

# A Comparative Study of Prisoner Disenfranchisement in Western Democracies

by

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## **Introduction and Review of Literature**

### *Introduction*

Universal suffrage has long since been accepted as the standard for enfranchisement in democracies, however full and equal participation is rarely the reality. One group in particular that is frequently excluded is prisoners. Throughout the world there are all sorts of different practices regarding prisoner enfranchisement, and the variety of these practices confounds comparative patterns. Prisoner voting rights exist at a rare intersection between suffrage and penal laws. Both of these spheres make some implicit argument on the notion of inclusion; suffrage establishes who is worthy of helping to create the law, and penal policy determines what happens to individuals who break the law. This study will trace how these two forms of inclusion interact with one another and conclude with a more nuanced understanding of democracy and participation.

The literature on the issue of prisoner enfranchisement is fairly scarce, and the majority of what is written is either a macro study of international practices or single country case study. The nature of this topic makes it particularly difficult to study comparatively; there is a large variance of policies, and not all policies are enacted the way they were legislated. The complexity of penal systems (prisoners, probationers, parolees, detainees, etc.) adds an additional challenge to a comprehensive global comparison.

In the existing literature, the macro studies compare prisoner enfranchisement policies across countries, and try to find a discernable pattern. What is most

interesting about these studies is how few statistically significant patterns are found. As Brandon Rottinghaus concludes in one of the most comprehensive macro studies, “There appears to be no strong pattern by geography, age, “strength” of democracy or size, which are typical classificatory categories for comparative politics”.<sup>1</sup> While there are some discernable trends in the data, they do not consistently follow the cross-national variation typically anticipated by comparativists.

The following chapter will seek to construct a broader comparative understanding of prisoner enfranchisement policies as they exist throughout the world, using both quantitative and qualitative analyses. It will begin with an initial analysis of prisoner enfranchisement policies and their association with basic country characteristics. This data demonstrates the high degree of variance in policy dispersal and the confusion of commonly expected patterns. The quantitative analysis will continue with a review of some of the results of macro studies on prisoner enfranchisement. These studies look towards a variety of factors in the hope of finding useful patterns. Many of the factors do not directly relate to prisoner enfranchisement, but rather are typical cleavages in cross-national comparison that may help align the issue of prisoner enfranchisement with a more commonly studied topic. The chapter will end with several aspects of qualitative analysis suggested for future study. Because the quantitative analyses have such a limited utility in providing consistent explanations for prisoner enfranchisement, the remainder of this study will focus on a qualitative analysis and comparison of several countries.

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<sup>1</sup> Rottinghaus 2003, 27

<sup>2</sup> A good deal of countries do not directly address prisoner voting in their election 5

## *Cross-National Variance in Prisoner Disenfranchisement*

### **Quantitative Analysis**

Policies on prisoner disenfranchisement vary significantly across countries. This section illustrates that variance by contextualizing the distribution of policies globally with basic country characteristics. Using the categorization of countries and their policies from Rottinghaus (2003), the countries are divided into four categories: countries that allow prisoner voting with no restrictions, countries that place some restrictions on prisoner voting, countries that do not allow prisoner voting, and countries that place a ban on voting for some period after the offender's sentence is complete. The data include all of the countries that the Rottinghaus study could find legislated policies for.<sup>2</sup> Of these 114 countries, 26% enfranchise prisoners with no restrictions, 20% place some restrictions on prisoners, 46% disenfranchise prisoners during incarceration, and 7% have a ban after completing their sentence.<sup>3</sup>

### **Likely Correlates of Prisoner Enfranchisement**

Levels of democratization and country wealth are primary country characteristics for cross-national comparison, and for the purposes of this study they may also have some bearing on enfranchisement policy. Because the issue of prisoner enfranchisement falls within the context of political rights, we might reasonably expect countries that are highly democratized to have more lenient prisoner enfranchisement policies. A second possibility is that wealthier nations would be more likely to have lenient enfranchisement policies as well. This is not to say that

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<sup>2</sup> A good deal of countries do not directly address prisoner voting in their election laws and therefore could not be used in the study.

<sup>3</sup> Complete country list by policy category in Appendix

there is a mechanism by which a nation's wealth directly influences its prisoner enfranchisement policy; rather wealth may serve as an indicator for a country's level of development in a variety of areas. This brief analysis of global policies uses democratization (as measured by FreedomHouse) and per capita GDP (Current US \$, measured by the World Bank) as potential variables. Along with the categories of free, partially free, and not free, FreedomHouse also provides numerical data for countries' political rights and civil liberties; both categories are assigned a value between 1 and 7, with one being the most rights/liberties and 7 being the least rights/liberties.<sup>4</sup> In order to calculate policy averages, the four categories of policies are each assigned a numerical value: prisoner enfranchisement = 1; some restrictions = 2; prisoner disenfranchisement = 3; ban after voting = 4. This is an admittedly crude form of categorization in that it assumes that what is written in legislation is an accurate representation of the policy as it actually occurs. We will see in the ensuing case studies that there are legitimate challenges to this assumption, however this form of categorization mimics that used by Rottinghaus (2003), Rottinghaus and Baldwin (2007), and Uggen et al (2009).

## Democratization

### Free Countries (N= 69)

Policy	GDP per capita	Political Rights	Civil Liberties
2.235	\$ 25,088.08	1.38	1.578

Table 1A

### Partially Free Countries (N = 28)

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<sup>4</sup> "Freedom in the World 2013: Democratic Breakthroughs in the Balance."

Policy	GDP per capita	Political Rights	Civil Liberties
2.43	\$ 3,327.50	3.89	3.857

Table 1B

### **Not Free Countries (N = 13)**

Policy	GDP per capita	Political Rights	Civil Liberties
2.615	\$7,294.09	6.46	5.61

Table 1C

The above charts present a comparison between the three FreedomHouse categories of democratization. As would be expected, the ‘free’ countries have a much higher average per capita GDP. What is interesting for this study is that while there is some variance in the enfranchisement policies, it is almost equal across all three categories. Despite great variance in levels of democratization and rights/liberties, prisoner enfranchisement policies in all three categories average out to about the same value (somewhere in between some restrictions and disenfranchisement).

### **Per Capita GDP**

#### **Top Ten GDP (N = 10)**

Policy	Political Rights	Civil Liberties	Free (%)	Partially Free (%)	Not Free (%)
2.4	1.1	1.3	100%	0%	0%

Table 2A

#### **Bottom Ten GDP (N = 10)**

Policy	Political Rights	Civil Liberties	Free (%)	Partially Free (%)	Not Free (%)
2.36	4.36	4.09	9%	18%	72%

Table 2B

These tables give a snapshot of how country wealth may relate to the potential variables by comparing prisoner enfranchisement policy and democratization between the ten wealthiest countries in the sample and the ten poorest countries in the sample. There is a clear association between high GDP and levels of democratization; the ten wealthiest countries are all free, whereas nearly three-quarters of the ten poorest countries are not free. Despite this association, the prisoner enfranchisement policies are essentially the same; there is no discernible relationship between country wealth and prisoner enfranchisement policy.

#### Policy

##### **Prisoner Enfranchisement (N = 30)**

GDP per capita	Political Rights	Civil Liberties	Free (%)	Partially Free (%)	Not Free (%)
\$ 25,254.53	2	2.1	72%	24%	3%

Table 3A

##### **Some Restrictions (N = 23)**

GDP per capita	Political Rights	Civil Liberties	Free (%)	Partially Free (%)	Not Free (%)
\$ 19,748.18	2.74	2.65	65%	17%	17%

Table 3B

##### **Prisoner Disenfranchisement (N = 53)**

GDP per capita	Political Rights	Civil Liberties	Free (%)	Partially Free (%)	Not Free (%)
\$ 11,526.17	3	2.98	55%	30%	14%

Table 3C

##### **Ban After Release (N = 8)**

GDP per capita	Political Rights	Civil Liberties	Free (%)	Partially Free (%)	Not Free (%)
\$ 24,967.25	2.375	2.25	62.5%	12.5%	25%

Table 3D

These tables organize the potential variables in the categories of the four different kinds of prisoner enfranchisement policies. As one may expect, the countries with the most lenient prisoner enfranchisement policies are the wealthiest, have the most rights/liberties, and include more free states than any of the other four categories. What is interesting is that the category with the second highest average GDP and second highest rights/liberties score is that of the strictest policy, ban after release from prison. One should also note that well over half (62.5%) of the countries with the strictest policies are considered highly democratized. While there is an association between high GDP, high levels of democratization, and lenient prisoner enfranchisement policies (as per Table 3A), these same variables are also associated with the strictest policy (Table 3D).

### Analysis

Taken together, these three basic comparisons demonstrate that prisoner enfranchisement policies vary considerably, and not in the ways comparativists would typically expect. In Table 1 and Table 2 the policy averages were very similar (between 2.2 and 2.6) despite extreme variance in GDP and levels of democratization. Wealth and democratization are correlated, as may be expected, however these associations do not consistently align themselves with enfranchisement policies. From these comparisons it is clear that for many nations, the issue of prisoner enfranchisement exists outside of typical policy decisions or norms.

To better understand the idiosyncrasies of prisoner enfranchisement policy dispersal, it may be helpful to the reader to point out several specific countries. The United States, Belgium, and New Zealand, which are all considered free and are awarded ones in both political rights and civil rights, are three of the eight countries that ban ex-offenders from voting after their release from prison. Several partially free countries, such as Pakistan and Bangladesh, allow prisoners to vote with no restrictions. Possibly the biggest surprise is Iran, which is the only not free nation to allow prisoner voting with no restrictions. Unexpected country-policy alignments such as these demonstrate the likelihood that for many countries, prisoner enfranchisement policy exists outside of policy norms, or follows a different path of development.

#### Quantitative Findings on Prisoner Enfranchisement Policy from the Literature

The analyses in the preceding section serve to demonstrate the unusual distribution of policies across the world, however they are not conclusive. Many of the macro studies reviewed conduct more rigorous statistical analyses and arrive at similar conclusions: there is a limited connection between prisoner disenfranchisement policies and major characteristics of cross-national variation. For many of the studied factors there is a discernable relationship with prisoner enfranchisement policy, however it is not consistent or strong enough to prove causation. The exceptions to these general relationships or trends are too frequent and too extreme to ignore.

#### **Country Wealth**

Uggen et al (2009) look towards the relationship between major country characteristics and prisoner enfranchisement policy, one of the first being country wealth.<sup>5</sup> They find a positive relationship between high per capita GDP and prisoner enfranchisement.<sup>6</sup> More specifically, “each thousand dollar increase in per capita GDP results in an 11 percent decrease in the likelihood that a nation will disenfranchise its prisoners”.<sup>7</sup> Consistent with this pattern they find a relationship between low per capita GDP and policies of disenfranchisement.<sup>8</sup> While this study does find an association between country wealth and prisoner enfranchisement, the relationship is not statistically robust enough to serve as a predictor of policy.

### **Democratization**

Rottinghaus and Baldwin (2007) distinguish between countries that are labeled democracies and the degree of political freedom within those countries.<sup>9</sup> They make use of FreedomHouse data for degrees of democratization and political freedom. They found that there is no statistically significant correlation between a nominal democracy and lenient prisoner enfranchisement policies.<sup>10</sup> Regarding the effect of political freedom, Rottinghaus and Baldwin find that there is no statistically significant relationship between level of freedom and enfranchisement policy, however the researchers argue that the margin of the difference in values indicates a substantive difference in political freedom.<sup>11</sup> Uggen, Van Brakle, and McLaughlin

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<sup>5</sup> Uggen et al 2009, 67

<sup>6</sup> Uggen et al 2009, 67

<sup>7</sup> Uggen et al 2009, 67

<sup>8</sup> Uggen et al 2009, 67

<sup>9</sup> Rottinghaus and Baldwin 2007, 695

<sup>10</sup> Rottinghaus and Baldwin 2007, 695

<sup>11</sup> Rottinghaus and Baldwin 2007, 694

(2009) conduct a similar statistical analysis also including all countries with complete information as their data set, and using the democratization index of Vanhanen (2003).<sup>12</sup> Using a bivariate analysis, they find a positive relationship between high levels of democratization and prisoner enfranchisement.<sup>13</sup> However, they also found that the strong correlation between GDP and democratization made it difficult to statistically differentiate between the causation of political or economic development.<sup>14</sup> Similar to their findings with per capita GDP, there is an association between democratization and prisoner enfranchisement, but it is not comprehensive.<sup>15</sup> Contributing to this data is Blais (2001), who finds that while there is a relationship between strength of democracy and prisoner enfranchisement, it is not statistically significant.<sup>16</sup> Specifically, his data shows that two thirds of strong democracies enfranchise prisoners, while the remaining third has a policy of disenfranchisement.<sup>17</sup> However it should be noted that this article does not provide any information on its methodology or sources of data.<sup>18</sup>

The results from the Uggen et al and Rottinghaus and Baldwin studies indicate a stronger relationship between democratization, GDP, and prisoner enfranchisement policy than the initial analysis indicated. However it is important to note that their findings are not statistically significant enough to be considered predictors of enfranchisement policy. They are more useful as indicators of broad patterns, yet as

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<sup>12</sup> Uggen et al 2009, 67

<sup>13</sup> Uggen et al 2009, 67

<sup>14</sup> Uggen et al 2009, 69

<sup>15</sup> Uggen et al 2009, 70

<sup>16</sup> Blais 2001, 58

<sup>17</sup> Blais 2001, cited by Rottinghaus & Baldwin 2007, 690

<sup>18</sup> Blais 2001

the initial analysis shows, even these broad patterns have some very conspicuous outliers. In this sense, these findings are very similar to the first analysis conducted earlier in the chapter. While some expected trends arose, they did not consistently hold true. In an attempt to develop a more robust understanding of this policy, the macro studies go on to address a variety of other potential causal variables.

### **Geography**

One of the four hypotheses proposed by Rottinghaus and Baldwin is that African and Latin American countries would be more likely to disenfranchise prisoners.<sup>19</sup> This hypothesis was arrived at based on assumptions of political stability and colonial history. The study found that location in Africa and South America has a negative but not a statistically significant effect on prisoner enfranchisement.<sup>20</sup> In their study, Uggen and Brakle found that European nations were more likely to allow prisoners to vote, however there is still a good deal of variance within Europe.<sup>21</sup>

### **Colonial Legacy**

The final contextual factor highlighted by the reviewed studies is that of colonial legacy. Comparative politics literature often finds that colonial legacies are heavily correlated with other factors of development. Rottinghaus and Baldwin find that most post-colonial nations follow the general trend of their colonizing country.<sup>22</sup> More specifically, several of the studies hypothesize that states that are former British colonies will be less likely to enfranchise prisoners.<sup>23</sup> This is expected to be the dual

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<sup>19</sup> Rottinghaus and Baldwin 2007, 694

<sup>20</sup> Rottinghaus 2003, 23

<sup>21</sup> Uggen et al 2009, 62

<sup>22</sup> Rottinghaus and Baldwin 2007, 694

<sup>23</sup> Rottinghaus and Baldwin 2007; Blais 2001

result of the influence of British enfranchisement rights, as well as the effects of the colonial legacy in general. Rottinghaus and Baldwin find that being a former British colony is not a significant indicator of enfranchisement policy; Blais has the same finding, however his study was looking at general restrictions to voting.<sup>24</sup> Rottinghaus and Baldwin also find that there is no significant difference between the enfranchisement policies of former British colonies and non-British colonies.<sup>25</sup>

### **Ethnic Fractionalization**

Uggen et al were the scholars in the available literature to look at ethnic fractionalization, which they defined as the “statistical measure of the likelihood that two randomly selected people from the same nation will belong to different ethnic groups”.<sup>26</sup> The researchers expected that countries with higher rates of ethnic fractionalization would be more likely to disenfranchise prisoners, and that is indeed what the findings suggested.<sup>27</sup> However the researchers do not consider ethnic fractionalization as the strongest policy indicator.<sup>28</sup> This suggests that there could be explicitly political motivations behind disenfranchising prisoners, particularly involving minorities or ethnic conflict.

### **Voter Access**

Only Rottinghaus and Baldwin (2007) look at several aspects of voter access and their correlation with prisoner enfranchisement. They find a statistically significant correlation between access to absentee ballots and prisoner

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<sup>24</sup> Rottinghaus and Baldwin 2007; Blais 2001

<sup>25</sup> Rottinghaus and Baldwin 2007, 695

<sup>26</sup> Uggen et al 2009, 64

<sup>27</sup> Uggen et al 2009, 67

<sup>28</sup> Uggen et al 2009, 67

enfranchisement.<sup>29</sup> The other aspects of voter access (residency requirements, hospital voting, and access for those with mental health issues) have a very minor association with prisoner enfranchisement law.<sup>30</sup> This suggests that a country's disposition towards voting rights in general (e.g. whether or not it is a guaranteed right) may affect its prisoner enfranchisement policy.

### **Prison Population**

Two of the reviewed studies found that countries with high prison populations tend to disenfranchise prisoners, however it is not a statistically significant indicator of policy and there is no proof of causation.<sup>31</sup> Uggen and Van Brakle extended this factor to include capital punishment as well; they found that countries with capital punishment were also more likely to disenfranchise prisoners.<sup>32</sup>

### **Summary**

Uggen et al and Rottinghaus and Baldwin have explored a variety of potential causal variables for prisoner enfranchisement policies. The majority of these variables can be summarized as broad patterns of country behavior, rather than statistically significant indicators. The causal variable that was statistically significant, access to absentee ballots, is quite specific in scope, and should be a focus for future study.

When contemplating the results of these studies, it is important to acknowledge the difficulty in accurately and comprehensively portraying this policy statistically. The statistical analysis studies conduct bivariate analyses, meaning the enfranchisement policies are coded as either “yes” or “no”, “enfranchised” or

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<sup>29</sup> Rottinghaus and Baldwin 2007, 696

<sup>30</sup> Rottinghaus and Baldwin 2007, 696

<sup>31</sup> Rottinghaus and Baldwin 2007, 695; Uggen et al 2009, 67; Rottinghaus 2003, 25

<sup>32</sup> Rottinghaus and Baldwin 2007, 695; Uggen et al 2009, 67; Rottinghaus 2003, 25

“disenfranchised”.<sup>33</sup> While this coding facilitates statistical analysis, it ignores the variety of practices as they exist. For example, a country may have it written into law that prisoners can vote, but in reality prisoners might face significant obstacles that render them essentially disenfranchised. It is certainly possible that by essentializing policies in this way, studies miss the distinctions that would result in a more conclusive statistical analysis. Because of the limited efficacy of statistical analysis, the ensuing study will turn to case studies and comparisons in the hopes of finding useful policy determinants.

### *Conclusion*

This chapter has demonstrated the limited utility of quantitative data analysis in constructing an understanding of the distribution of prisoner enfranchisement policies internationally. Relationships can be found between certain country characteristics and prisoner enfranchisement policy, however they are rarely consistent or statistically significant enough to qualify as indicators. For example, there is a general trend in which democratic countries with high per capita GDPs and low levels of ethnic fractionalization are more likely to allow prisoners to vote, but the trend does not hold up against its significant exceptions. The only statistically significant predictor of prisoner enfranchisement is open access to absentee ballots, which is a rather specific factor. After all of the statistical analyses we still know too little to predict what country is likely to have what kind of policy.

The way in which the statistical analyses are conducted is likely responsible in part for the weakness of their results. Statistical analysis of prisoner enfranchisement

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<sup>33</sup> Rottinghaus and Baldwin 2007, Uggen et al 2009

policy requires that the policies be easily categorized. The initial analysis used a four-part categorization technique, and the more sophisticated statistical analyses required dichotomous categorization. Essentializing policies ignores many of the complexities in the policy that could contribute to a more comprehensive understanding of prisoner enfranchisement. This topic is also difficult to study at large because many countries do not have specific laws pertaining to prisoner enfranchisement, and often times there is a disconnect between the written law of a country and the actual practice. Prisoner enfranchisement is difficult to analyze statistically, and the resulting analyses do little to increase understanding on the issue.

The high degree of variance in prisoner enfranchisement policy indicates that countries may be diverging from their typical paths of policy development when legislating this issue. Cross-national patterns are derived from observations that countries with certain shared characteristics tend to behave a certain way. When these patterns no longer hold true, as with the case of prisoner enfranchisement, we can surmise that different characteristics or processes may be involved. Quantitative analyses are helpful in finding new patterns or supporting known ones, but when policy development is more idiosyncratic, a qualitative study can provide greater clarity. The following chapters will look in-depth at the various aspects that may contribute to prisoner enfranchisement policy formulation.

# Chapter 1

## Case Studies and Hypotheses

### *Case Study Selection*

The preceding chapter has demonstrated the large variety in prisoner disenfranchisement policy internationally, and particularly how it eschews typical patterns of development. Since macro studies have had limited success in finding statistically significant patterns this study will instead conduct an in-depth analysis and comparison of prisoner disenfranchisement policies in five states. This study will pursue a most-similar comparison in an attempt to limit unnecessary variation. The selected case study countries are: Sweden, Germany, the United Kingdom, Ireland, and the United States of America. Despite sharing many similar characteristics, these five countries represent the broad range of prisoner disenfranchisement laws throughout the world. Sweden is one of the most lenient countries, the United States one of the strictest, and the other three cases are located at different key points along the spectrum.

All five countries have high levels of democratization, each categorized as “free” by FreedomHouse with scores of 1 in both Civil Liberties and Political Rights.<sup>34</sup> Several macro studies cited in the Introductory Chapter found a positive relationship between high levels of democratization and lenient prisoner enfranchisement policies. Although this relationship was not found to be statistically significant, prisoner disenfranchisement is an issue of political participation, so a country’s commitment to democracy will likely play a role in the resulting policy.

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<sup>34</sup> “Freedom in the World 2013: Democratic Breakthroughs in the Balance” 2013

The selected five countries all have high per capita GDPs. Similar to the case of democratization, previously cited macro studies have found positive relationships, although not statistically significant, between GDP per capita and lenient prisoner enfranchisement policies. Per capita GDP often serves as an indicator of development, so while country wealth may have a limited impact on prisoner disenfranchisement policy, it is a useful gage for a slew of more complex factors. Lastly, the five selected countries are all unquestionably western.

Even though these case countries were chosen for their strong similarities, there are some key developmental differences. Within the case selection there are both Anglo-American states (United Kingdom, Ireland, United States) and continental European states (Sweden, Germany). Within these categories there are important distinctions common in comparative studies regarding legal histories, representative systems, and the style of welfare state. All of these distinctions indicate certain political attitudes or aspects of development that may influence the formulation of prisoner disenfranchisement policy. By using a selection of countries that represent different styles of western democracy we can better understand if a particular style of democracy is more amenable to an expansive prisoner enfranchisement policy than another style.

Given that all of the other selected countries are in Western Europe, it may be unexpected that the fifth case study would be the United States; there are certainly other countries that would fit better into the most-similar comparison structure. The existing prisoner disenfranchisement policy (or collection of policies) United States is unique in a variety of ways. As will be discussed in the appropriate chapter, each of

the fifty states is responsible for its own prisoner enfranchisement laws, which has resulted in a large array of policies across the country. Depending on the state, prisoners in American can either vote in prison, or are permanently barred from voting after any sort of felony conviction. The United States presents the opportunity for in-country comparison of policies as well as comparison with other similar countries. This increases the ability to test hypotheses and to see how various factors play out in different states with their respective social makeup and history.

### *Structure of Studies*

The case studies will attempt to address a variety of factors that could not be sufficiently covered through a statistical analysis. Each will begin with an in-depth account of the current prisoner enfranchisement policy and how it developed. The development story is quite lengthy for some cases, particularly those whose policies have been challenged by domestic or international courts. The majority of prisoner disenfranchisement comparison studies available in the literature are looking at large global patterns in policies, and while these help us understand the policy landscape, they miss the historical contexts and processes that result in those policies. Tracking prisoner disenfranchisement policies over time to see how, when, and under what circumstances they developed will lead to a more robust understanding of this phenomenon and the various factors involved.

