



2019

Felon Disenfranchisement

Nora V. Demleitner

Washington and Lee University School of Law, demleitner@wlu.edu

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlufac>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Nora Demleitner, Felon Disenfranchisement, 49 U. Mem. L. Rev. 1275 (2019).

This Speech is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Felon Disenfranchisement

NORA DEMLEITNER^{*±}

Good afternoon. I want to thank the Law Review for inviting me to be part of this truly exciting day here at the law school. Increasingly we've seen informal restrictions on the ballot box. Those may take the form of closures of voting places, misleading information about voting times and places, and even registered voters being thrown off the ballot. There is, however, also a connection between the criminal justice system and voting. For example, some studies have documented the indirect impact of the criminal justice system on voter participation. For example, in neighborhoods in which excessive policing occurs, especially the infamous stop-and-frisk practices, voting participation is clearly depressed.¹

My focus today, however, is on a perfectly legal form of disenfranchisement. One that closely connects our voting rights and the

* Roy L. Steinheimer, Jr. Professor of Law, Washington and Lee University School of Law, Virginia. My area of expertise is in criminal justice, with a focus on sentencing and collateral sentencing consequences. Editor, *FEDERAL SENTENCING REPORTER* and lead author, *SENTENCING LAW AND POLICY* (4th ed. 2018). I can be reached at demleitn@wlu.edu and @NDemleitner. For their helpful research assistance, I thank Franklin Runge, Faculty Services Librarian at Washington and Lee's Law School, and my research assistant, Ryan Johnson, Washington and Lee Law Class of 2020.

± Editor's Note: This is an edited transcript of Professor Nora Demleitner's remarks at *The University of Memphis Law Review's* 2019 Symposium, *Barriers at the Ballot Box: Protecting or Limiting the Core of the American Identity*. To watch a video of this presentation, see Memphis Law Review, *Nora Demleitner: Felon Disenfranchisement*, YOUTUBE (Mar. 26, 2019), <https://www.youtube.com/watch?v=ObzWQjwM-24>.

1. See Woo Chang Kang & Christopher T. Dawes, *The Electoral Effect of Stop-and-Frisk*, N.Y.U. (Sept. 29, 2017), http://www.law.nyu.edu/sites/default/files/upload_documents/The%20Electoral%20Effect%20of%20Stop-and-Frisk.pdf.

criminal justice system—felon disenfranchisement. Felon disenfranchisement allows for citizens to be legally barred from voting because of a felony record. The impact of this bar is substantial as we have about 19 million Americans who have a felony record.² Some of those individuals are currently under the control of the criminal justice system, but many of them are not; they've long completed their sentences. It is the states that decide whether and for how long felons will be denied voting rights.

These bars continue even though we have neither a political philosophy nor a criminal justice policy that can justify them. Lack of a satisfying justification might be less distressing were the excluded group smaller and less racially skewed.

In its broadest forms, felon disenfranchisement excludes even individuals who have long been rehabilitated. Yet they are still treated only as partial citizens. Automatic, long-term restrictions on the franchise are unnecessarily exclusionary. More importantly, they hinder reentry and rehabilitation. Citizens returning from imprisonment, who can vote, have lower rates of recidivism than those who are barred from voting.³ Re-enfranchisement signals a return to citizenship. It advances and confirms a returning citizen's full participatory rights. Ultimately, that means we recognize these individuals as having lived up to the expectation of rehabilitation rather than leaving them feeling defeated.

Let's now turn to specific practices and their impact. In its broadest form, felon disenfranchisement impacts large groups of individuals, mainly those currently imprisoned, pre-trial detainees, and

2. Since there is no central database on individuals with a felony record, estimates vary, often based on the definition used. A detailed study analyzed state-level data of those convicted of a felony. It found about 8% of the U.S. population—19 million Americans—to have a felony (conviction) record in 2010. See Sarah K.S. Shannon et al., *Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 *DEMOGRAPHY* 1795 (2017). If those with felony arrest records also get counted, the number is closer to 70 million. See Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <http://www.brennan-center.org/blog/just-facts-many-americans-have-criminal-records-college-diplomas>.

3. See Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 *BERKELEY LA RAZA L. J.* 407, 423–29 (2012).

those under supervised release. In a select number of states,⁴ this disenfranchised populace includes individuals who have long been released from criminal justice supervision.

