Journal of Civil Rights and Economic Development

Volume 26
Issue 4 *Volume 26, Summer 2013, Issue 4*

Article 6

June 2013

Felon Disenfranchisement: An Inherent Injustice

Christopher Haner

FELON DISENFRANCHISEMENT: AN INHERENT INJUSTICE

CHRISTOPHER HANER*

INTRODUCTION

The practice of disenfranchising those who have broken societal rules has ancient roots dating back to the Greek and Roman traditions of prohibiting criminals from appearing in court, making speeches, attending assemblies, serving in the army and voting.[1] These traditions, which later came to be known as "civil death," spread to Europe after the fall of the Roman Empire.[2] In England, after the offender was convicted of a "heinous crime," "civil death" carried three penalties: "forfeiture, so-called 'corruption of the blood' (which prohibited the guilty party from retaining, inheriting, or passing an estate to his heirs), and loss of civil rights."[3] England saw fit to institute these "civil death" penalties because such penalties stigmatized the offender and his family and served as a warning to the rest of the community.[4] When the English colonists settled in America, "they brought with them their common-law traditions including 'civil death.'"[5] Over time, many of the elements of "civil death" were removed from our common-law tradition; however, "one aspect of 'civil death' remained very much intact in the colonies: felony disenfranchisement."[6]

After the Revolutionary War, states were given the power to establish voter qualifications under Article I, Section Two of the United States

* Christopher Haner is an associate at the Law Office of Roy A. List and a former student at St. John's University School of Law (J.D., 2012).

1 *See* William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 616 (2007); *see also* ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 16 (2006).

2 *See* Liles, *supra* note 1, at 616.

3 *See id.* at 616-17 (quoting HULL, *supra* note 1, at 16).

4 *See id.* at 617; *see also* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1085 (2002).

5 Liles, *supra* note 1, at 617; *see also* Ewald, *supra* note 4, at 1059.

6 Liles, *supra* note 1, at 617.

Constitution[7] and were granted "'broad powers to determine the conditions under which the right of suffrage may be exercised.'"[8] By the eve of the Civil War twenty-four states, or over seventy percent of the then existing states, "had statutes barring felons from voting or had felon disenfranchisement provisions in their state constitutions."[9] Since this time, the number of states which have enacted felon disenfranchisement provisions has grown rapidly.

> Today, forty-eight states and the District of Columbia disenfranchise felons who are presently incarcerated. Thirty-five states prohibit felons from voting while on parole, and thirty states bar voting while on probation. Twelve states disenfranchise all or some categories of felons for life, with two of those states disenfranchising felons for life upon a second felony conviction.[10]

The growth of felon disenfranchisement laws presents a very real problem for several reasons. First, by disenfranchising those who have been convicted of felonies, these laws have the effect of stigmatizing the felon as a second class citizen who is not fit to vote in his or her own country's elections. In effect, the felon becomes an outcast within his or her own domain and loses one of the most sacred rights of the American individual, the right to vote for the candidate of one's choice. By committing a felony, even one of a more minor nature, the felon is "deemed unworthy of exercising what the Supreme Court has called 'the right preservative of all other rights,' the franchise."[11] Second, the voting power of our nation's most needy and crime-ridden communities is substantially diluted as these laws work to disenfranchise many of their once eligible voting members. These laws should not punish communities and the individuals who live in these communities for being or living in

[7] *See* U.S. CONST. art. I, § 2, cl. 1. ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

[8] George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 853 (2005) (quoting Lassiter v. Northampton County Bd. of Election, 360 U.S. 45, 50-51 (1959)).

[9] *See* Liles, *supra* note 1, at 617; *see also* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 781 (2002).

[10] Liles, *supra* note 1, at 617-18; *see also Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT 1 (1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf [hereinafter *Losing the Vote*].

[11] ELIZABETH A. HULL, THE DISENFRANCHISEMENT OF EX-FELONS 1, 1 (2006) (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

"bad neighborhoods," yet this is the effect they have.

Finally, these laws retard the workings of our democratic system generally. By disenfranchising felons, we lose the voice of an entire population of citizens, voices that can provide the much needed insight into the various problems with our criminal justice system and can help reform it. Furthermore, by denying this class of citizens the right to vote, those in power are more easily able to retain that power. When an entire class of citizens, such as felons, are denied the right to vote, they cannot effect a change in the power structure that marginalized them; they cannot remove the leaders who created, voted for, and enforce the very laws that keep them out of power. Elizabeth Hull has commented:

> [w]hat are legislators to do if ballots are cast by too many 'undesirables' – classes of voters, say, whom they presume would support the 'wrong' sort of candidate? They can attach a 'felony' label to activity associated with these troublemakers and thereby expunge at least some of their names from the voting rosters.[12]

Our democracy was intended to give a voice to the voiceless, not to give those with power the choice to decide who has a voice and who does not. This is a cyclical problem that must be ended if we wish to see our criminal justice system reformed and democracy restored.

Section I of this paper examines the impact felon disenfranchisement laws have both on the U.S. population as a whole and the even graver impact they have on minorities and minority communities. Section II examines past attempts to challenge these laws under the Fourteenth Amendment of the United States Constitution and the Voting Rights Act of 1965 ("VRA"). Section II includes an in depth examination of the holdings and procedural history of *Hayden v. Patterson* and *Farrakhan v. Washington*. These cases represent the debate of whether disenfranchised, minority felons may state a cause of action under the VRA. Section III examines the impact of the Ninth Circuit's *en banc* opinion in *Farrakhan* which effectively ended the split between the Ninth and Second Circuits. Section IV of this paper discusses alternative grounds for attack. These alternatives include pursing claims under the Eighth Amendment and attacking the criminal justice system itself. Section IV further suggests that this may be accomplished by either pushing for individualized judicial determinations of disenfranchisement on a case-by-case basis and/or petitioning both the state and federal governments for legislative reforms.

[12] *Id.* at 6.

These reforms are made timely by the Supreme Court's ruling that felon disenfranchisement laws do not violate the Fourteenth Amendment of the Constitution and the, now universal, view of the circuit courts that the VRA is not implicated by felon disenfranchisement laws.

I. IMPACT OF FELON DISENFRANCHISEMENT LAWS

A. U.S. Population as a Whole

"No other democratic country in the world denies as many people – in absolute or proportional terms – the right to vote because of felony convictions."[13] This is due to our ever-increasing push to punish those who break the laws of our society through arrest, prosecution, conviction and imprisonment.[14] The United States has claimed the crown as the world's most frequent incarcerator; it is estimated that "[a]s of 2008, 1 of every 134 Americans was incarcerated [either] in prison or jail."[15] These numbers represent a "seven-fold" increase from "less than 200,000 in 1970 to 1,613,556 by 2009."[16] When we combine these numbers with those who are forced to serve a mandatory probationary period after committing a crime, the numbers become even more staggering. Using data gathered by the Bureau of Justice Statistics, the Sentencing Project has determined that "[t]here are now more than 7.3 million Americans incarcerated or on probation or parole."[17] As our push to punish through disenfranchisement continues, its harmful effects become multiplied.

It is important to note that disenfranchisement laws not only deny the vote to people who are currently incarcerated; instead "nearly three-quarters . . . of the disenfranchised are not in prison, but are on probation, or parole or have completed their sentences."[18] Taken cumulatively, "[a]n estimated 5.85 million Americans, or one in forty-one adults, have currently or permanently lost their voting rights as a result of conviction."[19]

[13] *Losing the Vote*, *supra* note 10, at 1.

