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NOTES

Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them

Carl N. Frazier[1]

I. INTRODUCTION

IN a democratic republic, perhaps no right is more fundamental than the right to freely cast a ballot.[2] Justice Black observed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[3] The fact is, however, that an estimated 5.3 million otherwise voting-eligible Americans are prohibited from exercising this most basic right.[4] These disenfranchised American citizens are convicted felons.[5]

At the time of its completion in 1787, the United States Constitution mentioned the right to vote only in passing and appeared to leave the quali-

1 J.D. expected, 2007, University of Kentucky College of Law; B.A. 2004, Transylvania University. The author wishes to express gratitude to Jeff for his affection, encouragement, and patience, all of which have been especially invaluable during the demands of law school. The author also wishes to thank the editors and staff of the *Kentucky Law Journal*, whose dedication to excellence is apparent and appreciated. The Note won first place in the 2006 Kentucky Bar Association student writing competition, and it is published here with permission of the KBA.

2 *See generally* THE FEDERALIST NO. 57 (James Madison) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscurity and unpropitious fortune. The electors are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the corresponding branch of the legislature of the State.").

3 Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

4 THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2006), http://www.sentencingproject.org/pdfs/1046.pdf [hereinafter THE SENTENCING PROJECT].

5 This also includes some convicted misdemeanants. *See* ALEC EWALD, THE SENTENCING PROJECT, A "CRAZY QUILT" OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAWS 6 (2005), http://www.sentencingproject.org/pdfs/crazy-quilt.pdf.

fication of voters as an issue for the states to decide.[6] In most states, the right to vote was originally limited to "property-owning, taxpaying white males over the age of twenty-one."[7] Gradually, the right to vote was expanded to previously disenfranchised classes. A series of constitutional amendments enfranchised African Americans in 1870,[8] women in 1920,[9] and all citizens over the age of eighteen in 1971.[10] Moreover, other constitutional amendments provided for the direct election of senators in 1913[11] and abolished the poll tax in 1964.[12] The U.S. Supreme Court weighed in with *Reynolds v. Sims* and *Harper v. Virginia State Board of Elections*, which respectively held that all voters must have an equal opportunity to participate in state elections,[13] and that the state's discretion in limiting the right to vote is narrow.[14] Finally, Congress passed the landmark Voting Rights Act in 1965, which prohibits states from diluting minority voting power and charges the U.S. Department of Justice with monitoring some states' voting practices.[15] Today, suffrage in statewide and federal elections is universal for citizens eighteen and older, with one important caveat: in most states, current and former criminals cannot vote.[16] As the political and judicial institutions of both federal and state governments have generally sought to expand the franchise to previously disenfranchised classes, no such progress has been

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6 U.S. CONST. art. I, § 2, cl. 1 ("[A]nd the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

7 Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1345 (2003).

8 U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

9 U.S. CONST. amend. XIX ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.").

10 U.S. CONST. amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.").

11 U.S. CONST. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof....").

12 U.S. CONST. amend. XXIV, § 1 ("The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.").

13 Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections.").

14 Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) ("But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.").

15 42 U.S.C. §§ 1971, 1973 (2000). The Voting Rights Act has been expanded and/or reauthorized in 1970, 1975, 1982, and 2006.

16 THE SENTENCING PROJECT, *supra* note 4.

made with respect to criminals.[17] Part II of this Note will examine the status of criminal disenfranchisement laws[18] throughout the states.[19] Part III will discuss the various types of legal arguments and political mechanisms used to challenge those laws.[20] Finally, Part IV will offer suggestions as to the most effective ways in which barriers to the franchise for criminals can be overcome.[21]

II. THE LAY OF THE LAND

A. *The Historical Context and Policy Considerations*

The roots of the American criminal disenfranchisement movement can be directly traced to the concept of "civil death" at British common law.[22] Under a process known as "attainder," a variety of collateral civil disabilities were attached to a felony conviction, such as the loss of the right to pass and inherit property and the right to vote.[23] When large portions of the English common law took hold in the newly independent American colonies, the concept of total civil death was generally rejected, but provisions barring criminals from voting remained.[24] Around 1850, nineteen of the thirty-four existing states had some type of law preventing criminals from voting.[25]

The ratification of the Fifteenth Amendment in 1870 brought voting rights to African Americans and other individuals who had previously toiled under state statutes prohibiting members of certain racial groups from voting. Shortly thereafter, racist Southern lawmakers—fearful of this new influx of voters—assembled state constitutional conventions to design and

17 *See* Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1300 (1989) [hereinafter Note].

18 The literature generally uses the phrase "felon disenfranchisement statute." *See, e.g.*, Martine J. Price, Note, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369 (2002). However, some states prohibit misdemeanants from voting, and other states merely disenfranchise felons while they are serving their sentences. *See* EWALD, *supra* note 5. In the interest of good semantics and to be as inclusive as possible, this note will utilize the phrase "criminal disenfranchisement laws."

19 *See infra* notes 22–63 and accompanying text.

20 *See infra* notes 64–180 and accompanying text.

21 *See infra* notes 181–82 and accompanying text.

22 *See* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 942–43 (1970).

23 *See id.* at 943.

24 JAMIE FELLNER & MARK MAUER, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (1998), http://www.sentencingproject.org/pdfs/9080.pdf.

25 Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 725 (1973) (quoting K. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 148 (1918)).

codify into law new prohibitions on voting.[26] These conventions resulted in mechanisms such as the poll tax, literacy tests, and grandfather clauses, which did not facially violate the Fifteenth Amendment.[27] A more subtly racist product of these conventions was the criminal disenfranchisement statute whose intent was clear: to suppress African American voters.[28] After 1890, Southern states actually changed their criminal disenfranchisement statutes to target crimes for which African Americans were prosecuted most often.[29] Mississippi's plan became a model followed by several other Southern states.[30] The results of these new voting restrictions were striking. In Louisiana, African Americans made up forty-four percent of registered voters following the Civil War but less than one percent in 1920.[31] In Mississippi, nearly seventy percent of African Americans were registered to vote in 1867, but less than six percent were in 1892.[32] Of the voting prohibitions introduced by these Southern conventions during Reconstruction, only criminal disenfranchisement remains.

Today, mainstream proponents of criminal disenfranchisement regimes do not point to minority vote dilution as a policy justification for these statutes' existence, for to rely on such a rationale would clearly run afoul of the Fourteenth Amendment.[33] Instead, some scholars point to "a fear that ex-convicts might use their votes to alter the content or administration of the criminal law"[34] and "a belief that the disqualification of former felons is necessary to guard against vote fraud and related election offenses"[35] as justification for criminal disenfranchisement. The first argument seems weak at best, as the content of one's vote or her reasons for choosing to cast a ballot are immaterial to the question of whether she should have

26 C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH: 1877–1913, at 321 (1951).

27 Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537–38 (1993).

28 *See id.* at 539–40.

29 *See* WOODWARD, *supra* note 26, at 330–31. The Mississippi Supreme Court noted that "[O]ffenses to which its [the state's] weaker members [African Americans] were prone..." included "bribery, burglary, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement or bigamy," which were the precise crimes for which individuals in that state were disenfranchised. Ratliff v. Beale, 20 So. 865, 867–68 (Miss. 1896).

30 *See* WOODWARD, *supra* note 26, at 321–22.

31 Karen McGill Arrington, *The Struggle to Gain the Right to Vote: 1787-1965*, *in* VOTING RIGHTS IN AMERICA 25, 30 (Karen M. Arrington & William L. Taylor eds., 1992).

32 *Id.*

33 It is settled that proof of a discriminatory purpose in enacting a voting procedure violates the Fourteenth Amendment. *See, e.g.*, Mobile v. Bolden, 446 U.S. 55, 67–68 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. The statute superseded *Bolden* on its interpretation of the Voting Rights Act; the court's discussion of the Fourteenth Amendment is still valid.

