

PUNISHING BLACKNESS AT THE BALLOT BOX:
A GENEALOGY OF DISENFRANCHISEMENT IN MARYLAND

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“Regarding the elective franchise as of inestimable value, [I] would watch over it and protect it as [I] would virgin chastity”

– Delegate Dennis, 1851¹

“The law fixes the penalty for larceny; and it says that a man who steals shall go to the penitentiary for such a length of time. He goes there and serves out his time, away from his fellow-men, deprived of citizenship. He comes out, proposing in the secret recesses of his soul, to reform. But as soon as he comes out of the doors of the penitentiary, he is met in the very teeth with another stigma flung in his face, saying to him, you are still a felon. I say that that in itself is enough to crush the exertions, and energies, and good intentions of any man.”

-Delegate Thomas, 1864²

In nearly every state of the United States, when people who have “paid their debt to society” are released from the custody of the state, they remain strangely yet fundamentally unfree. While the state might restore their physical liberty, it often continues to deny them a defining democratic right – the right to vote. In fact, voting rights restrictions serve as the cornerstone on which a whole host of “collateral consequences,” such as restrictions on movement, welfare entitlements, employment, state licensing, and custody are based.

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¹ Maryland. Constitutional Convention (1851), *Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution* (Annapolis: W. M'Neir official printer, 1851), 96.

² Maryland. Constitutional Convention (1864), Wm Blair Lord, and Henry M. Parkhurst, *The Debates of the Constitutional Convention of the State of Maryland* (Annapolis: R.P. Bayly, 1864), 1291.

States individually set their own voting qualifications, governed only by a few federal mandates. As such, there is great variation among states as to which classes of persons (ex-felons, probationers, parolees) are allowed to vote.³ At the time of writing, all but two states have some form of restriction of voting rights for convicted felons. During parole, 33 states deny access to the ballot box. Even upon the successful completion of parole, if the former inmate finds him or herself in one of 14 states, disenfranchisement may persist even after the full completion of the sentence.⁴ Of these, seven states have no automatic process for rights restoration. Absent an executive pardon, disenfranchisement is *de facto* permanent in Florida, Alabama, and Virginia, despite recent attempts in each state to simplify the restoration process.⁵ There is no standard form of disenfranchisement across states, leading department of justice officials to characterize the mix of state laws as a “crazy-quilt” of policies.⁶

Exclusion from political decision-making, along with other restrictions that continue to affect felons after their formal periods of “punishment” have ended, is an essential part of what it means to be a felon in the United States today. Criminal exclusions to suffrage, as practices, both reveal and help to maintain a triangular relationship among the felon, the innocent citizen, and

³ The Sentencing Project maintains the most accurate and up-to-date information on state-by-state variations in disenfranchisement provisions. See "Felony Disenfranchisement Laws in the United States," (Washington, D.C.: The Sentencing Project, 2008).

⁴ The overwhelming majority of persons impacted by felon disenfranchisement are male, but there is no reason to limit analysis by sex. Throughout this paper, I have tried to maintain the use of gender-neutral language where appropriate. Where an exclusive gender category is used, this is either to reflect 1) the gendered nature of the social phenomenon in question or 2) the gendered usage of the sources with which I am engaged.

⁵ The backup of clemency cases in Florida has reached staggering proportions, prompting civil lawsuits calling for blanket restoration. As a recent editorial in the St. Petersburg Times estimated that only 10 percent of the more than 88,000 eligible ex-felons in the state have successfully had their rights restored due to failures by the state to clear a long-standing backlog and notify ex-felons of the re-enfranchisement process. "Work Still to Be Done on Rights Restoration," St. Petersburg Times, July 9 2008.

On the ability of presidential pardon to restore civil privileges, even over the express wishes of a state government, see Everett S. Brown, "The Restoration of Civil and Political Rights by Presidential Pardon," *The American Political Science Review* 34, no. 2 (1940).

⁶ Alec C. Ewald, "A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law," (Washington, D.C.: The Sentencing Project, 2005).

the state. Disenfranchisement helps to bring into existence an order that is presumed to be stable precisely because it offloads that stabilizing work onto one of its figures, that of a criminalized other.⁷ At the discursive level, I argue against reading punishment and citizenship as distinct spheres. In order to make sense of punishment, we must attend to our conceptions of citizenship, and vice-versa.⁸

As an analysis of underlying political commitments, what felon disenfranchisement ultimately exposes are the foundations of American liberalism itself. “The paradox of disenfranchisement,” writes Jesse Furman in a critique of the practice, “is a reflection of a much deeper inconsistency – an ambivalence deep within modern liberalism’s normative ideals.”⁹ The *kind* of problem disenfranchisement poses is not simply a failure to properly enact some ideal set of conditions, but rather is a revelatory practice that lets us get at the heart of a deeper paradox between consensus and exclusion.

This paper is a genealogical investigation of this consensus and exclusion articulated through the elective franchise in a single case over time: the State of Maryland. I begin with a brief outline of the national trend of disenfranchisement before turning to an overview of the boundaries of suffrage during the history of Maryland, noting the significant changes in exclusion that have occurred, and with particular attention to the exclusion of persons convicted of various classes of crimes. I then look to the public records of the three constitutional

⁷ Loïc Wacquant, "Deadly Symbiosis: When Ghetto and Prison Meet and Mesh," *Punishment & Society* 3, no. 1 (2001); Loïc Wacquant, "Race as Civic Felony," *International Social Science Journal* 57, no. 183 (2005); Loïc Wacquant, "Slavery to Incarceration," *New Left Review*, no. 13 (2002).

⁸ Peter Ramsey, "The Responsible Subject as Citizen: Criminal Law, Democracy, and the Welfare State," *The Modern Law Review* 69, no. 1 (2006).

⁹ Jesse Furman, "Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice," *Yale Law Journal* 106, no. 4 (1997): 1198.

conventions held in 1851, 1864, and 1967 to explore a set of themes that show how it is that citizenship has been articulated as a form of standing with respect to criminal persons.¹⁰

First, I take up the relationship between the discourses of punishment and citizenship as understood in the two 19th-century conventions. I show that these delegates saw no necessary distinction between these discursive domains, and understood disenfranchisement precisely as a practice that managed the boundaries of full citizenship *through* the use of punishment. Second, I show how, despite their seeming “color-blind” construction, disenfranchisement provisions were integral to maintaining a white supremacist conception of citizenship after the end of chattel slavery. “Free negroes” were figured as criminal threats in order to reduce the threat their freedom imposed on the standing of white workingmen. Third, I explore the two discursive shifts which occurred in 20th century disenfranchisement provisions: 1) the move from infamy to felony as the primary marker of exclusion and 2) the movement of disenfranchisement provisions from the state constitution to election law. These two movements reflect an attempt to introduce a separation between the discourses of punishment and citizenship and to rationalize disenfranchisement statutes. Their ultimate effect, however, has been to mask the work of social and political differentiation performed by disenfranchisement.

1. Disenfranchisement in the United States

Scholars have drawn convincing connections between modern practices of disenfranchisement and practices in ancient Greece and Rome as well as medieval Europe.¹¹

¹⁰ Constitutional conventions were held in Maryland in 1774-1776, 1851, 1864, 1867, and 1967. I focus my attention on the 1851, 1864, and 1967 conventions for two reasons: 1) these are the years in which the greatest substantive changes were made in disenfranchisement provisions, and 2) verbatim debates records are only available for these years.

¹¹ Alec C. Ewald, “Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States,” *Wisconsin Law Review* 2002, no. 5 (2002): 1059-1061; Howard Itzkowitz and Lauren Oldak,

From being given the status of *atimia* in ancient Greece, to being deemed an “outlaw” in medieval Germany and England, to the declaration of “civil death” in feudal law, there have been numerous ways that authorities have stripped individuals of political rights.¹² Importantly, these forms were typically understood as forms of punishment, based solely on the logic of retribution. As Manza and Uggen note, “The problem [of dismissing political rights for criminal offenders] becomes fundamentally different in a world in which mass participation – and citizenship *rights* defined by birth – emerges alongside notions of the possibility of *rehabilitating* criminal offenders.”¹³ Under classical and medieval conditions, the notions of political and participatory rights were already dramatically limited by today’s standards. The shift towards the ideal of rehabilitation alongside ever increasing franchise rights seems to give criminal disenfranchisement a new form if not a new meaning.

Early American Colonial law carried over many of these practices from English common law, primarily in the form of restrictions of participation in public deliberations, the ability to hold public or honorific office, and the eligibility to act as a public witness. But given how restricted suffrage was in the colonial context, and even in the post-revolutionary period before the Jacksonian era expansion of the franchise, what we would understand as criminal restrictions simply do not exist in the United States until the early 19th century. Only Kentucky and Vermont

"Restoring the Ex-Offender's Right to Vote: Background and Developments," *American Criminal Law Review* 11, no. 721 (1973): 721-727. It is worth noting that Itzkowitz and Oldak is the primary source for nearly all authors writing on the ancient and medieval roots of disenfranchisement. It is the standard (and usually the only) citation for any claims about disenfranchisement’s historical roots. Also see Chapter 1 of Katherine Irene Pettus, "Felony Disenfranchisement in the Contemporary United States: An Ancient Practice in a Modern Polity" (Ph.D. Diss., Columbia University, 2002).

¹² Itzkowitz and Oldak, "Restoring the Ex-Offender's Right to Vote," 721-727; Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (New York: Oxford University Press, 2006), 23. Perhaps the most thoughtful examination of such practices in terms of political theory is Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, Calif.: Stanford University Press, 1998).

¹³ Manza and Uggen, *Locked Out*, 25.

had constitutional provisions for the disenfranchisement of criminals before 1800.¹⁴ By 1821, however, eleven states had added some form of restriction or had authorized their legislatures to draw up some restriction on criminals.¹⁵ Property qualifications on the franchise in nearly all of these states (including 10 of the original 13 colonies) had already reduced the actual electorate.¹⁶ The two key periods of growth for disenfranchisement are the years leading up to approximately 1850, and the period following the Civil War.

During this first period, most restrictions were implemented in the Northeast beginning in the 1840s, “following on the heels of the decline of property and other restrictions on white male suffrage.”¹⁷ Manza and Uggen argue that white workingmen’s suffrage drove this first wave of disenfranchisement, and was maintained alongside persistent restrictions on women, African-Americans, and immigrants as roughly co-equal groups of “undesirable voters.” As they note, “[b]etween 1840 and 1865, all 16 states adopting felon disenfranchisement measure did so *after* establishing full white male suffrage by eliminating property tests.”¹⁸ The two driving factors, they argue, were the expansion of a criminal justice system and workingmen’s suffrage. “The adoptions of disenfranchisement laws were not free-floating events. Rather,” they argue, “they were tied to social dynamics, in this case the spread of voting rights to propertyless white men.”¹⁹

¹⁴ Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2000), 358-361. The Kentucky constitution only gave authority for the legislature to disenfranchise criminals. It wasn’t until 1851 that they actually did so. In Vermont, the restriction in question was limited to election crimes.

