

Workshop on Democratic Governance
Panel: Participation
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Felon Disenfranchisement
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Issue: Denial of voting rights to people with felony convictions.

In 48 states and the District of Columbia people in prison are denied the right to vote. The sole exceptions are Maine and Vermont. While pre-trial detainees retain voting rights, often they are effectively disenfranchised.

Disenfranchisement of those with felony convictions is less uniform. Some states disenfranchise only those offenders in prison; others disenfranchise those in prison and on parole; again others disenfranchise those under any criminal justice sanction; some deny voting rights only to certain offenders with felony records. The most restrictive states disenfranchise all those with a felony record whose civil rights have not been restored. Restoration of rights varies widely among states but is generally burdensome.

See The Sentencing Project, *Felony Disenfranchisement Laws in the United States* (Sept. 2004), at <http://www.sentencingproject.org/pdfs/1046.pdf>; Patricia Allard & Marc Mauer, The Sentencing Project, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws* (2000).

Scope of the Issue:

In a 1998 study, The Sentencing Project and Human Rights Watch found approximately 3.9 million U.S. citizens (one in fifty adults) to be disenfranchised, including over one million who had fully completed their sentences. More than one third of the disenfranchised are African-American men, which means that thirteen percent of African-American men in the United States (1.4 million) are disenfranchised. See Jamie Fellner & Marc Mauer, The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), at <http://www.hrw.org/reports98/vote/>.

In 1980, 1.8 million persons were under supervision of the criminal justice system. By 2003, that number had grown to 6.9 million. A growing number of individuals with felony record means a larger number of disenfranchised. Projections indicate that nearly one in five African-Americans born today, and one in three African-American men, can expect to serve prison time. The impact on voting rights is obvious and disconcerting.

Historical Development:

Disenfranchisement was part of “civil death,” which originated in Roman and Greek law. Civil death denied offenders any participation in the state, allowed for forfeiture of their property, and even permitted anybody to kill them.

While the U.S. Constitution prohibits “civil death”, English colonists brought the concept of felon disenfranchisement to the United States.

Felon disenfranchisement became a major issue after Reconstruction. Many states, especially those in the South, considered felon disenfranchisement another means to deny blacks voting rights. Frequently they chose the categories of crimes leading to disenfranchisement not based on their heinousness but rather on their perception of how likely African-Americans were to commit them.

While many states abolished disenfranchisement following imprisonment, some continue to retain widespread disenfranchisement of those with felony records.

Litigation History:

In a landmark decision, the U.S. Supreme Court upheld felon disenfranchisement in *Richardson v. Ramirez*, 418 U.S. 24 (1974). It determined that the drafting history, historic practice, and the language of section 2 of the Fourteenth Amendment allow states to deny the right to vote based on a criminal conviction. So far the Supreme Court has not revisited the issue of felon disenfranchisement.

In a subsequent case, *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court declared Alabama's constitutional provision on disenfranchisement unconstitutional as a violation of the Equal Protection Clause. The state constitutional provision had been passed with a racially discriminatory purpose.

State courts and lower federal courts have upheld numerous challenges to felon disenfranchisement on constitutional and statutory grounds. Two cases -- one in Washington state, the other currently in the Eleventh Circuit -- have given intermediate victories to disenfranchised felons, however.

Legislative Action:

In Congress, legislation is pending to re-enfranchise all felons for the purpose of permitting them to vote in presidential elections but not in state and local elections, which are governed by state law. Constitutional concerns, practical problems, and lack of political will have stalled the bill from proceeding.

Legislative action has been more successful in some states. Piecemeal re-enfranchisement of non-violent offenders or those who have fulfilled their entire sentence have been most successful. Since 1997 nine states have scaled back or repealed parts of their disenfranchisement provisions.

Impact of Felon Disenfranchisement on Democracy:

The U.S. Census counts prisoners, even though the vast majority of them are denied voting rights, at their place of imprisonment. This means that members of Congress in districts whose borders are drawn based on Census data and that have large prison populations effectively represent a much smaller group of voters than those in districts with a large number of individuals imprisoned in a different part of the state. This leads to substantial vote dilution. For further information on this topic, see the PrisonersoftheCensus-News at www.PrisonersoftheCensus.org.

Some sociologists have projected that a number of senatorial and some presidential elections might have turned out differently without disenfranchisement laws. See Christopher Uggen & Jeff Manza, *The Political Consequences of Felony Disfranchisement Laws in the*

United States (2001), at <http://www.northwestern.edu/ipr/publications/papers/2000/disfranchise.pdf>.

Disenfranchisement also provides a disincentive to registering and voting to many individuals who consider themselves barred from participating in the election though they might not be. In some states voting rolls are purged without such information being provided to the potential voter. See Prison Reform Advocacy Center, *The Disenfranchisement of the Re-Enfranchised: How Confusion Over Felon Voter Eligibility in Ohio Keeps Qualified Ex-Offender Voters From the Polls* (Aug. 2004), at http://www.prisonreform.com/reports_main.shtml; Laleh Ispahani & Nick Williams, ACLU, Demos & Right to Vote, *Purged! How a patchwork of flawed and inconsistent voting systems could deprive millions of Americans of the right to vote* (Oct. 2004).

Racial Impact of Felon Disenfranchisement:

With the large number of African-Americans in the criminal justice system, the number of disenfranchised African-Americans is disproportionately large.

Disparate enforcement of laws, especially in the “war on drugs”, has not only caused the disproportionate incarceration of African-Americans but also their disproportionate denial of voting rights.

For some information on the local impact of felon disenfranchisement, see Ryan S. King & Marc Mauer, The Sentencing Project, *The Vanishing Black Electorate: Felony Disenfranchisement in Atlanta, Georgia* (Sept. 2004), at www.sentencingproject.org.

Comparative Dimension:

In 2002 the Canadian Supreme Court struck down as unjustified the denial of voting rights of prisoners held for two or more years. It determined that disenfranchisement of prisoners is not rationally connected to the government’s asserted objectives -- enhancing respect for the law and imposing legitimate punishment. *Sauvé v. Canada* (Chief Electoral Officer), [2002] S.C.R. --, 2002 SCC 68.

In March 2004 the European Court of Human Rights decided in *Hirst v. The United Kingdom* (no. 2) (application no. 74025/01) that the English voting ban could not be upheld in the case of a person who continued to be detained after the retributive portion of his sentence had passed based on a determination that he posed a danger to public safety. The Court struck down any automatic and blanket restriction on the franchise of all convicted prisoners.

In March 2004 South Africa’s Constitutional Court declared the disenfranchisement of prisoners unconstitutional under South Africa’s Constitution. It found neither cost nor logistical constraints persuasive. It also rejected the government’s concern that enfranchisement of prisoners might send a “soft-on-crime” message to the population. In light of the history of disenfranchisement in South Africa, the Court found the government’s arguments unpersuasive. *Minister of Home Affairs v. NICRO and Others*, Case CCT 03/04 (March 3, 2004).

For an in-depth discussion of disenfranchisement based on a criminal conviction under German law, see Nora V. Demleitner, *Continuing Payment on One’s Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 Minn. L. Rev. 753 (2000).