34 Note, *supra* note 17, at 1302–03 (discussing Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972)).

35 *Id.*

the right to vote in the first place.[36] If the premise of the second argument is true—that convicted criminals are more likely to commit vote fraud—a blanket prohibition on voting for all criminals seems to over-address the problem, especially in light of more specific statutes intended to preserve the sanctity of the electoral process.[37]

Given the weakness of these "regulatory" policy justifications, some scholars have evaluated criminal disenfranchisement regimes as a form of punishment.[38] Using a retributive punishment argument, some point out that criminals have broken the social contract and are therefore morally unsuitable to exercise the franchise.[39] Opponents argue that this justification misconstrues the nature and purpose of social contract theory and ignores scholarship demonstrating that criminals can be—and often are—rehabilitated as contributing members of society.[40] A retributive justification often proffered by the laity—the straight-forward "if-you-don't-want-the-time-don't-do-the-crime" argument—is unfulfilling, in that it does not address the underlying purpose of imposing such a punishment in the first place.[41] There may also be a deterrence justification for criminal disenfranchisement statutes—namely, that these statutes would deter some individuals from committing crimes for fear of losing their voting rights. Some scholars have argued that such a justification is weak, positing that the promise of disenfranchisement likely has little effect on a criminal's mind that is already undeterred by a lengthy prison sentence.[42] While the intent of this Note is not to be a treatise on the policy justifications of criminal disenfranchisement, it is important to observe that there are non-racist arguments for their perpetuation.

B. *Current Status of Criminal Disenfranchisement Laws*

The most consistent theme among the various state approaches to criminal disenfranchisement is that there is no consistency. A U.S. Department of Justice official described the phenomenon as a "national crazy-quilt of

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36 *See generally* Carrington v. Rash, 380 U.S. 89 (1965) (holding that voter disenfranchisement based on viewpoint is unconstitutional).

37 *See* Note, *supra* note 17, at 1302. Consider KY. REV. STAT. ANN. §§ 119.165, .205 (West 2005), prohibiting voter impersonation in the former and vote buying in the latter.

38 *See* Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150 (2004).

39 *See* Note, *supra* note 17, at 1304.

40 *See generally id.* at 1304–09.

41 The Eighth Amendment requires punishment be related to a legitimate purpose. *See generally* Furman v. Georgia, 408 U.S. 238, 303–04 (1972) ("[O]ur laws distribute punishments according to the gravity of crimes . . . .").

42 *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1105–06 (2002).

disqualifications and restoration procedures."[43] With respect to currently incarcerated individuals, all states and the District of Columbia, with the exception of Maine and Vermont, prohibit felony inmates from voting.[44] Thirty states deny the franchise to felons on probation, and an additional five prohibit voting by parolee felons.[45] Three states—Florida, Kentucky, and Virginia—permanently bar all convicted felons from voting.[46] In addition, nine other states place some voting restrictions on felons who have completed their sentences, either as a disability for a set number of years or permanent disenfranchisement only for certain felony offenses.[47]

Disqualification from voting is not always limited to felony convictions. At least four states—Colorado,[48] Illinois,[49] Michigan,[50] and South Carolina[51]—prohibit *any* incarcerated individual from voting. Maryland disen-

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43 EWALD, *supra* note 5, at 1 (citing SUSAN M. KUZMA, OFFICE OF THE PARDON ATTORNEY, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY i (1996)).

44 *See* THE SENTENCING PROJECT, *supra* note 4, at 3.

45 *See id.* The states that disenfranchise felons on probation include: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. These thirty states plus California, Colorado, Connecticut, New York, and South Dakota disenfranchise parolee felons.

46 *See id.* An additional state, Iowa, also has a constitutional provision that permanently bars those convicted of "infamous crimes" from voting unless the governor has restored their civil rights. IOWA CONST. art. II, § 5; *id.* art. IV, § 16. On July 4, 2005, Governor Tom Vilsack issued Executive Order 42, which implements a scheme to automatically restore the voting rights of felons who have completed their sentences. Iowa Exec. Order No. 42 (July 4, 2005). As a practical matter pursuant to Governor Vilsack's policy, Iowa felons' voting rights are restored upon completion of their sentence, yet the constitutional provision remains on the books.

47 *See* THE SENTENCING PROJECT, *supra* note 4, at 3. These states include: Alabama, Arizona, Delaware, Maryland, Mississippi, Nebraska, Nevada, Tennessee, and Wyoming.

48 *See* COLO. CONST. art. VII, § 10 ("No person while confined in any public prison shall be entitled to vote . . . .").

49 *See* 10 ILL. COMP. STAT. 5/3-5 (2005) ("No person who has been legally convicted, in this or another State or in any federal court, of any crime, and is serving a sentence of confinement in any penal institution, or who has been convicted under any section of this Act and is serving a sentence of confinement in any penal institution, shall vote, offer to vote, attempt to vote or be permitted to vote at any election until his release from confinement. . . .").

50 *See* MICH. CONST. art. II, § 1 ("Every citizen of the United States who has attained the age of 21 years, who has resided in this state six months, and who meets the requirements of local residence provided by law, shall be an elector and qualified to vote in any election except as otherwise provided in this constitution. The legislature shall define residence for voting purposes."); *id.* § 2 ("The legislature may by law exclude persons from voting because of mental incompetence or commitment to a jail or penal institution."); MICH. COMP. LAWS § 168.10 (2005) ("The term 'qualified elector', as used in this act, shall be construed to mean any person who possesses the qualifications of an elector as prescribed in section 1 of article 2 of the state constitution and who has resided in the city or township 30 days.").

51 *See* S.C. CODE ANN. § 7-5-120(b)(2) (2005) ("A person is disqualified from being regis-

franchises all individuals incarcerated for an "infamous crime."[52] In each of these states, there is evidence to suggest that misdemeanants may actually, as a practical and extra-legal matter, be permitted to vote, yet the application of this principle is inconsistent and open to the judgment of the government official entrusted with making such a decision.[53]

C. The Impact

Criminal disenfranchisement statutes have a marked effect on the landscape of the American electorate. The most recent estimates place the number of American citizens who are ineligible to cast a vote due to incarceration or a criminal conviction at 5.3 million.[54] Moreover, criminal disenfranchisement regimes have a disproportionate effect on racial minorities. For example, thirteen percent of all African American men are disenfranchised,[55] which is seven times the national average for all persons barred from voting due to a criminal conviction.[56] In 1998, Florida and Alabama's criminal disenfranchisement laws barred thirty-one percent of African American men from voting.[57] A voting rights advocacy group predicts that, given the current explosion in prison populations, the number of African American men barred from voting because of a criminal conviction may reach an astonishing thirty-three percent within the next generation.[58] While some would argue that these figures are merely indicative of a larger issue of prosecutorial bias towards racial minorities,[59] the fact that criminal disenfranchisement laws prohibit a significant number of individuals from voting is inescapable.

Aside from rendering fewer individuals in the electorate, criminal disenfranchisement laws have a number of secondary effects. First, the census counts inmates as living where they are incarcerated, which produces inappropriately sized districts in areas where there is a high prison population.[60]

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tered or voting if he: . . . (2) is serving a term of imprisonment resulting from a conviction of a crime . . . .").

52 *See* MD. CODE ANN., ELEC. LAW § 3-102(b)(1) (West 2005). The Maryland State Board of Elections interprets "infamous crime" to mean "any felony, treason, perjury, or any crime involving an element of deceit, fraud, or corruption." Md. State Bd. of Elections, Restoration of Voting Rights in Maryland, http://elections.state.md.us/voter_registration/restoration.html (last visited Feb. 25, 2007). Conceivably, there are misdemeanors that meet such a definition.