¹⁵ *Ibid.*, 63.

¹⁶ Manza and Uggen, *Locked Out*, 52.

¹⁷ *Ibid.*, 51.

¹⁸ *Ibid.*, 53-54.

¹⁹ *Ibid.*, 55.

Provisions enacted during this period (like nearly all disenfranchisement provisions throughout American history) made no explicit mention of race. During the pre-Civil War period, of course, suffrage was largely restricted to white men through separate eligibility requirements. Yet, concern increased throughout northern and border states about the status of “free negroes” within their jurisdictions. Free blacks were a source of anxiety, particularly in terms of labor competition with white and immigrant workers. It must be remembered that the same period in which white workingmen won the right to vote was also a period of increasing support of state funded and managed colonization efforts in Liberia to remove blacks from the United States. Secondly, to assume that these restrictions were not racialized because they were seemingly color-blind does not mean that they were not part of redefining what it meant to be both white and a citizen. In fact, criminal disenfranchisement provisions did not need to be explicitly racialized in order to maintain and support a white vision of citizenship and innocence.

The second wave of disenfranchisement following the Civil War was much more visibly racialized and concentrated in southern states, with 19 states increasing restrictions on criminal exclusions.²⁰ While the most pernicious voting rights exclusions that emerged during this period were not linked to criminal convictions (e.g. poll-taxes, grandfather clauses, etc.), the use of criminal disenfranchisement directly assisted the widespread project in the south to resist the 15th Amendment to the Constitution. Based on statistical analysis, Manza and Uggen found that during the post-1870 period, a strong predictor of disenfranchisement provisions is the relative proportion African-Americans incarcerated in a given state. “When African-Americans make up

²⁰ Ibid.

a larger proportion of a state's prison population," they argue, "that state is significantly more likely to adopt or extend felon disenfranchisement."²¹

Following the massive expansion of disenfranchisement after reconstruction, little movement occurred until the civil rights era brought with it a period of general liberalization during the 1960s and early 1970s. Keyssar notes, "The primary thrust of these reforms was the elimination of lifetime disenfranchisement: more than fifteen states took this step between the late 1960s and 1998."²² Manza and Uggen identify the high point in liberalization during the early 1970s, in which 23 states made some substantial reform to their disenfranchisement provisions. Popular sentiment and the difficulty of amending state constitutions further hampered reform in this period.²³ It is important to remember, too, that this period was one of heated rhetoric regarding crime policy, such as the clamor on the federal, state, and local levels for a "war on crime" and a "war on drugs." Even as there was some liberalization in the harshness of disenfranchisement provisions, the sheer number of persons who became subject to these provisions began to expand dramatically because of the rise of mass incarceration.

Keyssar sums up the difficulties of reform nicely:

"At the beginning of the twenty-first century, convicted felons constitute the largest single group of American citizens who are barred by law from participating in elections. ... That this group remains disenfranchised despite the transformation of voting laws in the 1960s and 1970s reflects not only its racial composition but also its utter lack of political leverage. Indeed, convicted felons – mostly minority males, many of them young – probably possess negative political leverage: it would be costly to any politician to embrace their cause."²⁴

During the past decade, however, there have been the makings of a new wave of reform, and there continues to be a good deal of change in disenfranchisement provisions. This is, perhaps, in

²¹ Ibid., 67.

²² Keyssar, *Right to Vote*, 303.

²³ Ibid.

²⁴ Ibid., 308.

part due to the increased scrutiny of the issue following the 2000 election and the highly publicized question of inaccurate felon lists in Florida. Additionally, several social movement organizations have emerged in the past decade, alongside professional policy organizations (such as the Sentencing Project), agitating on behalf of disenfranchised persons.²⁵ Between 1997 and 2006, sixteen states substantially reformed their disenfranchisement provisions, leaving far fewer states with permanent exclusions.²⁶

While there has been considerable reform in the past decade, there have also been revealing reversals. Since 1998, Utah, Massachusetts, and Kansas each substantially restricted felon voting rights. Utah and Massachusetts (which previously had no restrictions on felon voting whatsoever) disenfranchised inmates and Kansas disenfranchised probationers.²⁷ Even in states where rights restoration has become automatic upon completion of sentence, many states routinely fail to provide this information to former inmates. Perhaps most importantly, there is still a strong barrier to allowing currently incarcerated felons the right to vote.²⁸

²⁵ See Elizabeth Hull, *The Disenfranchisement of Ex-Felons* (Philadelphia: Temple University Press, 2006), Chapters 6-7; Manza and Uggen, *Locked Out*, 222-225.

²⁶ “These include three states that eliminated lifetime disenfranchisement provisions, four additional states that scaled back their lifetime disenfranchisement laws to apply to a narrower category of individuals, four states that simplified the restoration process for persons who have completed sentence, and two states that reformed interagency data sharing procedures to address issues of accuracy in compiling the lists of persons to be removed or restored to voting eligibility.” Ryan S. King, “A Decade of Reform: Felony Disenfranchisement Policy in the United States,” (Washington, D.C.: The Sentencing Project, 2006), 3.

²⁷ Manza and Uggen, *Locked Out*, 286-287.

²⁸ Manza and Uggen note: “These restrictions [on currently incarcerated inmates] are the least anomalous in the international context, as many other nations disenfranchise prison inmates. Current public opinion clearly supports the continuing disenfranchisement of prison inmates. The wave of democratization since the 1960s has swept past inmates, without so much as a single state expanding their voting rights” *Ibid.*, 230-231. Also see Chapter 12 of Hull, *The Disenfranchisement of Ex-Felons*.

2. The boundaries of suffrage in Maryland

Maryland roughly follows the national trend in expansions and contractions of suffrage.²⁹ Despite beginning with very restrictive voter eligibility, the franchise was quickly expanded to include white workingmen early in the 19th century. The state even found praise for its adoption of “universal suffrage” by none other than Alexis de Tocqueville.³⁰ In the years leading up to the Civil War, Maryland introduced its first (and most sweeping) criminal disenfranchisement rule that was solidified and maintained during the reconstruction era. Attempts at reform were made during the 1960s, but with only marginal success. The reform movement of the past decade has managed to successfully redraw the boundaries of felon disenfranchisement. Today, Maryland only excludes individuals during their incarceration.

During the colonial period, suffrage was limited both by the structure of Maryland’s government and by a strict property qualification.³¹ The first Maryland constitution, adopted after a long series of revolutionary and “martial” conventions spanning 1774 to 1776 provided little improvement. It was, according to official accounts, “what came later to be recognized as a most undemocratic form of government.”³² Suffrage rights were limited by a stiff property

²⁹ There are many excellent sources tracing the constitutional changes in Maryland’s history. See Dan Friedman, *The Maryland State Constitution: A Reference Guide* (Westport, Conn.: Praeger, 2006); James Warner Harry, *The Maryland Constitution of 1851* (Baltimore: John Hopkins Press, 1902); Maryland. Constitutional Convention Commission, *Report of the Constitutional Convention Commission: To His Excellency, Spiro T. Agnew, Governor of Maryland, the Honorable, the General Assembly of Maryland, the Delegates to the Constitutional Convention of Maryland and to the People of Maryland* (Annapolis, Md.: State of Maryland, 1967); Alfred Salem Niles, *Maryland Constitutional Law* (Baltimore, Md.: Hepbron & Haydon, 1915).

³⁰ Alexis de Tocqueville, *Democracy in America* (New York: Harper Perennial, 2006), 59.

³¹ There is at least one specific offence under Colonial law that makes reference to the loss of the right to vote: upon third conviction for drunkenness, “The Offender shalbe adjudged a Person infamous, and thereby made vncapable of giving vote” (sic). See Archives of Maryland, Volume 1, p. 375. Act of 1658. See also Raphael Semmes, *Crime and Punishment in Early Maryland* (Baltimore: Johns Hopkins University Press, 1996), 146.

³² Maryland. Constitutional Convention Commission, *Report of the Constitutional Convention Commission*, 28.

qualification.³³ There was no provision in the 1776 Constitution for subsequent conventions, and so, the governing document underwent massive revision over the next 75 years through amendments. In 1801, the franchise was expressly limited to white men,³⁴ and the property qualifications were eventually removed through amendment by 1810.³⁵ Present from 1776 on, however, was a permanent exclusion from office-holding, though not from voting, of individuals convicted of giving any “bribe, present, or reward, or any promise, or any security for the payment or delivery of any money, or any other thing, to obtain or procure a vote.”³⁶

During the early part of the 19th century, however, the Constitution of 1776 became cumbersome, for it failed to reflect demographic and industrial changes in the state. Prof. James Warner Harry writes in his study of the 1851 Convention that “Maryland, since the framing of the Constitution of 1776 had become a government of the minority.”³⁷ The system of representation designed in the original founding document and modified throughout the years ensured that the General Assembly was controlled by Whigs, mostly farmers from the Southern part of the state, along with plantation-interests along the Eastern Shore of the Chesapeake Bay. Baltimore City, rapidly growing in size and wealth, was massively under-represented by the mid 1850s.³⁸ Agitation for a new constitutional convention was difficult, since the 1776 Constitution did not provide for any automatic means for calling such a convention. By 1845, after a series of “reform conventions” held throughout the state, a statewide campaign began to agitate for a new

³³ Section 5 of the Declaration of Rights of 1776 states that “every man having property in, a common interest with, and attachment to the community, ought to have a right of suffrage.” This is restricted in Section 2 of the Constitution to “All freemen above twenty-one years of age, having a freehold of fifty acres of land ... or having thirty pounds current money, and having resided in the county in which they offer to vote one whole year.”

³⁴ Act of 1801, Chapter 90.

³⁵ Act of 1809, Chapters 83 and 198. Both Ratified 1810.

³⁶ Section 54 of Maryland Constitution of 1776.

³⁷ Harry, *The Maryland Constitution of 1851*, 13.

