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Kiley Staufenbeil
San Jose State University

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Abstract

This paper examines the damaging effects of felony disenfranchisement on American democracy. The premise of American democracy is to include citizens in government processes, thus, felony disenfranchisement is inherently anti-democratic. The first section analyzes the historical timeline of the origins and prominence of felony disenfranchisement dating back to Ancient Greece. The paper considers the legal standing of felony disenfranchisement by examining relevant court cases, such as *Richardson v. Ramirez* (1974). Following this, a case study of the states that practice distinct levels of felony disenfranchisement, ranging from the most punitive states to the most permissive, is presented. The paper then addresses the modern challenges regarding the legality of felony disenfranchisement and the shifts in American philosophy regarding corrections through a case study of Florida. This paper concludes with an examination of the constitutionality of the practice at its core. It suggests potential solutions for American policymakers to consider as the American political consciousness continues to shift from punitive correctional policy to less punitive.

Keywords

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Abstract

This paper examines the damaging effects of felony disenfranchisement on American democracy. The premise of American democracy is to include citizens in government processes, thus, felony disenfranchisement is inherently anti-democratic. The first section analyzes the historical timeline of the origins and prominence of felony disenfranchisement dating back to Ancient Greece. The paper considers the legal standing of felony disenfranchisement by examining relevant court cases, such as *Richardson v. Ramirez* (1974). Following this, a case study of the states that practice distinct levels of felony disenfranchisement, ranging from the most punitive states to the most permissive, is presented. The paper then addresses the modern challenges regarding the legality of felony disenfranchisement and the shifts in American philosophy regarding corrections through a case study of Florida. This paper concludes with an examination of the constitutionality of the practice at its core. It suggests potential solutions for American policymakers to consider as the American political consciousness continues to shift from punitive correctional policy to less punitive.

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Introduction

The right to vote is an idea engraved into Americans' heads beginning in early history classes and reiterated throughout schooling. The American public-school curriculum does not hide that the right to vote was not historically universal. Students learn of the Women's Suffrage Movement and then the Voting Rights Act, which protected the right to vote for African Americans, but this is by-and-large where voting rights discussion ends in schools. Today, the right to vote is far from evenly distributed and often withdrawn from entire populations of individuals nationally. Felony disenfranchisement refers to the revocation of voting rights for those convicted of a crime as a "collateral consequence of their felony convictions" (Behrens et al., 2003, p. 559). The United States has a long history of disenfranchisement legislation, with many state constitutions featuring a variation of disenfranchisement policies dating back to 1776 (Keyssar, 2009). According to a 2016 report by The Sentencing Project, 48 states practice some form of felony disenfranchisement. Such widespread policy has amounted to "more than four million Americans...currently unable to vote due to these laws" (Figler, 2006, p. 725).

Historically, the interpretation of the Fourteenth Amendment justified race- and class-motivated, state-sanctioned methods of revoking voting rights. The Supreme Court decision in *Richardson v. Ramirez* (1974) sealed the validity of felony disenfranchisement by establishing the legal basis of citing the Fourteenth Amendment as the grounds for permissibility. Since the decision in *Richardson v. Ramirez* (1974), scholars and activists of the last few decades have begun to challenge the validity of felony disenfranchisement as a punitive practice. Some

states have begun to move away from more punitive criminal justice policies characteristic of the last few decades. The result is a nation of states with differing access to the right to vote and left in its wake is a fragmented and stratified democracy. Furthermore, because felony disenfranchisement hinders a functional democracy, aspects of these laws are likely illegal, have disproportionately affected minorities, and are unjust in intent and results.

The Role of the Vote

The right to vote is a cornerstone value of American democracy and protected by the Constitution. Barring individuals from their right to vote impedes the function of a democracy, both normatively and legally. However, some assert that disenfranchising felons is the appropriate response to a knowing act of breaching the social contract. Both of these viewpoints are codified in the constitutions of various states in the US, making them useful for a case study of the issue of felony disenfranchisement.

