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MAKING THE GLOBAL CASE TO OUTLAW EX-FELONY DISENFRANCHISEMENT: Unconstitutionality & Recidivism

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About the Author

Ms. Grana earned her Juris Doctor from Penn State Law in May of 2024. She earned her Bachelor of Arts in Criminology from The College of New Jersey. Currently, she is a Law Clerk with Rohde Law Group in Northern New Jersey. Upon being admitted to the bar, she will become an Associate Attorney. The author thanks Professor Margaret E. Leigey of the Criminology Department at The College of New Jersey for inspiring her to pursue academic writing and advocacy work for distinct populations, including the disenfranchised and the elderly.

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Introduction

Though the United States is touted as a global beacon of equality, the Thirteenth Amendment engendered unequal citizenship through felony disenfranchisement legislation, which revokes the voting rights of convicted felons.¹ This is a common and growing practice in the United States, as there were approximately one million disenfranchised individuals in 1976 compared to the approximate six million disenfranchised individuals in 2016.² Ex-felony disenfranchisement should be prohibited in the United States, meaning³ felons should be restored the right to vote after the conclusion of their incarceration, parole, and probation.⁴

The highly publicized and divisive presidential election between Republican candidate George W. Bush and Democratic candidate Al Gore was the closest race in United States modern history.⁵ All eyes were on Florida as the swing state that would decide the fate of the election.⁶ Under Florida's election law, a machine recount of all votes cast is required whenever the margin of victory is less than 0.5 percent.⁷ The gap in this election was approximately 0.01 percent, so a recount was necessary.⁸ A vigorous recount process and the Supreme Court case

1. Emma Hersom, *Incarceration and the Right to Vote: An International Comparative Study*, TRINITY COLL. (May 3, 2022), <https://www.trincoll.edu/cher/blog/emma-hersom-incarceration> [<https://perma.cc/TSX3-TTTV>].
2. Lauren L. Powell, *Concealed Motives: Rethinking Fourteenth Amendment And Voting Rights Challenges To Felon Disenfranchisement*, 22 MICH. J. RACE & L. 383, 384 (2017); Neely Baugh-Dash, *Criminal Disenfranchisement: Deconstructing Its Justifications And Crafting State-Centered Solutions*, 7 BELMONT L. REV. 123, 124 (2019) (“Today, even though sixteen states and the District of Columbia either allow people to continue voting while in prison or automatically restore voting rights upon release, more people than ever are barred from voting due to a criminal conviction”).
3. See generally Reginald Thedford, Jr., *Ex-Felon Disenfranchisement and the Fifteenth Amendment: A Constitutional Challenge to Post-Sentence Disenfranchisement*, 6 IND. J.L. & SOC. EQUAL. 92 (2018).
4. *Id.*
5. Jeffrey L. Yates & Andrew B. Whitford, *The Presidency and the Supreme Court After Bush v. Gore: Implications for Institutional Legitimacy and Effectiveness*, 13 STAN. L. & POL'Y REV. 101, 101 (2002) (“Gore’s margin over Bush in the popular vote was 0.51 percent and the electoral vote margin was four votes in favor of Bush. Bush’s inauguration on January 20, 2001 made him the first president since Benjamin Harrison in 1888 to win the electoral vote but lose the popular vote”).
6. *Id.* at 102 (“A game of tug-of-war ensued between local voting districts that initiated recounts and state officials who decided whether and under what conditions to certify those recounts When the Florida Supreme Court ordered a manual recount of ballots—a recount perhaps tainted by political overtones—the court reasoned that, ‘[o]n this record, there can be no question that there are legal votes within the 9000 uncounted votes sufficient to place the results of this election in doubt”).
7. NCC Staff, *On This Day, Bush v. Gore Settles 2000 Presidential Race*, NAT’L CONST. CTR. (Dec. 12, 2023), <https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary> [<https://perma.cc/K428-9JLA>].
8. *Id.*

Bush v. Gore ensued.⁹ Ultimately, the Court ceased the recount to avoid violation of the Equal Protection Clause (“EPC”) and to act in accordance with Florida’s previous vote certification.¹⁰ Thus, Bush won the state’s electoral votes by only 537 votes.¹¹

Because Bush won by a narrow margin, this election brought felony disenfranchisement laws into the spotlight.¹² More than 500,000 Floridians were ineligible to vote due to prior felony convictions.¹³ Political researchers estimated that had Florida outlawed disenfranchisement, Gore would have won the state by more than 80,000 votes, effectively winning the election.¹⁴ This statistic demonstrates that the number of disenfranchised felons and ex-felons in each state, and the entire country, possibly has the potential to alter election outcomes.¹⁵