³⁸ *Ibid.*

convention. By 1849, county conventions throughout the state were calling for a new constitution. A convention was called by popular referendum in May of 1850. The issue of representation was front and center throughout the debates, underscored by the remarkable *lack* of conversation about slavery: one of the first actions of the convention was to pass an order taking that question off the table.³⁹

What did emerge in the 1851 Constitution, however, was the state's first sweeping restriction on criminal suffrage. Modifying the language of the 1776 provision on bribery, Section 2 of Article 1 of the 1851 Constitution permanently disenfranchised anyone duly convicted of either offering or receiving any form of bribe, present, reward or promise in exchange for voting or refraining from voting. Section 5 of Article 1 permanently stripped the voting rights of any person "convicted of larceny or other infamous crime, unless he shall be pardoned by the Executive." The same Section also held that no persons "under guardianship as a lunatic or as a person *non compos mentis*" would be allowed to vote. It is this basic form of the criminal restriction that has persisted until today, placing the criminal in the same company as the mentally infirm.

The Constitutions of 1864 and 1867 made only minor changes to these two provisions.⁴⁰ The 1864 Constitution, while notable for abolishing slavery in Maryland, did not drop the word "white" from the qualifications for suffrage. The word remained in the 1867 Constitution as well, and in fact has never been expressly removed through amendment. As noted in the Annotations to the Maryland Code, it was simply assumed to be have been removed automatically by the 15th

³⁹ Maryland. Constitutional Convention Commission, *Report of the Constitutional Convention Commission*, 44.

⁴⁰ The sections are re-numbered in 1864. Article 1, Section 2 of 1851 becomes Article 1, Section 5 in 1864 and Article 1, Section 5 of 1851 becomes Article 1, Section 3 of 1864.

Amendment to the US Constitution.⁴¹ Likewise, the word “male” was never explicitly removed from the State Constitution, but was presumed to have been stricken by the 19th Amendment to the US Constitution. The major restriction of the franchise introduced in 1864, however, focused squarely on the end of the Civil War. All persons who had served in the “so-called Confederate States of America” or who had given “aid, comfort, countenance or support to those engaged in hostility to the United States” were stripped of the vote. Election judges were empowered to demand that any prospective voter give an oath that they had been loyal to the Union during hostilities. The only substantive alteration to the elective franchise made in the 1867 Constitution was to remove this provision.⁴²

Constitutional exclusions for persons convicted of “larceny or other infamous crime, unless pardoned” remained in effect until 1972, when, by constitutional amendment, Article 1, Section 2 was removed. In its place, based on the recommendations of the 1967 constitutional convention (which produced a constitution but was rejected by popular vote), the General Assembly was empowered to, “Regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care of guardianship for mental disability.”⁴³ Like many other states during this period, Maryland sought to remove all restrictions on the franchise

⁴¹ Citing *Neal v. Delaware*, 103 US 370, Niles writes, “The word ‘white,’ ... is assumed to have been stricken out *ipso facto* by the adoption of the 15th Amendment to the Federal Constitution. In the Codes of 1888 and Bagby’s Code of 1912, the article is printed without the word ‘white’ which word a ‘note’ states to have been ‘expunged,’ or ‘omitted’ under the 15th Amendment, and in several cases our court has quoted the article as if the word ‘white’ had never appeared therein.” Niles, *Maryland Constitutional Law*, 87. This was still the case as late as the 1960s. In the study documents prepared for delegates at the 1967 convention, the text of the “present constitution” includes the words “white” and “male” with footnotes indicating that they are “now ineffective” in light of the federal constitution. Maryland. Constitutional Convention Commission, *Constitutional Revision Study Documents of the Constitutional Convention of Maryland* (Annapolis: 1968), 602.

⁴² Maryland. Constitutional Convention Commission, *Report of the Constitutional Convention Commission*, 62.

⁴³ Chapter 368. Article 1, Section 2 was later re-numbered as Section 4 in 1977.

from constitutional law and place them under the election code.⁴⁴ Likewise, election fraud no longer carries a specified punishment in the Constitution but is handled in the election code.⁴⁵

Until recently, §3-102 of the Maryland Election Code permanently disenfranchised any person twice convicted of a felony. In 1999, 2000, and 2001, attempts were made in both houses of the Maryland General Assembly to alter the existing rules on criminal exclusions.⁴⁶ None of these bills, however, made it to a full vote. In 2001, HB 495, which originally began as a reform bill, was redrafted to instead call for a “Task Force to Study Repealing the Disenfranchisement of Convicted Felons in Maryland.” While the resulting report made no specific legislative recommendations, it concluded that criminal disenfranchisement seemed to be compatible with federal law, highlighted the racially disproportionate impact of such policies, and noted a high level of administrative difficulty in the practice. Specifically, the report noted that there existed no automatic system for election boards to have accurate and consistent access to criminal records (especially important since permanent disenfranchisement required two convictions for “infamous crimes”). “As a result of the lack of information regarding the felony status of would-be voters,” the report concluded, “the quality and integrity of the voter registration rolls may be compromised.”⁴⁷

During the 2002 Legislative session, new legislation was passed that allowed first time offenders to apply for restoration at the end of the sentences, and two-time non-violent offenders

⁴⁴ Friedman, *Maryland State Constitution: A Reference Guide*, 53.

⁴⁵ Election bribery is currently defined as a misdemeanor under Maryland Election Code §16-201 but a disqualification for registering to vote under §3-102 (i.e. persons convicted of buying or selling votes).

⁴⁶ HB 25 in 1999 would have allowed felons to vote after probation. HB 438 of 2000 would have allowed felons to vote after a 5 year waiting period. SB 83 of 2001 had a 3 year waiting limit for persons with one conviction, and permanently disenfranchised persons with two convictions.

⁴⁷ "Task Force to Study Repealing the Disenfranchisement of Convicted Felons in Maryland," (Annapolis, MD: Department of Legislative Services, Office of Policy Analysis, 2002), 7. While the report only makes scant mention of the 2000 Presidential Election, the report of the Maryland task force was one of many produced in the wake of the contested Florida election, and the new scrutiny placed on the preparation of voter lists.

to apply after a three-year waiting period.⁴⁸ The success of the bill was largely the result of grassroots organizing and lobbying efforts.⁴⁹ A second round of reform was attempted in 2005 and 2006 with the aim of dropping the waiting period for two-time felons and the restriction on violent crime. The proposed bills were criticized as partisan attempts by Democrats to expand their electoral base and failed during both sessions (in large part under the threat of the then-Republican Governor's veto). Finally, in 2007 (and, not incidentally, with a Democratic Governor in office), the bill was passed, amending the Election Code to restrict the suffrage of three groups: 1) persons convicted of a felony and currently serving a sentence of imprisonment, parole, or probation, 2) persons under guardianship for mental disability, and 3) persons convicted of buying or selling votes. This is the current state of the franchise in Maryland, bringing it in line with the majority of states' disenfranchisement statutes.

3. The Convention Debates

John Dinan's 2007 study of constitutional convention debates is the only sustained effort to identify and analyze the historical record of the formation and adoption of criminal disenfranchisement provisions across the country.⁵⁰ Drawing on 114 records of convention debates, Dinan identifies convention records as a useful source for understanding disenfranchisement provisions. Summarizing the wide range of approaches his study uncovered, he writes:

At times, convention delegates considered whether to institute criminal disenfranchisement provisions. At other times, delegates debated whether to eliminate existing provisions. At still other times, debates about the general merits of criminal disenfranchisement policies were stimulated by specific questions, such as how to define the crimes that would trigger disenfranchisement, or

⁴⁸ The bill (SB 184) was virtually identical to the one proposed in 2001 (SB 83).

⁴⁹ Hull, *The Disenfranchisement of Ex-Felons*, 74.

⁵⁰ John Dinan, "The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates," *The Journal of Policy History* 19, no. 3 (2007).

whether to disenfranchise ex-felons in addition to incarcerated felons, or whether to modify the requirements that ex-felons had to meet before regaining the franchise, or whether to permit these various matters to be resolved on a statutory rather than a constitutional basis. On still other occasions, such debates transpired in the course of discussions about proposals declaring that all individuals except those disqualified by crime, insanity, or imbecility possessed a right of suffrage.⁵¹

Dinan uses the debate records to test a series of hypotheses about the “potential motivations” for disenfranchisement statutes. His interest is to identify *why* felon disenfranchisement provisions were placed in state constitutions and whether the accounts given in the normative literature on disenfranchisement hold up under historical scrutiny. My interest in the debates is different. Simply noting the changes over time in Maryland only gives us a sketch of the general trajectory of suffrage in Maryland over the past 200 years. I turn to the Maryland convention records in order to get a sense of what these exclusions *mean* in discursive terms. It is not my goal here to use the debates as a test of what happened or to identify the specific sources of troubling constitutional practices. Rather, I read these debates as expressions of public discourse on the meaning of the inter-related concepts of punishment and proportionality, infamy, permanent stigma, and race. What we find is documentary evidence of a series of exchanges among the discourses of citizenship and punishment, and the nascent production and management of figures of criminality through those exchanges. These debates thus reveal significant things about the discursive relations among citizenship, criminality, and state authority.

The debates during the 1851, 1864, and 1967 constitutional conventions covered a massive array of topics, and even narrowing my attention to those moments in which the delegates discussed criminal exclusions would be too unwieldy for the scope of this paper.⁵² Here, I focus on three themes. First, when criminal disenfranchisement provisions were

⁵¹ Ibid.: 283-284.

⁵² Records from the 1774-1776 convention are not readily available, and transcripts were not kept during the 1867 debates.

introduced into the state constitution during the 19th century, they were explicitly understood both as a form of punishment, subject to the constraints of proportionality, and as related to citizenship. Delegates at the 1851 and 1864 conventions understood that this restriction of the franchise was both expressly punitive in design, driven by the functional “objects” or “purposes” that punishment should have, and necessary under a conception of citizenship requiring a trustworthy moral character. That is, to think about disenfranchisement as *either* punishment *or* citizenship simply did not occur to the delegates. They assumed that the two issues were deeply related, tied together by the certainty that criminality implied dishonesty, and that dishonesty implied an unworthiness to take part in rule. Felons and infamous criminals required excessive treatment precisely for the kind of threat that they represented to the polity.

Second, while race was not invoked even once during the debates about criminal exclusions (leading many skeptics, including the United State Supreme Court, to dismiss charges that racial animus drove the adoption of disenfranchisement provisions), concern over the “negro problem” dominated the 1851 and 1864 conventions. More importantly, the specific nature of this problem is expressed in two sets of terms: “free negroes” are a danger to free labor and are explicitly linked to inherent criminal propensity. While the delegates may not have discussed race while debating criminal disenfranchisement provisions, when debating the presence of “free negroes” in the workforce, they trade almost exclusively in the language of criminal threat.

