

Written Submission of  
**Sean Morales-Doyle**  
Senior Counsel, Democracy Program  
Brennan Center for Justice at NYU School of Law

To the  
State Government, Tribal Relations & Elections Committee of the Washington Senate at the  
Work Session Concerning Washington's Criminal Disenfranchisement Law

October 22, 2019

Thank you for the opportunity to express support for restoring voting rights to Washingtonians living in the community with criminal convictions in their past. Rights restoration encourages civic participation, offers a second chance to those who have served their time, and furthers equality. It will also reduce confusion for both citizens and election officials alike. The Brennan Center has worked to reform criminal disenfranchisement laws at the state and federal levels for decades, through research, legislative and executive advocacy, and public education.<sup>1</sup> We enthusiastically support efforts to reform Washington's criminal disenfranchisement law.

Below, I explain why automatically restoring voting rights is good policy, provide some background on the issue nationally and in Washington, and offer suggestions on how to make this vital reform even more effective.

#### **A. The Benefits of Rights Restoration.**

For years, thanks in no small part to the work of this Committee, Washington has been a national leader in advancing democracy reforms and honoring the right to vote. This is a state that clearly understands the value of an expansive democracy that welcomes citizens to make their voices heard. The power of that welcoming message is never stronger than when it is delivered to people who are reintegrating into their communities after a conviction.

---

<sup>1</sup> The Brennan Center for Justice at NYU School of Law is a nonpartisan public policy and law institute that works to reform, revitalize, and defend our country's system of democracy and justice. The Brennan Center's work on rights restoration has been widely cited by legislators, government agencies, academic journals, and the media, and our experts have testified frequently before Congress and state legislatures across the country. I am a Senior Counsel in the Center's Democracy Program, focusing on voting rights and election administration. The opinions expressed in this testimony are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law.

As this Committee will hear today from justice-involved individuals, civic engagement is one component of healthy reentry. Our communities benefit when we encourage returning citizens to see themselves as a worthy part of the larger society. We can do that by giving them a vote, and therefore, a voice. On the other hand, when we deny people the right to vote, we tell them that their voices do not matter, and that they do not have a stake in the community. For this reason, both the American Probation and Parole Association and the Association of Paroling Authorities International have passed resolutions in favor of restoring voting rights upon release from prison.<sup>2</sup>

## **B. Criminal Disenfranchisement Nationwide.**

Sixteen states, both red and blue, plus Washington, D.C., restore voting rights immediately upon an individual's release from prison, while two states (Maine and Vermont) never take the right to vote away.<sup>3</sup> As a result, there are millions of Americans living in our communities—working, paying taxes, and raising families—who cannot vote because of a past criminal conviction.<sup>4</sup>

But the momentum for reform is growing. Building on a trend that stretches back two decades, three states took major actions last year to restore voting rights.<sup>5</sup> In New York, Governor Andrew Cuomo issued an executive order restoring voting rights to people on parole—an action that has impacted more than 30,000 people. In Louisiana, the legislature restored voting rights to over 36,000 people on parole or probation who have not been in prison for at least five years. And in Florida, voters overwhelmingly approved a constitutional amendment, known as Amendment 4, to restore voting rights to 1.4 million people previously disenfranchised for life.

This year, there was even more progress. In Iowa, one of only two states left with permanent disenfranchisement for all people with felony convictions, Governor Kim Reynolds announced her support for a constitutional amendment to put an end to that practice.<sup>6</sup> And in

---

<sup>2</sup> See AM. PROBATION & PAROLE ASS'N, RESOLUTION SUPPORTING RESTORATION OF VOTING RIGHTS (Oct. 17, 2007), available at [https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA\\_2&webcode=IE\\_NewsRelease&wps\\_key=a587deaf-9cbf-4efd-bd8d-025c14143f65](https://appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IE_NewsRelease&wps_key=a587deaf-9cbf-4efd-bd8d-025c14143f65); ASS'N OF PAROLING AUTHS. INT'L, RESOLUTION ON RESTORING VOTING RIGHTS (Apr. 30, 2008), available at <http://www.apaintl.org/about/resolutions.html>.

<sup>3</sup> See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE (last revised May 31, 2019), [https://www.brennancenter.org/sites/default/files/legal-work/2019.5.31\\_Criminal\\_Disenfranchisement\\_Map.pdf](https://www.brennancenter.org/sites/default/files/legal-work/2019.5.31_Criminal_Disenfranchisement_Map.pdf) (attached as Appendix A).

<sup>4</sup> CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT 16 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [hereinafter 6 MILLION LOST VOTERS].

<sup>5</sup> MORGAN MCLEOD, THE SENTENCING PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM 16 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/10/Expanding-the-Vote-1997-2018.pdf>.

<sup>6</sup> Stephen Gruber-Miller, *Kim Reynolds says she will continue to push efforts to give offenders a 'second chance,'* DES MOINES REGISTER (Oct. 15, 2019), <https://www.desmoinesregister.com/story/news/politics/2019/10/15/kim-reynolds-criminal-justice-working-group-naacp-felon-voting-rights/3984937002/?eType=EmailBlastContent&eId=a512b2f3-5961-419d-ac41-4831b5f0a07e>.

Kentucky, the other state that permanently disenfranchises returning citizens, a poll found that almost two-thirds of residents are in favor of rights restoration.<sup>7</sup> Colorado<sup>8</sup> and Nevada<sup>9</sup> enacted legislation automatically restoring voting rights to individuals upon release from prison. Several other states also considered bills this year that would restore voting rights to people previously convicted of a felony.<sup>10</sup> And in New Jersey, there is legislation still under consideration.<sup>11</sup>

Rights restoration has also become part of the national dialogue, with all major 2020 Democratic presidential candidates taking a position on the issue.<sup>12</sup> The House of Representatives also passed H.R. 1, an omnibus democracy reform package that includes the Democracy Restoration Act (the “DRA”), which would require all states to automatically restore voting rights in federal elections upon release from prison.<sup>13</sup> The DRA has also been introduced as a standalone bill in both chambers of Congress.<sup>14</sup>

### **C. Criminal Disenfranchisement in Washington State.**

While Washington has been a national leader in passing pro-voter laws, including the “Access to Democracy” package in 2018<sup>15</sup> and legislation ending prison-based gerrymandering in 2019,<sup>16</sup> it has the most regressive criminal disenfranchisement policy on the West Coast. Its policy is on par with that of Texas and Georgia. Under the current law, individuals convicted of a felony are prohibited from voting while they are in prison or on community custody.<sup>17</sup> As a

---

<sup>7</sup> Joe Sonka, *Poll: Two-Thirds of Kentuckians Support Automatic Restoration of Voting Rights for Felons*, INSIDER LOUISVILLE (Jan. 22, 2019), <https://insiderlouisville.com/government/poll-two-thirds-of-kentuckians-support-automatic-restoration-of-voting-rights-for-felons/>.

<sup>8</sup> H.B. 19-1266, 72nd Gen. Assemb., 1st Reg. Sess. (Colo. 2019).

<sup>9</sup> A.B. 431, 80th Leg., 1st Reg. Sess. (Nev. 2019).

<sup>10</sup> *Voting Laws Roundup 2019*, BRENNAN CTR. FOR JUSTICE (July 10, 2019), <https://www.brennancenter.org/analysis/voting-laws-roundup-2019> (attached as Appendix B).

<sup>11</sup> S771, 218th Leg. (N.J. 2018); S2100, 218th Leg. (N.J. 2018).

<sup>12</sup> Nicholas Riccardi, *2020 Democrats Confronting Debate Over Letting Felons Vote*, WASH. POST (Apr. 24, 2019), [https://www.washingtonpost.com/politics/2020-democrats-confronting-debate-over-letting-felons-vote/2019/04/24/4d0c9eb4-66ac-11e9-a698-2a8f808c9c9c\\_story.html?utm\\_term=.100439b503aa](https://www.washingtonpost.com/politics/2020-democrats-confronting-debate-over-letting-felons-vote/2019/04/24/4d0c9eb4-66ac-11e9-a698-2a8f808c9c9c_story.html?utm_term=.100439b503aa).

<sup>13</sup> Office of the Clerk, Final Vote Results for Roll Call 118, U.S. House of Representatives (Mar. 8, 2019), <http://clerk.house.gov/evs/2019/roll118.xml>.

<sup>14</sup> H.R. 196, 116th Cong. (2019); S. 1068, 116th Cong. (2019).

<sup>15</sup> S.B. 6002, 65th Leg., Reg. Sess. (Wash. 2018).

<sup>16</sup> S.B. 5287, 66th Leg., Reg. Sess. (Wash. 2019).

<sup>17</sup> R.C.W. § 29A.08.520.

result, there are over 20,000 Washingtonians living freely in the community who are unable to vote.<sup>18</sup>

Moreover, the law only “provisionally” restores voting rights to people who have completed their term of incarceration and/or community custody but still owe legal financial obligations.<sup>19</sup> This means that that a person can have their voting rights revoked if they fail to make timely payments.<sup>20</sup> It also means that the right to vote could be contingent on a person’s ability to pay, which is unconstitutional and a violation of the fundamental principle that voting rights should not be reserved for the wealthy.<sup>21</sup> And while these revocations are rare, this provision causes confusion about who is eligible, and discourages even eligible voters from registering and voting.<sup>22</sup> In fact, the law is made even more confusing by the fact that provisional restoration applies only to people convicted of felonies in Washington state court and not federal or out-of-state courts.

The damaging impact of Washington’s law is felt disproportionately by communities of color. As a result of racial disparities in the criminal justice system, Washington’s Black residents are four times more likely to be disenfranchised than the state’s non-Black residents, a rate higher than Oregon and California.<sup>23</sup> This is the case across the country, and there is a deep and troubling history of racism driving criminal disenfranchisement laws in this country.<sup>24</sup> Many of these laws, including Washington’s, date back to the Reconstruction Era.<sup>25</sup>

---

<sup>18</sup> WASH. STATE DEP’T. OF CORR., FACT CARD (Sept. 30, 2019), available at <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>.

<sup>19</sup> R.C.W. § 29A.08.520(1).

<sup>20</sup> *Id.* § 29A.08.520(2). In Washington, legal financial obligations are imposed at an average of \$2,540 per person in a felony case, and have an annual interest rate of 12%, which is mandated by state law. *Questions and Answers about Legal Financial Obligations (LFOs)*, ACLU OF WASHINGTON, <https://www.aclu-wa.org/questions-and-answers-about-legal-financial-obligations-lfos> (last visited Oct. 21, 2019).

<sup>21</sup> *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (striking down a poll tax because “[v]oter qualifications have no relation to wealth. . .”). Just last week, applying *Harper*, a federal court in Florida preliminarily enjoined the application of a law that requires the repayment of legal financial obligations before voting rights are restored to bar individuals who are unable to pay their obligations from voting. *Jones v. DeSantis*, No. 4:19cv300-RH/MJF, 2019 WL 5295192, at 11-13 (N.D. Fla. Oct. 18, 2019).

<sup>22</sup> *Disenfranchisement News: Re-enfranchised black voters helped push Doug Jones to victory*, THE SENTENCING PROJECT, Dec. 21, 2017, <https://www.sentencingproject.org/news/disenfranchisement-news-re-enfranchised-black-voters-helped-push-doug-jones-victory/> (noting that many impacted individuals in Washington were not aware they may vote as long as their LFO account is in good standing and, as a result, assumed they could not vote); *see also, generally*, ERIKA WOOD & RACHEL BLOOM, AM. CIVIL LIBERTIES UNION & BRENNAN CTR. FOR JUSTICE, DE FACTO DISENFRANCHISEMENT (2008), [https://www.brennancenter.org/sites/default/files/2019-08/Report\\_DeFactoDisenfranchisement.pdf](https://www.brennancenter.org/sites/default/files/2019-08/Report_DeFactoDisenfranchisement.pdf) (attached as Appendix C).

<sup>23</sup> In 2016, Washington disenfranchised 3.71% of its Black residents due to felony convictions, while Oregon and California did so at a rate of 2.62% and 3.41%, respectively. *See* 6 MILLION LOST VOTERS, *supra* note 4, at 16.

