

BARRED FOR LIFE: HOW STATE FELONY DISENFRANCHISEMENT LAWS BAN ELDERLY EX-CONS FROM THE VOTING BOOTH

Jeffrey Z. Raines

Our immense prison population is aging and as a result, ex-felons are being released from incarceration later and later in life. Older ex-felons have the lowest recidivism rates in the country, but despite having served their time, their reintegration into society is not an easy road to navigate. In many states, one's felony status can come with permanent exclusion from one of the most fundamental aspects of American society: voting. State felony disenfranchisement laws dictate whether an individual after their release from prison is able to participate in our elections. But an ex-felon's ability to participate in our democracy varies state-to-state. Created during the Reconstruction, felony disenfranchisement laws originated in the South as another vestige of Jim Crow discrimination. But unlike the rest of Jim Crow laws which were struck down, about fifty years ago, the Supreme Court upheld the constitutionality of state felony disenfranchisement laws, allowing each state to determine whether felony status can be a barrier to voting. As a result, in more than half of the fifty states, one's felony status can delay or even permanently prohibit an ex-felon's right to vote. States fall into one of four different buckets based on the severity of their disenfranchisement laws, ranging from no restrictions to voting to a permanent bar from ever again entering the voting booth. Mass incarceration and increases in the length of sentencing have only increased the number of individuals these disenfranchisement laws impact. This impact does not just affect an ex-felon's voting rights, but also, can alter the electorate to the point of potentially affecting the results of elections had this bloc of ex-felons been alternatively allowed to vote. Research has previously been conducted to determine the impact of these disenfranchisement laws on race, but not on age. The analysis of this Note, takes a first look at the extent in which age has been impacted by these laws, by selecting states in each of the four buckets to see the number of older ex-felons who are having their voting rights negatively impacted. This Note recommends

Jeffrey Z. Raines, Editor-in-Chief 2021–2022, Member 2020–2021, *The Elder Law Journal*; J.D. 2022 University of Illinois, Urbana-Champaign; B.A. 2014, Political Science, American University.

solutions tailored for each of the four categories of states, including modernizing voter registration and education laws, shortening the period an ex-felon must wait post-release from prison to register to vote, and eliminating the payments of court fines and restitution as barriers to voter registration.

I. Introduction

It is 6:00 AM on November 4, 2008, Election Day. Sylvester Hall, a seventy-one-year-old African-American man, excitedly gets up before sunrise and heads to Bailey's Community Center in Falls Church, Virginia to cast his vote for president for then-Senator Barack Obama.¹ But when it is Sylvester's turn to give his name to the poll worker to receive his ballot, he is rebuffed.² The poll worker says Sylvester is no longer on the voter rolls because, in 1978, he was convicted of a felony: buying twenty-five dollars' worth of cigarettes with another man's bank check.³

Because of Virginia's unforgiving stance on felony disenfranchisement, a thirty-year-old mistake over a measly twenty-five dollars and a couple packs of cigarettes cost Sylvester his right to *ever* cast a ballot in Virginia.⁴

Flash forward eight years, and it is time to elect another new president. Sylvester is back at his polling place in Falls Church.⁵ This time, Sylvester is allowed to cast his ballot.⁶ What happened in the interim? Virginia's then-governor, Terry McAuliffe, who was elected in 2013, granted clemency to Sylvester, alongside 67,000 other Virginians.⁷

The restoration of Sylvester's right to vote was a major change in the realm of Virginia voting rights, but it is a remedy still sought by more than 5.2 million Americans across the country.⁸ Each one of these

1. Moriah Balingit, *'It's been beautiful': With rights restored, 79-year-old felon votes again after 40 years*, WASH. POST (Nov. 8, 2016), https://www.washingtonpost.com/local/virginia-politics/its-been-beautiful-with-rights-restored-79-year-old-felon-votes-again-after-40-years/2016/11/08/08c31d28-a5f7-11e6-8042-f4d111c862d1_story.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Christopher Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENT'G PROJECT (Oct. 30, 2020) [hereinafter Uggen, *Locked Out*], <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

5.2 million Americans are unable to vote for one reason: they have a felony on their criminal record.⁹ Despite having “done their time” and reentering society ready to begin again, not one of them is allowed to vote.¹⁰

The reason for this is simple but a little counterintuitive to what middle school social studies and the Civil Rights Movement taught us. There is no right to vote in the United States Constitution.¹¹

Despite the many expansions and amendments made to the right to vote in our founding document—from barring race and gender discrimination, to allowing D.C. residents and eighteen-year-olds to vote—the right itself is not inherent in the Constitution.¹² And even with the occasional plaudits and affirmative dicta from the Supreme Court, a fundamental right to vote is not even *implied* anywhere in the document.¹³ The result: not only have we witnessed numerous states refuse to change their election protocols for the pandemic-plagued 2020 Election, but in just the first few months after November 2020, forty-three states put forth more than 250 bills to restrict voting access.¹⁴

Every year ahead of an election we witness politicians, as well as federal and state governments, sing the praises of voting one day and pass laws restricting the franchise the next.¹⁵ The courts are inconsistent

9. *Id.*

10. *Id.*

11. *Minor v. Happersett*, 88 U.S. 162, 177–78 (1874).

12. See U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXIII; U.S. CONST. amend. XXVI; see also U.S. CONST. amend. XVII; U.S. CONST. amend. XXIV; *Minor*, 88 U.S. at 177–78.

13. See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964); see also *Right to Vote Amendment*, FAIRVOTE, https://www.fairvote.org/right_to_vote_amendment (last visited Nov. 8, 2021).

14. Paul Flahive, *It's Ridiculous': States Struggle To Accommodate COVID-19 Positive Voters*, NPR (Aug. 9, 2020, 7:01 AM), <https://www.npr.org/2020/08/09/900317332/it-s-ridiculous-states-struggle-to-accommodate-covid-positive-voters>; Erika Williams, *ACLU Sues Puerto Rico Over Its Pandemic Voting Policies*, COURTHOUSE NEWS SERV. (Aug. 20, 2020), <https://www.courthousenews.com/aclu-sues-puerto-rico-over-its-pandemic-voting-policies/>; Ari Berman, *Republicans Are Taking Their Voter Suppression Efforts to New Extremes*, MOTHER JONES (Feb. 24, 2021), <https://www.motherjones.com/politics/2021/02/republicans-are-taking-their-voter-suppression-efforts-to-new-extremes/>.

15. See, e.g., *id.*; *Message from GOP lawmakers to Iowans: We don't want you voting*, DES MOINES REG. (June 12, 2020, 7:54 AM), <https://www.desmoinesregister.com/story/opinion/editorials/2020/06/08/gop-state-lawmakers-dedicated-making-harder-iowans-vote-editorial/3173108001/>.

on voting rights as well.¹⁶ Some courts apply strict scrutiny and describe such voting restrictions as forms of “invidious discrimination.”¹⁷ On the other end of the spectrum, other courts allow lower standards of review that enable state and local governments to bar American citizens from exercising this supposedly fundamental right.¹⁸

As a result, twenty-eight states bar some individuals from voting because of previous criminal convictions.¹⁹ These laws vary significantly state to state, from the most enfranchising states like Maine and Vermont, where individuals never lose their right to vote regardless of crime or incarceration status, to the eleven states that permanently disenfranchise portions of their population from ever again exercising the right to vote after a criminal conviction.²⁰ Most states fall somewhere in between, barring rights restorations based on the type of crime, requiring completion of probation and/or parole for restoration or additional time requirements to be met (sixteen states), or just automatically restoring one’s voting rights upon release from prison (twenty states).²¹ The individuals in the eleven most-restrictive states, however, make up nearly fifty percent of the entire disenfranchised population (around 2.23 million individuals).²²

Nationwide, approximately 5.2 million Americans are unable to vote because of felony disenfranchisement laws.²³ These laws range from prohibiting individuals from ever registering to vote, to requiring them to not recidivate within a certain number of years, or mandating they pay back court fees and fines they simply will never be able to afford.²⁴ And while five million Americans only represent two percent of the voting age population, their size vis-à-vis electoral turnout is much larger.²⁵

16. See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (quoting *Norman v. Reed*, 503 U.S. 279, 288–89 (1992)).

17. See, e.g., *Harper*, 383 U.S. at 668.

18. See, e.g., *Crawford*, 503 U.S. at 191 (quoting *Norman*, 503 U.S. at 288–89).

19. *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUST. (May 30, 2019). [hereinafter BRENNAN], <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states> (last updated Mar. 28, 2022).

20. *Id.*

21. See *id.*

22. Uggen, *Locked Out*, *supra* note 8.

23. *Id.*

24. *Id.*

25. *Id.*; Estimates of the Voting Age Population for 2019, 85 FED. REG. 8557–58 (Feb. 14, 2020).

In the 2020 election, 66.7% of all eligible voters (approximately 159 million voters) turned out to the polls—the highest turnout for a presidential election since 1900.²⁶ In the last two presidential elections, there were several battleground states with razor-thin margins between the winning candidate and the losing candidate.²⁷ In 2020, Joe Biden won Georgia by a margin of only 12,670 votes and Arizona by 10,457.²⁸ It is estimated there are over 301,000 ex-felons in Arizona and over 216,000 in Georgia who were unable to vote because of their respective states' strict and far-reaching disenfranchisement laws.²⁹ Both states' 2020 vote margins could have changed significantly if even a fraction of these disenfranchised populations were allowed to exercise the right to vote.³⁰

Disenfranchisement laws also could have impacted the 2016 presidential contest. Wisconsin's 2016 presidential election was decided by less than 23,000 votes, with 67.3% of eligible voters going to the polls (approximately three million voters).³¹ In 2016, there were 64,900 Wisconsinites under probation or parole supervision.³² This number has slightly increased since then.³³ Wisconsin's total probation, supervised/mandatory release, and parole numbers for 2019 were 65,822.³⁴ Had Wisconsin's parolee and probation population been allowed to vote, it is certainly possible this demographic could have changed the outcome of the 2016 presidential election in Wisconsin.

26. James M. Lindsay, *The 2020 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 15, 2020), <https://www.cfr.org/blog/2020-election-numbers>.

27. Benjamin Swasey, & Connie Hanzhang Jin, *Narrow Wins In These Key States Powered Biden To The Presidency*, NPR (Dec. 2, 2020, 5:00 AM), <https://www.npr.org/2020/12/02/940689086/narrow-wins-in-these-key-states-powered-biden-to-the-presidency>.

28. *Id.*

29. Uggen, *Locked Out*, *supra* note 8, at 5, 16 (estimating the total number of disenfranchised ex-felons by post-sentence, parole, and probation ex-felons combined for both Arizona and Georgia respectively).

30. See Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 (6) AM. SOCIO. ASS'N 777, 792–93 (Dec. 2002) [hereinafter Uggen & Manza], <https://www.jstor.org/stable/3088970>.

31. *Election 2016: Wisconsin Results*, N.Y. TIMES, <https://www.nytimes.com/elections/2016/results/wisconsin> (last updated Aug. 1, 2017, 11:22 AM); *Voter Turnout Partisan-NonPartisan Through November 2020*, WIS. ELECTIONS COMM'N, <https://elections.wi.gov/elections-voting/statistics/turnout> (last visited Feb. 8, 2022).

32. Jarred Williams et al., *The Wisconsin Community Corrections Story*, COLUM. U. JUST. LAB (Jan. 22, 2019), 4, <https://justicelab.columbia.edu/wisconsin-community-corrections-story>.

33. DIV. CMTY. CORRS., *2019: A Year in Review*, WIS. DEP'T OF CORRS., 9, <https://doc.wi.gov/DataResearch/DataAndReports/DCCYearInReview.pdf>.

34. *Id.*

This is not the only time where a close race could have come out differently if felony disenfranchisement laws did not have such an out-sized shadow on the electorate.³⁵ In 2000, Florida had an estimated 827,000 disenfranchised felons.³⁶ According to one study, if they had been allowed to register to vote and even just a quarter of them had turned out to the polls, given their strong Democratic lean, Al Gore would have likely won Florida by tens of thousands of votes and would have been elected president over George W. Bush.³⁷ Another race that likely would have come out differently is Mitch McConnell's first run for U.S. Senate in Kentucky in 1984, which he won by only 5,269 votes.³⁸ At that time, over 75,000 disenfranchised felons, ex-felons, probationers, and parolees in Kentucky were unable to vote, and with seventy percent of them identifying at the time as Democrats,³⁹ it is possible we might have a different Senate minority leader today.

While there has been previous analysis on how felony disenfranchisement disproportionately impacts communities of color,⁴⁰ there has not been an analysis on age—how older former felons have been negatively impacted by losing their right to vote. This issue will be the focus of this Note.

Older Americans have different needs in society.⁴¹ As a result, plenty of state and federal laws have been enacted directly to address the unique health care concerns, economic needs, and even food and housing insecurities of our aging population.⁴² Federal programs like Medicare, Social Security, and Meals on Wheels, as well as state and federal statutes addressing age discrimination, job training, and elder

35. Uggen & Manza, *supra* note 30, at 792–93.

36. *Id.*

37. *Id.*

38. *Id.* at 789.

39. *Id.*

40. Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST. (May 9, 2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf; 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. SOCIO. 559, 559–605 (Nov. 2003), http://users.cla.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf (finding that the larger a state's Black population, the more likely the state was to pass strict felony disenfranchisement laws).

41. See generally Natalie Kean & Kate Lang, *Supporting Older Americans' Basic Needs: Health Care, Income, Housing and Food*, JUST. IN AGING (Apr. 2018), https://www.justiceinaging.org/wp-content/uploads/2018/04/Supporting-Older-Americans%E2%80%99-Basic-Needs_Health-Care-Income-Housing-and-Food.pdf.

42. See *id.*

abuse were all created with senior citizens in mind.⁴³ Finally, when it comes to special considerations around voting, Congress has even passed legislation to ensure polling locations are accessible to the elderly and the disabled.⁴⁴ These are just a few select examples of how older Americans are given deferential treatment.

Part II of this Note will discuss the history of felony disenfranchisement and its rise under the policies of mass incarceration. Subject to how states break down their demographic data, including mandatory supervised release and parole data by age, Part III of this Note will analyze the impact voter disenfranchisement laws have on older former felons and how these laws not only negatively impact our elections, but our democracy. The analysis, when possible, will look at felon populations fifty years of age and older—the age generally accepted by criminology and correctional experts for when a prisoner becomes “elderly.”⁴⁵ With four distinct categories of states based on the strictness of their felony disenfranchisement laws, this Note will look at the older felon population in one state from each of the four categories using age-specific demographic data as available. This Note will also look at the major types of felony disenfranchisement laws, mirroring the states chosen above, and the impact of these laws.

Part IV of this Note will suggest reforms to state disenfranchisement laws that will immediately help this older subset of the formerly incarcerated population re-enfranchise. It also will outline additional voting laws and regulation reforms that should be considered to encourage their registration to vote and their participation at the polls on Election Day.

43. See *id.*; see also, President Franklin D. Roosevelt, *Presidential statement signing the Social Security Act (Aug. 14, 1935)*, SOC. SEC. ASS'N, <https://www.ssa.gov/history/fdrs/signstate.html> (“We can never insure one hundred percent of the population against one hundred percent of the hazards and vicissitudes of life, but we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age.”); *Age Discrimination in Employment Act of 1967* (Pub. L. 90-202); *Senior Community Service Employment Program (SCSEP)*, NAT'L COUNCIL ON AGING, <https://www.ncoa.org/economic-security/matureworkers/scsep/> (last visited Nov. 8, 2021); “The Elder Justice Act”, 42 U.S.C. §1397j (2010).

44. 52 U.S.C. § 20103.

45. *At America's Expense: The Mass Incarceration of the Elderly*, AM. CIV. LIBERTIES UNION (June 2012), 1 [hereinafter *At America's Expense: The Mass Incarceration of the Elderly*], <https://www.aclu.org/report/americas-expense-mass-incarceration-elderly>.

II. Background

For all intents and purposes, there are two types of felony disenfranchisement laws.⁴⁶ The first type involves laws that disenfranchise felons while they are incarcerated and the second type involves laws that continue to punish those individuals once they have been released.⁴⁷ Over one-third of states started disenfranchising ex-felons by 1850.⁴⁸ By 1920, three-fourths of states were disenfranchising ex-felons.⁴⁹

Models for felony disenfranchisement laws came over from Europe and were restricted to just a short list of enumerated felonies.⁵⁰ But these laws continued to grow over time and soon covered all felony crimes and expanded to haunt felons after they had completed their prison sentences.⁵¹ This long shadow that hangs over individuals who have already served their time is largely unique to the United States.⁵² Other nations that disenfranchise ex-felons are much more limited in the types of individuals their laws target, and they also restore voting rights after a relatively short period of time.⁵³ And while it is true that the history of felony disenfranchisement in the United States goes back to America's colonial status and these types of laws themselves can be traced back to ancient Greece and Rome, felony disenfranchisement laws in the United States really grew in prevalence after the end of the Civil War.⁵⁴

A. Growth Under Jim Crow

Felony disenfranchisement laws were a dominant Jim Crow method to disqualify the freed Black population from the voter rolls and re-establish white supremacy in the South.⁵⁵ In reaction to Congress barring high-ranking members of the Confederacy from winning back congressional seats after the Civil War ended, these Southern

46. See Behrens et al., *supra* note 40, at 564.

47. *Id.*

48. *Id.* at 564–66.