[14] *See Facts about Prisons and Prisoners*, THE SENTENCING PROJECT (2013), http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jan2013.pdf [hereinafter *Facts about Prisons*]; *see also* Kamala Mallik-Kane, Barbara Parthasarathy, & William Adams, *Examining Growth in the Federal Prison Population, 1998-2010*, URBAN INSTITUTE JUSTICE POLICY CENTER RESEARCH REPORT 3 (2012), http://www.urban.org/UploadedPDF/412720-Examining-Growth-in-the-Federal-Prison-Population.pdf.

[15] *Facts about Prisons*, *supra* note 14.

[16] *Id.*

[17] *Id.*

[18] *Losing the Vote*, *supra* note 10, at 8.

[19] *Felony Disenfranchisement Laws in the United States*, The Sentencing Project (2013), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Jun2013.pdf [hereinafter *Felony*

After considering the raw numbers presented above, it should be clear that felon disenfranchisement laws have the effect of silencing the voice of many felons, ex-felons, parolees and those sentenced to probation, as well as affecting the "political voice of many American communities."[20] However, if the raw numbers alone are not enough to shock the conscious, consider this: in 2006 it was estimated that if all disenfranchised felons and ex-felons "congregated in a single geographical area, it would become the nation's second-largest city, right behind New York."[21]

B. Minorities and Minority Communities

The numbers cited above are representative of the United States population as a whole; however, when considered in terms of race, it becomes clear that "[t]he racial impact of disenfranchisement laws is particularly egregious."[22] It is estimated that "39% of persons in prison or jail in 2009 were black [while] 22% were Hispanic."[23] The Sentencing Project has estimated that "Black males have a 32% chance of serving time in prison at some point in their lives [while] Hispanic males have a 17% chance [and] white males have [only] a 6% chance."[24] From 1988 to 1998 "the black men's rate [of incarceration] increased ten times the white men's increase"[25] while "Hispanics los[t] their vote due to a conviction approximately five times more often than whites."[26]

Black Americans are the most affected in terms of proportionality. Today it is estimated that "[t]hirteen percent of all adult black men – 1.4 million – are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is seven times the national average."[27] Furthermore, if the rates of incarceration continue to increase "three in ten of the next generation of

Disenfranchisement Laws]; *see also* Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 964 (2008).

20 *Felony Disenfranchisement Laws*, *supra* note 19.

21 HULL, *supra* note 11, at 1.

22 *Losing the Vote*, *supra* note 10, at 1.

23 *Facts about Prisons and Prisoners*, THE SENTENCING PROJECT (2013), http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jan2013.pdf [hereinafter *Facts about Prisons*].

24 *Id.*

25 *Losing the Vote*, *supra* note 10, at 12.

26 Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 746 (2006) (citing ALEC EWALD, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 37 (2003)).

27 *Losing the Vote*, *supra* note 10, at 8; *see Study: Non-Voting Felons Increasing*, ABCNEWS (Sept. 21, 2011), http://abcnews.go.com/Politics/story?id=121724.

black men can expect to be disenfranchised at some point in their lifetime [; while] [i]n states that disenfranchise ex-offenders, as many as 40% of black men may permanently lose their right to vote."[28] It should be clear that "[s]tate laws restricting the ability of persons who have been convicted of a felony from exercising the franchise may represent the single most pressing issue facing electoral participation by minority citizens."[29]

The adverse racial impact of felon disenfranchisement laws is extremely troubling for two reasons. First, minority citizens are arguably already marginalized by their racial status alone. Minorities have traditionally had the least access to power in the United States and disenfranchisement laws have the effect of taking away the power they fought so hard to gain during the civil rights era. In fact, the U.S. Civil Rights Commission has declared that "disenfranchisement . . . is the biggest hindrance to black voting since the poll tax,"[30] while the Leaders Conference on Civil Rights has declared that the rate of black disenfranchisement "threaten[s] to negate fifty years of hard-fought civil rights progress."[31] Arguably these laws were not created to have racial implications; however, the fact of the matter is they do and they are retarding minority access to power. Shockingly, "more black men are disqualified today by the operation of criminal disenfranchisement laws than were actually enfranchised by the passage of the Fifteenth Amendment in 1870."[32]

Second, minority citizens disproportionately tend to live in our nation's poorest and most crime ridden communities. This has negative implications both for the individuals in these communities and the communities themselves. Individuals who are disenfranchised in these neighborhoods have no say in the way their communities are governed.[33] "Unlike voters,

28 *Felony Disenfranchisement Laws in the United States*, The Sentencing Project (2013), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinus_Jun2013.pdf [hereinafter *Felony Disenfranchisement Laws*]; *see also* Maya Harris, *Black Men Barred from the Ballot Box*, ACLU OF NORTHERN CALIFORNIA (April 3, 2007), https://www.aclunc.org/about/senior_staff/maya_harris/black_men_barred_from_the_ballot_box.shtml.

29 Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 964 (2008); *see Losing the Vote*, *supra* note 13, at 8 ("Election voting statistics offer an approximation of the political importance of black disenfranchisement: 1.4 million black men are disenfranchised compared to 4.6 million black men who voted in 1996."); *see also* LYNNE M. CASPER & LORETTA E. BASS, U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1996 (July 1998).

30 HULL, *supra* note 11, at 9 (internal quotation marks omitted).

31 *Id.* at 27 (internal quotation marks omitted).

32 Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004).

33 *See* HULL, *supra* note 30, at 1; Neema Trivedi & Jenny Rose Flanagan, *Allowing Parolees to Vote Would Rebuild Lives*, THE DENVER POST, July 16, 2006, *available at* http://www.brennancenter.org/content/resource/allowing_parolees_to_vote_would_rebuild_lives/.

they can't stop the deterioration of their neighborhood schools or prevent yet another waste incinerator from moving in nearby."[34] Individuals who are not disenfranchised and who live in our nation's poorest neighborhoods, especially those with parents who have suffered disenfranchisement, may not feel that voting is important or may feel that it is a useless exercise of political power because they do not see the fruits of exercising this right. Because they feel they cannot vote more tax money into their neighborhood to improve decaying schools and the general standard of living, they may feel that they must fend for themselves. This, in many instances, may drive minority youths to crime as the means to power, which, should they be arrested and convicted, will continue this cycle.

Communities are affected in much the same way. If a neighborhood has a large number of citizens living in it who are disenfranchised, the community loses power because a large number of its citizens cannot vote; the community's political influence is diluted by artificially depressing the voting-eligible population.[35] Therefore, they will not see the changes they need, will feel marginalized and eventually could lose faith in the political process.

II. UNSUCCESSFUL ATTEMPTS TO ATTACK FELON DISENFRANCHISEMENT LAWS

A. Constitutional Challenge – 14th Amendment, Equal Protection Clause

Though state felon disenfranchisement laws have been attacked in the past as a violation of the United States Constitution, these laws have been upheld. In fact, the Supreme Court has held that a plain langue reading of Section 2 of the Fourteenth Amendment expressly allows a state to prohibit felons from voting.[36] Despite this general rule, the Court in *Hunter v.*

[34] HULL, *supra* note 11, at 1-5.

[35] John C. Keeney Jr., *Felon Disenfranchisement, in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 91, 92 (Benjamin E. Griffith ed., 2008); Dori Elizabeth Martin, *Comment, Lifting the Fog: Ending Felony Disenfranchisement in Virginia,* 47 U. RICH. L. REV. 471, 486 (2012).

