

FELONY DISENFRANCHISEMENT: A REVIEW OF SCHOLARLY LITERATURE

Introduction

The issue of felony disenfranchisement is increasingly drawing the interest of lawmakers, activists and academics. In part, this means that a greater variety of perspectives are given voice and that a dialogue regarding the consequences of disenfranchisement is being fostered. Additionally, debating the various legal and social issues attached to disenfranchisement has raised questions of its legality and social costs. Finally, as the call for reform is increasingly heard, strategic thinking about transforming felony disenfranchisement in both the courtroom and in legislative bodies is being developed. This brief summarizes some of the literature on felony disenfranchisement in the hope of fostering critical thinking, promoting a socially conscious debate, and encouraging the development of strategies advancing reasonable, democratic and equitable law.

Disenfranchisement Literature

Demleitner, Nora V. Continuing Payment On One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative. *Minnesota Law Review*, April 2000, 84 (4): 753-804.

Demleitner critiques U.S. disenfranchisement laws as a historical throwback devoid of justification or rationale. The author argues that because disenfranchisement is neither constitutionally mandated nor legally or logically explicable, it should be restricted to the German provision whereby deprivation of voting rights is limited to serious, legislatively enumerated offenses that must be assessed directly by the sentencing judge at the time of sentencing, and can be imposed only for a limited and relatively short period of time. The author assesses that remedying U.S. disenfranchisement law to the German approach would correct much of the racial imbalance prevalent today. Finally, the author argues that unlike the American model, the German format permits both punishment and a chance of reintegration into the community and the body politic, a substantial goal of any rational sentencing scheme.

Ewald, Alec C. "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Laws in the United States. Master's Degree Thesis, University of North Carolina, 2000.

Ewald draws together political theory, history, and law to examine the practice of criminal disenfranchisement and argues what he sees as the fundamental incoherence of lifetime criminal disenfranchisement law. The author maintains that while it may seem that a political theory of liberalism and republicanism - innate to U.S. society - supports a practice such as disenfranchisement, such laws are in fact not true to the principles of either ideology. He argues the focus on protecting fundamental individual rights should lead liberals to scrutinize such a policy that permanently denies citizens the ballot. He also finds that disenfranchising felons for

life is deeply at odds with many other central tenets of liberal ideology, such as the idea of creating penalties that are proportionate to individual offenses, or the right of persons to advance their own interests through voting. The author also argues that criminal disenfranchisement pushes against the republican commitment to character formation and to political activity as a central means by which such development is achieved. Finally, Ewald advances that the racially discriminatory dimensions of such laws should trouble adherents of both ideologies, and that the Voting Rights Act should be used to confront the inherent racism in the criminal justice system and society at large.

Fellner, Jamie and Marc Mauer. "Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States." Washington, DC: Human Rights Watch and The Sentencing Project, 1998.

This groundbreaking article provides a comprehensive analysis of the impact of state laws that disqualify current and former felony offenders from voting. Fellner and Mauer detail statistical highlights that define felony disenfranchisement in the U.S., reporting that forty-six states and the District of Columbia prohibit inmates from voting while serving a felony sentence, four states - Maine, Massachusetts, Utah, and Vermont - permit inmates to vote, thirty-two states prohibit felons from voting while they are on parole and twenty-nine of these exclude felony probationers also. Additionally, the authors document that ten states disenfranchise all ex-offenders who have completed their criminal sentence, four others disenfranchise some ex-offenders and Texas disenfranchises ex-offenders for two years after they have completed their sentences.

Fellner and Mauer argue that the impact of felony voting disenfranchisement has been severe, and estimates that 3.9 million Americans, or one in fifty adults, have currently or permanently lost their voting rights as a result of a felony conviction. They calculate that 1.4 million persons disenfranchised are ex-offenders who have completed their sentences and that 13% of black men are disenfranchised (a rate seven times the national average). The authors state that African Americans are particularly harshly affected by disenfranchisement, as in seven states that deny the vote to ex-offenders, one in four black men is permanently disenfranchised. Fellner and Mauer project that given current rates of incarceration, three in ten of the next generation of black men can expect to be incarcerated at some point in their lifetime, while in states that disenfranchise ex-offenders, as many as 40% of the black men may permanently lose their right to vote.

The authors argue the scale of felony voting disenfranchisement in the U.S. is far greater than in any other nation and has serious implications for democratic processes and racial inclusion. Fellner and Mauer judge the impact of these laws has been exacerbated by a quarter century of "tough on crime" criminal justice policies that have led to more people going to prison for longer periods of time. Finally, they recommend policymakers at the state and federal level reconsider these policies in light of legitimate correctional objectives and the democratic interests served by recognizing the right to vote of all sectors of the population.

