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We will consider this application without regard to race, color, sex, age, disability, religion, national origin or political belief.

PLEASE NOTE: A Face to Face interview is not required for Medicaid applications. Please notify DFCS staff and assistance will be provided free of charge.
Your Name: (Please Print) **FIRST NAME**
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Mailing Address:
Residence Address (if different from Mailing Address):
Please list all persons living with you for whom you want Medicaid. List yourself if y

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Check block(s) that apply to you:
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Felony Convictions and Access to Health Care:

EQUAL OPPORTUNITY FOR LIFE AND LIBERTY?

Written by: Eric J. Miller, LLM, LLB

Community Voices

Community Voices: Healthcare for the Underserved is working to make health care available to all. With eight sites across the country and managed by the National Center for Primary Care at the Morehouse School of Medicine, Community Voices is helping to ensure the survival of safety-net providers and strengthen community support services. Launched in 1998 by the W.K. Kellogg Foundation, the sites are part of a national effort to sort out what works from what does not in meeting the needs of those who receive inadequate or no health care.

Felony Convictions and Access to Health Care: *Equal Opportunity For Life and Liberty?*

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Introduction:

The deliberate disenfranchisement of felons and ex-felons is America's dirty little secret.

Disenfranchisement is an express, direct attack on the democratic process, one that is traditionally motivated by racism and which currently disproportionately impacts African-Americans.

The number of citizens deliberately disenfranchised is huge and rapidly expanding. Nearly 4.7 million Americans were ineligible to vote in 2000;¹ by 2004 that number had risen to 5.3 million, and it is still rising.² The largest number of disenfranchised citizens reside in four former Jim Crow states—Alabama, Florida, Kentucky, and Virginia—that prevent almost one-and-a-half million Americans from voting, or about one-quarter of the total currently disenfranchised.³ That number is roughly the

same as the total lost nationally to faulty voting machines in 2000.⁴

Felony re-enfranchisement has, however, struggled to gain the same sort of national acceptance as the recent reforms restructuring the mechanism of voting itself. Prompted by the shocking realization that the 2000 presidential election turned upon tens of thousands of “lost” votes in Florida, the whole voting process came under extreme scrutiny. In particular, the disproportionate impact on African-Americans caused considerable outcry.⁵ Further studies suggested that the number of votes lost nationally was disturbingly large. By one count, between four and six million votes disappeared due to a combination of faulty machines, defective registration, and flawed operations at the various

¹ Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 797 (2002).

² See Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281 (2006).

³ The actual number is 1,497,952. See Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV.

777, 797 (2002). It is likely to undercount the number of disenfranchised felons from these states, as the figures date from 2000, and so do not take into account the rise in the prison population. See Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281 (2006).

⁴ See CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 3 (2001) (putting number lost at between 1.5 and 2 million votes).

⁵ See U.S. Comm'n on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election*, 22-24, 77 (2001).

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polling places.⁶ More scandalous still, a comparable number of votes were purposely excluded due to felony disenfranchisement.

The American voting system is unique in many ways. America is the only Western democracy that precludes so many of its citizens from the ballot; most Western democracies do not disenfranchise felons who have fully served their sentence, and many permit incarcerated felons to vote.⁷ The picture is very different in America: thirty-five states prohibit felons voting while on parole; thirty preclude felony probationers from voting. Fourteen states preclude former felons who have completed their sentence from voting.⁸

Unlike these other countries, America has no national standard voting procedure. The right to vote is not determined nationally, but on a state-by-state basis. Studies commissioned in the wake of the Florida debacle revealed that states often did not maintain a comprehensive list of registered voters, but instead delegated the process to individual voting districts, with

⁶ See CALTECH/MIT VOTING TECH. PROJECT, VOTING: WHAT IS, WHAT COULD BE 3 (2001).

⁷ Except for a very narrow range of felonies against the process of voting or some other crimes. See Jeff Manza & Christopher Uggen, *Punishment and Democracy: The Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 500-01 (2004).

⁸ I include Washington State, which disenfranchises for infamous crimes and does not automatically re-enfranchise upon completion of sentence, resulting in a large number of ex-felons remaining disenfranchised. See *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); Jill Simmons, Note & Comment, *Beggars Can't be Voters: Why Washington's Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 305-07 (2003).

minimal statewide sharing of data. Yet while there is political agreement on the need to maintain accurate voter rolls and properly record each vote cast, enshrined in the Help America Vote Act of 2002,⁹ there has been little agreement or energy invested in ensuring that the state's eligibility rules are properly applied to felons and former felons. The success of HAVA is in stark contrast to congressional disenfranchisement reform efforts: felon re-enfranchisement provisions have been proposed since at least 1999.¹⁰ Nonetheless, Congress has consistently failed to end the deliberate disenfranchisement of citizens.¹¹

In fact, vote denial is part and parcel of partisan American politics, in which the goal not just to turn out your vote, but turn your competitor's away.¹² Felony disenfranchisement is the paradigmatic tool of voter inhibition: it focuses disproportionately upon minorities and the poor, people who often have limited information about their right to vote. In Florida, lists of felons were compiled and used in a slapdash fashion to purge many citizens entitled to vote; and there is plenty of evidence that lack of information combined with misinformation intimidates felons from regaining the right to vote, and legitimate voters from going to the polls.¹³

⁹ Help America Vote Act of 2002, 42 U.S.C. §§15301-15545 (West Supp. 2004).

¹⁰ See Civic Participation and Rehabilitation Act of 1999, H.R. 906, 106th Cong. (1999).

¹¹ See Civic Participation Act of 2000, S. 2666, 106th Cong. (2000); Voting Restoration Act, H.R. 2830, 107th Cong. (2001).

¹² Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206 (2005)

¹³ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship*,

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A detailed review of felony disenfranchisement in the 14 states that exclude ex-felons from the vote reveals that, despite recent legislative and executive initiatives in these various states, the disenfranchisement picture is mixed at best and depressing at worst. While the trend towards repealing disenfranchisement laws is mostly positive, four states account for a quarter of the total number of felons unable to vote, and 67 percent of ex-felons without the ballot. Many of the states that have enacted reforms still disenfranchise ex-felons permanently or for an extended period after completion of their sentence. These practices determine the outcome of elections; while most attention has focused on national elections, the impact on local elections may be more significant for the day-to-day life of those denied the vote.

What is Felony Disenfranchisement?

