On Election Day 2000 in Florida, in the midst of all the dimpled ballots and hanging chads, Thomas Johnson stayed home. Johnson, the African American director of a Christian residential program for ex-offenders wanted to vote for George W. Bush, but was prevented by Florida law from doing so. In 1992, Johnson had been convicted of selling cocaine and carrying a firearm without a license in New York. After serving his sentence and moving to Florida in 1996, Johnson found that as an ex-felon he was barred from the voting booth. He was hardly alone in this situation, as at least 200,000 others in Florida who had theoretically “paid their debt to society” were also frozen out of the electoral process. Nationwide, four million Americans either serving a felony sentence or who had previously been convicted of a felony were also forced to sit out the election.1

The laws that kept these citizens home can be traced back to the founding of the nation. In retrospect it is not terribly surprising that felons were excluded from political participation since the majority of the population was excluded at the time. With the founding “fathers” only having granted the vote to wealthy white male property holders, the excluded population also incorporated women, African Americans, illiterates, and the landless. Thus, political participation in the new democracy was extended to just 120,000 of the two million free Americans (not counting the more than one million slaves and indentured servants) at the time, about 6 percent of the population.2 Except for convicted felons, of course, all these other exclusions have been removed over a period of 200 years, and we now look back on those barriers with a great deal of national embarrassment.

The exclusion of felons from the body politic derived from the concept of “civil death” that had its origins in medieval Europe. Such a designation meant that a lawbreaker had no legal status, and also had dishonor and incapacity imposed on his or her descendants. The concept was brought to North America by the English in the Colonial period. After the Revolution, some of the English common law heritage was rejected, but the voting disqualifications were maintained by many states. Two hundred years later, every state but Maine and Vermont (which allow prisoners to vote) has a set of laws that restricts the voting rights of felons and former felons. Forty-eight states and the District of Columbia do not permit prison inmates to vote, 32 states disenfranchise felons on parole, and 28 felons on probation. In addition, in 13 states a felony conviction can result in disenfranchisement, generally for life, even after an offender has completed his or her sentence. Thus, for example, an 18-year-old convicted of a one-time drug sale in Virginia who successfully completes a court-ordered treatment program and is never arrested again has permanently lost his voting rights unless he receives a gubernatorial pardon.

While the issue of disenfranchisement would raise questions about democratic inclusion at any point in history, the dramatic escalation of the criminal justice system in the past 30 years has swelled the number of persons subject to these provisions to unprecedented levels. Currently, 2 percent of the adult population cannot vote as a result of a current or previous felony conviction. Given the vast racial disparities in the criminal justice system it is hardly surprising, but shocking nonetheless, to find that an estimated 13 percent of African American males are now disenfranchised.

The coalescence of disenfranchisement laws and racial exclusion began to be cemented in the post-Reconstruction era following the Civil War. Prior to that not only were blacks in the South obviously unable to vote, but only six Northern states permitted their participation. But the newly enfranchised black population in the South was quickly met with resistance from the white establishment. In many states, this took the form of the poll tax and literacy requirements being adopted, along with a number of states tailoring their existing disenfranchisement policies with the specific intent of excluding black voters. One scholar describes this as a measure designed to provide “insurance if courts struck down more blatantly unconstitutional clauses.”3

The disenfranchisement laws adopted in a number of southern states were not at all subtle, often requiring the loss of voting rights only for those offenses believed to be committed primarily by blacks. In Mississippi, for example, the 1890 constitutional convention called for disenfranchise-
voting for decades, it did not disenfranchise rapists and murderers until 1968.9

While one might debate whether the intended effect of disenfranchisement policies today is to reduce minority voting power, it is inescapable that this impact could have been predicted as a logical consequence of the nation’s wars on crime and drugs. The five-fold increase in the nation’s inmate population since the early 1970s brought about both an absolute increase in numbers as well as a disproportionately greater impact on persons of color. Much of this was due to the inception of the modern-day war on drugs in the 1980s, whereby the number of persons incarcerated for a drug offense rose from 45,000 in 1980 to nearly a half million today. Blacks and Latinos now constitute four of every five drug offenders in state prison. A considerable body of research documents that these figures are not necessarily a result of greater drug use in minority communities but rather drug policies that have employed a law enforcement approach in communities of color and a treatment orientation in white and suburban neighborhoods.10 And the greater the number of minority offenders in the system, the greater the rate of disenfranchisement.