The early beginnings of disenfranchisement in the United States are rooted in the Civil War era.¹⁶ The Fourteenth Amendment was ratified to the Constitution in 1868, three years after the Civil War ended.¹⁷ The amendment provides for equal protection under the laws, even for enslaved individuals.¹⁸ The EPC would later become the focal point of the United States Supreme Court case *Richardson v. Ramirez*, which held that felony disenfranchisement laws are constitutional under the Fourteenth Amendment.¹⁹

There are two main ways to successfully challenge felony disenfranchisement laws under the EPC: (1) establish a pattern of unequal enforcement under the disenfranchisement law or (2) establish that the law was designed to intentionally discriminate.²⁰ Even though there has been some triumph in challenging disenfranchisement laws in this manner, it is idealistic to presume that the Fourteenth Amendment will

9. See *Bush v. Gore*, 531 U.S. 98 (2000).

10. *Id.* at 110 (“[I]t is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work.”); see U.S. CONST. amend. XIV, § 1.

11. Martha Guarnieri, *Civil Rebirth: Making the Case for Automatic Ex-Felon Voter Restoration*, 89 TEMP. L. REV. 451, 470 (2017).

12. *Id.*

13. *Id.*

14. Powell, *supra* note 2, at 398–99.

15. *Id.* at 384.

16. See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in The United States*, 2002 WIS. L. REV. 1045 (2002); see also Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENTENCING REP. ED. 248 (2000).

17. Ewald, *supra* note 16, at 1065; see U.S. CONST. amend. XIV, § 1.

18. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”); but see Ewald, *supra* note 16, at 1065–66 (“Despite the liberating intent of the Amendment and the powerful language of the Equal Protection Clause, the Fourteenth Amendment has had the perverse effect of strengthening modern disenfranchisement law”).

19. Ewald, *supra* note 16, at 1066–67; see *Richardson v. Ramirez*, 418 U.S. 24 (1974).

20. William W. Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, And Future*, 58 ALA. L. REV. 615, 619–20 (2007).

alone be sufficient to outlaw disenfranchisement in the United States.²¹ It is more pragmatic to focus on making arguments using the Fifteenth Amendment and the Voting Rights Act (“VRA”).²² Particularly, ex-felony disenfranchisement laws should be deemed unconstitutional under the Fifteenth Amendment and Section 2 of the VRA.²³ Both pieces of legislation support the notion that ex-felons fall under a protected class of citizens, and thus it is unconstitutional for states to discriminate against them at the polls.²⁴

Disenfranchising offenders increases their likelihood of committing subsequent crimes in the future, causing the recidivism rate to increase.²⁵ In countries that practice disenfranchisement on a minimal basis, such as Norway and Finland, the recidivism, incarceration, and crime rates are significantly lower than in countries that habitually practice disenfranchisement, like the United States.²⁶

Though the United States arguably practices felony disenfranchisement to the fullest extent, there are several countries that either do not have such a practice or only enforce it in a limited capacity.²⁷ Norway and Finland, for example, only take away the right to vote for specific crimes.²⁸ While the United States criminal justice system focuses on deterrence and retribution, Norway and Finland strive for rehabilitation

21. *Id.* at 628.

22. Thedford, *supra* note 3, at 94; *see* U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude”); Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (codified as 52 U.S.C. § 10301–10702).

23. *Id.*; *see* 52 U.S.C.S. § 10301(a) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote . . .”).

24. *Id.* at 110.

25. *See* Hersom, *supra* note 1; *see also* Michael Pinard, *Article: Collateral Consequences of Criminal Convictions: Confronting Issues of Race And Dignity*, 85 N.Y.U.L. REV. 457, 463–64 (2010).

26. Denis Yuhnenko et al., *A systematic review of criminal recidivism rates worldwide: 3-year update*, 4 WELLCOME OPEN RES. 1, 7, tbl.2 (2020); Christina Sterbenz, *Why Norway’s prison system is so successful*, BUS. INSIDER (Dec. 11, 2014), <https://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> [<https://perma.cc/T6M3-ATLH>]; *see* Kristen Nelson & Jeanne Segil, *The Pandemic as a Portal: Reimagining Crime and Punishment in Colorado in the Wake of COVID-19*, 98 DENV. L. REV. 337, 343 (2021).

27. Hersom, *supra* note 1 (“Despite similar problematic histories across all selected European nations and within the United States, the social, political, and legislative realities for currently and formerly incarcerated individuals in Norway, Finland and Germany, particularly surrounding voting rights, sharply contrasts with the United States”).