Fletcher, George P. Disenfranchisement as Punishment: Reflections on the Racial Issues of Infamia. *UCLA Law Review*, August 1999, 46 (6): 1895-907.

Fletcher argues that the U.S. has created a criminal justice system that is at war against a “criminal class” that is perceived as inherently unreliable. He argues that an underclass has been created, and that a caste system where felons are stigmatized as “untouchables” is being strengthened. The author views voting disenfranchisement as a technique for reinforcing the branding of felons as the untouchables of American society and argues that their banishment from the political nature of community is advancing the idea of the “purity of the ballot box.” Fletcher sees two commonly assumed claims giving rise to the ballot box purity idea. The first is the mystical claim that people such as felons will taint the voting process, and that therefore they should be excluded. The second is the fanciful claim that felons somehow endanger the honesty of the electoral process. The author argues that the only rational argument for disenfranchisement is to call the entire affair a felon’s “civil death,” i.e. the loss of the right to vote.

Fletcher compares the racial impact of disenfranchisement to the racial impact of the crack/powder cocaine penalty disparities, and the racial impact of the death penalty disparities, calling all three entirely unacceptable. The author demands reform that he believes can come in several ways. First, he calls upon Congress to pass a statute under the Fifteenth Amendment that would suspend all state laws disenfranchising felons. Second, he catalogues various constitutional arguments that can and should be made in courtrooms against the disenfranchisement of felons: equal protection of the laws (not being materialized for African Americans as they are disproportionately affected), the Fifteenth Amendment (which explicitly prohibits the denial of voting rights on the basis of “previous conditions of servitude” - such as imprisonment), and the Bill of Attainder (which defines any form of legislative action that singles out an individual or a group of persons for punishment without trial as unconstitutional).

Gottlieb, Michael J. One Person, No Vote: The Laws of Felon Disenfranchisement. *Developments in the Law: The Law of Prisons, Part VI. Harvard Law Review*, May 2002, 115 (7): 1939-63.

Gottlieb examines recent developments in the movement against felony disenfranchisement by studying what has happened in state legislatures and state and federal courts. First, the author reviews how state legislatures have differentially adopted disenfranchisement, separating them into three groups: states with permanent disenfranchisement, states with modified permanent disenfranchisement, and states that are restoring the franchise. Next, he examines disenfranchisement in the courtroom and argues that few plaintiffs win challenges in cases that either attack the constitutionality of disenfranchisement or attempt to use the Voting Rights Act. His conclusion is that since these approaches have proved mostly unfruitful as strategies, advocates should instead focus on legislative amendments to combat the disproportionate effects of disenfranchisement.

Gottlieb surmises that current doctrine suggests courts will not invalidate disenfranchisement laws in a wholesale fashion, and suggests that alternatives to traditional litigation strategies must be employed. First, he recommends advocates use state legislation the way activists in states like Texas or Connecticut have, where strategic partnering amongst a variety of community

organizations has resulted in disenfranchisement changes. Second, Gottlieb recommends the use of strategic litigation, aiming at disenfranchisement in small, specific ways, such as against the specific manner of its implementation, application and enforcement, against disenfranchisement's discernable discriminatory result, or the choice of disqualifying crimes for franchise restoration. Regardless of future strategy, Gottlieb argues that wholesale litigation against disenfranchisement should be replaced by strategic litigation.

Harvey, Alice E. Comment: Ex-felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look. *University of Pennsylvania Law Review*, January 1994, 142: 1145-89.

In this article, one of the earlier examinations of voter disenfranchisement, Harvey argues that because the number of African Americans imprisoned in a number of states is so severely disproportionate to the number of whites imprisoned, and given the comparatively lower total black population and even smaller black voting age population in those states, felon disenfranchisement laws disproportionately impact the black vote to a significant degree.

The author posits that where a plaintiff presents statistics that clearly demonstrate an impact, and where there is strong evidence of historical voting and socioeconomic discrimination that are compounded by ex-felon disenfranchisement, the courts should view such law as denying African Americans an equal opportunity to participate in the political process, and thereby unlawfully diluting the black vote in violation of the Voting Rights Act.

Hirschfield, Paul. Losing the Prize? Assessing the Impact of Felon Disenfranchisement Laws on Black Male Participation. A paper presented at the 1999 Annual Meeting of the Law and Society Association.