[36] *See* Richardson v. Ramirez, 418 U.S. 24, 43, 55 (1974). In this case, Plaintiffs claimed that provisions of the California Constitution and implementing statutes which disenfranchised persons convicted of an "infamous crime" denied them the right to equal protection of the laws under the Federal Constitution. *Id.* Despite the Court's holding, it noted "we may rest on the demonstrably sound proposition that § 1 [of the 14th Amendment], in dealing with voting rights as it does, could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic section of reduced representation which § 2 imposed for other forms of disenfranchisement." *Id.* at 55. *See also* U.S. CONST. amend. XIV, § 2.

Underwood held that a state felon disenfranchisement law violates the Equal Protection Clause when it is established, by a preponderance of the evidence, that racial discrimination was a "substantial or motivating factor in the adoption" of the law.[37] If this is proven, the complainant will prevail "unless registrars prove by a preponderance of the evidence that the same would have resulted had the impermissible purpose not been considered."[38] The Court noted "we are confident that § 2 was not designed to permit . . . purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment."[39]

B. VRA Challenge

As a result of the Supreme Court's holdings in *Richardson v. Ramirez* and *Hunter v. Underwood*, it was apparent that very few felon disenfranchisement laws would be deemed unconstitutional as a violation of the Equal Protection Clause. As such, those who opposed these laws looked for another avenue of attack, eventually challenging them on the ground that they violate Section 2 of the Voting Rights Act.[40] These claims have enjoyed notable success, especially in the Ninth Circuit, though they have not been adopted by any circuit as of yet.

Representatives shall be appointed among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Id. (emphasis added).

37 Hunter v. Underwood, 471 U.S. 222, 225 (1985).

38 *Id.*

39 *Id.* at 232.

40 William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 624 (2007); *see also* 42 U.S.C. § 1973 (2010) ("(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement or the right of any citizen of the United States to vote on account of race or color. . . . (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political process leading to nomination or election in the State of political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity that other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered *provided* that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

a. Hayden v. Paterson

Hayden v. Paterson began as *Hayden v. Pataki*, a claim filed by Joseph Hayden, pro se, in the Southern District of New York on behalf of himself and all others similarly situated.[41] The plaintiffs to the suit were "black and [L]atino individuals who ha[d] been convicted of felonies under the laws of the state of New York and were . . . currently incarcerated in the New York prison system or on parole."[42] Because of their status as felons, plaintiffs were not permitted to vote in state or federal elections pursuant to New York Election Law section 5-106(2). [43] Through their suit, plaintiffs sought to invalidate New York Constitution Article II, Section 3[44] and New York Election Law Section 5-106(2) on federal constitutional grounds and as violative of the VRA.[45] Specifically, in regard to their VRA claim, plaintiffs claimed that New York Constitution Article II, Sections 3 and 5-106(2) violated Section 2 of the VRA, based on "Section 5-106(2)'s disproportionate impact on incarcerated and paroled Blacks and Latinos . . . [and] Section 5-106(2)'s dilution of the voting strength of Blacks and Latinos and certain minority communities in New York State."[46] Before the court in this case was defendants' motion for judgment on the pleadings.[47] The court granted defendants' motion,[48] holding that "[p]laintiffs' claims under Section 2 of the Voting Rights Act of 1965 . . . must be dismissed in light of the Second Circuit's recent holding in *Muntaqim v. Coombe*." [49]

On appeal, the Second Circuit, sitting *en banc*, addressed the question of whether the VRA applies to a claim that a disenfranchisement statute, such as § 5-106, acting in combination with historic racial discrimination allegedly afflicting the New York criminal justice system as well as society at large, results in the denial to Black and Latino prisoners the right to vote on account of race.[50] Jose A. Cabranes, writing for the majority, held that

41 Hayden v. Pataki, 2004 U.S. Dist. LEXIS 10863, *2 (2004), *aff'd sub nom.* Hayden v. Paterson, 594 F.3d 150 (2d Cir. N.Y. 2010).

42 *Hayden*, 2004 U.S. Dist. LEXIS 10863 at *3.

43 *See id.*; *see also* N.Y. Elec. Law §5-106(2) ("No person who has been convicted of a felony pursuant to the laws of this state, shall have the right to register for or vote at any election unless he shall have been pardoned or restored to the rights of citizenship by the governor, or his maximum sentence of imprisonment has expired, or he has been discharged from parole. . . .").

44 N.Y. CONST. art. II, § 3 ". . . The Legislature shall enact laws excluding from the right of suffrage all persons convicted of bribery or of any infamous crime."

45 *Hayden*, 2004 U.S. Dist. LEXIS 10863 at *2.

46 *Id.* at *5–*6.

47 *Id.* at *2, *3.

48 *Id.* at *3.

49 *Id.* at *16; *see* Muntaqim v. Coombe, 366 F.3d 102, 104 (2d Cir. 2004) ("§1973 cannot be used to challenge the legality of §5-106.").

50 Hayden v. Pataki, 449 F.3d 305, 314 (2006) (*en banc*).

the VRA prohibition against voting qualifications or prerequisites that resulted in a denial or abridgement of the right to vote on account of race or color did not apply to the plaintiffs' vote denial and dilution claims.[51] Cabranes made clear:

> the Voting Rights Act does not encompass these felon disenfranchisement provisions. . . . Our holding is based on our conclusion that Congress did not intend or understand the Voting Rights Act to encompass such felon disenfranchisement statutes,[52] that application of the Voting Rights Act to felon disenfranchisement statues such as these would alter the constitutional balance between the States and the Federal Government,[53] and that Congress at the very least did not clearly indicate that it intended the Voting Rights Act to alter the federal balance in this way[54]. . . . In light of our conclusion that the Voting Rights Act does not encompass felon disenfranchisement provisions and that plaintiffs thus cannot state a vote denial claim under the statute, it is clear that plaintiffs also cannot state a claim for vote dilution based on the assertion that the denial of the vote to incarcerated felons and parolees dilutes the voting

[51] *Id.*

[52] *See id.* at 310. In support of its conclusion that Congress did not intend to include felon disenfranchisement provisions within the coverage of the VRA, the court listed its reasons. *See id.* at 315-16. The court noted

These reasons include (1) the explicit approval given such laws in the Fourteenth Amendment; (2) the long history and continuing prevalence of felon disenfranchisement provisions throughout the United States; (3) the statements in the House and Senate Judiciary Committee Reports and on the Senate floor explicitly excluding felon disenfranchisement laws from provisions in the statute; (4) the absence of any affirmative consideration of felon disenfranchisement laws during either the 1965 passage of the Act or its 1982 revision; (5) the introduction thereafter of bills specifically intended to include felon disenfranchisement provisions with the VRA's coverage [and their subsequent defeat]; (6) the enactment of a felon disenfranchisement statute for the District of Columbia by Congress soon after the passage of the Voting Rights Act; and (7) the subsequent passage of statutes designed to facilitate removal of convicted felons from the voting rolls.

Id.

[53] *See id.* at 310. "Section 2 of the Fourteenth Amendment explicitly leaves the federal balance intact with regard to felon disenfranchisement laws specifically. . . .Therefore, extending the coverage of the Voting Rights Act to these provisions would introduce a change in the federal balance not contemplated by the framers of the Fourteenth Amendment. We have little difficulty concluding that application of the Voting Rights Act to prisoner disenfranchisement provisions like that of New York would effect a change in the federal balance. These laws, applying as they do only to currently incarcerated felons and parolees, implicate no less than *three* important state interests: (1) the regulation of the franchise; (2) the State's authority to craft its criminal law; and (3) the regulation of correctional institutions." *See id.* at 326.

