

A LEGAL ANALYSIS OF CARCERAL CITIZENSHIP AND REENTRY INTO SOCIETY AFTER INCARCERATION

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Abstract

Incarceration in the United States continues to grow, and little attention is paid to reentry into society following incarceration. Carceral citizenship is a term that describes how people who have been convicted of a felony are stripped of certain rights constitutional granted to citizens of the United States, solely because they were incarcerated. A goal of the criminal justice system is rehabilitation, with the intention of reintegration into the community. The laws that continue to penalize previously incarcerated citizens make reentry into the community increasingly difficult. Laws restricting people who have been previously incarcerated in areas such as voting, housing, and employment, contribute to the high rates of recidivism, and the lack of reentry initiatives and programs only furthers this issue. Food insecurity, lack of stable housing, lack of access to health care, barriers to education, and barriers to employment, are only a few of the common issues that previously incarcerated people face when reentering the community after incarceration. While the criminal justice system sets consequences for breaking the law in American society, it also seeks to rehabilitate previous offenders. If the criminal justice system aims to rehabilitate offenders, then it is imperative for legal barriers to reentry to be reduced, and government reentry programs must be more productive to truly accomplish this goal.

Overview of The American Prison System

At the end of 2019, there was approximately 1.4 million people in prison across America.¹ While the prison population is often forgotten in general by American society, the reality is millions of Americans cycle through the criminal justice system. Every year approximately 600,000 people are incarcerated in the United States and 10 million people go to jail each year (this number consists of people who are in jail awaiting trial and may be unable to make bail, not just convictions).² The Mass Incarceration system in America is defined by the American Civil Liberties Union as follows, “The United States incarcerates more people, in both absolute numbers and per capita, than any other nation in the world. Since 1970, the number of incarcerated people has increased sevenfold to 2.3 million in jail and prison today, far outpacing population growth and crime.”³ According to the Sentencing project, the Mass Incarceration system in the United States is growing, and correctional populations have increased substantially in the last 40 years, as it has increased at a rate of 500 percent.⁴ The increase in correctional populations should be cause for concern to reevaluate this country’s prison systems, namely the goals of such systems, as the increase in prison populations means it is imperative to reassess the aim of the Mass Incarceration system. If numbers in prison populations continue to grow,

¹ E. Ann Carson, PRISONERS IN 2019 - BUREAU OF JUSTICE STATISTICS PRISONERS IN 2019 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> (last visited Mar 10, 2023).

² Wendy Sawyer and Peter Wagner, *MASS INCARCERATION: THE WHOLE PIE 2022 PRISON POLICY INITIATIVE* (2022), <https://www.prisonpolicy.org/reports/pie2022.html> (last visited Feb 20, 2023).

³ Mass Incarceration, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/smart-justice/mass-incarceration/mass-incarceration-animated-series> (last visited Mar 10, 2023).

⁴ Trends in U.S. Corrections, The Sentencing Project (2021), <https://www.sentencingproject.org/app/uploads/2022/08/U.S.-Prison-Population-Trends.pdf> (last visited Mar 10, 2023).

as they have been for the last decades, an analysis of reentry into the community and the goals of such systems is completely necessary.

The United States Prison System continues to expand, and most people who are incarcerated are released at some point back into society. According to the Bureau of Justice Statistics, at least 95% of all state prisoners will be released from prison⁵ highlighting how essential focusing on reducing barriers for formerly incarcerated people, as most will return to society. Previously incarcerated people face numerous challenges to reentry into society such as housing issues, employment, access to health services, and stigmatization from society. These barriers are reinforced by laws that make access to vital aspects of survival such as housing or employment increasingly difficult, thus causing previously incarcerated people to recidivate, or relapse into their previous mode of behavior⁶, which ultimately may end up in prison.