Third, criminality and trustworthy character were linked in the minds of the delegates were through technical and vernacular understandings of “infamy,” “infamous crimes,” and “felony.” By tracing the debates over what specific classifications of crimes should be included in disenfranchisement, we see how the same features qualified individuals for both punishment and disenfranchisement, marking criminal figures as deceitful and corrupt. The attempt in recent

years to link disenfranchisement solely with incarceration and with the commission of a felony as a purely technical distinction of law obscures the fact that felons had historically been (and continue to be) constructed as a criminal kind whose public standing *must* be diminished through voting restrictions. It has only been in the 20th century that the punitive justification for disenfranchisement was rejected and discomfort with constitutional exclusions of this sort began to be expressed (albeit in a very limited fashion). But the effect of these two moves, from infamy to felony and from punishing to regulating the franchise, has been to hide the work that “felony” continues to do in expressly punitive and disproportionate terms. Felony is purported to be only a technical legal classification of criminal actions, but it carries with it the 19th century distinction between citizens and non-citizens. The modern citizen *continues* to be figured as innocent, but the work of disenfranchisement in that figuration has been increasingly hidden.

These three themes, while not an exhaustive treatment of the Maryland convention debates, at least demonstrate how criminal disenfranchisement provisions unpack several inter-related claims. First, punishment and citizenship are deeply related discourses. Second, criminal disenfranchisement is a practice that sits at the intersection of these discourses. Third, the felon comes into being as a criminological figure to manage these discourses through a necessarily excessive and disproportionate punishment. Fourth, it is through attention to this figure and this practice that we can see how the American citizen *continues* to be figured as white, male, and innocent through the use of disenfranchisement.

3.1 Proportionality and the Purpose of Punishment

Disenfranchisement is a practice that reflects the interplay between the demands of punishment and the boundaries of a community. The paradigmatic approach to understanding disenfranchisement takes these two perspectives for granted, that is, it presumes that they

provide different ways of looking at a question. But the 19th century delegates who drafted Maryland's disenfranchisement provisions simply did not see such a separation between questions of citizenship and questions of punishment. In the case of disenfranchisement, the two domains not only overlapped, there was little to no distinction between them.

Disenfranchisement was a form of punishment explicitly linked to the conception of full citizenship. By the 20th century, however, there were repeated attempts to alter disenfranchisement provisions to observe a distinction between these spheres, expressly rejecting the notion that disenfranchisement is an appropriate punishment, and attempts have been made to move disenfranchisement provisions out of the constitution and into state election law.

Throughout the 1851 and 1864 conventions, the delegates took it for granted that disenfranchisement is a form of punishment for a certain set of offenses. One after another, the delegates cited the “objects” and “purposes” of punishment to bolster their claims, insisting that a restriction on suffrage rights for persons convicted of voter bribery, larceny, and “other infamous crimes” merits disenfranchisement in addition to any punishment imposed by a court.⁵³ There was a clear consensus during this period that criminal disenfranchisement is a fitting and necessary consequence to being convicted of voter bribery, larceny, or infamous crimes.⁵⁴

Not surprisingly, the delegates debated disenfranchisement almost entirely within the language of proportionality, despite the fact that disenfranchisement is imposed in addition to the sentence already determined by the court. For the delegates, it was a proportionate punishment in two senses. First, it was proportionate because the crimes in question are of such severity. This is

⁵³ During the 1851 convention, see the comments of Delegates Merrick, Dirickson, Sellman, and Brent Maryland. Constitutional Convention (1851), *Debates of 1851*, 88-94.

⁵⁴ Conviction for voter bribery is in a separate provision from the other exclusions and receives far greater attention during the 1851 Convention. During the 1864 debates, the attention shifts to the “larceny and other infamous crimes” provision.

especially the case for the provision against voter bribery. One delegate insisted that “murder, arson, burglary, [and] theft were venial offences in comparison” to voter bribery.⁵⁵ Bribing a voter is, from this perspective, so severe an offense to society that it should be punished with permanent expulsion from the electorate. Second, and more importantly, disenfranchisement was proportionate to the danger presented by such persons. The commonality between bribery and infamous crimes is that they are crimes of deceit, fraud, and corruption. Persons who have committed such crimes must be dealt with using extreme punishment, not simply because their offense is so horrible, but because they are unfit to take part in elections.

The delegates applied the idea of proportionality not solely to the relationship between the severity of the crime and the severity of the offence but also to the ratio between the punishment and moral character of the convicted person. To be a citizen in the 19th century, that is, to have independent public standing, was to be free of this sort of illegality. The discourses of citizenship and punishment were indistinguishable in this period because part of what it *meant* to be a citizen was to be innocent. While this expressly moral understanding of punishment might be out of step with contemporary understandings, Delegate Merrick, arguing for permanent disenfranchisement, made this conception clear:

The great object of punishment was its example upon society – its effect in purifying and elevating the moral tone of that society. All punishments should be so framed as to have the greatest effect upon that moral tone; to preserve it pure, if it could be so, and to punish with a heavy hand all those who would attempt to pollute it.⁵⁶

What calls for the additional punishment of offenders is that they represent a moral failing in the minds of the delegates. And what demonstrates their moral failing is that they have been convicted and punished of a crime of moral turpitude.

⁵⁵ Maryland. Constitutional Convention (1851), *Debates of 1851*, 92.

⁵⁶ *Ibid.*, 88-89.

While there was some disagreement over whether disenfranchisement should be for life, the delegates agreed that the only fitting punishment for someone who has tried to tamper with the purity of an election, was to be barred from voting.⁵⁷ The delegates did not misunderstand proportionality or the terms of citizenship, but rather they used disenfranchisement to maintain the purity of the electorate exactly as a proportional punishment. Citizenship during this period was driven by a conception of qualification based on capability, and one of those crucial capabilities was to be trustworthy.⁵⁸ Persons convicted of certain crimes were excluded because their guilt implied a lack of capability that was dangerous to the purity of the electorate.

The 1851 obsession over voter bribery most clearly reflected this impulse. What was at stake in bribing voters was that they would cast “false” or “fraudulent” votes. The harm of this crime is that it diminishes the “truth” of an electoral outcome being reflective of popular sentiment. Ideally, the ballot box is a useful instrument of self-governance only insofar as it conveys the popular will.⁵⁹ The specific “danger” that the legislators had in mind, at least if we trust their conception of the problem of “infamy,” is that some persons cannot be trusted at the ballot box, and this is the basis for their exclusion.

⁵⁷ Several delegates object to permanent disenfranchisement on pragmatic grounds stating that it is ineffective because juries will be hesitant to impose such a punishment. Delegate Dirickson stated, “If, then, you desire to destroy bribery, let the punishment be modified and made proportionate to the offence. ... No jury ... could be induced to convict; the penalty absolutely victimized – and therefore defeated the very object sought to be obtained by its extreme and most disproportionate severity” Ibid., 93-94. This same point was echoed by delegates Brent, Gwinn, and Sellman. None of them, however, questioned the logic of imposing disenfranchisement as a form of punishment. They only attempted to limit it to a fixed period of time rather than imposing a lifetime ban.

⁵⁸ The importance of capability for voting rights is thoroughly demonstrated by Keyssar and is nicely explained in Jacob Katz Cogan, “The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America,” *The Yale Law Journal* 107, no. 2 (1997).

⁵⁹ I use the term “ideally” here because it is certainly arguable that the ballot box only has such a meaning in an abstract sense, given 1) that American elections are characterized by low turnout rates and 2) they are typically only reflections of candidate preferences. Nevertheless, the strong ideological support for elections and voting reflects a belief that this is the purpose they serve: to communicate popular sentiment in an aggregate way.

It is crucial to remember that the exclusion for larceny and infamous crimes is found in the same provision that excludes persons under the age of 21 and persons “under guardianship as a lunatic, or as a person *non compos mentis*.” These are qualifications based on status, which derive their justification expressly from a diminished *ability* to cast an independent vote. To think about criminals in this period is to think of a kind of person who is *incapable* of casting an independent and honest vote. It is a form of criminal subjectivity precisely of the sort Foucault identifies with the delinquent as a person who has some kind of natural affinity with crime rather than simply being guilty.⁶⁰ “Men who would deliberately inflict a stab on the purity of the ballot-box,” insisted Delegate J.U. Dennis, “[I] would mark with the brand of Cain, and drive them with the lash of scorpions from the pale of free institutions.”⁶¹ To mark persons in such a permanent and stigmatizing manner is to precisely conflate the categories of action and identity.

Disenfranchisement is punishment for the moral character flaw exposed by the crime, deserved by offenders, because of some kind of moral defect that they possess and continue to possess even after finishing their sentences. During the 1864 debates, Delegate Sterling argued, “I should have no objection to an amendment to allow the legislature power to restore a man to the right of voting, *should he subsequently become a good man*. But I do not think he should be restored simply because he has served out his time in the penitentiary, without any alternation in his conduct.”⁶² A “double penalty” is not a problem because the offender in question is, on this account, still an offender – i.e. still a person who, by virtue of his moral character, is not a “good

⁶⁰ Michel Foucault, *Abnormal: Lectures at the Collège De France, 1974-1975*, trans. Graham Burchell (New York: Picador, 2003); Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan (New York: Vintage Books, 1995).

⁶¹ Maryland. Constitutional Convention (1851), *Debates of 1851*, 95.

⁶² Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 1289, emphasis added.

man” even if he has been released from the penitentiary.⁶³ Delegate Sterling argued that individuals released from prison must actively demonstrate their good character, not simply have discharged their debt:

“An infamous offence is the kind of felony which characterizes the party with entire turpitude. If a man is convicted and sent to the penitentiary he ought not to be allowed to associate at the ballot-box with those people who have not been legally convicted. I think the door ought to be held open to every such man to reform; but if he does reform let there be an act of equal solemnity with that which sent him to the penitentiary, to restore him.”⁶⁴

The problem with his position is that there is no possible way to engage in such an act, because “entire turpitude,” under the conception of criminal subjectivity at play, is not something that can be removed. As a delegate put it during the 1851 debates, disenfranchisement “makes him an unforgivable offender.”⁶⁵

The delegates thought of these criminals as a distinct kind of person, but there was also a telling hesitancy that emerged when boundaries were erected between full citizens and criminals. Some delegates cautioned about the possibility being “mistaken” for a criminal. Delegate Dirickson argued that the proponents of permanent disenfranchisement for voter bribery had forgotten the

hustlings and mingling in the exciting scenes that ever, from the very nature of our government, surround the polls. Then under the influence of intense party

⁶³ The effectiveness of the penitentiary is a matter of some contention in 1864. Delegate Thruston stated, “Persons convicted of theft or other infamous offences certainly are not entitled to vote. Men convicted of crime and sent to the penitentiary rarely reform. I think it is much better therefore to obviate all danger of such persons being allowed to vote, than to leave the door open to the few who may be disposed to reform.” *Ibid.*, 1291. The same position was echoed by Delegate Miller: “I think the criminal statistics show that very few who come out of the penitentiary ever reform. They go on pretty much the same way again.” Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 1292. This position was rejected emphatically by Delegate Cushing: “A man in the penitentiary is not forced to herd with other felons. He is kept at hard work, and is not allowed to speak to the people that are near him. It is mainly a reformatory power. It gives him time for reflection; and under the present system tends to his improvement.” Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 1294.

