

---

---

CIVIL REBIRTH:  
MAKING THE CASE FOR AUTOMATIC EX-FELON  
VOTER RESTORATION\*

*I dropped out of school, joined the army and went to war. I went back to school when I left the army but got into a lot of messes. I got caught up in drugs, dropped out and became a street person. It all caught up with me and I ended up in prison. I was angry at the world. I had no desire to vote. I felt like if no one was going to help me, why should I do anything for them? As I got older, I realized I needed to be a part of the solution, not the problem. I saw a flyer on how to get your rights restored and decided to fight to get my right to vote back. When you can't do anything, you create a person who doesn't have a character anymore. But once you vote, you change that. I have a voice again.<sup>1</sup>*

I. INTRODUCTION

Felon disenfranchisement is the loss of voting rights by a citizen who has been convicted of a felony.<sup>2</sup> Some form of felon disenfranchisement exists in most states.<sup>3</sup> Some states withhold the right to vote until a waiting period has

---

\* Martha Guarnieri, J.D. Candidate, Temple University Beasley School of Law, 2017. I would like to thank the staff of the *Temple Law Review* for their hard work on this Comment. In particular, thanks to Liz Coyne, Joe Pangaro, Dan Kaufmann, and Rachel Sellers—and my father, Thom Guarnieri. Additional thanks to Professor David Kairys and Marc Mauer for their direction on this Comment.

1. *My First Vote: Testimonies*, BRENNAN CTR. FOR JUST. 19 (July 5, 2009), <http://www.brennancenter.org/publication/my-first-vote#testimonies> [<http://perma.cc/GG7G-LK4T>] (quoting Leroy Clark).

2. ERNEST DRUCKER & RICARDO BARRERAS, THE SENTENCING PROJECT, STUDIES OF VOTING BEHAVIOR AND FELONY DISENFRANCHISEMENT AMONG INDIVIDUALS IN THE CRIMINAL JUSTICE SYSTEM IN NEW YORK, CONNECTICUT, AND OHIO 1 (2005), <http://www.plagueofprisons.com/research/sentencingproject.pdf> [<http://perma.cc/2LN6-N4H9>]. Throughout this Comment, I discuss both felon disenfranchisement and ex-felon disenfranchisement. The term “felon” disenfranchisement generally is used to refer to the loss of the right to vote after a felony conviction. See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1049 [hereinafter Ewald, *Civil Death*]. I use the term “ex-felon disenfranchisement” when specifically discussing convicted individuals who have completed their sentence or punishment yet remain disenfranchised.

3. As of May 2016, every state but Maine and Vermont had felon disenfranchisement rules in place. See THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1 (2016) [hereinafter PRIMER], [http://sentencingproject.org/doc/publications/fd\\_Felony%20Disenfranchisement%20Primer.pdf](http://sentencingproject.org/doc/publications/fd_Felony%20Disenfranchisement%20Primer.pdf) [<http://perma.cc/3P52-TMY9>].

elapsed, even after probation or parole, whereas other states automatically restore it upon completion of a prison sentence, parole, or probation.<sup>4</sup> The categories of felons who lose their right to vote originally encompassed only those convicted of the most extreme crimes, then it expanded over time “to encompass a greater range and number of offenses, including many minor offenses.”<sup>5</sup> Some states even disenfranchise citizens convicted of misdemeanors.<sup>6</sup>

The practice of disenfranchising ex-felons is deeply rooted in the American political system and culture.<sup>7</sup> The Supreme Court of the United States has held that the Fourteenth Amendment permits state felon disenfranchisement laws.<sup>8</sup> Therefore, a wholesale challenge to disenfranchisement policies would likely prove unsuccessful.<sup>9</sup>

Additionally, voter restoration processes through the clemency systems by which states restore ex-felons’ civil rights are problematic, particularly in a few states.<sup>10</sup> Some relatively small-scale changes to these restoration processes could vastly improve the rights of ex-felons.

This Comment provides a comprehensive look at felon disenfranchisement laws, particularly voter restoration processes in states that have the most oppressive and confusing policies. It addresses the two options for restoring the voting rights of ex-felons: (1) the pardon and clemency power, or (2) automatic restoration after completion of a sentence.

Section II provides an overview of felon disenfranchisement policies, including the history of disenfranchising felons, the current practices of disenfranchisement, and the challenges to these policies. That Section also examines the history of voter restoration practices, which originate from the gubernatorial pardoning power. Lastly, by looking at the ex-felon voter restoration practices in three states, Florida, Iowa, and Kentucky, Section II explores recent trends to impede ex-felons’ voter restoration in those states.

Section III discusses the arbitrary nature of nonautomatic restoration practices, synthesizes some of the most problematic trends, and proposes

---

4. *Id.*

5. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 8 (2006) [hereinafter MANZA & UGGEN, LOCKED OUT].

6. *Id.* at 9; ALEC EWALD, THE SENTENCING PROJECT, A ‘CRAZY-QUILT’ OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF FELON DISENFRANCHISEMENT LAW i (2005) [hereinafter EWALD, CRAZY-QUILT], <http://www.sentencingproject.org/wp-content/uploads/2016/01/A-Crazy-Quilt-of-Tiny-Pieces-State-and-Local-Administration-of-American-Criminal-Disenfranchisement-Laws.pdf> [<http://perma.cc/4HNM-QE9B>]. Ewald argues that, because some of those disenfranchised may include misdemeanants, the term “felony disenfranchise” is not exactly accurate. *Id.* I use this term, however, in a general sense to categorize the practice of states revoking the right to vote after a conviction.

7. See *infra* Part II.A for a historical analysis of felon disenfranchisement laws.

8. See *infra* notes 80–85 and accompanying text for a discussion of *Richardson v. Ramirez*, 418 U.S. 24 (1974).

9. *Developments in the Law—VI. One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1959 (2002).

10. See *infra* Part II.D for a discussion of voter restoration processes in Florida, Iowa, and Kentucky.

automatic voter restoration as a solution to end the confusing practices that lead to “de facto disenfranchisement.”<sup>11</sup> Without a revamping of voter restoration policies in states that need it, a large portion of society will remain excluded from civic life.

## II. OVERVIEW

James Ghent, a Miami resident, completed his sentence for burglary in the early 1990s.<sup>12</sup> He completed his parole in 1995, overcame a drug addiction, and went to school for radiography.<sup>13</sup> In 2000, he embarked on the difficult journey of regaining his right to vote.<sup>14</sup> Ghent was motivated not only by a belief that voting “should always be a right” but also by his goal to gain a professional radiography license, which required civil rights restoration.<sup>15</sup> Florida’s clemency board, consisting of the governor and his cabinet, holds hearings four times a year in Tallahassee.<sup>16</sup> Petitioners seeking restoration of their civil rights have five minutes before the board to plead their case.<sup>17</sup>

Ghent travelled 500 miles to appear before the clemency board, and his pitch was quickly denied by then-Governor Jeb Bush.<sup>18</sup> Bush “wanted to see Ghent remain on the straight and narrow a bit longer.”<sup>19</sup> While he did not give Ghent a more specific reason for denying his petition, transcripts from various clemency hearings reveal that Bush rejected petitions for reasons such as the petitioner not having enough years of sobriety or not being remorseful enough.<sup>20</sup>

---

11. ERIKA WOOD & RACHEL BLOOM, ACLU & BRENNAN CTR. FOR JUSTICE, *DE FACTO DISENFRANCHISEMENT 1* (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> [<http://perma.cc/GA59-UTWH>].

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

*Id.*

12. Pema Levy, *How Jeb Bush Enlisted in Florida’s War on Black Voters*, MOTHER JONES (October 27, 2015), <http://www.motherjones.com/politics/2015/10/jeb-bush-florida-felon-voting-rights-clemency> [<http://perma.cc/29AK-WD3F>].

13. *Id.*

14. *Id.*

15. *Id.*; see Allison J. Riggs, *Felony Disenfranchisement in Florida: Past, Present and Future*, 28 J. C.R. & ECON. DEV. 107, 111 (2015) (explaining that the Florida legislature enacted a law prohibiting licensing boards from denying licenses solely based on lack of civil rights restoration, but explaining that restoration status can be considered in licensing decisions).

16. Levy, *supra* note 12.

17. *Id.* See also *infra* Part II.D.1 for a discussion of Florida’s restoration process.

18. Levy, *supra* note 12.

19. *Id.*

20. *Id.* An example of one of Bush’s rulings included him telling a petitioner: [T]o get your full pardon back, I would say don’t smoke marijuana and get caught, or don’t smoke marijuana at all would be good; make sure you’re respectful of your wife; make sure

Ghent's experience is not unlike others'. From 2011 to 2012, the Florida clemency board granted less than .01% of the outstanding applications for restoration of civil rights.<sup>21</sup>

As of 2014, over 6.8 million felons in the United States were under "correctional control," which includes probationers, parolees, prisoners, and prison inmates.<sup>22</sup> Between 1976 and 2000, the disenfranchised population grew from 1% to 2.3% of the electorate.<sup>23</sup> In 2016, it was estimated that 5.85 million Americans were unable to vote because of felony convictions, 75% of whom were not currently incarcerated.<sup>24</sup> This large number of disenfranchised Americans could alter the outcome of elections.<sup>25</sup>

The practice of felon disenfranchisement has a significant impact on the black vote, given the disproportionately large number of incarcerated African Americans.<sup>26</sup> Advocates of felon disenfranchisement focus on the race neutrality

---

you don't have an abundance of traffic violations; make sure that you continue to be on the straight and narrow and show respect for the law. And my guess is that the next Governor and the next clemency board will be—will act accordingly. That would be the advice of the old gov that's leaving.

*Id.*

21. Riggs, *supra* note 15, at 113 (explaining that the clemency board appointed by Governor Rick Scott granted 420 restoration petitions from 2011–2012, and that by June 2011 there were over 95,000 outstanding applications). This approval rate was a decline from previous years. *Id.*

22. DANIELLE KAEBLE ET AL., U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, 1 (2016), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf> [<http://perma.cc/B2E5-WTG5>] (basing statistics on the 2014 populations).

23. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV., 777, 782 (2010) [hereinafter Uggen & Manza, *Democratic Contraction*].

24. PRIMER, *supra* note 3, at 1, 5.

25. See Uggen & Manza, *Democratic Contraction*, *supra* note 23, at 794.

We find that felon disenfranchisement laws, combined with high rates of criminal punishment, may have altered the outcome of as many as seven recent U.S. Senate elections and at least one presidential election. One startling implication of these findings relates to control over the Senate. Assuming that Democrats who might have been elected in the absence of felon disenfranchisement had held their seats as long as the Republicans who narrowly defeated them, we estimate that the Democratic Party would have gained parity in 1984 and held majority control of the U.S. Senate from 1986 to the present. Changing partisan control of the Senate would have had a number of important policy consequences: In particular, it might have enabled the Clinton administration to gain approval for a much higher proportion of its federal judicial nominees, and key Senate committees would have shifted from Republican to Democratic control.

*Id.*

26. THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf> [<http://perma.cc/6JJK-RNP4>]; see also JOHN E. PINKARD SR., AFRICAN AMERICAN FELON DISENFRANCHISEMENT: CASE STUDIES IN MODERN RACISM AND POLITICAL EXCLUSION 2–3 (2013). See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 158–61 (2010); PIPPA HOLLOWAY, LIVING IN INFAMY: FELON DISENFRANCHISEMENT AND THE HISTORY OF AMERICAN CITIZENSHIP 133 (2014); MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 151.

of disenfranchisement policies and evaluate them outside the context of race.<sup>27</sup> Proponents of the elimination of these policies, however, note that one out of every thirteen black adults is disenfranchised nationally.<sup>28</sup> In Florida, Virginia, and Kentucky, more than one out of every five black adults is disenfranchised because of a prior conviction.<sup>29</sup>

Voting rights are prescribed by individual states,<sup>30</sup> and states have discretion to disenfranchise citizens with felony convictions.<sup>31</sup> Thus, issues of felon disenfranchisement are dealt with on the state level.<sup>32</sup> In recent years, many states have changed their felon disenfranchisement policies.<sup>33</sup> Some states have expanded voting access;<sup>34</sup> many now allow the automatic restoration of an ex-felon's right to vote upon completion of a sentence.<sup>35</sup> In contrast, other states have become more restrictive.<sup>36</sup> For instance, some states process applications

---

27. See, e.g., Roger Clegg et al., *The Case Against Felon Voting*, 2 U. ST. THOMAS J. L. & PUB. POL'Y 1, 2-5 (2008) [hereinafter Clegg et al., *The Case Against Felon Voting*]. Roger Clegg, President and General Counsel for the Center for Equal Opportunity, is the leading scholar advocating for felon disenfranchisement policies. See also, e.g., Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL'Y 159 (2001) [hereinafter Clegg, *Who Should Vote?*]; Hans A. von Spakovsky & Roger Clegg, *Felony Voting and Unconstitutional Congressional Overreach*, HERITAGE FOUND. LEGAL MEMORANDUM, no. 145, Feb. 11, 2015, [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM145.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM145.pdf) [<http://perma.cc/V9ZB-EK8R>].

28. See, e.g., PRIMER, *supra* note 3, at 2; Erik Holder, Attorney General, Dep't of Just., Attorney General Erik Holder Delivers Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarkson-criminal-justice-reform-georgetown> [<http://perma.cc/4JA8-XS7J>].