According to The Assistant Secretary for Planning and Evaluation, “More than two-thirds of prisoners are rearrested within 3 years of their release, and half are reincarcerated.”⁷ This points to a massive underlying issue in how the American prison system functions, as one of the goals of the system is to rehabilitate and reform, which counters the high rate of recidivism seen in the years following community reentry into the community. The rate of recidivism is high within 3 years of their release, that rate climbs after several years following incarceration according to the Office of Assistant Secretary for Planning and Evaluation. Reducing recidivism is necessary to “[improving] community safety and well-

⁵ Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community and Recidivism* (2015), <https://sgp.fas.org/crs/misc/RL34287.pdf> (last visited Mar 10, 2023).

⁶ *Recidivate Definition & Meaning*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/recidivate#:~:text=recidivated%3B%20recidivating%3B%20recidivates,criminal%20activity%20%3A%20to%20exhibit%20recidivism> (last visited Mar 2, 2023).

⁷ *Incarceration & reentry*, ASPE, <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0> (last visited Mar 12, 2023).

being, assist those returning from prison and jail in becoming productive citizens, and save taxpayer dollars by lowering the direct and collateral costs of incarceration.”⁸ Legal barriers and restrictions do not aid in the goals of reducing recidivism, as it serves as an obstacle in the many issues already facing previously incarcerated people.

According to the Office of Assistant Secretary for Planning and Evaluation, “because reintegration to the community after incarceration intersects with issues of health, housing, education, employment, family, faith, and community well-being, the U.S Department of Health and Human Services (HHS) and other federal agencies are focusing on the reentry population with activities that aim to improve outcomes in these areas.”⁹ While federal agencies are working to target these issues and address the gap in support for those reentering the community, state laws still persist that interfere with successful reintegration into the community, as recidivism is largely based upon a lack of support for previously incarcerated people, and the barriers to fundamental parts of life, such as housing, and voting restrictions.

These barriers, and restrictions can be understood with the term carceral citizenship, as explained by the following, “Carceral citizenship is a distinct form of political membership experienced by and enacted upon people convicted of a crime.”¹⁰ Law restrictions on voting and lack of protection from housing discrimination encompass parts of carceral citizenship, as those who were previously incarcerated face a different reality, and are subject to a different set of rules upon receiving a criminal conviction. The following quote explains the role law plays into carceral citizenship, “Carceral citizenship, then, has three defining features. First, it consists of laws and policies that shape how formerly incarcerated

⁸ Id.

⁹ Id.

¹⁰ Reuben Jonathan Miller & Forrest Stuart, *Carceral citizenship: Race, Rights and responsibility in the age of mass supervision*, 21 *Theoretical Criminology*, 532–548 (2017).

people engage the stabilizing institutions of a free society. Put differently, a criminal conviction changes the nature of one’s interactions with public welfare agencies, the labor and housing market, with their families, and in civic life.”¹¹ This inclusion of laws and policies is the legal framework encompassed in carceral citizenship, and it is through laws, or lack of protections of this vulnerable group, that carceral citizenship exists.

Housing Law Restrictions

The Fair Housing Act of 1968 followed the Civil Rights Act of 1964, as President Johnson saw it as imperative to expand the Civil Rights Act to ensure that there was an expansion of previous legislation against discrimination.¹² While the Fair Housing Act seeks to prevent discrimination from occurring to the groups protected under the Civil Rights Act, it is necessary to acknowledge intersectionality in the groups being discriminated against, as certain identities may be affected more by certain conditions that may be used as the basis for discrimination under a different condition. According to The United States Department of Justice, The Fair Housing Act does the following:

The Fair Housing Act, 42 U.S.C 3601 et seq., prohibits discrimination by direct providers of housing such as landlords and real estate companies as well as other entities such as municipalities, banks, or other lending institutions and homeowners insurance companies whose discriminatory practices make housing unavailable to persons because of: race or color, religion, sex, national origins, familial status or disability.¹³

¹¹ *Id.*

¹² *History of fair housing - HUD*, Hud.gov, U.S. Department of Housing and Urban Development, [https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history#:~:text=The%201968%20Act%20expanded%20on,Housing%20Act%20\(of%201968\)](https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history#:~:text=The%201968%20Act%20expanded%20on,Housing%20Act%20(of%201968),), (last visited Mar 10, 2023).

