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THE VIOLENCE OF VOICELESSNESS: THE IMPACT OF FELONY DISENFRANCHISEMENT ON RECIDIVISM

Guy Padraic Hamilton-Smith*

Matt Vogel**

I. INTRODUCTION

*No class of men can, without insulting their own nature, be content with any deprivation of their rights.*¹

In 2010, nearly 5.3 million American citizens were unable to vote because of a collateral consequence² from a felony conviction known as disenfranchisement.³ The political disenfranchisement of ex-felons is not accomplished through applying a provision within the United States Constitution or of any federal statute, but is instead administered at the discretion of state legislatures.⁴ In light of this state-by-state approach, there is considerable variation in how disenfranchisement is imposed throughout the country.⁵ The severity of disenfranchisement runs the gamut from allowing incarcerated prisoners to vote (Maine and Vermont) to prohibiting voting rights to those who complete their sentences.⁶ Even though disenfranchisement is a consequence of a felony conviction, courts have generally considered it to be

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1. Frederick Douglass, Speech at Massachusetts Anti-Slavery Society Meeting (1865).

2. The term “collateral consequence” refers to an effect of a criminal conviction that is separate and apart from the sentence imposed by a judge. Examples of collateral consequences include losing the right to possess a firearm, losing federal educational financial aid, and as this article addresses, losing the right to vote.

3. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2010), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusDecl1.pdf (Disenfranchisement refers to the ability and process of states to remove the voting rights of individuals convicted of serious criminal offenses).

4. *Id.* (Discussion of policy differences between states as a result of activity at the level of state legislatures).

5. *Id.*

6. THE SENTENCING PROJECT, *supra* note 3.

regulatory rather than punitive.⁷

Policy makers, philosophers, and jurists have voiced various rationales to support and oppose disenfranchisement. A frequently-made argument made against disenfranchisement is that it further isolates and segregates ex-felons re-entering into society by denying them the ability to participate in the political process. This isolation and segregation, in turn, is counterproductive to the rehabilitative ideals of the criminal justice system.⁸ If, *arguendo*, the primary goal of the American criminal justice system is to reduce crime, then policies that result in increased crime rates make little sense.

Although there have been numerous legal challenges to disenfranchisement laws, courts have not found the practice to be unconstitutional as a general matter.⁹ In these legal challenges, however, an argument that has not been meaningfully advanced is that disenfranchisement is intricately tied to recidivism, and that this relationship between disenfranchisement and recidivism poses a novel constitutional problem for disenfranchisement policies. This article argues that disenfranchisement of ex-felons is unconstitutional, that it results in increased crime, and that it should be abandoned as a draconian and costly practice of a pre-democratic era.

Part I of this article discusses the historical origins of disenfranchisement and its evolution to felony disenfranchisement as it exists today. Part II focuses on the philosophical, political and practical justifications that have traditionally been offered in support of disenfranchisement, and also briefly discusses mechanisms by which disenfranchisement can serve to increase criminal activity. Part III contains a discussion of the legal challenges that have been made against the practice of felony disenfranchisement and posits a novel constitutional argument against disenfranchisement. Part IV utilizes data collected by the Department of Justice Bureau of Justice Statistics to demonstrate that state disenfranchisement policies are significantly associated with recidivism. Finally, Part V contains a brief discussion of the implications of these findings.

II. A CIVIL DEATH: HISTORICAL ORIGINS OF DISENFRANCHISEMENT

A. *The Beginnings of Disenfranchisement*

Disenfranchisement is not a novel practice. Its roots are historic, dating to ancient Greece where a similar practice existed: *atimia* ("dishonor").¹⁰ In modern parlance, *atimia* was a form of constructive exile, much more expansive than modern disenfranchisement, wherein those subjected to *atimia* were unable to participate meaningfully in public life. They were prohibited from petitioning their government,

7. See *Trop v. Dulles*, 356 U.S. 86 (1958). Note that the treatment of disenfranchisement provisions as nonpenal in nature has been criticized elsewhere, see Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85 (2005).

8. Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, The Sentencing Project & Human Rights Watch (Oct. 1998), http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.

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

10. KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES* 12 (2005).

voting, holding office, instituting any criminal or civil actions against citizens, fighting in the army, or receiving any sort of welfare-type public assistance.¹¹

Atimia served as the basis for medieval European practices of outlawry and civil death.¹² Civil death was like *atimia* in that the individual affected by it was stripped of his or her civil rights.¹³ Medieval Germany practiced a similar phenomenon, known as outlawry where the offender would either be forced into exile or would be forced to live as an animal in the forests.¹⁴ He or she would lose all the benefits and protections that society could offer.¹⁵ In England, disenfranchisement took the form of attainder, wherein those convicted of certain crimes would have three different penalties imposed on them: forfeiture of property, corruption of the blood (relating to a prohibition on passing property to heirs through inheritance), and a loss of civil rights.¹⁶

As with much of the American legal system, antebellum views on disenfranchisement were borrowed from English common law, including the practice of civil death.¹⁷ Eventually, civil death became much more focused. Following the American Revolution, many states enacted statutes or constitutional provisions that prohibited offenders from voting; however, these provisions were less restrictive than those of a civil death.¹⁸ The duration of disenfranchisement varied, with some localities denying felons the franchise only temporarily whereas others would permanently bar felons from voting, especially if the crime was related to the administration of elections.¹⁹ Disenfranchisement became much more common following the Civil War as a means of keeping African-Americans from voting.²⁰ Since the passage of the Fourteenth and Fifteenth Amendments to the United States Constitution, felony disenfranchisement became one favored method utilized by states in suppressing the African-American vote.²¹ After 1890, many states began enacting disenfranchisement statutes and constitutional provisions that listed crimes for which African-Americans were most often prosecuted—such as burglary, theft, perjury, and arson—as disqualifying offenses.²² Disenfranchisement became an important aspect of the Jim Crow laws used in reconstruction-era America to continue to subjugate the newly-freed slaves.²³

The views that early American colonists brought with them from England concerning disenfranchisement were not necessarily motivated out of concerns about

11. *Id.* at 24.

12. *Id.* at 29-30.

13. *Id.*

14. William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615, 616 (2007).

15. *Id.* at 617.

16. *Id.* at 616-17.

17. *Id.* at 617.

18. *Id.*

19. Susan E. Marquardt, *Deprivation of a Felon's Right to Vote: Constitutional Concerns, Policy Issues and Suggested Reform for Felony Disenfranchisement Law*, 82 U. DET. MERCY L. REV. 279, 280-81 (2005).

20. Alysia Robben, *A Strike at the Heart of Democracy: Why Legal Challenges to Felon Disenfranchisement Laws Should Succeed*, 10 U. D.C. L. REV. 15, 19 (2007).

21. *Id.* at 19.

22. Carl N. Frazier, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 484 (2006).

23. PETTUS, *supra* note 10, at 33.

limiting repeat offenses. Rather, much of the motivation behind the adoption of these laws appeared to be consistent with the concept of a system of status citizenship whereby criminal offenders would lose essential aspects of citizenship by virtue of the crime committed.²⁴ Recidivism was generally treated as a peripheral issue in that it did not appear to be the primary motivating force behind disenfranchisement. That is not to say, however, that it is senseless to view disenfranchisement as relating to recidivism. Given that disenfranchisement's effects were often quite pervasive as applied to criminal offenders, and all societies have an interest in general crime control, it makes sense to view disenfranchisement as a deterrent to criminal activity.