⁶⁴ Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 1290.

⁶⁵ Maryland. Constitutional Convention (1851), *Debates of 1851*, 87

feeling and in the midst of great strugglings, men with the most unblemished moral character and the most spotless integrity, might almost imperceptibly be hurried into the commission of deeds, which, however improper, could scarcely under all the circumstances, be denominated even by the strictest moralist as highly criminal.⁶⁶

Even the “strictest moralist” runs the risk of being mistaken as a criminal given the chaos of the polls. The delegate was keenly aware that disenfranchisement might confer standing “incorrectly” if it was not carefully designed. Even more alarming was the possibility that the provision could be used to disenfranchise gentlemen farmers/politicians who during the harvest give a portion of their crops to the poor in their counties. Delegate Mitchell stated:

It was well known that in all the counties there was a large proportion of poor men. Poor men have very large families generally. (Laughter.) It is the practice among those who desire to help this class, and to stand well in their neighborhood, to give out corn about the months of June and July. I know that about that time the corn-houses are thrown open, and as the natural effect is to give them popularity at home, if they should chance to be candidates for office, the people of that neighborhood would usually vote for them. Now, if any malicious individual should lay hold of this circumstance, he might bring these gentlemen into Court, and by a jury picked by political opponents, they might, notwithstanding their known popularity would have elected them, without any such act of liberality, be convicted under this section ... and be forever disfranchised.⁶⁷

At this point, the delegate said that he could no longer continue to make a speech, as he was “getting frightened here.” The source of fear was that at least some of the delegates could *imagine themselves* becoming criminals under the bribery provisions. This fear of being mistakenly or maliciously punished with disenfranchisement is so powerful precisely because it is a punishment associated with a loss of political standing, with a loss of citizenship. The connection that Judith Shklar so painstakingly demonstrates between the franchise and the standing of those who possess it drives from the 19th century decision to disenfranchise

⁶⁶ Ibid., 93.

⁶⁷ Ibid.

criminals.⁶⁸ This is the starting point for Maryland's disenfranchisement provisions: an implicit understanding that it is a punishment that marks unqualified persons and manages a key boundary between citizens and non-citizens.

Because the 19th century delegates do not distinguish between the domains of citizenship and punishment, they see disenfranchisement as being perfectly in proportion to the "crime" of being unfit for citizenship. What seems so odd to us about this use of the conception of proportionality is that it seems to defy proportionality's modern meaning by endorsing a disproportionately extreme punishment. But this is only because it is easy to forget that to the 19th century delegates, disenfranchisement was not punishment for the harm done by an infamous crime, but punishment for the fact of infamy, deceit, and moral turpitude of the offender. Since individuals either are or are not marked by such infamy, they either do or do not have equal standing; the proportional response *is* to be excessive. Liberal proportionality, in this context, yields only all or nothing outcomes.

3.2 Race, slavery, suffrage, and the problem of "free negroes"

The convention debates over criminal disenfranchisement make nearly no mention of race or slavery.⁶⁹ As noted by Dinan, this is consistent with convention debates across the country. He found only one instance in which a delegate made an explicit connection between criminal disenfranchisement and racial discrimination or animus.⁷⁰ While he does not claim that

⁶⁸ Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass.: Harvard University Press, 1991).

⁶⁹ The one expressly racialized reference that I could find in the debates about criminal disenfranchisement in the Maryland convention records was a concern expressed by Delegate Scott in 1864 that a person who had been convicted in another state for having a copy of Uncle Tom's Cabin would be subject to disenfranchisement. There was in fact an 1857 case in Maryland of a free black receiving a 10 year prison sentence for owning that book. See Charles Wagandt, *The Mighty Revolution: Negro Emancipation in Maryland, 1862-1864*, Reprint ed. (Baltimore: Maryland Historical Society, 2004), 46, note 26.

⁷⁰ Dinan, "Adoption of Criminal Disenfranchisement Provisions." This was in Alabama's 1901 convention. See *Hunter v. Underwood* 47 U.S. 222 (1985).

this finding disproves the claim that racial animus drove disenfranchisement provisions, he argues that given the frequency with which delegates were willing to speak in openly racist terms elsewhere in the debates, it cannot be concluded (at least on this evidence) that racialized politics played a decisive role in the formation of criminal exclusions. He writes, “The absence of racially discriminatory comments regarding *criminal* disenfranchisement provisions in the extant convention debates in states other than Alabama is not without significance.”⁷¹

Yet, the question of restricting black suffrage through criminal exclusions was largely unnecessary most of the time, because other provisions excluded those persons. As noted above, suffrage was explicitly restricted to white men in the Maryland constitution until the passage of the 15th Amendment. Second, and more importantly, Dinan fails to note the way in which blacks were routinely constructed as inherently criminal throughout the debates. Dinan seems to assume that race is a static variable rather than a socially produced attribute, negotiated in multiple discourses at once. The debates reveal that “free negroes” were persistently figured in terms of crime and deviance, while whites were figured as productive laborers, and as victims of black crime. The delegates at the 1851 and 1864 conventions were persistently anxious about the increasing numbers of “free negroes” as a result of manumission during and the coming end of the Civil War.

In the years leading up to the 1851 convention, Maryland saw a notable rise in the number of free blacks, a high rate of manumission and geographical splits driving questions of representation in the state legislature that were directly tied to geographical distribution of slaves (in the South and Eastern Shore) and free blacks (in the West, along the Pennsylvania border,

⁷¹ Ibid.: 297.

and most importantly, in Baltimore City/Western Shore).⁷² This meant that a large group of free blacks would count toward representation but not have political franchise, potentially giving white Baltimore a far greater share of representation. Insofar as the 1851 convention was a response to the increasingly unbalanced system of representation in the state, the presence of free blacks (and their concentration in Baltimore City and neighboring Washington, D.C.) was of particular concern to the Whigs in power of the legislature at the time.⁷³ Attempts had already been made during the 1830s to enable (and possibly force) the migration of free blacks out of the state, and the State Colonization Society was established by the legislature “to employ the funds collected in Maryland for the removal of the free negro population.”⁷⁴ By 1860, there were more free blacks in Maryland than in any other state in the Union, largely by virtue of manumission.⁷⁵

Both the 1851 and 1864 conventions were conducted against the backdrop of the slavery question, but moved in opposite directions. In 1851, the demographic shift of the state’s population toward industrial Baltimore (where slave labor was not economically viable) pitted the agricultural and more culturally southern Whigs against under-represented Democrats on the Western Shore, and the issue was taken off the table. There would be no attempt made during the convention to end “the relation of Master and Slave.”⁷⁶ But by 1864, following a Unionist takeover of the General Assembly in the 1863 elections, the emancipation of slaves was settled

⁷² Harry, *The Maryland Constitution of 1851*, 59-63.

⁷³ *Ibid.*, 33-34.

⁷⁴ It was, Harry notes, state policy from the 1830s on to promote the removal of “free negroes” to Liberia, and land was purchased there with state funds in 1834. *Ibid.*, 60-61.

⁷⁵ Manumission was eventually banned by the General Assembly in 1860. Wagandt, *Mighty Revolution*, 8.

⁷⁶ See Article 3, Section 43 of the Constitution of 1851 as well as the Action 1836, chapter 148, which amended the 1776 Constitution to prohibit the legislature from abolishing “the relation of Master and Slave in this state.” Even before the 1850 Convention began proper deliberations, a committee was appointed to write a series of resolutions condemning the recent federal compromises on slavery being banned in the new state of California, the territories of Utah and New Mexico, and Washington D.C. for not meeting “the just demands of the South.” The federal fugitive slave law was praised, but seen as a “tardy and meager measure of compliance with the clear, explicit, and imperative injunction of the constitution.” Harry, *The Maryland Constitution of 1851*, 37-38..

relatively early.⁷⁷ The primary debate in 1864 turned on the question of compensation for slaveholders and what to do with or about the “free negro” population. Ultimately, any form of compensation from the State was prohibited. This was, in part, a compromise to ensure that the slaveholders would not become ineligible for Federal compensation, if that were to be made available. This never happened, and the 1867 Constitution included an exhortation to the federal government to compensate former slaveholders.⁷⁸ But the question of “free negroes” persisted. Nowhere, throughout any of the three conventions in 1851, 1864, or 1867, was there even a moment of consideration of extending the franchise to black men.

“Free negroes” were a serious source of anxiety for the delegates because they were a relatively unknown and virtually unthinkable phenomenon. While the institution of slavery was eroding, the category of slave still was capable of doing an immense amount of discursive work, delimiting citizens from non-citizens. The very fact of “Free negroes” troubled this distinction, so not surprisingly the delegates sought to solve the problem by 1) removing them physically from the state and 2) figuring them as criminals. Both strategies maintain the distinction between those included and those excluded from the polity. The first does this through physical removal, and the second, because, as noted above, infamous criminals were already excluded from political membership through disenfranchisement.

In 1851, the central question was to find a way to ensure that “Negroes” could be removed from the state, while ensuring that free whites would not likewise be removed. While

⁷⁷ See Article 24 of the Declaration of Rights of 1864. That the question was settled in the first months of the convention is not meant to imply that it wasn't contentious, only that it was largely a forgone conclusion politically, by virtue of the 1863 election results. In reference to Article 24, Wagandt writes, “The decision on this clause was predetermined and the subject thoroughly exhausted, but the delegates would not let it pass without unleashing a verbal torrent. It was like a theatrical performance. All the players knew the outcome of the drama but eagerly awaited their turn on the stage.” Wagandt, *Mighty Revolution*, 223.