[54] *See id.* at 310. "Our decision not to apply § 1973 to felon disenfranchisement provisions is confirmed and supported by the operation of the clear statement rule . . . a cannon of interpretation which requires Congress to make its intent 'unmistakably clear' when enacting statutes that would alter the usual constitutional balance between the Federal Government and the States. . . . Accordingly, to the extent that the Voting Rights Act would affect this balance if applied to felon disenfranchisement statutes, we must construe the statute not to encompass such provisions if it is even unclear whether Congress intended the Voting Rights Act to apply to such laws." *See id.* at 323.

strength of minority communities.[55]

The holding of *Hayden* is representative of the majority view of circuits that have paused to consider such a claim.[56] Though only four circuits have heard such claims, it seems likely that *Hayden* will continue to represent the majority, if not universal, view for the foreseeable future.

b. Farrakhan v. Washington

Farrakhan v. Washington began as *Farrakhan v. Locke*, a claim filed in the United States District Court for the Eastern District of Washington. In this case, the court was presented with a defendant's motion to dismiss for failure to state a claim and plaintiffs' motion for leave to amend.[57] Plaintiffs were African-American, Hispanic-American and Native-American felons.[58] Plaintiffs challenged the State of Washington's felon disenfranchisement scheme[59] as violative of the VRA as well as the First, Fourth, Fifth, Sixth, Ninth, Fourteenth and Fifteenth Amendments to the United States Constitution.[60] Plaintiffs' complaint was very similar to the complaint filed in *Hayden v. Pataki*, in that it alleged that "minorities are disproportionately prosecuted and sentenced, resulting in their disproportionate representation among the persons disenfranchised under the Washington Constitution [and as a result] Washington law causes vote denial and vote dilution on the basis of race, in violation of the VRA."[61]

Though the District Court granted defendants' motion to dismiss plaintiffs' vote dilution claim under the VRA[62] and plaintiffs'

55 *Id.* at 328.

56 *See, e.g.*, Johnson v. Governor of Florida, 405 F.3d 1214, 1234 (11th Cir. 2005) (*en banc*) (cert. denied, 546 U.S. 1015 (2005)); Simmons v. Galvin, 575 F.3d 24, 41 (1st Cir. 2009) (cert. denied, 131 S. Ct. 412 (2010)).

57 Farrakhan v. Locke, 987 F.Supp 1304, 1304 (1997).

58 *Id.* at 1307.

59 *See* WASH. CONST. art. VI, § 1 ("All persons of the age of eighteen or over who are citizens of the United States and who have lived in the state, and precinct thirty days immediately preceding the election at which they offer to vote, except those disqualified by Art VI, section 3 of this Constitution, shall be entitled to vote at all elections."); *see also* WASH. CONST. art. VI, § 3 ("All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise."); WASH. REV. CODE § 29A.04.079 ("An 'infamous crime' is a crime punishable by death in the state penitentiary or imprisonment in a state correctional facility. Neither an adjudication in juvenile court pursuant to chapter 13.40 RCW, nor a conviction for a misdemeanor or gross misdemeanor, is an 'infamous crime.'").

60 *Farrakhan*, 987 F.Supp at 1307.

61 *Id.*

62 *Id.* In reaching this conclusion the court noted that that plaintiffs were required to prove "(1) the minority group in question must be sufficiently large and geographically compact to constitute a majority in a voting district; (2) the group must be politically cohesive; and (3) the white majority group must vote sufficiently as a bloc so as to enable it to usually defeat the minority group's preferred candidate." *Id.* at 1313. The court noted "Plaintiffs Complaint and memorandum make conclusory

constitutional claims, it split with the Second Circuit in denying defendants' motion to dismiss plaintiffs' claims for vote denial under the VRA.[63] Instead, the court concluded that plaintiffs had "alleged sufficient facts to state a claim for vote denial under the VRA."[64]

Defendants and Plaintiffs then both moved for summary judgment on their claims. After considering both motions the court concluded that though "[p]laintiffs' evidence of discrimination in the criminal justice system, and the resulting disproportionate impact on minority voting power, is *compelling*, . . . " analyzing the disenfranchisement provision under the totality of the circumstances[65] "illustrates that the cause of this reduction is not the voting qualification; instead, the cause is bias *external* to the voting qualification," namely the criminal justice system itself.[66] Defendants' motion for summary judgment was granted and all plaintiffs' claims were dismissed.[67]

The Ninth Circuit reversed in part, affirmed in part, and remanded the case to the district court, holding that evidence of racial bias in the criminal justice system should not have been excluded from a totality of the circumstances analysis under Section 2 of the VRA.[68] On remand, the district court held that they were "compelled to find that there is discrimination in Washington's criminal justice system on account of race" [69] and that this discrimination "'clearly hinder[s] the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic.'"[70] The court noted, however, that the "remarkable absence of any history of official discrimination in Washington factors heavily in the analysis of totality of the circumstances analysis."[71] The court concluded "[t]aking all of the relevant factors into account . . . . the totality of the circumstances does not support a finding that Washington's felon disenfranchisement law results in discrimination in

statements about the existence of these factors, but nowhere do they allege any facts of, for instance, voter cohesiveness." *Id.*

63 *Id.* at 1304.

64 *Id.* at 1312.

65 Farrakhan v. Locke, 2000 U.S. Dist. LEXIS 22212, *14, *18 (2000) (emphasis added).

66 *Id.* at *4, *14-15 (2000) (emphasis added).

67 *Id.* at *1.

68 *Farrakhan*, 338 F.3d at 1012 (citing Thornburg v. Gingles, 478 U.S. 30, 47 (1986)).

69 Farrakhan v. Gregoire, 2006 U.S. Dist. LEXIS 45987, *18 (2006)

70 *Id.* (citing *Farrakhan*, 338 F.3d at 1020).

71 *Id.* at *25-26; *see also* John C. Keeney Jr., *Felon Disenfranchisement*, *in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 91, 95 (Benjamin E. Griffith ed., 2008) (applying the nine-factor test of *Thornburg v. Gingles* the court concluded that the totality of circumstances did to support a Voting Rights Act violation).

its electoral process on account of race."[72] The court, therefore, granted defendants' motion for summary judgment.[73]

On appeal, the Ninth Circuit reversed and granted summary judgment for the plaintiffs.[74] The court noted "[w]e agree with Plaintiffs for the reason that, given the strength of their Factor 5 showing,[75] the district court erred in requiring them to prove Factors that had little if any relevance to their particular vote denial claim."[76] The court further noted "[t]he *failure* to show that a state has a history of discriminatory voting practices . . . does not *negate* a showing that the current voting practice at issue is discriminatory."[77] Therefore, the court held "the 'on account of' requirement may be met 'where the discriminatory impact of a challenged voting practice is attributable to racial discrimination in the surrounding social and historical circumstances,' which includes the state's criminal justice system."[78] The court concluded "[w]e are bound by *Farrakhan I's* holding that § 2 of the VRA applies to Washington's felon disenfranchisement law. Plaintiffs have demonstrated that the discriminatory impact of Washington's felon disenfranchisement is attributable to racial discrimination in Washington's criminal justice system; thus, Washington's felon disenfranchisement law violates § 2 of the VRA."[79]

However, the notable success of plaintiffs' claim was short lived. In reconsidering the matter, the Ninth Circuit, sitting *en banc*, concluded: "[t]hree circuits – two sitting en banc – have disagreed with *Farrakhan I* and concluded that felon disenfranchisement laws are categorically exempt from challenges brought under section 2 of the VRA. . . . In light of those opinions, we conclude that the rule announced in *Farrakhan* I sweeps too

72 *Farrakhan*, 2006 U.S. Dist. LEXIS 45987 at *29.