America presents itself as a democracy built upon the principle of serving all people. The people's collective voice guides the hand of democratically produced legislation, policy, and elected representatives. Being a stakeholder in the democratic process is a distinctly and closely held American sentiment; one has a right to vote on tax spending, who represents their interests in government, and more general functions to preserve all "other rights" (Shapiro, 1993, p. 544). Participating in the electoral process is the purest manifestation of "buying into a society and its structures and norms" (King, 2007, p. 253). Furthermore, access to the electoral process is an integral part of democracy, based on the principle that representation serves as a means to identify the good of the whole public rather than a selection of the

whole. Pettus (2004) expands on this concept, noting that “the practice of felony disenfranchisement is a product of an ‘us versus them’ mentality.” Society views individuals with felony convictions as so vastly different and undeserving of political rights (p. 5). Felony disenfranchisement disqualifies an entire section of the US population from voting, and therefore, produces a voting electorate—which functions to benefit only the good of the part. American democracy cannot function when it operates only for the good of some of its people rather than all of them.

The Rise of Felony Disenfranchisement

The concept of revoking a person’s voting rights in response to criminal behavior appears in various forms throughout history. The practice originated in ancient Greek lawmaking, evolved into medieval Europe’s concept of “civil death,” and later manifests in Britain with the concept of “outlawry” (Brooks, 2005, p. 102). Disenfranchisement appears as early as the 1600s as a punishment for morality crimes, such as drunkenness (Brooks, 2005). This concept of civil death, or "the condition in which a convicted offender loses all political, civil, and legal rights", manifests in the philosophies of those who influenced early American thought (Ewald, 2012, p. 1049). Scholars like John Locke, whose ideas influenced many of America's principles and institutions, affirm the practice of disenfranchisement as the proper punishment for acting against society’s interest (Brooks, 2005).

Disenfranchisement makes an official appearance in many of the early state constitutions in the US. Brooks (2005) notes, "from 1776 to 1821, eleven states adopted constitutions that disenfranchised felons or permitted their statutory disenfranchisement," and this number continued to grow (p.103). The practice was not widely debated in the early American years and viewed as necessary in sustaining the "purity of the ballot

box" based on archaic, theoretical notions of "republican liberty" (Pettus, 2004, p. 141). Furthermore, King (2007) mentions in his discussion that, during this time, voting privileges were already selective: white property-owning men were the voting-eligible population of this time, and because of this, felony disenfranchisement "drew limited attention" with narrow-reaching effects (p. 249). It was not until the Reconstruction Era that the American franchise would begin to expand to include a new group of voters.

The Reconstruction Era ushered in new opportunities and protections for those previously excluded from the franchise, namely freed black men, largely due to the passage of the 13th and 14th Amendments. The 13th Amendment, most notably, abolished slavery. The 14th Amendment established the Equal Protection Clause, which grants every American indiscriminate treatment under the law—one person is not entitled to more of the government's legal protection than another. Section 2 of the 14th Amendment discusses the concept of proportional representation in Congress and describes potential instances in which revocation of voting rights is acceptable, though this part of the section historically raises debate. Subsequent judicial interpretations of these amendments are blighted with racial animus. The language in the 13th Amendment, for example, reveals the caveat that slavery is still constitutionally permissible as a "punishment for a crime." (U.S. Const. Amend XIII § 1). Additionally, the 13th Amendment abolished private slavery but sanctioned the rise of a new kind of slavery: state slavery. The case of *Ruffin v. Commonwealth* (1871) affirmed the idea of state slavery when Virginia Supreme Court referred to prisoners as "slaves of the state" (Ghali, 2008, p. 608). Despite the optimism of the Reconstruction Era, challenges to black suffrage would persist, as

“Jim Crow came to dominate the South as Reconstruction ended, and blacks were socially and politically excluded from full participation in the life of the nation” (Brooks, 2005, p. 108). Jim Crow would bring new practices aimed at excluding black people from the franchise and tools like “poll taxes, grandfather clauses, and property tests, as well as literacy tests and intimidation” (Brooks, 2005, p. 107). The 13th and 14th Amendments are crucial factors in discussing felony disenfranchisement: First, they were important in establishing civil rights and protections for former slaves and, more broadly, American citizens. Second, they have been used to curtail voting rights as they leave an exorbitant amount of state leverage to enact voting restrictions and ambiguity for interpretation.

