our democratic system is more inclusive and egalitarian, Boone maintained that “it is not universally held among Americans that it is good for all citizens to be extended the privilege to vote.”^{lx}

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B. Steps Toward Inclusion

Although a nation based on democratic principles, America was founded upon exclusion—democracy for some, but not for all. Through the years, electoral participation has been opened slowly to almost every group of Americans. In most cases, these extensions of the vote have come in the form of popular mandates translated into Constitutional Amendments. The first of these was the Fifteenth Amendment which, in 1870, prohibited discrimination against ex-slaves in voting laws. In 1920, the Nineteenth Amendment was ratified, outlawing voting laws which discriminated against women. And most recently, the Twenty-Sixth Amendment, added in 1971, extended voting laws to include individuals aged eighteen and older. Throughout American history, supporters of each of these Amendments fought fiercely against resolute opposition for years, if not decades, before winning their respective battles for the extension of the franchise. And, characteristic of the historical opposition to full egalitarian democracy, even these Constitutional Amendments have not always proven sufficient in curbing discriminatory voting procedures.

Within the past fifty years, federal mandates have served to further protect historically disadvantaged groups from being denied the vote, from people with disabilities to non-English-speaking citizens. The most far-reaching of these legislative initiatives is the Voting Rights Act passed in 1965 during Lyndon B. Johnson's presidency. This Act was aimed specifically at southern Jim Crow laws, quasi-legal actions and intimidation, which often circumvented the Fifteenth Amendment. In installing such ostensibly race-neutral devices as poll taxes, grandfather clauses, and literacy tests, many southern states successfully prevented black citizens from participating in the democratic process. During Reconstruction, before Jim Crow restrictions were put into place, over two-thirds of eligible blacks voted, and many black citizens were elected to legislative positions at local, state and federal levels. By 1940, however, only three percent of southern blacks were registered to vote.^{lxi} In Mississippi, where 40 percent of the voting-age population was black in 1965, the black registration rate sank to a mere 6.7 percent. Thirty-three years since the Voting Rights Act passed, Mississippi's black registration rate had jumped to 74.2 percent in the November 1998 election, an astounding testament to the effectiveness of this federal legislation.^{lxii}

C. Criminal Disenfranchisement as Jim Crow's Legacy

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The Voting Rights Act of 1965 is commonly thought to have dismantled the entirety of Jim Crow voting restrictions, yet many people familiar with felony disenfranchisement laws would disagree. They argue that laws banning felons from voting are the last remaining strand of the web of racist laws instituted in the late nineteenth and early twentieth centuries in many southern states. The Reconstruction-era United States Congress required that in order to be readmitted into the Union, every Confederate state rewrite its constitution according to the newly-passed Thirteenth, Fourteenth, and Fifteenth Amendments. But various states carefully crafted laws which complied with these new Amendments while denying equitable treatment to ex-slaves. In Florida, for instance, while granting suffrage to black citizens in 1868 with its rewritten constitution, the state simultaneously disenfranchised many of its new citizens by restricting all felons from voting for life.^{lxiii}

According to historian Andrew Shapiro, by 1890 other states had begun to realize the potential impact of such felony disenfranchisement laws with respect to limiting numbers of “undesirable” voters; in that year, Mississippi became the first state to tailor its pre-existing laws to target black offenders. At a state convention, it was decided to replace a law disenfranchising those who had committed “any crime” with one that disenfranchised only those convicted of certain petty crimes such as bribery, perjury, and bigamy, all considered to be far more prevalent among black offenders than white.

Through the next twenty years, eleven states followed suit, each fashioning its qualifying offenses specifically to target black citizens. At Alabama’s state convention in 1901, politicians declared that their expressed goal in changing the disenfranchisement laws was to “establish white supremacy,” thus leaving little room for speculation as to the intent and assumed impact of such new laws.^{lxiv} It is true that these disenfranchisement laws were far less effective and more subtle than their Jim Crow counterparts, which included the poll tax and the grandfather clause, but to their creators’ credit, felony disenfranchisement laws are the sole discriminatory voting laws to have survived the test of time.^{lxv} These remnants from the Jim Crow era exist on the books today without the narrowly-tailored focus on black offenders.^{lxvi} And yet, even now, these racially-neutral policies have the same impact that southern statesmen had intended when they enacted them into law one hundred years ago. Felony disenfranchisement disproportionately affects black citizens, diluting the power of the collective black vote in elections, and thus explicitly fulfilling the legacy of the Jim Crow era.

CHAPTER III

The Impact of Felony Disenfranchisement Laws

A. An Overview of State Laws

Today, felony disenfranchisement laws are in place in 48 states and the District of Columbia. In a report collecting and classifying these 49 different state procedures, the Department of Justice admitted that “the laws governing the same rights and privileges vary widely from state to state, making something of a crazy-quilt of disqualifications and restoration procedures.”^{lxvii} According to the U.S. Constitution, all decisions governing voting rights are made at the state level. Even qualifications for voting in federal elections and voting rights for felons convicted of federal offenses fall entirely within state jurisdiction.^{lxviii} Currently, only Maine and Vermont do not impose restrictions upon the voting rights of their felons, even allowing individuals to vote while incarcerated. Sixteen states and the District of Columbia disallow felons from voting while incarcerated, but institute no penalties for those released from prison or jail. Thirty-two states prohibit felons from voting while incarcerated or on parole, and twenty-eight of these states also disallow voting by felons on probation. Finally, thirteen states employ the severe penalty of revoking voting rights for felons even after they have fully served their sentences. In eight states, this penalty is permanent and applies to all felons, while in the other five states felons are affected for varying lengths of time depending upon their release dates and number of offenses. The following chart, last updated in April of 2001, shows the felon populations disenfranchised in each state:

Felony Disenfranchisement Laws, by State, April, 2001

STATE	PRISON	PROBATION	PAROLE	EX-FELONS
Alabama	X	X	X	X
Alaska	X	X	X	
Arizona	X	X	X	X*
Arkansas	X	X	X	

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STATE	PRISON	PROBATION	PAROLE	EX-FELONS
California	X		X	
Colorado	X		X	
Connecticut	X		X	
Delaware	X	X	X	X*
District of Columbia	X			
Florida	X	X	X	X
Georgia	X	X	X	
Hawaii	X			
Idaho	X			
Illinois	X			
Indiana	X			
Iowa	X	X	X	X
Kansas	X			
Kentucky	X	X	X	X
Louisiana	X			
Maine				
Maryland	X	X	X	X*
Massachusetts	X			
Michigan	X			
Minnesota	X	X	X	
Mississippi	X	X	X	X
Missouri	X	X	X	
Montana	X			
Nebraska	X	X	X	
Nevada	X	X	X	X
New Hampshire	X			
New Jersey	X	X	X	
New Mexico	X	X	X	
New York	X		X	
North Carolina	X	X	X	
North Dakota	X			
Ohio	X			
Oklahoma	X	X	X	

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STATE	PRISON	PROBATION	PAROLE	EX-FELONS
Oregon	X			
Pennsylvania	X			
Rhode Island	X	X	X	
South Carolina	X	X	X	
South Dakota	X			
Tennessee	X	X	X	X*
Texas	X	X	X	
Utah	X			
Vermont				
Virginia	X	X	X	X
Washington	X	X	X	X*
West Virginia	X	X	X	
Wisconsin	X	X	X	
Wyoming	X	X	X	X
Total	49	28	32	13

* These states selectively disenfranchise ex-felons. In Arizona and Maryland, ex-felons are only disenfranchised after their second felony. In Tennessee and Washington, ex-felons are only disenfranchised if their offenses predate 1986 and 1984, respectively. In Delaware, ex-felons are disenfranchised for five years after their sentences are complete.

Source: The Sentencing Project^{lxxix}

As is evident, lifetime disenfranchisement for felons is no longer the rule. Over the past forty years, fifteen states have eliminated disenfranchisement laws for ex-felons.^{lxxx} Especially in the past few years, reform of disenfranchisement policies has often appeared on state legislative agendas. In New Mexico, for example, the law permanently disenfranchising ex-felons has recently been repealed by the state legislature.^{lxxxi} And in many other states where felons are disenfranchised for life, recent attempts to reform these practices have met with more limited success, oftentimes reaching the floor of the legislative body before ending in a defeat by a majority vote. Yet in the past few years efforts have been underway on a state level to enhance voting rights for felons in places as diverse as Alabama, Connecticut, Delaware, Florida, Maryland, Pennsylvania, Virginia, and Nevada; this serves as a hopeful sign that, in some places, public opinion and legislative priorities are slowly shifting toward opposition to

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harsh disenfranchisement penalties.^{lxxii} Optimism must be tempered, however, with concern over the public sentiment in other states. Until recently, Utah and Massachusetts were among those states that did not suspend the voting rights of incarcerated felons. These liberal laws were replaced in 1998 and 2000, respectively, with stricter policies whereby felons must surrender the franchise upon incarceration.^{lxxiii}

Almost all states that disenfranchise ex-felons in theory allow them to regain their voting rights through specific legal procedures. The Department of Justice classifies state procedures in five general categories. In some states, voting rights are either not lost at all or are restored automatically upon release from incarceration. Other states automatically restore voting rights once a felon's sentence is fully complete by either the granting of a certificate or the passage of a specified amount of time. A third category includes states that allow voting rights to be restored by a judicial or administrative procedure when an ex-felon can prove his rehabilitation after a given amount of time. A fourth group of states mandates that a felon can only regain the privilege to vote upon a formal pardon. And finally, a few states declare voting rights to be permanently lost with no chance of restoration.

For persons convicted of federal felonies, the restoration process can be particularly difficult. Many states—at least sixteen as of March 1999—have no regulations in place specifically for this procedure. Thus, a presidential pardon serves as the only means by which many federal felons can regain their voting rights.^{lxxiv} Furthermore, the restoration process even for state felons is, as one clemency office employee put it, “sometimes worse than breaking a leg.”^{lxxv} For many ex-felons the court costs and other fees necessary for proving their rehabilitation, or the tedious legal process of submitting an application for a pardon, make the obstacles for restoration insurmountable.^{lxxvi} For example, according to the 1975 *Code of Alabama*, state authorities require a costly DNA sample as part of the application process for regaining voting rights. This situation is made ludicrous by the fact that as of 2000, only 4 of Alabama's 67 counties had correct DNA testing equipment to process the samples.^{lxxvii}

In addition to cumbersome legal procedures, many states do not properly inform felons upon their release of the correct application procedures, which might be regarded as the states' bare minimum responsibility in creating civic-minded citizens of ex-felons. In Florida, where the restoration process was deemed faulty and then readjusted in 2000, less than half of one percent of the states' ex-felons have been able to successfully regain their voting rights in the past year. As the law stands, ex-felons are denied the franchise for reasons such as traffic offenses or back-owed child support, something almost impossible for many recently released

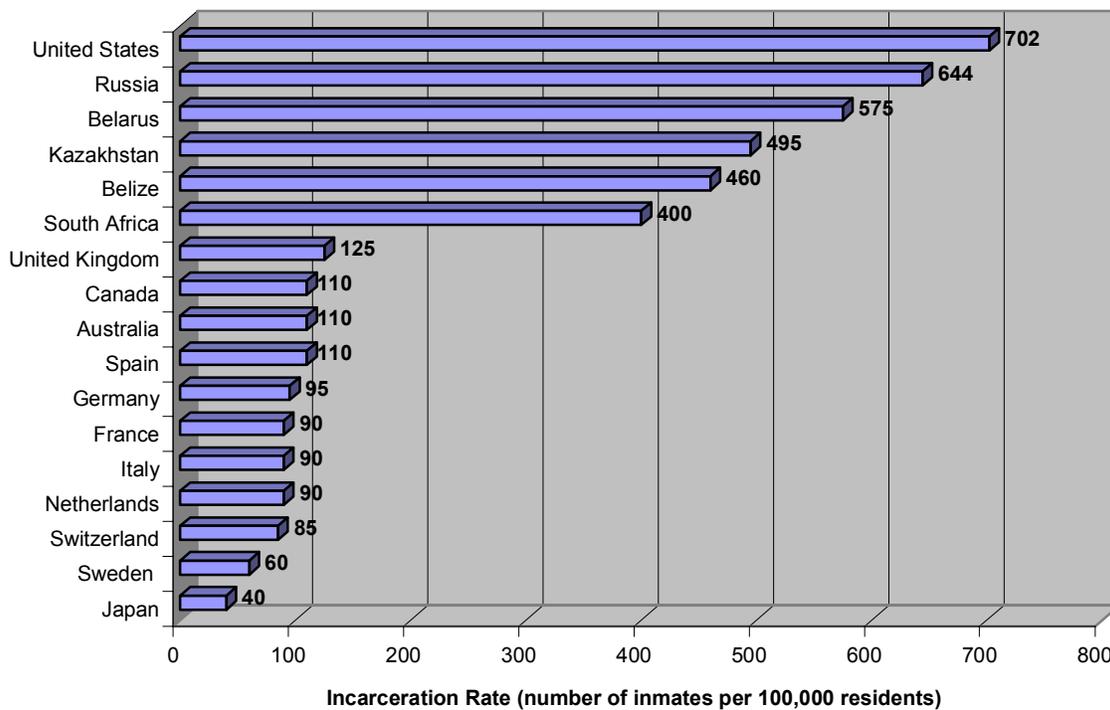
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fathers to pay. One state senator revealed that only 9 of the 175 ex-felons whom he helped through the restoration process were successfully given back their voting rights.^{lxxviii} In Virginia, a state with 200,000 ex-felons, only 404 regained their voting rights in 1996 and 1997.^{lxxix}

B. Incarceration Statistics

The ramifications of these disenfranchisement laws are enormous once the state laws are read along with recent incarceration statistics. As of 1997, it is estimated that 5.1 percent of U.S. residents are likely to be incarcerated in a state or federal prison in his or her lifetime.^{lxxx} According to the most recent Department of Justice statistics, on June 30, 2000, the inmate population in U.S. state or federal prisons or local jails, stood at 1,931,859, translating to a U.S. incarceration rate of 702 inmates for every 100,000 U.S. residents, or 1 inmate for every 142 U.S. residents. These incarceration rates contrast sharply with inmate populations around the world:

Rate of Incarceration in Selected Nations



Source: The Sentencing Project, using most recent available data^{lxxxi}

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The current American incarceration rate is up from 458 inmates for every 100,000 U.S. residents in 1990, when the total inmate population was 1,148,702.^{lxxxii} This translates to an annual average 5.6 percent increase in the American incarcerated population over the past decade.^{lxxxiii} Breaking this rate of increase down into state prisons, federal prisons, and local jails is interesting. While over the past ten years local jail populations have grown at an average annual rate of 4.6 percent, and state prison populations have grown at the somewhat higher annual average rate of 5.9 percent, the number of prisoners in federal custody has more than doubled in the same decade, growing at an average annual rate of 8.8 percent. Most recently, from June 30, 1999 to June 30, 2000, the federal inmate population grew at a rate of 11.4 percent, compared to state prison and local jail rates of 2.4 percent and 2.5 percent, respectively.^{lxxxiv}

Much of this discrepancy in growth rates is due to the federal government's War on Drugs. Although in 2000 the plurality of state prisoners were convicted of violent offenses (48 percent), followed by property and drug offenses (each group comprising 21 percent of state felons), the composition of federal prisons was dramatically different. Only 11 percent of federal prisoners were violent offenders, 7 percent were property offenders, but 57 percent were drug offenders. These drug offenses comprised 60.9 percent of the total growth in the federal prison system during the period 1990 through 1999.^{lxxxv} According to Department of Justice statistics for 1991, even at this early date 61.6 percent of first-time federal offenders were incarcerated for drug offenses, compared to 31.1 percent of first-time state prison admissions.^{lxxxvi}

Thus far, this statistical overview has consisted only of incarceration statistics in terms of state prison, federal prison, and local jail inmates. The majority of felons, however, exist not within prison or jail walls, but under supervised release in the form of probation or parole. In the context of disenfranchisement laws, this is particularly significant given that the majority of states disenfranchise felons serving probation and parole sentences. In 1999, while 1,881,379 felons were incarcerated in prisons and jails, 3,773,624 felons were on probation—with an additional 712,713 felons on parole. These numbers bring the total U.S. population under correctional supervision up to 6,318,900.^{lxxxvii}

Specifically in terms of felons convicted of federal offenses, matching the 119,185 individuals incarcerated in 1999 (57 percent of whom were drug offenders) were an additional 92,768 felons under community supervision (38.3 percent of whom were drug offenders).

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Almost two-thirds of these felons under community supervision were on parole, and the remaining 32,000 federal felons were on probation.^{lxxxviii} As for state felons, 629,218 were on parole in 1999, with Texas and California each holding over 100,000 felons on parole (both states disenfranchise parolees). In the South, where only the District of Columbia and Louisiana allow parolees to vote, 223,922 individuals were on parole in 1999.^{lxxxix} In terms of state felons on probation, Florida, Georgia, and Texas, three states that disenfranchise probationers, had a combined total of over one million individuals serving probation sentences in 1999. The southern region again led the nation in terms of numbers of felons on probation, comprising over 1.5 million of the nation's 3.6 million probationers. As with the parole population, this statistic is important in that the entirety of the southern region, excluding Louisiana and the District of Columbia, disenfranchise felons on probation.^{xc}

For the black and Hispanic communities, these statistics are even starker. According to 1997 figures, black males have a 28.5 percent chance over their lifetimes of being incarcerated in state or federal prisons. This same expected lifetime incarceration rate for Hispanic males is 16.0 percent (contrasted to the rate for white males of non-Hispanic origin of 4.4 percent). In fact, according to these data 15.9 percent of black males are incarcerated in state or federal prisons by the age of 25. For Hispanic males and white males of non-Hispanic origin aged 25 and under, this rate is 6.3 percent and 1.7 percent, respectively.^{xcii} Department of Justice statistics show that of the 1,237,489 prisoners under state, federal and local jurisdiction, 40.9 percent are white and of non-Hispanic origin, 48.5 percent are black, and 17.5 percent are of Hispanic origin.^{xciii} Nationwide, the male incarceration rate is 1,297 inmates for every 100,000 American residents, yet for white non-Hispanic males, this rate is only 683 inmates for every 100,000 residents. The Hispanic male incarceration rate is 1,715 inmates for every 100,000 residents, and a black male incarceration rate is 4,777 for every 100,000 residents. The rate is higher yet for black males 25- to 29-years old; in this subset of the population, there are 13,118 inmates for every 100,000 residents.^{xciii}

In examining total correctional populations, including inmates in state and federal prisons, local jails, and individuals on both probation and parole, a total of 2,149,900 black Americans were under correctional supervision in 1997 (37.8 percent of the total American population under correctional supervision, but only 12 percent of the U.S. population). This statistic shows that a full 9 percent of all black Americans, regardless of gender or age, were serving time for offenses. Obviously, this statistic skyrockets when narrowing the focus to males or to those 20 to 35 years of age.^{xciv} For black males aged 20 to 29, for example, there are over 27,000 adults in prison, jail, on probation, or on parole for every corresponding

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100,000 residents of the same race, gender, and age.^{xcv} This is one in four young black men. In terms of their offenses, many of these black felons are serving time for drug-related crimes. For state prisoners, whereas only 20.2 percent of white non-Hispanic felons and 20.7 percent of Hispanic felons are drug offenders, 57.6 percent of black felons have been convicted of drug offenses.^{xcvi} And for federal prisoners, over 65 percent of black inmates are serving time for drug offenses.^{xcvii} These statistics attest to the degree to which the War on Drugs has wreaked havoc on the black community; over 25 percent of black men in their twenties are currently under correctional supervision, most of these men serving time for drug-related offenses. These statistics, combined with felony disenfranchisement laws, constitute a democratic crisis.

C. Disenfranchisement Statistics

The incarceration rates described above translate directly into a bleak reality: 2.1 percent of the nationwide voting-age population is disenfranchised due to felon and ex-felon status.^{xcviii} And at a time of intense voter apathy, when political leaders have begun to openly discuss ways to remedy the ever-diminishing voter turnout rates, legally preventing over one in 50 citizens from voting makes a travesty of the democratic process. As would be expected by the varying incarceration rates and disenfranchisement laws among states, some states disenfranchise far more of their eligible electorate than others. And this is of particular concern in conjunction with the electoral college system.

Mississippi, Alabama, Nevada, Arizona, and Delaware, all states that disenfranchise ex-offenders, constitute half of the list of top ten states that incarcerate the largest percentage of their populations. Incidentally, Maine and Vermont, the two states that do not employ any form of felony disenfranchisement laws, are among the ten states that incarcerate at the lowest rate per resident population.^{xcix} Of the 11 states that permanently disenfranchise felons, the average state disenfranchisement rate is 5.1 percent, compared to 1.7 percent for the remaining 39 states. This shows the “effectiveness” of the ex-felon disenfranchisement laws, which have disenfranchised 1,400,000 ex-felons nationwide, persons who have completed their sentences and are living free in society.^c According to the July 2001 report of the National Commission on Federal Election Reform (Ford/Carter Commission), John Mark Hansen claimed that if permanent disenfranchisement, parole, and probation disenfranchisement laws were repealed, the overall disenfranchised population would shrink to 1.2 million Americans. This represents only 0.6 percent of the voting-age population.^{ci} As Professors Uggen and Manza found in their statistical analysis of the disenfranchised population, only 29 percent of those without voting

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rights are prison and jail inmates, while 34 percent are ex-felons, 27 percent are probationers, and 11 percent are parolees.^{cii} Their complete state-by-state estimates of disenfranchised felon populations, using Department of Justice reports, are shown below. Those states that permanently disenfranchise felons are shaded in black.

Inmate, Disenfranchised, and Voting Age Population, by State, December 31, 1998

State	Prison and Jail Inmates	Probationers	Felony Parolees	Ex-Felons	Total Disenfranchised	Voting Age Population	Disenfranchisement Rate
AL	24,468	32,725	6,785	140,384	204,362	3,293,000	6.21%
AK	2,547	4,403	492	0	7,442	437,000	1.70%
AZ	26,343	48,044	3,742	48,736	126,865	3,547,000	3.58%
AR	10,638	32,141	6,371	0	49,150	1,882,000	2.61%
CA	169,488	0	110,617	0	272,521	23,665,000	1.18%
CO	15,212	0	5,204	0	20,416	2,961,000	0.69%
CT	12,200	32,086	1,185	0	45,471	2,464,000	1.85%
DE	3,213	10,015	572	18,201	32,001	568,000	5.63%
DC	10,114	0	0	0	10,114	414,000	2.44%
FL	72,332	105,247	7,421	524,816	709,816	11,383,000	6.24%
GA	42,546	96,071	20,482	0	159,099	5,678,000	2.80%
HI	3,668	0	0	0	3,668	878,000	0.42%
ID	4,364	6,794	1,274	0	4,364	888,000	0.51%
IL	44,739	0	0	0	44,739	8,755,000	.51%
IN	20,476	0	0	0	20,476	4,410,000	0.46%
IA	7,694	8,155	2,194	71,277	89,320	2,157,000	4.14%
KS	8,621	0	6,025	0	14,646	1,925,000	0.76%
KT	16,024	10,741	4,508	95,506	126,780	2,990,000	4.24%
LA	34,790	0	0	0	34,790	3,149,000	1.10%
ME	0	0	0	0	0	957,000	0.00%
MD	23,667	21,944	15,528	61,232	122,371	3,824,000	3.20%
MA	0	0	0	0	0	4,731,000	0.00%
MI	47,442	0	0	0	47,442	7,266,000	0.65%
MN	6,072	28,285	2,995	0	37,353	3,483,000	1.07%
MS	17,567	11,530	1,489	75,676	106,262	2,014,000	5.28%
MO	22,668	41,275	10,366	0	74,309	4,042,000	1.84%
MT	2,886	0	0	0	2,886	658,000	0.44%
NE	3,886	2,390	624	0	6,690	1,231,000	0.56%
NV	10,141	4,806	4,055	40,875	59,876	1,314,000	4.56%
NH	2,328	0	0	0	2,328	890,000	0.26%
NJ	32,804	98,675	14,557	0	146,036	6,075,000	2.40%

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State	Prison and Jail Inmates	Probationers	Felony Parolees	Ex-Felons	Total Disenfranchised	Voting Age Population	Disenfranchisement Rate
NM	5,507	7,088	1,773	54,612	68,980	1,250,000	5.52%
NY	75,979	0	59,548	0	135,527	13,590,000	1.00%
NC	33,139	35,341	5,740	0	74,220	5,685,000	1.31%
ND	974	0	0	0	974	476,000	0.20%
OH	50,114	0	0	0	50,114	8,401,000	0.60%
OK	21,566	24,327	1,532	0	47,425	2,463,000	1.93%
OR	9,514	0	0	0	8,927	2,484,000	0.38%
PA	36,377	0	0	0	36,377	9,118,000	0.40%
RI	2,174	13,059	469	0	15,702	751,000	2.09%
SC	22,993	22,210	4,359	0	49,562	2,886,000	1.72%
SD	2,541	0	0	0	2,541	538,000	0.47%
TN	19,701	26,440	7,605	30,038	83,784	4,120,000	2.03%
TX	150,303	257,526	112,022	0	519,851	14,299,000	3.64%
UT	4,391	0	3,772	0	8,163	1,432,000	0.57%
VT	0	0	0	0	0	448,000	0.00%
VA	30,384	29,838	6,700	208,461	275,382	5,165,000	5.33%
WA	15,215	91,727	375	34,294	141,611	4,257,000	3.33%
WV	3,727	3,798	975	0	8,500	1,406,000	0.60%
WI	19,707	22,830	8,927	0	51,463	3,887,000	1.32%
WY	1,672	2,717	448	11,265	16,102	354,000	4.55%
TOTAL	1,204,916	1,132,227	440,731	1,415,373	4,193,245	200,939,000	2.09%

Source: Manza, Uggen, and Britton, “The Truly Disenfranchised”^{ciii}

The state-by-state comparisons within this chart are particularly interesting. With the exceptions of Tennessee, Washington, Maryland, and Arizona, all of which have permanent disenfranchisement laws but utilize them selectively, the lowest disenfranchisement rate among states that penalize ex-felons is 4.14 percent of the voting public. Even this lowest figure surpasses the disenfranchisement rate of every state that automatically re-enfranchises their felons upon completion of their sentences. The chart also makes clear which states are the grossest offenders in terms of violating a large number of citizens’ voting rights. Florida and Texas combine to disenfranchise over 1.2 million individuals, 29 percent of the total 4.2 million disenfranchised Americans. And the top five disenfranchisers, Florida, Texas, Virginia, California, and Alabama, together disenfranchise over half of the nation’s 4.2 million total. In contrast, the 20 lowest disenfranchisers together deny only 229,532 individuals the vote, a mere

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5 percent of the total disenfranchised population. Thus, although high incarceration rates nationwide have brought this problem of disenfranchisement to national attention, the gravest problem lies in certain states. In these states, growing felon populations coupled with harsh laws are adversely affecting huge numbers of citizens and the overall functioning of democracy.

Furthermore, these statistics, high as they seem, are misleadingly low in that they describe the adult population as a whole. In fact, when socioeconomic and especially racial divisions are factored in, it becomes evident that for certain populations, disenfranchisement rates are much higher than the national average of 2.09 percent. As with the total number of disenfranchised, these black felons and ex-felons are largely localized in particular states. With its final report, the Ford/Carter Commission published a chart listing the racial breakdown of Uggen and Manza's state-by-state findings as percentages of state voting-age populations. The following is a recreation of the Ford/Carter Commission's chart using data from January 1, 1999. Here, again, those states that disenfranchise ex-felons are shaded in black.