28. *See id.*; *see also* AMERICAN CIVIL LIBERTIES UNION, *OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES* 7 (MAY 2006), https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf.

and restorative justice.²⁹ However, the United States has one of the highest recidivism rates in the world, while Norway and Finland have some of the lowest.³⁰ In fact, studies have shown there is a negative correlation between the ability to vote and recidivism.³¹

On a related note, felony disenfranchisement has a disproportionate influence on people of color.³² For example, Black Americans are about four times more likely to be prohibited from voting than the rest of the population as a result of disenfranchisement.³³ Criminological theories, such as shaming and labeling theory, can also aid in understanding how felony disenfranchisement creates a criminal underclass of outcasts that can never fully rejoin society, resulting in recidivism.³⁴

I. History & Background of Felony Disenfranchisement

The tradition of disenfranchisement has its roots in ancient and medieval history, dating back to ancient Greece.³⁵ There, criminals were pronounced “infamous,” where they were banned from participating in politics, including appearing in court, serving in the army, and voting.³⁶ During the Renaissance, Europeans similarly created the concept of “outlawry,” where criminals were regarded as being outside of the law and prohibited from participating in politics.³⁷ The concept of “civil death”

29. Hersom, *supra* note 1.

30. Hersom, *supra* note 1; *see also* Yuhnenko et al., *supra* note 26, at 8 (The United States’ reconviction rate is 60 percent, Finland’s reconviction rate is 36 percent, and Norway’s reconviction rate is 20 percent).

31. Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, 2 *PERSP. ON POL.* 491, 502 (2004) (“It is perhaps not surprising that, faced with significant disadvantages in the labor market and a variety of restrictions on their ability to . . . enjoy . . . civil rights, almost two-thirds of released prisoners are rearrested within three years”).

32. *See* Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, THE SENTENCING PROJECT (updated July 28, 2021); *see also* Bridgett A. King & Laura Erickson, *Disenfranchising the Enfranchised: Exploring the Relationship Between Felony Disenfranchisement and African American Voter Turnout*, 47 *J. BLACK STUD.* 799 (2016).

33. Chung, *supra* note 32 (stating approximately one out of sixteen Black Americans is disenfranchised, totaling about 1.8 million citizens).

34. Guy P. Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 *BERKELEY LA RAZA L.J.* 407, 414–15 (2012).

35. Ewald, *supra* note 16, at 1059–60.

36. *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, And “The Purity Of The Ballot Box,”* 102 *HARV. L. REV.* 1300, 1301 (1989); Brian J. Hancock, *The Voting Rights of Convicted Felons*, 17 *J. ELECTION ADMIN.* 35, 35 (1996) (claiming because Greek society included so many people who lacked the rights of citizenship, “the social and civic degradation accompanying a criminal conviction served not only as a penal measure, but also as a deterrent to crime”); Mauer, *supra* note 16, at 248.

37. Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender’s Right to Vote: Background and Developments*, 11 *AM. CRIM. L. REV.* 721, 722 (1973); *see*

was also developed in Europe, particularly in England, and it eradicated a criminal's legal capacity and civil rights.³⁸ The forfeiture would typically be triggered when an individual was convicted of a felony or treason.³⁹ As the English created colonies in North America, statutes concerning suffrage came about.⁴⁰ Notably, moral requirements played the largest role in whether a colonist was permitted to vote in New England.⁴¹ For example, Plymouth denied suffrage to those who opposed the laws of the colony, who were not of amicable conversation, or who were "grossly scandalouse [sic] or notoriously vitious [sic]."⁴² The Maryland colony even disenfranchised anyone who obtained a third conviction for intoxication.⁴³ The disenfranchisement would often be permanent or subject to a special pardon by the court.⁴⁴

The connection between morals and disenfranchisement can be seen in early state constitutions as well.⁴⁵ Many states required proof of one's good character to obtain voting privileges and disqualified those convicted of felonies.⁴⁶ Eleven states' constitutions prohibited criminals from voting between 1776 and 1821.⁴⁷ In the following forty years, eighteen more states would follow suit.⁴⁸ It was not until the Civil War

Ewald, *supra* note 16, at 1060.