At modest rates of disenfranchisement such a policy is one that is clearly of concern to an individual felon but is unlikely to affect electoral outcomes in any significant number of cases. But at the historic levels that have been achieved in recent decades the issue is no longer one of merely academic interest but is likely to be having a profound impact on actual electoral results.

Sociologists Christopher Uggen and Jeff Manza have produced a sophisticated model for estimating the number of disenfranchised voters in each state and the effect of their absence on elections for national office.11 Uggen and Manza assume that felons and former felons would vote at lower rates than the (already low) national rate but that they would be more likely to vote Democratic, given that they are disproportionately minorities (an estimated 38 percent African American) and poor and working-class whites. Even with a projected lower turnout they conclude that disenfranchisement policies have affected the outcome of seven U.S. Senate races from 1970 to 1998, generally in states with close elections and a substantial number of disenfranchised voters. In each case, the Democratic candidate would have won rather than the Republican victor. Projecting the impact of these races over time leads them to conclude that disenfranchisement prevented Democratic control of the Senate from 1986 to 2000.

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Disenfranchisement policies are in sharp conflict with the goal of promoting public safety.

Supporters of felon disenfranchisement contend that regardless of their outcome these policies are important for several reasons. One of the significant court decisions, an Alabama case decided in 1884, found that denying the vote to ex-convicts was necessary to preserve the “purity of the ballot box” from the “invasion of corruption” and that “this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities.”

In more recent times, this rationale has been presented within the context of the “law and order” political climate, being expressed as a fear that convicted felons would presumably cast their vote in such a way as to weaken law enforcement institutions. In a significant New York case in 1967, Judge Friendly wrote that “it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.” Or in the words of one modern-day proponent, “criminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed . . . to be less trustworthy.”

In other words, ex-felons would presumably vote for policies that help criminals and thwart the legitimate interests of otherwise law-abiding members of the community. If so, this might set up a conflict between the principle of democratic inclusion and the need for public safety. How real a threat is this? Suppose, for example, a group of burglars want to reduce the criminal penalties for burglary. First, they would have to field a candidate (either one of their own or someone else who is “pro-burglar”) to run for state office. They would then have to mount a rather effective campaign in this era of “get tough” politics in order to secure 51 percent of the vote. Once elected, the new office holder would have to convince a majority of the state legislature and the governor to reduce penalties for burglary. This hardly seems like a substantial threat to the safety of the community.

Perhaps a less fanciful scenario relates to drug policy. As the war on drugs has swelled prison populations and taken a disproportionate toll on minority communities, considerable opposition has developed to mandatory sentencing and related policies. In some neighborhoods substantial numbers of people are returning home after serving five-year prison terms for low-level drug offenses. Arguably, their voices and votes, along with those of their neighbors, might lead to the election of candidates who support scaling back harsh drug laws. Is there a policy rationale that justifies excluding persons who have experienced the impact of such laws from deliberating about their wisdom?

The prospect of electoral fraud is also sometimes raised as a legitimate concern in regard to felon voting. While there might be some validity to this argument for felons convicted of electoral fraud, it is hard to imagine why a car thief or drug seller would have an interest in, or knowledge of, committing such an offense. Since more than 99 percent of felons have not been convicted of electoral offenses, this seems to be a rather overbroad concern. And when electoral fraud occurs, it rarely manifests itself in the presence of a voter in the voting booth, but rather through improper counting of ballots or outright bribery. One does not need to be a registered voter to commit these offenses. Ironically, in some states electoral offenses are only classified as misdemeanors and therefore persons convicted of these crimes are not subject to disenfranchisement.

Disenfranchisement is sometimes premised on being a legitimate aspect of punishment for a criminal offense, but this is curious in several respects. While all other aspects of sentencing are expected to be proportional to the offense involved and are imposed by a judge on an individual basis, disenfranchisement is an across-the-board penalty imposed on mass murderers and larcenists alike. Further, criminal convictions do not otherwise result in the loss of basic rights. Convicted felons maintain the right to divorce, own property, or file lawsuits. The only restrictions generally placed on these rights are ones that relate to security concerns with a prison. Thus, an inmate may subscribe to Time magazine but not to a publication that describes the production of explosive devices. Conflating legitimate punishment objectives with the denial of constitutional rights sets a risky precedent.