Disenfranchised Population as a Percentage of the Voting-Age Population, by State

State	Disenfranchisement Rate	Disenfranchisement Rate	Disenfranchisement Rate
	All	Black	White, Latino, and Other
National Total	2.09%	6.57%	2.09%
Alabama	6.24%	12.41%	4.26%
Alaska	1.70%	5.65%	1.55%
Arizona	3.58%	11.75%	3.29%
Arkansas	2.61%	7.60%	1.78%
California	1.18%	4.84%	0.87%
Colorado	0.69%	4.07%	0.55%
Connecticut	1.85%	6.42%	1.73%
Delaware	5.63%	15.60%	3.45%
D.C.	2.44%	4.18%	0.58%
Florida	6.24%	13.77%	5.07%
Georgia	2.80%	6.08%	1.62%
Hawaii	0.42%	0.26%	0.42%
Idaho	1.40%	4.05%	0.47%
Illinois	0.51%	2.39%	0.21%
Indiana	0.46%	5.24%	0.07%
Iowa	4.14%	22.52%	3.81%
Kansas	0.76%	5.22%	0.50%

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State	<u>Disenfranchisement Rate</u>	<u>Disenfranchisement Rate</u>	<u>Disenfranchisement Rate</u>
	All	Black	White, Latino, and Other
Kentucky	4.24%	14.96%	4.60%
Louisiana	1.10%	2.87%	0.36%
Maine	0.00%	0.00%	0.00%
Maryland	3.20%	7.57%	1.62%
Massachusetts	0.00%	0.00%	0.00%
Michigan	0.65%	2.72%	0.34%
Minnesota	1.07%	7.54%	0.91%
Mississippi	5.28%	9.71%	3.06%
Missouri	1.84%	6.56%	1.31%
Montana	0.44%	3.33%	0.43%
Nebraska	0.56%	3.83%	0.42%
Nevada	4.56%	16.53%	3.66%
New Hampshire	0.26%	1.91%	0.25%
New Jersey	2.40%	9.73%	1.25%
New Mexico	5.52%	24.78%	5.00%
New York	1.00%	3.11%	0.57%
North Carolina	1.31%	3.72%	0.68%
North Dakota	20.00%	1.04%	0.20%
Ohio	0.60%	3.10%	0.30%
Oklahoma	1.93%	8.00%	1.47%
Oregon	0.38%	2.74%	0.32%
Pennsylvania	0.40%	2.56%	0.19%
Rhode Island	2.09%	11.68%	1.65%
South Carolina	1.72%	3.90%	0.88%
South Dakota	0.47%	2.64%	0.46%
Tennessee	2.03%	5.86%	1.36%
Texas	3.64%	8.77%	2.95%
Utah	0.57%	5.01%	0.53%
Vermont	0.00%	0.00%	0.00%
Virginia	5.33%	13.82%	3.35%
Washington	3.33%	12.32%	3.01%
West Virginia	0.60%	2.70%	0.54%
Wisconsin	1.32%	10.61%	0.86%
Wyoming	4.55%	14.94%	4.46%

Source: The Ford/Carter Commission^{civ}

As is evident from these statistics, in many places black citizens face significantly higher chances of disenfranchisement than the American average of 1 in 50. Even more

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striking is the statistical chance that a black man is unable to vote due to his felony status. Across the country, 13 percent of all black men are currently disenfranchised. This is 36 percent of all of those disenfranchised, translating into 1.4 million adult black males nationwide.^{cv} In 7 states, over 25 percent of black men are *permanently* disenfranchised, and in Florida and Alabama, this percentage climbs to 31 percent, almost 1 in 3 adult black men.^{cvi} These are the statistics which prompt commentators to invoke Jim Crow imagery and the pre-Civil Rights Era status of black would-be voters.

D. Repercussions of Disenfranchisement for Ex-Felons and Their Communities

As should be expected, these disenfranchisement laws, which impact an increasing number of Americans every year, have damaging emotional and social consequences for those felons and ex-felons who fall under their jurisdiction. For not only are disenfranchisement laws fundamentally anti-rehabilitative in nature, but they cultivate a sense of inferiority, powerlessness, and exclusion in individuals at the very moment they are attempting to re-enter society. Perhaps the most obvious effect is the palpable social stigma that these laws create for ex-felons. As Itzkowitz and Oldak point out in *The American Criminal Law Review*, “The offender finds himself released from prison, ready to start life anew and yet at election time still subject to the humiliating implications of disenfranchisement . . . [Denying him the vote] is likely to reaffirm his feelings of alienation and isolation, both detrimental to the reformation process.”^{cvi} Ohio ex-felon Carl Upchurch calls disenfranchisement “emotionally scarring,” explaining the practice as denying the felon his very “right to citizenship.”^{cvi}

In their exclusion from the democratic process, ex-felons find a constant reminder of their alienation from society. This is particularly frustrating because of the potential good that could come of re-enfranchisement. While disenfranchisement has never proven to be a deterrent to criminal behavior, restoring voting rights for felons could be a powerful rehabilitative procedure. As Representative John Conyers (D-MI) declares, “if we want former felons to become good citizens, we must give them rights as well as responsibilities, and there is no greater responsibility than voting.”^{cix} Instead, our system cultivates disillusionment at a time when ex-felons are particularly vulnerable, reinforcing the feelings of estrangement and exclusion from society which are intrinsic to the incarceration process, according to Upchurch. In his experience, ironically many felons “never considered [themselves] citizens anyway,” and always felt themselves to be outside a system seemingly rigged against them.^{cx} According to a study commissioned by the Department of Justice on the various social challenges facing

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released prisoners upon their return to society, Joan Petersilia reported that among ex-felons “disillusionment with the political process also erodes citizens’ feelings of engagement and makes them less willing to participate in local political activities and to exert informal social control in their community.”^{cxix} Put bluntly by Upchurch, if an ex-felon is permanently outside of the law, he may be prone to think, “what desire do I have to remain inside the law?”^{cxii} Thus, disenfranchisement may even indirectly contribute to high rates of recidivism.

In terms of the black community as a whole, and the greater American society of which it is an integral part, the phenomenon of an increasing number of individuals being incarcerated and disenfranchised is cause for widespread social instability. Almost 600,000 prisoners from state, federal, and local correctional facilities are being released into society each year, and until Petersilia’s report in November 2000, the federal government had yet to undertake a comprehensive examination of the repercussions of this massive “prisoner reentry.” In this report, sociologist Elijah Anderson described a “breakdown of cohesion” and “socially disorganized communities” in which released felons become pop culture heroes, especially to youth. According to this sociological theory, ex-felons transmit their “criminal” behavior, as reinforced by their fellow inmates in prison, to the younger generation.^{cxiii}

To disenfranchise these released inmates creates not only a personal sense of alienation within these ex-felons individually, but also fosters disrespect and resentment for the authorities who repeatedly arrest, incarcerate, and then silence the political voices of large sections of the community. Politically speaking, this mentality translates into mass disillusionment in the governing system, which, come election time, manifests itself as political apathy, an oft-diagnosed malady of modern American society.^{cxiv} In a study undertaken by Marika Litras of the Department of Justice, state voter turnout rates for black citizens were lower in states that disenfranchised parolees and ex-felons than in states that automatically restored voting rights upon release from prison.^{cxv} In the 1996 election, black males of 18 to 24 years held the lowest voter turnout percentages in the American population as a whole. According to the U.S. Census, only 22.1 percent of black males aged 18 to 20 years voted, and for black males 20 to 24 years of age, this percentage was only slightly greater, 28.4 percent. These percentages fall well below the national average of 54.2 percent, and it is hardly surprising that this particular demographic group, which ranks the most likely to be incarcerated, is also the most politically apathetic.^{cxvi}

This apathy affects not only those most likely to be arrested, however, but also all people with personal ties to disenfranchised ex-felons. As Carl Upchurch described,

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disenfranchisement creates a ripple effect throughout the black community, especially affecting the peripheral family and the children of ex-felons. In Upchurch's words, "For children, their civics lesson is watching how the system affects their family." Thus, if children feel the system has mistreated their family, they are likely to lose faith in the system.^{cxvii} Studies show that persons most likely to vote had parents who voted. Conversely, each generation of disenfranchised ex-felons cultivates greater voter apathy.^{cxviii}

E. The Electoral Cost of Disenfranchisement – A Partisan Perspective

In addition to the emotional and social effects of disenfranchisement laws, there are political consequences for denying the vote to a large portion of the population. As pointed out by John Mark Hansen in a Ford/Carter Commission report, in the past fifty years the American electoral college system has had too many incredibly close elections. Since 1948, in fact, in the 14 presidential elections combined, 22 states have been decided by less than one percentage point. During this same time period, the outcome in 40 states has been decided by less than two percentage points. When looking at senatorial elections, four percent of all state-level elections over the past 52 years were decided by less than one percentage point, and five percent of gubernatorial elections were decided by similarly small margins.^{cxix} Seen in this context, the disenfranchisement of 4.2 million potential voters nationwide has had a possible dramatic electoral impact, inspiring deeper inquiry.

This was the very politically important question Sociology Professors Manza and Uggen set out to investigate. As Uggen explained, he and Manza realized that as the legal and philosophical aspects of felony disenfranchisement were being examined, an analysis of the political ramifications of these laws logically followed.^{cxx} One of their preliminary findings was that disenfranchisement rates had been largely disregarded in analyses of elections; voter turnout rates are tabulated according to the population of voting-age individuals, ignoring the fact that in some states relatively large numbers of this population are in fact legally barred from participating.^{cxxi}

Manza and Uggen utilized voter turnout statistics from the Current Population Survey's Voter Supplement Module and expected-vote choice statistics from the National Election Study for each presidential and senatorial election since 1972. Applying these data to corresponding disenfranchised populations as reported in Department of Justice reports, the researchers extrapolated voter turnout and voting preferences among felons from behavior of voters from

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similar populations. In terms of voter preference, the population of felons and ex-felons is disproportionately comprised of individuals of color and individuals with low income and education levels, sociological segments of the American population which vote overwhelmingly for Democratic candidates. Manza and Uggen examined each election separately, translating the appropriate turnout and voter preference rates in terms of the net Democratic votes, and then comparing this number to the margin of victory in the cases of Republican triumphs. The results are startling.^{cxxii}

Manza's and Uggen's estimated turnout rates for felons are low, ranging from 13.7 percent in the Northeast for the 1998 Senate elections to 38.6 percent in the Midwest for the 1984 presidential election. Yet, even at these low numbers, they determined that felon voters probably would have made the crucial difference in seven senatorial races. The results are as follows:

The Impact of Felony Disenfranchisement in Selected Elections

Year	1978	1978	1984	1988	1988	1992	1998
State	Virginia	Texas	Kentucky	Florida	Wyoming	Georgia	Kentucky
Current Felons	21,776	100,707	20,583	87,264	3,013	1,319	31,274
Ex-Felons	72,709	89,662	54,481	232,536	6,969	0	95,506
Total	94,475	190,369	75,481	319,800	9,982	131,911	126,780
Estimated Felon/Ex-Felon Turnout	17.2%	17.2%	30.2%	24.3%	27.5%	30.5%	14.0%
Percent Democratic	84.3%	84.3%	74.2%	82.9%	82.9%	74.7%	69.2%
Net Democratic Felon/Ex-Felon Votes	11,137	22,441	10,998	51,192	1,803	19,873	6,804
Actual Republican Margin of Victory	4,721	12,227	5,269	34,518	1,322	16,237	6,766
Counterfactual	-6,416	-10,214	-5,719	-16,674	-481	-3,636	-38

Source: Manza, Uggen and Britton, "The Truly Disenfranchised"^{cxxiii}

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Democratic victory in these seven Senate races would have stopped the Republican takeover of the Senate majority in the 1990s, and perhaps would even have affected the makeup of the Senate today, given the high probability that incumbent parties retain their seats each election.^{cxxiv} The most significant close election in recent history, however, is left off of this list. Although their results are not yet complete, Manza and Uggen have begun to run the numbers for the highly disputed presidential election of 2000. In terms of the popular vote, they have found that, not surprisingly, Gore would have beaten Bush by over one million popular votes had those felons and ex-felons currently disenfranchised been allowed to vote. In Florida, Gore would have come away with 80,000 to 90,000 more votes than the victorious Bush. The complete results of their analysis should be available soon.^{cxxv}

While the quantification of the electoral repercussions of disenfranchisement laws is an interesting exercise, this emphasis on translating felons and ex-felons into lost Democratic votes is potentially problematic. To let a partisan electoral gain eclipse the fundamental democracy issue at hand—focusing on disenfranchisement for the express purpose of gaining Democratic votes instead of fostering egalitarian democracy—would be a tragic statement about the priorities of the American political system.

CHAPTER IV

Felony Disenfranchisement as a Political Issue

In the past five years, various political movements have taken an interest in felony disenfranchisement laws, both for their effects on individual members of society and for the damage they cause to society as a whole. In today's climate of interest-group lobbying around increasingly specific issues, felony disenfranchisement stands at the intersection of a number of powerful political forces. Four such categories of advocacy movements are the prison reform movement, the social justice and democracy movement, the civil rights movement, and the election reform movement. Organizations, lawmakers, and independent activists working under the banners of all four of these political movements have helped to shed some light on this issue, and yet each movement faces particular challenges when addressing this issue. The result is that none yet has been able to make felony disenfranchisement its number one priority.

A. Disenfranchisement as a Prison Reform Issue

In the 1960s, the prison reform movement was reborn when individuals closely tied to the incarceration system empowered themselves to assert their grievances about the prison system. In large part, these activists patterned their movement after that of the civil rights activists. These early prison reformers first coalesced and then organized politically at grassroots levels.^{cxxvi} The movement has evolved over the past forty years, and today intellectuals and activists in the field come from all walks of life, from ex-felons and family members of prisoners to human rights-oriented students at the nation's elite universities, most of whom have no personal ties to the incarceration system. From the outset, this political movement has carefully defined its chief adversary as the ineffective criminal justice system and particularly the incarceration system itself; the movement's activists are committed to challenging and reforming the structures in place, at times even advocating their complete destruction. One group, the Critical Resistance Organization, was founded in 1998 by activist and author Angela Davis for the purpose of "resisting and transforming" the Prison Industrial Complex. This group uses as its mantra the lines from escaped political prisoner Assata Shakur's "Affirmation": "And, if I know anything at all,/ it's that a wall is just a wall/ and nothing more at all./ It can be broken down."^{cxxvii}

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Because the prison reform movement easily accepts and promotes a critical examination of the governmental structure, it provides a climate where the felony disenfranchisement cause is easily accepted. From CURE (Citizens United for Rehabilitation of Errants), an international advocacy group for prisoners and their families, to the D.C.-based Sentencing Project, where some of the preeminent research reports on the status of the prison system are conducted, prison reform organizations are not strangers to confronting the American political system.^{cxxviii} Marc Mauer of The Sentencing Project characterizes the current incarceration system as benefiting elected officials. The short-term solution of finding and punishing easy scapegoats, such as low-level drug traffickers in low-income urban neighborhoods, is especially appealing for politicians subjected to elections every two years who bear the burden of proving their effectiveness in a short time period. This skepticism of government officials' political motives fosters a critical analysis of felony disenfranchisement laws. For like the War on Drugs campaign, these "get tough" policies are secure within the legislative structure largely because of the political benefits reaped by those making the laws.^{cxxix} Prisoner advocate Carl Upchurch defined felony disenfranchisement as an issue of the states working in their own interests to control power instead of functioning democratically for the benefit of their citizens.^{cxxx} Again, this skepticism and critical lens in addressing governmental structures provide a natural setting for addressing felony disenfranchisement laws.