<sup>24</sup> ERIN KELLEY, BRENNAN CTR. FOR JUSTICE, RACISM AND FELONY DISENFRANCHISEMENT (2017), [https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement\\_History.pdf](https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf) (attached as Appendix D).

<sup>25</sup> Washington’s first felony disenfranchisement law was passed in 1866, when Washington was a territory. Territorial Law of 1866 (Rem. & Bal. Code, § 4755) (“No idiot, or insane person, or persons convicted of an infamous crime, shall be entitled

Advocates have spent years trying to change Washington’s law. Early efforts included litigation brought under the Voting Rights Act of 1965.<sup>26</sup> After years of litigation, and despite “uncontroverted” evidence of the law’s racially discriminatory impact,<sup>27</sup> the case was ultimately unsuccessful.<sup>28</sup> Though the legislature has made advances in the recent past,<sup>29</sup> it is time the state put an end to the confusion and declare that every adult citizen living in the community is eligible to vote. The political environment in Washington is ripe for this vital reform.

#### **D. The Finer Points: Designing Rights Restoration for Washington**

It is critical, however, that lawmakers reform the state’s criminal disenfranchisement policy in a way that truly engages those whose rights are being restored. The benefits of rights restoration are only fully realized if people exercise their newly restored rights. So, beyond automatically restoring voting rights to anyone not currently in prison or on community custody, we recommend that the legislature include two specific features. First, the law should require verbal as well as written notice of rights restoration to each person placed on community custody or released from prison. Second, the law should require the Department of Corrections (“DOC”) to collect and submit voter registration forms.

##### **1. Require verbal notification of rights restoration.**

Under current law, DOC is required to provide individuals with written notice of the process for provisional and permanent restoration of voting rights prior to their release from DOC’s authority. As we have recently learned working with partners working to register people on parole in New York after the Governor’s decision to use his pardon power to restore voting rights, a simple written notification is often not enough. The moment a person is released from prison is a critical point in their life, during which time it is crucial that they be provided information about how to reintegrate. However, it is also a moment when they have many other things on their mind and a lot of work ahead of them. We think it is important to require verbal notice of voting rights as well. This is a simple change, but it will make it more likely that the person receiving the information will take note and consider the possibility of registering.

---

to the privilege of an elector.”); *see also* Territorial Law of 1881 (Rem. & Bal. Code, § 3054) (“A crime shall be deemed infamous which is punishable by death or imprisonment in the penitentiary.”). The territorial law was written into the Washington Constitution as article VI, section 3 at the Constitutional Convention of 1889. 1941-42 Op. Wash. Att’y Gen. No. 209 (July 24, 1942). As originally enacted, article VI, section 3 provided, “[a]ll idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights, are excluded from the elective franchise.” *Id.*

<sup>26</sup> *Farrakhan v. Locke*, 987 F.Supp. 1304 (E.D.Wa.1997). *See also* *Madison v. Washington*, 163 P.3d 757 (Wash. 2007) (rejecting challenge to Washington’s criminal disenfranchisement law under the equal protection clause of the U.S. Constitution and the privileges and immunities clause of the Washington Constitution).

<sup>27</sup> *Farrakhan v. Gregoire*, 590 F.3d 989, 1015 (9th Cir. 2010).

<sup>28</sup> *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

<sup>29</sup> H.R. 1517, 61st Leg., Reg. Sess. (Wash. 2009).

## **2. Require DOC to collect and submit voter registration forms.**

Under current law, DOC is required to provide individuals with a voter registration form and written instructions for returning the form by mail prior to their release from DOC's authority. As this legislature recently recognized when it passed automatic voter registration into law, it is important to make the voter registration process as simple and streamlined as possible so that registration does not become an unnecessary barrier between a politically engaged citizen and the ballot box. We therefore suggest that DOC should be required: (1) to provide voter registration forms at the moment of rights restoration; and (2) to send completed forms to elections officials in order to ensure that returning citizens are actually getting registered. For people sentenced to prison, this will mean providing them the opportunity to be registered just prior to their release. For those sentenced only to community custody, this will mean providing them the opportunity to be registered at the beginning of their term of custody, perhaps at their first contact with a community corrections officer.

**Table of Contents**

Appendix A – Criminal Disenfranchisement Laws Across the United States

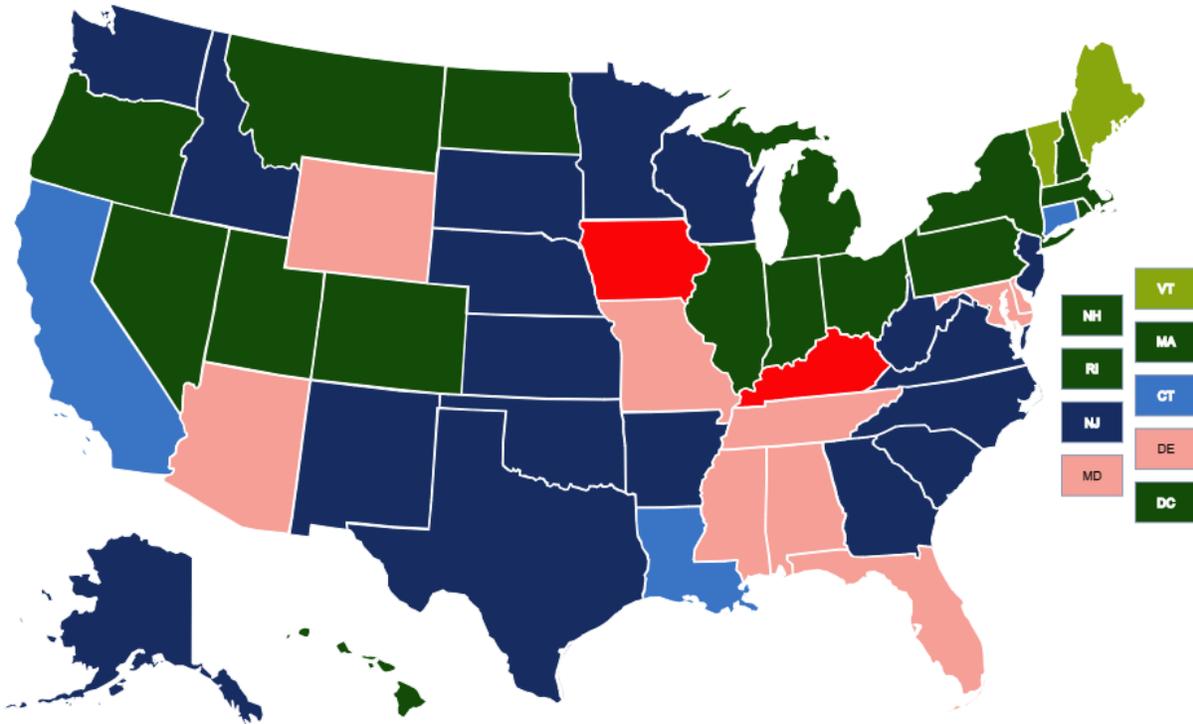
Appendix B – Voting Laws Roundup 2019

Appendix C – *De Facto* Disenfranchisement

Appendix D – Racism and Felony Disenfranchisement

# **APPENDIX A**

# Criminal Disenfranchisement Laws Across the United States<sup>1</sup>



-  **Permanent disenfranchisement for all people with felony convictions, unless government approves individual rights restoration:** IA, KY
-  **Permanent disenfranchisement for at least some people with criminal convictions, unless government approves restoration:** AL, AZ, DE, FL, MD, MO, MS, TN, WY
-  **Voting rights restored upon completion of sentence, including prison, parole, and probation:** AK, AR, GA, ID, KS, MN, NE, NJ, NM, NC, OK, SC, SD, TX, VA, WA, WV, WI
-  **Voting rights restored automatically after release from prison and discharge from parole (people on probation may vote):** CA, CT, LA
-  **Voting rights restored automatically after release from prison:** CO, DC, HI, IL, IN, MA, MI, MT, NH, ND, NV, NY, OH, OR, PA, RI, UT
-  **No disenfranchisement for people with criminal convictions:** ME, VT

<sup>1</sup> Even with these general categories there are variations in when states restore voting rights, including differing policies regarding whether citizens with pending legal financial obligations (LFOs) relating to their conviction are eligible to vote, how long citizens must wait after incarceration for restoration, and whether and in what circumstances misdemeanors are disenfranchising.

## State-by-State Breakdown

Last updated *May 31, 2019* **Permanent disenfranchisement for all people with felony convictions, unless government approves individual rights restoration:****Iowa****Kentucky** **Permanent disenfranchisement for at least some people with criminal convictions, unless government approves individual rights restoration:**

**Alabama:** People with certain felony convictions involving moral turpitude can apply to have their voting rights restored upon completion of sentence and payment of fines and fees; people convicted of some specific crimes - including murder, rape, treason, and crimes involving children - are permanently barred from voting.

**Arizona:** People convicted of one felony can have their voting rights restored upon completion of sentence, including all prison, parole, and probation terms and payment of legal financial obligations. People convicted of two or more felonies are permanently barred from voting unless pardoned or restored by a judge.

**Delaware:** People with most felony convictions have their voting rights restored automatically after completion of sentence, including prison, parole, and probation. People who are convicted of certain disqualifying felonies - including murder, bribery, and sexual offenses - are permanently disenfranchised. People convicted of election offenses are disenfranchised for 10 years following their sentences.

**Florida:** Florida voters approved a November 2018 constitutional amendment which automatically restores the right to vote to 1.4 million individuals with felony convictions in their past. The amendment restores the right to vote for people with felony convictions, except individuals convicted of murder or felony sexual offenses, once they have completed the terms of their sentence, including probation and parole.

**Maryland:** As of March 10, 2016, voting rights are restored automatically after release from court-ordered sentence of imprisonment. People who are convicted of buying or selling votes are permanently disenfranchised.

**Mississippi:** People who are convicted of specified disqualifying offenses are permanently disenfranchised unless pardoned by the governor or their right to vote is restored by a two-thirds vote of both houses of the legislature.

**Missouri:** People with most felony convictions have their voting rights restored automatically after completion of sentence, including prison, parole, and probation. People who are convicted of election-related offenses are permanently disenfranchised.

**Tennessee:** Tennessee has one of the most complex disenfranchisement policies in the country. People completing sentences for some felony convictions, who have paid all restitution and court costs, and are current with child support payments may apply for rights restoration. Individuals with certain types of convictions, including rape, murder, and bribery, among others, are permanently disenfranchised.

**Wyoming:** Voting rights automatically restored after five years to people who complete sentences for first-time, non-violent felony convictions in 2016 or after. Applications are required from people who completed sentences for first-time, non-violent felony convictions before 2016, and

from people convicted outside Wyoming, or under federal law. People with violent convictions or with multiple felony convictions are permanently disenfranchised, unless pardoned by the governor.

 **Voting rights restored upon completion of sentence, including prison, parole and probation:**

**Alaska**

**Arkansas**

**Georgia**

**Idaho**

**Kansas**

**Minnesota**

**Nebraska:** In Nebraska, voting rights are restored two years after the completion of sentence. Nebraska disenfranchises persons with treason convictions until they have their civil rights individually restored.

**New Jersey**

**New Mexico**

**North Carolina**

**Oklahoma:** In Oklahoma, citizens are disenfranchised for the time period set out in their original sentence. Voting rights are restored once this time period has elapsed.

**South Carolina**

**South Dakota**

**Texas**

**Virginia:** Virginia is one of four states whose constitution permanently disenfranchises citizens with past felony convictions but grants the state's governor the authority to restore voting rights. After a July 2016 Virginia Supreme Court decision invalidated an executive order restoring voting rights to over 200,000 citizens, the state's governor now issues individual restorations for citizens who have completed the terms of their sentence, including probation and parole.

**Washington**

**West Virginia**

**Wisconsin**

 **Voting rights restored automatically after release from prison and discharge from parole (people on probation may vote):**

**California**

**Connecticut**

**Louisiana:** Voting rights are restored for those on probation or parole who have not been incarcerated during the last five years. Practically speaking, this means many if not most people on

probation are eligible to vote and a small number of people on parole for more than five years are eligible.



