

# Collateral Consequences of Incarceration: the Racial, Social and Political Impact of Felon Disenfranchisement in Iowa between 2005-2016

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## ABSTRACT

**Tim van den Bergh:** “Collateral Consequences of Incarceration: the Racial, Social and Political Impact of Felon Disenfranchisement in Iowa between 2005-2016”

Universal suffrage legitimizes democratic governance. The establishment of a repressive United States criminal justice system, however, has imposed strict qualifications on the right to vote. Signified by racialized mass incarceration, the punitive law and order regime of the late 20th century has led to a crisis of incarceration that leaves more than 5 million Americans disenfranchised today. This paper maintains that felon disenfranchisement in the United States carries detrimental consequences for (ex-) felons’ processes of reintegration and moreover suggests that criminal voter disqualification contributes to increased racialized social stratification. Moreover, this paper studies the public policy of felon disenfranchisement at an intersection of punishment, race and citizenship discourse while applying theoretical frames consistent with social conflict and critical race theory. By use of the state of Iowa as a case study, I find that the collateral consequences of a felony conviction dilute the voting strength of racial minorities and have a significant impact on both regional and national American politics. This impact is potentially influenced by all three branches of government, making the political practice of felon disenfranchisement a suitable topic for studying the role of power relations and racial conflict in American political development.

**Key words:** *felon disenfranchisement, criminal justice, race, voting rights, citizenship*

(Under the direction of Dr. Jorrit van den Berk)

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## **Chapter I. Introduction**

### **A. Felon Disenfranchisement: What Does It Mean and Why is it Important?**

Felon disenfranchisement is the practice of disqualifying convicted (ex-)felons from the electoral process. As a public policy that disqualifies millions of Americans from participating in the electoral process, signifies the tenacious grasp of the U.S. criminal justice system. Cutting across a wide range of issues, felon disenfranchisement has warranted multidisciplinary scholarship engaged with the overarching topic of American democracy. As one of the many collateral consequences of incarceration, felon disenfranchisement comprises of a variety of socio-legal elements, making it a contentious policy not absent from persistent criticism. Much of this attention and criticism has highlighted the intersection of punishment and race as a problematic feature of both historical and contemporary criminal justice in the United States.

Currently, the Sentencing Project reports that, “5.85 million Americans are prohibited from voting due to laws that disenfranchise citizens convicted of felony offenses” (Chung n.p). This substantial disenfranchised population of felons and ex-felons is a direct result of the trend of mass incarceration and the repressive penal policies of the early 1970s. Felon disenfranchisement laws themselves, however, can be traced back to the period before and during the Reconstruction and are part of the United States’ racialized history. In her book, *The New Jim Crow*, Michelle Alexander observes that, “an extraordinary percentage of black men in the United States are legally barred from voting today, just as they have been throughout most of American history” (1). To that extend, the continuous trend of the disproportionate felon disenfranchisement of African Americans has led to a deterioration of African American political participation and power.

The race variable persists in most discussions on criminal justice reform in the United States. For instance, regarding the racialized outcomes of felon disenfranchisement, Robin Lenhardt notes that, “one in seven of the 10.4 million black males of voting age are either currently or permanently barred from voting due to a felony conviction” (918). Even more strikingly, Bowers & Preuhs estimate that “40 percent of the next generation of black men may be permanently disenfranchised in states with lifetime restrictions” (728). It is safe to say that due to the magnitude of America’s carceral state, the U.S. criminal justice system significantly

impacts the American polity. Few attempts, however, have been made to theorize how former felons fit into, and reshape, American democracy (Uggen, Manza, & Thompson 281) and this thesis will do exactly that. Through an application of theory and discourse concerned with punishment, citizenship, and race, this thesis investigates what political systems, branches, and institutions, are involved with the practice of felon disenfranchisement. Specifically, this thesis will look at the instrumentality of felon disenfranchisement within the context of social conflict theory and critical race theory. Together, these theoretical frameworks suggest that disqualifying (ex-)felons from the electoral process contributes to the maintenance of regimes of power relations and decreases the political participation and agency of minority populations. I follow Michelle Alexander's argument that institutionalized and overt racism have been replaced with structural racism and that felon disenfranchisement should be viewed as a response to the collapse of Jim Crow and as a backlash against the gains of the Civil Rights Movement.

For the purpose of offering both a broad national and a state-level perspective, this thesis consists of two parts. In Part I, I will provide a topical analysis of felon disenfranchisement within a broader theoretical framework. Here, I introduce specific concepts from critical race theory and social conflict theory to explore the social and political consequences of connecting citizenship to punishment. Furthermore, I analyze the history felon disenfranchisement and the trend of mass incarceration to explain how the expansion of a racialized U.S. prison population becomes more problematic when taking into account the collateral consequences of imprisonment. Lastly, Part I focusses on national implications, trends, and developments, and discusses how the issue of felon disenfranchisement fits within a larger context of American criminal justice policy that remains in conflict with a transnational discourse.

Part II narrows the scope to the State of Iowa and examines its unique felon disenfranchisement circumstances. A discussion of felon disenfranchisement on a state level allows for an in-depth analysis of the practices involved in the maintenance of the public policies that influence participation in the electoral process. More specifically, I will discuss the political processes that have influenced, or have had the capacity to influence, the voting rights of (ex-)felons. Between 2005 and 2016 Iowa has seen some significant developments regarding the *de jure* and the *de facto* disenfranchisement of its (ex-)felons, nevertheless Iowa remains one of the states with the harshest felon disenfranchisement laws in the nation. Together, these realities make the state of Iowa a suitable case study for a thesis engaged with the nexus of punishment,

race, and citizenship. To correlate punishment, race, and citizenship with one another, I look at channels and opportunities for protest and criminal justice advocacy. Here, I seek to investigate how criticism is voiced and what theoretical concepts are found in the discussion on the appropriateness of felon disenfranchisement. In order to conceptualize Iowa's discussion on voting rights and punishment, Part II draws on Executive Orders, letters sent by advocacy groups and court documents. These sources highlight how the conversation in Iowa is indicative of the race-variable and the punishment philosophy of rehabilitation.

For the remainder of this thesis I will refer to offenders who are still incarcerated as 'felons', offenders who have been released from state supervision as 'ex-felons' and will note both groups together as '(ex-)felons'. Furthermore, since felon disenfranchisement is a policy that is enforced in some states but not in all, Part I will consist of a more general discussion and Part II will consist of a more in-depth analysis of felon disenfranchisement consequences. This way, this thesis is able to address both the national implications of disenfranchising (ex-)felons and the regional politics involved in shaping disenfranchisement circumstances.

## **B. Overview of Chapters**

This thesis consists of nine chapters. Part I consists of chapter 2 through 5 and Part II consists of chapter 6 through 8. Chapter 2 discusses social contract theory and its compatibility with the policy of felon disenfranchisement. Here, I will refer to the works of Hobbes, Locke, and Rousseau, in order to apply social contract theory with various disenfranchisement explanations. Social contract theories have long been used to justify felon disenfranchisement, contending that the innate defects of a convict render him incapable of respecting society's laws (Levine 212). At the hand of the four punishment philosophies; incapacitation, retribution, deterrence and rehabilitation, this chapter highlights the (in)consistency of social contract theory with felon disenfranchisement. Furthermore, I will provide evidence, in the context of punishment philosophies and purposes as expressed by the above mentioned authors, necessary to compare and contrast social contract writing with felon disenfranchisement rhetoric and concepts. The social contract, which is a foundational theory originating from the enlightenment, provides an historical basis of theory related to transgression of law and the origins of formal society. This theory includes elements of the individual, the collective, and legitimacy of

authority, which constitute important theoretical considerations while addressing the policy of felon disenfranchisement.

Chapter 3 provides an overview of the existing body of literature on felon disenfranchisement. Here, I will look at the nexus of punishment and citizenship, while outlining scholarly perspectives on felon disenfranchisement as a collateral consequence. The main theories and concepts that are discussed in this chapter include colorblindness, social distance, racial threat, and conflict theory. Amongst other findings, literature on felon disenfranchisement emphasizes the adaptability of the oppressive institution of racism by highlighting various factors that suggest marginalized populations suffer at different rates from repressive penal policies. Additionally, this chapter explains how scholars have drawn on notions of power relations and construction of otherness to explain the function of felon disenfranchisement as a social phenomenon. Finally, chapter 3 will discuss the public support, or the lack thereof, of disenfranchising (ex-)felons.

In chapter 4, I will present an historical overview of felon disenfranchisement in the United States and provide an analysis of the significance of the trend of mass incarceration. An inclusion of an historical account of punishment in relation to citizenship status illustrates the importance of the race factor in the emergence and design of policies such as felon disenfranchisement. This chapter relates major political developments, such as the ratification of the 14th and 15th Amendment, to domestic race relations at specific moments in time. This historical analysis also serves to provide further context for some of the theories presented in chapter 3 and illustrates how felon disenfranchisement can be regarded as a response to the end of Jim Crow and as a backlash to the gains of the civil rights movement. Lastly, I will expand the scope of the collateral consequences of racialized mass incarceration and felon disenfranchisement to a broader community based perspective.

Chapter 5 looks at felon disenfranchisement from a jurisprudential, legislative, and transnational perspective. Here, I will discuss the 1974 *Richardson v. Ramirez* Supreme Court ruling and elaborate on several critiques of this decision. Furthermore, I will analyze the constitutionality of felon disenfranchisement and present some of the legal challenges that have been brought to court under the 8<sup>th</sup> and 14<sup>th</sup> Amendment and the Voting Rights Act of 1965. Then, this chapter outlines congressional efforts and proposed pieces of legislation that attempt to create uniform standards for federal elections. This section also highlights the complexity of

felon disenfranchisement as a state policy with national implications. One national implication which I mention is the issue of federal election and the instrumentality of felon disenfranchisement within a Democratic-Republican dichotomy. Lastly, I will include a transnational discourse illustrated by a cross-national comparison. Here, I will refer to foreign circumstances of felon disenfranchisement to expose the extremity of U.S. disenfranchisement laws and emphasize the anomalous character of the U.S. criminal justice system from a transnational perspective.

Chapter 6, the first chapter of Part II, narrows the scope to a state level and explains why Iowa deserves academic attention. More specifically, this chapter outlines historical and contemporary felon disenfranchisement circumstances in the State of Iowa and looks at the policies put in place that have influenced the voter disqualification process. Here, I will apply racial threat to Iowa's disenfranchisement origins and argue that today felon disenfranchisement is more likely explained by Iowa's sizeable minority prison population. Moreover, I will analyze changes in Iowa's de facto disenfranchisement enacted by Executive Orders signed in 2005 and 2011 and lastly I will examine the significance of the application procedure that is currently used for the restoration of rights and citizenship.

In chapter 7, I will review letters to Iowa Governor Branstad sent by the American Bar Association (ABA), the American Correctional Association (ACA), the American Probation & Parole Association (APPA), and a coalition of nonpartisan and Iowa faith-based organizations urging him to uphold the Executive Order that automatically restored the voting rights of ex-felons. Furthermore, I will highlight consistencies between the various organizations and relate the rhetoric of these letters to underpinnings of broader felon disenfranchisement theory and protest. Moreover, I will connect the language and references of the various criminal justice organizations to the issue of race and discuss their views on the ramifications of Governor Branstad's Executive Order 70 that reinstalled an application process for rights restoration.

Chapter 8 presents two notable court cases that have been brought before the Iowa Supreme Court, namely *Chiodo v. Section 34.24 Panel* and *Griffin v. Pate*. I will draw on opinions voiced by the Iowa Supreme Court and Amici briefs submitted by several civil rights organizations to illustrate the role of the judiciary in shaping the socio-legal circumstances of criminal voter disqualification in the state of Iowa. I will argue that the application of judicial minimalism in *Chiodo* in 2014 led to *Griffin* in 2016. Moreover, this chapter will discuss how the

race variable is introduced in the legal conversation and how this relates to the constitutionality of felony disenfranchisement.

Lastly, in chapter 9, I will present major findings from this thesis and discuss their implications for broader categories of American politics, justice, and democracy. Additionally, I will offer a perspective on the theoretical framework of colorblindness and provide concluding remarks on the consequences of incarceration and felon disenfranchisement from both national and state-level perspectives.

## **Chapter II. Felon Disenfranchisement and the Social Contract**

### **A. Introduction**

One theory that gets at the core of the government/body politic intersection is the social contract or political contract. Social contract theories have long been used to justify felon disenfranchisement, contending that the innate defects of a convict render him incapable of respecting society's laws (Levine 212). The Social contract delineates the legitimacy of the authority of the state over the individual as it explains how individuals surrender some rights for the protection of other rights. Since felon disenfranchisement is an enactment of such authority of the state over the individual it is necessary to address certain basic theoretical notions concerning the state, individuals, rights and governance that are central to core arguments given both in favor and in opposition to felon disenfranchisement.

This chapter outlines concepts from 17<sup>th</sup> and 18<sup>th</sup> century social contract theory, and compares and contrasts these concepts with the overall discourse on felon disenfranchisement. By simultaneously engaging with discourses on citizenship and punishment, this discussion aims to provide a basis for understanding the fundamental premises and foundational arguments of the authority and the legitimacy of the state. Moreover, this chapter provides insights on the appropriateness of allowing citizenship status to be within the reach of the state's punishment apparatus. By using the social contract as a theoretical justification for disenfranchisement, its proponents resort to a contractualist argument consisting of a core premise that holds that the rebel — or “outlaw” of earlier jurisprudence — rejects established civil authority in its general and specific forms and in so doing eschews the constraints of the social contract or a democratic polity (Kleinig & Murtagh 220). In colloquial terms, a person who breaks the law has broken his bond to the rest of society and the government, and has abandoned civilized, law abiding society (Levine 203). While this basic argument might seem intuitively proper, a closer reading of social contract literature and theory reveals the complexity of its concepts and uncovers areas in which such theory proves incompatible with disenfranchisement justifications.

In order to review the validity of rationalizing felon disenfranchisement based on social contract principles, I turn to philosophy during the Enlightenment when theory on the social contract was seeing its heyday. Theorists such as Hobbes, Locke, and Rousseau, all maintained specific interpretations of the state of nature, political authority and punishment and expanded

these interpretations to include perspectives on suitable governance. At the core of their writing we find, in some ways similar yet often divergent, ideas on the departure of the state of nature and the establishment of a civilization bound together by an accepted authority. Crudely summarized, social contract theory posits that individuals surrender some of their rights to a broader authority in exchange for the protection of other remaining rights. To that extent, Hobbes wrote in *Leviathan* that humans ("we") need the "terroure of some Power" otherwise humans ("we") will not heed the call of "doing to others, as we would be done to" (223). The assumption here is that law, and in some ways order, can only be mandated through channels of formal, collectivist, authority. Without it, Hobbes would argue, self-interests would trump notions of moral deliberations, leaving nothing but a chaotic state of nature tarnished by lawlessness. The essence of the writing of Hobbes, Locke and Rousseau thus lies in the relationship between natural and legal rights. Where the first are inalienable and cannot be modified in accordance with political structure, the latter are manufactured and derived from manmade legal systems.

In his essay "Punishment in the State of Nature: John Locke and Criminal Punishment in the United States of America", Matthew Sues applies a Lockean approach of punishment to contemporary issues of law, crime and punishment in the United States. The state of nature, which is also a recurring theme in the writing of Hobbes and Rousseau, refers to the realm of lawlessness that signified the lives of people before societies came into existence. Considerations of the state of nature were pivotal in the theoretical discussions of Enlightenment thinkers as it provided the hypothetical background onto which they projected and newly found societal structures. Sues writes, "The existence of law, coupled with the existence of free will, encourages communities to devise systems of punishment" (378). Similarly, Hobbes and Rousseau assumed punishment to be a response to a breach of the social contract, in which the offender, by transgressing the law of nature, has put himself outside the protections of the community (Sues 378). Punishment, however, when viewed from a social contract perspective, should not subvert that contract. To illustrate, Corey Brettschneider notes, in accordance with Rousseau's concepts of general will and political community, "the authority to punish in the first place depends on the state's guarantees of the other rights of the contract" (67). Evidently, the social contract is not a concept that can be referenced with a single definition, nor could a single author or philosopher be credited with its content and substance. Felon disenfranchisement, as a

punishment, is also unique as it relates to the very enactment of that 'contract' that has bound the individual to the collective. A more helpful approach in evaluating the validity of felon disenfranchisement consonant with social contract theory is a consideration of the four punishment philosophies; incapacitation, retribution, deterrence and rehabilitation.

## **B. The Social Contract & Philosophies of Punishment: Incapacitation, Retribution, Deterrence and Rehabilitation**

Punishment as a function of social control must be rationalized and this is often done so in accordance with the four principles of punishment mentioned above. When we consider these principles in our assessment of the compatibility of social contract theory with felon disenfranchisement it becomes evident that felon disenfranchisement justifications lack overall cogency.

Hobbes, Locke and Rousseau all maintained similar views on incapacitation as a purpose of punishment. In *Du Contrat Social* (1762), Rousseau writes, regarding offenders, "he must be removed by exile as a violator of the compact, or by death as a public enemy" (23). Undoubtedly, by the use of terms such as death and exile for breaches of social treaty, 18<sup>th</sup> century thought on punishment and crime appears more dramatic than contemporary punishment rhetoric. Yet, the element of incapacitation remains a widely used justification for punishment in social contract theory terms. In regard to felon disenfranchisement, however, incapacitation seems to serve a peculiar function. While it is clear that incarceration removes an offender from society and thus disables that offender from committing further crimes, the stripping of voting rights can only be weakly linked to the punishment principle of incapacitation. The most common, yet, rather illogical, argument by disenfranchisement defenders is that they continue to claim that denying felons the vote is necessary to protect something called the 'purity of the ballot box' (Ewald 110). External and unrelated to the purpose of punishment and incapacitation, to them, a breach of social contract should result in forfeiture political rights completely. The idea that (ex-)felons would unequivocally engage in subversive voting is based on a misguided view of the American democratic process. Limited to one vote, it is pretty unlikely that the felon, no matter how corrupt or immoral he is, would really sully the entire election. Additionally, felons, like all other citizens, can only allocate their votes to a pre-selected group of people and the argument that felons voting might eradicate the integrity of elections makes only sense if

disenfranchisement was limited to those who had been convicted of an election related crime (Levine 216).

George Brooks, an advocate for stripping offenders of their voting rights, neglects the importance of voting. In his article “Felon Disenfranchisement: Law, History, Policy and Politics”. Brooks maintains that “If qualifications can be placed on a felon’s constitutional rights to free association and to bear arms, voting should not be any different” (146). Brooks neglects however, in his line of reasoning, the instrumentality and significance of the voting process. Moreover, he forgets to acknowledge the importance of political incapacitation in sustaining the legitimacy of the social contract. In a better presented argument, contrary to the views of Brooks, Jason Schall contends, that “under a regime of disenfranchisement, an individual who breaches the social contract continues to be bound by the terms of the contract even after being stripped of the ability to take part in political decisions” (Schall 77). Unlike the constitutional right to bear arms, voting is what connects the individual who has consented to the social contract to the authority whom he has consented to.

If the social contract derives its legitimacy from the consent given by the individual to an authoritative power, the capacity to negotiate that social contract should not be restricted. Moreover, contract doctrine does not allow an injured party to force the breacher to perform its contractual duties without the injured party performing its own (Schall 77). The social contract gains its validity from the parties' freedom to contract and share an active voice in negotiating that contract through the voting franchise (Johnson-Parris 137). Active citizenship, although absent from Hobbes’ social contract, provides the contractual basis for the social agreement as we know it in the United States today. Without voting, active citizenship is but a facade (Johnson-Parris 137), and without (active) citizenship the contractual integrity of the social contract refutes Rousseau’s emphasis on individual’s consent. If, in Lockean terms, those who breach the contract suffer damages, namely, removal from society, then felon disenfranchisement remains illogical, as disenfranchised (ex-)felons are still bound by the contract while having lost the political agency that was necessary to validate the contract.

