Felon Disenfranchisement: The Judiciary’s Role in Renegotiating Racial Divisions

Brian P. Schaefer and Peter B. Kraska

Abstract
Felon disenfranchisement is deeply rooted in U.S. history as a form of punishment and as a tool to inhibit African Americans from voting. Today, there are 5.3 million U.S. residents politically disenfranchised due to a felony conviction—about 2 million of whom are African Americans. The overrepresentation of African Americans disenfranchised, and the U.S. history of racism, brings forth the question of how these laws continue to exist. The objective of this study is to demonstrate, through a socio–legal approach, the federal court system’s role in perpetuating and maintaining the ethnoracial divisions in society through the validation and rationalization of felon disenfranchisement laws. We aim to demonstrate how over the past century many disenfranchisement laws have been “whitewashed” in order to eliminate any indication of racially motivated practices, a practice that coincides with the historic expansion of the penal state in the controlling of minority populations.

Keywords
felon disenfranchisement, race and corrections, race and courts, supreme court decisions, critical race theory, criminological theories, White privilege, criminological theories, mass incarceration, race and death penalty, African/Black Americans, race/ethnicity

1 Department of Justice Administration, University of Louisville, Louisville, KY, USA

Corresponding Author:
University of Louisville, Department of Justice Administration, Louisville, KY 40292
Email: bpscha02@louisville.edu
Introduction

The shift toward mass incarceration in the United States has led to a felon population experiencing the highest rates of disenfranchisement ever witnessed in the United States (Manza & Uggen, 2008; Mauer & Chesney-Lind, 2002). Current estimates indicate more than 5.3 million felons or ex-felons are disenfranchised, representing 2.4% of the population (Manza & Uggen, 2008). For African American males, the effect is even more pronounced, with one in eight persons of voting age disenfranchised and 13 states disenfranchising more than 10% of their African American population (Hull, 2006; see Appendix A for state-by-state analysis). The geographic layout of disenfranchisement forms a “crazy quilt” of laws (Ewald, 2005) and exacerbates inequalities through high concentrations of persons under correctional supervision (King, 2007).

The growth of felon disenfranchisement can be attributed to the mass imprisonment of select groups of society (Beckett & Western, 2001; Christie, 1993; Garland, 2001; King & Mauer, 2004; Mauer, 1997, 2000, 2001; Mauer & King, 2007a, 2007b). This drastic increase in imprisonment has disproportionately affected African American men (Pettit & Western, 2004; Tonry, 1995). African Americans represent 49% of national prison inmates, while constituting only 13% of the entire population. Further, 32% of Black males between the ages of 20 and 29 are under correctional supervision (Sabol & West, 2007). The overrepresentation of African Americans in prison is further indicated by African Americans being “eight times more likely to be incarcerated than whites and large racial disparities can be seen for all age groups” (Western, 2007, p. 32).

A number of important studies have documented the troubling relationship between felon disenfranchisement and the African American population (Behrens, Uggen, & Manza, 2003; Bosworth, Bowley, & Lee, 2008; Manza & Uggen, 2008). Several quantitative studies of felon disenfranchisement document racial bias in felon disenfranchisement laws (Behrens, Uggen, & Manza, 2003; Manza & Uggen, 2008; Miles, 2004). A key legal issue, therefore, is whether the results of these laws violate the Equal Protection Clause of the 14th amendment. Section 1 of the Equal Protection Clause allows courts to strike down laws enacted intentionally to discriminate based on race (U.S. Const. amend. XIV, sec. 1). The research conducted by Manza, Uggen, and others does not implicate these laws as intentional; however, several legal scholars have examined the legal decisions regarding the racially disparate impacts of felon disenfranchisement and noted the difficulty in challenging these laws (Carter, 2007; Gottlieb, 2002; Handelsman, 2005).

While these few legal studies have shed some light, a significant gap still exists in our knowledge about why felon disenfranchisement of African Americans is still institutionalized in U.S. society and will likely remain so in the near future. One avenue for providing some answers is to examine the Federal Court System’s role in maintaining felon disenfranchisement laws, while integrating relevant theoretical frameworks that help account for the legal and social ideologies employed by the Federal Court system. The objective of this study, thus, is to demonstrate, through a
sociolegal approach, the federal court system’s role in perpetuating and maintaining the ethnoracial divisions in society through the validation and rationalization of felon disenfranchisement laws. We aim to demonstrate how over the past century many disenfranchisement laws have been “whitewashed” in order to eliminate any indication of racially motivated practices, a practice that coincides with the historic expansion of the penal state in the controlling of minority populations.

The Sociolegal Method

To accomplish this objective, two methodological tools are used. First, a historical analysis of voting laws used to disenfranchise African Americans places felon disenfranchisement within the full arc of ethnoracial divisions in the voting booth. Second, a sociolegal analysis (see Adler, 2003; Banakar, 2009; Travers, 2009) is conducted to assess the extent to which federal court decisions from the past 40 years affect the social ideology of felon disenfranchisement. The combination of sociolegal analysis with a historical perspective can illuminate the development and changes in legal institutions over time (Charlesworth, 2007). These methods can also deconstruct the relationship between legal change and the development of social structures.

