

Book Review

Disfranchisement Modernized

J. MORGAN KOUSSER

Jeff Manza and Christopher Uggen. *Locked Out: Felon Disenfranchisement and American Democracy*. New York: Oxford University Press, 2006, 384 pp., \$29.95 (hardcover).

Sasha Abramsky. *Conned: How Millions Went to Prison, Lost the Vote, and Helped Send George W. Bush to the White House*. New York: The New Press, 2006, 304 pp., \$25.95 (hardcover).

PETTY CRIMINAL DISFRANCHISEMENT

WHEN I WORKED in my first criminal disfranchisement case in 1979, I thought it was a mere tidying up operation, an effort to overturn the last vestiges of the openly racist 1901 “disfranchisement convention” in darkest Alabama.¹ I never imagined that the issue would become much more critical in the ensuing decades and that in 2006, I would be employed as an expert witness against felon disfranchisement in what claims to be the enlightened state of Washington.² In many respects, the world has not moved forward.

In 1974, I had published *The Shaping of Southern Politics*,³ which analyzed the transformation of southern politics by electoral laws passed from the 1870s through 1908 in the eleven states that had managed to secede from the Union

during the Civil War. One of the simplest and most blatantly racist of these types of laws permanently disfranchised men for such crimes as “miscegenation,” “wife beating,” and petty theft, and included some misdemeanors, while excluding some serious felonies, such as assault and battery and second degree manslaughter.⁴ Ironically, Section 182 of the Alabama constitution of 1901 nominally disfranchised election officials if they made “false returns,” despite the fact that ballot box stuffing was notoriously applied—indeed, was absolutely necessary—in the referenda that called the convention and ratified the constitution.⁵

When Ed Still, a Birmingham attorney cooperating with the ACLU, who had an unusually

² In his second summary judgment ruling in the case in six years, Federal District Judge Robert H. Whalley found the evidence of racial discrimination in Washington’s criminal justice system “compelling” and the connection of that discrimination to voting discrimination “clear,” but that Section 2 of the Voting Rights Act was not violated because too few of the 1982 “Senate factors,” such as a history of official discrimination, racially polarized voting, and candidate slating processes, were proven. Order Granting Defendants’ Motion, Denying Plaintiffs’ Motion For Summary Judgment, *Farrakhan v. Gregoire*, NO. CV-96-076-RHW (July 7, 2006), slip op. at 10–11, 13–14. After a similar summary judgment order in 2000, Judge Whalley was reversed by the Ninth Circuit. *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), cert. denied sub nom *Farrakhan v. Locke*, 543 U.S. 984 (2004). His 2006 decision is being appealed.

³ J. Morgan Kousser, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH* (1974), hereinafter *SHAPING*.

⁴ *Underwood v. Hunter*, 730 F.2d 614, 621, n. 13 (1984), hereinafter *Underwood*.

⁵ *SHAPING*, supra note 3, at 166.

J. Morgan Kousser is Professor of History and Social Science at Caltech.

¹ *Hunter v. Underwood*, 471 U.S. 222 (1985), hereinafter *Hunter*, was the first and so far the only successful challenge to criminal disfranchisement in the U.S. Supreme Court.

keen sense of the importance of historical issues in legal cases, cold-called me to ask whether I believed that Alabama's criminal disfranchisement provision had been adopted in 1901 with a racially discriminatory purpose and whether I would be willing to testify in court to that effect, I jumped at the chance to put my historical skills to work to rectify some of the racist practices I had studied for so long. I wrote a short report summarizing the evidence. All historians agreed that the central purpose of the constitutional convention was to disfranchise blacks. More specifically, the framer of the crimes section of the suffrage article, John Fielding Burns, claimed that the wife-beating provision alone could disfranchise 60 percent of the black adult males in the state, a fact about the workings of the criminal justice system that he, as a magistrate in the rural area around Selma, was in a position to speak about with some authority.⁶ Although Federal District Court Judge Frank McFadden, who first heard the *Underwood* case, did not publish an opinion on the subject, he indicated that he agreed with the State that the 1901 convention's desire to disfranchise poor whites excused its intention to disfranchise blacks. Examining the evidence much more closely, and rejecting the class rationale as legally incorrect and a proposed good government rationale as unsupported by the evidence, Circuit Court Judge Robert Vance ruled disfranchisement for misdemeanors in Alabama unconstitutional, and the Supreme Court unanimously affirmed.⁷

