

PS 1281: SEMINAR IN AMERICAN POLITICS RACE AND THE CRIMINAL JUSTICE SYSTEM (INSIDE-OUT Fall 2017)

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Essay Question: Reflect on the below quote. Do you agree with it? Why or why not? Be sure to discuss the relation between punishment and voting (if any).

“Felon disenfranchisement is a legitimate tool of penal policy, and is consistent with American constitutional norms.”

If not for felon disenfranchisement – “Al Gore would have been elected President of the United States rather than George Bush.”¹

Beginning with the latter portion of the quote that felon disenfranchisement “is consistent with American constitutional norms”, section two of the Fourteenth Amendment to the United States Constitution protects the right to vote of all United States citizens twenty-one years of age, “except for participation in rebellion, or other crime.” Thus, the Constitution appears to plainly allow felon disenfranchisement.

Our Judicial branch has likewise found a historic legitimacy in felon disenfranchisement and the constitutional recognition of the authority of the states to disenfranchise imprisoned felons. The United States Supreme Court has flat out said that a criminal record is an “obvious” factor that “a state may take into consideration in determining the qualifications of voters.”² Fifteen years later, our high court, again found that the right of convicted felons to vote is not fundamental.³

A state constitution may absolutely provide *greater* protection for individual rights than provided by the Constitution of the United States.⁴ However, only two states

¹ See, **Michelle Alexander**, *The New Jim Crow*, p. 160.

² See, *Lassiter v. N. Hampton County Bd. Of Elections*, 360 US 45, 51 (US 1959).

³ See, *Richardson v. Ramirez*, 418 US 24, 54 (US 1974); Also See, **Marc Mauer** who commented in his excerpt in, *Invisible Punishment*, that “[a]fter the revolution, some of the English common law heritage was rejected, but the voting disqualifications were maintained by many states.” P. 51.

⁴ See, *Western Pennsylvania Socialist Worker 1982 Campaign v. Connecticut General Life Insurance Co.*, 512 Pa. 23 (Pa. 1986).

have actually decided to provide that extra protection when it comes to felon disenfranchisement – Vermont and Maine.⁵ Pennsylvania’s Constitution and Elector Code does not explicitly disenfranchise incarcerated prisoners. However, the Elector Code’s definition of “qualified absentee elector” sufficiently precludes incarcerated individuals from voting. “[T]he words ‘qualified absentee elector’ shall in no wise be constructed to include persons confined in a penal or mental institution”.⁶

Like it or not, as far as constitutional norms are concerned, voter disenfranchisement appears to be embedded into the fabric of our society. This is, of course, in stark contrast to the constitutional norms of other nations. Germany, for example, not only allows prisoners to vote but encourages it. Nearly all the countries that place some restrictions on voting in prison are in eastern Europe, and were part of the former Communist Bloc.⁷

I disagree with the first segment of the quote that “[f]elon disenfranchisement is a legitimate tool of penal policy” on multiple grounds. First and foremost, it is legally inaccurate. Although voter disenfranchisement is a consequence of being convicted of a felony it does not fall within the legal meaning of a *penal* punishment or penalty.⁸

The United States Supreme Court has put it this way:

“A statute has been considered **nonpenal** if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose ... The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be **penal**. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for

⁵ See, **Marc Mauer**, *Invisible Punishment, Mass Imprisonment and Disappearing Voters*, p. 51.

⁶ See 25 Pa.C.S.A. § 2602 w (14), 3146.1 (n). See, *Martin v. Haggert*, 548 A.2d 371, 373 (Pa. Commw. 1988).

⁷ See, **Michelle Alexander**, *The New Jim Crow*, p. 159

⁸ **Penal** is defined in *Black’s Law Dictionary* (Ninth Edition) as, of relating to, or being a penalty or punishment esp., for a crime.

voting, this law is sustained as a **nonpenal** exercise of the power to regulate the franchise.”⁹

Thus, per the law of the land, the consequence of being convicted of a felony and losing one’s right to vote is regulatory, rather than penal and punitive.