73 *Id.*

74 Farrakhan v. Washington, 590 F.3d 989, 993 (2010).

75 *Id.* at 1004. The court is referring to the Senate Report accompanying the 1982 amendments which identified "typical factors" that may be relevant in analyzing whether section 2 has been violated. *See* S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. These Factors include

(1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or other-wise to participate in the democratic process; . . . (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process . . .

Id.

76 *Farrakhan*, 590 F.3d at 1004.

77 *Id.* at 1007-08.

78 *Id.* at 1009 (citing Farrakhan v. Locke, 338 F.3d 1009, 1019-1020 (2003)).

79 *Id.*

broadly."[80]

Despite the apparent loss suffered by plaintiffs in *Farrakhan*, several victories were won. First, plaintiffs were successful not only in demonstrating that there was evidence of racial discrimination in Washington's criminal justice system, but were able to convince the courts that this evidence "and the resulting disproportionate impact on minority voting power [was] *compelling*."[81] Second, plaintiffs in this case were able to achieve something plaintiffs in *Hayden* could not: they were able to convince the Ninth Circuit that "the *failure* to show that a state has a history of discriminatory voting practices . . . does not *negate* a showing that the current voting practice is discriminatory."[82] In effect, they were able to convince the court that despite the fact that the disenfranchisement provision was not enacted with the taint of racial animus, the provision still had discriminatory effects, and therefore, when working in tandem with the tainted criminal justice system, should be considered as if it were a racially discriminatory law.[83] Though the Ninth Circuit eventually overturned its decision and agreed with the Second Circuit's holding in *Farrakhan*, plaintiffs were able to demonstrate that their claim may be a viable one. Given the right circuit and making the same arguments as those advanced by plaintiffs in *Farrakhan*, future disenfranchised minorities may enjoy success on such a claim.

III. IMPACT OF NINTH CIRCUIT'S EN BANC OPINION IN FARRAKHAN

The Ninth Circuit should have allowed the ruling of summary judgment for plaintiffs to stand. As noted by the court in *Farrakhan* "[p]laintiffs' vote denial claims create a constitutional problem when construed as a facial challenge. . . . If the Court ultimately concluded that Washington's provision was invalid with respect to racial minorities, then only white felons could be disenfranchised so long as racial bias existed in the criminal justice system. That would obviously create an Equal Protection problem."[84] Had the Ninth Circuit allowed plaintiffs' grant of summary judgment to stand, it would have effectively forced the Supreme Court to grant certiorari to resolve the then existing circuit split. This action should have been taken by the Supreme Court in 2004 when it refused to grant

80 Farrakhan v. Washington, 2010 U.S. App. LEXIS 20803, *5 (2010) (per curium).
81 Farrakhan v. Locke, 2000 U.S. Dist. LEXIS 22212, *3-4, 14-15 (2000) (emphasis added).
82 Farrakhan v. Washington, 590 F.3d 989,1004 (2010).
83 *Id.* at 1009 (citing Farrakhan v. Locke, 338 F.3d 1009, 1019–20 (2003)).
84 *Locke*, 2000 U.S. Dist. at *6–7.

certiorari of the *Farrakhan* and *Muntaqim* cases.[85]As indicated by the Second Circuit in *Hayden*, these claims pose "a complex and difficult question that, absent Congressional clarification, will only be definitively resolved by the Supreme Court."[86] Instead of forcing the Supreme Court to definitively answer the question of whether disenfranchised racial minorities can state a cause of action for vote dilution and denial under the VRA, the question remains unanswered at the national level, which allows for further circuit splits on this issue and further uncertainty.

IV. OTHER GROUNDS FOR ATTACK

A. 8th Amendment Concerns

"The asymmetry of disenfranchisement has prompted scholarship suggesting that it raises serious Eighth Amendment concerns."[87] However, in neither *Farrakhan* nor *Hayden*, did the plaintiffs advance such a claim.[88] Unfortunately, the plaintiffs in *Farrakhan* and *Hayden* are not anomalies. Instead, "Eighth Amendment challenges to such laws have received surprisingly short shrift [and] advocates have not presented Eighth Amendment claims with much vigor."[89]

There is one overarching reason for these phenomena, found in the Supreme Court's ruling in *Trop v. Dulles*;[90] the Court stated, in dicta, that the disenfranchisement of convicted felons simply is not punishment[91] under the Eighth Amendment.[92] Therefore, "[w]hen presented with Eighth Amendment challenges to felon disenfranchisement laws, judges typically rely on . . . *Trop v. Dulles* for the proposition that disenfranchisement is not 'punishment' for Eighth Amendment purposes."[93] Instead, disenfranchisement provisions are viewed by judges as regulatory rather

85 *See* Locke v. Farrakhan, 543 U.S. 984 (2004); Muntaqim v. Coombe, 543 U.S. 978 (2004).

86 Hayden v. Pataki, 449 F.3d 305, 310 (2d Cir. 2006).

87 Bailey Figler, *A Vote for Democracy: Confronting the Racial Aspects of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 734 (2006).

88 *See generally* Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997); Hayden v. Pataki, 2004 U.S. Dist. LEXIS 10863 (S.D.N.Y. 2004).

89 Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 99 (2005).

90 356 U.S. 86 (1958).

91 *See id.* at 96–97; *see also* Wilkins, *supra* note 89, at 88, 118 ("A party seeking to demonstrate a violation of the Eighth Amendment must prove both (1) that the challenged action constitutes 'punishment' within the meaning of the Amendment and (2) that the punishment is 'cruel and unusual.'").

92 *Trop*, 356 U.S. at 96–97.

93 Wilkins, *supra* note 89, at 100.

than penal statutes and, therefore the Eighth Amendment's ban on cruel and unusual punishment is not held to be applicable to such claims.[94]

This is problematic for several reasons. First, "[a]lthough *Trop v. Dulles* was indeed an Eighth Amendment case . . . it did not concern the disenfranchisement of felons."[95] Instead, the Court simply considered "a hypothetical felony disenfranchisement statute."[96] The Court's statement regarding felon disenfranchisement in *Trop* is clearly dicta, nothing more. As such, it is not entitled to be cited as persuasive weight.

Furthermore, in *Trop*, "Chief Justice Warren identified no particular legitimate, nonpenal purposes served by disenfranchising the offender[]. . . . Instead, he simply relied on two nineteenth-century decisions – *Davis v. Beanson* and *Murphy v. Ramsey* – in which the Court had upheld the denial of voting rights to polygamists as a simple regulation of the franchise."[97] Both *Davis* and *Murphy*, however, "rested on the proposition that a state's power to restrict the ability to vote is plenary, that is, that virtually any restriction on eligibility for voting is legitimate."[98] Because this is clearly no longer the case, as is apparent after examining the VRA, and because the reference to felon disenfranchisement laws in *Trop* is nothing more than dicta, *Trop* has lost its precedential value, if it ever truly had any. Because felon disenfranchisement laws can no longer be seen as purely regulatory in nature, they can serve only one purpose: to punish. As such, felon disenfranchisement laws have met the first prong of Eighth Amendment analysis: felon disenfranchisement laws do "constitute[] 'punishment' within the meaning of the Amendment."[99]

Under the second prong of the Eighth Amendment test, felons must establish that the punishment of disenfranchisement is cruel and unusual.[100] There are two ways to accomplish this. First, they may argue that these laws "violate[] the country's 'evolving standards of decency that mark the progress of a maturing society.'"[101] Though no easy task, there is evidence that our country no longer views felon disenfranchisement as aligned with

94 John C. Keeney Jr., *Felon Disenfranchisement*, *in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 91, 93 (Benjamin E. Griffith ed., 2008).