Each development story is unique, and indicates different aspects of the political structure or culture of the respective country. For this reason the studies focus primarily on the most relevant factors for that particular case country, rather than devoting the same degree of attention to all factors for the sake of parallelism.

That being said, there are key elements of development and current policy that are addressed in all chapters, which facilitate cross-country comparison. The factors addressed to some extent in all case studies are: history of suffrage and democratic rule; political structure and culture; and penal policy and societal view of prisoners. Included in many of these categories is a discussion of political ideologies that have historically or currently guide policy making in that particular area. These topics were chosen because they were either specifically indicated in the development stories of the case studies or they were assumed to have some bearing on the current disenfranchisement policy. Since the issue of prisoner disenfranchisement exists at a cross-section of different policy spheres, the selected topics of study seek to provide information on the many potential influences. Prisoner disenfranchisement raises the question of who is allowed to participate in the political sphere, so an understanding of the country's history with democracy and its views on public participation will be useful. It is also an issue of prisoners' rights and their position in society, so an understanding of the country's penal policy will be helpful as well. Political structure and culture is an admittedly broad topic that seeks to encompass many of the factors indicated in the particular development stories. For example, whether or not a country has a written constitution affects how rights are determined, and potential recourse for when they are violated.

We saw in the introductory chapter that the statistical analyses were largely unsuccessful in finding significant indicators for prisoner disenfranchisement policy, however the one variable that was statistically significant was access to absentee ballots. For this reason the country studies will address this variable and its potential

relevance to that case, often including a more general discussion about voter access. The topic of voter access is more relevant across all studies, and essentially addresses whether the government considers the onus to be on itself or the citizens to get their votes cast. While the ideology behind the policies may be different for the cases, for the most part the laws regarding voter access are quite similar, with the only exception being the United States.

### *Conclusions*

This study will demonstrate the great deal of complexity involved in the formulation of prisoner disenfranchisement policies. There is no singular path to the development of a particular policy, and it appears that idiosyncratic country factors play a great deal of importance. However at least three positive conclusions can be drawn from the analysis. Firstly, political ideas are important. Each political society has a particular balance between what an individual has by right of citizenship and what must be earned. Implicated in this is the balance of power between the state and the individual regarding political participation and how the state maintains legitimacy. States that rely on the full and equal participation of its citizens for legitimacy, and believe that political participation is a right not a privilege, are likely to allow their prisoners to vote. Conversely, states that view participation as a privilege that must be earned and maintained are likely to disenfranchise their prisoners. Secondly, how salient the issue is for political actors and the public at large may determine if and how policy gets made. Since prisoner voting rights exist at a cross-section of topics that rarely meet, we frequently see in case studies that actors are largely unaware of the issue. Not only does this affect if and when the policy is

addressed or changed, but we also see interesting results when the issue becomes more or less salient. Lastly, the case studies show that institutions matter. Whether or not a state has constitutional courts or a federalist structure changes how prisoner voting policy will be addressed.

These conclusions are neither airtight nor exhaustive. Rather than resulting in a list of variables, this in-depth comparison and analysis points to concepts in political development and policy formulation. Although many of these factors would be very difficult to quantify, they may go further than a statistical approach in explaining how and why countries develop certain prisoner voting policies, and accordingly why there is so much global variation.

## Chapter 2

### **Theoretical Understanding of Prisoner Disenfranchisement**

#### *Introduction*

In comparison with other aspects of suffrage, the issue of prisoner enfranchisement, including its global distribution and influencing factors, is not very well understood. For this reason it is helpful to begin this comparative analysis with a brief study of the ideological concepts supporting or challenging prisoner disenfranchisement. The two concepts most frequently cited in the secondary literature are civil death and violation of the social contract. Although both concepts can arrive at the policy of disenfranchisement, there are some important distinctions between the two, including their greater ideological context. Challenging these defenses of disenfranchisement is the more modern understanding of political equality, which poses a different relationship between democracy and the individual.

An important reason for understanding these concepts is that as we delve into the particular case studies, we see that political actors speaking in defense of disenfranchisement often cite these concepts. These citations often appear unintentional, which leads to the hypothesis that for many actors, the ideological foundations of prisoner disenfranchisement are deeply rooted in their overall understandings of governance, society, and rights. By understanding these concepts and locating them in a larger theoretical context we can better comprehend how prisoner disenfranchisement policies develop and persist.

## *Civil Death*

The oldest concept is that of civil death, which is the idea that once convicted of a crime, the civic (i.e. public) part of an individual's life is over. In its original form, 'civic death' extends to all parts of public life, including political and civil rights and the ability to engage in economic transactions.<sup>35</sup> The reasoning behind this is based in the republican understanding of the polity as not simply the aggregate of individual wills, but as having values shared by the citizens. The strength of the community lies in the virtue of its citizens, so if an individual proves himself to be immoral, his continued participation in the community can put everything at risk. This is particularly true because the republican idea of virtue is intrinsically linked with what is good for the polity; since breaking the law cannot possibly be in the best interests of the community, there is no way in which an individual can break the law and remain a virtuous citizen.<sup>36</sup> For this reason civil death has been most relevant in crimes deemed to be immoral or demonstrative of bad character, a category which has varied depending on the society and time.<sup>37</sup> Along with protecting the polity at large, civil death was determined to be a harsh punishment because it denied individuals the opportunity to participate in society, which republicans believed made one more virtuous.<sup>38</sup> By breaking the law, the individual has proven he is of poor character, and no longer worthy of public participation.<sup>39</sup>

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<sup>35</sup> Easton 2011, 24; Dhami 2005, 239

<sup>36</sup> Ewald 2002, 1081

<sup>37</sup> Rottinghaus 2003, 6

<sup>38</sup> Ewald 2002, 1084

<sup>39</sup> Ewald 2002, 1084

Civil death is interesting as a concept because it is as old as democratic governance, and has recurred in many different iterations throughout time. The first known instances of civil death occurred in ancient Greece and Rome; these societies were the first in western civilization to promote public participation as a virtuous, and accordingly a denial of this privilege was a severe punishment.<sup>40</sup> Because the standards of citizenship were so limiting in ancient Greece and Rome, civil death was actually a common status for many individuals, most notably women and slaves.<sup>41</sup> Therefore civil death could only be a punishment for individuals of a particular status, and thus would have the additional effect of rendering one civilly equivalent to a slave.

Civil death later resurfaced in medieval and then modern European societies. Because these polities were monarchical rather than self-governing, there were some clear differences in the practical effects of civil death. The inability to participate in public life did not refer to governance, and there was less of an emphasis on the republican notion of virtue. In many cases laws of civil death upon conviction meant that all of the individual's possessions were surrendered to the king, and the individual could no longer bequeath or inherit an estate.<sup>42</sup> In some extreme cases the effects were more like exile, the individual could legally be murdered.<sup>43</sup> In England civil death laws were particularly strong, and were only liberalized with the Forfeiture Act of 1870.<sup>44</sup> This law removed all of the civil death punishments associated with

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<sup>40</sup> Kleinig and Murtagh 2005, 218; Easton 2011, 16

<sup>41</sup> Rottinghaus 2003, 7; Easton 2011, 16

<sup>42</sup> Easton 2011, 221

<sup>43</sup> Easton 2011, 221

<sup>44</sup> Easton 2011, 221

conviction, however it maintained the ban on prisoners voting and running for office (this will be discussed in greater detail in the UK chapter).<sup>45</sup>

Early American colonies also had very strict civil death laws.<sup>46</sup> Puritan colonists brought the concept with them along with other aspects of British law, but it was also used to promote morality within the colonies.<sup>47</sup> Self-governance and community rule were very important in Puritan communities, however this coincided with an emphasis on community morality reminiscent of Greek and Roman republicanism.<sup>48</sup> In some circumstances morality tests were prerequisites for voting, and the breaking of laws rendered one unworthy of public participation.<sup>49</sup>

The persistence of civil death laws throughout western civilization demonstrates that it is a concept that resonates with many different societies. Theoretically it is based on the importance of community values and the benefits of political participation, however civil death laws were prominent in monarchical societies in which participation was extremely limited. In those cases, the effects of the punishment were largely economic, perhaps mirroring a shift towards public life as primarily economic, with the rights of citizenship following suit. This makes the idea of civil death particularly interesting as we move into the contemporary era, in which public participation in actuality is somewhat limited but the rhetoric of rights and inclusion has gained prominence.

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<sup>45</sup> Easton 2011, 221

<sup>46</sup> Ewald 2002, 1060

<sup>47</sup> Ewald 2002, 1060

<sup>48</sup> Ewald 2002, 1060

<sup>49</sup> Ewald 2002, 1060

*'Purity of the Ballot Box'*

Different from civil death but related to the republican understanding of citizenship is the notion of a 'pure' ballot box, which effectively means a democratic process free from moral corruption.<sup>50</sup> The specific phrase was first used in the ruling opinion for *Washington v State*, a prisoner disenfranchisement case brought before the Alabama Supreme Court in 1883.<sup>51</sup> In the ruling defending the state's prisoner disenfranchisement policy, the justice wrote that such a policy would "preserve the purity of the ballot box".<sup>52</sup> Laws in many American states specify disenfranchisement as a punishment for "infamous crimes" or crimes involving "moral turpitude".<sup>53</sup> This specific phrase, as well as its ideological context, has been frequently cited in defenses of prisoner disenfranchisement, and this sentiment can be found in many laws enacted before the nineteenth century. It is certainly rooted in some elements of republican thought, although more precise than civil death more broadly. While civil death refers to all of public life, the 'purity of the ballot box' concept is specific to electoral participation and the moral character of the individual. The idea is predicated on a morality qualification for voting; if an immoral individual participates in the vote, the entire electoral process will be sullied.<sup>54</sup> Disenfranchisement in this sense is more of a protective measure for the democratic process than it is a punishment of the individual.

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<sup>50</sup> Rottinghaus 2003, 7

<sup>51</sup> Rottinghaus 2003, 7

<sup>52</sup> *Washington v State* (1833) cited in Easton 2011, 211

<sup>53</sup> Rottinghaus 2003, 7

<sup>54</sup> Rottinghaus 2003, 7

The popularity of this notion is interesting because it demonstrates that many polities assume a moral qualification for voting, although such laws are rarely enacted (an exception being the Puritan colonies mentioned above). Given that communities that serve as rights-giving units (i.e. nations, American states) are presumably too heterogeneous (or decidedly pluralist) to develop or sustain moral standards, it is possible that disenfranchising prisoners is the most feasible way to maintain some sort of morality qualification. However determinations of morality based on incarceration can be theoretically problematic. An individual who loses his right to vote while incarcerated will eventually regain this right upon his release (except in the most restrictive states, of which there are few). If the reasoning for his temporary disenfranchisement is his immorality, then how could his re-enfranchisement be justified? A claim on an individual's morality is too eternal to correspond with the defined temporality of prison terms.

### *The Social Contract*

The idea of governance as a social contract has also lent considerable support for the disenfranchisement of prisoners. Born out of liberal thought, the social contract is an understanding that in living in a community, there is an implied contract between members: one gives up the unfettered freedom available in the state of nature and abides by certain rules in exchange for the privileges and protections of cooperative living. This contractualist view of society has particular consequences for felons. By committing a crime, an individual not only violates the written law, but also the social contract that holds the whole society together.<sup>55</sup> In this sense, felons

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<sup>55</sup> Kleinig 2005, 219

have acted in a way that puts them outside of the boundaries of society, and makes them unworthy of its protections and privileges.<sup>56</sup> The social contract is at the crux of much liberal political thought, and as such this particularity has received much attention from its foremost thinkers. Thomas Hobbes, John Mill, John Locke, and Jean Jacques Rousseau have all written in favor of the disenfranchisement of prisoners, arguing in varying degrees about the extent of political participation.<sup>57</sup> In John Locke's *Second Treatise of Civil Government* he writes a strong condemnation of those who break the law:

“In transgressing the law of nature, the offender declares himself to live by another rule than that of reason and common equity, which is that measure God has set to the actions of men, for their mutual security; and so he becomes dangerous to mankind, the tie, which is to secure them from injury and violence, being slighted and broken by him” (Section 8 Chapter 2, *Second Treatise of Civil Government*)

Locke establishes that in society there is a clear social order, and by breaking the law criminals prove that they are fundamentally incapable of understanding or abiding by this order. It follows then that criminals' participation in society should be limited if not entirely removed.

The social contract and other liberal thought have strongly influenced contemporary understandings of citizenship and democratic participation. Many western nations' conceptions of citizenship are highly influenced by contractualist thought, the idea being that if one benefits from citizenship one also has certain obligations to that state, abiding the laws being one of them.<sup>58</sup> An individual who decides to not obey the laws has violated a very clear understanding, and no longer

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<sup>56</sup> Rottinghaus 2003, 5

<sup>57</sup> Rottinghaus 2003, 6; Ewald 2002, 1073

<sup>58</sup> Easton 2011, 16

deserves the privileges of citizenship.<sup>59</sup> The liberal understanding of the individual has also provided support for prisoner disenfranchisement. Liberal thought emphasizes that each individual is rational, and pursues courses of action that advance his interests. Accordingly, if a criminal were to vote, he could vote in support of politicians or laws that would facilitate his criminal interests.<sup>60</sup> Many contemporary defenses of prisoner disenfranchisement have cited this fear of subversive voting, although there is no evidence to suggest it is a significant possibility.<sup>61</sup>

The social contract has been very influential in providing support for a variety of punishment issues, including prisoner disenfranchisement. It is particularly relevant in modern democratic societies in which public participation in politics is more limited and community virtue is less of a concern. However there are some issues with this line of thought. Although they have violated the supposed social contract, prisoners retain many rights, specifically those that align with their incarcerated status. Many states also now promote rehabilitation as the primary goal for incarceration; if the prisoner is to eventually return to society, then he is only temporarily undeserving of the rights of citizenship. Shifts in political participation and punishment call into question the relevance of social contract ideology and its support of prisoner disenfranchisement.

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<sup>59</sup> Easton 2011, 16

<sup>60</sup> Ewald 2002, 1077

<sup>61</sup> Ewald 2002, 1077

*Political Equality and a Universalist Democracy: An Alternative Approach*

We have seen above how views of democracy founded on liberalism and republicanism can lend support to narrowly defined citizenship, however twentieth century developments in democratic theory have introduced a different approach. Democracy has become the global standard for political systems in the modern world, and theorists have developed a new interpretation of democracy based on universal political rights. As one of the twentieth century's leading democratic theorists, Robert Dahl helped to crystalize this universalist message. In Dahl's definition of democracy, all adults have the right and the ability to participate politically, and state power can only be legitimate when it is derived from the equal and fair participation of all of its citizens.<sup>62</sup> This alternate reading of democracy presents a serious challenge to the disenfranchisement of prisoners.

As noted in the beginning of Robert Dahl's *On Democracy*, democracy has had many different meanings over its 2,500 year history.<sup>63</sup> Even from the brief explanations of civil death and the social contract we can see two distinct understandings of the relationship between man and state; both support some form of representative government, but for very different reasons. Dahl's approach illustrates a new understanding of the individual-state relationship, one that is predicated on full inclusion rather than earned inclusion. This theory of democracy is based on the principle of political equality. The explanation of political equality begins with the

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<sup>62</sup> Dahl does allow for some exceptions, which will be addressed in the preceding paragraphs.

<sup>63</sup> Dahl 1998, 1

more basic principle of intrinsic equality: that all individuals are inherently equal.<sup>64</sup> From intrinsic equality Dahl develops the Presumption of Personal Autonomy.<sup>65</sup> This is the two-part assumption: (a) an individual is the best judge of what is best for him and (b) an individual is morally autonomous, that is to say he makes his own laws guiding his moral choices.<sup>66</sup> Because an individual has experience with an internal decision-making mechanism and is the most aware of what is in his best interests, he has the ability and the right to participate in any binding political process.<sup>67</sup> Contrary to older interpretations of democracy, Dahl argues that all individuals must be able to participate politically if they are to be affected by the decisions.

Dahl's theory does address exceptions to full participation, the most obvious of which is children. It is commonly accepted that because of their mental immaturity, children are not the best judges for what is in their best interests.<sup>68</sup> This assumption is consistent throughout all aspects of a child's life. The only other individuals excluded are those who are so disabled that they require a guardian, thus effectively in the same legal position as children.<sup>69</sup> Absent from this narrow pool of acceptable exceptions are those convicted of crimes or those accused of other antisocial behaviors. Dahl does not specifically address prisoners, although he is very clear in his limits to disenfranchisement. One could potentially make an argument analogizing the condition of prisoners and the severely mentally handicapped; prisoners are also under the control of an external authority, which includes the

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<sup>64</sup> Dahl 1998, 65; Dahl 1989, 86

<sup>65</sup> Dahl 1989, 99

<sup>66</sup> Dahl 1989, 91-99

<sup>67</sup> Dahl 1989, 99

<sup>68</sup> Dahl 1998, 75

<sup>69</sup> Dahl 1998, 75; Dahl 1989, 101

extreme regulation of daily tasks. However this analogy would be superficial at best. The state of imprisonment is temporary; it is nonsensical that an individual could be completely incapable of making his own choices one month and then be capable of it upon release. Imprisonment also only typically affects the responsibilities of the individual directly associated with his state of imprisonment; he is still legally and financially responsible for himself while in prison. All in all, we can safely assume that Dahl's theory of democracy would allow for prisoner enfranchisement. This is very interesting in that Dahl's requirement for enfranchisement is the ability to make rational decisions rather than the quality or merits of those decisions. Whether or not an individual chooses to follow the law does not have any bearing on his ability to participate in lawmaking in the future. In this view of democracy, full participation is fundamental for both the citizens and the state; for citizens it affords them an equal chance at self-determination, for the state it ensures its legitimate claim to rule.

Another defense for prisoner enfranchisement can be drawn from Dahl's writings. In *On Democracy* he concludes that an individual who is denied the right to participate politically will not have his interests represented to the extent that he would if he had participated.<sup>70</sup> This addresses the very precarious situation that disenfranchised prisoners are in. Prisoners represent a specialized group in society that is particularly vulnerable to laws, but is limited in its ability to participate in the making or changing of these laws. As will be seen in several case studies, prisoners are also vulnerable to being reduced to a political prop or a societal scapegoat.

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<sup>70</sup> Dahl 1998, 77

Perhaps there is a connection between this lack of political influence and the politicization of crime and dehumanization of criminals.

*Conclusion: Analysis and Consequences for Policy Making*

One consistency in the concepts of civil death and violation of the social contract is that there are clear boundaries to citizenship and political participation. There may be different standards for inclusion, but both the republicanism of civil death and the liberalism of the social contract place criminal offenders outside of the boundaries of citizenship. In both circumstances it appears that citizenship is something that must be earned and maintained, rather than the default status for an individual living in the polity. This stance is directly challenged by the concepts of universal participation and political equality described by Robert Dahl. In Dahl's democracy, political participation only excludes children and extreme cases of mental incompetence.

The temporal differences between the three theoretical concepts discussed are important to understanding their respective positions on political inclusion. Civil death and the social contract were engendered in times of extreme exclusion. The very possibility of total equality was hardly broached before the twentieth century, and certainly not politically pursued until then. Perhaps a potential explanation for prisoner disenfranchisement is whether or not that state is pursuing the most contemporary visions of democracy. Modernity has also brought with it a greater understanding of criminality and rehabilitation. Scholars have developed very thorough arguments demonstrating the connection between crime and poverty and sociopolitical exclusion. Environmental causations of crime pose challenges to the

arguments advanced by civil death and social contract theory. Both concepts view the criminal as an isolated case of moral bankruptcy that must be removed from the community before causing any damage. However if we understand crime as largely a result of circumstance and environment rather than a calculated choice to violate the social order, then continued exclusion of an already marginalized population seems unjust. This critique is amplified in the light of crime statistics particularly in the United States, in which inmates are significantly more likely to be minorities from lower socioeconomic backgrounds. We will see in the ensuing case studies how a state's current stance on inclusion and rehabilitation may affect its prisoner disenfranchisement policy.

When reviewing defenses of disenfranchisement policies made by political actors across case studies, references to the concepts of civil death and the social contract are frequent. However they are often cited either cited together or in complete isolation of any supporting ideological component. In many cases it seems as if these defenses are dependent on a broader understanding of citizenship, democracy, or enfranchisement that are obvious to the speaker but not coherently defined or explained. Because prisoner disenfranchisement is so infrequently discussed, it is possible that political actors have very strong opinions guided by their overall political outlook, but have not had the occasion to develop a coherent explanation of this opinion. An understanding of these ideological bases helps in identifying them when they are used in debate, and leads to a more conclusive and dynamic understanding of prisoner disenfranchisement policy.

## Chapter 3

### Sweden and Germany: the Expansive Cases

#### *Introduction*

The cases of prisoner disenfranchisement in Sweden and Germany are both representative of more inclusive policy options. In Sweden prisoners can vote without any restrictions whatsoever, and in Germany prisoner disenfranchisement is reserved for very specific crimes and is rarely used. While there are differences in these policies, both demonstrate a clear support for voting rights amongst even those that have broken the law. Regarding how these policies were developed, there are similarities in both the early timeline and non-politicization of the issue. We will see how even though Germany and Sweden followed two very different paths to democracy, they have since maintained a political culture that is strongly democratic and has not politicized crime, thus resulting in their expansive prisoner enfranchisement policies.

### Sweden

#### *Current Policy and its Background*

Prisoners in Sweden can vote without restrictions either by in-prison polling places or by proxy.<sup>71</sup> This change was first enacted in 1937 during a period of general suffrage expansion.<sup>72</sup> Previously Swedish election laws had disallowed prisoner voting on the basis of “loss of civic confidence”, a concept that will be explored further in the succeeding paragraphs.<sup>73</sup> Today the Swedish Electoral Law specifies

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<sup>71</sup> “The Swedish Electoral System”

<sup>72</sup> “The Swedish Electoral System”

<sup>73</sup> “The Swedish Electoral System”

how prisoners and other citizens under some form of state guardianship are to exercise their right to vote, providing for several different options based on the needs and circumstance of the individual.<sup>74</sup>

### *Suffrage*

Sweden is a strong example of a universalist democracy. All citizens over eighteen are eligible to vote, and the burden is on the government to ensure that all eligible voters can exercise their right. Registration is automatic, elections are held on Sundays, and provisions are made to ensure that those who cannot physically get to their polling station can still vote.<sup>75</sup> These provisions include proxy voting, a method by which an individual can arrange for someone else to vote in their stead, postal ballots, and special polling places provided for people in institutional care, such as hospitals, prisons, and homes for the elderly.<sup>76</sup> The variety of special provisions available demonstrates an understanding of political participation as an integral part of the democratic system.

Prisoner enfranchisement in Sweden was one of many steps in the remarkably peaceful and linear expansion of the right to vote. The initial thrust for manhood suffrage began at the end of the 19<sup>th</sup> century, and was largely propelled by the effects of industrialization.<sup>77</sup> Sweden began industrialization rather late compared to other European nations, but once started it led to many dramatic economic, social, and geographic shifts.<sup>78</sup> Changes in the social order coincided with the rise of two very

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<sup>74</sup> “The Swedish Electoral System”; “The Elections Act 1997” (Vallag)

<sup>75</sup> Board 85; Rustow 121

<sup>76</sup> “The Swedish Electoral System”; “The Elections Act 1997” (Vallag)

<sup>77</sup> Rustow 44; Edler 3; Board 31

<sup>78</sup> Edler 2; Rustow 45

influential political movements: socialism and liberalism.<sup>79</sup> Proponents of both ideologies pushed for manhood suffrage against the resistance of Conservatives, who were interested in maintaining the current political order, which included income and wealth requirements for political participation.<sup>80</sup> From 1907 to 1909 a series of compromises between Liberals, Socialists, and Conservatives resulted in the establishment of manhood suffrage in exchange for a system of proportional representation.<sup>81</sup> After this compromise there remained many restrictions barring women, paupers, prisoners, those who had not completed their military service, and several other groups.<sup>82</sup> In the succeeding years the majority of these restrictions were done away with. In 1921 women received full suffrage, as did men who did not complete their military service, in 1933 suffrage was expanded to those who had filed for bankruptcy, prisoners in 1937, and in 1945 paupers gained the right to vote.<sup>83</sup> The last group to gain the franchise was those who were considered by a court to be “legally incompetent”, and they finally received the franchise in 1991.<sup>84</sup> As far as one can tell, the process of vote liberalization in Sweden was relatively calm and apolitical. The Conservatives were hesitant to expand the franchise but eventually acquiesced in a rather typical form of political compromise. The enfranchisement of prisoners occurred no differently from the enfranchisement of the other groups not initially included in universal suffrage.