29. PRIMER, *supra* note 3, at 2. A recent battle has ensued in Virginia over the rights of felons to vote, as Governor McAuliff issued an executive order in 2016 that restored the voting rights of over 200,000 ex-felons. Fenit Nirappil & Jenna Portnoy, *Va. High Court Invalidates McAuliffe's Order Restoring Felon Voting Rights*, WASH. POST (July 22, 2016), [http://www.washingtonpost.com/local/virginia-politics/virginia-court-invalidates-gov-terry-mcauliffes-order-restoring-felon-voting-rights/2016/07/22/3e1d45f6-5058-11e6-a7d8-13d06b37f256\\_story.html](http://www.washingtonpost.com/local/virginia-politics/virginia-court-invalidates-gov-terry-mcauliffes-order-restoring-felon-voting-rights/2016/07/22/3e1d45f6-5058-11e6-a7d8-13d06b37f256_story.html) [<http://perma.cc/Z9VE-GFWP>]. In July 2016, the Virginia Supreme Court invalidated the order, calling it an improper exercise of the pardon power. *Id.* Because of this change, this Comment does not discuss Virginia in depth.

30. See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2623 (2013) ("States have 'broad powers to determine the conditions under which the right of suffrage may be exercised.'" (quoting *Carrington v. Rash*, 380 U.S. 89, 91 (1965))).

31. See *infra* notes 80-85 and accompanying text for a discussion of Supreme Court precedent in *Richardson v. Ramirez*, which sanctioned state felon disenfranchisement.

32. See PRIMER, *supra* note 3, at 1.

33. See *id.* at 4.

34. *Id.*; Myrna Perez et al., *The Sustained Momentum and Growing Bipartisan Consensus for Voting Rights Restoration*, BRENNAN CTR. FOR JUST. (July 6, 2015), [http://www.brennancenter.org/analysis/sustained-momentum-and-growing-bipartisan-consensus-voting-rights-restoration#\\_edn7](http://www.brennancenter.org/analysis/sustained-momentum-and-growing-bipartisan-consensus-voting-rights-restoration#_edn7) [<http://perma.cc/DH5J-SK6Z>].

35. ERIKA WOOD, BRENNAN CTR. FOR JUSTICE, RESTORING THE RIGHT TO VOTE 16 (2009) [hereinafter WOOD, RESTORING THE RIGHT TO VOTE], <http://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf> [<http://perma.cc/N5BS-W62L>].

36. See *infra* Part II.D for a discussion of policy reforms in Florida, Iowa, and Kentucky.

for voting rights reinstatement through their clemency boards.<sup>37</sup>

In this Section, Part II.A discusses the history of felon disenfranchisement in the United States. Parts II.A.3, II.A.4, and II.A.5 explore legal challenges to disenfranchisement policies. Next, Part II.B.1 explores competing views on pardoning as an act of mercy or as a remedial measure. Part II.B.2 then discusses the history of the gubernatorial pardon as a tool for restoring civil rights. Part II.C discusses the range of policies that exist in different states. And Part II.D analyzes the voter restoration processes in Florida, Iowa, and Kentucky. These states provide helpful examples both because of recent policy changes<sup>38</sup> and because of their role as important swing states in national elections.<sup>39</sup>

#### A. *History of Felon Disenfranchisement*

##### 1. Early Justifications for Felon Disenfranchisement

Felon disenfranchisement dates back to ancient Greek and Roman civilizations and Medieval Europe.<sup>40</sup> The practice of disenfranchising felons has roots in the medieval doctrine of “civil death,”<sup>41</sup> or the loss of “all political, civil, and legal rights” by a convicted offender.<sup>42</sup> Early American colonial statutes and rules included some of these notions about criminal disenfranchisement.<sup>43</sup> For example, in order to participate in colonial town meetings, new citizens were subject to requirements including land ownership and other “moral

---

37. See generally Melissa C. Chiang, *Some Kind of Process for Felon Disenfranchisement*, 72 U. CHI. L. REV. 1331 (2005) (providing an overview of the evolution of clemency authority to restore voting rights).

38. See PRIMER, *supra* note 3, at 4; see also Bryan Lee Miller & Joseph F. Spillane, *Civil Death: An Examination of Ex-felon Disenfranchisement and Reintegration*, 14 PUNISHMENT & SOC’Y 402, 409–10 (2012) (noting the high amount of felons who are barred from voting in Florida); Riggs, *supra* note 15, at 111–13 (discussing the importance of Florida in the 2000 election and how that situation brought the state’s felon disenfranchisement problems to light).

39. Ronald Brownstein, *The Most Valuable Voters of 2016*, ATLANTIC (Feb. 18, 2015), <http://www.theatlantic.com/politics/archive/2015/02/the-most-valuable-voters-of-2016/431865/> [http://perma.cc/R92U-ZB3E]. Kentucky is not considered a swing state but is included because of its significant change after an executive order in November of 2015. BRENNAN CTR. FOR JUSTICE, VOTING RIGHTS RESTORATION EFFORTS IN KENTUCKY (Oct. 13, 2016), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-kentucky> [http://perma.cc/UXU4-83TF] (stating that the recent executive order makes Kentucky’s felony disenfranchisement law “once again one of the harshest in the nation”).

40. MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 22.

41. *Id.* at 22–23; see also Ewald, *Civil Death*, *supra* note 2, at 1059–61.

42. Ewald, *Civil Death*, *supra* note 2, at 1049 n.13. In Europe and England, a person was said to be civilly dead once convicted because he could not perform any legal function, including the ability to vote. *Id.* at 1060. The types of crimes that resulted in permanent disenfranchisement were limited to the most serious crimes. *Id.* at 1061. Additionally, disenfranchisement was issued in medieval societies “only upon judicial pronouncement in individual cases.” *Id.*

43. See MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 24; see also Ewald, *Civil Death*, *supra* note 2, at 1062–63 (explaining that colonial states did not adopt all aspects of English common law, and that the Constitution rejected some aspects, such as “bills of attainder, forfeiture for treason, and ‘Corruption of Blood’”).

qualifications.”<sup>44</sup> In some colonies, when a citizen lost his ability to vote for failing to meet moral qualifications, the loss was permanent.<sup>45</sup> Disenfranchisement was often a separate element of sentencing.<sup>46</sup> Therefore, the purposes of the penalty were articulated in the law and considered by the courts.<sup>47</sup> This “public dimension” to the loss of voting rights as a discrete element in sentencing in the early colonies differs from the collateral nature of disenfranchisement today.<sup>48</sup>

Early justifications for felon disenfranchisement were based on the philosophical social contract theory.<sup>49</sup> The social contract theory holds that citizens enter into a social contract whereby they surrender personal liberty in exchange for protection from the government.<sup>50</sup> The basis of the social contract justification for felon disenfranchisement is that “having violated the rules, the criminal forfeits the right to participate in [making the rules].”<sup>51</sup> In other words, if a voter “cannot be trusted to have the country’s interests at heart,” then he or she should not participate in the political system.<sup>52</sup> A voter must have “certain minimum, objective standards of responsibility, trustworthiness and commitment to our laws.”<sup>53</sup>

## 2. Disenfranchisement in the United States

With the ratification of the U.S. Constitution in 1788, voting rights were left to the states.<sup>54</sup> Even though the Constitution itself remained silent about felon disenfranchisement, many early state constitutions adopted “civil death statutes” from their colonial predecessors.<sup>55</sup> “[E]ven state constitutions adopted

---

44. Ewald, *Civil Death*, *supra* note 2, at 1061–62 (explaining that fornication and drunkenness were included in banned activities).

45. *Id.* at 1062.

46. *Id.*

47. *Id.*

48. *Id.* (“Modern disenfranchisement laws [are] automatic, invisible in the criminal justice process, considered ‘collateral’ rather than explicitly punitive, and applied to broad categories of crimes with little or no common character . . .”).

49. *Id.* at 1075–79.

50. Eli L. Levine, Comment, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JURIS. REV. 193, 193–94 (2009).

51. Ewald, *Civil Death*, *supra* note 2, at 1073.

52. Clegg, *Who Should Vote?*, *supra* note 27, at 162. In concluding that loyalty to the country is a requirement for voting, Clegg relies on the fact that residents are not able to vote until citizenship is gained. *Id.*

53. Roger Clegg, *Allowing Felons to Vote*, N.Y. TIMES (Feb. 18, 2014), [http://www.nytimes.com/2014/02/19/opinion/allowing-felons-to-vote.html?ref=topics&\\_r=1](http://www.nytimes.com/2014/02/19/opinion/allowing-felons-to-vote.html?ref=topics&_r=1) [<http://perma.cc/W5C5-LWEA>] [hereinafter Clegg, *Allowing Felons to Vote*].

54. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.”).

55. MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 24; *see also* Ewald, *Civil Death*, *supra* note 2, at 1062–63.

between 1776 and 1821 prohibited or authorized the legislature to prohibit” criminals from voting.<sup>56</sup> By the time the Fourteenth Amendment was adopted in 1868, that number had risen to twenty-nine states<sup>57</sup> of the thirty-seven that existed at that time.<sup>58</sup>

As more states began to adopt felon disenfranchisement policies, they also began to specify which crimes deserved a loss of voting rights.<sup>59</sup> These early felon disenfranchisement policies may have been part of an effort in many states to undercut the rights granted to former slaves in the Reconstruction Amendments.<sup>60</sup> “[A] white South Carolina businessman who temporarily chaired the 1868 South Carolina constitutional convention at its opening session, explained that . . . ‘[t]he intent of those laws was to deprive every colored man of their right of citizenship . . . [by making] the most trivial offense a felony.’”<sup>61</sup>

Despite the fact that many states did not have statutes allowing black people to vote at that time,<sup>62</sup> southern states may have anticipated the freeing of slaves.<sup>63</sup> Notably, Section 2 of the Fourteenth Amendment prohibits states from abridging the right to vote “except for participation in rebellion, or other crime.”<sup>64</sup> Republicans at that time interpreted the “other crimes” language as being an additional mechanism for disenfranchising former Confederates.<sup>65</sup>

However, states adopted early felon disenfranchisement laws along with poll taxes and literacy tests specifically to disenfranchise black voters.<sup>66</sup> The Mississippi Supreme Court articulated this intent to disenfranchise blacks in *Ratliff v. Beale*.<sup>67</sup> The court explained the state legislature’s attempt to circumvent constitutional amendments in order to include certain “furtive” crimes among those that disenfranchise in order to discriminate against blacks:

By reason of its previous condition of servitude and dependence, [the

---

56. *Green v. Bd. of Elections*, 380 F.2d 445, 450 (2d Cir. 1967).

57. *Id.*

58. *See States Ranked by Date that State Entered the Union*, IPL2.ORG, <http://www.ipl.org/div/stateknow/dates.html> (last visited Feb. 15, 2017) [<http://perma.cc/QDB2-U3A7>].

59. *See, e.g.*, HOLLOWAY, *supra* note 26, at 5–9 (discussing a Tennessee code in 1829 that differentiated between infamous and noninfamous crimes). “Infamous offenses included a variety of property crimes, arson (‘malicious burning’), sex crimes (bigamy, crime against nature, incest, rape, carnal abuse of a female child), counterfeiting, forgery, and perjury. Murder and various kind [sic] of assault were not categorized as infamous.” *Id.*

60. *Id.* at 34. The Reconstruction Amendments are the Thirteenth, Fourteenth, and Fifteenth amendments. Erika L. Wood, *Who Gets to Vote?*, N.Y. TIMES: CAMPAIGN STOPS (Nov. 7, 2011, 9:42 PM), [http://campaignstops.blogs.nytimes.com/2011/11/07/who-gets-to-vote/?\\_r=0](http://campaignstops.blogs.nytimes.com/2011/11/07/who-gets-to-vote/?_r=0) [<http://perma.cc/FF38-NASD>] [hereinafter Wood, *Who Gets to Vote?*].

61. HOLLOWAY, *supra* note 26, at 36.

62. *See von Spakovsky & Clegg, supra* note 27, at 3.

63. *See HOLLOWAY, supra* note 26, at 36.

64. U.S. CONST. amend. XIV, § 2.

65. HOLLOWAY, *supra* note 26, at 47.

66. Wood, *Who Gets to Vote?*, *supra* note 60; *see also* HOLLOWAY, *supra* note 26, at 15 (“White southern Democrats never succeeded in making all African Americans convicts. They did not have to because literacy tests and poll taxes did the primary work of disfranchisement.”).

67. 20 So. 865 (Miss. 1896).