B. *Current Practices in America and Abroad*

Felony disenfranchisement remains an active practice in the United States. Forty-eight states and the District of Columbia practice some form of felony disenfranchisement.²⁵ Current disenfranchisement laws keep approximately 5.3 million Americans who have a prior felony conviction from voting in local and national elections.²⁶

Although states differ in their approaches to disenfranchisement, they generally fall into one of several broad categories.²⁷ At one end of the spectrum are states that do not disenfranchise at all like Maine and Vermont.²⁸ In those states, felons are allowed to vote even while incarcerated using an absentee ballot.²⁹ On the other extreme are states such as Iowa, Kentucky, and Virginia that permanently disenfranchise all ex-felons, even after the expiration of their criminal sentence.³⁰ In those states, the only way for an individual to regain the ability to vote is through executive action, such as a pardon or restoration of civil rights. Most states, however, fall somewhere in between these two extremes and allow for the automatic restoration of voting rights after the completion of incarceration and parole or probation.³¹

Nearly three-fourths of individuals who are disenfranchised are not incarcerated.³² Although every state has procedures for obtaining restoration of voting rights, many of these procedures are so involved and technical that they operate as a *de facto* bar to restoration, especially for those ex-offenders with limited resources and education.^{33,34} This characterization of restoration as a hollow remedy is corroborated by the fact that very few disenfranchised individuals ever successfully get the right to vote back: in eleven different states that practice disenfranchisement, fewer than three percent of disenfranchised ex-felons have

24. *Id.*

25. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011) http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusDec11.pdf.

26. *Id.*

27. *Id.*

28. *Id.*

29. VERMONT DEP'T CORR. DIRECTIVE 324.01, available at <http://www.doc.state.vt.us/about/policies/rpd/324.01%20Voting.pdf/view?searchterm=voting>.

30. THE SENTENCING PROJECT, *supra* note 25.

31. *Id.*

32. Robben, *supra* note 20, at 20.

33. THE SENTENCING PROJECT, *supra* note 25.

34. Marquardt, *supra* note 19, at 295.

gotten their voting rights restored.³⁵

Despite the shared historical roots of *atimia* and civil death with other nations, the United States is an outlier when it comes to disenfranchisement. No other country disenfranchises more of its citizens on a per capita basis than the United States.³⁶ Many other democratic nations have ceased automatic disenfranchisement of criminal offenders.³⁷ Disenfranchisement in other first-world democracies, if employed at all, is limited in period and imposed on individuals who were involved in offenses directly related to elections.³⁸ Disenfranchisement is associated more often with non-democratic regimes that have high incarceration rates and are economically underdeveloped.³⁹ Despite all of this, disenfranchisement retains popularity amongst American politicians and their constituents.⁴⁰ Contemporary examples of this sentiment are not hard to come by. Indeed, as of the writing of this article, state officials in Florida and Iowa have taken steps that would disenfranchise a greater number of ex-felons for longer periods of time.^{41,42}

III. PHILOSOPHICAL, PRACTICAL, AND POLITICAL PERSPECTIVES ON DISENFRANCHISEMENT

A. Philosophical Underpinnings

Given the long tradition of disenfranchisement policies through much of civilized society, it comes as no surprise that the practice has found support amongst classical theorists and philosophers as far back as Aristotle.⁴³ One way that disenfranchisement has traditionally been viewed is the consequence that arises from the breach of a “contract” between society and the individual, defined as an agreed upon set of norms of behavior meant to facilitate the functioning of society.⁴⁴ Thomas Hobbes and John Locke, for example, argued that by transgressing against

35. Marc Mauer & Tushar Kansal, *Barred for Life: Voting Rights Restoration in Permanent Disenfranchisement States*, THE SENTENCING PROJECT (Feb. 2005), http://www.sentencingproject.org/doc/publications/fd_barredforlife.pdf.

36. Robben, *supra* note 20, at 20.

37. Nora V. Demleitner, *U.S. Felon Disenfranchisement: Parting Ways with Western Europe*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 80 (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

38. *Id.*

39. Christopher Uggen, Mischelle Van Brakle & Heather McLaughlin, *Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 59 (Alec C. Ewald & Brandon Rottinghaus eds., 2009).

40. Elizabeth A. Hull, *Our ‘Crooked Timber’: Why is American Punishment So Harsh?*, in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE 136 (Alec C. Ewald & Brandon Rottinghaus, eds. 2009).

41. Peter Wallsten, *Fla. Republicans Make it Harder for Ex-felons to Vote*, THE WASH. POST, Mar. 9, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/08/AR2011030806672.html>.

42. IA EXEC. ORDER NO. 70 (2011), available at http://brennan.3cdn.net/3028848c276fa4ecf6_4fm6bxvvd.pdf. (Governor Branstad issued an Executive Order that terminated the automatic restoration of voting rights for felons).

43. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 25 (Dedi Felman ed., 2006).

44. See Zdravko Planinc, *Should Imprisoned Criminals Have a Constitutional Right to Vote?*, 2 CAN. J.L. & SOC. 153 (1987).

fellow citizens and the state through violation of the law, criminals breach the social contract and become unfit for citizenship.⁴⁵ Support from influential thinkers, such as Hobbes and Locke, provided a theoretical basis for disenfranchisement which helped to perpetuate it. Many of these ideas, however, are representative of systems of thought concerning citizenship that are regarded as *anathema* to the ideal of universal suffrage:

[T]he confident dismissal of political rights for criminal offenders in the writings of early modern theorists had largely disappeared from political philosophy by the second half of the nineteenth century. This shift coincides with the beginnings of the modern democratic polity, and the modern criminal justice system of criminal courts, police forces, and graduated punishments. The problem becomes fundamentally different in a world in which mass participation—and citizenship *rights* defined by birth—emerges alongside notions of the possibility of *rehabilitating* criminal offenders.⁴⁶

In essence, many of the philosophical justifications that helped to perpetuate disenfranchisement throughout history became largely vestigial in an era that began to view concepts like citizenship and civil participation as rights rather than privileges.

B. Practical and Policy Considerations of Disenfranchisement

In addition to the theoretical underpinnings of disenfranchisement, there are several more practical arguments that proponents have made in defense of the practice. One such argument is that, if allowed access to the ballot box, ex-felons would represent a voting bloc that could alter the administration and enforcement of the criminal law.⁴⁷

This argument, however, suffers from two major weaknesses. First, it assumes that ex-felons are a homogeneous group of individuals who would vote and advocate for policies that would weaken the enforcement of the criminal law. Additionally, it assumes that some politicians would run on a “soft on crime” platform in a bid to appeal to the ex-felon voting bloc.

Such concerns, however, are bereft of evidentiary support. There is evidence, on the other hand, of ex-felons would not and have not sought to do away with the criminal justice system or to weaken its enforcement. There are examples of offenders who have lobbied legislators for *tougher* criminal laws.⁴⁸ In addition, there are cases where ex-felons served on juries and, rather than use their opportunity to sabotage the enforcement of the criminal law by forcing a hung jury, returned guilty verdicts after the prosecution had met their burden of proof.⁴⁹

Perhaps the strongest rejoinder to this argument, however, comes from the

45. *Id.* at 155.

46. MANZA & UGGEN, *supra* note 43, at 25. (emphasis in original).

47. Frazier, *supra* note 22, at 484-85.

48. MANZA & UGGEN, *supra* note 43, at 143.

49. James M. Binnall, *Convicts in Court: Felonious Lawyers Make a Case for Including Convicted Felons in the Jury Pool*, 73 ALB. L. REV. 1379, 1403 (2010).