95 Wilkins, *supra* note 89, at 88; *see Trop*, 356 U.S. at 86.

96 Wilkins, *supra* note 89, at 101; *see Trop*, 356 U.S. at 96–97.

97 Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150-55 (2004); *see Trop*, 356 U.S. at 97.

98 Karlan, *supra* note 97, at 1151; *see* Davis v. Beanson, 133 U.S. 333 (1890); *see also* Murphy v. Ramsey, 114 U.S. 15 (1885).

99 *See Trop*, 356 U.S. at 94.

100 *See id.*; *see also* Karlan, *supra*, note 97, at 99 (providing an example to show that proof of cruel and unusual punishment is required for an Eighth Amendment claim).

101 Wilkins, *supra* note 89, at 137; *see also Trop*, 356 U.S. at 101.

our evolving standards of decency. In fact, a recent "public opinion poll suggests that approximately 80% of the American public supports restoration of voting rights for most ex-felons."[102]

Furthermore, the Supreme Court indicated in *Atkins v. Virginia* that there are two factors that might "inform a court's assessment of whether a punishment offends contemporary standards: recent legislative decisions and trends and approaches within the world community."[103] As is especially true in the case of ex-offender disenfranchisement, "both types of evidence support the conclusion that the punishment is inconsistent with contemporary notions of appropriate penal sanctions."[104]

> Thirty years ago, when the Supreme Court upheld lifetime disqualifications in *Richard v. Ramirez*, twenty-eight states inflicted lifetime disenfranchisement. Only eight continue that practice today. Since *Richardson v. Ramirez*, no state has enacted legislation barring ex-offenders from voting. The consistency of the direction of change provides powerful evidence of a national consensus, particularly given the well-known fact that anti-crime legislation is far more popular then legislation providing protections for persons guilty of violent crimes. Similarly, consensus within the world community is uniformly against lifetime disenfranchisement. Thus, the states that continue to exclude all felons permanently are outliers, both within the United States and in the world.[105]

Second, felons may argue that disenfranchisement is a "grossly disproportionate" punishment for a particular offense[106] as the "Eighth Amendment succinctly prohibits excessive sanctions and demands that the 'punishment for crime should be graduated and proportioned to the offence.'"[107] This claim, however, may not be equally available to all felons, depending on the severity of the crime committed. Those "subject to permanent long term disenfranchisement for relatively minor felonies" will have a much greater chance of success with this claim than those who have

102 Wilkins, *supra* note 89, at 141 (citing Jeff Manza et al., *Public Attitudes toward Felon Disenfranchisement in the United States*, 68 Pub. Opinion Q. 275, 280-81 (2004), *available at* http://www.soc.umn.edu/uggen/ManzaBrooksUggenPOQ04.pdf).

103 Karlan, *supra* note 97, at 1168; *see* Atkins v. Virginia, 536 U.S. 304, 313-16 (2002).

104 Karlan, *supra* note 97, at 1168.

105 *Id.* at 1168–69 (internal quotations omitted)

106 *See* Harmelin v. Michigan, 501 U.S. 957, 1001 (Kennedy, J., concurring) (noting that, for non-capital punishments, the Eighth Amendment forbids only punishment that is "grossly disproportionate" to the crime at issue).

107 Karlan, *supra* note 97, at 1164-65 (quoting *Atkins*, 536 U.S. at 311 (2002)).

been convicted of more serious offenses.[108] As eloquently stated by Elizabeth Hull, "[d]isenfranchisement is an excessive penalty . . . [as well as] an arbitrary one, inflicted on []felons without regard to either their crime or their moral culpability, regardless of whether they committed homicide or, in California, conspired to operate a motor vehicle without a muffler."[109]

Further supporting the proposition that felon disenfranchisement may be violative of the Eighth Amendment is Justice Byron White's 1989 plurality opinion in *Stanford v. Kentucky* in which Justice White explained "that the government also violates the Eighth Amendment if it imposes a sentence that 'makes no measurable contribution to acceptable goals of punishment and hence is nothing more that the purposeless and needless imposition of pain and suffering."[110] As is discussed in Section B of this paper, it is very doubtful that felon disenfranchisement laws advance the traditional goals of criminal sanction: deterrence, incapacitation and rehabilitation. Therefore, their continued legitimacy is further called into question as they "make[] no measurable contribution to acceptable goals of punishment."[111]

B. The Criminal Justice System

The disenfranchised and eligible voters alike should also attack the criminal justice system itself as it is the indirect cause of disenfranchisement. As reported by the Sentencing Project,

> the proportion of the population that is disenfranchised has been exacerbated in recent years by the advent of harsh sentencing policies such as mandatory sentence, 'three strikes' laws and truth-in-sentencing laws. Although crime rates have been relatively stable, these laws have increased the number of offenders sent to prison and the length of time they serve.[112]

The impact of changed sentencing policies is readily apparent from Department of Justice Data. For example "persons arrested for burglary had a 53 percent greater likelihood of being sentenced to prison in 1992 than in 1980, while those arrested for larceny experienced a 100 percent

108 *See* Wilkins, *supra* note 89, at 142.

109 HULL, *supra* note 11, at 121 (2006).

110 *Id.* at 116 (quoting Stanford v. Kentucky, 492 U.S. 361, 371 (1989) (plurality opinion)).

111 *Id.*

112 *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT 11 (1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf [hereinafter *Losing the Vote*].

increase."[113]

What is perhaps worse is the ever-increasing rate of arrest, prosecution and conviction of nonviolent offenders. It is estimated that "[e]ighty-four percent of the increase in state prison admission during this period [1980-1992] was due to incarceration of nonviolent offenders."[114] Perhaps even more shocking is that "[f]ifty-three percent of state inmates were sentenced for nonviolent offenses."[115] Of those sentenced for nonviolent crimes, the people arrested, prosecuted and convicted of drug charges has experienced the most marked increase. It is estimated that "1 in 4 inmates in 2002 was in jail for a drug offense, compared to 1 in 10 in 1983; drug offenders constituted 22% of state prison inmates in 2006 and 52% of federal prison inmates in 2008."[116] When we consider earlier years, we find that from 1980 to 1992 drug arrestees were "almost five times as likely to be sent to prison in 1992 as in 1980."[117] Clearly this is a compounding problem, and the national war on drugs is doing far greater harm than good.

Considering the impact of our laws through a racial lens, we find that minorities are disproportionately impacted by our criminal justice system. African Americans fare the worst. The Sentencing Project has stated: "[t]he striking disproportionate rate of disenfranchisement among African American men reflects their disproportionate rate of incarceration. . . [from 1988 to 1998] the black men's rate increased ten times the white men's increase."[118] The national war on drugs has had a particularly significant impact on black arrest, prosecution and conviction.[119] "Although drug use and selling cuts across all racial, socio-economic and geographic lines, law enforcement strategies have targeted street-level drug dealers and users in low-income, predominantly minority, urban areas. As a result, the arrest rates per 100,000 for drug offenses are six times higher for blacks than for whites."[120] Considering the statistical evidence demonstrating the

113 *Id.* (citing U.S. Department of Justice, Office of Justice Programs (DOJ/OJP), "Prisoners in 1994," Bulletin NCJ-151654, (Washington, D.C.: DOJ, August 1995)).

