Katherine
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FELONY DISENFRANCHISEMENT IN AMERICA

Historical Origins, Institutional Racism, and Modern Consequences

Criminal Justice
Recent Scholarship

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To all the missing and disappeared from the American polity since its inception.

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No man is an island, entire of itself;
Every man is a piece of the continent, a part of the main.
If a clod be washed away by the sea, Europe is the less,
As well as if a promontory were, as well as if a manor of thy friend's
Or of thine own were: Any man's death diminishes me,
Because I am involved in mankind,
And therefore never send to know for whom the bell tolls;
It tolls for thee.

John Donne, Meditation XVII

If a constitution is to survive, all the elements of the state must join in willing its existence and continuance…. Those constitutions which consider only the personal interest of the rulers are all *wrong* constitutions, or *perversions* of the right form. Such perverted forms are despotic [i.e. calculated on the model of the rule of the master, or 'depotes' over slaves], whereas the polis is an association of freemen.

Aristotle, *Politics,* II, ix 1270b; III.vi. 1279a

Introduction

Classical political theory since Plato has asked the question, "what is the nature of the regime?" in a particular polity. Theorists such as Aristotle answered the question by looking at who is a citizen "in the full sense of the term." This book uses this classical standard of citizenship to interrogate the American claim that the United States is a democracy. I take this position because the modern American practice of felon disenfranchisement (state enforced but federally sanctioned) had its origins in the classical conception of citizenship invented and practiced in Athens more than two millennia ago. The first chapter of the book establishes this genealogy.

The red thread connecting Athens to Alabama, so to speak, is the fact both were slave societies, both considered themselves democracies, and both disenfranchised convicted felons for life. In 2004, approximately four million United States citizens are denied the right to vote in both state and federal elections because they have been disenfranchised by their states for felony (see Table 1).[1] Coincidentally, this is the same number of slaves who became "Americans" after the Civil War. This study is motivated by a curiosity about the fact that a disproportionate number of the criminally disenfranchised are non-White relative to their populations in the citizenry as a whole, although "criminality" is distributed relatively proportionally throughout the population.

The classic question of the identity of the regime has been largely ignored by the contemporary theoretical discourse on disenfranchisement, which looks at the constitutionality of the modern practice, its effect on minority voting rights, and partisan politics. All these aspects of the practice are important and deserve scholarly attention, but the question of the identity of the regime frames the bigger picture. Unquestionably, the United States qualifies as a democracy for the majority of its citizens, and felon disenfranchisement is constitutional, if only in terms of the particular version of citizenship that prevailed at the time of the First Founding.

Table 1. Categories of Felons Disenfranchised Under State Law

State	Prison	Probation	Parole	Ex-Felons	
				All*	Partial
Alabama		X	X	X	
Alaska	X	X	X		
Arizona	X	X	X		X (2nd felony)
Arkansas	X	X	X		
California	X		X		
Colorado	X		X		
Connecticut	X		X		
Delaware	X	X	X		X (5 years)
District of Columbia	X				
Florida	X	X	X	X	
Georgia	X	X	X		
Hawaii	X				
Idaho	X	X	X		
Illinois	X				
Indiana	X				
Iowa	X	X	X	X	
Kansas	X	X	X		
Kentucky	X	X	X	X	
Louisiana	X	X	X		
Maine					
Maryland	X	X	X		X (2nd felony, 3 years)
Massachusetts	X				
Michigan	X				
Minnesota	X	X	X		
Mississippi	X	X	X	X	
Missouri	X	X	X		
Montana	X				
Nebraska	X	X	X	X	

Nevada	X	X	X		X (except first-time nonviolent)
New Hampshire	X				
New Jersey	X	X	X		
New Mexico	X	X	X		
New York	X	X			
North Carolina	X	X	X		
North Dakota	X				
Ohio	X				
Oklahoma	X	X	X		
Oregon	X				
Pennsylvania	X				
Rhode Island	X	X	X		
South Carolina	X	X	X		
South Dakota	X				
Tennessee	X	X	X		X (pre-1986)
Texas	X	X	X		
Utah	X				
Vermont					
Virginia	X	X	X	X	
Washington	X	X	X		X (pre-1984)
West Virginia	X	X	X		
Wisconsin	X	X	X		
Wyoming	X	X	X		X (5 years)
U.S. Total	**49**	**31**	**35**	**7**	**7**

* While these states disenfranchise all persons with a felony conviction and provide no automatic process for restoration of rights, several (Alabama, Kentucky, and Virginia) have adopted legislation in recent years that streamlines the restoration process.

