

# Preserving Dignity: Rethinking Voting Rights for U.S. Prisoners, Lessons from South Africa

by

Kamesha Spates, Ph.D.  
Assistant Professor, Department of Sociology  
Kent State University

&

Carlton Mathis, Ph.D.  
Assistant Professor, Department of Sociology  
Kent State University

## Abstract

Researchers recognize that voting bans placed upon individuals with felony convictions prove troubling for any democratic society. In the United States, an estimated 5.85 million people are currently ineligible to vote under these statutes. In light of the fact that South Africa recently extended voting rights to incarcerated individuals, some researchers are revisiting the notion of voting rights for incarcerated individuals in the U.S. This article provides a critique of the process of mass incarceration and its impact on peoples of African descent in the United States and throughout the Diaspora. This article emphasizes how mass incarceration has exacerbated social inequality. Using Critical Race Theory, this article provides a theoretical analysis of the ways in which voting bans, disproportionately placed on Blacks and Latinos, have served as a means to universally silence entire segments of the population. The authors' conclude by discussing why it is time for the U.S. to reevaluate voting bans on incarcerated individuals, how we can apply what we have learned from South Africa's discourse on "dignity" to the current situation in the U.S., and implications of overturning such laws on U.S. society.

**Keywords:** Black; African Americans; Critical Race Theory; Felon Disenfranchisement; Mass Incarceration.

## **Introduction**

The purpose of this article is to demonstrate how voting restrictions have impacted people of African descent in the United States and throughout the Diaspora. We begin with a discussion of Critical Race Theory (CRT). Taking a critical perspective, we illustrate how through the guise of legal neutrality, mass incarceration has largely resulted in the silencing of entire segments of the population. This in-depth analysis describes the laws and policies that have created structural barriers for an ever-increasing population of individuals with a history of incarceration.

We then proceed to review felon disenfranchisement laws in South Africa. Although there are similarities between some of the structural barriers encountered by individuals in both countries, one drastic difference is the successful revision of policy that allows incarcerated South Africans to vote. In this article we draw on the discourse on dignity as it is applied in the constitution of South Africa. We seek to highlight how, in light of the history of apartheid, this spirit of dignity and the inclusiveness it implies helps maintain the value of the incarcerated population. Ultimately, it is time to apply these lessons learned from the South African context to reevaluate voting restrictions in the U.S.

## **Critical Race Theory**

Critical Race Theory emerged in the mid-1980s in response to discontent of legal scholars of color with the neglect of Critical Legal Studies to bring about progressive racial reform. Fundamental principles of CRT stem from the legal scholarship of Derrick Bell. Bell's work, among others, argues that the "White experience," by way of the dominant narratives, gets circulated as truthfulness, which is not only erroneous but oppressive to non-Whites (Bell, 2000).

They lack people of color's voices and perspectives, causing scholars of color to question the intent and accuracy of the narrative. CRT scholars advocate for the importance of revealing multiple viewpoints, to emphasize the side of the story that rarely gets told. Although the narrative of minorities is and will be different from that of the dominant narrative, in order to ensure that the presentation is comprehensive people of color should be at the center of contemporary racial discourse (West, Crenshaw, Gotanda, Peller, & Thomas, 1995).

Central arguments of CRT posit that: intersecting notions of race, power, and law contribute to widespread marginalization of people of color; racism is a fundamental aspect of U.S. society that generates psychological and material privileges for Whites, and because racism benefits elite Whites materially and working class Whites psychologically, large segments of the White population have no desire to eradicate it; and notions of rationality, objective truth, and judicial neutrality serve as yet another medium for Whites to spread dominant narratives (Delgado & Stefancic, 2013; West et al., 1995).

Accordingly, CRT provides scholars with trans-disciplinary theoretical and methodological approaches to challenge notions of White privilege and racial hierarchies, while focusing particularly on the ways in which laws serve to maintain existing social order.

CRT contributes an additional take on the ways in which we define race. Theorists claim not only that race is socially constructed, but also legally constructed. Ian Haney Lopez, in *White by Law*, recounts the ways in which race and legality merged several centuries ago (Haney-López, 1996). In *Dred Scott v. Sandford*, the United States Supreme Court (USSC) decided that African Americans, enslaved or free, could not be granted U.S. citizenship. It was not until the Naturalization Act of 1870 that African Americans were granted birthright citizenship ("*Dred Scott v. Sandford*," 1856).

Racial prerequisite cases (e.g., *Dred Scott*, *Ozawa*) set the stage for naturalization guidelines ("*Dred Scott v. Sandford*," 1856; "*Ozawa v. United States*," 1922). Prerequisite cases were cases whereby the judicial system determined citizenship eligibility. These decisions were primarily based on skin color (i.e., race) and cultural and intellectual fitness. Consequently, prerequisite cases set the stage for the legal construction of race. The courts relied on four different legal rationales to substantiate who was White or who was Black: common knowledge; scientific rationale; Congressional intent; and legal precedent (Haney-López, 1994). Each of the aforementioned rationales was based exclusively on White men's opinion of non-Whites. They turned to scientific claims to validate their opinions and when science or previous legal decisions failed to protect the boundaries of Whiteness they would then rely on notions of "common knowledge" (i.e., whatever White men thought) (Haney-López, 1996).

Naturalization rights for Hispanics, Asians, and other groups of color were not bestowed until much later. It was not until the Immigration and Nationality Act of 1952 (also known as the McCarran-Walter Act) that the U.S. rescinded racial restrictions on immigrant populations. Lopez's work brings attention to the role that legal actors played in the fabrication of the races. Additionally, prerequisite cases operationalized meanings of non-White, yet deliberately failed to establish meanings of Whiteness. On the whole, Lopez establishes that race, racism, and American law emerged concurrently (Haney-López, 1994; 1996).

## **A Critique of "Justice"**

For much of the twentieth century, equal protection under the law was nothing more than an ideal. For centuries, people of color faced a justice system that included harsher sentences for people of color, all-White juries, and excessive cruelty at the hands of law enforcement. And so, non-Whites faced a different reality within the legal system compared to Whites (Fukurai, Butler, & Krooth, 1993).