Another purpose of punishment is retribution. Punishing criminals as a means of seeking revenge was the basis of early criminal justice systems (Levine 219), and retributive elements are common in the social contract discussions of Hobbes, Locke and Rousseau. For instance, one way Hobbes refers to punishment is as “an evil inflicted by public authority, on him that hath

done ... a transgression of the Law” (Hobbes 18). This eye for an eye mentality, which certainly signified pre-enlightenment civilization, also made sense in social contract terms. If a person transgressed the laws of society, the very framework that legitimized the authority of a governing entity, than retribution was a reasoned consequence of that transgression. It was, and in some American states still is, thus not uncommon to be put to death as a retributive response to particularly heinous crimes.

While retribution might appear as an intrinsically sound response to a transgression of law, it is important that such retributive measures are proportionate to that very transgression. In that regard, Locke maintains, in *Second Treatise of Government* (1689) that in the state of nature a criminal may not be punished, “according to the passionate heats, or boundless extravagancy of his own will; but only to retribute to him, so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for reparation and restraint” (12). While Locke accepts retribution as a purpose and justification of punishment he makes note of the importance of proportionality. When we consider proportionality in terms of disenfranchisement justification there is little substance to validate the appropriateness of deprivation of voting rights, unless the offense was affront to democratic governance. With respect to felon disenfranchisement, a retributive theory of punishment raises more questions than it answers (Levine 220). Most importantly, if retribution is consistent with social contract than it should be proportionate to a specific transgression of law, meaning that all crimes that result in disenfranchisement must be first separately justified through retribution argumentation. In other words, a felon who commits homicide and a petty thief guilty of shoplifting will receive the same treatment with respect to voting rights (Levine 220), yet, there seems to be little consistency between the two transgressions of law. The connection between punishment and moral wrongdoing, which is the essential purpose of retribution, is hard to identify when disenfranchisement policies are institutionalized the way they are in the United States right now. Moreover, stripping someone of their voting rights as a means to ‘avenge’ a previous crime lacks a properly justified correlation, and thus a properly justified purpose.

Deterrence, the use of punishment as a threat to discourage people from committing crimes, is a punishment philosophy that remains central in many criminal justice systems today. Deterrence is regarded as either specific, in which it refers to the offender in question, or general, in which it refers to the overall population. The threat of criminal sanctions is a key element in

social contract theory. Locke suggests that criminals should be “punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like” (Locke 12). Locke’s rhetoric embodies the philosophy of deterrence and it is the credible threat made by a legitimate authority that constitutes the foundation of an application of the Lockean social contract. Furthermore, deterrence within the social contract rhetoric of Hobbes, Locke and Rousseau is mostly concerned with its general implications. For example, Hobbes proposes in *Leviathan II* in a discussion on the commonwealth, “Suppose the law on pain of death prohibit stealing, and there be a man who by the strength of temptation is necessitated to steal and is thereupon put to death; does not this punishment deter others? Is it not a cause that others steal not?” (270). Clearly, for Hobbes and Locke, the visible consequences of the transgression of law and the breach of social contract are thought to be demotivating factors for future crime, and this is surely true for most sanctions imposed by criminal justice systems. Disenfranchisement, however, remains rather weakly linked to principles of deterrence.

Firstly, it is hard to see how (permanently) losing one’s right to vote will discourage and dissuade from crimes of murder, theft, or fraud (Levine 221). Furthermore, although losing one’s right to vote is an important element of citizenship in the American democracy, the threat of losing one’s right to vote will not likely deter people from crimes of passion or crimes committed in the heat of the moment. The threat of incarceration or probation, both limitations on one’s physical liberty, constitutes much more plausible deterrents than the non-corporal restriction of disenfranchisement (Simson 3).

Secondly, much evidence suggests that felon disenfranchisement prevails as a rather criminogenic policy. In their article “Disenfranchising Felons”, Kleinig and Murtagh report, “many advocates of prisoner voting rights argue that the deprivation of those rights exacerbates the alienation of prisoners from the wider community, fostering a bitterness that is detrimental to their social reintegration” (176). In turn, limited social integration can often result in a lack of societal ties which subsequently leads to higher risks of recidivism among released offenders. The notion that disenfranchisement does little to deter from crime is confirmed by Itzkowitz & Oldak who report that, “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” (733). Moreover, restoration of citizenship status upon serving a

sentence could be seen as an incentive to reject tendencies of criminal behavioral. It is much more plausible to think that participation in elections as stakeholders might reduce recidivism (Uggen et al. 312) than it would be plausible to think that the obstruction of such participation serves as a productive specific or general deterrent.

One theory that possibly explains the criminogenic nature of disenfranchisement policies is labeling theory. Labeling theory, which became particularly prominent in the 1960s and 1970s, asks what happens to criminals after have been labeled and suggests that crime be heightened by criminal sanctions (Plummer 444). Being labeled a ‘deviant’ or a ‘criminal’ can result in a self-fulfilling prophecy style recidivism that contributes to cyclical patterns of criminal behavior and incarceration. While stripping one from their voting rights might do little to deter from future crime, it does a lot in terms of formal labeling. This observation is significant because it could be argued that labeling is a political act and that what rules are to be enforced, what behavior regarded as deviant and which people labelled as outsiders must be regarded as political questions (Plummer 445). In that regard, a labeling theory approach supports the idea that Felon Disenfranchisement laws are unique because they explicitly limit political participation, while making implicit claims regarding who is worthy of accessing the political process (Persons 105).

The political dimension of labeling places felon disenfranchisement into a context of power relations and conflict theory on which I will elaborate later in this thesis. Regarding social contract theory and one of its core features the principle of general deterrence, the institution of felony disenfranchisement fails the test of effectively stymieing criminal activity (Simson 3) and is thus difficult to reconcile with Hobbes’ and Locke’s views on social contract and purposes of punishment.

The last major philosophy of punishment is rehabilitation. While social contract principles, at times, differ between Hobbes, Locke and Rousseau, all three philosophers consider punishment as an appropriate function of authority but should only in rare cases be applied indefinite. Rousseau writes, “In any case, frequent punishment is a sign of weakness or slackness in government. There is no man so bad that he cannot be made good for something” (Rousseau 79). Although Rousseau’s views in the 18<sup>th</sup> century were controversial to say the least, they see much resonance in most western nations today. Similarly, Locke proposed that punishment needed to suit the severity of crime and that it should not be indefinite. With this claim, Locke hinted at a life beyond punishment which is suggestive of perspectives on reintegration and

rehabilitation. This perspective is also conveyed by Hobbes who contends that a purpose of punishment is retributive, yet “men may thereby the better be disposed to obedience” (12). The rehabilitative function of punishment that should be regarded in accordance with social contract rhetoric thus rests on the idea of a second chance, a chance to re-establish the sanctity of the social treaty by repairing the bond between the individual and the legitimized authority.

A belief in a second chance is however; largely absent in the argumentation of most disenfranchisement proponents. For instance, Brooks writes, “Opponents of disenfranchisement claim that the inability to vote stymies felons' 'remittance into a law-abiding society.' Yet they neglect to explain why the tonic of voting did not curtail felons from committing crimes initially” (145). Brooks’ assumption that the transgression of law cannot be redeemed stands in contrast to the restorative justice approach that is slowly but surely gaining prominence in the United States. When looking at social contract theory however, there appears to be an inconsistency in the reasoning of Brooks and disenfranchisement advocates alike. If a person is rehabilitated through the criminal justice system and returns to society certain rights and privileges are restored while others are not. If the right to vote is an anomaly in the process of rights restoration it needs to be addressed and justified as such. The social contract, which partially derives its framework from principles of consent, general will and legal rights, shows little support for permanent disenfranchisement as it would impede the process of successful reintegration and transcend the proportionality of punishment in respect to a most of transgressions of law. In fact, re-enfranchisement might possibly serve a rehabilitation function if it was offered as an incentive for good behavior (Levine 224). Thus, while rehabilitation has been a neglected element within the American punishment model of the “tough-on-crime” paradigm, the incompatibility of perpetuated felon disenfranchisement with the rehabilitative purpose of punishment still threatens the validity of the social contract as a justification of voter disqualification.

### **C. Conclusion**

In sum, while the social contract appears to be a promising body of theory for explaining felon disenfranchisement policies, the stripping of voting rights as a punishment is inconsistent with social contract’s purposes of punishment. Locke, Hobbes and Rousseau can all elucidate how a criminal forfeit his rights to participate in society by having broken his promise to uphold the law (Levine 224), but the connection between crime and the voting process is weak and

policies based on such connections are inapposite and rather obsolete. Disenfranchisement appears as a disproportionate response to a breach of social contract because active citizenship is the very glue that holds to contract together. To get rid of voting is to get rid of the negotiability of the contract which makes it a void theoretical framework with little applicable merit. In the other words, the sanction of disenfranchisement is essentially a forfeiture of a very important right for a single breach of the social contract (Levine, 222). Subsequently, social contract theory and the objectives of punishment fail to provide a satisfactory explanation for the denial of a fundamental right (Schall 83), a right that epitomizes democratic governance, and a right that binds the individual to the collective and vice versa.

## **Chapter III. Literature Review & Theoretical Considerations**

### **A. Introduction**

The existing literature on felon disenfranchisement highlights the anomalous character of current and historical criminal justice circumstances in the United States. Not only are the United States' rates of incarceration extremely high in a cross-national comparative context, but the United States is also the only country in the democratic world that systematically disenfranchises large numbers of non-incarcerated felons (parole and probation) and ex-felons (Manza & Uggen 501). The extremity of American penal practices becomes even more consequential when taking into account research on the intersection of crime and race. What appears to be true for mass incarceration can also be said for the policy of felon disenfranchisement. While explanations for felon disenfranchisement are varied and based on a diverse set of theoretical concepts, a substantial and consistent part of the literature emphasizes the significance of the race variable. Bowers and Preuhs report for example that, "the most prominent and widely documented empirical findings on the effects of felon disenfranchisement laws shows that these laws disproportionately impact the black community" (726). Demographically, felon disenfranchisement falls harder on certain communities than others. In that regard, Western et al. note that, "the disenfranchised population is disproportionately young, male, African American and less educated than the general population of voters" (9). Consequently, an expanding class of disenfranchised (ex-)felons is being politically incapacitated and this class is disproportionately represented by racial minorities.

The abovementioned realities have warranted a rich body of scholarly work concerned with research on several components U.S. criminal justice system. An analysis of this work highlights the multidisciplinary attention that has been given to recent punishment policies, of which disenfranchisement remains a rather controversial example. Scholars have approached the issue from a diverse set of angles. Some scholars are contesting recent theories on color blindness and racism by looking at disenfranchisement policies from a jurisprudential perspective. Others are drawing on notions of political consistency in a discussion on citizenship and punishment discourse. Where some researchers have looked at individuals within a larger social environment, other researchers have broadened their scope to a community perspective,

asserting that the ramifications of felon disenfranchisement extend far beyond the boundaries of a prison cell.

This chapter looks to conceptualize and contextualize the disenfranchisement rhetoric presented by various scholars. I will refer to literature and research engaged with race, class and citizenship to illustrate the complexity of felon disenfranchisement and its implications for American politics. In doing so, I am paying attention to both the primary and secondary consequences of felon disenfranchisement policies from individual and community based perspectives. Moreover, I draw on recent critical scholarship on colorblindness, post-raciality and racial threat to analyze the state of racism in America. Lastly, this review includes an analysis of social conflict theories that focus on the creation of social distance and the construction of otherness as frameworks for explaining the political and criminological issues of disenfranchisement practices.

## **B. Colorblindness in a Post-racial Society?**

In the beginning of the 20<sup>th</sup> century, opposition to disenfranchisement was mainly expressed through rhetoric on race relations and racial inequality. For instance, it was W.E.B Du Bois who wrote that, “Disfranchisement is the deliberate theft and robbery of the only protection of poor against rich and black against white. The land that disfranchises its citizens and calls itself a democracy lies and knows it lies” (13). While Du Bois’ writing was in reference to the perpetuation of African American disenfranchisement after the Reconstruction era, and not limited specifically to felon disenfranchisement, his words do capture the essence and function of felon disenfranchisement in the United States. Today, disenfranchisement is still a policy that brings forth many questions regarding race, yet, the language and context in which it is presented is one of ‘colorblindness’ in a post-racial society. While the framework of colorblindness has definitely some ideological merit in theory, it remains problematic in practice.

The 20<sup>th</sup> century saw a widespread revocation of overt discriminatory practices. Amended constitutions no longer permitted for discrimination based on race, gender and class and those who had previously been denied political agency were increasingly included into the formal American body politic. Although these developments are undoubtedly signs of progress, Michelle Alexander would argue that racism’s adaptability proves fierce. She suggests that, “African Americans repeatedly have been controlled through institutions such as slavery and Jim

Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time” (21). Her assertion that racism is adaptable and evolves to fit new regimes of oppression by means of preservation through transformation is shared by Eduardo Bonilla-Silva who similarly maintains that, “racial practices during the Jim Crow Era were typically overt and clearly racial, whereas today they tend to be covert, institutional, and apparently non-racial” (138). In the age of colorblindness, overt discriminatory institutions such as slavery and Jim Crow are rather inconceivable. In courts, they would easily be contested on grounds of violation of, to name a few, the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments. Nevertheless, opponents of ‘color-blind’ policies stress the fact that in color-blind situations whiteness remains the normative standard and blackness remains different or marginal and that with insistence on no reference to race, black people can no longer point out the racism they face (Taylor 184). Consequently, where some racist institutions, in a legal sense, have been “abolished”, other racist institutions and the symbolic legacies of abolished institutions prevail.

In some ways, the practical inadequacy of colorblind policies is exemplified by the jurisprudential debate on felon disenfranchisement practices. Racial neutrality is not a reality when it comes to felon collateral consequence policies (Christie 541). In theory, the stripping of voting rights based on felony convictions is a ‘colorblind policy’. Its legal language and interpretation makes no reference to race and all racial demographics are represented, although not in equal rates, amongst those deprived of their voting rights upon a felony conviction. Yet, as continuously stressed by activists, scholars, and politicians alike, marginalized populations are disproportionately affected by the consequences of felon disenfranchisement policies and this can be said for about a variety of color blind policies related the U.S. criminal justice system. In other words, many academics argue that we live in an era of colorblind racism, where de jure racism has been eliminated, but de facto racism produces unequal social justice for minority populations, especially African Americans (Schaefer & Kraska 312).

From a jurisprudential perspective, the problem revolves around the issue of intent. For seemingly race-neutral laws to be deemed unconstitutional, arguments emphasizing the failure of color blind policies require proof of discriminatory intent. This legal requirement of intent, as argued by many opponents of colorblind policies, is neglecting the character of modern day racism. Felon disenfranchisement, as interpreted by scholars such as Alexander, Bonilla-Silva, and Taylor, is thus argued to perpetuate structural racism. The lack of racial equity, which

signifies the U.S. criminal justice system and other social, economic and political systems in the United States, supports the idea that the historical patterns and arrangements of race-based exclusion continue (Bonilla-Silva 473). As a result, it is legally almost impossible to insist discriminatory intent regarding felon disenfranchisement policies, yet clear discriminatory outcomes persist. Since the policy makes no specific reference to race and since felons are a racially varied class, the race-variable has at times been dismissed for lacking a strong legal basis.

In actuality, however, race is an undeniably significant variable when looking at the ramifications of public policies like voter disqualification. In that regard, Schaefer & Kraska point out that, “a legal decision can cause the same harm to minorities whether its effects are intentional or not” (313). Similarly, many scholars propose that colorblind policies, without colorblind consequences, couldn’t be considered genuinely colorblind at all. While felon disenfranchisement might lack the explicit intent of race discrimination, its effects are hard felt throughout minority populations. To illustrate, states with larger minority prison populations are more likely to ban convicted felons from voting when compared to states with a smaller minority prison population (Christie 545). Moreover, Robert Preuhs found in 2001 that even after controlling for alternative explanations, race remained as the primary explanatory factor in a state’s adoption of restrictive felon disenfranchisement policy. Such evidence clearly illustrates the discrepancy between the theory of colorblindness and the reality of colorblind practices. Where colorblind theory could be viewed as admirable and indicative of a progressive stance on race, the practical realities of institutions and organizations such as the U.S. criminal justice system accentuate the incompatibility between the naive notion of a post-racial American society and the pervasive manifestation of contemporary structural racism.

### **C. Discourses of Punishment and Citizenship**

Where scholars such as Alexander, Bonilla-Silva, and Taylor are concerned with the evolved state of racism in contemporary political and social regimes of oppression, other authors look primarily at the functions of citizenship in relation to punishment. Engaged with the purposes of discourse and language, these authors use the topic of felon disenfranchisement to highlight areas in which (false) assumptions about present day situations result in problematic suppositions regarding political agency, race and hierarchy.

In his book, *Punishment and Inclusion: Race, Membership, and the Limits of American Liberalism*, Andrew Dilts gives a theoretical and historical account of the practice of felon disenfranchisement while drawing on early modern political philosophy and critical race theory. In critiquing Judith Shklar's *American Citizenship* (1991), Dilts suggests that Shklar's omission is "symptomatic of the larger twentieth-century separation between the discourse of punishment and the discourse of citizenship, which in turn creates a productive blind spot" (134). Dilts contends that the discursive separation of punishment and citizenship, as presented in Shklar's book, is both problematic in its conceptual and normative form. Where the conceptual separation of discourses assumes that each domain is concerned with a different set of political questions, the normative separation identifies any connections made between the discourses as a problem to overcome. According to Dilts, however, the punishment/citizenship nexus exemplifies the workings of the reproduction of a systemically racialized U.S. criminal justice system. That that extend, Dilts claims that, "we use the vote as a signifier of our equality and our finally realized liberality, and at the same time it expresses our unearned and deeply illiberal desire for standing, distinction, and hierarchy" (135). The blind-spot, created by separating the discourses of citizenship and punishment, is productive of a continued notion of citizenship as innocent and as free from the United States' own pernicious past. Instead, Dilts argues that, "it continues to rely on a racially disproportionate and expansive disenfranchised population" (136).

Moreover, Dilts points toward examples of historical political thought in which the discourses of citizenship and punishment have been intertwined, using examples from writers at the height of the Republican tradition, including Rousseau, Hegel, Hobbes and Mill to name a few. To acknowledge the connection between punishment and citizenship and to emphasize the qualifications that have resulted in an exclusionary membership society, one comes to rethink the actual state of 'universal' suffrage in the United States. While Dilts opposes the separation of citizenship and punishment discourse, Dilts does not look for justifications of felon disenfranchisement in the congruence of both discourses. Rather, he proposes that the way these discourses are framed is instrumental in identifying the covert discriminatory policies that they perpetuate. Ultimately, thinking about felon disenfranchisement as a punishment strategy that directly influences the makeup of the United States body politic is a more productive approach than to view citizenship and membership as completely external to the United States punishment apparatus.

#### **D. Social Distance Theory, Racial-caste and the Construction of Otherness**

From a social theory perspective, authors have stressed the importance of interaction in social spaces. In *21st Century Criminology: A Reference Handbook*, Mitchell Miller refers to Donald Black, whose social distance theory has been widely used to explain different manifestations of social control. Miller writes, “Donald Black has argued that social distance between individuals increases the likelihood and extent of formal social control between them” (820). Drawing on notions of the constructed social space, Blackian theory is concerned with the perceived configurations of individuals in that social space. Felon disenfranchisement, in Blackian terms, is thus the result of extreme social distance between felons and policy makers, which in turn leads to feelings of moral superiority justifying exclusionary laws (Miller 820).

Although Black’s theory of social distance is not expressed strictly in racial terms, we find much resonance of social distance in Alexander’s discourse on race and the U.S. criminal justice system. Alexander asserts that the United States is continuously developing means to establish a racial hierarchy in the form of an informal racialized caste system. She notes, “the most ardent proponents of racial hierarchy have consistently succeeded in implementing new racial caste systems by triggering a collapse of resistance across the political spectrum” (22). Caste systems and racialized social stratification embody the concept of social distance submitted by Black. Along the lines of superiority and social remoteness, racial caste systems sustain notions of otherness while invoking the sense of social distance that is necessary to justify laws regulating the interaction between one (dominant) group and another (marginalized) group. Evidently, many scholars have viewed the connection between voting and crime as a product of group conflict rather than societal consensus (Uggen, Manza, & Behrens 309).