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<sup>79</sup> Board 1970, 29; Rustow 1944, 47, 53

<sup>80</sup> Board 1970, 29

<sup>81</sup> Board 1970, 31; Rustow 1955, 44

<sup>82</sup> Board 1970, 31

<sup>83</sup> Board 1970, 31

<sup>84</sup> Rustow 1955, 121, “The Swedish Electoral System”

As the franchise expanded in Sweden, ideas about the right to political participation also changed. An older, more republican view of participation – evidenced by the ‘loss of civic confidence’ law – was gradually replaced by a universalist view of democracy in line with the theories of Robert Dahl. A clear marker in this evolution was the 1937 law that called for the enfranchisement of prisoners and the abandonment of the ‘loss of civic confidence’ concept. Codified in the 1864 Penal Code, ‘loss of civic confidence’ (Förlust av medborgerligt förtroende) meant that an individual convicted of particular crimes lost the respect of his fellow citizens, and was therefore unfit to participate in political life.<sup>85</sup> <sup>86</sup> This concept has clear ties to that of civil death; it emphasizes the role of the community, and particularly how members of the community should be able to trust in the character of one another if they are to be self-governing. The 1937 law that enfranchised prisoners specifically mentioned ‘loss of civic confidence’ and how it was no longer a guiding principle.<sup>87</sup> This indicates a shift in how Swedes understood the franchise and its role in their democratic system. By citing this kind of behavioral qualification, the political actors appeared to be consciously deciding that full enfranchisement is more important for advancing democracy than the ‘civic confidence’ of their citizens.

The enfranchisement of prisoners in Sweden was also designed to positively impact their social status. According to Damaska, Swedish legislators were concerned about the stigmatizing effects of disenfranchisement.<sup>88</sup> Voting was considered an important part of community participation, and the inability to do so would

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<sup>85</sup> Translated by Google

<sup>86</sup> “Swedish Electoral System”

<sup>87</sup> “Swedish Electoral System”

<sup>88</sup> Damaska 1968, 358

emphasize the individual's past wrongdoings and make reintegration all the more difficult.<sup>89</sup> This commitment to successful reintegration and the removal of the stigma of conviction reflects the rehabilitative view of penal policy in Sweden, which will be discussed later in the chapter. It is clear that in the early part of the 20<sup>th</sup> century the political culture of Sweden shifted towards a universalist view of democracy with a strong emphasis on equal and full political participation.

Considering how volatile the expansion of voting rights has been in other states, it is quite interesting that it occurred so peacefully in Sweden. The extension of suffrage is an integral part of a state's political identity, and fights for enfranchisement often coincide with a serious debate over political inclusion. Majority groups often use the right of political participation to maintain control vis à vis other groups; thus any change in political participation would lead to a significant restructuring of the political order. Perhaps a state with a deeply ingrained sense of equality between individuals, such as Sweden, would not face the same political challenges in enfranchisement expansion as more divisive states.

#### *Political Institutions and Culture*

Sweden is distinctive from the other cases in the study in that its political development has been gradual and its politics have been consistently characterized by moderation. This has likely had an effect on the non-politicization of crime, and the subsequent policy of full prisoner enfranchisement.

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<sup>89</sup> Damaska 1968, 358

Sweden developed in relative isolation and without much influence from foreign powers.<sup>90</sup> Accordingly, Sweden's political development has been rather incremental. Without influence from conquering powers or significant cultural exchanges, Sweden developed consistently and gradually into the nation-state it is today.<sup>91</sup> Some of the characteristics consistent throughout Sweden's development with political implications are a tradition of self-governance, codification of laws, and equality amongst men.<sup>92</sup> In Robert Dahl's brief history of democracy in *On Democracy* he cites the tradition of assemblies of men and principles of equality that developed independently in Viking communities in what is now Sweden and its neighboring states.<sup>93</sup> These local assemblies that approved of kings and laws were the bases of the modern parliament once the nation-state was established.<sup>94</sup> Sweden's history demonstrates a tradition of self-governance that has permeated generations of political life.

Another important factor in Sweden's development is its cultural, ethnic, linguistic, and religious homogeneity.<sup>95</sup> Unlike other western European states that were forged from diverse regions with their respective cultures, the area that would become Sweden was always been geographically unified, and very few distinctions existed amongst the inhabitants.<sup>96</sup> Even religion served more as a force of unification than division; the only demographically significant religion is Lutheranism, although

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<sup>90</sup> Rustow 1955, 9; Board 1970, 19, 173

<sup>91</sup> Board 1970, 19, 173

<sup>92</sup> Herlitz 1939, 118; Dahl 1998, 19

<sup>93</sup> Dahl 1998, 19

<sup>94</sup> Dahl 1998, 19

<sup>95</sup> Edler 1970, 1; Board 1970, 10; Rustow 1955, 132

<sup>96</sup> Edler 1970, 1; Board 1970, 10; Rustow 1955, 132

secularism is becoming increasingly popular.<sup>97</sup> The largest cleavage that does exist is between social classes (often indicated by level of employment), although even then these divisions have been relatively mild and have not resulted in civil wars or social revolutions.<sup>98</sup>

Modern Swedish politics are largely characterized by stability and moderation. There are opposing parties that represent various positions along the political spectrum, however compromise is common and polarization is limited.<sup>99</sup> Compromise between parties is made easier by the fact that even if they have strong differences in policy, political parties are much less ideological, and non-absolutist in their ideology.<sup>100</sup> This moderation has resulted in a relatively mild political history. Sweden's political history is largely defined by gradual changes facilitated by compromise rather than radical shifts and ruptures.<sup>101</sup> The expansion of the franchise in Sweden exemplifies this tradition of moderation. The shift to manhood suffrage and later universal suffrage was hugely important to the political order; when manhood suffrage was passed in 1907 the electorate more than doubled, and doubled again with the addition of women in 1921.<sup>102</sup> Despite the profound implications of these electoral expansions, the laws were arrived at and passed as rather standard pieces of legislation, not a fundamental restructuring of the political order. This historical example helps to indicate the kind of moderation typical of Swedish politics in which compromise between political parties is capable of addressing issues of

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<sup>97</sup> Board 1970, 12

<sup>98</sup> Rustow 1955, 132, 135

<sup>99</sup> Rustow 1955, 231

<sup>100</sup> Board 1970, 20

<sup>101</sup> Board 1970, 20

<sup>102</sup> Board 1970, 31

fundamental importance to Sweden's identity as a state. Sweden's political moderation and stability may help us understand the context of its prisoner enfranchisement policy. Intense ideological conflict between political parties often results in the politicization of non-essential issues, particularly when the marginalization of certain groups is involved. If Sweden has not experienced a highly polarized political culture, it is likely that there was never an occasion to politicize an issue such as prisoner enfranchisement.

### *Prisoners and Society*

Given that the issue at hand involves such a particular group in society, an understanding of how Sweden conceives of prisoners and punishment is necessary. Sweden has gained international attention in recent years for the treatment of its prisoners, and the overall ethos of crime. The Swedish approach to crime and penalization is defined by rehabilitation and the eventual reentry of prisoners into society.<sup>103</sup> Swedish prisons are noted for their humanism, and public dialogue rarely demonizes criminals.<sup>104</sup> It is clear that prisoners are not considered vastly different from the average citizen, and they retain their role as citizens. This is indicated in part by the history of prisoner enfranchisement. As noted in the history of suffrage expansion, prisoners gained the right to vote nearly ten years before paupers; from this one can assume that prisoners were not considered a particularly unworthy group, rather just one of several groups that were on the fringes of society. Today Sweden imprisons only 6,364 individuals, at a rate of 67 prisoners per 100,000 individuals in

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<sup>103</sup> Board 1970, 179

<sup>104</sup> Board 1970, 179

the population.<sup>105</sup> Interestingly, 30% of those currently in prison are foreign nationals, so perhaps incarceration is becoming associated with changing demographics and rapid globalization.<sup>106</sup> The low incarceration rate likely corresponds with Swedes' feelings about crime; in a 2007 Pew Research survey only 25% of Swedish respondents considered crime to be a "very big problem" in their society, which is one of the lowest percentages for that answer.<sup>107</sup> From this assortment of data we can conclude that Sweden both historically and today has had little use for harsh response to crime and has relied primarily on rehabilitative measures.

### *Conclusion*

Sweden is exemplary of a universally democratic state whose principles of political equality have resulted in a very liberal prisoner enfranchisement policy. Prisoners can vote without any restriction, and there appears to be little objection over their rights. When comparing case studies, it may be useful to think of Sweden as a kind of control case: prisoner enfranchisement is treated as any other enfranchisement issue, and all states with more restrictive policies are diverging from this path.

## **Germany**

### *Current Policy and its Background*

Germany's prisoner enfranchisement policy is more restrictive than that of Sweden, but still quite inclusive in a comparative perspective. The Penal Code does allow for prisoners to be disenfranchised, but it is a punishment that must be decreed

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<sup>105</sup> "World Prison Brief: Sweden"

<sup>106</sup> "World Prison Brief: Sweden"

<sup>107</sup> "Pew Global Attitudes Project"

by a judge and is reserved for particular crimes deemed to be damaging to the democratic order.<sup>108</sup> Such crimes include election fraud, treason, or rebellion.<sup>109</sup> Previous legislation has specified the crimes which may incur the punishment of disenfranchisement, and even then disenfranchisement may only endure for two to five years, and must be specifically ordered by the sentencing judge.<sup>110</sup> This policy was instituted in the late 1960s; previously Germany had a policy of automatic prisoner disenfranchisement for long-term inmates similar to that of other states at the time.<sup>111</sup> Compared to other nations like the United States, the practical effect of this punishment is insignificant; in 2003 only two defendants were punished with disenfranchisement.<sup>112</sup> In recent years Germany has gained approval from international organizations such as the European Council on Human Rights (ECHR) for the fairness and proportionality of their prisoner enfranchisement policy. Although Germany preserves the possibility for disenfranchising prisoners, it is quite limited, and the vast majority of German prisoners maintain their right to political participation.

### *Suffrage*

Germany's inclusive prisoner enfranchisement policy is largely representative of their suffrage laws at large. Voting laws in Germany today follow the principle of universal suffrage, with the government taking responsibility for ensuring that all citizens get to exercise their right to vote. Registration is automatic for all citizens,

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<sup>108</sup> "Act for the Reform of the Penal Code" Section 45, 1998

<sup>109</sup> "Act for the Reform of the Penal Code" Section 45, 1998

<sup>110</sup> Demleitner 2009, 86

<sup>111</sup> Demleitner 2009, 86

<sup>112</sup> Demleitner 2009, 86

and since changes in residency must be confirmed with the police department, the government always has an updated list of voters.<sup>113</sup> Election law also mandates that all elections be held on Sundays or federal holidays to maximize the number of citizens who can make it to the polls.<sup>114</sup> Universal suffrage is written in Article 38 of the Basic Law (the German Constitution), and Section 12 of the Federal Election Act specifies that all Germans who are 18 and over, residents of at least three months, and not excluded by judicial decree are eligible to vote.<sup>115</sup> The only other two cases in which a judicial decree can disenfranchise an otherwise eligible citizen are under the condition of custodial control over the individual's legal and economic affairs, and if the individual is institutionalized in a psychiatric hospital.<sup>116</sup> German electoral law stresses the importance of political participation for as many groups as possible.

The government's emphasis on the participation of its citizens is reflected in the historic high rate of voter turnout in Germany. From the beginning of the post-war republic up till 1990 voter turnout oscillated between 70% and 90%.<sup>117</sup> There are several reasons for the high rate of participation amongst German citizens. One is that the electoral system is an innovative iteration of proportional representation that maximizes the effect of each vote; citizens feel like their votes actually count.<sup>118</sup> The second reason is that Germany's modern history has demonstrated how fragile a democracy can be, and accordingly a strong culture of political participation has been

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<sup>113</sup> Roberts 2000, 67

<sup>114</sup> Roberts 2000, 67

<sup>115</sup> Basic Law for the Federal Republic of Germany

<sup>116</sup> Federal Elections Act Section 13, last amended 2013

<sup>117</sup> Roberts 2000, 66

<sup>118</sup> O'Neil et al 2013, 224; Roberts 2000, 67

an integral part of the new republic.<sup>119</sup> The Basic Law codifies in Article 20 that the state is inherently democratic, and all power must be derived from the people.<sup>120</sup> To better understand the importance of democracy to the German political system, we turn to the state's history and political development, particularly in the twentieth century.

### *Political Institutions and Culture*

In Sweden, universalist democratic ideas developed gradually in the context of a homogenous society and limited political conflict. In Germany, by contrast, universalism was embraced suddenly and in the wake of a major catastrophe. While the circumstances of development were very different, the resulting policies were remarkably similar. The current German republic is almost entirely the result of traumatic events and changes, including two catastrophic losses in war and the division and eventual reunification of the nation. The development of the political system has to intentionally respond to these events.

The geographic entity of what is now Germany was not unified until 1871.<sup>121</sup> Because the new territory consisted of a diverse group of smaller states with their own respective cultures and capabilities, a national identity had to be forged and propagated.<sup>122</sup> In 1919 the government was replaced by the Weimar Republic.<sup>123</sup> Even though the Weimar Republic was the first representative political system, its constitution had very weak protections for individual rights and democratic

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<sup>119</sup> Roberts 2000, 67

<sup>120</sup> Roberts 2000, 37

<sup>121</sup> Roberts 2000, 2

<sup>122</sup> Roberts 2000, 3

<sup>123</sup> Roberts 2000, 5

principles.<sup>124</sup> This can be taken as an indication of the unpopularity of democracy amongst many Germans who did not have a long tradition of self-governance and equality.<sup>125</sup> The rather anemic protections for individual rights in the Weimar constitution are often considered contributing factors for the downfall of the republic and the subsequent rise of Nazism.<sup>126</sup> Nazi Germany used a powerful combination of populist rhetoric and national pride to delegitimize the value of democratic control of the state.<sup>127</sup> Every aspect of government and society was controlled by Nazi ideology.<sup>128</sup> Germany's loss in WWII was catastrophic, and resulted in the occupation and control of the Allied forces.<sup>129</sup>

The Allied occupation was incredibly important for the development of the German republic we know today. Under Allied control, all remnants of Nazism were to be removed, which included the extensive reeducation of the German citizens in the way of democratic values.<sup>130</sup> By 1949 West Germany shifted to self-governance with the creation of the new federal republic and the passage of its ruling document, the Basic Law (today the Basic Law is considered to be the Constitution, but at the time it was intended to be temporary, thus the reason for the different name).<sup>131</sup> The Allied forces assisted in the writing of the Basic Law and insisted on certain provisions based upon their interpretation of why the Weimar Republic fell.<sup>132</sup>

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<sup>124</sup> Roberts 2000, 5

<sup>125</sup> Roberts 2000, 5

<sup>126</sup> Roberts 2000, 5

<sup>127</sup> Roberts 2000, 7

<sup>128</sup> Roberts 2000, 8

<sup>129</sup> Roberts 2000, 10

<sup>130</sup> Roberts 2000, 10

<sup>131</sup> Roberts 2000, 12

<sup>132</sup> Roberts 2000, 12

The Basic Law established the rules and principles for the new German republic with the primary goal of protecting the democratic order from another Hitler. As mentioned briefly before, many criticized the constitution of the Weimar Republic for inadequately enforcing democracy, so much effort was put into the proper formation of the new constitution. Accordingly several main principles that were deemed particularly important guide the Basic Law: the federal structure of the state, a detailed list of protected individual rights, the importance of democratic rule, and the concentration of power in political parties rather than individual leaders.<sup>133</sup> For the purposes of this study, the protection of individual rights is particularly important. The extensive dehumanization and control of citizens in Nazi Germany highlighted the necessity of rights protections. The articles in the Basic Law defining and protecting individual rights are impervious to amendment.<sup>134</sup> This has become an indelible part of German political identity; today Germany is one of the foremost champions of human rights.

The framers intended for the Basic Law to not only institute a democratic system, but to be able of defending itself from anti-democratic forces. To this day, the Government can ban political groups and movements that promote anti-democratic values.<sup>135</sup> Essentially German political culture permits the restriction of individual liberties for the protection of democracy for all. This fits with what is known about prisoner disenfranchisement in Germany: the only individuals who can be deprived of

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<sup>133</sup> O'Neil et al 2013, 216; Roberts 2000, 36

<sup>134</sup> O'Neil et al 2013, 216

<sup>135</sup> Roberts 2000, 188

their right to vote are those who have proven themselves to be threats to the democratic system.

### *Prisoners and Society*

Despite their differences regarding political development, Germany and Sweden have very similar liberal attitudes regarding crime and the treatment of prisoners. While the German Penal Law has undergone some changes throughout the twentieth century, it has consistently placed an emphasis on the rehabilitation and reintegration of prisoners into society, which is part of its commitment to humane treatment.<sup>136</sup> German law has also taken steps to remove the ambiguity of the rights and liberties prisoners retain; rights may only be limited or removed if they are either necessary to the physical incarceration of the individual, or imposed separately by a judge (such as voting bans).<sup>137</sup> This helps to protect prisoners from de facto loss of other rights and abuses by prison officials.

Penal policy began facing major reforms in the 1960s, the same era in which prisoners gained the right to vote.<sup>138</sup> The Social Democrats at the time began pushing for the liberalization of criminal codes and prisoner treatment in 1959, although the Christian Democrats opposed them.<sup>139</sup> Ten years later the Social Democrats succeeded in passing two major criminal reform bills, one of which made rehabilitation the primary goal of imprisonment by using socially therapeutic institutions (*sozialtherapeutische Anstalten*).<sup>140</sup> The succeeding years saw even more

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<sup>136</sup> Demleitner 2009, 105

<sup>137</sup> Demleitner 2009, 106

<sup>138</sup> Landfried 1985, 200

<sup>139</sup> Landfried 1985, 200

<sup>140</sup> Landfried 1985, 200

reforms in criminal policy, including reducing the punishment for political demonstration and the provision of legal aid to the poor.<sup>141</sup> The major political parties disagreed over these reforms, however that is not to say that crime became a politicized issue in Germany. Like Sweden, Germany avoided the conflation of criminal prosecution and the control or marginalization of certain groups.<sup>142</sup> This may help to explain why the extension of the vote to prisoners did not raise many political concerns at the time, and why it has not been reengaged as a political issue. Germany today imprisons 63,317 individuals at a rate of 77 per 100,000.<sup>143</sup> Similar to the situation in Sweden, 27% of the prison population consists of foreign nationals.<sup>144</sup> While Germany arrived to the idea of rehabilitation later than Sweden, it has since remained on that path and avoided the politicization of crime.

### *Conclusion*

One cannot understand the German republic of today without knowing its past. The events of the twentieth century forced the new republic to evaluate itself and consciously design its new political system to avoid the mistakes of the past. This new political system, codified in the Basic Law, asserted German history's first strong defenses of democratic values and human rights. The preeminence of rights and democracy combined with a non-politicized view of crime are likely responsible for the establishment of Germany's current prisoner enfranchisement policy, in which the vast majority of prisoners retain their rights.

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<sup>141</sup> Landfried 1985, 200

<sup>142</sup> Demleitner 2009, 91

<sup>143</sup> "World Prison Brief: Germany"

<sup>144</sup> "World Prison Brief: Germany"

## **Discussion and Analysis**

### *Universalist Democracy*

Although Sweden and Germany arrived at these views in very different ways, both states have a strong identification with universalist ideals of democracy. The active and full participation of all citizens is seen as necessary for legitimate democratic rule. Referring back to the discussion of relevant theoretical concepts we see that this is not the case in all democracies. Civil death and violation of the social contract both indicate a belief that political participation is a right reserved for those who deserve it. Considering the number of countries worldwide that retain some form of prisoner disenfranchisement, this belief is more common than not. By allowing prisoners (or the vast majority of prisoners in the case of Germany) to vote, Germany and Sweden appear to be more in line with the vision of universalist democracy and political equality outlined by Dahl. Citizens merit the right to participate in lawmaking as long as the laws have the potential of affecting them in some way; no other characteristic is needed. The fact that the expansion of the franchise occurred in the early and mid 20<sup>th</sup> century in a linear fashion indicates that the suffrage laws were being made to represent the democratic political culture, rather than being fought for by particular interest groups.

There is an obvious difference between the policies of Sweden and Germany in that Germany does allow for some prisoners to be disenfranchised by a judge. Because this punishment is proportional to the crime and so rarely used, the practical effect of prisoner disenfranchisement is negligible, and the state of prisoner enfranchisement at large in Germany is much closer to that of Sweden than the other

case studies. What is interesting is that Germany's disenfranchisement policy is arguably the more logical outcome of the violation of the social contract concept. A key point in defending disenfranchisement using the idea of the social contract is that criminals act rationally in their self-interest; thus a convicted criminal may sell his vote or use it to weaken crime laws. This logic assumes that all kinds of crime are essentially the same and that people who break the law are single-mindedly interested in weakening the political order, two assumptions which would be quite difficult to prove. However an individual convicted of election fraud or treason has proven through his crime a proclivity for destabilizing the political order, or at the very least a disrespect for the democratic process. In this sense, Germany's prisoner disenfranchisement policy demonstrates a clear link between the crime, the intent of the perpetrator, and the punishment. In fact, the ECHR's ruling in *Hirst v the United Kingdom* (to be discussed in later chapters) specifically cited Germany's policy as an acceptable form of prisoner disenfranchisement.

A potential explanation for this difference between Sweden and Germany is that the German republic since 1949 has emphasized the need to protect the democratic system. As explained above, German law goes as far as to take away rights of participation to groups that promulgate anti-democratic or intolerant values. Unlike Sweden, which had a long history of democracy and equality, those values are relatively new to Germany, and had to be propagated through education and institution building. One could argue that the democratic system in Germany is more tenuous than that of Sweden, particularly during the twentieth century. Thus a

stronger defense of democratic values through electoral and penal laws would be understandable for the establishment of a new German republic.

### *Politicization of Crime*

In both Sweden and Germany we find that crime has not become a political issue, or at least not to the extent of many other western democracies. Liberalization of penal policy was typically passed in both states through legislative means, which indicates some sort of interaction (whether collaborative or antagonistic) between political parties. However both countries avoided the systematic stigmatization of criminals and harshening of sentences that became common amongst many western democracies beginning in the 1970s. The subsequent case studies of the United States and the United Kingdom will demonstrate how the politicization of crime has perpetuated or worsened prisoner disenfranchisement in those respective states.

Combined with the non-politicization of crime, Sweden and Germany have both pursued penal policies that emphasize rehabilitation. Not only does rehabilitation mean less punitive measures, but it also indicates a different understanding of prisoners. In rehabilitative penal systems prisoners are viewed more as citizens who are temporarily removed from society, rather than individuals that are not fully citizens. Accordingly prisoners retain all the rights that are not clearly invoked by the state of their imprisonment, as opposed to more punitive systems in which prisoners must demand and earn their rights. Rehabilitation may also serve to advance arguments in favor of prisoner enfranchisement. The theoretical concepts of civil death and political equality both build upon the idea that through political participation one becomes a better citizen and a better individual. If the point of a

rehabilitative prison is to reform an individual and make him prepared to have a successful life in society, then perhaps promoting political participation through voting would be a helpful step forward.