49. *Id.*

50. *Id.*

51. *Id.*

52. Uggen & Manza, *supra* note 30, at 778.

53. *Id.*

54. Kelley, *supra* note 40; see also Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721–25 (1973).

55. Behrens et al., *supra* note 40, at 563.

separatists turned around and targeted the newly-established Black vote, which threatened to undermine their power.⁵⁶ Their aim was to undo the electoral impact of the newly-enfranchised Black voters by creating Black Codes and Jim Crow laws to criminalize and prosecute Black people in large numbers for whatever conduct triggered these racists' inferiority complexes.⁵⁷ Felony disenfranchisement laws were the first widespread restrictions on voting imposed on Black Southerners.⁵⁸ These laws were put on the books even before Southern states added poll taxes, literacy tests, white-only primaries, and grandfather clauses to their state election codes and state constitutions.⁵⁹

Of the eleven former Confederate states, eight passed laws targeting these felon populations by 1869, just a few years after Civil War hostilities subsided.⁶⁰ Two of the remaining states, Louisiana and Virginia, already had felony disenfranchisement laws before the war; the final state, North Carolina, joined the club by 1876.⁶¹ Many of these other Jim Crow barriers to voting were adopted by the South after 1890.⁶²

Over time, the reach of disenfranchisement laws grew. Soon, they did not just apply to felony offenses while someone was incarcerated, but also grew to reach ex-felons whose time was served.⁶³ For example, in South Carolina in 1895, the reason for this expansion to ex-felons was literally Black and white.⁶⁴ Party leaders spread rumors that there were forty-thousand more Black voters in the state than whites as a part of their push to disenfranchise ex-felons at a state constitutional convention.⁶⁵

56. Gerard N. Magliocca, *Amnesty and Section Three of the Fourteenth Amendment*, 36 CONST. COMMENT. 87 (2021), 1, 6–9, available at: <https://ssrn.com/abstract=3748639>; see Behrens et al., *supra* note 41, at 563.

57. *Id.*, at 563, 566; see *The Southern "Black Codes" of 1865-66*, CONST. RTS. FOUND., <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> (last visited Nov. 8, 2021); *Jim Crow Laws*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> (last visited Nov. 8, 2021).

58. Behrens et al., *supra* note 40, at 563, 566.

59. *Id.* at 563.

60. *Id.*, at 564–66; see Ted Widmer, *Disunion: Did the American Civil War Ever End?*, N.Y. TIMES (June 4, 2015, 12:41 PM), <https://opinionator.blogs.nytimes.com/2015/06/04/did-the-american-civil-war-ever-end/>.

61. Behrens et al., *supra* note 40, at 565.

62. *Id.* at 564–66.

63. *Id.* at 569.

64. *Id.*

65. *Id.*

Later, even minor offenses became grounds for losing one's voting rights.⁶⁶ For example, Alabama focused on prohibiting anyone who had committed a crime of "moral turpitude" from voting.⁶⁷ Crimes of moral turpitude were considered by the Alabama Supreme Court to be anything "immoral in itself, regardless of the fact whether it is punishable by law."⁶⁸ In practice, this meant that not only could committing a misdemeanor of an "immoral" nature cost one their voting rights, but so could an "immoral" act that was in fact only a common-law-created "crime" not based in any Alabama state criminal statute.⁶⁹

Concern about immoral "crimes" was just a proxy for the real issue that was eating at Alabama politicians.⁷⁰ Just like in South Carolina, Alabama's constitutional convention on this subject was really honed in on fears of white politicians losing their racial supremacy.⁷¹ The president of Alabama's all-white convention justified this blatant electoral manipulation to avert "the menace of negro domination" in the affairs of government.⁷² This sentiment was true across these Southern constitutional conventions.⁷³ Notorious white supremacist U.S. Senator James Vardaman was unequivocal: "Mississippi's constitutional convention of 1890 was held for no other purpose than to eliminate the [n—] from politics."⁷⁴

Despite these overtly racist motivations, the actual state constitution provisions were, on their face, race-neutral.⁷⁵ In one case, the

66. Uggen & Manza, *supra* note 30, at 781.

67. Behrens et al., *supra* note 40, at 569.

68. *Id.*; *Pippen v. State*, 197 Ala. 613, 616 (1916) (quoting *Fort v. Brinkley*, 87 Ark. 400, 112 S.W. 1084, 1084 (1908)) ("The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude"); *see also Gillman v. State*, 165 Ala. 135, 136 (1910) (stating that moral turpitude required "an inherent quality of baseness, vileness, depravity...").

69. Behrens et al., *supra* note 40, at 569; *Pippen*, 197 Ala. at 616.

70. *See* Behrens et al., *supra* note 40, at 569.

71. *Id.*

72. *Id.*

73. *See generally id.*

74. Jerry Mitchell, *Lawsuit: Mississippi Constitution still disenfranchising thousands*, CLARION LEDGER (Mar. 27, 2018, 5:31 PM), <https://www.clarionledger.com/story/news/2018/03/27/mississippi-still-disenfranchising-thousands/458068002/> (racial slur removed); *see generally* William F. Holmes, *The White Chief: James K. Vardaman in Mississippi Politics, 1890–1908*, (May 1964) (Ph.D. dissertation, Rice University) (on file with Rice University), <https://scholarship.rice.edu/bitstream/handle/1911/14165/6410174.PDF?sequence=1&isAllowed=y>.

75. *See Williams v. State of Mississippi*, 170 U.S. 213, 225 (1898); *see, e.g., MISS. CONST. art. XII, § 241; S.C. CONST. art. II § 6* (amended as art. II § 7 in 1971 removing all the 1895 specific offenses that could disenfranchise a voter).

Mississippi Supreme Court justified the state's felony disenfranchisement constitutional provision by noting their state constitution convention understood that it could not discriminate against Black Mississippians because of the Reconstruction Amendments, so instead, they were simply discriminating against the characteristics and offenses to which this "weaker" race was prone.⁷⁶ Similarly, the Alabama constitutional convention president explained their facially-neutral language this way: these provisions were not to punish Black voters for their race, but for the inferiority of their intellect and morality.⁷⁷

These expansions of voter disenfranchisement provisions came as Southern white supremacists began to expand their anti-Black strategy to reassert their dominance at the ballot box outside the criminal law context.⁷⁸ Their Southern constitutional conventions also added in grandfather clause provisions, literacy tests, and the like to further deny Black Southerners a voice at the ballot box.⁷⁹ While other Jim Crow methods to prohibit Black folks from voting expired under the mighty review of the U.S. Supreme Court or as a result of the Voting Rights Act of 1965 ("VRA"), felony disenfranchisement laws have not shared the same fate.⁸⁰ In fact, felony disenfranchisement laws only gained power in the decades following the Civil Rights Movement.⁸¹

B. Tough on Crime's Expansive Reach

Jim Crow might have started states down the path to disenfranchise their citizens who have completed their prison sentences, but it was the start of the "tough on crime" era and the War on Drugs under

76. *Ratliff v. Beale*, 74 Miss. 247, 20 So. 865, 868 (1896) (noting that the 13th, 14th, and 15th Amendments barred certain lawmaking considerations based on race).

77. *Behrens et al.*, *supra* note 40, at 571.

78. *Uggen & Manza*, *supra* note 30, at 781.

79. *See, e.g.*, MISS. CONST. art. XII, § 243–44 (requiring a poll tax and literacy test to vote), available at: <http://mshistorynow.mdah.state.ms.us/articles/103/index.php?s=extra&id=270>; *Guinn v. United States*, 238 U.S. 347, 356 (1915) (citing Oklahoma's grandfather clause at issue in the case).

80. *See generally* *Guinn v. United States*, 238 U.S. 347 (1915) (striking down an Oklahoma constitutional clause granting white voters access to a grandfather clause provision that would circumvent the state's mandatory literacy tests); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 666 (1966) (striking down poll taxes for state elections); Voting Rights Act of 1965, 52 U.S.C. § 10101 (banning the use of literacy tests with only narrow exception); *see also* *Oregon v. Mitchell*, 400 U.S. 112 (1970) (barring states from imposing literacy tests on federal elections).

81. *See Kelley*, *supra* note 40.

President Nixon in 1971 that gave these disenfranchisement laws the power they still hold over our country fifty years later.⁸²

In the 1970s and 1980s, Presidents Richard Nixon and Ronald Reagan, with help from Congress, started enacting new crime laws to deal with the decline of “law and order.”⁸³ Nixon and his cronies peddled new crime policy blaming the 1960s Civil Rights Movement and Dr. Martin Luther King Jr.’s civil disobedience tactics for rising crime stats in order to create a political wedge issue against Black Americans and hippies.⁸⁴ Reagan’s rhetoric continued what Nixon started, tapping into deeply held societal attitudes against communities of color and illicit drug use.⁸⁵ At the same time, Democrats in Congress were worried about looking “soft on crime” and passed new mandatory minimums without hearings and without conferring with the Bureau of Prisons or the federal judiciary.⁸⁶ Others in Washington grew tired of current laws that allowed judges to have broad discretion to determine prison sentences and parole.⁸⁷ Punishment became the primary purpose of prison, no longer justice or rehabilitation.⁸⁸

As a result, the federal government over the resulting decades has continued to press for increased penalties for specific crimes, lengthier and mandatory sentencing requirements, and increased prosecution

82. *A Brief History of the Drug War*, DRUG POL’Y ALL., [hereinafter DRUG POL’Y ALL.], <https://drugpolicy.org/issues/brief-history-drug-war> (last visited Nov. 8, 2021).

83. See NAT’L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* (Jeremy Travis et al. eds., 2014), <https://www.nap.edu/read/18613/chapter/6#106>.

84. Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, THE ATLANTIC (Oct. 2015), <https://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>; Tom LoBianco, *Report: Aide says Nixon’s war on drugs targeted blacks, hippies*, CNN (Mar. 24, 2016, 3:14 PM), <https://www.cnn.com/2016/03/23/politics/john-ehrllichman-richard-nixon-drug-war-blacks-hippie/index.html>.

85. Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks”* 6 J. GENDER RACE & JUST. 381, 389–91 (2002).

86. Arit John, *A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug Sentencing*, THE ATLANTIC (Apr. 22, 2014), <https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/>; see also Coates, *supra* note 84.

87. Coates, *supra* note 84.

88. John, *supra* note 86; Cyrus Tata & Neil Hutton, *Getting Tough On Crime: The History And Political Context of Sentencing Reform Developments Leading to The Passage Of The 1994 Crime Act*, SENT’G & SOC’Y: INT’L PERSPS. 1, 4–5 (2002), <https://www.justicestrategies.org/sites/default/files/Judy/GettingToughOnCrime.pdf>.

rates for drug crimes.⁸⁹ When Reagan entered office in 1981, the prison population was 329,000.⁹⁰ When he left eight years later, it had nearly doubled, to 627,000.⁹¹ The number of incarcerated nonviolent drug offenders increased from 50,000 in 1980 to more than 400,000 by 1997.⁹² In 2003, Congress created, increased, or expanded nearly forty mandatory minimum sentencing requirements, adding more fuel to the fire.⁹³

Over the decades, state governments have followed suit. Between 1975 and 1985, all fifty states passed at least one mandatory sentencing law.⁹⁴ In the 1980s, twenty-eight states passed “truth in sentencing” laws that require people to serve nearly their entire sentence before even becoming eligible for parole.⁹⁵ Long prison sentences were also added for a host of crimes.⁹⁶ Southern states were restricting clamping down on parole board discretion.⁹⁷ Other states mandated what judges could or could not do at sentencing hearings—eliminating their discretion and requiring certain sentence ranges or requiring a mandatory minimum sentence.⁹⁸ From 1985 to 2000, the likelihood of a long state prison sentence had doubled for drug possession and tripled for drug trafficking.⁹⁹

Even though in recent years there have been some governmental efforts to reform the criminal justice system including adding flexibility back into sentencing guidelines, deprioritizing certain drug offenses, and, even, state decriminalization efforts, in many places the “tough on crime” mentality still holds true fifty years later.¹⁰⁰ With more

89. See Lauren-Brooke Eisen, *Criminal Justice Reform at the State Level*, BRENNAN CTR. FOR JUST. (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level>; see, e.g., Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); see also Nunn, *supra* note 85, at 387.

90. James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

91. *Id.*

92. DRUG POL’Y ALL., *supra* note 82; John, *supra* note 86.

93. John, *supra* note 86.

94. Tata & Hutton, *supra* note 88, at 9.

95. Eisen, *supra* note 91.

96. Tata & Hutton, *supra* note 88, at 2.

97. *Id.* at 6.

98. See, e.g., *id.* at 7, 9; Coates, *supra* note 84.

99. Coates, *supra* note 84.

100. Justin George, *What’s Really in the First Step Act?*, THE MARSHALL PROJECT (Nov. 16, 2018, 12:45 PM), <https://www.themarshallproject.org/2018/11/16/what-s-really-in-the-first-step-act>; see, e.g., Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, THE MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how>

individuals in prison as a result of mandatory and longer prison sentences, state felony disenfranchisement laws have now reached hundreds of thousands more Americans as prison populations ballooned 222% between 1980 and 2010.¹⁰¹ The result is more disenfranchised felons under these unforgiving systems.¹⁰²

“Tough on crime” policies have been shown to have a marginal-at-best effect on reducing crime rates.¹⁰³ Despite their ineffectiveness, and despite subsequent decades with plummeting crime rates, there have not been any major changes to these policies.¹⁰⁴ The 2018 First Step Act received a lot of attention for being the first real criminal justice reform bill to be signed into law in a decade, but as its name suggests, it was not meant to be holistic reform.¹⁰⁵ The Act only impacted a few thousand federal prisoners.¹⁰⁶ The law did not even touch the 1.3 million prisoners in state penitentiaries.¹⁰⁷ The political will for major reform is hard to find, however. Partisan politics and political gamesmanship has killed off reform efforts before.¹⁰⁸ That is all not especially surprising when the overwhelming majority of the people who are most impacted by the current crime laws cannot vote anyone out of office while incarcerated, and plenty more cannot vote upon their

prosecutions-have-changed-in-cook-county; Richard Luscombe, *How marijuana legalization made strides across the US in this election*, THE GUARDIAN (Nov. 14, 2020, 6:00 AM), <https://www.theguardian.com/us-news/2020/nov/14/marijuana-legalization-us-elections-2020>; *Oregon voters approve ‘magic’ mushrooms for therapeutic use*, ASSOCIATED PRESS (Nov. 3, 2020), <https://apnews.com/article/oregon-ballot-drug-measures-senate-5cb7b67f09908157f0d28618c8743d43>.

101. Uggen, *Locked Out*, *supra* note 8; see also *Criminal Justice Facts*, THE SENT’G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited Nov. 8, 2021).

102. Uggen, *Locked Out*, *supra* note 8.

103. NAT’L RSCH. COUNCIL, *supra* note 83.

104. Coates, *supra* note 84; see Dartunorro Clark & Janell Ross, *The First Step Act promised widespread reform. What has the criminal justice overhaul achieved so far?*, NBC NEWS (Nov. 24, 2019, 7:00 AM), <https://www.nbcnews.com/politics/politics-news/first-step-act-promised-widespread-reform-what-has-criminal-justice-n1079771>.

105. See Kara Gotsch, *One Year After the First Step Act: Mixed Outcomes*, THE SENT’G PROJECT (Dec. 17, 2019), <https://www.sentencingproject.org/publications/one-year-after-the-first-step-act/>.

106. Ames Grawert, *What Is the First Step Act—And What’s Happening With It?*, BRENNAN CTR. FOR JUST. (June 23, 2020), <https://www.brennancenter.org/our-work/research-reports/what-first-step-act-and-whats-happening-it>.

107. Clark & Ross, *supra* note 104.

108. See Carl Hulse, *Why the Senate Couldn’t Pass a Crime Bill Both Parties Backed*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/us/politics/senate-dysfunction-blocks-bipartisan-criminal-justice-overhaul.html>.

release.¹⁰⁹ “Tough on crime” has not just impacted individual communities with over-policing and mass incarceration; its imprint has been left on the very foundation of our democratic system.¹¹⁰

C. The Constitutionality of Disenfranchisement Laws

Unlike the rest of the Jim Crow era’s disenfranchisement laws, felony disenfranchisement laws are the only ones still on the books.¹¹¹ The Supreme Court struck down grandfather clauses in 1915.¹¹² Literacy tests bit the dust in 1965.¹¹³ Poll taxes were killed off by the Twenty-fourth Amendment (for federal elections) and by the U.S. Supreme Court for state offices in 1966.¹¹⁴ When given the opportunity to address the constitutionality of felon disenfranchisement, however, the Supreme Court did not swing at the pitch.¹¹⁵

The Court upheld the constitutionality of state felon disenfranchisement laws in 1974 in *Richardson v. Ramirez*.¹¹⁶ *Richardson* was brought to the Court by three Californian men who had completed their sentences but, under state law, were permanently disenfranchised unless their rights were restored by a pardon or court order.¹¹⁷ The men sued for their right to vote and were denied by then-Justice William Rehnquist who found that Section 2 of the Fourteenth Amendment allowed states to deny voting rights for felons and ex-felons.¹¹⁸ Section 2 of the Fourteenth Amendment states:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the

109. See Uggen, *Locked Out*, *supra* note 8.

110. See *id.*

111. Erika Wood, *NY’s Jim Crow laws—back in the day, and what remains today*, BRENNAN CTR. FOR JUST. (Mar. 1, 2010), <https://www.brennancenter.org/our-work/analysis-opinion/nys-jim-crow-laws-back-day-and-what-remains-today>.

112. See *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915); see also *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

113. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(e), 79 Stat. 437–39, (codified as amended in 52 U.S.C. § 103003) (banning the use of literacy tests with only narrow exception); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966); see also *Oregon v. Mitchell*, 400 U.S. 112 (1970) (barring states from imposing literacy tests on federal elections).

114. U.S. CONST. amend. XXIV; *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

115. See *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

116. *Id.*

117. *Id.* at 29–31.

118. *Id.* at 54.

right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or *other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.¹¹⁹

In the majority opinion, Justice Rehnquist focused on the “other crime” language in Section 2 of the Fourteenth Amendment, stating that because this language was included, a state could therefore exclude someone from voting because they had engaged in criminal activity.¹²⁰ Rehnquist interpreted this language literally as an “affirmative sanction” within the Constitution to permit states to consider felony status as part of determining the qualifications of voters.¹²¹ Whereas the Supreme Court normally applied the Equal Protection Clause of the Fourteenth Amendment to voting rights cases and demanded the state show it will survive strict scrutiny,¹²² here, Justice Rehnquist said that Section 2 effectively insulates felony disenfranchisement laws from a strict scrutiny challenge.¹²³

In doing so, Justice Rehnquist muddled the original context of Section 2, which was added after the Civil War to constitutionally disincentivize former Confederate states from disregarding the newly freed slaves in their states when it came to the Electoral College and congressional apportionment.¹²⁴ Section 2 was not about who got to cast their ballots in those states and who did not.¹²⁵ In distorting the original intent behind Section 2 and ruling against the individual respondents

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

120. *Richardson*, 418 U.S. at 53–54.

