

## **FELON DISENFRANCHISEMENT AND THE SYSTEMIC RACISM OF THE CRIMINAL JUSTICE SYSTEM**

*Matthew D. Itkin\**

Felon disenfranchisement is a threat to our democracy. Let us assume for the sake of argument that the government is controlled by people with brown eyes. These people will want to remain in power and prevent anyone with blue or green eyes from prevailing in an election. They pass felon disenfranchisement laws, which seem on the surface to be regulation of voter eligibility. However, the brown-eyed people in power then go on to make policy decisions that are tough on crime and use their police power to selectively target “street crimes,” the type of crimes light-eyed people are more likely to commit. This “war on crime” results in a disproportional rate of criminal charges being brought against individuals with blue or green eyes. The consequence is that a significant percentage of the light-eyed voting population has now been reduced, since a large amount of them are now mixed into the criminal justice system and caught under the umbrella of the disenfranchisement laws. It is the day after the election and, not surprisingly, the brown-eyed candidates manage to keep their seats of power.

This hypothetical, although extreme, is demonstrative of the injustice and potential abuse of felon disenfranchisement. Even though the disenfranchisement laws may *appear* as if they are neutral with respect to eye color, they are only as neutral as the system which ends up labeling people as felons -- the justice system. If the “war on crime” was focused on the criminal activity that brown-eyed people typically commit, namely embezzlement, money laundering, forgery, bribery, fraud and insider trading, the types of crime that end up economically victimizing society *more* than localized crimes like robbery and drug offenses,<sup>1</sup> the brown-eyed people

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\* B.A. in Criminal Justice, State University of New York at Albany, 2005; JD candidate, Touro College, Jacob D. Fuchsberg Law Center, 2009. The author is a co-founder and vice president of Criminal Law Society, Senior Staff Member of the *Journal of Race, Gender and Ethnicity* and the Secretary of the Student Bar Association. He would like to express his gratitude to Jeannine Farino, Alice Jakyung Choi and Felicia Bromes for their assistance in editing this article. Special thank you to Professor Douglas Scherer for his thoughtful comments and insight.

<sup>1</sup> Encyclopedia Britannica, White-Collar Crime, *available at* <http://www.britannica.com/EBchecked/topic/642189/white-collar-crime> (“The cost of corporate crime to society is many times that of organized crime or the more common street crime. Moreover, it cannot be measured in monetary damages alone, because corporate crimes can also pose health risks, compromise safety, cause injuries or fatalities, bring harm to wildlife and the environment, and lead to organizational failures and associated job losses. Owing to the concealed nature of many frauds and the fact that few are reported even when discovered, their cost is impossible to estimate precisely, but

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would either repeal the disenfranchisement laws or move to change the public focus back to fighting “street crimes.”

It is clear that the black and Hispanic populations are disproportionately caught up in the criminal justice system<sup>2</sup> and disproportionately disenfranchised as a consequence.<sup>3</sup> The U.S. Department of Justice reported that, in 1997, about nine percent of the black population was under some form of correctional supervision, compared to about two percent of the white population. Moreover, blacks are almost three times more likely to be incarcerated in jail than Hispanics and almost *five times* more likely than whites.<sup>4</sup> It would make sense for the proportions of people involved in the justice system to at least be close to their overall representation in society, but if one were to look at these percentages without knowing anything about our population, it would be hard to guess that these groups are considered to be minorities.

The effect of this minority overrepresentation in the justice system is that state disenfranchisement laws have a dramatic racial impact. “Thirteen percent of all adult black men—1.4 million—are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is *seven times* the national average.”<sup>5</sup> The statistics of disenfranchised black males in some states are staggering. In Alabama and Florida, about thirty-one percent of the black male population has lost the right to vote.<sup>6</sup>

Although states *may* have constitutional authorization to disenfranchise felons,<sup>7</sup> in order to avoid unconstitutional action and not blatantly violate the purpose of the Fifteenth Amendment, the institutional determination of who is to be considered a felon must not be infected by systemic racism. Nevertheless, the

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in the United States it is thought to be at least 10 times the combined cost of thefts, burglaries, and robberies”).

<sup>2</sup> U.S. Department of Justice, *Bureau Of Justice Statistics*, available at <http://www.ojp.usdoj.gov/bjs/gcorpop.htm>.

<sup>3</sup> Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (1998), available at <http://www.hrw.org/reports98/vote/index.html>.

<sup>4</sup> U.S. Department of Justice, *supra* note 2.

<sup>5</sup> Human Rights Watch, *supra* note 3 (emphasis added).

<sup>6</sup> *Id.*

<sup>7</sup> See U.S. CONST. amend. XIV, § 2 (“when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State ... or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced...”); see also *Richardson v. Ramirez*, 418 U.S. 24 (1974).