In response, the Alabama legislature proposed and the people of the state in 1996 passed a whitewashed constitutional amendment that substituted a vague "moral turpitude" disfranchisement provision for the more specific and more obviously discriminatory list in the 1901 constitution.⁸ Over the years, the huge expansion of the prison population, largely African-American, magnified the effect of the disfranchisement provision far beyond that of 1979. Ed Still continues to litigate felon disfranchisement in Alabama.⁹

One of the chief revisionist themes of *Shaping* was that suffrage restriction had partisan, as well as racial and class purposes. Democrats were sometimes open about their partisan

aims, and southern white Republicans and Populists often overcame their discomfort about black suffrage because they knew that African-Americans generally supported parties that opposed the Democratic Establishment. Philosophical reasons for and against suffrage laws, I concluded more generally, almost always hid more self-interested impulses.¹⁰ In both of these respects, the importance of partisanship and the comparative unimportance of ideology in struggles over criminal disfranchisement, things have not changed in a century.

THE NEW, IMPROVED DISFRANCHISEMENT

If Al Gore had been credited with 600 more votes in Florida in 2000, the eventful history of the world since then would have been remarkably different. By the presidential race of 2004, 5.3 million Americans,¹¹ over a fifth of whom lived in Florida,¹² were disfranchised because they had been convicted of felonies or, in six states, misdemeanors.¹³ According to Jeff Manza and Christopher Uggen, a disproportionate number of the disfranchised would have voted for Gore.¹⁴ If one percent of the disfranchised felons in Florida had voted, and they had split sixty-four for the Democrat, George W. Bush would not have been elected president.

In their comprehensive and fascinating new book, which both sums up and markedly ex-

⁶ *Underwood*, at 619–20.

⁷ *Underwood*; *Hunter*.

⁸ "No person convicted of a felony involving moral turpitude, or who is mentally incompetent, shall be qualified to vote until restoration of civil and political rights or removal of disability." Alabama Const., Art. VIII, Section 196A(b) (2005).

⁹ Val Walton, *Federal judges urge settlement in voting lawsuit*, Birmingham News, March 8, 2006.

¹⁰ J. Morgan Kousser, *Suffrage*, in 3 *ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY* 1236, 1240–44 (Jack P. Greene, ed., 1984).

¹¹ Jeff Manza & Christopher Uggen, *Lcocked Out: Felon Disenfranchisement and American Democracy* 250 (2006), hereinafter *LOCKED OUT*.

¹² *Id.* at 248.

¹³ *Id.* at 9.

¹⁴ *Id.* at 191–93.

tends the burgeoning literature on the topic, sociologists Manza and Uggen emphasize that alone among democracies, America disfranchises felons after their release from prison, probation, and parole.¹⁵ Such ex-felons (overwhelmingly males) constitute thirty-nine percent of those disfranchised for crimes in the U.S. Only twenty-seven percent of felons who are denied the vote are currently incarcerated. The other thirty-four percent are on probation or parole.¹⁶ Sixteen million Americans now have felony convictions on their records, and many do not realize that permanent disfranchisement laws were weakened in the 1960s, 70s, and 90s. Not only are they often unaware that they can now register and vote, but they are frequently misinformed about those rights by state employees.¹⁷

Although their principal focus is on the present, Manza and Uggen have interesting things to say about the past. Criminal disfranchisement provisions in nineteen U.S. states preceded widespread black enfranchisement in the late 1860s, but nearly all of these laws succeeded or came at the same time as the abolition of property qualifications for white male voting. This entirely circumstantial evidence suggests to Manza and Uggen a desire by antebellum state constitution-makers to temper political equality by excluding the most “undesirable” white voters.¹⁸ More work is needed on this claim.