Removal of the right to vote is not part of the punishment imposed by a court for committing a crime. It is a collateral, “regulatory” sanction imposed automatically once the prisoner is convicted.¹⁴ Furthermore, “felon” disenfranchisement is a misnomer. Some disenfranchised citizens have *not* been convicted of a felony. Maryland and Michigan states, for example, disenfranchise for certain misdemeanors (as do three other states). Over one-third of citizens disenfranchised by criminal conviction are ex-felons who have fully served their time and are no longer under the control of the criminal justice system. For the majority of them,

Democracy, and the Civic Reintegration of Criminal Offenders, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281 (2006).

¹⁴ See *Trop v. Dulles*, 365 U.S. 86, 96-97 (1958) (Warren, C.J., plurality opinion); *Carrington v. Rash*, 380 U.S. 89, 91 (1965).

the felonies for which disenfranchisement resulted was relatively minor.

It is hard to predict in the abstract what crimes prompt disenfranchisement because there is so much variation from jurisdiction to jurisdiction. Accordingly, the type of act — e.g., drug possession — that constitutes a felony in Florida may constitute a misdemeanor in Massachusetts. Innocent acts in one jurisdiction may be criminal in the next. There is no general application of felony disenfranchisement to only the most heinous crimes, nor to universally criminalized types of conduct.

Of the estimated 5.3 million disenfranchised felons and former felons, only 1.4 million, or about 25 percent, are incarcerated.¹⁵ The rest live in the community on probation, parole, or having served their sentence.¹⁶ In fact, the largest number of disenfranchised felons (2 million, or 39 percent), are not really felons at all: they are “*former felons who reside in states in which they are ineligible to vote.*”¹⁷ There are 14 such states, all of which disenfranchise every felon currently on probation, parole, or in prison.¹⁸

¹⁵ Christopher Uggen, Angela Behrens, and Jeff Manza, *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCIENCE 307, 308 (2005)

¹⁶ Christopher Uggen, Angela Behrens, and Jeff Manza, *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCIENCE 307, 308 (2005)

¹⁷ Christopher Uggen, Angela Behrens, and Jeff Manza, *Criminal Disenfranchisement*, 1 ANN. REV. L. & SOC. SCIENCE 307, 308 (2005)

¹⁸ Probation is an alternative to incarceration; subject to various conditions the offender is released into the community rather than sent to jail or prison; parole permits releases the offender from prison to serve part of his or her sentence in the community.

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Of the states that disenfranchise ex-felons, three (Florida, Kentucky and Virginia) permanently disenfranchise all former felons as a matter of course. Others engage in a more selective process of post-sentence deprivation, so that some, though not all felons are perpetually deprived of the vote. Five states (Alabama, Iowa, Mississippi, Nevada, Tennessee) deprive former felons of the right to vote based on the type of crime committed. Two states (Arizona, Maryland) disenfranchise recidivists. Three states (Delaware, Nebraska, Wyoming) impose a mandatory waiting period on former felons who have completed their sentence. Washington State requires all former felons to have paid all outstanding fines.¹⁹

As listed in Chart 1, the number of ex-felons disenfranchised as of 2000 was 1,590,932, or almost 66 percent of the 14-state total and over one-third of the national total. The 862,579 African-American felons disenfranchised in those states was almost 47 percent of the national total for African-Americans; 35 percent of the total of all citizens disenfranchised in the 14 states; and 19 percent of the national total for all citizens. The 1,654,497 ex-felons disenfranchised nationally is over 36 percent of *all* felons who are currently disenfranchised. The 542,558 African American ex-felons disenfranchised was 22 percent of the total number of felons disenfranchised in the 14 states and 12 percent of

¹⁹ See Jill Simmons, Note & Comment, *Beggars Can't be Voters: Why Washington's Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 305-07 (2003); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003) (finding that Washington State disenfranchises for infamous crimes, and does not automatically re-enfranchise upon completion of sentence).

national total for *all* felons.

Finally, an often-ignored category of inmates are precluded in fact, though not by law, from voting. More than 500,000 misdemeanants or unconvicted pretrial detainees were incarcerated during the 2002 national elections.²⁰ Pre-trial detainees have not been convicted of a crime; while some may be recidivists, many are not. Accordingly, a large number of non-felons are denied the right to vote simply because they find themselves in jail on election day and the state refuses to provide some means of counting (or even providing) their ballot.

It is worth looking at a couple of states that do not disenfranchise ex-felons to glean a sense of the difference this form of disenfranchisement makes. The state of Georgia disenfranchises prisoners, parolees, and felony probationers. As of 2000, Georgia had a total voting age population of 6,020,679,²¹ and disenfranchised an estimated 286,277 people, of which 217,038 or more than 75 percent were felony probationers.²² Accordingly, 0.04 percent of the population is disenfranchised because of felony conviction, and 0.03 percent are probationers living in the community.

²⁰ See Jeff Manza & Christopher Uggen, *Punishment and Democracy: The Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 495 (2004).

²¹ See U.S. Census Bureau Voting and Registration in the Election of November 2000, Detailed Tables for Current Population Report, P20-542.

²² Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002).

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A Brief Comparison: Georgia and Michigan

Georgia has been one of the most active states in terms of exercising its pardon power. That is in large part because Georgia uses an administrative, rather than executive, pardon mechanism: the power to pardon is exercised by a government agency rather than the governor, and so the power to pardon is somewhat shielded from the vicissitudes of electoral politics. The pardon power has not had much of an impact on voting because Georgia automatically restores the right to vote on completion of sentence; it primarily uses the pardon mechanism to reinstate various civil rights not regained at that time.²³ There are, however, some concerns about the manner in which state election officials ensure the voting rolls accurately reflect those felons in the community ineligible to vote, so as to avoid purging legitimate voters from the rolls.²⁴

Michigan does not disenfranchise felons in the community; only those felons in prison or jail are denied the vote.²⁵ So, while Michigan does adopt a more stringent standard for misdemeanants than all but five other states,²⁶ it more lenient than most in permitting

²³ See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide* (2005) (Sentencing Project).

²⁴ See The American Civil Liberties Union, Demos, and the Right to Vote Campaign, *Purged! How a Patchwork of Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote*, (October 2004).

²⁵ Mich. Comp. Laws § 168.758b; U.S. v. Wegrzyn, 305 F. 3d 593, 595 (6th Cir. 2002). Rhode Island adopted the same policy by referendum in 2006. See Gen.Laws 1956, § 17-9.2.