Let me start with those who are imprisoned. There are two American states that do not bar anyone from the ballot box based on their criminal record. Maine and Vermont permit prison inmates to vote.⁵ But those are the only two states. All other states, at a minimum, disenfranchise individuals currently serving prison time under a felony sentence. That is about 1.5 million people in the United States as a whole.⁶

In addition to convicted prisoners, there are about 550,000 people in jails around the country awaiting trial.⁷ Technically, they are not precluded from voting. They have not lost their voting rights because the law deems them innocent. Yet administrative hurdles effectively

4. The states that retain lifetime disenfranchisement include Iowa, Kentucky, and Virginia. See Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, SENT'G PROJECT (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/10/Expanding-the-Vote-1997-2018.pdf>. Alabama and Delaware prohibit voting upon conviction of select offenses even for those long released from a criminal justice sentence. See *id.* Tennessee's lifetime ban applies only to select offender populations, based on the dates of conviction. See *id.* at 4. Wyoming disenfranchises most offenders, other than those convicted of non-violent offenses. In these states, excluding Delaware, only gubernatorial clemency can restore the right to vote. See *id.* Florida's lifetime disenfranchisement ended with the adoption of a constitutional change in the election of 2018. See *id.*

5. See *Felon Voting Rights*, NAT'L CONF. ST. LEGISLATURES (Dec. 21, 2018), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>; McLeod, *supra* note 4, at 14. In-prison voting is not unusual in some other countries. See Brandon Rottinghaus & Gina Baldwin, *Voting Behind Bars: Explaining Variation in International Enfranchisement Practices*, 23 ELECTORAL STUD. 688 (2007). For a discussion of felon disenfranchisement practices abroad, see also Nora V. Demleitner, *Collateral Sanctions and American Exceptionalism: A Comparative Perspective*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT (Kevin Reitz ed., Oxford University Press 2017).

6. See E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2016*, BUREAU JUST. STAT. (Jan. 9, 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> (updated Aug. 7, 2018); Oliver Hinds et al., *People in Prison in 2017*, VERA INST. JUST. (May 2018), <https://www.vera.org/publications/people-in-prison-in-2017>; Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (March 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

7. See Sawyer & Wagner, *supra* note 6 ("Over 540,000 people are locked up who haven't even been convicted or sentenced.").

disenfranchise them.⁸ Many do not understand that they retain the right to vote. They may not have the ability to get ballot materials, and often they are concerned that voting may be held against them at trial or in other later proceedings. In the Cook County jail in Chicago, Illinois, 17% of pre-trial detainees voted in the 2016 presidential election.⁹ Most of the jails around the country, though, have voting participation rates of less than 1%.¹⁰

Even though the current era has frequently been dubbed the era of “mass imprisonment,” this term is misleading. While our prison system is exceptionally large, the population that is under supervision actually dwarfs it substantially. Almost 4.5 million people are on probation, on parole, or on another form of post-prison supervision.¹¹

State laws determine which of these groups is being disenfranchised at any one point. Some states allow probationers to vote, others do not.¹² Some allow those on parole to vote, others do not.¹³ Some

8. See, e.g., Margaret Barthel, *Getting Out the Vote from the County Jail*, THE ATLANTIC (Nov. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783/>; Danielle Root & Lee Doyle, *Protecting the Voting Rights of Americans Detained While Awaiting Trial*, CTR. AM. PROGRESS (Aug. 23, 2018), <https://www.americanprogress.org/issues/democracy/reports/2018/08/23/455011/protecting-voting-rights-americans-detained-awaiting-trial/>; see also Nsombi Lambright et al., *Pretrial Detainees Not Convicted of Crimes Can Vote, But Mississippi Makes It Impossible*, CLARION LEDGER (Nov. 2, 2018), <https://www.clarionledger.com/story/opinion/columnists/2018/11/02/pre-trial-detainees-mississippi-denied-right-vote/1845808002/>. For a discussion of the voting rights of inmates and how to operationalize them, see MICHAEL MUSHLIN, 3 RIGHTS OF PRISONERS § 16:13 (5th ed., Oct. 2018 Update); AM. CIVIL LIBERTIES UNION & RIGHT TO VOTE, VOTING WHILE INCARCERATED: A TOOL KIT FOR ADVOCATES SEEKING TO REGISTER, AND FACILITATE VOTING BY, ELIGIBLE PEOPLE IN JAIL (2005) https://www.aclu.org/files/pdfs/votingrights/votingwhileincarc_20051123.pdf.