The 1960s marked another era of goals for the suffrage of marginalized groups. The Voting Rights Act of 1965 signified another attempt to remedy the injustice of the years prior, as it “was tremendously effective in extending suffrage to black Americans” (Brooks, 2005, p. 110). The Voting Rights Act functioned as a measure to ensure the implementation of the 15th Amendment. The Voting Rights Act “suspended literacy tests and other ‘devices’ [aimed at obstructing access to the polls for people of color]” (Keyssar, 2009, p. 211). Further, federal examiners sent to monitor ensured full abandonment in the states previously practicing them. Though the Voting Rights Act made more obvious acts of racially motivated voter suppression illegal, felony disenfranchisement has continue to remain legally permissible and widely practiced. Felony disenfranchisement is one way how racial discrimination prevailed long after the Voting Rights Act, working as an extension of practices like the poll tax. The success of felony disenfranchisement derives from the subtlety of its nature (Shapiro, 1993). Historically, the practice "provided

Southern states with ‘insurance’ if courts struck down more blatantly unconstitutional clauses" (Shapiro, 1993, p. 538). This philosophy has proved successful, and decades of the practice would follow, unchecked and affirmed by law.

The validity of felony disenfranchisement was established in the case of *Richardson v. Ramirez* (1974). When felony disenfranchisement came under judicial scrutiny, “felon disenfranchisement laws were almost always found to be constitutional” (Brooks, 2005, p. 110). *Richardson v. Ramirez* (1974) involved three convicted felons who had served their sentence, completed probation, and were still unable to register to vote. The trio convened a lawsuit in response. The Supreme Court of California held that "disenfranchisement of felons who had served their time and completed parole... was a violation of equal protection under Section One of the Fourteenth Amendment" (Brooks, 2005, p. 111). The Supreme Court found otherwise and stated that Section 2 of the 14th Amendment expressly indicated that the practice was constitutional and that the framers intended to "exclude felons from the franchise" (Brooks, 2005, p. 111). The Court found felony disenfranchisement to be distinguishable from other forms of voter suppression in that there is "affirmative sanction" for the practice in the language of Section 2 of the 14th Amendment (Brooks, 2005). The decision in *Richardson v. Ramirez* (1974) codified the legality of felony disenfranchisement. It worked to further seal the fate of felony disenfranchisement as a policy taken for granted by the American electorate.

The Tough on Crime Era

Most states still practice some form of felon disenfranchisement policy. For the last few decades, the Tough on Crime movement largely shaped. According to Greene (2002),

American politics of the 1980s was characterized by “a perceived need to ‘get tough’ on crime” (p. 11). The justice system underwent numerous changes that had lasting implications during this time, as “18 states passed mandatory minimum sentencing laws,” and the behaviors that constituted a felony widened to include non-violent offenses as well (Greene, 2002, p. 11). The metamorphosis of the American view of crime during this time gave rise to a generation of punitive, and often racially driven, policies like the War on Drugs, which put thousands of people behind bars for non-violent drug offenses. These punitive policies are responsible for the exponential growth of the United States’ incarcerated population over the last few decades. According to the Sentencing Project, “there are 2.2 million people in the [United States’] prisons and jails—a 500% increase over the last 40 years” (The Sentencing Project, n.d.). Mass incarceration plays a prominent role in the impact of felony disenfranchisement policies. With such a vast number of incarcerated individuals, many of whom will participate in parole or probation even after they are released, the population of voting-disqualified individuals in the United States is sizable. The recent decades of policies that have given rise to mass incarceration have resulted in the number of disenfranchised Americans increasing by nearly 5 million since the 1970s (Uggene et al., 2016). Being tough on crime remained the American correctional system’s prevailing philosophy for decades, and felony disenfranchisement’s impact would deepen as the number of convicted persons grew at exponential rates.