²⁶ Alec Ewald, *A 'Crazy-Quilt' of Tiny Pieces: State and Local Administration of American Criminal Disenfranchisement Law* (2005) (Sentencing Project); See U.S. v. Wegrzyn, 305 F. 3d 593,

offenders in the community to exercise the franchise. The result is that less than 0.1 percent of its citizens are disenfranchised because of criminal convictions.²⁷

In the four most disenfranchising states, the voting-age population unable to vote comprises: 6 percent in Alabama; 8 percent in Florida; 5 percent in Kentucky; and 6 percent in Virginia.²⁸ It is clear that felony disenfranchisement, and in particular the disenfranchisement of ex-felons, has a drastic effect on voting in those states that continue to endorse the practice.

Impact on National, State, and Local Elections

Most attention surrounding disenfranchisement has focused on the national level. Disenfranchisement certainly affected the presidential election of 2000, and may have impacted a number of other close congressional races. Given that the American electorate appears relatively evenly split between the two major parties, and the recent battles to control the Senate in particular turning on one or two races, the emphasis on

595 (6th Cir. 2002).

²⁷ In 2000 there were 49,318 criminals disenfranchised out of 7,345,849 eligible voters according to Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002) and U.S. Census Bureau Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2000.

²⁸ Figures taken from: Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002) and U.S. Census Bureau Reported Voting and Registration of the Citizen Voting-Age Population, for States: November 2000.

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national politics is understandable.²⁹

A cursory look at various races makes the point clear.

There is strong evidence that, had ex-felons been allowed to vote in Florida in 2000, Al Gore would be president.

While recent reform activities have had an impact on the number of disenfranchised ex-felons, the current, streamlined process would probably have resulted in the same outcome had it existed in 2000.

The Washington State gubernatorial election of 2004 was sufficiently close for felony disenfranchisement to make a difference. The initial result of the contest between Democrat Christine Gregoire and Republican Dino Rossi had Rossi winning by 261 votes out of the more than 2.8 million votes counted; after a recount, the winning margin fell to 42 votes.³⁰ After a further hand recount, Gregoire won by 129 votes.³¹ As of 2000, there was an estimated 22,075 ex-felons precluded from voting in Washington State. Of them, evidence suggests that at least 1,401 felons did manage to vote. Rossi received at least four felon votes, an independent candidate at least one, and there was no evidence that Gregoire received any. Because felons tend to vote Democrat in greater numbers than Republican, however, it is likely that Gregoire would have won by a more comfortable margin had ex-felons

²⁹ Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777 (2002); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006).

³⁰ *In re Coady*, 130 P.3d 809 (Wash. 2006) (en banc).

³¹ *Borders v. King County*, No. 05-2-00027-3 (Chelan County Super. Ct. June 24, 2005).

been allowed to vote.

It is at the local level that disenfranchisement's impact is likely to be most profound. Disenfranchised ex-felons, along with probationers and parolees, are permitted no say in the governance of the communities in which they reside, often weakening the political clout of those districts on a local or state-wide level.

In 2000, more than 60 percent of eligible African-American voters did not vote. Non-voting was at its most extreme among 18 to 44 year-olds, the group with the greatest number of convicted felons.³² The impact upon the political process is not measurable in races won or lost, but in reduction of political capital across the communities in which the disenfranchised reside. These communities are generally poor, urban, and minority. Disenfranchisement precludes them from forming the sort of coalitions required to direct the political debate. Currently, neither party need worry about being punished at the polls for failing to cater to these communities' concerns.³³

The Foreseeable Impact of Felony Disenfranchisement

Anyone attempting to justify felony disenfranchisement must deal with two stark facts: (1) for the most part, the criminal justice system now

³² BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE *Voting and Registration in the Election of November 2000*, 3 (February 2002).

³³ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281, 298 (2006).

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targets drug users, but (2) it does not target all drug users equally. Certain drugs and certain communities are subjected to disproportionate measures of criminalization at all levels of the criminal justice system in particular, crack cocaine, and African-American users of crack. Drug policing is cheap and intrusive, using a stop-and-frisk style of law enforcement that, though it may not physically harm criminal suspects, nonetheless affronts their dignity.³⁴ Government officials possess broad discretion in selecting the crimes and neighborhoods to police; they tend to choose urban, poor, and mostly minority neighborhoods to arrest crack users. They tend to use a form of “buy-and-bust” policing that permits mid-level dealers to flourish, while arresting low-level drug dealers or the users themselves. The majority of these individuals are hopelessly addicted, better-suited to a public health intervention than a criminal one.

Once arrested, race continues to play a role in the criminal justice process. Prosecutors disproportionately charge African-Americans more often than whites who have committed similar crimes, and offer them less-attractive plea deals.³⁵ Judges tend to sentence African-Americans more harshly than whites for the same offenses.

Most drug crimes are non-violent; of the states disenfranchising ex-felons, only Maryland and Nevada

distinguish violent from non-violent offenders; only Arizona and Maryland distinguish recidivists from non-recidivists.³⁶ So it is not the fact that some offenders are violent or repeat offenders that makes them susceptible to disenfranchisement. Depending on where you live, anyone from a misdemeanor to a murder may be disenfranchised.

Given the lack of screening combined with quite deliberate selection of poor crack addicts for prosecution and the predictably disparate treatment of African-Americans in the criminal justice system, it is quite foreseeable that disenfranchisement affects drug offenders more than any other category of criminal, and African-Americans most of all. One under-appreciated impact of the War on Drugs, however, is its even more disproportionate impact upon women and, in particular, African-American women who use drugs. Thus, while ex-felon disenfranchisement predominantly affects men, and primarily Black men, the number of Black women who are potentially disenfranchised, though small in comparison, is rising at an alarming rate.

Impact On African American Men

Felony disenfranchisement has, and at its inception was intended to have, a disproportionate racial impact. For every three African-American men who voted in the 1996 presidential election, a fourth was disenfranchised as a result of a felony conviction.³⁷

³⁴ Eric J. Miller, *Role-Based Policing: Restraining Police Conduct “Outside the Legitimate Investigative Sphere,”* 94 Cal. L. Rev. 617, 625 (2006).

³⁵ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13 (1998).

³⁶ See Md. Code Elec. L. §3-102(b)(3); Nev. Rev. Stat. §213.157(2).

³⁷ See Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the*

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Disenfranchisement not only affects election results, it hinders the re-entry and re-integration of African-American former felons into the community.³⁸

Disenfranchisement of felons is best understood as part of a larger pattern of vote suppression or denial directed primarily at African-Americans.³⁹ Throughout the South, states revised their Constitutions and criminal codes to target minorities, linking disenfranchisement to crimes characterized as those committed predominantly by African-Americans.⁴⁰ “White” crimes, even serious ones such as robbery and murder, were excluded from disenfranchisement.⁴¹ The criminal law became yet another means of perpetuating Jim-Crow-style exclusions from citizenship.

