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Racism & Felony Disenfranchisement: An Intertwined History

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The United States stands alone among modern democracies in stripping voting rights from millions of citizens on the basis of criminal convictions.¹ Across the country, states impose varying felony disenfranchisement policies, preventing an estimated 6.1 million Americans from casting ballots.² To give a sense of scope — this population is larger than the voting-eligible population of New Jersey.³ And of this total, nearly 4.7 million are people living in our communities — working, paying taxes, and raising families, all while barred from joining their neighbors at the polls.⁴

This widespread disenfranchisement disproportionately impacts people of color.⁵ One in every 13 voting-age African Americans cannot vote, a disenfranchisement rate more than four times greater than that of all other Americans.⁶ In four states, more than one in five black adults are denied their right to vote.⁷ Although the data on Latino disenfranchisement is less comprehensive, a 2003 study of ten states ranging in size from California to Nebraska found that nine of those states “disenfranchise the Latino community at rates greater than the general population.”⁸

While the origins of disenfranchisement can be traced back to early colonial law in North America, and even farther back to ancient Greece, the punishment was typically applied only in individual cases for particularly serious or elections-related crimes.⁹

It wasn’t until the end of the Civil War and the expansion of suffrage to black men that felony disenfranchisement became a significant barrier to U.S. ballot boxes.¹⁰ At that point, two interconnected trends combined to make disenfranchisement a major obstacle for newly enfranchised black voters. First, lawmakers — especially in the South — implemented a slew of criminal laws designed to target black citizens. And nearly simultaneously, many states enacted broad disenfranchisement laws that revoked voting rights from anyone convicted of any felony. These two trends laid the foundation for the form of mass disenfranchisement seen in this country today.

The End of the Civil War: An Increasingly Racist Criminal Justice System

By the end of the Civil War, states were already incarcerating African Americans at a higher rate than whites.¹¹ This disparity significantly worsened in the ensuing years, a fact well-documented in the South.¹²

Although outlawing slavery itself, the Thirteenth Amendment carved out an exception allowing states to impose involuntary servitude on those who were convicted of crimes.¹³ Seeing an opportunity to sustain their crumbling economy, numerous Southern politicians quickly implemented new criminal laws that were “essentially intended to criminalize black life,” wrote Pulitzer Prize-winning author Douglas Blackmon.¹⁴ These ostensibly race-neutral

laws were selectively enforced by a nearly all-white criminal justice system.¹⁵ While white people accused of crimes often escaped punishment, black people were arrested and convicted “almost always under the thinnest chimera of probable cause or judicial process,” as Blackmon put it.¹⁶

Identifying these new criminal laws as “Black Codes,” historian Eric Foner describes how they bolstered the South’s faltering economy by providing employers “with a supply of cheap labor” through convict leasing.¹⁷ This system was reserved nearly entirely for black prisoners — at least 90 percent of those forced into convict leasing arrangements were black.¹⁸ Because convict leasing generated significant profits for states, law enforcement officials, and companies alike, the practice incentivized baseless arrests and convictions of black citizens.¹⁹

These factors and others spurred widening disparities in incarceration rates. In Alabama, for example, the percentage of nonwhite prisoners jumped from 2 percent in 1850, to 74 percent by 1870.²⁰

A First Wave of Backlash to Voting Rights Expansion: Broad Felony Disenfranchisement Laws

Within the context of an increasingly discriminatory criminal justice system, states became “particularly likely to pass punitive felon disenfranchisement laws” in the 15 years after the Civil War — just as black men gained voting rights nationwide.²¹

Before the Civil War, most states already had some form of disenfranchisement on the books, but these new laws were significantly broader, imposing disenfranchisement as a consequence for *all* felonies, rather than only a few select crimes.²² In rapid succession between 1865 and 1880, at least 13 states — more than a third of the country’s 38 states — enacted broad felony disenfranchisement laws.²³