121. *Id.* at 54.

122. *Kramer v. Union Free Sch.*, 395 U.S. 621, 627 (1969); *see also* *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

123. *See Richardson*, 418 U.S. at 54–56.

124. *Compare id.* at 49–50, with Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1604–05 (2012), <https://www.yalelawjournal.org/article/voting-and-vice-criminal-disenfranchisement-and-the-reconstruction-amendments>.

125. *Compare Richardson*, 418 U.S. at 49–50, with William W. Van Alstyne, *The Fourteenth Amendment, the “Right” to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 *SUP. CT. REV.* 33, 46 <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1814&context=facpubs>.

in *Richardson*, Justice Rehnquist expanded Section 2's interpretation to recognize states' power to deny the right to vote.¹²⁶

Section 2 of the Fourteenth Amendment was meant to be narrow.¹²⁷ The defeat of the South in the Civil War ironically threatened to increase the power of Southern white supremacists and former slave-owners if left unchecked.¹²⁸ Not only did the Thirteenth Amendment end slavery, it marked the end of the three-fifths compromise.¹²⁹ This meant that the free Black men and women of the South counted as "full people" toward Congressional apportionment rather than just three-fifths of a person.¹³⁰ The Thirteenth Amendment granted the South twelve more congressmen, putting their total at thirty seats just from the region's Black population alone.¹³¹ Northerners were concerned that this shift of congressional seats southward would not come with any guarantee that these former slaves, who in many states made up a strong plurality or even slight majority of the population, would be allowed to vote.¹³² To avoid that outcome, Section 2 of the Fourteenth Amendment was the North's political assurance that the losers of the Civil War could not then turn around and dominate the halls of Congress.¹³³ Section 2 gave the South a choice: either relent and enfranchise the Black men who resided in the state (women's suffrage would not be won for another fifty-two years), or lose seats in Congress.¹³⁴ Either way, the North would not have to worry about handing over the keys of Congress to former members of the Confederacy.¹³⁵ The purpose of Section 2 was only to address this issue, not apply more broadly to the rest of the Fourteenth Amendment.¹³⁶

126. See *Richardson*, 418 U.S. at 73–74, 76 (Marshall, J., dissenting) (citing William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 SUP. CT. REV. 33, 43–44, 58, 65); see also Richard W. Bourne, *Richardson v. Ramirez: A Motion to Reconsider*, 42 VAL. L. REV. 1, 6 (2007), <https://scholar.valpo.edu/cgi/viewcontent.cgi?article=1130&context=vulr>.

127. See Van Alstyne, *supra* note 125, at 46.

128. Re & Re, *supra* note 124, at 1604.

129. *Id.*; see also U.S. CONST. amend. XIII.

130. Re & Re, *supra* note 124, at 1604; U.S. CONST. amend. XIV § 2.

131. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 (1) FORDHAM L. REV. 93, 94 (1961), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1700&context=flr>.

132. Re & Re, *supra* note 124, at 1604; Bourne, *supra* note 125, at 8–9.

133. Re & Re, *supra* note 124, at 1605; JOSEPH B. JAMES, *THE FRAMING OF THE FOURTEENTH AMENDMENT* 137 (1965); see also Van Alstyne, *supra* note 125, at 46.

134. Re & Re, *supra* note 124 at 1605; see generally U.S. CONST. amend. XIX.

135. Re & Re, *supra* note 124, at 1605; JAMES, *supra* note 135, at 137.

136. See *Richardson v. Ramirez*, 418 U.S. 24, 73–74 (Marshall, J., dissenting); see also Van Alstyne, *supra* note 125, at 43–44, 65.

With *Richardson*, the Supreme Court, in effect, dramatically prevented lower courts from reviewing felony disenfranchisement claims under equal protection grounds without an allegation of a purpose or pattern of intentional discrimination against a suspect class.¹³⁷

In *Hunter v. Underwood*, Alabama's bar on former felons voting was found to be unconstitutional because it had been drafted to discriminate against Black Alabamians.¹³⁸ The president of the all-white constitutional convention that had assembled to place this discriminatory provision in Alabama's constitution was about as overt as one can get.¹³⁹ He stated: "[W]hat is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."¹⁴⁰ His racist statements, cited in the Court's opinion to invalidate the law, were critical to demonstrating that the law was passed with a purpose of intentional discrimination, despite its facially neutral language.¹⁴¹

Even with the racist origins of these felony disenfranchisement laws discussed earlier, because none of these state laws and state constitutional provisions were written to be racially discriminatory on their face, the Supreme Court has been generally skeptical about invalidating them just because of its disparate impact on race.¹⁴² *Hunter* has, in effect, become the exception to the rule of Supreme Court skepticism.¹⁴³ For a federal court to invalidate a felony disenfranchisement law, the facts would, in effect, need to be a carbon copy of the *Hunter* facts: where the state's purpose behind the law was racial discrimination, that discrimination was obvious or overtly stated, and the state has failed to demonstrate any alternative, permissible purpose for passing the law.¹⁴⁴ If there is an alternative, permissible reason for the law, then even with a

137. See *Hunter v. Underwood*, 471 U.S. 222, 229 (1985) (holding unanimously that Alabama's petty crime and misdemeanor disenfranchisement provisions were unconstitutional under the Equal Protection Clause based on evidence of discriminatory intent).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 227–28 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976); see also, e.g., *Williams v. State of Mississippi*, 170 U.S. 213, 225 (1898) (holding the state constitution's provisions about electors was neutral on its face and without a showing of the law's actual administration being "evil" the defendant's conviction by an all-white jury was valid).

143. *Id.*

144. See *Hunter v. Underwood*, 471 U.S. 222, 230–33.

disparate impact on a suspect class, the law would be upheld.¹⁴⁵ As a result, these Jim Crow relics were allowed to stay.

D. Circuit Court Analysis

Circuit courts have upheld this principle ever since by affirming that a felon's right to vote is not a fundamental right and that felony disenfranchisement rights do not require any stricter level of scrutiny than the rational basis test.¹⁴⁶ Thus, felons are not a suspect class that receive strict scrutiny.¹⁴⁷ As such, it comes down to voter qualifications as opposed to voter enfranchisement, allowing a lower standard of review.¹⁴⁸ As a result, federal courts are reluctant to overturn state laws on equal protection grounds that only require the rational basis test.¹⁴⁹ The varying treatment would have to be "so unrelated" to a legitimate government interest that a federal court could only conclude the state's disenfranchisement action was "irrational."¹⁵⁰ Therefore, the circuit courts have upheld these disenfranchisement laws under rational review because the federal courts only have a limited purview over states' constitutional authority to set their own prerequisites and conditions to vote.¹⁵¹

Some petitioners have attempted to circumvent *Richardson* by focusing on the Voting Rights Act as their source of relief instead of the Fourteenth Amendment.¹⁵² The circuit courts have also denied petitions for relief under the VRA for two reasons.¹⁵³ First, under Section 2 of the

145. See *id.* at 231–32; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 (1977).

146. See, e.g., *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010); *Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010); *Owens v. Barnes*, 711 F.2d 25, 28 (3d Cir. 1983); *Shepherd v. Trevino*, 575 F.2d 1110, 1114 (5th Cir. 1978) (ruling that states have a "realm of discretion" when it comes to which felons are disenfranchised and which can be re-enfranchised).

147. See, e.g., *Parker v. Lyons*, 757 F.3d 701, 707 (7th Cir. 2014) (holding that felons are not a suspect class); cf. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985) (noting suspect classes are only: race, alienage, or national origin, with gender as a quasi-suspect class).

148. See *Harvey*, 605 F.3d at 1078.

149. *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 470–01 (1991)).

150. *Id.* at 170 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

151. See *id.* at 169–70 (citing *Plyler v. Doe*, 457 U.S. 202, 216–17 (1982)); see, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 134–35 (1970).

152. See, e.g., *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010).

153. *Id.*

VRA, federal courts have rejected these arguments because the challengers either have not alleged discriminatory intent or have not proven it existed.¹⁵⁴ Without a plaintiff being able to show that a state's felony disenfranchisement law was passed to discriminate against the plaintiff because of the plaintiff's race, their claims failed.¹⁵⁵ Second, the courts have not recognized felony disenfranchisement laws as applicable under the VRA.¹⁵⁶ Multiple courts, in fact, stated that Congress clearly knew this issue existed when subsequent VRA reauthorizations were passed, but left felons out of the legislation.¹⁵⁷ Therefore, according to these courts, if Congress had wanted to address the issue, they would have.¹⁵⁸

Circuit courts have also declined to prevent states from only selectively disenfranchising certain felons, rather than everyone with a felony conviction.¹⁵⁹ In *Hayden v. Paterson*, the Second Circuit dismissed the plaintiff's arguments protesting New York state law, which, at the time, only prevented felons who were currently incarcerated or paroled from voting, but did not stop felons out on probation.¹⁶⁰ The *Paterson* court noted that the Supreme Court has stated that a legislature can act incrementally to address a problem.¹⁶¹ "[T]he Equal Protection clause 'does not compel . . . [l]egislatures to prohibit all like evils, or none. A legislature may hit at an abuse which it has found, even though it has failed to strike at another.'"¹⁶²

Per *Richardson's* guidance, the circuit courts have noted the latitude a state gets to determine its disenfranchisement laws do not get them around creating distinctions between types of invidious or

154. See *id.* (en banc); *Simmons v. Galvin*, 575 F.3d 24, 26 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 329 (2d Cir. 2006) (en banc); *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1240 (11th Cir. 2005) (en banc). See also Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 (6) *YALE L.J.* 1566, 1590 n.133 (2019), https://www.yalelawjournal.org/pdf/Stephanopoulos_3rua1o85.pdf (citing *Farrakhan*, 623 F.3d at 993 for why despite courts holding that the rest of voting right litigation involving Section 2 of the Voting Rights Act uses a disparate impact two-part test, the circuit courts have ruled that felony disenfranchisement cases are beyond this Section's reach in their support of the discriminatory purpose test instead).

155. See, e.g., *Farrakhan*, 623 F.3d at 993.

156. *Id.*; *Hayden v. Pataki*, 449 F.3d at 322–23; *Johnson v. Gov. of Fla.*, 405 F.3d at 1249.

157. *Farrakhan*, 623 F.3d at 993; *Hayden v. Pataki*, 449 F.3d at 319–21.

158. *Hayden v. Pataki*, 449 F.3d at 322–23.

159. See, e.g., *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010).

160. *Hayden v. Paterson*, 594 F.3d at 169.

161. *Id.* at 170.

162. *Id.* (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938)).

arbitrary classifications—such as race or gender.¹⁶³ Some courts even choose to illustrate other types of arbitrary status distinctions that would not be permissible under rational basis for disenfranchisement or re-enfranchisement, such as brown eyes or height.¹⁶⁴

Laws that make distinctions based on status classifications typically fail under the Equal Protection Clause.¹⁶⁵ The Supreme Court only recognizes status classifications of “discrete and insular minorities,” such as race, national origin, and gender.¹⁶⁶ Courts have also thrown out laws that were in reality punishing the homeless for being homeless, as well as substance-related laws declared unconstitutional for punishing someone for being a drug user or a drunk (instead of drug distribution, possession or public intoxication).¹⁶⁷

Perhaps the reason courts have not recognized felons as a status classification is because the felons petitioning to regain their voting rights committed a voluntary act (the crime) and thus, the courts do not consider this a conviction of status.¹⁶⁸ The question then becomes whether this argument still holds water after the sentencing has been completed.¹⁶⁹ Now, just branded an “ex-felon” or an “ex-con,” we, as a society, inhibit these now-rehabilitated individuals from gainful employment and still restrict their ability to restore their voting rights.¹⁷⁰ Being a felon upon their release from prison should be as much a status as one’s racial identity, political party affiliation, eye color, or even height.

It is possible that courts have already found at least a partial way around this.¹⁷¹ The Second Circuit noted that a felon’s deprivation of

163. *Harvey*, 605 F.3d at 1079; *Owens v. Barnes*, 711 F.2d 25, 28 (3d Cir. 1983).

164. *Harvey*, 605 F.3d at 1079; *Owens*, 711 F.2d at 27.

165. *See United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

166. *See id.*; *see also City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41 (1985).

167. *Powell v. Texas*, 392 U.S. 514, 534 (1968); *Robinson v. California*, 370 U.S. 660 (1962) (declaring California’s statute outlawing drug addiction to be unconstitutional); *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006) (ruling unconstitutional an ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within the city).

168. *See, e.g., Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010).

169. *See John Crain, How Congress Can Craft A Felon Enfranchisement Law That Will Survive Supreme Court Review*, 29 B.U. PUB. INT. L.J. 1, 5 (Winter 2019).

170. *See, e.g., Patricia Barnes, Study Says “Ban The Box” Policies Hurt (Not Help) Young Minority Male Job Seekers*, FORBES (Mar. 1, 2020, 11:06 PM), <https://www.forbes.com/sites/patriciagbarnes/2020/03/01/study-says-ban-the-box-policies-hurt-not-help-young-minority-male-job-seekers/?sh=14c22bbb40e8>.

171. *See Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 450 (2d Cir. 1967).

voting rights was not considered a punishment.¹⁷² The court considered it to be “nonpenal” all together and instead, simply a regulation on the requirements of voting.¹⁷³

Since *Richardson*, the Supreme Court has not touched the issue under the idea that the Constitution reserves to the states the power to regulate their own elections.¹⁷⁴ States have the power to set eligibility requirements, registration requirements and deadlines, and even, when to have elections.¹⁷⁵ State election laws are only subject to certain constitutional restrictions (e.g. to prevent race and gender discrimination, poll taxes or otherwise, run counter to federal voting laws).¹⁷⁶

Richardson made it clear that felony disenfranchisement laws were well within states’ purview as a voting-eligibility law, not a penal law.¹⁷⁷ This next Section will focus on a state-based analysis of felony disenfranchisement laws.

II. Analysis

The impact of felony disenfranchisement laws on older adults is only increasing.¹⁷⁸ With the rise of mass incarceration and stiffer sentencing rules, there are now more people incarcerated and more people serving longer sentences.¹⁷⁹ In the coming years, this means that not only will the percentage of incarcerated adults over fifty years old increase, but also that ex-felons, including those on parole and probation,

172. *See id.*

173. *See id.*

174. *Oregon v. Mitchell*, 400 U.S. 112, 124–25 (1970); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 7–8 (2013).

175. *See Carrington v. Rash*, 380 U.S. 89, 91 (1965).

176. *See id.*; *see also Mitchell*, 400 U.S. at 124–25; *Inter Tribal Council of Arizona Inc.*, 570 U.S. at 7–8, 20 (finding that state registration requirements are preempted by federal law when the former is in conflict with the latter); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) (finding that the state’s durational residency requirements did not represent a compelling interest and directly impinged on the constitutional right to travel).

177. *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974); *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958). *See also Green v. Bd. of Elections of City of New York*, 380 F.2d 445, 450 (2d Cir. 1967).

178. German Lopez, *Mass incarceration in America, explained in 22 maps and charts*, VOX (Oct. 11, 2016, 1:50 PM) [hereinafter Lopez, *Mass incarceration in America, explained in 22 maps and charts*], <https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts>.

179. *Id.* (noting that practically all crimes result in longer prison sentences nowadays).

will re-enter society older than they were in the past.¹⁸⁰ These rising statistics are not from a Baby Boomer crime wave, but rather from prisoners aging while being incarcerated for longer sentences.¹⁸¹

Despite disenfranchisement's increasing relevance for fifty-year-old felons and former felons, politically, there has been increasing movement in favor of re-enfranchisement within state governments. Over the last few decades, felony disenfranchisement laws have been changing to grant greater access to the ballot box.¹⁸² Since 1997, more than twenty-five states have made significant efforts to re-enfranchise former felons.¹⁸³ In fact, the number of former felons who are barred from voting has decreased since 2016.¹⁸⁴

From removing court fees and fines as barriers to voter registration in Arizona, to two Virginia governors using their clemency power to individually restore the voting rights of more than 220,000 people, we have seen great deal of movement toward re-enfranchisement.¹⁸⁵

180. See *Corrections Statistical Analysis Tool (CSAT)—Prisoners*, BUREAU OF JUST. STATS., (last visited Nov. 8, 2021), <https://www.bjs.gov/index.cfm?ty=nps> (click "Quick Tables"; then follow "Percent of sentenced prisoners under state and federal jurisdiction, by sex, race, Hispanic origin, and age, December 31" for the years 2011 through 2019) (estimating the percentage of prisoners in state and federal prisons over 50 years old has steadily increasing every year, from 15.6 percent in 2011 up to 21.2 percent in 2019); see *At America's Expense: The Mass Incarceration of the Elderly*, *supra* note 45, at 6–8; see *Federal Criminal Case Processing Statistics*, BUREAU OF JUST. STATS., https://www.bjs.gov/fjsrc/var.cfm?ttype=trends&agency=BOP&db_type=Prisoners&saf=OUT (last visited Nov. 8, 2021) (to download the table: select 2010 to 2016 range, variable: at time of release, and select all age ranges) (estimating the number of individuals over 50 years old who have been released from federal prisons have increased by 49 percent in just the last seven years) (spreadsheets on file with author).

181. *At America's Expense: The Mass Incarceration of the Elderly*, *supra* note 45, at 20–22. Martina E. Cartwright, *The Silver Tsunami: Aging Prisoners, Early Release, Guardianship and Prisoner Advocate Initiatives for Long Term Care Beyond the Prison Walls*, 1 J. AGING, LONGEVITY, L. & POL'Y 54 (2015).

182. Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENT'G PROJECT 2 (June 27, 2019), <https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf>.

183. *Id.*; see also Veronica Stracqualursi, *Iowa Governor Signs Executive Order Restoring Some Ex-Felons' Voting Rights*, CNN, <https://www.cnn.com/2020/08/05/politics/iowa-governor-ex-felons-voting-rights/index.html> (last updated Aug. 5, 2020, 2:49 PM) (reporting on the most recent relaxation of Iowa's felon disenfranchisement law since the 2019 report's last update on the state).

184. Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENT'G PROJECT 3 (Oct. 6, 2016), [hereinafter *6 Million Lost Voters*], <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf>.

185. Chung, *supra* note 182; Ben Paviour, *Governor Northam Continues McAuliffe's Felon Voting Rights Restoration*, VPM NEWS (Nov. 1, 2018), <https://vpm.org/>

Many of these reforms have not been big changes, but rather incremental ones.¹⁸⁶ For example, after the controversially-close 2000 presidential election, a divided government in Connecticut pressed into law a reform that restored the voting rights for an estimated 36,000 individuals by changing the restoration requirement from finishing probation to finishing one's prison sentence.¹⁸⁷ Ironically, the Connecticut governor who signed the bill into law has subsequently benefitted from it.¹⁸⁸ After serving two nonconsecutive prison sentences for corruption, the former governor's three-year probation only just concluded in the summer of 2021.¹⁸⁹ He will be eligible to vote in the 2022 election cycle.¹⁹⁰

There are four main categories that states generally fall into when it comes to disenfranchisement.¹⁹¹ The first bucket is no disenfranchisement for felons, even while incarcerated.¹⁹² This bucket is only occupied by Maine and Vermont.¹⁹³

The second bucket is where rights are automatically restored upon release from prison.¹⁹⁴ There are twenty states in this category.¹⁹⁵ The third bucket requires additional prerequisites to be met besides the completion of one's prison sentence before a felon can register to vote.¹⁹⁶ These state-by-state requirements may include completion of parole and/or probation (fifteen states),¹⁹⁷ payment of court fees or restitution

news/articles/6115/governor-northam-continues-mcauliffes-felon-voting-rights-restoration (noting that Virginia Gov. Terry McAuliffe restored voting rights for more than 173,000 Virginians between 2016–18); Press Release, Va. Governor Ralph Northam, Governor Northam Announces Civil Rights Restored to More Than 20,000 Virginians (Oct. 9, 2019), <https://www.governor.virginia.gov/newsroom/all-releases/2019/october/headline-847902-en.html>.

186. See, e.g., Paul Zielbauer, *Felons Gain Voting Rights In Connecticut*, N.Y. TIMES (May 15, 2001), <https://www.nytimes.com/2001/05/15/nyregion/felons-gain-voting-rights-in-connecticut.html>.

187. *Id.*

188. See Edmund H. Mahony, *Federal prosecutors slam ex-Gov. Rowland's attempt to cut short his probation*, HARTFORD COURANT (Feb. 4, 2020, 1:44 PM), <https://www.courant.com/news/connecticut/hc-news-gov-john-rowland-probation-20200204-20200204-4hlvoazlqbh5bln5zxedhiaiom-story.html> (noting Ex-Governor Rowland's three-year probation completes before elections in 2022).

189. *Id.*

190. See *id.*

191. See BRENNAN, *supra* note 19.

192. *Id.*

193. *Id.*

194. *Id.*

195. See *id.*

196. See *id.*

197. *Id.*

(twenty-six states),¹⁹⁸ a certain number of years without recidivating (three states),¹⁹⁹ or some combination of these requirements.²⁰⁰

Finally, the fourth and final bucket is occupied by eleven states that have specific state laws that allow for the permanent disenfranchisement of felons.²⁰¹ At the time of this Note's publication, none of the fifty states permanently disenfranchise all felons, however, this statement is tenuous and will be discussed in detail at the end of this Section.²⁰² Additionally, the majority of the eleven states in this most unforgiving fourth bucket require some combination of factors and requirements to be met for rights restoration. For some, restoration is only available for first-time offenders or only for non-violent offenders, requires the completion of parole and/or probation, repayment of fees and fines, or only when the government approves an individual's rights restoration.²⁰³

This Section will look at each of these four groups of states and will provide a study of a specific state for each category based on the age-related data available for their parole/probation/released felon population. The purpose of these single-state analyses will be to compare the two groups of states that have very forgiving policies toward felons' voting rights with the two restrictive groups of states and how that impacts older adults. States have been chosen based on age-related data available for the prison, parole, and probation populations. This will be a limiting application for this Note, as there was not found to be available age-related data on released, former felons.

198. Margaret Love & David Schussel, *Who Must Pay to Regain the Vote?: A 50-State Survey*, COLLATERAL CONSEQUENCES RES. CTR., (July 2020), <https://ccresource-center.org/wp-content/uploads/2020/07/Who-Must-Pay-to-Regain-the-Vote-A-50-State-Survey.pdf>.

199. See BRENNAN, *supra* note 19 (noting that Louisiana has a five year waiting period); *Restoration of Voting Rights*, WYO. DEP'T OF CORR., <http://corrections.wyo.gov/home/restoration-of-voting-rights> (noting that as of 2017, the voting rights of first-time nonviolent felons are automatically restored after five years, but that felons released before 2010 must apply); *Removing the Wait: Disenfranchisement in Nebraska*, NEBRASKANS FOR CIVIC REFORM 1 (Feb. 2017), http://nereform.org/wp-content/uploads/2015/10/Removing-the-Wait-2017.pdf?_ga=2.114298439.1100940845.1601010988-608527620.1601010988 (noting that Nebraska requires a two-year waiting period).

200. See BRENNAN, *supra* note 19.

201. *Id.*

202. *Id.*

203. See *id.*

A. **Bucket One: No Voting Rights Restrictions**

There are only two states that never disenfranchise their felon population, even while incarcerated: Maine and Vermont.²⁰⁴ Why these two? Both these New England states share a couple of key characteristics that make voting in prison less controversial.²⁰⁵ First, both states only allow prisoners to vote absentee at their last registered address.²⁰⁶ As a result, the inmates cannot sway any local election because they are not allowed to vote using the prison's address.²⁰⁷ Additionally, the racial dynamics of the two states also factor in: both prison populations are majority white, matching their state demographics.²⁰⁸ Given the racist history surrounding disenfranchisement laws discussed in the previous Section, the relative lack of racial tensions and lack of diverse populations could be a reason Maine and Vermont have a different outlook from the rest of the country. Another factor could be their small state population sizes and significantly lower imprisonment rates than the national average.²⁰⁹ Vermont has a population of about 643,000 and ranks forty-sixth of fifty states in terms of their state imprisonment rate, only imprisoning 182 people out of every 100 thousand.²¹⁰ Maine's population is 1.36 million and their imprisonment rate is even lower (146 out of every 100 thousand people), ranking forty-ninth in the country.²¹¹

Of these two states, only Maine had data available for prisoners by age.²¹² Running a search for individuals over fifty years old came back with just under 400 prisoners in the search results.²¹³ While

204. Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do.*, THE MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do>.

205. *Id.*

206. *Id.*

207. *See id.*

208. *Id.*

209. *See generally id.*

210. *Quick Facts Vermont*, U.S. CENSUS BUREAU, <https://www.census.gov/quick-facts/VT/> (last visited Feb. 27, 2022); *State-by-State Data*, THE SENT'G PROJECT [hereinafter *State-by-State Data*], <https://www.sentencingproject.org/the-facts/#rankings> (last visited Nov. 8, 2021).

211. *Quick Facts Maine*, U.S. CENSUS BUREAU, <https://www.census.gov/quick-facts/ME/> (last visited Feb. 27, 2022); *State-by-State Data*, *supra* note 210.

212. *Adult Resident/Adult Community Corrections Client Search*, ME. DEP'T OF CORR., [hereinafter *Maine Correctional Resident Search*], <https://www1.maine.gov/cgi-bin/online/mdoc/search-and-deposit/search.pl?Search=Continue> (last visited Nov. 8, 2021).

213. *Id.* (running a search by selecting age range: 50 to 91 and "incarcerated" under "Current Status").

Vermont did not have this same data available, it is clear that Vermont's prison population is growing older.²¹⁴ From 2008 to 2018, adults over fifty-years-old increased from eleven percent of the Green Mountain State's prison population to nineteen percent.²¹⁵ Because Vermont and Maine both let these felon populations vote, this data can give one an idea of how a forgiving criminal justice system in other states would impact older adults' voting rights.²¹⁶

This does not mean, however, that all incarcerated individuals in Maine and Vermont actually get to vote. Because both states require a prisoner's voter registration address to be a valid non-prison address, it is unclear what percentage of incarcerated individuals actually cast a ballot.²¹⁷ But it is not likely to be a large percentage.²¹⁸ Unfortunately, that is best we can do—this data is unavailable because the prisoners' ballots are mixed in with everyone else from the town, just like any other person's mail-in ballot.²¹⁹

Similar to the rest of the country, both Vermont and Maine reacted to the "tough on crime" era by incarcerating more people and increasing sentencing requirements.²²⁰ With longer prison sentencing still on the books, their states' prison population's average age will go up as prisoners stay behind bars for longer.²²¹ The longer an individual's prison sentence, the more likely that an incarcerated Mainer or Vermonter is to eventually lose their right to vote because their last address will no longer be valid.²²² As buildings get torn down and family members age, move, or pass away, it is just common sense that a thirty-year-old serving a thirty-year sentence is more likely to not have a valid former address as the end of their sentence draws near.²²³ This means that

214. *Vermont's Prison Population*, AM. CIV. LIBERTIES UNION VT., <https://www.acluvt.org/en/vermonts-prison-population> (last visited Nov. 8, 2021).

215. *Id.*

216. *See generally id.*; *Maine Correctional Resident Search*, *supra* note 212.

217. Lewis, *supra* note 204.

218. *See id.*

219. *See id.*

220. *See Douglas Rooks, Column: A missing link in Maine's corrections system*, CENTRAL ME., <https://www.centralmaine.com/2012/01/02/douglas-rooks-a-missing-link-in-maines-corrections-system/> (last updated December 31, 2019); Elizabeth Hewitt, *Advocates suggest ways to end 'unnecessary' incarceration*, VTDIGGER (Mar. 1, 2017), <https://vtdigger.org/2017/03/01/advocates-suggest-ways-end-unnecessary-incarceration/>.

221. *See At America's Expense: The Mass Incarceration of the Elderly*, *supra* note 45, at 5–8.

222. *See Rooks, supra* note 220; Hewitt, *supra* note 220.

223. *See id.*

as Vermont and Maine's prison populations age, their right to vote in prison could become in theory only.²²⁴ Without access to prisoner voter turnout, however, whatever correlation that could exist between the length of the prison sentence and the ability to vote cannot be determined. That does not mean that these states are not completely disregarding age. It is worth noting that Vermont, in response to COVID-19, tried to reduce their prison population by evaluating the prisoners who are over sixty-five years old for a sort of special compassionate release.²²⁵ It remains to be seen if this sort of age-specific review will remain in place once the pandemic is over.

The only change this category has seen in recent years is from Washington, D.C.'s city government.²²⁶ In 2020, D.C. changed their city laws to never disenfranchise voters, even while incarcerated.²²⁷ So wherever D.C. residents are incarcerated, they will be informed of their right to vote whenever there is a D.C. local election and be given access to a ballot.²²⁸

B. Bucket Two: Automatically Restored upon Release

There are twenty states that automatically restore voting rights upon a prisoner's release from prison.²²⁹ For example, the State of Oregon has approximately 6,000 individuals over fifty-years-old on parole and probation.²³⁰ Representing about one-third of the state's total parolees and probationers, all of these older former felons are eligible to vote upon their release from prison.²³¹ Oregon had instituted felony disenfranchisement at the state's inception, barring the right to vote to

224. *See id.*

225. Emily Corwin, *Vermont Is Trying To Shrink Its Prison Population, But 350 Inmates Are Locked Up Past Their Minimums*, VT. PUB. RADIO (Apr. 29, 2020 5:48 PM), <https://www.vpr.org/post/vermont-trying-shrink-its-prison-population-350-inmates-are-locked-past-their-minimums#stream/0>.

226. Julie Zauzmer & Ovetta Wiggins, *D.C. and Maryland have new policies allowing prisoners to vote. Making it happen is hard.*, WASH. POST (Sept. 28, 2020), <https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/>.

227. *Id.*

228. *Id.*

229. *See* BRENNAN, *supra* note 19.

230. OR. DEP'T OF CORRS., CMTY. POPULATION PROFILE FOR 07/01/2021 (2021), <https://www.oregon.gov/doc/Documents/community-profile.pdf> (note that this number is an estimate after combining their top two age brackets, which are a little more inclusive than the minimum age threshold used elsewhere in this Note).

231. *Id.*; *Voting in Oregon*, OR. SEC'Y OF STATE, <https://sos.oregon.gov/voting/pages/voteinor.aspx> (last visited Nov. 8, 2021).

anyone who had been convicted to a term of imprisonment, but subsequently changed the law to apply only to one's term of imprisonment.²³²

Based on their felony disenfranchisement laws, these twenty states have determined that punishment ends when incarceration does—rather than reaching ex-felons for their past acts.²³³ While none of these states are in the South, that might be the only extent of what these twenty states have in common.²³⁴ They range from politically liberal and demographically diverse states like California, Hawaii, and Illinois to political battlegrounds like Michigan and New Hampshire to more homogenous, conservative states like Utah and North Dakota.²³⁵ Control of the state government is also pretty mixed among this group.²³⁶ Six of the state governments are controlled by Republicans, eleven are controlled by Democrats, and the remaining three are split.²³⁷ They also vary widely in terms of their populations of seniors (over sixty-five-years-old); Utah has the smallest over-sixty-five population percentage of any state, while Montana ranks sixth in the nation.²³⁸

There are two ways restoration upon release positively impacts older ex-felons compared to the more restrictive alternatives. First, with the aging prison population, it stands to reason that the average age on release is also going up as a result.²³⁹ In these twenty states, these newly freed felons are automatically eligible to register to vote and exercise that right.²⁴⁰

The second reason relates to the first. The reason restoration upon release is so important as the prison population gets older is that incarceration takes years off one's life.²⁴¹ Studies have found that each year

232. Behrens et al., *supra* note 40 at 565; OR. CONST. art II § 3 (1857), <https://sos.oregon.gov/archives/exhibits/constitution/Documents/transcribed-1857-oregon-constitution.pdf>; OR. REV. STAT. ANN. § 137.281 (West).

233. See BRENNAN, *supra* note 19.

234. See *id.*

235. See *id.*

236. See *id.*

237. See *State Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Feb. 1, 2022) [hereinafter *State Partisan Composition*], <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx#>.

238. Christine L. Himes & Lillian Kilduff, *Which U.S. States Have the Oldest Populations?*, POPULATION REFERENCE BUREAU (Mar. 16, 2019), <https://www.prb.org/which-us-states-are-the-oldest/>.

239. See *At America's Expense: The Mass Incarceration of the Elderly*, *supra* note 45, at 5–8.

240. See *id.*

241. Emily Widra, *Incarceration shortens life expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/.

in prison takes two years off an individual's life expectancy.²⁴² The amount of time served has a direct correlation to number of years of life lost.²⁴³ Because of this and the sheer number of people in prison, the national life expectancy has gone down almost two years.²⁴⁴ That means these former felons are more likely than others their age who have not done time to pre-maturely pass on.²⁴⁵ This is more reason to consider incarcerated fifty-year-olds as "older adults."²⁴⁶

States that restore voting rights upon release are giving these recently released felons a chance to participate in democracy with no additional strings attached, with no further time spent waiting. With less time left than an adult the same age who was not incarcerated, the commodity of time becomes that much more valuable for an older former felon.²⁴⁷ Unlike the states in the next two categories, these twenty states are not letting the social stigma of committing a felony hang over these ex-felons after their release and impact their ability to participate in democracy.²⁴⁸

Seven states have joined this category since 2018,²⁴⁹ making it the fastest growing group of the four categories. Most of the new seven states have moved up into this bucket as a result of modest changes.²⁵⁰ For example, in 2021, Connecticut moved to restoring rights after release, after previously requiring completion of parole.²⁵¹ Hopefully, these recent changes continue to represent a trend toward restoration at release as momentum builds.

242. *Id.*

243. *Id.*

244. *Id.*

245. *See id.*

246. *See At America's Expense: The Mass Incarceration of the Elderly*, *supra* note 45, at 1.

247. *See Widra*, *supra* note 241.

248. *See BRENNAN*, *supra* note 19.

249. *See Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (June 28, 2021) [hereinafter *Felon Voting Rights*], <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx#recent>.

250. *See id.*

251. *Voting Rights Restoration Efforts in Connecticut*, BRENNAN CTR. FOR JUST. (Jun. 23, 2021) [hereinafter *Voting Rights Restoration Efforts in Connecticut*], <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-connecticut>.

C. Bucket Three: Post-Release Waiting Required

Each of the following states requires some waiting time after one's release from prison. Whether it is completion of parole, probation, a set number of years, or until the ex-felon has paid back all their fines, fees, and/or restitution, these states do not consider serving time in prison to be sufficient punishment or rehabilitation in order to restore the right to vote.²⁵²

1. RESTORED UPON COMPLETION OF PAROLE AND/OR PROBATION

Fifteen states require completion of parole and probation to vote.²⁵³ The national average for probation is a little over twenty-two months.²⁵⁴ The prevalence of probation can vary by state, but it is typically a large plurality, if not majority, of a state's "correctional control" population, which accounts for imprisonment, parole, and probation.²⁵⁵ Parole rules vary even more state to state, making it harder to discern an average time, but one group believes the national average is nineteen months.²⁵⁶ Parole and probation requirements impact a large number of ex-felons.²⁵⁷ The number of adults under community supervision (parole and probation) tripled since the 1980s.²⁵⁸ Data from the Bureau of Justice Statistics noted in 2018 there were 4,399,000 adults on

252. See BRENNAN, *supra* note 19.

253. *Id.*

254. Jake Horowitz, *States Can Shorten Probation and Protect Public Safety*, THE PEW CHARITABLE TRUSTS (Apr. 15, 2021), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/12/states-can-shorten-probation-and-protect-public-safety>.