**Voting rights restored automatically after release from prison:**

**Colorado**

**Hawaii**

**Illinois**

**Indiana**

**Massachusetts**

**Michigan**

**Montana**

**Nevada**

**New Hampshire**

**North Dakota**

**New York:** On April 18, 2018, Governor Cuomo announced that he would restore the right to vote to New Yorkers on state parole through executive order. Since then, he has restored voting rights to over 24,000 New Yorkers living and working in their communities. Prior to this announcement, New Yorkers were disenfranchised until the completion of incarceration and parole.

**Ohio:** Persons who have been twice convicted of a violation of Ohio's elections law are permanently disenfranchised.

**Oregon**

**Pennsylvania**

**Rhode Island**

**Utah**

**Washington, D.C.**



**No disenfranchisement for people with criminal convictions**

**Maine**

**Vermont**

# APPENDIX B

## EXPERT BRIEF

# Voting Laws Roundup 2019

With most legislatures closed, major positive reforms were enacted, but a handful of states made it more difficult to vote.

Brennan Center for Justice

LAST UPDATED: July 10, 2019

PUBLISHED: July 10, 2019



**Ensure Every  
American Can Vote**

Voting Reform



At this point in the year, 42 state legislatures have concluded their last regular legislative session in the leadup to a presidential election year. Looking back at this session, three new, Democratic trifectas – New York, Nevada, and Colorado – were responsible for an outsize portion of the most impactful expansive voting laws enacted so far this year. [1]

At the same time, a late-session surge in legislation cutting back voting access was successful in creating new restrictions in five states. Most significantly, in Florida, a new restriction cuts back on the gains made by Amendment 4. This new restriction could dramatically curtail the number of people who get their voting rights back under Amendment 4 and it flies in the face of the voters' decision last November to expand voting access. In addition, in Tennessee, lawmakers added new burdens on voter registration drives. And in Texas, lawmakers pushed through a new restriction on early voting, but it could have been even worse, if a powerful coalition had not come together to stop an even more restrictive bill that was moving toward passage.

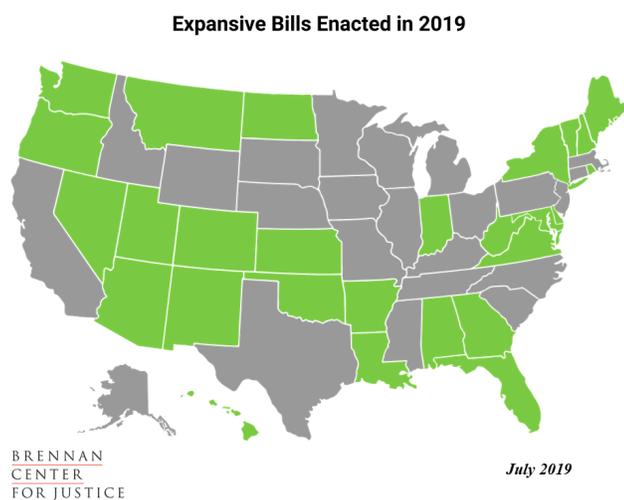
Overall, since the start of the session, 46 states have introduced or carried over 688 bills expanding access compared to 29 states have introduced or carried over at least 87 bills restricting voting access. In addition, 33

states have introduced or carried over at least 108 bills related to election security.

### Expansive Voting Bills

The massive burst of pro-voter bills introduced this session – 688 bills in 46 states – translated into significant reform across the country. As a group, states with new, Democratic trifectas led the way in terms of expansive laws this year – and, within that group, New York, Colorado, and Nevada enacted multiple, high-impact reforms. In addition, Delaware and Virginia enacted early in person voting. And a number of other states – under Democratic, GOP, and mixed control – enacted reforms that are either more incremental or alleviate past voter suppression.

(Click [here](#) for a list of expansive bills that have passed at least one house and are still alive – as we are now deep into the legislative calendar, bills that have seen significant movement are generally the ones to watch for passage.)



A couple of other trends emerged as well. States enacted a number of bills providing notice and cure opportunities for absentee ballots and voter registrations. In addition, despite Florida’s decision to cut back on Amendment 4, rights restoration continues to gain momentum. See below for more details:

**New Democratic Trifectas.** Following the 2018 election, Democrats **newly obtained** trifecta control of state government in six states. At the start of 2019, U.S. House Democrats made democracy reform a central part of the party’s agenda, by introducing (and then passing) a democracy reform bill as H.R.1 – the first bill in the new House. Each of the six states with new Democratic trifectas states has enacted (or is shortly expected to enact) major pro-voter reforms.

- **New York** passed the most significant reforms this year, enacting into law a package of voting reforms at the start of the legislative session, including: **early voting** (SB 1102), **pre-registration** for 16- and 17-year-olds (AB 774), and **portability** of registration records (AB 775), as well as a law that consolidated the dates for state and federal primaries and required ballots to be distributed to military voters farther in advance of elections (AB 779). The legislature also passed constitutional amendments to permit **same-day registration** (SB 1048) and **no-excuse absentee voting** (SB 1049), which will need to be passed again and then ratified by the voters.
- **Colorado** enacted a law **restoring voting rights** to individuals on release from incarceration (HB 19-1266) and a law expanding **AVR** and writing that reform into the statute books (it had previously been put in place as an administrative measure by election and DMV officials) (HB 19-235). In addition, the state

enacted a law improving voting access for voters with disabilities (SB 19-202) and a law with several additional reforms, including new standards for vote centers and improvements to the registration process for voters living on Indian reservations (HB 19-1278).

- The **Illinois** legislature sent Governor Pritzker a bill that would enhance voting access for eligible voters confined in jails (SB 2090).
- **Maine** enacted **AVR** (HB 1463).
- **Nevada** enacted a law providing immediate **rights restoration** to people on release from incarceration (AB 431) and a law that authorizes **same day registration**, improves the provisional ballot process and extends early or absentee voting deadlines, among other reforms (AB 345).
- **New Mexico** enacted same day voter registration (SB 672).

**Additional Notable Reforms.** Several states passed additional expansive reforms through their legislative process. Both red and blue states took steps to expand access this year – continuing a trend we have seen throughout the decade. While GOP-controlled states passed a wide variety of pro-voter measures, the most common were reforms to enhance absentee voting and access for voters with disabilities. Reforms include:

- **Delaware** enacted **early in-person voting** (HB 38).
- **Georgia** enacted into law reforms addressing a variety of problems with its voting systems (and the lawsuits that challenged them), including improvements to its “no match, no vote” policy, voter purges, absentee voting, provisional voting, voting for people with disabilities (HB 316).
- **Virginia** enacted **no-excuse early in-person voting** (SB 1026/HB 2790).
- **Washington** enacted a Native American voting rights act (SB 5079).

**Notice/Cure Process.** States' processes for determining the validity of voting materials like absentee ballots or registration applications are critically important but can result in improper disenfranchisement. For example, some states require elections officials to compare the voter's signature on an absentee ballot with the signature they have on file and to reject the ballot if the signatures do not match. In some cases, though, states offer inadequate guidance to officials to make the comparison and inadequate recourse to voters whose ballots have been rejected.

This year, several states enacted laws that require election officials to notify and/or permit voters to cure deficiencies in absentee ballots, absentee ballot applications, or voter registration applications (or improve their existing processes), including: Arizona (SB 1054), Florida (SB 7066), Georgia (HB 316), Kansas (SB 130), and Virginia (HB 1042).

**Rights Restoration Momentum Continues.** Last year, Florida voters enacted the paradigm-shifting Amendment 4, and New York and Louisiana also made major improvements to their rights restoration laws. This year, while Florida lawmakers cut back on Amendment 4, lawmakers in other states pushed forward.

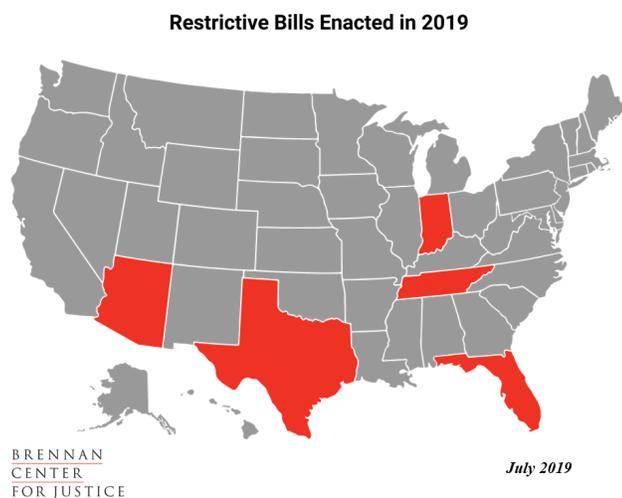
- As noted above, **Colorado** and **Nevada** enacted rights restoration laws. In addition, **Arizona** enacted a law that would eliminate the obligation for people with only one felony conviction to pay certain types of legal financial obligations before having their voting rights restored (HB 2080). People are still required, however, to pay any outstanding restitution.
- **California** (AB 646) and **New Jersey** (SB 2100) continue to consider rights restoration legislation.

- Moreover, even though efforts in Iowa (HJR 14) and Tennessee came up short this year, the seriousness of those efforts, in states with extremely restrictive rights restoration regimes, is a further indication of the momentum behind this critical reform.

### Restrictive Voting Bills

While some states are expanding voting access, others are cutting it back. At least seven restrictive bills in five states have been signed into law. All of the five states with new restrictions are under Republican trifecta control, and all of them had already passed restrictions making it more difficult to vote previously since we started systematically tracking anti-voter legislation in 2011.

(Click [here](#) for a list of restrictive bills that have passed at least one house in states with open sessions.)



The most noteworthy restrictions that passed this year are in Florida, where lawmakers cut back on Amendment 4, and Tennessee, which enacted new restrictions on voter registration drives. Arizona, Indiana, and Texas also signed new restrictions into law. Opponents, however, were able to stop a major additional piece of legislation in Texas.

**Florida** enacted a law that **cuts back** on the **historic changes to the state's felony disenfranchisement laws** that voters passed overwhelmingly in November 2018 (SB 7066). Voting rights advocates, including the Brennan Center, have filed a lawsuit challenging the law.

**Tennessee** enacted into law wide-ranging **new restrictions on third-party voter registration** (HB 1079 and SB 971). The initial version of the bill imposed new registration and training requirements on third-party registration groups, as well as civil and criminal penalties for, among other things, submitting too many "deficient" voter registration forms. The amended version improves on this by carving out volunteers and organizations that only use volunteers from the new requirements. Voting rights groups have filed lawsuits challenging these new restrictions.

**Arizona** enacted laws that **extend voter ID requirements to early voting** (SB 1072) and **restrict access to emergency early/absentee voting** (SB 1090). These bills appear to be a GOP **reaction** to the use of emergency vote centers in Maricopa County during the 2018 Senate election.

**Indiana** enacted a law **cutting the deadline** for submitting an **absentee ballot application** for most voters from eight days to 12 days prior to the election (HB 1311) and a law **restricting state court lawsuits to extend polling place hours** (SB 560).

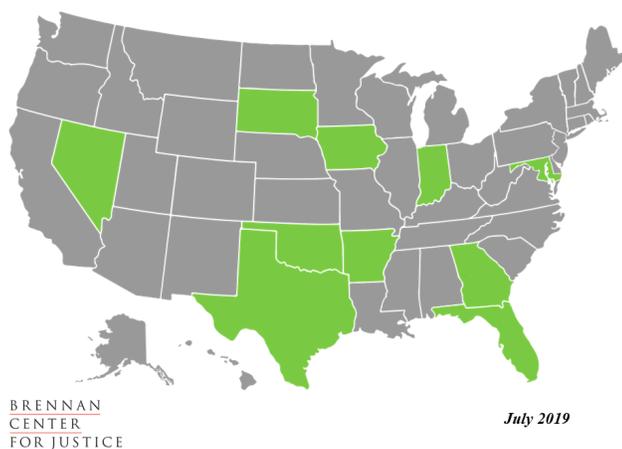
**Texas** enacted a law **restricting mobile early voting** sites (HB 1888). Voters and voting rights advocates joined in a powerful coalition, however, to halt another highly restrictive bill that was moving towards passage. SB 9 would have significantly increased penalties and risk of prosecution for election code violations by voters; permitted poll watchers to inspect voter ID; and imposed new restrictions on people assisting voters with physical limitations or who cannot read the ballot, among other measures.