But felon disfranchisement is now and has always been primarily a racial issue in the U.S. In an “event history” analysis, Manza and Uggen show that the order in which criminal disfranchisement laws were passed or extended from 1840 on was statistically associated with indices of black political threat.¹⁹ Despite the currently “colorblind” laws, disfranchisement for crime continues to be a racial issue today. Because of biases in the criminal justice system, disfranchisement for crime now affects African-American men more than Latinos and much more than Anglos. One in seven black men is disfranchised for crime, and in ten states in America’s decentralized system of suffrage, more than fifteen percent of blacks have lost the vote.²⁰ No state disfranchises as many as ten percent of whites.²¹ If current trends con-

tinue, thirty-two percent of black men, seventeen percent of Latinos, and fewer than six percent of white men will go to prison during their lifetimes, suggesting that roughly five times as high a percentage of African-Americans as of white men may lose their votes for extended periods or forever.²²

Although the disfranchisement of criminals has a long history in abstract theorizing from Aristotle to Locke to Mill, its practical effect has been fairly minimal until recently. Directly contrary to trends in crime rates, which have declined,²³ the number of people incarcerated in the U.S. has grown from 1.2 million to 5.3 million in the thirty years since 1976.²⁴ Conviction rates, sentence lengths, and recidivism because of technical violations of probation have soared, inflating disfranchisement rates along with them. In 2002, thirty-one percent of those convicted of felonies in state courts were charged with drug trafficking or possession, while only nineteen percent were convicted of violent crimes. Murderers and rapists, who are often spotlighted in arguments defending felon disfranchisement, made up only four percent of felons.²⁵ Like the imposition of post-incarceration disfranchisement, America’s degree of criminalization is unmatched in other countries. In incarceration rates, the U.S. is number one, imprisoning more than three times as high a proportion of its people as England, seven times as high as Italy and France, and roughly ten times as high as Sweden and Switzerland.²⁶ Manza and Uggen term this “the most intensive incarceration campaign in world history.”²⁷

¹⁵ *Id.* at 37–39.

¹⁶ *Id.* at 77.

¹⁷ *Id.* at 179, 222–25; Shasha Abramsky, *CONNED: HOWE MILLIONS WENT TO PRISON, LOST THE VOTEK, AND HELPED SEND GEORGE W. BUSH TO THE WHITE HOUSE* (2006), 13, hereinafter *CONNED*.

¹⁸ *LOCKED OUT*, *supra* note 11, at 53–55.

¹⁹ *Id.* at 64–67.

²⁰ *Id.* at 79.

²¹ Implied by *id.* Table A 3.3, 248–50.

²² *Id.* at 71.

²³ *Id.* at 98–99, 110.

²⁴ *Id.* at 77.

²⁵ *Id.* at 70.

²⁶ *Id.*, at 70.

²⁷ *Id.* at 106.

Despite the protestations of the preservers of felon disfranchisement, such as those offered by Republican Senators George Allen of Virginia and Mitch McConnell of Kentucky during a 2002 floor debate on a bill to guarantee the suffrage to released felons in federal elections,²⁸ the current process of regaining the vote is Kafkaesque in its complexity and inconsistency, designed to accomplish by indirection what its proponents usually fear to defend in principle. In Florida, fifteen percent of the outlawed are eligible to go through an agonizingly slow bureaucratic process, but a full eighty-five percent must instead, if they wish their civil rights restored, appear in person before the governor and his cabinet at quarterly sessions at which the governor sometimes questions them about their entirely legal personal habits before he decides, for reasons that he need not reveal, arrived at by processes that he need not justify, whether to continue their votelessness.²⁹ Studying a random sample of 1,217 files of Floridians who applied to have their rights restored, Manza and Uggen found African-Americans less likely than whites to apply for restoration and less likely, among those who did apply, to succeed in regaining their rights.³⁰

In Washington State, where ninety percent of released felons have fines and or victim restitution payments to make before their right to vote can be restored, there is no central authority to collect all such “legal financial obligations” or to monitor their satisfaction, and no obvious way to navigate the bureaucratic maze.³¹ Seattle Superior Court Judge Michael S. Spearman recently declared that Washington’s suffrage restoration process violated both the Equal Protection Clause of the U.S. Constitution and a similar clause of the Washington State Constitution.³² The state is appealing the decision in the suit, which was brought by the ACLU.³³ Between 1996 and 2004, only fifty-three of 29,785 disfranchised ex-felons in Washington managed to regain the vote. In thirteen states that disfranchised felons after completion of their sentences, less than three percent of the 2004 population of disfranchised ex-felons regained their rights.³⁴