These new laws were closely linked to the rising inequalities in the nation’s criminal justice system. A historical analysis by authors Jeff Manza and Christopher Uggen found “[w]hen African Americans [made] up a larger proportion of a state’s prison population, that state [was] significantly more likely to adopt or extend felon disenfranchisement.” In later decades, the reverse would hold true, as “[s]tates with a small proportion of African-American prisoners [were] most likely to abolish ex-felon voting restrictions.”²⁴

The motivation for enacting broad felony disenfranchisement laws in this context was clear: preventing newly enfranchised black citizens from exercising political power. “Felon disenfranchisement provisions offered a tangible response to the threat of new African-American voters that would help preserve existing racial hierarchies,” the authors of a study published in the *American Journal of Sociology* wrote.²⁵

New York is a clear example of the way in which states expanded the franchise while simultaneously using felony disenfranchisement to restrict its reach. By 1860, New York was the only state that required property ownership for black voters — and black voters only.²⁶ This law clearly violated the Fifteenth Amendment, which prohibited voting restrictions based on race and which New York ratified in 1870.²⁷ In 1874, a governor-appointed “Constitutional Commission” finally struck down the property law, but in the same stroke quietly amended New York’s constitution to impose felony disenfranchisement.²⁸

Once these broad disenfranchisement laws were on the books, racist politicians could also enforce them in a deliberately discriminatory manner. For example, in 1876 Virginia broadened its felony disenfranchisement law to encompass petty theft, or “petit larceny,” a crime of which white politicians believed black citizens could be easily convicted. The next year, the legislature passed a law requiring that lists of voters convicted of any of the new, broader array of disenfranchising crimes be delivered to county registrars. Applied “almost exclusively to the detriment of African American voters,” the law facilitated racist politicians’ attempts to selectively enforce disenfranchisement. “We publish elsewhere a list of negroes convicted of petit larceny,” a Richmond-based newspaper advertised several years later, advising that “Democratic challengers should examine it carefully.”²⁹

A Second Wave of Backlash to Voting Rights Expansion: Targeted Disenfranchisement Laws

A distinct wave of changes to disenfranchisement laws began in the last decade of the 1800's, when Southern states began holding overtly racist constitutional conventions in response to partisan shifts in Congress and the growing threat of a Populist movement that was uniting white farmers and black political forces.³⁰

Mississippi's new disenfranchisement law, adopted at its constitutional convention in 1890, served as a model for other states.³¹ Before, conviction for "any crime" disqualified an individual from voting. But at the convention, Mississippi's white politicians narrowed disenfranchisement to a specific list of crimes they believed black men were most likely to commit, such as bigamy, forgery, burglary, arson, and perjury.³² Upholding this new disenfranchisement scheme six years later, the Mississippi Supreme Court acknowledged the racist motivations for the change:

Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker member were prone....Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications [from voting], while robbery and murders, and other crimes in which violence was the principal ingredient, were not.³³

Other states soon followed with their own racially targeted disenfranchisement laws, including South Carolina in 1895, Louisiana in 1898, and Alabama in 1901.³⁴

Felony Disenfranchisement Laws Today

Over a century later, our nation is still grappling with the racist origins of felony disenfranchisement. The targeted laws of the late 1800's are less prominent — most states do not distinguish between specific felonies, instead imposing disenfranchisement as a consequence for all felony convictions. But the racial impact of these laws continues, with disproportionate numbers of people of color arrested, prosecuted, convicted, and — as a result — disenfranchised. The related emergence of mass incarceration and harsh sentencing has led to unprecedented — and still rising — levels of disenfranchisement nationally.³⁵

Moreover, this mass disenfranchisement has serious repercussions beyond those directly impacted; studies show that these laws also keep eligible voters away from the polls. Many states' disenfranchisement policies are so complex that election officials often misunderstand and misrepresent them, spreading inaccurate messages and causing untold numbers of would-be voters to wrongly believe they are ineligible.³⁶ And the turnout-dampening effects of disenfranchisement most seriously impact black communities. A 2009 study found that eligible and registered black voters were nearly 12 percent less likely to cast ballots if they lived in states with lifetime disenfranchisement policies — while white voters' probability of voting decreased by only 1 percent in such states.³⁷ The study's results "suggest that [felony disenfranchisement] exacerbates the bias against low socioeconomic status racial and ethnic minorities in electoral outcomes and policy responsiveness."³⁸

