

**BRENNAN
CENTER
FOR JUSTICE**

at New York University School of Law

**Written testimony of
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Submitted to the
State Government, Tribal Relations & Elections Committee of the Washington Senate
concerning
Senate Bills 5076 (proposed substitute) & 5207**

January 30, 2019

The Brennan Center is grateful for the opportunity to submit testimony in support of Senate Bill 5207 and the proposed substitute to Senate Bill 5076. We commend this committee for the consideration of these bills and urge the Committee to report the bills to the full Senate and work to pass them into law.

The Brennan Center is a nonpartisan law and public policy institute based in New York City that seeks to improve our systems of democracy and justice. We work on a range of voting rights and election issues and have a long record of supporting efforts to reform criminal disenfranchisement laws at the state and federal levels, including in Washington. For years, we have advocated for both legislative and executive action to restore rights to Americans living in the community with convictions in their past.

In many ways, Washington has been a national leader in passing pro-voter laws. We were happy to celebrate the passage of the Access to Democracy legislation last year. But unfortunately, Washington's criminal disenfranchisement law represents a remaining barrier to that access for tens of thousands of Washingtonians living and working in their communities. By knocking down that barrier, passage of Senate Bill 5207 and the proposed substitute to Senate Bill 5076 will demonstrate that Washington is committed to continuing in its role as a leader. Below, we offer some background on the issue nationally and in Washington, explain the significance of passing these bills, and offer minor suggestions on how to make them even more effective.

Putting Washington in Context: Criminal Disenfranchisement Nationwide

As the attached map shows, until Washington passes these bills, it is far from a leader on this issue. It trails Washington, D.C., and 16 states that already automatically restore voting rights to everyone living in the community, including two states (Maine and Vermont) that never take voting rights away. Washington currently has the most regressive criminal disenfranchisement policy on the West Coast, with a policy on par with Texas and Georgia.

It is time that changes. In fact, this is the perfect moment for Washington to reassert its role as a leader on improving democracy, as momentum has been building on this issue nationwide for

years and we appear to be on the brink of even more change. Earlier this month, Governor Reynolds of Iowa proclaimed her support for a constitutional amendment along the lines of the one that just passed in Florida. Just last week, a bill aimed at restoring voting rights advanced out of a committee in New Mexico’s legislature.

These are early signs that the nation is poised to build on progress that ramped up to a new level last year. In spring 2018, Governor Cuomo began using his pardon power to restore voting rights to people on parole in New York—an action that immediately impacted more than 20,000 New Yorkers and that we are hopeful will be codified by the New York legislature this session.¹ Shortly thereafter, Louisiana’s legislature passed a bill restoring voting rights to tens of thousands of people on probation on parole. Then, in November, voters in Florida—a state that had previously lagged behind the rest of the country on this issue—overwhelmingly approved a constitutional amendment that restored voting rights to an astounding 1.4 million people.

Washington should pass Senate Bill 5207 and the proposed substitute to Senate Bill 5076, restore voting rights to everyone living in the community, and help keep this national momentum at a fever pitch.

Felony Disenfranchisement in Washington

Under current law, Washington prohibits all persons convicted of a felony from voting while they are in prison or on community custody. As a result, there are almost 30,000 Washingtonians living and working in the community who are unable to vote.² We as a society all have an interest in these people successfully completing the terms of their community custody and living productive and engaged lives. Yet the law sends them the message that we are not truly interested in their participation, that we do not trust them to be a part of our democracy, and that we do not consider them to be full citizens.

This damaging impact is felt disproportionately by communities of color. As a result of racial disparities in incarceration rates, 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.³ This is the case across the country, and there is a deep and troubling history of racism driving criminal disenfranchisement laws in this country.⁴ Many of these laws, including Washington’s, date back to the Reconstruction Era.⁵ It is time Washington and the rest of the country bring democracy into the 21st century.

¹ Exec. Order No. 181, Restoring the Right to Vote for New Yorkers on Parole (Apr. 18, 2018), <https://on.ny.gov/2N6sUft>.

² Christopher Uggen, et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement 2016* 15, THE SENTENCING PROJECT (Oct. 2016), available at <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

³ *Id.* at 16. Washington disenfranchises 3.71% of its black residents due to felony convictions, while Oregon and California do so at a rate of 2.62% and 3.41%, respectively. *Id.*

⁴ Erin Kelly, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUSTICE (May 19, 2017), available at <https://www.brennancenter.org/publication/racism-felony-disenfranchisement-intertwined-history>.

⁵ 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 to the privilege of an elector.”); see also Territorial Law of 1881 (Rem. & Bal.