Source: Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project, October 1998, and updated by The Sentencing Project. 05/04

The fact that it is still constitutional and still relegates a portion of the citizenry to what Nora Demleitner calls "internal exile" raises the question of the consistency and integrity of the contemporary version of American democracy for the polity as a whole, not just a part.

Twentieth (and no doubt 21st) century students of political theory are taught Plato's, Aristotle's, and Polybius' theories of regimes in the context of the history of pre-modern political thought, rather than in the context of critical theory. Contemporary normative political theory analyzes and critiques liberal, republican, and democratic discourses of citizenship, [2] but ignores regime classification as such because it takes for granted the status of universal, *jus solis* citizenship. I believe this is a mistake. A polity such as the United States that claims democratic legitimacy in terms of a universal citizenship regime needs to ensure that claim is consistent in terms of all the citizens' political rights.

My search for the genesis of the contemporary American practice of felon disenfranchisement began with an examination of Aristotle's political theory, which studies citizenship regimes and identifies regimes in terms of their "conception of justice." A regime's conception of justice, in turn, determines who is and who is not a citizen, and therefore reveals what constitutes citizenship for those who qualify. The practice of disenfranchising or, less anachronistically, "dishonoring" citizens for transgressions of the requirements of the status began and was institutionalized as *atimia* in classical Athens, and was discussed by Aristotle in *The Politics*.

An Aristotelian analysis of the contemporary American citizenship regime brings the practice of felon disenfranchisement into theoretical perspective, since in The Philosopher's lexicon the disenfranchised are not citizens "in the proper sense of the term." Nonetheless, they "share" a polity in which citizenship is universally ascribed by birth. In the post-14th-Amendment American polity all persons born and naturalized in the United States are citizens both of the nation and of the state in which they live. Therefore, the presence in those polities (states and nation) of citizens without political rights raises the core Aristotelian questions of the nature of (American) citizenship and the identification, as well as the "justice" of the regime.

Although this study focuses primarily on the institutional issues outlined above, it is motivated by more than clinical curiosity to classify the contemporary American citizenship regime in terms of a modern taxonomy. The Aristotelian perspective, while superficially clinical, is deeply normative: the "end and purpose of the *polis* is the good life, and the institutions of social life are a means to that end." The ordering of those institutions in the political associations reveals their "justice," and

"justice consists in what tends to promote the common interest." The weakly normative argument of the book is therefore that lifetime felon disenfranchisement, as it is institutionalized and legitimized in the United States today, is an unjust institution because it does not tend to promote the common interest. The genealogical enterprise of the book is to trace the origins of the contemporary injustice to its institutional root, which, empirically speaking is racial slavery, and philosophically speaking, is the absence of a normative framework within which Americans can judge, or adjudicate, the claims of the victims of slavery. The result is a deficit of justice that is expressed via the *criminal* justice system, as a failure of democracy. Permanent felon disenfranchisement is a contemporary (constitutional) American practice that explicitly contravenes the twin democratic promises of the anonymity and universality of political rights.

My claim that felon disenfranchisement is an unjust institution because it does not promote the common interest does not imply the existence of any predetermined notion of the "common interest" that can be discerned and implemented by particular citizens or rulers possessed of vision and skill. It is agnostic about the substance of the common interest, which I understand as something that can only be determined only by means of a fully inclusionary collective undertaking on the part of free citizens whose basic rights to participate in the political process are protected by fundamental law. It is agnostic because it denies that any group of citizens, no matter how morally "worthy" their qualifications may be in that they have never been convicted for crime, can discern the "common interest" if they exclude any portion of the citizenry from their deliberations.

The modern American practice of disenfranchising felons, particularly ex-offenders who have been released from prison into the polity of free enfranchised citizens, is a structural impediment to the fully inclusionary undertaking of discerning the common interest. This undertaking, in my view, is a precondition for the formulation of public policy that serves the good of the whole rather than the good of the part. Democracy is not simply a good in itself; it is not a political form that must be achieved and perfected for its own sake: its conception of justice as political equality is *functional.* Its purpose is to include all citizens on equal terms because only through inclusion can the potential of all individuals to develop and learn and therefore contribute to the whole be maximized.