The effects of these rehabilitative policies can be seen in the imprisonment figures for both countries. Germany does imprison about ten times more individuals as Sweden, but when put in the context of population, there is only a ten-point difference between their incarceration rates. There are nations with significantly lower incarceration rates than both Sweden and Germany, however in comparison with all European states they are amongst the lowest. From 1992 to 2010 both states showed an increase in incarceration rates but these increases were relatively minor and stayed within ten points.<sup>145</sup> Both Sweden and Germany have demonstrated surprisingly high percentages of foreign nationals in their prison populations. However when these percentages are ranked with all other European states one sees a pattern in which states with higher socioeconomic indicators incarcerate more foreign nationals, and the states with the lowest indicators are at the bottom of the list. This comparison suggests that the higher rate of foreign national incarceration is associated with higher rates of immigration rather than a palpable prejudice or shift in penal policy.

#### *Critical Differences in Development*

The cases of Sweden and Germany present many similarities, however one clear difference is how the two states developed politically. Political development in Sweden is notable for its peaceful and incremental progress, and its politics are

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<sup>145</sup> “World Prison Brief: Germany”; “World Prison Brief: Sweden”

marked by stability and moderation. Conversely, the current German political system was consciously designed to avoid the mistakes that led to the catastrophic war and eventual loss. Yet these two near opposite paths to democracy resulted in the same views of political participation and prisoner rights. This gives rise to the hypothesis that a long tradition of democracy and equality is less important to the development of prisoner enfranchisement laws if the same values are sufficiently instituted in the political culture later in time.

### **Conclusion**

The cases of Sweden and Germany demonstrate countries can arrive at the same policies and characteristics that influence those policies even if they travel along different paths. Both countries have policies of full (or essentially full) prisoner enfranchisement, however in Sweden prisoners gained the vote during a period of vote expansion, and in Germany prisoners gained the vote during a period of easing penal policy. From these cases we see that prisoner enfranchisement legislation does not need to originate in a particular policy sector in order to eventually be successful. These different policy environments also illustrate how prisoner enfranchisement cuts across policy spheres. The universalist democratic values that guide enfranchisement policy in Sweden and Germany were also arrived at in very different ways. Sweden became universalist after a long history of democratic participation and political moderation, whereas Germany sought out and instituted universalist ideas to form a more defensible democracy. Even though they had near opposite paths of development, both countries accepted full-heartedly the concepts of universal suffrage and political equality.

Sweden and Germany have both avoided politicizing crime to a considerable extent and have been strong proponents of democratic values. An important clarification for this last point is the kind of democratic values a state believes in. As seen in the discussion of theoretical bases for disenfranchisement policies, representative governments can still arrive at a policy of prisoner disenfranchisement in more than one way. Universal democracy and political equality are values that are more likely to result in full prisoner enfranchisement. Many western democratic states engage in universalist rhetoric, so a truer test of a state's values may be their electoral laws and whether it is the individual or the government who is responsible for full political participation. Several potential policy explanations have been suggested, however one should not underestimate the role state idiosyncrasies in the development of policy in this area.

From the most similar countries of the most similar case set, we find the most important factors for the development of a policy of prisoner enfranchisement to be the non-politicization of crime and a universalist democratic view. The major difference in policy (the limited disenfranchisement in Germany) is itself a result of idiosyncratic country factors; because of Germany's turbulent past, the state has found the need to occasionally subsume the right to participation of the individual if it will endanger the democratic order. This demonstrates that while shared characteristics can result in similar policies, factors unique to a particular country can still be very influential.

## Chapter 4

### **The United Kingdom and Ireland: Diverging Paths of Anglo-American States**

#### *Introduction*

Despite having important differences in their respective voting laws, prisoners in both the United Kingdom and Ireland have been in a state of disenfranchisement for the majority of the twentieth century.<sup>146</sup> In the United Kingdom there is an all-encompassing ban on prisoner voting, regardless of type or severity of crime, whereas in Ireland prisoners have technically had the right to vote since the 60s, although no voting mechanisms were established until the 21<sup>st</sup> century. These more restrictive policies are likely due to the more exclusive view of political participation and harsher view of prisoners held in the United Kingdom and Ireland. On both of these dimensions Ireland represents milder positions than the United Kingdom, which is largely a factor of its unique political experiences. Throughout the policy stories there is the sense of general apathy on the parts of the governments in addressing the issue of prisoner disenfranchisement. This disinterest itself has been integral to the policy process in these cases, and raises the question of how salient an issue is in political discourse affects how it is legislated.

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<sup>146</sup> Ireland enfranchised its prisoners in 2006 after an ECHR court case against the United Kingdom. This case is the subject of the ensuing chapter, so this chapter will focus only on the policies before 2004 (the year of the first case).

## **The United Kingdom**

### *Current Policy and its Background*

The United Kingdom has one of the most restrictive prisoner disenfranchisement policies in all of Europe, in which all prisoners are disallowed from voting, regardless of kind or severity of the crime. The development of this policy is complex, non-linear, and often appears unintentional. At several points in the policy history it seems unlikely that the respective legislative change was intended to affect prisoner enfranchisement. In recent years the United Kingdom's prisoner disenfranchisement policy has gained notoriety as it has been challenged by the European Council on Human Rights court; this case will be discussed in the succeeding chapter, so this chapter will only go up until that case.

The United Kingdom has had a long and complicated history with prisoner disenfranchisement, the modern end of which begins with the passage of the Forfeiture Act in 1870. This act of parliament removed most of the aspects of civil death that had been punishments for felony conviction, the most well known of which was the forfeiture of all goods and possessions.<sup>147</sup> While this was a fairly progressive change for the time, the Act maintained one remnant of civil death: disenfranchisement.<sup>148</sup> The ban also extended to holding elected office, although it excluded Scotland and only took effect after a period of twelve months of imprisonment.<sup>149</sup> At this time prisoners only convicted of a misdemeanor were also

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<sup>147</sup> Easton 2011, 221; Easton 2009, 227

<sup>148</sup> Easton 2009, 227

<sup>149</sup> Easton 2009, 227

disenfranchised, even though they were not included in the Forfeiture Act.<sup>150</sup> This was because no procedures were ever established to allow misdemeanor offenders to vote, and because residency requirements for registration did not consider prisons to be a possible residence, they were effectively disenfranchised.<sup>151</sup>

Beginning in the late 1940s the status of prisoners' suffrage went through several changes, often for reasons that had little to do with an intentional expansion of the right to vote. No developments for prisoner enfranchisement occurred before this period until the mid-twentieth century with some changes to the general election laws.<sup>152</sup> In 1948 the ruling Labour Party instituted the first use of postal ballots, which were meant to allow soldiers to vote.<sup>153</sup> However through a loophole in the text of the legislation, misdemeanor prisoners who were not officially banned by the Forfeiture Act gained the right to vote using postal ballots.<sup>154</sup> Eventually legislators realized the unintended consequences of this law, however no attempts to change it were made until the passage of the 1967 Criminal Law Act.<sup>155</sup> The Act removed the distinction between felonies and misdemeanors in the legal system, which then meant that all prisoners could vote using postal ballots.<sup>156</sup> This period of enfranchisement only lasted a year. In 1969 parliament passed the newest Representation of the People Act, which is best known for extending the franchise to 18-year-old citizens, but it also

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<sup>150</sup> Murray 2013, 517

<sup>151</sup> Murray 2013, 517; White 2014, 3

<sup>152</sup> Murray 2013, 519

<sup>153</sup> Murray 2013, 519

<sup>154</sup> Murray 2013, 519

<sup>155</sup> Murray 2013, 519

<sup>156</sup> Murray 2013, 520

reinstated prisoner disenfranchisement, only with this iteration the ban was total.<sup>157</sup> Section 3 of the Act states, “A convicted prisoner during the time that he is detained in a penal institution in pursuance of his sentence...is legally incapable of voting in any parliamentary or local election”.<sup>158</sup> It appears that there was no significant public or parliamentary debate on the issue in the period between enfranchisement and disenfranchisement.<sup>159</sup> Interestingly, the Act differed from the Forfeiture Act in that it did not include a ban on prisoners running for elected office.<sup>160</sup> It’s unclear whether this was an oversight on the behalf of legislators or a conscious difference, although there is reason to believe that it may have been accidental. In 1981 Bobby Sands, an influential member of the Provisional Irish Republican Army, ran for parliament from his prison cell in Northern Ireland.<sup>161</sup> Sands won the seat, although he died in from a hunger strike before he could take office.<sup>162</sup> Right after Sands’ election the United Kingdom parliament passed the Representation of the People Act 1981, which banned prisoners of more than twelve months from holding elected office.<sup>163</sup> The ban was reaffirmed in the 1983 Representation of the People Act, although this version allowed remand prisoners and those who had yet to be convicted to vote by postal ballot or proxy.<sup>164</sup> The RPA was passed again in 2000 in essentially the same form.<sup>165</sup>

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<sup>157</sup> Murray 2013, 520; Easton 2009, 224

<sup>158</sup> Easton 2009, 224; White 2014, 3

<sup>159</sup> Murray 2013, 520

<sup>160</sup> Murray 2013, 521

<sup>161</sup> Murray 2013, 521

<sup>162</sup> Murray 2013, 521

<sup>163</sup> Murray 2013, 521

<sup>164</sup> Murray 2013, 520; White 2014, 3

<sup>165</sup> Murray 2013, 521; White 2014, 4

While the issue of prisoner disenfranchisement had not gained much prominence by this point, there were several organizations that attempted to publicize the issue. The Prison Reform Trust began publishing papers on prisoners' involvement in the democratic process in 1998, and in 2004 it launched a campaign for prisoner enfranchisement with the help of Unlock, a national organization of ex-offenders.<sup>166</sup> The Liberal Democrats Party was fairly supportive of the cause, although they received strong criticism by both Conservatives and the Labour Party for this position.<sup>167</sup> The PRT and Unlock campaign was marginally successful in raising awareness on the issue, although it was the case of *Hirst vs. UK* that really brought the issue to prominence, which will be discussed in the following chapter.

### *Suffrage*

The United Kingdom is an important case study for enfranchisement issues because it has the longest consistent history with representative institutions and the vote in the world.<sup>168</sup> The beginnings of this Anglo form of democratic rule were premised on the desire of nobles to limit the absolute power of the monarch, rather than a belief in self-rule. For the first several centuries of this political system only wealthy nobles were allowed the right to political participation.<sup>169</sup> Limitations on the power of the monarch were intensified after the Glorious Revolution when the Parliament instituted a Bill of Rights, which consecrated the power of the Parliament vis à vis the monarch.<sup>170</sup> Unlike other bills of rights that were enacted in other

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<sup>166</sup> White 2014, 5,6

<sup>167</sup> White 2014, 6

<sup>168</sup> O'Neil et al 2013, 39

<sup>169</sup> O'Neil et al 2013, 43

<sup>170</sup> O'Neil et al 2013, 44

countries in later years, this 1689 document was again more about limiting the absolute rights of the king rather than protecting a litany of rights for the average, non-noble, individual.<sup>171</sup> Beginning in the 19<sup>th</sup> century the British parliament began pushing through reforms that very gradually expanded the electorate.<sup>172</sup> These first reforms opened the vote to less wealthy men, and it wasn't until 1928 that women had equal voting rights as men.<sup>173</sup> This expansion of the franchise in the early 20<sup>th</sup> century was largely precipitated by the development of the Labour Party in 1900.<sup>174</sup> Because voting rights had largely been reserved for the wealthier members of society, Labour gained much of its support from working class citizens seeking an active voice in the Government.<sup>175</sup> In 1969 the voting age was finally lowered from 21 to 18, and residency requirements were lessened to help university students vote.<sup>176</sup>

The most recent developments in suffrage have been focused on increasing access to the ballot for those already eligible to vote. This has included facilitating voting for British citizens living abroad and expanding the postal vote.<sup>177</sup> Citizens living abroad were first granted the right to vote in national elections in 1985 but the right only lasted for up to five years away.<sup>178</sup> The time limit has been gradually extended throughout the years, and since 2002 the limit has been fifteen years.<sup>179</sup>

Regarding non-British individuals living in the United Kingdom, Irish citizens and

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<sup>171</sup> O'Neil et al 2013, 44

<sup>172</sup> O'Neil et al 2013, 47

<sup>173</sup> O'Neil et al 2013, 47

<sup>174</sup> O'Neil et al 2013, 47

<sup>175</sup> O'Neil et al 2013, 47

<sup>176</sup> Russell and Davidson 2007, 4

<sup>177</sup> Johnston 2013, 2

<sup>178</sup> Johnston 2013, 54

<sup>179</sup> Johnston 2013, 54

those from British Commonwealth countries are allowed to vote in all United Kingdom elections, although all other foreign nationals are excluded unless they become naturalized citizens.<sup>180</sup> Postal voting was first granted to active soldiers in 1918, and in 2000 it was extended to all United Kingdom citizens who fill out the appropriate application; voting by proxy is now another possibility.<sup>181</sup> Despite having a more restrictive view of who gets the right to vote, the United Kingdom has worked to increase access to the ballot for those who are already eligible.

### *Political Institutions and Culture*

Regarding the social make-up of the United Kingdom it is in many ways both homogenous and diverse. Throughout the centuries the four separate nations of the United Kingdom (England, Scotland, Wales, and Northern Ireland) have been more or less unified, thus resulting in feelings of national unity and many shared characteristics.<sup>182</sup> However amongst the four nations there remain certain cultural, ethnic, linguistic, and religious differences that become more or less important over time.<sup>183</sup> Northern Ireland was particularly problematic following Irish independence; nearly half the population was Catholic and faced intense discrimination on the behalf of the Protestants.<sup>184</sup> This led to decades of violence as the Irish Republican Army attempted to unify Northern Ireland with the Republic of Ireland, a conflict that will

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<sup>180</sup> Johnston 2013, 54

<sup>181</sup> Johnston 2013, 54

<sup>182</sup> O'Neil et al 2013, 75

<sup>183</sup> O'Neil et al 2013, 75

<sup>184</sup> O'Neil et al 2013, 74

be discussed further in the next section.<sup>185</sup> Despite this and other conflicts, the United Kingdom has remained racially and ethnically homogeneous.<sup>186</sup>

The political structure of the United Kingdom has some unique elements that may have contributed to the formulation of the current prisoner disenfranchisement policy. The United Kingdom has no written constitution in the same vein as the other case countries. While there are a series of documents establishing fundamental rights (including the 1689 Bill of Rights previously discussed, as well as the Magna Carta (1215) and the 1707 Act of Union), there is no higher law that sets aspirations or limitations for legislative acts.<sup>187</sup> This has significant consequences for the average citizen. The rights enumerated in the above documents are rather anachronistic, and do little to protect the average citizen from overreaches on the behalf of the government.<sup>188</sup> If Parliament passes a law resulting in the constriction of an individual's rights, there is no constitution, or for that matter a constitutional court, to which the individual can appeal.<sup>189</sup> Instead, British citizens have begun appealing to European charters, such as the European Convention on Human Rights.<sup>190</sup>

### *Prisoners and Society*

As demonstrated previously with the prevalence of civil death and forfeiture, the United Kingdom has had a history of rather severe policies towards prisoners. The passing of the Forfeiture Act marked the beginnings of a more modern and lenient approach to prisoners. Prisoners in the United Kingdom have residual rights, meaning

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<sup>185</sup> O'Neil et al 2013, 74

<sup>186</sup> O'Neil et al 2013, 74

<sup>187</sup> O'Neil et al 2013, 49

<sup>188</sup> O'Neil et al 2013, 49

<sup>189</sup> O'Neil et al 2013, 49

<sup>190</sup> O'Neil et al 2013, 51

that they are assumed to have all of the regular rights of a citizen unless the law specifically precludes it.<sup>191</sup> However for much of the twentieth century these protections were not always sufficient as much discretion was left up to the prison authorities.<sup>192</sup> Beginning in the 1970s and 1980s prisoners and sympathetic rights organizations were active in demonstrating against mistreatment and pushing for rights.<sup>193</sup> The movement was much more mild than its American counterpart, however they were successful in gaining increased attention from the courts who were previously unwilling to take on prisoners' cases.<sup>194</sup> By the 1990s there was greater transparency and accountability in the penal system, although the majority of changes were rather mild.<sup>195</sup>

Ironically the late twentieth century also saw a shift towards harsher politics of crime, which has largely continued to this day. As the United States' penal policies became more and more severe, the United Kingdom replicated many, including the ideas of being 'tough on crime' and 'zero tolerance' policing.<sup>196</sup> As a result the United Kingdom is now one of the largest incarcerators in Western Europe. The United Kingdom now incarcerates close to 85,000 people at a rate of 149 prisoners per 100,000 citizens.<sup>197</sup> There has been a considerable increase in both prisoners and the incarceration rate over the past two decades: between 1992 and 2010 the number of prisoners nearly doubled and the rate of incarceration increased from 90 out of

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<sup>191</sup> Easton 2011, 29

<sup>192</sup> Easton 2011, 29

<sup>193</sup> Easton 2011, 28

<sup>194</sup> Easton 2011, 32

<sup>195</sup> Easton 2011, 35

<sup>196</sup> Jones and Newburn 2005, 59

<sup>197</sup> "World Prison Brief: United Kingdom, England and Wales"

100,000 to 153 (which has since decreased to 149).<sup>198</sup> Despite the gains in rights and transparency made in the 1970s-80s the United Kingdom has been pursuing a path of harsher penal policies and retributive justice. This could largely be due to the politicization of crime, in which public concern over crime has been used by politicians to gain political standing, which will be discussed in later chapters.

### *Conclusion*

Throughout the twentieth century United Kingdom has experienced many changes in its prisoner enfranchisement policy, however these policy changes were rarely the result of a public and reasoned debate on the issue. Rather it seems in many instances that changes to prisoner enfranchisement policy were done unintentionally, as a byproduct of changes in election law or penal policy. Even if little public debate has been had on the topic, United Kingdom legislators have for the most part stood strongly against prisoner enfranchisement. This is likely related to two important factors in British political development: the exclusive nature of the franchise and the unforgiving view of prisoners. Despite having one of the longest histories of political representation, the United Kingdom did not expand the right to vote to the majority of citizens until the twentieth century, when global standards for enfranchisement were being set. This rather exclusive view of political participation has persisted; universalism has not gained much traction in the United Kingdom. The concept of civil death and its many implications for prisoners has had a strong effect on British penal policy, and in recent decades the United Kingdom has pursued a path of harsher criminal laws. Even though the United Kingdom is a strong, wealthy, western

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<sup>198</sup> “World Prison Brief: United Kingdom, England and Wales”

democracy, several important characteristics have resulted in the development of much more restrictive prisoner disenfranchisement policies than the previously studied cases.

## **Ireland**

### *Current Policy and its Background*

The current Republic of Ireland was part of the United Kingdom for several centuries, and throughout this period Ireland's political development took on many of the same traits, particularly regarding law and legal tradition.<sup>199</sup> A clear example of this is the 1870 Forfeiture Act passed in Britain and also law in Ireland, which is particularly important for the history of prisoner enfranchisement.<sup>200</sup> The Forfeiture Act codified the theoretical idea of 'civil death' by decreeing that any person imprisoned for more than twelve months loses his right to vote.<sup>201</sup> The first electoral law passed after independence, the Electoral Act of 1923, maintained the restrictions on prisoner voting and specified that prisoners could not be registered to vote since they were not considered residents of any district.<sup>202</sup>

Debate over prisoner enfranchisement was first raised at the inception of the Irish Free State. After winning independence from Britain in 1922, Ireland quickly fell into a brief civil war.<sup>203</sup> The war was over within a year, but during that time the government had imprisoned over 12,000 political opponents, many of whom were

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<sup>199</sup> Behan 2008, 12; Hamilton and Lines 2009, 206

<sup>200</sup> Behan 2011, 12; Hamilton and Lines 2009, 206

<sup>201</sup> Behan 2011, 12; Hamilton and Lines 2009, 206

<sup>202</sup> Behan 2011, 12; Hamilton and Lines 2009, 206

<sup>203</sup> Behan and O'Donnell 2008, 324

simply detained and never tried.<sup>204</sup> In August of 1923 the government, which had won the civil war, declared they would hold elections.<sup>205</sup> At the time of the elections, around 10,000 political opponents from the civil war were still detained.<sup>206</sup> Many members of the opposition party petitioned the government to allow the prisoners to vote in the upcoming election, either through temporary release or postal ballot.<sup>207</sup> However the government rejected both of these proposals, claiming that they were too impractical and using the language of civic responsibility to downplay the enfranchisement claims of prisoners.<sup>208</sup> In the ensuing elections the prisoners were not allowed to vote, but eighteen members elected from the Sinn Féin party were elected from their jail cells.<sup>209</sup>

In 1937 a new constitution was passed, *Bunreacht na Eireann*, which continues to rule Ireland to this day.<sup>210</sup> The constitution provides for universal suffrage for everyone over twenty-one (has since been modified to include everyone over eighteen), providing that they “are not disqualified by law and comply with the provisions of the law relating to the election of members of Dàil Eireann”.<sup>211</sup> It appears that this phrasing would allow for prisoner disenfranchisement laws, although no law doing so was ever passed.<sup>212</sup> The next development regarding prisoner

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<sup>204</sup> Behan and O'Donnell 2008, 324; Behan 2011, 14

<sup>205</sup> Behan 2011, 14

<sup>206</sup> Behan 2011, 14

<sup>207</sup> Behan 2011, 14

<sup>208</sup> Behan 2011, 13

<sup>209</sup> Behan 2011, 15

<sup>210</sup> Hamilton and Lines 2009, 206; Behan 2011, 16

<sup>211</sup> *Bunreacht na Eireann* 1937; Hamilton and Lines 2009, 206

<sup>212</sup> Hamilton and Lines 2009, 206; Behan 2011, 16

enfranchisement did not occur until 1963 when the new Electoral Act was passed.<sup>213</sup> The 1963 Electoral Act specifically repealed the remaining sections of the Forfeiture Act and the Electoral Act of 1923 that allowed for prisoner disenfranchisement, as well as a 1923 bill that made disenfranchisement part of the punishment for “corrupt practices”.<sup>214</sup> The 1963 Electoral Act also included provisions that expanded the qualifications for postal voting to the police force.<sup>215</sup> There was a proposal to include prisoners in this expansion, but it was rejected by the government.<sup>216</sup> This left prisoners in a strange position – there were no legal barriers to their enfranchisement, but there was also no physical way in which they could cast their vote.<sup>217</sup> The 1963 Electoral Act specified that prisoners would be considered residents of the prison and would have to be registered in that constituency in order to vote, but made no provisions to allow for voter registration in the prisons.<sup>218</sup>

Prisoner enfranchisement was again addressed in the 1992 Electoral Act. The legislation changed the registration of prisoners, making it so that they would be registered not in the district of the prison, but in the district they would have occupied had they not been incarcerated.<sup>219</sup> Hamilton and Lines mention that around this time Irish prisons frequently used temporary release to help assuage overcrowding in prisons, so this may have had a significant impact on the ability of prisoners to

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<sup>213</sup> Hamilton and Lines 2009, 207; Behan 2011, 17

<sup>214</sup> Hamilton and Lines 207 2009

<sup>215</sup> Behan 2011, 18

<sup>216</sup> Behan 2011, 18

<sup>217</sup> Hamilton and Lines 2009, 207

<sup>218</sup> Hamilton and Lines 2009, 207

<sup>219</sup> Hamilton and Lines 2009, 207; Behan 2011, 20

vote.<sup>220</sup> However, the legislation once again failed to provide any guidelines for how prisoners would cast their ballots.<sup>221</sup> Interestingly, the 1992 Electoral Act also contained a provision that barred anyone in prison for over six months from holding the office of Oireachtas (Senate).<sup>222</sup> Following the 1992 Electoral Act, a series of legal challenges were brought to the Irish Supreme Court in an attempt to ensure prisoners were enfranchised in actuality.