Hirschfield argues that given its racial impact, permanently disenfranchising those convicted of felonies is reminiscent of Jim Crow laws that aimed at depriving enough African Americans of their vote to dilute their political strength. The author's study addresses the counter-argument to felony disenfranchisement, namely that so few African American male felons – whether disenfranchised or not – actually vote that disenfranchisement laws are likely of little political consequence. To study the veracity of this hypothesis the author examines whether more stringent disenfranchisement laws independently lower black males' probability of voting. Using a sample of black male voters from 26 states the study explores the impact of states' disenfranchisement rates on the odds of voting participation. Hirschfield's analysis suggests the tentative conclusion that, at least in the South, disenfranchisement rates have a significant effect on voting participation rates, namely that black males are relatively less likely to vote in states with relatively high rates of voter disenfranchisement.

Lippke, Richard L. The Disenfranchisement of Felons. *Law and Philosophy*, November 2001, 20(6): 553-80.

In this article the author discusses the right to political participation and examines the arguments for the disenfranchisement of those having committed serious criminal offenses. Lippke divides arguments for disenfranchisement into two groups: (1) arguments that are relatively independent of the justifying aims of punishment, and (2) arguments that make explicit reference to the justifying aims of punishment. In the first group he finds that some, though by no means all, serious offenders should lose the vote for a period of time (which, however, does not have to overlap with the duration of the other sanctions brought against them). In this first set of arguments he also finds implied that the state is justified in attempting to exclude the offenders in question from all forms of political participation, a position he admits runs afoul of moral limits on punishment. In the second group of arguments Lippke finds that none support the blanket disenfranchisement of felons, except possibly for serious offenders and even then only as long as the following assumption holds: all live in a reasonably just society that is genuinely democratic. For Lippke this assumption points to the critical problem of disenfranchisement, which is its assumption that society uniformly creates equality between all members.

Manza, Jeff, Christopher Uggen, and Marcus Britton. The Truly Disenfranchised: Felon Voting Rights and American Politics. Presented at the annual meetings of the American Sociological Association in Washington, D.C., August 16, 2000, and web-published at <http://www.northwestern.edu/ipr/> in Evanston, IL: Institute for Policy Research, 2001.

This study estimates the political consequences of laws denying convicted felons the right to vote in the U.S. by examining prior elections and asking how the outcomes would have been affected had felon disenfranchisement not existed. To calculate the political consequences, sociologists Manza, Uggen and Britton use election and correctional data to hypothesize how such lost votes might be distributed amongst political parties and how they would affect past senatorial and presidential elections. Their results suggest that at least one Democratic presidential victory would have been jeopardized had contemporary rates of disenfranchisement prevailed during earlier periods, and that felon disenfranchisement has played a decisive role in at least seven senatorial elections, contributing to the Republican Senate majority of the early 1980s and mid-1990s. The authors also project that in the states affected by disenfranchisement policies the current 2.5% of the total voting age population comprised of felons and ex-felons will increase to 3% by 2005. Considering that the margin of victory in 3 of the last 10 presidential elections has been 1.1% or less of the total voting age population, the authors argue that felon disenfranchisement could be a decisive factor in future presidential elections.

Mauer, Marc. Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration. *Federal Sentencing Reporter*, March/April 2000, 12 (5): 248-51.

This article briefly reviews felon disenfranchisement laws in the U.S., their place in the international context and the impact they have on U.S. elections. The author is centrally concerned with the reasoning put forth for disenfranchisement laws and explores counter-arguments. In a critical and questioning line of argumentation Mauer examines disenfranchisement rationale and finds it false or wanting. The author discusses some of this

rationale and its problems in greater detail: that convicted felons are not trustworthy voters, that they are not loyal to our nation, that felons would fraudulently interfere with the voting process if allowed to vote, that allowing inmates to vote is logistically overly cumbersome, that few convicted felons would vote, and finally, that disenfranchisement is a legitimate aspect of criminal punishment. Mauer argues that instead we should encourage felons' electoral participation in light of their likely return to society, and he specifically recommends "palatable political arguments" for a series of interim reforms: (1) Repealing disenfranchisement bans based on the popularly agreed upon notion of "doing the time for the crime" and allowing a felon the chance to return to civil life, (2) pushing for a uniform federal ban in the interest of uniformity between state and federal conflicts on disenfranchisement, (3) arguing for shifting to judicially imposed felony disenfranchisement, and (4) conducting information campaigns to inform felons who have won their voting rights of their right to vote.

Miles, Thomas J. Does the Disenfranchisement of Convicted Felons Reduce Electoral Participation? Drafted in March 1999, unpublished.

Miles' study tests an assumption implicit in most arguments of both opponents and proponents of criminal disenfranchisement laws: that in the absence of such law convicted felons would vote. The author argues that his calculations of disenfranchisement and voter participation rates demonstrate that criminal disenfranchisement does not have a statistically significant impact on electoral behavior or political outcomes. Miles' evidence is that the maximum potential effect of the disenfranchisement of felons is about a 1% reduction in overall registration and voting rates - statistically indistinguishable from zero. For the same reason the author also argues that the numbers of African Americans affected by these laws is not statistically significant and thus does not prove that blacks are being affected disproportionately, nor that these laws favor the electoral chances of either party.