African-Americans continue to feel the impact of disenfranchisement more than other communities. In part, that is because of the disparate impact of the War on Drugs on poor, minority communities. Currently, African Americans comprised more than half of those incarcerated in prison and jail, a “foreseeable disparate United States, 67 AM. SOC. REV. 777, 787-790 (2002); Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1346-47 (2003).

³⁸ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281 (2006).

³⁹ See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1090-95 (2002).

⁴⁰ See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1090-95 (2002).

⁴¹ See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1090-95 (2002).

impact on Blacks”⁴² of targeting crack cocaine. Despite comprising about 12 percent of the general population, “African Americans make up almost half of the prison and parole populations and almost one-third of the felony probation population.”⁴³

The cost to the African-American community in general, and in urban centers in particular, is devastating. Almost 10 percent of African-Americans live under the supervision of the criminal justice system. For young Black men living in our cities, the situation is much worse. “The Bureau of Justice Statistics further estimates that about 32 percent of African-American men and 17 percent of Latino men born in 2001 will go to prison during their lifetimes, compared to less than 6 percent of white men.”⁴⁴ The cure is now worse than the disease: “[t]he mandatory minimum sentences which were intended to rid our streets of drugs have instead stolen minority youth from their communities.”⁴⁵ The communities — urban, minority, and poor — have lost human souls and the political capital to reclaim these souls to the War on Drugs and felony disenfranchisement.

⁴² Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25, 52 (1994).

⁴³ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281, 291 (2006).

⁴⁴ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281, 285 (2006).

⁴⁵ Charles J. Ogletree, Jr., *The Burdens and Benefits of Race in America*, 25 HASTINGS CONST. L.Q. 219, 229 (1998).

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Impact On Women (in Particular, African-American Women)

Felony disenfranchisement impacts men much more than women: “94 percent of all prison inmates, 90 percent of parolees, and 79 percent of probationers [a]re males.”⁴⁶ The War on Drugs is nonetheless having an increasing impact upon women. In Virginia, one of the four permanent-disenfranchisement states, “between 1996 and 2003, female commitments to Virginia prisons were substantially larger than those of men – 43.4 percent vs. 29.3 percent respectively.”⁴⁷

In the last two decades, the rate of incarceration of women has increased at an alarming rate. While the total number of women in prison is much lower than men, the number of women in prison increased by 125 percent between 1990 and 2000, resulting in more than 166,000 in American prisons and jails at that time.⁴⁸ To get some sense of the exponential increase in women felons. In 1980, the onset of the War on Drugs, the number of women in state and federal prison alone was 12,331; by 1986, when mandatory minimums for drug use were enacted, the number had risen to 24,544; by 1990 the number was 40,564; in 1994, when the sentencing guidelines were re-authorized, 60,125; and in 2000,

⁴⁶ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281, 285 (2006).

⁴⁷ Advancement Project, *Access Denied: The Impact of Virginia's Felony Disenfranchisement Laws* (2005) (citing John W. Marshall, Offender Population Forecasts: FY 2005 to FY 2010, Secretary of Public Safety, (October 15, 2004) at 23).

⁴⁸ Candace Kruttschnitt, Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1 (2003).

91,612.⁴⁹ The rate of increase in female incarceration was much greater for African-American women in particular, but to a lesser extent Latinas, whereas, the rate was much less for white women.⁵⁰ Florida ranks in the top three states in both incarcerating women and disenfranchising felons.⁵¹

The major difference was the way in which the state and federal governments targeted drugs. Even as late as the mid-1980s, almost three times as many women were incarcerated for violent offenses and property offenses as drug offenses. “By the end of the 1990s, the largest proportion of the female state prison population — 34 percent — was incarcerated for drugs, with violent offenders accounting for only 28 percent and property offenders only 21 percent.”⁵² Women fall foul of the Federal Sentencing Guidelines in two new ways: family ties and responsibilities are no longer taken into account; and any participation in drug activity, particularly conspiracy, is heavily punished.⁵³ Accordingly, women who have a peripheral role in their boyfriend's drug activity are sentenced based on their relationship, rather

⁴⁹ Candace Kruttschnitt, Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1 (2003).

⁵⁰ Candace Kruttschnitt, Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1 (2003).

⁵¹ Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795 (2004).

⁵² Candace Kruttschnitt, Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1, 7 (2003).

⁵³ Candace Kruttschnitt, Rosemary Gartner, *Women's Imprisonment*, 30 CRIME & JUST. 1 (2003); Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795 (2004); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime And Sentencing*, 4 AM. U. J. GENDER & L. 1 (1995).

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than their crime.⁵⁴

The majority of women in prison are victims of abuse who are punished as much for their past relationships as for their crime. “The statistics inform us that up to sixty percent of female inmates have been subject to either sexual or physical abuse, many before reaching the age of eighteen.”⁵⁵ Accordingly, African-American female ex-felons are generally non-violent, extremely poor drug addicts who are the victims of abuse and often tangentially involved in the crime that put them in prison. Disenfranchising these women makes no sense.

Felony Employment

The number of individuals released on probation and parole each year is staggering: currently the annual figure is in excess of 630,000 prisoners.⁵⁶ Only about one-in-five prisoners have a job waiting for them upon release.⁵⁷ “The majority of inmates leave prison with no savings, no immediate entitlement to unemployment benefits, and few job prospects. One year after release, as many as 60 percent are not employed in the legitimate labor market.”⁵⁸ In Maryland, for example, 56 percent

⁵⁴ Eda Katharine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906 (2001).

⁵⁵ Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795, 804 (2004).

⁵⁶ Urban Institute, *From Prison to Work: The Employment Dimensions of Prisoner Reentry* 1 (October 2004).

⁵⁷ Urban Institute, *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute’s Prisoner Reentry Portfolio* 4 (January 2006)

⁵⁸ Joan Petersilia, *When Prisoners Return to the*

of respondents “were either unemployed or were working fewer than 40 hours a week.”⁵⁹ Furthermore, reentering offenders belong primarily to the urban poor and they return to the poor, urban communities they left behind. As a result, parolees and former prisoners tend to concentrate in a few large cities in each state, and within those cities, concentrate in communities that “have above-average unemployment, female-headed households, and families living below the federal poverty level.”⁶⁰

Employers are often reluctant to hire former felons. One study that surveyed employers in four major cities to determine whether they would accept ex-offenders found that only one in eight “would definitely accept such an application”; and just over one-quarter “probably would.”⁶¹ Even when employers may be willing to hire former felons, ex-offenders and parolees often face employment restrictions across a range of proscribed professions.⁶² Many ex-prisoners face additional difficulties that the general population does not, and these complicate the job-hunting process, including restrictions

Community: Political, Economic, and Social Consequences, 9 SENTENCING & CORRECTIONS 1, 3 (2000).