After the 1992 Electoral Act passed prisoners remained in a strange middle ground between enfranchisement and disenfranchisement. Once the guiding legislation specified the right to register, several inmates took this as an opportunity to pursue enfranchisement through legal channels. The first suit was brought by Patrick Holland in 1998; Holland was a registered voter, but since he had been in prison during several election cycles he had not been able to exercise his right to vote.<sup>223</sup> As part of his argument he invoked the article of the ECHR that guaranteed the right to free elections, however Ireland was not a member at the time, so Holland could not apply to the court itself.<sup>224</sup> In its defense the government argued against all the possible methods of enfranchising prisoners claiming that temporary release on Election Day would be a security risk, placing ballot boxes in all the prisons would be too onerous, and postal voting was not constitutionally guaranteed.<sup>225</sup> The Court sided with the government, finding that the government was not denying prisoners any

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<sup>220</sup> Hamilton and Lines 2009, 208

<sup>221</sup> Hamilton and Lines 2009, 207; Behan 2011, 20

<sup>222</sup> Behan 2011, 20

<sup>223</sup> Hamilton and Lines 2009, 209

<sup>224</sup> Behan 2011, 20

<sup>225</sup> Hamilton and Lines 2009, 210; Behan 2011, 20

guaranteed right.<sup>226</sup> Embedded in the court's decision was the idea a loss of voting rights was a reasonable punishment for those in prison.<sup>227</sup> The decision went on to make reference to the idea of civil death; "...Such restrictions could, in the Commission's opinion, be explained by the notion of dishonor that certain convictions carry with them for a specific period, which may be taken into consideration by legislation into respect of the exercise of political rights".<sup>228</sup>

The next notable court case was brought by Stiofan Breathnach in 2001.<sup>229</sup> Unlike the arguments made in *Holland*, Breathnach pursued the argument that in failing to provide the means through which he could cast his ballot, the government was treating him unequally under the law.<sup>230</sup> Breathnach was successful at the High Court; the Justice agreed that the right to vote was not ceded during imprisonment, and was not convinced by the government's claims that special measures for prisoners would be unfeasible.<sup>231</sup> However, the government appealed the decision, and in the ensuing Supreme Court case the judges reversed the ruling.<sup>232</sup> Regarding the claim of inequality under the law, Chief Justice Keane located the issue of equality within prisoners as a group, rather than all Irish citizens; he argued that Breathnach was not treated any differently than any other prisoners, and therefore the equality under the law argument was not convincing.<sup>233</sup> Even though the law did allow for the possibility of prisoner enfranchisement, Justice Keane found that, "The

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<sup>226</sup> Hamilton and Lines 2009, 210

<sup>227</sup> Behan 2011, 20

<sup>228</sup> Behan 2011, 21; *Patrick Holland v. Ireland* 1998

<sup>229</sup> Hamilton and Lines 2009, 210; Behan 2011, 21

<sup>230</sup> Hamilton and Lines 2009, 210; Behan 2011, 21

<sup>231</sup> Hamilton and Lines 2009, 211

<sup>232</sup> Hamilton and Lines 2009, 211; Behan 2011, 21

<sup>233</sup> Hamilton and Lines 2009, 211; Behan 2011, 22

applicant has no absolute right to vote under the Constitution. As a consequence of lawful custody many of his constitutional rights are suspended. The lack of facilities to enable the applicant vote is not an arbitrary or unreasonable situation”.<sup>234</sup>

Ideologically, the decision references both the concepts of civil death and breaching the social contract as excuses for disenfranchisement.<sup>235</sup> The decision found that disenfranchisement was not an arbitrary punishment, even though a prisoner’s ability to vote would depend on whether or not he was on leave, rather than his crime.<sup>236</sup>

The *Breathnach* decision thoroughly refuted the arguments in favor of actualizing prisoner enfranchisement. It affirmed that imprisonment itself did not remove voting rights, but also stated that the government was under no obligation to ensure these rights could be exercised. Once again prisoners found themselves in a middle ground between enfranchisement and their reality. In 2006 Irish prisoners were finally enfranchised, an event which the ensuing chapter will cover in detail.

### *Suffrage*

Ireland and the United Kingdom have had a long and often contentious relationship that has contributed to many aspects of the nation’s development, particularly regarding political representation. British rule over parts of Ireland began as early as the 12<sup>th</sup> century, although the island did not officially become part of the United Kingdom until the Act of Union of 1800.<sup>237</sup> The Act of Union effectively eliminated the Irish parliament, and in exchange they gained 15% of the total seats in

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<sup>234</sup> Behan 2011, 22

<sup>235</sup> Hamilton and Lines 2009, 212

<sup>236</sup> Hamilton and Lines 2009, 212

<sup>237</sup> Coakley 1992, 2

the new House of Commons.<sup>238</sup> Even though the new Parliament technically legislated for both England and Ireland, there were circumstances under which specific legislation would be passed for each part of the state.<sup>239</sup> One important aspect in which Irish law differed from that of the entire United Kingdom was suffrage; the franchise was extended very gradually by way of slight modifications throughout the nineteenth century, and it wasn't until 1918 that universal male suffrage was enacted.<sup>240</sup> In this sense, pre-independence Irish citizens had some experience with electoral politics, but limited access to true self-governance.

The next major change in the franchise occurred after the ratification of the Constitution of the Irish Free State by the Dáil and the establishment of the independent Irish state.<sup>241</sup> The Electoral Act of 1923 instituted universal suffrage for all Irish citizens; this is particularly interesting in that it means Irish women gained the right to vote years before their British counterparts.<sup>242</sup> The 1922 Constitution was replaced in 1937 with the *Bunreacht na Eireann*, and while there were some important changes made to the new constitution, the thrust of the suffrage laws remained in place.<sup>243</sup> The last major expansion of the suffrage occurred with the Electoral (Amendment) Act of 1973, which changed the voting age from 21 to 18.<sup>244</sup>

Today Ireland has a fairly expansive access to the polls. All Irish and British citizens who are 18 or older may vote, European Union citizens can vote in both local

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<sup>238</sup> Coakley 1992, 3

<sup>239</sup> Coakley 1992, 3

<sup>240</sup> Coakley 1992, 5

<sup>241</sup> Coakley 1992, 385

<sup>242</sup> Coakley 1992, 5

<sup>243</sup> Gallagher 1992, 77

<sup>244</sup> Coakley 1992, 5

and European elections, and all other foreign nationals can vote in local elections.<sup>245</sup>

Unlike the United Kingdom, Irish citizens living abroad do not have the right to vote in any kind of election, and voting by proxy is not an option.<sup>246</sup> Ireland does make use of the postal ballot, which has been extended from use solely by police and defense workers to citizens who cannot make it to the polls on election day.<sup>247</sup> The Irish Government has taken steps to ensure that eligible voters are able to cast their ballots in whichever way is most convenient.

Ireland has maintained democratic rule since its founding, however scholars disagree over the extent of citizens' commitment to democratic ideals.<sup>248</sup> The state of Ireland was able to peacefully change its constitution at a period in which other European states' democracies were flailing, and voters have consistently turned out in high rates to support democratic parties.<sup>249</sup> Complicating this narrative of support for democratic values are arguments that a prominent streak of authoritarianism runs throughout Irish political history.<sup>250</sup> It is important to note that this particular brand of authoritarianism as it is described exists within democratic institutions, and refers to support of political leaders as personalities more so than representatives accountable to the people.<sup>251</sup> The less-democratic characteristics in Irish politics are likely influenced by its political history, and particularly its relationship with the United Kingdom. Recall that Ireland was folded into the United Kingdom's representative

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<sup>245</sup> "Right to Vote in Ireland"

<sup>246</sup> "Right to Vote in Ireland"

<sup>247</sup> "Right to Vote in Ireland"

<sup>248</sup> Coakley 1992, 55

<sup>249</sup> Coakley 1992, 55

<sup>250</sup> Coakley 1992, 55

<sup>251</sup> Coakley 1992, 55

system with the Act of Union, and Britain had a very exclusive idea of who could participate politically. The Irish independent state was founded from a violent struggle in which loyalty to charismatic leaders was stronger than loyalty to democratic rule.<sup>252</sup> These two pieces of Irish political development likely had a tempering effect on commitment to democracy as an end to itself. Ireland's democracy has remained strong to this day, however it has not adopted the kind of universalism professed by Sweden and Germany.

### *Political Institutions and Culture*

As previously mentioned, the first Constitution of the Irish Republic was ratified in 1922. In 1937 a new Constitution was passed, essentially creating the Republic of Ireland as it exists today.<sup>253</sup> It retained many of the same elements from the previous constitution, but also made some important changes, including the strengthening of the judiciary.<sup>254</sup> Unlike the British political system, which has neither a written constitution nor a constitutional court, the Irish constitution established a constitutional court with interpretative powers parallel to that of the American court system.<sup>255</sup> Throughout the twentieth century Irish citizens have appealed to the court more frequently in civil liberties cases, and the court has responded by realizing its position as defenders of these rights.<sup>256</sup> This is particularly interesting for the civil rights issues prompted by prisoner disenfranchisement. As discussed above, two important cases directly addressed prisoners who had been

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<sup>252</sup> Coakley 1992, 59

<sup>253</sup> Lee 1989, 204

<sup>254</sup> Lee 1989, 208

<sup>255</sup> Lee 1989, 208

<sup>256</sup> Lee 1989, 208

deprived of their right to vote. In both cases, the court sided on the behalf of the government, arguing that the government was under no obligation to ensure prisoners have access to ballots. Even though Ireland has a judicial system established for protecting constitutional rights, the courts have consistently supported a policy of de facto disenfranchisement.

### *Prisoners and Society*

Ireland is unique from many other Western European countries in that prisoners have played quite a large political role in its history. Because of the fight for independence from British rule, the ensuing civil war after independence, and the Northern Ireland conflict, many of Ireland's politicians had gained prominence through dissidence and imprisonment.<sup>257</sup> In fact, many of these politicians had been elected from their jail cells, despite electoral laws banning current prisoners from serving as political representatives.<sup>258</sup> However it is interesting to note that despite having a relatively large number of former prisoners in political representation, few have used their position to advocate for better prison conditions.<sup>259</sup> Behan (2011) argues that once elected, Irish politicians who had served time wanted to distance themselves from that part of their past to gain "respectability".<sup>260</sup>

This interesting experience with political prisoners is tied in with Ireland's public and political attitudes towards crime in general. Ireland's view on crime and punishment occupies a sort of middle ground between the punitiveness of the United Kingdom and the rehabilitative standard used in Germany and Sweden. Neither of the

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<sup>257</sup> Behan 2011, 10

<sup>258</sup> Behan 2011, 15

<sup>259</sup> Behan 2011, 11

<sup>260</sup> Behan 2011, 25

ideas of rehabilitation nor retribution was ever fully accepted by prison authorities; Ireland's penal policy has not faced the same kind of scrutiny and overhaul as the other case countries did in the latter half of the twentieth century.<sup>261</sup> This is not to say that crime has never been a political factor in Ireland. In the year from 1996 to 1997 crime was momentarily one of the biggest topics of political debated in Ireland.<sup>262</sup> Crime rates, which had been rising throughout the 1990s, had actually peaked in 1995 and rapidly declined by 1999.<sup>263</sup> However in 1996 Ireland was rocked by several high-profile murders and the ensuing public outrage called for some sort of government response.<sup>264</sup> The Fianna Fail party, led by TD John O'Donoghue, capitalized on this public panic to gain political popularity as the 'tough on crime' party. By 2001 this public panic about crime largely faded away, however there were several lasting effects of the 1996-97 crisis.<sup>265</sup> Fianna Fail was successful in its push for a 'zero tolerance' crime policy (borrowed from New York City Mayor Rudy Giuliani) and the construction of new detention facilities with 2,000 spaces; the Government was already planning on building new facilities and was debating over the capacity – by most estimates 2,000 was excessive.<sup>266</sup>

The hysteria over crime barely lasted more than a year, and by the beginning of the twenty-first century it appears that public opinion was back to normal. In fact in a 2001 referendum 62% of the public voted to effectively ban the death penalty.<sup>267</sup>

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<sup>261</sup> O'Donnell and O'Sullivan 2003, 58

<sup>262</sup> O'Donnell and O'Sullivan 2003, 47

<sup>263</sup> O'Donnell and O'Sullivan 2003, 43

<sup>264</sup> O'Donnell and O'Sullivan 2003, 47

<sup>265</sup> O'Donnell and O'Sullivan 2003, 47

<sup>266</sup> O'Donnell and O'Sullivan 2003, 50

<sup>267</sup> O'Donnell and O'Sullivan 2003, 57

However the Government has continued to incarcerated growing numbers of people; the number of people incarcerated has nearly doubled since 1992, and the incarceration rate has increased from 61 out of every 100,000 to 89.<sup>268</sup> From these different pieces of evidence one could argue that Ireland still occupies a relatively moderate position on crime. The intense period of politicization of crime was quite brief and was a response to a confluence of events rather than the beginning of a sustained movement towards retributive penal policy. However Ireland has maintained a high incarceration rate, which suggests that there has not been towards rehabilitation or leniency either. It also appears that the politicization of crime that did occur avoided the demonization of criminals seen in the United Kingdom and the United States; instead the rhetoric was focused on the loss of control and resulting fear.<sup>269</sup> Ireland is more punitive than many other western European states but not to the extent of the United Kingdom.

### *Conclusion*

Ireland's experience with prisoner enfranchisement has been rather confused: political actors were willing to enfranchise prisoners through legislation, but were consistently unwilling to make any electoral changes that would allow prisoners to actually vote. This is the only case within those selected for this study in which there was a notable disparity between enfranchisement as it was legislated and as it was experienced. As we have seen, Ireland's contentious past has resulted in a unique relationship with prisoners; the state adopted many of the harsher penal policies of the

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<sup>268</sup> "World Prison Brief: Republic of Ireland"

<sup>269</sup> O'Donnell and O'Sullivan 2003, 47

United Kingdom, but had to contend with the fact that many of its prominent political actors throughout the years have been incarcerated.

## **Discussion and Analysis**

### *Low-Salience Policy Making*

Despite some differences in the technicalities of the policy and its development, the cases of Ireland and the United Kingdom are very similar in some interesting ways. Notable in both cases is a sense of general apathy on the part of the governments regarding the issue of prisoner enfranchisement. Although there were definite legislative changes in policy, we see that in the United Kingdom these shifts occurred with very little to no debate, and in Ireland the government allowed prisoners to stay in political limbo for nearly fifty years. In fact many of the changes that did occur throughout the decades seem accidental. In the UK the 1969 Representation of the People Act that made it possible for Bobby Sands to run for office whilst incarcerated in 1981 was amended that year to preclude prisoners from standing for office. The Irish law that technically allowed prisoners to vote but fought any effort to actually allow them to cast their ballots demonstrates at the very least some confusion on the issue.

Because of the various actors involved and interests that must be navigated in politics, there is a general assumption that policies resulting from legislation reflect some coherent set of ideals or goals. Legislative changes are made in response to pressure from interested parties or precipitating events. However if there are no vocal groups pushing for reform or events that raise the profile of an issue, it is unlikely that

it will be addressed legislatively. Every active change in policy results in some sort of consequence, intended or no, and it is certainly possible that a particular policy may be unintentionally affected by some other kind of legislative change. The often incoherent policy changes in the cases of Ireland and the United Kingdom support the possibility of unintentional policymaking.

Thus we introduce the idea of prisoner enfranchisement as a low to non-salient political issue: an issue that the government and polity at large are not conscious of or do not have strong and coherent opinions about. Two contributing factors for this non-salience are a non-politicization on the behalf of political parties and a lack of attention from the government. Competition for votes between political parties can result in the politicization of an issue that previously went relatively unnoticed. However we see in both cases that no political party raised the issue, a fact that may be contributed to the negative political image of prisoners. Both cases also demonstrate a general lack of attention on behalf of the government, particularly in contrast to the previous cases of Sweden and Germany. The legislative changes allowing prisoners to vote in Sweden and Germany occurred as part of efforts to expand the franchise and ease criminal laws, respectively; changes in both cases were made proactively to keep the law in line with advancing notions of political equality and universalist ideals. This demonstrates an active role of the government in ensuring that all aspects of law reflect the same understanding of the relationship between man and state. Perhaps certain countries in the twentieth century took a more active position on universalizing their democracies, which helped to re-enfranchise prisoners.

If prisoner disenfranchisement as an issue has a low level of salience in these countries and the policies were arrived at somewhat unintentionally, why were the governments of the United Kingdom and Ireland so resistant to shifting the policy towards enfranchisement? There are several potential reasons for this reticence. Firstly, there may be a common assumption amongst policy makers and constituents that the status quo of a previously unconsidered issue is the correct position. If the government has maintained a certain policy for a long period of time and no other actor has vocalized a convincing argument to the contrary, it may be that the majority of citizens assume there was a good reason for the development of the policy in the first place, and there is no reason for it to be changed. The second possible answer may have something to do with prisoners and how they are viewed by society. While Germany and Sweden think of prisoners as full citizens who are temporarily removed from society, this position is far from the norm. Many political communities have very harsh views towards prisoners, which translates into legal treatment. More punitive states often assume that prisoners have lost many rights, not just the ones directly associated with incarceration; this places prisoners in these states in a strange limbo in between full citizenship and non-citizenship. Even though citizenship is infrequently revoked as a punishment for crime, a lack of many of the political rights guaranteed by citizenship challenges the legal status of prisoners, although this is hardly ever clarified by the governments. A state that does not view prisoners as full and regular citizens would be more likely to reject a proposal to enfranchise them, even if there were no coherent ideology explaining their different status.

*Political Ideas*

The views of democracy and political participation held by the United Kingdom and Ireland are likely important for understanding their prisoner disenfranchisement laws. As previously discussed, the United Kingdom's long history with representative government was based much more on a desire to limit absolutist monarchy than on a belief in the right and ability for all men to rule. The path to full enfranchisement in the United Kingdom was very gradual, and only occurred around the same time as that of other western democracies. During Ireland's long period of political association with the United Kingdom it inherited many of these beliefs. The fight for independence strengthened support for republicanism, but Irish republicanism was often more focused on anti-British sentiment and the creation of a strong Irish state than on equal rights and participation for all citizens. Unlike Sweden and later Germany, the United Kingdom and Ireland have not appeared to shift towards a universalist perspective of democracy in which political equality is an important goal. Instead the United Kingdom and Ireland have maintained a more exclusionary view of democracy, in which the state grants the right of participation to its law-abiding citizens and can take it away from the more troublesome members of society.

### *Conclusion*

The country characteristics that were found to be important in the previous two cases were again influential in the United Kingdom and Ireland: both states share an exclusive view of democracy and a punitive stance on prisoners. There are some important differences in the countries' respective experiences in these areas, due in large part to idiosyncratic aspects of their political development. In studying the cases

of the United Kingdom and Ireland, we discover a new important factor in the development of prisoner disenfranchisement policy: the issue's salience in political discourse. At multiple points in both states prisoner disenfranchisement policy was altered as the result of penal or electoral policy changes, rather than a conscious effort to change the electoral status of prisoners. How relevant the topic of prisoner enfranchisement is to political actors (or its overall likelihood of consideration) can have a serious impact on how policies are determined. The ensuing chapter will demonstrate what occurs when exogenous factors raise the salience of prisoner enfranchisement.

## Chapter 5

### ***Hirst v United Kingdom: A Critical Juncture***

#### *Introduction*

A defining moment for prisoner enfranchisement policy in the United Kingdom and Ireland occurred in 2004 (and later 2006) with the European Council on Human Rights case *Hirst v United Kingdom*. This case successfully relocated the issue of prisoner enfranchisement from the technicalities of electoral policy in the individual states to the international stage of human rights. What had been a fairly understudied issue became an important part of political dialogue, as the Government of the United Kingdom was forced to publicly respond to the ruling. This surge in attention to the United Kingdom's prisoner disenfranchisement policy helped to demonstrate how little was commonly understood or accepted about the reason for the policy. To this day the United Kingdom government has continued to avoid making any of the changes requested by the ECHR, thus raising the question as to why successive governments have been so attached to this policy. Conversely, the *Hirst* ruling was the impetus for Ireland's government to finally pass legislation aligning prisoners' technical right to vote with the mechanization to do so. Ireland was not implicated at all in the ruling, yet the government almost unanimously took it as an opportunity to finally make the changes that had been needed for decades. These two very different responses to this case help to elucidate some of the differences between the two states, and further emphasize the idiosyncratic nature of policy development on this front.

This chapter uses the language of historical institutionalism, specifically that of the critical juncture. According to Capoccia and Kelemen, a critical juncture is a “...relatively short period of time during which there is a substantially heightened probability that agents’ choices will affect the outcome of interest”.<sup>270</sup> For an event to be “critical” it does not necessarily have to result in a policy change.<sup>271</sup> The defining features are that a policy shift was considered and more likely to occur; if consideration of different options ends with maintaining the status quo, the period can still be considered a critical juncture.<sup>272</sup> The idea of the critical juncture is particularly helpful for understanding this moment in the development of prisoner disenfranchisement policy in the United Kingdom and Ireland.

#### *The United Kingdom and Hirst*

There were several attempts to gain prisoner enfranchisement through judicial cases, the most influential of which was *Hirst v. UK* (2004, 2006). Domestic courts in the UK were consistently unwilling to address prisoner enfranchisement in cases, often falling on the explanation that it was a question that should be solved through the legislature. This led John Hirst, a United Kingdom citizen serving out a life term for manslaughter, to bring his case to the European Court on Human Rights (ECHR).<sup>273</sup> The ECHR is a Luxembourg-based court designed to ensure that signatory countries comply with the standards agreed upon in the European Convention on Human Rights (signed 1950).<sup>274</sup>

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<sup>270</sup> Capoccia and Kelemen 2007, 348

<sup>271</sup> Capoccia and Kelemen 2007, 352

<sup>272</sup> Capoccia and Kelemen 2007, 352

<sup>273</sup> Easton 2011, 212

<sup>274</sup> “The Court in Brief”

In his argument, Hirst claimed that continued disenfranchisement of prisoners weakened the democratic process and further alienated prisoners, who are already disconnected from society.<sup>275</sup> In its 2004 decision the Court ruled that although member nations have the discretion to enforce some voting restrictions for offenders, a total and automatic ban of the kind in place in the United Kingdom is contrary to the principles of democracy.<sup>276</sup> The Court found that the United Kingdom's disenfranchisement policy was in violation of Article 3 of the First Protocol of the European Convention on Human Rights.<sup>277</sup> In the decision the court argued that the policy was arbitrary, and any acceptable form of disenfranchisement as punishment would have to demonstrate a clear connection between the crime and the punitive intention of the sentencer.<sup>278</sup> It should be noted that several member states maintain some form of prisoner disenfranchisement, but in all states it is tied to either the type of crime or length of sentence (the policy of Germany was specifically cited as a good example).<sup>279</sup> One of the reasons for the court's rejection of the UK's policy was because of the dearth of debate on the subject; it would be more accepting of a disenfranchisement policy that was the result of a thorough and public debate. Regarding changes to be made, the decision left it up to the discretion of the UK government to make the policy compatible with the Convention.<sup>280</sup>

#### *Government Response*

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<sup>275</sup> Easton 2011, 212

<sup>276</sup> Easton 2011, 213; Murray 2013, 523

<sup>277</sup> Kesby 2007, 258; White 2014, 4

<sup>278</sup> Easton 2011, 213; Kesby 2007, 258; Briant 2011, 281; Murray 2013, 523; White 2014, 8

<sup>279</sup> Easton 2011, 213; Murray 2013, 524

<sup>280</sup> Kesby 2007, 260; Briant 2011, 281; Murray 2013, 523

The United Kingdom Government appealed the initial decision to the ECHR's Grand Chamber, but the Court upheld the initial ruling in its October 2005 decision.<sup>281</sup> In both cases the Government defended its disenfranchisement policy on a variety of grounds; it claimed that the policy was reasonable, proportional, non-arbitrary, and that re-enfranchisement of prisoners would be offensive to the public.<sup>282</sup> However after the second and final ruling the Government publically agreed to investigate potential options for reforming their disenfranchisement policy.<sup>283</sup> In December of 2006 the Government published a Consultation paper, described as a way to gather information and opinions on the issue and eventual consideration of possible action.<sup>284</sup> It is important to note that the Consultation Paper was intended to be a consideration of whether any action should be taken at all –no promise for expanded enfranchisement was made.<sup>285</sup> The options for action proposed by the Consultation Paper include: no action (maintaining full disenfranchisement); enfranchising prisoners sentenced to a specified term or less; leaving disenfranchisement up to sentencers; maintaining disenfranchisement for specific election-based offenses; altering disenfranchisement for prisoners in mental hospitals; and enfranchising prisoners serving life sentences who are post-tariff (as in *Hirst*).<sup>286</sup> Along with descriptions of each proposal the paper includes the Government's position on each option, and it is quite clear that the Government wishes to maintain

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<sup>281</sup> White 2014, 8; Easton 2011, 214

<sup>282</sup> White 2014, 8; Easton 2011, 214

<sup>283</sup> White 2014, 10

<sup>284</sup> White 2014, 11

<sup>285</sup> White 2014, 11

<sup>286</sup> "Voting Rights of Convicted Prisoners Detained within the United Kingdom" 2006, 24; Kesby 2007, 260

the total ban.<sup>287</sup> It is also interesting that the Consultation Paper includes maintaining the ban as an option, considering the ECHR made it very clear that it was not an acceptable policy.