255. See Alexi Jones, *Correctional Control 2018: Incarceration and supervision by state*, PRISON POL'Y INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html>.

256. Beth Schwartzapfel, *Nine Things You Probably Didn't Know About Parole*, THE MARSHALL PROJECT (July 10, 2015, 2:14 PM), <https://www.themarshallproject.org/2015/07/10/nine-things-you-probably-didn-t-know-about-parole>; Jorge Renaud, *Grading the parole release systems of all 50 states*, PRISON POL'Y INITIATIVE (Feb. 26, 2019), https://www.prisonpolicy.org/reports/grading_parole.html; *Probation and Parole Requirements*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/resources/training-resources/reentry-ministry/ministry-basics/probation-and-parole-requirements/> (last visited Nov. 15, 2021).

257. See JAKE HOROWITZ, THE PEW CHARITABLE TRUSTS, *PROBATION AND PAROLE SYSTEMS MARKED BY HIGH STAKES, MISSED OPPORTUNITIES 4* (2018), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

258. *Id.*

probation and parole nationwide.²⁵⁹ This number takes into account the rolling entrances and exits of prisoners of each year.²⁶⁰

Of these 4.4 million, about 500,000 parolees and 1.13 million probationers are ineligible to vote due to state disenfranchisement laws.²⁶¹ Unfortunately, there is no national data available by age brackets for parole and probation.²⁶² But by the time one breaks down the data to a specific state's impact on older adults, the number can seem quite small in comparison to the national annual number. For example, Idaho, which does break down its community corrections population (parole and probation) by age, only has 1,679 individuals over fifty-five-years-old out on parole and probation.²⁶³ This age demographic represents about ten percent of their total parole-probation population.²⁶⁴ While this number may seem insignificant compared to the racial demographics involved in the prison industry, the impact is important. As noted in the second bucket, prison takes years off one's life.²⁶⁵ Probation and parole only tacks on more precious time an older ex-felon has to wait in order to again fully participate in democracy.

2. WAITING PERIODS

There are only three states that require waiting periods separate from the wait already prescribed by parole or probation.²⁶⁶ These states' disenfranchisement policies turn on a set number of years that must pass in addition to parole/probation or separate from it.²⁶⁷ For example, Louisiana has a strict five-year waiting period.²⁶⁸ In 2019, that meant

259. DANIELLE KAEBLE & MARIEL ALPER, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 252072, PROBATION AND PAROLE IN THE UNITED STATES, 2017-2018 3 (2020), <https://www.bjs.gov/content/pub/pdf/ppus1718.pdf>

260. *See id.*

261. Uggen, *Locked Out*, *supra* note 8, at 16.

262. MARK MOTIVANS, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., NCJ 254598, FEDERAL JUSTICE STATISTICS, 2017-2018 17 (2021), <https://bjs.ojp.gov/content/pub/pdf/fjs1718.pdf>.

263. IDAHO DEP'T OF CORR., POPULATION OVERVIEW FY 2019 30 (2019) https://www.idoc.idaho.gov/content/document/fy_2019_population_overview.

264. *Id.*

265. *See* Widra, *supra* note 241.

266. *See* BRENNAN, *supra* note 19 (explaining Louisiana requires a five-year period to pass after the end of incarceration); NEBRASKANS FOR CIVIC REFORM, *supra* note 199; WYO. DEP'T OF CORR., *supra* note 199.

267. BRENNAN, *supra* note 19.

268. *See id.*

about 36,000 ex-felons were allowed to register to vote for hitting their five-year mark.²⁶⁹

Louisiana annually provides their parole and probation figures by age.²⁷⁰ In 2020, the Pelican State reported about 9,600 individuals over fifty-years-old on their probation and parole systems.²⁷¹ According to the Brennan Center, the effect of the Pelican State's disenfranchisement laws is that most Louisianans on probation can vote, but most parolees cannot.²⁷² Simplifying this, given the limited data available, this could mean that about 5,000 of the 2020 list of older parolees cannot vote in Louisiana elections.²⁷³ Given there is no data available on the number of individuals waiting their five years who are not on either parole or probation or even past annual reports of parolees available, this number is only a part of the total number of older ex-felons Louisiana stops from voting.²⁷⁴

The other two states in this category, Wyoming, and Nebraska, add their term of years on top of parole and probation.²⁷⁵ This position exacerbates the premature aging effects of prison because not only do these two states require completion of community supervision, but additional time even after that.²⁷⁶ This diminishes the likelihood that older ex-felons vote as their age gets closer to their lowered life expectancy. Any additional time requirement to "earn" one's right to vote after completion of one's prison sentence just makes it more likely that this older population will simply not be around to eventually exercise that right.

269. Rosemary Westwood, *The battle for voting rights in the age of mass incarceration*, VOX (Nov. 15, 2019, 12:30 PM), <https://www.vox.com/the-highlight/2019/11/8/20953476/louisiana-election-voting-rights-ex-prisoners-felons-florida>.

270. LA. DEP'T OF PUB. SAFETY & CORRS., PROBATION AND PAROLE 139 (June 30, 2020) [hereinafter LA. DEP'T OF PUB. SAFETY & CORRS.], <https://s32082.pcdn.co/wp-content/uploads/2020/08/0e-Probation-and-Parole.pdf>.

271. *Id.*

272. See BRENNAN, *supra* note 19.

273. See *id.*; LA. DEP'T OF PUB. SAFETY & CORRS., *supra* note 270, at 139 (stating that are 5,195 individuals over 50 on parole and good time/parole supervision combined. However, since it's unclear exactly how many parolees cannot vote, this number in the Note has been left as general approximation).

274. See, e.g., LA. DEP'T OF PUB. SAFETY & CORRS., *supra* note 270, at 139.

275. NEBRASKANS FOR CIVIC REFORM, *supra* note 199; WYO. DEP'T OF CORR., *supra* note 199.

276. See generally NEBRASKANS FOR CIVIC REFORM, *supra* note 199; WYO. DEP'T OF CORR., *supra* note 199.

3. REPAYMENT REQUIRED

Twenty-six states consider repayment a requirement for rights restoration.²⁷⁷ Only three states have laws mandating indefinite denial of the vote to any person with any unpaid legal financial obligations (“LFOs”) from a disqualifying conviction, even if the person has completed all non-financial requirements of the sentence, and regardless of ability to pay.²⁷⁸ An additional seven states may also indefinitely deny re-enfranchisement because of LFOs, but only in certain circumstances.²⁷⁹ The final sixteen states tie parole and probation requirements to LFOs, which can delay rights restoration in most of those states.²⁸⁰

Legal financial obligations are court fees, fines, and restitution owed from the offender to either the court or the victim.²⁸¹ The most common type of LFO is a docket fee, a standard court charge that acts as a way for the court system to subsidize costs.²⁸² This is common practice.²⁸³ A U.S. Department of Justice investigation into the Ferguson Police Department found that the town based a whopping twenty percent of the city’s budget on anticipated owed court fines and fees from convicted and incarcerated individuals (about \$3 million in revenue).²⁸⁴

Collecting LFOs from the formerly incarcerated is another matter entirely because of inability to pay and lack of income.²⁸⁵ Unfortunately, the exact impact of LFOs is unknown, not just for older ex-felons, but all ex-felons because of lack of research about their disparate effect on

277. Love & Schussel, *supra* note 198, at 4.

278. *Id.*

279. *Id.* at 2.

280. *Id.* at 2.

281. Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 310 (June 2017), [hereinafter *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*], <https://www.journals.uchicago.edu/doi/pdf/10.1086/694323>.

282. *See id.* at 311.

283. *See id.*

284. CAMPAIGN LEGAL CTR. & GEO. L.C.R. CLINIC, *CAN’T PAY, CAN’T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 19*, (2019) [hereinafter *CAN’T PAY, CAN’T VOTE*], https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf.

285. *See* Adam Looney, *5 facts about prisoners and work, before and after incarceration*, BROOKINGS INST. (Mar. 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/>; *see also, e.g., For victims of crime, collecting court-ordered restitution can be a nightmare*, ABC 7 DENVER (Dec. 12, 2018, 11:28 AM), <https://www.thedenverchannel.com/long-form/for-victims-of-crime-collecting-court-ordered-restitution-can-be-a-nightmare>.

demographic groups, what they fund, and their true magnitude.²⁸⁶ One estimated total from a randomized sample of 500 ex-felons put the average owed in LFOs at \$7,234 per person.²⁸⁷ Another average put that number even higher at \$13,600 per person.²⁸⁸

The individual stories get worse. Sixty-year-old Edna Lewis, who served a prison sentence for theft, owes \$19,205.90 in fees and fines to the State of Florida.²⁸⁹ Living on disability benefits, Ms. Lewis paid about \$126 per month toward that balance since 2015.²⁹⁰ At that rate, it will take her about thirty or more years to pay off her fines.²⁹¹ Because Florida requires she pay off her total balance, she will be about ninety-five years old before she can even register to vote.²⁹² Another former felon owed \$33,000 in legal obligations relating to her felony conviction.²⁹³ She made the minimum monthly payments for thirteen years, but because of interest rates attached to the LFO, her debt to the state rose to \$72,000.²⁹⁴ She likely will never be able to escape her debt if minimum payments is all she can afford.

To put this all into context of a former felon's earning potential, in 2018, the Brookings Institution found that only half of felons of prime working age had any income to declare during their first year out of prison.²⁹⁵ And of those that did earn a paycheck, half of those formerly incarcerated individuals earned under \$10,000 per year.²⁹⁶ Another study put the unemployment rate for twenty-five to forty four year old ex-felons at twenty-seven percent.²⁹⁷ COVID-19 has only made it harder for the formerly incarcerated to find work.²⁹⁸ Unemployment rates for

286. *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, *supra* note 282, at 312–13.

287. *Id.* at 313–14.

288. CAN'T PAY, CAN'T VOTE, *supra* note 284, at 20.

289. *Id.* at 9.

290. *See id.*

291. *See id.*

292. *See id.*

293. Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, THE ATLANTIC (July 5, 2016), <https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026/>.

294. *Id.*

295. Looney, *supra* note 285.

296. *Id.*

297. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

298. Charisse Jones, *'You just want to ... have a chance': Ex-offenders struggle to find jobs amid COVID-19*, USA TODAY (Feb. 3, 2021, 12:03 AM), <https://www.usatoday.com>.

older ex-felons would almost certainly be even higher if more data was available to focus on unemployment by age bracket.²⁹⁹ It is estimated the total outstanding LFOs cost is over \$50 billion, reaching ten million former felons.³⁰⁰ Just like Ms. Edna Lewis, ability to pay is a big issue for older felons.³⁰¹ Between limited income and health-related illnesses that already exist in this age demographic,³⁰² older former felons see increased difficulty because of their felony status from some of the few job options out there.³⁰³ LFOs can only further compound this problem.

While voting rights advocates consider LFOs the new poll tax, courts have disagreed.³⁰⁴ This is in part because restitution does not fit the definition.³⁰⁵ Poll taxes are supposed to go to the government, not the victim.³⁰⁶ LFOs will likely continue to withstand rational review unless a discriminatory intent is found.³⁰⁷ While it could be possible to argue that withholding voting rights from those who truly lack the ability to pay these fines should fail even the rational basis test, circuit courts have not taken the bait thus far.³⁰⁸ More data on this problem can only bring more attention to its impact on such a large subset of the formerly incarcerated.

The rights restoration problems associated with LFOs are the most significant of any waiting period in this category because they are not defined or restricted by time.³⁰⁹ LFOs that are basically and solely dependent on the ex-felon's ability to pay (or rather inability) can, in effect, be a lifetime ban on voting for a former felon.³¹⁰

com/story/money/2021/02/03/unemployment-ex-offenders-among-many-struggling-find-work/6656724002/.

299. See generally, Couloute & Kopf, *supra* note 297.

300. CAN'T PAY, CAN'T VOTE, *supra* note 284, at 19.

301. See generally, Barnes, *supra* note 170.

302. See *Get the Facts on Economic Security for Seniors*, NAT'L COUNCIL ON AGING (Mar. 1, 2021), <https://www.ncoa.org/article/get-the-facts-on-economic-security-for-seniors>.

303. See generally, Barnes, *supra* note 170.

304. See, e.g., *Johnson v. Bredesen*, 624 F.3d 742, 751(6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067 (9th Cir. 2010).

305. *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, *supra* note 281, at 313.

306. *Id.* (quoting *Johnson v. Bredesen*, 624 F.3d 742, 742 (6th Cir. 2010)).

307. *Id.* at 310.

308. *Id.* at 328 (quoting Justice O'Connor in *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010)).

309. *Id.* at 314.

310. See generally *id.*

4. A NOTE ABOUT RECIDIVISM RATES

Elsewhere in the criminal justice system, states already make special exceptions for older adults by granting compassionate release (albeit rarely).³¹¹ If states are already willing to look past one's remaining prison sentence to let them out of prison early, there is an argument to be made that sentencing laws should be reduced. Additionally, if a state is already willing to release some nonviolent, older individuals from prison early, this also cuts against misplaced concerns about recidivism.

Waiting periods, like most disenfranchisement laws, largely exist because states are worried about recidivism.³¹² Recidivism is always a big conversation when it comes to the criminal justice system:³¹³ how high it is, what other demographic information seems to correlate with it, and how to ameliorate it.

The recidivism argument's relevance to felony disenfranchisement, however, is overblown. For instance, a Florida commission reported in July 2018 that of the 992 felons that had their rights restored in 2016–17, only one of them was convicted of a new felony.³¹⁴ The Department of Justice's most recent analysis of twenty-three states' 2005 recidivism rates is consistent with data on re-offenses with community supervisor rates; finding that most cases of rearrest occurred within the first two years after release.³¹⁵ This should bring into question the efficacy of any waiting period after that two-year mark.

Further, federal recidivism data points to older felons being the least likely to recidivate.³¹⁶ A recent U.S. Sentencing Commission report

311. See Emily Widra & Wanda Bertram, *Compassionate release was never designed to release large numbers of people*, PRISON POL'Y INITIATIVE (May 29, 2020), <https://www.prisonpolicy.org/blog/2020/05/29/compassionate-release/>.

312. 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, 422 (2012).

313. *Id.*

314. Reggie Garcia, *Amendment 4 gives felons a second chance and saves Florida money* | Opinion, FLA. TODAY (Sept. 20, 2018, 1:48 PM), <https://www.floridatoday.com/story/opinion/2018/09/20/amendment-4-gives-felons-second-chance/1367873002/>.

315. Mariel Alper et al., *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period (2005-2014)*, BUREAU OF JUST. STATS. 3, 5 (May 2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>; Kendra Bradner et al., *More Work to Do: Analysis of Probation and Parole in the United States, 2017-2018*, COLUM. UNIV. JUST. LAB, 13 (Aug. 2020), <https://justicelab.columbia.edu/sites/default/files/content/More%20Work%20to%20Do.pdf>.

316. See Kim Steven Hunt & Billy Easley II, *The Effects of Aging on Recidivism Among Federal Offenders*, U.S. SENT'G COMM'N, 22–23 (Dec. 2017), <https://www.>

found that the federal recidivism rate for individuals over fifty years old was just over twenty-five percent.³¹⁷ This number goes down with each age bracket as well as when the data is further divided up between rearrest, reconviction, and reincarceration rates.³¹⁸ For example, fifty to fifty-four-year-olds have 30.1% rearrest rate; this number drops to 13.4% for prisoners over sixty-five.³¹⁹ Reconviction and reincarceration rates drop even more.³²⁰ Reconviction rates start at 15.9% for fifty to fifty-four-year-olds and drop to 11.4% for sixty to sixty-four-year-olds.³²¹ Only 6.5% of those over sixty-five are reconvicted.³²² Reincarceration goes from 12.8% (fifty to fifty-four-year-olds) down to only 4.1% of former felons over sixty-five.³²³

With the risks of recidivating already down for older adults and the likelihood of death higher, the social costs of these wait-and-see felony disenfranchisement laws cut the hardest against older adults.

D. Bucket Four: Permanent Disenfranchisement

Exactly how restrictive these states are when it comes to felony disenfranchisement can vary widely. Some states limit the release and effectively permanently prohibit felons from voting unless the governor issues an individual pardon.³²⁴ Other states focus on the crimes themselves from creating enumerated lists of felonies (violent crimes, murder, or election-related felonies) that are permanent bars on voting,³²⁵ to setting the barrier at the number of crimes and stopping those convicted of multiple felonies.³²⁶ But at the end of the day, each of these eleven states brand a person for life as a felon by stripping away at least a part of their state population's voting rights.³²⁷

While none of these states have post-release data available by age, the size of the disenfranchised population as a whole for this category

ussc.gov/research/research-reports/effects-aging-recidivism-among-federal-offenders.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. See BRENNAN, *supra* note 19 (Kentucky, Mississippi, and Wyoming).