9. See Barthel, *supra* note 8.

10. In Houston, only 29 out of 662 newly registered jail inmates voted. See *id.*

11. See DANIELLE KAEBLE, BUREAU CRIM. JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2016, at 1 (2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>; Sawyer & Wagner, *supra* note 6.

12. See Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT (July 17, 2018), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

13. See *id.* In 2006 The United Nations Human Rights Committee declared felon disenfranchisement that extends beyond the time of imprisonment discriminatory and in violation of international law. For a discussion of disenfranchisement practices in Europe, see CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL

require all conditions of a sentence, such as fines and other types of costs assessed, be fulfilled before voting rights are restored.¹⁴ In fact, it is these financial sanctions that increasingly serve as a barrier to the restoration of rights. In addition to restitution and court fines, many systems now increasingly assess, what I would call, general criminal justice costs.¹⁵ Some states charge individuals for their incarceration as if they had stayed at a hotel. Some charge them with the cost of prosecution, and in a few places, they even get charged with the cost of a public defender.¹⁶ This means convicted individuals carry with them a debt, which unless and until paid in full, renders them ineligible to vote. Because of this difference between the states, what we are really seeing is a patchwork model of state disenfranchisement provisions.

Let us now look at the interaction between the criminal justice system on the one hand and our voting provisions on the other. The

PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus eds., 2009); Demleitner, *supra* note 5; Rottinghaus & Baldwin, *supra* note 5.

14. See Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 310 (2017) (explaining that as of 2016, 9 states had such a requirement for restoration of rights post-sentence); ALLYSON FREDERICKSEN & LINNEA LASSITER, ALLIANCE FOR JUST SOC'Y, *DISENFRANCHISEMENT DEBT: MILLIONS IMPOVERISHED BY PRISON, BLOCKED FROM VOTING* 7, 14 (2016), <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt-FINAL-3.8.pdf>. The courts have generally upheld financial requirements, including the payment of restitution and child support, prior to re-enfranchisement. See, e.g., *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010).

15. See Alexes Harris et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States*, 115 AM. J. SOC. 1753 (2010); Wayne A. Logan, *What the Feds Can Do to Rein in Local Mercenary Criminal Justice*, 2018 U. ILL. L. REV. 1731, 1733–34 (2018); see also Nora V. Demleitner, *Commodifying Policing: A Recipe for Police-Community Tensions*, 51 GA. L. REV. 1047 (2017).

16. See Leah A. Plunkett, *Captive Markets*, 65 HASTINGS L.J. 57, 59, 92 (2013); Lauren-Brooke Eisen, BRENNAN CTR. FOR JUSTICE, *CHARGING INMATES PERPETUATES MASS INCARCERATION* 2 (2015), http://www.brennancenter.org/sites/default/files/blog/Charging_Inmates_Mass_Incarceration.pdf; DEVON PORTER, AM. CIVIL LIBERTIES UNION OF SOUTHERN CAL., *PAYING FOR JUSTICE: THE HUMAN COST OF PUBLIC DEFENDER FEES* 1–4 (2017), <https://law.yale.edu/system/files/area/center/liman/document/pdfees-report.pdf>.

level of disenfranchisement has crept up, starting in the mid-1970s.¹⁷ There was a dramatic jump in the 1990s, in part due to the War on Drugs, but also a host of other criminal justice policies that dramatically increased the number of individuals under its supervision.¹⁸ In 1974 the U.S. Supreme Court, in *Richardson v Ramirez*, declared felon disenfranchisement to be perfectly constitutional under Section 2 of the Fourteenth Amendment.¹⁹

When the prisons started to fill, of course the percentage of disenfranchised individuals went up. Compared to 1976, the United States now has more than four times as many people who are disenfranchised.²⁰ That's the case even though the states have actually loosened their disenfranchisement provisions in the last few years.