The reality of felony disenfranchisement policies is that they do not affect people equally. Mass incarceration and felony disenfranchisement have disproportionately affected people of color, especially African Americans. These racial disparities have amounted to a system that discriminately disenfranchised Black

voters: 1 in 12 cannot vote because of a felony conviction; for men, 1 in 8 cannot vote disenfranchised (King, 2007). The implications include reduced political engagement and lower registration numbers; however, less obvious is vote dilution and barriers to reentry for those returning to their communities after being incarcerated (King, 2007). Vote dilution is a theory that the African American community is distinctly weakened due to the high numbers of its population barred from voting. Felony disenfranchisement affects more than the disenfranchised individual and weakens the communal vote of African Americans as a whole (King, 2007).

Furthermore, the United States' Correctional System is driven by a purpose of any combination of "retribution, deterrence, incapacitation, and rehabilitation" to transform the criminal into a functioning member of society (Russo et al., 2017, p. 3). Functioning members of society work and functioning members of society vote, both of which are tasks that are markedly difficult for formerly incarcerated individuals to carry out in the wake of civil death. The process of prisoner reentry into the community suffers, as voting is "both a symbolically expressive activist and a functional act that demonstrates a commitment to American institutions and means of political expression" (King, 2007, p. 253). Impeding the opportunities for formerly incarcerated individuals to reenter society dampens the notion that they have agency in their lives, perpetuating high percentages of recidivism.

The "Patchwork"

The current state of disenfranchisement in America is a spectrum, with some states practicing permanent disenfranchisement, others allowing for voting in prison, and most states falling somewhere in between. As the ACLU refers to it, this fact leaves the US as a "patchwork" of disenfranchisement

policies. The current situation in the United States makes it impossible to discern the collective good, because of the stratified access that people with felony convictions have to voting. According to 2018 data from the Brennan Center for Justice, eighteen states restored voting rights after completing a sentence (including prison, parole, and probation). Fourteen states (including the District of Columbia) restore voting rights automatically upon release from prison. Ten states permanently disenfranchise "at least some people with criminal convictions, unless the government approves restoration;" four states automatically restore rights after "release from prison and discharge from parole (people on probation may vote);" two states permanently disenfranchise anyone with a felony conviction, and two states practice *no* disenfranchisement for people with criminal convictions (Brennan Center For Justice, 2018). The fact that there is no universally accessible electorate leave the strength of American democracy devastatingly muddled.

Evaluating a more punitive state, like Kentucky, in comparison to a more permissive state, like Maine, demonstrates the spectrum of felony disenfranchisement policy in the United States. Kentucky is one of two states in the US that permanently bar people with felony convictions from voting (Equal Justice Initiative, 2007). The only way to attempt restoration for individuals who have completed their sentence is to "submit an Application for Restoration to Civil Rights to the Division of Probation and Parole, which then forwards it to the Governor for consideration" (Mauer & Kansal, 2005, p. 14). Mauer and Kansal (2005) note the process is arduous and that individuals must write an explanation of why they want to vote and submit "three letters of reference" (p. 3). Then, the fate of their voting privileges falls to the Governor's discretion, who will either approve or deny their

application. According to data from the League of Women Voters, "more than 300,000 Kentuckians are barred from voting due to a felony conviction" (Equal Justice Initiative, 2017). Of the individuals disqualified from voting in Kentucky, 26.2% are African American, while only 8.3% of Kentucky's population is African American (United States Census Data). On the other end of the policy spectrum are states like Vermont, one of two states in the US that allow absentee ballot voting for people in prison. Vermont serves as a case study in the field of justice studies, as it appears that allowing individuals to retain the right to vote while incarcerated has not soiled the purity of the ballot box. These individuals are not electing people who are softer on crime and "appear to be concerned with the same issues as most Americans" like the economy or policies that affect their localities (King, 2007, p. 259). For those working in Vermont's justice department, the right to vote for incarcerated individuals is not a contested topic. This is reflected in the remarks by Chittenden County, "voting from prison does not negate their incarceration or any work done by law enforcement to put them there" (Nichanian, 2019, para. 15). Many Vermont justice and corrections department professionals see it as a natural extension of the American right to vote. Vermont serves as a compelling example of the functionality of allowing incarcerated individuals to maintain their voting rights, and neither Vermont's justice department nor the communities they serve in have suffered because of it.