Gunnar Myrdal's examination of the southern White court system revealed that African American offenders who victimized Whites received the strictest penalties (Myrdal, 1944). This can particularly be seen in Pre-Civil War statutes on sexual assault. The courts employed race-specific doctrines for Black defendants accused of raping White women. For instance, the Virginia Code of 1819 instituted a penalty of death for the rape or attempted rape of a White woman by an enslaved person; whereas if the offender was White, he faced 10-21 year sentence. On the other hand, the penalty for the rape or attempted rape of a Black woman by a White man was 1-7 years in prison. Similarly, in accordance to with Kansas Compilation of 1855, a Black man convicted of raping a White woman was to be castrated, while a White man convicted of raping a White woman could receive a maximum penalty of 5 years in prison (Walker, Spohn, & Delone, 2012).

The legacy of disparate penalties for Blacks and Whites remains well intact. Scholars Gary LaFree and Anthony Walsh offer up evidence that suggests African American men convicted of sexually assaulting White women are more likely to serve prison time than any other offenders in Indianapolis and in a metropolitan Ohio county (Kansal, 2005; LaFree, 1989; Walsh, 1987). Research suggests that, even though African Americans make up about 13 percent of the general population, they have been sentenced to death and executed at disproportionately higher rates than other racial groups (Baldus, Pulaski, & Woodworth, 1983; Death Penalty Information Center, 2014; Ogletree Jr, 2002). A closer look at the 2014 racial composition of death row inmates shows that 1,284 (41.8 percent) were African American, 388 (12.6 percent) were Hispanic, and 1,323 (43.1 percent) were White. In all, 467 African Americans (34.4 percent) have been executed in the United States since 1976. There have been 290 persons executed in the United States for interracial murders since 1976; 270 of these cases consisted of a Black defendant and a White victim (NAACP Legal Defense Fund, Winter 2014).

Although overt discrimination in the U.S. legal system has declined, Blacks and Whites continue to hold vastly different viewpoints regarding the fairness of the U.S. justice system. In a 2013 *Washington Post* interview, authors' John Hurwitz and Mark Peffley discussed differences in how Blacks and Whites perceive the criminal justice system. They conclude because Blacks and Whites have had two vastly different sets of experiences with the criminal justice system, they interpret the legal system differently (Sides, 2013).

According to a 2013 Gallup poll, almost one in four Black men between the ages of 18 and 35 believe that they have been treated unfairly by the police within the last 30 days (Newport, 2013). Similarly, Chaney and Robertson (2013) examine public perception of police officers alongside the ways in which race and racism shape these conversations. They found that public perceptions of the police remain largely negative. Consequently, a large number of participants articulated notions of suspicion, mistrust, and concerns over police brutality as worthy of discussion (Chaney & Robertson, 2013).

Research continues to validate African Americans' perceptions of an unjust justice system. To this point, Ronald Weitzer finds that the two main issues troubling African Americans today are "under-policing and abusive policing" (Weitzer, 2005). Additionally, studies continue to show that African Americans, when compared to their White counterparts, are more likely to be stopped, arrested, and questioned, and they are also more likely to be searched and frisked. A large body of research assesses the effects of race at virtually every stage of the criminal justice system (Cole, 2000; Joseph, 2003; Rosich, 2007; Walker et al., 2012).

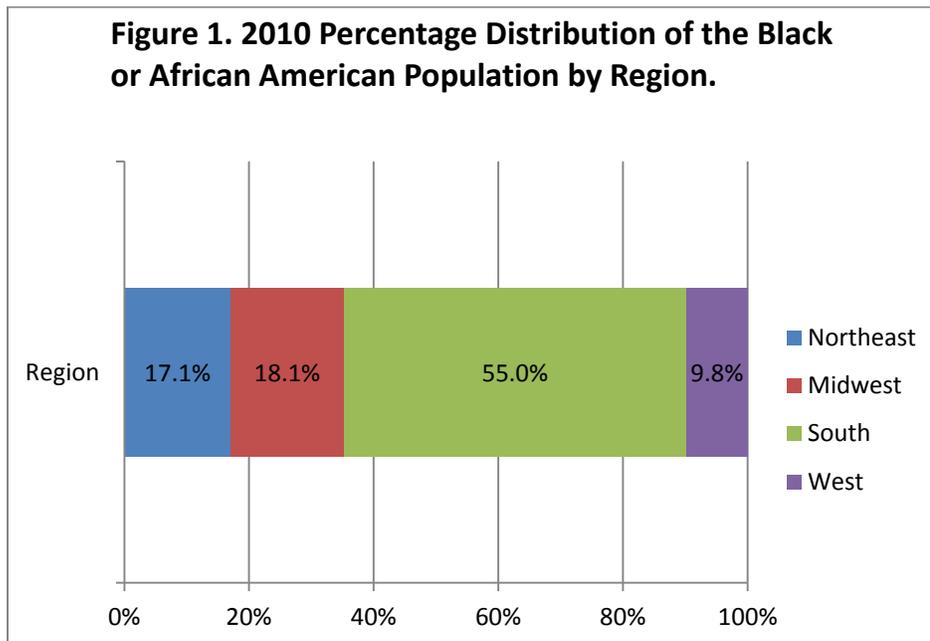
Contemporary discourse claims that the application of law is objective and race-neutral. While matters have improved, African Americans disproportionately continue to face contemporary challenges. CRT scholars argue that we must pay close attention to the multiple areas built into the law where discretion is not only encouraged but expected (Smith & Levinson, 2011). For example, decisions made by officers of whom to ticket or give verbal warnings, the role of prosecutorial discretion, and peremptory challenges used during the jury selection process are all seemingly made within the context of a legally colorblind framework.

Although the primary objective of the U.S. legal system is objectivity and colorblindness, CRT has long established that this objective is merely a myth. CRT proves that we have yet to reach a place where all Americans have an equal chance of experiencing colorblind justice. Instead, CRT scholars argue that our existing legal structure plays a central role in perpetuating and maintaining racial hierarchies. And thus, every stage of this process is deeply embedded with racial, gender, and class-based assumptions about individuals. Though legal discourse calls for colorblindness, we instead find a trail of policies and practices with racist outcomes.