In this study, these methodological approaches use the court’s narratives and historical context to analyze the deep structures of historical and contemporary racism present in modern disenfranchisement laws. The opinions and dissents of judicial decisions regarding felon disenfranchisement, situated within a historical context, provide an empirical window which reveals the roots of current practices and the extent to which White hegemony shifts and changes shape over time but is not fundamentally altered.

A Brief History of Felon Disenfranchisement

Felon disenfranchisement developed out of Greece and Rome, where criminals lost the right to vote (Ewald, 2003). “Outlawry” was an English concept where criminals were viewed as being outside the law, so they were deprived of the benefits of the law (Thompson, 2002). American colonies also adopted the practice of enforcing civil disabilities on criminals (Fellner & Mauer, 1998). Early colonies based citizenship on religion and property ownership, so lawmakers chose to disenfranchise men whom they labeled scandalous or corrupt (Ewald, 2003). These early disenfranchisement laws generally reflected the most egregious crimes and were used for shaming (Ewald, 2003). Modern disenfranchisement laws are broader, automatic, and an invisible consequence of conviction (Ewald, 2003).

The passing of the U.S. Constitution banned the use of bills of attainder to achieve certain civil disabilities but allowed states to disenfranchise criminals (Fellner & Mauer, 1998). The earliest form of disenfranchisement was based on law violations and not based on suppressing the African American vote. This was largely due to the Constitution containing no guarantees of suffrage, so states commonly disenfranchised many groups of people, including Blacks, women, and criminals. Thus,
prior to the Reconstruction Amendments, felon disenfranchisement laws were not exclusively driven by discriminatory intent, as explicitly racial discrimination was legal.

Racial discrimination began to motivate disenfranchisement laws after the Civil War, and constitutional provisions enacted at the time contained loopholes allowing such discrimination as a political compromise. The abolition of slavery by the Thirteenth Amendment in 1865 nullified the Three-Fifths Clause, under which states counted three fifths of their slave population in determining the number of members of the House of Representatives to which they were entitled (U.S. Const. art. I, section 2, cl. 3). In 1868, Congress passed the Fourteenth Amendment to ensure that representatives would be apportioned according to the population of each state (U.S. Const. amend. XIV, section 2). The increased representation of the southern states concerned the Republican members of the 39th Congress because it threatened their political dominance (Van Alstyne, 1965). The southern states could benefit from increased representation from their large former slave population and yet deny Blacks—with their political sympathies toward the north—the right to vote.

To ensure an equal right to vote, the “Penalty Clause,” later called the “others crime exception,” was included in section 2 of the Fourteenth Amendment. The “Penalty Clause” punished states for disenfranchising African Americans on the basis of race by reducing the representation of their voting population (U.S. Const. amend. XIV, section 2). The “Penalty Clause” contained two exceptions for states to disenfranchise criminals without suffering a reduction in representation: persons who commit rebellion and an “other crime” exception (U.S. Const. amend. XIV, section 2). The complicated and contradictory language provided in the “Penalty Clause” is the source of the modern debates surrounding the legality of racially biased disenfranchisement laws.

The passing of the Fifteenth Amendment provided felon disenfranchisement with new meaning, as state legislatures began to use the “other crimes” provision to deny African Americans the right to vote (Hench, 1998). Though felon disenfranchisement laws were on their face race-neutral before reconstruction, the evidence of discriminatory intent is indisputable. During the Virginia Convention of 1906, Congressman Carter Glass stated, “We are here to discriminate to the very extremity of permissible action under the limitation of the Federal Constitution, with a view to the eliminating of every negro voter who can be gotten rid of legally, without materially impairing the numerical strength of the white electorate” (Harrisonburg-Rockingham Historical Society, 2011).

The rapid adoption of these laws during Reconstruction went hand-in-hand with a dramatic increase in Black imprisonment. Between 1850 and 1870, the non-White prison populations of many southern states nearly doubled (Behrens, Uggen, & Manza, 2003). Through felon disenfranchisement laws, states could target a portion of the population preselected to overinclude Blacks (Behrens, Uggen, & Manza, 2003). Lawmakers wrote disenfranchisement statutes that consciously targeted crimes more likely to be committed by Blacks than Whites or amended existing statutes to achieve the same goal. For example, Mississippi’s original felon disenfranchisement
constitutional provision defined the right to vote to men convicted of any crime (Ewald, 2003). In 1890, however, the legislature narrowed the law to target only those convicted of specific crimes—crimes for which Blacks were more often convicted than Whites (Ewald, 2003).