Furthermore, the efforts to reform felony disenfranchisement laws fall clearly within the objectives of prison reform organizations. Two main purposes of prison advocacy groups are to expose the corruption, abuse, and discriminatory practices of the incarceration system and to empower those locked within the system both personally and politically.^{cxxxi} The call to end disenfranchisement laws serves both purposes. Statistical reports and opinion pieces written by prison reformers on felony disenfranchisement laws do much to influence the public view about the injustice present within certain components of the criminal justice and incarceration systems. As Christine Thompson decries in a recent *Prison Issues* article, "[The purpose of revoking voting privileges] is to inflict unwarranted harm on a person who has paid his or her debt and is trying to rejoin the community."^{cxxxii} Here she uses felony disenfranchisement to depict a governmental structure in opposition to the general welfare of the prisoner. Fighting felony disenfranchisement laws also falls under the rubric of delivering social justice to those incarcerated within the prison system. Politically speaking, no single issue can be more effective in empowering prisoners and ex-felons than restoring their voting rights. Additionally, prison advocates treat voting as a potentially rehabilitative act which could cultivate not only responsibility but humanity within a system which often lacks both. Thus,

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the political issue of ending felony disenfranchisement practices appeals to those fighting for the just and humane treatment of prisoners.

In essence, felony disenfranchisement laws are so detestable to many prison reformers because they deny the basic aspect of American citizenship and democratic identity to individuals on the basis of their criminal records, violating the civil rights of prisoners and ex-felons. Constitutionally speaking, these questions of prisoners' rights have provoked murky answers through post-bellum American history. As scholar Joy James pointed out, the human rights of prisoners in the United States are theoretically protected under the International Covenant on Civil and Political Rights, yet in 1998 the United States decided to exempt itself from complying with the standards set forth in this international contract.^{cxxxiii} In fact, written into the Thirteenth Amendment, the very legal action which freed the slaves, was a loophole: slavery and involuntary servitude were deemed permissible "as a punishment for crime whereof the party shall have been duly convicted." Thus, from the outset, the case for the protection of the civil rights, voting rights, and indeed basic human rights for felons has stood on tenuous constitutional ground.^{cxxxiv} Today, prison advocates attempt to appeal to the American sense of humanitarianism and social justice in protecting the rights of incarcerated and released felons when the laws fail to offer protection.

And yet, for all of the ways in which felony disenfranchisement laws fall neatly in line with many prison reformers' objectives and goals, the issue is problematic in its appeal. For prison advocates, priority issues often target critical life or death matters such as the discriminatory assignment of the death penalty or harsh criminal justice practices that add years onto sentences, such as mandatory minimum laws. Other reformers focus on equally urgent issues of poor treatment inside prisons, from the violence endured by inmates at the hands of prison guards and fellow prisoners to the often inhumane conditions of prison-employment projects.^{cxxxv} In this context, the issue of felons being stripped of the vote, while certainly harmful to the psyche on some level, necessarily elicits less urgent attention than the physical and emotional abuse suffered daily by many prisoners.

Furthermore, the movement's skeptical view of the government, which makes it so prone to accept the cause of felony disenfranchisement, also poses some problems for this issue. This skepticism can lead to an intrinsic lack of interest in an issue that benefits felons only by expanding their rights within a system which is viewed as fundamentally flawed. Ex-felon Carl Upchurch, who works in prisons professionally to rehabilitate inmates, admitted that many felons are apathetic to a political process which they perceive as not only indifferent, but

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purposely hostile to them.^{cxxxvi} Fighting for felon voting rights is based on confidence in the democratic workings of the American system, and the belief that one's vote can effect just change in the system. But many felons and prison advocates lack this faith. In addition, because the movement is essentially grassroots, it lacks a focus on national policy. Even organizations such as The Sentencing Project, which are policy-focused, believe in the importance of pairing lobbying efforts with grassroots organizing.^{cxxxvii} In this climate, felony disenfranchisement is rarely a major concern of prison reform groups, especially on the grassroots level where activists tend to have the closest connections to felons themselves.

Increasingly, scattered through the movement, however, are reformers who see a broader vision of how prisoners and their grievances affect and are affected by the greater democratic flaws in our system. These outspoken advocates address the disenfranchisement issue within broader reform agendas. As Upchurch declared, "prison reformers would be missing the point if they did not give this issue priority."^{cxxxviii}

B. Disenfranchisement as a Democracy Issue

In the words of Marc Mauer, "This is not just a criminal justice issue, but one of basic democracy."^{cxxxix} From organizations devoted to promoting pure democratic principles domestically to those specializing in international human rights, social justice groups are building support for the campaign to end felony disenfranchisement laws. Some of the first efforts to publicize the impact of felony disenfranchisement came from a partnership of The Sentencing Project with the internationally-known Human Rights Watch. Both organizations recognized the importance of embracing this issue as a way to promote equality in the American democratic system. On the legal front, New York University's Brennan Center for Justice has taken the lead in its outspoken statements condemning disenfranchisement. Staff attorneys have publicly questioned the rationality and civic purpose of these laws, while simultaneously probing their constitutionality.^{cxl}

As a whole, one might characterize the diverse set of organizations that define the social justice, democracy, and human rights movements as united in their common struggle toward social equity and aiding the disempowered. Clearly, felony disenfranchisement laws qualify as an appropriate target for these groups. For Dēmos, a recently founded advocacy organization whose mission is to "strengthen democracy and create more broadly shared economic prosperity for the 21st century," attacking felony disenfranchisement is a top priority. As an

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organization which promotes the development of an equitable democracy, Dēmos places an emphasis on the importance of fair election practices as the starting point for a just democratic system. In a recent *American Prospect* article, Dēmos president Miles Rapoport called felony disenfranchisement “one of the great exclusions of civic life in the United States.”^{cxli} As another example of a political organization supporting this cause, the Association of State Green Parties has recently come out in strong opposition to felony disenfranchisement laws. For many social justice groups, including the Green Party, felony disenfranchisement laws are closely linked with discriminatory criminal justice practices, such as the War on Drugs, which they have long held in contempt.^{cxlii}

Some groups with international scope, such as Human Rights Watch, lend a degree of international solidarity to the issue. The United States is the only democracy to penalize its felons with disenfranchisement after a sentence has been completed. As mentioned before, some states’ disenfranchisement laws contradict the United Nations’ *International Covenant on Civil and Political Rights*, Assembly resolution 2200 A (XXI) of December 16, 1966, which mandates in Article 25 that:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) 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.

The resolution allows for curtailment of voting rights only so long as these are “reasonable restrictions,” for instance if a judge specifically confers the penalty of disenfranchisement as part of the sentence for a particular crime. State laws that disenfranchising all felons, regardless of their crimes, have been deemed outside the definition of “reasonable.”^{cxliii} Not only do many nations allow incarcerated felons to vote (the Czech Republic, France, Israel, Japan, Kenya, Peru, Poland, Romania, and Zimbabwe), but some nations such as Germany even *mandate* that prison authorities encourage inmates to exercise their right to vote and coordinate their voting procedures.^{cxliv} In an amazing democratic display, by a vote of the Constitutional Court of South Africa on April 1, 1999, that country became the most recent nation to abolish voting restrictions on incarcerated felons. The court’s decision read, “the vote of each and every citizen is a badge of dignity and personhood. Quite literally everybody counts.”^{cxlv}

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For social justice activists and organizations working on democracy issues, the international community's opposition to felony disenfranchisement laws provides support. This is exceedingly important given the hostile response with which many of these domestic social justice organizations have been met by the mainstream political elements of the U.S. policy sphere. Felony disenfranchisement laws have been invoked as a blight on our democratic ideals by various politicians, academics, journalists, and activists, and yet the majority of American policymakers and the general public are only just beginning to listen. In fact, there is a more favorable political resonance in labeling felony disenfranchisement a "democracy issue" than a "prison reform issue." For even politicians conservative on criminal and social justice issues should be reluctant to take a hard-line public stand against the principles of expanding democracy and supporting voting rights. Opposition to felony disenfranchisement laws stands to gain from identifying it as a democracy issue.

C. Felony Disenfranchisement as a Civil Rights Issue

In both legal and historical terms, felony disenfranchisement is perhaps most compelling as an issue of civil rights—that is, felony disenfranchisement's silencing of a disproportionate number of black voices at the ballot box. A long list of racially-biased practices should have been protected by the Fifteenth Amendment, such as poll taxes, literacy tests, grandfather clauses, white primaries, and racial gerrymandering. While the anti-poll-tax movement was building over many years, the poll tax wasn't abolished until passage of the 24th Amendment in January 1964. And in many ways, the Civil Rights Act of 1964 and the Voting Rights Act of 1965 were so magnificent in their impact because they challenged various ways in which the Fifteenth Amendment had been circumvented. The very movement that won this battle against racial discrimination almost forty years ago has begun to take an interest in the laws that are depleting the voting strength of today's communities of color. In literature and press releases, the civil rights and voting rights struggles are commonly invoked by civil rights groups in decrying the effects of felony disenfranchisement laws. In an essay written for *Mother Jones* magazine, civil rights leader Jesse L. Jackson, Sr. directly asserted that current criminal justice policies and the incarceration system have "rolled back" the successes of the civil rights movement.^{cxlvi} Law professor Jamin B. Raskin references the "blood and sweat of civil rights activists in the South" as he discusses the past work of the movement to establish universal suffrage, and the futility of these heroic efforts in light of the current conviction and incarceration rates in communities of color.^{cxlvii}

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Especially since the 2000 presidential election, many organizations promoting civil rights have publicly criticized the effects of these laws. The USCCR, in a voting registration report released after Election 2000, claimed that felony disenfranchisement laws:

necessarily [deplete] a minority community's voting strength over time by consistently placing a greater proportion of minority than majority voters under a voting disability at any given time. For this reason, the effects of the intentional discrimination that originally motivated felony disenfranchisement still linger.^{cxlviii}

Both Congressmen John Conyers (D-MI) and Earl Hilliard (D-AL), civil rights advocates on Capitol Hill, refer to felony disenfranchisement as a primary civil rights issue. Hilliard's Legislative Assistant Jack Zylman stresses that more than a prison reform or democracy issue, felony disenfranchisement is a blight on the history of civil rights successes throughout the second half of the twentieth century.^{cxlix}

Civil rights advocacy groups have recently begun to more emphatically and publicly condemn felony disenfranchisement. The NAACP, which released a ten-point election reform agenda in July 2001, included an end to ex-felon disenfranchisement as point ten.^{cl} Even before this formal announcement, the NAACP issued a statement declaring ex-felon voting rights to be a top legislative priority in April 2001. In the press release, President and CEO Kweisi Mfume asserted that as a society, "we should be encouraging ex-felons to vote, not prohibiting them."^{cli} Especially in the wake of Election 2000, the NAACP has become a more outspoken critic of felony disenfranchisement laws, noting especially their disparate impact on black males. Yet, civil rights organizations as a whole have been slow to act aggressively on this issue. Perhaps this lukewarm acceptance of the felony disenfranchisement issue stems from a reluctance to admit to a link between felons and the black community. Author Earl Ofari Hutchinson has lambasted civil liberties and civil rights organizations for taking, as he calls, a "hands off stance" on the issue of felony disenfranchisement for fear of reinforcing misconceived notions of an intrinsic connection between criminal nature and the black community.^{clii}

In recent years, civil rights debates have centered on affirmative action, welfare reform, and school desegregation. It is easy to understand why many civil rights organizations are hesitant to bring up a prison issue which focuses on the rights of convicted felons. Due to the stereotypes of criminals as people of color, this reluctance to embrace prisoners' rights issues seems a logical strategic defense.^{cliii} Yet, the result is the loss of a potentially powerful political

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ally for those working to reform felony disenfranchisement laws. In a sense, Election 2000 has served as a turning point on this issue for civil rights groups, with organization leaders becoming increasingly vocal. They are now invoking the voting rights triumphs of the past century to advocate repeal of the laws that are devastating communities of color and affecting elections on the national level. With its proud history, the civil rights movement has much to offer those fighting to felony disenfranchisement laws. The sooner this is realized by both civil rights organizations and those leading the campaign against disenfranchisement, the sooner the effective political battle to end these discriminatory practices will begin.

D. Disenfranchisement as an Election Reform Issue

Even before November 7, 2000, strong political movements were underway which addressed various faulty components of the electoral system, from the corruption of big money campaign contributions to chronic redistricting concerns to challenges to the electoral college system. Since the chaos of the November election, however, the urgency, tone, and scope of these reform efforts have changed dramatically. In the words of American Civil Liberties Union (ACLU) President Nadine Strossen, in the post-Election 2000 era “it is simply no longer possible for the nation to ignore the deep, disturbing, and discriminatory flaws in the electoral system that have now been revealed to all of us in excruciating detail.”^{cliv} In the wake of the election, the government, as well as private organizations, has convened numerous groups to assess the irregularities in the 2000 election. This has created a climate in which issues of election reform are being given unprecedented emphasis. Media sources from *The Wall Street Journal* to *The Nation* have lavished attention on election reform issues.

As reported by the Ford/Carter Commission, the 2000 election “shook American faith in the legitimacy of the democratic process,” a faith which arguably has been diminishing for decades, as is evinced by ever-rising voter apathy rates. The Ford/Carter Commission found that 24 percent of Republicans, 40 percent of Independents, and 75 percent of Democrats believed that the electoral process was conducted unfairly in the year 2000.^{clv} While certainly much of this dissatisfaction stemmed from the technical errors on ballots and other purely structural failings of the system, the election was remarkable in highlighting racially discriminatory practices, including states’ felon disenfranchisement practices. In particular, Election 2000 has brought the formerly obscure issue of ex-felon disenfranchisement onto the agendas of organizations and political leaders from the NAACP to former Presidents Carter and Ford.