The impact on disenfranchisement varies dramatically around the country. By 1980, in a select number of states, including Florida and Virginia, between 2% and 5% of the population was already disenfranchised.²¹ In 2016, there were a number of states, including Tennessee, with disenfranchisement rates of over 5% of their population.²² Granted, Florida's disenfranchisement rates have changed since 2016 in light of Amendment 4, but this map highlights disenfranchisement rates increasing around the country, not just in outlier states.²³

17. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENT'G PROJECT (2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>. In the early 1970s the number of disenfranchised based on a felony record fell to an all-time low of below 1.2 million. *Id.* By 2016, it had reached an all-time high at over 6.1 million. *Id.*

18. For a discussion of the causes for the growth in population under supervision of the criminal justice system, see NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

19. See 418 U.S. 24, 56 (1974) (holding convicted felons could be barred from voting without violating the Fourteenth Amendment to the United States Constitution).

20. See Uggen et al., *supra* note 17.

21. See *id.* at 7.

22. See *id.* at 8.

23. See *id.* at 7–8 (comparing felony disenfranchisement rates by states, 1980 and 2016).

Disenfranchisement, however, does not impact every population group in the same way. It is proportional to how our criminal justice system is dramatically and disproportionately racially skewed.²⁴ When looking at disparate racial impact, by 1980 you already see a dramatic difference between African Americans and whites,²⁵ and to some extent Native-Americans in certain states. Stunningly by 2016, in a fair number of states, over 20% of the voting age minority population, largely African Americans, were barred from voting; this also includes the State of Tennessee.²⁶ It is solely a function of who you choose to disenfranchise based on a felony conviction and for how long that determines the racially exclusionary pattern.

There have been a number of court cases that have attacked felon disenfranchisement. Advocates have tried every kind of theory under the Constitution and the Voting Rights Act.²⁷ These theories have largely failed, with one notable exception. In 1985, the U.S. Supreme Court struck down part of Alabama's felon disenfranchisement law because of the clear racial bias during its adoption.²⁸ The legislative history clearly indicated these semi-discretionary voting provisions were designed to ensure white supremacy in the State of Alabama.²⁹ Alabama subsequently narrowed its disenfranchisement provisions, but there is still substantial exclusion.³⁰ Disparate impact has not been sufficient for courts to overturn disenfranchisement provisions, even though the impact is quite striking in many cases.

24. See NAT'L RESEARCH COUNCIL, *supra* note 18, at 56–68, 91–101.

25. See Uggen et al., *supra* note 17, at 10.

26. See *id.* at 11.

27. See MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE* 47–48 n.10, 259–63 (2019); MICHAEL B. MUSHLIN, *3 RIGHTS OF PRISONERS* § 16:12 (5th ed., Oct. 2018 Update); Robin Miller, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th 31 (2006); *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939 (2002).

28. See *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (invalidating Alabama's criminal disenfranchisement provision in violation of the Equal Protection Clause of the Fourteenth Amendment).

29. See *id.* at 226–32.

30. See Lawrence Specker, 'Long Way to Go' on Voting Rights Restoration, *Say Advocates*, AL.COM: MOBILE REAL-TIME NEWS (Mar. 27, 2019), <https://www.al.com/news/mobile/2019/03/long-way-to-go-on-voting-rights-restoration-say-advocates.html>.

In light of the impact and magnitude of felon disenfranchisement laws, we have to ask about justifications. On the one hand, there may be political theory, democratic values that may provide a justification. Yet there isn't much. The first argument is one of valor and good character: Voters should be upstanding with an unblemished record. This argument is frequently tied to concerns that felons would band together to become single-issue voters, undermining democracy and passing pro-felon and pro-crime laws. Yet the States of Maine and Vermont do not have any more pro-crime legislation than any other state in the country.³¹

The second argument is that felons have violated their part of the bargain and therefore lost their right to participate in a crucial aspect of citizenship. Well, that's why we punish people, and the argument can't be that we continue to do this forever, let alone effectively deny someone indicia of citizenship. Closely tied to this argument is a fraud-based claim: Felons, since they have such bad character, will almost automatically try to commit ballot fraud when they vote. So, to prevent that, we must preclude them from voting entirely from the outset.