The failure of the Fourteenth and Fifteenth Amendments to alleviate discrimination in voting laws led Congress to pass the Voting Rights Act (VRA) of 1965. Section 2 of the VRA is a key provision, particularly in the context of felon disenfranchisement. Section 2 guarantees

\[ \text{[\text{n}]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. (Voting Rights Act of 1965, 42 U.S.C. section 1973) \]

The Supreme Court ruled section 2 of the VRA prohibits “any standards, practices, or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities” (Thornburg v. Gingles, 1986, p. 43).

**Modern Legal Arguments**

Felon disenfranchisement has an extensive history in the United States dating back to colonial times. Following the Civil War, many states began writing felon disenfranchisement laws to weaken the voting rights of recently freed slaves. Felon disenfranchisement was the first set of measures used to restrict the African American population in the postslavery era. The modern legal battles debate whether current disenfranchisement laws function as a constitutionally validated punishment for criminals, or are the remaining vestiges of a reconstruction era racially motivated exclusionary tool.

The dualistic meaning of felon disenfranchisement leads to a complicated battle over eliminating, preserving, or enhancing these laws involving distinct political, legal, and social ideologies. The modern day battles over the legitimacy of the felon disenfranchisement laws are fought in many arenas, one of which is the Federal Court system. The Federal Court cases involving felon disenfranchisement as a racially motivated tool to oppress the African American vote are argued on two grounds: challenges under the Equal Protection Clause of the Fourteenth Amendment and challenges under the VRA.

**Equal Protection Clause**

The Supreme Court recognizes that the disenfranchisement of any persons or groups of persons should be judged against the standards of the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment, above all other Civil War amendments, stands out as perhaps the most relevant and important constitutional
amendment regarding felon disenfranchisement (Clegg, Conway, & Lee, 2008). Section 1 provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. art. XIV, sect. 1)

The Equal Protection Clause in section 1 forms the basis which allows courts to strike down laws enacted intentionally to discriminate based on race, while section 2 allows for States to deny voting rights to individuals participating in “rebellion or other crimes” (U.S. Const. amend. XIV, sec. 2). In other words, section 1 works to ensure all persons have equal voting rights, while section 2 legitimates the use of disenfranchisement of criminals.

The Supreme Court case Richardson v. Ramirez (1973) was the first to question the intent of the Fourteenth Amendment. Judge Rehnquist, writing for the majority in Richardson, found section 1 of the Fourteenth Amendment, “could not have meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which section 2 imposed for other forms of disenfranchisement” (Richardson v. Ramirez, 1973, p. 55).

In dissent, Justice Marshall and Justice Brennan emphasized there was no clear purpose behind section 2 and argued that it was included “largely through the accident of political exigency” (Richardson v. Ramirez, 1973, p. 77). They suggested that the failure to apply strict scrutiny to felon disenfranchisement statutes is at odds with modern notions of equality embodied in the evolving concept of equal protection. “In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what a given time deemed to be a limit of fundamental rights” (Richardson v. Ramirez, 1973, p. 77).

The Supreme Court decision in Richardson restricted the ability of plaintiffs to challenge disenfranchisement laws under the Equal Protection Clause (Shapiro, 1993). The Richardson decision, however, does not explicitly bar equal protection claims against felon disenfranchisement laws outright, it only holds that felon disenfranchisement do not in and of themselves violate the Fourteenth Amendment. The Supreme Court and Federal Court of appeals have subsequently held that states should not intentionally strip felons of their right to vote on the basis of race—as decided in Hunter v. Underwood (1985).

The plaintiffs, in Hunter, argued that section 182 of the 1901 Alabama Constitution was enacted to intentionally disenfranchisement African Americans for crimes of moral turpitude. Alabama contended “the removal of racist provisions of section 182 through the intervening decades erase the original discriminatory intent” (Hunter v. Underwood, 471 U.S. 232 [1985]). The Hunter court ruled that a disenfranchisement law violates the Equal Protection Clause only if the plaintiff can prove discriminatory intent and disproportionate impact (Gottlieb, 2002).
The Supreme Court, in an opinion again by Justice Rehnquist, affirmed the Court of Appeals’ ruling that “found substantial evidence that discriminating intent was a motivating factor of section 182, that the provision had a discriminatory impact, and that it would not have been adopted absent the impermissible intent” (Hunter v. Underwood, 1985, p. 232). The Court rejected Alabama’s argument that the passage of 80 years had wiped the slate clean; they found the law’s “original enactment to be motivated by a desire to discriminate against blacks on account of race” (Hunter v. Underwood, 1985, p. 233). Justice Rehnquist concluded, “we are confident that section 2 was not designed to permit the purposeful racial discrimination attending the enactment and operation of section 182 which otherwise violates section 1 of the Fourteenth Amendment” (Hunter v. Underwood, 1985, p. 233).

The law established in Hunter creates a strict test requiring plaintiffs to prove disenfranchisement laws were enacted with discriminatory intent and have a disproportionate impact—a difficulty burden of proof. The Supreme Court in Richardson concluded that states do not have to provide a compelling reason for denying felons the right to vote. The Supreme Court in Richardson confirms the right for states to enact felon disenfranchisement laws as provided in section 2 of the Fourteenth Amendment. The decision in Hunter disallows intentional discrimination, and therefore barred Richardson from establishing that all felon disenfranchisement laws are constitutional.