Legal challenges to felony disenfranchisement have largely floundered, after a 1974 Supreme Court ruling held that the practice is generally permissible under section two of the Fourteenth Amendment.³⁹ Despite these courtroom losses, the nation has seen promising momentum towards reform of felony disenfranchisement laws over the past two decades. In this timeframe, a number of states have taken legislative or executive action to change their policies by shortening the disenfranchisement period that follows a felony conviction.⁴⁰ But the number of disenfranchised Americans continues to increase — growing more than a quarter of a million in just six years between 2010 and 2016.⁴¹

Deeper and wider-reaching change is urgently needed. Because they are inseparable from the entrenched racial disparities of our criminal justice system, felony disenfranchisement laws continually reproduce inequity in our democracy. Given these policies' roots in historical efforts to prevent black men from voting, this impact is not surprising. Rather, the surprise lies in the fact that these laws persist in a democracy that claims to value every citizen's voice.

Endnotes

¹ BRANDON ROTTINGHAUS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM 24-26 (2003), http://www.prisonpolicy.org/scans/08_18_03_Manatt_Brandon_Rottinghaus.pdf (identifying only 8 nations—Armenia, Cameroon, Chile, Belgium, Finland, New Zealand, Philippines, and the United States—that disenfranchise citizens during incarceration and for varying periods of time afterwards and noting that the United States disenfranchises many more of its citizens than any of these countries); *see also* JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 17-18 (1998), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf>; JEFF MANZA & CHRISOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 37-39, 235 (2006).

² This total represents 2.5 percent of all voting-age citizens. THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

³ New Jersey’s voting-eligible population was approximately 6.0 million as of 2014, while the number of disenfranchised Americans—including those who are incarcerated—is approximately 6.1 million. 2014 November General Election Turnout Rates, UNITED STATES ELECTIONS PROJECT <http://www.electproject.org/2014g> (last updated Dec. 20, 2015); *see also* THE SENTENCING PROJECT, *supra* note 2.

⁴ *See* THE SENTENCING PROJECT, *supra* note 2, at 15 (providing the number of disenfranchised individuals by state and sentence status, including parole, probation, and “ex-felon” or fully completed sentence).

⁵ NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 10-12 (2015), <http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>; *see also* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT 1-2 (2014), <http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>.

⁶ THE SENTENCING PROJECT, *supra* note 2, at 3.

⁷ These states are Florida, Kentucky, Tennessee, and Virginia. *Id.*

⁸ MARISA J. DEMEO & STEVEN A. OCHOA, MALDEF, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES 17 (2003), <http://maldef.org/assets/pdf/feb18-latino-voting-rights-report.pdf>.

⁹ Alec C. Ewald, ‘Civil Death’: The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 WIS. L. REV. 1045, 1059-61.

¹⁰ Although 20 states adopted broad felony disenfranchisement laws in the years before 1865, the underdevelopment of the criminal justice system at that early point limited the actual impact of these laws. Angela Behrens’ chapter in *Locked Out* ties the emergence of these laws, particularly in the 25 years prior to the Civil War, to the elimination of property taxes, which allowed property-less white men to vote. MANZA & UGGEN, *supra* note 1, at 51-56 (“Between 1840 and 1865, all 16 states adopting felon disenfranchisement measures did so after establishing full white male suffrage by eliminating property tests. . . . It is also important to note that in this early period, the criminal justice system was still quite underdeveloped, although entering a phase of rapid development . . . Most states maintained a single state penitentiary, and incarcerated only a small number of offenders . . .”).

¹¹ *See* Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 560 (2003) (“African-American imprisonment rates have consistently exceeded white rates since at least the Civil War era . . .”).