Supreme Court of the United States. In *Carrington v. Rash*, the Court ruled on the constitutionality of a provision of the Constitution of the State of Texas that prohibited members of the military from voting if they were not residents of Texas prior to joining the armed services.⁵⁰ This constitutional provision was enacted in response to a perceived threat from members of the military in local elections. Specifically, the Texas legislature, concerned with the prospect of large groups of military members exerting undue influence over local elections, voted to disenfranchise the entire group.⁵¹ The Supreme Court held, however, that “[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”⁵² Therefore, even if the underlying assumptions of the argument that ex-felons would sabotage the criminal law through the political process were accurate, exclusion from the franchise on the basis of such a justification would not pass constitutional muster.⁵³

Another argument made in support of disenfranchising ex-felons is that doing so prevents voter fraud or other election-related offenses.⁵⁴ The essential premise of this argument is that ex-felons, having demonstrated criminality in the past, are more likely to commit election-related offenses such as voter fraud or vote buying in the future.⁵⁵ There is, however, no empirical evidence that suggests ex-felons, either as a group or as individuals, are at a higher risk of committing election-related offenses.⁵⁶ Furthermore, the efficacy of disenfranchising ex-felons is dubious as a prophylactic measure because one does not need to be eligible to vote in order to commit election-related offenses.

C. *Disenfranchisement as an Obstacle: Towards a Redemptive Theory of Criminal Justice*

It is the ultimate idea of this article that disenfranchisement is a policy that creates harms which far outweigh its benefits, serving only to further alienate and isolate a group of individuals at a time when they are trying to re-integrate into society.⁵⁷ Underlying the many collateral consequences of a conviction, especially that of disenfranchisement, is the implicit assumption communicated to the offender that the collateral consequences are permissible because total rehabilitation is impossible.⁵⁸ It is reasonable to hypothesize that these sanctions result in alienation and isolation, which only serves to *increase* further incidences of criminal activity. If one has no stake in his or her community, then one has little incentive to behave in a pro-social manner other than to avoid punishment. Punishment, in turn, often comes in the form of re-incarceration – a deterrent which, for many individuals, may be a

50. *Carrington v. Rash*, 380 U.S. 89 (1965).

51. *Id.*

52. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (citing *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939)).

53. See Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 283, 344 (2007).

54. Fellner & Mauer, *supra* note 8, at 15.

55. *Id.*

56. MANZA & UGGEN, *supra* note 43.

57. Fellner & Mauer, *supra* note 8, at 16.

58. Demleitner, *supra* note 37, at 82.

threat that is more rote than daunting.

Research strongly supports the notion that ex-felons who are able to re-enter society with stable work and familial relationships are less likely to engage in criminal activity.⁵⁹ Many of the collateral consequences of a felony conviction—including disenfranchisement, becoming ineligible for certain types of public assistance, and stigmatization—function as an obstacle in achieving and maintaining stability.⁶⁰ Research has also supported the idea that active participants in the democratic process are more likely to adopt the shared values of their broader community.⁶¹ Many individuals who are subject to disenfranchisement laws speak of disenfranchisement as a symbol that they do not belong, and that they are outsiders in their own community.⁶² In this sense, disenfranchisement can be fairly characterized as a modern form of outlawry. While not, for example, forced to live in the forests as in medieval Germany, the message is nevertheless the same: ex-felons are not deserving of the benefits and protections of the law. Thus, if ex-felons are not deserving of the protections of the law, then there is even less incentive to abide by it.

The empirical research, although limited, supports the argument that democratic participation is positively associated with a reduction in recidivism. For example, one study found that voting behavior was significantly correlated with subsequent measures of incarceration, re-arrest, and self-reported criminality.⁶³ In other words, “[d]isenfranchisement cannot help to foster the skills and capacities that will rehabilitate offenders and help them become law-abiding citizens. Indeed, on the contrary, it is more likely that ‘invisible punishments’ such as disenfranchisement act as barriers to successful rehabilitation.”⁶⁴ Even if viewed from a retributive standpoint, evidence suggests that disenfranchisement is a policy that metes out punishment at the expense of reinforcing the individual’s perception that they are, and will continue to be, a criminal.

There are several plausible theoretical models that help describe how collateral consequences, such as disenfranchisement, impair the successful reintegration of offenders into society. One such model is reintegrative shaming, developed by Australian criminologist John Braithwaite.⁶⁵ The crux of reintegrative shaming is that the societal disapproval that undergirds punishment for criminal offenses can be thought of as falling into one of two categories: reintegrative or stigmatizing.⁶⁶ Reintegrative shaming is hypothesized to facilitate reintegration by denouncing the offense as opposed to the offender.⁶⁷ This is in contrast to more stigmatizing forms of shaming which function by denouncing the offender, not the

59. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 196 (2004).

60. Jessica A. Focht-Perlberg, *Two Sides of One Coin – Repairing the Harm and Reducing Recidivism: A Case for Restorative Justice Reentry in Minnesota and Beyond*, 31 HAMLINE J. PUB. L. & POL’Y 219, 232 (2009).

61. Uggen & Manza, *supra* note 59, at 198.

62. *Id.* at 212.

63. *Id.* at 213.

64. MANZA & UGGEN, *supra* note 43, at 37. (Internal citations omitted).

65. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (9TH prtg. 1999).

66. Toni Makkai & John Braithwaite, *ng and Compliance with Regulatory Standards*, 32 CRIMINOLOGY 361 (1994).

67. *Id.*

offense, and thereby acting as an obstacle to reintegration.⁶⁸ Disenfranchisement is best thought of as more stigmatizing as opposed to reintegrative in that it serves to further isolate the offender from society, and is tied to the offender as opposed to the offense.

Classical labeling is another theoretical model that helps illuminate the interaction between disenfranchisement and recidivism.⁶⁹ Classic labeling explains deviance through labels or traits ascribed to the individual by society and the interaction of those traits with the mentality of the individual.⁷⁰ While many labels are active only within certain contexts, others – such as the label of a criminal or a deviant—are more salient and have a greater impact on the psychology of the individual.⁷¹ The salient impact of the criminal label trumps all other labels that society ascribes because it brands the ex-felon as “generally rather than specifically deviant produc[ing] a self-fulfilling prophecy.”⁷² Once an individual is labeled as a criminal or deviant and internalizes that label, the label itself serves as the mechanism by which the demonized behavior is elicited.⁷³

There are significant consequences for the individual and society once the deviant or criminal label is applied and internalized:

[d]eviant labeling, official labeling in particular, is seen as a transitional event that can substantially alter the life course by reducing opportunities for a conventional life. Thus, labeling is seen as being indirectly related to subsequent behavior through its negative impact on conventional opportunities. Sampson and Laub (1997) suggest that labeling is one factor that leads to “cumulative disadvantage” in future life chances and, thereby, increases the probability of involvement in delinquency and deviance during adulthood.⁷⁴

Disenfranchisement can, in turn, be seen as an extension of the criminal label. Closely akin to ancient meanings of civil death and *atimia*, what is communicated to the offender is that they are no longer members of society on a basic, fundamental level. Consistent with labeling theory, the outsider or outcast label can become a self-fulfilling prophecy resulting in increased criminal activity by virtue of the psychological effects that the label has on the individual themselves.

It should be noted that, in understanding the effects of disenfranchisement on ex-felons, what is important to focus on is not whether one exercises the right to vote, but whether one possesses the right in the first place. This is a small but critical distinction since many people in the United States do not exercise their right to vote, despite having the ability to do so.⁷⁵ No message, however, is delivered by society

68. *Id.*

69. HOWARD BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963).

70. *Id.* at 25-40.

71. *Id.* at 34.