## **Blacks in the U.S.**

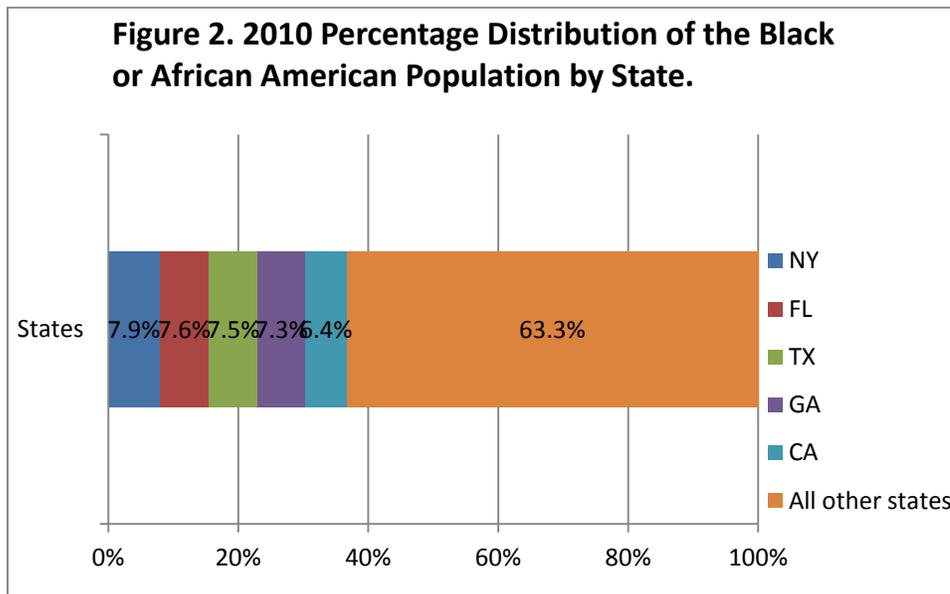
We have established thus far that people of color are disproportionately sentenced more harshly than their White counterparts. Let us take a closer look at the demographic breakdown of Black Americans today. According to Census reports for the year 2010, 12.9 percent of the U.S. population identified as African American. Within this demographic population, African American males represented 6.1 percent of the total African American population (August, 2005; McKinnon & Bennett, 2005; Rastogi, Johnson, Hoeffel, & Drewery, 2011). Figure 1 summarizes the percentage distribution of those that identified as Black or African American by region (Rastogi et al., 2011). The Census 2010 reports that the majority (55 percent) of Blacks resided in the south (Rastogi et al., 2011), whereas the least (9.8 percent) number of Blacks resided in the western region of the country.

State-level estimates in Census 2010 show that the least number of Blacks resided in South Dakota, where Blacks accounted for 1.8 percent of the total population; New Hampshire, where Blacks accounted for 1.7 percent of the total population; Maine, Utah, and North Dakota, where Blacks accounted for 1.6 percent of the total population; Vermont, where Blacks accounted for 1.5 percent of the total population; Wyoming, where Blacks accounted for 1.3 percent of the total population; Idaho, where Blacks accounted for 1.0 percent of the total population; and Montana, with the smallest population of Blacks in the U.S., where Blacks accounted for only 0.8 percent of the total population.



Note: Percentages may not add to 100.0 due to rounding.

Source: U.S. Census Bureau, 2010 Census Redistricting Data (Public Law 94-171)



*Note: Percentages may not add to 100.0 due to rounding.*

*Source: U.S. Census Bureau, 2010 Census Redistricting Data (Public Law 94-171)*

*Figure 2 highlights the states with the largest distribution of Blacks (Rastogi et al., 2011).*

In 2010, 7.9 percent lived in New York (3.5 million); 7.6 percent lived in Florida (3.2 million); 7.5 percent lived in Texas (3.2 million); 7.3 percent lived in Georgia (3.1 million); 6.4 percent lived in California (2.7 million); followed by North Carolina (2.2 million), Illinois (2.0 million), Maryland (1.8 million), Virginia (1.7 million), and Ohio (1.5 million).

## **Racial Disparities within the Criminal Justice System**

Since 1980, the U.S. prison population has increased by some 300 percent. While Blacks constitute only 13 percent of the overall US population, estimates reveal that African Americans account for nearly 1 million of the nearly 2.3 million total prison population (NAACP, 2014). Likewise, by the end of 2010, Black men were incarcerated at a rate seven times higher than their White counterparts (Guerino, Harrison, & Sabol, 2011).

In recent years, policy makers have taken notice of the substantial number of African American men serving time behind bars. In this manner, law professor David Cole examines widespread race and class discrepancies that exist within the national criminal justice system (Cole, 1999). In his book, *No Equal Justice* (1999), he states:

These double standards are not, of course, explicit; on the face of it, the criminal law is color-blind and class-blind. But in a sense, this only makes the problem worse. The rhetoric of the criminal justice system sends the message that our society carefully protects everyone's constitutional rights, but in practice the rules assure that law enforcement prerogatives will generally prevail over the rights of minorities and the poor. By affording criminal suspects substantial constitutional rights in theory, the Supreme Court validates the results of the criminal justice system as fair. That formal fairness obscures the systemic concerns that ought to be raised by the fact that the prison population is overwhelmingly poor and disproportionately black (pp. 8-9).

To make matters worse, statistics divulge a stark reality for young black males. One in three Black males born today can expect to serve prison time in their lifetimes, compared to one in six Latinos, and one and seventeen White males (Bonczar, 2003; Clear, Reisig, & Cole, 2012). Based on research conducted by Bruce Western and Becky Petit, approximately 1 in 28 U.S. children had a parent in jail or prison (The Pew Charitable Trusts, 2010). Further breakdowns by race suggest that almost one in nine (11.4 percent) Black children had a mother or father in jail or prison, in comparison to 1 in 28 (3.5 percent) Hispanic children, and 1 in 57 (1.8 percent) White children (The Pew Charitable Trusts, 2010).

Policy makers have taken note of the effects of incarceration beyond the adult offender. In 2009, U.S. Attorney General Eric Holder acknowledged the need to address intergenerational effects of having a parent in jail or prison. At the Fatherhood Town Hall meeting held at Morehouse College, he stated, "People sometimes make bad choices. As a result, they end up in prison or jail. But we can't permit incarceration of a parent to punish an entire family" (Holder, 2009). Additionally, we now know that children who have a parent serving time in prison are more likely to be suspended, expelled, or drop out from school; more likely to partake in delinquent behaviors; and subsequently more likely to serve prison time themselves (Schirmer, Nellis, & Mauer, 2009).