⁷⁸ Maryland. Constitutional Convention Commission, *Report of the Constitutional Convention Commission*, 62.

the convention never explicitly took up the question of forced migration, the delegates took great care to ensure that Article 21 of the Declaration of Rights, which prohibited imprisonment, forfeiture, and exile without due process, would not “prevent the Legislature from passing all such laws for the government, regulation and disposition of the free colored population of the State as they may deem necessary.”⁷⁹ The delegates went out of their way to be sure that the mass deportation of blacks out of the state was possible, with persistent reference to the danger represented by blacks in their midst, and the unnaturalness of the two races mixing together.⁸⁰

Even those who seemed to be in favor of tempering the debate (e.g. by insisting that blacks, would have the protection of law while they remained in the State) still insisted that the this protection would end if they failed to “conduct themselves peaceably.”⁸¹ Without protection under the law, some delegates argued, the law would not be able to constrain “free negroes”, and they would surely reveal their innate criminal natures. “While they [free blacks] remain,” argued Delegate Gwinn, “let there be no inference even that their labor and property are placed without the shelter of law. For, although their physical power in the State is beneath apprehension, yet, as a class, if outlawed by our statutes, they would become a source of perpetual mischief; crowding our prisons with petty offenders, who seek their daily bread by thefts and violence.”⁸² The rationale given by the delegates was one of self-preservation. “Free negroes” represented a tangible danger to the white population. “We should at all times guard against the torch of the incendiary being applied to the magazine,” argued Delegate Brent, “and here was a class of

⁷⁹ Declaration of Rights of 1851, Article 21

⁸⁰ Maryland. Constitutional Convention (1851), *Debates of 1851*, 194-199.

⁸¹ *Ibid.*, 198.

⁸² *Ibid.*, 196.

people, which at the some time, might become a moral magazine, fraught with our destruction.”⁸³

The question returned in the 1864 debates. During the war years, it had become increasingly clear that slavery was at an end, and the decision to end slavery was made in the first weeks of the convention. A committee was formed to deal specifically with the question of “free negroes,” whose report to the convention proposed that “[n]o free negro or free mulatto shall come into or settle in this State after the adoption of this Constitution.”⁸⁴ While this proposal ultimately never made it into the Constitution, a desire to simply be rid of “free negroes” pervaded the debate.

The danger of this “moral magazine” was figured explicitly in the 1864 debates as unfair competition with white laborers and increased crime. It was imperative, many delegates argued, to prevent “free negroes” from Washington, D.C. and other southern states from coming into Maryland or else it would ruin the wages of white laborers. As Delegate Clarke put it, “If the State is overrun with free negroes, they will have to work, if they do not want to starve, and they will come into competition with white men. White men will not get the labor which the blacks perform, unless they work at the same wages with the free negro.” The problem, as he put it, was simply “a question of political economy, and not at all as involved in the political question of their franchise. Unless you adopt some such provision, this will be the effect on the poor white man.”⁸⁵

But of course, it was linked to the question of franchise, insofar as what the “free negro” represented a challenge to the standing of white workingmen. If they could not be physically

⁸³ Ibid., 198.

⁸⁴ Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 110.

⁸⁵ Ibid., 112.

removed from the state altogether, then the other strategy for marking their lower standing was to associate them with crimes that demonstrate their lack of standing: i.e. larceny and infamous crimes. Delegate Abbot, in an odd defense of “free negro” laborers in Baltimore, insists that they “make some of the best laborers we have.” But he then goes on to say, “It is true that they will steal a little at times, but then only a meal of victuals, a ham, or something of that kind.”⁸⁶

Delegate Clarke responded directly:

In Baltimore city it is probable that they [free negroes] steal only a little ham and bacon. But then they have their clerks in their stores to watch their property, and they also have their police on the lookout. But in the country we are a little more unfortunate. They steal there something more than a little ham and bacon. They will go off to Washington city and take along with them 15 or 20 or more valuable sheep, and put themselves under the protection of the military authorities. They drive off your horses, and carry off wagon-loads of tobacco; they go into your corn-fields at night and pillage them, and if we are overrun with this class of people, the free negro will have an opportunity to destroy more in the night than the white man can make in the day.⁸⁷

Delegate Edelen, who was, as noted above, perhaps the strongest advocate for permanent criminal disenfranchisement, made nearly the same point:

There [in Baltimore] you have your police officers at every turn and corner of the streets. And the free negroes there, whether they are or are not of a better class than those we have in the counties, have not the same opportunities or means of indulging their peculiar habits of thieving and robbing as exists in the sparsely populated rural districts. The gentleman says that with them they steal only a little ham and bacon. But allow this flood of free negroes to overrun us in the counties, and what protection or security shall we have for our meat-houses, our pig-sties, our hen-roosts, or even the corn in our fields?⁸⁸

Given the opportunity, “free negro” labor represents two threats: they are dangerous both for being good workers and for being untrustworthy thieves. If one believes that the “free negro”

⁸⁶ Ibid., 122.

⁸⁷ Ibid. The prospect of having “police officers at every turn and corner of the streets” should have strong resonance here, given the Lockean problem of having no judge to appeal to other than God in heaven, and the Foucaultian understanding of the carceral society as one of increasing surveillance. Even contemporary depictions of Baltimore in HBO’s acclaimed series *The Wire* can be read as a fulfillment of this statement, aided by the use of audio and visual surveillance technology.

⁸⁸ Ibid., 124.

laborer drives down the wages of white laborers (i.e. that they “steal” jobs that rightfully belong to white laborers), then both dangers can actually be seen as one specific danger: larceny.

Everything that the “free negro” does, by virtue of their very presence outside of the slave system, becomes criminal by definition. Both working for a wage and robbing farms are, in this sense, forms of theft from white men. This is precisely what Du Bois means when he notes the connection between “free Negro labor” and criminality, writing:

When the Negroes were freed and the whole South was convinced of the impossibility of free Negro labor, the first and almost universal device was the use of the courts as a means of reënslaving the blacks. It was not than a question of crime, but rather one of color, that settled a man’s conviction on almost any charge.⁸⁹

The ambiguous identity of the free negro is rendered as criminal and as seen in the Maryland debates, rendered specifically as the kind of criminal that merits exclusion under criminal disenfranchisement provisions.

“Free negroes” at best have an affinity with crime and at worst are, in and of themselves, purely criminal beings. They are posited as a source of danger both in physical terms, and also as a specific location of anxiety about criminal behavior. But compared to the threat to public standing that “free negroes” represent to white workingmen, this is a very useful and productive anxiety. Blacks are no longer a threat because they are implicitly understood as the kind of creatures that have no standing. No wonder then that there is little to no mention of them in the criminal disenfranchisement sections. It did not need to be said.

The greater fear, of course, was that “negroes” would be given more than just economic power and free movement. The greatest fear, perfectly expressed by Delegate Clarke, was that they would claim political power:

⁸⁹ W.E.B. Du Bois, *The Souls of Black Folk*, ed. Robert Gooding-Williams (Boston: Bedford Books, 1997), 142.

If this State shall be overrun by thousands and thousands of these people, you will not only have brought them into competition with the white man, but you may have men getting up before the people of this State, as is now done in the Senate of the United States, where it is proposed to give to negroes in Washington city the right of suffrage; you may have the same proposition made in the State of Maryland, and made an engine of political power. . . . If they are allowed to come here, and men, for party political purposes, succeed in giving them the elective franchise, and the white men of Maryland become virtually enslaved by the negro voting for and supporting a particular class of white men, it will be one of my proudest memories that pending the consideration of the organic law of the State, I did what I could to preserve the rights and liberties of white men, to keep the rights and liberties of white men under the control of white men; and to keep the labor of white men at such a standard that it could not be brought into competition with free negro labor; and to prevent the bringing down of the white man, if not to a political equality, to at least an economical level with the negro, where, in order to sustain himself and his family, he will be compelled to work upon the same terms with the negro.⁹⁰

This statement is a near perfect rendering of what Shklar argues about the relationship between labor and citizenship as standing. But add to it the link between “free negro” labor and inherent criminality, and we can see precisely how the boundary between citizen and non-citizen was handled expressly in both racial and criminological terms during the 19th century in Maryland.

3.3 Liberalization: Two Transformations

Maryland’s criminal disenfranchisement provisions remained untouched for the next century. In the last 40 years, however, we can track two major discursive shifts that correspond to both the national trend in disenfranchisement reform during these periods and the shift identified by Foucault as the rise of a neo-liberal conception of governance. First, in the late 1960s and early 1970s, the punishment/citizenship discourse was split into distinct spheres by moving disenfranchisement provisions out of the constitution and into the election code, and second, during the past decade, the language of “infamous crimes” was replaced with “felony conviction” as the basis for disenfranchisement. These discursive shifts reflect the rationalization

⁹⁰ Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 123.

and reform of disenfranchisement, but they achieve their ends by moving the work of differentiation between innocent citizens and guilty felons into the shadows. Maryland (like nearly every other state) continues to disenfranchise felons in order to maintain citizenship through a display of innocence, relying on the punitive system to do this work, but it does so in the face of an active attempt to disavow the relationship between the two discourses.

While the 19th century delegates expressly understood disenfranchisement as a practice that reflected the mutual requirements of punishment and citizenship, the delegates to the 1967 Constitutional Convention refused this discursive overlap. The draft constitution they produced removed the disenfranchisement provisions from the constitution itself. Disenfranchisement, they argued, was acceptable only so long as it was *not* employed as a form of punishment. Delegate Key introduced the committee report proposing that the criminal disenfranchisement provision be removed from the constitution and replaced it with a provision authorizing (and possibly requiring) the General Assembly to handle these restrictions in the Election Code. Key began by noting that the current Committee on Suffrage and Elections emphatically disagreed with the justification for disenfranchisement given by delegates at previous conventions:

A look at the previous Constitutional Convention records clearly shows that the reason for such an item, appearing the 1867 Constitution, as we know it, was to punish. It was stated by delegates then, during that Constitutional Convention, that people who commit crimes ought not have the right of good citizens, and this was the basis for including this article in our present Constitution. Now, our Committee on Suffrage and Elections admits that it does not feel the same as the 1867 Constitutional Convention delegates, and would not like to punish twice those who commit serious crimes, would not like to punish forever people who do get involved in these misfortunes, but they would continue this same kind of article. ... Because of the changes going on in our society away from punishment to rehabilitation, the Committee admits ... that if at some time in the future the penal institutions of the State became truly institutions for rehabilitation, that it might be desirable to restore the right to vote simultaneously with release from an

institution. They admit that they believe that the legislature ought to be free to determine when that situation has arrived.⁹¹

This final clause became the central question for the 1967 delegates: empowering the legislature with the authority to handle criminal disenfranchisement. Even those who spoke out against any restriction framed the question largely as disenfranchisement's incompatibility with constitutional law, but not necessarily as incompatible with the law *per se*. Delegate Taylor made a clear argument against disenfranchisement, noting that "a person who has been convicted and once served his term, should have all his civil rights restored," but then immediately followed by noting that "this is not a constitutional matter."⁹² What matters most even to those opposed to criminal disenfranchisement is that it be removed from the constitution.⁹³

While the constitution drafted in 1967 was ultimately rejected by a statewide popular vote (although the provision removing the power to disenfranchise persons convicted of "serious crimes" was adopted by amendment to the existing constitution in 1972), the debate over the proper location of such a provision is still illustrative. The problem with disenfranchisement under the 19th century constitution was two-fold: it inflicted disenfranchisement as explicitly as a

⁹¹ Maryland. Constitutional Convention Commission, *Debates of the Constitutional Convention of 1967-1968* (Annapolis: Hall of Records Commission, 1982), 1971. I believe that the delegate is mistaken in citing the 1867 debates, as a verbatim record of those debates was not kept. To the best of my knowledge, all that exists in the Maryland Archives is a daily summary of proposed amendments, motions, and votes cast. Perhaps the delegate is referring to the earlier debates, but is confused since it is the 1867 constitution that was in effect at the time. The delegate is, however, quite correct to characterize the 19th century understanding of disenfranchisement as a form of punishment.