This can also be put negatively: to the extent that free citizens are legally excluded or marginalized from the polity through institutions such as felon disenfranchisement, the polity (in John Donne's words) "is

the less." The disenfranchised are America's "missing," our "disappeared," and the cumulative impact of their exclusion for as long as disenfranchisement laws have been in effect in the polity is incalculable. It has created an epistemological deficit in that the demos can never know what it has missed by fencing them out of the democratic process. Modern democracy is an ideally inclusive form: it is no longer the classical "rule of the poor," and the democratic political unit defined as "the whole" must justify political exclusions in terms of its own universal criteria in order to claim legitimacy.

I argue that the contemporary American practice of disenfranchising felons is predicated upon a (usually unarticulated) ideological, rather than deeply moral belief that "they" are importantly different from "us," and are therefore unworthy of political rights. The modern practice is structurally implicated in what was historically, and continues to be, a citizenship regime based on status honor that serves only the good of the part. As long as it continues to serve the good of the part, it is unjust and dysfunctional when the goal of today's democracy must be the good of the whole.

I say this because I believe, as all political theorists throughout the ages have believed, that we live in very critical times, particularly with regard to the condition of the planet and the future of life on earth. The United States, as the "most powerful nation on earth," the largest consumer of the world's resources, and "the leader of the free world," has a particular moral obligation to all the other inhabitants of the planet to organize its political society to serve the common interest. In that it is organized as a democracy, its citizens have the responsibility to develop the best public policies they can; by definition these require the collective wisdom of the demos, which cannot know in advance which voices to exclude, which will not be "worth" listening to.

The interesting question is why the ancient practice of disenfranchising citizens for crime is not only federally legitimized, but actively functions at historically unprecedented rates in a modern constitutional democracy such as the United States despite heroic and often successful grassroots efforts to change state laws.[3] The answer has several parts: constitutional, political, legal, and social. Constitutional law and federal jurisprudence positively sanction the practice; elected representatives allow historically enacted provisions to stand (political); offenses classified as felonies automatically trigger disenfranchisement upon conviction (legal); and law enforcement officials tend to profile and arrest suspects who can be charged, convicted and disenfranchised (social). The practice is both formally and informally sanctioned by officials of the criminal justice system, from the arresting officer to the

Supreme Court justice. It continues in the twenty-first century because a disproportionate number of those incarcerated and disenfranchised for crime are poor and minority citizens. To run the counterfactual, were the criminal laws applied generally, such that those incarcerated and disenfranchised for crime members were (proportionally) members of the political majority, white middle class or suburban citizens (voters) before their arrests, it is fair to speculate that the practice might have been abolished by now.

Felon disenfranchisement statutes have been on the books, in most states, since their incorporation into the Union, whether as former colonies, new states, or "reconstructed" states. As long as incarceration rates were stable in the U.S., and crime was not a publicly salient issue, the somewhat archaic requirement that convicted felons be disenfranchised did not appear to be either politically or normatively significant.[4] As incarceration rates began to rise exponentially in the second half of the twentieth century, and as public and scholarly attention began to focus on the negative or collateral consequences of the war on drugs, the issue of disenfranchisement became a "live" one for scholars and critics with concerns about American democracy. Formally speaking, disenfranchisement rates are tied to conviction and incarceration rates, which must be distinguished from crime and victimization rates. Socially and politically speaking, though, arrest, conviction and incarceration rates are institutionally inseparable from the American history of democracy, which is rooted in slavery and the institutionalized racism that has been legitimized by electoral majorities and constitutional jurisprudence since the Founding.

State felon disenfranchisement practices are a tool that can be used to deconstruct the "positive face" of the status of American citizenship. They reveal the "negative face," those citizens who are permanently exiled from the polity. The federalism that perpetuates felon disenfranchisement creates a double citizenship identity, which can be described as follows: American citizens cannot, despite their national citizenship status, vote in federal elections if they have been disenfranchised for felony by the *state* in which they are a citizen. Yet Americans must, and do have the constitutional right to vote for their national officers: President, Vice-President, and Members of Congress, those who represent them in virtue of their American, rather than state citizenship.