The United States "get tough on crime" philosophy has resulted in the most sizable prison population in the world. Although over 2 million people are currently serving time behind bars, estimates show that over 90 percent of offenders will be released from prison at some point (Schmitt & Warner, 2010). Upon their release, ex-offenders encounter restrictions that are nearly as harsh as those of their prison-serving counterparts. For an example, we turn to a blog discussion posted on Professor's Chris Uggen's website. In response to Dr. Uggen's post on ex-felon employment and expungement blogger, ex-con Pete C. describes the challenges of life after incarceration:

Dear Dr. Uggen: I am a 48 yr old with a felony conviction (escape) in GA. I have a substantial criminal record (drug and property crimes) dating back to the 1970's due to a drug addiction that began as a teenager. Despite my addiction I was able to complete undergraduate school and attended law school before my disease overtook my life entirely. I entered treatment at age 30 and, with the help of support groups, was able to earn an MBA by age 32. I was able to find a good job at IBM but was laid off due to corporate down-sizing in 1998. I was convicted of felony escape in GA as a result of leaving a half-way house type of institution. I was sentenced to this institution for a misdemeanor theft conviction resulting from my having relapsed into my addiction. I served 20 months in a GA prison and have not been able to find sustainable (above-poverty level) employment since my release. In many ways my sentence (5 yrs.) has become a de facto "life sentence" due to the stigma of my conviction. It will probably shorten my life due to the fact that I cannot obtain affordable health insurance from an employer. One could even say that, in that respect, I have been given a "death sentence" of sorts. I have tried in vain to secure employment here in Augusta, GA but even the most menial positions in the labor market have rejected me. It is a very difficult existence (Pete C, 2005) (Pete C, 2005).

Pete C.'s depiction of his life mirrors that of other former felons. Ex-offenders in the U.S. are sentenced to a life of second-class citizenship. They face structural discrimination in employment and housing, while drug felons are also ineligible for food stamps and public housing, and in some cases lose their driving privileges (Brewer & Heitzag, 2008).

Given that we incarcerate more people than any other country, the U.S. is home to the largest number of disenfranchised felons (both incarcerated and non-incarcerated) and ex-felons in the world (Jeff Manza & Uggen, 2004). As a result, disenfranchisement laws have received worldwide attention. Researchers acknowledge that voting bans placed upon individuals with felony convictions prove troubling for any democratic society (Uggen, Manza, & Thompson, 2006). Now some 50 years after the passing of sweeping civil rights legislation, many are beginning to question the harmful impact of voting bans on our society. In a recent nationwide poll, conducted to gauge public attitudes about felon disenfranchisement laws in the U.S., findings reveal that between 60 and 68 percent of respondents believed that individuals under correctional supervision (i.e., probation or parole) should be allowed to vote. Additionally, almost one-third of respondents believed that incarcerated individuals should have their voting privileges reinstated (Jeff Manza, Brooks, & Uggen, 2004). Perhaps it is time to revisit the driving notions behind these policies.

## Disenfranchisement Among African American Men

*The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete.*

—Chief Justice Beverly McLachlin ("*Sauvé v. Canada*," 2002)

A felony conviction in the U.S. results in an immediate forfeiture of civil rights. Many of these individuals lose the right to serve on juries, hold public office, obtain and hold state licenses for certain jobs, and vote. Voting differentiates insiders from outsiders, the voiced from the voiceless. From the start of our country's history, participation in a democratic society has been coveted. Inalienable rights allow individuals to feel a sense of responsibility not only to self, but also to the collective community. Ultimately, the ability to partake in the decision making process results in a political agenda that may or may not speak to the greater good of the people. Although in theory the democratic process was created to allow everyone in the country an outlet to voice their concerns, in practice we face a very different reality (Jeff Manza & Uggen, 2004; Uggen et al., 2006).

Because the U.S. Constitution did not explicitly state which "citizen" could vote, states were allowed to institute policies based on their interpretation of one's Constitutional rights. What was clear was that our American forefathers did not intend to grant African Americans citizenship. When the Constitution was first drafted, African Americans were considered three-fifths of a person (Feagin, 2014). Early on in our history, White males—particularly those who were land owners and/or reported taxable income—were the only individuals eligible to participate in the democratic process. Consequently, poor White men, White women, and non-Whites were excluded from participating in the democratic process.

The U.S. attempted to rectify its exclusive voting policies at varying points in its history. In 1868, the 14<sup>th</sup> Amendment granted voting rights to all naturalized citizens. In 1870, the 15<sup>th</sup> Amendment granted voting rights to individuals regardless of "race, color, or previous conditions of servitude." Several decades later, in 1920, the 19<sup>th</sup> Amendment solidified women's right to vote by stating "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex" (*U.S. Constitution Amendment XIX*, 1920).

In spite of the aforementioned Constitutional amendments, many southern states established literacy tests (1890s-1960s), religious tests, poll taxes (1870s-1960s), and grandfather clauses (1898-1915) to disenfranchise entire groups of people. These policies overtly targeted non-White citizens, Native Americans, and other “undesirable” individuals. It was not until the passage of the federal government’s Voting Rights Act of 1965 that these policies were formally outlawed (Feagin, 2014).

We have established that minority groups’ voting rights were not equally protected under the law until the 1960s. In view of that, only during the last 50 years have African Americans been given the opportunity to fully contribute within the democratic process. With that said, contemporary felon disenfranchisement laws have produced similar social consequences to that of their racist predecessors. Yet the Constitutional rights of incarcerated and formerly incarcerated populations have gone largely neglected (Spates & Royster, 2011).