There is very little empirical evidence for either the claim of voting fraud or coordinated voting for a pro-crime agenda on the part of felons. My suspicion is that because these arguments are so inherently implausible, they haven't found much favor with the public. In fact, opinion polls indicate that generally the public is not supportive of broad felon disenfranchisement laws.³² Florida overwhelmingly

31. See generally Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WISC. L. REV. 1045 (2002) (addressing different political ideologies applied in defense of felon disenfranchisement). For a discussion of the arguably empirically based argument that those with a felony record vote in a subversive manner, see Alec C. Ewald, *An "Agenda for Demolition": The Fallacy and the Danger of the "Subversive Voting" Argument for Felony Disenfranchisement*, 36 COLUM. HUM. RTS. L. REV. 109 (2004) (undermining the subversive-voting hypothesis).

32. See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 205–20 (2006); Jeff Manza, Clem Brooks & Christopher Uggen, *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275 (2004); Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons' Voting Rights, But Disagree on How*, HUFFINGTON POST (March 21, 2018), https://www.huffpost.com/entry/felons-voting-rights-poll_n_5ab2c153e4b008c9e5f3c88a (detailing information based on a HuffPost/YouGov poll).

voted for Amendment 4 to abolish almost all post-sentence felon disenfranchisement in the state.³³

The interesting part of Steve Mulroy's presentation to me was that these public opinion polls have been across the board very persuasive.³⁴ Still there has been a counter argument to re-enfranchisement: We shouldn't re-enfranchise convicted felons because they're uneducated, and they couldn't possibly participate in the political process because they don't understand it. As a sideline whisper, these arguments contend felons would likely vote for the Democratic Party anyways, so we shouldn't want to re-enfranchise them.

There is an argument to be made that re-enfranchisement would probably benefit the Democratic Party more than the Republican Party. Two very well-known sociologists, Christopher Uggen and Jeff Manza, did a study of the 2000 presidential election in Florida.³⁵ They concluded that without Florida's extensive felon disenfranchisement provisions at the time, the presidential election would have ended differently, leading to the victory of the Democratic presidential contender rather than the Republican who won.³⁶ Senatorial races in a number of states also would have led to different outcomes, in some cases changing the majority party in the Senate.³⁷ This may be true in other states

33. Amendment 4 automatically restored the voting rights of people with a prior felony conviction, except those convicted of murder or a felony sexual offense, upon release from their criminal justice sanction, including prison, parole, and probation. *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, BALLOTPEdia (2018), [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)). The constitutional amendment carried with 64.55% of the vote by surpassing the required supermajority standard of 60%. *Id.* The result may not be surprising considering some opinion research that indicated Americans are generally opposed to a permanent loss of the franchise. See Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URBAN L.J.* 1519, 1530 (2003).

34. For a video of Professor Steve Mulroy's presentation, see Memphis Law Review, *Steve Mulroy: Ranked Choice Voting and Proportional Representation*, YOUTUBE (Mar. 27, 2019), https://www.youtube.com/watch?v=Y-u_GhLdEEg.

35. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *AM. SOC. REV.* 777 (2002).

36. See *id.* at 792–93.

37. See *id.* at 789–90. But see Randi Hjalmarsson & Mark Lopez, *The Voting Behavior of Young Disenfranchised Felons: Would They Vote if They Could?*, 12 *AM.*

as well, but certainly that analysis cannot serve as an argument against re-enfranchising felons.

If the democracy-based arguments are a little shaky, maybe there are criminal justice based arguments for disenfranchisement? Not really is the short answer. First, we don't treat felon disenfranchisement as a punishment; legally we don't consider it a penalty. It's not a criminal sanction at all, it's deemed a civil sanction that we don't impose in open court. It befalls the offender automatically and is one of the many things that happens to a felon solely because of his conviction. In some cases, there is no ending point tied to it. It is not connected to the severity of the crime or the culpability of the offender. It's certainly not proportional. Retribution, therefore, can't apply.

Now, I think we all have to chuckle about the deterrence argument. The threat of disenfranchisement is not what stops people from committing crime, especially when they don't even know about it. So, incapacitation is our sole argument. But there's really no reason to incapacitate an offender from the voting booth, perhaps unless they have committed voting fraud.