Insofar as American citizens disenfranchised by their state laws do not have this right, American policy, including foreign policy, lacks democratic legitimacy. Furthermore, American citizenship, according to the language of the Fourteenth Amendment, and the legislative history of its framing and passage, is lexically prior to state citizenship, yet in states

that disenfranchise felons, that priority is reversed such that state citizenship trumps national citizenship on Election Day. The public policy corollary of this argument is that, although state law may disqualify a convicted felon from voting for local and state officers, federal law should allow her to vote for the federal officers who will represent her in virtue of her American citizenship.[5]

In the American states that disenfranchise felons today, in contrast with the premodern societies that disenfranchised citizens for what was essentially political misconduct, all convictions for offenses classified as "felonies," which range from trivial to serious, result in disenfranchisement. The American category of "infamous" crimes has expanded the original, highly serious meaning of "infamy," which was applied to capital crimes such as treason, to the point that the words "infamy" and "infamous" are now politically (as opposed to juridically) meaningless. Cesare Beccaria, the Enlightenment philosopher of punishment, made this point more than two centuries ago: "The punishment of infamy should not be too frequent, for the power of opinion grows weaker by repetition, nor should it be inflicted on a number of persons at the same time, for the infamy of many resolves itself into the infamy of none."

I argue throughout the book that just as the use of the penalty of felon disenfranchisement to exclude citizens from political rights creates double citizenship, it institutionalizes a fractionalized polity. The first polity—the numerator so to speak—comprises fully enfranchised, politically equal citizens who are entitled to participate in the representative system of "democratic" rule. Members of this polity, an internally democratic citizenship regime, take turns "ruling over" one another, but rule permanently over members of the second polity, constituted by the disenfranchised "free" citizens.[6] Members of the numerator polity have a positive political identity, members of the denominator polity a negative one.

My conclusion, after surveying the history of disenfranchisement, American criminal justice policy, and the jurisprudence regarding the practice, is that the American political "doubleness" structured by felon disenfranchisement configures a neo-colonial regime comprising a metropolis of "citizens proper" and a periphery of subjects. I believe the perspective of post-colonial theory, together with the immanent critique of liberalism articulated in the concept of the "racial contract" (Mills 1997) most accurately accounts for the racial bias in the American criminal justice system and the rates of disenfranchisement that "dilute" the minority vote. The identification of the regime as neo-colonial demystifies, de-"moralizes" the criminal justice policies that result in the incarceration and disenfranchisement of large numbers of poor and

minority citizens. Revealing those policies and practices as the cumulative institutional expression of a multi-century pattern of racialized group domination (colonial) rather than the aggregated statistical expression of individual or personal moral failure (liberal/ republican) opens the way for political—democratic—conversation and action to alter those practices.

My argument is based upon the fact that the United States, as a post-colonial nation, constitutionalized the practice of African slavery institutionalized under English rule and structured the norms of white supremacy into its particular conception of republican citizenship. The Union victory in the Civil War and the ascendancy of the Republican Party during the Reconstruction Congresses that constitutionally abolished slavery, represented neither national rejection of those norms, nor an accounting for slavery insofar as it was a crime, and comprehended many "crimes." Never having developed a normative framework of retributive justice sufficient to evaluate such a domestic crime—as the Allies did in Nuremberg—the legacy of two and a half centuries of legalized slavery has gone unrepaired.

According to Hegel's theory of retributive justice, the harm wrought by a crime continues if it is left unpunished, and I argue in the final chapter that the national failure to address the federal crimes of slavery has damaged, and continues to damage both the polity as a whole and the democratic conception of justice that legitimizes it. Until it is addressed democratically, through the issue of reparations for slavery, the legacy of the original crime will continue to manifest itself by means of the structural racism that configures such institutions as the criminal justice system. The democratic "memory-justice" (Booth 2001) type of conversation called for will put the issue of felon disenfranchisement front and center, since according to the theory of democracy described in Chapter Two, all free members of the polity must be included or the reasons for their exclusion legitimately justified. Distortions in the national citizenship regime wrought by felon disenfranchisement and law enforcement practices could become apparent to American citizens by means of a democratic "memory-justice" conversation. Only then do I believe Americans will reject both the practice of permanent ex-felon disenfranchisement, as well as cumulative impact of discriminatory law enforcement policies that result in chronic offender disenfranchisement, and accept that democratic conversation will teach us how much we still have to learn from one another.