---

---

black] race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from that of the whites, –a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses . . . . Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics . . . .<sup>68</sup>

### 3. Early Challenges to Felon Disenfranchisement

The first Supreme Court challenges to felon disenfranchisement were the “so-called Mormon cases” in the late 1800s.<sup>69</sup> In *Murphy v. Ramsey*<sup>70</sup> and *Davis v. Beason*,<sup>71</sup> the United States Supreme Court upheld territorial regulations that banned polygamy and bigamy and disenfranchised anyone convicted of either act.<sup>72</sup> Though the Supreme Court did not take up this issue again until 1974, other courts addressed it “in the context of the larger prisoner’s rights movement of the 1960s and 1970s.”<sup>73</sup>

Federal courts did not deal with the issue of felon disenfranchisement again until *Green v. Board of Elections*<sup>74</sup> in 1967. *Green* involved a New York disenfranchisement statute and a constitutional challenge by Gilbert Green, a Communist organizer who was convicted of crimes under the Smith Act.<sup>75</sup> The plaintiff had three constitutional challenges to the statute: the rule against bills of attainder, the Eighth Amendment’s ban on cruel and unusual punishment, and the Fourteenth Amendment’s Equal Protection Clause.<sup>76</sup> Relying on Supreme Court precedent that the Bill of Attainder Clause only applies to “statutes imposing penalties,” Judge Friendly concluded that disenfranchisement is not purely punitive; it serves “some other legitimate governmental purpose.”<sup>77</sup> In dismissing the plaintiff’s three claims, Judge Friendly relied on the plaintiff’s history, calling him a “convicted mafiosi.”<sup>78</sup> However, he added a caveat that there may be “crimes that would not come within the definition of a particular state law on exclusion from the franchise . . . or which are of such minor significance that exclusion for their commission might raise . . . a substantial

---

68. *Ratliff*, 20 So. at 868.

69. MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 28.

70. 114 U.S. 15 (1885).

71. 133 U.S. 333 (1890).

72. See MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 28–29.

73. *Id.* at 29.

74. 380 F.2d 445 (2d Cir. 1967).

75. *Green*, 380 F.2d at 447; 18 U.S.C. § 2385 (2012). The Smith Act was “[a] 1948 federal antisedition statute that criminalize[d] advocating the forcible or violent overthrow of the government.” *Smith Act*, BLACK’S LAW DICTIONARY (10th ed. 2014).

76. *Green*, 380 F.2d at 449–51.

77. *Id.* at 449–50 (citing *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion)) (“[Because] the purpose of [the statute disenfranchising the convicted felon] is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.” (alterations in original) (quoting *Trop*, 365 U.S. at 96–97)).

78. *Id.* at 451.

constitutional question [under] § 1 of the Fourteenth Amendment.”<sup>79</sup>

#### 4. Equal Protection Challenges to Felon Disenfranchisement

The question of whether felon disenfranchisement should be scrutinized under the Fourteenth Amendment’s Equal Protection Clause was addressed by the Supreme Court seven years after *Green*. In *Richardson v. Ramirez*,<sup>80</sup> three ex-felons challenged their loss of voting rights after serving their prison or jail time and successfully completing parole.<sup>81</sup> The plaintiffs claimed that California’s constitution violated the Equal Protection Clause of the Fourteenth Amendment because it disenfranchised people convicted of “infamous crime[s].”<sup>82</sup> Justice William Rehnquist, writing for the majority, reviewed the “scant” amount of legislative history surrounding the passage of Section 2 of the Fourteenth Amendment.<sup>83</sup> He concluded that the “exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment.”<sup>84</sup> A dissent by Justice Thurgood Marshall interpreted the legislative history differently—finding the “other crimes” language of Section 2 “tacked on” as a political compromise with southern states.<sup>85</sup> Others have argued that the “other crimes” language was intended to apply specifically to crimes surrounding rebellions.<sup>86</sup>

Eleven years later, the Rehnquist Court carved out an exception to *Richardson* in *Hunter v. Underwood*,<sup>87</sup> which held that Section 2 of the Fourteenth Amendment prohibits felon disenfranchisement statutes that have a discriminatory purpose.<sup>88</sup> Justice Rehnquist based this conclusion on speeches from the Alabama Constitutional Convention that outlined the intent of the legislature to disenfranchise blacks.<sup>89</sup> The Southern District of Mississippi relied on similar evidence of discriminatory intent in *McLaughlin v. City of Canton*,<sup>90</sup> which held that a plaintiff’s equal protection rights were violated when he was

---

79. *Id.* at 452.

80. 418 U.S. 24 (1974).

81. *Richardson*, 418 U.S. at 31.

82. *Id.* at 26–27.

83. *Id.* at 43–48.

84. *Id.* at 54.

85. *Id.* at 73–74 (Marshall, J., dissenting).

86. HOLLOWAY, *supra* note 26, at 47 (“The activities of southern constitutional conventions in the wake of the Fourteenth Amendment do not offer definitive evidence of what Congress meant by ‘other crimes’ in Section Two of the amendment. However, they do support the notion that the phrase ‘other crimes’ in the new amendment was interpreted by Republicans at the state constitutional conventions to mean crimes committed by former Confederates.”). *But see* *Green v. Bd. of Elections*, 380 F.2d 445, 452 (2d Cir. 1967) (“We see nothing in the language or in history to support plaintiff’s suggestion that ‘other crimes’ meant only a crime connected with the rebellion.” (footnote omitted)).

87. 471 U.S. 222 (1985).

88. *Hunter*, 471 U.S. at 233.

89. *Id.* at 229.

90. 947 F. Supp. 954 (S.D. Miss. 1995).

disenfranchised for committing a misdemeanor.<sup>91</sup>

While *Hunter* and *McLaughlin* seemed to create an exception to the *Richardson* ban on equal protection review for felon disenfranchisement laws, both cases still remain outliers.<sup>92</sup> This may be a result of federal courts offering a “pathway for . . . statutory rehabilitation” by which a state can remove discriminatory intent from a previously racially motivated statute.<sup>93</sup> In *Cotton v. Fordice*,<sup>94</sup> the Fifth Circuit held that race-neutral amendments to the state’s disenfranchisement law caused the law to “overcome its odious origin” and “the discriminatory taint associated with the original version.”<sup>95</sup> In other words, because the Mississippi legislature added crimes such as murder and rape that were “not considered ‘black’ crimes,” the statute lost its discriminatory intent.<sup>96</sup> Citing *Cotton*, a Florida district court held that a “re-enactment of the felon disenfranchisement provision in 1968 cleansed Florida’s felon disenfranchisement scheme of any invidious discriminatory purpose that may have prompted its inception in Florida’s 1868 Constitution.”<sup>97</sup> Therefore, *Cotton* provided state legislatures with an escape hatch from the *Hunter* standards.<sup>98</sup> The cumulative effect of *Richardson* and *Cotton* was to block equal protection challenges to felon disenfranchisement laws, since any questionable intent could be eliminated easily.<sup>99</sup>

##### 5. Challenges to Felon Disenfranchisement Under the Voting Rights Act

Ex-felons have also challenged felon disenfranchisement policies in federal court under the Voting Rights Act of 1965 (VRA).<sup>100</sup> The VRA was passed to prohibit any voting practice or procedure that is “imposed or applied . . . to deny or abridge the right of any citizen of the United States to vote on account of race or color.”<sup>101</sup> Since 2010, there has been a circuit split over whether felon disenfranchisement constitutes a voting qualification that abridges the right to vote on account of race under section 2 of the VRA. The Second and Eleventh

---

91. *McLaughlin*, 947 F. Supp. at 976–78 (citing *Ratliff v. Beale*, 20 So. 865 (Miss. 1896) for support, and holding that policies disenfranchising those convicted of misdemeanors should be subject to strict scrutiny under the Fourteenth Amendment and therefore must be “precisely tailored to serve some compelling governmental interest”).

92. See HOLLOWAY, *supra* note 26, at xiii–xiv.

93. *Id.* at xiv.

94. 157 F.3d 388 (5th Cir. 1998).

95. *Cotton*, 157 F.3d at 391.

96. See *id.*

97. *Johnson v. Bush*, 214 F. Supp. 2d 1333, 1339 (S.D. Fla. 2002), *aff’d in part, rev’d in part, remanded sub nom. Johnson v. Gov. of Fla.*, 353 F.3d 1287 (11th Cir. 2003).

98. See *id.*; *Hunter v. Underwood*, 471 U.S. 222, 233 (stating that felon disenfranchisement statutes with a discriminatory purpose are prohibited by Section 2 of the Fourteenth Amendment).

99. See *Johnson*, at 1337–39; see also *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974); *Cotton*, 157 F.3d at 391.

100. Lauren Handelsman, *Giving the Barking Dog a Bite: Challenging Felon Disenfranchisement Under the Voting Rights Act of 1965*, 73 *FORDHAM L. REV.* 1875, 1876 (2005).

101. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2(a), 79 Stat. 437 (codified as amended at 52 U.S.C. § 10301 (2012)).

Circuits have ruled that VRA challenges to felon disenfranchisement laws are inappropriate.<sup>102</sup> The Sixth and Ninth Circuits have ruled otherwise, opening the door to such VRA challenges.<sup>103</sup>

### B. *Ex-Felon Voter Restoration*

#### 1. The Pardon Power

The pardon power<sup>104</sup> includes the right to grant various types of relief: full pardons, sentence commutations, and partial pardons.<sup>105</sup> Voter restoration functions differently from traditional pardons and is generally considered a partial pardon.<sup>106</sup> The U.S. Constitution gives the Executive the power to grant a pardon.<sup>107</sup> In states, the pardon power, also called the clemency power, is generally vested in the governor alone.<sup>108</sup> However, clemency procedures vary by state, and clemency power for voter restoration may be vested in a clemency board, and the governor may or may not participate in the process.<sup>109</sup>

The concept of the pardoning power has been viewed in two different ways: (1) as an act of mercy, and (2) as a remedial mechanism of justice.<sup>110</sup> Any

102. See David Zetlin-Jones, Note, *Right to Remain Silent?: What the Voting Rights Act Can and Should Say About Felony Disenfranchisement*, 47 B.C. L. REV. 411, 436 (2006). The author explained that three circuit courts have refused to extend the Voting Rights Act to felon disenfranchisement statutes: *Johnson v. Governor of Fla.*, 405 F.3d 1214 (11th Cir. 2005), *Muntaquim v. Coomb*, 366 F.3d 102 (2d Cir. 2004), and the dissenting opinion in *Farrakhan v. Wash.*, 359 F.3d 1116 (9th Cir. 2004) (Kozinski, J., dissenting). *Id.* These courts rested their decisions on the fact that “1) Congress did not intend for the VRA to reach state criminal disenfranchisement laws, and 2) Congress lacks the authority to reach state criminal disenfranchisement laws.” *Id.*

103. *Id.* at 445; see also *Wesley v. Collins*, 791 F.2d 1255, 1259–61 (6th Cir. 1986) (holding that there was no VRA violation).

104. While “clemency” and “pardon” are often used interchangeably, Professor Daniel Kobil explains that clemency is a broad umbrella term that includes within it five “specific varieties of leniency,” including “pardon, amnesty, commutation, remission of fines, and reprieve.” Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991) [hereinafter Kobil, *The Quality of Mercy Strained*]. Throughout this Comment, I use the term “pardon” to refer to voter restoration, as pardon “provides the most sweeping remission of the consequences that normally attend violation of the law.” *Id.* at 576.

105. Chiang, *supra* note 37, at 1331.

[T]he state may issue a full or absolute pardon, which erases any legal consequences stemming from conviction (including any time remaining on a sentence); the state may commute a sentence, which converts a capital penalty to a life sentence or reduces the length of incarceration; or the state may issue a partial pardon, which restores only certain civil rights such as the right to vote, the right to serve on a jury, or the ability to hold public office.

*Id.* (footnote omitted).

106. *Id.*

107. U.S. CONST. art II, § 2, cl. 1 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).

108. Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L.J. 698, 706 (2012) [hereinafter Kobil, *Compelling Mercy*].

109. Chiang, *supra* note 37, at 1336–37.

110. Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 22 (2005).

proposed reforms to voter restoration hinge on the way the power is understood.<sup>111</sup> The United States adopted its pardon procedures from English common law<sup>112</sup> and incorporated the presidential pardon power into the Constitution.<sup>113</sup> Many states followed suit by including an exclusive grant of pardon power to the governor in their state constitutions.<sup>114</sup> Justice Marshall explained in *United States v. Wilson*<sup>115</sup> that the “pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.”<sup>116</sup>

In *Biddle v. Perovich*,<sup>117</sup> the Supreme Court laid out the theory of “public good,”<sup>118</sup> which may have replaced the *Wilson* theory of the pardon as an act of grace—“of the sovereign’s benevolence.” Justice Holmes advocated the “public good” theory 100 years after *Wilson*: “A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme.”<sup>119</sup>

These differing views of the pardon have led to a theoretical debate about how best to place checks and balances on the pardoning power.<sup>120</sup> More succinctly, there is disagreement over “whether a pardon is more properly viewed as an act of grace that requires neither justification nor defense, or whether it is a discretionary decision of an executive that must be made via principled deliberation, and is therefore open to criticism.”<sup>121</sup> Much of the scholarship around pardons, however, has focused on the use of pardons for sentencing issues, rather than for civil rights.<sup>122</sup> While the traditional pardon is different from a pardon for voter restoration, this theoretical debate is

111. *See id.* at 2–5.

112. Kobil, *The Quality of Mercy Strained*, *supra* note 104, at 585–89. The theory of a pardon as an act of grace has its roots in the English pardon practice. The royal pardon was used not only to balance the rigid criminal justice system but also for political favors. *Id.* at 586. With a lack of meaningful checks on this power, it was widely critiqued in England. *See id.* at 585–89.

113. *See United States v. Wilson*, 32 U.S. 150, 160 (1833) (“As this power had been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon . . .”).