I haven't talked about rehabilitation as a goal, and the reason is that the evidence runs the other way: Recidivism declines with re-enfranchisement.³⁸ Apparently those convicted of a felony see the right to participate in elections as a vote of confidence in their ability to rehabilitate, and they attempt to live up to that expectation. Considering these arguments and the racial impact that is so stark and dramatically uncomfortable, it may not be not surprising that a number of states, including so-called red states, have moved towards loosening their

L. & ECON. REV. 356 (2010) (arguing that the Uggen & Manza study overestimated turnout-rate of those who had a felony record, and especially those they call "serious criminals").

38. See Padraic & Vogel, *supra* note 3 (mentioning that higher rates of disenfranchisement are tied to higher rates of recidivism). Others are more cautious in their assessment though noting that "[v]oting appears to be part of a package of pro-social behavior that is linked to desistance from crime." Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. REV. 193, 214 (2004).

felon disenfranchisement provisions.³⁹ Some states opened the franchise to those on probation and parole.⁴⁰ Other states also re-enfranchised most of those released from prison but continued to exclude some categories of offenders.⁴¹

Overall there is a notable retrenchment of felon disenfranchisement provisions around the country. The way in which that has occurred has differed, though. In some states, the legislature changed voting rights provisions, often surgically, with respect to specific aspects of sentences.⁴² Sometimes those changes came after threats of litigation. In other states, executive practice, either by the governor or the Pardon and Parole Board, brought about re-enfranchisement.⁴³ In those states, restoration or pardon procedures allowed individuals to regain either a host of rights lost upon conviction or voting rights specifically. In Virginia, the last governor, Terry McAuliffe, implemented a broad restoration of rights program that effectively ended Virginia's

39. Alec C. Ewald, *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 J. FEDERALISM 527, 527 (2009) (explaining that the severity of the initial policy is a strong predictor of change toward less restrictive felon disenfranchisement).

40. Maryland restored voting rights to persons on probation and parole by legislative action in 2016. See McLeod, *supra* note 4, at 4 (detailing recent felony disenfranchisement policy changes). New York also recently extended voting rights to parolees by an executive order in 2018. See *id.*

41. For example, Connecticut, Missouri, and New Jersey generally restore voting rights upon completion of the sentence, but this does not apply to individuals convicted of election-related offenses. See *50-State Comparison, Loss and Restoration of Civil Rights and Firearm Rights*, RESTORATION RTS. PROJECT, <http://ccresource-center.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/> (last updated Aug. 2018) (comparing the disenfranchisement laws of each state).

42. The California legislature passed Assembly Bill 2466 in 2016, which restored voting rights to jail inmates. See McLeod, *supra* note 4, at 5 (explaining how California re-enfranchised 50,000 inmates). Wyoming also acted through its legislature in 2017 to automatically restore voting rights to all non-violent ex-felons. See *id.* at 12–13 (discussing Wyoming's movement towards expanding the franchise in the last decade).

43. New York Governor Anthony Cuomo issued an executive order restoring voting rights to parolees in 2018. See *id.* at 10 (mentioning that Governor Cuomo intends to continue using executive orders to restore voting rights to felons).

constitutionally based lifetime disenfranchisement.⁴⁴ And finally, direct citizen action changed the broadest disenfranchisement law in the country: Florida's.⁴⁵ Florida had lifetime disenfranchisement until the 2018 election in which the state's voters, with almost 65% of the vote, passed a constitutional amendment to automatically restore the rights of 1.4 million Floridians.⁴⁶ This amendment, however, does not apply to felons convicted of murder or a felony sexual offense. Yet there seems to be ongoing disagreement about some aspects of the law, especially with respect to the meaning of the completion of "all terms of [a] sentence." Florida's Republican lawmakers introduced a bill that would require ex-felons to pay all restitution and fees as a prerequisite to completing "all terms of their sentence."⁴⁷ One republican state senator proposed that the supermajority requirement for future constitutional changes be increased to a two-thirds majority vote.⁴⁸

Despite these changes, felon disenfranchisement continues to play a substantial role in our electoral system, and there are a couple of reasons for that. First, it remains difficult in many states to regain rights. There's often confusion about the requirements for re-enfranchisement. Tennessee, for example, has a very confusing statute.⁴⁹ While talking with one of our morning speakers, Danielle Lang, about

44. See *id.* at 12 (discussing Virginia's efforts to restore felon voting rights).

45. See FLA. CONST. ART. VI, § 4; see *supra* note 33.

46. See *Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018)*, *supra* note 33 (listing the text of Amendment 4 and the final vote).