72. *Id.*

73. FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* (1938).

74. Jön Gunnar Bergnurg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 *CRIMINOLOGY* 1287, 1288 (2003).

75. Michael McDonald, UNITED STATES ELECTIONS PROJECT, (2011) (data listing the average

when non-voters fail to exercise their franchise and no label is thrust upon them. However, there is a clear and resounding message communicated by society to those individuals who are excluded from the franchise: that of being an outcast.

IV. THE LEGAL FRAMEWORK OF DISENFRANCHISEMENT IN THE UNITED STATES

Despite the paucity of policy justifications for disenfranchisement, the judiciary has provided a strong legal foundation for states to deny ex-felons the right to vote. Challenges to disenfranchisement have generally fallen into two categories: those based on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and those based on the Voting Rights Act of 1965.

A. *Equal Protection Challenges to Felony Disenfranchisement*

Richardson v. Ramirez is the most widely-recognized case establishing the constitutionality of felony disenfranchisement.⁷⁶ In *Ramirez*, the Supreme Court reviewed a petition for a writ of mandamus by three ex-felons, all of whom had “served their time” and were disenfranchised by a provision of the California Constitution that excluded any person convicted of a felony from voting.⁷⁷ The respondents contended that their disenfranchisement was a violation of the Equal Protection Clause of the Fourteenth Amendment, an argument that the California Supreme Court found convincing.⁷⁸ Writing for the majority, Chief Justice Rehnquist disagreed and held that rather than indicating the unconstitutionality of disenfranchisement, the Fourteenth Amendment actually allowed states to disenfranchise felons as they pleased.⁷⁹ The Fourteenth Amendment provides, in relevant part, that:

[W]hen the right to vote at any election for the choice of electors . . . 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 . . .⁸⁰

The Court focused on the phrase “or other crime” in holding that disenfranchisement was constitutional.⁸¹ Based on the floor debates in the House and Senate, the Court concluded that the Amendment’s principal architects intended disenfranchisement to be a constitutional exercise of Congressional power under Section Two.⁸² The Court also addressed the relationship between disenfranchisement and rehabilitation. While the Court recognized that disenfranchisement may impede the rehabilitation and

voter turnout in the 2010 General Election to be 41%) available at http://elections.gmu.edu/Turnout_2010G.html.

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

77. *Id.* at 26-27.

78. *Id.* at 33-34.

79. *Id.* at 56.

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

81. *Richardson v. Ramirez*, 418 U.S. at 56.

82. *Id.* at 45.

return of ex-felons to society, it reasoned that that was an issue that fell outside the Court's duties and obligations:

Pressed upon us by the respondents, and by amici curia, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California's present constitutional provisions. But it is not for us to choose one set of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view.⁸³

The Court's holding in *Ramirez*, however, did not completely insulate state disenfranchisement laws from legal challenges under the Equal Protection Clause. Commentators have suggested, and other courts have noted, that disenfranchisement provisions will still be subject to Fourteenth Amendment challenges under *Ramirez* if one of two conditions exists: if disenfranchisement is unequally enforced amongst felons, or if the primary motivating factor in the enactment of a particular state's disenfranchisement provisions is racial discrimination.⁸⁴

Hunter v. Underwood provides an example of the Court's narrow view of viable Fourteenth Amendment challenges.⁸⁵ *Underwood* is a Supreme Court case that concerned a provision of Alabama's State Constitution that disenfranchised individuals who were convicted of "any. . . crime involving moral turpitude."⁸⁶ In addition to the moral turpitude provision, Alabama's Constitution specifically set forth several crimes for which disenfranchisement would result that would lead to disenfranchisement.⁸⁷ In *Underwood*, the Court dealt with the plight of Carmen Edwards and Victor Underwood, two Alabama citizens who were disenfranchised after being jailed for writing bad checks.⁸⁸ Even though these offenses were misdemeanors, state authorities nevertheless deemed that they were crimes involving moral turpitude, which made Edwards and Victor eligible for disenfranchisement under Alabama's Constitution.⁸⁹ In turn, Edwards and Victor argued that Alabama's disenfranchisement provision was enacted to intentionally exclude African-Americans from the franchise, that it actually disenfranchised large sections of the black electorate, and, as a result, it violated the Fourteenth Amendment's Equal

83. *Id.* at 55.

84. Liles, *supra* note 14.

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

86. *Id.* at 226 (citing ALA. CONST. § 182 (1901)).

87. *Id.* ("treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, [and] crime [sic] against nature").

88. *Id.*

89. *Id.* at 223-24.

Protection Clause.⁹⁰ The Supreme Court agreed, holding that “its original enactment [of § 182 of the Alabama Constitution] was motivated by a desire to discriminate against blacks on the account of race and that the section continues to this day to have that effect.”⁹¹ The Court further explained that its earlier holding in *Ramirez* was not inconsistent with finding Alabama’s constitutional provisions at odds with the Fourteenth Amendment: “we are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in *Richardson v. Ramirez* . . . suggests the contrary.”⁹²

Collectively, *Ramirez* and *Underwood* indicate that state disenfranchisement laws or constitutional provisions are vulnerable to Equal Protection challenges only where a racial animus motivated their enactment and where state authorities continued to operate in a way that was discriminatory in nature.⁹³ Otherwise, Section 2 of the Fourteenth Amendment would permit states to disenfranchise ex-felons in line with the Court’s reasoning in *Ramirez*.

B. Challenges to Felony Disenfranchisement based on the Voting Rights Act

The Voting Rights Act of 1965⁹⁴ (“VRA”) was enacted for the purpose of helping to ensure racial equality at the ballot box in response “to the increasing sophistication with which the states were denying racial minorities the right to vote.”⁹⁵ The VRA was amended in 1983 to prohibit racially discriminatory voting practices.⁹⁶ Section 2 of the Act states that:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .⁹⁷

Numerous federal plaintiffs have challenged disenfranchisement provisions under the VRA, and several of these cases have reached U.S. Circuit Courts of Appeals. Thus far, the Supreme Court has not granted certiorari in any of these cases, but collectively they establish a new source for challenging disenfranchisement provisions outside of the Equal Protection Clause.⁹⁸

Generally, plaintiffs challenging state disenfranchisement regimes under the VRA have asserted that state criminal justice systems discriminate by saddling a

90. *Id.* at 230.

91. *Id.* at 233.

92. *Id.* (internal citations omitted).

93. See Liles, *supra* note 14, at 620.

94. 42 U.S.C. § 1973(a) (2000).

95. *Farrakhan v. Washington*, 338 F.3d 1009, 1014 (9th Cir. 2003) (citing *Farrakhan v. Locke*, 987 F. Supp. 1304, 1308 (E.D. Wash. 1997)).

96. *Frazier*, *supra* note 22, at 494.

97. 42 U.S.C. § 1973(a) (2000).