114. Kobil, *The Quality of Mercy Strained*, *supra* note 104, at 605.

115. 32 U.S. 150 (1833).

116. *Wilson*, 32 U.S. at 160.

117. 274 U.S. 480 (1926).

118. KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 64–65 (1989); *see also* Kobil, *The Quality of Mercy Strained*, *supra* note 104, at 594 n.156.

119. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927). Morison disagrees with Moore that this case redefined the Supreme Court’s definition of the executive pardon as an act of mercy and calls Holmes’ statement dictum. Morison, *supra* note 110, at 113 n.211.

120. *See* Clifford Dorne & Kenneth Gewerth, *Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 413, 418–19 (1999).

121. *Id.* at 418–19; *see also* Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1423–25 (2004).

122. *See generally* MOORE, *supra* note 118; Kobil, *The Quality of Mercy Strained*, *supra* note 104; Morison, *supra* note 110.

instructive to the discussion of reforming voter restoration procedures.<sup>123</sup>

Many suggested reforms to the pardon process focus on its arbitrary nature and potential for abuse.<sup>124</sup> Professor Daniel Kobil has suggested a “clemency commission”—an independent board of professionals that operates without political pressure on its decisions.<sup>125</sup> Daniel Markel has suggested, among other reforms, the “use of [an arbiter] to seek judicial review of executive leniency, which would force executives to provide reasons for the use of the pardon power.”<sup>126</sup> Both of these reforms highlight the need for oversight and clarification of the role of the pardon. The arbitrary nature of the pardon surfaces in studies showing that pardon rules vary from state to state and that the rate of pardons varies from administration to administration.<sup>127</sup>

## 2. History of Gubernatorial Pardons and Clemency Processes for Voter Restoration

After the Civil War, restoration of civil rights became an important issue for many former Confederates who lost their right to vote and hold office because of convictions.<sup>128</sup> As some of these former felons received executive pardons, they hoped that the pardons would carry relief for these collateral effects.<sup>129</sup> In 1866, the Supreme Court held in *Ex parte Garland*<sup>130</sup> that the executive pardon “removes the penalties and disabilities, and restores [the pardonee] to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.”<sup>131</sup> In *Garland*, a lawyer seeking admission to the bar received an executive pardon after being convicted of treason for his involvement in the Confederacy.<sup>132</sup> The *Garland* decision reaffirmed the idea that a pardon can erase the collateral effects of a felony conviction.<sup>133</sup>

The states took varying approaches when applying *Garland*.<sup>134</sup> Some allowed the governor’s pardons to restore civil rights and some did not.<sup>135</sup>

---

123. See *infra* notes 270–75 and accompanying text for a discussion of how voter restoration differs from the traditional pardon power.

124. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1721 (2003) (explaining that the pardon is particularly unreliable for those who are not wealthy or politically connected).

125. Kobil, *The Quality of Mercy Strained*, *supra* note 104, at 622. See *infra* Part II.D for a discussion of the use of clemency boards in particular states.

126. Markel, *supra* note 121, at 1432.

127. Kobil, *The Quality of Mercy Strained*, *supra* note 104, at 605–06. See *infra* Part II.D.1 for an exploration of the varying levels of clemency applications granted in Florida.

128. HOLLOWAY, *supra* note 26, at 105.

129. *Id.* at 105–06.

130. 71 U.S. 333 (1866).

131. *Ex parte Garland*, 71 U.S. at 380–81.

132. *Id.* at 336, 340.

133. HOLLOWAY, *supra* note 26, at 106.

134. *Id.* at 106–11.

135. See *id.* Alabama and South Carolina used the gubernatorial pardons to remove collateral consequences of convictions. *Id.* at 106. Virginia, on the other hand, required a separate procedure from the pardon to restore voting rights. *Id.* at 107.

However, an increasing number of Southerners sought civil rights restoration after *Garland*.<sup>136</sup> They sought restoration not only to obtain the right to vote but also to testify in court, hold political office, and obtain professional licenses.<sup>137</sup> This increase in the volume of citizens seeking pardons propelled states to clarify their processes.<sup>138</sup>

Many of the state voter restoration processes required that the applicant write a letter or petition and pay fees.<sup>139</sup> The petition often included information about the person's good behavior, employment, family, military history, and other characteristics that the governor may consider favorable.<sup>140</sup> Expenses included court fees and counsel fees for preparing the petition, an expense especially critical for illiterate petitioners.<sup>141</sup>

Some voter restoration processes involved respected citizens testifying to the applicant's worthiness for relief.<sup>142</sup> The prominence or status of the recommender could increase the likelihood of the applicant's success.<sup>143</sup> Often, political purposes motivated recommenders; politicians would support an individual's voter restoration in exchange for the pardonee's political support.<sup>144</sup>

Historically, the severity of a crime did not impact the outcome of a restoration petition.<sup>145</sup> However, as is the case in many states today, a conviction for a voting crime often resulted in disenfranchisement.<sup>146</sup> Rather than looking at the type of crime, the assessments of restoration petitions dealt with whether the applicant had shown moral or character reformation.<sup>147</sup>

### C. *Traditional Justifications for Felon Disenfranchisement*

Setting aside the long history of felon disenfranchisement in the United States, its advocates continue to assert a number of justifications.<sup>148</sup> Some justifications can be categorized as pragmatic, while others can be called philosophical.<sup>149</sup> Pragmatic arguments focus on the traditional punishment

---

136. *Id.* at 112–14.

137. *Id.*

138. *See id.* at 112.

139. *Id.* at 112–13.

140. *Id.* at 114–15, 122.

141. *Id.* at 112–13.

142. *Id.* at 116.

143. *Id.* at 117.

144. *Id.* at 119.

145. *Id.* at 124.

146. *See id.* at 125 (explaining that Governor Mann of Virginia refused to restore an applicant's rights after receiving reports that the applicant's convictions were for marking ballots).

147. *See id.* (stating that, for example, evidence of gambling showed that an applicant possessed an immoral character).

148. *See, e.g.,* ELIZABETH HULL, *DISENFRANCHISEMENT OF EX-FELONS* 43–54 (2006) (explaining the various “pragmatic, principled, and philosophical” justifications for felon disenfranchisement).

149. *See id.* (explaining that these various justifications, along with a category of “principled” justifications—which outline the practice of temporary disenfranchisement for the incarcerated—can

justifications, while philosophical arguments focus on the social contract theory.<sup>150</sup>

The traditional justifications for criminal punishment include retribution, deterrence, incapacitation, and rehabilitation.<sup>151</sup> The retributive justification for felon disenfranchisement may be the “most persuasive” of pragmatic justifications.<sup>152</sup> This justification focuses on the idea that the punishment should be proportionate to the crime committed.<sup>153</sup> This justification is particularly cogent for felons who have been convicted of voting fraud or voting crimes.<sup>154</sup> It may also rationalize the practice of permanent disenfranchisement for certain ex-felons who have been convicted of crimes that “represent the most profound breaches of community norms and values” such as “murder, rape, arson, robbery, burglary, kidnapping, and prison escape.”<sup>155</sup>

Both deterrence and rehabilitation justifications are of limited use to advocates of felon disenfranchisement.<sup>156</sup> From a deterrence point of view, some criminologists argue that the loss of voting rights may discourage crime.<sup>157</sup> However, this assumes that prospective criminals (1) understand that vote loss is a possible criminal consequence, and (2) care enough about losing their vote to change their behavior.<sup>158</sup> The rehabilitative justification centers on the possibility that “by motivating ex-felons to adopt so responsible a lifestyle . . . even the least charitable clemency board will see fit to reinstate their voting privileges.”<sup>159</sup> Rehabilitative reasons are often given for re-enfranchising ex-felons.<sup>160</sup>

The philosophical justifications for felon disenfranchisement are rooted in the belief that voters must possess the capacity to vote, rather than be able to vote by virtue of being a citizen.<sup>161</sup> Advocates of felon disenfranchisement rely

---

serve criminal justice ends, namely deterrence).

150. *Id.* at 43–53.

151. Ewald, *Civil Death*, *supra* note 2, at 1105.

152. HULL, *supra* note 148, at 45.

153. *Id.* at 46.

154. Many states include voter fraud on a list of disenfranchising crimes. *See, e.g.*, FLA. COMM’N ON OFFENDER REVIEW, RULES OF EXECUTIVE CLEMENCY (2011) [hereinafter RULES ON EXECUTIVE CLEMENCY], [http://www.fcor.state.fl.us/docs/clemency/clemency\\_rules.pdf](http://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf) [<http://perma.cc/7PKH-HNM2>]. Nearly fifty percent of state and federal prisoners are incarcerated for violent offenses, according to data from 2012. *Incarcerated Felon Population by Type of Crime Committed, 1974-2012*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=004339> (last updated Jan. 28, 2015, 12:25 PM) [<http://perma.cc/6MG6-ZWHT>].

155. Mary Sigler, *Defensible Disenfranchisement*, 99 IOWA L. REV. 1725, 1741 (2014).

156. HULL, *supra* note 148, at 43–44 (noting that there “is not a shred of evidence” to support the potential deterrent and rehabilitative effects).

157. *Id.* at 43.

158. *See id.* at 43–44 (“Even if aspiring lawbreakers *did* realize that criminal behavior might cost them their vote, they would scarcely be fazed. The vast majority of offenders are well under age thirty, and every study of voting behavior concludes that young people don’t value the franchise nearly as much as their elders do.”).

159. *Id.* at 44.

160. *See* WOOD, RESTORING THE RIGHT TO VOTE, *supra* note 35, at 11.

161. *See* HULL, *supra* note 148, at 50–53 (“In one illustrative case [wherein] a judge averred that the suffrage should be denied ex-felons no less than ‘idiots, insane persons, and minors,’ who similarly



on the disenfranchisement of both “mentally incompetent”<sup>162</sup> adults and children to support a theory that an objective standard of capacity is required to vote.<sup>163</sup> Like felon voting laws, however, mental capacity voting laws vary widely by state.<sup>164</sup> Additionally, there has been pushback to mental capacity laws, including the argument that “excluding the broad and indefinite category of persons with mental incapacities is not consistent with either the constitutional right to vote without discrimination or the current understanding of mental capacity.”<sup>165</sup> Moreover, mental incompetence is not equivalent to criminal behavior.<sup>166</sup> This is evidenced by the fact that citizens accused of felonies are competent enough to testify at trial and to be incarcerated.

#### D. Contemporary Policies and Procedures by State

Over time, states have changed their felon disenfranchisement policies and procedures, weaving a confusing web.<sup>167</sup> There is some form of regulation in every state except Maine and Vermont, which allow incarcerated people to vote.<sup>168</sup> Three states—Florida, Iowa, and Kentucky—only allow ex-felons to vote after they have applied for and received an executive pardon through a clemency board.<sup>169</sup> Four states prohibit voting while incarcerated or while on parole but allow voting while on probation.<sup>170</sup> Fourteen states and the District of Columbia allow voting while on parole or probation but do not allow voting while incarcerated.<sup>171</sup> And eight states restrict voting based on the type of crime or amount of time that has passed since its commission.<sup>172</sup>

---

‘lack the requisite judgment and discretion which fit them for the exercise.’”) (quoting *Washington v. State*, 75 Ala. 582 (1884)); Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT’L L.J. 197, 207 (2011).

162. *Black’s Law Dictionary* defines “incompetency” as “[l]ack of legal ability in some respect, esp. to stand trial or to testify.” *Incompetency*, BLACK’S LAW DICTIONARY (10th ed. 2014).

163. Clegg, *Allowing Felons to Vote*, *supra* note 53.

164. MYRNA PEREZ, BRENNAN CTR. FOR JUSTICE, *VOTER PURGES* 19 (2008) [hereinafter, PEREZ, *VOTER PURGES*], [http://www.brennancenter.org/sites/default/files/legacy/publications/Voter\\_Purges.f.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/Voter_Purges.f.pdf) [<http://perma.cc/W75W-J2FW>].

165. Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 932 (2007).

166. See Reuven Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT’L L.J. 197, 207 (2011).

167. See PRIMER, *supra* note 3, at 1.

168. See *infra* Part II.D for a discussion of voter restoration processes in Florida, Iowa, and Kentucky.

169. *Id.*

170. *Id.* (California, Colorado, Connecticut, and New York).

171. *Id.* (District of Columbia, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah). In 2016, Maryland’s legislature overrode a gubernatorial veto and restored the rights to vote for over forty thousand ex-felons. See Matt Ford, *Restoring Voting Rights for Felons in Maryland*, ATLANTIC (Feb. 9, 2016), <http://www.theatlantic.com/politics/archive/2016/02/maryland-felon-voting/462000/> [<http://perma.cc/5SYH-HKYY>].