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compelling disproportion of minorities being disenfranchised by these laws illuminates the injustice within the criminal justice system. Whether at the investigation and arrest stages or the prosecution and sentencing stages, the disparate treatment of minorities received throughout the process demonstrates clearly that the system is not balanced.<sup>8</sup>

The Supreme Court has determined that the right to vote free of racial discrimination is a “fundamental principle” of the Constitution and a “right that is preservative of all rights.”<sup>9</sup> The Congress passed the Voting Rights Act of 1965 (hereinafter “VRA”) to legislate these principles in unequivocal terms:

[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .<sup>10</sup>

Additionally, the Supreme Court has emphasized that Congress intended to give the VRA the “broadest possible scope.”<sup>11</sup> Certainly, a law prohibiting a felon from voting is a voting qualification and requiring non-felon status, before one is considered eligible to vote, is a prerequisite to voting. Furthermore, the result of these qualifications and prerequisites is an undeniable dilution or abridgment of the votes of minority populations. Scrutinized in a vacuum, the concept of prohibiting felons from voting does not implicate the VRA. However, because the criminal justice system does not label people as felons in a manner unattached from race,<sup>12</sup> felony disenfranchisement laws violate both the text of the VRA and the legislative purpose behind the text.

Although the Court has held that, for a voting disenfranchisement law to be unconstitutional, there must be intent to purposefully discriminate,<sup>13</sup> since then, the

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<sup>8</sup> Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 628-632 (2004) (describing racial bias within the criminal justice system).

<sup>9</sup> *Rice v. Cayetano*, 528 U.S. 495, 512 (2000); *see also Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966) (describing the right to vote as “precious and fundamental” and “the right that is preservative of all rights”).

<sup>10</sup> 42 U.S.C. § 1973 (2008) (emphasis added).

<sup>11</sup> *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969).

<sup>12</sup> For instance, if a black man and a white man both commit the same felony level offense, it is statistically more likely that the black man will be arrested, charged, prosecuted, and sentenced more harshly. *See Goldman, supra* note 8, at 629.

<sup>13</sup> *See City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980).

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legislature has indicated that *results* and not intent should be dispositive.<sup>14</sup> Since “race, crime, and the criminal justice system are inextricably linked,”<sup>15</sup> courts should view any state felony disenfranchisement law with a presumption of unconstitutionality. When attempting to deprive a citizen of the only fundamental right that allows one to politically communicate with their democratic government, because of a label received by an institution with such obvious racial inequality, a state should minimally have to demonstrate some compelling interest. However, this will not be an easy task for a state, particularly when dealing with felons who have already served their time. As stated by Justice Thurgood Marshall,

[i]t is doubtful...whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. [Ex-offenders] have fully paid their debt to society. They are as much affected by the actions of government as any other citizen, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of [a] right to vote to such persons is [a] hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.<sup>16</sup>

While Justice Marshall was speaking of people who have already served their time in prison, people who are currently incarcerated should not also be subject to a blanket proscription of their right to vote. Due to racial inequality imbedded throughout the system, any legislation aimed at preventing incarcerated inmates from voting should be narrowly tailored to meet the state’s interest in running a proper election. Simply excluding all felons from the electoral process is overinclusive and results in the unconstitutional dilution of minority voices.

What is perhaps most unsettling about these disenfranchisement laws is the cycle of undemocratic activity which stems from such legislation. People in power make the laws. People who break those laws lose the right to choose who is in power and the laws then remain the same. Crimes that are *mala prohibita*,<sup>17</sup> such as those which proscribe drug use or gambling, are purely the result of legislation. The

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<sup>14</sup> Congress amended the Voting Rights Act to prohibit states from applying “any voting qualification or standard that ‘results’ in the denial of the right to vote ‘on account of’ race.” *Hayden v. Pataki*, 449 F.3d 305, 313 (2d Cir. 2006) (citing 42 U.S.C. § 1973(b) (2008)).

<sup>15</sup> Goldman, *supra* note 8, at 628.

<sup>16</sup> *Richardson v. Ramirez*, 418 U.S. 24, 78 (1974) (Marshall J. dissenting).

<sup>17</sup> Translates to “wrong [as or because] prohibited”; conduct that is considered a crime only by virtue of statute as opposed to conduct that is inherently evil. See BLACK’S LAW DICTIONARY 444 (3<sup>rd</sup> pocket ed. 1996).

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exclusion of unpopular voices that disagree with how these activities are regulated flies in the face of our democracy and the values of universal suffrage.<sup>18</sup>

The brown-eyed against light-eyed hypothetical comes to life when observing the criminalization of drug use. The staggering number of convictions in this country, particularly among minorities, is a result of the “war on drugs,”<sup>19</sup> a political movement to fight crime, which is not inherently wrong. Felony disenfranchisement becomes a sword for the people in power, who are essentially shaping the morals and values of our society from the top down. It becomes easier to keep these laws and political movements at the forefront when states first incarcerate the people who dissent through participation in the illegal activity, then remove their voices in government as well. Easier yes, yet undoubtedly undemocratic.

Whether one considers felony disenfranchisement an additional punishment for criminal activity or regulation of voter eligibility, the result is a self-evident disproportional removal of racial minorities from the electorate. Perhaps in the future, when our population becomes more diverse and our societal institutions become detached from systemic racial inequality, the injustice will fade away. For now though, in 2009, if a state wants to prevent people from exercising a fundamental right, it should not be because of a label received from our criminal justice system.

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<sup>18</sup> Human Rights Watch, *supra* note 3.

<sup>19</sup> Goldman, *supra* note 8, at 629.