Michelle Alexander suggests that the “death of Jim Crow” was immediately followed by the “Birth of Mass Incarceration” (Alexander, 2010). Alexander expounds on this point, as she states:

For more than a decade—from the mid-1950’s and late 1960’s—conservatives systematically and strategically linked opposition to civil rights legislation to calls for law and order, arguing that Martin Luther King Jr.’s philosophy of civil disobedience was a leading cause of crime. Civil rights protests were frequently depicted as criminal rather than political in nature, and federal courts were accused of excessive ‘lenience’ toward lawlessness, thereby contributing to the spread of crime.... Some segregationists went further, insisting that integrating causes crime, citing lower crime rates in Southern states as evidence that segregation was necessary. (pp. 40-41)

Alexander (2010) highlights the fact that after the passage of the Civil Rights Act segregationists deliberately detached from their overtly racist discourse by embracing a more colorblind rhetoric approach referred to as “get tough on crime.” Alexander goes on to say:

After the passage of the Civil Rights Act, the public debate shifted focus from segregation to crime. The battle lines, however, remained largely the same. Positions taken on crime policies typically cohered along lines of racial ideology. (p. 42)

In essence, Alexander’s (2010) analysis substantiates the claim that the U.S. criminal justice system has recreated the racial caste system that was allegedly eradicated through the passing of civil rights legislation.

## **Voting Bans on Americans with Felony Convictions**

According to state-level Constitutional provisions, and voting laws in all but two states, incarcerated felons are not allowed to vote (The Sentencing Project, 2014). Similar laws apply in varying degrees to convicted felons on probation, parole, and after release from prison. Laws permanently disenfranchise felons in at least 13 states. Though yet again, these laws disproportionately impact the Black community, which feels the impact of disenfranchisement. The statistics are indeed disturbing. Fourteen percent of African American men are ineligible to vote because of criminal convictions (Manza & Uggen, 2004). In seven states, one in four Black men is permanently barred from voting because of criminal records (Pager, 2007).

*Table 1* summarizes disenfranchisement laws by state. Maine and Vermont are the only states that allow incarcerated felons to vote, while the remaining 48 states ban voting among incarcerated felons. Four states permanently disenfranchise all of those with felony convictions (Iowa, Kentucky, Virginia, and Florida); whereas eight other states disenfranchise those with certain types of felony convictions and/or accept applications to reinstate rights following the specified waiting period for certain offenses, such as 5 years in Wyoming and 2 years in Nebraska (The Sentencing Project, 2014).

**Table 1. Disenfranchisement Categories under State Laws**

No Restrictions	Inmates Only	Inmates & Parolees	Inmates, Parolees, & Probationers	Inmates, Parolees, Probationers, & Ex-felons
Maine	Hawaii	California	Alabama <sup>1</sup>	Florida
Vermont	Illinois	Colorado	Alaska	Iowa
	Indiana	Connecticut	Arizona <sup>1</sup>	Kentucky
	Massachusetts	New York	Arkansas*	Virginia
	Michigan		Delaware <sup>1</sup>	
	Montana		Georgia	
	New Hampshire		Idaho	
	North Dakota		Kansas	
	Ohio		Kentucky	
	Oregon		Louisiana	
	Pennsylvania		Maryland	
	Rhode Island		Minnesota	
	Utah		Mississippi	
			Missouri	
			Nebraska <sup>1</sup>	
			Nevada <sup>1</sup>	
			New Jersey	
			New Mexico	
			North Carolina	
			Oklahoma	
			South Carolina	
			South Dakota	
			Tennessee <sup>1</sup>	
			Texas	
			Washington	
			West Virginia	
			Wisconsin	
			Wyoming <sup>1</sup>	

Failure to satisfy obligations associated with convictions may result in post-sentence loss of voting rights. Source: The Sentencing Project, April 2014 (Felony Disenfranchisement in the United States).

In 1976, there were 1.2 million people living in the U.S. that had lost their voting privileges due to felony convictions. As of April of 2014, nearly 6 million Americans have lost their voting privileges as a consequence of these laws (The Sentencing Project, 2014). The majority of felons and ex-cons blocked from voting reside in one of six southern states—Florida, Alabama, Mississippi, Kentucky, Virginia, and Tennessee. For example, there are more than 3 million persons barred from the voting rolls in these states. The end result is that people of color are disproportionately affected by these laws. Nationwide estimates reveal that 1 in 13 African American males of voting age are unable to vote due to their ex-con status.

In a recent Huffington Post article, ex-felon Eric Bates expresses his discontent with the widespread lasting effects of his felony conviction (Lee, 2012). Bates, a 53-year-old unemployed engineer, served a 14-month prison sentence for driving with a suspended license on multiple occasions during the late 1990s. He was released from prison in 2008. Bates returned home hoping to put an end to his legal issues only to find out that many of his rights had not been reinstated. In reference to this matter he states:

I owned up to my crime. I served my time and I just want my rights back. I want to participate. But it's just as well as if I murdered somebody. It's a life sentence....not being able to vote on top of everything else, it makes me kind of feel like a second-class citizen. I'm not the only one either. There are thousands and thousands of people just like me (Lee, 2012, para. 4).

Eric Bates' story highlights a pervasive issue among felons and ex-felons. Although each state has a formal restoration process, relatively few ex-offenders ever have their rights reinstated due to burdensome processes. This means that despite significant efforts to overcome racial discrimination, we have maintained an underclass in our society. This continuous stigmatization of felons silences them indefinitely. Rather than being active participants in society they exist on the margins, as if they are not part of the societal landscape. Disqualifying them from choosing whether or not to vote communicates the idea that they are not needed in our democracy.

## **Felon Disenfranchisement Laws in the U.S.: A Legal Overview**

While U.S. disenfranchisement laws are the harshest in the world, U.S. courts have consistently rejected appeals to overturn the legal statutes that disenfranchise felons and ex-felons. Perhaps the most noteworthy case on the subject is *Richardson v. Ramirez*, in which plaintiffs fought to have their voting rights restored after they completed the terms of their felony sentences ("*Richardson v. Ramirez*," 1974).

Initially California electoral officials reinstated voting rights of Abran Ramirez, Albert Lee, and Larry Gill but due to the fact that the decision would have affected a significant portion of the state's felons, the case was then sent to the California Supreme Court—who sided with electoral officials. Ultimately the United States Supreme Court heard the case and overturned the previous local and state level rulings, deciding in 1974 that California's disenfranchisement clause was Constitutional.