⁵⁹ Urban Institute, *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute’s Prisoner Reentry Portfolio* 13 (January 2006).

⁶⁰ Urban Institute, *Understanding the Challenges of Prisoner Reentry: Research Findings from the Urban Institute’s Prisoner Reentry Portfolio* 14-15 (January 2006).

⁶¹ Richard Freeman, *Can We Close the Revolving Door? Recidivism vs. Employment of Ex-Offenders in the U.S.* 10 (Urban Institute Re-Entry Roundtable, May 19-20, 2003).

⁶² Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, 9 SENTENCING & CORRECTIONS 1, 4 (2000).

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on public housing and welfare eligibility.⁶³ In particular, on release from prison many women seek to reconstitute their family and reconnect with their children while finding some means of financial support.⁶⁴ The burden of work and family is particularly difficult for female offenders to balance.

Re-Enfranchisement

There is, however, some cause for hope. The last decade has seen a flurry of felony disenfranchisement reform, much of it occurring after the disputed election of 2000. In that time, sixteen states have enacted some form of reform of their felony disenfranchisement laws. Most significantly, New Mexico enacted legislation in 2001 re-enfranchising as many as 63,000 voters.⁶⁵ Furthermore, two other states restored the rights of felons by other means. In Iowa, by executive order Governor Vilsack introduced a process for the automatic restoration of the right to vote on completion of a felony. In the case of *Mixon v. Commonwealth*,⁶⁶ a Pennsylvania court restored the right of ex-felons to vote in that state.

The picture is not all rosy, however. Colorado, Kansas,

⁶³ See Urban Institute, *From Prison to Work: The Employment Dimensions of Prisoner Reentry* 20 (October 2004).

⁶⁴ Joan Petersilia, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, 9 SENTENCING & CORRECTIONS 1, 4 (2000).

⁶⁵ See Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 797 (2002).

⁶⁶ 759 A.2d 442 (Pa. Cmwlth. 2000).

Massachusetts, Oregon, and Utah have all passed laws limiting the right of current and former felons to vote,⁶⁷ two of them doing so in the last six years. Furthermore, although the total number of citizens re-enfranchised tops 620,000, the rate of felony disenfranchisement has continued its rapid ascent as the rate of the prison population in general has climbed.⁶⁸ In fact, the total number of felons re-enfranchised in the last decade is about 55,000 people *less* than the total number of women current and former felons presently disenfranchised.⁶⁹

Part of the problem is that, while 10 of the 14 states under consideration have introduced reforms to their disenfranchisement procedures, the impact of such reforms is quite limited. See *Chart 2*. Whereas Alabama, Florida, and Virginia — states with the three largest disenfranchised felon and former felon populations — have all simplified the restoration process, none has taken Iowa Governor Vilsack's dramatic step of restoring the rights of all former felons. In fact, former Governor Warner of Virginia ignored efforts, just prior to the end of his term, to have him re-enfranchise prisoners by executive order. Furthermore, the recent Florida reforms are stingy compared to its past practice: between 1975 and 1991, the Governor of Florida automatically restored the rights of any prisoner convicted of a disenfranchising

⁶⁷ Jeff Manza & Christopher Uggen, *Punishment and Democracy: The Disenfranchisement of Nonincarcerated Felons in the United States*, 2 PERSPECTIVES ON POLITICS 491, 499 (2004)

⁶⁸ See Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281 (2006).

⁶⁹ Sentencing Project, *Felony Disenfranchisement Laws in the United States* (2006) (Sentencing Project).

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crime upon application and without a hearing.⁷⁰ Since that time, the pardon process generally requires a hearing by the Governor and a Clemency Board,⁷¹ and in 1999, the Governor added 200 disqualifying offenses to the list. That number has recently been reduced. Nonetheless, the recent reform efforts do not approach the simplicity of the former scheme.⁷²

Although some states have streamlined their restoration process, without an automatic restoration, the process remains generally lengthy and depends upon the frequency of hearings and the criteria employed during the hearing process. Where a limited number of officials meet to determine re-enfranchisement on a case-by-case basis, few cases are heard each year. In Florida, for example, large numbers of ex-felons are forced to apply to the Clemency Board for a formal hearing to regain the right to vote. “But so many felons are barred by the restrictions that the board doesn’t have the time or staff to hear their cases. At the current pace, it could take up to three decades for all the felons who have asked to vote to get an answer.”⁷³

Furthermore, there is some evidence that former felons

⁷⁰ See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide* (2005) (Sentencing Project); *Gallie v. Wainwright*, 362 So. 2d 936, 938 (Fla. 1978).

⁷¹ See Fla. Rules of Executive Clemency, available at: <http://www.state.fl.us/fpc/Policies/ExecClemency/ROEC12092004.pdf>

⁷² See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide* (2005) (Sentencing Project).

⁷³ Debbie Cenziper & Jason Grotto, *Clemency Proving Elusive for Florida’s Ex-Cons*, MIAMI HERALD, Oct. 31, 2004.

do not apply for restoration in as great of a number as expected. In part, that may be due to ignorance that re-enfranchisement exists; it may also be due to disaffection with the criminal justice system.⁷⁴ Many states rely upon non-governmental agencies to spearhead restoration of rights initiatives where there is no automatic notice of the right to apply for restoration. Thus, even when restoration is a formality upon application, ex-felons lack the information necessary to apply to have their rights restored.

Ending Disenfranchisement

The momentum for reform of disenfranchisement laws has never been greater. While it is unlikely that prison inmates will have the vote restored in the near future, some states have extended the right to vote to prisoners and parolees. New Mexico and Iowa have, by different means, re-enfranchised their ex-felon populations, while other states have re-enfranchised portions of the ex-felon community or streamlined the process for obtaining a pardon. See *Chart 2*. Given the number of ex-felons, the disparate geographic and racial impact of their disenfranchisement, and the citizenship issues associated with permanently depriving a citizen of the right to vote, focusing first on ex-felons makes political and social sense. There are, however, important issues associated with enabling probationers and parolees to vote, as well as the impact enfranchising prisoners might have given the geographic, racial, and political features of the upstate, rural, white communities in which

⁷⁴ See Flynn Patrick Carey, *Extending the Home Court Advantage: A Call to Update the Arizona Civil Rights Restoration Scheme*, 48 ARIZ. L. REV. 1129 (2006).