114 *Id.*; *see also* MARC MAUER,THE SENTENCING PROJECT, AMERICANS BEHIND BARS: THE INTERNATIONAL USE OF INCARCERATION, 1992-1993 (1994).

115 *Losing the Vote*, *supra* note 112, at 12.

116 *Facts about Prisons and Prisoners*, THE SENTENCING PROJECT (2013), http://www.sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jan2013.pdf [hereinafter *Facts about Prisons*].

117 *Losing the Vote*, *supra* note 112, at 11.

118 *Id.* at 12; *see also* Michael Tonry, *Crime and Punishment in America, 1971-1996*, OVERCROWDED TIMES, Apr. 1998, 15.

119 *Losing the Vote*, *supra* note 112, at 13; *see* DORIS MARE PROVINE, UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS 1-2 (2007).

120 *See Losing the Vote*, *supra* note 112, at 13; *see also* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 756-57 (1993);

disproportionate effect the "war on drugs" has had on minority citizens, perhaps the national "war on drugs" could be more aptly deemed the "war on minorities."[121]

A further reason to attack the criminal justice system itself is that it is not fulfilling its traditional goals; felon disenfranchisement laws do not promote deterrence, incapacitation and rehabilitation. First, "[r]evoking a person's right to vote is not a strong deterrent to crime [as] it is highly unlikely that someone who commits a crime in the face of a prison sentence, fines, or probation, would be dissuaded by the loss of voting rights."[122] Furthermore, those who commit crimes will not be deterred by disenfranchisement laws in large part "because most criminals don't even know that by robbing a store, say, or selling drugs on the street corner, they might imperil their voting rights."[123] Second, "[d]isenfranchisement does not further incapacitation goals, as it cannot prevent an offender from committing future crimes."[124] Finally, "[f]elon disenfranchisement is not rehabilitative, as it ostracizes criminals from the political process rather than reintegrating them into society. When excluded from voting, a person may fell stigmatized as a second-class citizen."[125] Depriving "erstwhile convicts of the ballot in no way encourages them to embrace community norms."

Significantly, the American Law Institute has argued that "'disenfranchisement exclude[s] offenders from society and thus [has] increased[, not decreased,] the likelihood of recidivism.'"[126] Conversely, re-enfranchisement may actually encourage rehabilitation as there appears to be a connection between voting rights and successful reintegration.[127] In fact, The National Advisory Commission on Criminal Justice Standards and Goals found that "ex-offender's 'respect for law and the legal system

MICHAEL TONRY, MALIGN NEGLECT – RACE, CRIME, AND PUNISHMENT IN AMERICA 111 (1995); Human Rights Watch, *Race and Drug Law Enforcement in the State of Georgia*, A HUMAN RIGHTS WATCH SHORT REPORT, July 1996; Bailey Figler, *A Vote For Democracy: Confronting The Racial Aspects Of Felon Disenfranchisement*, 61 N.Y.U. ANN. SURV. AM. L. 723, 747 (2006) ("During the war on drugs in New York between 1980 and 1997, there was a 93% increase in drug offenses for whites, and 1,6615% and 1,311% increase for Hispanics and blacks respectively.").

121 HULL, *supra* note 11, at 25.

122 Figler, *supra* note 120, at 733.

123 HULL, *supra* note 11, at 43.

124 Figler, *supra* note 120, at 733.

125 *Id.*

126 *Id.* at 734; *see also* Elena Saxonhouse, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1603 (2004).

127 HULL, *supra* note 11, at 44; *see also* Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, ANN. REV. OF SOC. 29, 89–113 (Aug. 2003).

may well depend, in some measure, on his ability to participate in that system.'"[128]

How should these concerns be addressed and how should we seek to implement a positive change?

a. Allow for Judicial Determination of Disenfranchisement on a Case-by-Case Basis

We must recognize that "[c]ivil disabilities of the past differed greatly from those imposed in modern American practice."[129] Early disenfranchisement laws generally only applied to the most serious crimes and were imposed by judges on an individual basis. "Conversely, modern felon disenfranchisement laws are implemented across the board through state election laws, so there is no opportunity for judges to exercise individual discretion."[130] We must demand that the disenfranchisement of felons, if it is to remain, be imposed by judges on an individual basis, as was the case in the past.

There are two reasons for this. First, the list of crimes that qualify as felonies had ballooned in recent years. The crime of larceny, a felony in many states currently, though not a felony when many states' felon disenfranchisement laws were enacted, is not as severe a crime as murder, which has been considered a felony since the founding of the United States.[131] It is very unlikely, when enacting these laws, that state legislatures had the foresight to see that less severe crimes, such as larceny, would subject the offender to possible lifetime disenfranchisement. Second, it is inherently inequitable to subject people convicted of "minor" felonies to the same punishment of disenfranchisement as those who have committed more severe felonies, such as murder. Murder carries a more severe prison sentence than larceny, and the offender's criminal actions are considered on an individual basis in handing down the prison sentence. If we simply allow a judge to review the offender's crime on an individualized basis and determine if the crime is severe enough to warrant disenfranchisement we can alleviate, in part, the threat posed by a

128 HULL, *supra* note 11, at 44.

129 Figler, *supra* note 120, at 728; *see also*, ALEC EWALD, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 10, 17–18 (2003).

130 Figler, *supra* note 120, at 728.

131 *See* HULL, *supra* note 11, at 5 (noting that felonies "include, in addition to such serious acts as assault and murder, relatively innocuous ones such as passing bad checks, using fake ID's, and possessing fireworks without a license"); *see also* William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 620 (2007) (discussing that in Mississippi grand larceny is a crime, which led to a lifetime revocation of state voting rights).

ballooning list of felonies and the inherent inequity that exists in imposing a punishment as severe as disenfranchisement on an across the board basis.

b. Petition the State and Federal Governments for Legislative Reforms

Because the disenfranchised cannot vote, we, America's eligible voters, must use our voices and speak loudly in demanding legislative reform at both the state and national level to redeem the voices of the voiceless. Though many may think that the problem of disenfranchisement is not a concern among voters, just the opposite is true. In fact, "a great majority of Americans are currently opposed to felony disenfranchisement laws."[132] Elizabeth Hull notes that "more that 80 percent of Americans believe that felons who have 'paid their debts' in full should have their voting rights reinstated"[133] while "more than 40% would allow offenders on probation or parole to vote."[134] We must recognize this and, in recognizing that felon disenfranchisement is a salient issue for so many, must find the courage and the motivation to demand reform.

There have been notable successes for concerned voters at the state level. For example, in "March 2005, the Nebraska legislature voted (by overruling the governor's veto) to end the state's permanent disenfranchisement of felons."[135] In addition, "in 2000, Connecticut restored voting rights to convicted felons on probation and Delaware amended its constitution so that it now re-enfranchises felons five years after completion of their sentences."[136]

There have also been movements toward federal reform. Perhaps most notably is the Count Every Vote Act, "which, among other things, ensures that people convicted of felonies can vote in federal elections even if barred

132 Liles, *supra* note 131, at 616; *see* Brian Pinaire, Milton Heumann, & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1540 (2003) (finding that 81.7% of those surveyed felt that the right to vote should be restored to convicted felons at some point).