Solutions

In recent years, the country has been undergoing another philosophical shift about the appropriate approach to correctional policies. Notably, the movement away from "Tough on Crime" policies exemplifies the new tone of criminal justice. The

increased awareness of the financial and societal costs of mass incarceration promotes to soften their criminal justice policies. Voters themselves are inclined to vote for policies that are more restorative than those in years prior. Florida, for example, recently restored voting rights to 1.5 million convicted felons (De La Garza, 2018). For Florida to amend their state constitution in this way is consequential because, for decades, it was a state that fell on the most extreme side of the spectrum of felony disenfranchisement practitioners. Florida previously was one of the states that, like Kentucky, permanently disenfranchised felons (De La Garza, 2018). In 2018, Florida voted to amend their constitution to restore voting rights for those who have completed their sentences. According to Public Citizen, "approximately 1.4 million people will be granted the right to vote in Florida elections because of Amendment 4" (De La Garza, 2018, para. 3). This change to Florida's constitution indicates a shift in the political mindset of voters. This example is especially compelling considering states like Florida, or Iowa and Kentucky, have represented the far more punitive end of the disenfranchisement policies for felons.

Another example of this philosophical shift in America's criminal justice policy is the recent passage of Proposition 47 in California. During the "Tough on Crime" Era, California voters passed the "Three Strikes and You're Out" law, which required mandatory sentencing and jail time for those convicted of an applicable crime (courts.ca.gov, n.d.). This policy, in particular, aided in introducing a problem of prison overcrowding in California. In 2014, Californians voted to pass Proposition 47: The Safe Neighborhoods and Schools Act, which responds to their state's overcrowded prison problem. Proposition 47 sought to "ensure that prison spending is focused on violent and serious

offenses, to maximize alternatives for non-serious, non-violent crime, and to invest savings generated from [the proposition]” into alternative programming such as “victim services, and mental health and drug treatment” (courts.ca.gov, n.d.). Proposition 47 changed some theft and drug possession offenses from felonies to misdemeanors, qualified individuals to petition current sentences that qualify as misdemeanors following the bill’s passage, and authorized qualifications to petition for reclassification of their sentences retroactively. These developments in policy are significant in a twofold manner. First, both Florida and California are two large and politically powerful states in the US. Second, both of these states have historically produced correctional policies that contribute to mass incarceration. Philosophical change coming from these highly influential states may prompt other states to follow suit.

At the academic level, experts have attempted to dispel the legality of the practice of felony disenfranchisement with a closer inspection of the legislation that has historically permitted it. Cosgrove (2004) asserts that the Supreme Court overlooked a few critical issues in deciding *Richardson v. Ramirez* (1974) and offers litigators insight into potential avenues to revisit the legal grounds of felony disenfranchisement. First is that the types of crimes that now warrant felony convictions, such as drug-related offenses, were not classified as such when the 14th Amendment was adopted (Cosgrove, 2004). Because these offenses were not captured under The Penalty of Loss of Representation of the 14th Amendment (The Penalty), they should not be adequate grounds for disenfranchisement. Additionally, Cosgrove (2004) asserts that because the holding in *Richardson v. Ramirez* (1974) centered on language that only mentions male ex-felons, it could be that the disenfranchisement of male ex-felons violates the 19th

Amendment, which prohibits the denial of the right to vote on at the basis of sex. He goes on to mention that “the Penalty in Section 2 of the Fourteenth Amendment [may be] inconsistent with the Nineteenth Amendment” (Cosgrove, 2004, p. 160). If this inconsistency is present, the Penalty in Section 2 of the 14th Amendment would then be considered repealed, and the mandates of *Richardson v. Ramirez* (1974) and implores litigators to bring these questions to trial, as they cast doubt as to the constitutionality of felony disenfranchisement.