Scholars have argued that the USSC misinterpreted Section 2 of the 14<sup>th</sup> Amendment as it relates to disenfranchised felons (Schrader, 2009). First, it has been declared that Section 2 of the 14<sup>th</sup> Amendment never intended for states to disenfranchise felons, especially to the extent that we see today. Succeeding Constitutional amendments have essentially annulled Section 2 of the 14<sup>th</sup> Amendment as it relates to disenfranchised felons. Accordingly, Schrader (2009) states, "Taken together, these arguments suggest that the Court ought to revisit its application of the Fourteenth Amendment in the context of felon disenfranchisement" (p. 1287).

Others have challenged the disparate impact that disenfranchisement laws have on African Americans. In the case of the City of Mobile, *Alabama v. Bolden*, Bolden and others filed a class action lawsuit in federal court against city electorates claiming that the city's practices for establishing electoral districts unjustly diminished the "Negro" vote ("City of Mobile, Alabama v. Bolden," 1980). The USSC ruled that these practices were in violation of the 14<sup>th</sup> and 15<sup>th</sup> Amendments. Ultimately, this case set legal precedence for forthcoming cases when challenging disenfranchisement laws on the basis of racial intent.

In the case of *Hunter v. Underwood*, two appellees filed suit alleging that Section 182 (felon disenfranchisement laws) of Alabama's constitution was a violation of the equal protection clause ("Hunter v. Underwood," 1985). Victor Underwood, a White man, and Carmen Edwards, an African American woman, were barred from voting for "presenting a worthless check ... a crime involving moral turpitude," which was deemed a misdemeanor at the time. The premise of their argument was that the law adopted in 1901 was initially implemented as a sanction for crimes most frequently committed by Blacks. In 1985, the USSC ruled that this law was in fact passed with the intent to target and disenfranchise African Americans and it was thus a violation of the equal protection clause.

*Farrakhan v. Washington* is yet another example of the discontent for contemporary disenfranchisement laws. Six convicted felons residing in the state of Washington filed suit arguing that the felon disenfranchisement laws have had racially disparate consequences, which are in and of themselves unconstitutional as they relate to Section 2 of the Voting Rights Act ("Farrakhan v. Washington," 2003).

The 9th Circuit U.S. Court of Appeals decided that their voting rights had not been restored because they had yet to fulfill the conditions of their sentence, and thus the case was sent back to the district court to decide. Before doing so, the 9<sup>th</sup> Circuit U.S. Court of Appeals did establish that Section 2 of the Voting Rights Act was applicable to felons, but went on to say that “the district court misconstrued the causation requirement of a Section 2 analysis” (p. 7).

The vast majority of the discourse surrounding disenfranchised felons focuses exclusively on the rights of felons following their release. Yet there are two states that permit voting among currently incarcerated individuals. Both Maine and Vermont allow incarcerated felons to vote by way of absentee ballot, and ex-felons are allowed to vote while under correctional supervision (i.e., parole, probation, etc.). Although Maine and Vermont have been praised for their progressive policies on voting, very few African Americans reside in these states to begin with. For instance, African Americans constitute over a third of the 5.85 million banned from voting, yet they account for only 1.6 percent (21,764) of Maine’s total population and 1.5 percent (9,343) of Vermont’s total population (Rastogi et al., 2011).

Despite the courts’ failures to reverse previous rulings, the damaging effects of felon disenfranchisement laws are undeniable. Could our forefathers have anticipated the extent of the damage these policies have on people of color and the poor? A closer look at history yields a daunting answer. We see that middle and upper class citizens, which for much of the last two centuries meant White males, were deliberate about constructing notions of a “citizen,” of “Whiteness,” and of “Blackness.” Law makers of the past targeted the Black vote through a series of facetious policies, at times offering up overtly racist rationales or a more colorblind rationale (Keyssar, 2009; Shapiro, 1993). Either way, people of color feel disregard and frustration with these current legal procedures.

## **Felon Disenfranchisement Laws in South Africa: A Legal Overview**

The transition to a democratic, post-apartheid South Africa was undertaken with great anticipation. The first democratic election held in 1994 was followed by a series of legal challenges that included the adoption of a new constitution. While reforms are being made to the criminal justice system, post-apartheid South Africans with criminal records encounter many of the reentry barriers faced by African Americans in the U.S. The most significant of these barriers are restrictions to their employment (Pinard, 2010). Despite significant reentry barriers, which correspond with high rates of recidivism, South Africans with criminal records maintain the ability to vote. More importantly, that right is understood to be a human right.

The discourse on dignity is a clear response to centuries of colonial rule and racial discrimination. Chief Justice Arthur Chaskalson describes the values set forth in the first section of the new South African constitution, which include “human dignity, the achievement of equality, and the advancement of human rights and freedoms” (Chaskalson 2010, p. 1377). While this document represented a positive step toward undoing years of social, political, and economic domination there were still obstacles to be overcome.

Leading up to the first democratic election, the South African Prisoners’ Organization for Human Rights (SAPHOR) faced a pivotal decision. They were charged with raising the issue of whether prisoners would be allowed to vote. Initially, prisoners were to be excluded from the vote. However, SAPHOR took advantage of the opportunity to mobilize current prisoners and align them with major political parties. This resulted in a series of protests known as “rolling mass action” and eventually led to a change in the law (Van Zyl Smit, 1998). The initial amendment to the Electoral Act of 1993 conditionally allowed prisoners to vote. Under this ruling, prisoners convicted of murder, robbery with aggravated circumstances, and rape were excluded.

In 2004, the Constitutional Court, in the *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and two convicted offenders* who were incarcerated at the time, issued a further provision to the law. The court found it to be unconstitutional to deprive prisoners serving a sentence of imprisonment without the option of paying a fine the right to register and vote in upcoming elections (Pinard, 2010). In his statement representing the majority, Chief Justice Chaskalson (The Sentencing Project, 2014) describes the importance of such a ruling for the functioning of a democracy. He states:

Given the history of disenfranchisement in our country, the right to vote occupies a special place in our democracy. Any limitation of this right must be supported by clear and convincing reasons. If the government seeks to disenfranchise a group of its citizens it must place sufficient information before the Court demonstrating what purpose the disenfranchisement is intended to serve and to evaluate the policy considerations on which such decision was based (p. 1).

This statement demonstrates a drastic departure from how democracy is understood in the United States. The right to vote is understood as a basic right of all citizens, rather than a privilege afforded those without criminal convictions. This distinction has important ramifications for how prisoners view their role in a society.