The First Consultation Paper was open to the public, and the opinions gathered were highly polarized with about twice as many respondents favoring full enfranchisement than those favoring disenfranchisement.<sup>288</sup> These responses are likely not representative of the public as a whole; the strength of opinion expressed and the low number of responses suggest that the majority of responses were from citizens with a particular knowledge of or interest in the subject. In 2009 the Government published the second Consultation Paper.<sup>289</sup> This paper stated that some sort of enfranchisement expansion would be necessary to make the policy ECHR compatible, with the preferred policy being one of enfranchisement based on length of sentence.<sup>290</sup> However the Consultation Paper reaffirmed that this was a legislative question, and any final policy should originate in Parliament.<sup>291</sup>

Several prisoner rights advocacy groups attempted to capitalize on the *Hirst* ruling to further push the government towards expanding voting rights. The Prison Reform Trust and Unlock, both organizations that advocated for prisoner voting rights well before the ECHR ruling, lobbied members of parliament, specifically

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<sup>287</sup> “Voting Rights of Convicted Prisoners Detained within the United Kingdom” 2006, 24

<sup>288</sup> White 2014, 14; Easton 2011, 214

<sup>289</sup> White 2014, 14; Easton 2011, 214

<sup>290</sup> White 2014, 14; Kesby 2007, 260

<sup>291</sup> “Voting Rights of Convicted Prisoners Detained within the United Kingdom” 2006, 14

focusing on Liberal Democrats.<sup>292</sup> This campaign was mildly successful; in 2005 the leader of the Liberal Democrats used a televised interview to state the party's support for full prisoner enfranchisement, arguing that full citizens are entitled to their right to vote.<sup>293</sup> However members of both the Conservative Party and Labour publically criticized this position in arguments largely based in the unpopularity of prisoners.<sup>294</sup> Despite the dearth of movement on this issue in the past several years, the Prison Reform Trust and Unlock, along with several other rights organizations, have continued to lobby for reform, publishing updates on government activity (or inactivity) and the history of the policy.<sup>295</sup> While the issue remains unpopular for the majority of political actors, there remain some advocates attempting to raise awareness and push for change.

Despite the publicity the issue of prisoner enfranchisement earned after the *Hirst* ruling, to date the United Kingdom Government has yet to make any changes to its enfranchisement policy. The Consultation Papers compiled information and opinions, but it is not clear that any of it has been used to develop legislation. One of the ECHR ruling's major issues with the policy was that it was not the result of a thoughtful legislative debate, so in a sense the Consultation Papers helped to rectify that complaint.<sup>296</sup> However the issue and policy exploration in the papers has not made its way to a debate over legislation, and no legislation has come out of these consultations. It is also unclear whether this is a conscious effort on the behalf of the

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<sup>292</sup> White 2014, 8; "Barred from Voting: The Right to Vote for Sentenced Prisoners" 2010, 5

<sup>293</sup> White 2014, 8

<sup>294</sup> White 2014, 8

<sup>295</sup> "Barred from Voting: The Right to Vote for Sentenced Prisoners" 2010

<sup>296</sup> Briant 2011, 281

Government to stall any change, or if it is simply not a high priority. The slow pace of the Government stands in strong contrast to how quickly other nations have changed their policies, most notably Ireland. This lethargic pace of change has also been noticed by international organizations and bodies within the ECHR. The Joint Committee on Human Rights has brought up its disappointment with the United Kingdom Government in at least three reports (from 2007-2009), and as recently as last year the Council of Europe's Human Rights Commissioner chastised the government for its refusal to change its policy, going as far as suggesting that the United Kingdom leave the Council if it refuses to abide by its rulings.<sup>297</sup>

#### *Arguments for Continued Disenfranchisement*

The United Kingdom Government has been noticeably resistant to changing its prisoner enfranchisement policy, in fact MPs from multiple parties have come out strongly against any change, and David Cameron has insisted that any change should come from Parliament.<sup>298</sup> As mentioned above, when the Liberal Democrats expressed support for prisoner enfranchisement they were strongly criticized by both the Conservative Party and the Labour Party, which suggests that this is a politically unpopular issue.<sup>299</sup> It is not clear if the issue is unpopular with voters, or if politicians assume that it will be unpopular and therefor choose to not support it. As part of the Government's initial defense in *Hirst* it was argued that enfranchising prisoners

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<sup>297</sup> Bowcott 2012, 1; Kesby 2007, 260

<sup>298</sup> Guardian 2013, 1

<sup>299</sup> White 2014, 5; Easton 2011, 215

would be “offensive” to the public, although the Court rejected this defense and there is little public polling data available to support such a claim.<sup>300</sup>

The arguments in favor of maintaining a total ban have varied, but the majority appeal to the concepts of civil death or the social contract. A recurring phrase amongst MPs from both parties has been, “those who had breached the basic rules of society should be deprived of the right to participate in the government of the country”, which clearly references the social contract.<sup>301</sup> Morality and virtue as prerequisites for citizenship and the rights of citizenship has been brought up.<sup>302</sup> The United Kingdom also has a history of civil punishments (civil death) that accompanied felony conviction, most notably those removed in the Forfeiture Act of 1870.<sup>303</sup> Politicians frequently cited this history as an explanation for continued prisoner enfranchisement, and there have actually been an increase in civil punishments, such as removal of driving privileges and hiring holds.<sup>304</sup> Politicians in favor of the ban also argued that the right to vote is not absolute, and that disenfranchisement helps to strengthen respect for the law and discourage crime, although there is little evidence linking lower crime rates with prisoner disenfranchisement.<sup>305</sup>

#### *Current State of Policies*

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<sup>300</sup> Easton 2011, 213

<sup>301</sup> Easton 2011, 220

<sup>302</sup> Easton 2009, 227

<sup>303</sup> Easton 2009, 227

<sup>304</sup> Easton 2009, 227; Easton 2011, 221

<sup>305</sup> Easton 2011, 219; Briant 2011, 281; Easton 2009, 226

At present the United Kingdom Government has yet to make any progress on making its prisoner disenfranchisement policy ECHR compatible.<sup>306</sup> Despite the passage of ten years and much insistence on the behalf of the ECHR, the Government has only put out two Consultation Papers and insisted that the issue must be resolved through the legislature. It appears that this is becoming an issue with the United Kingdom and the ECHR, as well as other European international bodies that are unimpressed with the United Kingdom's compliance.

### **Ireland: 2006 Electoral Reform**

The same critical juncture that opened up debate on prisoner disenfranchisement in the United Kingdom also initiated a new debate on the issue in Ireland – with near opposite results. The publicity of the *Hirst v. United Kingdom* decision prompted a resurgence of activism on the part of the Irish Penal Reform Trust (IPRT).<sup>307</sup> The organization started a campaign to raise public awareness of prisoner disenfranchisement and engaged government ministers and opposition parties to push the issue onto the agenda.<sup>308</sup> The public awareness campaign was quite successful; many news outlets covered the issue, and opinion was largely in favor of enfranchisement.<sup>309</sup>

All of the political attention culminated in a bill drafted by then-opposition party Fine Gael in conjunction with the IPRT.<sup>310</sup> The bill was submitted to parliament in the fall session of 2005, and sought to extend postal voting to prisoners, with their

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<sup>306</sup> Bowcott 2012, 1; “Prisoners ‘Damn Well Shouldn’t’...”

<sup>307</sup> Hamilton and Lines 2009, 215

<sup>308</sup> Hamilton and Lines 2009, 215

<sup>309</sup> Hamilton and Lines 2009, 216

<sup>310</sup> Hamilton and Lines 2009, 217

votes counting towards their home constituency rather than that of the prison.<sup>311</sup> It is interesting to note that Fine Gael is considered to be a conservative party, particularly regarding law and crime.<sup>312</sup> Hamilton and Lines specifically mention in their article that the Fine Gael TD who proposed the legislation, Gay Mitchell, represented a constituency that contained two correctional facilities.<sup>313</sup> The Fine Gael bill appeared to be on a good track to passage, however that December the Government (comprised of Fianna Fáil and the Progressive Democrats) itself declared that it would write and pass its own version of a prisoner enfranchisement bill.<sup>314</sup> The government's bill was essentially the same as that of Gay Mitchell, providing for postal voting in the home constituency.<sup>315</sup> The parliamentary debate on the bill was almost entirely technical and hardly ideological; by this point it appears that there was little disagreement about prisoner enfranchisement itself, and all political parties supported some form of the measure.<sup>316</sup> Parliamentary discussions in favor of both the Fine Gael bill and that of the Government worked within the language of responsibility, particularly balancing the rights prisoners have with the responsibilities of citizenship.<sup>317</sup> In November 2006 parliament finally passed the Electoral (Amendment) Act, and prisoners voted for the first time the following year.<sup>318</sup> The bill was passed as a stand-alone piece of legislation, and was not part of any other penal reforms.<sup>319</sup>

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<sup>311</sup> Hamilton and Lines 2009, 217; Behan 2011, 24

<sup>312</sup> Hamilton and Lines 2009, 217; Behan and O'Donnell 2008, 327

<sup>313</sup> Hamilton and Lines 2009, 217

<sup>314</sup> Hamilton and Lines 2009, 218; Behan 2011, 24

<sup>315</sup> Hamilton and Lines 2009, 218; Behan 2011, 24

<sup>316</sup> Hamilton and Lines 2009, 217; Behan and O'Donnell 2008, 319; Behan 2011, 30

<sup>317</sup> Behan and O'Donnell 2008, 327

<sup>318</sup> Hamilton and Lines 2009, 218

<sup>319</sup> Behan 2011, 30

### *Current State of Prisoner Enfranchisement*

Since the passage of the 2006 Electoral Amendment, prisoners have been allowed to vote without restrictions.<sup>320</sup> The majority of the debate over the bill was regarding the technicalities of how the votes would be cast, and the final result was that prisoners would be registered in their home constituencies rather than that of the prison, and vote using postal ballots.<sup>321</sup> The first election in which Irish prisoners en masse could vote was the following year. Behan and O'Donnell (2008) studied and analyzed this first election and its potential implications. Regarding participation, they found that the 2007 election had a very low registration rate within the prison.<sup>322</sup> Some possible explanations are that the registration period was short, many of the terms being served were relatively short, thus reducing the incentive to register in prison, and some prisoners arrived after registration had taken place.<sup>323</sup> Of those who registered, a high percentage went on to vote in the election.<sup>324</sup> An interesting point is that there were higher levels of registration and voter turnout in prisons with more long-term criminals convicted of more serious crimes.<sup>325</sup> Even if there had been a high overall registration and turnout rate in the prisons, there are few enough prisoners that it would be statistically unlikely for them to make a significant difference in the election.<sup>326</sup>

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<sup>320</sup> Behan and O'Donnell 2008, 319

<sup>321</sup> Behan and O'Donnell 2008, 326

<sup>322</sup> Behan and O'Donnell 2008, 328

<sup>323</sup> Behan and O'Donnell 2008, 328

<sup>324</sup> Behan and O'Donnell 2008, 329

<sup>325</sup> Behan and O'Donnell 2008, 329

<sup>326</sup> Behan and O'Donnell 2008, 330

## **Analysis and Discussion**

### *Political Ideas*

When looking at the arguments on either side of the prisoner enfranchisement debate following the *Hirst* ruling, it is clear that many invoke the same concepts present throughout the history of the issue. When the *Hirst* ruling challenged the United Kingdom's disenfranchisement policy, the Government itself and many other political actors spoke in defense of the policy and against prisoner enfranchisement. These arguments typically cited the ideas of civil death and the violation of the social contract. There is also an assumption in these lines of argument that voting is a right reserved for upstanding citizens, not an entitlement. This would seem to fit with the United Kingdom's long history of representative systems in which voting rights were reserved for a small portion of the population. The arguments in favor of the current disenfranchisement policy also seem to build upon a general distrust and dislike of prisoners. The Government's appeal to the ECHR included the defense that allowing prisoners to vote would be "offensive" to the public; whether or not this is accurate, this sends a very clear message that prisoners are categorically different than 'regular' citizens and should be treated differently.

Advocates supporting prisoner enfranchisement view the issue as one of political equality; prisoners are also citizens, and as such they should be afforded all of the same rights as those who are not incarcerated. This was the argument made by the Liberal Democrats in the United Kingdom, as well as the Prison Reform Trust and Unlock. The last two organizations also argue for enfranchisement in the name of social inclusion. They claim that social exclusion is the driving force behind

recidivism, and isolating prisoners politically contributes to the feeling of exclusion.<sup>327</sup> This reasoning is interesting in that it is more concrete; rather than making a normative claim about how society should function, the idea of social exclusion is more of a response to observable phenomenon in the service of making change. In Ireland, however, the major arguments in favor of enfranchisement used the language of responsibility. Representatives of different political parties spoke in support of prisoner enfranchisement in the hopes of aligning prisoner rights as citizens with their responsibilities as citizens, one of which is political participation.<sup>328</sup> This is particularly interesting in that it advances the rights of prisoners without making a case for them as being the same as other citizens. The idea of making prisoners ‘responsible’ highlights how their position is different from the rest of society, and could be read as a paternalistic attempt at reformation. Behan and O’Donnell believe this expansion of the franchise to be much less altruistic than initially perceived.<sup>329</sup> The authors see this policy change as indicative of a greater push towards the ‘responsibilization’ of prisoners, which they argue is meant to alter the perception of control over personal circumstance to make prisoners, rather than penal officials, seem more accountable for their situation.<sup>330</sup>

Between these two ideological poles is the position held by the ECHR ruling. Although the ruling of the Court was based on the section of the charter labeling political participation as a fundamental right, the ruling also determined that some level of prisoner disenfranchisement is allowable. The Court’s major objection to the

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<sup>327</sup> “Barred from Voting: The Right to Vote for Sentenced Prisoners” 2010, 6

<sup>328</sup> Behan and O’Donnell 2008, 331

<sup>329</sup> Behan and O’Donnell 2008

<sup>330</sup> Behan and O’Donnell 2008, 331

United Kingdom's policy was its arbitrariness, rather than categorically rejecting the notion that the right to vote can be revoked as punishment. This presents a strange compromise between political ideals and realism: voting is a fundamental right that must be protected, but it could also be revoked under the right circumstances. The ruling seems to demonstrate the ideological shift towards a universalist view of democracy, yet also a recognition of the opposition to this concept.

In comparing the experiences of the United Kingdom and Ireland we see that there is a divide over degree, as well as the kind, of ideology. In Ireland the parliamentary debates over the prisoner enfranchisement bill were almost entirely technical rather than ideological. Representatives were unanimously in favor of enfranchisement; the main subject of debate was how it should occur. Conversely, the political dialogue in the United Kingdom has barely strayed from whether or not prisoners should have the right to vote, with the majority arguing no. What is responsible for this difference in debate? As discussed previously, both countries have relatively conservative views of prisoners and their role in society, and it is unlikely that the *Hirst* ruling inspired a radical shift in perceptions of prisoners in Ireland. In Ireland members of the Government and the opposition party were both in favor of prisoner enfranchisement; it is possible that the relative consensus on this issue precluded the need for an ideological debate. The degree and influence of ideology on political debates is one part of the story of policy divergence between the United Kingdom and Ireland.

#### *Public Opinion Leaders*

In the United Kingdom one of the popular policy defenses for the Government was that allowing prisoners to vote would be “offensive to the public”. Along with the criticisms levied at the Liberal Democrats for their support of enfranchisement, there seems to be an assumption amongst British politicians that prisoners are politically unpopular, and consequently full prisoner enfranchisement is a non-option. However there is little support for the belief that the public is strongly against prisoner enfranchisement; it is hardly an issue that has made it onto public opinion polls. This raises the question as to why politicians choose to believe that the public feels a certain way towards prisoners. Rather than figuring out what their political base or constituents think about prisoner enfranchisement, it appears that the majority of British politicians are formulating their positions on the assumption that enfranchisement is not popular. It is then strange that politicians in the United Kingdom assume that prisoner enfranchisement is politically risky whereas politicians in Ireland pushed for re-enfranchisement.

#### *Old Policy, New Meaning*

Another potential explanation for the differences in response to the *Hirst* ruling might be associated with the idea of non-salience previously discussed. Recall that even though both Ireland and the United Kingdom effectively disenfranchised all prisoners, Ireland’s law technically allowed prisoner voting. Since the issue of prisoner enfranchisement was so under-discussed and affected so few people, it is likely that few citizens or political actors had a comprehensive opinion on prisoner enfranchisement. Once the ECHR ruled against the United Kingdom’s policy, the issue was popularized and made salient for political discourse. One possibility for

resulting policy differences is that once the issue was raised, individuals looked to the existing law for guidance on opinion formulation. Because there is a general assumption that laws are derived for a particular reason (rather than by default), there is a strong possibility that those existing laws may guide public opinion on under-discussed issues. Citizens in Ireland and the United Kingdom could assume that the respective policy was arrived at for some reason, and absent any convincing argument to the contrary that could become the default policy. Because Ireland technically allowed prisoners the right to vote previous to the *Hirst* ruling, and the ruling demonstrated a support for prisoner enfranchisement, political actors may have simply assumed that enfranchisement was the correct policy, rather than formulating a new line of reasoning either way.

#### *Critical Juncture and Historical Institutionalism*

The reevaluation of prisoner disenfranchisement policies by political actors in Ireland and the United Kingdom demonstrates the ‘criticalness’ of this period in the development of enfranchisement policy. Until the *Hirst* decision movement on prisoner disenfranchisement policy occurred sporadically, and when changes were made they were rarely the result of a deliberate and coherent debate. The ECHR’s ruling highlighted the issue and necessitated a response from the United Kingdom government; the Irish government was not indicated in the litigation but took the time to reevaluate their prisoner disenfranchisement policy anyway. Because the issue of prisoner disenfranchisement was politically non-salient, there were few scenarios in which change would be likely. Any shift from the status quo would require a critical mass of political actors both recognizing that this is an issue worthy of debate and

then choosing to address it over all other political issues at the time. However the *Hirst* decision presented a moment in which government actors were forced to reevaluate their policy, or at least appear to do so.

The results of this reevaluation of policy may also be better explained through historical institutionalist theory. In Pierson and Skocpol's article on historical institutionalism, they discuss how critical junctures are important not just as opportunities for change, but because whatever the outcome of that period is often self-reinforcing; "...Outcomes at a critical juncture trigger feedback mechanisms that reinforce the recurrence of a particular pattern in the future".<sup>331</sup> This idea of self-reinforcement may help explain the new interpretations of old policies discussed above. In Ireland the decision made decades earlier to technically allow prisoners to vote may have influenced contemporary actors' view of the issue; if previous actors had made this decision, there would have to be a particularly compelling reason to alter the policy and change paths. In the United Kingdom a series of decisions throughout the twentieth century disenfranchised prisoners (although not consistently) and unlike the case in Ireland, there was no ambiguity about the law. Pierson and Skocpol argue that once decisions are made and perpetuated for a period of time, they alter the way that citizens and actors view the world.<sup>332</sup> For this case, that would mean that because prisoners were almost always disenfranchised in recent memory and are currently disenfranchised, actors would be more likely to see prisoners as undeserving of the right to vote than to critically reevaluate the policy and its intent.

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<sup>331</sup> Pierson and Skocpol 2002, 699

<sup>332</sup> Pierson and Skocpol 2002, 700

As we have seen in the case of the United Kingdom the Government has yet to make any changes to their disenfranchisement policy. Using the language of a critical juncture and path dependency, the Government's reticence takes on a deeper meaning. From the definition of a critical juncture, we see that a change in policy is not necessary for a period to be considered 'critical'. However the United Kingdom Government has not definitively decided to stay with the status quo; although the actual effect is the same (prisoners cannot vote) the issue is technically undecided. Although the Government has maintained the same policy of disenfranchisement, the official position is that they are still considering policy options and waiting for the issue to be addressed in Parliament. This means that the 'critical' period has been continuously extended, which according to Capoccia and Kelemen may have an important effect on the eventual outcome.<sup>333</sup> The authors suggest that the longer a critical period goes on, the more likely it is that the relevant actors will be constrained by structural factors and choose to retain the initial policy.<sup>334</sup> In the case of the United Kingdom this idea seems quite likely. When the *Hirst* decision was first released there were several organizations and one political party pressing for change in the way of re-enfranchisement.<sup>335</sup> However the Liberal Democrats faced quite a backlash from this position, and their vocal support of re-enfranchisement has since cooled. Because public interest in prisoner disenfranchisement has waned in the years since the decision, it is unlikely that a critical mass of actors will be galvanized by the issue and push for expansive change. The strongest political force that would push the

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<sup>333</sup> Capoccia and Kelemen 2007, 351

<sup>334</sup> Capoccia and Kelemen 2007, 351

<sup>335</sup> Unlock, Penal Reform Trust, and the Liberal Democrats, respectively

United Kingdom to change its policy is the ECHR itself, however it's possible that the ECHR's insistence on change will have the opposite effect on actors who are wary of European interference in domestic issues. The United Kingdom Government never seemed that receptive to change, and it is likely that they will maintain their prisoner disenfranchisement policy for the foreseeable future.

### *Prison Population and Minorities*

An important aspect of the difference between the disenfranchisement experiences in the United Kingdom and Ireland is how the prison systems in the respective states affect minorities. In both states the prison populations are disproportionately from low socioeconomic backgrounds, however in the United Kingdom racial minorities are also disproportionately incarcerated. In United Kingdom prisons, 13% of those incarcerated are black, compared to 3% of the general population.<sup>336</sup> Amongst incarcerated foreign nationals, 62% were from a minority ethnic group.<sup>337</sup> Also 13% of incarcerated persons were listed as Muslim even though only 4% of the general population identifies as Muslim.<sup>338</sup> Comparatively in Ireland there does not appear to be any notable correlation between ethnicity and representation in the prison system.<sup>339</sup> The disproportionate effect of imprisonment on minorities has not been specifically mentioned by advocates on either side of the prisoner enfranchisement debate in the United Kingdom, however the American experience with this issue supports the possibility of a correlation between race and view of prisoners.

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<sup>336</sup> Berman and Dar 2013, 10

<sup>337</sup> Berman and Dar 2013, 10

<sup>338</sup> Berman and Dar 2013, 10

<sup>339</sup> "Facts and Figures"

## *Conclusion*

The ECHR's ruling in *Hirst v United Kingdom* highlighted the issue of prisoner enfranchisement for the international community, and in so doing forced the Governments of Ireland and the United Kingdom to revisit their prisoner voting policies. These countries that had previously developed along similar pathways responded in very divergent ways. Even though prisoners in both states were effectively disenfranchised for decades, Ireland's early decision to technically allow prisoners to vote became an important point of difference, and led to the Irish prisoners gaining the vote while the state of British prisoners remained the same. The *Hirst* case and its effects demonstrate how along with shared country characteristics, critical junctures and the process of an issue's salience being raised can have a serious impact on prisoner disenfranchisement policy.

## Chapter 6

### **The United States: The Most Restrictive Path**

#### *Introduction*

Prisoner disenfranchisement in the United States represents the most diverse collection of policies of the study and the international community. A unique structure of institutions has allowed for the creation of different enfranchisement policies in each state, creating an incredibly varied and dynamic collection of experiences. The issue has historically and continues to be much more salient than in the other cases previously studied. This is because the two topics that most directly encompass prisoner enfranchisement, expansion of the vote and penal policy, have very contentious histories in the United States, and as such have had prominent roles in the political sphere. Implicated throughout prisoner disenfranchisement policy in the United States is America's unique experience with race and its political consequences. Similar to the other case studies, in America there is a relationship between more exclusive views of democratic participation and more severe penal policies and the resulting policies of prisoner disenfranchisement.