47. See Lawrence Mower & Emily L. Mahoney, *Florida House Passes Amendment 4 Legislation; Senate Is Next*, TAMPA BAY TIMES (Apr. 24, 2019), <https://www.tampabay.com/florida-politics/2019/04/24/florida-house-passes-amendment-4-legislation-senate-is-next/> (reporting on Florida's legislative efforts to implement Amendment 4).

48. See A.G. Gancarski, *House Ready to Vote on Supermajority for Constitutional Amendments*, FLA. POLITICS (Apr. 8, 2019), <https://floridapolitics.com/archives/293005-house-ready-for-two-thirds> (discussing Rep. Rick Roth's bill that would increase the passage threshold of a constitutional amendment from 60% to 66%).

49. See DIV. OF ELECTIONS, TENN. SEC'Y OF STATE, ELIGIBILITY TO VOTE AFTER A FELONY CONVICTION, <https://sos-tn-gov-files.tnsosfiles.com/forms/Eligibility%20to%20Vote%20after%20Felony%20Conviction.pdf> (detailing Tennessee's confusing disenfranchisement laws). Critics describe Tennessee's current disenfranchisement scheme as "asinine" and lacking any coherent structure. See Billy Binion, *Tennessee Bill Would Restore Felons' Voting Rights*, REASON (Feb. 19, 2019, 4:30 PM), <https://reason.com/2019/02/19/bill-in-tennessee-would-restore-felony-v>.

Tennessee specifically, it became apparent that these requirements create difficulties for people to understand when and if they are eligible to vote again and how to proceed accordingly.

Also, a fair number of states still have executive discretion built into their restoration provisions. It is often the Boards of Pardon and Parole that make these discretionary decisions. Depending on who the governor is, the approval rate maybe be 95% or 5%, which is solely a political decision.⁵⁰ Lack of knowledge and confusion about the requirements for the restoration of voting rights are major impediments in many states. Not surprisingly the more complicated the law, the greater the confusion.

The other problem comes in with an interstate move. A felon with an assault conviction would not have problems voting in the state of Vermont. But if deciding to move to Wyoming, he wouldn't be permitted to vote any longer—not in a Wyoming state election and not in a presidential election.⁵¹ Our hypothetical felon would have to move to states that allow him to vote.

Mistakes often occur because people don't understand the voting provisions in the state they've moved to. Sometimes they're confused about the interplay between a federal conviction and the state voting laws. And, in some cases, they're not sure whether they have a felony or a misdemeanor conviction, which obviously impacts whether they can vote.

Finally, increasingly people with a felony record, even if they think they're eligible to vote, are concerned about voting. Among the few people prosecuted for voting fraud were people who had criminal records that made them ineligible to vote, but they still voted. There were about a dozen of them in North Carolina.⁵² Probably the most

50. See *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Apr. 11, 2019), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> (noting that Gov. Rick Scott restricted Gov. Charlie Christ's efforts to expand the franchise, and restored voting rights to fewer than 2,000 Floridians five years into office).

51. See H.R. 75, 64th Leg., Reg. Sess. (Wyo. 2017) (explaining that those convicted of violent felonies remain permanently disenfranchised).

52. See Jack Healy, *Arrested, Jailed and Charged With a Felony. For Voting.*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html>; Ben Kamisar et al., *Man at the Center of North Carolina Election Fraud Allegations Has a Complicated Past*, NBC NEWS (Dec. 8, 2018, 8:41 AM),

high-profile occurrence was a woman in Texas, who was on a supervised release from a federal non-voting related conviction and got a five-year prison sentence in Texas state court for voting illegally.⁵³ She also had her federal supervised status revoked, so she was going back to federal prison after her state sentence.

Needless to say, if I had a felony record I probably would be reluctant to register, because who knows what could happen? These stories are really disconcerting to people in that situation.

So, what should come next? I think we cannot afford the impact on democracy that comes from the large number of people we have intentionally chosen to disenfranchise without substantial justifications. From a criminal justice reform perspective, which is where much of my work is, it's really highly problematic to continue with this practice. We know it will not thwart recidivism, in fact it does not support reintegration and reentry of individuals.