325. See *id.* (Alabama, Delaware, Florida, Maryland, Mississippi, Missouri, Tennessee, and Wyoming)

326. See *id.* (Arizona and Wyoming).

327. See *id.*

does give an idea of its impact on older ex-felons.³²⁸ Nine percent of the Alabama population is permanently disenfranchised.³²⁹ Ten percent of Mississippi's population is as well.³³⁰ Because there is no forgiveness, no term of years, no conditions that can be met, anyone no matter their age or how long they have been out of prison is permanently disenfranchised under these states' laws.³³¹ Unlike the parolee and probation requirement states, where older former felons will eventually meet these requirements and be able to vote, there is significantly less chance of relief in these states.³³²

Returning briefly to recidivism, a 2012 study found that permanently disenfranchising felons actually *increased* the likelihood of a felon reoffending by about ten percent.³³³ Perhaps these reoffenders simply found that they had nothing else to lose after losing the right to vote.³³⁴

In just the last couple years, the final three states that had permanently disenfranchised all felons—Florida, Iowa, and Kentucky—made “progress.”³³⁵ In 2018, Florida voters passed a constitutional amendment (“Amendment Four”) with nearly sixty-five percent of the vote to help 1.4 million Floridians who served their time have their rights automatically restored upon release.³³⁶ In 2019, Kentucky's newly-elected governor, Andy Beshear, signed an executive order to restore the voting rights of some 140,000 Kentucky residents who completed their sentences.³³⁷ Finally, in August of 2020, Iowa Governor Kim Reynolds

328. Uggen, *Locked Out*, *supra* note 8.

329. *Id.* at 16.

330. *Id.*

331. *See generally id.*, at 18 tbl.1.

332. *See id.*

333. Hamilton-Smith & Vogel, *supra* note 312, at 427.

334. *Id.* at 413.

335. Samantha J. Gross, *Florida Voters Approve Amendment 4 on Restoring Felons' Voting Rights*, MIA. HERALD, <https://www.miamiherald.com/news/politics-government/election/article220678880.html> (last updated Nov. 7, 2018); *see also* BRENNAN CTR. FOR JUST., *Voting Rights Restoration Efforts in Florida* [hereinafter BRENNAN CTR. FOR JUST., *Restoration Efforts in Florida*], <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida> (last updated Sept. 11, 2020).

336. *See generally*, Gross, *supra* note 335; BRENNAN CTR. FOR JUST., *Restoration Efforts in Florida*, *supra* note 335.

337. Michael Wines, *Kentucky Gives Voting Rights to Some 140,000 Former Felons*, N.Y. TIMES (Dec. 12, 2019), <https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html>.

followed suit and signed an executive order also ending the lifetime ban on voting for the formerly incarcerated.³³⁸

The impact on these three states' voter rolls is tenuous, however. There is no guarantee that future governors of Iowa or Kentucky will allow their predecessors' executive orders to stay in place to keep these second chance policies on the books.³³⁹ In fact, both Iowa and Kentucky have had previous executive orders restoring some voting rights reversed when that governor left office and was replaced by a member of the opposite political party.³⁴⁰ Both Iowa and Kentucky, as members of the most restrictive, unforgiving group of states when it comes to felony disenfranchisement laws, need to stop batting ex-felons back and forth every four to eight years about whether or not they can vote and instead, pursue legislative change to make these executive actions permanent.

Florida's change to felony disenfranchisement has proven far from permanent. Shortly after Amendment Four's passage, Florida Republicans passed new legislation requiring ex-felons to pay their court fees and restitution in order to register to vote.³⁴¹ The law also promised to prosecute those who had already registered if they voted without paying.³⁴² This new law devastated the impact of Amendment Four and nearly entirely prevented ex-felons from getting registered for the 2020 elections because they owed fees or fines over \$500 they could not afford to pay.³⁴³

Unfortunately, when supporters of Amendment Four sued the state calling the law a "modern day poll tax," the Eleventh Circuit upheld this new Florida state statute.³⁴⁴ The circuit court brushed off poll

338. Stracqualursi, *supra* note 183.

339. See Wines, *supra* note 337; Stracqualursi, *supra* note 183.

340. See *id.*

341. Nina Totenberg, *Supreme Court Deals Major Blow To Felons' Right To Vote In Florida*, NPR (July 17, 2020, 5:00 AM), <https://www.npr.org/2020/07/17/892105780/supreme-court-deals-major-blow-to-ex-felons-right-to-vote-in-florida>.

342. *Id.*

343. Lauren Lantry, *Over One Million Former Felons Still Face Hurdles After Being Given Right to Vote*, ABC NEWS (Mar. 8, 2020, 4:17 AM), <https://abcnews.go.com/Politics/felons-florida-vote-million-face-hurdles-fees/story?id=69060375>; Daniel Villarreal, *Modern-Day 'Poll Tax' Amendment In Florida Faces Court Battle Before Election*, NEWSWEEK (Aug. 18, 2020, 7:52 PM), <https://www.newsweek.com/modern-day-poll-tax-amendment-florida-faces-court-battle-before-election-1526013>.

344. Patricia Mazzei, *Ex-Felons in Florida Must Pay Fines Before Voting, Appeals Court Rules*, N.Y. TIMES (Sept. 11, 2020), <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html>; *Jones v. Gov. of Fla.*, 975 F.3d 1016, 1031 (11th Cir. 2020) (en banc).

tax claims, instead, concluding that LFOs, unlike poll taxes, are “highly relevant to voter qualifications... promot[ing] full rehabilitation of returning citizens and ensur[ing] full satisfaction of the punishment imposed.”³⁴⁵ A similar result occurred in Washington state in 2007, where the state supreme court ruled the disenfranchisement scheme requiring LFOs to be paid first did not classify voting based on wealth.³⁴⁶ The not-fully-explored disparate impact of low-income or impoverished ex-felons was not sufficient to warrant more than rational review.³⁴⁷

As a result of this new Florida law, only four percent—67,000 Floridians—out of the 1.4 million ex-felons that stood to benefit from Amendment Four were able to register to vote ahead of the Sunshine state’s 2020 registration deadline.³⁴⁸ Only four percent of 1.4 million possible new voters got registered, despite efforts by celebrities and billionaires like Michael Bloomberg, who all raised twenty million dollars to help these prospective voters pay off their fees.³⁴⁹

At the end of the day, even if Florida, Iowa, and/or Kentucky regress back to absolute, permanent disenfranchisement as a result of the next few election cycles, states in this category will likely continue to find themselves more and more of an outlier. Eight states have moved away from permanent disenfranchisement in recent years, and it looks like that number could keep growing in the near future.³⁵⁰

345. *Jones*, 973 F.3d at 1031.

346. *Madison v. State*, 163 P.3d 757, 769 (Wash. 2007).

347. *Jones*, 973 F.3d at 1030; *Madison*, 163 P.3d at 769.

348. Gary Fineout, *Final tally: Group says 67,000 felons registered in Florida after Amendment 4*, POLITICO (Oct. 19, 2020, 2:12 PM), <https://www.politico.com/states/florida/story/2020/10/19/final-tally-group-says-67-000-felons-registered-in-florida-after-amendment-4-1327176>.

349. Gary Fineout, *Bloomberg, others rack up \$20M to register Florida felons after time served*, POLITICO, <https://www.politico.com/states/florida/story/2020/09/22/bloomberg-others-rack-up-20m-to-register-florida-felons-after-time-served-1317710> (last updated Sept. 22, 2020, 10:22 AM); Dan Merica & Devon M. Sayers, *Florida attorney general asks for investigation of Bloomberg’s efforts to reinstate felon voting rights*, CNN (Sept. 23, 2020, 9:25 PM), <https://www.cnn.com/2020/09/23/politics/florida-michael-bloomberg-investigate-felon-voting-rights/index.html>.

350. See Uggen, *Locked Out*, *supra* note 8, at 5; see, e.g., Daniella Cheslow, *Virginia Democrats Plan To Restore Voting Rights For Felons, But Remain Divided On How Far To Go*, DCIST (Feb. 9, 2021, 4:41 PM), <https://dcist.com/story/21/02/09/virginia-democrats-debate-restoring-voting-rights-felons/>.

E. Why Reform Is Needed

Felony disenfranchisement laws end up shrinking and whitening a state's electoral demographics.³⁵¹ Because of how the criminal justice system disproportionately targets Black and Brown communities and leads to their overrepresentation in prison, there is a discriminatory impact on communities of color and their right to vote.³⁵² In fact, there is evidence to suggest a strong relationship between the percentage of non-white prisoners and laws restricting felon voting rights.³⁵³ Higher incarceration rates within these communities mean that the remaining folks who have not lost their access to the ballot still have lost strength within their voting bloc and subsequently, the size of the impact they can have on elections.³⁵⁴

But while the impact falls the hardest on states with large Black prison populations and the most unforgiving felony disenfranchisement laws, in fact, regardless of the disenfranchisement category a state falls into, the underlying disparate impact is present in every state.³⁵⁵

For example, Vermont's laws, which never take away a citizen's right to right to vote even if incarcerated, still have this disparate effect.³⁵⁶ Even though Vermont allows prisoners to vote, this does not mean voting is as simple for a prisoner as it would be for someone not in state custody.³⁵⁷ Whether it is an issue of prison staff not initiating or responding to requests for ballot access, the prisoner not being informed or educated of their continued right to vote, or the prisoner no longer having a legitimate "last voluntary address" to be registered at, based on available information, the percentage of the Vermont prison

351. See Behrens et al., *supra* note 40, at 598.

352. *Id.* at 560; Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html> (noting that Black incarceration rates are significantly higher than white rates nationwide and that Black prisoners are overrepresented in each of the fifty state prison systems compared proportionally to the state's Black population); Uggen, *Locked Out*, *supra* note 8., at 11–12 (finding that thirty-four states have higher incarceration rates for their Latino/a residents than the state's general population).

353. Behrens et al., *supra* note 40, at 585, 587–89, 596–97.

354. *Id.* at 574–75; see also Uggen & Manza, *supra* note 30, at 780–81.

355. Behrens et al., *supra* note 40, at 596; see generally Sakala, *supra* note 352.

356. Riley Board, *What does an election look like inside a prison?*, BURLINGTON FREE PRESS (Aug. 24, 2020, 1:00 PM), <https://www.burlingtonfreepress.com/story/news/politics/elections/2020/08/24/vermont-inmates-can-vote-how-elections-prison-mail-in-ballot/3326694001/>.

357. *Id.*

population that actually exercises their right to vote is low.³⁵⁸ And this is where the disparate racial impact comes in. While only one percent of Vermont's state population is Black, they make up around ten percent of its prison population.³⁵⁹ That is a 10-to-1 ratio, twice the national average and also, the third largest overrepresentation disparity of any state (only behind Oklahoma and Wisconsin).³⁶⁰ With barriers to voting continuing to get in the way of prison population turnout, this means these barriers still have a disparate racial impact on Vermont's relatively small Black prison population because of how much they are overrepresented vis-à-vis their even smaller state population presence.³⁶¹

III. Recommendation

This Section will discuss reforms to felony disenfranchisement that will have an immediate, positive impact on older ex-felons. This Section will be subdivided into three parts that will address specific reforms for the states depending on what their felony disenfranchisement laws are currently. Given how rights are already restored in the two most forgiving categories of states—Buckets One and Two—recommended reforms for these two categories are combined in the same subsection. The purpose of having different policy recommendations for the different buckets is to tailor more realistic policy changes in states based on how strict their disenfranchisement laws are. From statutorily ending permanent disenfranchisement for the states that still have it, to mitigating de facto disenfranchisement in the states that do not penalize ex-felons, this Section will argue what can be done based on where there is movement.

It is worth noting before getting too far into this Section how these recommendations are state-focused as opposed to looking toward the federal courts or Congress. One reason for this is that because the Supreme Court has gotten more conservative since *Richardson v.*

358. *Id.*; Lewis, *supra* note 204.

359. John Dillon & Angela Evancie, *Why Are There So Many African-Americans Incarcerated In Vermont?*, VPR (Nov. 2, 2018, 4:38 PM), <https://www.vpr.org/post/why-are-there-so-many-african-americans-incarcerated-vermont#stream/0>.

360. *Id.*

361. *See id.*

Ramirez,³⁶² it is unlikely the Court would entertain any argument to extend something like the Eighth Amendment's bar on "cruel and unusual punishment" to felony disenfranchisement laws.³⁶³

Second, even if we forget about the hyper-partisanship that riddles Congress of its problem-solving function and would certainly prevent such a bill from passage, the path to reform would be tenuous.³⁶⁴ In addition to the previously discussed problems created by *Richardson* in Part II, the Supreme Court has already stopped Congress from using its powers under other constitutional provisions to change state voting laws.³⁶⁵ The Court has previously stopped Congress from using the Election Clause in Article I from trying to expand voting rights, including to set voter qualifications for the country.³⁶⁶ A Congressional attempt using the Equal Protection Clause or the Fifteenth Amendment would almost certainly be rebuffed by the Court as well.³⁶⁷ Rather than predicate reform on what the Supreme Court could do, reforms in this area focus on state-specific solutions instead.

A. Solutions for Buckets One & Two: Eliminate de facto Disenfranchisement

Because these two categories of states do not prevent former felons from exercising their right to vote, there is a lot less that needs to be done here than in more restrictive states. But these states can do more to register former felons to vote and encourage them to exercise that

362. See generally Jessica Gresko, *Breyer leaves a court more conservative than one he joined*, ASSOCIATED PRESS (Jan. 27, 2022), <https://apnews.com/article/stephen-breyer-us-supreme-court-4eacf1172764eea1ce84f876b0bd0458>.

363. Richard L. Hasen, *The Uncertain Congressional Power to Ban State Felon Disenfranchisement Laws*, 49 HOW. L.J. 767, 769 (Spring 2006).

364. Crain, *supra* note 169, at 4, 13–14, 17; see also Charles Davis, *Republicans and majority of Democrats vote to keep incarcerated people from participating in elections*, BUS. INSIDER (Mar. 2, 2021, 3:41 PM), <https://www.businessinsider.com/congress-votes-to-deny-incarcerated-people-right-participate-elections-2021-3> (noting that when given the opportunity, a bipartisan Congress balked at rights restoration).

365. See *Oregon v. Mitchell*, 400 U.S. 112, 130 (1970); *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 16–17 (2013).

366. See *Oregon v. Mitchell*, 400 U.S. at 130 (stating that Congress' Elections Clause power only extended to federal elections, and they could not use legislation to change the voting age to 18 for state and local elections) (hence the need for the 24th Amendment); *Inter Tribal Council of Arizona, Inc.*, 570 U.S. at 16–17 (stating that Congress's Elections Clause power did not extend to setting qualifications to vote).

367. Hasen, *supra* note 363, at 779–80, 783 (citing the Court's decision to rein in Congress in *City of Boerne v. Flores*, 521 U.S. 507 (1997)); Crain, *supra* note 169, at 17, 25–26.

right. The Campaign Legal Center estimates that as many as eighteen million ex-felons who are legally able to register to vote and exercise their constitutional right have not done so because of the confusion surrounding state disenfranchisement laws.³⁶⁸ This is called “de facto disenfranchisement.”³⁶⁹ There are several reasons de facto disenfranchisement continues to exist.

DE FACTO DISENFRANCHISEMENT

First, perhaps unsurprisingly, even when a state offers a formerly incarcerated individual the opportunity to get his or her rights restored, it is not always seized.³⁷⁰ For example, in Louisiana, of the 36,000 felons who became eligible in 2019, only 581 registered to vote by September of that year.³⁷¹ While data for former felons voting is hard to come by, limited statistical studies suggest turnout from this demographic is significantly lower than the national average.³⁷²

A second reason for lower uptake on participatory democracy among ex-felons is because of the lack of information about how to get one’s right to vote restored.³⁷³ A 2004 survey found that an overwhelming majority (eighty-six percent) of ex-felons were confused about their voting rights while ninety-six percent said they received no information from prison or parole staff about re-enfranchisement.³⁷⁴

This type of de facto discrimination continues to disenfranchise hundreds of thousands of ex-felons who can legally vote, but were

368. *Restore Your Vote: I have a felony conviction. Can I vote?*, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/restoreyourvote> (last visited Nov. 15, 2021).

369. Bridgett A. King, *What we often forget when we talk about voting restrictions: the actual voters*, VOX (Oct. 27, 2016, 12:00 PM), <https://www.vox.com/policy-and-politics/2016/10/27/13428088/voting-restrictions-restrictive-voting-laws-voter-id-early-voting-election-2016>.

370. See Westwood, *supra* note 269.

371. *Id.*

372. Compare Michael V. Haselswerdt, *Con Job: An Estimate of Ex-Felon Voter Turnout Using Document-Based Data*, 90 SOC. SCI. Q. 262, 268–69 (June 2009), <https://www.jstor.org/stable/42940586> (finding that a 660 sample of ex-felons in Erie over four elections between 2004–2005 has a voter turnout about five percent) and Uggen & Manza, *supra* note 30, at 786 (estimating a hypothetical turnout rate 35 percent in presidential elections), with Drew DeSilver, *In past elections, U.S. trailed most developed countries in voter turnout*, PEW RSCH. CTR. (Nov. 3, 2020), <https://www.pewresearch.org/fact-tank/2020/11/03/in-past-elections-u-s-trailed-most-developed-countries-in-voter-turnout/>.

373. See *Restoring Voting Rights to Former Felons*, PROJECT VOTE (Apr. 2010), 1, 5 [hereinafter PROJECT VOTE], <http://www.projectvote.org/wp-content/uploads/2014/03/POLICY-PAPER-FELON-RESTORATION-MARCH-2014.pdf>.

374. *Id.*

never informed if and when their rights were restored.³⁷⁵ There have been some efforts to pass voter rights notification laws as an affirmative step on behalf of the government to inform former felons of their ability to vote.³⁷⁶ A study of three states' notification laws found that there was little difference in registration and turnout rates before and after ex-felons were notified.³⁷⁷ One problem was that voting restoration information packets in these states are not individually tailored and are remarkably dense and unclear.³⁷⁸ Unlike Iowa's two-paragraph notification letter in large font that was found to significantly boost voter turnout among ex-felons, most informational brochures in the other states are distributed alongside a handful of other discharge paperwork.³⁷⁹

A third problem is that sometimes the number of hurdles required to regain one's voting rights appears to deter would-be voters.³⁸⁰ For example, Wyoming requires an application process for any first-time, nonviolent felony offenders who were convicted before 2010.³⁸¹ This could present many hurdles to an older adult looking to get their rights restored. The application requires either access to a computer and broadband internet or an ability to drive to fill one out in-person.³⁸² It is only accessible online or, presumably, at the Department of Corrections office in Cheyenne.³⁸³

375. Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, BRENNAN CTR. FOR JUST. (2008), 1–3, https://www.brennancenter.org/sites/default/files/2019-08/Report_DeFactoDisenfranchisement.pdf.

376. Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 224 (2014) [hereinafter *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*], <http://www.jstor.org/stable/24541703>.

377. *Id.* at 236–37, 240.

378. *Id.* at 240.

379. *Id.* at 240–45.

380. See BRENNAN, *supra* note 19.

381. *Id.*; WYO. DEP'T OF CORR., *supra* note 199; Megan Cassidy, *Wyoming is one of toughest states for ex-felon voting rights*, CASPER STAR TRIB. https://trib.com/news/state-and-regional/wyoming-is-one-of-toughest-states-for-ex-felon-voting-rights/article_45b90f9c-b6b7-5229-800a-ebfe34dac548.html, (last updated Sept. 24, 2012).

382. See WYO. DEP'T OF CORR., *supra* note 199.

383. See *Application for Restoration of Wyoming Voting Rights*, WYO. DEP'T OF CORR., <https://docs.google.com/a/wyo.gov/viewer?a=v&pid=sites&srcid=d3lvLm dvdnxbk2N8Z3g6MTIkMjQxOTI3ZWEyZDA4OA> (last visited Nov. 15, 2021).

This internet access is a problem that gets exacerbated when it comes to older adults.³⁸⁴ Pew Research data suggests that only about half of older Americans nationwide have broadband access at home,³⁸⁵ whereas one-third of adults aged sixty-five-years or older have never used the internet.³⁸⁶ As of 2020, there are nine states that do not allow a prospective voter to register online.³⁸⁷ These nine states run the gamut when it comes to the severity of felony disenfranchisement, from Maine as one of the most lenient to Mississippi, one of the most restrictive.³⁸⁸ As a result, these nine states have severely restricted the ability of older adults, who are without access to a car to register in-person or without a computer to register online, to participate in democracy.³⁸⁹

Going back to the previous example, there is reason to believe that the digital divide could impact even more older Wyomingites than the national average as the state ranks forty-fifth in terms of broadband access because of its largely rural population.³⁹⁰ Forty-five percent of rural Wyomingites do not have access to “high speed” internet.³⁹¹ Secondly, the applicant themselves could face another felony if they fill out the form wrong.³⁹² Talk about a high risk for an ex-felon who might not understand everything on that application form.

Perhaps it should not be a surprise that hardly anyone in Wyoming has successfully petitioned for their rights to be restored.³⁹³ Since 2003, when the application first became available, only 107 Wyomingites have successfully petitioned for their voting rights back.³⁹⁴ This number has not changed in at least five years, as zero former felons

384. See Monica Anderson & Andrew Perrin, *Tech Adoption Climbs Among Older Adults*, PEW RSCH. CTR. (May 17, 2017), 1, <https://www.pewresearch.org/internet/2017/05/17/tech-adoption-climbs-among-older-adults/>.

385. *Id.*

386. *Id.*

387. *Online Voter Registration*, NAT’L CONF. STATE LEGISLATURES (July 26, 2021) [hereinafter *Online Voter Registration*], <https://www.ncsl.org/research/elections-and-campaigns/electronic-or-online-voter-registration.aspx>.

388. See *id.*; BRENNAN, *supra* note 19.

389. See *Online Voter Registration*, *supra* note 387; BRENNAN, *supra* note 19.

390. Elise Schmelzer & Christine Peterson, *In Wyoming, access to high-speed internet depends on where you live*, CASPER STAR TRIB., https://trib.com/news/state-and-regional/in-wyoming-access-to-high-speed-internet-depends-on-where-you-live/article_1fb35fbb-de1d-5a89-b70b-fe4a2c9322cb.html (last updated Sept. 28, 2018); see also *What is Rural*, WYO. DEP’T OF HEALTH, <https://health.wyo.gov/publichealth/rural/officeofruralhealth/what-is-rural/> (last visited Nov. 15, 2021).

391. Schmelzer & Peterson, *supra* note 390.

392. *Application for Restoration of Wyoming Voting Rights*, *supra* note 383.

393. Cassidy, *supra* note 381; *6 Million Lost Voters*, *supra* note 184, at 13.

394. *Id.*

from the Cowboy State have gotten their voting rights back through this process since 2016.³⁹⁵

Finally, there is also evidence that state government and prison officials are not always allowing voting registration efforts to go forward, both for those prisoners who are allowed to retain their voting rights while incarcerated and for the general public at the DMV.³⁹⁶ In Vermont, for example, Jason Anderson waited for prison guards to circulate sign-up sheets to learn about voting, but the guards never came.³⁹⁷ Later, he submitted approximately twenty grievances to the prison staff to get assistance with voting in the 2018 general election, but never received a response.³⁹⁸

In 2005, Alabama's Attorney General issued an opinion that their state's "moral turpitude" criminal language, which had led to disenfranchisement of individuals even for felony DUIs and liquor law violations, had been interpreted too broadly.³⁹⁹ When ex-felon Kenneth Glasgow, Rev. Al Sharpton's half-brother, found out about the change, he sued to enter Alabama's penitentiaries to register eligible inmates and sued again, in 2008, after Republican election officials tried to bar him from registering eligible voters ahead of the presidential election.⁴⁰⁰ When governments have voting laws that encourage registration and participation, make the process more accessible, and hold accountable those that do not to comply with these laws, not only do voter rolls grow, but turnout increases as well.⁴⁰¹

395. Uggen, *Locked Out*, *supra* note 8, at 14.

396. *See, e.g.*, Board, *supra* note 356; Douglas R. Hess, *Monkey Cage Blog: States are ignoring federal law about voter registration. Here's why.*, WASH. POST (July 4, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/04/states-are-ignoring-federal-law-about-voter-registration-heres-why/>.

397. Board, *supra* note 356.

398. *Id.*

399. Nina Martin, *Murder Charge Can't Deter Sharpton's Brother From Voting Rights Crusade*, PROPUBLICA (Nov. 4, 2018, 9:00 PM), <https://www.propublica.org/article/kenneth-glasgow-murder-charge-sharpton-brother-voting-rights-crusade>.

400. *Id.*

401. *Id.*; *see, e.g.*, Kevin Morris & Peter Dunphy, *AVR Impact on State Voter Registration*, BRENNAN CTR. FOR JUST. (Apr. 11, 2019), <https://www.brennancenter.org/our-work/research-reports/avr-impact-state-voter-registration> (finding that automatic voter registration significantly increased voter registration); Nathaniel Rakich, *What Happened When 2.2 Million People Were Automatically Registered To Vote*, FIVETHIRTYEIGHT (Oct. 10, 2019), <https://fivethirtyeight.com/features/what-happened-when-2-2-million-people-were-automatically-registered-to-vote/> (finding a 42 percent and 54 percent voter turnout rate for new voters who had registered to vote using AVR in four different states); *see also* Jake Grumbach & Charlotte Hill,

Each of these problems can be addressed by reconsidering when and how we reach out to former felons about voting rights and getting them registered at their correct address. The first solution is to get rid of arbitrary voter registration deadlines, which stop all eligible voters who register after that deadline from voting in the upcoming election and, instead, allow voters to get registered as close to the election as they are able—even at the polls on Election Day.⁴⁰² This is called “same-day registration” or “Election Day registration.”⁴⁰³ The main benefit of this policy is to reach voters who either were not aware of registration deadlines until it was too late or moved too close to Election Day.⁴⁰⁴

How this registration modernization policy impacts older felons would be complicated to measure. On the one hand, seniors have the highest voter registration rates of any age bracket,⁴⁰⁵ but former felon voter registration falls on the opposite end of the spectrum.⁴⁰⁶ And while restoration on release might bridge at least part of the registration gap, it can come down to a matter of timing. If the state does not have same day registration, they might have to wait until the next election cycle.⁴⁰⁷ For example, an older felon released from prison in Oregon in say, mid-October 2024, would have their right to vote restored upon release, but if they did not live at the same address they had before incarceration and had to re-register to vote, the state’s registration

Automatic Voter Registration Boosts Turnout Among Young and Low Income People, DATA FOR PROGRESS (July 11, 2019), <https://www.dataforprogress.org/blog/2019/7/11/automatic-voter-registration-boosts-turnout-among-young-and-low-income-people> (finding that AVR increased voter turnout especially within younger demographics and low-income communities).

402. *Same Day Voter Registration*, NAT’L CONF. OF STATE LEGISLATURES (Oct. 6, 2020) [hereinafter *Same Day Voter Registration*], <https://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

403. *Id.*

404. Walter Shapiro, *Election Day Registration Could Cut Through Many of the Arguments in the Voting Wars*, BRENNAN CTR. FOR JUST. (Oct. 16, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/election-day-registration-could-cut-through-many-arguments-voting-wars>.

405. See *Voting and Registration in the Election of November 2018: Table 3*, U.S. CENSUS BUREAU (Apr. 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> (finding across all regions, the top age brackets had the highest registration rates).

406. See *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, *supra* note 376, at 229, 231, 233.

407. Compare BRENNAN, *supra* note 19 (listing the 18 states that grant automatic restoration), with *Same Day Voter Registration*, *supra* note 402 (listing the 21 states in 2020 that offered same-day registration).

deadline of twenty-one days before an election would prohibit them from exercising their right.⁴⁰⁸

Arbitrary registration deadlines stop too many eligible citizens from voting on Election Day.⁴⁰⁹ Same-day registration has proven to show higher voter turnout.⁴¹⁰ Any way states can modernize their voter registration systems will impact voters from all walks of life, including ex-felons who typically lack the information and resources to register on their own.⁴¹¹

Another solution to stop de facto disenfranchisement is to not just leave state law to automatically restore voting rights upon release, but instead automatically registering former felons to vote upon release. The difference here may seem small, but it is significant. Automatic restoration just means the person who has just been released from prison is eligible to vote and can vote presuming two tall orders: (1) they still maintain the same address they were registered at before incarceration and (2) the state does not purge voters from the voter rolls for inactivity.⁴¹² Automatic voter registration (“AVR”) would counteract those two presumptions by focusing on the present over the past—registering the individual at whatever address they are going to reside at upon release regardless of how long ago they last voted.⁴¹³

Twenty-two states already automatically restore at least some of their ex-felon population.⁴¹⁴ Twenty states (plus D.C.) automatically

408. *Accord* BRENNAN, *supra* note 19, *with Voting in Oregon, supra* note 231.

409. *Id.*

410. *See* Shapiro, *supra* note 404.

411. *See* PROJECT VOTE, *supra* note 373, at 5 (noting how uncommon and inaccessible voting rights resources and information is to ex-felons).

412. *See* BRENNAN, *supra* note 19. Neither of these presumptions are likely to be met, however. *See* Teresa Wiltz, *Where ‘Returning Citizens’ Find Housing After Prison*, PEW CHARITABLE TRUSTS (Apr. 23, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/04/23/where-returning-citizens-find-housing-after-prison> (noting that between public housing restrictions and parole restrictions about living arrangements, ex-felons have limited options); *see also, e.g.*, Steve Mills, *State keeps 1,250 parolees behind bars due to housing shortage*, CHI. TRIB. (Jan. 25, 2015, 6:49 PM), <https://www.chicagotribune.com/news/ct-violating-at-the-door-met-20150125-story.html>. *See* Kevin Morris et al., *Purges: A Growing Threat to the Right to Vote*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://www.brennancenter.org/our-work/research-reports/purges-growing-threat-right-vote> (finding that between 2014 and 2016 states removed more than 16 million voters from the voter rolls).

413. *Automatic Voter Registration, a Summary*, BRENNAN CTR. FOR JUST. (June 30, 2021) [hereinafter *Automatic Voter Registration, a Summary*], <https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary>.

414. *See* BRENNAN, *supra* note 19 (20 states automatically restore rights for all, Maryland and Delaware both restore for the majority of felons after release, but not all).

register state residents to vote; however, none of the AVR states offer this service to incarcerated individuals getting released.⁴¹⁵ Only fourteen states appear on both lists.⁴¹⁶ This leaves two avenues for reform. First, the restoration upon release states that do not have AVR should adopt the practice to make these two lists as close to the same as they can. Second, all the states with restoration on release should adopt AVR procedures for their departments of corrections so that registration can take place as prisoners are getting ready to be released from their facilities.

AVR is a huge boon for ballot access and voter turnout.⁴¹⁷ Rather than prospective voters having to take affirmative steps themselves to register to vote, whether that is going down to the DMV—by choice—to register there or going online (if the state offers online voter registration), AVR changes the dynamics.⁴¹⁸ Rather than the prospective voter “opting-in” to vote (taking the affirmative step to register), AVR makes voter registration an “opt-out” process instead.⁴¹⁹ States with AVR automatically register every eligible citizen who goes to the DMV, presumably to get a license or update their address, and registers them to vote unless the voter opts out and says “no thank you.”⁴²⁰ This small change drastically increases the number of voters on the state’s voter rolls, makes the voter rolls more accurate, and now, as a result, boosts voter turnout.⁴²¹

Over 650,000 inmates are released from state and federal prisons each year.⁴²² Many of these releasees are not able to get a government

415. See *Automatic Voter Registration, a Summary*, *supra* note 413; see also *Policy Differences of Automatic Voter Registration*, BRENNAN CTR. FOR JUST. [hereinafter *Policy Differences of Automatic Voter Registration*] (June 30, 2021), https://www.brennan-center.org/our-work/research-reports/policy-differences-automatic-voter-registration?_ga=2.177488613.1144747385.1613752030-1026350786.1598585594 (noting about half of states with AVR only automatically register voters at the DMV. None include the state department of corrections.).

416. Compare BRENNAN, *supra* note 19, with *Policy Differences of Automatic Voter Registration*, *supra* note 415.

417. See Rakich, *supra* note 401; Grumbach & Hill, *supra* note 401.

418. Niyati Shah, *Automatic Voter Registration Best Practices*, PROJECT VOTE (Aug. 2015), <http://www.projectvote.org/wp-content/uploads/2015/08/Automatic-Registration-Best-Practices-August-2015.pdf>.

419. *Automatic Voter Registration, a Summary*, *supra* note 413.

420. *Id.*

421. Rakich, *supra* note 401; Grumbach & Hill, *supra* note 401.

422. *Prisoners and Prisoner Re-Entry*, U.S. DEPT OF JUST., https://www.justice.gov/archive/fbci/progmenu_reentry.html (last visited Nov. 15, 2021).

ID card after release.⁴²³ Whether they get deterred by government bureaucracy or the sticker price,⁴²⁴ this hurdle can stop many ex-felons from being able to vote in a majority of states, where there is an ID requirement to check in at a polling place.⁴²⁵ The elderly, alongside low-income individuals, are less likely to have a government-issued ID than other demographic groups—nearly one in five adults over age sixty-five do not have a government-issued ID.⁴²⁶ Therefore, the need to present a valid government ID to vote should disproportionately impact older ex-felons who fall into each of these at-risk categories.⁴²⁷ This is precisely why counting on felons going to the DMV for registration is not sufficient in states that automatically restore voting rights upon release—especially when a more efficient option exists: AVR upon release from the department of corrections.

In this day and age, expanding AVR to other state agencies, like the department of corrections, is just a matter of these agencies (and more specifically their computers) being able to talk to one another, transferring an individual's personal information from one agency to the state agency responsible for voter registration.⁴²⁸ For inmates getting released, this would require a state's department of corrections to send the contact information they already collect from inmates getting released to the state's election authority (likely the state board of

423. Juleyka Lantigua-Williams, *The Elusiveness of an Official ID After Prison*, THE ATLANTIC (Aug. 11, 2016), <https://www.theatlantic.com/politics/archive/2016/08/the-elusiveness-of-an-official-id-after-prison/495197/>; Cat Wise, *Leaving prison without a government ID can block access to housing, jobs and help*, PBS (Dec. 31, 2020, 4:56 PM), <https://www.pbs.org/newshour/nation/leaving-prison-without-a-government-id-can-block-access-to-housing-jobs-and-help>.

424. *Id.*

425. *Voter Identification Requirements | Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES (Oct. 7, 2021), <https://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>.

426. Marsha Mercer, *Can We Still Vote?*, AARP (Aug. 30, 2012), <https://www.aarp.org/politics-society/government-elections/info-01-2012/voter-id-laws-impact-older-americans.html>; Ina Jaffe, *For Older Voters, Getting The Right ID Can Be Especially Tough*, NPR (Sept. 7, 2018, 5:01 AM), <https://www.npr.org/2018/09/07/644648955/for-older-voters-getting-the-right-id-can-be-especially-tough>.

427. *Id.*

428. See *Automatic Voter Registration (AVR)*, ILL. STATE BD. OF ELECTIONS, <https://www.elections.il.gov/votingandregistrationsystems/automaticvoterregistration-info.aspx?MID=uW8H%2BjUMn4Q%3D> (last visited Nov. 15, 2021) (noting electronic data transfer as the method to share interagency voter registrations with the state board).

elections or secretary of state's office).⁴²⁹ Rather than relying on these newly freed individuals to go out and register themselves now that their eligibility to vote has been restored, let us save them the step and register them proactively upon release.

These recommendations are just a few of the steps state governments must take to stop treating older ex-felons as second-class citizens and seriously walk the walk when it comes to correctional rehabilitation. The long arm of the law is only supposed to apply to criminals who have not yet been caught, not act as an eternal shadow hanging over the heads of 5.2 million ex-felons who served their sentences.⁴³⁰

B. Solution for Bucket Three: Eliminate Waiting Periods

There are only three states that have a separate amount of time, not tied to probation, parole, or repayment, that one must wait to have their voting rights restored after their release from prison.⁴³¹ The remaining three should join the other forty-seven.