Moreover, the construction of the “other”, which is a recurring theme in much of felon disenfranchisement literature, is also central to Marsha Darling’s argument as presented in her book *The Voting Rights Act of 1965: Race, Voting, and Redistricting*. Here, Darling writes, “disenfranchisement is driven not by pragmatic realities or theoretical principles but rather by an atavistic and deep-rooted social need to define the boundaries of the community by stigmatizing some persons as outsiders” (373). This stigmatization of outsiders is coherent with the stigmatization that comes from being labeled a criminal. When relating this theoretical notion to a Blackian perspective on social distance, it appears that this stigma allows for greater social distance between offenders and non-offenders, and, more importantly, between offenders and

policy makers. Similarly, as African Americans are disproportionately recycled through the U.S. criminal justice system, the stigmatization of ‘criminal outsiders’ fosters an instrumental racist component that is consistent with Alexander’s conceptualization of adaptable racism and racialized systems of hierarchy.

Casting ‘others’ and ‘outsiders’ through social control mechanisms is an influential political practice that allows for dominant groups to oppress marginalized groups. As a public policy, felon disenfranchisement can be seen as contributing to the maintenance of the social distance between policy makers and the disenfranchised population that is necessary for this oppression. Consequently, laws restricting voting rights are coherent with concepts of social stratification, classism and socio-economic status, which all point toward a structural rather than a cultural explanation of crime. Furthermore, such interpretations of social distance, caste and constructions of otherness fall in line with broader categories of conflict theory. Accordingly, in conflict theory terms, felon disenfranchisement is predictable because the empowered legislators tend to be wealthy and supported by the wealthy and middle class, both of whom disfavor felons as a class (Miller 820). By viewing felons as a class, some scholars illustrate how felons’ lack of political agency contributes to a continuation of repressive policies, even upon completion of prison sentence. In accordance with modern Marxist thought, conflict theory assumes individuals and institutions to interact with each other on the basis of self-interest.

This notion of self-interest, for example, is also consistent with Black’s theory of social distance, in which the distance between policy makers and the criminally casted outsiders is maintained through forms of social control, namely incarceration and post-incarceration disenfranchisement. Similarly, conflict theory’s focus on unequal power distributions is coherent with Darling’s emphasis on social stigma. In that sense, disenfranchisement policies serve to reinforce policy makers’ own sense of morality and esteem, by foregrounding an offender’s criminal status during and post-incarceration. Regarding social conflict theory’s framework for explaining voter disqualification based on criminal offenses, Miller argues that “regardless of the relative merits of rationales in favor or against felon disenfranchisement, the policies themselves are dictated by the calculi of self-interest” (820). In the context of regional and national American politics, felon disenfranchisement policies could thus also be viewed in terms of a favorable or unfavorable political stance. Appearing ‘soft on crime’, for instance, can decrease

the size of a politician's constituency, where being appearing 'tough on crime' generally leads to political expedience.

Evaluations of felon disenfranchisement policies along the lines of appearing soft or tough on crime should, however, include data and evidence as to whether people truly believe that disenfranchisement is a justified policy. Regarding public opinion on felon disenfranchisement, which ought to be an important factor in any policy making process, the amount of literature available is rather slim. Nevertheless, Manza et al. report, in regard to a 2004 national telephone survey, that between "60 and 68 percent of the public believes that felony probationers should have their voting rights restored, and that 66 percent support voting rights for even ex-felons convicted of a violent crime who have served their entire sentence" (281). Not surprisingly, there are different rates of support for voting rights restoration based on whether an offender is still serving his/her sentence or is released from state supervision, and whether the crime committed was violent or non-violent. Generally, however, public attitudes on felon disenfranchisement suggest that a civil liberties view is prevailing over a repressive punitive view, which disputes the notion that being 'tough on crime' would automatically result in political expediency. To that extend, felon disenfranchisement policies can hardly be justified in the context of the public support for such policies. While conflict theory's illustration of power configurations contributes to our overall understanding of the perpetuation of felon disenfranchisement, public opinion research suggests that either felon disenfranchisement exceeds the expectation of a 'tough on crime' perspective or being 'tough on crime' is no longer viewed as favorable by the American public. Either way, the lack of public support for felon disenfranchisement calls for future research aimed at correlating public views on punishment with specific criminal punishment policies.

### **E. Racial Threat Theory**

A more specific conflict based theory, one that is often used in explaining repressive criminal justice policies in the United States, is racial threat theory. Racial threat theory proposes that racialization occurs when whites use their disproportionate power to implement state-control over minorities and, in the face of a growing minority population, encourage more rigorous, racialized practices in order to protect their existing power and privileges (Dollar 1). In other words, racial threats in the political realm are potentially devastating to existing power relations

because the extension of suffrage formally equalizes individual members of dominant and subordinate racial groups with respect to the ballot (Behrens, Uggen, & Manza 575). The premise of racial threat theory is consistent with research done on the intersection of race and felon disenfranchisement legislature. For example, Natasha Christie used Alec Ewald's felon collateral consequence scores for the 50 states as the dependent variable and symbolic racism and racial threat variables as the major independent variables. She reports that, "states with high levels of racial threat and symbolic racism were more likely to have higher felon collateral consequence scores" (541).

Whereas symbolic racism incorporates the legacies of racial prejudice that have signified American history, racial threat assumes that (perceived) increased minority population or minority power will lead dominant groups (whites) to apply more social control to protect their self-interest. With that in mind, felon disenfranchisement policies offer an ideal test of the validity of the theoretical notion that majorities undermine minority influence by means of social control. Such theoretical notions have been researched by Holona Ochs, who reports, regarding racial consequences of felon disenfranchisement that, "a state in which voting rights are automatically restored after the period of incarceration has an estimated rate of disenfranchisement for blacks of 0.08, and a state in which voting rights are never reinstated has an estimated rate of disenfranchisement of 0.18 for blacks (86).

The severity of disenfranchisement rates can thus be correlated with the size of the minority population in a state. States with above average populations of African Americans are more likely to uphold severe felon disenfranchisement laws. Moreover, Behrens, Uggen, & Manza found, in their study, "Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002" that, "even while controlling for timing, region, economic competition, partisan political power, state population composition and state incarceration rate, a larger nonwhite prison population significantly increases the odds that more restrictive felon disenfranchisement laws will be adopted" (597). The evidence that states with high level of racial threat (high levels of minority (prison-)populations) are more likely to disenfranchise its felons supports the idea that felon disenfranchisement is instrumental in shaping the political agency of minority populations.

## **F. Conclusion**

The body of literature concerned with felon disenfranchisement illustrates the complexity of public policies associated with the U.S. criminal justice system. Scholarly work on felon disenfranchisement has illustrated the importance of discourse in formulating and evaluating the state of affairs regarding race, punishment and citizenship in historical and contemporary America. In search for explanations for the seemingly unnecessary collateral consequences of incarceration, scholarly work and research has comprised of various interpretations of key social, political and philosophical concepts.

A discourse on race recurred throughout much of the literature and race remains a common variable in qualitative research on the punishment/citizenship nexus. More recently, scholars have looked at theories of colorblindness and post-raciality to describe ways in which felon disenfranchisement highlights the inconsistency of U.S. criminal justice discourse absent of race. In jurisprudential terms for instance, the theoretical language of color blindness does not always correlate with the empirical outcomes of the practice of disenfranchising felons. Moreover, these scholars argue that the inconspicuous ways in which racism adapts to newly formed regimes of power highlights the significance of social control mechanisms in facilitating systems of oppression.

Other authors have referred to social theories, such as social distance, racial caste systems and labeling, in looking at the underlying motivations and explanations for felon disenfranchisement. Such approaches consisted of a range of research from the smallest possible unit to a broader community, state, or national perspectives. Overall, a large quantity of scholarly work is written with elements of conflict theory in mind. Racial threat theory appears promising as it is backed with statistical evidence from regional and national data. The disproportionate effects of felon disenfranchisement on minority populations, most importantly African Americans, have shifted some of the debates to a race-central conversation. Subsequently, much of the literature on felon disenfranchisement can be found at an intersection of critical race theory and conflict theory. To that extend, Christie notes that, “where a dominant group feels threatened by the power of a subordinate group, the dominant group takes actions to reduce the power and potential threat of the subordinate group” (547). Racialized power relations thus remain a recurring theme in the discourse on the U.S. criminal justice system and much language and rhetoric is expressly referencing the interaction between dominant and subordinate groups.

The qualitative and quantitative data that supports the premise that felon disenfranchisement is race-neutral in theory, but anything but race-neutral in practice, should be alarming and problematic to the ears of American policy makers. The shortcomings of felon disenfranchisement, however, have not gone unnoticed in the academic world. The result is that most of the literature available on felon disenfranchisement appears written from a position of protest and opposition to repressive criminal justice policy, which proves the contentiousness of allowing voting rights within the reach of the U.S. punishment apparatus.

## **Chapter IV. A History of Felon Disenfranchisement in the United**

### **States and the Trend of Mass Incarceration**

#### **A. Introduction**

Upon review of literature, many of the explanations for the perpetuation of felon disenfranchisement include a need for social stratification and draw on the workings of racialized politics. Whether one would take a Blackian theory of social distance or Michelle Alexander's theory of racial caste, felon disenfranchisement has been, and still is, a measure of social control. In that respect, many scholars have stressed the idea that felon disenfranchisement has racist origins, or at least can be traced back to times where race was a strong indicator of voting exclusivity. For instance, some scholars argue that the felon disenfranchisement was a response to the Reconstruction Era when certain policies were specifically aimed at enfranchising African Americans, thus contending that felon disenfranchisement should be considered a backlash against a sudden increase of African American political power. This scholarship suggests that southern states sought to maintain a sense of white exclusivity of the ballot after the illegalization of poll taxes and grandfather clauses. Other scholars have emphasized how the perpetuation of felon disenfranchisement can be seen as a response to the progress made by the civil rights movement. Either way, the racial implications of felon disenfranchisement can be traced to both contemporary and historical American politics.

This chapter provides an historical overview of felon disenfranchisement practices in the United States and includes an analysis of the trend of mass incarceration, which began in the 1960s. An historical analysis illustrates how certain periods of time have demanded specific policies, which then can be used to validate or invalidate certain claims of racism and social conflict theories related to specific historical eras. Mass incarceration, which changed the face of the U.S. criminal justice system to such extent that the United States is now the country with the world's largest prison population, has not only made the discussion on felon disenfranchisement more important as it entails a larger segment of the population, but can also be linked to previously mentioned theories of social control, racial threat and conflict.

## **B. A History of Felon Disenfranchisement: 1600-1965**

Most ideas about voting in the United States are direct and indirect products of European history, and the practice of barring criminals from politics is no exception (Ewald 1048). The capacity to assign, revoke and shape political participation has historically been enjoyed by the nation-state's governing institutions, which have used interpretations of law and founding legal documents to restrict the process of voting based on gender, race and class. Although it seems intrinsically problematic that policies regarding political participation are channeled through exactly those institutions whose agents are affected by the political participation of the body politic, governments have rarely shied away from actively shaping their country's voting population. European empires, for instance, have generally sought measures to exclude people from political participation based on specific qualifications. In ancient Greece, criminals who were pronounced 'infamous' lost their right to vote for the assembly, make public speeches, or serve in the army. Similarly, In Rome, the ability to hold office and to vote in the public assembly could be denied to those tagged with *infamia*. Along those lines, European lawmakers later developed the concept of "civil death", which put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence (Ewald 1048).

Consistently with these early European empires, the settlers of the Americas used similar practices to safeguard the purity of New World's democratic establishments. George Brooks notes, "The first disenfranchisement laws in America appeared in the 1600s, typically as punishment for morality crimes such as drunkenness, and were present from the earliest times of the Republic" (103). In the land of opportunity, the relationship between the state and her citizenry was opened up to newly found scrutiny based on protection from religious persecution and freedom of oppressive governance. Nevertheless, in historical America subversive behavior was almost immediately counteracted with the deprivation of political agency based on moral competence. In regard to early disenfranchisement laws, Brooks asserts that the rationale of disenfranchising felons rested on principles of the social contract. Other justifications included the "prevention of election fraud, the fear that criminals would weaken laws and their enforcement, and a purity of the ballot box" (104). Even though, historical explanations for disenfranchisement are often expressed through the rhetoric of applied social contract theory, an in-depth analysis of such theory, as I have presented in chapter 2, highlights the inconsistency of

social contract with felon disenfranchisement characteristics. Furthermore, scholarship suggests that the strategic framing of the relationship between the government and the body politic was merely meant to establish qualifications on certain rights and privileges in order to satisfy the needs of those who enjoyed the capacity to design such policy from a position of power.

Between 1776 and 1821, already eleven states disenfranchised at least some convicts. Disenfranchisement at this time was often used merely a collateral consequence of specified criminal convictions related to the electoral process, such as perjury, bribery, or betting on elections (Schall 56). Indeed, while the American war for independence was shaping the country we now have come to know as the United States, disenfranchisement at that time remained mostly a repressive measure against those offenders whose criminal behavior was seen as an attack on the nation. Especially then, when the stability of a United States depended on succession from its colonial oppressor Great Britain, disenfranchisement laws were meant to safeguard the sovereignty of the nation state and the democratic processes that form it.

By 1857, twenty-four states had some sort of constitutional provision calling for or authorizing the disenfranchisement of some felons. Nineteen states specified certain crimes that would be punishable by disenfranchisement, the most common still being bribery, treason, perjury, larceny and fraud (Schall 58). The Reconstruction period, however, was one of particular change. Between 1850 and 1900, 19 states adopted or amended laws restricting the voting rights of criminal offenders (Manza & Uggen 2005). At the same time, the question of suffrage for former slaves became a widely debated issue. During the Reconstruction Era, the Republican Party would benefit from both possible outcomes of the slavery suffrage predicament. If African Americans would be enfranchised they would presumably have voted for Lincoln's Party, or they would not have been allowed to vote, which would have reduced Southern—and predominately Democrat—representation in Congress (Brooks 106). In 1868, the 14<sup>th</sup> Amendment extended citizenship to all persons born in the United States regardless of race; thereby nullifying the Supreme Court's infamous holding a decade earlier in *Scott v. Sandford*. The 15<sup>th</sup> Amendment, added two years later in 1870, eliminated states' rights to disenfranchise on the basis of race, thus, during this period, states potentially lost significant power with respect to controlling access to the ballot (Uggen, Manza, & Behrens 314).

In the early 20<sup>th</sup> century, much of felon disenfranchisement policies were linked to issues of racialized politics. Brooks notes that, "Some Southern states passed laws disenfranchising

those convicted of what were considered to be “black” crimes, while those convicted of “white” crimes did not lose their right to vote” (108). For example, South Carolina disenfranchised criminals for theft, which was considered a ‘black’ crime, but not for murder, which was considered a ‘white’ crime. Criminal disenfranchisement laws provided the Southern states with ‘insurance if courts struck down more blatantly unconstitutional clauses, such as the grandfather clause and literacy tests” (Schall 58). Whereas courts found it easy to strike down constitutional clauses containing overt discriminatory language and reference, covert ‘colorblind’ policies such as felon disenfranchisement continued under a system of structural racism. For instance, the state of Florida complied with the requirements needed to re-enter the Union—rewriting the state constitution to incorporate the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments— but also simultaneously restricted all felons, many of whom were black, from voting for life (Christie 453).

While the use of the criminal justice system to limit African American political participation remained a common occurrence in many states, the early 1960s were signified by a wave of liberalizing changes. In this period, 17 states eliminated their ex-felon disenfranchisement laws, restoring voting rights automatically upon completion of one’s sentence (Uggen, Behrens, & Manza 309). The 24<sup>th</sup> Amendment, ratified in 1964, eliminated poll taxes and by 1965, the extensive record of racially motivated disfranchisement and intensified assertions of African American voting rights forced Congress to act, leading to the passage of the 1965 voting rights act, officially extending suffrage to African Americans (Crooms-Robinson 554). While disenfranchisement laws became less restrictive during the 1960s, however, the subsequent era of mass incarceration and the politics surrounding the war on drugs caused the disenfranchised population to increase dramatically, subsequently altering the racial makeup of the U.S. corrections population.

### **C. The Trend of Mass incarceration**

Since felon disenfranchisement policies are part of the punitive practices of the U.S. criminal justice system, major developments within that system are important to consider when delineating historical and contemporary disenfranchisement circumstances. In the latter part of the 20<sup>th</sup> century, some significant changes in U.S. penal policies contributed to what I call a ‘crisis of incarceration’. This occurrence has also been designated as the emergence of a “prison

industrial complex,” of a “carceral state,” or the “mass incarceration society” (Bobo & Thompson 324). This crisis of incarceration can be signified by the fact that between 1995 and 2004, the incarcerated population grew by an average of 3.4 percent annually (U.S. Bureau of Justice, 2008) (Cnaan 179) and that the United States prison population has grown seven-fold over the past 35 years (Dhondt xi). As I have mentioned above, and as can be seen in Figure 1, while laws regarding disenfranchisement became somewhat less repressive towards the end of the 20<sup>th</sup> century, the trend of mass incarceration still caused the disenfranchised population to grow dramatically. Moreover, this trend of mass incarceration and the conservative penal policies that started it have disproportionately affected marginalized populations, expanding class related conflict along the lines of racialized social stratification.

It is not difficult to find empirical evidence and data in support of the claim that the U.S. criminal justice system is disproportionately affecting minority populations. Ian Haney-López reports in 2009 that, “one in every thirty-one adults in the United States is in prison or on parole or probation; broken down by race, that is one in every eleven African Americans, one in twenty-seven Latinos, and one in forty-five whites” (1028). The statistical information above illustrates two core developments that embody the essence of racialized mass incarceration; extremely high rates of subjection to the carceral system and a disproportionate representation of non-whites among those incarcerated.

In their article, “Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States”, Uggen & Manza elaborate on the political impact of mass incarceration and consider its implications for partisan politics in the United States. They note, “by the mid-1970s, a rising chorus of conservative scholars, policy analysts and politicians were advocating punitive strategies of deterrence and incapacitation, dismissing the rehabilitative model as an anachronism” (787). As a result of this shift in punishment philosophy, the U.S.

**Figure 1. Disenfranchised Population, 1960-2010**

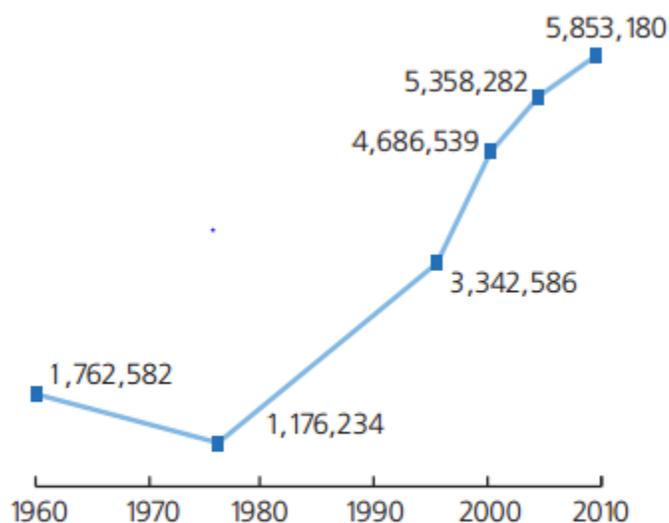


Fig. 1. Growth of disenfranchised population due to felony convictions in the United States, 1960-2010. Graph from The Sentencing Project, *Felony Disenfranchisement: A Primer*, (Washington D.C, 2016) 3. Web.

criminal justice system has become more repressive and shifted focus on incarceration rather than exploring alternative forms of punishment such as community service, probation and house-arrest. The War on Drugs led to an increased policing of the possession of drugs. The unequal distribution of police resources that went into the enforcement of street drugs such as crack cocaine over the 'Caucasian' drug of powder cocaine hinted at a racialization of law enforcement focus. This dichotomy, in turn, sparked a wave of increased incarceration rates of African Americans where white drug-offenders walked free.