98. See Liles, *supra* note 14.

disproportionate number of minorities who are arrested with felony convictions when compared with whites in the same position. The result is the disproportionate disenfranchisement of minority voters, which the plaintiffs in these cases allege violates Section 2 of the VRA.⁹⁹ Along these lines, in *Farrakhan v. Washington*, the Ninth Circuit Court of Appeals found that Section 2 of the VRA was, in fact, means by which an ex-felon could possibly challenge felony disenfranchisement.¹⁰⁰ According to the Court, in order to make a claim under Section 2 of the VRA, a plaintiff would have to demonstrate that a discriminatory bias based on race existed within the criminal justice system that had a positive discriminatory effect on the disenfranchisement of minorities.¹⁰¹ On remand, the district court found evidence of racial discrimination within the Washington state criminal justice system, but found that it was insufficient under the test mandated by the Voting Rights Act to constitute a redressable injury.¹⁰² The plaintiffs appealed to the Ninth Circuit Court of Appeals.¹⁰³

In the time it took for *Farrakhan* to reach the Ninth Circuit a second time, several other circuits issued opinions utilizing alternative reasoning that ultimately caused a split with the Ninth Circuit. For example, in *Johnson v. Governor of the State of Florida*, the Court of Appeals for the Eleventh Circuit precluded challenges to state disenfranchisement laws under the VRA by employing the doctrine of constitutional avoidance.¹⁰⁴ The Court essentially found that interpreting the VRA to allow state level challenges to disenfranchisement under the Fourteenth Amendment would needlessly raise constitutional issues under the Fourteenth and Fifteenth Amendments, which would be inappropriate for review.¹⁰⁵

In *Hayden v. Pataki*, the Second Circuit Court of Appeals dealt with a class of plaintiffs who were challenging the constitutionality of the disenfranchisement regime in New York State¹⁰⁶ on the basis that it violated Section Two of the VRA.¹⁰⁷ The Second Circuit, in addressing the matter *en banc*, held that Section Two of the VRA was not a viable means by which state inmates could challenge disenfranchisement.¹⁰⁸ In doing so, the *Hayden* court actually went a step further than the Eleventh Circuit in *Johnson* with respect to its interpretation of the VRA. The Court applied the “clear statement” doctrine, which is similar to but broader than the constitutional avoidance doctrine relied upon in *Johnson*.¹⁰⁹ In applying the clear statement doctrine to the VRA within the context of disenfranchisement, the Court found that the plaintiffs had no grounds under the VRA on which to challenge felony disenfranchisement:

99. *Farrakhan v. Washington*, 338 F.3d 1009, 1013 (9th Cir. 2003).

100. 338 F.3d at 1017.

101. *Id.* at 1021.

102. *Farrakhan v. Gregoire*, 623 F.3d 990, 992-93 (9th Cir. 2010).

103. *Id.*

104. *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11th Cir. 2005).

105. *Id.* at 1229-1230.

106. The New York approach, at the time of *Hayden*, was that only those felons who were serving a sentence were disenfranchised from the polls.

107. *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2005).

108. *Id.* at 326.

109. *Id.* at 323 (The clear statement rule is “a canon of interpretation which requires Congress to make its intent ‘unmistakably clear’ when enacting statutes that would alter the usual constitutional balance between the Federal Government and the States.”).

[T]he Voting Rights Act must be construed to not encompass prisoner disenfranchisement provisions like that of New York because (a) Congress did not intend the Voting Rights Act to cover such provisions; and (b) Congress made no clear statement of an intent to modify the federal balance [of power] by applying the Voting Rights Act to these provisions.¹¹⁰

In essence, neither the Second Circuit in *Hayden* nor the Eleventh Circuit in *Johnson* ever reached a substantive analysis of felony disenfranchisement provisions within the context of the VRA, instead relying on more general principles of constitutional law.

In light of the opinions subsequent to *Farrakhan v. Washington*, the Ninth Circuit Court of Appeals has retreated significantly from its earlier holding. More recently, the Court has stated that “plaintiffs bringing a section Two VRA challenge to a felon[y] disenfranchisement law based on the [sic] operation of a state’s criminal justice system must at least show that the criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent.”¹¹¹

Until the Supreme Court grants certiorari in a VRA case, doubt will remain about whether ex-felons can use it as an effective means to challenge felony disenfranchisement. Given the recent decisions that appear to entirely foreclose or significantly limit the possibility of a plaintiff’s victory under the VRA, however, any doubt that the Supreme Court could resolve by taking up a VRA case may be minimal at best.

C. Disenfranchisement as Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution provides that, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹¹² A law must constitute a form of punishment to violate the Eighth Amendment. The judiciary has traditionally found that disenfranchisement laws are not punishments, and therefore are not subject to Eighth Amendment challenges.¹¹³

Perhaps the most commonly cited authority for this proposition comes from the Supreme Court in *Trop v. Dulles*.¹¹⁴ *Trop* was not actually a voting-rights case, but instead concerned the Nationality Act of 1940 and whether its provision for the expatriation of members of the military who were court-martialed for desertion during wartime was constitutional.¹¹⁵ In discussing the nature of statutes and punishment, the Court wrote specifically about disenfranchisement when discussing whether a statute should rightly be considered punitive in nature or as something other than punishment:

110. *Id.* at 328.

111. *Farrakhan v. Gregoire*, 623 F.3d at 993 (9th Cir. 2010) (emphasis in original).

112. U.S. CONST. amend. XIII.

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

114. *Trop v. Dulles*, 356 U.S. 86 (1958).

115. *Id.*

If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, the law is sustained as a nonpenal exercise of the power to regulate the franchise.¹¹⁶

However, the Supreme Court's view that disenfranchisement is not a punishment has been roundly criticized. For instance, in *Trop*, the Supreme Court rested its analysis on two cases that now represent antiquated views of what the right to vote represents as well as what power should states have in restricting the franchise.¹¹⁷ Furthermore, the Thirty-ninth Congress—the same Congress that passed the Fourteenth Amendment on which the analysis in *Ramirez* so heavily relies—would, in laws readmitting the southern states to the union, typically “include[] the ‘fundamental condition’ that the state constitution ‘shall never be so amended or changed as to deprive any citizen or class of citizens of the United States who are entitled to vote by the constitution herein recognized, *except as a punishment for such crimes as are now felonies at common law*”¹¹⁸ In other words, the 39th Congress believed that disenfranchisement was a politically acceptable practice *only* when it was viewed as a punishment, and not as a regulatory measure.¹¹⁹

Nevertheless, when confronted with an Eighth Amendment challenge, courts have continued to invoke the Supreme Court's holding in *Trop* that disenfranchisement is not a punishment in any sense of the word, much less a cruel and unusual one.

D. Recidivism, Proportionality, and Policy – A Novel Approach

While some briefs and arguments dealing with disenfranchisement have addressed rehabilitation as a general concern, none have squarely argued that

116. *Id.* at 96-97.

117. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1150-51 (2004) (stating the two cases relied on were *Davis v. Beason*, 133 U.S. 333 (1890), and *Murphy v. Ramsey*, 114 U.S. 15 (1885), wherein the Supreme Court affirmed the ability of states to exclude polygamists from the franchise on the proposition that the state's ability to restrict the franchise was virtually unlimited. That reasoning, however, has since been rejected in subsequent decisions).

118. *Id.* at 1154 (emphasis added).

119. *Id.*

disenfranchisement hinders rehabilitation in such a way as to *increase* recidivism.¹²⁰ Research in this area, has been limited because it was performed using community samples and criminal behavior was measured against voting *behavior* of ex-felons as opposed to *eligibility*.¹²¹

The argument concerning recidivism is important both within a legal and legislative context. Within a legal context, if it is persuasively shown that disenfranchisement is related to an increase in crime, then the legality of disenfranchisement, using the constitutional analysis in *City of Boerne v. Flores*, is subject to a novel argument.¹²²

At first glance, *Flores* doesn't appear to be related much, if at all, to disenfranchisement and recidivism. In *Flores*, the Catholic Archbishop of San Antonio, Texas, brought suit against the City of Boerne for refusing to give a building permit to St. Peter's Catholic Church to enlarge their building.¹²³ The suit alleged that the refusal of the city to grant the building permit was done in violation of the Religious Freedom Restoration Act of 1993.¹²⁴ The Supreme Court's opinion, however, had occasion to discuss the Fourteenth Amendment. The Court stated that "[w]hile preventative rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."¹²⁵

This holding potentially opens a new line of attack against disenfranchisement that is distinct from the prior challenges based on Equal Protection of the Voting Rights Act. One of the stated rationales of many disenfranchisement provisions is the prevention of recidivism.¹²⁶ Thus, if it can be shown that there is a significant relationship between disenfranchisement and recidivism, it could be argued that an across-the-board, one-size-fits-all approach to disenfranchisement is neither congruent nor proportional to the intended goal of preventing future offenses, whether those offenses are election-related or not. Moreover, state-law provisions—motivated either in whole or in-part by the prevention of crime—those preventative measures would not be proportional nor congruent under *Boerne* if they actually serve to *increase* the very evil they seek to ameliorate.