Miles concludes that the results of his study are also consistent with the idea that criminal disenfranchisement does not affect rates of voter registration and turnout because those who are most likely to be subject to such a penalty are also those who, for reasons other than the law, are less apt to vote. The author argues that his findings have important implications for the debate over criminal disenfranchisement, in that they suggest to proponents of the policy that disenfranchisement is unlikely to inflict much voter dilution on convicted felons because abstinence from voting is their preferred behavior anyway. He argues the study also suggests to opponents of this policy that it is not likely to impede rehabilitation, because voting does not appear to be an activity valued by those likely to be involved with the criminal justice system. Lastly, the author argues that his work suggests to those who seek to increase the electoral participation of minority communities that these laws are not primarily responsible for racial differences in rates of electoral participation.

Pettus, Katherine Irene. Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity. Dissertation, Columbia University, 2002.

Pettus asks what the permanent absence of the disenfranchised from the electorate says about the legitimacy of government policies. In her dissertation the author examines theoretical concepts of citizenship and status-honor, and analyzes American citizenship as a “compound” phenomenon in a federal system. She compares American citizenship to republican and democratic notions of citizenship, taking the notion of democratic individuality as the normative ideal, and examines the post-bellum administrative imperative of black citizenship, the Fourteenth Amendment, and the institutional sources of American felony disenfranchisement. The author’s conclusions are that the criminal justice system is constructed as a representative institution distorted by prosecutorial discretion. The jurisprudence of vote dilution, individual rights, and the Warren Court decisions are examined, and the political inequality of “qualified” American citizens caused by varied state disenfranchisement law is posited. Pettus discusses the “double-polity” where the enfranchised rule over the disenfranchised, and identifies it as a neo-colonialist regime. Finally, felony disenfranchisement is analyzed from a post-colonial perspective and is viewed as a perpetuation of the “Racial Contract.”

Preuhs, Robert R. State Felon Disenfranchisement Policy. *Social Science Quarterly*, December 2001, 82(4): 733-48.

Preuhs is interested in how felony disenfranchisement policies disproportionately affect minority citizens, and how legal scholars and others have argued that felon disenfranchisement is a result of racial politics aimed primarily at undermining the electoral power of black and Latino citizens. His study evaluates these claims in an empirical analysis using cross-sectional data on current state felon disenfranchisement policies. Preuhs’ findings demonstrate that the size of the minority population, parity in incarceration rates, and the degree of legislative professionalism are the primary explanatory factors of this policy. He concludes that given the continued rise in minority incarceration rates relative to those for whites, the link between the racial composition of a state and the severity of felon disenfranchisement laws, the future of minority participation in the democratic process is bleak.

Shapiro, Andrew L. Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy. *Yale Law Journal*, November 1993, 103: 537-66.

In this article Shapiro reviews and critiques court decisions in cases challenging criminal disenfranchisement laws under the Constitution and the Voting Rights Act. The author maintains that plaintiffs can rely on the Act’s results test in Section 2, which expressly prohibits any electoral qualification that denies or abridges voting rights in a manner that results in members of a minority group having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” Thus, he argues, plaintiffs can use the Voting Rights Act to establish that criminal disenfranchisement laws are unconstitutional for two reasons: first, because these laws deny the vote to a class of individuals who are disproportionately nonwhite (vote denial), and second, because these laws dilute the voting strength of minority communities (vote dilution). For Shapiro, the Voting Rights Act is the most effective weapon against criminal disenfranchisement currently available.

The author argues that after the failure of cases such as *Richardson v. Ramirez*, few plaintiffs are attacking criminal disenfranchisement in the courts. More specifically, he judges that *Wesley v. Collins* has deterred plaintiffs from bringing cases against criminal disenfranchisement under the Voting Rights Act. But, as Shapiro views it, the alternatives are not better. He finds that while state legislative reform efforts have met with some success, they are piecemeal and as such are leaving millions of offenders without the right to vote. The author suggests that while the current American climate of retributive zeal against convicted criminals makes the possibility of swift legislation mandating enfranchisement of all offenders unlikely, much can be achieved through vigorous litigation under the Voting Rights Act and through using its results test of Section 2.

The following bibliography constitutes a varied reading list of literature produced on disenfranchisement. It contains references of historically important scholarship, a sampling of references on disenfranchisement from associated perspectives, and instances of popular treatments of the subject. Further information on this literature is available from *The Sentencing Project*.

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