### Election Security Bills

In advance of the 2020 elections, state legislatures showed renewed interest in shoring up election infrastructure and implementing election integrity measures. Ten states have signed into law 14 election security bills thus far this year, and another three states have passed bills through their legislature.

(Click [here](#) for a list of election security bills that have passed at least one house in states with open sessions.)

**Election Security Bills Enacted in 2019**



Several states have recognized the critical importance of post-election audits to verify vote totals. The urgency of adopting these audits has only increased in light of the foreign interference in the 2016 election – and the likelihood that foreign powers will attempt to interfere in next year’s election. Still, more work remains in order for states to be ready for 2020.

The following bills have been enacted into law or passed through the legislature:

**Arkansas** enacted a law that requires post-election audits (SB 524).

The **California** legislature passed a bill authorizing the Secretary of State to require data security training as a condition of receiving voter registration information.

The **Delaware** legislature passed a bill that makes the paper ballot is the legal ballot of record, enhances pre-election voting machine inspection requirements, and requires post-election audits (SB 121).

**Florida** enacted a law requiring the Secretary of State to promulgate security standards addressing chain of custody of ballots, transport of ballots, and ballot security (SB 7066). (Note that this bill also cuts back on Amendment 4, as explained above.)

**Georgia** enacted a law that requires voting machines to produce a paper record and authorizes a risk-limiting audit pilot program (HB 316),<sup>[i]</sup> as well as a law that requires the Secretary of State to establish security protocols to protect voter registration information (HB 392).

**Indiana** enacted a law requiring two-factor authentication to access the computerized voter registration list as well as requiring election vendors to disclose foreign ownership (SB 558); a law authorizing a risk-limiting audit pilot program (SB 405); a law prohibiting the acquisition and, eventually, the use of direct recording electronic voting machines (“DREs”), and imposing new security measures for e-pollbooks, among other measures (SB 570); and a law mandating annual cybersecurity training for county elections officials (SB 560).

**Iowa** enacted a law directing state and local election officials to adopt new election cybersecurity measures (HF 692).

**Maryland** enacted a law requiring vendors to disclose foreign ownership (SB 743).

**Nevada** enacted a law that would mandate risk-limiting audits starting in 2022 (and a pilot risk-limiting audit program for the 2020 election) and establish a cybersecurity training requirements for local elections officials (SB 123).

**Oklahoma** enacted a law: authorizing the State Board of Elections to order post-election audits, requiring county election officials to undertake new cyber-security measures, and authorizing the State Board to declare an election emergency in response to security threats or interference (SB 261).

The **Oregon** legislature has passed a bill authorizing risk-limiting audits (SB 944).

**South Dakota** enacted a law that requires vote centers and counties that use e-pollbooks to have printed paper copies of the registration list.

**Texas** enacted a law that would direct the Secretary of State to establish new cybersecurity rules for protecting elections data, among other reforms (HB 1421).

[i] This document tracks certain voting legislation making it easier or harder to register or vote, as well as certain legislation related to election security. Evaluating which laws to include requires exercising judgment and is not susceptible to precise quantification. Note that there are several types of election- and voting-related legislation that we do not track, including: redistricting, ballot design, enfranchisement of people under 18 or non-citizens, or public or individual notice requirements. The document also does not track administrative changes that could expand or restrict access.

[ii] The bill, however, is highly controversial: It does not require the use of hand-marked paper ballots and critics are concerned that it would result in the state purchasing voting systems that only use ballot-marking devices.

# **APPENDIX C**

# DE FACTO --- DISENFRANCHISEMENT

Erika Wood and Rachel Bloom

American Civil Liberties Union  
and  
Brennan Center for Justice *at New York University School of Law*

## ABOUT THE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

## ABOUT THE BRENNAN CENTER FOR JUSTICE

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. Our work ranges from voting rights to redistricting reform, from access to the courts to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector.

© 2008. This paper is covered by the Creative Commons “Attribution-No Derivs-NonCommercial” license (see <http://creativecommons.org>).

It may be reproduced in its entirety as long as the Brennan Center for Justice at NYU School of Law and the ACLU are credited, a link to the each organization's web page is provided, and no charge is imposed.

The paper may not be reproduced in part or in altered form, or if a fee is charged, without the Center's and ACLU's permission. Please let the Brennan Center and the ACLU know if you reprint.

## ABOUT THE AUTHORS

**Erika Wood** is Deputy Director of the Democracy Program at the Brennan Center for Justice, spearheading the Brennan Center's Right to Vote Project. She is the primary author of three reports documenting the continued illegal disenfranchisement of people with felony convictions, which launched major reform efforts. Ms. Wood is an Adjunct Professor at NYU Law School where she teaches the Brennan Center Public Policy Advocacy Clinic.

**Rachel Bloom** is the Right to Vote Advocacy Coordinator in the American Civil Liberties Union's Racial Justice Program, where her work focuses on felony disenfranchisement. Ms. Bloom works with ACLU affiliates throughout the country, as well as with national partners, to raise awareness about this issue and promote the fundamental right to vote. Ms. Bloom received her undergraduate degree in History from Barnard College and a Masters degree in Social Policy and Planning from the London School of Economics.

## ACKNOWLEDGMENTS

The authors would like to thank Laleh Ispahani, Garima Malhotra, Liz Budnitz, Maggie Barron, Amalea Smirniotopoulos, Nicole Kief, Will Matthews, Lynda Garcia, Aron Cobbs, Alison Silveira, ACLU of Arizona, ACLU of Colorado, ACLU of Mississippi, ACLU of New Jersey, ACLU of Oklahoma, ACLU South Carolina National Office, ACLU of Tennessee, ACLU of Washington, Demos, Legal Action Center, NAACP-LDF, Colorado Voting Rights Project, Mississippi Voter Empowerment Coalition, and Right to Vote.

The Brennan Center thanks the Carnegie Corporation of New York, Democracy Alliance, Educational Foundation of America, Ford Foundation, JEHT Foundation, Open Society Institute, Tides Foundation, and an anonymous donor for the generous support that made this paper possible. The statements made and views expressed in this paper are solely the responsibility of the Brennan Center and the American Civil Liberties Union.

# TABLE OF CONTENTS

---

I. Introduction	2
II. Confusion About Basic Voter Eligibility Rules	5
III. Confusion About Basic Voter Registration Procedures	6
IV. Communication Problems	7
V. Getting It Right	8
VI. Causes of De Facto Disenfranchisement	8
VII. Policy Recommendations	9

---

Appendix: Components of a Voting Rights Restoration Bill	11
Endnotes	18

---

## I. INTRODUCTION

Voting is both a fundamental right and a civic duty. However there remains a significant blanket barrier to the franchise: 5.3 million American citizens are not allowed to vote because of criminal convictions. As many as four million of these people live, work, and raise families in our communities, but because of convictions in their past they are still denied the right to vote.<sup>1</sup>

State laws vary widely on when voting rights are restored. Maine and Vermont do not deny the franchise based on a criminal conviction; even prisoners may vote there. Kentucky and Virginia are the last two states to continue to permanently disenfranchise all people with felony convictions unless they receive individual, discretionary clemency from the governor. The remaining 46 states fall somewhere in between, with the varied state laws forming a patchwork across the country. Some states restore voting rights upon release from prison, others upon completion of probation and parole, and others impose waiting periods or other contingencies and categories before restoring voting rights.<sup>2</sup>

This disenfranchisement by law of millions of American citizens is only half the story. Across the country there is persistent confusion among election officials about their state's felony disenfranchisement policies. Election officials receive little or no training on these laws, and there is little or no coordination or communication between election offices and the criminal justice system. These factors, coupled with complex laws and complicated registration procedures, result in the mass dissemination of inaccurate and misleading information, which in turn leads to the **de facto** disenfranchisement of untold hundreds of thousands of *eligible* would-be voters throughout the country.

De facto disenfranchisement has devastating long-term effects in communities across the country. Once a single local election official misinforms a citizen that he is not eligible to vote because of a past conviction, it is unlikely that citizen will ever follow up or make a second inquiry. Without further public education or outreach, the citizen will mistakenly believe that he is ineligible to vote for years, decades, or maybe the rest of his life. And that same citizen may pass along that same inaccurate information to his peers, family members and neighbors, creating a lasting ripple of de facto disenfranchisement across his community.

Between 2003 and 2008, the ACLU and the Brennan Center for Justice, together with our state partners, conducted interviews with election officials in 23 states to determine the level of knowledge of their state's felony disenfranchisement law. This report summarizes the results of telephone interviews conducted in Arizona, Colorado, Kentucky,

Louisiana, Mississippi, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee and Washington.

Prior to conducting interviews in each state, the ACLU and the Brennan Center performed a thorough legal analysis of the state's felony disenfranchisement law. A separate set of questions was designed for each state based on the state law and the specific information sought in the state. The same questions were asked of each election official in the state and their answers were carefully documented along with the official's name and the date and time of the interview. Where feasible, we interviewed a representative of every local election office in each state. In states where a large number of localities made this difficult, a representative sample was identified.<sup>3</sup>

The interviews revealed an alarming national trend of de facto disenfranchisement:

- **Election officials do not understand the basic voter eligibility rules governing people with criminal convictions;**
- **Election officials do not understand the basic registration procedures for people with criminal convictions;**
- **Interviewers experienced various problems communicating with election officials, including repeated unanswered telephone calls and bureaucratic runaround.**

## II. CONFUSION ABOUT BASIC VOTER ELIGIBILITY RULES

### Misdemeanors

In the vast majority of states, only those with felony convictions are denied the right to vote. People with misdemeanor convictions rarely lose the right to vote. A misdemeanor is generally a minor offense such as shoplifting or minimal marijuana possession which does not warrant incarceration and often results in a brief community service requirement. However, interviews with election officials in several states revealed that they often did not understand the difference between misdemeanors and felonies and improperly stated a person with a misdemeanor conviction was not eligible to vote.

For example, people with misdemeanor convictions in **Kentucky** do not lose the right to vote. However, 53% of county clerks interviewed in 2005 responded incorrectly to the question of whether individuals with misdemeanor convictions are eligible to vote.<sup>4</sup> Nearly 40% of the clerks interviewed stated that those with misdemeanor convictions are

not eligible to vote; and 14% were uncertain how to answer the question. This error is particularly egregious in Kentucky which has one of the most restrictive disenfranchisement laws in the country. A felony conviction in Kentucky results in loss of the right to vote *for life* unless the individual is granted clemency by the governor.<sup>5</sup> Consequently, the confusion on this fundamental issue has the potential to disenfranchise those with the most minor convictions for life.

**Ohio** also permits those convicted of misdemeanors to vote.<sup>6</sup> But interviews with local election officials in 2008 revealed that 30% responded incorrectly or expressed uncertainty about whether or not individuals with misdemeanor convictions could vote. Most troubling, a representative from the Ohio Secretary of State's office advised that individuals incarcerated for misdemeanors may not vote in Ohio.

### **Distinction between Probation and Parole**

Five states permit people on probation to vote, but disenfranchise those on parole.<sup>7</sup> In these states, the distinction between probation and parole is critical, yet local election officials are often – and understandably – unfamiliar with the workings of the criminal justice system and fail to make the distinction. The result is that many eligible voters on probation are often misinformed that they are ineligible to vote.

For example, interviews with election officials in **New York** in 2006 revealed that more than a third (38%) of the local boards incorrectly stated that people on probation are ineligible to vote. Most disconcerting, three out of the five New York City boroughs and the New York City Board of Elections were misinformed about the law. Similarly, interviews conducted in **Colorado** in 2004 and 2007 found that half the local officials did not know that people on probation could vote.

The problem of confusing probation and parole has particularly harsh consequences. First there are the sheer numbers. In both New York and Colorado, more people are sentenced to probation than to prison or parole. In New York there are more than 120,000 people currently on probation, about half of whom live in New York City.<sup>8</sup> Over 46,000 people are currently on probation in Colorado.<sup>9</sup> Then there is the fact that probation is the most lenient sentence reserved for minor offenses – generally misdemeanors and a few very low-grade, first-time felonies. Indeed, these states made the determination that those sentenced to probation should not be disenfranchised under the law.