Advocates have spent years trying to change Washington’s law. Early efforts included a 1996 lawsuit under the Voting Rights Act of 1965. After years of litigation, and despite “uncontroverted” evidence of the law’s racially discriminatory impact,⁶ the case was ultimately unsuccessful.⁷ In the meantime, the legislature acted to improve the law by restoring rights to people who had completed any term of community custody, but had outstanding court fines, restitution, or other legal financial obligations (LFOs).

Even under current law, however, people who owe LFOs are only “provisionally” restored the right to vote.⁸ This leaves thousands more Washingtonians living under threat of disenfranchisement because of a confusing system that allows voting rights to be revoked if a person “willfully” fails to pay any outstanding court fines, restitution, or other legal financial obligations (LFOs).⁹ This confusion extends to everyone from election officials to prospective voters themselves about who is eligible to vote. The result is that even voters that are entitled to vote think that they cannot,¹⁰ or refrain from voting out of fear that they may be breaking the law, a phenomenon we call “*de facto* disenfranchisement.”¹¹

Proposed Substitute to Senate Bill 5076

As is, the proposed substitute to Senate Bill 5076 will finally remove all of the barriers to voting for anyone living in the community and resolve all of this confusion. If passed, it will send the clear message to everyone in community custody that they are truly citizens whose voices are welcomed. It will also make it easy for elections officials to know who can register and who cannot. But we believe that minor changes to the bill, along with the passage of Senate Bill 5207, will help eradicate the lingering negative results of Washington’s years of disenfranchising people living in the community. We offer two small suggestions that could prove significant:

1. *Strike the language that provides for the various ways that voting rights can be restored, i.e., a discharge order or a certificate of restoration.*

Specifically, this would mean striking Sections 1(3) and 2(1)(e) of the bill. The beauty of the policy set out in Senate Bill 5076 is that it removes the need for these various processes. Instead, voting rights will be automatically restored to anyone not currently incarcerated.

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.*

⁶ *Farrakhan v. Gregoire*, 590 F.3d 989, 1015 (9th Cir. 2010).

⁷ *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

⁸ Wash. Rev. Code Ann. § 29A.04.079(2).

⁹ *Id.*

¹⁰ *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).

¹¹ Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, BRENNAN CTR. FOR JUSTICE (Oct. 1, 2008), available at <https://www.brennancenter.org/publication/de-facto-disenfranchisement>.

2. *Improve the current procedures for removing people with convictions from the voting rolls.*

In addition to providing for the loss and restoration of voting rights for people with felony convictions, Section 29A.08.520 of the Revised Code of Washington provides for the process by which those people's names shall be removed from the state's voter rolls.¹² Currently, these provisions require the Secretary of State to remove names just twice a year by matching the names and birthdates on a list of people with felony convictions with those of people on the voter rolls.¹³ Unfortunately, in addition to the many other problems caused by criminal disenfranchisement laws, they also sometimes have the effect of causing the accidental removal of legitimate voters from the rolls.¹⁴ This can be the result of sporadic purges and weak matching criteria to identify voters on the rolls with convictions.

We therefore recommend amending these provisions of the code to require the Secretary of State to conduct a monthly review of the rolls using stronger matching criteria to identify voters for removal, including a unique identifier such as the last four digits of a person's Social Security Number.

Senate Bill 5207

Senate Bill 5207 is a simple and straightforward bill that requires each person being released from a Washington prison to be provided with written notice of their voting rights and a voter registration form to fill out. This is incredibly important. People who have been disenfranchised due to felony convictions are far less likely to participate in the democratic process than others, even controlling for other factors.¹⁵ This is surely due at least in part to the confusion about when rights are restored caused by the variation in laws across the country, the lack of public education on this topic, and the particularly confusing process of "provisional restoration" for people that owe LFOs in Washington. But we think these notice provisions can be improved in two simple ways that will make them more effective:

1. *Require both written and verbal notification.*

The moment of a person's release from prison is a critical point in their life, during which 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. As we have recently learned working with partners working to register people on parole in New York after the Governor's recent decision to use his pardon power to restore voting rights, a simple written notification is often not enough.

¹² Wash. Rev. Code Ann. § 29A.08.520(5).

¹³ *Id.*

¹⁴ Jason Clayworth, "This is wrong": Iowa's flawed felon list has been disqualifying legitimate voters for years, DES MOINES REGISTER, Jan. 13, 2019, <https://www.desmoinesregister.com/story/news/investigations/2019/01/13/iowa-election-felon-voting-rights-ban-voters-polling-place-how-register-vote-state-rejected-votes-ia/2359082002/> (updated Jan. 14, 2019).

¹⁵ See, e.g., Alan S. Gerber, et al., *Can incarcerated felons be (re)integrated into the political system? Results from a Field Experiment*, 59 AM. J. OF POL. SCI. 912, 913-15 (2015) (collecting research).