¹² *See* ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at xxiv (2002) (“That the Reconstruction of the North receives less attention than its Southern counterpart reflects, in part, the absence of a detailed historical literature on either the region’s social and political structure in these years, or the relationship between changes there and events in the South.”).

¹³ DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 53 (2008).

¹⁴ *Id.*

¹⁵ *See* FONER, *supra* note 12, at 205 (“In much of the South, the courts of Presidential Reconstruction appeared more interested in disciplining the black population and forcing it to labor than in dispensing justice. . . . If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms. . . .”); *see also* BLACKMON, *supra* note 13, at 54 (“Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites.”).

¹⁶ BLACKMON, *supra* note 13, at 7; *see also* FONER, *supra* note 12, at 203-05.

¹⁷ FONER, *supra* note 12, at 205; *see also* *Convict Leasing*, NPR (July 16, 2001), <http://www.npr.org/templates/story/story.php?storyId=1125921>.

¹⁸ BLACKMON, *supra* note 13, at 57.

¹⁹ BLACKMON, *supra* note 13, at 7 (“Sheriffs were now incentivized to arrest and obtain convictions of as many people as possible—regardless of their true guilt or whether a crime had been committed at all.”); *see also* FONER, *supra* note 12, at 205; *Convict Leasing*, *supra* note 17 (“Generally the population of those who were sent into labor ran about 85 to 95 percent black . . . there were many thousands of individuals pressed into labor through this practice who had been arrested on trivial or almost non-existence kinds of charges. And it’s also very clear, as you reconstruct this, that there were profound financial incentives that created which fed this system so that county sheriffs and other local officials made a great deal of money personally off fulfilling these labor contracts for the private companies that were involved.”).

²⁰ Behrens, *supra* note 11, at 598 (“In many Southern states, the percentage of nonwhite prison inmates nearly doubled between 1850 and 1870.”)

²¹ *Id.*, at 597 (“States were particularly likely to pass punitive felon disenfranchisement laws in the Reconstruction period following the Civil War and through the 1870s. During this time, the threats posed by the possible incorporation of African-American men into the political system were ardently debated.”).

²² *See* Ewald, *supra* note 9, at 1061-66; *see also* Behrens, *supra* note 11, at 565-66.

²³ *See supra* note 10 and accompanying text. As identified by study authors Angela Behrens, Christopher Uggen, and Jeff Manza, these states are Alabama, Arkansas, Colorado, Florida, Georgia, Illinois, Mississippi, Missouri, Nebraska, North Carolina, South Carolina, Tennessee, and Texas. *See* Behrens, *supra* note 11, at 565-66. Although New York is not included in their count, the state did move to impose disenfranchisement for “infamous crime” in 1874 by slightly altering language in the state Constitution. ERIKA WOOD & LIZ BUDNITZ, BRENNAN CTR. FOR JUSTICE, JIM CROW IN NEW YORK 12-13 (2009), http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY_2010.pdf. Virginia is also not included in this count, although the state broadened its disenfranchisement law to include petit larceny in 1876. Helen Gibson, *Felons and the Right to Vote in Virginia: A Historical Overview*, 91 VA. NEWSL. (Weldon Cooper Ctr. for Pub. Serv., Charlottesville, Va.), Jan. 2015, at 2, <http://www.coopercenter.org/sites/default/files/publications/Virginia%20News%20Letter%202015%20Vol.%2091%20No%201.pdf>.

²⁴ MANZA & UGGEN, *supra* note 1, at 67; Behrens, *supra* note 11, at 596, 599. It is also notable that Maine and Vermont, the only two states that do not restrict voting rights on the basis of criminal convictions, are currently the two states with the highest percentage white not Hispanic population in the country. In both states, an estimated 95 percent of the population is white not Hispanic. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES, STATES, AND COUNTIES: JULY 1, 2015 (2016), <http://factfinder.census.gov/> (on file with author). According to the Prison Policy Initiative, as of 2010, Maine, Vermont, and New Hampshire incarcerated the highest percentages of white prisoners in the country. LEAH SAKALA, PRISON POLICY INITIATIVE, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY (2014), <http://www.prisonpolicy.org/reports/rates.html>.