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According to Marc Mauer, the 2000 election brought attention to felon and ex-felon voting rights even before the Election Day debacle; in Florida, predicted to be an important battleground for electoral votes, laws permanently stripping felons of the vote were under attack before the tallying began.^{clvi} After the election, these disenfranchisement laws were even more carefully scrutinized as to their intended purpose and their disparate effect. The USCCR determined in its “Report on Voting Irregularities in Florida During the 2000 Presidential Election” that the unlawful purging of ex-felon lists “fell most harshly on the shoulders of African Americans.” Throughout the state, the ratio of rejected black votes to white votes was almost nine to one.^{clvii} In fact, David Bostis, senior research associate at the Joint Center for Political and Economic Studies, believes that the felon list purges were designed with the specific intention of discriminating against black voters. In Florida’s Hillsborough County, where 11 percent of the voting age population is black, 54 percent of those wrongly placed on felon purge lists were black voters.^{clviii} The USCCR came down harshly on the Florida election proceedings, chastising election officials for “[failing] to fulfill their duties” and declared that overall, the election was riddled with “injustice, ineptitude and inefficiency.”^{clix}

In the process of condemning Florida’s misuse of the ex-felon purge lists, the ACLU and many other organizations have also focused on the inherently discriminatory and undemocratic practice of disenfranchising Florida’s felons and ex-felons.^{clx} The numerous studies investigating the exact margin of victory in Florida have found that the Florida Secretary of State’s official count of 537 vote margin actually errs on the high side; this speaks directly to the significance of the hundreds of thousands of ex-felons disenfranchised in the state, who far outnumber the undervotes and overvotes in the Florida election.^{clxi} By the time of the *Bush v. Gore* decision, certain media sources had begun to train the nation’s attention on felony disenfranchisement laws and their impact, thus launching an unprecedented level of awareness of former felons’ voting rights.

For election reform in general, and for the fight to end felony disenfranchisement laws specifically, this has been a critical time. Former President Carter stressed this urgency during a panel of the Ford/Carter Commission: “I think if you would have brought up this same kind of discussion four years ago, there would have been very little interest. I think now is the time when there might be enough focus to actually do something. I would guess that four or eight years in the future, that opportunity might have dissipated again.”^{clxii} Put succinctly by Jamin B. Raskin, the current time is a “constitutional moment,” a small window of opportunity when the American public actually believes in the necessity of legal reform.^{clxiii} Unlike prison reform, election reform is a timely issue about which the American public and its elected

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officials have a vacillating sense of urgency based upon election cycles and election scandals. Election 2000 stands as a landmark event to spur interest in election reform issues. The election has afforded reform advocates the opportunity to address the many structural flaws that have long plagued the electoral system.

For those reformers specifically interested in felony disenfranchisement, one effective way to use the momentum of the Florida 2000 fiasco has been to join the patriotic and democratic call for all Americans to vote. From partisan advocacy groups to Representatives fearful of losing their elected seats, many influential people have high stakes in preventing persons who are likely to vote “wrong” from voting at all. Many officeholders, noting a felon’s likely race and socioeconomic status, categorize his voting preferences as “wrong.” As Professor Boone pointed out during a Ford/Carter Commission panel, all successful reform policy must first be grounded in a philosophy that idealizes full electoral participation of the American populace.^{clxiv} Thus, as an election reform issue, repealing felony disenfranchisement laws transcends the mechanics of voting procedure to embody an important democratic principle.

Advocates of ending felony disenfranchisement are beginning to take advantage of a natural alignment with other election reform policies similarly based in these same fundamentally democratic notions of full electoral participation. Today, voting reform takes the shape of efforts to improve and equitably distribute voting equipment, establish stronger federal standards for localities to effectively conduct elections, and end undemocratic structural components of elections such as the electoral college and winner-take-all districts. Those arguing against felony disenfranchisement laws have much to gain from the potential solidarity of the vast network of organizations and advocates focused around similar causes.^{clxv} Election reform advocates seem increasingly ready to accept felon voting rights as a priority. The Ford/Carter Commission, USCCR, House Democratic Caucus, ACLU, other multi-issue advocacy groups, and numerous journalists who have translated Election 2000 problems into advocacy for the end to felony disenfranchisement indicate the increasing readiness of election reform advocates to accept the importance of felon voting rights.^{clxvi}

However, this coalition-building may not be easy. Unlike the prison reform and social justice movements, election reform has been accepted by elected officials and is readily acknowledged by the government as a subject worthy of attention. Thus, much of the work on this issue takes place on Capitol Hill, where coalitions of advocacy organizations are pressuring the 107th Congress to address various concerns in developing and reworking legislation. One

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such coalition in support of H.R. 1170/S. 565, the “Equal Protection of Voting Rights Act,” was led by the NAACP and was composed of a diverse set of organizations ranging from the AFL-CIO to the American-Arab Anti-Discrimination Committee to Americans for Democratic Action.^{clxvii} Of the many policy points these various organizations hoped to make with authors of the legislation, ending felony disenfranchisement was not included. Even though as individuals many of the S. 565 coalition members support ex-felon voting, the consensus was that attaching this issue to other election reform issues might alienate moderates in Congress. The fear of controversy surrounding prison issues creates a hostile climate for introducing felon voting rights within election reform bills.^{clxviii} Both Keenan Keller, Democratic Counsel to the House Judiciary Committee and Jack Zylman, Legislative Assistant to Representative Hilliard, two House staff members working on bills ending felony disenfranchisement, expressed opinions that the issue may be a better sell to Members of Congress as a prison reform or democracy issue than as an election reform issue.^{clxix}

Constitutional law professor Jamin B. Raskin advocated a different legislative course of action in his August 27, 2001 *American Prospect* article. He picked up on Representative Jesse Jackson, Jr.’s (D-IL) proposed voting rights constitutional amendment that would, among other functions, put an end to disenfranchisement laws affecting ex-felons. Raskin disputed the intrinsically controversial nature of the felon voting issue. As an issue of “universal suffrage and democracy,” Raskin placed ex-felon voting in line with issues such as federal representation for Washington, D.C. residents and equalizing voting equipment across all districts (all far from generally popular in Congress).^{clxx} He may be overly optimistic in discussing the length to which Congress will go toward making the electoral system equitable. But in his article, Raskin demonstrates the benefits to felony enfranchisement advocates of winning a place for this issue on election reform agendas. As a political issue, election reform has captured the attention of the American voting public in the past year, and has also become a big concern for policymakers. In the end, however, it is elected officials who have the power to legislate an end to felony disenfranchisement.

Currently, felony disenfranchisement is gaining increasing prestige and popular support as an electoral reform issue, more so than strictly as a prison reform issue, a basic democracy issue, or a civil rights issue. Especially in organizations such as the National Coalition on Black Civic Participation, with its dual-agenda of civil rights and election reform, and for the many commissions and organizations that have only in the last year developed electoral reform platforms, ending ex-felon disenfranchisement stands firmly as a priority, albeit rarely a first or

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second priority.^{clxxi} Instead of being categorically ignored by advocates of election reform, felony disenfranchisement is now being included among other issues as an area of concern, quite a step forward for the campaign against felony disenfranchisement laws.

CHAPTER V

Current Progress on the Legislative Front

The felony disenfranchisement issue has begun to gather steam on interest groups' lobbying platforms, and also on legislative agendas around the nation. Legislative progress, however, has been slow. Thus far, federal bills have received limited support due to hesitation on the part of politicians. Unlike past movements to extend the franchise to women or to 18 year-olds, felons are not a natural constituency which can easily organize and mobilize itself into a lobbying effort. Jack Zylman, Legislative Assistant to Representative Hilliard (D-AL), a Congressman who has introduced legislation on felony disenfranchisement, admits that Hilliard's constituents have not been vocal on the issue.^{clxxii} Disenfranchised felons are not a politicized group of individuals in the same sense as other special-interest groups. Furthermore, officeholders feel little personal responsibility to this group—felons are highly disconnected from the political sphere.^{clxxiii} This ambivalence toward re-enfranchisement efforts holds true across party lines, for as Jimmy Carter described in a Federal Election Reform panel:

A safe and secure Congress seat or House seat in the Legislatures is a very valuable thing, and to open up the Pandora's box for new registrants is not always an easy thing to sell. I was surprised to find that some of the most liberal Democrats in the Congress were the ones that basically opposed the efforts we made . . . to liberalize the means by which people could register.^{clxxiv}

Although this reluctance to promote full electoral participation is widespread among elected officials, Manza and Uggen's sociological report demonstrates the degree to which this issue is perceived in partisan terms. Since disenfranchised ex-felons are believed to be overwhelmingly in support of Democratic candidates, Republicans feel a political stake in maintaining these voting restrictions.^{clxxv} In discussing the political uses for his report, Uggen admitted that both Democrats and Republicans are reluctant to cite his statistical predictions. Republicans fear that bringing attention to the report will spur Democrats into action to reclaim what are now lost votes. Democrats fear that Republican knowledge of such statistical data will steel their resolve to prevent these laws from ever leaving the books.^{clxxvi} In the post-1965 Voting Rights Act era, government officials have ostensibly accepted the responsibility for supporting full electoral participation of all eligible Americans. And yet, because political candidates are acutely aware of the role that racial, socioeconomic, and other factors play in

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voting preferences, many candidates in Election 2000 attempted to manipulate this information to their benefit. In Arkansas, the Republican governor bemoaned on national radio in the pre-election hours that Democrats were busing black voters in to the polls, “as if they were cattle in a truck.”^{clxxvii} It is difficult to fathom how legislation to enfranchise large numbers of black voters can ever be enacted in a climate where Arkansas’ leading government official can publicly begrudge electoral participation of a racial subset of his states’ citizens.

And yet, a trend has begun in Connecticut and New Mexico which brings hope to those working for legislation to end felony disenfranchisement laws. By focusing on the universal theme of promoting democracy, civil rights advocates in the Connecticut State Legislature pushed through—with Republican support—a bill restoring voting rights to probationers. The bipartisan bill was signed into law in May 2001 by Connecticut’s Republican Governor.^{clxxviii} Similarly, New Mexico’s Republican Governor is breaking with traditional GOP tenets in his criticisms of criminal justice policies, particularly drug laws, which contribute to skyrocketing incarceration rates. Even though these high numbers of incarcerated felons may contribute to Republican electoral power in the state, Governor Gary Johnson publicly embraces drug treatment programs and other such “liberal” criminal justice policies as more humane and economically-sound approaches to combating drug use.^{clxxix} His ideas about reform show an evolution of the traditionally Republican “tough on crime” stance. This gives hope that as happened in Connecticut, there is the potential for elected officials to look beyond their partisan political interest and support the policies which most benefit society as a whole and, particularly, its most disadvantaged members. It is with this hope that legislators on both the state and federal levels have introduced bills to effect change in current ex-felon disenfranchisement policies.

A. Efforts on the Federal Level

At the federal level, there is some optimism about potential progress in the current Congress. A handful of committed Representatives and Senators are currently attempting to effect change via legislation dedicated solely to ending felony disenfranchisement laws. Longtime civil rights leader Representative John Conyers (D-MI) has led the way, relentlessly introducing legislation to end ex-felon disenfranchisement ever since the 103rd Congress in 1994. The most successful of his attempts thus far occurred in 1999, when the Conyers-sponsored Civic Participation and Rehabilitation Act of 1999 (H.R. 906) garnered 37 co-sponsors and was referred to the House Judiciary Committee and then the Subcommittee on the

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Constitution, where a hearing was held in October of 1999. The Act rests on the “basic concepts of fundamental fairness and equal protection,” and cites the rehabilitative properties of extending the franchise to ex-offenders. Its singular purpose is to protect the voting rights of citizens from being obstructed or denied on the basis of a felony conviction, excepting those currently incarcerated. Within the text of the bill are statistics showing the numbers of citizens disenfranchised, references to the inconsistency of the “crazy-quilt” of laws across the states, and evidence of the disproportionate numbers of male black and Hispanic citizens affected by the laws.^{clxxx} Although this bill found organizational support from such influential political groups as the ACLU, NAACP, and Human Rights Watch, it died in committee before reaching the House floor.^{clxxx}

Already in the 107th Congress four bills have been introduced directly addressing the felony disenfranchisement issue. Representatives Danny Davis (D-IL), Earl Hilliard (D-AL), Maxine Waters (D-CA), and Jesse Jackson, Jr. (D-IL) have each crafted bills to end ex-felon disenfranchisement, albeit utilizing varying approaches. The first bill to be introduced was Representative Davis’ Constitutional Protection of the Right to Vote Act, which has languished in the Subcommittee on the Constitution since April 2000. The wording of this bill carefully defines the privilege of voting as “the most basic constitutive act of citizenship.” After briefly reviewing disenfranchisement statistics, and highlighting the disparate effect on African Americans, the bill qualifies that although states have the prerogative to establish voting qualifications, they may not curtail the right of citizens to vote.^{clxxxii}

The Voter Registration Protection Act of 2001, co-sponsored by Representative Hilliard and 18 colleagues, explicitly prohibits states from denying individuals convicted of federal crimes their voting rights in federal elections, excepting those felons currently incarcerated. Hilliard’s bill neither mentions disenfranchisement statistics and the disparate effect on black citizens, nor principles of justice and equality.^{clxxxiii} Perhaps the fact that this bill was drafted in direct response to the problems of the 2000 election explains its trained focus on voting rights issues without delving into criticisms of criminal justice policies or racial biases inherent in incarceration rates.^{clxxxiv} Like Representative Davis’ legislation, this bill has been largely ignored since its referral to the Judiciary Committee.

In Representative Waters’ Voting Restoration Act, the focus once again is exclusively on the right of ex-felons to vote in Federal elections, however after detailing many of the same statistics as those in Representative Conyers’ 1999 bill, Waters also invokes drug policies and their effects on incarceration rates. In her findings Waters asserts that these disenfranchisement

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laws should be addressed precisely because of their impact on “minority communities.” She also provides for extensive enforcement procedures for the states, including a grant program to help states accomplish re-enfranchisement. With no co-sponsors and little support, there has been no action on this bill since its referrals to the House Judiciary and Administrative Committees.^{clxxxv}

The most creative attempt to address this issue is Representative Jesse Jackson, Jr.’s joint resolution proposing an Amendment to the United States Constitution regarding the right to vote. This initiative, part of a larger Constitutional Amendment strategy of attacking various issues from health care to abortion, was introduced in time for the one-year anniversary of Election 2000. The Amendment would simply give all American citizens 18 years of age and older the right to vote. The only limitation permitted would be a “narrowly tailored” regulation established by the federal or a state government for the express purpose of “[producing] efficient and honest elections.” The mention of ex-felons is not necessary, for this Constitutional Amendment would effectively block a state’s ability to disenfranchise felons, and in its lack of specificity, this bill creates the potential for universal appeal. Despite this creative strategy, the bill has yet to gain any cosponsors, and has received little attention in the Judiciary Committee to which it has been referred.^{clxxxvi}

The best chance for successful legislation to reform felony disenfranchisement laws will most likely be the revised version of Representative Conyers’ bill from the 106th Congress. This bill is to be unveiled in the 2002 Congressional session. As Ranking Member of the House Judiciary Committee, Representative Conyers is in a prime position to rally support for his bill and to draw attention to the felony disenfranchisement issue.