53 *See* EWALD, *supra* note 5.

54 THE SENTENCING PROJECT, *supra* note 4.

55 *Id.*

56 *Id.*

57 JAMIE FELLNER & MARK MAUER, *supra* note 24, at 8.

58 THE SENTENCING PROJECT, *supra* note 4. The predicted rate of disenfranchisement rises to forty percent in states that bar all ex-offenders from voting. *Id.*

59 *See generally* Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 628–32 (2004).

60 *See* Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the*

Denying the franchise to inmates effectively renders the voters of these districts more powerful than voters in other, less prisoner-populated districts.[61] Second, the enfranchisement of criminals in some jurisdictions may lead to significant changes in the outcome of elections. For example, Al Gore lost the 2000 presidential election in Florida by 537 votes[62]—an election in which 525,000 non-incarcerated Floridians were prohibited from voting because of a felony conviction.[63] Turnout of a mere fraction of those disenfranchised individuals may have changed the outcome of the entire 2000 presidential election. Finally, in excluding a substantial number of individuals from the political sphere, criminal disenfranchisement laws arguably alter the content and character of the available viewpoints in any given election.

III. STRATEGIES FOR ATTACKING CRIMINAL DISENFRANCHISEMENT STATUTES

Challenges to the legality of criminal disenfranchisement statutes began shortly after the disenfranchisement conventions of the post-Fifteenth Amendment period and continued into the twenty-first century.[64] Opponents have utilized various novel legal arguments, yet most attacks to criminal disenfranchisement provisions are generally grounded in one or more of the following theories: the Equal Protection Clause of the Fourteenth Amendment,[65] the Eighth Amendment,[66] the Voting Rights Act of 1965,[67] and political pressure on legislative policymakers.[68] This Note examines each of these theories in turn.

"Usual Residence" Principle, 152 U. PA. L. REV. 431, 445-49 (2003).

61 *Id.* at 448.

62 Div. of Elections, Fla. Dep't of State, Election Results, http://election.dos.state.fl.us/elections/resultsarchive/index.asp (follow "2000 General" hyperlink; then follow "U.S. President" hyperlink) (last visited Feb. 25, 2007).

63 Brian Pinaire et al., *Barred From the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1520 (2003).

64 *See, e.g.*, Williams v. Mississippi, 170 U.S. 213 (1898); Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2004) (en banc). The U.S. Supreme Court upheld the so-called Mississippi Plan constitutional disenfranchisement provisions barring those who had been "convicted of theft, arson, repe [*sic*], receiving money or goods under false pretenses, bigamy, [and] embezzlement" in 1898. *Williams*, 170 U.S. at 221, 225 (noting "[t]hey [the state's criminal disenfranchisement provisions] do not on their face discriminate between the races, and it has not been shown that their actual administration was evil, only that evil was possible under them.").

65 *See infra* notes 69–95 and accompanying text.

66 *See infra* notes 96–112 and accompanying text.

67 *See infra* notes 113–148 and accompanying text.

68 *See infra* notes 149–174 and accompanying text.

A. Equal Protection

In 1974, the U.S. Supreme Court, in *Richardson v. Ramirez*, issued what many consider its seminal opinion on the constitutionality of criminal disenfranchisement.[69] In a suit brought by disenfranchised felons alleging a violation of the Fourteenth Amendment's Equal Protection Clause, the Court upheld California's constitutional and statutory criminal disenfranchisement provisions.[70] It is well-established that statutes affecting a fundamental right, such as voting, and those affecting a suspect class, such as racial groups, are subjected to strict scrutiny by the Court.[71] The *Richardson* plaintiffs argued that California's disenfranchisement policy limited a fundamental right, but the Court refused to apply strict scrutiny.[72] The Court noted that strict scrutiny is justified in voting rights cases only when the statute or policy in question runs afoul of section 1 of the Fourteenth Amendment.[73] Criminal disenfranchisement statutes, the Court held, are specifically authorized by section 2 of the Fourteenth Amendment.[74] Therefore, the Court reasoned, an act specifically envisioned by section 2 could not run afoul of section 1.[75] As *Richardson* instructs, once the fundamental rights inquiry is completed, a state need only satisfy minimum rationality to meet the equal protection threshold for criminal disenfranchisement laws.[76] Subsequently, lower fed-

69 *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

70 *Id.* at 56.

71 *See generally* Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (holding that race is a suspect classification and subjecting statutes drawing racial classifications to strict scrutiny); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627–28 (1969) (holding that voting is a fundamental right and subjecting statutes interfering with the franchise to strict scrutiny).

72 *See Richardson*, 418 U.S. at 55–56.

73 *See id.* at 54. Section 1 states in relevant part: "[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

74 *See Richardson*, 418 U.S. at 42–43, 54–55. Section 2 states in relevant part:

> 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.

U.S. CONST. amend. XIV, § 2 (emphasis added).

75 *See Richardson*, 418 U.S. at 55.

76 Virtually any legitimate state interest (retribution for convicted felons, for example) will satisfy minimum rationality. In *Richardson*, minimum rationality was met. *See id.* at 55–56.

eral courts followed *Richardson* in upholding criminal disenfranchisement provisions against equal protection challenges.[77]

Although *Richardson* seemed to foreclose, for all practical purposes, the possibility of a successful equal protection challenge to criminal disenfranchisement laws, the Supreme Court reopened the door in 1985 with its decision in *Hunter v. Underwood*.[78] In *Hunter*, a group of felons brought an equal protection challenge to Alabama's constitutional provision providing for felon disenfranchisement, which was ratified during the disenfranchisement convention movement at the dawn of the twentieth century.[79] The plaintiffs in *Hunter* presented the argument not addressed by *Richardson*—namely, that the provision was created with racially discriminatory intent.[80] The *Hunter* Court held that notwithstanding the Fourteenth Amendment section 2 authority to disenfranchise criminals, such a provision might still violate equal protection if (1) it was adopted with racially discriminatory intent and (2) it has a disproportionate impact on a protected class.[81] The Court considered voluminous historical records showing that the delegates to the Alabama constitutional convention who adopted the disenfranchisement provision openly declared their intention to prevent African Americans from exercising the franchise.[82] Additionally, the Court reviewed statistical evidence demonstrating the disparate impact criminal disenfranchisement has on African Americans in Alabama.[83] Having satisfied both the intent and impact prongs, the *Hunter* Court invalidated the Alabama criminal disenfranchisement provision.[84]

Although *Hunter* provided opponents of criminal disenfranchisement with an equal protection avenue of attack, it has proven minimally fruitful at best.[85] In practice, lower federal courts appear unwilling to invalidate

77 *See, e.g.*, Owens v. Barnes, 711 F.2d 25 (3d Cir. 1983), *cert. denied*, 464 U.S. 963 (1983); Shepherd v. Trevino, 575 F.2d 1110 (5th Cir. 1979), *cert. denied*, 439 U.S. 1129 (1979).

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

79 *Id.* at 223–24.

80 *Id.* at 224.

81 *See id.* at 233.

82 The evidence included transcripts of the convention and historical monographs detailing the disenfranchisement convention movement in the South. *Id.* at 228–31. The Court concluded: "[W]e simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race. . . ." *Id.* at 233.

83 "In Jefferson and Montgomery Counties blacks are by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under section 182 for the commission of nonprison offenses." *Id.* at 227 (quoting Underwood v. Hunter, 730 F.2d 614, 620 (11th Cir. 1984), *aff'd*, 471 U.S. 222 (1985)).

84 *Hunter*, 471 U.S. at 233 ("[W]e are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 [of the Alabama Constitution] which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.").