The trend of mass incarceration continued in the 1980s and 1990s when the Reagan, Bush and Clinton administrations manifested themselves as "tough on crime" administrations. Repressive policies, such as truth in sentencing and mandatory minimum sentencing signaled a departure from rehabilitation as a punishment model and a shift towards incapacitation as the norm. From a statistical perspective, Scholars estimate that 80 to 85 percent of prison expansion can be explained through these sentencing changes which increased both how long one goes to prison (expansion among the intensive margin) and who goes to prison (expansion along the extensive margin), whereas at the most 17 percent of the expansion can be explained by criminal behavior (Dhondt 23). If the dramatic increase in incarceration rates cannot be explained by a dramatic increase in crime rates there must be other factors that have contributed to the onset and continuation of a crisis of incarceration.

Recently, scholars in sociology and political science have suggested that today's punitive regime originated in a backlash to the Jim Crow era and the civil rights movement (Haney-López 1031). As evident in chapter 3 and 4, Michelle Alexander stresses the importance of race within this new law and order paradigm. She argues that, "in response to a major disruption in prevailing racial order - this time the civil rights gains of the 1960s - a new system of racialized social control was created by exploiting the vulnerabilities and racial resentments of poor and working class whites" (58). Furthermore, Alexander points towards the adaptability of discriminatory institutions to new political climates. In contrast to the era of Jim Crow, overt racially biased policies would no longer be feasible in a post-civil rights era. Instead, a new law and order regime that included the mass incarceration of minority populations was established by justification of race-neutral language and terminology. This rhetoric consisted of a reframing of the segregationists' crime-race argument, where conservatives argued that poverty was caused not by structural factors related to race and class but rather by culture - particularly black culture

(Alexander 45). Altogether, the War on Drugs and the repressive carceral state of the late 20<sup>th</sup> century should be viewed as a direct response to a perceived African American culture of crime and deviance. Hence, the emphasize on the criminalization of inner-city crack cocaine over powder cocaine can be understood in the context of the new political climate of the 1960s, 1970s and 1980s, where the political rhetoric on crime failed to take into consideration the social and racial realities of urban America.

The racialization of mass incarceration suggests that America's prison-industrial-complex can be partially explained along the lines of race and class conflict. Geert Dhondt, who has looked at the relationship between mass incarceration and crime in the neoliberal period in the United States, suggests that, "the racial hierarchy essential to capitalist hegemony in the United States was threatened with collapse with the end of Jim Crow laws", and later argues that "mass incarceration has played an essential role in overcoming these barriers to stable capitalist accumulation under neoliberalism" (xiii). From a Marxian class theory perspective, Dhondt explains mass incarceration as a means of establishing the social stratification necessary under the neoliberal capitalist model. As a type of social control, incarceration manages populations based on socio-economic, racial and class characteristics, which, according to Dhondt, is a natural occurrence in neoliberal social structures of accumulation. The inevitable result is that, "the inequalities generated by neoliberal capitalism fall hardest on these young (African American) men, who are made increasingly vulnerable and are therefore trapped in a vicious and expanding cycle of poverty and incarceration" (Dhondt 112). Dhondt's research is concerned with macro-economics and neoliberal tendencies in the 20<sup>th</sup> century American capitalist model and there is a strong connection to be made between race and class in his line of argumentation. Intersectionality, which is the simultaneous suffering from multiple oppressive institutions, signifies poor urban neighborhoods where the intersection of race and class correlates with high risks of incarceration.

Structural conditions should be regarded as primary, rather than secondary, indicators of crime. In doing so, one rejects the fallacious notion that crime is a racialized cultural product rather than a product of structural disadvantage. The differential levels of African American exposure to crime and incarceration, which are indisputable, thus should not be explained through a model of culture. Instead, this differential exposure to crime and incarceration is primarily traceable to African American's above average subjection to conditions of extreme

poverty, extreme racial segregation, changed law enforcement priorities, and the modern legacy of racial oppression (Bobo & Thompson 330). Consequently, felon disenfranchisement policies should be discussed with the racialized nature of mass incarceration in mind. It would be insufficient to look at any element of the U.S. criminal justice system without considering the racial implications that it entails. U.S. domestic criminal justice policy has led to a new regime of punitive law and order, which seems to have originated in a response to the gains of the civil rights movement. Through policies such as felon disenfranchisement, the shift toward mass incarceration is also affecting our democratic processes in ways that are increasingly profound (Mauer & Coyle 20). The extremity of the crisis of incarceration and its lopsided effects on marginalized populations requires a future scholarship engaged with a closer examination of the underlying processes that sustain the collateral consequences of incarceration.

A more conscientious perspective on mass incarceration includes an analysis of writing along the lines of racial divide but one that looks beyond the individual to highlight mass incarceration's implications for neighborhoods and communities. Such research is meaningful because, by widening the scope from the individual to the collective, inconspicuous patterns of mostly unintended collateral consequences become apparent. This is illustrated by Bobo & Thompson, who quote Dorothy Roberts in summarizing that in "African American communities where it is concentrated, mass imprisonment damages social networks, distorts social norms, and destroys social citizenship" (350). In a cyclical fashion, predominantly lower class African American neighborhoods and communities become exponentially more exposed to crime and incarceration, resulting in the damaging of broader social norms. Moreover, Bobo & Thompson argue that racialized mass incarceration undermines social citizenship by "both profoundly stigmatizing those with criminal records and frequently expressly stripping even ex-felons of the right to vote" (350). To that extend, mass incarceration and the subsequent practice of felon disenfranchisement exemplify not only the problematic intersection of race, punishment and citizenship, but also carry detrimental consequences for residential neighborhoods segregated by race and class.

## **D. Conclusion**

The historical overview presented in this chapter has in some ways confirmed the theoretical notions introduced in chapter 3. When looking at developments of felon disenfranchisement over time, it appears that the policy can be viewed as a response and backlash to racially liberating policies. That is, especially in the early 20<sup>th</sup> century, some states specifically attached felon disenfranchisement as a collateral consequence to crimes that were considered to be “black” crimes. Even though such specific policies were eventually struck down by the courts, the racist roots of felon disenfranchisement can be identified at the hand of the historical analysis offered in this chapter.

Furthermore, this chapter has outlined the importance of mass incarceration and the political environment of the 1960s, 1970s and 1980s. The repressive punitive policies that stem from this period have increased not only the amount of people who are disenfranchisement due to a felony conviction, but also led to an increase of minority representation in the prison population. Moreover, I have expanded the claim that disenfranchisement and mass incarceration can be viewed as a neoliberal response to the formal dismantling of the Jim Crow system and other oppressive institutions. To that extent, it is important to include the U.S. criminal justice system developments of the late 20<sup>th</sup> century in any discussion on felon disenfranchisement and American democracy.

## **Chapter V. Judicial Interpretations, Legislation and the Emergence of a Transnational Discourse**

### **A. Introduction**

Found at the intersection of punishment and citizenship, felon disenfranchisement has transcended a mere category of law or politics. It comprises of both ideological and pragmatic elements that form a measure of social control consistent with the repressive penal philosophy of the late 20<sup>th</sup> century. In their seminal work, “Criminal Disenfranchisement”, Uggen, Manza, & Behrens highlight the broad range of socio-legal issues that can be related to the practice of denying convicted felons the right to vote. Regarding the pervasiveness of felon disenfranchisement laws in the United States, they ask “How do these laws persist when they limit a fundamental right, they are the product of a racially discriminatory history, and they are markedly out of step with international practices and American public opinion?” (315). These questions surround the current debate on felon disenfranchisement practices and force the conversation to address the elements of disenfranchisement policies that are no longer appropriate in a restorative justice paradigm.

This chapter addresses the legal and legislative implications of felon disenfranchisement in the United States and discusses the emergence of a transnational discourse concerned with prisoner’s rights and the punishment/citizenship nexus. I elaborate on the most significant court cases that have ruled on the legality of felon disenfranchisement and include an analysis of challenges to felon disenfranchisement based on interpretations of the Reconstruction Amendments. Then, I will address the congressional efforts to create uniform national felon disenfranchisement legislation. Here, I look at the potential role of congress in shaping voter disqualification standards through proposed pieces of legislation and briefly discuss the implications of bipartisanship and the Democratic-Republican dichotomy. Lastly, I draw on some cross-national comparisons to illustrate the how disenfranchisement circumstances in the United States are inconsistent with transnational standards and expectations.

## **B. Felon Disenfranchisement: A Jurisprudential Perspective**

In a legal context, felon disenfranchisement has always been an issue that lingered in a legal grey zone. Judicial opinions have resorted to different jurisprudential interpretations of law to either defend or contest the legality of voter disqualification of (ex-)felons. The most important court case on this matter is *Richardson v. Ramirez* (1974). In *Richardson* the U.S. Supreme Court upheld felon disenfranchisement to be constitutional, referencing Section 2 of the 14<sup>th</sup> Amendment. The 14<sup>th</sup> Amendment, which addressed citizenship rights and equal protection under the law, was one of the Reconstruction Amendments designed to facilitate the integration of former slaves into the United States' formal body politic. Amongst other things, the 14<sup>th</sup> Amendment forced states to choose between extending suffrage to all males or losing some congressional representation, which was meant to deter Southern states from disenfranchising newly emancipated African-Americans (Ziegler 210). Section 2 of the 14<sup>th</sup> Amendment, however, made an exception for states that disenfranchised males "for participation in rebellion, or other crime" (Uggen, Manza & Behrens 314). Based on an interpretation of this section the U.S. Supreme Court rejected Ramirez's 1974 class petition for a writ of mandate in the California Supreme Court, addressing his ineligibility to vote due to a previous felony conviction. Instead, the Court maintained, in a 6-3 decisions, that "The exclusion of felons from the vote has an affirmative sanction in Section Two of the Fourteenth Amendment" (Rehnquist).

The Supreme Court's decision, which would become the legal basis and precedent for future judicial review of felon disenfranchisement, has seen some widespread jurisprudential criticism. A majority of these critiquing opinions can be summarized by Justice Thurgood Marshall's dissent in which he accused the Court of an "unsound historical analysis" (Marshall).

With his dissent, Marshall condemns the Court for its narrow textualist approach in defining concepts such as "other crimes". Nevertheless, as the majority of the court decided that felon disenfranchisement was a constitutionally validated state policy, challenges to disenfranchisement under the 14<sup>th</sup> Amendment's Equal Protection Clause have been largely unsuccessful.

Another part of the U.S. Constitution, that has been used to challenge felon disenfranchisement, is the ban on cruel and unusual punishment found in the 8<sup>th</sup> Amendment. Where legal challenges based on the 14<sup>th</sup> Amendment require a plaintiff to show that the state intended to engage in invidious discrimination, the 8<sup>th</sup> Amendment allows for more creative

channels of opposition. To that extent, unlike the overall application of stare decisis in regard to the 14<sup>th</sup> Amendment's Equal Protection Clause, 8<sup>th</sup> Amendment jurisprudence has been generally more evolutionary. For instance, in *Trop v. Dulles*, the seminal 8<sup>th</sup> Amendment case, the Court's majority opinion suggested that "Citizenship is not a license that expires upon misbehavior" and that the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (Warren). Consequently, the 8<sup>th</sup> Amendment provides an opportunity to alleviate courts from the burden of historical meaning and purpose in their contemporary legal interpretations. With that in mind, it is rather peculiar that most legal challenges to felon disenfranchisement have resorted to the language of the 14<sup>th</sup> Amendment and little to none have approached the issue from an 8<sup>th</sup> Amendment perspective. After all, felon disenfranchisement is hard to reconcile with the punitive philosophies of rehabilitation and deterrence, making it a collateral consequence that could very well be understood as 'unusual' under what the *Trop* Court envisioned as the 'evolving standards of a decency that mark the progress of a maturing society'.

Where legal challenges to under the 8<sup>th</sup> and 14<sup>th</sup> Amendment have led to little felon disenfranchisement abolishment, race-based challenges to felon disenfranchisement laws have produced a more assorted judicial analysis. These arguments are generally based on the 15<sup>th</sup> Amendment or Section 2 of the Voting Rights Act (VRA) of 1965 and assert that disenfranchisement laws serve either to dilute or to deny the right to vote on the basis of race (Uggen, Manza, & Behrens 315). The 1982 amended VRA required courts to analyze all voting-related claims of racial discrimination using a results-based test that considers the 'totality of the circumstances'. Felon disenfranchisement, with its racially slanted outcomes would initially appear to be a suitable legal objection under the VRA test. However, Courts have held that Congress did not intend for the VRA to apply to felon disenfranchisement and it therefore cannot be used to challenge the laws (Uggen, Manza, & Behrens 316). The unsuccessfulness of legal challenges to felon disenfranchisement not only emphasize the strength of state sovereignty in the United States, but also highlights the ineffectiveness of arguing discriminatory intent under the umbrella of colorblindness and post-racial policy making.

The unwillingness of courts to strike down felon disenfranchisement practices due to race-based arguments is not so much testament for a discriminatory judicial system, as it is exemplary of the incompatibility of 18<sup>th</sup> and 19<sup>th</sup> century legal documents with 21<sup>st</sup> century

criminal justice reality. In that regard, much of the criticism of the *Ramirez* decision is expressed in reference to a lack of a pragmatic understanding of anachronistic policies. Uggem, Manza, & Behrens note that the “purpose of the 14<sup>th</sup> Amendment was to enfranchise African Americans, a feat accomplished with the addition of the 15<sup>th</sup> Amendment just two years after the 14<sup>th</sup> Amendment took effect” (316). Thus, as some authors have argued, Section 2 had a limited historical purpose that should have been repealed by the adoption of the 15<sup>th</sup> Amendment. At times, the vague language of Constitutional provisions and clauses demands contemporary interpretation by the U.S. judiciary. As the case of felon disenfranchisement makes evident, the discrepancy between intended outcomes and actual outcomes, especially in regard to the racially disproportionate outcomes of felon disenfranchisement, proves to be a jurisprudential head scratcher. Sometimes the meaning and purpose of legal documents remains rather ambiguous, which often resulted in a perpetuation of racially neutral policies with racially disparate outcomes.

### **C. Legislative Efforts, Congress and National Elections**

The issue of felon disenfranchisement in the United States exemplifies the dichotomy that exist between the federal and the state. Where at times national legislation has strongly influenced the persistence or diminishing of policies involving the electoral process, state sovereignty remains the context in which felon disenfranchisement laws have bypassed national or even transnational instances of legal contestation. Much of writing in defense of felon disenfranchisement based on arguments related to states’ rights. After all, Article I, Section 2 of the U.S. Constitution vests the states with the power to decide who is eligible to vote, and but for the explicit exceptions spelled certain Constitutional Amendments, states are free to decide which criteria they want to maintain. For example, as I have mentioned above, the *Ramirez* decision validated the continuation of disenfranchisement ‘for participation in rebellion, or other crime’ as one of the criteria for voter disqualification.

Regardless of the limited federal influence, national pieces of legislature concerning felon disenfranchisement have seen the floor of the U.S. Congress numerous times. These bills do not always seek to undermine state rights completely, but are aimed at reshaping specific elements of felon disenfranchisement practices. For example, in 2009, Democratic Senator from Wisconsin Russ Feingold introduced the Democracy Restoration Act to the 110th Congress. In

2015 this bill was reintroduced by Democratic Senator from Maryland Benjamin Cardin. The Democracy Restoration Act, which has not been passed, would re-enfranchise all people for federal elections who have served their sentence and ensure that probationers never lose their right to vote in federal elections. Such legislation is mostly concerned with the fact that right now there is no uniform standard for voting in Federal elections which leads to an unfair disparity and unequal participation in Federal elections based solely on where a person lives (Feingold, n.p 2009). In other words, although federal elections are expected to be of uniform nature, people in some states can easily regain their voting rights while in other states people effectively lose their right to vote permanently. To illustrate, currently a person who has been convicted of a felony in Iowa is less likely to ever register a federal vote again than somebody who has been convicted of a felony in Maine.

In regard to partisan politics, seminal works by Uggen and Manza (2002, 2004, and 2006) find that Republican candidates benefit from felon disenfranchisement. Their models predict that about 35 percent of the disenfranchised population would turn out in a presidential election, with about 73 percent of those who vote supporting the Democratic presidential candidate (Meredith & Morse 222). Although, strategically speaking, evidence indicates that the Republican Party does not benefit from leniency in disenfranchisement legislation; this evidence is largely based on Republicans' reticence to vote for reform. In response, however, Meredith & Morse note that not all scholars agree with Uggen and Manza's speculative estimates. Instead, they refer to Hjalmarsson and Lopez (2010) and Burch (2012) who argue that this Republican bias is overstated, suggesting that, "if eligible, ex-felons would vote at a much lower rate than the general population, as the demographics of felons - disproportionately male, racial and ethnic minorities, young, less educated, unmarried - are associated with lower voter turnout" (Meredith & Morse 4). Nevertheless, the suggestion that there is an indication of predominant Democratic over Republican affiliation among the disenfranchisement population demands further research. Moreover, the Democratic-Republican dichotomy fuels discussions on the political implications of disenfranchisement policies within the context of the United States' bi-party political arena.

To complicate things, Republican Senator from Kentucky, and previous candidate for the 2016 Republican presidential bid, Rand Paul, introduced the Civil Rights Voting Restoration Act of 2015. This bill proposes that the right of a U.S. citizen to vote in any election for Federal Office shall not be denied or abridged because the individual has been convicted of a non-violent

criminal offense, unless, at the time of the election, the individual is serving a sentence in a correctional facility or a term of probation (Paul, n.p, 2015). Paul's bill differentiates between a violent and non-violent offense, which in debates on felon disenfranchisement standards has been a recurring topic. Moreover, Paul's restoration efforts contrast views that there is no Republican endeavor whatsoever in combating felon disenfranchisement ramifications and reaching uniform federal standards.

Although we find opponents and proponents of felon disenfranchisement policies on both sides of the American political aisle, there has been little productive bipartisanship in creating productive uniform federal legislature. As mentioned earlier, statistical research suggests that the disenfranchised population could be characterized as predominantly Democratic in their political affiliation. Now that the size of the disenfranchised population has grown to a point such that it holds the power to change the outcomes of closely contested elections (Uggen, Manza, & Behrens 318), felon disenfranchisement has become more than a mere legal issue concerning individual rights.

One example, which often has been referred to regarding federal elections implications, is the George W. Bush versus Al Gore presidential race in 2000. If Florida did not bar hundreds of thousands of its non-incarcerated citizens from voting, Vice President Al Gore almost certainly would have carried the state in the Presidential election as the margin was only 537 votes (Ewald 140). But even four years later, when Bush ran against John Kerry and won the state of Florida with a margin of a little over 300,000 popular votes, there has been speculation that the disenfranchised population could have altered the outcome of the state's election and once again have changed the outcome of the overall presidential election results. Furthermore, Uggen, Manza, & Behrens note that, one study indicates that but for felon disenfranchisement laws, "seven races for seats in the United States Senate would have turned out differently, which would have also changed the overall partisan composition of Congress during the 1990s" (318). Although we should be aware of the speculative nature of these claims, it is safe to say that, even though felons as a class has negative political leverage, their collective voting rights status should definitely be viewed as significant to American politics.

#### **D. A Transnational Discourse: Cross-national Comparisons**

In her 2004 Presidential Address to the American Studies Association, Shelley Fisher Fishkin stated, “As the transnational takes on greater importance in American studies, we will welcome opportunities to understand how visions of American democracy and American citizenship shape and are shaped by conversations outside the United States” (35). In her view, and that of many alike, transnational interpretations of American issues deserve a central rather than a peripheral place in American studies discourse. Especially, since the United States’ felon disenfranchisement practices could be considered anomalous in an international context, an inclusion of conversations outside the United States provides a more complete illustration of felon disenfranchisement and its broader implications.