In addition to the constitutional argument, an argument linking recidivism and disenfranchisement is also important within a legislative and rhetorical context. Arguing that the disenfranchisement of those who have "served their time" actually creates more crime could resonate powerfully with state legislatures. If it can be demonstrated that disenfranchisement increases crime, then elected officials would be placed in the position of either defending a policy with dubious criminal justice utility, or scrapping it altogether.

The following section examines the link between recidivism and

120. See Brief for American Civil Liberties Union of Southern California as Amicus Curiae Supporting Respondents, *Richardson v. Ramirez*, 418 U.S. 24 (1974) (No. 72-1589), 1973 WL 172332.

121. See MANZA & UGGEN, *supra* note 43.

122. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

123. *Id.* at 512.

124. *Id.*, 42 U.S.C.A. § 2000bb *et seq.*

125. 521 U.S. at 530.

126. E.g., the concern over ex-felons being more likely to engage in election-related offenses.

disenfranchisement using a different methodology than prior research. The analysis uses data on recidivism as well as state policies on disenfranchisement to examine whether states that take a more draconian approach to disenfranchisement (e.g. permanent disenfranchisement) actually see an increase in recidivism.

V. IMPACT OF DISENFRANCHISEMENT ON RECIDIVISM: AN EMPIRICAL ANALYSIS

A. Data

Data for this analysis is drawn from the Department of Justice's study *Recidivism of Prisoners released in 1994*.¹²⁷ This data pool represents a nationally representative sample of individuals released from prison in fifteen states in 1994.¹²⁸ States chosen for the sample provided basic information on all prisoners released that year, amounting to data on 302,309 prisoners.¹²⁹ The Department of Justice then drew a clustered sample of 38,624 releasees based on offense type and state of release.¹³⁰ This final sample is representative of 272,111 releasees, or roughly two-thirds of all prisoners released in 1994.¹³¹

State and federal RAP¹³² sheets were the primary source of demographic and criminal history information.¹³³ The RAP sheet data include prisoners' date of birth, race, sex, and detailed information on past arrests, including type of offense, date, and arrest outcome.¹³⁴ The RAP sheets were reported to the Department of Justice spanning a minimum of three years following the 1994 release.¹³⁵ These data account for almost the entire criminal histories of 38,624 individuals released from prison in 1994, from the date of their first arrest through at least 1997.¹³⁶

Although these data were collected almost fifteen years ago in the later part of the 1990s, it is the most comprehensive national study of recidivism in existence. Since the publication of these data, several states have conducted their own recidivism studies; however, the utilization of different measures, time points, and samples of offenders make it incredibly difficult to reliably conduct interstate comparisons. The only other national data on recidivism was published recently by the PEW Center on the States,¹³⁷ however, this report contained only aggregated state trends and focused exclusively on subsequent incarcerations. While this was an impressive enterprise, the lack of individual-level data makes it difficult to take into

127. Hereinafter, RPR94.

128. Patrick A. Langan, David J. Levin, *Recidivism of Prisoners Released in 1994*, U.S. Dep't of Justice (2002) <http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf>.

129. *Id.* at 12.

130. *Id.*

131. *Id.* at 1.

132. Record of Arrest and Prosecution.

133. Langan & Levin, *supra* note 128, at 12.

134. *Id.*

135. *Id.*

136. Report says that only ninety-seven percent of the data were obtained.

137. PEW CENTER ON THE STATES, *STATE OF RECIDIVISM THE REVOLVING DOOR OF AMERICA'S Prisons* (2011) http://www.pewcenteronthestates.org/uploadedFiles/Pew_State_of_Recidivism.pdf.

account factors that are likely driving observed differences across states. Moreover, not all fifty states complied with the data collection procedures, and the PEW report contains no information on half of the states that permanently disenfranchise or those states that have no disenfranchisement policy.¹³⁸ While the Department of Justice recidivism data is now somewhat dated, it is still the most comprehensive study of recidivism in the United States and the most appropriate data to examine the effect of state disenfranchisement policies on individual recidivism.

B. Measures

1. Recidivism

For the purposes of this analysis, recidivism is defined as an individual being re-arrested within three years following his or her release from prison. Approximately sixty-six percent of individuals in the sample experienced at least one post-release arrest.¹³⁹ Although the RPR94 also contains detailed information on the number of re-arrests, re-convictions, and returns to prison, the dichotomous re-arrest measure is preferred as a measure of recidivism for several reasons. First, a single post-release arrest could have led to a conviction and ultimately a subsequent prison sentence, thus removing an individual from the sample and biasing the interpretation of a large number of subsequent arrests (as these are likely to be relatively minor offenses). Second, given the relatively short observation period, the measures of conviction and incarceration are likely to vary as a function of a state's criminal justice processing time. Lastly, the process leading from arrest to eventual incarceration is lengthy, and many of those arrested towards the end of the observation period are unlikely to have been arraigned or sentenced, and therefore may be excluded from the analysis if a conviction or incarceration measure is utilized.

2. Individual Controls

The statistical models used in this analysis incorporate several individual-level controls that are traditionally associated with criminal behavior and consistently implicated as static predictors of recidivism.¹⁴⁰ Additionally, the statistical models also take into account the effects of sex, age, and race. Table 1 presents the descriptive statistics of the variables included in the models.

Two criminal history factors are also controlled: most recent offense, and number of prior offenses. Most recent offense captures the specific offense for which the individual was incarcerated prior to their 1994 release. This variable is collapsed into seven categories: murder, sexual offenses, assault, robbery, property offenses, drug offenses, and other.¹⁴¹ In instances where individuals were serving time for multiple offenses, the value of the most severe offense is utilized. The number of prior offenses is measured as the number of arrests on an individual's record,

138. *Id.*

139. *Id.* at 8, Table 9.

140. Paul Gendreau, Tracy Little & Claire Goggin, *A Meta-analysis of the Predictors of Adult Offender Recidivism: What Works?*, 34 CRIMINOLOGY 575 (1996).

141. The other category contains various public order, weapons, and DWI offenses.

excluding the arrest leading to the 1994 release. A score of zero signifies that the released prisoner was a first time offender when released. The average number of priors in this sample is 7.09.

3. State Level Predictors

State disenfranchisement is measured as a dichotomous variable that distinguishes states that permanently restricted the right to vote and states that returned the right to vote post-release in 1994. Roughly twenty-five percent of prisoners in the sample ($N = 9,854$) were released in five states that permanently disenfranchised felons in 1994.¹⁴² State-level unemployment (measured as the average unemployment rate over the three year period) is also controlled to account for variation in state-level factors that may contribute to differences in recidivism. Criminological research indicates that the crime rate varies with the unemployment rate, and so recidivism can be expected to be higher in states with higher unemployment.¹⁴³

Table 1: Descriptive Statistics ($N=33,790$)¹⁴⁴

State Covariates

	Mean/Proportion	SD
Disenfranchisement	0.33	—
Unemployment Rate	5.25	1.03

Individual Covariates

	Mean/Proportion	SD
Subsequent Arrest	0.59	—
Age	33.86	9.53
Female	0.06	—
Black	0.44	—
Other Race	0.01	—
Number of Prior Convictions	7.09	7.81
Homicide Conviction	0.03	—
Sex Offense	0.29	—
Robbery Conviction	0.08	—
Assault Conviction	0.07	—
Property Crime Conviction	0.17	—

* Statistics in this table were computed after removing missing data.