Proponents of disenfranchisement suggest that even in the most extreme cases the loss of the right to vote is never truly for a lifetime since all states maintain a process whereby ex-felons can seek restoration of their rights from the governor. While this is true in theory, in practice it is often illusory. A number of states impose a waiting period of 5 or 10 years before an ex-felon can even petition to have his or her rights restored. The process of seeking restoration is also often cumbersome and expensive. In Alabama, for example, ex-felons are required to seek a pardon from the Board of Pardons and Paroles, but also to provide a DNA sample to the state. Yet only four counties are set up to administer DNA testing, so an ex-felon might have to travel hundreds of miles to do so. In Mississippi, ex-felons must either secure an executive order from the governor or convince a state legislator to introduce a bill on his or her behalf, obtain a two-thirds majority in the legislature, and have it signed by the governor.

Data on the number of former felons who have their rights restored are difficult to come by, but in one recent two-year period a total of 404 persons in Virginia regained their voting rights at a time when there were more than 200,000 ex-felons in the state. The state of Florida had previously instituted a procedure whereby the Department of Correc-
tions was required to aid released inmates in regaining their voting rights, and as many as 15,000 former felons a year were able to do so in the mid-1980s. But new rules imposed by the state in the early 1990s greatly restrict the number of eligible inmates, with the result that fewer than 1,000 persons a year have their rights restored. Those who are not eligible still have the option of applying for executive clemency, but this process involves completing a 12-page questionnaire that asks about such items as the details of a spouse’s previous marriage, existing disabilities, amount of stocks and bonds owned, and a description of “your relationship with your family.”

While the rationale in favor of disenfranchisement is hardly compelling, there are two primary arguments which suggest that these laws are both counterproductive and out of line with evolving international norms. First, disenfranchisement policies are in sharp conflict with the goal of promoting public safety. Whether an offender has been sentenced to prison, probation, or some other status, a primary goal of the criminal justice system and the community should be to reduce the likelihood that the person will reoffend. One means by which this can be accomplished is through instilling within the offender a sense of obligation and responsibility to the community. Those persons who feel some connection to their fellow citizens are less likely to victimize others. As former Supreme Court Justice Thurgood Marshall stated, “[Ex-offenders] . . . are as much affected by the actions of government as any other citizen, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of a right to vote to such persons is hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.”

American disenfranchisement policies are also quite extreme by the standards of other industrialized nations. In no other democracy are convicted offenders who have completed their sentences disenfranchised for life, as is the case in more than a dozen states. Of the handful of nations that restrict voting rights for a period of time after the conclusion of a prison term, those such as Finland and New Zealand only do so for several years and only for electoral offenses or corruption. A number of nations, including ones as diverse as the Czech Republic, Denmark, Israel, Japan, and South Africa, permit inmates to vote as well.

In recent years, the increased attention devoted to this issue has resulted in a reconsideration of some of the more extreme policies within the states. In 2000, the governor of Delaware signed into law a measure repealing the state’s lifetime ban on ex-felon voting (imposing a five-year waiting period in its place), and the following year New Mexico did away with its lifetime ban as well. Connecticut went further, extending voting privileges to felons currently on probation as well. And in August 2001, the bipartisan National Commission on Federal Election Reform co-chaired by former Presidents Ford and Carter recommended that states allow for the restoration of voting rights for felons who have completed their sentence. In the wake of the national discussion generated over electoral problems and reforms, the nation is likely to see a renewed focus on this area of public policy in the coming years.

The irony of the combined impact of American disenfranchisement policies along with the massive expansion of the prison system is that a half century after the beginnings of the civil rights movement increasing numbers of African Americans and others are losing their voting rights each day. As the Western democracy with the lowest rate of voter participation, it is long past time for the United States to consider means of bringing more Americans into the electoral process and end the practice of excluding large groups of citizens.

References
5 Ratliff, 266–67; see also Shapiro, p. 541.
6 Shapiro, p. 541.
7 Ewald, p. 91.
9 Ewald, p. 92.
12 Washington v. State, 75 Ala. 582, 585 (1884).
16 Fellner and Mauer, p. 6.
17 Ibid., pp. 5–6.
18 Florida Parole Commission, “Clemency Questionnaire.”
19 Richardson v. Ramirez, 418 U.S. at 78 (Marshall J. dissenting, citations omitted).
20 Fellner and Mauer, p. 18.