Earlier in this thesis, I have explicated how continued repressive penal policies have led to a crisis of incarceration in the United States. More importantly, the size and racial character of the disenfranchised population has led to not just to a crisis of incarceration but a crisis of American democracy as well. A transnational perspective on policies like felon disenfranchisement serves to highlight the discrepancy between the United States’ own perceived level of democracy, and the empirical level of democracy and freedom that is actually being enjoyed by United States citizens. A cross-national comparison suggests that the frailty of the United States democracy is largely confirmed by the treatment of its (ex-)prisoners.

Article 25 of the United Nations International Covenant on Civil and Political Rights states that, “Every citizen shall have the right and the opportunity, without unreasonable restrictions 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” (ICCPR). Evidently, universal suffrage is considered a cornerstone of the democratic process. Although the phrasing of “unreasonable restrictions” allows a country like the United States to respect its’ states sovereignty in deciding to disenfranchise felons or not, it is clear that voting rights are a crucial element of negotiating the political contract and shape political developments.

At the intersection of punishment and democracy, Reuven Ziegler has looked at U.S. felon disenfranchisement from a comparative and international human rights perspective. Ziegler writes, “The propriety of convicts’ disenfranchisement has recently become the subject of a robust transnational judicial discourse. The discourse is premised on a shared democratic

paradigm and on a notion of (ex-)convicts as rights-holders whose disenfranchisement is considered a prima facie infringement of their right to vote” (221). The notion of convicts as rights-holders seems to be less accepted in the United States than it is in other democratic nations. For instance, other democratic nations such as Belgium and Israel allow each person regardless of his or her status as a prisoner or ex-prisoner to participate in any election. Furthermore, these and many other countries arrange for polling stations to be placed in prisons on Election Day and encourage all prisoners to exercise their right to vote (Cnaan et al. 180). In regard to the punishment/citizenship nexus, voting circumstances differ greatly between the United States and other democratic nations. Where, of the few countries that disenfranchise non-incarcerated ex-offenders, most automatically restore voting rights after a waiting period that commences upon release from prison (Uggen, Manza, & Behrens 319), the United States does little for restoring rights and citizenship status post-incarceration. More importantly, in more than 30 states, ex-prisoners on probation are not allowed to vote, nor start any restoration procedure (Sentencing Project n.p).

Transnationally, democratic nations have seen instances of legal cases ruled in defense of prisoners’ voting rights. When looking at Canada for example, we see that the Judiciary branch has been successful in protecting the voting rights of prisoners under claims of constitutionality. In 2002, the Canadian Supreme Court held, in *Sauvé v. Canada*, that prisoners have a “right to vote under section 3 of the Canadian Charter of Rights and Freedoms” (McLachlin). Moreover, Section 3 of the Canadian Charter of Rights and Freedoms, which constitutionally guarantees Canadian citizens the democratic right to vote in a general federal or provincial election, cannot be overridden by Parliament or the Legislative assembly under section 33’s notwithstanding clause. Thus, where voting rights in Canada are not denied upon a felony conviction, the legislative body is also not able to pass any law which would disenfranchise any Canadian citizen for ideological or political purposes connected to a criminal conviction.

Felon disenfranchisement in Europe is also less common and, if existent all, only applied upon conviction of specific crimes. For instance, Nora Demleitner notes that in Germany, “the offenses which allow the court to deny an offender the right to vote are assumed to be those whose commission will or is likely to undermine the foundation of the state or constitutes tampering with elections” (761). Additionally, if voting rights were denied in Germany they can

be reinstated if the court feels this will assist in rehabilitating the offender. The rehabilitative purposes of punishment remain central within the emerging transnational discourse on felon disenfranchisement. The fact that, contrary to the United States' policy of disenfranchisement upon any felony conviction, most democratic nations require certain qualifications for disenfranchising criminals, supports Ziegler's claim that most democratic nations consider convicts' voting rights a given and find felon disenfranchisement a "prima facie infringement of their right to vote". Consequently, the transnational discourse on felon disenfranchisement seems to respect the rights of prisoners rather than embrace all opportunities to revoke those rights. In that regard, the continuation of severe repressive penal policies in the United States remains a legal outlier in desperate need of explanation and justification.

## **E. Conclusion**

In his work, "Stakeholder Citizenship and Transnational Political Participation", Rainer Bauböck argues that, "The results of democratic elections are distorted if they exclude those parts of the demos that have been forced out of a country "where disenfranchisement has been a motive for one group to displace another" (2437). Although Bauböck's argument is not specifically in reference to felon disenfranchisement but rather to transnational conflict, we could still take his premise and apply it to current incarceration practices in the United States. As such, incarceration, too, can be considered a form of displacement and when citizenship status and civil rights are infringed upon, we could definitely look at felon disenfranchisement as a distortion of elections due to the strategic displacement of felons as a class.

The legal and political implications of felon disenfranchisement have been persistent topics of debate in the United States. The 1974 *Ramirez* decision has served as a legal precedent in determining the constitutionality of felon disenfranchisement practices. Legal challenges to this decision have so far been unsuccessful and state's rights and autonomy have been protected in the courtrooms. Where the courts have been unable to interfere with states' sovereignty in disenfranchising felons under the language of "other crimes" as found in Section 2 of the 14<sup>th</sup> Amendment, national legislative efforts have sought to create uniform standards for national elections. These pieces of legislature, which have yet to be ratified and signed into law, suggest that there exists a growing national conversation on prisoner rights that embraces the idea of rehabilitation over the strict punitive philosophies of retribution and incapacitation. The

implications of felon disenfranchisement on elections, however, illustrate unproductiveness of the United States' partisan politics. After all, evidence suggests that Republicans in the United States benefit from a larger disenfranchised population of felons, which makes it harder for congress to come together and generate viable change of disenfranchisement laws.

Moreover, a cross-national comparison of felon disenfranchisement policies between the United States and other democratic nations not only highlights the repressive disposition of the U.S. criminal justice system, but also the ineffectiveness of those institutions, both legal and legislative, that are expected to conform the United States disenfranchisement circumstances to the broader standards of international human rights and social justice. Transnationally, and within a growing democratic paradigm, the nexus of citizenship and punishment seems to be rejected more often. Consequently, stripping convicts of their voting rights is not a common policy, and even when it is, it requires specific and sound reasoning as to why such collateral consequences are deemed appropriate. To that extend, transnational perspectives and discourse serves to emphasize the extremity of United States penal policies and offer effective alternatives to such policies. Furthermore, a transnational comparative approach regarding prisoner rights offers evaluative evidence in respect to overall protection of citizenship and rights. For instance, Cnaan et al. content that, "the more punitive and exclusionary are the policies towards prisoners and ex-prisoners, the less protected are the rights of citizens in general" (178). Further research is needed, however, before we can empirically correlate general rights of citizens to the rights of (ex-)prisoners in democratic nations. Nonetheless, an in-depth analysis of conditions of prisoner rights in the United States hints at least at the frailty of civil rights in a carceral state.

**Chapter VI. Iowa's Felon Disenfranchisement Scheme: A question of Gubernatorial Discretion?**

**A. Introduction**

Since the policy of felon disenfranchisement varies from state to state, a closer look at specific states can sometimes be more useful than a broad national perspective. Contemplating how and why states have continued or discontinued to disenfranchise its prisoners uncovers the importance of state-level politics in criminal justice reform. Over the last decades, most states have adopted more lenient laws regarding ex-felon's access to the ballot. Some states, however, including Iowa, have significantly curtailed restoration efforts since 2010 (Uggen, Shannon, & Manza 13). Currently, Iowa has some of the most repressive disenfranchisement laws in the nation. Disenfranchisement is applied to felons who are in prison, on parole, on probation, and felons who are released from state supervision. Recent voting rights policy changes, however, have led to significant changes to the Iowa voting population, including increases and decreases in the political representation of minority populations.

This chapter outlines historical and contemporary felon disenfranchisement circumstances in the State of Iowa. First, I apply racial threat theory to the historical manifestation of disenfranchisement laws in Iowa. Here, I argue that voter disqualification in Iowa can be traced back to a time where race relations led to specific restrictive criminal justice policy related to the electoral process. Then, I analyze the contemporary disenfranchisement politics of Iowa, where I consider the Iowa Constitution as the legal basis for disenfranchisement practices and discuss the influence the Office of the Governor has on the de facto disenfranchisement of felons. More specifically, I address Executive Order 42 which was signed into effect in 2005 and led to an automatic restoration of rights of citizenship (including voting rights) and Executive Order 70 which officially rescinded Executive Order 42 in 2011 and reinstated an application procedure for the restoration of rights of citizenship. Finally, this

chapter discusses the function of the application procedure for restoration of rights citizenship and the empirical consequences it entails.

### **B. Iowa's disenfranchisement History: An Application of Racial Threat Theory**

The historical case of Iowa's disenfranchisement scheme provides a solid base for a close examination of race-relations within a race/punishment/citizenship nexus. From territorial days Iowans generally had not welcomed black settlers and had treated the few who came as second-class citizens (Wubben 410). Even before the Reconstruction, legislative efforts were aimed at obstructing the arrival of African Americans in the state. As I have argued in Part I, origins of felon disenfranchisement laws are signified by racial tension and the continued struggle of African Americans to gain formal citizenship and civil rights. Not surprisingly, an analysis of Iowa's racialized history confirms such notions of social conflict theory and illustrates the pervasiveness of symbolic and institutionalized racism in a post-slavery era. In a publication that was part of a voting rights initiative of the National Association for the Advancement of Colored People, the NAACP writes, "In 1851, the Iowa state legislature passed a new law excluding black immigration into the state. Thus, prior to the nation's dramatic shift away from slavery in 1865 and Jim Crow policies (including 'Black Codes') that emerged thereafter, Iowa had long since grounded itself in efforts to thwart the black vote (NAACP n.p). Indeed, the black vote had been an exhaustive topic in many political debates during slavery and subsequent to its abolishment. The demographic changes to the U.S. body politic that would occur once millions of African Americans, most of whom previously had not enjoyed any type of formal citizenship, would be freed brought forth pragmatic questions that extended far beyond the (im)morality of slavery debate.

In their work, "Lifetime Felony Disenfranchisement in Florida, Texas, and Iowa: Symbolic and Instrumental Law", Christie & Galliher look at historical and contemporary functions of disenfranchisement laws in three states that disenfranchise felons for life. Regarding Iowa during the Reconstruction they note, "One of the main arguments against black suffrage expressed by the legislators was that there was a threat of blacks overrunning the state (85). After the slavery paradigm, the manifestation of disenfranchisement laws as a response to the fear of a sudden increase in formal African American citizenry and political power fits within the explanatory framework of racial threat. In respect to Iowa, the workings of racial threat and its

legislative responses can be identified at the Constitutional Convention of 1857. Many democratic legislators at the time of the Constitutional Convention of 1857 anticipated the overwhelming horrors that would come to Iowa if black men were given the right to vote in the state. In this way, these legislators took advantage of the fears and prejudices felt by many people in Iowa (Christie & Galliher 86).

Although the issue of black suffrage was submitted to the people in a referendum and defeated in 1857, legislative discourse extended the perceived fear of African Americans gaining significant political power in the state. Consequently, Christie & Galliher note that this unrealistic fear instilled in the white population by the Iowa's legislature served as a gesture of cohesion and differentiation and that the passage of lifetime felon disenfranchisement legislation in Iowa had "much to do with race" (89). At the time that felon disenfranchisement was adopted in the 1846 Constitution, however, the policy was already race-neutral in its language. Nevertheless, since African Americans would be deliberately exposed to the U.S. criminal justice system at higher rates the policy was undoubtedly utilized as a racialized social control mechanism in order to appease the white majority population.

Today, racial threat theory is not as easily applied to Iowa's felon disenfranchisement scheme as it was towards the end of the 19<sup>th</sup> century. Although claims of racism and conflict theory still rightfully persist among disenfranchisement critics, the minority population in Iowa has been rather low for years now. In racial threat terms, the fact that Iowa only has an African American population that makes up 3.4 % of its total population (Iowa Data Center) suggests that it is not likely that policies are designed in an anticipation of a sudden influx of African Americans in the state. It is more likely Iowa's current severe repressive felon disenfranchisement laws are resulting from a disproportionately high minority prison population. This proposition is consistent with the findings of a 2003 study in which Behrens et al. suggest that high proportions of minorities in a state's prison population are associated with the presence of lifetime felon disenfranchisement laws. Even though African Americans make up only 3.4% of Iowa's total population, they make up 25.5 % of the prison population (Iowa Data Center). The symbolic and instrumental disenfranchisement laws that emerged in response to a perceived fear of African Americans coming to the state of Iowa are still in place, yet serve a different purpose. In other words, while the fear of African Americans overrunning Iowa is no longer present, the disenfranchisement laws still exist. To that extend, racial threat offers no longer a

viable basis for explaining contemporary felon disenfranchisement in Iowa. Instead, the relatively large amount of incarcerated minorities appears to be an indicative variable of the lifetime felon disenfranchisement scheme in Iowa today.

### **C. The Iowa Constitution and the Powers of the Governor: Executive Orders 42 & 70**

Currently, Iowa, like many other states, still derives its capacity to disenfranchise its felons from both the Federal and State Constitution. Article I, Section 2 of the United States Constitution gives states broad powers to determine the conditions under which the right of suffrage may be exercised, absent of course the discrimination which the Constitution condemns (Brooks 103). Amongst such conditions and qualifications are; residence requirements, age, and previous criminal record. Based on those broad powers granted by the United States Constitution, the 1846 Iowa Constitution reads, “No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector” (Iowa Const. Art. II. §5). A Constitutional Amendment to change this provision would require passage by a majority of both houses of the legislature in two successive sessions, ratification by a majority of the voters, and implementing the subsequent legislation.

More important for the de facto disenfranchisement of (ex-)felons in Iowa are the powers of the Governor as determined by the Constitution. Iowa Constitution Article IV, section 16, states that, “The Governor shall have power to grant reprieves, commutations and pardons” (Iowa Const. Art IV §16). Among these broad powers of executive clemency is the power to restore the rights of citizenship, including the right to hold public office and to vote. In other words, the Governor in Iowa has the capacity to restore citizenship rights on a case-to-case basis but also collectively through executive orders. Moreover, the Legislature cannot restrict the governor’s clemency power, and the courts may not review the exercise of this power, making felon disenfranchisement an issue that is largely influenced through gubernatorial channels.

Over the last 12 years, executive clemency exercised by the Governor of Iowa has led to drastic changes in the de facto disenfranchisement of ex-felons. In 2005, Governor Thomas Vilsack signed into effect Executive Order 42, which restored the rights to vote and to hold public office to an estimated 80,000 citizens of Iowa who had fully served their sentences on felony or aggravated misdemeanor convictions. Many prisoner rights advocate groups applauded Executive Order 42 and considered it a sign of progress that complied with a more rehabilitative

punishment model and a restorative justice approach. The language of Executive Order 42 illustrated a departure from the strict repressive punishment philosophy which signified the policy of lifetime felon disenfranchisement that it revoked. Most notably, Governor Vilsack's Executive Order maintained that, "research indicates that ex-offenders that vote are less likely to reoffend, that restoration of the right to vote is an important aspect of reintegrating offenders in society to become law-abiding and productive citizens, and that disenfranchisement of offenders has a disproportionate racial impact thereby diminishing the representation of minority populations" (Exec. Order, No. 42, Vilsack, 2005).

Executive Order 42's reference to the ineffectiveness of felon disenfranchisement as a general or specific deterrent is coherent with propositions made by scholars who maintain that losing the right to vote is not likely to keep people from committing crimes. More specifically, Vilsack contends that voting actually functions as a remedy against recidivism. This provision is consistent with Itzkowitz & Oldak's (1972) finding that states with harsh forms of felony disenfranchisement laws often have "higher recidivism rates than those states which utilize more lenient forms of disenfranchisement laws" (733). Furthermore, effective reintegration of ex-felons, which is promoted by Vilsack's order, contrasts Black's social distance theory's explanation for the need for disenfranchisement. That is, as I argued in Part I, lifetime felon disenfranchisement could be explained as a means of formal social control that sustain a sense of social distance between criminals and non-criminals during and post-incarceration. In an attempt to decrease this social distance, Vilsack's Executive Order highlights the rehabilitative function of punishment and suggests that regaining suffrage is an important aspect of the reintegrating offenders back into society. In doing so, Vilsack simultaneously seeks to underscore the possibility of ex-convicts becoming "law-abiding and productive citizens" while suggesting that the right to vote could diminish the lingering of social stigma associated with incarceration.

Lastly, but arguably most importantly, Executive Order 42 makes reference to the disproportionate racial impact of felon disenfranchisement. Although felon disenfranchisement is a 'colorblind' policy that is applied to all felony cases in Iowa without mention of the offender's race, Vilsack admits the discrepancy that exists between a policy in theory and a policy in practice. In that regard, Vilsack's mention of racial impact can be considered accordant with Bonilla-Silva's proposition that racism today is rather "covert, institutional, and apparently non-racial" (138). Moreover, Executive Order 42 acknowledges the effects felon disenfranchisement

has on the political representation of marginalized groups. Accordingly, Vilsack also recognizes Schaefer & Kraska's claim that with felon disenfranchisement in an era of colorblind racism, "de facto racism produces unequal social justice for minority populations, especially African Americans" (312). In other words, Vilsack acknowledges the fact that while felon disenfranchisement may be absent of de jure racism, it certainly contributes to de facto racism as it so clearly influences minorities at relative greater rates than whites.

Specifically in the context of minority representation, unequal social justice is often more complex than the single issue of (ex-)felon suffrage. For example, Michelle Alexander points out that, "as the Census Bureau counts imprisoned individuals as residents of the jurisdiction in which they are incarcerated and as prison construction, in states such as Iowa, occurs predominantly in white, rural areas, white communities benefit from inflated population totals at the expense of the urban, overwhelmingly minority communities from which the prisoners come (193). When felons from Iowa's larger cities such as Des Moines, Cedar Rapids and Iowa City are transferred to prisons in predominantly white counties such as Jones County (Anamosa State Penitentiary) and Lee County (Iowa State Penitentiary), Iowa's demographics experiences a racialized redistricting that does much harm to the political representation of minority populations. Moreover, Alexander points out that white rural communities that house prisons wind up with more people in state legislatures representing them, while poor communities of color lose representatives because it appears their populations has declined (193). Alexander's point illustrates one of many ways in which the ramifications of incarceration extend beyond the individual and can have long lasting effects on broader communities. To that extend, Executive Order 42 identifies the pervasiveness of the collateral consequences of incarceration and centralizes the race-variable by installing an effective criminal justice policy.

After six years of automatic voting restoration for felons released from state supervision, newly elected Republican Governor Terry Branstad reinstated an application process and revoked the automatic restoration process. Branstad, whom had previously held the Gubernatorial Office from 1983 until 1999, signed into effect Executive order 70 in 2011 which officially rescinded Vilsack's Executive Order 42 and once again made Iowa one of the states with the harshest felon disenfranchisement practices in the nation. With the signing of Executive Order 70, felons who have completed their sentence, parole and/or probation, and have completed all payment of court fees, restitution and fines, can now apply for a restoration of the

rights of citizenship through the Office of the Governor. In Executive Order 70 Branstad writes, “the act of filing an application for restoration of the rights of citizenship is an important and necessary aspect of an offender’s process of reintegration into society” (Exec, Order, No. 70, Branstad, 2011). Branstad’s view clearly contrasts that of his Democratic predecessor whom considered voting rights to be a facilitator of reintegration rather than a qualification of a reintegration standard. Whereas Branstad sees the application for restoration as a vital part of the reintegration process, Vilsack sees such application as an obstacle to that very process.