Certainly, last but not least is the fact that we have this huge documented racial disparity. And we know that it also reflects socioeconomic disparity, because the majority of people with felony records are not wealthy.⁵⁴

We need a national debate about the franchise. We know this after today's Symposium, but also understand this from this discussion about the purpose of felon disenfranchisement, or more accurately the lack of purpose of felon disenfranchisement, its scope and length. I do not necessarily think we have to abolish every felon disenfranchisement provision. Indeed, there may be two categories that render disenfranchisement defensible. One category is crimes that directly attack democracy and the state. For example, if an individual is convicted of treason, it's perfectly fine for a court—in open court—to impose a life-

<https://www.nbcnews.com/politics/elections/man-center-north-carolina-election-fraud-allegations-has-complicated-past-n945511>.

53. See Omar Villafranca, *Texas Woman Facing 5 Years in Prison for Voter Fraud Speaks Out*, CBS NEWS (Aug. 30, 2018, 6:39 PM), <https://www.cbsnews.com/news/crystal-mason-texas-woman-sentenced-to-5-years-for-voter-fraud-speaks-out-on-felon-voting-rights/>.

54. For a longitudinal study on the relationship between income and incarceration, see ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION 11–14, (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

long denial of the franchise. That should be, however, part of the sentence and expressly imposed. If an individual commits voting fraud, or as recently occurred in North Carolina if you are the candidate who supports voting fraud and are criminally convicted, there's no reason why that should not carry an exclusion from the franchise. It doesn't have to be lifelong, by the way. Not everything in our criminal justice system has to be a multiple decade sentence. But certainly, it would send a message about the importance of the franchise and how we're using it if we condemned a voting crime by taking away the franchise for a few years.

Watch for Kentucky. The people who made Amendment 4 a reality in Florida have moved to Kentucky, which has one of the most exclusionary provisions in the country.⁵⁵ It has lifelong disenfranchisement provisions, including for misdemeanor convictions. That's the next state a lot of people are expecting to see pass legislation in some form.

After that, my personal prediction is Virginia. Probably because I live there, but also because Virginia now re-enfranchises people almost automatically by gubernatorial action.⁵⁶ The state constitution in Virginia still mandates lifelong disenfranchisement,⁵⁷ and a governor from a different party may feel very differently about restoring civil rights.

On the litigation side, what you will probably see is the question of what re-enfranchisement upon "completion of a sentence" means.

55. See KY. CONST. § 145(1) ("Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon."); see also *Disenfranchisement News: After Win in Florida, Iowa and Kentucky Consider Reform*, SENT'G PROJECT (Jan. 22, 2019), <https://www.sentencingproject.org/news/disenfranchisement-news-win-florida-iowa-kentucky-consider-reform/> (explaining how Kentucky may model disenfranchisement reform based on success in Florida).

56. See Sheryl Gay Stolberg & Erik Eckholm, *Virginia Governor Restores Voting Rights to Felons*, N.Y. TIMES (Apr. 22, 2016), <https://www.nytimes.com/2016/04/23/us/governor-terry-mcauliffe-virginia-voting-rights-convicted-felons.html?module=inline>.

57. See VA. CONST., art. II, § 1 ("No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.").

This will probably be litigated in Florida, where some of the Republican legislators have indicated that they believe it means having paid off all your fees and fines.⁵⁸ Defenders of Amendment 4, however, have argued it means that supervision has ended—period. We will see how this dispute ends. Right now, it seems that the easiest way for people who favor disenfranchising felons is to argue for more financial sanctions in the criminal justice system. This would enable them to justify disenfranchisement as a criminal justice matter rather than a voting rights issue.

It's overdue for us to take on felon disenfranchisement and really look at this from a broader perspective. We can't allow this ongoing patchwork that serves to disenfranchise people and removes their voting rights because of an often long ago conviction. It's a stain on our democracy, and it really makes us "exceptional" among other Western democracies in a way in which it isn't desirable to be exceptional.⁵⁹ Thank you.

58. See S.B. 7086, 2019 Leg., 121st Sess. (Fla. 2019) (requiring felons to pay all restitution, fees, and fines in order to complete "all terms of sentence").

59. For a discussion of the outlier status of the United States among Western democracies because of its criminal justice policies, see *AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT* (Kevin R. Reitz ed., 2018).