### **Categories of Offenses**

Several states make restoration of voting rights contingent upon an individual's offense

or number of convictions.<sup>10</sup> In these states, some people may get their voting rights back as soon as they have completed probation and parole; others may be permanently disenfranchised or subject to an extended waiting period. Needless to say, these complicated laws cause a lot of confusion at the registrar's office. Interviews with election officials in some of these states revealed widespread misunderstanding of state law.

**Tennessee** law is particularly complicated because eligibility depends on the year of conviction as well as the type of offense.<sup>11</sup> Depending on these factors, some people never regain the right to vote, while others do only after satisfying a series of requirements that make them eligible to apply for what is known as a "Certificate of Restoration," a prerequisite to registering to vote. Interviews conducted in 2007 revealed that 63% of local election officials interviewed could not provide the specific years and offenses that would permanently disenfranchise individuals. In addition, not one of the 95 election officials interviewed was able to list the four key requirements that individuals must satisfy before they can apply for a Certificate of Restoration.

**Mississippi** law bars individuals convicted of certain crimes from registering to vote unless the governor pardons them or a two-thirds majority of the legislature passes a bill restoring that individual's right to vote.<sup>12</sup> The Mississippi Constitution lists ten specific crimes that result in disenfranchisement, but the Attorney General expanded that list to include 11 additional crimes.<sup>13</sup> Interviews conducted in 2005 revealed that about half of all Mississippi counties were using the list set forth in the Constitution, while the other half relied on the Attorney General's expanded list.

**Arizona** law differentiates between individuals with first-time, single-count felony convictions and those with repeat or multiple felony convictions.<sup>14</sup> Individuals with first-time, single-count felony convictions are automatically eligible to vote upon completion of sentence. By contrast, individuals with multiple felony convictions must satisfy a two-year waiting period and then apply to a court for restoration of their voting rights. Interviews with local election officials in 2007 revealed that half the officials interviewed were confused about the distinction in the treatment of these two groups. Additionally, over half the officials either responded incorrectly to the question of whether an individual convicted of more than one felony can ever vote again in Arizona, or did not know that individuals with two or more felony convictions could seek to have their rights restored.

## Waiting Periods

Some states impose additional waiting periods on individuals who have completed their sentences before they may register to vote or apply for restoration of voting rights. For

example, **Arizona** imposes a two-year waiting period before individuals with multiple felonies can apply for restoration of voting rights.<sup>15</sup> But in interviews with Arizona's election offices in 2007, only one county official knew about the waiting period. All other officials, when asked if there was a waiting period, responded "no" or "I don't know." The "no" answers are particularly troubling because they could lead an individual to register to vote before he or she is eligible, which is a felony in Arizona.<sup>16</sup>

In **Oklahoma**, individuals do not have their voting rights restored until they have fully completed prison and any term of parole or probation, *and* the time of their original sentence has expired.<sup>17</sup> In other words, individuals may not vote until a period of time equal to the original time to which they were sentenced elapses. Interviews with Oklahoma's county election officials in 2005 indicated that 17, or 22%, of Oklahoma counties responded with incorrect information when asked at what point people with felony convictions become eligible to vote. In 12 of the 17 counties, officials stated that individuals must wait twice the length of time of their original sentences before registering to vote, or spend the same time out of prison as they had served in prison before they could register.

### Overstating Eligibility

In a few states election officials said people were eligible to vote when they were actually disenfranchised under the law. This type of misinformation could lead people to register and vote when in fact they are *not* eligible, thus exposing them to criminal prosecution for voter fraud.

For example, individuals with felony convictions in **Pennsylvania** cannot vote until released from prison.<sup>18</sup> But in response to interviews in 2004, two counties mistakenly stated that people with felony convictions could vote by absentee ballot while incarcerated for a felony conviction. One county official advised that people incarcerated for felonies could vote by absentee ballot. Another said, "[n]obody is not allowed to vote. You can vote if you're in jail. Drug dealers, rapists, murderers can vote because politicians are looking for votes."

**South Carolina** is one of the few states that do disenfranchise individuals with misdemeanor convictions, but only while they are incarcerated.<sup>19</sup> The law also bars anyone with a misdemeanor specifically related to election fraud from voting until full completion of sentence. Interviews of election officials in 2008 found that 61% of officials did not understand the state's law on misdemeanors, with several officials incorrectly stating that individuals could vote while incarcerated for a misdemeanor conviction.

### III. CONFUSION ABOUT BASIC VOTER REGISTRATION PROCEDURES

#### **Arbitrary Documentation**

While a few states have laws or regulations that specifically require people with past convictions to produce certain documentation before being able to register to vote, the vast majority of states have no such requirements. Nevertheless, in several states local officials imposed arbitrary documentation requirements with the potential result of illegally disenfranchising many eligible voters.

Interviews with election officials in **New York** in 2003 and 2006 revealed widespread illegal documentation requirements being imposed throughout the state. In 2003, more than half the local offices, including all five boroughs of New York City, were requiring people to present some type of documentation before registering to vote. None of the forms of documentation requested were required by law and several of them simply did not exist. Despite a 2003 State Board of Elections policy directive prohibiting local officials from imposing any documentation requirements, interviews in 2006 revealed that more than a third of the local offices, including three out of five New York City boroughs, continued to illegally require documentation. Similarly, a 2004 survey in **New Jersey** revealed that more than a third of local election offices were illegally demanding documentation from people with past criminal convictions.

**Washington** law does not require people with felony convictions to provide documentation when registering to vote.<sup>20</sup> However, interviews conducted in 2004 revealed that 36% of Washington election officials stated that individuals with felony convictions would need to provide documentation from the court before being able to register to vote. An additional 30% of officials were unclear about the law or refused to answer the question regarding documentation requirements.

#### **Out-of-State and Federal Convictions**

Interviews also revealed widespread confusion about whether and how out-of-state or federal convictions affect the right to vote. For example, in **Tennessee** individuals with out-of-state or federal felony convictions can vote if their voting rights were restored in another state or if they meet the Tennessee requirements.<sup>21</sup> However, in interviews in 2007, 90% of local officials failed to respond correctly regarding the voting eligibility of a person convicted of a federal felony. More specifically, 54% of officials did not mention any specific restriction, 27% cited one or two of the five restrictions, and 9% stated they did not know the answer. Seventy-five percent of the Tennessee officials provided incorrect answers regarding the voter eligibility of a person convicted of felony in another state.

Similarly, in 2005 more than a third of the local officials interviewed in **Kentucky** were either unsure about the law or misrepresented the law on out-of-state convictions.

In **Colorado**, individuals with federal and out-of-state convictions are eligible to vote upon completion of incarceration and parole.<sup>22</sup> Officials interviewed in 2007 were extremely confused about the restoration requirements for individuals with federal and out-of-state felony convictions. Seventy-two percent of officials responded incorrectly or inaccurately regarding eligibility for individuals with out-of-state convictions, and 69% responded incorrectly or inaccurately as to the eligibility of individuals with federal convictions. Officials repeatedly stated that if individuals with federal and out-of-state convictions were not on the list of ineligible voters provided by the Secretary of State they would not know whether to revoke or restore their voting rights.

In **Mississippi**, a person does *not* lose the right to vote if convicted in another state or in federal court.<sup>23</sup> However, interviews in 2005 revealed that only a third of the officials interviewed knew the law regarding federal convictions, and only half knew this was also true for out-of-state convictions.

#### IV. COMMUNICATION PROBLEMS

The interviews also revealed a variety of communication problems when trying to speak with election officials across the country, ranging from officials' failure to answer repeated telephone calls to outright hostility.

A recurrent problem was the refusal or unwillingness of election officials to answer basic questions about the state election law. Interviewers in **Colorado, New York, New Jersey, Oklahoma, Pennsylvania, and Rhode Island** all experienced difficulty in getting basic questions answered. Some officials in these states did not answer the phone, hung up on callers, advised that there was no staff to answer the questions, or referred interviewers to other offices that were also unable to answer the questions.

Some interviewers received some deeply troubling responses from officials. In **Tennessee**, six county election officials indicated that they would not offer assistance, either directly or through a referral, to a formerly incarcerated individual having difficulty obtaining the Certificate of Restoration required to restore voting rights. One Tennessee official said individuals with felony convictions "shouldn't be allowed to vote." Another said, "not if I can catch them." And another stated, "I uphold the good people, and criminals can take care of themselves. . . I'm not going to bend over backwards to help a felon." In response to a question about how people are removed from the voter rolls, an official

in **Oklahoma** said that election officials “pretty well know” who has been in trouble with the law. In response to another question, the same official used the term “sambo,” a racist slur for African Americans.

## V. GETTING IT RIGHT

Generally, election officials in states that restore voting rights to people upon release from prison are better informed on the law. This is not surprising. The law in these states is straightforward – if a person is out of prison he or she can register to vote.

For example, in **Ohio** nearly 82% of election officials interviewed correctly stated that people are eligible to vote while on parole, and nearly 75% stated that people can vote while on probation.<sup>24</sup> In **Oregon**, a whopping 100% of officials responded correctly that people are eligible to vote as soon as they are released from prison.

But in states where the law has changed recently, training is especially important. In 2006, **Rhode Island** was the first state in the country where voters approved a ballot referendum to amend the state constitution to restore voting upon release from prison. But interviews in 2008 revealed that only 61% of local officials correctly stated that a person on probation is eligible to vote, and only 64% of election officials correctly stated that a person on parole is eligible to vote. Only six officials stated they had been trained on the new law.

## VI. CAUSES OF DE FACTO DISENFRANCHISEMENT

This report documents an unsettling phenomenon. Across our country, potentially hundreds of thousands of *eligible* voters may be denied their right to vote. Although the eligibility and registration laws vary widely from state to state, the 27 interviews of election officials in 23 states identified some root causes of this national problem of de facto disenfranchisement:

- Laws are unnecessarily complicated and difficult for election and criminal justice officials and the public to understand;
- Administering these laws requires election officials to have expertise in the criminal justice system;
- Informing individuals of their rights requires criminal justice officials to have expertise in voting laws;

- Little or no training is given to election officials and criminal justice officials about felony disenfranchisement laws;
- Few, if any, educational materials explaining these laws are available for officials, the impacted population, or the general public; and
- There is a severe lack of communication between criminal justice agencies and election officials.

## VII. POLICY RECOMMENDATIONS

There is some good news. The widespread and persistent confusion and misinformation that results in this mass disenfranchisement is easily remedied by a few straightforward, common sense policy initiatives:

**Simplify the Law.** States should restore voting rights to people as soon as they are released from prison. Currently fifteen states, the District of Columbia and Puerto Rico restore voting rights to people out of prison.<sup>25</sup> Allowing people to vote as soon as they are released from prison simplifies election administration – individuals not in prison, are eligible to vote. Moreover, restoring voting rights to people who are living in the community helps to build a stronger democracy, protect public safety, and empower families and communities.<sup>26</sup> This system eliminates the need to coordinate complicated data matches, administer convoluted eligibility requirements, or sort through thousands of restoration applications, saving valuable time, money, energy and resources and avoiding burdensome lawsuits.

But changing eligibility requirements is not enough by itself. The evidence described in this report demonstrates the need to assure that state laws are widely understood and consistently enforced. We recommend state laws include the following elements to ensure that citizens can freely exercise their fundamental right to vote:

**Educate.** Regularly train election and criminal justice officials on the law and proper registration procedures. Clear guidance and information should be widely available to the public through written materials, state websites and public service announcements.

**Provide Notice.** Ensure that criminal defendants are informed: (1) before conviction and sentencing to prison, that they will lose their voting rights; and (2) when they are again eligible to register and vote.

**Assist with Voter Registration.** Make the Department of Corrections and Probation and Parole authorities responsible for assisting with voluntary voter registration. Ensure that all citizens are subject to the same application procedures.

**Synchronize Voter Registration Databases.** Ensure that names on the state's computerized list of registered voters are marked inactive upon a person's imprisonment and then automatically reactivated when eligible by electronic information-sharing between criminal justice agencies and election agencies.