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prisons are often located.

There are perhaps three major paths to re-enfranchisement activism: legislative, litigative, and public pressure on elected officials. Certain of these options may be affected by the source of disenfranchisement in a given state; of the 14 states that deprive former felons of the right to vote, two do so by statute, the other 12 by virtue of their state Constitution. Where disenfranchisement is limited to certain crimes, different states authorize different crime-selection procedures. So there is little uniformity among the states in selecting a disenfranchisement process.

As much as that is true for disenfranchisement, it is even more so for re-enfranchisement. For some states, re-enfranchisement is an automatic process; in other states, discretionary. Even where automatic, some offenders must apply for reinstatement of civil rights, whereas in other states restoration is triggered by completion of sentence. Some states inform offenders of their rights and any applicable restoration procedures, other states do not. The discretionary process varies from state to state: it may be administered by the governor, administrative officials, or the judiciary, or some combination of them. Finally, there is often little uniformity in application of the rules within individual states when it comes to compiling and enforcing voting rolls. State voting officials often receive little guidance to ensure that they understand and comply with the law they are supposed to enforce. Particularly in the states that disenfranchise the most voters, voting officials do not apply uniform

statewide standards and the state imposes insufficient quality control through supervision of and complaint procedures to ensure that the correct individuals are purged from the rolls. The result is “overzealous”⁷⁵ — that is, just plain wrong — purges of residents from the voting rolls across the country every voting season.

Accordingly, the potential strategies fall into different ranges. One strategy aims at ending ex-felon disenfranchisement. Legislatively, that may be accomplished by passing some national statute requiring re-enfranchisement of felons on completion of sentence; working on a state-by-state basis to alter the constitution or, where appropriate, the current statutory scheme of disenfranchisement; persuading executive or administrative officials to adopt an automatic procedure for re-enfranchising all ex-felons; repealing or reducing waiting periods for former felons where appropriate; or limiting the number of offenses that disenfranchise citizens, in particular, ending disenfranchisement for misdemeanants. In addition, some mandatory scheme of notification of rights on completion of sentence and training for officials administering the process of voting is essential.

Litigation has been a harder path to pursue, particularly because the Supreme Court has narrowly (and mistakenly) interpreted the Fourteenth Amendment’s Equal Protection Clause in a manner that rarely enables a court

⁷⁵ Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 695 (2006) (quoting U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, at xiv (2001)).

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to deem disenfranchisement schemes unconstitutional. The Voting Rights Act has proved little better as a mechanism for restoring offenders' rights. Some strategies remain untested, however, and so litigation has not been exhausted as a method of re-enfranchisement.

For probationers and parolees in particular, but also prison inmates, the strategies are essentially the same, but the battle tougher. It is particularly important to articulate the arguments favoring re-enfranchisement, and to point out the problems with the various rationales for disenfranchisement. We should recognize, however, that America is less out of step in disenfranchising citizens still under the control of the penal system than those who have completed their sentence.

Litigation, Legislation, and Other Activity: Litigation

The Fourteenth Amendment's Equal Protection Clause provides the primary, though partial, remedy for race-based disenfranchisement. The two major cases are *Richardson v. Ramirez*,⁷⁶ in which the Supreme Court upheld state laws disenfranchising ex-offenders, and *Hunter v. Underwood*,⁷⁷ where it struck down disenfranchisement laws in Alabama that were "motivated by a desire to discriminate against blacks on account of race." *Hunter* has inspired some recent litigation, but the challenge of showing intentional discrimination has proved a significant hurdle to obtaining relief.

Generally, the Equal Protection Clause has been

interpreted to provide "vigorous protection" for voting rights, and "subjecting restrictions on the franchise to strict scrutiny."⁷⁸ In *Richardson*, however, the Court interpreted the express provision of felony disenfranchisement in Section Two of the Fourteenth Amendment to justify the constitutionality of the practice. States may therefore disenfranchise ex-felons, although *Hunter* required them to do so in a manner that is not motivated by intentional racial discrimination. *Richardson* rests, however, on a provision of the Constitution designed to enable the states to disenfranchise Confederate sympathizers in the wake of the Civil War.⁷⁹ That provision is best read as having been repealed by the Fifteenth Amendment's reconstitution of the right to vote.⁸⁰

Recent litigation has foundered upon the rocks of *Richardson* and *Hunter*, and the requirement to show deliberate discrimination on the basis of race. States with disenfranchisement laws initially motivated by racial discrimination can "remove[] the discriminatory taint associated with the original version" by re-authorizing the

⁷⁸ Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth?*, 92 GEO. L.J. 259 (2004)

⁷⁹ Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. (2004).

⁸⁰ See Gabriel J. Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581 (2004); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth?*, 92 GEO. L.J. 259 (2004).

⁷⁶ 418 U.S. 24 (1974).

⁷⁷ 471 U.S. 222 (1985).

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disenfranchisement provision without mention of race.⁸¹ As a result, the race-based approach faces formidable obstacles where a statute that displays no overt racial purpose supercedes a discriminatory one.⁸²

Litigation under the Voting Rights Act has fared little better. Generally, litigation has proceeded under Section 2 of the Act, prohibiting any “qualification or prerequisite” that denies the vote on grounds of race.⁸³ The Second, Sixth, and Eleventh Circuits have all rejected challenges to felony disenfranchisement under this provision;⁸⁴ the Ninth Circuit has provisionally entertained a challenge. While the likelihood of success is slim, the various opinions at least illustrate the manner in which the Voting Rights Act could be amended to preclude felony disenfranchisement.

The Second Circuit and Eleventh Circuits held that applying the Voting Rights Act to criminal disenfranchisement laws would raise serious constitutional questions. Accordingly, these circuits have both employed the “clear statement” rule when interpreting the Voting Rights Act, requiring Congress

⁸¹ *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998); *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

⁸² *See, e.g. Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

⁸³ 42 U.S.C. §1973(a).