## **Lessons from South Africa**

The relationship between race and collateral consequences is made more apparent when rates of incarceration in the United States are compared to those of South Africa. Similar to the United States, South Africa has a history of employing criminal justice policies that disproportionately impact racial minorities and indigenous peoples. Unlike the United States, South Africa recognizes the historic and contemporary discrimination of its criminal justice system and actively seeks to lessen the disparity. This is most apparent in the realm of voting rights.

The United States adopts a much more narrow interpretation of the dignity interests of currently and formerly incarcerated persons. Perhaps it is time to follow the example of South Africa, where a more encompassing interpretation of the dignity of incarcerated persons is adopted. Framing voting rights as a basic human right protects the maintenance of dignity. This exposes a basic dichotomy in the United States between privileges and basic rights. Were the United States to follow suit and absolve this distinction it would lessen the sting of mass incarceration by lifting one of the many barriers that continues to differentiate those with criminal records from those without.

## **Discussion**

Critical Race Theory is an appropriate theoretical lens by which to examine the social and political implications of felon disenfranchisement laws. With the exception of Maine and Vermont, states restrict the voting rights of felons in some capacity or another. We use CRT to call attention to the deliberate ways in which dominant groups have used the legal system to maintain racial hierarchies through political domination. West et al. (1995) state that “the law is central in constructing the rules of the game, selecting eligible players, and choosing the playing field” ( p. xxv). Therefore, dominant groups solely police eligibility requirements of Whiteness, citizenship, and basic human rights.

Many scholars suggest that felon disenfranchisement laws were a mere extension of Jim Crow laws that targeted African Americans for centuries (Alexander, 2010; (Bentele & O'Brien, 2013; Jeff Manza & Uggen, 2006). After the 15<sup>th</sup> Amendment granted Blacks the right to vote, disenfranchisement laws were created to suppress African American voting in the south, where the vast majority of Black Americans have always resided. The American Civil Liberties Union voting rights program director, Laughlin McDonald, expressed to the Huffington Post that “There’s no question this has a basis in race discrimination.... It’s part of the history of the racial minorities in the South. The Southern states adopted a whole variety of measures to take away the right to vote after Reconstruction” (McLaughlin, 2012).

Our forefathers wrote the U.S. Constitution with a narrow scope of whom they deemed “worthy” of having rights. We argue that it is time for the U.S. to revisit felon disenfranchisement laws. This will require policy makers to address the disparate impacts that these laws have had on communities of color. A look at the challenges that felons face in obtaining employment, transportation, and housing are significant. These barriers coupled with voting bans make it difficult for ex-offenders to reintegrate back into society.

## References

- Alexander, M. (2010). *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*: New Press.
- Baldus, D., Pulaski, C., & Woodworth, G. (1983). Comparative of Death Sentences: An Empirical Study of the Georgia Experience. *The Journal of Criminal Law and Criminology*, 74(3), 661-753.
- Bell, D. A. (2000). Race, racism, and American law.
- Bentele, K. G., & O'Brien, E. E. (2013). Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies. *Perspectives on Politics*, 11(4), 1088-1116. doi: 10.1017/s1537592713002843
- Bonczar, T. (2003). Prevalence of Imprisonment in the U.S. Population, 1974-2001. In B. o. J. Statistics (Ed.). Washington D.C.
- Brewer, R. M., & Heitzag, N. A. (2008). The racialization of crime and punishment: Criminal justice, color-blind racism, and the political economy of the prison industrial complex. *American Behavioral Scientist*, 51, 625-644.
- Chaney, C., & Robertson, R. V. (2013). Racism and Police Brutality in America. *Journal of African American Studies*, 17, 480-505.
- City of Mobile, Alabama v. Bolden, 446 55 (1980).
- Clear, T., Reisig, M., & Cole, G. (2012). *American Corrections*: Cengage Learning.
- Cole, D. (1999). *No Equal Justice: Race and Class in the American Criminal Justice System*. New York: The New Press.
- Cole, D. (2000). Race, Class and Criminal Prosecutions: The Supreme Court’s Role in Targeting Minorities *Guild Prac*, 57, 38-40.
- Death Penalty Information Center. (2014). National Statistics on the Death Penalty and Race. Retrieved June 30, 2014, from <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976>
- Delgado, R., & Stefancic, J. (2013). *Critical Race Theory: The Cutting Edge*: Temple University Press.
- Dred Scott v. Sandford, 60 393 (U.S. Supreme Court 1856).
- Farrakhan v. Washington, 35032 1 (2003).

- Feagin, J. R. (2014). *Racist America, Third Edition: Roots, Current Realities, and Future Reparations*: Taylor & Francis.
- Fukurai, H., Butler, E. W., & Krooth, R. (1993). *Race and the Jury:: Racial Disenfranchisement and the Search for Justice*: Springer.
- Guerino, P., Harrison, P. M., & Sabol, W. J. (2011). Prisoners in 2010. In Bulletin (Ed.), *Bureau of Justice Statistics*: U.S. Department of Justice.
- Haney-López, I. (1994). The Social Construction of Race. *Harvard Civil Rights-Civil Liberties Law Review*, 1(29).
- Haney-López, I. (1996). *White By Law*. New York: New York University Press.
- Holder, A. G. E. (2009). Fatherhood Town Hall [Press release]. Retrieved from <http://www.justice.gov/ag/speeches/2009/ag-speech-091215.html>
- Hunter v. Underwood, 471 222 (U.S. 1985).
- Joseph, J. (2003). (1997-2003) Ethnicity/Minorities, Crime, and Criminal Justice.
- Kansal, T. (2005). Racial Disparity in Sentencing: A Review of the Literature. In M. Mauer (Ed.), (pp. 1-19). Washington, D.C.: The Sentencing Project.
- Keyssar, A. (2009). *The right to vote: The contested history of democracy in the United States*: Basic Books.
- LaFree, G. D. (1989). *Rape and Criminal Justice: The Social Construction of Sexual Assault*. Belmont, CA: Wadsworth.
- Lee, T. (2012, October 8, 2012 web). States Deny Millions of Ex-Felons Voting Rights. *Huffington Post* p. web. Retrieved from [http://www.huffingtonpost.com/2012/10/08/felon-voting-rights\\_n\\_1924535.html](http://www.huffingtonpost.com/2012/10/08/felon-voting-rights_n_1924535.html)
- Manza, J., Brooks, C., & Uggen, C. (2004). Public attitudes toward felon disenfranchisement in the United States. *Public Opinion Quarterly*, 68(2), 275-286.
- Manza, J., & Uggen, C. (2004). Punishment and democracy: Disenfranchisement of nonincarcerated felons in the United States. *Perspectives on Politics*, 2(03), 491-505.
- Manza, J., & Uggen, C. (2006). *Locked Out: Felon Disenfranchisement and American Democracy*. New York: Oxford University Press.
- McKinnon, J. D., & Bennett, C. E. (August 2005). We the People: Blacks in the United States. In U. C. Bureau (Ed.), *Census 2000 Special Reports*. Washington D.C.
- McLaughlin, M. (2012, July 12, 2012 web). Felon Voting Laws Disenfranchise 5.85 Million Americans With Criminal Records: The Sentencing Project. *Huffington Post*. Retrieved from [http://www.huffingtonpost.com/2012/07/12/felon-voting-laws-disenfranchise-sentencing-project\\_n\\_1665860.html](http://www.huffingtonpost.com/2012/07/12/felon-voting-laws-disenfranchise-sentencing-project_n_1665860.html)
- Myrdal, G. (1944). *An American Dilemma: The Negro Problem and Modern Democracy*. New York: Harper and Brothers.
- NAACP. (2014). Criminal Justice Fact Sheet. Retrieved April 10, 2014, from <http://www.naacp.org/pages/criminal-justice-fact-sheet>
- NAACP Legal Defense Fund. (Winter 2014). *Death Row U.S.A.* New York: NAACP LDF.