85 Price, *supra* note 18, at 382 ("Few lawsuits, however, have been successful in applying the *Hunter* rule to similar statutes. . . .").

criminal disenfranchisement laws on facts less compelling than those of *Hunter*.[86] Reviewing a Mississippi constitutional provision of "similar age and intent" as the one invalidated in *Hunter*, the Fifth Circuit held that a state can save a criminal disenfranchisement provision enacted with racially discriminatory intent by amending it in such a way as to remove the taint.[87] Here, the court was persuaded that amendments to the list of crimes for which one can be disenfranchised—crimes previously excluded from the list because they were not considered "black crimes"—rendered the provision constitutional.[88] The Eleventh Circuit, reviewing Florida's criminal disenfranchisement provision, noted that while some lawmakers may have had racially discriminatory intentions at the time the provision was amended following the Civil War, two facts saved the provision: (1) criminal disenfranchisement existed at the time of Florida's statehood; and (2) the Florida Constitution was revised in 1968 to make the provision disenfranchise more individuals.[89] The Fourth Circuit adopted similar grounds when it upheld a Virginia disenfranchisement provision.[90] The court noted that the Virginia provision has remained relatively unchanged and pre-dated both the Civil War and the extension of the franchise to African Americans.[91] Therefore, the court reasoned, the provision's intent could not have been to deny the franchise to African Americans when they were already disenfranchised. Finally, the same court upheld Maryland's criminal disenfranchisement provision because the record was devoid of evidence that the statute was applied in a racially discriminatory manner.[92] As such, there was no equal protection argument.[93]

There is an equal protection avenue open to opponents of criminal disenfranchisement statutes. However, proof requires a highly persuasive argument that the provision was created for substantially racially discriminatory reasons and that the result is a clear disparate impact on a suspect class.[94] Given the case law, however, it seems that states can prevail on equal protection grounds by amending their criminal disenfranchisement provisions to remove the taint of discrimination, perhaps even if such an amendment is disingenuous. Despite strong evidence that criminal disenfranchisement laws disproportionately affect African Americans and other racial and ethnic minorities,[95] a successful equal protection challenge re-

86 *See, e.g.*, Cotton v. Fordice, 157 F.3d 388, 391–92 (5th Cir. 1998).

87 *See id.*

88 *See id.* at 391.

89 *See* Johnson v. Governor of Fla., 405 F.3d 1214, 1220–21 (11th Cir. 2004) (en banc).

90 *See* Howard v. Gilmore, 205 F.3d 1333 (Va. 2000) (per curiam).

91 *Id.*

92 *See* Buckner v. Schaefer, 36 F.3d 1091 (1994) (per curiam).

93 *Id.*

94 *See, e.g.*, *Hunter*, 471 U.S. at 233.

95 *See supra* notes 55–59 and accompanying text.

quires discriminatory *intent.* Unless the record surrounding the adoption of the provision in question demonstrates a desire to dilute or exclude the franchise of a racial or ethnic class, a plaintiff bringing an equal protection challenge to a criminal disenfranchisement law will almost certainly fail.

B. Eighth Amendment

The most obvious result of a criminal conviction is loss of liberty (i.e. incarceration). It logically follows that such a loss of liberty necessarily includes the loss of certain "rights." For example, once convicted and incarcerated, an offender can no longer exercise the right to travel freely, the right to dance on a sidewalk, and the right to go shopping. It seems reasonable that a state may also prohibit other rights while incarcerated, including the right to vote. However, many criminal disenfranchisement jurisdictions prohibit the offender from voting *after* he or she is released from custody; in some jurisdictions, this prohibition continues for life.[96] Such a regime results in criminal defendants who feel the effects of their conviction through disenfranchisement long after the rest of their sentence is complete. Some opponents of criminal disenfranchisement provisions maintain that such a system constitutes a punishment that is unnecessarily "cruel or unusual" in violation of the Eighth Amendment.[97]

The first step in the Eighth Amendment inquiry is determining whether the challenged provision is actually a punishment as opposed to a mere regulatory measure.[98] The Supreme Court has defined penal reactions to crime as those that "impose[ ] a disability for the purposes of punishment . . . to reprimand the wrongdoer, to deter others, etc . . . ."[99] Such an outcome is contrasted with non-penal provisions, which are those that "impose . . . a disability, not to punish, but to accomplish some other legitimate governmental purpose."[100] To determine if a provision is penal or non-penal, courts will look to the "evident purpose of the legislature," recognizing that a provision may manifest both penal and non-penal characteristics.[101] A court will proceed to an Eighth Amendment analysis only if it has satisfied itself that the purpose of the provision under review is punishment.

Plaintiffs seeking to prove criminal disenfranchisement laws unconstitutional as cruel and unusual punishment have been uniformly unsuc-

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96 *See supra* notes 44–53 and accompanying text.

97 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

98 *See generally* Ingraham v. Wright, 430 U.S. 651 (1977); Mark E. Thompson, Comment, *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 (2002).

99 Trop v. Dulles, 356 U.S. 86, 96 (1958).

100 *Id.*

101 *Id.*

cessful. In fact, courts have not reached the Eighth Amendment analysis because they have asserted that criminal disenfranchisement provisions are regulatory rather than penal in nature.[102] Lower federal courts seem to have drawn their support for this conclusion from a line in *Trop v. Dulles*, a 1958 Supreme Court decision. To illustrate the application of his test for determining whether a provision is regulation or punishment, Chief Justice Warren described a hypothetical bank robber who is incarcerated and loses his right to vote: "[b]ut because the purpose of the latter statute [the criminal disenfranchisement provision] is to designate a reasonable ground of eligibility for voting, the law is sustained as a nonpenal exercise of the power to regulate the franchise."[103] In his opinion, Warren did not elaborate further on this point or offer support as to why a criminal disenfranchisement provision is not penal. Regardless, a number of lower federal courts have cited this statement as precedent. The Second Circuit stated only Chief Justice Warren's pronouncement and proceeded to summarily reject an Eighth Amendment challenge to New York's criminal disenfranchisement law.[104] Similarly, in evaluating Washington's criminal disenfranchisement law, a federal trial court did not analyze whether the provision is regulation or punishment but rather accepted as a truism that it is the latter.[105] Another federal trial court actually examined the regulation versus punishment argument and concluded that because of Georgia's strong interest in regulating elections, its criminal disenfranchisement provision must be regulatory in nature.[106] Finally, the California Supreme Court took a similar approach in concluding that the state's criminal disenfranchisement provision—much like a prohibition on voting for minors and the mentally ill—is merely a regulation intended to prevent those without the requisite capacity from exercising the franchise.[107]

Given the case law, it would seem that pursuing an Eighth Amendment challenge to a criminal disenfranchisement statute would be ill-advised. Unless the United States Supreme Court is prepared to overrule *Trop*, any successful Eighth Amendment case must prove that criminal disenfranchisement provisions are penal in nature, which has yet to be done in the federal courts.[108] In the plaintiff's favor, there is a large body of scholarship that suggests retribution is the true policy justification behind these provisions, and there is little, if any, evidence to indicate convicted crimi-

102 *See* Thompson, *supra* note 98, at 186–87 ("Courts have relied on Trop as precedent for the proposition that disenfranchisement is not punishment.").

103 *Trop*, 356 U.S. at 96.

104 *See* Green v. Bd. of Elections, 380 F.2d 445, 449 (2d Cir. 1967).

105 *See* Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997), *aff'd in part, rev'd in part sub nom.* Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003).

106 *See* Kronlund v. Honstein, 327 F. Supp. 71, 73–74 (N.D. Ga. 1971).

107 *See* Otsuka v. Hite, 414 P.2d 412, 416–17 (Cal. 1966).