THE FUTURE OF FELON VOTING

What would be the consequences if all felons, all non-incarcerated felons, or all ex-felons could vote? Drawing on a series of not altogether satisfactory surveys and sets of interviews, Manza and Uggen paint a picture of a population that is different, but not dramatically different, from other voters with the same class, race, and gender characteristics. Former public high school students in St. Paul, Minnesota who had served time in prison were less likely than those who had been arrested, but not jailed, or never arrested, to identify with a political party,³⁵ trust government,³⁶ discuss politics,³⁷ or turn out for elections,³⁸ but the formerly incarcerated were even more likely than others surveyed to support Democrat Bill Clinton for president in 1996 and independent Jesse Ventura for governor in 1998.³⁹ Voting seems to produce or perhaps only to signal civically-conscious behavior: Those who voted in 1996 were less likely than non-voters to be arrested in the four subsequent years and less likely to admit committing property or violent crimes.⁴⁰

²⁸ *Id.* at 82. In the sixty-six years from 1938 to 2004, only 3,234 Virginia felons had their rights restored. CONNED, *supra* note 17, at 175. There were nearly 300,000 disfranchised felons in Virginia in 2004. LOCKED OUT, *supra* note 11, at Table 3, 248–50.

²⁹ LOCKED OUT, *supra* note 11, at 87–88, 90–92; CONNED, *supra* note 17, at 24–26.

³⁰ LOCKED OUT, *supra* note 11, at 92–94.

³¹ Jill E. Simmons, *Beggars Can't Be Voters: Why Washington's Felon Re-Enfranchisement Law Violates the Equal Protection Clause*, 78 Wash. L.R. 297 (2003); Plaintiff's First Set of Interrogatories and Request for Production of Documents, Objections and Answers Thereto, in *Madison v. State of Washington*, State of Washington, King County Superior Court, No. 04-2033414-4 SEA, at 2.

³² *Madison v. State of Washington*, State of Washington, King County Superior Court, NO. 04-2033414-4 SEA, slip op. (March 27, 2006).

³³ Rachel La Corte, *State to appeal ruling granting voting rights to felons who owe fines*, Seattle Times, March 29, 2006.

³⁴ Computed from LOCKED OUT, *supra* note 11, at 254, Table A3.5. Arizona, which keeps no statewide statistics on restoration, also provides for post-incarceration disfranchisement.

³⁵ *Id.* at 119.

³⁶ *Id.* at 120.

³⁷ *Id.* at 121.

³⁸ *Id.* at 123.

³⁹ *Id.* at 123–24.

⁴⁰ *Id.* at 132–34.

But these conclusions are based on a short-term panel survey that sampled from an urban area in a high-turnout, ninety percent white state with a strong liberal tradition. While this is apparently the only recent survey sample that asks questions about politics as well as arrests and incarceration, Manza and Uggen note that it may not be representative of offenders in the country as a whole,⁴¹ and that it does not span enough election cycles to establish causal relationships between voting and crime definitively.⁴²

To probe more deeply into current prisoners' views on politics, government, and their own disfranchisement, Manza and Uggen conducted semi-structured interviews with thirty-three Minnesota prisoners, parolees, and probationers. None had been radicalized in prison, and they seemed unlikely to pose any threat to the political system if they could vote.⁴³ Though a majority identified as Democrats,⁴⁴ many called themselves "conservatives," referring not so much to policy as to their aspirations for a respectable lifestyle. Most considered their disfranchisement alienating and insulting, but not the central disability that resulted from imprisonment.⁴⁵ Yet it is unsafe to generalize even these rather undramatic conclusions from this small sample, two-thirds of whom were white and fifteen percent Native American,⁴⁶ to the larger population of American felons.