⁹² *Ibid.*, 1972.

⁹³ The exception is Delegate Bothe, who alone among delegates who spoke on the issue in any year, attempts to strike the entire disenfranchisement provision from the constitution and not give the General Assembly the authority to restrict the franchise at all: "It is my belief . . . that the General Assembly should have no authority of any sort to disenfranchise anyone otherwise qualified to vote. . . . The automatic disenfranchisement of anybody because of his acts is an extremely dangerous precedent. . . . I think that we ought to allow every citizen who meets the minimal qualifications the opportunity, if he sees fit, to take advantage of voting. We should not tamper with this sacred right." She even goes so far as to insist that there be no exclusion on currently incarcerated individuals, nor that currently incarcerated individuals be barred from holding office: "As to the question of whether a felon or insane person would run for office, I am not at all concerned about that. I do not see any reason why a convict cannot file for office. If the voters want to elect him, that is their affair. If these same people want to put him in office, I suppose that is the way it will have to be." Her proposal was voted down by a 2-1 margin. *Ibid.*, 2024-2028.

form of punishment, and was excessive, i.e. it was a form of “double punishment”, but more importantly, the imposition of punishment had no place within a constitutional document, which should be focused on providing a general framework for government. The solution they proposed to these problems was to move the provision to another body of law.

Disenfranchisement as a part of constitutional law reflected what became an unacceptable blurring of the demands of punishment and the boundaries of membership. Disenfranchisement, the delegates argued, was unacceptable as a form of punishment *precisely* because it was excessive, a form of “double punishment.” The constitutional provision adopted in 1972 only authorized the General Assembly to enact restrictions *based* on a conviction for “infamous and serious” crimes. Criminal disenfranchisement was thus rendered, with respect to the law, as only a restriction on voting eligibility, a technical qualification for voting, determined by the power vested in the General Assembly to set voter qualifications.

The real “success” of this move was to alter the terms upon which disenfranchisement could be understood. When legislative agitation began to arise in the late 1990s and beginning of the 2000s, there was very little talk about disenfranchisement as a disproportionate punishment. The 2002 report issued by the Office of Policy Analysis identifies four areas of concern regarding disenfranchisement provisions: 1) the disproportionate impact on African-American men, 2) whether the provisions violate the Voting Rights Act of 1965, 3) whether felons should be excluded because they have “breached their ‘social contract’ with society,” and 4) whether administrative difficulties might lead to inconsistent enforcement.⁹⁴ No mention was made in the report of disenfranchisement as a form of punishment, but the concern over inconsistent enforcement could be read as a concern over proportionality (i.e. like offenders should be treated

⁹⁴ "Task Force to Study Repealing the Disenfranchisement of Convicted Felons in Maryland," 4.

in a like manner). The discussion over the “social contract” is remarkably brief, taking no explicit stance on whether felons have, in fact, breached such a contract, but interestingly quotes Locke’s *Second Treatise*. The report focuses most of its attention on the impact of disenfranchisement on African-American men.

Each of the four areas of concern identified in the 2002 report fixates on the problem of disenfranchisement as purely a question of civil rights restrictions. Concern over its punitive character has dramatically diminished. The question of disenfranchisement, from the official point of view, is not at all a penological or criminological question, something the 19th century delegates took for granted. When progressive reform finally passed in 2005 and more recently in 2007, it was entirely in the terms of reform of voter qualifications. The 2007 bill was titled the “Voter Registration Protection Act” and had a stated purpose of “generally relating to voter registration eligibility requirements for individuals convicted of certain crimes.”⁹⁵

What this represents is a “successful” separation of the discourses of punishment and citizenship. This is perhaps a positive movement, recognition that disenfranchisement fails any penological justification, and the delegates of the 19th century conventions were emphatically wrong to support the practice on such terms. Maryland (like all but two other states) continues to exclude currently incarcerated felons from the polls. The alterations of the election code made during the past decade certainly represent reform of disenfranchisement, but within a strictly limited set of terms. While they represent an official denial that disenfranchisement sits at the intersection between punishment and citizenship, the punitive character remains, despite this separation in law. It is a successful move to alter the terms of the debate such that recognizing the overlap between punishment and citizenship becomes more difficult, an overlap that the 19th

⁹⁵ SB 488 / HB 554.

century delegates had little problem seeing. Disenfranchisement was *both* a punishment and a regulation of the franchise, because citizenship was (at least in part) about being *innocent*.

The second discursive shift can be seen in the recent removal of the phrase “infamous crimes” from Maryland’s disenfranchisement provision. The goal of this shift was expressly to strike what was taken to be a vague, confusing, and archaic term and rely on a more precise technical distinction. It is true that as long as the term “infamous crimes” was used, there was confusion surrounding just what crimes fell under this classification. But the reason why “infamous crimes” were ground for exclusion, and why their relationship to “felonies” was never in doubt, can be seen in the 19th century convention debates.

The 1851 and 1864 debates reflect repeated concerns that “infamous crimes” were too vague and that the “wrong kind” of crimes might be accidentally included or excluded from disenfranchisement. As noted above, the crimes subject to disenfranchisement in the 19th century were those that signified a lack of truthfulness, reflecting beyond the character of the crime itself and specifically on the character of the criminal. What was in dispute during the 19th century debates was not if this was the wrong category of crime to target, but over the specific meaning of those terms.

In 1851, the immediate concern over the phrase “infamous crimes” was that it was too vague. Delegate Weems expressed his own confusion with the term: “Now, he might consider it infamous, if a gentlemen were to spit in his face. And if he were to knock down the person who committed the outrage, that might be considered as infamous in him. He wanted something more definite in the phraseology, such as perjury felon, &c.”⁹⁶ Delegates responded that there was a

⁹⁶ Maryland. Constitutional Convention (1851), *Debates of 1851*, 381-382.

precise definition in the legal scholarship that specifies the character of infamous crimes.⁹⁷ What defines an infamous crime is *not* that it leads to punishment in the penitentiary, but that it is a crime characterized by deceit or fraud and its history is linked to restrictions on who could give evidence in court. Delegate Prestman explained that the term

exists in the law books with a technical meaning, including treason, felony and all offences which come within the “*crimen falsi*” of the Roman Law. To avoid uncertainty, the committee had designated some offences by name, and then added the word “infamous” to cover the rest. Because the courts may commit errors, was not a sufficient reason for changing the language of the books.⁹⁸

The confusion over which crimes would count as infamous and which would not reflects less a concern over the distinction the term attempts to draw between honest and deceitful persons and more a concern over what specific acts would indicate this character. In order to clear up this confusion, Delegate Constable, who “objected to the phrase *infamous crimes*, because its meaning was uncertain,” proposed that a more precise term be used to designate those crimes noxious to the demands of honest citizenship: felony.⁹⁹

But finding a precise way to identify individuals who should carry this mark still vexed the delegates. Delegate Edelen (himself a strong proponent of disenfranchisement), also sought to move away from the language of infamy and employ a more technical distinction: that

⁹⁷ Delegate Chambers states, “[T]he words used were technical words in common law, and in common law treatises; and to strike them out might involve us in difficulty. It depended on the punishment affixed by law to a crime.” *Ibid.*, 382.

⁹⁸ *Ibid.*, 383.

⁹⁹ Delegate Constable “objected to the phrase *infamous crimes*, because its meaning was uncertain, and there might be a want of uniformity in its application, arising from a diversity of opinion as to import, which would operate injustice. ... Whatever might have been the *crimes* known as *infamous* at common law, he believed there were none below the grade of felony, it was obvious that they might be multiplied indefinitely by statute. Thus *forgery*, which was not a *felony* at common law, and hence not embraced in the class of offences that it denounced as *infamous*, had been made so by act of parliament.

In the same manner, assault and battery and other trivial *misdemeanors*, may be made *infamous crimes*; and those who commit them be subjected to the harsh disabilities imposed by this section. This phrase then, was liable to be extended both by *legislation* and *construction*, and if done by the *latter*, the same crime when committed by different persons might not always be visited with these disabilities. [in order to avoid this confusion]... he would move to substitute the word, *felony*, for the phrase, *infamous crimes*.” *Ibid.*

disenfranchisement would follow any crime whose penalty included “confinement in the penitentiary.”¹⁰⁰ For his definition, Edelen also turned to legal texts because “I am at a loss to understand the definition ... of infamous crimes.”¹⁰¹ It is worth repeating the quotation in full:

Infamy, in a general sense, is the condition of a person who is regarded with contempt and disapprobation by the generality of men on account of his vices. But in a legal sense, it is the state of one who has been lawfully convicted of a crime, followed by a judgment, by which he has lost his honor. The crimes which render a person infamous are, first, treason; second, felony; third, frauds; which come within the section of *crimen falsi* of the Roman law, as perjury and forgery, piracy, swindling and cheating, barratry, and bribing a witness to keep away. The consequences of infamy, are the loss of political rights, and incapacity to testify as a witness.¹⁰²

Even given this definition, the delegates repeatedly referred to the definition as “vague and indeterminate” and expressed fear that the legislation will “have made and constituted your judges of election the judges of the term ‘infamous crime.’”¹⁰³ Again, the delegates had no dispute over the notion that infamous crimes should be excluded; they were solely concerned with how this distinction would be enforced. The use of what now seems like an archaic term, reflects, in fact, a better understanding during that period than that which we have today about the *kind* of exclusion which was being sought. It is less puzzling on this account that criminal disenfranchisement provisions were found (and continue to be found) alongside the disenfranchisement of persons under guardianship for insanity and lunacy. Taken together, both the insane and the criminal are *unfit* and *incapable* of participation. A telling moment occurred when Delegate Sands attempted to amend the provision barring convicts from voting “unless he shall produce to the judges of the election ... a certificate signed by six or more lawful voters,

¹⁰⁰ Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 1295.