Voting Rights Act

Much of the debate regarding the permissibility and scope of felon disenfranchisement laws proceeding under the VRA was shaped by earlier challenges under the 14th amendment—including the Richardson and Hunter decisions. The ineffectiveness of the Equal Protection Clause in the Fourteenth Amendment, along with other reconstruction amendments, led Congress to pass the VRA in 1965. Congress passed the VRA to stop racial bias in the American political process and to achieve truly equitable voting rights. Section 2 of the VRA guarantees:

> No 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. (42 U.S.C. section 1973(a) [1988])

City of Mobile v. Bolden (1980) was the first case challenging the VRA of 1965. The Supreme Court decided, in a ruling written by Justice Stewart, that plaintiffs must show discriminatory intent in order to challenge a disenfranchisement law under the VRA. This decision drastically increased the burden of proof for plaintiffs (Shapiro, 1993).

In response, Congress amended the VRA in 1982 in order to establish a violation of section 2. The 1982 Amendment to the VRA prohibited voting restrictions that have a racially discriminatory impact (Handelsman, 2005). The revised VRA provides that a
violation of the act is established if, “based on the totality of the circumstances, it is shown that the political processes. . . are not equally open to participation by members of a class of citizens protected in subsection (a) [in this instance race]. . .” (42 U.S.C. section 1973(a) [1982]). The changes to the VRA were significant: it substituted a results-based methodology in place of the strict intent requirement, thereby easing the burden of proof that City of Mobile established. Under the amended VRA, plaintiffs can challenge voting practices by showing, through the “totality of the circumstances,” that they have a disparate impact on minority participation. Specifically, the 1982 amendment allows plaintiffs to make two claims: voter denial and voter dilution. Voter denial is the practice of eliminating certain minority populations, while voter dilution occurs when a voting practice diminishes a minority population’s right to vote (Handelsman, 2005).

Two recent Federal circuit cases summarize the current state of felon disenfranchisement challenges under the VRA, namely Farrakhan v. Washington (2003) and Muntaqim v. Coombe (2004).1 In Farrakhan, Black, Hispanic, and Native American felons claimed that Washington’s felon disenfranchisement law violated the VRA. The plaintiffs challenged the Washington’s disenfranchisement law on the grounds of voter dilution and voter denial as well as equal protection claims. The court determined that the evidence of racial bias in the criminal justice system produced by the plaintiffs was “compelling” and the VRA applied to felon disenfranchisement laws. The Ninth Circuit held that in either a vote dilution or vote denial claim, the court must “consider the way in which the disenfranchisement law interacts with racial bias in Washington’s criminal justice system to deny minorities an equal opportunity to participate in the state’s political process” (Farrakhan v. Washington, 338 F. 3d 1014 [9th Cir. 2003]).

The Second Circuit disagreed with the Farrakhan decision. In Muntaqim v. Coombe, a Black inmate serving a life sentence brought vote dilution and vote denial claims against several officials in the New York State Department of Correctional Services. The plaintiff argued that the state disenfranchisement law resulted in voter denial and voter dilution and is caused by racial discrimination in the criminal justice system and disparity in the prison population (Muntaqim v. Coombe, 2004, p. 102). The Second Circuit conceded that, “the plaintiff in Muntaqim would have stated a valid section 1973 claim if the Voting Rights Act applied to felons, but held that it only applies to non-felon disenfranchisement” (Muntaqim v. Coombe 385 F.3d 102 [2d. Cir. 2004]). Muntaqim holds that Congress’s power to enforce the VRA does not extend to felon disenfranchisement, reasoning that “Congress did not specifically identify felon disenfranchisement as a possible tool for voter discrimination when passing the Voting Rights Act” (Muntaqim v. Coombe, 2004, p. 103).

The challenges under the VRA revolve around the question of whether or not Congress has the power to challenge felon disenfranchisement laws under the VRA. The Ninth and Second Circuit are in agreement on several issues; however, the issues they disagree on reflect distinct ideological differences. Examining these differences, as detailed below, is highly instructive for better understanding the continuation of felon disenfranchisement for African Americans in U.S. society.
Critical Interpretive Analysis

Tracing the development of federal court decisions demonstrates both the construction and the demolition of racially motivated barriers. The Civil Rights movement challenged the dominant ideologies of racial positioning in society by providing an “equal” political voice to its citizens. The Passing of the Civil Rights Act of 1964 and the VRA of 1965 “served as an authoritative legal and political rebuke of the Jim Crow social order” (Bobo & Smith, 1998, p. 209). The legacies of slavery and blatant racism reverberate through our institutional systems (Behrens, Uggen, & Manza, 2003, p. 568).