The economist Thomas Miles and others have argued that felon disfranchisement makes no difference because people with their demographic traits—principally poor black and Latino men with less education and less family and geographic stability than other Americans—would not vote if they could.⁴⁷ Manza and Uggen test Miles's poorly supported assertion by performing a painstaking regression analysis using Current Population Survey data to predict turnout and vote choice among people with the same demographic profiles as current prisoners. Nationally, they estimate, felon turnout would generally have run fifteen to twenty percent behind the turnout of all voters in the presidential and congressional elections from 1972 through 2004—i.e., a quarter to a third would have turned out in presidential years and slightly fewer in congressional off-

year contests.⁴⁸ In close elections, these are certainly large enough numbers to change outcomes. And as Manza and Uggen acutely point out, if restrictions were lifted for those who were no longer incarcerated or no longer on probation or parole, then more ex-felons would be aware of the fact that they could vote, and their turnout would almost certainly rise.⁴⁹ Some of those who support the continued disfranchisement of felons or ex-felons worry about criminals flooding into the electorate, while others dismiss re-enfranchisement as a chimera that would have no effect. Manza and Uggen's careful data analysis goes a long way toward alleviating the fear and undermining the dismissal.

Although less likely to vote than average citizens, felons, nationally, were twenty to thirty percent more likely to support Democratic candidates in presidential and senatorial contests, according to Manza and Uggen's estimates.⁵⁰ Had disfranchised felons voted in Florida in the 2000 presidential election at the rate and with the partisan proclivity that Manza and Uggen estimate for people with their demographic traits (twenty-seven percent turnout, sixty-nine percent Democratic), Gore would have carried the state by eighty thousand votes.⁵¹ On the other hand, if current rates of felon disfranchisement are projected back to 1960 (a hypothetical 2.5 million felons, instead of the actual 1.4 million), Richard Nixon would have enjoyed a national majority of votes over John F. Kennedy.⁵² In the thirteen states that disfranchise people past the completion of their sentences, they project that between 1978 and 2004, six senatorial and four gubernatorial outcomes would have been reversed, with Democratic

⁴¹ *Id.* at 114–15.

⁴² *Id.* at 135.

⁴³ *Id.* at 144.

⁴⁴ *Id.* at 147.

⁴⁵ *Id.* at 151, 155.

⁴⁶ *Id.* at 138.

⁴⁷ Thomas J. Miles, *Felon Disenfranchisement and Voter Turnout*, 33 *JOURNAL OF LEGAL STUDIES*, 85 (2004).

⁴⁸ *LOCKED OUT*, *supra* note 11, at 172.

⁴⁹ *Id.* at 179–80.

⁵⁰ *Id.* at 190–91.

⁵¹ *Id.* at 192.

⁵² *Id.* at 193.

candidates elected rather than Republicans.⁵³ It is no wonder that felon disfranchisement has become a highly partisan issue. Nonetheless, the lack of direct survey evidence on the partisan preferences and participatory desires of prisoners and former prisoners should raise some cautionary flags. Manza and Uggen are forced to employ complicated statistical techniques because more straightforward evidence is currently unavailable.

There is better survey evidence, however, on the attitudes of the general American public on felon disfranchisement, and given the seemingly Manichean contemporary view of criminals in the U.S. (they are incorrigibly evil; we are essentially good), the results are surprising. Although only thirty-one percent of Americans believe that those currently incarcerated should be able to vote, a full sixty percent feel that parolees or probationers should be allowed to cast ballots. Eighty percent favor enfranchising ex-felons, though that percentage falls to the sixty percent level when specific crimes are mentioned, and to only fifty-two percent for those convicted of sex crimes.⁵⁴ The public also supports civil liberties beyond voting for ex-felons. Nearly three-fourths would allow someone convicted of a drug crime to give a public speech in favor of drug legalization, a level comparable to American support for freedom of speech for religious and political dissenters.⁵⁵ Thus, Manza and Uggen's characterization of public support for felon disfranchisement as a "myth" seems well supported.⁵⁶