172. PRIMER, *supra* note 3, at 1 (Alabama, Arizona, Delaware, Mississippi, Nebraska, Nevada, Tennessee, and Wyoming).

Some states restrict voting by the type of crime committed, whether it is the first offense, or the time elapsed since the sentence was completed.<sup>173</sup> For example, a convicted felon in Alabama loses the right to vote if he or she is convicted of a crime of “moral turpitude”<sup>174</sup>—and many crimes qualify as such.<sup>175</sup> In Mississippi, twenty-one specific offenses carry the penalty of disenfranchisement.<sup>176</sup> And in Tennessee, people convicted of “murder, treason, rape, voter fraud, [or] sexual offenses” cannot vote.<sup>177</sup>

Many states have begun revising their felon disenfranchisement statutes in recent years.<sup>178</sup> Contemporary public opinion surveys show widespread public support for granting voting rights to citizens who have completed their sentences.<sup>179</sup> At the same time, however, certain states have restricted voting rights for ex-felons or made the restoration process more cumbersome.<sup>180</sup> This “[p]ublic fear of crime, and a desire to punish criminal offenders . . . co-exists alongside broad support for basic civil liberties . . . and a right to due process for

173. *Id.*

174. *Moral Turpitude*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Conduct that is contrary to justice, honesty, or morality.”).

175. THE VOTING RIGHTS OF PEOPLE WITH CRIMINAL CONVICTIONS IN ALABAMA, BRENNAN CTR. FOR JUSTICE & RIGHT TO VOTE CAMPAIGN 1 (2005), <http://www.brennancenter.org/sites/default/files/analysis/AL%20Losing%20the%20Right%20to%20Vote.pdf> [<http://perma.cc/59Y4-UA4E>]. Examples of crimes of moral turpitude in Alabama include:

Impeachment, murder, rape in any degree, sodomy in any degree, sexual abuse in any degree, incest, sexual torture, enticing a child to enter a vehicle for immoral purposes, soliciting a child by computer, production of obscene matter involving a minor, production of obscene matter, parents or guardians permitting children to engage in obscene matter, possession of obscene matter, possession with intent to distribute child pornography, or treason.

ALA. CODE § 15-22-36.1(g) (2016).

176. *Voting Rights Restoration Efforts in Mississippi*, BRENNAN CTR. FOR JUST. (March 27, 2014), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-mississippi> [<http://perma.cc/L8KZ-HD5F>] (explaining that the Mississippi Constitution lists ten crimes that can eliminate a person’s right to vote, and that the state Attorney General treats eleven others as “effectively encompassed within the constitution’s list”); see also *Jim Crow Still Disenfranchising Voters*, MISS. NAACP (June 3, 2015), <http://naacpms.org/jim-crow-still-disenfranchising-voters/> [<http://perma.cc/AJ6P-LP79>] (explaining that committing “arson, armed robbery, bigamy, bribery, carjacking, embezzlement, extortion, felony bad check, felony shoplifting, forgery, larceny, murder, obtaining money or goods under false pretense, perjury, rape, receiving stolen property, robbery, statutory rape, theft, timber larceny, and unlawful taking of a motor vehicle” can eliminate the right to vote).

177. *Voting Rights Restoration Efforts in Tennessee*, BRENNAN CTR FOR JUST. (March 27, 2014), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-tennessee> [<http://perma.cc/GS34-YBZF>].

178. See Rachel M. Cohen, *The Growing Movement to Restore Voting Rights to Former Felons*, AM. PROSPECT (Aug. 7, 2015), <http://prospect.org/article/growing-movement-restore-voting-rights-former-felons> [<http://perma.cc/A3JR-YB2M>]; see also Rebecca Beitsch, *States Rethink Laws Denying the Vote to Felons*, HUFFINGTON POST (July 16, 2015, 11:08 AM), [http://www.huffingtonpost.com/entry/felons-right-to-vote\\_55a7c72de4b0896514d06ed0](http://www.huffingtonpost.com/entry/felons-right-to-vote_55a7c72de4b0896514d06ed0) [<http://perma.cc/2BJ4-YYFW>].

179. PRIMER, *supra* note 3, at 4.

180. See *infra* notes 193–98 and accompanying text for a discussion of state policies that make the voter restoration practice more cumbersome.

those accused of crimes.”<sup>181</sup>

There have been many voter restoration reforms in recent years. In 2013, the Delaware legislature passed a constitutional amendment that repealed the five-year waiting period after completion of a sentence.<sup>182</sup> In 2015, the California Secretary of State announced that the state would “drop litigation over policies that prevented low-level offenders from voting.”<sup>183</sup> In 2015, Wyoming passed a law allowing first time nonviolent offenders to vote.<sup>184</sup>

Though there is a modern trend toward loosening restrictions on post-sentence voting, some states have taken the opposite approach.<sup>185</sup> A memorandum from the Heritage Foundation<sup>186</sup> advocates for waiting lists and application processes for violent offenders.<sup>187</sup> This process would allow for an “individualized review” of the felon to determine eligibility for re-enfranchisement.<sup>188</sup> Scholars reference recidivism statistics to justify long waiting periods for re-enfranchising former felons.<sup>189</sup> In particular, they cite statistical data showing that a vast majority of felons are arrested for a new crime within three years, and three-fourths are arrested for a new crime within five years.<sup>190</sup> Additionally, groups advocating for crime victims, such as Kentuckians’ Voice for Crime Victims, support these statutes.<sup>191</sup>

The voter restoration process can be complicated in many states.<sup>192</sup> In eight

181. Jeff Manza, Clem Brooks & Christopher Uggen, “Civil Death” or Civil Rights? Public Attitude Towards Felon Disenfranchisement in the United States 3 (Northwestern Univ. Inst. Policy Research, Working Paper No. 02-39, 2003), <http://users.cla.umn.edu/~uggen/POQ8.pdf> [<http://perma.cc/5YS7-64Y2>].

182. *Voting Rights Restoration Efforts in Delaware*, BRENNAN CTR. FOR JUST. (Aug. 5, 2016), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-delaware> [<http://perma.cc/ZZ3D-RSN4>].

183. *Voting Rights Restored for 60,000 Low-Level Offenders*, SANJOSEINSIDE (Aug. 12, 2015), <http://www.sanjoseinside.com/2015/08/12/voting-rights-restored-for-60000-low-level-offenders/> [<http://perma.cc/Z89Q-C6U7>].

184. Beitsch, *supra* note 178.

185. See *infra* Parts II.D.1–2 for a discussion of the Iowa and Florida voting restoration processes. Additionally, some scholars advocate for tightening restrictions on felon voting. See, e.g., Clegg et al., *The Case Against Felon Voting*, *supra* note 27, at 2; Sigler, *supra* note 155, at 1744.

186. *About Heritage*, HERITAGE FOUND., <http://www.heritage.org/about> (last visited Feb. 15, 2017) (stating that the Heritage Foundation’s mission is “to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense”).

187. von Spakovsky & Clegg, *supra* note 27, at 8.

188. *Id.*

189. See, e.g., *id.*

190. *Id.*

191. Chris Kenning, *In Ky., Felon Voting Law Leaves Many Out of Election*, USA TODAY (Nov. 1, 2014), <http://www.usatoday.com/story/news/politics/2014/11/01/in-kentucky-felon-voting-law-leaves-many-out-of-election/18285799/> [<http://perma.cc/AV3W-NZWD>] (quoting Katherine Nichols, president of Kentuckians Voice for Crime Victims, in a discussion of the opposition to a proposed Kentucky amendment giving felons the right to vote because “felons ‘lost that right when (they) chose to commit the crime’”).

192. MARC MAUER & TUSHAR KANSAL, *THE SENTENCING PROJECT, BARRED FOR LIFE: VOTING RIGHTS RESTORATION IN PERMANENT DISENFRANCHISEMENT STATES* 1 (2005),

states, the only way for ex-felons to avoid lifetime disenfranchisement is through individual application, review, and approval.<sup>193</sup> Such processes involve long waiting periods and confusing application procedures to a clemency or pardon board.<sup>194</sup> Additionally, some states require the payment of court fines before restoring the right to vote.<sup>195</sup> From a practical perspective, many of these procedures are poorly advertised and change quickly, which can lead to de facto disenfranchisement where there may not be de jure disenfranchisement.<sup>196</sup> In some states, ex-felons are not given documentation to show that their parole has ended, so it becomes difficult to prove eligibility even when they are technically eligible.<sup>197</sup> Additionally,

[t]hree states hold the dubious . . . distinction of disenfranchising black voters [for prior felony convictions] at the highest national rates. Florida disenfranchises 23% of its black population, followed by Kentucky at 22%, and Virginia at 20%. In each of these three states more than one in five black adults is disenfranchised.<sup>198</sup>

### 1. Voter Restoration in Florida

In 2000, the Florida elections brought felon disenfranchisement laws to the forefront of public dialogue.<sup>199</sup> George W. Bush won the state's presidential election by a 537-vote margin, while over 500,000 voters were kept from the polls because of felony convictions.<sup>200</sup> At least 139,000 of those voters were African Americans who predominately vote for Democrats.<sup>201</sup> Today, fifty percent of disenfranchised ex-felons in the United States reside in Florida.<sup>202</sup>

Florida's felon disenfranchisement rules have become more restrictive in recent years.<sup>203</sup> In 2011, Governor Rick Scott reversed reforms passed by Governor Charlie Crist, making it more difficult for ex-felons to vote.<sup>204</sup> Most significantly, Governor Scott reinstated a waiting period of five to seven years

---

<http://www.sentencingproject.org/wp-content/uploads/2016/01/Barred-for-Life-Voting-Rights-Restoration-in-Permanent-Disenfranchisement-States.pdf> [<http://perma.cc/AX2D-G9YQ>].

193. PEREZ, VOTER PURGES, *supra* note 164, at 14, 38 n.68 (Alabama, Arizona, Delaware, Florida, Mississippi, Nevada, Tennessee, and Wyoming).

194. See MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 84.

195. Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 387 (2012).

196. DRUCKER & BARRERAS, *supra* note 2, at 1; WOOD & BLOOM, *supra* note 11, at 8 (“Across our country, potentially hundreds of thousands of *eligible* voters may be denied their right to vote.”).

197. MAUER & KANSAL, *supra* note 192, at 3.

198. Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 251 (2015).

199. Levy, *supra* note 12.

200. *Id.*

201. *Id.*

202. *Id.*

203. Riggs, *supra* note 15, at 107–11 (giving a comprehensive historical analysis of Florida's felon disenfranchisement policies).

204. *Id.* at 111.

after completion of sentence before ex-felons can apply for the right to vote.<sup>205</sup>

The voting rights of ex-felons in Florida are processed through the Office of Executive Clemency.<sup>206</sup> The Clemency Board, comprised of the governor and his cabinet, convenes four times a year.<sup>207</sup> The board deals with many issues of clemency and pardon, notably the restoration of civil rights.<sup>208</sup> The 2011 reforms to the Rules of Executive Clemency included the implementation of Rules 9 and 10, which created two tiers of ex-felons.<sup>209</sup> Ex-felons who have committed less serious crimes fall within Rule 9<sup>210</sup> and are required to wait five years upon completion “of all sentences and conditions of supervision imposed.”<sup>211</sup> Ex-felons who have committed more serious crimes<sup>212</sup> must wait seven years and have a hearing before the Clemency Board to get their vote back.<sup>213</sup> In the hearing, ex-felons have five minutes to make their cases and answer board questions.<sup>214</sup> Additionally, all ex-felons must repay any outstanding restitution.<sup>215</sup>

The success rate of the voter restoration process in Florida is extremely low.<sup>216</sup> Former Florida Governor Bush approved only one-fifth of the 385,522 applications for restoration of voting rights submitted during his tenure.<sup>217</sup> Clemency decisions in Florida rest mainly on the governor’s shoulders. “If the governor recommends clemency, and if a majority of the cabinet members agree—and they almost always do—the ex-offender’s civil rights are restored. If the governor feels otherwise, the petitioner returns home without the full privileges of citizenship.”<sup>218</sup>

## 2. Voter Restoration in Iowa

Like Florida, Iowa has recently turned toward more conservative felon

---

205. See Kate Conway, *Gov. Rick Scott Revives Law Originally Intended to Disenfranchise Blacks*, POL. CORRECTION (Mar. 11, 2011, 10:00 AM), <http://politicalcorrection.org/blog/201103110003> [<http://perma.cc/5BM2-HXWZ>].

206. RULES OF EXECUTIVE CLEMENCY, *supra* note 154, at 3.

207. *Id.* at 3, 16.

208. *Id.* at 5.

209. *Id.* at 10–15; Riggs, *supra* note 15, at 111 (“In March of 2011 . . . the Board voted unanimously to revise . . . the rules governing the restoration of civil rights.”).

210. Rule 9 sets forth a list of serious crimes of which individuals seeking restoration of civil rights under Rule 9 must never have been convicted. See RULES OF EXECUTIVE CLEMENCY, *supra* note 154, at 11–13.

211. *Id.* at 10.

212. Rule 10 applies to individuals who are seeking restoration of their rights but who have been convicted of the serious crimes listed in Rule 9. These crimes include murder, DUI, sexual battery, and child abuse, among many others. See *id.* at 11–13.

213. *Id.* at 14; see also Riggs, *supra* note 15, at 111 (noting that Rule 10 felons may end up waiting years for a hearing because the Clemency Board only meets quarterly in Tallahassee).

214. RULES OF EXECUTIVE CLEMENCY, *supra* note 154, at 16.

215. *Id.* at 11, 15.