**Statistics presented here are not weighted.

142. Note that the Arizona and Maryland laws only apply to repeat offenders. We also computed the reported models excluding first time offenders in these states and noted no differences from the full models reported here. The five states that permanently disenfranchised in 1994 were Arizona, Delaware, Florida, Maryland, and Virginia.

143. Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & ECON. 259 (2001).

144. The difference between this number and the number of prisoners in the RPR94 has to do with our removal of missing data—see Appendix.

C. *Analytic Strategy*

The following analyses utilize multi-level logistic regression models to estimate the effect of disenfranchisement laws on recidivism while simultaneously accounting for unobserved differences across states and adjusting for the characteristics of releasees within those states.¹⁴⁵ The approach estimates whether an individual was rearrested post-release as a function of his or her background characteristics (race, gender, age, criminal history) and the characteristics of the state where he or she was released. The general method is popular in social-science research to estimate differences in individual outcomes across aggregate units (states, counties, schools) while also accounting for the possibility that individuals within each unit systematically differ from those in other units.¹⁴⁶ All data management was conducted in Stata/SE version 10 and the analyses were performed using HLM version 7.

The study demonstrates the robustness of the effect of disenfranchisement laws on subsequent arrest by first estimating the bivariate association in Model 1 and then re-estimating the association once controlling for individual characteristics and state unemployment in Model 2. The results indicate that net of the effects of demographic background characteristics, criminal history, and state unemployment rates, disenfranchisement laws have a robust effect on the likelihood of experiencing a subsequent arrest.

The models are estimated using a two-step approach. The first step, presented in Table 2, estimates the difference in the likelihood of being rearrested across states. This model indicates that there are statistically meaningful differences in the probability of being rearrested depending on the state in which an individual is released. Approximately seven percent of the variation is due to state-level differences. This means that it is appropriate to model individual variation in subsequent arrests as a function of state-level factors.

Next, the study considered whether variation in state disenfranchisement policies accounted for the observed variation in recidivism across states. A transformation of the coefficient for a state's disenfranchisement law reveals that individuals who are released in states that permanently disenfranchise are roughly nineteen percent more likely to be rearrested than those released in states that restore the franchise post-release.¹⁴⁷ This finding provides initial evidence consistent with the thesis that disenfranchisement is directly related to recidivism.

A potential issue with this conclusion is that unobserved differences in releases may be driving the observed variation in recidivism across states. For instance, some states may incarcerate only the most serious offenders, while other states may be more likely to incarcerate relatively minor offenders. Given the time-frame in which these data were collected, it is reasonable to expect some variation in drug statutes and mandatory minimums across the fifteen states. Therefore, variations in recidivism may simply reflect differences in the types of offenders being released.

145. See RAUDENBUSH, S.W. & BRYK A.S., *HIERARCHICAL LINEAR MODELS: APPLICATIONS AND DATA ANALYSIS METHODS* (2d ed. 2002).

146. For a more technical discussion of the statistical models, refer to the Appendix.

147. $p < 0.001$, See Appendix.

In order to account for this possibility, the models are adjusted for each individual's demographic characteristics and criminal history. As evidenced in Model 2, being black, younger and having prior felony convictions are all positively associated with an individual's likelihood of experiencing a subsequent arrest. Conversely, being female, white, and older are negatively associated with the likelihood of arrest. Of particular interest here is that although the positive effect of permanent disenfranchisement policy on recidivism was slightly diminished once controlling for these individual factors, it remained a significant predictor nonetheless. The results of this model indicate the net of the effect of race, gender, criminal history, and the state unemployment rate on recidivism. Individuals released in states that permanently disenfranchise are roughly ten percent more likely to reoffend than those released in states that restore the franchise post-release.¹⁴⁸ This association is displayed graphically in Figure 1.

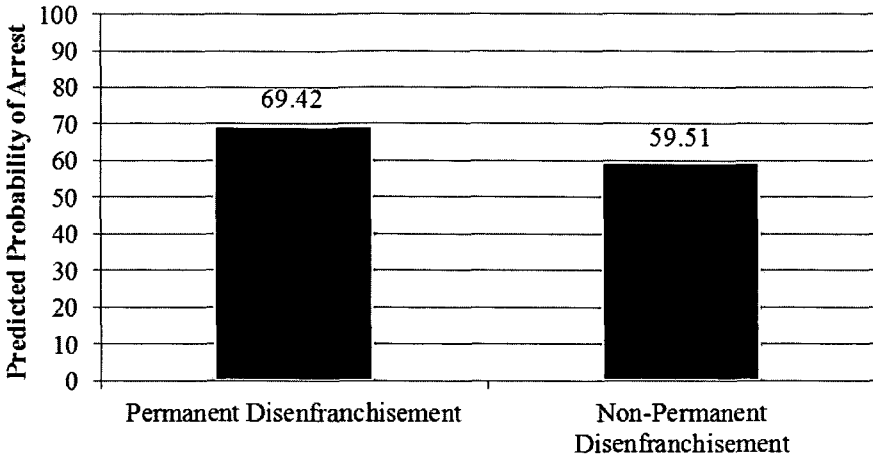
Table 2: Restricted Maximum Maximum Likelihood Logistic Regression of Re-Arrest (N= 33,790)

	Model 1: Baseline			Model 2: Within States		
Fixed Effects	LO	se		LO	se	
<i>Between States</i>						
Intercept	.283	.126	***	.434	.066	***
Permanent Disenfranchisement	.604	.220	***	.385	.117	**
Unemployment Rate	—	—		.083	.035	*
<i>Within States</i>						
Age at Release	—	—		-.059	.004	***
Sex	—	—		-.479	.009	***
Black	—	—		.491	.061	***
Other Race	—	—		-.392	.303	
Number of Prior Convictions	—	—		.077	.009	***
Homicide Conviction	—	—		-.651	.054	***
Sex Offense	—	—		-.504	.123	***
Robbery Conviction	—	—		-.058	.050	
Assault Conviction	—	—		-.051	.049	
Property Crime Conviction	—	—		.284	.056	***
Random Effects						
	VC ^b	χ^2 (df)		VC ^b	χ^2 (df)	
Between States	0.0723	415.48 (1)	***	0.066	259.61 (12)	***
Statistics						
Likelihood	-54864.62			-54650.59		
(Estimated Parameters)						
χ^2 (df) ^d	—			426.82(11)		***

***p < 0.001; **p < 0.01, * p < 0.05

148. p<0.01.

Figure 1: Predicted Probability of Rearrest for Offenders Released from Prison in 1994.



*** Adjusted for age, race, sex, criminal history and state-level unemployment and weighted at the individual level**

VI. CONCLUSION

Disenfranchisement excludes large numbers of American citizens from the franchise, thereby prohibiting their participation in the political process. The philosophical views that underlie disenfranchisement are reflective of a pre-modern era, one not characterized by the ideals of democracy and universal suffrage.¹⁴⁹ Disenfranchisement is a stark example of American exceptionalism as no other first-world democracies disenfranchise their citizens to the extent seen in the United States.