¹⁰¹ Ibid.

¹⁰² The text he quotes from is from Volume One of John Bouvier, *Institutes of American Law*, 4 vols. (Philadelphia: R.E. Peterson, 1851). It is also probably the case that this is same text which was referred to during the 1851 debates by Delegate Prestman, given the specific reference to Roman Law.

¹⁰³ Maryland. Constitutional Convention (1864), Lord, and Parkhurst, *Debates of 1864*, 1298.

that since his discharge from the penitentiary, he has demeaned himself as a sober, honest, and law-abiding citizen.”¹⁰⁴

The courts subsequently picked up the lingering concern over the vagueness of “infamous crimes.” In *State v. Bixler* (1884) the court ruled that perjury (although not a felony) was as an infamous crime and thus subject to disenfranchisement. The opinion stated, “An ‘infamous crime’ is such crime as involved moral turpitude, or such as rendered the offender incompetent as a witness in Court, upon the theory that a person would not commit so heinous a crime unless he was so depraved as to be unworthy of credit.”¹⁰⁵ Explaining the meaning of this distinction, the Court expounds:

The constitution in providing for exclusion from suffrage of persons whose character was too bad to be permitted to vote, could only have intended, by the language used, such crimes as were ‘infamous’ at common law, and are described as such in common law authorities. In the interest of citizenship and its incidental rights, the Constitution must be understood as confining the exclusion from suffrage, to such cases as fall under the common law understanding of the term, and not to include any offences of lower grade. Larceny is mentioned, and then follow the words ‘other *infamous* crime.’ It must be a *felony*, which larceny is, or that which is *infamous* though it be not a felony.¹⁰⁶

¹⁰⁴ Ibid., 1296. Delegate Berry, in response to this amendment provides a humorous moment: “I would suggest to the gentleman to strike out the word ‘sober.’ It would be very unpopular in his section of the State.” The concern for sobriety and voting rights has persisted over time. As reported in a front page *New York Times* article in 2004, part of the state of Florida’s rights restoration process required an audience before then Governor Jeb Bush, whose questioning of former convicts had virtually no boundaries. “Gov. Jeb Bush looked out over a roomful of felons appealing to him for something they had lost, and tried to reassure them. ‘Don’t be nervous; we’re not mean people,’ the governor said as some fidgeted, prayed, hushed children or polished their handwritten statements. ‘You can just speak from the heart.’ And they did: convicted robbers, drunken drivers, drug traffickers and others, all finished with their sentences, standing up one by one in a basement room at the State Capitol and asking Mr. Bush to restore their civil rights. Their files before him, Mr. Bush asked one man about his drinking, another about his temper, and so on. . . . ‘How’s the anger situation going?’ Mr. Bush asked one man after leafing through his file. . . . ‘You’ve stayed clean?’ the governor asked another.” Abby Goodnough, “Disenfranchised Florida Felons Struggle to Regain Their Rights,” *New York Times*, March 28 2004.

¹⁰⁵ *State V. Bixler*, 62 Md. 354 (Md. 1884)

¹⁰⁶ Ibid. (

All felonies are considered infamous crimes, but not all infamous crimes are felonies.¹⁰⁷

“Whether a crime is or is not punishable by confinement in the penitentiary,” writes Niles in his 1915 commentary on the Maryland Constitution, “is not a test of whether it is infamous. The test is, is it a felony, or a misdemeanor classified as infamous by common law authorities?”¹⁰⁸

By the 1967 debates, the concern over the designation of infamy had not disappeared. Delegate Key reported that the variable and often changing designations of criminal classifications produced confusion and difficulty in enforcing the provisions equitably: “Repeatedly the state’s attorneys have come to Annapolis as the people in the General Assembly know, to change different crimes from misdemeanors to felonies which further disenfranchise citizens who perhaps the day before the passage of a new bill permitting a crime to become a felony would have been permitted to vote.”¹⁰⁹

The delegates in 1967 seemed to have the same basic difficulty as their predecessors a century earlier: there existed no easily discernible way to know what crimes would trigger disenfranchisement and which would not. In reference to the proposed addition of the term “serious” to the disenfranchisement authorization given to the General Assembly, the following exchange is reported in the debates:

Delegate Hargrove: Could your Committee determine what a serious crime was? I do not think the courts have been able to do that.

Delegate Koss: Delegate Hargrove, if the courts have not, neither have we.¹¹⁰

Nevertheless, when the General Assembly amended the Constitution in 1972 they followed the failed convention’s recommended language and added “serious crimes” to “infamous crimes”

¹⁰⁷ Niles, *Maryland Constitutional Law*, 94.

¹⁰⁸ *Ibid.*

¹⁰⁹ Maryland. Constitutional Convention Commission, *Debates of 1967*, 1971.

¹¹⁰ *Ibid.*, 1973.

and “felonies” as eligible for disenfranchisement. Interestingly, Delegate Taylor, in insisting that the provision relies on an archaic definition of crime, points not to the term “infamous” but rather “felony”:

I want to read from a text book on state government: “A felony at common law has been defined as ‘any crime which occasioned a forfeiture of land and goods, and to which might be superadded capital or other punishment.’ Forfeiture of lands and goods as a punishment for crime has been abolished in England and the United States so that the term no longer has its original meaning.” So we have provided in this present draft of ours a concept that is outmoded and obsolete.¹¹¹

The delegate was correct to note that “felony” is a term whose meaning has changed over time, but completely missed that a central aspect of its meaning during the time that disenfranchisement provisions were enacted is that it signifies a moral failing that is *punished* by disenfranchisement.

Not surprisingly, confusion over which specific offenses are “infamous crimes” persisted. The Maryland Attorney General’s office had issued several clarification letters in 1973 that are referenced in a lengthy footnote in *Thiess v. State Administrative Board of Election Laws*.¹¹² In *Thiess*, the court argued that the plaintiffs (a group of disenfranchised felons) could not support their claim that the phrase “infamous” was constitutionally vague, because it was possible to obtain a “laundry list” of infamous crimes from the Attorney General so easily.¹¹³

The solution to all this confusion, introduced in the 2007 reforms, was to drop the terms of “infamous and serious crimes” altogether from the disenfranchisement statute. Currently, disenfranchisement occurs upon 1) conviction of a felony and 2) currently serving a court-order

¹¹¹ Ibid., 2266.

¹¹² *Thiess V. State Administrative Board of Election Laws*, 387 F. Supp. 1038 (D. Md. 1974)

¹¹³ The easy availability of such a “laundry list” of infamous crimes did not diminish the difficulty of enforcing the restrictions, as county election officials reported as recently as 2004 that they were unaware that such a list even existed. Ewald’s excellent report on state-by-state variations in disenfranchisement policies includes this interesting note about local election officials in Maryland: “For county registrars, the infamous crimes list adds difficulty to administering the law. Nine of ten local officials interviewed knew the eligibility basics, though three did not mention the concept of infamous crimes at all.” Ewald, “‘Crazy-Quilt’ of Tiny Pieces,” 24.

sentence of imprisonment, probation, or parole.¹¹⁴ The most recent reform in Maryland has only displaced the determination of which crimes trigger disenfranchisement from the election code to the sentencing judge. In trying to make disenfranchisement truly collateral, the reform has, in effect, only made disenfranchisement more directly an integral part of a punitive sentence of incarceration.

The move from “infamy” to “felony” is a discursive shift that perfectly reflects the transformation of criminological discourse from the 19th to late 20th centuries. The 19th century discourse, struggling with the rehabilitative ideal and the deep criminal subjectivity captured in categories like delinquency, understood disenfranchisement in far more complex ways than it is today. This language crossed over beautifully to the justifications for disenfranchisement based on the qualifications of a citizen as a trustworthy and honest individual. Hence it relied on “infamy” and an understanding of “felony” as indicative of moral character: persons who have demonstrated their affinity with falsity, deceit, and corruption and are assumed to be false, deceitful, and corrupt persons. But the use of the term felony continues to do the same work that “infamy” did previously: it identifies a source of the threat to the ballot box in the character of the criminal as deceitful and untrustworthy. While the debates and confusion surrounding “infamy” were, at times, messy and contradictory, they were at least forthright in acknowledging what they were about: marking the boundaries of citizenship through punishment and punishing persons for not being worthy citizens. This is still what disenfranchisement does today, but cleaner, displaced and hidden from view through 1) separating the penal law from election law, and 2) disavowing the moral differentiation work inherited by the classification of felony. The reforms of disenfranchisement provisions have only altered the *way* in which they operate. They

¹¹⁴ See Md. Ann. Code art. EL, §3-102 and §16-202.

have not altered the public standing conferred or the construction of the citizen as necessarily innocent.

4. Conclusion

Why is it that the current Maryland election code refers to felonies when it establishes disenfranchisement? The term “felony” is historically and discursively indebted to the distinction between members and non-members. What infamy did then, felony does now: it distinguishes between the honest and deceitful, between the innocent and the guilty. It carries with it the work of social and political differentiation. It marks the boundary between citizens and non-citizens. But it does this work in the dark, making this distinction without admitting to how it makes it, and worse, it claims to be a purely technical distinction between crimes that involve incarceration and those that do not. This reform has not resolved the tension between citizenship and punishment it was meant to deal with, but instead displaces it through law onto the felon. We still sort citizens according to their moral character, but we do it quietly, through a decentralized system of criminal and civil law. That is, the reform movement of recent years continues to represent the thinking of the 19th century, but more perniciously, because it claims not to do so.

The history of the franchise in Maryland reveals how punishment and citizenship are linked. The figures that bear these negotiations can be seen throughout, excluded for the sake of the coherence and stability of the American citizen. The “free negro,” the rebel soldier, the infamous criminal, and, ultimately, the felon each is brought into view on the boundary between inside and outside, a boundary maintained through the extension and retraction of the right to vote.

The 19th century debates about what should and should not be considered an infamous crime, a crime reflecting moral turpitude, were messy, but they were, in a way, preferable to the

current state of affairs, which hides both the messiness and the exercise of power. The Maryland disenfranchisement provision continues to use the word “felony” because the exclusion of felons is *supposed* to be about drawing a distinction between those who are capable of being citizens and those who are not. To be a full citizen in the United States means to be innocent and to be a felon is to be denied full citizenship. Felon disenfranchisement does this work for us, and it does it quietly and efficiently.