⁸⁴ *See Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (per curiam) (en banc); *Muntaqim v. Coombe*, 366 F.3d 102, 107-08 (2d Cir. 2004); *Hayden v. Pataki*, 449 F.3d 305 (2nd Cir. 2006) (en banc). *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). The Sixth Circuit’s decision wrongly applies Section 2 of the Voting Rights Acts. *See Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 714 (2006).

to expressly state that it wished to include felony disenfranchisement as part of the voting practices precluded by the act.⁸⁵

In contrast to Second, Sixth, and Eleventh, the Ninth Circuit concluded that felon disenfranchisement was a form of vote denial subject to Section 2. The Farrakhan Court held that “[f]elon disenfranchisement is a voting qualification” in violation of Section 2, and that the relevant consideration is not only whether there was discriminatory motivation, but whether the denial of the right to vote “interact[ed] with surrounding racial discrimination in a meaningful way.”⁸⁶

Legislation

Even if the Ninth Circuit is wrong, and Section 2 of the Voting Rights Act does not cover felony disenfranchisement, nonetheless the Second and Eleventh Circuit opinions suggest that, if Congress found that disenfranchisement discriminated on the basis of race, and that precluding felony disenfranchisement was necessary to preclude disenfranchisement race-based vote denial, it could do so. The “clear statement” rule is motivated by the worry that the national government should not interfere with state-government prerogatives; determining the scope of the right to vote is within the power of the states. Nonetheless, the Voting Rights Act has already curbed the manner in which the states can interfere with the right to vote; for example, limiting the

⁸⁵ *See Hayden v. Pataki*, 449 F.3d 305 (2nd Cir. 2006) (en banc). *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc).

⁸⁶ *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

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use of “tests and devices” to exclude voters.⁸⁷ While amending the Act does raise constitutional concerns, these need not be insuperable.

In addition to amending the Voting Rights Act, there are less constitutionally fraught remedies that could have a national impact. For example, Congress could fund state or private organizations to explain to felons their voting rights on completion of their sentence. Such a notification statute would help clear up much of the confusion surrounding the right to vote, and ease the chilling effect that felony disenfranchisement spreads across the nation.

Local legislation in those states without mandatory notification provisions would have the same impact. Other forms of legislation worth considering at the state level are constitutional amendments to repeal felony disenfranchisement provisions; where constitutional amendments are not required, repeal of the statutes permitting disenfranchisement, as in New Mexico, could have a tremendous impact.

Legislation to end waiting periods would have a profound effect in Delaware, Maryland, and Nebraska. The waiting requirement seems irrational: why make a felon wait? Either they have served their sentence, including probation, and deserve to have their civil rights restored; or they should be permanently disenfranchised. Waiting periods seem an uncomfortable compromise between re-enfranchisement and severity.

⁸⁷ See *South Carolina v. Katzenbach*, 383 U.S. 301, 330 (1966). See also *Gaston County v. United States*, 395 U.S. 285, 292 (1969).

Another possible area of reform is the range of crimes defined as subject to disenfranchisement by the state. Where possible, the state should limit disenfranchisement to felonies and narrowly draw the list of disqualifying offenses. For example, a first step may be to limit disqualification to violent offenses or recidivists.

Finally, while HAVA promises to make voter rolls more accurate, it must still make voter information available to the relevant officials and ensure they correctly and uniformly apply the disenfranchisement standards. The disconnect between the content and application of the rules severely hinders many ex-felons from voting and dissuades others from even trying.

Other Activity: Executive and Administrative Pardons

Of the 14 states, all permit re-enfranchisement by some form of clemency, either executive or administrative. See *Chart 2*. Under the executive model, the governor retains the power to grant clemency, although that power may be conditioned upon the advice of a court or administrative board. Under the administrative model, board members possess the clemency power, although the governor may sit on the board.⁸⁸

For example, Kentucky and Virginia both follow the executive model. Both vest the ultimate power to restore

⁸⁸ See Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 255-58 (2003); Melissa C. Chiang, *Comment: Some Kind of Process for Felon Reenfranchisement*, 72 U. CHI. L. REV. 1331, 1336-37 (2005).

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civic rights in the office of the governor.⁸⁹ Under Alabama's administrative model, the State Board of Pardons and Paroles operates independently of the governor to make clemency decisions. Florida uses a mixed model whereby the governor approves the recommendations of a clemency board. The governor retains, however, the sole power to pardon upon approval of three members of his cabinet.⁹⁰ No other branch of government may limit that power.

While executive clemency is a quick and comprehensive fix to the problem of felony disenfranchisement, it is nonetheless a partial fix. A governor's clemency policy may be rescinded at any time, and is particularly vulnerable to changes of administration or political climate. Political calculation has not, however, worked straightforwardly along party lines. Virginia Governor Mark Warner, though making the re-enfranchisement process work more smoothly, did not respond to the efforts of The Advancement Project, a democracy and justice action group, to persuade him to issue an executive order before leaving the governorship. In Florida, by contrast, during 2006 gubernatorial elections both Democratic and Republican Party candidates affirmed their support for automatic restoration of rights for

⁸⁹ See Melissa C. Chiang, *Comment: Some Kind of Process for Felon Reenfranchisement*, 72 U. CHI. L. REV. 1331, 1338 (2005) (citing Ky. Const. §145; Va. Code Ann. § 24.2-101). Chiang claims that the Governor of Virginia may restore civic rights "only after a circuit court has recommended the petition." *Id.* But see *In re Phillips*, 574 S.E.2d 270, 272 (Va. 2003) (petition not required prior to grant of executive clemency; governor not bound by court's determination).

⁹⁰ Fla. Const. art. IV, § 8; *In re Advisory Opinion of the Governor Civil Rights*, 306 So.2d 520 (Fla.1975).

felons upon serving their sentence.⁹¹ Accordingly, the new Republican Governor of Florida, Charlie Crist, could re-enfranchise the currently over 613,000 former felons unable to vote in Florida.

CALL TO ACTION

Encouraging community leadership to promote systems change in a democracy is muted and almost impossible when people are not able to express their opinions in the most important democratic process, electing officials that represent them and their concerns. Felony disenfranchisement impacts the entire community and giving voice back to communities and former offenders, especially those non-violent offenders, is crucial. We cannot engage members from the community if they cannot express their voice in this sacred democratic process. As a call to action, we recommend:

- States must reinstate the right to vote to those formerly incarcerated, especially non-violent offenders, once they have served their sentence and returned to their communities.
- States should allow all of those incarcerated, especially non-violent offenders, to vote and make mechanisms available for them to do so.
- For states that do reinstate the right to vote, they must provide streamlined procedures to do so. In fact, the right to vote should be reinstated automatically upon release.
- Federal and state governments must address

⁹¹ Mary Ellen Klas, *Voting Ban for Felons Could End with Next Governor*, MIAMI HERALD, Oct 18, 2006.

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barriers to employment for ex-offenders by continuing to provide incentives programs to hire those formerly incarcerated.