In the meantime, felony disenfranchisement has come up during the Senate’s debate of election reform in early 2002. On February 14, during the Senate’s consideration of Senator Christopher Dodd’s (D-CT) Election Reform bill (S. 565), Senator Harry Reid (D-NV) proposed a bipartisan amendment (S. Amdt. 2879) to restore voting rights to ex-felons for federal elections. The impassioned debate in support of the amendment was led by Reid and Senator Arlen Specter (R-PA), with Senator Russell Feingold (D-WI) also pledging his strong support. Proponents of the legislation were countered, however, by traditional conservative rhetoric: Senator Mitch McConnell’s (R-KY) invoked states’ rights concerns and Senator Jeff Sessions’ (R-AL) admitted that, “as a prosecutor for 15 years, I wonder how those people I helped put in the slammer feel about me. I do not care about them voting on my election.” In this way, Sessions exhibited the exclusionary tendency about which Professor Boone warned

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during a Ford/Carter Commission hearing—that many of our elected officials do not believe that voting should be a right bestowed to all Americans, but that voting should be a privilege bestowed only upon those who have proven themselves worthy.^{clxxxvii}

The opposition to Senator Reid’s amendment, however, was not limited solely to the GOP. In an effort to ensure the success of his Election Reform bill, Senator Dodd voiced his opposition to the amendment, stating his action was, “not because I disagree with what [Senator Reid] is trying to do, but I think this is not the right place for us to be dealing with that idea.” Although the amendment did ultimately fail 31 to 63, Senator Reid’s proposal and the dialogue which ensued on the Senate floor mark a great victory for those fighting to reform felony disenfranchisement laws. Senator Dodd’s opposition was, in fact, indicative of the greatest hurdle for the movement to end felony disenfranchisement. In order for this issue to move from the fringe into the center of the political dialogue, proponents of reform must first win over those in powerful positions—be they elected officials or policy organizations—who support the cause, yet are not willing to compromise their greater agendas to prioritize the felony disenfranchisement issue.^{clxxxviii}

B. The Constitutional Legitimacy of Federal Legislation

Despite the potential for progress, a troubling question looms over all the aforementioned legislative actions: Is it the federal government’s place to be making legislative decisions regarding disenfranchisement of felons? Many Members of Congress fear the answer is no, further eroding tentative support for legislation. The question of constitutionality was directly addressed during the Subcommittee on the Constitution hearing in October 1999 on Representative Conyers’ bill, H.R. 906. Congressional support for the substance of the bill appeared strong during this hearing, but several legal experts argued convincingly that the bill was not constitutional. Legal scholars disagree on interpretations of relevant sections of Article I and the Fourteenth and Fifteenth Amendments. These interpretations differ on whether the federal government has the power via legislation to prohibit states from disenfranchising felons, since the Constitution grants states the right to determine voter qualifications. This leaves proponents of federal legislation to prove that, due to the extenuating circumstances of felony disenfranchisement laws (possibly their discriminatory intent), it is in fact constitutional for the federal government to intervene.

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The Constitution states in Article I, Section 2, Clause 1, that voters in Congressional elections, and by extension all federal elections, “shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”^{clxxxix} This clearly gives jurisdiction for defining voter qualifications to the states. And yet, this power is restricted by the Elections Clause, Article I, Section 4, Clause 1, which declares that “the Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic.] Senators.”^{cx} Thus, the crucial question arises of whether extending the vote to convicted felons is technically a function of the “times, places, and manner of holding elections;” if so, then as Congress has a Constitutional mandate to create and alter such electoral regulations, a federal law barring states from disenfranchising felons is indeed legitimate.

During the Subcommittee on the Constitution hearing on H.R. 906, several related and interesting constitutional points were discussed. Gillian E. Metzger, Staff Attorney at the Brennan Center for Justice at NYU’s School of Law, argued in favor of H.R. 906’s constitutionality. Of her three-pronged argument for H.R. 906, however, her weakest rationale was the one grounded in an interpretation of Article I, Section 4 as authorizing Congressional action. In her argument, Metzger broadly defined Congressional power with regard to regulating the “Times, Places, and Manner of elections,” citing *Oregon v. Mitchell*, 400 U.S. 112 (1970). She also based her position on the Supreme Court’s decision in *Tashjian v. Republican Party*, 479 U.S. 208 (1986), in which the Court found that “far from being a device to limit the federal suffrage, the Qualifications Clause was intended by the Framers to prevent the mischief which would arise if state voters found themselves disqualified from participation in federal elections.” Thus, although the Qualifications Clause of Article I, Section 2 clearly gives the right to determine voting qualifications to the states, this clause need not be read as prohibiting Congress from altering these qualifications, particularly in the case of a state’s exclusive voting regulations.

Todd F. Ganziano, Senior Fellow in Legal Studies at The Heritage Foundation, spoke strongly in opposition to H.R. 906, rejecting the idea that voting qualifications legitimately fall under the protection of “Times, Places, and Manner.” He, along with fellow panelists Roger Clegg, Vice President and General Counsel to the Center for Opportunity, and Viet D. Dinh, Associate Professor of Law at Georgetown University Law Center, also referred to *Oregon v. Mitchell* in making a case that changing voter qualifications is outside of federal jurisdiction. As these three conservative legal scholars described, *Oregon* involved the federal law allowing

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18 year-olds to vote in federal elections. Although this law was indeed upheld by a narrow five-four vote, only Justice Hugo Black cited Article I, Section 4 in his decision. The following year the privilege to vote was definitely guaranteed to 18 year-olds by ratification of the 26th Amendment. The other four justices voting in favor of the law relied upon anti-discrimination mandates, though these readings of federal enforcement authority have since been overturned by two other Supreme Court decisions, namely *Richardson v. Ramirez*, 418 U.S. 24 (1974) and *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). Thus, as a highly-fractured decision, much of which has been overruled in subsequent cases, *Oregon v. Mitchell* stands as a tenuous precedent for the constitutionality of congressional action on such bills as H.R. 906.^{cxc1}

A state's right to determine voting qualifications, however, can be trumped when the laws utilized in this process are proven to be discriminatory, a dubious proposition with the current composition of the Supreme Court. The question of whether felony disenfranchisement laws are intrinsically discriminatory was addressed during hearings on H.R. 906 by each of the four legal experts mentioned above. This legal question revolves around interpretations of the Fourteenth and Fifteenth Amendments. These Amendments provide, respectively, that no state may abridge the privileges or immunities of citizens of the U.S. or deny any person "equal protection of the laws," nor may any state or the federal government deny or abridge the right to vote "on account of race, color, or previous condition of servitude." Both Amendments end with a clause bestowing upon Congress the "power to enforce this article by appropriate legislation." In fact, many significant pieces of legislation—the Civil Rights Act of 1964 and the Voting Rights Act of 1965, to name two—have been enacted pursuant to these amendments. The problem of felony disenfranchisement does not fall neatly under the Equal Protection Clause, for within the text of the Fourteenth Amendment itself, an exception of the protection of the right to vote is made "for participation in rebellion or other crime." Thus, the issue of felony disenfranchisement seems not to be covered by the Fourteenth Amendment.

Nevertheless, Metzger argues that current data show the disparate impact of these laws on people of color, and historical evidence is strong that the original intention of these laws was to discriminate against black would-be voters, and these findings supersede the criminal exception of the Fourteenth Amendment. She cited the Supreme Court case *Hunter v. Underwood*, 471 U.S. 222 (1985), in which the court struck down a discriminatory voting restriction in Alabama which disenfranchised criminals convicted of crimes involving "moral turpitude" as a violation of the Equal Protection Clause. This precedent shows that discriminatory criminal disenfranchisement laws are not exempt from the Equal Protection

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Clause merely because of the Fourteenth Amendment’s general allowance for states to disenfranchise felons. The careful historical evidence of a connection between an “intention to discriminate” and felony disenfranchisement laws is crucial to this argument, and Metzger relied upon legal historian Andrew Shapiro’s documentation of racially discriminatory motives in establishing these laws in the post-Reconstruction South. There is precedent for finding this “intent to discriminate” for other “facially neutral” laws, that is, laws which do not explicitly employ discriminatory language. For even if a law is facially neutral, so long as it creates a disparate impact on people of color there may be a constitutional mandate to create legislation correcting it. Poll taxes and literacy tests constitute two examples, although it took a constitutional amendment to outlaw the poll tax. According to *City of Boerne*, “[p]reventative measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional,” as would likely be the case for disenfranchisement laws, given their discriminatory bias.^{cxcii}

Furthermore, Metzger pointed out that in *City of Rome v. United States*, 466 U.S. 156 (1980), the Supreme Court found that Congress did in fact have the authority to “prohibit voting practices that have only a discriminatory effect,” even without proof of discriminatory intent. This topic was addressed by USCCR, which quoted Professor Allan Lichtman’s explanation of this “results test” in terms of Election 2000:

We do not have to demonstrate an intent to discriminate. We do not have to demonstrate that there was some kind of conspiracy against minorities or that anyone involved in the administration of elections today or yesterday had any intent whatever to discriminate against minorities, because indeed under the Voting Rights Act, practices can be illegal so long as they have the effect of diminishing minority opportunities to participate fully in the political process and elect candidates of their choice.^{cxci}

And several studies have clearly shown the extent to which these laws result in the disenfranchisement of disparate numbers of citizens of color. Were this the only legal evidence needed to prove the illegality of disenfranchisement laws, then the Congress would clearly have the authority to enact H.R. 906 or any similar law.

Clegg, Dinh, and Galianzo, however, provided substantial counter-attacks to Metzger’s argument, rephrasing the questions of intentional discrimination and disparate impact. Clegg simplified this position by asserting a contradictory position to that of Lichtman—unless

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discriminatory intent is proved, as was the case in *Hunter v. Underwood* with Alabama's "moral turpitude" clause, there is no basis for federal legislative intervention under the Fourteenth or Fifteenth Amendment. He cited *City of Mobile v. Bolden*, 466 U.S. 55 (1980) for the main precedent in this position. In this case, a plurality of judges determined that a law's disparate impact was not sufficient to register as a violation of the Fourteenth Amendment, but that proof of discriminatory intent was also necessary. In the case of literacy tests and other Jim Crow voting obstructions which were facially neutral yet disparately impacted black voters, Clegg argued that because these laws had a clear historical basis in intentional discrimination, they passed the "intent" test of *City of Mobile*.^{cxci}

Dinh likewise took issue with the discriminatory intent in felony disenfranchisement laws. As a recommended course of action, he suggested that H.R. 906's authors determine to what extent discriminatory intent is relevant to the laws in question, and assuming this evidence substantial, to include an assertion of discriminatory intent within the text of the bill itself. According to Keller of the Judiciary Committee, this advice has been taken into consideration in a later draft of the bill. Dinh was quick to warn, however, that even including proof of discriminatory intent might not warrant action on the federal level to ban all states from the practice of felony disenfranchisement. He thus recommended that a constitutionally legitimate method for ending disenfranchisement would be to prove historical racial animus state by state. Ganziano, like Clegg and Dinh, agreed that in failing to clearly demonstrate that felony disenfranchisement laws were instituted on a pretext of intentional racial discrimination, H.R. 906 cannot legitimately follow the precedent of *Hunter v. Underwood* and come under the protection of the Fourteenth Amendment. In Ganziano's opinion, if racial bias can be proven inherent to these laws, then a judicial solution is in order, and there is no need for legislative action on the federal level.^{cxv} Litigation or legislation would still be state by state.

These legal experts shed light on the complications in legislating at the federal level to reform state felony disenfranchisement. Aside from the legal question of the federal government's interference with a constitutionally-determined prerogative of the state, proving both the intent of these laws as well as their disparate impact on communities of color is not easy. For, as even Metzger pointed out, it is difficult to contend that the federal government can legitimately intervene in a matter which has been delegated to the states, absent proof of discriminatory intent. The court cases surrounding the Voting Rights Act of 1965 gave a sense of the breadth with which this law may be interpreted. Thus it is unlikely that a bill such as

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H.R. 906, or any other federal legislation, will be deemed constitutional by the Supreme Court, let alone by a majority of legislators, without convincing evidence of intent.^{cxvii}

Although both Representatives Davis and Waters have included in their bills the discriminatory impact of these laws, both pieces of legislation refrain from making claims as to the discriminatory intent of felony disenfranchisement laws. Of the four bills discussed, only H.J. Res. 72, Representative Jackson's proposed Constitutional Amendment establishing a "right to vote," completely overcomes the legal obstacles raised by the constitutional experts at the H.R. 906 hearing. Jackson's proposed method for addressing felony disenfranchisement looks to history for its strategy: ex-slaves, women, and 18 year-olds were not extended the privilege of the vote until a formal change to the Constitution was adopted. The poll tax was outlawed by Constitutional Amendment. In fact, Jackson's Amendment would not only protect the voting rights of ex-felons, but strengthen the Fifteenth, Nineteenth, and Twenty-sixth Amendments simultaneously by basing them on a promise made by the federal government to every American that he has the fundamental right to partake in this nation's democracy.

Because Representative Jackson's bill has received little support, and because of the fundamentally flawed nature of the other three bills (failing to offer convincing proof of an "intent to discriminate"), there is little reason to have faith in the federal government's ability to legislate an end to state disenfranchisement laws. Even Andrew Shapiro, a leading historian on felony disenfranchisement laws who has published historical evidence of the racially discriminatory motives of these laws at their inception, has asserted that effective legislative reform cannot happen on the federal level.^{cxviii} For this reason, he and many other legal scholars, legislators, and policy activists are reluctantly advocating a legislative strategy of working on the state level for new laws.^{cxviii} Nevertheless, as in the case of the poll tax and voting rights for 18 year-olds, years of legislative effort can keep the issue alive and help build public support.