The exercise of certain of the Governor’s broad powers of clemency, or the abstinence thereof, has predominantly shaped the felon disenfranchisement circumstances in Iowa in the 21st century. As I mentioned earlier in this chapter, in Iowa the Legislature cannot restrict the governor’s power of executive clemency and the courts may not review the exercise of this power. Subsequently, Executive Orders are constitutionally binding and thus productive and substantial measures of political action. It is under these circumstances that felon disenfranchisement remained a state-wide policy, even after Iowa had seen more lenient practices under Democratic Governors Tom Vilsack and Chet Culver from 2005 to 2011. When it comes to felon disenfranchisement, it seems that the influence of party affiliation on public policies and state politics reinforces the Democratic-Republican dichotomy and the workings of left-rights politics. Future research on the influence of party affiliation and the perpetuation of felon disenfranchisement is needed in order to correlate party platforms, political ideologies, and elected positions with specific repressive or liberal criminal justice practices.

#### **D. The Bureaucratic Barrier of the Application for Restoration of Rights of Citizenship**

The main difference between Governor Vilsack’s and Governor Branstad’s policies is the application process. As noted above, Executive Order 42 put in place an automatic restoration of rights whereas Executive Order 70 reversed that process and reintroduced an application process supervised and reviewed by the Office of the Governor. Branstad maintains that the function of the application process is part of the reintegration process because it allows ex-felons to pay their dues to the society they have harmed with their offense. Empirically, however, the application remains a bureaucratic and formal process that results in sustained post-incarceration stigmatization. Moreover, discussing the application process from a pragmatic rather than philosophical or ideological perspective allows for a more productive conversation on criminal

justice. For instance, research has been done on the effects of bureaucratic application procedures on ex-felon voter turnout. Such research concerns the experienced and applied policy outcomes, which contribute statistical evidence to an otherwise theoretical discussion on the appropriateness of bureaucratic barriers restricting the ballot. In the following section, I will discuss both the ideological and the empirical perspectives on the recent changes in Iowa's restoration of rights of citizenship processes.

Following the signing of Executive Order 70 in 2011, a new application procedure for ex-felons who wanted to vote or hold public office was installed. Although this application was streamlined and simplified in 2012, the application remained a strong reminder of the fact that in Iowa a felon's citizenship and suffrage are completely forfeited upon conviction. To illustrate, one of the twenty-nine questions on the original application form reads, "Please state why you believe that you have demonstrated good citizenship such that your citizenship rights (right to vote and hold public office) might be restored by the Governor" (Application for Restoration of Rights). This question attributes a great amount of discretionary power to the Office of the Governor. Moreover, with a lack of standards or safeguards in place to guarantee that reviewers will not reject an application based on an "unsatisfactory" answer, the question assumes citizenship to be a duty and a responsibility, rather than a right. With questions like this, the application also confirms that a completion of sentence and payment of outstanding fines and obligations by itself is not sufficient for a restoration of rights and citizenship. In colloquial terms, while an ex-felon might have paid his or her dues as ordered by the U.S. criminal justice system, there are more ways in which that person must prove he or she is fit to regain formal American citizenship and enjoy the privileges that come with it.

As I have discussed in Chapter 5, however, this idea of strict qualifications on formal citizenship is not shared by the emerging transnational discourse on citizenship and punishment. In fact, the question above directly disputes Ziegler's notion of the transnational judicial discourse that fosters a "notion of convicts as rights-holders whose disenfranchisement is considered a prima facie infringement of their right to vote" (221). Indeed, with the bureaucratic procedures that followed Executive Order 70, citizenship and voting rights in Iowa have been made more exclusive. From a conflict theory perspective, the bureaucratic presence of the application is typical. The application formally attributes broad discretionary power to the Office of the Governor and because the statute establishes no formal guidelines the Governor has

substantial autonomy in determining the conditions under which an ex-felon regain the right to vote. When taking into account the magnitude of the United States' crisis of incarceration, this gubernatorial autonomy constitutes consequential political power, instrumental in perpetuating the social control mechanisms that are necessary to protect the self-interest of the dominant class.

With a more empirical approach, scholars found that increased bureaucratic procedures also lead to a lower voter turnout. In their work, "The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa", Marc Meredith and Michael Morse investigate the influences of the recent changes in the restoration of voting rights procedures in Iowa on the political participation of ex-felons. They note that only "366 of the 8,646 individuals discharged from a felony sentence in 2002 or 2003 applied to restore their voting rights prior to the signing of Executive Order 42" (19). The low level of applications in the years before Governor Vilsack installed an automatic restoration process could mean that voting rights restoration, or voting in general, had not been a priority for most ex-felons. Meredith & Morse found, however, that, "ex-felon turnout increased between the 2004 and 2008 presidential elections, particularly among ex-felons who were officially informed that their voting rights were restored" (3). To that extend, the signing of Executive Order 70 in 2011 confirmed the hypothesis of Meredith & Morse, who found clear evidence that "being subject to an application requirement reduced ex-felon turnout in Iowa in 2012" (38). The finding that increased bureaucratic barriers decreases voter turnout is anything but surprising. Yet, empirical evidence in support of such claims specifically calls into question the validity of the ways in which access to the ballot is restricted to some and unrestricted to others.

When ex-felon voter turnout is largely influenced by the extensiveness of the bureaucratic process that stands between an ex-felon and the ballot, discussions on the appropriateness of such processes should include an evaluation of the pragmatic and empirical contemplations of racial impact. In an amicus brief submitted by the NAACP Legal Defense and Educational Fund (LDF) in Iowa's most recent felon disenfranchisement case *Griffin v. Pate*, which I will further discuss in chapter 8, John Whiston writes, "Prior to Executive Order 42, one in four (24.87%) African-American adults in Iowa were disenfranchised. This was more than triple the national African-American disenfranchisement rate (7.48 percent). Under Executive Order 42, 6.9 percent of African-American voting-age Iowans were disenfranchised by criminal convictions, a significant decrease from previous years" (27). From a strictly statistical

perspective, the automatic restoration of rights of citizenship enacted by Executive Order 42 significantly decreased the disenfranchisement rate of African Americans in Iowa. While both felon disenfranchisement and Branstad's application process are theoretically racially neutral, the empirical evidence exposes a questionable racial impact. Moreover, the application process strengthens Georgia Persons claim that felon disenfranchisement laws are unique because they explicitly limit political participation, while making implicit claims regarding who is worthy of accessing the political process (105). The increased discretionary power of the governor could be a pitfall for racial bias; yet, such claims can only be validated by clear evidence. More importantly, however, is the fact that the application process has a negative impact on ex-felon voter turnout, subsequently leading to a decrease of political representation of minority populations. This reality, which was one of the main points emphasized by Vilsack's Executive Order 42, appears as a strong argument against the application process but has yet to be conceded by the Office of Governor Branstad.

As I have mentioned in chapter 5, Meredith & Morse have suggested that Uggen and Manza (2002) substantially overstated the number of citizens who would vote absent felon disenfranchisement. In a more nuanced view, they question the electoral consequentiality of felon disenfranchisement, but remain hesitant in their argument. Scholars disagree about the electoral consequences of felon disenfranchisement, namely because there is little consensus about the rates at which ex-felons would vote if eligible. Meredith & Morse note that "Uggen and Manza (2002) predict that about 35 percent of the disenfranchised population would vote in presidential elections" (3). They themselves, however, found that, "less than 15 percent of recently enfranchised ex-felons voted in Iowa, Maine, and Rhode Island" (37), bringing into question the notion that disenfranchisement as electorally consequential as proposed by Uggen and Manza (2002), whose estimates were much higher. Nevertheless, the negative impact of the application process on voter turnout remains undisputed. Furthermore, whether or not ex-felon voting rights are electorally consequential should be a secondary rather than a primary concern if one approaches the topic from a perspective of individual rights and liberties. Rightfully so, the symbolic and ideological function of voting in a democracy persists at the core of the felon disenfranchisement debate. The scope of the political leverage of ex-felons as a class does, however, deserve further academic attention and should be studied at the hand of a conflict theory framework and with an awareness of racial impact.

## **E. Conclusion**

Through an application of racial threat, this chapter explained how the historical circumstances of Iowa's felon disenfranchisement scheme signified race-relations. I found that, during the Reconstruction a perceived fear of an influx of African Americans coming to Iowa was used to pass laws that could decrease the political power of these African Americans. Currently, however, there is little evidence to suggest that a fear of increased minority populations warrants Iowa's severe disenfranchisement policies. Instead, the states' highly disproportionate minority prison population is a more promising explanatory variable for the persistence of Iowa's disenfranchisement scheme. Both historically and contemporarily the Iowa Constitution provides the legal basis for felon disenfranchisement in Iowa. Where the U.S. Constitution grants states with the power determine the conditions under which the right of suffrage may be exercised, the Iowa Constitution has made a conviction of an "infamous crime" one of those conditions. In 21st century Iowa, however, the policy of felon disenfranchisement has been more effectively shaped through Executive Orders. Executive order 42, signed by Democratic Governor Tom Vilsack in 2005, automatically restored the voting rights of ex-felons and those who would be released from prison thereon. 6 years later, however, newly elected Republican Governor Terry Branstad rescinded Vilsack's order and reinstated an application procedure.

This chapter has explored the importance of Executive Order 42 and 70 and the influence they had on Iowa's voting practices. I found that Executive Order 42 embodied the rhetoric of the emerging transnational judicial democratic paradigm which assumes convicts to be in possession of certain rights. Moreover, the instrumentality of voting in the context of reintegration proves to be a main argument for those who oppose lifetime felon disenfranchisement and I will continue the discussion on this opposition in chapter 7.

Finally, this chapter looked at both the ideological and the pragmatic implications of the application for restoration of rights of citizenship. In both practical and theoretical terms the application process removes ex-felons further from the ballot, leading to a more exclusive voting process that increases the Governor's discretionary power. This should be viewed as problematic because qualifications on the right to vote can lead to discriminatory, or at least, democratically questionable voting circumstances. To strengthen these claims, I drew on statistical evidence related to ex-felon voter turnout that is suggestive of disproportionate racial impact. In this

analysis, I presented evidence supporting the claim that increased bureaucratic processes can be considered barriers between (ex-)felons and the ballot, which leads to a decrease of the political leverage and agency of minority populations.

## **Chapter VII. Letters to Governor Branstad: Criticism of the**

### **Application Process**

#### **A. Introduction**

During the Iowa Gubernatorial election of 2010, sitting Democratic Governor Chet Culver faced off against former Republican Governor Terry Branstad. Many prisoner's rights advocates groups, criminal justice associations and faith-based organizations anticipated a reversal of the 2005 Executive Order 42 if Republican candidate Branstad would win the election. Consequently, in the wake of Branstad's victory, many of these groups presented letters to the newly elected Governor, urging him to uphold Executive Order 42. Although these letters to Governor Branstad failed to prevent the signing of Executive Order 70, a unified voice of criminal justice advocacy and policy reform spoke out against the lifetime felon disenfranchisement scheme in Iowa.

This chapter will review, compare and contrast the letters addressed to Governor Branstad while drawing on previously presented theory and research. I will highlight consistency in major points of opposition and discuss how these letters embody a sense of shared activism regarding a widely contested public policy issue. Specifically, this chapter draws on letters drafted by the American Bar Association (ABA), the American Correctional Association (ACA), the American Probation & Parole Association (APPA) and a letter from a coalition of nonpartisan and Iowa faith-based organizations. The criticism expressed by these organizations remains consistent on several major points. Firstly, they all stress the importance of rehabilitation and argue that rescinding Executive Order 42 hinders the rehabilitation process. Secondly, the criminal justice organizations mentioned above suggest that, where the act of voting has a positive effect on recidivism rates, continued post-incarceration disenfranchisement perpetuates a sense of ex-felons as political outsiders, which carries significant ramifications for the possibilities of effective reintegration. Lastly, these organizations emphasize the dangers of including financial obligations in the application for restoration of rights process. Regarding these financial obligations, they argue that making such criminal justice policies wealth dependent increases disparate policy outcomes and diminishes African American political participation and power. With such claims, critics of the application process and felon

disenfranchisement in general hint at the ineffectiveness of colorblind policies. To demonstrate this ineffectiveness, they provide statistical evidence that suggests that African Americans in Iowa are already suffering from repressive penal policies, making felon disenfranchisement one of many collateral consequences of incarceration that contributes to increased racialized social stratifications.

## **B. The Rehabilitative Function of Punishment: Reintegration, Recidivism and the Effects of Labeling**

Organizations from a variety of fields urged Governor Branstad to maintain Executive Order 42. These organizations, which are all committed to effective criminal justice policy, came from various branches of the United States criminal justice offering specific perspectives and areas of expertise. Despite these diverse backgrounds, several themes recurred throughout the letters, most of which recommended a departure from the repressive punishment philosophy of the late 20<sup>th</sup> century. To that extend, all letters to Governor Branstad included remarks on the rehabilitative function of punishment and described how voting rights can facilitate the process of effective reintegration.

Consistent with the original language of Executive Order 42, the relationship between voting rights and positive reintegration appeared as a central theme throughout the letters of protest. Since felon disenfranchisement constitutes a policy in Iowa that is applied post-incarceration, the effects of disenfranchisement on reintegration were a logical point of focus. For instance, the American Bar Association (ABA) writes, “restoration of the right to vote is an important part of an individual’s successful reentry and reintegration into the community after conviction” (Susman n.p). The ABA’s emphasis on reintegration into the community is shared by many of the other criminal justice organizations. Similarly, the American Probation & Parole Association (APPA) notes, “Bringing people into the political process makes them stakeholders in their communities and encourages them to lead law-abiding lives” (Wicklund n.p). The overarching sentiment that is conveyed by the ABA and the APPA is that the process of voting and the right to vote produce formal ties to society and the community.

This idea that the reintegration process is facilitated by restoration of voting rights is based on the conviction that voting is the active measure of mediation by stakeholders within a larger social environment. The importance of the political process, in the context of community

ties and social reintegration is also stressed by the American Correctional Association (ACA), who, from a rather ideological perspective mention that, under Executive Order 42, “people who have served their sentence are welcome as integral members of the their home communities and invests them in our democracy” (Gondles 3). The similarity in language between the ABA, APPA and the ACA signifies a cohesive democratic stance against the unnecessary collateral consequences of excessive penal practices. This opposition is especially unified against policies that interfere with the rehabilitative purpose of punishment. Specifically, the ACA adheres that, “the loss of the right to vote does not serve any rehabilitative function” (Gondles 2). To that extend, all organizations agree that without a rehabilitative function lifetime felon disenfranchisement cannot be reconciled with proper standards of punishments philosophy.

Moreover, part of the reintegration process consists of actively combating recidivism. That is, in the United States, the majority of the people released from prison will at one point find themselves behind bars again. The reasons and explanations for these cyclical trends of criminal behavior and excessive exposure to the U.S. criminal justice system vary. Much evidence, however, attributes part of this problem to socially disorganized neighborhood conditions and a failure of the U.S. criminal justice system to install effective measures of deterrence and recidivism remedies. The ABA, APPA and ACA’s focus on voting and reintegration thus includes a community based approach which highlights the importance of formal ties to the social environment an ex-felon is released into. To that extend, Uggen et al. suggest that it “is much more plausible to think that participation in elections as stakeholders might reduce recidivism” (312). This specific connection between voting rights and recidivism is also made by the ACA who believes “former offenders who have the right to vote are less likely to reoffend” and “that bringing people into the political process decreasing recidivism” (Gondles 3). According to the criminal justice organizations that addressed Governor Branstad, the right to vote can thus be considered more than an indication of reintegration, it can also serve as means to reduce recidivism, which from a rehabilitative perspective constitutes a major indicator of successful post-incarceration reintegration.

Additionally, the APPA and a coalition of nonpartisan and faith-based organizations suggest that continued disenfranchisement upon release from state supervision stigmatizes ex-felons. This stigmatization is not only consistent with Black’s social distance theory but also with Darling’s explanation of the social need for felon disenfranchisement. As mentioned in

chapter 3, Darling proposes that, “disenfranchisement is driven by an atavistic and deep-rooted social need to define the boundaries of the community by stigmatizing some persons as outsiders” (373). This fabrication of social and political outsiders, which is perpetuated by allowing some to participate in the political process and others not, is identified as problematic by the APPA when they write, “creating additional barriers and obstacles to reintegration brands people as political outsiders and endangers successful reentry” (Wicklund n.p). The mention of ex-felons as political outsiders also supports the basic social conflict theory proposition that those with power will seek to exploit those without. Likewise, the letter from the coalition of nonpartisan and faith-based organizations submits that, “People transitioning out of the criminal justice system are expected to reintegrate themselves fully back into society. This will be made far more difficult if we brand them as second-class citizens” (n.p). In the context of political power, the designation of ex-felons as ‘others’, ‘political outsiders’, or ‘second-class citizens’, in order to strip them from their voting rights, should be viewed as exemplary of the workings of social conflict theory through labeling mechanism. In other words, using deviance, or the label/brand of ‘deviant’, as a differentiator between ‘us’ and ‘them’ allows those in power to pass and uphold repressive laws and produce public policy which is beneficent to their political self-interest.

The labeling process, however, does not start upon release from state supervision but already happens within the prison. To illustrate, Patrick Lopez-Aguado uses Foucauldian discourse to explain the workings of labeling and its wider implications on race and communities. Lopez-Aguado suggests that, “this identification of former inmates as a criminal class is the central accomplishment of the prison” (16). Moreover, in *Discipline & Punish* (1977), Foucault attributes the function of prison as being a labeling mechanism so that it secures state power by depoliticizing illegality and framing obedience as a moral objective. With that in mind, Lopez-Aguado includes the race-variable and proposes that the “expansion of mass incarceration not only structures the consistent return of such labeled “criminals” to poor communities of color in large numbers but also funnels them into a fairly small number of urban neighborhoods” (17). The consequences of labeling thus fall harder on certain neighborhoods than others. As race is often the differentiator of these neighborhoods, the legacies of incarceration cannot be discussed without or outside a race discourse.

Since, the branding of ex-felons as ‘criminals’ confirms their status as ‘outsiders’ or ‘second-class citizens’, the label serves a real political function. This label is instrumental in maintaining the collateral consequences of incarceration which allows for increased social stratification. Moreover, the social status produced by incarceration remains a strenuous obstacle for ex-felons seeking access to legitimate means of self-sufficiency, especially in communities where ex-felons are highly concentrated. Therefore, it is not surprising that almost all letters to Governor Branstad mentioned the detrimental effects of the stigmatization resulting from the ‘criminal’ label. Furthermore, the disenfranchisement of (ex-)felons formalizes the symbolic label of ‘criminal’ during and post-incarceration. Thus, as suggested by Darling, disenfranchisement is a way to define the boundaries of the community. Organizations such as the ABA, APPA and the ACA, who stress the importance of rehabilitation as a purpose of punishment, see this defining of the boundaries of the community as interfering with the rehabilitation process. For them, post-incarceration disenfranchisement is an unnecessary additional barrier to reintegration. This sentiment is most eloquently conveyed by the original founding principles of the ACA. For instance, in their letter to Branstad the ACA maintains that the state, “having raised the criminal up, has further duty to aid in holding him up. In vain we shall have given the convict an improved mind in heart. If, on his discharge, he finds the world in arms against him, with none to trust him” (Gondles 2). Permanent disenfranchisement confirms the perceived boundaries between the insiders and outsiders of the community. Additionally, it sends a message to ex-felons that, even though they have completed their sentence, their debt to society has not and never will fully be paid. As ex-felons lack the coping mechanisms necessary to deal with the strain that emerges from being labeled an ‘outsider’, permanent disenfranchisement remains a criminogenic policy that often leads to cyclical trends of incarceration.