Shapiro (1993) takes a slightly different approach in his work to dispel the practice of felony disenfranchisement, citing a breach of voting protections codified by both the Constitution and the Voting Rights Act of 1965. He writes that Section 2 of the Voting Rights Act reveals the illegal nature of felony disenfranchisement as a racially discriminatory voting restriction and one that dilutes the vote of minority communities. Shapiro (1993) also calls upon a new litigation approach against felony disenfranchisement: stating that the intent *and* result of these policies were to operate "like the polls tax and literacy test" (p. 543), and as such, are illegal. Shapiro (1993) asserts that felony disenfranchisement is a barrier to the vote adopted with the intent and result being racially discriminatory. These findings are significant, as they indicate the potential for new litigation strategies to oppose the practice of felony disenfranchisement because they explicitly violate the law.

Another consideration in the critique of felony disenfranchisement is the fact that it is an outdated practice. As the US enters a new era of criminal justice policies, characterized by attempts to break the cycles of reentry and discriminatory arrests, it is time to abandon the policies that have historically legitimized these forms of voter suppression. Felony

disenfranchisement, Shapiro notes, "is the only substantial voting restriction of the era that remains" (Shapiro, 1993, p. 538). According to researchers at the Rand Corporation, the US correction sector is beginning to focus on "reentry, specialty or problem-solving courts, restorative justice, [and] the value of treatment;" (Russo et al., 2007, p. 3-4). Several states have expanded their correctional mission statements to include reentry and reintegration into society post-incarceration. Felony disenfranchisement operates in direct opposition to the goals of contemporary criminal justice. Inhibiting the right to vote diminishes a sense of civic responsibility and agency in an individual's life and dilutes the collective voting power of the communities which incarcerated individuals belong to. It is time to shed these antiquated practices, as they serve no purpose toward criminal justice's contemporary goals in the United States.

Functional democracy is intrinsically linked to the equal and protected access to the vote. From the time the United States began formally drafting legislation, disenfranchisement has been a feature of its state constitutions, revealing a long-held sentiment that some deserve access to the democratic process and others do not. Another disturbing facet of this discriminatory policy how it has historically affected African American individuals at markedly higher levels. This idea that the law picks who is deserving of fundamental political rights is a direct threat to democracy and a continuation of racist policies that harken back to the era of private slave ownership. It would appear that in the wake of mass incarceration study and awareness, voters see the injustice of felony disenfranchisement. American politics is undergoing another distinct philosophical shift when it comes to the best approach to criminal justice, demonstrated in the case of Floridians voting to restore the vote for felons, a state long

characterized by strict corrections and felony disenfranchisement policies, and in California with its reformatory Proposition 47 bill. In the wake of a changing electorate, lawmakers would do well to consider this shifting ideology and to examine the racial, societal, and economic implications of continuing to practice policies like felony disenfranchisement. Furthermore, scholars are working to introduce new perspectives into the Constitution's historical interpretations and the influential court decisions on the prevalence of felony disenfranchisement. Hopefully, these new findings will prompt a new generation of litigators to bring forth a case against felony disenfranchisement.

Justice for the franchise does not end at allowing felons to vote; the true testament to the responsiveness and durability of American democracy will be the oversight in the implementation of these policies. Ballot booths in prisons, for example, could become grounds for voter intimidation at the hands of prison employees without proper oversight. Furthermore, the abolition of felony enfranchisement is a temporary fix to a deeper institutional problem. America needs a more holistic approach address the underlying racial animus that is still present in the country. A restored right means very little if an individual's legal status is as good as civilly dead. Sustainable justice begins at humanizing incarcerated individuals, opening avenues of reentry upon completion of a sentence, and working consciously to end the practice of disproportionately arresting people of color. In its most pure form, justice cannot be achieved without the combination of these factors, though the abolition of felony disenfranchisement is an earnest first step.

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Kiley Staufienbeil is in her fourth and final year as a political science student at San José State University, dual minoring in Anthropology and Public Policy. Over the course of her studies at SJSU, she developed an interest in political theory, local government, restorative justice, and inquiry into the quality of American democracy. After receiving her degree, Kiley plans on working in her community and later attending Graduate school. When not behind her computer screen, Kiley can be found on a walk with her dog (and trusty sidekick), Jack.