During the 1960s and 70s, nineteen states at least partly severed the connections between crime and disfranchisement, and seventeen others joined them before and after those progressive decades.⁵⁷ Manza and Uggen do not examine why these efforts succeeded and others, no doubt, failed—a major lacuna in their work. They also pay minimal attention to challenges to criminal disfranchisement in courts and treat them principally as propaganda vehicles to keep the issue in the news.⁵⁸ Instead, they concentrate in their last chapter on the policy advocacy campaign launched by Marc Mauer and The Sentencing Project in 1998, which has produced or incited a barrage of scholarship, including their book, and they put

their faith in state legislatures.⁵⁹ While I certainly do not doubt the energizing effect of the Sentencing Project and the quality of the scholarship it has fostered or inspired, I would have given attention also to the ACLU, the NAACP-LDF, and the Brennan Center, which have fought lengthy legal battles against criminal disfranchisement, several beginning before the emergence of The Sentencing Project, and I would have examined at least a few of the state legislative struggles on the issue. Study of the politics of such reform efforts is not only interesting in itself; its lessons may make possible further successes.

THE DISFRANCHISED AND THE POLITICIANS

Sasha Abramsky's *Conned* partly fills in the political gap in *Locked Out*. Journalistic rather than academic, qualitative rather than quantitative, and manifestly angry at injustice rather than coolly principled, *Conned* combines a travelogue and excerpts from interviews with felons and political activists on both sides of the issue with factual descriptions of states' processes for restoring suffrage rights and legislative efforts to ease the restrictions. A freelance journalist long concerned with the consequences of the exponentially rising American incarceration rates, Abramsky has produced a somewhat self-indulgent⁶⁰ but often compelling attempt to put a human face on the abstract policy problem that Manza and Uggen analyze.⁶¹

Typical of his book is a fourteen-page chapter on the successful effort to authorize auto-

⁵³ *Id.* at 194–97.

⁵⁴ *Id.* at 215–16.

⁵⁵ *Id.* at 217.

⁵⁶ *Id.* at 218.

⁵⁷ *Id.* at Table A2.1, 238–39.

⁵⁸ *Id.* at 227.

⁵⁹ *Id.* at ix, 224, 227.

⁶⁰ Abramsky's reactions to the events of the 2004 campaign and to his reading of De Tocqueville begin to grate long before the end of the book.

⁶¹ In the front matter of his book, Abramsky pointedly thanks Mauer, Manza, and Uggen for information and praises Manza and Uggen's work. *CONNED*, *supra* note 17, at ix.

matic re-enfranchisement for all ex-felons in Nevada. Led by Chris Giunchigliani, a Las Vegas Democratic Assemblywoman since 1990 who was also president of the state teachers' union and who represented a poor district in which ex-felons comprised perhaps ten percent of the adults, the multi-year effort enlisted civil rights and community activist organizations and attracted support largely from Democrats.⁶² After earlier efforts failed or resulted in tepid compromises, a bill finally passed the Republican-majority State Senate only because the Democratic majority in the Assembly threatened to delay all Republican legislation originating in the Senate if the re-enfranchisement legislation did not pass. Abramsky briefly interviewed Representative Giunchigliani and followed up by visiting an organization that helped ex-prisoners, EVOLVE, to see how well informed ex-prisoners were of their new rights. At EVOLVE, he spotlighted Shawn Smith, an ex-con excited about voting for the first time and urging others to regain and exercise their rights.⁶³ Although Republican opponents of the 2003 law refused requests for interviews, a Reno auto-repair shop owner who had spent fourteen years and \$17,000 to obtain a gubernatorial pardon did talk, and his case shows how hard it had been to restore rights before the 2003 change and how much restoration meant to some former prisoners.⁶⁴ Unlike what a historian or many other journalists might do, Abramsky provides few details on the legislative process. Unlike what a social scientist would do, he does not try to estimate the effect of the 2003 law systematically. Abramsky's well-written human snapshots may appeal to students and general readers, but they do not tell the whole story.