108 *See supra* notes 102–07 and accompanying text.

nals disrupt elections.[109] These facts will prove paramount to successfully arguing that these laws are intended as punishment. Litigants, however, should be aware that even overwhelming evidence to the contrary may be no match for crafty legislators who declare an intent to "regulate elections" within legislation or a criminal disenfranchisement-enabling constitutional provision .[110] Finally, even after convincing a court to hear an Eighth Amendment challenge on its merits, a successful plaintiff will have to argue that criminal disenfranchisement provisions *actually are* cruel and unusual punishment. The success of such a claim will depend on the length of the disenfranchisement in question and available mechanisms for having one's franchise restored. The United States Supreme Court has relied on "evolving standards of decency" that are the hallmark of "a maturing society" in determining what is and what is not cruel and unusual punishment.[111] With forty-eight states plus the District of Columbia having some sort of criminal disenfranchisement provision on the books,[112] arguing that anything is evolving is likely to be a hard sell.

C. Voting Rights Act of 1965

The legal theory summoned to the aid of criminal disenfranchisement opponents most recently is section 2 of the Voting Rights Act of 1965 ("VRA").[113] Section 2 was amended in 1982 to prohibit voting procedures that have a racially discriminatory impact, as opposed to those that have a racially discriminatory intent.[114] In this regard, there is statistical evidence

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109 *See supra* notes 34–37 and accompanying text; *see generally* Thompson, *supra* note 98.

110 However, most state constitutional provisions and statutes prescribing criminal disenfranchisement do not declare a legislative purpose, but this information may be discerned by digging into the legislative history. *See* Thompson, *supra* note 98, at 188. At least one state constitution authorizes the legislature to enact statutes to protect the sanctity of the electoral process. *See* N.M. CONST. art. VII, § 1 ("The legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise."). Following this constitutional command, the New Mexico state legislature restored the felons' voting rights upon completion of their sentences in 2001. *See* N.M. STAT. § 1-4-27.1 (2001). Ostensibly, the state legislature concluded that continuing to disenfranchise felons after they had completed their sentence was unnecessary to effectively regulate New Mexico elections.

111 Trop v. Dulles, 256 U.S. 86, 101 (1958). Recently, the Court utilized this test, in part, to hold that the execution of mentally retarded individuals violates the Eighth Amendment. Atkins v. Virginia, 536 U.S. 304 (2002).

112 *See* THE SENTENCING PROJECT, *supra* note 4, at 3.

113 42 U.S.C. § 1973 (2000).

114 *Compare* City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion) (construing the VRA before the 1982 amendment), *with* Taylor v. Haywood County, 544 F. Supp. 1122, 1134 (W.D. Tenn. 1982) (construing the VRA after the 1982 amendment). The current form of the VRA provides, in relevant part:

> (a) No voting qualification or prerequisite to voting or standard,

in the literature to demonstrate that criminal disenfranchisement provisions disproportionately affect minorities, particularly African Americans.[115] However, claims under section 2 of the VRA have historically involved minority vote dilution by operation of the way in which governments design voting districts, specifically at-large elections and multi-member districts.[116] Buoyed by this historical application, some scholars and practitioners doubt that section 2's prohibitions on voting regimes that have a racially discriminatory impact extend to criminal disenfranchisement provisions. There are records in the legislative history surrounding the passage of the original VRA that indicate Congress did not intend the VRA to prohibit states from enforcing criminal disenfranchisement laws.[117] These debates, however, took place in 1965, when Congress may not have fully understood or discussed the gross racial disparity in voting rights caused by these laws.[118]

Due to ambiguity regarding Congress' intent to cover or exclude criminal disenfranchisement provisions from section 2 protection, the case law is unresolved as to whether a challenge to a criminal disenfranchisement provision can proceed on a VRA theory.[119] The core of the disagreement is one of federalism—namely, whether Congress, via the VRA, can legislate voter qualifications, which is a power that has historically been left to the

> practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section. (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973 (2000).

115 *See supra* notes 55–59 and accompanying text.

116 *See* Daniel Hays Lowenstein & Richard L. Hasen, Election Law: Cases and Materials 188 (3d ed. 2004).

117 S. Rep. No. 89-162 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (providing the joint view of Senators Dodd, Hart, Long, Kennedy, Bayh, Burdick, Tydings, Dirksen, Hruska, Fong, Scott, and Javits) ("Subsection 4(c)(3).—The third type of test or device covered is any requirement of good moral character. This definition would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability. It applies where lack of good moral character is defined in terms of conviction of lesser crimes.").

118 *See generally supra* notes 55–59 and accompanying text.

119 *See generally* Lauren Handelsman, Note, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 Fordham L. Rev. 1875 (2005) (examining the VRA challenges to criminal disenfranchisement laws).

states.[120] In five cases involving section 2 challenges to criminal disenfranchisement laws to come before the federal appellate courts, the Second and Eleventh Circuits found that a VRA challenge could not proceed,[121] while the Sixth and Ninth Circuits held otherwise.[122] Despite the fact that the federal appeals courts have reached two different conclusions on this point, the Supreme Court denied certiorari in three of these cases.[123]

In the first of two criminal disenfranchisement cases argued on a section 2 theory to come before the Second Circuit, the court concluded that "such an application would raise serious constitutional questions regarding the scope of Congress' authority to enforce the Fourteenth and Fifteenth Amendments."[124] The court noted that criminal disenfranchisement laws existed throughout the country prior to the passage of the Civil War Amendments to the United States Constitution as proof that such laws are "not an attempt to evade the requirements" of those amendments.[125] Additionally, the court pointed out that, as courts have done with respect to equal protection challenges to criminal disenfranchisement statutes,[126] the very language of section 2 of the Fourteenth Amendment appears to authorize states to bar criminals from exercising the franchise.[127] The court reasoned, therefore, that a statute such as the VRA passed pursuant to the Fourteenth Amendment cannot be used to invalidate a procedure expressly authorized by the same amendment.[128]

120 *Id.* at 1876.

121 *See* Johnson v. Governor of Fla. (*Johnson II*), 405 F.3d 1214 (11th Cir. 2005) (holding that a VRA challenge cannot proceed on the merits), *cert. denied sub nom.* Johnson v. Bush, 126 S.Ct. 650 (2005); Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (per curiam) (same). Another case decided by a panel of the Second Circuit originally held that VRA challenge cannot proceed on the merits. Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004). The Supreme Court denied a writ of certiorari in that case. Muntaqim v. Coombe, 543 U.S. 978 (2004). However, the Second Circuit later agreed to rehear the case en banc and ultimately held that the plaintiff prisoners were not citizens of New York and therefore lacked standing to bring the suit in the first instance. *See* Muntaqim v. Coombe, 449 F.3d 371 (2d Cir. 2006) (vacating the panel's opinion).

122 *See* Farrakhan v. Washington, 338 F.3d 1009 (9th Cir 2003) (holding that a VRA challenge can proceed on the merits), *cert. denied sub nom.* Locke v. Farrakhan, 543 U.S. 984 (2004); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (same).

123 *Bush*, 126 S. Ct. at 650; *Muntaqim*, 543 U.S. at 978; *Farrakhan*, 543 U.S. at 984. The petitions for certiorari in *Farrakhan* and *Muntaqim* specifically asked the Court to review the decisions to resolve the circuit split as to whether a challenge to a criminal disenfranchisement law can proceed on a VRA section 2 theory. The Court denied both petitions on November 8, 2004. *See* Handelsman, *supra* note 119, at 1877.

124 *Baker*, 85 F.3d. at 922 (Mohoney, J., concurring).

125 *Id.* at 928.

126 *See supra* notes 74–77 and accompanying text.

127 *See Baker*, 85 F.3d. at 929 (Mohoney, J., concurring).