C. Efforts on the State Level

For all of the legal roadblocks in the way of federal legislation to outlaw state felony disenfranchisement, no such barriers exist for changing these laws on the state level. Although it can be questioned whether the Constitution allows states to disenfranchise on the basis of a criminal record, it is certain that states may choose *not* to disenfranchise ex-felons, probationers, parolees, and even incarcerated felons. States are empowered to specify

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qualifications for voting. The state-level fight has begun in various locations to change the laws in the forty-eight states (and the District of Columbia) that disenfranchise felons during their imprisonment, and in some cases thereafter. These efforts are most critical in those thirteen states where ex-felons may be permanently disenfranchised. The often bitter battles in state legislative bodies have already resulted in some limited successes. In New Mexico, the vote was restored to ex-felons by a bill passed in March 2001. More limited progress has been made in Connecticut, where in May 2001 the Governor signed legislation allowing probationers to vote. In Delaware, the law mandating lifetime disenfranchisement was replaced in June 2000 with a five-year ban on voting upon sentence completion, after which most ex-felons may apply for a restoration of their civil rights.^{ccix} In Virginia, more limited success was attained by Assembly Chapter 969, approved by the Governor in April 2000, which replaces ex-felon disenfranchisement with a law allowing certain ex-felons to apply to the circuit court for restoration of their civil rights five years after sentence completion (and seven years after sentence completion for drug offenders). The court's decision, however, must be approved by the Governor.^{cc}

In several other states, including Florida, Alabama, and Maryland, legislative efforts are currently underway to reform felony disenfranchisement practices. In Florida, six bills addressing this issue are currently pending. Four of these, all introduced in late January 2002, would automatically restore civil rights to felons upon the completion of their sentences.^{cci} Similar bills were also introduced in January in Alabama and Maryland, both of which would effectively end ex-felon disenfranchisement in their respective states.^{ccii} All of these bills are currently pending committee action. In Nevada, although Assemblyman Wendell Williams introduced legislation aimed at reforming ex-felon disenfranchisement policies in 1999, the bill died in the Senate Judiciary Committee after passing through the Assembly. No legislation on this issue has been introduced since this time.^{cciii}

Far worse, as mentioned earlier, in Utah, Oregon, Massachusetts, and Louisiana state legislatures have voted to make felony disenfranchisement laws *more* stringent.^{cciv} Developments such as these suggest that progress on the state level will never be fully successful. Throughout American history, liberals and progressive reformers have leaned on the federal government to step in and correct undemocratic tendencies and discriminatory practices which have existed on local and state levels. In this case, left to the states themselves, it seems apparent that the great progress made by states such as New Mexico, Connecticut, and Delaware is being balanced by huge setbacks in other states. And the less biased, more purely

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democratic hand of the federal government, which could theoretically guide these states to more equitable and just laws, has thus far been excluded from this arena altogether. Although state-level legislative battles are continuing, many advocates of ending felony disenfranchisement are doubtful they can succeed when all of the power remains with individual states. Thus, skepticism prevails on both the state and federal levels in terms of legislating an end to felony disenfranchisement practices. For this reason, an alternative strategy has been developed to circumvent these legislative obstacles—a litigation strategy.

CHAPTER VI

Current Progress on the Judicial Front

A. The Fourteenth Amendment, Voting Rights Act, and Legal Precedents

For much of American history, the legal case against state felony disenfranchisement laws both began and ended with the Fourteenth Amendment. Section 1 of the Amendment established “equal protection of the laws” for every citizen, thus laying the groundwork for felons to claim that they are “unequally protected” under voting laws because of their criminal records. As interpreted by the Supreme Court, the Equal Protection Clause does not absolutely ban states from treating different groups differently, however, but instead requires states to show a legitimate interest for differential treatment. This requirement to show a legitimate state interest is heightened when the restricted right in question is a fundamental right. As ruled in *Reynolds v. Sims*, 377 U.S. 533 (1964), voting does constitute one such fundamental right. Thus, because disenfranchisement violates this fundamental right, in disenfranchisement cases the burden lies with the state to prove that restriction of the vote is not only a necessary precaution for the state’s own interest, but also the least obtrusive mechanism for accomplishing its ends, as laid out in *Dunn v. Blumstein*, 405 U.S. 330 (1972).

Section 2 of the Fourteenth Amendment, however, has frustrated many legal attempts to confront disenfranchisement laws under the Equal Protection Clause. Coupled with this section’s assertion that the state cannot deny citizens the right to vote on penalty of reduced state representation is the qualification that “participation in rebellion or other crime” is cause for exemption from this protection.^{ccv} In 1974, the Supreme Court ruled in *Richardson v. Ramirez* that Section 2 limits the amendment’s protection of felons’ voting rights “equal protection;” California’s denial of the franchise to three ex-felons was determined not to be in violation of the Fourteenth Amendment’s Equal Protection Clause. Justice Thurgood Marshall dissented in the decision, pointing to historical disenfranchisement motives and possible political incentives for adding the phrase “or other crime” to this otherwise clear statement of protection against Confederate patriots. He quoted *Byers v. Sun Savings Bank*, 41 OKLA. 728, 731, 139 P. 948 (1914) in his dissenting opinion, declaring that “the disenfranchisement of ex-felons had ‘its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government.’”^{ccvi}

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Yet, despite Marshall's dissent, which was grounded in historical evidence from the Reconstruction Era, *Richardson v. Ramirez* has served as the legal precedent on felony disenfranchisement laws, freeing states of any obligation to prove a compelling state interest. Accordingly, states have an "affirmative sanction" to disenfranchise felons, who are specifically excluded from "equal protection of the laws," including the fundamental right of voting.^{ccvii}

As a Reconstruction Amendment, the Fourteenth Amendment was crafted specifically to protect ex-slaves and blacks, and thus functions to allow voters who are part of a protected group to challenge both outwardly discriminatory laws and facially-neutral discriminatory laws. In some cases, the Equal Protection Clause has worked effectively toward this end. In 1985, the Supreme Court decision of *Hunter v. Underwood* somewhat tempered the narrow interpretation of the *Richardson v. Ramirez* decision of a decade earlier. In *Hunter v. Underwood*, the felony disenfranchisement law in question was an Alabama law which deemed specific felonies and misdemeanors, along with "any . . . crime involving moral turpitude," to be cause for disenfranchisement. This law, on the basis of its "moral turpitude" clause, was determined to be in violation of the Fourteenth Amendment's Equal Protection Clause in that the law was adopted to intentionally discriminate against black voters. In the closing words of the Supreme Court decision, the ruling pivots on whether the Alabama felony disenfranchisement law in question:

is excepted from the operation of the Equal Protection Clause of [Section] 1 of the Fourteenth Amendment by the "other crime" provision of [Section] 2 of that Amendment. Without again considering the implicit authorization of [Section] 2 to deny the vote to citizens 'for participation in rebellion, or other crime,' see *Richardson v. Ramirez*, 418 U.S. 24 (1974), we are confident that [Section] 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of [Alabama's disenfranchisement law] which otherwise violates [Section] 1 of the Fourteenth Amendment.^{ccviii}

In this way, *Hunter v. Underwood* served to clarify the functioning of the Fourteenth Amendment with respect to felony disenfranchisement laws. For although these laws are not in and of themselves in violation of the Fourteenth Amendment (per *Richardson v. Ramirez*), when such laws can be proven to have been enacted with a discriminatory intent, as was the case in *Hunter v. Underwood*, they stand in violation of the Equal Protection Clause.

The precedents of *Ramirez v. Richardson* and *Hunter v. Underwood* provide legal opponents of felony disenfranchisement laws one framework to combat these laws. So long as

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the discriminatory intent of felony disenfranchisement laws is proven, attorneys can utilize the Equal Protection Clause of the Fourteenth Amendment as the basis for the case. Another approach centers on the Voting Rights Act, specifically the 1982 amendment to the Act. In 1965, Congress passed the Voting Rights Act with the intention of strengthening the Fifteenth Amendment. Up to that point, the Amendment had attained only limited success in enfranchising black voters due to the many obstructions put in place by various state governments, e.g., poll taxes, literacy tests, and grandfather clauses.^{ccix} As a legislative act meant to broaden the scope and enforcement powers of the Fifteenth Amendment, particularly against facially-neutral but discriminatory laws, the Voting Rights Act of 1965 has a clear place in the judicial fight against felony disenfranchisement laws.

In terms of felony disenfranchisement laws, the most significant case interpreting the Voting Rights Act is *City of Mobile v. Bolden*, 446 U.S. 55 (1980). In this case, the Supreme Court ruled that proof of intent to discriminate was needed in order for a law to be in violation of the Voting Rights Act of 1965, thus severely limiting the scope of the Voting Rights Act. Under *City of Mobile v. Bolden*, plaintiffs were required to prove not only the disproportionate effects of actions, but also discriminatory intent, a much more difficult task. Congress, dismayed at this effectual limiting of the Voting Rights Act, passed an Amended Section 2(b) to the Act in 1982, restoring the broad discriminatory results standard to the Act. This amendment utilized the term “vote dilution” in an attempt to assess the overall harm inflicted on an entire community. The 1982 Amendment states, “vote dilution”:

[occurs] if, based on the totality of circumstances, it is shown that the political processes leading to the nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.^{ccx}

If this “vote dilution” could be found, the voting restrictions in place could be illegal.

Thus, the 1982 Amendment established the “results test,” relieving a plaintiff’s burden of proving the intentional discriminatory nature of a disenfranchisement law. By this amendment, Congress instead legislated that so long as the “totality of circumstances” of any disenfranchisement practice results in the denial of the vote on the basis of race, it is illegal, regardless of the motivation for putting such a law in place.^{ccxi} According to Brennan Center attorney Jessie A. Allen, under the “results test,” proof that the denial is on account of race comes from the “totality of circumstances,” including, for instance, historical vote

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discrimination against the group in question or proof of socioeconomic disparities between groups granted and those denied the vote by a particular law.^{ccxii}

In the years directly following 1982 and the passage of the Amendment to the Voting Rights Act, felony disenfranchisement foes hailed the potential for judicial success in the new litigation strategy of trying state felony disenfranchisement laws under the Voting Rights Act.^{ccxiii} While drawing a line from the racial animus associated with the institution of felony disenfranchisement laws to their current disparate effect on communities of color has been difficult to prove in court, there is abundant evidence to show the discriminatory effect of the laws. Much of this hope was deflated in 1986, however, with *Wesley v. Collins*, 791 F. 2d 1255 (6th Cir. 1986). In this case, the plaintiff argued that Tennessee's ex-felon disenfranchisement laws resulted in discrimination against people of color by diluting the black vote, thus violating the Voting Rights Act. A federal court disregarded the 1982 amendment and dismissed the case. The court instead based its decision on the fact that inconclusive evidence had been presented to establish a connection between historic and modern discriminatory practices of ex-felon disenfranchisement laws. The court rejected the causal premise of circumstantial evidence, and decided that although the "totality of circumstances" showed evidence of discrimination, "these facts could not be tied to historical tradition and rationale for disenfranchising felons."^{ccxiv} Yet, the 1982 Amendment to the Voting Rights Act had been put in place specifically so that circumstantial evidence, such as the disparate result and a history of discrimination, could be strung together to prove this "totality of circumstances" without explicitly proving an intent to discriminate. This decision has left felony disenfranchisement legal scholars and attorneys to wonder why the facts in *Wesley v. Collins* were dismissed so casually, prompting Andrew Shapiro to call the decision a "misapplication of the results test," and Allen to allege that the court had neglected to take into account race as a factor.^{ccxv}

B. Florida Conference of Black State Legislators et al. v. Michael Moore, in his official capacity as the Secretary of the Florida Department of Corrections

Litigators have not given up hope of attacking felony disenfranchisement laws, but are now cautious in challenging them under the amended Section 2 of the Voting Rights Act, or making claims solely on the basis of vote dilution without proof of intent. In fact, some attorneys have devised creative methods of circumventing the legal precedents which appear stacked in favor of retaining current felony disenfranchisement laws. One example is a lawsuit currently pending, filed March 14, 2001 by the ACLU of Florida, along with the Florida Equal

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Voting Rights Project, Florida Justice Institute, Inc., and Florida Legal Services. It attacks the practice of ex-felon disenfranchisement while carefully avoiding a direct challenge to Florida's felony disenfranchisement laws themselves.^{ccxvi} The suit's plaintiffs are disenfranchised felons and ex-felons representing themselves, as well as the Florida Conference of Black State Legislators ("Black Caucus"), People United to Lead the Struggle for Equality, Inc. (PULSE), Brothers of the Same Mind, Inc., and Inner City Grassroots Civic Coalition. Instead of calling for an end to disenfranchisement laws in Florida, the plaintiffs in *Florida Conference of Black State Legislators et al. v. Moore* make a complaint against the Secretary of the Florida Department of Corrections for his failure to assist felons in completing the necessary application materials for restoration of their civil rights upon release from incarceration by the only available means, gubernatorial pardon. The responsibility of Michael Moore as Secretary of the Florida Department of Corrections to assist felons in this procedure is detailed in *Fla. Stat.* § 944.293 (2000). The plaintiffs do not challenge the legality of the complicated procedure of attaining a gubernatorial pardon, but complain merely of the unfair practices that have occurred as part of this structure. For in shirking its duties to assist inmates with the appropriate civil rights restoration forms, the Florida Department of Corrections is rendering them disenfranchised *de facto*, even though the law theoretically functions such that ex-felons may have the vote restored.^{ccxvii}

Just as was seen in the precedent cases, the issue of disproportionate impact on communities of color is mentioned early in this case and serves as a basis for the plaintiffs' complaint. Yet, rather than attempt to embroil itself in the complicated legal precedents involving the constitutionality of the laws which render these large percentages of the population voteless, this case requests only that Moore fulfill his responsibilities in aiding felons to complete the necessary forms compliant with *Fla. Stat.* § 944.293. Thus, the success of the case, and the chance for more ex-felons to have the opportunity for the governor's pardon and restoration of their civil rights, is not bound by the necessity to prove intentional discrimination or any of the other barriers created by the judicial precedents.^{ccxviii}