### **C. The Application for Restoration of Rights and Citizenship, an Ineffective Colorblind Policy?**

Some of the documents drafted in anticipation of Governor Branstad’s rescinding of Executive Order 42 included remarks on racial impact and drew comparisons between the application process and historical instances of discriminatory policies. For instance, regarding the fees and financial obligations of the application the ABA writes, “making the right to vote

contingent on such payments essentially creates a modern-day poll tax, allowing individuals of means to vote while keeping those who are struggling to pay off their debts disenfranchised” (Susman n.p). The issue of payment as part of voting restoration evoked also a response from the coalition of nonpartisan and faith-based organizations, whose letter almost identically reads, “making voting contingent on payments essentially creates a modern-day poll tax, allowing wealthy individuals to vote while those who are struggling to pay off their debt remain disenfranchised” (n.p). With this last statement, the coalition explicitly mentions the unfair consequences of a policy that falls harder on some than on others based on wealth and financial circumstances. Iowa’s largest newspaper, The Des Moines Register, also acknowledged similarities between the discriminatory policies of the Jim Crow era and Iowa’s disenfranchisement scheme. In a 2010 editorial titled “Voting Rights Part of Rehabilitation”, the Des Moines Register contended that, “the right to vote could hinge on one’s financial status, which is akin to an unconstitutional poll tax” (n.p).

All of these statements of protest are coherent with Michelle Alexander’s theory of adaptable racism. As noted before, she suggests that, “African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new forms, tailored to the needs and constraints of the time” (21). The financial element of the application for voting restoration does, without a doubt, show similarities with the poll tax policy of the late 19<sup>th</sup> century. Both the poll-tax and the application fees are in theory racially neutral policies. The outcome, however, as was evident during the Jim Crow era, remains a significant backlash of mostly African American political agency. The financial obligation of the application process, just like the financial obligation of the poll-tax, falls harder on African Americans due to their relatively lower economic status. To illustrate, in 2015 the Des Moines Register reported that in Iowa, across the state, black Iowans fail to enjoy the same level of economic prosperity as their white neighbors. A third of Iowa’s black households earn less than \$20,000 annually, compared with 8 percent of white households” (Hardy n.p). More importantly, the disparities extend far beyond simple income statistics, as in 2014, “Iowa’s statewide unemployment rate for white residents averaged 4.4 percent, while for blacks, it was 14.1 percent — more than three times higher” (Hardy n.p).

With such statistical evidence at hand, the Des Moines Register suggested in their editorial that the financial penalty of the voting restoration application “would fall most heavily

on low-income African-Americans in Iowa” (n.p). Consistent with the writing of Alexander, the Des Moines Register seeks to diminish the myth of felon disenfranchisement as a ‘colorblind’ policy. In that regard, the emphasis on disparate racial impact remains one of the major points of protest for those seeking to reform repressive criminal justice policies like felon disenfranchisement. For instance, the ABA adds that they are dedicated to eliminating racial disparities and bias in the criminal justice system. They find that such disparities and bias are, “amplified by laws withholding the right to vote even after an individual’s liberty is restored” (Susman n.p). It is, indeed, worth noting that lifetime felony disenfranchisement, as it is currently applied to felons in the state of Iowa, drastically increases the scope of the U.S. criminal justice system, allowing for a continuation of racially disparate policy outcomes. Evidently, African Americans are now not only more likely to be exposed to the U.S. criminal justice system, but also more likely to suffer from the legacies of that exposure.

The result, as noted by the APA, is that “prior to Executive Order 42 Iowa had the highest rate of African-American disenfranchisement in the country” (Susman n.p), which with the rescinding of Executive Order 42 would be the case once again. This illustration of the extremity of Iowa’s felon disenfranchisement policy outcomes signifies the larger problematic reality of the myth of colorblindness in a post-racial society. The extreme rate of disenfranchisement amongst African Americans in Iowa magnifies the unjust racialized practices of theoretically race-neutral policies related to the U.S. criminal justice system. Organizations like the ABA, APPA and ACA seek to diminish these disparities by offering cogent criticism to policies that facilitate disproportionality, of which felon disenfranchisement is a prime example.

#### **D. Conclusion**

In spite of the various letters to Governor Branstad urging him to uphold Executive Order 42, Branstad rescinded the order by signing into effect Executive Order 70 the day he took office. Nevertheless, pre-emptive criticism of that decision has delineated the dangers of permanent disenfranchisement and emphasized the importance of the race-variable. The instrumentality of voting, as argued by the critics of Executive Order 70, extends beyond casting a vote in an election, it also embodies the production of formal ties to society and the community. It is estimated that ex-felons as stakeholders are less likely to fall into patterns of recidivism and with that in mind the right to vote becomes more than a symbolic measure of

political power, it becomes a crucial element of the reintegration process. Moreover, the deprivation of voting rights leads to increased (racialized) social stratification. When ex-felons are perpetually labeled and branded as “criminal” the boundaries of the community are made clearer and the benefits of belonging to that community become more exclusive.

As political outsiders, ex-felons suffer from a consequential lack of political agency. Subsequently, when certain neighborhoods and communities suffer at greater extent from this lack of political agency the variable of race becomes increasingly more relevant. Especially, when financial obligations are used in the application process, voting rights become influenced by socio-economic status, which, to say the least, is problematic to any nation or state attempting to uphold strong democratic principles. Furthermore, the racial impact of disenfranchisement in Iowa remained a common theme in the letters of criticism. Since the application procedure contains features that are akin to Jim Crow era policies, the letters to Branstad highlighted the racial disparities associated with Iowa’s felon disenfranchisement. To that extend, Iowa’s disenfranchisement data prior to Executive Order 42 showed but a grim picture of the statistical reality of African American disenfranchisement, which is anticipated to only get worse if current trends persist.

A small victory for the critics of the application was reached in 2012, when the continued objections against the part of the application procedure that entailed a credit report resulted into the removal of that element from the process. Ultimately, even though Executive Order 42 was rescinded by Governor Branstad, the proponents of automatic restoration of voting rights presented a coherent and concise set of arguments, which touched upon the most stressing contemporary criminal justice issues related to the punishment philosophy of rehabilitation and the empirical evidence suggestive of racial disparity. Together, this focus on rehabilitation and racial disparity formed the basis of criticism aimed at uncovering Iowa’s felon disenfranchisement scheme’s injurious consequences in the context of its prejudicial reality.

## **Chapter VIII. The Constitutionality of Iowa’s Felon**

### **Disenfranchisement Scheme - an Interpretation of “Infamous Crime”**

#### **in the Iowa Courtrooms: Chiodo (2014) & Griffin (2016)**

##### **A. Introduction**

Since 2011, when Branstad’s Executive Order 70 reinstated the application process for restoration of rights and citizenship, the Iowa Supreme Court has reviewed two notable cases related to felon disenfranchisement. As explained in chapter 6, the state of Iowa derives its capacity to disenfranchise its felons from the Iowa Constitution, which reads “No idiot, or insane person, or person convicted of any infamous crime, shall be entitled to the privilege of an elector” (Iowa Constitution, Article II, §5). The cases recently brought before the Iowa Supreme Court revolved around the ambiguous term ‘infamous crime’ and its application for voter disqualification. In both cases, *Chiodo v. Section 43.24 Panel* and *Griffin v. Pate*, the Court was asked to provide a jurisprudential interpretation of the language of the Iowa Constitution and use this interpretation to confer about the legality of voter disqualification pertaining to a specific misdemeanor and felony offense. The role of the judiciary in such matters is explained by Iowa Supreme Court Chief Justice Mark Cady, who remarked in *Chiodo*: “from the beginning of our constitutional journey as a state, as now, the courts have been given the role to interpret the constitution and provide the needed definition so our constitutional principles can be applied to resolve the disputes we face today” (Cady). In regard to Iowa’s felon disenfranchisement, the disputes today require a more specific application of the language of the State Constitution. In other words, the Iowa Supreme Court had to decide whether or not the specific crimes of the cases constituted an ‘infamous crime’, which would determine whether or not a voter disqualification or electoral ineligibility was appropriate under the provisions of the State Constitution.

This chapter addresses the legal developments of Iowa’s felon disenfranchisement scheme by discussing the two major Supreme Court cases heard in 2014 and 2016. An analysis of these court cases outlines the most important legal challenges to felon disenfranchisement, while illustrating how the judicial branch can influence political processes in Iowa. I follow

Michael Boal's critique of the Iowa Supreme Court's minimalist approach in *Chiodo* and will argue that *Griffin* was the expected consequence of that approach. Furthermore, this chapter draws on various briefs by amici curiae, individual court opinions and responses to court cases, to show how the issue of race is presented to the courtroom. As "friends of the court", civil rights organizations are able to submit research that forces the court to acknowledge the racial implications of voter disqualification. These documents are part of a discourse that emerged from *Chiodo* and *Griffin*, which, together with recent media attention and protest efforts, implies that felon disenfranchisement in Iowa, will be continuously scrutinized by various legal and legislative bodies, for years to come.

### **B. Chiodo v. Section 43.24 Panel: A Split decision Tainted by Judicial Minimalism**

Iowa Code 321J.2 makes operating while under the influence (OWI) of alcohol or a drug a misdemeanor offense. An OWI second offense however, which has to happen within 12 years of the previous OWI, incurs a minimum imprisonment period in the county jail of seven days and qualifies as an aggravated misdemeanor. The qualification of an OWI second offense as an aggravated misdemeanor and its subsequent consequences as such, provided the legal context for *Chiodo*.

In 2014, Anthony Bisignano filed an affidavit of candidacy to run for the Iowa Senate. Another candidate for this position, Ned Chiodo, filed an objection to Bisignano's candidacy on the grounds that Bisignano was disqualified from holding public office due to an OWI second offense conviction, which would fall under the 'infamous crime' clause of Article II, Section 5 of the Iowa Constitution. The objection was first heard by a panel comprised of the Iowa Attorney General, the Iowa Auditor of State and the Iowa Secretary of State (the Panel) whom denied Chiodo's objection. Then, upon an appeal, a district court affirmed the panel's decision, which led to Iowa's Supreme Court granting an expedited review and offering final opinions on the matter.

Although the case, as brought before the Iowa Supreme Court, appeared rather straightforward, it entailed important judicial review of a significant and complex recurring legal issue. Basically, the Court had to decide whether an OWI second offense is an infamous crime within the linguistic meaning of article II, Section 5 of the Iowa Constitution. The Court's opinion, however, was anything but straightforward and implied the intricateness of

constitutional jurisprudence. In a split decision, the Court determined that a person convicted of the crime of OWI, second offense, is not disqualified from holding a public office in Iowa, thereby affirming the decision of the district court. Only a plurality of three justices (Cady, Hecht and Zager), however, ruled that a crime is not infamous unless it's a felony that would tend to undermine the process of democratic governance. A two-justice concurrence (Mansfield and Waterman) agreed the crime is not infamous, but only because the crime is not a felony. While, lastly, a lone dissenting justice (Wiggins) ruled that all crimes that carry a potential prison sentence are infamous, meaning that all felonies and aggravated misdemeanors are 'infamous crimes'. Ultimately, five of the six participating justices agreed that Bisignano's crime, an aggravated misdemeanor, was not infamous, which made him an eligible elector with the right to hold public office. With this decision, the Court departed from a century-old precedent set by *Blodgett* and formally disapproved of *Flannagan* and *Haubrich*, all cases which defined infamous crime as "any crime punishable by imprisonment in the penitentiary"(Boal 749). Although stare decisis was only applied by the lone dissenting justice, the plurality and concurrence were unable to discern a unified framework or a cohesive opinion containing substantive legal guidelines.

The ambiguity that signified *Chiodo* was confirmed by the amount of unanswered questions that remained after its ruling. In his essay, "An Infamous Case: How the Iowa Supreme Court's Minimalist Approach Forced Everyone to Come Back for More in *Chiodo v. Section 43.24 Panel*", Michael Boal describes the consequences of *Chiodo* for future voting disqualification and litigation in Iowa. Boal maintains that the Court in *Chiodo* provided an incompletely theorized agreement and an incompletely specified agreement, which constitute the "two forms of judicial minimalism" (747). More specifically, Boal argues that because the Court avoided any "broad theoretical underpinning to its analysis and declined to apply the framework to any other crime except OWI, second offense" it left the state of law "equally unclear" (749). Thus, while the Court's minimalist approach through an incompletely specified agreement might have satisfied the circumstantial facts of *Chiodo*, it offered little to no framework for lower courts to deal with future litigation pertaining similar legal questions. Boal provides several reasons as to why this minimalism, in the context of *Chiodo*, was not appropriate. Most importantly, he proposes that courts should avoid minimalism when interpreting constitutional rights, as the judiciary is the final arbiter of a constitution's text and an incompletely specified

agreement can only negatively affect individual rights. On top of that, Boal suggests that “courts should employ minimalism only to the extent that the doctrine of stare decisis applies” (740), which was clearly not the case in *Chiodo*. As a result, where the *Chiodo* Court partially overruled strong precedent and court doctrine, it failed to replace this precursory framework with a productive new one. Subsequently, the inappropriateness of the Court’s minimalist approach was signified by the increased post-*Chiodo* confusion that resulted from overall inconsistencies in the presented framework. To that extend, lower courts interpreting voter disqualification standards had to work in a legal grey-zone, where they had to determine whether the new framework applied to any crime other than an OWI, second offense, or, given its non-binding status, apply at all.

Where the *Chiodo* Court failed to produce a specified agreement on voter disqualification, it also failed to diminish the inconsistency between the legislative voter registration framework and its own framework. To illustrate, the Iowa Code states: “the following persons are disqualified from registering to vote and from voting: 1. A person who has been convicted of a felony as defined in section 701.7, or convicted of an offense classified as a felony under federal law” (Iowa Code § 701.7.48A). However, as mentioned in chapter 6, the Governor may use his powers of executive clemency to restore the rights of (ex-)felons. Even though the plurality opinion contradicts the legislative definition used to apply voter disqualification, it “does not render the legislative definition of ‘infamous crime’ under Iowa Code section 39.8(8) unconstitutional” (Boal 758). Thus, the plurality decided not to discard the Iowa Legislature’s definition. By doing so, Boal argues, the plurality “allowed three interpretations of the phrase to remain viable: its own new interpretation, the interpretation of its trilogy precedent, and the Iowa Legislature’s interpretation” (758). The consequences of this vagueness would result in a substantial increase in future litigation, which can be seen as one of the downfalls of a minimalist approach in a constitutional case. Aware of its own minimalism, the Court suggested that it would articulate its framework for voter disqualification at a later date. With one justice recused during *Chiodo*, the anticipation for this later date grew stronger. After all, his vote, if consistent with the plurality, would mean a majority opinion that could generate some ‘good law’ from Iowa’s highest Court. The day where the Court would have to revisit its *Chiodo* review came in 2016, when the *Griffin* Court had to address the ‘infamous crime’ issue once again.

### **C. Griffin v. Pate: Revisiting the ‘Infamous Crime’ Standard**

In 2014, Boal predicted that after *Chiodo* “the Court may be confronted with another challenge to Iowa’s voter disqualification constitutional provision sooner rather than later” (763). His forecast was confirmed in 2016, when the Iowa Supreme Court heard and ruled the *Griffin* case. The anticipation of *Griffin* was already build up during *Chiodo* when the plurality acknowledged that their decision was limited and that they would “leave it for future cases to decide which felonies might fall within the meaning of “infamous crime(s)” that disqualify Iowans from voting” (Cady). It should be noted, however, that *Chiodo* was an expedited appeal that traveled through the appellate process with unprecedented speed. This was necessary because the legality of Bisignano’s candidacy had to be determined before the Iowa Senate election, giving the Court very little time to contemplate its opinion. So, while, it was tempting to view the *Griffin* case as a case where only the previously recused justice (Appel) would weigh-in and join, Ryan Koopman suggested, on the Iowa Appellate Blog, that “having had more than a couple days to think about it, some of the justices could easily change their mind” (n.p). To that extend, the *Griffin* case bore some significant similarities to *Chiodo*. In a way, the Court simply expanded its formal view on the ‘infamous crime’ doctrine and the constitutionality of felon disenfranchisement to include Kelli Griffin’s specified criminal act. Nonetheless, it was expected that the Court would deviate from its previously applied judicial minimalism and use its full bench and ample time to form a more completely specified agreement than it did in *Chiodo*.

In *Griffin*, the lawsuit was brought by the American Civil Liberties Union of Iowa, on behalf of Kelli Jo Griffin, who is disenfranchised because of a past drug-related offense. Griffin was charged and acquitted earlier that year of perjury in connection with voting in a 2013 local election. *Griffin* appeared before the Iowa Supreme Court upon an appeal after an Iowa Polk County District Court dismissed her suit and denied her summary judgment in 2014. With that dismissal, the Polk County District Court noted that: “Concerning electors like Griffin, who have been convicted of a felony, *Blodgett* and *Haubrich* retain precedential value until they are overruled by a majority of the Iowa Supreme Court” (Gamble). This statement confirms the warning for increased future litigation by the *Chiodo* concurrence and dissent. In other words,

the Polk County District Court did not feel inclined to disregard atavistic precedent based on *Chiodo*'s vague ruling, leaving the decision to the Iowa Supreme Court.

Consequently, two years after the original dismissal of Griffin's suit, the Iowa Supreme Court was asked to adjudicate whether or not the Iowa Constitution prohibits the disenfranchisement of people convicted of certain felonies, such as Griffin's nonviolent drug offense of the delivery of a controlled substance. With a, somewhat controversial, 4-3 majority the Court concluded that Kelli Griffin remains an ineligible elector. Justice Cady, who was joined by Waterman, Mansfield and Zager, voiced the majority opinion and stated the following: "Constrained, as we must be, by our role in government, we conclude our constitution permits persons convicted of a felony to be disqualified from voting in Iowa until pardoned or otherwise restored to the rights of citizenship" (Cady). This decision, which justified Koopman's pre-ruling prudence, came as a surprise to some. The three justice plurality opinion in *Chiodo* had become a minority opinion in *Griffin*. Where Cady, Hecht and Zager contended in *Chiodo* that a crime is not infamous unless it concerns a felony that would tend to undermine the process of democratic governance, in *Griffin*, Cady and Zager reversed their previously held opinion and were joined by Waterman and Mansfield, to form the majority that ruled in favor of Pate and upheld Iowa's current felon disenfranchisement policy.

Justice Appel, who was recused from *Chiodo*, did submit an opinion consistent with that of the *Chiodo* plurality. He contended that only *crimen falsi* or crimes that interfere with the electoral process and undermine the democratic process should be considered 'infamous' under the Iowa Constitution. Moreover, Appel stated: "I think it is clear that Griffin's drug crimes do not qualify as *crimen falsi* or crimes that interfere with the electoral process. No one would seriously argue that allowing her to vote threatens the administration of justice" (Appel). Similarly, Hecht, who maintained the same opinion as in *Chiodo*, reported in his dissenting opinion: "I believe an infamous crime that disqualifies a citizen from voting must at least feature some nexus to the electoral process" (Hecht).

It could be said that *Griffin* resulted in a more completely theorized and a more completely specified agreement than *Chiodo*. Evidently, the Court filled in some of the gaps that the judicial minimalism in *Chiodo* had left behind. For instance, the majority in *Griffin* noted that: "In taking the next step forward today to develop a more complete framework to interpret the infamous-crime language; we are drawn to the approach historically taken by courts when

called upon to interpret the meaning of constitutional phrases that necessarily embody social judgments that evolve over time” (Cady). With this historical approach, the Court returned to an application of stare decisis and referred to 1994, when the Iowa Legislature enacted a statute defining an infamous crime as “any felony” (Iowa Code § 701.7.48A). Ultimately, at the hand of this historical framework the majority decided that there is “insufficient evidence to overcome the 1994 legislative judgment, and we must accept it today as the standard for infamous crime” (Cady).

Ironically, regarding *Chiodo*, Boal noted in 2014 that the Court “does not render the legislative definition of ‘infamous crime’ under Iowa Code section 39.8(8) unconstitutional” (758). However, as pointed out by the ACLU of Iowa in Kelli Griffin’s petition to the Polk County District Court, the three justice plurality and the lone dissenting justice in *Chiodo* agreed that the legislature may not define the scope of the term “infamous crime”, and that it is clear that an offense cannot be considered “infamous” based solely on whether the legislature statutorily classifies the offense as a felony (Bettis 4). With this observation, the ACLU of Iowa stresses the notion that felon disenfranchisement is a constitutional, rather than statutory, determination, and seeks to invalidate the Court’s attachment to the definition enacted by the 1994 statute. In *Griffin*, nonetheless, it appears that this legislative definition was used as an authority which the majority refused to overrule. In that regard, Justice Appel objected to the majority’s unwillingness to depart from the legislative definition when he remarked in his dissent: “I conclude that the deletion of legislative authority in article III, Section 5 should be given its intended effect. The determination of which crimes might qualify as infamous for purposes of disqualification from suffrage rests with the court, not with the general assembly” (Appel). In this section, Appel observes that with the amended Iowa Constitution of 1846 the legislature no longer had a role in determining the boundaries of disqualification of voters based on infamous crimes. Instead, this disqualification would occur upon a conviction of any infamous crime and no longer occur upon conviction of crimes which were deemed “infamous by act of the legislature” (Iowa Const. of 1844, art. III, § 5).