128 *Id.* (citing with approval Richardson v. Ramirez, 418 U.S. 24, 43 (1974)).

The Second Circuit adopted and clarified the *Muntaqim* reasoning.[129] The court referred to a canon of judicial construction known as the "Clear Statement Rule," which states that any Congressional intent to alter the balance of state and federal authority must be made clearly and explicitly.[130] After examining the text of section 2 of the VRA and the legislative history surrounding its adoption, the Second Circuit found no evidence of such intent.[131] Therefore, the Second Circuit concluded, a VRA challenge to criminal disenfranchisement laws cannot proceed to the merits.[132] Shortly after vacating its first decision—holding that a VRA challenge to Florida's criminal disenfranchisement statute is permissible—the Eleventh Circuit changed its course on the same issue.[133] The court adopted the Clear Statement Rule reasoning of *Muntaqim*, noting that the application of the VRA to criminal disenfranchisement laws "raises grave constitutional concerns."[134] The court felt that the decision to disenfranchise criminals is a matter of public policy, and "[f]ederal courts cannot question the wisdom of this policy choice."[135]

Other courts have reached the merits of a VRA challenge to criminal disenfranchisement laws. In a 1986 case, the Sixth Circuit did not discuss whether the VRA applies to such laws and instead proceeded directly to a discussion on the merits of the claim.[136] Using a totality of the circumstances test, the court concluded that the Tennessee criminal disenfranchisement statute did not result in minority vote dilution.[137] The court noted the even-handed application of the law to all felons and concluded that the law did not actually *create* fewer minority voters.[138] Rather, the court reasoned that it is the individuals themselves—both minorities and non-minorities—who have chosen to commit a proscribed act that triggered the state's interference with their franchise.[139]

As to the applicability of the VRA to criminal disenfranchisement laws, the Ninth Circuit's decision in *Farrakhan* is more instructive.[140] The court noted that "[f]elon disenfranchisement is a voting qualification," and as such, "Section 2 is clear that *any* voting qualification that denies citizens

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129 Muntaqim v. Coombe, 366 F.3d 102, 115 (2d Cir. 2004).

130 *Id.*

131 *Id.*

132 *Id.*

133 Johnson v. Governor of Fla. (*Johnson I*), 353 F.3d 1287 (11th Cir. 2003), *vacated* 377 F.3d 1163 (11th Cir. 2004).

134 Johnson v. Governor of Fla. (*Johnson II*), 405 F.3d 1213, 1234 (11th Cir. 2005).

135 *Id.* at 1235.

136 Wesley v. Collins, 791 F.2d 1255, 1259–60 (6th Cir. 1986).

137 *Id.* at 1260–61

138 *Id.* at 1262

139 *Id.* at 1262.

140 Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).

the right to vote in a discriminatory manner violates the VRA."[141] Proceeding to the merits, the Ninth Circuit noted that the plaintiffs' evidence of racial discriminatory impact was "compelling" but remanded the case for a totality of the circumstances inquiry, which the district court had failed to conduct in the initial proceeding.[142] On remand, the trial court found that although "[t]he Court has no doubt that members of racial minorities have experienced discrimination in Washington's criminal justice system," the plaintiffs failed to carry their burden of showing a discriminatory impact under a totality of the circumstances analysis.[143] Accordingly, the trial court granted summary judgment for the defendants.[144]

The question as to whether the VRA applies to criminal disenfranchisement provisions is a classic "spirit of the law" versus "letter of the law" controversy. On the one hand, the language and intent of the VRA is to prevent racial minorities from having their vote diluted. Criminal disenfranchisement laws appear to violate this spirit, as statistical evidence indicates these laws do bar a disproportionate percentage of minorities from exercising the franchise.[145] On the other hand, there is no explicit prohibition against criminal disenfranchisement laws in the VRA, and section 2 of the Fourteenth Amendment appears to implicitly approve the enactment of such laws.[146] Regardless, it is important to note that no criminal disenfranchisement statute has ever been invalidated using a VRA theory.[147] Therefore, if the U.S. Supreme Court eventually sanctions the use of section 2 of the VRA to review criminal disenfranchisement laws, it will be necessary for plaintiffs to clearly and forcefully argue the racially discriminatory effect of such laws. A showing of areas with a high-criminal, low-voting population would prove particularly useful in this regard. While some had hoped Congress would amend the VRA to reach racially discriminatory criminal disenfranchisement laws, those hopes were dashed when the 2006 VRA reauthorization did not include such language.[148]

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141 *Id.* (citing Hunter v. Underwood, 471 U.S. 222, 233 (1985)).

142 *Farrakhan*, 338 F.3d at 1020.

143 Farrakhan v. Gregoire, No. CV-96-076-RHW, 2006 WL 1889273, at *9 (E.D. Wash. July 7, 2006).

144 *Id.*

145 *See supra* notes 55–59 and accompanying text.

146 U.S. CONST. amend. XIV, § 2. *See generally supra* note 74.

147 *See* Handelsman, *supra* note 119, at 1876.

148 *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577; *see also* Charles Babington, *Voting Rights Act Extension Passes in Senate, 98 to 0*, WASH. POST, July 21, 2006, at A1.

D. Political Change

The most successful challenges to criminal disenfranchisement laws in recent years have taken place entirely outside the judicial arena. In several states, opponents of criminal disenfranchisement have successfully lobbied state legislatures to make ex-felons eligible to vote. Some states, including Tennessee in 1996,[149] Texas in 1997,[150] and New Mexico in 2001,[151] responded by restoring ex-felons' voting rights immediately upon completion of their sentence. Two other states, Delaware[152] and Nebraska,[153] recently enacted legislation to replace their lifetime felon voting ban with a five-year and two-year post-sentence prohibition on voting respectively. Maryland[154] and Nevada[155] have also passed legislation in recent years increasing ballot access for some ex-felons. A grassroots movement in Rhode Island led to the passage of a constitutional amendment in 2006 that extended the franchise to probationers and parolees.[156] Similarly, Connecticut provided voting rights to criminals on probation in 2001.[157] Finally,

149 *See* TENN. CODE ANN. § 40-29-105 (1996). In Tennessee, the individual must obtain a judgment from a local trial court in order to restore her voting rights. Individuals convicted of murder, rape, treason, or voter fraud are ineligible to have voting rights restored. *Id.* § 40-29-105(c)(2)(B).

150 *See* TEX. ELEC. CODE ANN. § 11.002 (Vernon 1997).

151 *See* N.M. STAT. § 31-13-1 (2006).

152 *See* DEL. CONST. art. V, § 2. An amendment to the Delaware Constitution in 2000 provides for automatic restoration of felon voting rights after five years have elapsed. Convictions for murder, sexual crimes, and "crimes against the public" are not eligible for automatic restoration. *Id.*

153 *See* NEB. REV. STAT. § 29-112 (2006). The Nebraska legislature initially passed Legislative Bill 53 on March 3, 2005, however Governor Dave Heinemann vetoed it. The legislature responded by overriding the veto by a vote of thirty-six to eleven. *See* Nate Jenkins, *Lawmakers Override Felon Voting Veto*, LINCOLN J. STAR (Lincoln, Neb.), Mar. 11, 2005, at B1.

154 *See* MD. CODE ANN., ELEC. LAW § 3-102 (West 2006) (removing the lifetime ban on voting for felons who are twice convicted of non-violent felonies three years after the completion of the individual's sentence).

155 *See* NEV. REV. STAT. § 213.157 (2006) (automatically restoring voting rights upon completion of the sentence for felons convicted of a first-time non-violent felony)

156 *See* R.I. CONST. art. II, § 1; *see also* OFFICE OF THE R.I. SEC'Y OF STATE, 2006 VOTER INFORMATION HANDBOOK 6 (2006), *available at* http://www.sec.state.ri.us/elections/elections/publications/referenda-guide-06.pdf; Monica Davey, *Liberals Find Rays of Hope on Ballot Measures*, N.Y. TIMES, Nov. 9, 2006, at 16.