#### *Current Policy and its Background*

The United States has the most restrictive policy of this study and one of the largest percentages of disenfranchised citizens in the world.<sup>340</sup> Unlike the other case countries, prisoner voting policies in the United States are developed by the states themselves rather than a singular national policy. This has created a mosaic-like variety of policies across the country, ranging from current prisoner enfranchisement

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<sup>340</sup> Rottinghaus 2003, 28

to lifetime bans even after the individual is released. Every state but Vermont and Maine (96% of states) has some sort of prisoner disenfranchisement policy, and 32 states (64%) ban ex-prisoners from voting for some period of time after their release.<sup>341</sup> These policies disproportionately affect minorities, and 13% of the African American male population in the US is permanently disenfranchised, compared to 2.3% of the population at large.<sup>342</sup> Because so many states ban prisoners from voting after their release, nearly three-quarters of all disenfranchised prisoners are no longer in custody.<sup>343</sup>

Prisoner disenfranchisement laws have existed in America since before the founding of the nation. Many of the New England colonies that engaged in local representative government had laws restricting or removing the franchise from those convicted of crimes, often making loss of suffrage part of the punishment.<sup>344</sup> After Independence, states established their own voting laws, which were often replications of whatever laws they had as colonies. In the period between the ratification of the Constitution and the Civil War many states passed prisoner disenfranchisement laws for the first time.<sup>345</sup> These laws were part of a series of changes to the franchise that further limited it based on behavioral characteristics rather than just race, sex, and wealth.<sup>346</sup> In fact laws disenfranchising paupers were much more common earlier on than those disenfranchising prisoners.<sup>347</sup> Many of the disenfranchisement policies

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<sup>341</sup> Rottinghaus 2003, 28

<sup>342</sup> Rottinghaus 2003, 28; Uggen and Manza 2002, 782; Easton 2011, 231

<sup>343</sup> Ewald 2002, 1055

<sup>344</sup> Ewald 2002, 1060

<sup>345</sup> Burkhardt 2011, 357; Keyssar 2000, 358

<sup>346</sup> Keyssar 2000, 63

<sup>347</sup> Keyssar 2000, 63

were tied to particular felony charges or “infamous” crimes, a somewhat vague category that includes crimes that would otherwise make one ineligible to testify in court.<sup>348</sup>

The end of the Civil War and the passage of the Thirteenth, Fourteenth, and Fifteenth amendments expanded the franchise to African-Americans for the first time. This threatened to destabilize the social and political order in the Southern states where it would have the greatest effect, and in response, many states that had not previously barred prisoners from voting began passing disenfranchisement laws. Some states had written their constitutions to allow for such laws to be made, but had not yet passed corresponding legislation.<sup>349</sup> For example, Alabama’s constitution states “Laws shall be made to exclude from...suffrage...those who shall hereafter be convicted of bribery, perjury, forgery, or other crimes and misdemeanors”, however no such law banning convicted felons from voting was passed until 1867.<sup>350</sup> From the end of Reconstruction to the early twentieth century, many southern states passed prisoner disenfranchisement laws for the first time, or updated previous laws.<sup>351</sup> However unlike the first wave of prisoner disenfranchisement laws that occurred after Independence, many of these laws were passed with the intent to discriminate against African Americans.<sup>352</sup> Transcripts from legislative floor debates and public debate demonstrate how these laws were specifically written to include crimes most

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<sup>348</sup> Keyssar 2000, 63

<sup>349</sup> Keyssar 2000, 358

<sup>350</sup> Keyssar 2000, 358; Behrens et al 2003, 565

<sup>351</sup> Behrens et al 2003, 564; Ewald 2002, 1088

<sup>352</sup> Keyssar 2000, 162; “Losing the Vote” 1998, 3; Ewald 2002, 1088

commonly attributed to African Americans.<sup>353</sup> These laws resulted in their intended effect, and African Americans were disproportionately affected. In Alabama for example, the state's prisoner disenfranchisement law resulted in banning ten times as many African American men as white men.<sup>354</sup>

By the beginning of the twentieth century, nearly every state had some kind of law disenfranchising prisoners.<sup>355</sup> The issue remained relatively static until the latter half of the twentieth century when the Civil Rights movement brought the question of equal voting access to the national stage. The movement, and the laws it inspired, did not address prisoner disenfranchisement, however it introduced a new dialogue on equality and shed light on the many ways in which minorities were marginalized in the United States. The Civil Rights movement also emphasized the role of the court system. Following the importance of the Supreme Court in holding states accountable for equality, several prisoners pursued a similar path in the hopes of gaining access to the vote. In a rather strange 1974 decision in *Richardson v Ramirez*, the court actually found a defense for prisoner disenfranchisement laws in the Fourteenth Amendment.<sup>356</sup> Section two of the Amendment lays out the only exception to full male enfranchisement as those convicted of "participation in rebellion, or other crime".<sup>357</sup> Justice Rehnquist and the court majority took this to mean that the authors must have intended for prisoner disenfranchisement to be legal, although many critics

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<sup>353</sup> Keyssar 162; Behrens et al 2003, 570; Ewald 2002, 1088

<sup>354</sup> Ewald 2002, 1091

<sup>355</sup> Keyssar 2000, 162

<sup>356</sup> Keyssar 2000, 306

<sup>357</sup> Behrens et al 2003, 562; U.S. Constitution Amendment XIV 1868

argued that this was targeted at Confederate soldiers.<sup>358</sup> Even though the Supreme Court had been active in expanding prisoners' rights and equal access to the polls, it seemed hesitant to push for prisoner enfranchisement rights.

In the 1985 case *Hunter v Underwood* the Supreme Court for the first time ruled against a prisoner disenfranchisement policy on the basis of equal protection.<sup>359</sup> The appellants were able to prove that the Alabama state law was designed specifically to disenfranchise minorities, thus rendering it unconstitutional.<sup>360</sup> Recall from the history of prisoner disenfranchisement that there were transcripts in which representatives openly stated their intention to disenfranchise African-Americans with the law. The *Hunter* case represented an important step for prisoner voting rights, however its success largely hinged on the available historical records that proved discriminatory intent, thus making it a difficult victory to repeat with other states' policies.

During the latter half of the century, many states took it upon themselves to moderate their prisoner disenfranchisement policies.<sup>361</sup> In most instances this meant reducing the ban from life to a specified period of time and limiting the kinds of crimes that would result in disenfranchisement.<sup>362</sup> These changes are important in that they imply some sort of discussion on the issue and a willingness to adapt policies, however they should not be taken as an indication of a national movement towards vote expansion. During this time state legislatures in Rhode Island and Idaho

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<sup>358</sup> Keyssar 2000, 306; Ewald 2002, 1100

<sup>359</sup> Keyssar 2000, 307

<sup>360</sup> Keyssar 2000, 307

<sup>361</sup> Keyssar 2000, 303

<sup>362</sup> Keyssar 2000, 303

specifically chose to maintain their disenfranchisement policies, and in 2000 Massachusetts voted to institute a prisoner disenfranchisement law for the first time in the state's history.<sup>363</sup> This is quite notable given that Massachusetts is typically considered to be a more liberal state. In 2008 twenty-two different states brought forth a total of seventy-five bills regarding prisoner disenfranchisement.<sup>364</sup> While all of these bills discussed prisoner voting rights, they represented a large variety of policy changes, both towards re-enfranchisement and further disenfranchisement.<sup>365</sup>

America still has the highest incarceration rate in the world, which has stayed over two million prisoners nationwide for several years.<sup>366</sup> Decades of prisoner disenfranchisement policies mean that today there are five million American citizens who are banned from voting.<sup>367</sup> Because so many states ban ex-offenders from voting even after their release, nearly three-quarters (or four million people) of all disenfranchised persons in the United States have already completed their sentence.<sup>368</sup> Even more notable than these high numbers of disenfranchised citizens is which parts of the population are the most affected. Of the five million offenders and ex-offenders permanently disenfranchised, 1.4 million are African American males.<sup>369</sup> This figure represents 13% of the entire African American male population of the United States, and is much higher in certain southern states.<sup>370</sup> Along with the continuation of the War on Drugs, three strikes laws, and mandatory minimums, changes in prosecution

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<sup>363</sup> Keyssar 2000, 303, 331; Demleitner 2009, 83

<sup>364</sup> Easton 2011, 233

<sup>365</sup> Easton 2011, 233

<sup>366</sup> Easton 2011, 1

<sup>367</sup> Easton 2011, 231

<sup>368</sup> Ewald 2002, 1055; Rottinghaus 2003, 28

<sup>369</sup> Rottinghaus 2003, 28

<sup>370</sup> Rottinghaus 2003, 28

tactics have also contributed to the high number of disenfranchised citizens in the United States. Prosecutors have been relying more heavily on plea bargains rather than bringing every case to trial; while the accused end up with shorter sentences, there are a larger number of people being imprisoned who may have otherwise been acquitted.<sup>371</sup>

Most states that have some sort of disenfranchisement policy also have a process through which a citizen can regain their right to vote, but often the process is incredibly long and confusing, thus making it very unlikely that an ex-offender will succeed.<sup>372</sup> In some cases the only option is a pardon from the Governor or President.<sup>373</sup> Along with being very burdensome, these re-enfranchisement policies invoke certain wealth and class differences; many laws mandate that all outstanding fines and fees be paid before ex-offenders can be re-enfranchised, which is more difficult or impossible for the impoverished.<sup>374</sup> The American Civil Liberties Union (ACLU) along with other rights groups have criticized these policies, arguing that they are essentially a poll tax.<sup>375</sup> There is also great uncertainty surrounding prisoners' voting rights, particularly after release. The laws are complicated and there is great variance across states; many election officials themselves do not fully understand who is or is not allowed to vote.<sup>376</sup> This means that many eligible voters can be disenfranchised due entirely to uncertainty and error.<sup>377</sup>

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<sup>371</sup> "Losing the Vote" 1998, 5

<sup>372</sup> "Losing the Vote" 1998, 6; Easton 2011, 232

<sup>373</sup> "Losing the Vote" 1998, 56; Easton 2011, 232

<sup>374</sup> Easton 2011, 231

<sup>375</sup> Easton 2011, 231

<sup>376</sup> Easton 2011, 235; Wood and Bloom 2008, 8

<sup>377</sup> Easton 2011, 235; Wood and Bloom 2008, 8

While the majority of movement on this issue has and will most likely continue to take place within the states, the national spotlight may still hold some influence. In February of this year United States Attorney General Eric Holder called on states to allow felons who have completed their prison sentences to vote.<sup>378</sup> In his speech Holder linked prisoner disenfranchisement to other practices designed to keep minorities from the polls, specifically citing how minorities are disproportionately affected by these policies.<sup>379</sup> The position of the Attorney General has no authority over this issue, and it is unlikely that the United States Congress would put forth a bill re-enfranchising felons. However comments such as these demonstrate the practical effect and the subsequent visibility this issue has in America.<sup>380</sup>

### *Suffrage*

The American Constitution does not directly address the issue of suffrage. Article 4 charges the federal government with ensuring that every state has a “republican form of government”, but such details as what is meant by ‘republican’ and how this is to be achieved are left up to interpretation.<sup>381</sup> Instead, the Constitution leaves the question of who is allowed to vote and by what means up to the state legislatures to decide, even for federal elections. The state-based development of voting rights allowed for a continuation of suffrage laws. During the years between independence and the ratification of the Constitution states had been writing their

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<sup>378</sup> Apuzzo 2014, 1

<sup>379</sup> Apuzzo 2014, 1

<sup>380</sup> Apuzzo 2014, 1

<sup>381</sup> Keyssar 2000, 4; U.S. Constitution Article 4

own election laws, many of which were recreations of colonial laws of English inspiration.<sup>382</sup>

Like most other democracies of the time, the United States in the decades following Independence did not have full male suffrage. The majority of states had implemented property and tax-paying requirements; supporters of these restrictions claimed that they ensured only those who shared the burden of the community were allowed to participate in law making.<sup>383</sup> Yet by the mid-nineteenth century important developments in the socioeconomic and political landscape led to the reformation of suffrage laws.<sup>384</sup> Property and tax-paying requirements were repealed in states throughout the nation, which moved much of America closer to universal white male suffrage.<sup>385</sup> As states redrew the boundaries of the franchise to include more white men, they also moved to exclude individuals who did not fit this new conception of the American citizen. From Independence to the mid-nineteenth century, many states passed laws specifically disenfranchising women, minorities, and those otherwise considered to be undeserving of the franchise, including paupers, migrants, and prisoners.<sup>386</sup> The dueling trajectories of enfranchisement during this time demonstrate that states were undergoing a reconceptualization of the polity, and not simply in a move towards expansion.

The end of the Civil War and the ensuing Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth Amendments) marked the most dramatic change in the

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<sup>382</sup> Keyssar 2000, 5

<sup>383</sup> Keyssar 2000, 49

<sup>384</sup> Keyssar 2000, 50

<sup>385</sup> Keyssar 2000, 50

<sup>386</sup> Keyssar 2000, 61

polity America had seen since its founding. The Fourteenth Amendment instituted the concept of national citizenship (previously individuals had been considered citizens of their state), which offered rights and protection to freed slaves.<sup>387</sup> The Fifteenth Amendment (1870), states “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 – The Congress shall have power to enforce this article by appropriate legislation”.<sup>388</sup> Along with extending the vote to non-white males, the Fifteenth Amendment was also monumental in that it relocated authority on enfranchisement law from solely the states to the federal authority. This expansion of federal authority would prove to be paramount to the enforcement of equal suffrage nearly a century later. Southern states responded by making it nearly impossible for African Americans to vote or engage in other forms of public participation through a variety of tactics including violence, intimidation, literacy tests, and poll taxes.<sup>389</sup> Throughout the South minorities would remain disenfranchised for almost another century.

Fifty years after the passage of the Fifteenth Amendment, women finally gained the right to vote. In 1920 the Nineteenth Amendment to the Constitution, which barred disenfranchisement on the basis of sex, was ratified.<sup>390</sup> As we have seen in previous case studies, this was around the same time that women in other western democracies gained access to the vote. This was the last major development in national rights until the Civil Rights movement in the middle of the twentieth century,

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<sup>387</sup> U.S. Constitution Amendment XIV 1868

<sup>388</sup> U.S. Constitution Amendment XV 1870

<sup>389</sup> Behrens et al 2003, 561

<sup>390</sup> Keyssar 2000, 218

which sought to finally give minorities the rights that had been promised to them in the Civil War Amendments. By the middle of the twentieth century, nearly every state had some sort of prisoner disenfranchisement law, and the practice was commonly accepted.<sup>391</sup> However the Civil Rights Movement of the 1960s brought new attention to the injustices in the American electoral system and challenged the myriad ways in which minorities were kept from exercising their right to vote. One of the most significant changes to come from Civil Rights activism was the Voting Rights Act of 1965. The VRA reemphasized the prohibition of discriminatory voting practices initially written into the Fifteenth Amendment and, most importantly, gave the federal government the authority to regulate and enforce laws in the states; while the individual states retained the right to write their own election laws, its citizens could now appeal to federal rather than state authority over unjust laws.<sup>392</sup> For the purposes of this study it should be noted that the VRA did not address prisoner disenfranchisement. However the Act did institute a new legal vocabulary of equal rights and equal protection, which would prove to be very useful in legal challenges to disenfranchisement laws.

Since the Civil Rights Movement and the passage of the VRA, the federal government has held states to the standard of full enfranchisement. States have retained the authority to draft their own election laws, so there is still a good deal of variety regarding voter access throughout the country. Absentee and early voting are common; however voting by proxy is not an option. In general the United States is

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<sup>391</sup> Keyssar 2000, 302

<sup>392</sup> “The Voting Rights Act of 1965”

more similar to the United Kingdom and Ireland regarding voter access; the burden is more on the individual than the government to ensure that every voice is heard.

### *Political Institutions and Political Culture*

Federalism and the Constitution are the two institutional aspects of the United States most relevant to the topic of prisoner disenfranchisement, and are also unique amongst the case studies. The federalist system enshrined in the Constitution gave the states a huge degree of autonomy; in fact all acts by government at the national level must be specifically allowed in the text of the Constitution. One of the topics on which states have authority is the franchise. As previously described, the original text of the Constitution leaves the question of voting rights entirely up to the states. The passage of the Fifteenth and Nineteenth Amendments established the standard that individuals could not be disenfranchised based on race or sex, however the states maintain the authority to legislate all other aspects of access to the ballot. This has led to a fragmented electoral policy in which the state where one resides can have a significant impact on how one can vote, and the stakes are particularly high for prisoners and ex-prisoners.

Even though the American Constitution is rather vague on issues of enfranchisement, its enumeration and protection of rights is especially important for the country's political development. The process of judicial review (not actually detailed in the Constitution but has become an accepted practice) means that citizens can appeal to an authority that is not beholden to electoral success. As will be detailed

later in the chapter, this has been particularly useful for the protection of prisoners and other politically unpopular groups.

### *Prisoners and Society*

Even though the United States is now one of the harshest countries in terms of penal policy and treatment of prisoners, this has not always been the case. We saw earlier how the emphasis on morality in early Puritan colonies led to severe punishments for those who had broken the law. These unforgiving beginnings did not have a lasting impact on penal policy, and by many accounts American dealings with crime were comparable to Europe until the 1960s.<sup>393</sup> Around the latter half of the twentieth century several important developments occurred, and America's path diverged from that of Europe.

From around 1960-1980 there was a rise of two paradigm shifts largely influenced by one another: the prisoners' rights movement and the politicization of crime. The prisoners' rights movement was less of an organized movement and more a series of demonstrations and suits aimed at affording prisoners increased rights and visibility.<sup>394</sup> Action on this issue actually began in the 1960s when Black Muslim prisoners organized to fight for religious freedom, but the majority of influential court cases consecrating rights gains did not occur until the 1970s.<sup>395</sup> These rights gain included improved access to legal aid, privacy, protection from cruel and unusual

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<sup>393</sup> Hull 2009, 143

<sup>394</sup> Jacobs 1980, 432

<sup>395</sup> Jacobs 1980, 432, 441; Hull 2009, 143

punishment, and increased visibility to the public.<sup>396</sup> Activism on behalf of prisoners' rights also influenced which governing body would be the decisive authority on the issue. Before the 1960s prisoners had largely been under the authority of state governments and corrections officials.<sup>397</sup> However after the Civil Rights movement federal courts and the Supreme Court were more willing to look at prisoner cases under the auspice of equality, and legislatures became more active in the formation of prison policy.<sup>398</sup>

Prisoners managed to make significant gains in rights and visibility during the late 60s and early 70s, however the succeeding decade would present new challenges to incarcerated persons or those at risk of incarceration. Beginning in the early 1970s crime became a popular topic in political discourse.<sup>399</sup> As what can be argued as a backlash to the decade of rights advancements that preceded it, conservative legislatures across the country began passing much harsher sentencing laws.<sup>400</sup> Three strikes laws, in which third-time offenders could be put away for life disregarding the seriousness of the crime, mandatory minimum sentences, and the War on Drugs were some specific results of this period that significantly contributed to skyrocketing incarceration rates.<sup>401</sup> These "tough on crime" policies were often passed under the guise of "victim's rights" and security, although their disproportionate effect on minority communities indicated a significant racial component.<sup>402</sup> During this time

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<sup>396</sup> Jacobs 1980, 432

<sup>397</sup> Jacobs 1980, 433

<sup>398</sup> Jacobs 1980, 444, 445

<sup>399</sup> Hull 2009, 145

<sup>400</sup> Hull 2009, 149

<sup>401</sup> Easton 2011, 208

<sup>402</sup> Hull 2009, 148

crime was established as an important political talking point, and politicians from both parties competed for harsher laws.<sup>403</sup>

Although tough on crime has proved itself to be a winning political stance, it is not clear if politicians were responding to political opinion or leading it.<sup>404</sup> In fact this general movement towards harsher views towards offenders has made it much more politically dangerous for legislators to speak in favor of fairer treatment or sentencing.<sup>405</sup> The results of close to forty years of ‘tough on crime’ policies have been staggering. From 1972 to 2004 the United States has increased its prison population by six times, and is now the number one incarcerator in the world.<sup>406</sup>

### **Discussion and Analysis**

The case of prisoner disenfranchisement in the United States is very different from the cases previously discussed in a variety of ways. Unlike the United Kingdom and Ireland, it appears that the disenfranchisement laws in the United States were deliberately decided at every point. Rather than being conflated with changes in residency requirements or postal ballot regulation, prisoners throughout the United States were either disenfranchised or re-enfranchised through legislation specific to that issue. Recent reports have indicated the possibility of de facto disenfranchisement but that is in regards to ex-offenders who are no longer incarcerated and confusion over their eligibility.

### *Saliency*

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<sup>403</sup> Hull 2009, 147

<sup>404</sup> Hull 2009, 157

<sup>405</sup> Hull 2009, 159

<sup>406</sup> Hull 2009, 139

The development of disenfranchisement policy in is likely associated with the relatively high level of salience the issue has received in the United States. We have seen in other cases that prisoners' access to the polls is simply not an issue much of the public is aware of, thus making it less likely that it will be addressed in a coherent way. However in the United States the issue of prisoner disenfranchisement has been brought up frequently since the founding of the nation. In 2008 alone 75 bills regarding prisoners' rights to vote were brought up nationwide; even though many of these bills would further restrict prisoners' access to the polls, the sheer number demonstrates that this is an issue being discussed across many states.

Two unique aspects of American political development that may contribute to this high level of salience are the historic contentiousness of vote and the high incarceration rate. The United States has experienced very public and very divisive debates over voting rights and racial equality, both of which are indicated by prisoner disenfranchisement. Rather than being a seemingly insignificant topic, many rights groups have presented the issue as a continuation of efforts to make democratic equality a reality for all citizens. The United States is one of the few nations that has a statistically significant number of citizens disenfranchised due to incarceration (or former incarceration), and in some states the percentage is high enough to potentially have electoral effects. In a counterfactual study, Uggen and Manza (2002) determined that had prisoners been enfranchised in certain states, several high-profile elections would likely have turned out differently.<sup>407</sup> While prisoners are assumed to be less politically active than the average citizen, the authors argued that the number of

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<sup>407</sup> Uggen and Manza 2002, 794

disenfranchised was large enough that there still would be a significant difference.<sup>408</sup>

This is only one study and has not been reproduced by other scholars, but it does raise several possibilities worthy of consideration. The sheer number of people incarcerated in America has made the issue of prisoner disenfranchisement important for practical as well as symbolic or normative reasons.

The United States also presents a conundrum regarding issue salience: conscious changes are made to policy to suggest that legislators are aware of the issue, however it has yet to gain the kind of national attention of other issues. Politicians do not campaign on prisoner enfranchisement and it is rarely brought up in public debate; it is likely that most citizens have never thought about this issue before. So there is a paradox: political actors are aware enough of the issue to pass legislation specific to it, but it is rarely discussed openly in the public. One clear exception would be the passage of the Massachusetts referendum disenfranchising prisoners for the first time.

### *Political Ideas*

The highly complex experience of prisoner disenfranchisement in the United States emphasizes the importance of understanding the political ideas supporting or contradicting prisoner disenfranchisement. The very first prisoner disenfranchisement laws were in Puritan New England colonies, and strongly reflected the ideologies of those communities. These disenfranchisement laws were dually influenced by English common law and Puritan morality.<sup>409</sup> As seen in the United Kingdom chapter, England had a long history of removing rights from convicted criminals. The

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<sup>408</sup> Uggen and Manza 2002, 794

<sup>409</sup> Ewald 2002, 1060

religious influence added an element of morality to the punishment; many of the colonies were very protective of the “purity” of their communities, and anyone who threatened that by demonstrating poor character or impiety must not be allowed to ruin the rest of the community.<sup>410</sup> This defense contains a very clear invocation of the republican idea of the political community, however the religious underpinnings appear to emphasize morality and purity over the more Greek idea of civic virtue. This unique ideological compilation may be important in explaining modern day America’s complex opinion on crime and punishment.