The repeated themes of *Conned* from state to state and from interesting character to interesting character are the complications of the restoration process, the misinformation often given to and generally believed by the ex-felons about their right to vote, and the depth of the desire of many to recover full citizenship status and to help shape the laws that affect them and their families. In Iowa before 2001, each former felon who wished to regain his civil rights had to submit to a pardon board and the governor an incredibly detailed form including

a complete post-prison employment history, the names and current addresses of all attorneys and judges who had been connected with the felon's case, a description of the circumstances of the crime, and an argument for why the felon should be pardoned. Almost none of the often functionally illiterate former prisoners succeeded in fording this bureaucratic river.⁶⁵ After 2001, the application form was simplified, but fewer than one percent of Iowa's disfranchised felons made it through the pardon process each year. A bill to make re-enfranchisement automatic after all legal obligations were met could not even be scheduled for floor consideration in 2004.⁶⁶

In Montana, crusading ex-cons Casey and Eddie Rudd gave speeches throughout the state informing prisoners of their rights and passing out surveys to their audiences. Most ex-felons who filled out their questionnaires thought, incorrectly, that they were permanently debarred from voting.⁶⁷ Thus, misinformation serves as a grandfather clause, rendering legal liberalization merely theoretical for many.⁶⁸

In Texas, a fourteen-year campaign that moved the law from permanent disfranchisement to waiting periods for re-enfranchisement to elimination of the waiting period had little effect. Without presenting systematic evidence, Abramsky asserts that the reason was the absence of any legal requirement that state officials tell felons or ex-felons about the liberalization.⁶⁹ This unwillingness to foster the exercise of voting rights, Abramsky points out acutely, is in stark contrast to the administrative efficiency with which Texas criminal justice officials apprise voting registrars of who

⁶² *Id.* at 56–58.

⁶³ *Id.* at 59–60.

⁶⁴ *Id.* at 62–66.

⁶⁵ *Id.* at 125.

⁶⁶ *Id.* at 126–32.

⁶⁷ *Id.* at 81–86. This misinformation needs to be taken into account in any attempt to assess the effects of criminal disfranchisement laws or changes in them.

⁶⁸ The original grandfather clauses, of course, kept illiterate and propertyless whites *enfranchised*. But the phrase has come to mean any rule that preserves the previous status for people with certain traits.

⁶⁹ *Id.* at 98–99.

has been convicted of a crime and thus has *lost* his rights—an ironic example of asymmetric information distribution in a country supposedly dedicated to democracy and individual rights.⁷⁰

In Tennessee, the legislature markedly changed the list of crimes resulting in disfranchisement four times in twenty-three years, creating four cohorts of ex-felons with some in each cohort disfranchised for crimes that would not have disfranchised them if they had committed the same crimes five years earlier or later—a scheme certain to maximize confusion on the part of election officials and ex-offenders alike. Yet no bill to liberalize or even rationalize the system made it to the legislative calendar.⁷¹ Felons could regain the vote only by submitting a pardon application that was so complicated that it required legal assistance. When some Nashville lawyers let it be known that they would assist such applicants without charging fees, they were inundated with hundreds of pleas for help, a testament to how strongly people sought to regain the suffrage.⁷² One of the successful Nashville applicants was Emmette Barrow, a thirty-one-year-old college graduate and small business owner who had thirteen years earlier been caught riding in a car that contained drugs. “The last election made me think,” he told Abramsky. “How many guys like me can’t vote? . . . This present election [2004], every vote counts. . . . I’m kinda excited now they’re saying [that his vote is] going to be restored. I’m thinking, *Yeah, I make a difference.*”⁷³ Even more energetic was “Jamaica S.,” a young white woman in Nashville, who had gotten her citizenship rights back just in time to vote in 2004 and who e-mailed Abramsky breathlessly: “I am a different person already. I have a sense of accomplishment, redemption, and dignity now. I feel validated and empowered to overcome other obstacles in my life.”⁷⁴

REFORM AND RESEARCH

During the consideration of renewing certain sections of the Voting Rights Act in 2006, felon disfranchisement was not seriously debated, even though two of the major civil rights or-

ganizations, the ACLU and the NAACP-LDF, had for several years been litigating major suits based on the contention that criminal disfranchisement violated Section 2 of the Act.⁷⁵ A 2005 effort to amend the Help America Vote Act to enfranchise in federal elections all felons who had completed parole and probation and who had paid all fines went nowhere.⁷⁶ Since the Roberts Court seems most unlikely to reverse *Richardson v. Ramirez*,⁷⁷ the 1974 case that ruled that criminal disfranchisement did not violate the Fourteenth Amendment, the prospects of either Congress or the federal judiciary easing this growing restriction on the suffrage seem poor.