157 *See* CONN. GEN. STAT. § 9-46a (2006).

Kentucky,[158] Virginia,[159] and Wyoming[160] have enacted disparate types of legislation aimed at making it easier for ex-felons to regain their right to vote. In the absence of legislative action, Iowa Governor Tom Vilsack announced a policy in 2005 to automatically restore ex-felons' voting rights with a monthly executive order.[161]

In addition to the panoply of states that have recently enacted legislation affecting criminals' right to vote, a large number of states are currently considering such measures.[162] In 2005 alone, no fewer than fifty bills were introduced in statehouses across the country impacting voting rights for ex-felons.[163] In Kentucky, three bills have been introduced in the 2007 General Assembly that would submit to voters an amendment to section 145 of the Kentucky Constitution permitting ex-felons to vote.[164] Criminal

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158 *See* KY. REV. STAT. ANN. § 196.045 (West 2006) (directing the Kentucky Department of Corrections to notify felons at the time of release from prison of the procedures for regaining their voting rights).

159 VA. CODE ANN. § 53.1-231.1 (2006) (requiring the Virginia Department of Corrections to notify felons at the time of release from prison of the procedures for regaining their voting rights). Under a streamlined and simplified restoration process, Governor Mark Warner restored voting rights to 3,414 ex-felons during his time in office. Christina Bellatoni, *3,414 Felons' Rights Restored*, WASH. TIMES, Jan. 13, 2006, at B1.

160 *See* WYO. STAT. ANN. § 7-13-105 (2006) (allowing first-time, non-violent ex-felons to petition the Wyoming Parole Board for a restoration of voting rights five years after the completion of their sentence).

161 *See* Iowa Exec. Order No. 42, *supra* note 46.

162 In 2006, bills were introduced in at least twenty states that would enfranchise felons or otherwise ameliorate barriers to voting for felons. TrendTrack, http://thomas.trendtrack.com/texis/tt/search (query "felon voting") (last visited Mar. 25, 2006).

163 *See* Electionline.org, *Felony Voting Legislation*, http://electionline.org/Default.aspx?tabid=291 (last visited Feb. 25, 2007).

164 *See* S.B. 15, 2007 Gen. Assem., Reg. Sess. (Ky. 2007), *available at* http://www.lrc.ky.gov/record/07RS/SB15.htm; H.B. 36, 2007 Gen. Assem., Reg. Sess. (Ky. 2007), *available at* http://www.lrc.ky.gov/record/07RS/HB36.htm; H.B. 70, 2007 Gen. Assem., Reg. Sess. (Ky. 2007), *available at* http://www.lrc.ky.gov/record/07RS/HB70.htm. HB 70, which appears to have the greatest chance of passage, is cosponsored by nineteen members of the Kentucky House of Representatives. The measure would propose a constitutional amendment to voters that would create an automatic restoration of voting rights upon the completion of a felon's sentence. Individuals convicted of murder, sexual contact with a minor, rape, and sodomy would not receive automatic voting rights restoration. Such individuals, however, could reacquire voting rights through a gubernatorial pardon. *See id.* The bill passed the house by a vote of seventy to twenty-eight, but its fate is uncertain in the senate. *See id.*; *see also* Brandon Ortiz, *Senator Upset His Amendment Cut—Mongiardo: Republicans' Hypocrisy Exposed*, LEXINGTON HERALD-LEADER, Mar. 1, 2007, at D4; Sarah Vos, *Amendment to Restore Vote to Felons Advances—House OK's Measure for Most Offenses*, LEXINGTON HERALD-LEADER, Mar. 1, 2007, at D4.

Similarly, three bills to amend section 145 to allow varying levels of ex-felon voting were filed during the 2006 General Assembly. *See* S.B. 184, 2006 Gen. Assem., Reg. Sess. (Ky. 2006), *available at* http://www.lrc.ky.gov/record/06RS/SB184.htm; H.B. 434, 2006 Gen. Assem., Reg. Sess. (Ky. 2006), *available at* http://www.lrc.ky.gov/record/06RS/HB434.htm; H.B. 480, 2006

disenfranchisement laws have come to the attention of Congress as well. In 2005, Senator Hillary Rodham Clinton introduced the Make Every Vote Count Act, which would allow ex-felons who have completed their terms of incarceration, probation, and parole to vote in all federal elections notwithstanding a state-mandated prohibition on voting in other elections.[165] Congressman Charles Rangel has introduced similar legislation in the 110th Congress.[166]

The removal of barriers to criminal voting rights via legislation follows no discernable geographic or ideological trend. The fact that states as dissimilar as Connecticut, Nebraska, Texas, Virginia, and Wyoming have taken steps to enfranchise criminals means that this issue is gaining exposure throughout the country. If history is any indication, much of the pending legislation will not be enacted into law; however, with each introduced bill, the plight of disenfranchised criminals gains notoriety. Perhaps the recent legislative response has been motivated by public officials who desire a more inclusive democracy—one in which more individuals are allowed to cast ballots for the representatives of their choice. Regardless of the effect of benevolent intent, recent legislation surely has been driven in part by a strong public consensus on the issue.[167] In 2002, a team of sociologists surveyed 1,000 American adults and found that eighty percent favored voting rights for ex-felons who have completed their terms of incarceration, probation, and parole.[168] In addition, the survey found that sixty-four percent of respondents favored voting rights for probationers, and sixty percent supported voting rights for parolees.[169] It is likely that lawmakers are hearing—and responding to—the voices of many of these constituents.

Gen. Assem., Reg. Sess. (Ky. 2006), *available at* http://www.lrc.ky.gov/record/06RS/HB480.htm. Despite having nineteen co-sponsors, HB 480 never received a hearing in committee. Similarly, HB 434 was withdrawn by the sponsor, and SB 184 died in the State and Local Government Committee.

As one of the three states to permanently prohibit ex-felons from voting, Kentucky's disenfranchisement regime has received increasing attention. A League of Women Voters report notes that one in every seventeen Kentucky adults—186,248 otherwise voting-eligible individuals in all—cannot vote because of a felony conviction. Jack Brammer, *League: Restore Felons' Voting Rights*, LEXINGTON HERALD-LEADER, Nov. 3, 2006, at B7. The rate rises to one in four among African Americans. *See id.* In fact, Kentucky has the highest African American felony disenfranchisement rate in the country and is sixth-highest overall. *See* Editorial, *Right This Wrong—When Debt to Society is Paid, Let Felons Vote*, LEXINGTON HERALD-LEADER, Nov. 15, 2006, at A12.

165 S. 450, 109th Cong. (2005). A companion bill was introduced by Representative Stephanie Tubbs Jones in the House of Representatives. H.R. 939, 109th Cong. (2005). Both bills died in committee.

166 H.R. 818, 110th Cong. (2007).

167 Jeff Manza et al., *Public Attitudes Towards Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 280 (2004).

168 *Id.* at 280–81.