133 HULL, *supra* note 11, at 118.

134 Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1148 (2004); *see* Pinaire et al., *supra* note 132, at 1540 (finding that only 5% of those surveyed felt that felons should lose the right to vote only while on parole or probation).

135 Figler, *supra* note 120, at 731; *see* Nate Jenkins, *Legislature Overrides Veto*, JOURNALSTAR.COM (Mar. 9, 2005 6:00 PM), http://www.journalstar.com/articles/2005/03/10/local/doc4231011b86575214372611.txt (discussing that felons will be allowed to return to the voting booth in Nebraska).

136 George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 898 (2005); *see* Martine J. Price, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 401 (2002) ("In May 2000, Connecticut Governor John Rowland signed into law a bill restoring voting rights to ex-felons on probation.").

from voting in state elections."[137] There have also been recommendations submitted on behalf of National Commission on Federal Election Reform, which would seek to reform states' disenfranchisement laws at the national level. One such recommendation was submitted in 2001 when the Commission, co-chaired by former presidents Jimmy Carter and Gerald Ford, recommended that "'each state should allow for restoration of voting rights to otherwise eligible citizens who have been convicted of a felony once they have fully served their sentence, including any term of probation or parole.'"[138] In addition, the American Bar Association has also weighed in on the debate and has approved standards on collateral sanctions that prohibit the "deprivation of the right to vote, except during actual confinement."[139] However, despite that progress is being made, as of yet no reform movements have been successful at the federal level and there remains no federal statute for restoration of a felon's civil rights.[140]

What is more, the justifications advanced by those who support felon disenfranchisement laws are tenuous at best and this must be exposed. The first justification advanced by supporters is the "subversive voting theory, which holds that felons [and] ex-felons vote in a subversive way." [141] In practice, however, "the evidence runs counter to the subversive voting theory: there is no data suggesting that criminals would vote differently than non-criminals; [however] there is evidence that offenders actually support the existence of the laws they have broken." [142] Even putting this argument aside, the subversive voting theory "violates the principle that discrimination against voters based on their viewpoint is unconstitutional." [143] The second theory advanced by those who support felon disenfranchisement laws is the "purity of the ballot box theory," which holds that felons who, "by their acts[,] have proven themselves unfit" should not be allowed to vote.[144] This fails for the same reason as the subversive voting theory. "Because viewpoint discrimination is

137 Figler, *supra* note 120, at 732.

138 John C. Keeney Jr., *Felon Disenfranchisement*, *in* AMERICA VOTES!: A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 91, 91 (Benjamin E. Griffith ed., 2008).

139 ABA CRIMINAL JUSTICE SECTION STANDARDS 19-2.6(a).

140 *See* Keeney, *supra* note 138, at 99 (concluding that the United States is one of the few countries to disenfranchise former felons); *see also* Alec Ewald, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 7 (2003) (noting that there is "an uneven patchwork quilt of state laws" regarding disenfranchisement statutes, even though there has been a movement in the United States to restore voting rights).

141 Figler, *supra* note 120, at 735.

142 *Id.* at 735; Ewald, *supra* note 140, at 33.

143 Figler, *supra* note 120, at 735; *see also* Carrington v. Rash, 380 U.S. 89, 94 (1965).

144 Christopher R. Murray, Note, *Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965*, 23 ALASKA L. REV. 289, 291 (2006).

unconstitutional, the theory that a felon's vote will taint the election process quickly breaks down."[145]

The third theory advanced by the supporters of felon disenfranchisement laws is the "electoral fraud theory," which holds that, because felons have demonstrated a willingness to break the law, it is likely that they will commit election fraud.[146] However, there is no evidence that felons are more likely to commit electoral fraud that any other voter.[147] Furthermore, if felon disenfranchisement laws have electoral fraud prevention as their aim, "then they are over-inclusive, as they apply across the board though the vast majority of crimes leading to disenfranchisement are not related to elections."[148] Also, if felon disenfranchisement laws were enacted with the intention of preventing electoral fraud, they are unnecessary, for we already have laws in place to prevent election fraud and punish those who break the law.[149]

The final theory advanced by supporters of these laws is the Lockean social-contract theory, which holds that in breaking societal rules, felons waive their right to participate in the rule-making function of society.[150] Not only is this theory outdated, but it misinterprets the message advanced by Locke. The social-contract theory – certainly as Locke conceived it – "honors the principle of proportionality."[151] Locke "made clear in his writings that the power to strip someone of his political rights extends only 'so far as calm reason and conscience dictate what is proportionate to [the] transgression, which is so much as may serve for reparation and restraint.'"[152] In short, the theories advanced by those who support felon disenfranchisement laws all are simply untenable.

We must band together, provide a voice to the voiceless and demand that felon disenfranchisement laws be reconsidered and abolished. Felons can provide an important voice in our democracy and can strengthen it. They

145 Figler, *supra* note 120, at 736.

146 *Id.*

147 *Id.*; Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

148 Figler, *supra* note 120, at 736.

149 *Id.* at 736-37; Mark E. Thompson, Note, *Don't Do the Crime If You Ever Intend to Vote Again: Challenging the Disenfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 SETON HALL L. REV. 167, 193-94 (2002).

150 *See* Christopher R. Murray, Note, *Felon Disenfranchisement in Alaska and the Voting Rights Act of 1965*, 23 ALASKA L. REV. 289, 291 (2006); Alice E. Harvey, Note, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. Pa. L. Rev. 1145, 1169-70.

151 HULL, *supra* note 11, at 52.

152 *Id.* (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT 126 (Thomas I. Cook, ed., Hafner Publishing Co 1947) (1689) in which Locke asserted that lawbreakers should be "punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify other from doing the like").

have a unique insight that many of us lack. They have experienced the injustices of the criminal justice system and may provide the voice necessary to institute meaningful reforms within it. Furthermore, these laws work an injustice on our friends, neighbors and loved ones; they affect us all. If you do not believe felon disenfranchisement laws affect you or ever will, I urge you to consider this: "if . . . incarceration rates remain unchanged, Department of Justice data indicate that an estimated one in twenty of today's children will serve time in prison during his or her lifetime and will be disenfranchised for at least the period of incarceration."[153]

CONCLUSION

Felon disenfranchisement laws are inherently unjust as they stigmatize the felon as a second class citizen, deny one of the most sacred American rights, harm our nation's most needy and crime ridden communities by diluting their voting strength and retard the workings of our democratic system by silencing an entire class of citizens who possess a helpful and informative voice and create a cycle whereby those in power are able to retain their power by disenfranchising more and more citizens. We must seek to abolish disenfranchisement laws and must use all avenues of attack. First, disenfranchised, minority plaintiffs must continue to pursue claims under the VRA. Though *Farrakhan* proved, in the end, an unsuccessful claim, the decisions and findings of the courts in the Ninth Circuit prior to the *en banc* hearing were significant for they showed that these claims may yet have some life. Second, we must attack the criminal justice system itself as the major indirect cause of disenfranchisement. In order to do so, we must petition our state and national governments for reconsideration and reformation of disenfranchisement laws and must demand that disenfranchisement, if it is to remain, be determined by a judge on and individualized and case-by-case basis. Finally, felon disenfranchisement laws raise serious Eighth Amendment concerns. Claims must be filed attacking these laws for what they are, a *punishment* which not only offends our country's evolving standards of decency but is grossly disproportionate and excessive to many of the crimes committed by felons.

153 *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT 12 (1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.