Either way, with the *Griffin* ruling and with Governor Branstad’s executive order 70 in place, all ex-felons in Iowa remain ineligible electors until their voting rights have been restored by the Office of the Governor. This is not to say that the felon disenfranchisement dispute is settled in the state of Iowa. As Justice Cady noted in the *Griffin* majority opinion, “A new

definition of ‘infamous crime’ will be up to the future evolution of our understanding of voter disqualification as a society, revealed through the voices of our democracy” (Cady). It is, therefore, expected that felon disenfranchisement in Iowa will be subjected to strict scrutiny for years to come. In order for that judicial review to have a significant impact on Iowa’s felon disenfranchisement scheme, however, the courts should avoid judicial minimalism and aim to develop broad theoretical foundations for its holdings.

#### **D. What About Race? Perspectives from the Amici Curiae**

Although the burden of legal judgement in *Chiodo* and *Griffin* ultimately fell on the shoulders of the Iowa Supreme Court bench, several organizations contributed to the discussion by submitting current research and expert opinions to the Court. With these amici briefs, civil rights organizations were able to emphasize the race factor in the courtroom and present a more thorough assessment of Iowa’s current felon disenfranchisement scheme and its racialized implications.

Not surprisingly, when organizations such as the Brennan Center for Justice and the NAACP were given a voice in Iowa’s most recent felon disenfranchisement court cases, the theme of racial disparity was widely advanced. Although the *Griffin* ruling appeared unsympathetic to claims of discriminatory policy maintenance, the majority in *Griffin* felt compelled to address the issue of race in its opinion and acknowledged that “voter disqualification based on criminal convictions has a disproportionate impact on voting rights of African Americans and perhaps other groups in society” (Cady). They added, however, that since this outcome is tied to the US criminal justice system as a whole, “racial disparity does not necessarily undermine the concept or current definition of infamous crime as a standard for voter disqualification” (Cady).

Nevertheless, civil rights organizations and criminal justice advocacy groups embraced the opportunity to voice their opinion in *Griffin* in order to provide historical context for the discrimination inherent in felon disenfranchisement laws and to illustrate the contemporary impact of these laws on minority populations in Iowa. For instance, the NAACP’s LDF argued in their amicus brief that: “explicit racial bias motivated many states’ felon disenfranchisement laws” (Whiston 6). Likewise, an amicus brief by Iowa Veterans claims that felon disenfranchisement has origins in “segregation and disempowering minority racial groups” (Glazebrook 2). While

the Court's majority considered such evidence insufficient to restore Kelli Griffin's voting rights, Justice Appel was more easily persuaded by the amici's observation of the disturbing features of the history of voter disqualification. In his dissent, he noted that "voter disqualification on the grounds of being convicted of infamous crimes was used as a tool to prevent African Americans from voting" (Appel) in southern states after reconstruction. By admitting to the potentially racist origins of felon disenfranchisement, Appel suggests that, even though the disproportionate outcomes of the policy are tied to the US criminal justice system as a whole, the clear discriminatory sentiment of felon disenfranchisement inception should be acknowledged as such and not be swept under the rug of the US criminal justice system's broader racial disparity.

Furthermore, the various amici briefs embodied a more contemporary discussion of felon disenfranchisement and its ramifications for Iowa's minority populations. The Brennan Center, which filed an amicus brief on behalf of the League of Women Voters of Iowa, stressed the negative consequences of felon disenfranchisement from a community based perspective. They wrote, "Although Iowa has a small minority population, its disproportionately high minority incarceration rates render the impact of its disenfranchisement law on minority Iowa communities especially severe" (McCormick 22). Voter disqualification and its devastating effect on the electoral power of marginalized communities was also highlighted by the LDF, which added that felon disenfranchisement law "deprives African American communities of the collective power of the votes of disfranchised relatives and neighbors and facilitates the development of a culture of political non-participation among community members who have the ability to vote" (Whiston 13).

In response to these suggestions by the Brennan Center and the LDF, dissenting Justice Hecht formulated an opinion coherent with that of those amici engaged with civil rights and social justice. He remarked, although without specific mention of race, "when disproportionate numbers of citizens in the same community are denied the right to vote, the political power of the community's residents—including those who have never been convicted of a crime—is weakened" (Hecht). Similarly, Appel mentioned that: "If a neighborhood has a large number of citizens living in it who are disenfranchised, the community loses power" (Appel). Nevertheless, the influence of the Brennan Center, the NAACP's LDF and the Iowa Veterans, remained limited. Although these civil rights organizations were able to emphasize racial impact in a legal case that could have potentially resulted in a decrease of repressive criminal justice policy in

Iowa, the majority in *Griffin* found their claims not compelling enough to change Iowa's current laws, leaving all felons and ex-felons disenfranchised.

## **E. Conclusion**

As felon disenfranchisement in Iowa is ultimately a constitutional matter; the judiciary is the most appropriate authority to shape the laws that concern voter disqualification. This chapter reviewed two major court cases that were brought before the Iowa Supreme Court. *Chiodo*, which was heard and ruled in 2014, asked the Court to decide whether or not an aggravated misdemeanor of OWI, second offense, constituted an infamous crime under the language of the Iowa Constitution. In this case, the Court applied judicial minimalism, which invited increased future litigation due to its ambiguous ruling and specification. In other words, the limited outcome of *Chiodo* set the state for *Griffin* two years later. With *Chiodo*, however, the Court did indicate that the state had begun to recognize the overbreadth of its burdensome and restrictive felon disenfranchisement regime (Whiston 23).

In *Griffin*, the Court revisited the unfinished discussion of voter disqualification. More specifically, the Court was to decide whether Kelli Griffin's non-violent drug offense was an infamous crime, which would make her an ineligible elector. In a 4-3 decision, the Court ruled that there was insufficient evidence to suggest that the infamous crime standard had changed from its previous interpretations, thus, ruling that Griffin remained disenfranchised. With this decision, the Iowa Supreme Court refused to have the impact on Iowa's felon disenfranchisement scheme that it could have. Nonetheless, the Court hinted at the fact that voter disqualification and infamous crime language will be continuously reviewed in the future to align it with the current community standards at hand.

Furthermore, this chapter looked at the role of amici curiae in the *Griffin* case to explore how civil rights organizations can influence legal decisions. Examples of references to racial impact were provided and correlated to specific opinions by individual justices. As felon disenfranchisement remains a 'colorblind' policy, race, in both *Chiodo* and *Griffin*, appeared as a secondary rather than a primary theme. Regardless, the Brennan Center and the NAACP were able to provide the Court with research and expert opinions that unveiled some of the racist roots of felon disenfranchisement and its detrimental effects on specific communities.

The judicial developments regarding felon disenfranchisement in Iowa illustrates the power of the courts, but also the limitations of a court caught in the crossfire of partisan politics. In *Griffin*, all four of the justices that formed the majority were appointed by Republican Governor Branstad and all three of the dissenting justices were appointed by former Governor Vilsack. As the ruling directly affected the appropriateness of Branstad's policy it could be argued that the courts, no matter the integrity of the bench, will never be completely absent of left-right politics, which could potentially interfere with the judicial process. Nonetheless, Iowa's judiciary decided to follow the legislative definition of the infamous crime standard at this time and made clear that the constitutionality of felon disenfranchisement is decided by the court and the court alone. Voter disqualification laws will undoubtedly be subjected to strict scrutiny in the near future and a different bench might not share the current judicial view that all felonies in Iowa constitute an infamous crime.



## **Chapter IX. Discussion & Conclusion**

### **A. Discussion: Felon Disenfranchisement and the Paradigm of Colorblindness**

If there is one thing that an in-depth analysis of the United States' and, more specifically, Iowa's felon disenfranchisement scheme has illustrated is that an ideology of colorblindness neglects the racial realities of contemporary American society. The findings presented in this thesis uncover the problematic nature of felon disenfranchisement within the system of democratic governance of the American polity. Consistent with recent scholarship on critical race theory and social conflict theory, the workings of voter disqualification as a measure of punishment illustrate the broader function of social control mechanisms in the maintenance of power relations. To that extent, the findings in this thesis have confirmed the notion that felon disenfranchisement exemplifies, in many ways, the shortcomings of the framework of post-raciality as it perpetuates racialized social stratification and in that it increases the social distance between offenders and non-offenders.

But even if we put the race variable aside for a minute, proper justifications for permanent felon disenfranchisement are scarce. As I have contended in chapter 2, the social contract, one of the most principal theoretical frameworks for explicating the relationship between a citizen and the state, offers little substance that is genuinely coherent with voting rights deprivation under a punishment model. Rather, restrictions on voting rights should be viewed as an interference with the democratic process, in so far that it removes the negotiability of the political contract. Without a strong framework for justification, the policy of felon disenfranchisement makes the United States distinctive in its penal practices. To that extend, this thesis proposed, through an application of a cross-national comparative perspective, that the anomalous characteristics of the U.S. criminal justice system persistently disputes the state of American democracy.

Where are we headed then? Opposition to criminal voter disqualification has been expressed in through both race-neutral and race-central arguments. In race-neutral terms, felon disenfranchisement seriously hinders the process of rehabilitation. To illustrate, criticism of Executive Order 70 is largely based on the correlation of voting rights with successful post-incarceration reintegration. Moreover, the social effects of labeling offenders through revocation

of voting rights and citizenship interferes with the reintegration process and is argued to lead to higher rates of recidivism. These arguments should be regarded in the context of both individual offenders and broader communities. Especially a community perspective is offered to emphasize the adverse effects of the collateral consequences of incarceration and their implications for segregated residential areas.

Regarding the race-variable, currently the most pervasive approach remains colorblindness, yet, as this thesis shows, this ideological framework is unable to account for the continued disproportionality of U.S. criminal justice system's policy outcomes. Although the aim of racial equity is admirable and any approach to realize racial equity should be regarded as such, a more productive discourse is one of structural racism. For instance, a closer look at Iowa's felon disenfranchisement scheme elucidated the racial impact of Iowa's voter disqualification laws. Through the lens of a structural racism, the interactions between the Iowa legislature, executive, and judiciary appear to have produced racialized policy outcomes that incapacitate large proportions of Iowa's minority population. To that extend, a case study of Iowa contributed to the discussion on race, punishment, and citizenship in that it provided both a historical and contemporary context for analysis that brought to the surface many issues related to structural racism. For example, although racism is no longer legal, the criminal disenfranchisement passed with discriminatory intent more than 150 years ago achieves their racist goals (Sennot & Galliher 79).

Moreover, while an institutionalized racism explanation, consistent with historical racial threat, might have explained the passing of disenfranchisement laws in Iowa right before and during the Reconstruction, the fact that these laws have persisted over time and are still in place today is more so suggestive of conditions of structural racism and an unwillingness of the legislative, executive and judiciary branches to truly acknowledge the inadequateness of colorblind criminal justice policies. Similarly, in framing felon disenfranchisement within a narrow legal framework, the Federal Courts have ignored the social realities of racism in The United States, resulting in a perpetuation of ethno-racial divisions while systematically diluting the African American vote (Schaefer & Kraska 316). As I have illustrated in chapter 8, however, there is a potentially significant role for the courts in shaping the felon disenfranchisement circumstances of the United States. Many states have already established more lenient laws over

the past years, yet, Iowa remains an outlier. In that regard, it appears that *Griffin* will go into the record books as a missed opportunity for social and racial justice.

Michelle Alexander reminds us of the uncomfortable truth that racial differences will always exist among us. Even if the legacies of slavery, Jim Crow, and mass incarceration were completely overcome, the United States would remain a nation of immigrants in a larger world divided by race and ethnicity (243). Recognition of racial divide, right now, is more useful than a naïve proclamation of a post-racial society. Additionally, the conversation on American criminal justice policy should be conditioned by an awareness of the interconnectedness of race and class and an acknowledgement of the extensiveness of punishment ramifications for both individuals and communities who have fallen within the reach of the U.S. criminal justice system's punishment apparatus. Moreover, the conversation should emphasize the fact that restricted access to the ballot box is but a piece of a larger pattern of social exclusion for America's vast correctional population (Uggen & Manza 795).

Alternative to the penal philosophies of the late 20<sup>th</sup> century, most of the criticism of felon disenfranchisement is part of a larger discourse of restorative justice. With a focus on the needs of the victims, the offenders and the involved community, the restorative justice approach mirrors repressive criminal justice policy and instead offers pro-active victim-offender mediation through alternative means of punishment. Because the restorative justice approach assumes crime and wrongdoing to be an offense against an individual or community rather than the state, it views felon disenfranchisement as an illogical collateral consequence absent of any constructive purpose.

Particularly, the United States' crisis of incarceration, manifested by a complex set of social and economic relationships, has warranted comprehensive scholarly attention engaged with improving American standards of civil rights and alleviating the U.S. criminal justice system from its structurally racist disposition. As a political matter, the "racism" in "structural racism" is meant to invoke a sense that, even in the face of obvious improvements in race relations, normatively illegitimate practices continue (Haney-Lopez 1071). Although felon disenfranchisement practices can be influenced by the executive, the legislature and the judiciary, the case of Iowa illustrated an overall sentiment of hesitance in generating the kind of progress that has been long overdue. To that extend, the findings in this thesis have contributed to the already growing body of literature that advocates a more race-central academic discourse

and proposes alternative policy recommendations coherent with the philosophy of restorative justice. For now, however, Iowa remains of just three states that permanently ban all people with a felony conviction from voting.

## **B. Conclusion**

This thesis looked at the policy of disqualifying (ex-)felons from the electoral process within the context of national and state-level American politics. The right to vote is a pivotal civil liberty within any representative democracy and bears broad implications with it. Not only does the right to vote constitute the means of political participation but it also formalizes citizenship status. Consequently, qualifications on the right to vote in the United States have fueled political debates ever since the birth of the nation. Whether through litigation or legislation, challenges to felon disenfranchisement have been diverse but often are in reference to the U.S. criminal justice system's disproportionate racial impact.

Part I presented the topic of felon disenfranchisement, discussed the context within which this practice has been established in the United States, and analyzed the implications it has on contemporary politics specifically minority political representation. Before moving to a contemporary discussion of the United States' felon disenfranchisement scheme, this thesis showed that social contract theory is inconsistent with the practice of criminal voter disqualification. Here I argued that felon disenfranchisement is neither reconcilable with social contract conceptualization of punishment purposes, as presented by Locke, Hobbes and Rousseau, nor with the prevalent criminal justice punishment philosophies of incapacitation, retribution, deterrence and rehabilitation.

After an application of the social contract, Part I continued with a general theoretical discussion on felon disenfranchisement. I provided a theoretical framework that was concerned with both social conflict theory and critical race theory and used this framework to illustrate the intersectionality of felons as a class and elaborated on the racialized workings of the U.S. criminal justice system. I found that the theoretical framework that currently dominates scholarship on felon suffrage can be signified by a discourse on structural racism and that this discourse submits that racism's adaptability to newly found political structures and power relations forms the basis for the perpetuation of seemingly imprudent public policies.

Scholars like Alexander, who write on the pervasiveness of racism, advance the argument that racism is adaptable by relating developments of felon disenfranchisement policies to slavery and the Jim Crow era, when racist institutions acted overtly and conspicuously. Along with an understanding of the significance of the unbridled crisis of incarceration that signified the American carceral system since the early 1970s, the adaptable racism argument makes the repercussions of felon disenfranchisement on minority populations painfully evident. To that extend the basic message of racial stratification and structural racism is powerfully simple: the vast racial disparities that mar our society, and in particular our criminal system, result from continuing patterns of racism, and we have a national moral obligation to respond (Haney-Lopez 1072).

Additional to the theoretical framework for studying felon disenfranchisement, Part I also outlined the most significant legal challenges to the criminal sanction of voter disqualification and examined recent legislative efforts aimed at creating national felon disenfranchisement standards. The litigation involved with felon disenfranchisement in Federal Courts has been mostly engaged with interpretations of the function of Reconstruction Amendments, yet, as I have showed in Part I, these challenges have been unsuccessful in that they have failed to prove felon disenfranchisement discriminatory intent. Similarly, national legislative efforts have yet to include productive bi-partisanship in establishing nationalized standards.

Lastly, Part I concluded with a brief discussion on the emerging transnational discourse on felon suffrage. This thesis showed, at the hand of cross-national comparisons, that this discourse is inconsistent with the felon disenfranchisement practices in the United States and that, generally speaking, lifetime felon disenfranchisement is scarcely applied in other democratic nations.

In Part II, this thesis presented the state of Iowa as a case study for a discussion on voter disqualification. Due to Iowa's severe felon disenfranchisement laws and recent changes and challenges to these laws, Iowa remains a unique legal outlier that is deserving of scholarly attention. First, this thesis introduced both Iowa's historical and contemporary felon disenfranchisement circumstances. Here, I explained how executive powers of the Governor have influenced the de facto disenfranchisement of felons in Iowa. More specifically, I provided a discussion on Executive Orders 42 and 70 and presented criticism and responses to these

Executive Orders. This criticism, which was offered in the form of letters to Republican Governor Branstad, embodied some striking elements found in the theoretical framework I provided in Part I. I found that recurring themes of punishment philosophies, social distance and structural racism laid the groundwork for a unified voice of opposition against the prolonging of disqualifying ex-felons from the electoral process.

Additionally, Part II outlined the most recent judicial developments of felon disenfranchisement in Iowa. More specifically, this thesis described the legal significance of both *Chiodo v. Section 34.24 Panel* and *Griffin v. Pate* and related the decisions made in these cases to the issues raised in Part I and the beginning of Part II. Although Iowa Supreme Court ruled that currently all felonies will still result in disenfranchisement and that the right to vote can only be restored through an application procedure, it did hint at the possibility of continued litigation and application of strict scrutiny, suggesting that the constitutionality of disenfranchisement will be continuously reviewed in the future.

Furthermore, the case of felon disenfranchisement is a powerful reminder that, even the most basic elements of democratic governance, such as a universal right to vote, can still be threatened in a polity otherwise asserting its democratic credentials (Manza & Uggen 502). With the consequences of racialized social stratification in mind, disqualifying people from the electoral process by means of the United States punishment apparatus should be considered a problematic practice that endangers the integrity of American democracy. I concur with Michelle Alexander when she suggests that “we should hope not for a colorblind society but instead for a world in which we can see each other fully, learn from each other, and do what we can to respond to each other with love” (244). The acknowledgement of race does not constitute a justification of racism. Rather, it allows for policy makers to be aware of the outcomes of ‘colorblind’ policies and work with the racial reality of our time. This reality remains one of disproportionality and laws that exclude ex-felons from voting place additional weight on the already disproportionate burden that minorities shoulder under the current criminal policy regime (Preuhs 745).

Defending the rights of criminals is hardly a popular occupation, but I truly believe that rights are not forfeited upon the conviction of a criminal act. The U.S. criminal justice system has been unable to eliminate the disproportionate impact of its practices and the extremity of the United States’ crisis of incarceration has made any criminal justice issue and issue of national

importance. The dangerous notion that citizenship can be taken away and given back resides in a legal grey-zone that has complicated the status of American democracy. Ideally, federal legislation or a Constitutional Amendment mandating a right to vote for all American citizens would be lead to an abolishing felon disenfranchisement. This can only be realized, however, if the executive, legislative and judiciary branches of American politics are willing to acknowledge the detrimental consequences felon disenfranchisement has on American society.

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