**Eliminate paperwork.** Voting rights should be restored automatically without additional paperwork and bureaucratic red tape. Once eligible to vote, individuals with criminal histories should follow the same registration procedures as everyone else.

The Appendix includes a model bill incorporating all of these provisions to which policy makers may look for guidance.

## APPENDIX: COMPONENTS OF A VOTING RIGHTS RESTORATION BILL

A bill to restore voting rights to people with felony convictions should have several sections, including **Title, Findings, Purpose, Restoration of Rights, Notice, Voter Registration, Maintaining a Statewide Voter Registration Database, Education, Conforming Amendments, and Effective Date.** This memorandum will describe each section and identify any relevant strategy decisions to be made. The memo also provides examples of legislative language to use in each section. Of course, every state is different, and every coalition will need legal help in drafting a bill tailored to its state.

### TITLE

The bill needs a name. The “[Name of State] Restoration of Voting Rights Act” is a typical title.

### FINDINGS

The findings section states the facts and principles that make the bill necessary. Ordinarily, the findings should include:

- A statement about how important voting is to democracy;
- A statement about how political participation helps with rehabilitation and reintegration into the community;
- A statement about how many people in the state have lost their right to vote because of felony convictions;
- A statement about the harms of disfranchisement in minority communities;
- A statement about how the bill will streamline the process by which the government restores rights to people with criminal convictions and thus save the taxpayers money.

Here, for example, are the findings from a bill that became law in Rhode Island in 2006:

1. Voting is both a fundamental right and a civic duty. Restoring the right to vote strengthens our democracy by increasing voter participation and helps people who have completed their incarceration to reintegrate into society. Voting is an essential part of reassuming the duties of full citizenship.

2. Rhode Island is the only state in New England that denies the vote to people convicted of felonies, not only while they are in prison, but also while they are living in the community under the supervision of parole or probation officials.
3. As a result of this extended disfranchisement, Rhode Island deprives a greater proportion of its residents of voting rights than any other state in the region. More than 15,500 Rhode Islanders have lost the right to vote because of a felony conviction. Of these, 86% are not in prison: they have either been released or their convictions did not result in actual incarceration. Rhode Island has the second highest rate of people on probation in the nation.
4. Criminal disfranchisement in Rhode Island has a disproportionate impact on minority communities. The rate of disfranchisement of African-American voters is more than six times the statewide rate. Hispanics lose the vote at more than 2.5 times the statewide average. One in five black men and one in eleven Hispanic men are barred from voting in Rhode Island. By denying so many the right to vote, criminal disfranchisement laws dilute the political power of entire minority communities. Because these communities are concentrated in cities, the urban vote is also suppressed, with the rate of disfranchisement in urban areas 3.5 times the rate in the rest of the state.
5. Extending disfranchisement beyond a person's term of incarceration complicates the process of restoring the right to vote. Under current law, a person may regain that right when released from incarceration if no parole follows, when discharged from parole, or when probation is completed. This system requires the involvement of many government agencies in the restoration process. This bill would simplify restoration by making people eligible to vote once they have served their time in prison, thereby concentrating in the Department of Corrections the responsibility for initiating restoration of voting rights. A streamlined restoration process conserves government resources and saves taxpayer dollars.

## PURPOSE

This section states the purpose of the bill, explaining why it should be enacted. For example:

The purposes of this act are to strengthen democratic institutions by increasing participation in the voting process, to help people who have completed their incarceration to become productive members of society, and to streamline procedures for restoring their right to vote.

## RESTORATION OF RIGHTS

This section restores voting rights to people with felony convictions. Before it is drafted, the state coalition needs to make an important strategy decision: how great a change in state law to seek? Here are some possibilities:

- Full restoration, including the right to vote from prison;
- Restoration upon release from incarceration;
- Restoration upon completion of parole (probationers can vote);
- Restoration upon completion of parole or probation;
- Restoration upon “completion of sentence” (*beware*: this may require a person to pay all fines, restitution, and court costs before being allowed to vote);
- Restoration upon completion of sentence and expiration of a waiting period.

What is possible will depend in part on whether the state in question disfranchises people in its *state constitution*. Each state has its own constitution, and each one is unique. Laws passed by a state legislature cannot conflict with the constitution of that state. Some of the state constitutions have provisions relevant to the voting rights of people with criminal convictions. Some provisions pose no bar to restoration by legislation alone. In other states, however, restoration is impossible without an amendment to the state constitution. The amendment process differs from state to state, but it is usually multi-layered and generally involves a public referendum (popular vote) on the amendment.

The political climate may also set limits. Some state coalitions are committed to full restoration, including the right to vote while in prison, but few states are prepared to go that far. At the other end of the spectrum, some laws, like one passed in March 2005 in Nebraska, would restore rights only when a person has completed parole or probation and waited an additional two years. This can be a step forward in a state, again like Nebraska, that previously disfranchised people permanently.

Where possible, there are many advantages to proposing legislation that would restore voting rights as soon as a person gets out of prison. This approach re-enfranchises more people than most plausible alternatives. In addition, election officials can understand and follow this rule: a person who is living in the community and appears at a polling place should not be barred from voting because of any criminal record – once the person is out, the person is eligible. This system also concentrates the restoration process in the Department of Corrections, without the need to involve probation and parole officials.

A restoration of rights section may look like this:

A person who has lost the right of suffrage . . . because of such person's incarceration upon a felony conviction shall be restored the right to vote when that person is discharged from incarceration.

## NOTICE

A good bill should require notice both before conviction or sentencing and before release from prison. These are typical notice provisions for a bill that restores rights immediately following incarceration:

Before accepting a plea of guilty or nolo contendere to a felony, and before imposing a felony sentence after trial, the court shall notify the defendant that conviction will result in loss of the right to vote only if and for as long as the person is incarcerated and that voting rights are restored upon discharge.

As part of the release process leading to the discharge of a person who has been disfranchised because of incarceration upon a felony conviction, the Department of Corrections shall notify that person in writing that voting rights will be restored.

## VOTER REGISTRATION

Assuming the bill restores the right to vote when a person gets out of prison, this section should require the Department of Corrections to assist people in registering to vote just before they are released. The best option is to make the Department of Corrections a "voter registration agency." Under a federal law passed in 1993, the National Voter Registration Act, the states should have designated certain social welfare agencies as "voter registration agencies." These agencies must offer people assistance with voter registration in a non-coercive way. Because laws establishing this system already exist in most states, the bill can "piggyback" by adding the Department of Corrections to the existing list of voter registration agencies. The bill should refer to the existing state law.

Here is an example:

The Department of Corrections shall act as a voter registration agency in accordance with § [xxx] of this Code. As part of the release process leading to the discharge of a person who has been disfranchised because of a felony conviction, the Department of Corrections shall provide that person with a voter registration form and a declination form, and offer that person assistance in filling out the

appropriate form. Unless the registrant refuses to permit it to do so, the Department of Corrections shall transmit the completed voter registration form to the [appropriate registration agency] in the county where the registrant resides.

## MAINTAINING A STATEWIDE VOTER REGISTRATION DATABASE

States are in the process of creating centralized voter registration databases that will contain electronic information about all registered voters, in accordance with the federal Help America Vote Act. The names of eligible and registered ex-felons need to be included in these databases. In most states, the secretary of state is the chief election official and is responsible for maintaining the database.

When a person just out of prison registers or re-registers to vote, that person's name should be added to the database even without special provisions in the bill. Just in case that system has gaps, however, the bill can include other avenues for transmitting names to the secretary of state and adding these names to the database.

Here are some typical provisions:

The Department of Corrections shall, on or before the 15th day of each month, transmit to the secretary of state two lists. The first shall contain the following information about persons convicted of a felony who, during the preceding period, have become ineligible to vote because of their incarceration; the second shall contain the following information about persons convicted of a felony who, during the preceding period, have become eligible to vote because of their discharge from incarceration:

- name,
- date of birth,
- date of entry of judgment of conviction,
- sentence,
- last four digits of social security number, or driver's license number, if available.

The secretary of state shall ensure that the statewide voter registration database is purged of the names of persons who are ineligible to vote because of their incarceration upon a felony conviction. The secretary of state shall likewise ensure that the names of persons who are eligible and registered to vote following their discharge from incarceration are added to the statewide voter registration database in the same manner as all other names are added to that database.

The secretary of state shall ensure that persons who have become eligible to vote because of their discharge from incarceration face no continued barriers to registration or voting resulting from their felony convictions.

## EDUCATION

State officials and the public should learn about the changes in the law that would result from passage of the bill. The bill should therefore require relevant training and education.

Here are some relevant provisions:

The Secretary of State shall develop and implement a program to educate attorneys; judges; election officials; corrections officials, including parole and probation officers; and members of the public about the requirements of this section, ensuring that:

1. Judges are informed of their obligation to notify criminal defendants of the potential loss and restoration of their voting rights, in accordance with subsection (x) of this section.
2. The Department of Corrections is prepared to assist people with registration to vote in anticipation of their discharge from incarceration, including by forwarding their completed voter registration forms to the [appropriate registration agencies].
3. The language on voter registration forms makes clear that people who have been disqualified from voting because of felony convictions regain the right to vote when they are discharged from incarceration.
4. The Department of Corrections is prepared to transmit to the Secretary of State the information specified in subsection (x) of this section.
5. Probation and parole officers are informed of the change in the law and are prepared to notify probationers and parolees that their right to vote is restored.
6. Accurate and complete information about the voting rights of people who have been charged with or convicted of crimes, whether disenfranchising or not, is made available through a single publication to government officials and the public.

## CONFORMING AMENDMENTS

The bill will need to amend various provisions of pre-existing state law that would otherwise conflict with it. This is a job for the lawyer or lawyers who do the drafting.

## EFFECTIVE DATE

Finally, the bill will need an effective date. Different states have different rules and customs about when bills take effect as law. To ensure that the bill protects people who were sentenced or discharged before its effective date, however, a provision like the following is necessary:

Voting rights shall be restored in accordance with this act to all [name of state] residents who have been discharged from incarceration or who were never incarcerated following felony convictions, whether they were discharged or sentenced before or after the effective date of this act.

\* \* \* \* \*

These model provisions can help in drafting or evaluating a bill. It is also extremely helpful to have local, experienced criminal defense lawyers who understand how the bill would work in practice and can recommend improvements.

## ENDNOTES

- 1 For additional background information on restoration of voting rights, see Erika Wood, *Restoring the Right to Vote* (2008), available at [www.brennancenter.org](http://www.brennancenter.org); and *Breaking Barriers to the Ballot Box*, available at [http://www.aclu.org/pdfs/votingrights/fd\\_pamphlet.pdf](http://www.aclu.org/pdfs/votingrights/fd_pamphlet.pdf); Jeff Manza & Chris Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (2006).
- 2 For a map explaining the law in each state, see [www.brennancenter.org](http://www.brennancenter.org) and [www.aclu.org/rightto-vote](http://www.aclu.org/rightto-vote).
- 3 In this report, all localities in a state were contacted unless otherwise noted. In addition, we maintain the supporting documentation for all of the interviews.
- 4 The Kentucky interviews were conducted with officials in half of the counties in Kentucky which were randomly selected within each geographical region – north, south, east and west.
- 5 KY. CONST. § 145(1), (2); KY. REV. STAT. ANN. § 27A.070 (2007).
- 6 OH. REV. CODE ANN. § 2961.01(A), (C) (2006).
- 7 These states are California, Colorado, Connecticut, New York, and South Dakota. See N.Y. ELEC. LAW § 5-106 (2008); CAL. CONST., art. II § 4; CAL. ELEC. CODE § 2101 (2008); COLO. REV. STAT. §1-2-103(4) (2008); CONN. GEN. STAT. § 9-46a (2008); S.D. CODIFIED LAWS §§ 23A-27-35; 24-5-2; 24-15A-7 (2008).
- 8 New York State Division of Criminal Justice Services, New York State Probation Population, 2007 Profile (June 2008), available at <http://dpca.state.ny.us/pdfs/nysprobationreport2007profile.pdf>.
- 9 Colorado Judicial Department, Annual Statistical Report for Fiscal Year 2007 (June 2007), available at [http://www.courts.state.co.us/Administration/Custom.cfm/Unit/annrep/Page\\_ID/97](http://www.courts.state.co.us/Administration/Custom.cfm/Unit/annrep/Page_ID/97).
- 10 The states are: Alabama, Arizona, Delaware, Florida, Mississippi, Nevada, Tennessee and Wyoming.
- 11 TENN. CONST. ART. 1, § 5; TENN. CODE ANN. §§ 40-20-112; 40-29-202(a), (b), (c); 203(a); 204 (2008).
- 12 MISS. CONST. art. 12, § 241; Op. Miss. Atty. Gen. No. 2005-0193 (Wiggins, Apr. 26, 2005).
- 13 Op. Miss. Atty Gen. No. 2004-0171 (April 23, 2004). The Attorney General's opinion is being challenged in court. See *Strickland v. Clark*, No. 2005-0193 (Miss. Ch. Ct., Oct. 6, 2006).