169 *Id.*

Activist organizations and the media have joined the fight for equal voting rights as well. The Sentencing Project operates a clearinghouse for criminal disenfranchisement news and information from around the country.[170] Other advocacy groups such as the National Association for the Advancement of Colored People ("NAACP") Legal Defense Fund[171] and the American Civil Liberties Union ("ACLU") Voting Rights Project[172] contribute financial and staff resources to assist with litigation involving challenges to criminal disenfranchisement laws. Numerous local advocacy groups have joined the campaign and have organized grassroots movements throughout the country.[173] In addition, the media has joined those calling for an end to ex-felon disenfranchisement regimes, as editorials and opinion pieces to this effect have appeared in print throughout the country.[174]

E. Restoration

Restoration of civil rights, while neither a permanent solution to the plague of criminal disenfranchisement laws nor a frontal attack on the laws themselves, is the most rapid and effective way felons are able to regain their right to participate in the democratic process. Individuals who do not reside in a jurisdiction that automatically restores criminals' voting rights and who are unwilling or unable to launch a court battle to challenge the law that disenfranchises them are left with one option: the restoration process. Procedures for having voting rights restored vary widely from state to state.[175] In most states, the restoration process is difficult for ex-felons to navigate; for the undereducated applicant without assistance, it is nearly impossi-

170 *See* The Sentencing Project, *Felony Disenfranchisement*, http://www.sentencingproject.org/pubs_05.cfm (last visited Feb. 19, 2006).

171 *See* National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, http://www.naacpldf.org (last visited Feb. 25, 2007).

172 American Civil Liberties Union, *Voting Rights Project*, http://www.aclu.org/votingrights/exoffenders/index.html (last visited Feb. 25, 2007).

173 For example, Kentuckians for the Commonwealth is leading a grassroots movement in Kentucky to amend the state's constitution to allow ex-felons to vote. *See generally Restoration of Voting Rights*, KFTC CITIZENS LEGISLATIVE GUIDE (Kentuckians for the Commonwealth, London, Ky.), Jan. 17. 2006, at 5

174 *See, e.g.*, Editorial, *Building Better Citizens*, N.Y. TIMES, Oct. 28, 2006, at 14; Derrick Z. Jackson, Op-Ed, *Where Are Voting Rights for Ex-Felons*, BOSTON GLOBE, Nov. 16, 2005, at A15; Editorial, *Nebraska in the Lead*, N.Y. TIMES, Aug. 29, 2005, at A-14; Rebecca Perl, *The Last Disenfranchised Class*, NATION, Nov. 24, 2003; Cindy Rodriguez, Op-Ed, *Parolees Deserve the Right to Vote*, DENV. POST, Dec. 20, 2005, at F-01; R. David Stengel, *Return Voting Rights to Ex-Felons—Voters are Less Likely to be Rearrested*, LEXINGTON HERALD-LEADER, Feb. 19, 2007, at A11; Commentary, *Voting Rights for Ex-Felons*, CHRISTIAN SCI. MONITOR, Mar. 1, 2005, 8; Editorial, *Voting Rights for Ex-Felons*, WASH. POST, Oct. 27, 2004, at A24; Adrienne Washington, Op-Ed, *Let All the People Feel the Power of the Their Vote*, WASH. TIMES, Oct. 21, 2004, at B02.

175 *See* EWALD, *supra* note 5, at 3–4.

ble.[176] For example, Kentucky Governor Ernie Fletcher began requiring restoration applicants to write an essay as part of their application, a feat nearly impossible for a poorly educated ex-felon.[177] Surveys of election officials in states with restoration procedures have discovered discrepancies in the application of disenfranchisement statutes and process for approving restoration petitions.[178] Perhaps more disturbing, many states employ election officials who are unfamiliar with disenfranchisement and restoration laws; in many cases, the officials provided incorrect information to those involved in the study.[179] Finally, the administration of a restoration application review process is expensive and inefficient.[180] This puts a significant strain on state employees and budgets that are already overextended.

As automatic voting rights restoration laws have grown in popularity, the number of states with restoration mechanisms has decreased. However, those states that still require ex-felons to petition the government to be re-enfranchised are in need of immediate reform. Officials must standardize procedures throughout each state and make the application processes as non-restrictive as possible. Antiquated, confusing, and arrogant restoration practices only serve to exacerbate the dire condition of ex-felon voting rights in this country, and therefore legislatures must fix them immediately.

IV. What Now?

For a nation that considers itself one of the pinnacles of democracy in the world, the United States does a poor job of guaranteeing fully participatory elections. The 2000 presidential election shed light on just how non-democratic many voting procedures are throughout the country. In response,

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176 *See id.* at 7–8.

177 *See* Mark R. Chellgren, *Pardon Advocates Take Advantage of Jobs Scandal*, Ky. Post (Covington, Ky.), Oct. 3, 2005, at K1. The Fletcher Administration also began requiring the applicant to provide three references and giving the local prosecutor veto power over the application. *Id.* The decision to require applicants to write an essay is ironic and troubling in light of Governor Fletcher's recognition that "60 percent of the prison population, and 90 percent of those on death row, can't read." Ernie Fletcher, Governor, Commonwealth of Ky., State of the Commonwealth Address (Jan. 13, 2004), *available at* http://governor.ky.gov/multimedia/speeches/sotc_2004.htm. One wonders whether this practice qualifies as a literacy test, which, of course, is prohibited by the Voting Rights Act. Notwithstanding the stringent new restoration policy, Fletcher has restored the voting rights of 730 previously-disenfranchised Kentucky citizens in nearly four years in office. *See* Jack Brammer, *Panel Approves Limiting Pardoning Powers—Restoration of Voting Rights for Felons Also OK'd*, Lexington Herald-Leader, Feb. 14, 2007, at A1. This figure, however, is dismal when compared to the total number of applications received. *See* Editorial, *Right This Wrong—When Debt to Society is Paid, Let Felons Vote*, Lexington Herald-Leader, Nov. 15, 2006, at A12.

178 *See* Ewald, *supra* note 5, at 8–9, 17.

179 *See id.* at 15–16.

180 *See id.* at 10–12.

Congress enacted the Help America Vote Act, which provides standards for voting procedures throughout the country and funding to ensure that all voting age non-felons are able to participate in the electoral process.[181] It seems ironic that this country has made it a national priority to expand ballot access to all individuals, no matter how politically uninformed they may be, while demonstrating largely lukewarm interest in re-enfranchising a segment of the population that numbers into the millions. Moreover, public officials struggle to create new strategies for "rehabilitating" ex-felons. It seems that a government that recognizes the value of every person's citizenship through extension of voting rights has gone a long way toward reintegrating ex-felons into life beyond the prison walls. As one disenfranchised ex-felon observed, "[w]hen the system disregards people, the people disregard the system . . . ."[182]

Given the mostly fruitless efforts to use the courts to overturn barriers to ex-felon voting, opponents of the practice must turn their attention to the political sector. The confluence of public opinion, advocacy networks, and the media during the past decade appears to have produced a "perfect storm" for opponents of criminal disenfranchisement laws. While litigants seeking voting rights for ex-felons have generally fared poorly in the judicial system, substantial progress is being made on the political front. This disparity is undoubtedly due to the pervasive public discourse being generated on the topic. While those who view criminal disenfranchisement laws as unconstitutional, illegal, or both may be disappointed by the nearly uniform refusal of the courts to overturn these laws, those who are working for criminal voting rights must realize that the fight is most likely to be won in the political arena. The litigant challenging a criminal disenfranchisement law in court is well-advised to abandon her costly litigation and focus instead on lobbying elected officials for change.

With widespread public and media support and a number of enacted legislative provisions to their credit, those in the criminal disenfranchisement movement are in a position to score significant legislative victories. And they must. Across the country, courthouses almost uniformly slam the doors shut to criminals attempting to regain voting rights. Absent a dramatic, marked change in American jurisprudence on the issue, only the political arena remains for the vindication of criminals' voting rights. Whether it is because they are anti-rehabilitative, unfair, racist, purposeless, anachronistic, unconstitutional, or perhaps a combination of all these reasons, criminal disenfranchisement laws are a hallmark of an era whose time has passed. It is time to put these vestiges of a sad history to rest once and for all.

181 Help America Vote Act of 2001, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

182 DVD: Democracy's Ghosts (ACLU 2005).