Recidivism rates, especially in the oldest segments of the prison population, are already the lowest of any age bracket.⁴³² Rather than forcing a fifty-year-old to wait another couple years after his release from prison (or even a few years after his completion of probation if he lives in one of the three waiting period states), these states should keep rehabilitation and reintegration in focus.⁴³³ This category, however, has shrunk over the last twenty years.⁴³⁴ In 2013, Delaware passed a constitutional amendment that removed their state's mandatory five-year waiting period in favor of completion of sentence and supervision.⁴³⁵ Nevada, Texas, and Virginia have all removed their waiting periods in recent years as well.⁴³⁶

429. See *Voter Registration List Maintenance*, NAT'L CONF. STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/voter-list-accuracy.aspx#convicted> (last visited Nov. 15, 2021).

430. Uggen, *Locked Out*, *supra* note 8.

431. See BRENNAN, *supra* note 19 (finding that former felons in Louisiana must wait five years regardless of their probation/parole status, Nebraskans must wait two-years after their release, & eligible Wyomingites must wait five years); WYO. DEP'T OF CORR., *supra* note 199.

432. Hunt & Easley, *supra* note 316, at 22–23.

433. *Id.*

434. Chung, *supra* note 182, at 5.

435. *Voting Rights Restoration Efforts in Delaware*, BRENNAN CTR. FOR JUST., (Feb. 12, 2018) <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-delaware>.

436. *Id.*

On the other hand, waiting periods could also be a potential middle ground for the states with permanent disenfranchisement policies. This was the route Nebraska took when they changed to a two-year waiting period back in 2005.⁴³⁷ Given how uncommon these waiting periods are, however, the most restrictive states should just breeze right past them.

1. ALLOW INDIVIDUALS ON PROBATION AND PAROLEES TO VOTE

Twenty states already automatically restore an ex-felon's voting rights upon release from prison.⁴³⁸ Connecticut, New York, and Washington updated their laws in 2021 to join this category.⁴³⁹ Virginia also took its first step to alleviate their burdensome disenfranchisement law.⁴⁴⁰ Given that five states in just the last few years changed their laws to remove parole and probation requirements, there is movement to eliminate this unnecessary waiting period.⁴⁴¹

There are two reasons why states should eliminate these parole and probation requirements. First, the concern about recidivism is misplaced. Recidivism rates are the lowest for older ex-felons and continue to drop the older the individual is.⁴⁴² Recidivism rate data combined with the fact that most parolees and probationers are non-violent offenders should make this reform solution an easier pill to swallow for state legislatures.⁴⁴³

Second, one study found that voting rights for former felons actually further lowers the chances of recidivism.⁴⁴⁴ The limited study found consistent differences between voters and non-voters in re-arrests, reincarceration, and self-reported criminal behavior.⁴⁴⁵ Voting might have just been one significant factor of several impacting recidivism,⁴⁴⁶

437. NEBRASKANS FOR CIVIC REFORM, *supra* note 199, at 1.

438. BRENNAN, *supra* note 19.

439. *Felon Voting Rights*, *supra* note 249.

440. See *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-virginia> (last updated Mar. 16, 2021).

441. *Felon Voting Rights*, *supra* note 249.

442. Hunt & Easley, *supra* note 316, at 22–23.

443. *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, *supra* note 257, at 8.

444. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 213 (2004).

445. *Id.* at 210–11, 213.

446. *Id.* at 214.

but the fact that it was statistically significant at all points to the need to press harder against prolonged and permanent disenfranchisement.

At the very least, low recidivism rates raise questions about the efficacy of delaying rights restoration after the first years after release. Recidivism is a red herring concern within the rights restoration conversations.⁴⁴⁷ It is a modern-day Willie Horton political tactic—aimed to stoke fear and racial animus⁴⁴⁸—when this should be a discussion of how we need to reform the criminal justice system to focus on greater rehabilitation. It should not be an excuse to continue punishing individuals who have paid their debt to society by refusing to let them engage in the most basic and fundamental right in the democratic process: voting.

States with a history of recently changing their felony disenfranchisement laws (such as New Mexico and Minnesota), as well as some states with legislatures with more compromising or moderate political factions (Kansas and Alaska) should be the top targets for reform.⁴⁴⁹

2. ELIMINATE LFOS

State legislative efforts are the best bet to eliminate LFOs. If criminal justice reform and voting rights advocates can raise the resources to map out the impact of LFOs—on communities of color and on the indigent—and give a clearer sense of how many former felons are unable to vote because of them, they can demonstrate disparate impact to move legislators to act.

Picking state targets on this point will be a bit tricky, as the harshest LFO states are run by conservative political majorities that have not been very inclined to expand voting rights or ballot access—especially as this Note was written after the 2020 election.⁴⁵⁰ Softer targets would be from the group of states where LFOs can slow down the restoration process. The easiest states in this group would be New Mexico,

447. *Id.*

448. See Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html>.

449. See, e.g., *Voting Rights Restoration Efforts in New York*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-new-york> (last updated May 4, 2021).

450. John Laloggia, *Conservative Republicans are least supportive of making it easy for everyone to vote*, PEW RSCH. CTR. (Oct. 31, 2018), <https://www.pewresearch.org/fact-tank/2018/10/31/conservative-republicans-are-least-supportive-of-making-it-easy-for-everyone-to-vote/>.

Minnesota, and Rhode Island because of the liberal lean to their state legislatures and recent history of relaxing their felony disenfranchisement laws.⁴⁵¹

Of the three states that bar voting rights for all outstanding LFOs, Florida is the best target.⁴⁵² Because of the preexisting grassroots coalitions that helped pass Amendment Four, they can continue to mobilize to raise funds to pay off individual LFOs and encourage legislative reform by demonstrating the positive impact it would have on the Cuban-American communities in and around Miami-Dade.⁴⁵³ Given the conservative leaning of these communities,⁴⁵⁴ the Amendment Four coalitions could cite a clear example of just how diverse former felons' political ideologies are.⁴⁵⁵

In addition to legislative efforts, voting rights advocates should seek out indigent petitioners in circuit courts that have not yet ruled on the constitutionality of LFOs using the opening left in *Harvey v. Brewer*, where she noted that barring voting rights from the indigent might not pass the rational basis test.⁴⁵⁶ This would set up a circuit split on this issue and could incentivize the Supreme Court to take up the issue.

To quote Justice Douglas in *Harper v. Virginia State Bd. of Elections*, a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.⁴⁵⁷

A person's wealth or lack thereof should not pose a barrier to the ballot box.

451. See Love & Schlüssel, *supra* note 198, at 3; *State Partisan Composition*, *supra* note 237; Chung, *supra* note 182, at 5.

452. See Love & Schlüssel, *supra* note 198.

453. See generally Alajiah Brown, *Florida's Amendment 4 Affects Grassroots Initiatives*, JOURNEY (Oct. 28, 2020) <https://jmagonline.com/articles/floridas-amendment-4-affects-grassroots-initiatives/>.

454. Jens Manuel Krogstad, *Most Cuban American voters identify as Republican in 2020*, PEW RSCH. CTR. (Oct. 2, 2020), <https://www.pewresearch.org/fact-tank/2020/10/02/most-cuban-american-voters-identify-as-republican-in-2020/>.

455. See Chandra Bozelko & Ryan Lo, *Five myths about felony disenfranchisement*, WASH. POST (July 31, 2020, 10:03 AM), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-felony-disenfranchisement/2020/07/31/ac446a2e-d1ef-11ea-8c55-61e7fa5e82ab_story.html.

456. *Harvey v. Brewer*, 605 F.3d 1067, 1080 (9th Cir. 2010) ("Perhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass this rational basis test....").

457. *Harper v. Virginia State Bd. Elections*, 383 U.S. 663, 666 (1966).

C. Solution for Bucket Four: End permanent disenfranchisement laws in states that still have them

About thirty-five years ago, Roy Harness, an Army veteran, forged checks and served twenty-three months, three weeks, and three days in a Mississippi prison.⁴⁵⁸ Now about sixty-five-years-old, Roy still cannot vote because Mississippi has a wide-ranging list of twenty-two enumerated crimes, including nonviolent crimes like embezzlement and fraud, that forever cost a person their voting rights (unless the state legislature approves the individual's rights restoration).⁴⁵⁹ A less than two-year sentence has left Roy with more than thirty-five years of second-class citizenship.⁴⁶⁰ Despite being able to turn his life around, he might never be able to vote again.⁴⁶¹ Should Roy really have to feel like he has been branded and defined by a mistake more than three decades later?

Naysayers will talk about "just deserts" and not letting violent or dangerous criminals decide who holds public office.⁴⁶² But that is really just hot air. First of all, the original intent of incarceration was rehabilitation, not merely punishment.⁴⁶³ Rehabilitation is just a ten-cent word if it does not come with real, meaningful reintegration into society and rights restoration upon an inmate's release from prison. Additionally, we must remember the "mass" in mass incarceration. Most of the inmates of concern are not going anywhere realistically. Parole does not exist in sixteen states and is rarely granted in the remaining.⁴⁶⁴ And since more states adopting Vermont and Maine's policy of letting prisoners vote is very unlikely, it is implausible that violent ex-cons will be able to swing any election of any size.⁴⁶⁵

458. *Roy Harness' Redemption*, MISS. CTR. FOR JUST. (Apr. 13, 2020), <https://mscenterforjustice.org/roy-harness/>.

459. *Id.*; Arielle Dreher, *Fighting for the Right to Vote*, JACKSON FREE PRESS (Oct. 11, 2017, 10:29 AM), <https://www.jacksonfreepress.com/news/2017/oct/11/fighting-right-vote/>; BRENNAN, *supra* note 19 (noting Mississippi requires legislative approval for rights restoration).

460. *See* MISS. CTR. FOR JUST., *supra* note 458.

461. *Id.*

462. *See generally* Tata & Hutton, *supra* note 88, at 6.

463. *See generally id.*

464. *See* Renaud, *supra* note 256; *see also* Elizabeth Gaynes et al., *The High Costs of Low Risk: The Crisis of America's Aging Prison Population*, OSBORNE ASS'N, 13 (2018), <http://www.osborneny.org/resources/resources-on-aging-in-prison/osborne-aging-in-prison-white-paper/>.

465. German Lopez, *The Democratic debate over letting people in prison vote, explained*, VOX (May 13, 2019, 8:00 AM), <https://www.vox.com/policy-and-politics/2019/5/13/18535423/prisoner-felon-voting-rights-bernie-sanders-2020> (noting that

Put simply, the political climate is already moving away from such permanent bans.⁴⁶⁶ In the last fifteen years, eight states have eased up on permanent disenfranchisement.⁴⁶⁷ Most of these moves were to shrink the size of the pool and disenfranchise fewer voters going forward.⁴⁶⁸ Besides what has previously been discussed about Florida, Iowa, and Kentucky, the most recent change in this group was Nevada.⁴⁶⁹ In 2016, the Silver State permanently disenfranchised any felon who had been convicted of two or more felonies or at least one violent felony.⁴⁷⁰ But in 2019, with a newly elected Democratic governor in office, Nevada moved to automatically restore voting rights upon one's release from prison.⁴⁷¹ And while some of the other states have instead trimmed down the number of felonies that lead to disenfranchisement or focused solely on election-related crimes,⁴⁷² it is likely we will see more states move out of this fourth bucket as momentum continues to grow in states with changing demographics and politics.⁴⁷³

The two states with the most opportunity in this category are Maryland and Delaware.⁴⁷⁴ Both these states are already almost in this category—only permanently disenfranchising a select group of former felons.⁴⁷⁵ These two states are the only Democratically-controlled states in the category.⁴⁷⁶ Democrats control both chambers and the governor's mansion in Delaware, and Maryland's split government will likely

recent polls have found that between 65–69 percent of respondents disagree with the proposal to let prisoners vote).

466. See Uggen, *Locked Out*, *supra* note 8, at 5.

467. *Id.*

468. *Id.* at 12.

469. *Id.* at 4.

470. *6 Million Lost Voters*, *supra* note 184, at 4.

471. *Restoration of Voting Rights in Nevada*, NEV. SEC'Y OF STATE, <https://www.nvsos.gov/sos/elections/voters/restoration-of-voting-rights-in-nevada> (last visited Nov. 15, 2021).

472. See *Voting Rights Restoration Efforts in Delaware*, BRENNAN CTR. FOR JUST. (Feb. 12, 2018), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-delaware>; Uggen, *Locked Out*, *supra* note 8 (noting Wyoming's 2017 update to allow nonviolent felons apply for restoration); see also Chung, *supra* note 182, at 1 (noting that Louisiana permanently bars felons who have committed election fraud or similar crimes).

473. Cheslow, *supra* note 350 (Just as we saw in Nevada, Virginia Democrats seem to have prioritized this issue in 2021 after gaining the majority in both chambers following the 2019 elections as the state continues to trend more Democratic).

474. BRENNAN, *supra* note 19.

475. *Id.*

476. *State Partisan Composition*, *supra* note 237.

revert to a Democratically-controlled government after the 2022 elections.⁴⁷⁷

D. Additional solution: Expand compassionate release

“Compassionate release” is really a misnomer. Available to only a select few and full of subjectivity and bureaucratic red tape, it is simply not an easy process.⁴⁷⁸ It is hardly compassionate. Its purpose is really to discourage the majority of applicants during its arduously long process and tough prerequisites.⁴⁷⁹ After hurdles of paperwork, age and time-served requirements, medical exams to demonstrate one’s impending death, and even an administrative veto power given to the warden or prison board, only six percent of inmates receive this reprieve from their sentence.⁴⁸⁰

Compassionate release does not have to be so restrictive, especially when it comes to our older incarcerated population. As previously discussed, older ex-felons are the least likely to recidivate.⁴⁸¹ With the average prison age rising,⁴⁸² rather than force correctional departments to cut services in prisons, stretch staff thinner, and risk their safety, this policy change can release the budget pressure before it pops. Additionally, housing older adults in prison is only going to stretch state prison budgets.⁴⁸³ Medical and health care costs associated with older prisoners could annually cost a state over \$102,000 per older adult.⁴⁸⁴

Compassionate release reform will impact older adults primarily in two categories: restoration on release (Bucket Two) and parole and probation states (Bucket Three). Older former felons in both categories will benefit from this policy change.⁴⁸⁵ In both categories, the earlier older adults are released, the earlier they will be able to restore their right to vote.

In the restoration on release states, this will have an immediate impact because ex-felons will have their rights restored immediately

477. *See id.*

478. Widra & Bertram, *supra* note 311.

479. *Id.*

480. *Id.*

481. Hunt & Easley, *supra* note 316, at 22–23.

482. *At America’s Expense: The Mass Incarceration of the Elderly*, *supra* note 45, at 6–8.

483. *Id.*

484. *Id.* at 27.

485. *Id.* at 51.

and start voting before their sentence would otherwise be completed had compassionate release not been granted.⁴⁸⁶ Second, for the parole and probation waiting period states, this will start their clock earlier.⁴⁸⁷ Now, instead of spending longer time in prison and then having to complete their post-release probation, these newly-released felons can start accruing time sooner. Granting compassionate release should require less than running a bureaucratic marathon and one's impending death.

Given incomplete reporting data on compassionate release, the focus for reform should be to target states that already have this policy and publicly report their state process rather than states that lack one or the other. Because these states are already inclined to continue their compassionate release program, they can be shown ways to cut down the number of bureaucratic hurdles, which will save the state money on top of the medical costs they can save by letting more older prisoners out early.⁴⁸⁸

One final recommendation is simply to strive for uniformity amongst the states when it comes to re-enfranchisement.⁴⁸⁹ Then, regardless of where an individual is incarcerated vis-à-vis what state they are from, especially in the federal system or states that outsource housing prisoners, there will be less confusion about what their rights are upon their reentry into society.⁴⁹⁰

IV. Conclusion

When someone finishes their prison sentences, we often think of the phrases: "done your time" or "paid your debt to society." Both idioms get at the heart of what the criminal justice system should be: when it is over, it should be over. While about 800,000 more former felons have been able to get their voting rights restored between 2016 and 2020, 5.2 million people disenfranchised is still too many.⁴⁹¹

Instead, we keep these 5.2 million ex-felons in limbo, in a type of societal purgatory that is ready to condemn them if they step out of line

486. *Id.*

487. *Id.*

488. *See id.*, at 26–29.

489. PROJECT VOTE, *supra* note 373, at 5.

490. *See id.*

491. *Compare 6 Million Lost Voters, supra* note 184, at 3, *with Uggen, Locked Out, supra* note 8.

without any wiggle room to truly reintegrate into the mainstream.⁴⁹² Felony disenfranchisement laws are just another way to remind five million Americans who have done their time that they are not really welcome in society. Every two years, they see and hear the political ads on TV, read about the political bloviating going on in Washington, and get no voice in the process.⁴⁹³

The rise of “law and order” political grandstanding and “tough on crime” laws has resulted in our prison population ballooning and lengths of sentences increasing.⁴⁹⁴ As a result, our prison population is staying imprisoned for longer and is rapidly aging.⁴⁹⁵ An increasingly aging prison population is only going to further strain government budgets and risk leaving millions of aging inmates with worse and worse standards of care for age-related health conditions.⁴⁹⁶

From early bird specials to Medicare and Social Security, the ADEA and compassionate release from prison, we often recognize that age changes government policy priorities and social interactions.⁴⁹⁷ Our laws should recognize the impact felony disenfranchisement laws have on all felons, including the elderly and older adults, to really ensure the phrase “done your time” is not just another example of hypocrisy or disingenuousness within our democracy.

492. *See id.*

493. *Id.*

494. *See John, supra note 86; Lopez, Mass incarceration in America, explained in 22 maps and charts, supra note 178.*

495. *At America’s Expense: The Mass Incarceration of the Elderly, supra note 45, at 1.*

496. *Id.* at 26–30; *see also* KiDeuk Kim & Bryce Peterson, *Aging Behind Bars: Trends and Implications of Graying Prisoners in the Federal Prison System*, URB. INST., 1, 16–18 (2014).

497. *See* Bill Voit & Nancy Vickers, *Policies and Programs to help America’s Senior Citizens*, THE COUNCIL OF STATE GOV’T (Jan. 10, 2012), <https://knowledgecenter.csg.org/kc/content/policies-and-programs-help-america%E2%80%99s-senior-citizens>.