- Newport, F. (2013). Gallup. *In U.S., 24% of Young Black Men Say Police Dealings Unfair* Retrieved April 22, 2014, from [http://www.gallup.com/poll/163523/one-four-young-black-men-say-police-dealings-unfair.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_campaign=syndication&utm\\_content=morelink&utm\\_term=Politics%20-%20USA](http://www.gallup.com/poll/163523/one-four-young-black-men-say-police-dealings-unfair.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=Politics%20-%20USA)
- Ogletree Jr, C. J. (2002). Black man's burden: Race and the death penalty in America. *Or. L. Rev.*, 81, 15.
- Ozawa v. United States, 260 178 (U.S. Supreme Court 1922).
- Pager, D. (2007). *Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration*. Chicago, IL: The University of Chicago Press.
- Pete C. (2005). Ex-felon Employment and Expungement. In C. U. s. Blog (Ed.), 7:39 AM (Vol. 2014). Retrieved <http://chrisuggen.blogspot.com/2005/07/ex-felon-employment-and-expungement.html>.
- Pinard, M. (2010). Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity. *New York University Law Review*, 85, 457-534.
- Rastogi, S., Johnson, T. D., Hoeffel, E. M., & Drewery, M. P. (2011). *The Black Population: 2010 Census Briefs*. Washington D.C.: US Census Bureau.
- Richardson v. Ramirez, 418 24 (U.S. Supreme Court 1974).
- Rosich, K. J. (2007). Race, Ethnicity, and the Criminal Justice System. In D. o. R. a. Development (Ed.), *How Race and Ethnicity Matter*. Washington D.C.: American Sociological Association.
- Sauvé v. Canada, 519 68 (Supreme Court of Canada 2002).
- Schirmer, S., Nellis, A., & Mauer, M. (2009). *Incarcerated Parents and Their Children Trends 1991-2007* Washington D.C.: The Sentencing Project: Research and Advocacy for Reform.
- Schmitt, J., & Warner, K. (2010). *Ex-offenders and the Labor Market* (pp. 1-22). Washington D.C. : Center for Economic and Policy Research.
- Schrader, J. B. (2009). Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws. *Vanderbilt Law Review*, 62(4), 1285-1314.
- Shapiro, A. L. (1993). Challenging criminal disenfranchisement under the Voting Rights Act: A new strategy. *Yale Law Journal*, 537-566.
- Sides, J. (2013). White people believe the justice system is colorblind. Black people don't. *The Washington Post*. Retrieved from <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/>
- Smith, R. J., & Levinson, J. D. (2011). Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, *The Seattle UL Rev.*, 35, 795.

- Spates, K., & Royster, M. D. (2011). Religious Rights. In W. C. a. G. J. Golson (Ed.), *Key Issues in Crime and Crime and Punishment: Corrections* (Vol. 4, pp. 245-260). Thousand Oaks: Sage Publishing.
- The Pew Charitable Trusts. (2010). Collateral Costs: Incarceration's Effect on Economic Mobility. In T. P. C. Trusts (Ed.). Washington D.C.
- The Sentencing Project. (2014). Felony Disenfranchisement Laws in the United States. *Fact Sheet: Felony Disenfranchisement Laws*. Retrieved May 10,, 2014, from [http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Laws%20in%20the%20US.pdf)
- U.S. Constitution Amendment XIX, (1920).
- Uggen, C., Manza, J., & Thompson, M. (2006). Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders. *The Annals of the American Academy*, 605, 281-310.
- Van Zyl Smit, D. (Ed.). (1998). *Comparing prison systems: Toward a comparative and international penology* (Vol. 8): Taylor & Francis.
- Walker, S., Spohn, C., & Delone, M. (2012). *The Color of Justice: Race, Ethnicity, and Crime in America*. Belmont, CA: Wadsworth.
- Walsh, A. (1987). The Sexual Stratification Hypothesis and Sexual Assault in Light of the Changing Conceptions of Race. *Criminology*, 25, 153-173.
- Weitzer, R. (2005). Can the Police be Reformed? *Contexts*, 4(3), 21-26.
- West, C., Crenshaw, K., Gotanda, N., Peller, G., & Thomas, K. (Eds.). (1995). *Critical Race Theory*. New York: The New Press.

---

<sup>i</sup> Post-sentence voting bans for certain offenses in Alabama & Tennessee; Post-sentence voting bans in Arizona for 2<sup>nd</sup> felony offenses; Post-sentence voting bans in Delaware and Wyoming for certain offenses for a period of 5 years; Post-sentence in Nebraska for a period of 2 years; Post-sentence voting bans in Nevada, except for first time offenders.