The task now is to examine the underlying ideological context of why felon disenfranchisement laws are institutionalized in our society. This section provides a critical interpretive analysis of the Federal and Supreme Court opinions on felon disenfranchisement laws. The analysis reveals two themes that act to rationalize and legitimize this institutionalization: (1) perpetuating the myth of color-blind jurisprudence and (2) the demonization of the felon. Arguing that the federal court system assists in perpetuating the ethnoracial divisions of society does not infer their decisions are precalculated or consciously racist. The objective here is to analyze the legitimating ideology underpinning these federal court decisions and to reveal their impact on social and political rationalities.

Perpetuating the Myth of Color-Blind Jurisprudence

Brewer and Hietzig (2008) argue that we live in an era of color-blind racism, where de jure racism has been eliminated, but de facto racism produces unequal social justice for minority populations, especially African Americans. Clearly, felon disenfranchisement constitutes de jure racism in that it was at one time a racially motivated tool for suppressing African Americans’ vote and is now justified on the basis of lawbreaking. The current status of judicial review holds that felon disenfranchisement is a constitutionally allowable form of punishment detached from its racially biased history, unless intentional voter bias or dilution can be shown. The Civil Rights legal reforms failed to fundamentally challenge racial inequality. This trend continues as the Muntaqim court focuses on the current state of law outside of its historical context and modern-day consequences. The Muntaqim court argued, “Because felon disenfranchisement statutes pre-date the Civil War, the contention that states have used them disingenuously to evade the subsequently enacted Reconstruction Amendments proves a dubious proposition.” The court made this assertion while disregarding the plaintiff’s factual assertions of discriminatory results. The plaintiffs argued that “blacks and Hispanics constitute less than thirty percent of the voting-age population in New York State; they make up over eighty percent of the inmates in the state prison system” (Muntaqim v. Coombe, 2004, p. 2). The Muntaqim court did not challenge this assertion, thus implicitly denying that the case was about race.

In Hunter v. Underwood, the Supreme Court made its first decision regarding racially motivated bias in disenfranchisement laws. Hunter held there must be a clear
showing of discriminatory intent for a felon disenfranchisement law to be overturned. Constitutional challenges to criminal disenfranchisement laws based on *Hunter* will only succeed if the plaintiffs are able to demonstrate purposeful discrimination in the law’s enactment. The plaintiff must show that the illicit purpose played a substantial role in the passage of the law (*Farrakhan v. Washington*, 2004). Thus, plaintiffs challenging the state laws on an Equal Protection claim will not meet their burden by demonstrating merely that a law disparately impacts a particular racial group. The *Hunter* decision limited the *Richardson* ruling, but much like previous rulings on racial bias, the Court failed to fundamentally challenge racial inequality.

Since race has traditionally occupied a role in determining the status of African Americans in society, the discriminatory effects of race consciousness should remain a consideration of the courts. The overt racism of the past has diminished; however, covert discrimination remains and lies in the application of rules and legal decisions that do not take into account the discriminatory consequences of race. The rulings of the court in *Muntaqim*, *Richardson*, and *Hunter* are not likely a product of explicit racism. The restrictions on determinations of racially motivated bias are a result of a formalist approach to legal interpretation, resulting in color-blind jurisprudence.

Many academic analysts, of course, refer to this as *structural racism*: where even though intentional bigotry is not evident, the historical patterns and arrangements of race-based exclusion continue (Bonilla-Silva 1997). Long after overt discrimination diminishes, there still exists an array of social, economic, and legal arrangements, constructed during a time of explicit hatred, that work to the disadvantage of racial minorities. Where racial prejudice is kept alive by hate, structural racism thrives under conditions of conscious and unconscious indifference to these historical realities and their contemporary consequences.

Felon disenfranchisement is a poignant example of color-blind jurisprudence: it “appear[s] to accept a legacy of historical racial discrimination uncritically and to oppose reforms by appealing to the legal and popular foundations of a system devised to benefit whites during slavery and Jim Crow eras” (Behrens, Uggen, & Manza, 2003, p. 573). In viewing felon disenfranchisement as based on felon status without accounting for race, one may avoid the guilt associated with blatant racism, yet still perpetuate discrimination. Color blindness requires proof of discriminatory intent for seemingly race-neutral laws to be deemed unconstitutional, but does not account for structural racism. The intent requirement is inconsistent with the character of modern day racism. A decision can cause the same harm to minorities whether its effects are intentional or not.

The passing of the Civil Rights Act and the VRA shows a societal adoption of the rhetoric of racial equality yet falls short of ending racial subordination. When equality laws are seen as color-blind, this rhetoric presents a difficult obstacle to eliminate conditions of White hegemony. Removing White hegemony from the law did not, of course, eradicate racism. The removal of explicitly racist voting laws is meaningful and provides a powerful source of progress for color-blind rhetoric. The commitment to eliminating discrimination and the subsequent rhetoric conceals many conflicting and contradictory interests which attempt to reinforce the status quo.
The development of felon disenfranchisement as a tool to oppress the African American vote parallels the development of the prison as a device for caste control. Wacquant (2001, p. 07) argues

the astounding upsurge in black incarceration in the past three decades as a result of the obsolescence of the ghetto as a device for caste control and the correlative need for a substitute apparatus for keeping (unskilled) African Americans ‘in their place,’ i.e. in a subordinate and confined position, physical, social, and symbolic space.