²⁵ Behrens, *supra* note 11, at 598.

²⁶ The property requirement for white men had already been abolished in 1821—notably, by the very same convention that enacted that requirement for black men. WOOD & BUDNITZ, *supra* note 23, at 8, 10-13.

²⁷ *Id.*, at 12. After initially ratifying the Fifteenth Amendment, New York’s legislature subsequently voted to rescind that ratification—though that vote was ignored by Congress. *Id.*

²⁸ *Id.*, at 12-13.

²⁹ Gibson, *supra* note 23, at 3.

³⁰ MICHAEL WALDMAN, THE FIGHT TO VOTE 82-85 (2016); Behrens, *supra* note 11, at 564 (“[T]he 1860s and 1870s are marked by greater disenfranchisement as well as by the adoption of the Fourteenth and Fifteenth amendments. A period of fewer changes followed before another wave of restrictions began in 1889”); *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 (1993) (“But between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other preexisting voting qualifications, to increase the effect of these laws on black citizens.”).

³¹ Shapiro, *supra* note 30, at 540.

³² *Id.*, at 540 n.20.

³³ *Id.*, at 541; *see also* Behrens, *supra* note 11, at 569-70.

³⁴ Shapiro, *supra* note 30, at 541. Alabama’s 1901 constitutional convention, for example, altered the state’s disenfranchisement law to include even non-criminal acts. The president of the convention, John B. Knox, spoke at its opening, explaining that “manipulation of the ballot” was justified in order to avoid “the menace of negro domination.” When introducing the disenfranchisement provision he wrote, Delegate John Field Bunting was forthright about its intended goal, promising his audience that “the crime of wife-beating alone would disqualify sixty percent of the Negroes.” Behrens, *supra* note 11, at 569, 572.

³⁵ *See* THE SENTENCING PROJECT, *supra* note 2, at 9.

³⁶ *See generally* ERIKA WOOD & RACHEL BLOOM, AM. CIVIL LIBERTIES UNION & BRENNAN CTR. FOR JUSTICE, DE FACTO DISENFRANCHISEMENT (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> (finding that many

elections officials misunderstand their state's felony disenfranchisement laws, meaning that "untold hundreds of thousands of eligible, would-be voters throughout the country" may be getting turned away by misinformation).

³⁷ Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722, 739-40 (2009) (finding that "strict FD policies tend to dampen the probability of voting for Blacks, but not for non-Hispanic whites"); see also ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 12 (2009), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf> (explaining evidence that disenfranchisement has a broad impact on communities, particularly because "the presence of disenfranchised individuals also affects the voter participation of other members of the community").

³⁸ Bowers & Preuhs, *supra* note 37, at 741.

³⁹ In a ruling that has since been extensively analyzed and critiqued, the Supreme Court held in *Richardson v. Ramirez* that felony disenfranchisement laws do not violate the Constitution's equal protection provisions, based on section two of the Fourteenth Amendment, which stipulates that states' Congressional representation would be reduced were they to deny voting rights "to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States...except for participation in rebellion, or other crime." ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 246-51 (rev. ed. 2009); MANZA & UGGEN, *supra* note 1, at 29-33.

⁴⁰ Myrna Pérez, Tomas Lopez & Vishal Agraharkar, *The Sustained Momentum and Growing Bipartisan Consensus for Voting Rights Restoration*, THE BRENNAN CTR. FOR JUSTICE (July 6, 2015), <http://www.brennancenter.org/analysis/sustained-momentum-and-growing-bipartisan-consensus-voting-rights-restoration>.

⁴¹ See THE SENTENCING PROJECT, *supra* note 2, at 9; see also Christopher Uggen et al., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES, 2010 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf>.