Disenfranchisement is a practice that has thus far been resistant to legal challenges. Plaintiffs have primarily challenged disenfranchisement under the Equal Protection provision of the Fourteenth Amendment or under the Voting Rights Act—challenges, which have largely been ineffective. Courts have also been reluctant to view disenfranchisement as punishment at all, thereby insulating it from attack under the Eighth Amendment.

One argument, which courts have never fully examined, however, is that disenfranchisement is linked to recidivism. Consistent with theories of labeling and shaming, one potential consequence of disenfranchisement is to create a permanent criminal underclass of outcasts, which is unable to fully rejoin society after their sentence is served. The outcome of this effect could, in turn, lead to an increase in criminal activity.

149. MANZA & UGGEN, *supra* note 43.

Not only is disenfranchisement a poor social policy, it is arguably unconstitutional under the Supreme Court's *Boerne* test. Disenfranchisement schemes also do not fulfill any crime prevention purpose, either as deterrence to criminal offenses or prevention of election-related offenses. Disenfranchisement may actually increase criminal activity across-the-board for all criminal offenders, regardless of class or type of offense.

Taken as a whole, these findings indicate that states which permanently disenfranchise ex-felons experience significantly higher repeat offense rates than states that do not. If it is the case that disenfranchisement policy has a causal relationship with recidivism, then states that disenfranchise permanently can expect to see a significant reduction in the re-arrest rates of ex-felons should they restore the franchise post-release. A reduction of this sort would be a potential boon for states, not only in terms of the general principles of crime control, but economically as well.¹⁵⁰

The analysis, however, is not without several important caveats and limitations. Foremost, what is borne out by the data is simply an association between disenfranchisement and recidivism, but the nature of that relationship—whether it is simply correlational or causal—remains unclear. In addition, the criminal justice systems across states differ in many respects, and many of those variables can be difficult to both detect and control through statistical analysis. If nothing else, the data suggests there is a relationship between disenfranchisement and recidivism, which should create significant implications for policy-makers, the judiciary, and the criminal justice system. However, the relationship deserves further investigation in subsequent work.

In conclusion, while disenfranchisement has been a part of many political and social traditions, it is a vestige of a pre-democratic era and makes little sense in modern times. Its justifications are illusory, its history is dubious, and as this article has shown, its effects on those trying to make amends for their crimes and rejoin the ranks of society may well outweigh any supposed benefit that disenfranchisement provides.

VII. APPENDIX

The following provides a more technical discussion of the hierarchical logistic regression models presented in Table 2. As reflected in Eq. 1, the outcome variable in each model is the natural logarithmic transformation of the odds of being re-arrested in the three-year observation period, denoted here as p .

$$\text{Eq. 1 } \eta_{ij} = \log(p / 1 - p)$$

This outcome variable is interpreted as the log odds of individual i in state j experiencing a subsequent arrest. An exponential transformation of $e^{\eta_{ij}}$ yields the expected odds which can be transformed again ($e^{\eta_{ij}} / 1 + e^{\eta_{ij}}$) to determine the predicted probability of re-arrest. The models present the coefficients as log odds, but for ease of interpretation the findings are discussed in terms of predicted probabilities.

150. See PEW CENTER ON THE STATES, *supra* note 137.

The logistic regression models can be best conceptualized as a two-level process. The level-one models refer to the effect of individual characteristics (demographic and criminal history) and level-two models refer to the effect of state factors on recidivism. To gauge the magnitude of variation in recidivism across states, an unconditional model was specified with no covariates at either level. Given the Bernoulli sampling distribution, the level one model is expressed as:

$$\eta_{ij} = \beta_{0j}$$

and the level two model as:

$$\beta_{0j} = \gamma_{00} + U_{0j}$$

In this unconditional model, γ_{00} is the average log-odds of recidivism across states and U_{0j} is a random effect accounting for variation in the average log-odds of recidivism across states. The level-one model incorporates respondent-level covariates allowing for an estimation of the log-odds of recidivism controlling for characteristics of releasees in each of the states:

$$\begin{aligned} \eta_{ij} = & \beta_{0j} + \beta_{1j}(\text{black}) + \beta_{2j}(\text{other race}) + \beta_{3j}(\text{Age}) + \beta_{4j}(\text{Gender}) \\ & + \beta_{5j}(\text{Priors}) + \beta_{6j}(\text{Homicide Conviction}) + \beta_{7j}(\text{Sex Offense Conviction}) \\ & + \beta_{8j}(\text{Robbery Conviction}) + \beta_{9j}(\text{Assault Conviction}) + \beta_{10j}(\text{Property Crime Conviction}) \end{aligned}$$

Each of the level-one covariates was grand mean centered allowing the intercept, β_{0j} , to be interpreted as the expected odds of an average prisoner experiencing a subsequent arrest across states. The equation incorporates a random intercept (β_{0j}) at level-one, which allows one to assess the variation in recidivism due to state-level characteristics (as reflected in the variance component). For the sake of model parsimony the effects of the level-one covariates in each of the models are fixed. These results, then, rest on the assumption that the associations between race, gender, age, criminal history, and recidivism are constant across states. It is important to note that there may be reason to believe that these relationships vary across states, but the limited number of level-two units necessitates that degrees of freedom are preserved where possible. Thus this restriction is based on empirical, rather than theoretical grounds.

The level-two model incorporates the intercept from the level-one model as a dependent variable such that:

$$\begin{aligned} B_{0j} = & \gamma_{00} + \gamma_{01}(\text{Disenfranchisement Law}) + \\ & \gamma_{02}(\text{State Unemployment Rate}) + U_{0j} \end{aligned}$$

In this equation, γ_{00} is the mean log odds of recidivism across states, γ_{01} is the effect of the state's disenfranchisement law, γ_{02} is the effect unemployment rate and U_{0j} is the error term for the effect of the j th state on the mean log-odds of recidivism. The final models were weighted for survey design. The application of these probability weights adjusts the results to be representative of over 300,000

prisoners released in 1994, which accounts for over two-thirds of all prisoners released in the United States that year. The missing variables list-wise are excluded, which reduced the final sample to roughly ninety-two percent of all available cases.

The random effects portion of the models represents the variation in subsequent arrests due to state-level characteristics. In the first model, the variance component indicates that roughly seven percent¹⁵¹ of the variation in arrests is due to differences across states. Although most of the observed variation in arrests is due to individual characteristics, an appreciable portion can be attributed to state-level differences. In the second model, this figure drops slightly once controlling for individual-factors and unemployment, suggesting we have explained part of the state differences in subsequent arrest by controlling for unemployment rates.

Model fits were estimated by multiplying the difference between the likelihood functions of the full and restricted models by -2. This quotient approximates a chi-square distribution with degrees of freedom equal to the difference in parameters between the two models. A significant chi-square value indicates the full model is preferred over the restricted model. The χ^2 reported here indicates that the model including the individual characteristics and state unemployment rate provides a more comprehensive explanation of recidivism than the model with disenfranchisement law only.

In order to gauge the effect of dataset outliers and points of leverage on these results, the standardized Pearson residual, the deviance residual, and the Pregibon leverage statistic were computed. Individual data points with leverage greater than 3 times the average leverage, and data points with residuals that were greater than the absolute value of 2.0 were then removed. This amounted to removing roughly 4.5 percent of the data points. The statistical models were then re-fit. The general findings reported here remained significant in these updated models, suggesting that outliers and points of leverage do not undermine the strong association between disenfranchisement and recidivism.

151. 0.0723, $p < 0.001$.