- 14 ARIZ. CONST. art. VII, § 2(c); ARIZ. REV. STAT. §§ 13-906.
- 15 ARIZ. REV. STAT. 13-906 (2008)
- 16 ARIZ. REV. STAT §§ 16-152, 16-184 (2008).
- 17 OKLA. STAT. tit. 26,§ 4-101(1) (2008).
- 18 25 PA. CONS. STAT. §§ 2602(w), 3146.1 (2008); *Ray v. Pennsylvania*, 263 F. Supp. 630 (W.D. Pa. 1967).
- 19 S.C. CODE ANN. §§ 7-5-120(B)(2),(3) (2008).
- 20 WASH. REV. CODE §§ 29A.04.079; 9.94A.637 (2008).
- 21 TENN. CODE ANN. § 40-29-105 (2008).
- 22 COLO. REV. STAT. §§ 1-2-103, 1-2-606 (2007).
- 23 See *State ex rel. Mitchell v. McDonald*, 145 So.2d 508 (Miss. 1993); *Middleton v. Evers*, 515 So.2d 940 (Miss. 1987); see also MS AG Op., Doxey (August 27, 1987); MS AG Op., Wilburn (January 19,1987) (“It has been the long standing opinion of this office that only convictions of disenfranchising crimes committed under the jurisdiction of this State affect one’s right to vote”).
- 24 Interviews were conducted in the 27 most populous counties in Ohio, representing more than 75% of Ohio citizens.
- 25 Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. Maine and Vermont allow prisoners to vote.
- 26 For a comprehensive policy proposal in favor of restoring voting rights to people upon release from incarceration see Erika Wood, *Restoring the Right to Vote*, available at [www.brennancenter.org](http://www.brennancenter.org)

BRENNAN  
CENTER  
FOR JUSTICE

Brennan Center for Justice  
at New York University School of Law

161 Avenue of the Americas  
12th floor  
New York, New York 10013  
212.998.6730 Fax 212.995.4550  
[www.brennancenter.org](http://www.brennancenter.org)



American Civil Liberties Union

125 Broad Street  
18th floor  
New York, NY 10004  
[www.aclu.org](http://www.aclu.org)

# **APPENDIX D**

BRENNAN  
CENTER  
FOR JUSTICE  
TWENTY  
YEARS

*at New York University School of Law*

## **Racism & Felony Disenfranchisement: An Intertwined History**

*Erin Kelley*

The United States stands alone among modern democracies in stripping voting rights from millions of citizens on the basis of criminal convictions.<sup>1</sup> Across the country, states impose varying felony disenfranchisement policies, preventing an estimated 6.1 million Americans from casting ballots.<sup>2</sup> To give a sense of scope — this population is larger than the voting-eligible population of New Jersey.<sup>3</sup> And of this total, nearly 4.7 million are people living in our communities — working, paying taxes, and raising families, all while barred from joining their neighbors at the polls.<sup>4</sup>

This widespread disenfranchisement disproportionately impacts people of color.<sup>5</sup> One in every 13 voting-age African Americans cannot vote, a disenfranchisement rate more than four times greater than that of all other Americans.<sup>6</sup> In four states, more than one in five black adults are denied their right to vote.<sup>7</sup> Although the data on Latino disenfranchisement is less comprehensive, a 2003 study of ten states ranging in size from California to Nebraska found that nine of those states “disenfranchise the Latino community at rates greater than the general population.”<sup>8</sup>

While the origins of disenfranchisement can be traced back to early colonial law in North America, and even farther back to ancient Greece, the punishment was typically applied only in individual cases for particularly serious or elections-related crimes.<sup>9</sup>

It wasn't until the end of the Civil War and the expansion of suffrage to black men that felony disenfranchisement became a significant barrier to U.S. ballot boxes.<sup>10</sup> At that point, two interconnected trends combined to make disenfranchisement a major obstacle for newly enfranchised black voters. First, lawmakers — especially in the South — implemented a slew of criminal laws designed to target black citizens. And nearly simultaneously, many states enacted broad disenfranchisement laws that revoked voting rights from anyone convicted of any felony. These two trends laid the foundation for the form of mass disenfranchisement seen in this country today.

### **The End of the Civil War: An Increasingly Racist Criminal Justice System**

By the end of the Civil War, states were already incarcerating African Americans at a higher rate than whites.<sup>11</sup> This disparity significantly worsened in the ensuing years, a fact well-documented in the South.<sup>12</sup>

Although outlawing slavery itself, the Thirteenth Amendment carved out an exception allowing states to impose involuntary servitude on those who were convicted of crimes.<sup>13</sup> Seeing an opportunity to sustain their crumbling economy, numerous Southern politicians quickly implemented new criminal laws that were “essentially intended to criminalize black life,” wrote Pulitzer Prize-winning author Douglas Blackmon.<sup>14</sup> These ostensibly race-neutral

laws were selectively enforced by a nearly all-white criminal justice system.<sup>15</sup> While white people accused of crimes often escaped punishment, black people were arrested and convicted “almost always under the thinnest chimera of probable cause or judicial process,” as Blackmon put it.<sup>16</sup>

Identifying these new criminal laws as “Black Codes,” historian Eric Foner describes how they bolstered the South’s faltering economy by providing employers “with a supply of cheap labor” through convict leasing.<sup>17</sup> This system was reserved nearly entirely for black prisoners — at least 90 percent of those forced into convict leasing arrangements were black.<sup>18</sup> Because convict leasing generated significant profits for states, law enforcement officials, and companies alike, the practice incentivized baseless arrests and convictions of black citizens.<sup>19</sup>

These factors and others spurred widening disparities in incarceration rates. In Alabama, for example, the percentage of nonwhite prisoners jumped from 2 percent in 1850, to 74 percent by 1870.<sup>20</sup>

### **A First Wave of Backlash to Voting Rights Expansion: Broad Felony Disenfranchisement Laws**

Within the context of an increasingly discriminatory criminal justice system, states became “particularly likely to pass punitive felon disenfranchisement laws” in the 15 years after the Civil War — just as black men gained voting rights nationwide.<sup>21</sup>

Before the Civil War, most states already had some form of disenfranchisement on the books, but these new laws were significantly broader, imposing disenfranchisement as a consequence for *all* felonies, rather than only a few select crimes.<sup>22</sup> In rapid succession between 1865 and 1880, at least 13 states — more than a third of the country’s 38 states — enacted broad felony disenfranchisement laws.<sup>23</sup>

These new laws were closely linked to the rising inequalities in the nation’s criminal justice system. A historical analysis by authors Jeff Manza and Christopher Uggen found “[w]hen African Americans [made] up a larger proportion of a state’s prison population, that state [was] significantly more likely to adopt or extend felon disenfranchisement.” In later decades, the reverse would hold true, as “[s]tates with a small proportion of African-American prisoners [were] most likely to abolish ex-felon voting restrictions.”<sup>24</sup>

The motivation for enacting broad felony disenfranchisement laws in this context was clear: preventing newly enfranchised black citizens from exercising political power. “Felon disenfranchisement provisions offered a tangible response to the threat of new African-American voters that would help preserve existing racial hierarchies,” the authors of a study published in the *American Journal of Sociology* wrote.<sup>25</sup>

New York is a clear example of the way in which states expanded the franchise while simultaneously using felony disenfranchisement to restrict its reach. By 1860, New York was the only state that required property ownership for black voters — and black voters only.<sup>26</sup> This law clearly violated the Fifteenth Amendment, which prohibited voting restrictions based on race and which New York ratified in 1870.<sup>27</sup> In 1874, a governor-appointed “Constitutional Commission” finally struck down the property law, but in the same stroke quietly amended New York’s constitution to impose felony disenfranchisement.<sup>28</sup>

Once these broad disenfranchisement laws were on the books, racist politicians could also enforce them in a deliberately discriminatory manner. For example, in 1876 Virginia broadened its felony disenfranchisement law to encompass petty theft, or “petit larceny,” a crime of which white politicians believed black citizens could be easily convicted. The next year, the legislature passed a law requiring that lists of voters convicted of any of the new, broader array of disenfranchising crimes be delivered to county registrars. Applied “almost exclusively to the detriment of African American voters,” the law facilitated racist politicians’ attempts to selectively enforce disenfranchisement. “We publish elsewhere a list of negroes convicted of petit larceny,” a Richmond-based newspaper advertised several years later, advising that “Democratic challengers should examine it carefully.”<sup>29</sup>

## **A Second Wave of Backlash to Voting Rights Expansion: Targeted Disenfranchisement Laws**

A distinct wave of changes to disenfranchisement laws began in the last decade of the 1800's, when Southern states began holding overtly racist constitutional conventions in response to partisan shifts in Congress and the growing threat of a Populist movement that was uniting white farmers and black political forces.<sup>30</sup>

Mississippi's new disenfranchisement law, adopted at its constitutional convention in 1890, served as a model for other states.<sup>31</sup> Before, conviction for "any crime" disqualified an individual from voting. But at the convention, Mississippi's white politicians narrowed disenfranchisement to a specific list of crimes they believed black men were most likely to commit, such as bigamy, forgery, burglary, arson, and perjury.<sup>32</sup> Upholding this new disenfranchisement scheme six years later, the Mississippi Supreme Court acknowledged the racist motivations for the change:

Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker member were prone....Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications [from voting], while robbery and murders, and other crimes in which violence was the principal ingredient, were not.<sup>33</sup>

Other states soon followed with their own racially targeted disenfranchisement laws, including South Carolina in 1895, Louisiana in 1898, and Alabama in 1901.<sup>34</sup>

### **Felony Disenfranchisement Laws Today**

Over a century later, our nation is still grappling with the racist origins of felony disenfranchisement. The targeted laws of the late 1800's are less prominent — most states do not distinguish between specific felonies, instead imposing disenfranchisement as a consequence for all felony convictions. But the racial impact of these laws continues, with disproportionate numbers of people of color arrested, prosecuted, convicted, and — as a result — disenfranchised. The related emergence of mass incarceration and harsh sentencing has led to unprecedented — and still rising — levels of disenfranchisement nationally.<sup>35</sup>

Moreover, this mass disenfranchisement has serious repercussions beyond those directly impacted; studies show that these laws also keep eligible voters away from the polls. Many states' disenfranchisement policies are so complex that election officials often misunderstand and misrepresent them, spreading inaccurate messages and causing untold numbers of would-be voters to wrongly believe they are ineligible.<sup>36</sup> And the turnout-dampening effects of disenfranchisement most seriously impact black communities. A 2009 study found that eligible and registered black voters were nearly 12 percent less likely to cast ballots if they lived in states with lifetime disenfranchisement policies — while white voters' probability of voting decreased by only 1 percent in such states.<sup>37</sup> The study's results "suggest that [felony disenfranchisement] exacerbates the bias against low socioeconomic status racial and ethnic minorities in electoral outcomes and policy responsiveness."<sup>38</sup>

Legal challenges to felony disenfranchisement have largely floundered, after a 1974 Supreme Court ruling held that the practice is generally permissible under section two of the Fourteenth Amendment.<sup>39</sup> Despite these courtroom losses, the nation has seen promising momentum towards reform of felony disenfranchisement laws over the past two decades. In this timeframe, a number of states have taken legislative or executive action to change their policies by shortening the disenfranchisement period that follows a felony conviction.<sup>40</sup> But the number of disenfranchised Americans continues to increase — growing more than a quarter of a million in just six years between 2010 and 2016.<sup>41</sup>

Deeper and wider-reaching change is urgently needed. Because they are inseparable from the entrenched racial disparities of our criminal justice system, felony disenfranchisement laws continually reproduce inequity in our democracy. Given these policies' roots in historical efforts to prevent black men from voting, this impact is not surprising. Rather, the surprise lies in the fact that these laws persist in a democracy that claims to value every citizen's voice.