¹³ The Fair Housing Act, The United States Department of Justice (2022), <https://www.justice.gov/crt/fair-housing-act-1> (last visited Mar 10, 2023).

Although previous criminal convictions are not included in the protections under the Fair Housing Act, the U.S Department of Housing and Urban Development had issued guidance that deals with previously incarcerated people and discrimination in housing. This gap in legislation had been addressed by the U.S Department of Housing and Urban Development, as there has been an acknowledgment that discrimination against those with previous felony convictions, a decision made by a court of law a person is guilty of a crime specifically a felony in this case¹⁴, disproportionately affects black and brown people in America.¹⁵ The department of Housing and Urban Development also issued guidance on the Fair Housing Act in Relation to those with previous criminal convictions, “While having a criminal record is not a protected characteristic under the Fair Housing Act, criminal history-based restrictions on housing opportunities violate the Act if, without justification, their burden falls more often on renters or other housing market participants of one race or national origin over another (i.e., discriminatory effects liability).”¹⁶ This essentially states that a criminal record is not a housing barrier, but it is acknowledged that sometimes landlords and private companies do discriminate against felons, as it is not illegal.

Voting Law Restrictions in Florida

Felon Disenfranchisement describes how laws, statutes, and court rulings can prevent people with a felony conviction from voting even after their

¹⁴ Conviction, CONVICTION | DEFINITION IN THE CAMBRIDGE ENGLISH DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/conviction> (last visited Mar 5, 2023).

¹⁵ Helen R Kanovsky, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF (last visited Mar 14, 2023).

¹⁶ *Id.*

sentence has been completed.¹⁷ Felony disenfranchisement can be traced most recently to the Reconstruction period in American History, as explained as follows, “Felony disenfranchisement is the denial of voting rights on the basis of a felony conviction. Although laws preventing people with criminal convictions from voting can be traced to colonial times, most modern felony disenfranchisement laws originated in the time period after Reconstruction...”¹⁸ This withdrawal of voting rights for people who have been convicted of a felony has been long contested within American society, as the right to vote is a fundamental civil right, is guaranteed by Constitution, and protected from discrimination on the basis of an individual belonging to a certain group, but the right to vote is never protected for those with previous criminal convictions in the Constitution, thus allowing felon disenfranchisement to occur on various levels according to the State.

The level of felon disenfranchisement differs from state to state, with Florida having contested the right to vote for those convicted of a felony. The state of Florida has a long history with felon disenfranchisement and continues to lead the country in the number of people who have been incarcerated who cannot vote, as explained by this quote from the Sentencing Project, “Florida remains the nation’s disenfranchisement leader in absolute numbers, with over 1.1 million people currently banned from voting, often because they cannot afford to pay court-ordered monetary sanctions”¹⁹. Monetary sanctions are not limited to but include, “fines, fees, restitution, and other legal costs imposed on persons convicted of crimes and other legal violations.”²⁰ While some states may

¹⁷ *Felony disenfranchisement explained*, Democracy Docket, (2022), <https://www.democracydocket.com/analysis/felony-disenfranchisement-explained/>, (last visited Mar 10, 2023).

¹⁸ *Id.*

¹⁹ Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights* The Sentencing Project (2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/>, (last visited Mar 13, 2023).

²⁰ Brittany Friedman & Mary Pattillo, *Statutory Inequality: The logics of monetary sanctions in state law*, RSF: The Russell Sage Foundation Journal of the Social

grant voting rights to people who have been incarcerated for felonies after they have served their sentence regardless of outstanding fees, this clause in Florida prevents people who have served their sentence from voting if they have outstanding court fees. Monetary fees serve as a barrier to obtaining voting rights, as previously incarcerated people lose access to an intrinsically American right that should not be denied, if the denial is contingent on monetary fees that deem whether or not someone has completed their sentence.