This disproportionate representation of African American community under criminal justice supervision, as well as the loss of voting rights, is a serious impediment to political participation. The Courts reinforce this process by denying structural racism through the legitimating rhetoric of color-blind justice. The courts ignore the realities of racial bias in felon disenfranchisement, thus reinforcing “caste control” (Wacquant, 2001). The conflicting decisions of the Federal Court have ultimately upheld existing social arrangements, and the denial of racial discrimination of felon disenfranchisement, reflects, reworks, and reinforces the racial divisions of American society through the criminal justice apparatus. This is an example of what Simon (2001), and in a less direct way Wacquant (2001), means by “governing through crime”—criminal justice practices, rooted in seemingly reasonable legal rulings, have become a central societal force in governing the citizenry; in this instance, through governing racial divisions and perpetuating racial harm in U.S. society.

Demonizing the Felon

The legacies of slavery and blatant racism, then, reverberate through today’s institutional systems. The Court’s persistence in ignoring the racial aspects of felon disenfranchisement would not be possible without the long history of taking the vote away from the convicted. It is the “criminal” identity that underpins the justification for disenfranchisement laws. When a law performs its proper function of assuring equality of process—as the VRA suggests—then differences in outcomes between groups would not reflect past discrimination but rather real differences between groups (i.e., one’s “choice” of criminality).

Wesley v. Collins (1986) clearly expressed a race-neutral justification for disenfranchisement based solely on violating the law: “Felons are not disenfranchised based on any immutable characteristics, such as race, but on their conscious decision to commit an act for which they assume the risks of detention and punishment (at 813)” Similarly, the Second Circuit, in Muntaqim (2004), deems felon disenfranchisement a traditional state function and subsequently “couches felony disenfranchisement within the traditional state authority to punish its criminals.” Close examination of the Second Circuit’s rationale reveals that the plaintiff’s felon status drove its decision rather than their race. The emphasis on felon status subsequently provides justification for the continued use of an extra-penological punishment for law violators.
Viewing felon disenfranchisement as an acceptable punishment is consistent with the larger cultural trend in society of demonizing the felon as a justification for exceptionally punitive laws and policies (Garland, 2002; Simon, 2001). In a late-modern culture, individual justice is pushed aside in favor of a hardened stance against the criminal population as the demonized “other” (Young, 1999). The Second Circuit draws directly from this accepted cultural script by arguing for the use of felon disenfranchisement as a punishment for criminals, while simultaneously ignoring the uneven racial impact. Since these views of the criminal and de facto racism are both ingrained features of our society, felon disenfranchisement laws appear routine and natural.

Young (1999) would see this type of racial harm as being rooted in “essentializing the other.” He posits that the late-modern feature of social exclusion splits societal members between individuals who follow society’s norms and those who break them. In a culture preoccupied with risk, law violators pose a significant potential danger—whether real or imaginary. The ontological insecurity created by the preoccupation with risk and safety gives rise to the search for clear lines of demarcation and crisp boundaries between the included and excluded. “Othering”—for example, defining those who break laws as not worthy of citizenship—is essential in establishing these boundaries.

The effects of social exclusion are apparent on both the micro level and the macro level. On the micro level, the loss of voting rights is a strong stigma that differentiates criminals from law abiding citizens. Individuals marked with a felony record are expected to contribute and be a law abiding citizen yet are systematically cutoff from any sort of political voice. The stigma of felon status creates discontent rooted “in the contradiction between ideas that legitimate the system and the reality of the structure that constitutes it” (Young, 2003, p. 398). On the macro level, the stigma becomes a way for society as a whole to differentiate persons as worthy to vote. Simply through the identification of these persons as unworthy of the vote, negative views are formed and reinforced. The reliance on the criminal system to demarcate the good from the bad “provides the color-blind regime the perfect set of codes to describe racialized patterns of alleged crime and actual punishment without ever referring to race” (Brewer & Heitzig, 2008, p. 633). This differentiation is often an unconscious action that stems from seeing crime as natural among certain class and racial groups. As Davis (1998, p. 62) observed, “crime is one of the masquerades behind which ‘race,’ with all its menacing ideological complexity, mobilizes old public ears and creates new ones.” In the context of legal arguments surrounding felon disenfranchisement, there is little discussion of race and racism, rather than the discussion about the crimes and the criminals. Felon disenfranchisement of African Americans is seen, then, as an acceptable form of punishment and consequently, the disproportionate impact of this practice is not a concern.