## Endnotes

<sup>1</sup> BRANDON ROTTINGHAUS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM 24-26 (2003), [http://www.prisonpolicy.org/scans/08\\_18\\_03\\_Manatt\\_Brandon\\_Rottinghaus.pdf](http://www.prisonpolicy.org/scans/08_18_03_Manatt_Brandon_Rottinghaus.pdf) (identifying only 8 nations—Armenia, Cameroon, Chile, Belgium, Finland, New Zealand, Philippines, and the United States—that disenfranchise citizens during incarceration and for varying periods of time afterwards and noting that the United States disenfranchises many more of its citizens than any of these countries); *see also* JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 17-18 (1998), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf>; JEFF MANZA & CHRISOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 37-39, 235 (2006).

<sup>2</sup> This total represents 2.5 percent of all voting-age citizens. THE SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016), <http://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

<sup>3</sup> New Jersey’s voting-eligible population was approximately 6.0 million as of 2014, while the number of disenfranchised Americans—including those who are incarcerated—is approximately 6.1 million. 2014 November General Election Turnout Rates, UNITED STATES ELECTIONS PROJECT <http://www.electproject.org/2014g> (last updated Dec. 20, 2015); *see also* THE SENTENCING PROJECT, *supra* note 2.

<sup>4</sup> *See* THE SENTENCING PROJECT, *supra* note 2, at 15 (providing the number of disenfranchised individuals by state and sentence status, including parole, probation, and “ex-felon” or fully completed sentence).

<sup>5</sup> NAZGOL GHANDNOOSH, THE SENTENCING PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 10-12 (2015), <http://www.sentencingproject.org/publications/black-lives-matter-eliminating-racial-inequity-in-the-criminal-justice-system/>; *see also* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT 1-2 (2014), <http://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>.

<sup>6</sup> THE SENTENCING PROJECT, *supra* note 2, at 3.

<sup>7</sup> These states are Florida, Kentucky, Tennessee, and Virginia. *Id.*

<sup>8</sup> MARISA J. DEMEO & STEVEN A. OCHOA, MALDEF, DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES 17 (2003), <http://maldef.org/assets/pdf/feb18-latinovotingrightsreport.pdf>.

<sup>9</sup> Alec C. Ewald, ‘Civil Death’: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059-61.

<sup>10</sup> Although 20 states adopted broad felony disenfranchisement laws in the years before 1865, the underdevelopment of the criminal justice system at that early point limited the actual impact of these laws. Angela Behrens’ chapter in *Locked Out* ties the emergence of these laws, particularly in the 25 years prior to the Civil War, to the elimination of property taxes, which allowed property-less white men to vote. MANZA & UGGEN, *supra* note 1, at 51-56 (“Between 1840 and 1865, all 16 states adopting felon disenfranchisement measures did so *after* establishing full white male suffrage by eliminating property tests. . . . It is also important to note that in this early period, the criminal justice system was still quite underdeveloped, although entering a phase of rapid development . . . . Most states maintained a single state penitentiary, and incarcerated only a small number of offenders . . . .”).

<sup>11</sup> *See* Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. SOC. 559, 560 (2003) (“African-American imprisonment rates have consistently exceeded white rates since at least the Civil War era . . . .”).

<sup>12</sup> *See* ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877, at xxiv (2002) (“That the Reconstruction of the North receives less attention than its Southern counterpart reflects, in part, the absence of a detailed historical literature on either the region’s social and political structure in these years, or the relationship between changes there and events in the South.”).

<sup>13</sup> DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 53 (2008).

<sup>14</sup> *Id.*

<sup>15</sup> *See* FONER, *supra* note 12, at 205 (“In much of the South, the courts of Presidential Reconstruction appeared more interested in disciplining the black population and forcing it to labor than in dispensing justice. . . . If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms. . . .”); *see also* BLACKMON, *supra* note 13, at 54 (“Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites.”).

<sup>16</sup> BLACKMON, *supra* note 13, at 7; *see also* FONER, *supra* note 12, at 203-05.

<sup>17</sup> FONER, *supra* note 12, at 205; *see also* *Convict Leasing*, NPR (July 16, 2001), <http://www.npr.org/templates/story/story.php?storyId=1125921>.

<sup>18</sup> BLACKMON, *supra* note 13, at 57.

---

<sup>19</sup> BLACKMON, *supra* note 13, at 7 (“Sheriffs were now incentivized to arrest and obtain convictions of as many people as possible—regardless of their true guilt or whether a crime had been committed at all.”); *see also* FONER, *supra* note 12, at 205; *Convict Leasing, supra* note 17 (“Generally the population of those who were sent into labor ran about 85 to 95 percent black . . . there were many thousands of individuals pressed into labor through this practice who had been arrested on trivial or almost non-existence kinds of charges. And it’s also very clear, as you reconstruct this, that there were profound financial incentives that created which fed this system so that county sheriffs and other local officials made a great deal of money personally off fulfilling these labor contracts for the private companies that were involved.”).

<sup>20</sup> Behrens, *supra* note 11, at 598 (“In many Southern states, the percentage of nonwhite prison inmates nearly doubled between 1850 and 1870.”)

<sup>21</sup> *Id.*, at 597 (“States were particularly likely to pass punitive felon disenfranchisement laws in the Reconstruction period following the Civil War and through the 1870s. During this time, the threats posed by the possible incorporation of African-American men into the political system were ardently debated.”).

<sup>22</sup> *See* Ewald, *supra* note 9, at 1061-66; *see also* Behrens, *supra* note 11, at 565-66.

<sup>23</sup> *See supra* note 10 and accompanying text. As identified by study authors Angela Behrens, Christopher Uggen, and Jeff Manza, these states are Alabama, Arkansas, Colorado, Florida, Georgia, Illinois, Mississippi, Missouri, Nebraska, North Carolina, South Carolina, Tennessee, and Texas. *See* Behrens, *supra* note 11, at 565-66. Although New York is not included in their count, the state did move to impose disenfranchisement for “infamous crime” in 1874 by slightly altering language in the state Constitution. ERIKA WOOD & LIZ BUDNITZ, BRENNAN CTR. FOR JUSTICE, JIM CROW IN NEW YORK 12-13 (2009), [http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY\\_2010.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY_2010.pdf). Virginia is also not included in this count, although the state broadened its disenfranchisement law to include petit larceny in 1876. Helen Gibson, *Felons and the Right to Vote in Virginia: A Historical Overview*, 91 VA. NEWSL. (Weldon Cooper Ctr. for Pub. Serv., Charlottesville, Va.), Jan. 2015, at 2, <http://www.coopercenter.org/sites/default/files/publications/Virginia%20News%20Letter%202015%20Vol.%2091%20No%201.pdf>.

<sup>24</sup> MANZA & UGGEN, *supra* note 1, at 67; Behrens, *supra* note 11, at 596, 599. It is also notable that Maine and Vermont, the only two states that do not restrict voting rights on the basis of criminal convictions, are currently the two states with the highest percentage white not Hispanic population in the country. In both states, an estimated 95 percent of the population is white not Hispanic. U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION BY SEX, RACE, AND HISPANIC ORIGIN FOR THE UNITED STATES, STATES, AND COUNTIES: JULY 1, 2015 (2016), <http://factfinder.census.gov/> (on file with author). According to the Prison Policy Initiative, as of 2010, Maine, Vermont, and New Hampshire incarcerated the highest percentages of white prisoners in the country. LEAH SAKALA, PRISON POLICY INITIATIVE, BREAKING DOWN MASS INCARCERATION IN THE 2010 CENSUS: STATE-BY-STATE INCARCERATION RATES BY RACE/ETHNICITY (2014), <http://www.prisonpolicy.org/reports/rates.html>.

<sup>25</sup> Behrens, *supra* note 11, at 598.

<sup>26</sup> The property requirement for white men had already been abolished in 1821—notably, by the very same convention that enacted that requirement for black men. WOOD & BUDNITZ, *supra* note 23, at 8, 10-13.

<sup>27</sup> *Id.*, at 12. After initially ratifying the Fifteenth Amendment, New York’s legislature subsequently voted to rescind that ratification—though that vote was ignored by Congress. *Id.*

<sup>28</sup> *Id.*, at 12-13.

<sup>29</sup> Gibson, *supra* note 23, at 3.

<sup>30</sup> MICHAEL WALDMAN, THE FIGHT TO VOTE 82-85 (2016); Behrens, *supra* note 11, at 564 (“[T]he 1860s and 1870s are marked by greater disenfranchisement as well as by the adoption of the Fourteenth and Fifteenth amendments. A period of fewer changes followed before another wave of restrictions began in 1889 . . . .”); *see also* Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 540 (1993) (“But between 1890 and 1910, many Southern states tailored their criminal disenfranchisement laws, along with other preexisting voting qualifications, to increase the effect of these laws on black citizens.”).

<sup>31</sup> Shapiro, *supra* note 30, at 540.

<sup>32</sup> *Id.*, at 540 n.20.

<sup>33</sup> *Id.*, at 541; *see also* Behrens, *supra* note 11, at 569-70.

<sup>34</sup> Shapiro, *supra* note 30, at 541. Alabama’s 1901 constitutional convention, for example, altered the state’s disenfranchisement law to include even non-criminal acts. The president of the convention, John B. Knox, spoke at its opening, explaining that “manipulation of the ballot” was justified in order to avoid “the menace of negro domination.” When introducing the disenfranchisement provision he wrote, Delegate John Field Bunting was forthright about its intended goal, promising his audience that “the crime of wife-beating alone would disqualify sixty percent of the Negroes.” Behrens, *supra* note 11, at 569, 572.

<sup>35</sup> *See* THE SENTENCING PROJECT, *supra* note 2, at 9.

<sup>36</sup> *See generally* ERIKA WOOD & RACHEL BLOOM, AM. CIVIL LIBERTIES UNION & BRENNAN CTR. FOR JUSTICE, DE FACTO DISENFRANCHISEMENT (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> (finding that many

---

elections officials misunderstand their state's felony disenfranchisement laws, meaning that "untold hundreds of thousands of eligible, would-be voters throughout the country" may be getting turned away by misinformation).

<sup>37</sup> Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722, 739-40 (2009) (finding that "strict FD policies tend to dampen the probability of voting for Blacks, but not for non-Hispanic whites"); *see also* ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 12 (2009), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf> (explaining evidence that disenfranchisement has a broad impact on communities, particularly because "the presence of disenfranchised individuals also affects the voter participation of other members of the community).

<sup>38</sup> Bowers & Preuhs, *supra* note 37, at 741.

<sup>39</sup> In a ruling that has since been extensively analyzed and critiqued, the Supreme Court held in *Richardson v. Ramirez* that felony disenfranchisement laws do not violate the Constitution's equal protection provisions, based on section two of the Fourteenth Amendment, which stipulates that states' Congressional representation would be reduced were they to deny voting rights "to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States...except for participation in rebellion, or other crime." ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 246-51 (rev. ed. 2009); MANZA & UGGEN, *supra* note 1, at 29-33.

<sup>40</sup> Myrna Pérez, Tomas Lopez & Vishal Agraharkar, *The Sustained Momentum and Growing Bipartisan Consensus for Voting Rights Restoration*, THE BRENNAN CTR. FOR JUSTICE (July 6, 2015), <http://www.brennancenter.org/analysis/sustained-momentum-and-growing-bipartisan-consensus-voting-rights-restoration>.

<sup>41</sup> *See* THE SENTENCING PROJECT, *supra* note 2, at 9; *see also* Christopher Uggen et al., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES, 2010 (2012), <http://sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felon-Disenfranchisement-in-the-United-States-2010.pdf>.