Some may argue that having monetary restrictions determine whether or not a person has the right to vote is reminiscent of a poll tax. According to the Smithsonian Museum poll taxes, “Begun in the 1890s as a legal way to keep African Americans from voting in southern states, poll taxes were essentially a voting fee. Eligible voters were required to pay their poll tax before they could cast a ballot...”²¹ A poll tax served as a then legal way to restrict African Americans from Voting, as even though the Constitution had prohibited the restriction of voting rights for African American males per the 15th amendment that explicitly stated, “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 race, color, or previous condition of servitude.”²² Although the rights of citizens may not be abridged or denied on the basis of race or color, this left room for some states to institute poll taxes, and the grandfather clause that serves as a barrier to the right to vote.

A similar situation is seen when looking at Florida laws, as in 2018 voters voted to approve Florida Amendment 4, which restored the right to vote

Sciences, Vol.5, No.1, pp. 173-196 (2019), <https://www.jstor.org/stable/10.7758/rsf.2019.5.1.08>, (last visited April 3, 2023).

²¹ *Poll taxes*, National Museum of American History, (2018), <https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/poll-taxes>, (last visited Mar 5, 2023).

²² *Voting rights for African Americans*, Library of Congress, <https://www.loc.gov/classroom-materials/elections/right-to-vote/voting-rights-for-african-americans/>, (last visited Mar 10, 2023).

for felons except those convicted of murder or a felony sexual offense.²³ While this restored the right to vote for most of those convicted of a felony offense in Florida, as this was a previously restricted right, this did not stop another bill from being signed that restricted the right to vote for felons, similar to poll taxes in relation to the 15th amendment. Florida Governor, Ron DeSantis, signed Senate Bill 7066 into law which requires, “convicted felons to complete “all terms of sentence” including full payment of restitution, or any fines, fees, or costs resulting from the conviction. Section 25 of SB 7066 also provides a specific list of crimes that count as a *felony sexual offense* or *murder*. Florida Governor Ron DeSantis (R) signed Senate Bill 7066 into law on June 28, 2019.”²⁴ The language of “all terms of the sentence” is rather vague, which leaves room for monetary restrictions to be put in place that prevent people with previous felony convictions from voting, even though that right was previously restored with a Florida Amendment. This bill was contested as many claimed that the requirement of felons to pay all fees was unconstitutional, as it infringed upon the constitutional right to vote. The court decision is as follows, “On September 11, 2020, the 11th Circuit Court of Appeals ruled in *Jones v. DeSantis* that the state of Florida can require former felons to pay all fines and fees before regaining the right to vote. The court ruled that the plaintiffs failed to show that their constitutional rights were violated.”²⁵ The verdict of *Jones v. DeSantis*²⁶, asserted that it was constitutional for Florida to require the payment of all fines before voting rights may be restored, illustrating the continuation of felon disenfranchisement in Florida due to additional barriers,

²³ Florida Senate Bill 7066 (2019), Ballotpedia, (2019)
https://ballotpedia.org/Florida_Senate_Bill_7066, (last visited Mar 10, 2023).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Jonathan Manes, *Jones v. DeSantis*, MacArthur Justice Center, (2020),
<https://www.macarthurjustice.org/case/jones-v-desantis/>, (last visited Mar 15, 2023).

regardless of the right to vote being restored by a previous Florida amendment.

Conclusion

Previously incarcerated felons experience a different reality within American society following release, due to legal barriers to reentry into society, and the lack of government reentry services to support reentry into the community. Carceral citizenship describes an altered reality for those who have been previously incarcerated, as they face unique challenges after incarceration that deprive them of certain rights and prevent successful reintegration into the community. People who have been previously incarcerated should also be able to participate in politics and policy change in America, which is only possible through the full restoration of voting rights after incarceration, since voting is an integral part of the American Political Process. With prison populations rising steadily for the last 40 years, most people will be released and will struggle to reenter society if action is not taken. Reducing barriers to successful reentry is essential for American society, as the goals of the criminal justice system are not strictly punitive but rather include rehabilitation. This includes ensuring the restoration of certain rights to those who have been previously incarcerated, as well as ensuring that discrimination based on a felony conviction is not a barrier to achieving successful reentry into the community.