As noted above, the use of disenfranchisement laws to perpetuate racial exclusion is a continuation of a historical process of exclusion characterized by defining and confining the “other” population (Wacquant 2001). The continued use of disenfranchisement laws reinforces the bifurcation and exclusion of the African American population, through a social process of associating a persons’ race with criminal propensity. In this way, felon disenfranchisement contributes to the “production of
racialized public culture of vilification of criminals” (Wacquant, 2001, p. 97). It is a powerful tool of exclusion based in the disproportionate conviction of African Americans that bolsters the ideological notion of African Americans as law violators—while ignoring the historical context of racial oppression in U.S. society.

Conclusion

Millions of felony offenders are denied the right to vote. More than 13% of African American men are affected by disenfranchisement laws, which is more than 7 times the rate for the population as a whole (Sentencing Project, 2011). This study has demonstrated that the federal court system has done little to address this problem and has in fact gone to great legal lengths to deny the historical practice of racial containment through voting laws. The two legitimizing strategies used by the courts include the myth of color-blind justice and the demonization of the felon. It was argued that these two rationalities and how they are applied to felon disenfranchisement practice coincide well with leading criminal justice analysts’ theories of social exclusion and late-modern governance. This study argues that felon disenfranchisement is an exemplar of late-modern racial oppression that is consistent with a long-running pattern of exclusionary practice that acts to prolong ethnoracial divisions in the United States.

The subordination of the African American population has a long history in the United States. A long list of rhetoric and stereotypes were used to make this subordination appear natural. White hegemony has long been premised upon ideologies that rely on negative racial characterizations about African Americans, which have evolved into a deep and difficult to uproot legitimating ideology. In framing felon disenfranchisement within a narrow legal framework, the Federal Court ignores the social realities of racism in our country, and as a result contributes to the perpetuation of ethnoracial divisions while systematically diluting the African American vote. Furthermore, the Court’s discussion of felon disenfranchisement places the criminal as the justification of its existence, which further excludes and vilifies law violators. And given the disproportionate application of the criminal law, African Americans have become a symbol for many of lawbreaking. The law is a powerful force in producing and reinforcing racial symbolism: it embodies and reinforces ideological assumptions that people come to accept as legitimate and hence natural. In a late-modern society, de jure discrimination of felon disenfranchisement is eliminated; de facto discrimination thrives.

Recent events will likely place the courts again in a position to examine the controversial use of these laws. In 2011, as a preemptive measure taken before the 2012 election, two Republican governors from Iowa and Florida have issued executive orders that reinstate felon disenfranchisement laws that will essentially prohibit all those with past felony convictions from voting—permanently. “In Florida, as many as a million people could be disenfranchised as a result of the new rules; Iowa previously had the highest rate of disenfranchisement of African Americans in the country before the restoration process had been eased in 2005” (Sentencing Project, 2011). If current legal practice and thinking stands, the courts will likely ignore once again the harmful
racial impact this blatant political maneuvering will have on the Black community. And if it stays consistent with late-modern cultural sensibilities, as outlined in this study, it will fail to recognize the reality of structural racism in the United States, falling back on the myths of color-blind justice and the acceptability of permanently punishing law violators long past their debt paid to society.