216. Levy, *supra* note 12.

217. *Id.*

218. *Id.*

disenfranchisement laws.<sup>219</sup> In 2011, Governor Terry Branstad reversed a prior executive order that had allowed ex-felons who had completed their sentence to vote.<sup>220</sup> Ex-felons in Iowa must now apply to the governor to have their rights restored.<sup>221</sup> In 2016, Governor Branstad simplified the previously arduous application.<sup>222</sup> The new application includes thirteen questions instead of twenty-nine.<sup>223</sup> The application must be supplemented by a criminal history report, which must be paid for by the applicant,<sup>224</sup> and documented proof that court costs or fines have been paid.<sup>225</sup>

Very few ex-felons in Iowa have had their right to vote restored.<sup>226</sup> Between 2011 and the end of 2013, of the nearly twenty-five thousand people who had completed their sentences, the governor only restored the right to vote for forty.<sup>227</sup> In 2012, Iowa's Republican Secretary of State, Matt Schultz, launched a large-scale investigation into cases of potential voter fraud, sixty-eight of which were ex-felons who had potentially registered to vote before their rights had been restored.<sup>228</sup> The investigation resulted in sixteen charges of voter fraud.<sup>229</sup> The investigation report also indicated that there were twenty former felons whose rights should have been restored but who instead were denied access to

---

219. See *Voting Rights Restoration Efforts in Iowa*, BRENNAN CTR. FOR JUST. (Sept. 23, 2016), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-iowa> [<http://perma.cc/Z8CG-2H6G>].

220. *Id.*

221. *Id.* For the application, see OFFICE OF THE GOVERNOR OF IOWA, STREAMLINED APPLICATION FOR RESTORATION OF CITIZENSHIP RIGHTS (2012), <http://governor.iowa.gov/sites/default/files/documents/Streamlined%20Application%20for%20Restoration%20of%20Citizenship%20Rights.pdf> [<http://perma.cc/B3TE-LGS6>].

222. David Pitt, *Iowa Simplifies Voting Rights Restoration Form for Felons*, ASSOCIATED PRESS (Apr. 27, 2016) <http://bigstory.ap.org/article/887e4ea415284232b6ab12e074e233d4/iowa-simplifies-voting-rights-restoration-form-felons>.

223. *Id.*

224. Iowa has two levels of obtaining a criminal history report. See *Request an Iowa Criminal History Record Check*, IOWA DEP'T PUB. SAFETY, [http://www.dps.state.ia.us/DCI/supportoperations/crimhistory/obtain\\_records.shtml](http://www.dps.state.ia.us/DCI/supportoperations/crimhistory/obtain_records.shtml) (last visited Feb. 15, 2017) [<http://perma.cc/NR82-JVCD>]. A limited request is available through the Iowa Criminal History Record Checks, and each report costs fifteen dollars. See *id.* A full criminal history report, which may require a signed waiver, can be requested by filling out a form from the Iowa Division of Criminal Investigation, and either faxing, mailing, or hand delivering it to the office. See *id.* The latter request is not available online or by phone. *Id.*

225. OFFICE OF THE GOVERNOR OF IOWA, *supra* note 221.

226. Ryan J. Foley, *Iowa Governor Restores More Felons' Voting Rights*, WASH. TIMES (Jan. 14, 2014), <http://www.washingtontimes.com/news/2014/jan/14/iowa-governor-restores-more-felons-voting-rights/?page=all> [<http://perma.cc/6U4N-P7J7>].

227. *Id.*

228. MATT SCHULTZ, DCI VOTER FRAUD INVESTIGATIONS REPORT 2, 5 (2014), <http://publications.iowa.gov/16874/1/DCI%20Voter%20Fraud%20Report%205-8-14.pdf> [<http://perma.cc/J727-3S7B>]; Jason Noble, *Final Report: 117 Fraudulent Votes Found in Investigation*, DES MOINES REG. (May 8, 2014, 3:03 PM), <http://www.desmoinesregister.com/story/news/politics/iowa-politics/2014/05/08/iowa-secretary-of-state-voter-fraud-report-matt-schultz/8858595/> [<http://perma.cc/5YL3-QBT8>].

229. SCHULTZ, *supra* note 228, at 5.

the ballot box.<sup>230</sup>

The Iowa Supreme Court recently ruled on a challenge to a felon disenfranchisement law by a low-level drug offender.<sup>231</sup> Kelli Jo Griffin, who completed her prison sentence and probation, registered and voted in 2013.<sup>232</sup> Griffin was prosecuted for perjury for registering and voting in a 2013 municipal election, and a jury acquitted her.<sup>233</sup> In a separate suit, she challenged the Iowa statute, arguing that the law invalidly revoked her privileges as an elector and constituted a violation of her due process rights.<sup>234</sup> Essentially, the Iowa Supreme Court would decide whether the drug offense for which Griffin was convicted constituted an “infamous crime” under the state constitution.<sup>235</sup> Ultimately, the court relied in part on the legislature’s intent and denied her challenge.<sup>236</sup>

### 3. Voter Restoration in Kentucky

Kentucky has experienced a rollercoaster of felon voter restoration policies. In November 2015, Kentucky Governor Steven Beshear issued an executive order making about 140,000 nonviolent ex-felons able to apply for voter restoration.<sup>237</sup> The executive order specified that those who were not convicted of treason, bribery in an election, or certain violent offenses automatically would have their right to vote restored as long as outstanding restitution had been paid and there were no “pending criminal cases, charges or arrests.”<sup>238</sup> The order counteracted Kentucky’s place among the four states that provided no process for automatically restoring the rights of ex-felons who have completed their sentences.<sup>239</sup>

Then, in December 2015, Republican Governor Matt Bevin took office and revoked the executive order.<sup>240</sup> Though Governor Bevin had campaigned on

---

230. *Id.*; Noble, *supra* note 228.

231. Griffin v. Pate, 884 N.W.2d 182, 184 (Iowa 2016).

232. *Id.* See *infra* Part III.B.4 for a discussion of Griffin’s voter fraud case.

233. Griffin, 884 N.W.2d at 184.

234. *Id.*

235. *Id.* at 183.

236. Griffin, 884 N.W.2d at 203.

237. Erik Eckholm, *Kentucky Governor Restores Voting Rights to Thousands of Felons*, N.Y. TIMES (Nov. 24, 2015), [http://www.nytimes.com/2015/11/25/us/kentucky-governor-restores-voting-rights-to-thousands-of-felons.html?\\_r=0](http://www.nytimes.com/2015/11/25/us/kentucky-governor-restores-voting-rights-to-thousands-of-felons.html?_r=0) [<http://perma.cc/339A-UCCY>].

238. Exec. Order No. 2015-871, Relating to the Restoration of Civil Rights for Convicted Felons (Nov. 24, 2015), <http://corrections.ky.gov/communityinfo/Documents/Civil%20Rights/Executive%20Order%202015-871.pdf> [<http://perma.cc/3PX6-76TJ>].

239. *Id.* At the time, Kentucky was one of four states in which ex-felons were permanently deprived of the right to vote; Iowa, Florida, and Virginia were the others. See *Voting Rights Restoration Efforts in Iowa*, *supra* note 219; *Voting Rights Restoration Efforts in Virginia*, BRENNAN CTR. FOR JUSTICE (Jan. 6, 2017), <http://www.brennancenter.org/analysis/voting-rights-restoration-efforts-virginia> [<http://perma.cc/8DBS-KFWB>]. See also *supra* note 29 for more information about Virginia.

240. Samantha Lachman, *A GOP Governor Just Undid a Major Voting Rights Victory in His State*, HUFFINGTON POST (Dec. 23, 2015, 1:09 PM), <http://www.huffingtonpost.com/entry/matt-bevin->

supporting restoration of civil rights for ex-felons, he believed the change should happen through legislative action.<sup>241</sup> Four months after he revoked the executive order, Governor Bevin signed Kentucky House Bill 40,<sup>242</sup> which allows nonviolent, nonsexual offenders to apply for restoration after a waiting period and paying a hundred dollar fine.<sup>243</sup>

### III. DISCUSSION

Felon disenfranchisement is deeply ingrained in American political culture.<sup>244</sup> The longstanding nature of this practice and the Supreme Court's permissiveness<sup>245</sup> make a sweeping challenge unlikely to be successful. This Comment, therefore, has focused on the discrete pocket where the issue is most problematic: states with the most restrictive laws. Though the availability of voter restoration once made "wide-reaching laws" disenfranchising all convicted felons "more palatable,"<sup>246</sup> history does not justify the practice of these laws today. Similarly, traditional justifications for felon disenfranchisement do not justify contemporary voter restoration procedures.

Part III.A of this Section applies the traditional justifications for felon disenfranchisement to the current state of voter restoration. Part III.B explores the arbitrary and inefficient nature of the voter restoration processes. Finally, Part III.C argues that automatic eligibility upon completion of a sentence is a more efficient and fair alternative.

#### A. *Contemporary Voter Restoration Processes Do Not Fit Within the Traditional Justifications for Felon Disenfranchisement.*

Many ex-felons are unable to regain the right to vote due to confusing and arbitrary restoration processes.<sup>247</sup> This is true even when the ex-felon may technically be eligible to vote.<sup>248</sup> Traditional arguments in favor of felon disenfranchisement cannot justify either de facto or de jure disenfranchisement, which can result in indefinite disenfranchisement.<sup>249</sup>

The social contract theory cannot justify lifetime bans because such bans "insult the principle that the offender can repay his debt to society . . . [by]

---

voting-rights\_us\_567ac72ee4b014efe0d7aacc [http://perma.cc/RQ4F-S6WK].

241. *Id.*

242. H.B. 40, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016).

243. Dustin Skipworth, *Bevin Signs Legislation to Restore Felons' Voting Rights*, WKU HERALD (Apr. 18, 2016), [http://wkuherald.com/news/bevin-signs-legislation-to-restore-felons-voting-rights/article\\_ba072132-05bc-11e6-aa26-e727b29d8e94.html](http://wkuherald.com/news/bevin-signs-legislation-to-restore-felons-voting-rights/article_ba072132-05bc-11e6-aa26-e727b29d8e94.html) [http://perma.cc/48H6-MBUL].

244. See *supra* Part II.A.2 for a discussion of the history of felon disenfranchisement in the United States.

245. See *supra* Parts II.A.3–4 for a discussion of felon disenfranchisement jurisprudence.

246. HOLLOWAY, *supra* note 26, at 130.

247. For example, see *supra* Part II.D.1 for a discussion of the backlog of restoration applications in Florida.

248. See *supra* note 12 and accompanying text for a discussion of de facto disenfranchisement.

249. See *supra* Part II.C for a discussion of these justifications.



servicing one's punishment to completion and moving on to become a better man."<sup>250</sup> While some social contract theorists say that temporary bans may be justified, they present no strong governmental purpose for the practice.<sup>251</sup> Additionally, the confusing restoration processes that lead to de facto disenfranchisement create problems for the social contract theory because citizens are essentially parties to a contract for which they do not know the terms.<sup>252</sup>

Like the social contract theory, traditional punishment justifications become problematic when applied to current restoration processes. None of the four traditional justifications for punishment apply to current practices.<sup>253</sup> First, the rehabilitative justification rings hollow with a lack of any evidence that disenfranchisement helps reintegrate ex-felons back into society.<sup>254</sup> In fact, "the very message of such exclusion is to suggest that ex-[felons] are beyond redemption."<sup>255</sup> On the other hand, voting has been found to encourage prosocial behavior and reduce recidivism rates among ex-felons.<sup>256</sup> Therefore, eliminating long waiting periods and cumbersome application processes would accomplish the goal of rehabilitation.<sup>257</sup> Justice Brennan articulated this idea when he said that "[disenfranchisement] constitutes the very antithesis of rehabilitation . . . . I can think of no more certain way in which to make a man in whom, perhaps, rest the seeds of serious antisocial behavior more likely to pursue further a career of unlawful activity."<sup>258</sup>

Second, it is very unlikely that the possibility of disenfranchisement will deter criminal behavior.<sup>259</sup> If the possibility of incurring huge fines or serving a long prison sentence does not deter a potential offender, the potential of losing voting rights similarly will not.<sup>260</sup> This is especially true given the invisible and collateral nature of disenfranchisement.<sup>261</sup> In particular, young people, who are most likely to commit and recommit crimes, are unlikely to value their right to vote as much as older potential offenders.<sup>262</sup>

---

250. See Levine, *supra* note 51, at 224.

251. See, e.g., Ewald, *Civil Death*, *supra* note 2, at 1107–08.

252. See *supra* Part II.D for a discussion of confusing restoration processes and see *infra* notes 329–35 and accompanying text for a discussion of the wasteful voter fraud investigation in Iowa.

253. Ewald, *Civil Death*, *supra* note 2, at 1105.

254. Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1166 (2004) [hereinafter Karlan, *Convictions and Doubts*].

255. *Id.* at 1166.

256. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 196–97 (2004) [hereinafter Uggen & Manza, *Voting and Subsequent Crime*].

257. See *infra* Part III.B.3 and accompanying text.

258. *Trop v. Dulles*, 356 U.S. 86, 111 (1958) (Brennan, J., concurring).

259. See Karlan, *Convictions and Doubts*, *supra* note 254, at 1166.

260. *Id.*

261. Ewald, *Civil Death*, *supra* note 2, at 1103–07 (arguing that the collateral consequences of a sentence should be reviewed with a standard of proportionality to the crime).