2. *Require the Department of Corrections to collect and submit voter registration forms.*

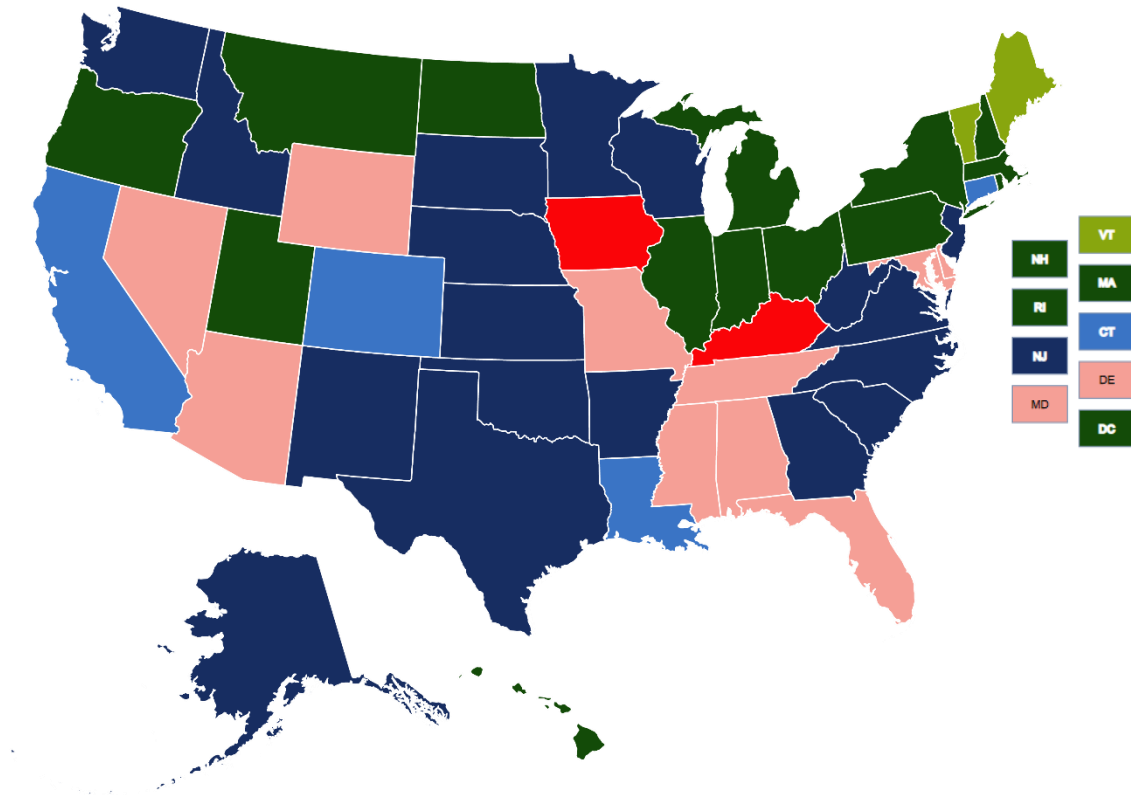
Currently, the bill essentially requires the Department of Corrections to hand each person a registration form on their way out the door. As Washington's legislature recently recognized when it passed automatic voter registration into law, it is important to make the voter registration process as simple 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 instead the Department should be required: (1) to provide each person the opportunity to fill out and return that form; and (2) to send completed forms to elections officials in order to ensure that returning citizens are actually getting registered.

Conclusion

We thank you again for the opportunity to provide this testimony and we are happy to respond to any questions you may have about our suggestions. We look forward to the passage of both of these bills.

Criminal Disenfranchisement Laws Across the United States¹



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, NV, 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, CO, CT, LA


Voting rights restored automatically after release from prison: DC, HI, IL, IN, MA, MI, MT, NH, ND, NY, OH, OR, PA, RI, UT

No disenfranchisement for people with criminal convictions: ME, VT

¹ 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 *December 7, 2018*

 **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.

Nevada: Voting rights automatically restored to people completing sentences for most first-time felony convictions. People with certain felony convictions - including those defined as "category A" felonies - or with multiple felony convictions arising from separate instances, are permanently disenfranchised unless they are pardoned or granted a restoration of civil rights from a court. Individuals that received a "dishonorable discharge" from parole or probation permanently lose voting rights unless pardoned.

Starting on January 1st, 2019, as a result of legislation passed in 2017, voting rights will be automatically restored for most first-time felony convictions, regardless if they received a “dishonorable discharge” from probation or parole. Additionally, persons with certain “category B” felonies will have their voting rights automatically restored two years after completion of sentence.

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

Colorado

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:**

Hawaii

Illinois

Indiana

Massachusetts

Michigan

Montana

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