Appendix A
Disenfranchised Population by State: 2008a

<table>
<thead>
<tr>
<th>State</th>
<th>Total</th>
<th>Blacks (%)</th>
<th>State</th>
<th>Total</th>
<th>Blacks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>250,046</td>
<td>124,398 (15.3)</td>
<td>Montana</td>
<td>4,145</td>
<td>61 (2.2)</td>
</tr>
<tr>
<td>Alaska</td>
<td>11,132</td>
<td>1,469 (7.6)</td>
<td>Nebraska</td>
<td>61,996</td>
<td>11,403 (22.7)</td>
</tr>
<tr>
<td>Arizona</td>
<td>176,103</td>
<td>24,181 (11.1)</td>
<td>Nevada</td>
<td>43,594</td>
<td>12,632 (14.2)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>57,691</td>
<td>25,486 (9.0)</td>
<td>New Hampshire</td>
<td>2,587</td>
<td>148 (2.7)</td>
</tr>
<tr>
<td>California</td>
<td>283,124</td>
<td>114,305 (7.6)</td>
<td>New Jersey</td>
<td>127,178</td>
<td>70,249 (8.7)</td>
</tr>
<tr>
<td>Colorado</td>
<td>28,636</td>
<td>7,459 (5.4)</td>
<td>New Mexico</td>
<td>18,080</td>
<td>1,722 (6.7)</td>
</tr>
<tr>
<td>Connectcut</td>
<td>22,854</td>
<td>14,304 (6.7)</td>
<td>New York</td>
<td>122,018</td>
<td>78,692 (6.3)</td>
</tr>
<tr>
<td>Delaware</td>
<td>46,677</td>
<td>20,862 (19.6)</td>
<td>North Carolina</td>
<td>73,113</td>
<td>42,227 (5.7)</td>
</tr>
<tr>
<td>D.C.</td>
<td>7,407</td>
<td>7,040 (3.1)</td>
<td>North Dakota</td>
<td>1,466</td>
<td>37 (1.0)</td>
</tr>
<tr>
<td>Florida</td>
<td>1,179,687</td>
<td>293,545 (18.8)</td>
<td>Ohio</td>
<td>45,487</td>
<td>24,487 (5.3)</td>
</tr>
<tr>
<td>Georgia</td>
<td>283,607</td>
<td>160,905 (9.6)</td>
<td>Oklahoma</td>
<td>49,541</td>
<td>14,882 (7.3)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>6,530</td>
<td>366 (1.7)</td>
<td>Oregon</td>
<td>14,228</td>
<td>1,988 (4.4)</td>
</tr>
<tr>
<td>Idaho</td>
<td>17,416</td>
<td>308 (6.0)</td>
<td>Pennsylvania</td>
<td>41,626</td>
<td>26,101 (3.2)</td>
</tr>
<tr>
<td>Illinois</td>
<td>45,825</td>
<td>33,053 (7.2)</td>
<td>Rhode Island</td>
<td>20,793</td>
<td>5,183 (2.6)</td>
</tr>
<tr>
<td>Indiana</td>
<td>26,245</td>
<td>11,371 (3.2)</td>
<td>South Carolina</td>
<td>48,522</td>
<td>30,840 (3.7)</td>
</tr>
<tr>
<td>Iowa</td>
<td>121,418</td>
<td>14,705 (3.4)</td>
<td>South Dakota</td>
<td>3,271</td>
<td>142 (3.7)</td>
</tr>
<tr>
<td>Kansas</td>
<td>27,863</td>
<td>8,750 (7.4)</td>
<td>Tennessee</td>
<td>94,258</td>
<td>43,198 (4.6)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>186,348</td>
<td>49,293 (23.7)</td>
<td>Texas</td>
<td>522,887</td>
<td>165,985 (9.3)</td>
</tr>
<tr>
<td>Louisiana</td>
<td>98,190</td>
<td>67,850 (6.8)</td>
<td>Utah</td>
<td>5,970</td>
<td>459 (3.4)</td>
</tr>
<tr>
<td>Maine</td>
<td>0</td>
<td>0</td>
<td>Vermont</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Maryland</td>
<td>111,521</td>
<td>64,403 (5.8)</td>
<td>Virginia</td>
<td>377,847</td>
<td>208,343 (19.8)</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>10,140</td>
<td>3,804 (1.6)</td>
<td>Washington</td>
<td>167,316</td>
<td>23,364 (17.2)</td>
</tr>
<tr>
<td>Michigan</td>
<td>49,788</td>
<td>8,267 (7.4)</td>
<td>West Virginia</td>
<td>10,800</td>
<td>1,462 (3.4)</td>
</tr>
<tr>
<td>Minnesota</td>
<td>38,784</td>
<td>8,865 (7.9)</td>
<td>Wisconsin</td>
<td>62,342</td>
<td>24,293 (11.1)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>146,155</td>
<td>92,232 (13.2)</td>
<td>Wyoming</td>
<td>20,198</td>
<td>685 (20.0)</td>
</tr>
<tr>
<td>Missouri</td>
<td>93,752</td>
<td>34,685 (8.0)</td>
<td>Total</td>
<td>5,266,206</td>
<td>2,000,290 (3.9)</td>
</tr>
<tr>
<td>Total Blacks</td>
<td>2,000,290</td>
<td>8.3</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note. aThe latest numbers are available from Manza and Uggen (2008).
bIndicates states that do not have felon disenfranchisement laws.
Acknowledgments
The authors would like to thank the reviewers for their invaluable and insightful comments and critiques. In addition, the authors would like to thank Avi Brisman, Rolando del Carmen, Kevin Steinmetz, Gary Potter, and Mark Konty for their comments and suggestions.

Declaration of Conflicting Interests
The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding
The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes
2. The dissenting Judges in Muntaqim use similar arguments as the majority opinions in Farrakhan. This dynamic is also seen in the relationship between the dissent in Farrakhan and the majority opinion in Muntaqim.

References


Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003).


Muntaqim v. Coombe, 396 F.3d 95, 95 (2d Cir. 2004).


Van Alstyne, W. W. (1965). The Fourteenth Amendment, the “right” to vote, and understanding of the thirty-ninth Congress. *Supreme Court Review, 84*, 33–86.


Wesley v. Collins, 791 F.2s 1255, 1262 (6th Cir. 1986).


**Bios**

**Brian P. Schaefer** is a doctoral student in Justice Administration at the University of Louisville. His research interests include critical criminology and social responses to marginalized populations.

**Peter B. Kraska** is a professor and Chair of Graduate Studies and Research in the School of Justice at Eastern Kentucky University. He is the author of Criminal Justice and Criminology Research Methods (2012), Theorizing Criminal Justice: Eight Essential Orientations (2010), Militarizing The American Criminal Justice System (2001), and numerous articles published in journals such as Social Problems, Justice Quarterly, and Policing and Society. His recent academic interests include mixed methods research, criminal justice theory, and various trends associated with late modernity.