262. HULL, *supra* note 148, at 44; see also Bryan Lee Miller & Laura E. Agnich, *Unpaid Debt to*

Third, the retributive justification, the idea of proportionally punishing crime, cannot justify lifetime disenfranchisement, because it implies that a person could never fully repay his or her debt to society.<sup>263</sup> The retributive theory cannot justify blanket bans because these bans provide the same punishment regardless of the crime.<sup>264</sup> Therefore, blanket voting bans for felonies “lump[] together crimes of vastly different gravity.”<sup>265</sup> Though some advocates of disenfranchisement argue for individualized review of restoration applications, they do not advocate for individualized review *before* the right to vote is revoked.<sup>266</sup> Without this form of review, there is no way to know whether disenfranchisement is appropriate for a certain crime (possibly with the exception of some voting fraud convictions).<sup>267</sup> Fourth, the punishment justification of incapacitation may justify the limited practice of disenfranchising those who commit electoral crimes, since the punishment is narrowly tailored to fit the crime.<sup>268</sup> However, actual cases of voter fraud are very rare.<sup>269</sup> For ex-felons who have not committed electoral crimes, lifetime disenfranchisement is disproportionately harsh, especially when there is no evidence that someone on parole or probation will be more likely to commit voter fraud.<sup>270</sup>

*B. Contemporary Voter Restoration Processes Are Arbitrary and Inefficient*

Because states rely on the pardon process as the primary vehicle for ex-felon voter restoration, that process should be fair and expedient. While it is true that the pardon has the potential to be a “weapon for reform . . . directed against the most basic structural economic and racial injustices,”<sup>271</sup> this assumes there are sufficient checks and balances on pardon power. Currently, felon restoration processes fall far short of providing a proper remedy.<sup>272</sup> These processes are

---

*Society: Exploring How Ex-felons View Restrictions on Voting Rights After the Completion of Their Sentence*, CONTEMP. JUST. REV., Nov. 2015, at 11 (“When examining the responses to the question, ‘How does losing these rights make you feel?’ [among ex-felons] three distinct narratives emerged—anger, embarrassment, and fatalism.”).

263. Ewald, *Civil Death*, *supra* note 2, at 1106–07.

264. See Karlan, *Convictions and Doubts*, *supra* note 254, at 1167.

265. *Id.*

266. See, e.g., von Spakovsky & Clegg, *supra* note 27, at 8.

267. See Ewald, *Civil Death*, *supra* note 2, at 1103 (“It is not logically clear why the loss of voting rights is a proportional penalty for a first-time drug offender sentenced to probation, for example, as well as a murderer incarcerated for life, while the sanction is rarely imposed at all on those who violate the social contract and endanger the lives of the public by driving intoxicated.”); see also Hamed Aleaziz et al., *UFO Sightings Are More Common Than Voter Fraud*, MOTHER JONES (Aug. 2, 2012), <http://www.motherjones.com/politics/2012/07/voter-id-laws-charts-maps> [http://perma.cc/8G52-Y4TR] (stating that voter fraud is extremely rare). See *infra* notes 329–35 and accompanying text for a discussion of the wasteful voter fraud investigation in Iowa.

268. See Ewald, *Civil Death*, *supra* note 2, at 1106.

269. Aleaziz et al., *supra* note 267.

270. See WOOD, RESTORING THE RIGHT TO VOTE, *supra* note 35, at 10–11.

271. MOORE, *supra* note 118, at 225 (internal quotation marks omitted).

272. See MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 81–88 (providing a discussion of the difficulties in restoring felon voting rights through state clemency boards).

arbitrary and inefficient in many ways, including: (1) a lack of meaningful review of political decisions,<sup>273</sup> (2) the requirement that applicants pay fees,<sup>274</sup> (3) arbitrary waiting periods,<sup>275</sup> and (4) the complicated and poorly publicized processes.<sup>276</sup>

### 1. Lack of Meaningful Review of Political Decisions

Reliance on the pardon process for voter restoration inappropriately places voting rights in the hands of politicians.<sup>277</sup> Changes in governorship often correspond with changes in clemency procedures, and sometimes the changes are extreme.<sup>278</sup> Florida provides a perfect case study with the number of voter restoration applications approved varying widely depending who is governor.<sup>279</sup> Under Lawton Chiles, governor from 1991 to 1998, the Florida Clemency Board approved significantly fewer applications per year than the governor before him.<sup>280</sup> Governor Chiles also reenacted Rule of Executive Clemency 9A, which required a hearing for most voter restorations.<sup>281</sup> Bush, governor from 1999 to 2007, approved around 73,000 applications for civil rights restoration, about a fifth of the 385,522 applications received by the clemency board during his term.<sup>282</sup> Then, Governor Crist streamlined the process for civil rights restoration and approved nearly 155,315 applications during his four-year term from 2007–2011.<sup>283</sup> Governor Scott revoked Governor Crist's reforms, again making it more difficult for ex-felons to regain the right to vote.<sup>284</sup> As of January 2015, Governor Scott had approved 1,534 applications since he took office in 2011, while over 11,000 applications were pending.<sup>285</sup>

Because clemency is processed through the executive pardon mechanism, there has been a general lack of judicial review of these decisions.<sup>286</sup> There has also been a lack of due process protections for clemency hearings, though the

---

273. See *infra* Part III.B.1 and accompanying text.

274. See *infra* Part III.B.2 and accompanying text.

275. See *infra* Part III.B.3 and accompanying text.

276. See *infra* Part III.B.4 and accompanying text.

277. See HOLLOWAY, *supra* note 26, at 119.

278. As an example, see *supra* Part II.D.2 for a discussion of changes in Iowa.

279. Levy, *supra* note 12.

280. *Id.*

281. Kyle Yeldell, *Punished for Life*, BLACK PRESS USA (Mar. 26, 2014), <http://www.blackpressusa.com/punished-for-life/#sthash.qgmU42XA.dpbs> [http://perma.cc/AN6Z-XT3T]; RULES OF EXECUTIVE CLEMENCY, *supra* note 154.

282. Levy, *supra* note 12.

283. Dan Sweeney et al., *Florida Among Nation's Toughest Places to Have Voting Rights Restored*, SUNSENTINEL (Jan. 25, 2015), <http://www.sun-sentinel.com/news/florida/sfl-felon-voting-rights-20150121-htmlstory.html> [http://perma.cc/B3Z5-D7Z7].

284. *Id.*

285. *Id.*

286. Chiang, *supra* note 37, at 1343. Chiang argues that “in contrast to traditional clemency, due process should apply when the clemency power is expressly used to restore voting rights and when there is an opportunity for an oral hearing.” *Id.* at 1333.

Supreme Court has affirmed their constitutionality.<sup>287</sup> This is because there are no protectable interests if these decisions are considered an act of grace.<sup>288</sup> The Supreme Court has held that “pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”<sup>289</sup>

However, voter restoration decisions differ in important ways from traditional sentence commutation or pardon decisions.<sup>290</sup> First, voting rights are not litigated because their loss is a collateral, rather than direct, consequence of a sentence.<sup>291</sup> Second, former felons applying for voter restoration have likely completed their sentences and are only seeking to “mitigate [their] legal consequences.”<sup>292</sup> This difference may make former felons applying for restoration similar to those “seeking state privileges,” such professional licenses or security clearing.<sup>293</sup> Privilege-seeking processes, unlike traditional pardon and commutation procedures, generally involve more process and judicial review.<sup>294</sup>

Additionally, the clemency boards in many states are not independent. In Florida, the clemency board consists of the governor and his cabinet.<sup>295</sup> In Iowa, the governor’s office controls voter restoration processes.<sup>296</sup> These boards would be more effective if they consisted of independent members who had expertise in analyzing the fairness of the issue at stake<sup>297</sup>—for example, experts in criminal justice or others who are able to apply fairer standards than merely deciding whether certain subjective qualities make the person worthy of restoration.<sup>298</sup>

## 2. The Payment Requirement

It is inappropriate to require former felons to pay fines or fees in order to apply for the right to vote.<sup>299</sup> These fines include court costs and other legal financial obligations like victim restitutions, attorney fees, and other costs associated with confinement and supervision.<sup>300</sup> Expenses may also include the

---

287. *See id.*

288. *Id.* at 1333, 1342–43.

289. *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 276 (1998) (plurality opinion) (quoting *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1985)).

290. *See Chiang*, *supra* note 37, at 1335–54.

291. *Id.* at 1350–51.

292. *Id.* at 1351.

293. *Id.*

294. *See id.* at 1351–52.

295. *See supra* notes 207–08 and accompanying text for a discussion of the makeup of the Florida Clemency Board.

296. *See supra* Part II.D.2 for a discussion of voter restoration in Iowa.

297. *See Kobil, The Quality of Mercy Strained*, *supra* note 104, at 622–23.

298. *Cf. Levy*, *supra* note 12 (discussing former Florida Governor Bush’s process for approving applications for the restoration of civil rights).

299. *See Cammett*, *supra* note 195, at 397–99; ALEXANDER, *supra* note 26, at 159.

300. *Legal Financial Obligations (LFOs)*, JUST. CTR., <http://csgjusticecenter.org/courts/legal-financial-obligations/#> (last visited Feb. 15, 2017) [<http://perma.cc/DV6M-H9J2>].

application fee required to initiate the voter restoration process<sup>301</sup> or the cost of obtaining criminal record reports.<sup>302</sup> While some states have removed the requirement that ex-felons repay fees for their voter restoration application,<sup>303</sup> in others, the condition remains.<sup>304</sup>

Based on *Richardson v. Ramirez*, appellate courts have decided that requiring individuals to pay fines for voter restoration is constitutional because a felon's right to vote is not fundamental.<sup>305</sup> Fines are defined broadly.<sup>306</sup> In *Johnson v. Bredesen*,<sup>307</sup> the Sixth Circuit held that the requirement that an ex-felon pay child support and victim restitution before registering to vote holds a "direct and rational" relationship to state interests.<sup>308</sup> However, the dissent took a different approach.<sup>309</sup> Judge Karen Moore questioned whether the statute even passed rational basis review:

[T]he absence of any policy justification for the distinction in the instant case, as well as Supreme Court precedent addressing the propriety of provisions that discriminate on the basis of wealth, compel the conclusion that this is one of those instances [where the statute does not pass rational basis review].<sup>310</sup>

Judge Moore's dissent may indicate a trend toward "a more nuanced discourse" around fee obligations before ex-felon voter registration.<sup>311</sup> This trend, coupled with legislative reforms, may curb the practice of denying voter restoration "simply because they cannot pay their debts."<sup>312</sup> Supporters of disenfranchisement policies argue that allowing ex-felons to vote without paying fines occurs "at the expense of victims who are still owed restitution."<sup>313</sup> However, the fee requirements in many states, such as Tennessee and Iowa, are much broader than victim restitution and include unrelated debts like child support.<sup>314</sup> It is inappropriate to require ex-felons to pay these debts in order to vote when the same is not required of the general population. This requirement functions like a modern-day poll tax, which was made illegal by the Twenty-

---

301. Cammett, *supra* note 195, at 388.

302. See *supra* Parts II.D.1–2 for a discussion of the fee requirements of Florida and Iowa, respectively.

303. See, e.g., Press Release, Virginia.gov, Governor McAuliffe Announces New Reforms to Restoration of Rights Process (June 23, 2015), <http://governor.virginia.gov/newsroom/newsarticle?articleID=11651> [<http://perma.cc/7NG3-5QU2>].

304. See Cammett, *supra* note 195, at 387.

305. *Id.* at 389–91.

306. See *id.*

307. 624 F.3d 742 (6th Cir. 2010).

308. *Johnson*, 624 F.3d at 747.

309. *Id.* at 754 (Moore, J., dissenting).

310. *Id.* at 756 (Moore, J., dissenting).

311. Cammett, *supra* note 195, at 402.

312. See *id.* at 405.

313. von Spakovsky & Clegg, *supra* note 27, at 8.

314. See, e.g., *Johnson*, 624 F.3d at 754–55 (Moore, J., dissenting). See *supra* note 224–25 and accompanying text for the fee payment requirements in Iowa.

Fourth Amendment.<sup>315</sup>

### 3. Arbitrary Wait Times

The wait times imposed on former felons are arbitrary and confusing. Supporters of disenfranchisement policies argue that requiring a waiting period is “fair and reasonable given the high recidivism rate among felons.”<sup>316</sup> However, this does not account for the offense-specific wait times in some states. In Florida, felons are categorized based on the seriousness of their offense, with waiting periods proportional to severity.<sup>317</sup> Not only are these laws confusing, they are not based on accurate data about recidivism.<sup>318</sup>

Recidivism data is misleading. Data from a thirty-state survey revealed that two-thirds of felons were arrested for a new crime within three years and three-fourths were arrested for a new crime within five years.<sup>319</sup> Advocates of felon disenfranchisement have argued that because of recidivism, states should “wait some period of time, review the felon’s record and, if he has shown he is now a positive part of his community, then have a formal ceremony—rather like a naturalization ceremony—in which his rights are restored.”<sup>320</sup> However, the data these advocates relied upon conveniently focuses on arrest rates, rather than prison reentry rates, which are lower.<sup>321</sup>

Additionally, significant evidence shows that voter restoration can help reintegrate ex-felons into society.<sup>322</sup> Voting and civic participation are connected with prosocial behavior, such as participation in stable work and family

315. U.S. CONST. amend. XXIV, § 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

*Id.*

316. Roger Clegg, *Felon Voting and Congress*, CTR. FOR EQUAL OPPORTUNITY (Feb. 17, 2015, 10:27 AM), <http://www.ceousa.org/voting/voting-news/felon-voting/873-felon-voting-and-congress> [<http://perma.cc/W62F-A3V8>].