The chances for state legislation and litigation are better, if only because there are so many states that it is difficult to stop any changes from taking place *somewhere*. More study of the legislative successes and failures, described so tantalizingly by Abramsky—there are many more descriptions than I have mentioned—is clearly needed. Particularly interesting is the tension within the Democratic party, which favors widespread enfranchisement, particularly of people who would be likely to vote Democratic, but which fears to be considered soft on criminals.

Research and reform, or anti-reform for that matter, are potentially very closely aligned here. Three research questions seem particularly pressing: First, under what conditions—most notably, of partisan competition and con-

⁷⁰ *Id.* at 102–03.

⁷¹ *Id.* at 163–67.

⁷² *Id.* at 168.

⁷³ *Id.* at 171–72, italics in original.

⁷⁴ *Id.* at 261.

⁷⁵ In 1981–82, the civil rights forces took advantage of the necessity to renew and extend Section 5 of the Act to amend Section 2 to overrule *City of Mobile v. Bolden*, 446 U.S. 55 (1980). The same forces might similarly have attempted to use the occasion of the renewal of Section 5 in 2006 to amend Section 2 to make clear that it was meant to apply to felon disfranchisement. Such an amendment might have failed, as four conservative amendments failed in the House. Shailagh Murray, *Voting Rights Act Extensions Pass House Despite GOP Infighting*, Washington Post, July 14, 2006; Raymond Hernandez, *After Challenges, House Approves Renewal of Voting Act*, New York Times, July 14, 2006. But it was never offered.

⁷⁶ CONNED, *supra* note 17, at 261.

⁷⁷ 418 U.S. 24 (1974).

trol—were measures tightening or loosening restrictions on ex-criminal voting most likely to pass in the legislatures of the several states? Did a tight party balance or divided control, for example, enhance or does it diminish the likelihood of suffrage liberalization?⁷⁸ Second, what arguments did the successful and unsuccessful parties make during the debates? These may not have been the most logical or factual arguments, but the ones that were most effective in bringing about the success or failure of the legislation. Third, how did those arguments stack up against facts? Did opponents of ex-felon voting try to paint the typical ex-con as a rapist or murderer? Did proponents exaggerate the anxiousness of former prisoners to vote?

Locked Out and *Conned* repeatedly emphasize the dearth of correct information that both officials and offenders display about exactly who in this class of quasi-citizens can vote, a little noticed but unsurprising fact in a fifty-state system with frequent recent changes in the disfranchisement rules. *Conned* especially stresses the complications and sometimes manipulations of the bureaucratic process to deny people the vote, which is referred to in the study of social services for the poor as “bureaucratic disenfranchisement.”⁷⁹ These observations suggest the importance of future, much more systematic research into two seemingly minor topics that may have a major impact on the effect of past and present criminal disfranchisement laws: information dissemination and the bureaucracy of disfranchisement. Before the passage of the Voting Rights Act in 1965, it appeared to some observers that a vaguely

defined fog of discrimination hung over African-Americans’ right to vote in the South, that specific laws, especially those that concerned electoral structures, made little difference. As the mists cleared and blacks in the Deep South began to vote again in large numbers, it became easier to see the sequence and variety of laws and bureaucratic procedures that had first established and then maintained the system of disfranchisement.⁸⁰ These two books and the increasing literature that they build on make possible a similar deepening of scholarship and a strong connection between research and political change that demonstrates the continuing vitality of American social science.

Address reprint requests to:
J. Morgan Kousser

← AU1

E-mail: ← AU2

⁷⁸ It was weak party competition, rather than strong, that was positively correlated with the order in which American states adopted laws against racial discrimination in public schools in the nineteenth century. J. Morgan Kousser, “The Onward March of Right Principles”: State Legislative Actions on Racial Discrimination in Schools in Nineteenth-Century America, 35 *HISTORICAL METHODS* 177 (2002).
⁷⁹ Joel Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in an Historical Perspective*, 16 *N.Y.U. REVIEW OF LAW AND SOCIAL CHANGE* 457 (1987–88).

⁸⁰ *SHAPING*, *supra* note 3; J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION*, at 22–38 (1999).

KOUSSER

AU1

please provide address

AU2

Please provide email address