- State and local governments must limit employer access to criminal records by excluding information about cases that did not result in convictions as well as past convictions and include only information that is relevant and sensible for the employer to know.
- Federal and state governments must make available small loans programs to assist those coming home in setting up their own businesses (e.g. car detailing services, landscape services, food services, and any other businesses), provide training for the entrepreneurs in business plan development, fiscal management, and compliance with tax and other regulatory codes.
The Federal government must remove barriers to federally student loans and welfare for those formerly incarcerated and convicted of drug-related crimes.
- Since many employment opportunities available to ex-offenders are often low-paying jobs without health insurance coverage, Medicaid must be expanded to include low-income men and women who otherwise would not qualify.

Conclusion

Felony disenfranchisement has as great an impact as all other forms of electoral problems combined. But felony disenfranchisement is a deliberate and express act to deny the ballot to citizens, many of whom live in the community and have fully served their time. Disenfranchisement predictably impacts minority communities more harshly, in part because the practice of exclusion was originally an integral part of segregation. With the War on Drugs' disparate effect on the African-American community, minorities are once again disproportionately denied the vote.

There is some cause for optimism. While litigation has proved only partially successful, there are a range of legislative and executive initiatives that have restored the vote to hundreds of thousands of citizens. There are, however, still more than one-and-a-half million ex-felons who deserve to have their right to vote restored.

Appendix

Chart 1⁹²

| State | Post-Sentence | Total as of 2000 | Estimated Ex-Felons | Black Felons Total | Estimated Black Ex-Felons |
|----------------------------------|--|------------------|---|--------------------|---------------------------|
| Alabama | Certain offenses | 212,650 | 148,830 | 111,755 | 77,932 |
| Arizona | Second felony | 140,870 | 58,936 (14,384 post restoration) | 17,700 | 8,651 |
| Delaware | All offenders 5-year waiting period | 30,006 | 14,384 | 15,058 | 7,162 |
| Florida | All offenders permanently | 827,207 | 613,514 | 256,392 | 167,413 |
| Iowa | Infamous Crimes | 100,631 | 80,257 (now negligible) | 11,192 | 7,671 |
| Kentucky | All offenders permanently | 147,434 | 109,132 | 35,955 | 24,632 |
| Maryland | Second Felony, three-year waiting period; second crime of violence, permanently | 139,565 | 78,206 (40,900 post restoration) | 85,251 | 42,519 |
| Mississippi | Certain offenses | 119,943 | 82,002 | 76,106 | 50,035 |
| Nebraska | All offenders, 2-year waiting period | 53,428 | 44,001 | 9,240 | 7,164 |
| Nevada | All offenders except first-time non-violent | 66,390 | 43,395 | 17,970 | 11,514 |
| Tennessee | Certain offenses | 91,149 | 28,720 | 41,759 | 11,946 |
| Virginia | All offenders permanently | 310,661 | 243,902 | 161,559 | 121,737 |
| Washington | Failure to satisfy obligations associated with conviction may result in post-sentence loss of rights | 158,965 | 32,856 | 22,075 | 3,824 |
| Wyoming | All offenders, 5-year waiting period | 17,850 | 12,797 | 567 | 358 |
| 14 State Total | | 2,416,749 | 1,590,932 | 862,579 | 542,558 |
| Total Nationally | | 4,486,539 | 1,654,497 ¹ (over 36% of total) | 1,841,515 | 550,308 |
| 2004 National Total ² | | 16,114,288 | 11,704,462 | 5,496,770 | 3,890,130 |

⁹² This Chart represents material compiled from Christopher Uggen & Jeff Manza, *Democratic Contraction? The Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 797 (2002); and SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006) (Sentencing Project)

Chart 2 (* indicates state is one of 13 most active pardon authorities)⁹⁵

| State | Source of Deprivation | Notice of Rights | Restoration Mechanisms | Recent Reform Activity | Year |
|-------------|-----------------------|------------------|--|---|------------|
| Alabama* | Constitution | Yes | Automatic for certain offenses; executive pardon | Streamlined restoration for most persons upon completion of sentence | 2003 |
| Arizona | Constitution | Yes | Automatic for certain offenses; executive pardon; judicial restoration | | |
| Delaware* | Constitution | No | Automatic on application for certain offenses; executive pardon | Repealed lifetime disenfranchisement, replaced with 5-year waiting period for persons convicted of most offenses | 2000 |
| Florida | Constitution | Yes | Executive pardon | Simplified clemency process; adopted requirement for county jail officials to assist with rights restoration | 2004, 2006 |
| Iowa | Constitution | N/A | Automatic by executive pardon | Established automatic pardon procedure | 2005 |
| Kentucky | Constitution | Yes | Executive pardon | | |
| Maryland* | Constitution | No | Automatic for certain offenses; executive pardon | Repealed lifetime disenfranchisement for persons convicted of 2 non-violent offenses; replaced with 2-year waiting period | 2002 |
| Mississippi | Constitution | No | Executive pardon; vote by two-thirds of legislature | | |
| Nebraska* | Statute | Yes | Automatic restoration for certain offenses; pardon by Board of Pardons; judicial restoration | Repealed lifetime disenfranchisement, replaced with 2-year waiting period | 2005 |
| Nevada | Constitution | No | Automatic restoration for certain offenses; pardon by Board of Pardons Commissioners; judicial restoration | Repealed five-year waiting period to restore rights | 2001 |
| Tennessee | Constitution | No | Automatic restoration for certain offenses; executive pardon; judicial restoration | Streamlined restoration process for most persons upon completion of sentence | 2006 |
| Virginia | Constitution | Yes | Executive pardon | Required notification of rights and restoration process by Department of Corrections; streamlined restoration process | 2000, 2002 |
| Washington | Constitution | No | Automatic for certain offenses; executive pardon; judicial restoration | | |
| Wyoming | Statute | Yes | Automatic upon application; executive pardon; | Restored voting rights to persons convicted of first-time non-violent offense | 2003 |

⁹³ In 2000, New Mexico still disenfranchised ex-felons (63,565 of them). It no longer does so.

⁹⁴ Christopher Uggen, Jeff Manza, and Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANN. AM. ACAD. OF POL. & SOC. SCIENCE 281, 290 (2006).

⁹⁵ Chart 2 is based substantially on information provided by Ryan S. King, *A Decade of Reformation: Felony Disenfranchisement Policy in the United States (2006)* (Sentencing Project); Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-By-State Resource Guide: Table#4- Characteristics of 13 Most Active Pardon Authorities (2005)* (Sentencing Project).

FOR A N

The National Center for Primary Care (NCPC) has the unique distinction of being the only congressionally sanctioned center in the country dedicated to promoting optimal health care for all, with a special focus on serving underserved communities. Headquartered at the Morehouse School of Medicine, the NCPC is committed to the pursuit of a healthier nation.

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