The republican notion of a morally upright citizenry has been reflected in other iterations of American prisoner disenfranchisement. In an Alabama Supreme Court decision in the case *Washington v. State* (1883) that is cited throughout prisoner disenfranchisement literature, the Court wrote that prisoners should be banned from voting so as to “preserve the purity of the ballot box”.<sup>411</sup> Examples of key phrases such as these demonstrate the pervasive idea in American states that voters should be moral, and those who demonstrate immorality should not be allowed to participate in the electoral process. More so than the violation of the social contract, the idea of an upright citizenry appears to have been very important in the passing of disenfranchisement laws. During the second period of disenfranchisement laws, morality and uprightness took on a dual meaning of racial coding. Recall that Alabama was a state for which there was documented evidence of the intent to disenfranchise minorities, and in the 1985 case *Hunter v Underwood* the Supreme

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<sup>410</sup> Ewald 2002, 1061

<sup>411</sup> Keyssar 2000, 163; Ewald 20002, 1081; Demleitner 2009, 103; “Losing the Vote” 1998, 15

Court found the evidence of discriminatory intent to be sufficient enough to rule the Alabama disenfranchisement law unconstitutional. Knowing that the law was unquestionably racist changes the lens through which one should view the notion of ‘purity’ in its defense in *Washington*. The language of ‘purity’ regarding a political community in the American South (particularly during Reconstruction) is fraught with racial coding. America’s unique experience with race adds a layer of depth to the conceptual defenses of prisoner disenfranchisement.

### *Race and Disenfranchisement*

The political importance of prisoner disenfranchisement in America is greatly heightened by its racial implications. While this may not be unique to the United States (recall that prison populations in the United Kingdom have a disproportionately high percentage of non-white minorities), America’s experience with race and inequality has been particularly intertwined with the right to vote. There are also clear ties between race and criminal justice laws in America. Minorities are significantly more likely to be arrested and convicted even when controlling for socioeconomic standing, and political rhetoric often uses crime as a stand-in for race. Several studies have also demonstrated connections between minority populations in states and the likelihood that they will adopt or reverse prisoner disenfranchisement policies. The argument that prisoner disenfranchisement policies are driven by racial factors is popular amongst scholars of this topic; most studies of the American case at least mention the possibility of a racial component. However the very first prisoner disenfranchisement laws were instituted in New England colonies, and similar policies exist across states with negligible minority populations. Clearly there must be

other factors that explain the American case that are not racial bias. However this is not to say that race is not an important factor. Minorities in America were systematically excluded from the democratic process for most of American history and have also been disproportionately involved in the penal system. The confluence of these two experiences makes a strong case for race being an important factor in the prisoner disenfranchisement policies of the United States.

### *Institutions*

State legislatures, prison authorities, federal courts, as well as other governing bodies, have all had a hand in prisoner voting laws. Early in the twentieth century judges often did not take cases involving prisoners because they did not want to usurp authority from other officials. Perhaps the issue of prisoner disenfranchisement is affected by interactions between the different authorities involved. When state legislatures are involved, the ensuing policies are not as partisan as one would expect. Democrats are more likely to re-enfranchise prisoners than Republicans, however plenty of Democratic legislatures have been responsible for harshening policies. While there is some political divide, it is not robust enough of an indicator to say definitively that the issue is championed by one party over the other.

As in the United Kingdom case, the development of prisoner disenfranchisement policy in the United States has been remarkably non-linear. Many states did not specifically disenfranchise prisoners until decades after their founding, and Massachusetts only passed the first such law in 2000. Particularly throughout the last century, many states have harshened and relaxed their laws multiple times, and today there is no national consensus over what direction the policy should move in.

Compared to most other enfranchisement issues this is quite bizarre. Similar democracies have typically begun with a restrictive idea of who can participate politically (property owning white males) and this is expanded to include different groups over time. In America's experience with prisoner disenfranchisement it appears that the policies are influenced by events of alterations in political circumstances. More so than other groups, prisoners' voting rights are much more vulnerable to change. This indicates that prisoners occupy a unique position in American political society in which there is little permanent consensus over their rights.

### *Penal Policy*

America's harsh penal policies indicate a particular conception of prisoners and crime, which likely has a strong effect on prisoners' rights to vote. Even before the politicization of crime beginning in the 1970s Americans demonstrated a harsh view of criminals, often suggesting a strong moral judgment. Perhaps the unforgiving morality of the Puritan colonists left an indelible mark on the American political psyche and has been influencing attitudes ever since. Other western democracies entered the twentieth century with a harsher view of criminal offenders, however many transitioned to a policy of rehabilitation around the middle of the century. The United States took the opposite route, and instead adopted 'tough on crime' policies that continue to rule penal policy in many states to this day. Why America split ways with most of Western Europe is probably due to idiosyncratic political changes. Ever since the beginning of 'tough on crime' policies it has been clear that they are a political winner. To this day politicians who attempt to institute rehabilitative

measures are often attacked for being ‘soft on crime’ or unsympathetic to victims. It is very likely that prisoners remain disenfranchised because politicians fear the repercussions of that vote. However it is still not clear if these strong stances against crime are actually in line with public opinion writ large. In a survey of public opinion on the issue of prisoner disenfranchisement, Uggen and Manza found that 80% of interviewees supported re-enfranchising ex-felons.<sup>412</sup> What is interesting, however, is that support for re-enfranchisement dropped when the crime was specified, with sex offenders receiving the least support for re-enfranchisement.<sup>413</sup> Committing a sex crime, while abhorrent, is unlikely to have anything to do with whether or not one will commit election fraud in the future; compared to the crimes that warrant disenfranchisement in Germany this makes little sense. This indicates a strong degree of moral judgment on the behalf of the interviewees, which is in line with what is known about much of American political ideology. Perhaps a significant number of Americans still view voting rights (or political rights in general) as reserved for morally upright citizens, rather than absolutes granted to all. Enfranchising prisoners requires an understanding of political rights as more important to the political system than punishment of criminals, so this conception is likely a factor in the retention of harsh disenfranchisement policies.

### *Conclusion*

The United States is the most complicated and distinctive case of prisoner disenfranchisement in this study. The voting rights of a prisoner or former prisoner is entirely dependent on where he resides, and there is a good deal of confusion. Despite

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<sup>412</sup> Manza et al 2004, 283

<sup>413</sup> Manza et al 2004, 283

the large degree of variation in policies throughout the country, we see that American institutions, political ideas, and race-based conflict have had a profound impact on the development and change of prisoner voting rights. The country characteristics that were found to be important in the previous cases, view on democracy and penal policy, held true for the American case as well. The United States is unique in that it presents the opportunity for intrastate policy comparison, which would be an interesting and potentially very useful area of study for future research.

## Conclusion

Prisoner enfranchisement is one of few aspects of suffrage that has not yet been standardized. Even amongst countries that are otherwise very similar, there is a great deal of variety in prisoners' voting status. Because large-scale quantitative analyses have had little success in proving patterns in the global distribution of policies, this study analyzes prisoner enfranchisement policies through a most-similar comparison of five countries: the United States, the United Kingdom, Ireland, Sweden, and Germany. All five countries share many of the characteristics typically used in cross-national comparisons, and yet they represent the full spectrum of prisoner enfranchisement policies. Sweden and Germany had the most inclusive enfranchisement policies, the United States and the United Kingdom had the most restrictive policies, and Ireland's policy occupied an interesting place in the middle.

In the Introductory chapter we saw that the only statistically significant indicator of prisoner enfranchisement policies was the use of absentee ballots, yet amongst the five case studies absentee ballot policies were fairly consistent and not indicative of their policy differences. In the analysis of the case studies, other characteristics proved to be much more influential. Political ideas and political culture, institutions, and issue salience are the three factors that have the most notable and consistent impact on prisoner enfranchisement policy. Although not exhaustive, these conclusions provide a useful lens through which future studies can better understand the complex question of prisoner enfranchisement.

### *Political Ideas and Political Culture*

The policy stories and country histories of these five case studies illustrate the importance of political ideas for the development of prisoner enfranchisement policies. Of the catalog of values and mores in a political society, the ones carrying the greatest impact on prisoner enfranchisement policy are democratic values and boundaries of participation, and prisoners' role in the polity. The quantitative analyses at the beginning of this study demonstrate that amongst democracies there is a great deal of variance in policy, and that the presence of a democracy is no guarantee for an expansive prisoner enfranchisement policy. The ensuing case comparisons illustrate that even within a most similar group of western democracies there are different kinds of democratic values supporting the political system. The countries that have universalist democratic ideals in which political participation is considered a right not a privilege have policies of full (or essentially full) prisoner enfranchisement; alternatively, the countries with more exclusive views of political participation have policies of prisoner disenfranchisement.

In the early chapter on theory we see that the two most commonly used defenses for prisoner disenfranchisement, civil death and violation of the social contract, are both based on narrowly bounded views of the polity. Both concepts argue that certain kinds of unaccepted behavior, such as breaking the law, makes one unworthy of the privileges of civic participation. This is founded in the idea that citizenship is conditional on proper comportment. Alternatively there are the concepts are universalist democracy and political equality exemplified by the writings of Robert Dahl. In this view of democracy, the state's legitimacy is dependent on the full

and equal participation of its citizens; accordingly political participation is a right for all that can only be removed under extreme and rare circumstances. Universalist democracy of this sort supports a policy of full prisoner enfranchisement, since prisoners retain their rights of citizenship throughout their incarceration. The five case countries explored in this study exemplify these different views on democracy: Sweden and Germany have universalist democracies in which all citizens are both allowed and highly encouraged to participate politically, and the United Kingdom, Ireland, and the United States demonstrate a stricter view of democracy, in which participation is more of a privilege than a right. There is a clear correspondence between these categories of democratic ideals and prisoner enfranchisement policy; this relationship is less reliable in Ireland, however the complexities of its policy story have much to do with this difference.

While a country's political ideas are important for the development of its prisoner enfranchisement policy, its path to those ideas may be less so. This is demonstrated in the cases of Sweden and Germany. Both countries have universalist democratic values, but they were arrived at in very different ways. Germany consciously instituted those values in an effort to create a strong democratic system that would be resistant to fascism, whereas Sweden's values developed gradually from a long history of political equality. Despite these different origins, both countries resulted in policies of expansive prisoner enfranchisement. The guiding political ideas of a state are often deeply rooted in its history, however the German case demonstrates that these ideas can successfully be reevaluated and replaced.

There are also important temporal differences between these varying views on democracy and inclusion. Civil death is as old as democratic practice, and violation of the social contract originates with the social contract itself in the modern era. Universalist democracy, however, was developed in the twentieth century, and has replaced earlier concepts of democratic inclusion amongst many international organizations and rights groups. The standard for democracy is no longer the absence of authoritarianism, but a state that is both guided by its people and protective of their rights and equality. In Sweden and Germany we can identify the period in which the states adopted universalist policies, or put those policies into place: in Sweden the vote was expanded from the 1930s-1940s to include all previously disenfranchised groups, and during the formation of the post-WWII German state rights and protections for the individual became paramount. None of the remaining three Anglo-American cases, the United States, the United Kingdom, and Ireland, went through a comparable process. Some democracies have reevaluated their democratic values and updated their laws to reflect these new values, which has resulted in the enfranchisement of prisoners and other marginalized groups, whereas other democracies have maintained older, more restrictive conceptions of participation. In this sense, the process of a country reevaluating its core values may itself be a path for policy change, and the ability and willingness of a country to do so is the corresponding country characteristic.

A state's understandings of citizenship and the polity also greatly influence its view of prisoners, and consequently their right to participate politically. The preceding case studies have demonstrated a variety of views on prisoners and their

role in society. Rehabilitative policies, exemplified by Sweden and Germany, understand prisoners as full citizens who are temporarily residing with the state. Prisoners are not essentialized by their wrongdoing, and great effort is made to assist them in reintegration into society. Alternatively, the United Kingdom and the United States have much harsher views on crime and its perpetrators, which is largely demonstrated by the number of individuals incarcerated and the severity of terms. Ireland's experience with crime is slightly different; it appears that Ireland had had harsher views on prisoners, but these views were tempered because of unique country experience in which many political actors were incarcerated at some point. Again there is the same distinction between country characteristics and resulting policies: the states in the study with more rehabilitative views of prisoners have inclusive prisoner enfranchisement laws, and the countries with punitive views of prisoners have policies of disenfranchisement.

In the case of the United States we see that severe treatment of crime carries strong racial implications. From the passage of disenfranchisement laws in the South during Reconstruction to the number of minorities incarcerated today, American penal policies disproportionately affect minorities, particularly African-American males. Much scholarship has been devoted to the racial coding used in discussion on crime, and many domestic and international organizations consider the criminal justice system to be the next frontier for civil rights in America. Even though America is an extreme example, it is not the only country in which this is an issue. The United Kingdom disproportionately incarcerates racial minorities, and the numbers are especially alarming given the small percentage of minorities in the

country. In countries that view criminals as unworthy and morally failing, there may be a tendency for those sentiments to intersect with racial anxiety, and allow punishment of crime to become a tool of further marginalization.

### *Political Institutions*

Institutions and their roles are an important part of the process stories in the development of prisoner disenfranchisement policy. The issue of prisoner voting encompasses rights of citizenship, the interpretation and defence of those rights, and policy legislation and implementation. The institutions involved in all of those processes, and the ways in which they interact with one another, have an important effect on the eventual outcome. Within the selected case studies the institutions with the greatest impact are courts and judicial review, federalism, and international bodies.

Throughout the prisoner disenfranchisement policy stories, courts and litigation have a large presence. The case of *Hirst v United Kingdom* was integral to the policy stories of the United Kingdom and Ireland, and some of the most important developments in prisoner disenfranchisement policy have occurred through domestic court cases in all three Anglo-American democracies. Lawsuits of this kind are predicated on a judicial system that allows individuals to sue against the state, and some enumeration of individual rights and state responsibilities that citizens can appeal to. In states with less explicit definitions of rights or weaker protections thereof, prisoners may have more difficulty making electoral gains through judicial means. A judicial channel for rights expansion is important because it is not as beholden to the democratic pressures of the representative systems that legislate. The

exclusivity of prisoner enfranchisement in America proves that the existence of a court system alone does not guarantee greater protection of rights. Such results are still dependent on courts first choosing to decide the case and then finding in favor of prisoners. However the fact that the decision is rendered by an institution not beholden to the opinions of voters means the issue will be considered on its legal and intellectual bases, rather than its popularity with voters. This increases the chances that expansions of rights that are treacherous for political actors can still be put into effect.

As clearly demonstrated in the cases of Ireland and the United Kingdom, international institutions have an important role. Although they have lesser implementation capabilities than individual states, international institutions can set certain standards on a whole range of issues, and publicize when they are not being met by member nations. This is especially useful in under-discussed topics that lack policy consensus such as prisoner enfranchisement. From the *Hirst* case we see that the European Court on Human Rights took a position on prisoner disenfranchisement, and in doing so brought the issue to the national stage. However the ruling also demonstrated some of the limits to international institutions and their setting of standards. As mentioned in the *Hirst* chapter, the court's position described in the ruling is inconsistent. It appears drawn between the poles of universalist ideals in which political participation is a human right, and the reality that prisoner disenfranchisement occurs to some degree in a variety of member states. International institutions play an important role in providing some consistency and standards on issues with diverse policies, however they too must balance ideals and reality.

Along with the presence and structure of institutions, the ways in which they interact with each other are important for prisoner disenfranchisement policy. The topic of prisoner voting rights exists at an intersection of different policy spheres, each with their particular governing authority; from the cases we see that the initial establishment of a policy and later attempts at change implicate shifts in power. Federalism in the United States is a strong example. Because of the division of power between states and the federal government consecrated in the Constitution, voting rights were very inconsistent throughout the country, and millions of eligible voters were deliberately disenfranchised. This led the federal government to grant itself the authority (by way of Constitutional Amendment) to ensure a degree of equality. This shift in power was unnecessary in the other case studies because of the centralization of their governing authority.<sup>414</sup>

Interaction between institutions is also seen in the United Kingdom and the United States, where courts were at some point unwilling to address cases involving prisoners because it would interfere with whatever system of authority was already in place. The interaction of institutions is further clarified in the case of international bodies, particularly the ECHR's ruling against the United Kingdom. While the ECHR ruled against the policy a decade ago, change has yet to occur because it must come from the United Kingdom, which insists that policy changes must originate in Parliament. Prisoners in the United Kingdom were recognized as deserving of the vote ten years ago, however the number of institutions involved, and the power balances implicated in any change, are at least partially responsible for the stagnation.

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<sup>414</sup> Germany has a federalist system but much of the authority, particularly regarding suffrage and penal policy, is enacted at the national-level.

Unlike some of the other conclusions drawn from this study, there is no clear relationship between institutions and prisoner enfranchisement policy. Rather, it is an aspect of policy development that has proven to have an impact and would make a good topic of future study.

### *Salience*

The salience of prisoner disenfranchisement in a political environment is one of the most important factors in policy development. The issue exists at a rare intersection of penal policy and voting rights, and neither policy sphere is in the habit of considering its relationship with the other; for this reason prisoner voting rights are rarely discussed. This lack of awareness has meant that much of the relevant policy formulation in certain cases has been the unintended consequence of changes in other policies. Particularly in the United Kingdom and Ireland, changes in voter access laws or penal policies have changed prisoners' voter status.

The case studies illustrate that the issue's salience can be raised through exogenous events, such as the *Hirst* ruling, or through increased debate on related issues. The ECHR's ruling in *Hirst* catapulted the issue of prisoner disenfranchisement to the national stage and forced countries to engage in an open debate about issue. The United Kingdom has yet to change its policies, but the Government has been forced to continuously defend its position since the ruling, which is more than anything else that had happened previously. The United States presents a different path towards higher salience: the contentiousness of relevant issues. Both voting rights and penal policy have been highly debated issues in the American political sphere, largely because of the way they have been used to

marginalize minorities and maintain systematic racism. The high number of minorities disenfranchised through incarceration, along with the harrowing history of minority disenfranchisement in general, makes the issue quite salient in American politics.

Higher issue salience can affect policy making, but it does not guarantee a certain policy outcome. As best demonstrated in the case of the United Kingdom, increased salience of prisoner disenfranchisement presents an opportunity for the policy to be reevaluated and changed, but that does not mean that change will occur, or that it will occur in a certain direction. In this sense a period of increased issue salience is like a critical juncture. Precisely because prisoner disenfranchisement is such an unknown issue, the immediate reactions to it when it rises to prominence are very important. These reactions can reveal the deep-seated political values discussed previously that influence opinions, and are often self-reinforcing. By closely following moments when prisoner disenfranchisement becomes more salient, we can better understand which political values guide opinion, and resulting policy.

#### *Patterns and Idiosyncrasies*

Each case study documented both the individual country's experience and relevant country characteristics, and the analysis of these studies shows that both pieces are integral to the development of prisoner enfranchisement policy. The relationships between country characteristics and policies are necessary for comparative study; they highlight patterns that can be traced by future studies and help to understand the issue in a greater context. However, unique country experiences that cannot be fit into a pattern are also vital for understanding the issue.

The policy development stories for the selected cases are unexpected and occasionally challenge the patterns previously explained. This tension between the importance of trends of country characteristics and that of idiosyncratic country development makes prisoner enfranchisement such a complex and dynamic topic.

#### *Recommendations for Further Study*

The analysis of prisoner disenfranchisement in the case studies demonstrates a division between the experiences of Germany and Sweden and those of Ireland, the United Kingdom, and the United States. The initial explanation of the selected case studies hypothesized that such a division might occur because of the known characteristic differences between continental European and Anglo-American countries. This hypothesis was largely correct; the comparison between these cases illustrates that the concept of inclusion in the continental countries is more amenable to expansive policies of prisoner enfranchisement than that of the Anglo-American countries. Further comparisons between these country categories may help determine if this policy distinction is consistent, or a factor of the particular countries selected.

Future studies may also consider further comparisons of voter access and its effect on prisoner enfranchisement, particularly the use of residency requirements. Several of the case studies show that residency requirements affect prisoner enfranchisement; for example, whether or not a prison is considered a legitimate residence impacts when and how prisoners can register. Especially in Western Europe, the question of residency has also been very important in debates over immigration policy. Given the dual patterns of increasing immigration to Western Europe and higher rates of incarceration of foreign nationals, it would be interesting

to see if there is a more dynamic role for residency in prisoner enfranchisement policy.

## Appendix

### *Nations that Allow Prisoners to Vote – No Restrictions*<sup>415</sup>

Albania  
Bangladesh  
Bosnia  
Canada  
Croatia  
Czech Republic  
Denmark  
Finland  
France  
Greece  
Iceland  
Iran  
Ireland  
Israel  
Kenya\*  
Latvia\*  
Lithuania\*  
Macedonia  
Montenegro  
Norway  
Pakistan  
Peru\*  
Poland\*  
Puerto Rico (US)  
Serbia  
Slovenia  
South Africa  
Sweden  
Switzerland  
Ukraine

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<sup>415</sup> All country information sourced from Rottinghaus 2003, 22

### *Nations that Allow Prisoner Voting - Some Restrictions*

Australia (twelve months or less can vote; five years and under can vote in federal elections) Austria (length of sentence)  
Belize (no voting for sentences over 1 year)  
Benin (sentences of 3 months or more cannot vote)  
China (no voting on death row)  
Germany (convicted of treason, electoral fraud, espionage or membership in illegal organization are banned)  
Greece (certain felonies)  
Kosovo (convicted felons cannot vote)  
Italy (certain felons cannot vote)  
Jamaica (sentences over 6 months cannot vote)  
Japan (certain offenses banned)  
Laos (certain offenses banned)  
Lesotho (those serving life sentence or on death row are banned) Macedonia (those prohibited from “practicing their profession” cannot vote)  
Mali (sentences over 1 month cannot vote)  
Malta (sentences over 1 month cannot vote)  
Netherlands (sentences of 1 year or more are banned)  
Papua New Guinea (sentences of 9 months or more are banned) Slovakia (only in presidential elections)  
Spain (certain offenses)  
Trinidad & Tobago (sentences of more than 1 year are banned)  
Turkey (more than one year cannot vote; offenses such as “involvement in ideological or anarchistic activities.”)  
Zimbabwe (only those serving a sentence less than six months can vote)

### *Nations with No Prisoner Voting*

Angola  
Argentina  
Azerbaijan  
Bahamas  
Belarus  
Botswana  
Brazil  
Bulgaria  
Cape Verde  
Comoros  
Cyprus  
Egypt

Equator  
Equatorial Guinea  
Estonia  
Georgia  
Guatemala  
Haiti  
Honduras  
Hungary  
India  
Kazakhstan  
Kenya\*  
Kyrgyzstan  
Latvia\*  
Lithuania\*  
Luxembourg  
Madagascar  
Malaysia  
Micronesia  
Moldova  
Mongolia  
Mozambique  
Nigeria  
Palestinian Territories  
Panama  
Peru\*  
Poland\*  
Portugal  
Romania  
Russia (those awaiting trial can vote)  
Samon  
Sao Tome  
Senegal  
Sierra Leone  
St. Lucia  
St. Vincent  
Uganda  
United Kingdom (detainees can vote)  
Uruguay  
Venezuela  
Vietnam

\*Countries are listed both under Full Prisoner Enfranchisement and Full Prisoner Disenfranchisement in the original Rottinghaus data set. This study has not determined whether this is an error in data collection or a reflection of complications in the writing or practice of the respective law.

*Nations Restricting Voting After Term is Complete*

Armenia

Cameroon (ten years)

Chile (ten years)

Belgium (those imprisoned for 5 years or more are permanently disenfranchised)

Finland (seven years)

New Zealand (seven years)

Philippines (five years)

United States (varies by state)

Estimated: 4.5 million people disenfranchised internationally by prison disenfranchisement policies.<sup>416</sup>

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<sup>416</sup> Dhami 2005, 236; Rottinghaus 2003, 25

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