C. Thomas Johnson et al. v. Jeb Bush et al.

According to Randall Marshall, Florida ACLU's Legal Director and plaintiff attorney in *Florida Conference of Black State Legislators et al. v. Moore*, part of the reason that his case refrains from directly tackling felony disenfranchisement laws themselves is that a case is concurrently underway for that purpose.^{ccxix} This second Florida suit, *Thomas Johnson et al. v.*

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Jeb Bush et al., was submitted by the Brennan Center for Justice at New York University Law School and The Lawyers Committee for Civil Rights Under Law. As a class action complaint on behalf of eight disenfranchised ex-felons (five black men, one black woman, one Latino man, and one white man) as representative of the 613,000 ex-felon citizens of Florida who have been disenfranchised, this suit claims that Florida felony disenfranchisement laws violate the First, Fourteenth, Fifteenth, and Twenty-Fourth Amendments to the United States Constitution, as well as Sections 2 and 10 of the Voting Rights Act of 1965, as amended in 1973 and in 1982. Thus, this case takes on all of the issues raised by the legal precedents, such as questions of proving an intent to discriminate.^{ccxx}

In fact, an assertion that “the permanent disenfranchisement of felons in Florida was initially adopted to discriminate against African-American voters and continues to have significant discriminatory impact” is made in the preliminary statement of the case. The case goes on to trace the history of Florida’s disenfranchisement laws in detail, beginning with their inception in 1838, when Florida was still a territory, and their expansion in 1868 when blacks were first enfranchised. This historical narrative places these laws in line with the rest of the post-Civil War Black Codes, which were created to discriminate against newly-freed slaves. Next, the case exposes how the disenfranchisement laws functioned to ensure white supremacy and the dominance of conservative Democrats as part of the redrafted Florida Constitution in 1868. This history carefully traces the thread of intentional racial discrimination in voting from Florida’s pre-state existence, and then further demonstrates with statistics the disparate impact still caused by these disenfranchisement laws today. The purpose of this detailed narrative is clear: to prove the intent to discriminate inherent in Florida’s felony disenfranchisement laws. This history is incorporated into all of the case’s claims, and is meant to stand as circumstantial historical evidence for the final conclusion of the brief, that “the political processes in Florida are not equally open to participation by African-American citizens and African-Americans have less opportunity than others of the electorate to participate in the process and elect representatives of their choice.”^{ccxxi}

Johnson et al. v. Bush et al. makes six claims, each taking a different approach to attacking the felony disenfranchisement laws. The first claim for relief is that Florida’s laws violate the Equal Protection Clause. The claim is supported by the original intent of the laws to discriminate against black citizens, and the current disproportionate impact of the laws on black citizens. Because of its statement of intent, based on the historical evidence present, the claim attempts to avoid falling into the trap laid by *Richardson v. Ramirez*. This claim makes the case that Florida felony disenfranchisement laws, while facially-neutral, are in violation of the

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Equal Protection Clause due to their discriminatory nature, both in intent and impact, in the same way that the Alabama law was.^{ccxxii}

The second claim rests on section 2 of the Voting Rights Act, as amended in 1982. Although the claim states that felony disenfranchisement laws “[mean] that African-Americans have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice,” this claim, like the first, involves vote denial, and not vote dilution, since all of the plaintiffs in *Johnson et al. v. Bush et al.* are themselves disenfranchised by Florida’s felony disenfranchisement law.

The third claim reaches back to the Equal Protection Clause of the Fourteenth Amendment. This claim differs from the first two in that it does not rest on evidence of racial discrimination, either in intent or practice, but instead on the substance of the Florida law as “arbitrary and irrational.” The legal precedent of *Richardson v. Ramirez*, which declared that for felons protection of the fundamental right to vote is not assured, in light of the mention of crimes in section 2, will make this claim difficult to prove. Since race is not a factor in this claim, the court is not bound to employ “strict scrutiny,” its harshest review, when determining whether the state is functioning in accordance with a legitimate interest in punishing ex-felons. Instead, the court need only determine that Florida’s felony disenfranchisement law bears a “rational” relationship to a legitimate government interest. Historically voting rights violations have only been struck down when “strict scrutiny” has been employed, either because intentional discrimination has been proven or a fundamental right has been violated.^{ccxxiii} Thus, although the state of Florida has a difficult task in proving a legitimate state interest in its felony disenfranchisement laws, the plaintiffs also have a difficult task in making their case without the leverage of a fundamental right violation.^{ccxxiv}

The fourth claim also disregards racial discrimination, instead focusing on the basic violation of the right to vote—contained in the First and Fourteenth Amendments—by the disenfranchisement laws in question. As with the third claim, the challenge here is to distinguish this claim from *Richardson v. Ramirez*. That case relied on the section 2 exception (citizens who have participated in “rebellion or other crime” have no right to vote). Instead of relying on evidence of racial discrimination, this claim utilizes statistics showing the extent to which these laws affect large numbers (4.6 percent) of Florida’s general voting age population.^{ccxxv}

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The case's last two claims enter territory unexplored by felony disenfranchisement litigation. Both claims specifically address those ex-felons who have been denied the ability to apply for restoration of their civil rights without a hearing because of outstanding restitution payments.^{ccxxvi} This monetary obstruction to voting is analogized to the poll tax, and is thus deemed to be a violation of the Fourteenth Amendment and the Twenty-Fourth Amendments by the fifth claim, and section 10 of the Voting Rights Act by the sixth claim.^{ccxxvii}

These six claims, as they rest on the history of felony disenfranchisement laws in Florida, comprise what is likely to be the most viable chance of challenging state felony disenfranchisement in the nation today. The plaintiffs will be represented by a skilled team of attorneys who have taken into account all of the most recent research on felony disenfranchisement, from Manza and Uggen's sociological report, "The Truly Disenfranchised," to the Sentencing Project's latest analyses of Department of Justice incarceration data.^{ccxxviii} Everyone frustrated by the many barriers in the way of federal voting rights legislation, and the slow, impermanent progress of state-level legislative solutions are holding their breath. The court's decision in this case will decide whether litigation in other states will be fought using a similar legal strategy or whether new strategies are needed. Meanwhile grassroots advocacy groups must begin work in full force to press for state legislative action and steps toward amending the U.S. Constitution.

CHAPTER VII

Felony Disenfranchisement's Place in the American Agenda

A. The Key to Success

The American Left has the infamous reputation of being highly fractured, a conglomerate of many special interest groups whose specific agendas have at times competed with each other to the extent that only the conservative voice remains loud enough to be heard in the policy arena. The recipe for success calls for a united front—something difficult to attain in practice. Multifaceted issues such as felony disenfranchisement have the potential to bring together a diverse set of public interest groups. Felony disenfranchisement weaves together issues dear to the prison reform movement, civil rights movement, democracy initiatives, and election reform efforts, and thus creates the potential for an alliance in pursuit of a single common goal. Such a strategy has already proven fruitful at the state level. According to Dēmos president Miles Rapoport, the fight in the Connecticut legislature to end probation disenfranchisement was won only when organizations as diverse as Common Cause, gender equality groups, the NAACP, prisoner advocacy organizations, and church groups came together with a single, strong progressive voice. By the end of this legislative struggle, bipartisan support existed for ending probation disenfranchisement.^{ccxxix}

When put under pressure, a politician should find it difficult to rationalize his refusal to support an extension of the primary democratic principle upon which this nation was founded. The problem thus far has been that this pressure has not been sufficiently applied. Viable legislation has been scarce, and those few federal bills introduced have received little vocal support from either Members of Congress or the general public. Ending felony disenfranchisement will most likely find success as a “bottom-up” grassroots reform movement. Without a strong popular appeal to the democratic principles of equality and justice, few elected officials will be motivated to override the conservative exclusionary tendency to maintain the status quo.

Therefore, the voters, public interest groups, and lobbying organizations must play an integral role in creating this pressure through forging a heightened awareness of the threat to our democratic system inherent in felony disenfranchisement laws, especially today when an unprecedented number of citizens are incarcerated. Most Americans are entirely ignorant on

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this issue, and when briefed on simple disenfranchisement statistics are shocked to learn of their widespread and disparate effects. Furthermore, taking advantage of what Raskin termed a “constitutional moment,” liberal advocacy groups should act now to educate Americans about the undemocratic tendencies of the electoral system as it stands. In the current climate, Americans of all political stripes are eager to avoid a recurrence of Election 2000 with its structural and implementation flaws, and to reach a goal of every citizen investing his full confidence in a just system. At this unique moment, after Election 2000, liberal politicians have a rare opportunity to come together and step forward with a powerful voice advocating reform. Although the time may be ripe for liberal mobilization, without organized unity and a strong popular support base, this “constitutional moment” will pass without the democratic reforms our system so desperately needs.

Federal legislation reforming felony disenfranchisement laws, or, better yet, a Constitutional Amendment mandating a right to vote for all American citizens, would be the most effective legislative means for abolishing felony disenfranchisement laws nationwide. Such a campaign would take a coalition of mammoth proportions. In the meantime, while advocacy groups begin to coalesce around this critical issue of American democracy, working on the state level to address felony disenfranchisement policies is an effective interim strategy on two grounds. First, legislation would enfranchise a substantial group of citizens, and, second, work at the state level contributes to the necessary grassroots mobilization. Concurrent with these efforts, the litigation route of fighting felony disenfranchisement laws must continue. A court ruling to disallow felony disenfranchisement laws is preferable to the impermanent solution of legislation. A federal court decision could seal the fate of felony disenfranchisement laws by determining that they violate constitutional mandates, though until the Supreme Court agrees, the ruling would fail to achieve nationwide effect.

B. The Symbolic Significance of Ending Felony Disenfranchisement Laws

Felony disenfranchisement laws serve as a reminder of the undemocratic underpinnings of our electoral and criminal justice systems today. And this corrupt practice has hardly gone unnoticed by those on the receiving end of the disparate treatment. Incarceration statistics by race or the rate of black to white votes uncounted in Florida in Election 2000 certainly warrant a distrust of the system by communities of color. For historical discrimination cannot be read as a closed chapter in American history until all remnants of this oppression have been stamped out. Until that time, the system will continue to cultivate a feeling of hopelessness in

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communities of color, manifesting itself as a widespread distrust in the American democratic system. Therefore, when attempting to combat crime, instead of operating on a strategy of disparate targeting of particular crimes, our society would be wise and farsighted to take concrete steps toward promoting faith in the system to all members of society.

Instilling confidence in those who feel wronged by the criminal justice system is a difficult task. According to Carl Upchurch, the key is to recognize that in our system, “it’s the spirit that gets crushed;” thus, reversing this process is merely a matter of knowing “there’s a flower under the rock.” As a symbolic action, the legislative procedure of ending felony disenfranchisement is unmatched in both its healing message and political effectiveness. And while certainly not the panacea for all of our societal failings, felon and ex-felon re-enfranchisement can serve as an all-important first step in forging a relationship of trust and good faith between the government and those who have been crushed under the criminal justice system’s metaphorical rock. Until they are armed with the franchise, how can felons and ex-felons be expected to trust in the American system or to thrust themselves into responsible civic roles? All members of our society should recognize the danger in a society with increasing numbers of disenfranchised citizens. And the potential benefits of taking this first step in establishing a relationship grounded in responsibility and mutual trust are unparalleled.

Establishing the right to vote for all Americans, regardless of their prison records, should serve as one of the centerpieces of a new progressive political strategy that promotes an inclusive egalitarian democracy and social justice. We are now in an era when public disillusionment with the government and its policies runs high, particularly in communities of color and among those who have endured historic discrimination. Yet, this disillusionment creates a window of opportunity for political figures who will dedicate themselves to policy initiatives which promote just change in the system. One of the issues through which these politicians could prove their commitment to just reform could be the battle against felony disenfranchisement.

Currently, it is impossible to predict whether the demise of felony disenfranchisement laws will be the result of legislative reform or a judicial solution. Regardless, until the American public comes to have an unfavorable view of these laws, recognizing their undemocratic basis and disparate impact, felony disenfranchisement will likely stay on the books. For in terms of a judicial solution, without ready and willing felons and ex-felons to serve as plaintiffs, passionate attorneys to fight on their behalf, and open-minded judges

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committed to equitable justice, productive trials will not take place. And in terms of a legislative solution, without an awakened public eager to put pressure on elected officials in states throughout the nation, there will be few lawmakers active on this issue. The key to raising awareness is convincing the public that this is an issue which not only affects disenfranchised felons, but also creates a blight of injustice on the democratic system as a whole, thereby restricting the liberty of all Americans.

Citizens who actively work toward a society based in equality and justice for all Americans regardless of skin color, ethnicity, or historical state of oppression must recognize the failings of the criminal justice system today. These corruptions result in the creation of a criminal society weighted along racial lines, and beget a cycle of hopelessness that only leads to more criminal activity. What kind of democratic society institutes laws that capitalize on these inequitable practices to mute the political voices of those who need this tool most, thus squelching their opportunity for legitimate empowerment?

Disrupting this cycle and creating a politically-empowered community from these shreds of justice is a daunting task. Yet, there is no more important priority for the maintenance—and improvement—of American democracy than the establishment of the right to vote for all Americans. Felony disenfranchisement laws are undemocratic and unjust in denying certain citizens their political voice. And in doing this, these repugnant laws not only strip these citizens of their opportunity for legitimate self-empowerment, but make a mockery of those of us who have faith that our democratic system can spawn a just society.

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- ^{xciv} U.S. Department of Justice, Office of Justice Programs (DOJ/OJP), “Correctional Populations in the United States, 1997,” Bureau of Justice Statistics, NCJ-177613 (November 2000) Table 1.2, p.2.
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- ^{xcvii} DOJ/BJS, *Sourcebook of Criminal Justice Statistics 1999*, Table 6.47, p.519.
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- ^c Manza, Uggen, and Britton, “The Truly Disenfranchised,” Appendix 1.
- ^{ci} Ford/Carter Commission, Federal Election System Taskforce, John Mark Hansen, coordinator, “To Assure Pride and Confidence in the Electoral Process: The Final Report of the Commission’s Taskforces,” Part VIII, Disenfranchisement of Felons, (July 2001), pp. 1-2.
- ^{cii} Manza, Uggen, and Britton, “The Truly Disenfranchised,” p. 27.
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Americans disenfranchised compared to Manza, Uggen, and Britton's 4.2 million. I directly asked Marc Mauer his opinion of Manza and Uggen's estimate, and he stated that having read their report and their methods, he felt the 4.2 million statistic to be an appropriate estimate.

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