317. See *supra* Part II.D.1 for a discussion of Florida’s felon restoration policies.

318. See *infra* notes 318–20 and accompanying text for a discussion of the flawed data on felon re-enfranchisement wait periods.

319. MATTHEW DUROSE ET AL., U.S. DEP’T OF JUSTICE, *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 1 (2014), <http://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf> [<http://perma.cc/EBU3-HYVQ>].

320. Roger Clegg, *Eric Holder’s Call for Felon Reenfranchisement*, NAT’L REV. (Feb. 12, 2014, 12:20 PM), <http://www.nationalreview.com/corner/370943/eric-holders-call-felon-reenfranchisement-roger-clegg> [<http://perma.cc/6GX4-EY5C>].

321. See Spakovsky & Clegg, *supra* note 27, at 8. The number of former felons returning to prison was lower than the number cited by von Spakovsky and Clegg, with nearly half of former felons being imprisoned for new arrests or parole or probation violations within three to five years. DUROSE, *supra* note 319, at 1.

322. See WOOD, *RESTORING THE RIGHT TO VOTE*, *supra* note 35, at 8 (“While having strong family support and stable employment are critical to a person’s successful transition from prisoner to citizen, researchers have determined that one’s identity as a responsible citizen—including jury service, volunteer work, neighborhood involvement, and voting—is also important.”).

relationships.<sup>323</sup> Encouraging this behavior can help curb recidivism. A study of the voting habits of young adults who had criminal records presented an interesting result: those who voted had lower arrest and incarceration rates.<sup>324</sup> The study concluded that “[w]hile the single behavioral act of casting a ballot is unlikely to be the sole factor that turns felons’ lives around, the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.”<sup>325</sup> Another seminal study showed that “among former arrestees, about 27 percent of the nonvoters were rearrested, relative to 12 percent of the voters.”<sup>326</sup> Despite the fact that voting involvement is just one possible figure that helps lower recidivism rates, it should be encouraged because of its likely potential rehabilitative effect. Lastly, long waiting periods do not affect public safety significantly enough to justify the practice.<sup>327</sup>

#### 4. Confusing and Poorly Publicized Processes for Voter Restoration

Voter restoration processes are not well advertised and are confusing to ex-felons seeking relief.<sup>328</sup> Because policies vary among states and are always changing, there is widespread confusion about who can register, where they can register, and when they can register.<sup>329</sup>

The recent changes in felon voting laws in Iowa<sup>330</sup> have been highlighted by an expensive investigation and lawsuit.<sup>331</sup> Griffin, the ex-felon discussed in Part II.D.2, registered to vote believing that her rights had been automatically restored from a previous executive order.<sup>332</sup> She and twenty-five others were charged with perjury as a result of an investigation that cost the state \$280,000.<sup>333</sup> Democrats and voting rights activists have called this expense a waste of money, particularly in light of general confusion over the restoration process.<sup>334</sup> The jury

---

323. Uggen & Manza, *Voting and Subsequent Crime*, *supra* note 256, at 196–97.

324. *Id.* at 204–05. Despite my critique that arrest rates are lower than prison reentry rates, I chose to focus on the scholars’ data about arrests to more fully respond to their arguments.

325. *Id.* at 213.

326. Riggs, *supra* note 15, at 112 (quoting MANZA & UGGEN, *LOCKED OUT*, *supra* note 5, at 131–33).

327. RAM SUBRAMANIAN ET AL., VERA INST. OF JUSTICE, *RELIEF IN SIGHT?: STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014*, at 34 (2014), <http://www.vera.org/sites/default/files/resources/downloads/states-rethink-collateral-consequences-report-v3.pdf> [<http://perma.cc/7XC7-866S>].

328. See WOOD & BLOOM, *supra* note 11, at 1.

329. *Id.*

330. See *supra* Part II.D.2 for a discussion of Iowa felon voting law and *Griffin v. Pate*.

331. See *Ex-drug Offender Acquitted in Iowa Voter Fraud Case*, TRIB LIVE (Mar. 20, 2014, 6:57 PM), <http://triblive.com/usworld/nation/5804533-74/griffin-iowa-voting> [<http://perma.cc/XKA8-3JUL>].

332. David Pitt, *Law Removing Felons’ Voting Rights Is Upheld*, DES MOINES REG. (Sept. 29, 2015, 2:39 PM), <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/09/29/law-removing-felons-voting-rights-upheld/73040666/> [<http://perma.cc/Z5YU-VW6T>].

333. *Ex-drug Offender Acquitted in Iowa Voter Fraud Case*, *supra* note 331. Many of those charged as a result of the investigation were former felons. *Id.*

334. *Id.*

acquitted Griffin after a short deliberation.<sup>335</sup> Notably, the Iowa Secretary of State's investigation revealed more wrongful denials of votes than instances of potential voter fraud.<sup>336</sup>

There is sometimes very little communication between the criminal justice system and election officials.<sup>337</sup> This has led to confusion and at times, requirements that ex-felons present unnecessary documentation.<sup>338</sup> For example, those who are convicted of non-disenfranchising crimes may be referred to the voter restoration process only to discover that they had never lost their right to vote.<sup>339</sup> This de facto disenfranchisement is particularly problematic.<sup>340</sup>

### C. *Automatic and Unconditional Voter Registration*<sup>341</sup>

#### 1. Automatic Voter Restoration Eliminates Confusion

Automatic voter restoration eliminates confusion about voter eligibility and process.<sup>342</sup> Voter eligibility confuses ex-felons, election officials, and local elected officials alike.<sup>343</sup> As discussed above, the frequently changing laws in many states, as well as the varying policies among states, creates uncertainty about the process.<sup>344</sup> In states with waiting periods, the burden of tracking the waiting period often falls on the ex-felon.<sup>345</sup> In turn, ex-felons face difficulties proving to election officials exactly when their parole or probation ended because they have not received documentation to that effect.<sup>346</sup>

The failure of state governments to compile and maintain adequate data on voter restoration may cause a lack of knowledge among election and local officials.<sup>347</sup> In a study of restoration policies nationwide, local election officials were less confused in states where voting rights were restored immediately upon release from prison.<sup>348</sup>

---

335. *Id.*

336. Noble, *supra* note 228.

337. WOOD & BLOOM, *supra* note 11, at 1.

338. *Id.* at 1, 6.

339. WOOD, RESTORING THE RIGHT TO VOTE, *supra* note 35, at 14.

340. *See* WOOD & BLOOM, *supra* note 11, at 8–9.

341. In this Part, I propose automatic voter restoration upon completion of a sentence. Though some commentators observe that “completion of a sentence” may include the payment of fines, restitution, and court costs, I do not use the term that way. Rather, I argue that an ex-felon's vote should be restored upon release from incarceration. *See* WOOD, RESTORING THE RIGHT TO VOTE, *supra* note 35, at 21 (noting the range of options for when voter restoration can occur, from “full restoration, including the right to vote from prison” to “restoration upon completion of sentence and expiration of a waiting period”).

342. *See* WOOD & BLOOM, *supra* note 11, at 8.

343. *See supra* Part III.B.4; WOOD & BLOOM, *supra* note 11, at 1, 6.

344. *See id.* at 1.

345. MAUER & KANSAL, *supra* note 192, at 3.

346. *Id.*

347. *See* WOOD & BLOOM, *supra* note 11, at 3–5.

348. *Id.* at 8.



## 2. Automatic Voter Restoration Is Efficient

Automatic voter restoration saves valuable time and resources spent reviewing restoration applications.<sup>349</sup> In states with arduous restoration application procedures, resources are spent “coordinat[ing] complicated data matches, administer[ing] convoluted eligibility requirements . . . [and] sort[ing] through thousands of restoration applications.”<sup>350</sup> Not only are resources spent on administration, but resources are also spent informing the public and election officials of the rules.<sup>351</sup>

Some due process protections should apply when the clemency power is used to restore voting rights in states that hold hearings.<sup>352</sup> While such protections might be helpful in a state like Florida,<sup>353</sup> they may not solve issues with some of the most problematic procedures in other states that do not hold hearings.<sup>354</sup> In these states, confusing paper applications and waiting periods impede former felons from obtaining restoration.<sup>355</sup> Therefore, a more comprehensive solution is necessary.

## 3. Voting Rights Should Be Automatic to All Members of Society

Conditioning voter restoration on individual review is a flawed concept that leads to racially influenced results.<sup>356</sup> Because criminal laws are “enforced in a manner that is massively and pervasively biased,” many African Americans are unable to vote due to felon disenfranchisement policies.<sup>357</sup> African Americans are over four times more likely to lose their right to vote than the general adult population.<sup>358</sup> Because of this disproportionate impact on the black electorate, it is unrealistic to view felon disenfranchisement outside the context of race.<sup>359</sup> Additionally, an investigation showed that white voter restoration applicants are more likely than black applicants to have their applications approved.<sup>360</sup>

---

349. *Id.* at 9.

350. *Id.*

351. *Id.* (arguing that these educational resources, however, are insufficient).

352. Chiang, *supra* note 37, at 1366.

353. *See id.* at 1340–41.

354. *See* WOOD & BLOOM, *supra* note 11, at 4–5. For example, neither Iowa nor Kentucky provides the opportunity for hearings. Chiang, *supra* note 37, at 1338 (noting that Kentucky does not provide the opportunity for hearings). *See supra* Part II.D.2 for a discussion of Iowa’s application process.

355. *See supra* Parts III.B.3–4 for a discussion of application wait times and confusing processes for voter restoration.

356. *See supra* notes 26–29 and accompanying text for a discussion of how the criminal justice system, and as a result, felon disenfranchisement laws, have a greater impact on African Americans.

357. *See* PINKARD, *supra* note 26, at 26–27.

358. PRIMER, *supra* note 3, at 2.

359. *See supra* notes 27 and accompanying text for a discussion of arguments urging a race-neutral view of disenfranchisement policies.

360. Christopher Uggen, Jeff Manza & Angela Bahrens, *Felony Voting Rights and the Disenfranchisement of African Americans*, 5 SOULS: A CRITICAL J. BLACK POL., CULTURE, & SOC’Y 48, 52 (2003).

Applications commonly request personal information about the applicant's home life, employment information, and financial obligations like child support—the process is intrusive.<sup>361</sup> The thought of requesting this information from “the general public when they register to vote is unimaginable.”<sup>362</sup> This intrusion, along with data showing that “[c]riminal laws are enforced in a manner that is massively and pervasively biased,”<sup>363</sup> and a lack of oversight on restoration processes, have a devastating impact on the black vote.<sup>364</sup>

Automatic voter restoration aligns with the spirit of the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment carries two somewhat conflicting messages relating to felon disenfranchisement. On one hand, it sanctions the practice of felon disenfranchisement by states.<sup>365</sup> On the other hand, the framers intended that the Fourteenth Amendment “protect all persons from government abuse.”<sup>366</sup> Therefore, though a wholesale challenge to disenfranchisement under the Equal Protection Clause may not be justified, the indiscriminate practice of voter restoration in Florida, Iowa, and Kentucky should not be permissible today.<sup>367</sup>

#### IV. CONCLUSION

States with nonautomatic voter restoration processes tend to execute them poorly. These processes cannot be supported by the traditional justifications for felon disenfranchisement and should not be shielded as unreviewable executive acts of grace. The implementation of restoration policies is arbitrary, unfair, and confusing and results in de facto disenfranchisement.

James Ghent stated that “[a] lot of people don't have the understanding of the process to be able to go through it . . . I believe sincerely that it's geared that way so you wouldn't be able to do it.”<sup>368</sup> Ghent, an African American trying to navigate Florida's complicated restoration system, was denied his right to vote

---

361. MANZA & UGGEN, LOCKED OUT, *supra* note 5, at 86.

362. *Id.*

363. PINKARD, *supra* note 26, at 27.

364. ALEXANDER, *supra* note 26, at 193 (“Felon disenfranchisement laws have been more effective in eliminating black voters in the age of mass incarceration than they were during Jim Crow.”); see also Pamela Karlan, *Forum*, in RACE, INCARCERATION, AND AMERICAN VALUES 48 (2008) (arguing that “[f]elon disenfranchisement has decimated the potential black electorate”).

365. *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974).

366. Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1232 (2006).

367. Challenges under the Equal Protection Clause have been unsuccessful because ex-felons are not categorized as a suspect class. *Id.* at 1217. The Supreme Court defined suspect class as “saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Id.* at 1212 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). Though arguments can be made that ex-felons should be treated as a suspect class, courts have “generally upheld collateral consequences under rational-basis review where the restrictions are in any way narrowed or targeted to certain types of offenders or government benefits.” *Id.* at 1215–16.

368. Levy, *supra* note 12.

because of a governor's opinion of him.<sup>369</sup> Nonautomatic voter restoration processes threaten the integrity of the American democratic process by excluding large swaths of the population. Automatic voter restoration upon completion of a sentence is the most efficient, most constitutionally sound option and should be implemented immediately.

---

369. See *supra* notes 12–21 and accompanying text for Ghent's story.