Nearly 90% of all state criminal matters and 97% of all federal criminal proceedings are resolved via plea bargains.¹⁰ During a plea bargain stage the Constitution demands that the presiding Judge inform the defendant of any *direct* consequences of pleading guilty. However, the plea judge is *not* required to explain to the defendant the *collateral* consequences of pleading guilty.¹¹ Thus, a plea court is not obligated to explain to the defendant the extra invisible punishments that will most certainly be inflicted upon the defendant due to the felony conviction.¹² Forfeiture of ones’ pension, being disqualified to serve on a jury, the loss employment opportunities, and voter disenfranchisement, all fall with the scope of collateral consequences.¹³

I vigorously oppose the notion that felon disenfranchisement is in any way legitimate, let alone a useful tool of *penal policy*. It is an illegitimate and appalling tool used by politicians to curtail the minority vote.¹⁴ For example, African Americans make up roughly 13 percent of the United States population, Hispanics 18 percent, and Whites about 62 percent. However, the state prison population consists of 35 percent White, 38

⁹ See, *Trop v. Dulles*, 356 US 586, 96-97 (US 1958)

¹⁰ See, *Criminal Defense Techniques*; Vol. 2, 45.03; *U.S. v. Booker*, 160 L.Ed.2d 621, 671 (U.S. 2005) (97% of all federal criminal prosecutions were terminated by plea agreements).

¹¹ See, *Brady v. United States*, 397 US 742 (US 1970).

¹² The United States Supreme Court has found that counsel could be constitutionally ineffective in failing to inform his client of the collateral consequence of pleading guilty. See, *Padilla v. Kentucky*, 559 U.S. 356 (US 2010).

¹³ See, *United States v. Crowley*, 529 F.2d 1066, 1072 (3rd. Cir. 1976); *Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012).

¹⁴ See, *Marie Gottschalk, Caught: The Prison State and The Lockdown of America Politics*, p. 245.

percent Black, and 21 percent Hispanic.¹⁵ The statistics clearly illustrate an overrepresentation of minorities in the United States prison population.

Disenfranchisement has significantly impacted the minority voter block in this country and it is disgraceful as well as alarming.

Assistant Director of The Sentencing Project, Marc Mauer, estimates that 13 percent of African-American males are disenfranchised. In 2010, nearly six million people were ineligible to vote due to some type of criminal conviction. Tens of thousands of Hispanic voters have gone missing in Arizona, California, Florida, New York, and Texas because of felon disenfranchisement. Add to that the fact that most of these people are prohibited from serving on juries, and you essentially have a class of people completely removed from the democratic process. The collateral consequence of disenfranchisement is not an individual punishment, but a punitive measure taken against a class of people. It produces a cycle in which *lawmakers choose who* they are accountable to.

The question is, is it intentional? The answer is, most certainly. Reputable legal scholars and political scientists have found that felon disenfranchisement was historically used as a tool by states to disenfranchise blacks. States passed laws disenfranchising those convicted of “black crimes” while those convicted of “white crimes” did not lose their right to vote.¹⁶ Likewise, during the Reconstruction era, several states enacted felon disenfranchisement laws and carefully selected disenfranchisement crimes in order to disqualify a disproportionate number of black voters.¹⁷ If felon disenfranchisement was

¹⁵ See, **Nina Moore**, *The Political Roots of Racial Tracking*, p. 22, 23, and 64; See, **John F. Pfaffe**, *Lock In*, p. 45-46.

¹⁶ See, **George Brooks**, *Comment, Felon Disenfranchisement: Law, History, Policy and Politics*, 32 Fordham Urb. L.J. 851 (2005).

¹⁷ See, **Virginia E. Hench**, *The Death of Voting Rights: The Disenfranchisement of Minority Voters*, 48 Case W. Res. L Rev. 727, 738 (1998).

used *then* to curtail the “black” vote, than why on earth would one think that it is not being used today for the same exact reasons?

The sickening fact is, it worked then and it still works today. It has been calculated that if Florida had not disqualified an estimated 800,000 former felons from voting in the 2000 election, Al Gore would not only have won the state, but would have won the Presidency.¹⁸

Felon disenfranchisement is not only an individual punishment, or a class punishment, but it’s a *national* punishment. The most powerful people on earth are quite possibly those who don a black robe and preside over our federal judiciary. As iterated above if not for felon disenfranchisement, Al Gore would have been our President from at least 2000-2004. If Al Gore were the President during that time, the scores of federal rightwing judges who now have *lifetime* appointments to the federal judiciary and make rulings that affect our daily lives in ways most Americans do not fully grasp, would not be sitting on the court. However, if the judiciary doesn’t rank high on your list of concerns, maybe ISIS does. The chances are in the aftermath of 911, Gore probably wouldn’t have invaded Iraq, and destabilized an already unstable area, thus leading to the creation of ISIS.

My point is, racially charged and just plain old stupid rules like felon disenfranchisement have serious consequences and it is high time we tear them from the fabric of society and begin including everyone in the process.

¹⁸ See, **Marie Gottschalk**, *Caught: The Prison State and The Lockdown of American Politics*, p. 245.