38. Ewald, *supra* note 16, at 1060 n.44 (describing how civil death surpassed outlawry by extending to the offender's descendants, where they were also imposed with dishonor and legal incapacity).
39. *Id.* (citing Itzkowitz & Oldak, *supra* note 37, at 724) (A person convicted of either crime faced "forfeiture corruption of the blood," meaning land owned by the criminal would not pass to their heirs but to the king).
40. *See generally* CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES III, 3 (Colum. Coll. Pol. Sci. Fac. eds., 1893).
41. *Id.* at 54 ("Evidence of a positive character was at one time necessary before a person could be admitted to the freedom of the colony, while the absence of correctness in moral behavior would, in certain cases, lead to the suspension of a freeman from his privileges or even to his total disfranchisement").
42. *Id.* at 55.
43. Ewald, *supra* note 16, at 1062 (citing BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA, 1606–1660 161 n.150 (1983)).
44. Bishop, *supra* note 40, at 55 (quoting a 1650 statute, "It is ordered by this Courte [sic] and decreed, that if any person within these Libberties [sic] haue beene or shall be fyned [sic] or whipped for any scandalous offence, hee [sic] shall not bee [sic] admitted after such time to haue any voate [sic] in Towne [sic] or Commonwealth, nor to serue [sic] in the Jury, untill [sic] the Courte [sic] shall manifest their [sic] satisfaction").
45. Ewald, *supra* note 16, at 1061 (Moral qualifications were commonly used to limit voting rights, as well as having a certain religion and owning property).
46. *Id.* at 1063.
47. *Id.* (The eleven states were Alabama, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New York, Ohio, and Virginia. Curiously, Vermont authorized its supreme court to disenfranchise any citizen convicted of a "notoriously scandalous" offense, but a legislative council found the law vague and thus unconstitutional. Afterward, Vermont only took away a criminal's right to vote if they were convicted of an election offense).
48. *Id.* (The eighteen states were California, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Oregon,

approached in the 1860s that attitudes toward disenfranchisement began to shift.⁴⁹ Women, men without property, African Americans, students, soldiers, the mentally ill, and criminals were all ineligible to vote.⁵⁰ After Reconstruction, southern states modified their disenfranchisement laws to apply to crimes believed to be committed primarily by African Americans and exclude crimes believed to be committed primarily by White Americans.⁵¹ This practice continued even after the Reconstruction era.⁵² By 1912, forty-two out of forty-eight states practiced disenfranchisement, either via statute or constitution.⁵³

In the aftermath of the Civil War, the Fourteenth Amendment was ratified granting citizenship to everyone born or naturalized in the United States, including individuals who were enslaved, and conferred unto all citizens “equal protection under the laws.”⁵⁴ The EPC would later become the focus of the United States Supreme Court case *Richardson v. Ramirez*, which held felony disenfranchisement laws were constitutional under the Fourteenth Amendment.⁵⁵

In the majority of the United States today, felons lose their right to vote either temporarily or permanently, the length of time varying from state to state.⁵⁶ For example, California allows for the restoration

Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin).

49. *Id.* at 106–65.
50. *Id.*; *Who Voted in Early America?*, TEACH DEMOCRACY, <https://www.crf-usa.org/bill-of-rights-in-action/bria-8-1-b-who-voted-in-early-america> [<https://perma.cc/58HC-WMV9>] (last visited Oct. 8, 2022); Mauer, *supra* note 16, at 248.
51. Baugh-Dash, *supra* note 2, at 129–30 (“[I]n Alabama . . . a man convicted of vagrancy would lose his right to vote, but a man convicted of killing his wife would not. In the state of South Carolina, lawmakers made thievery, adultery, arson, wife beating, housebreaking, and attempted rape into felonies accompanied by the deprivation of voting rights, while murder and fighting were excluded from disenfranchisement”) (quoting Robin L. Nunn, Comment, *Lock Them Up and Throw Away the Vote*, 5 CHI. J. INT’L L. 763, 767–68 (2005)); Ewald, *supra* note 16, at 1065; Mauer, *supra* note 16, at 249; Pinard, *supra* note 25, at 513.
52. *See generally* Chung, *supra* note 32.
53. Baugh-Dash, *supra* note 2, at 130 (All states except for Maine and Vermont formally adopted a disenfranchisement law).
54. *Id.* at 128 (“After the war, the passage of the Fourteenth Amendment limited the reasons for which a state could disenfranchise its citizens, while appearing to affirm the practice of criminal disenfranchisement.”); U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).
55. Baugh-Dash, *supra* note 2, at 130–31; *see Richardson v. Ramirez*, 418 U.S. 24 (1974).
56. *See generally* Chung, *supra* note 32 (Only four United States territories have no voting restrictions, twenty-one territories restrict the right to vote while in prison, sixteen territories restrict the right to vote during prison, parole, and probation, and eleven territories restrict the right to vote post-sentence).

of felons' voting rights after their prison time has ended, while Tennessee permanently takes away felons' voting rights.⁵⁷

However, disenfranchisement policies are quite different in various European countries as compared to the United States.⁵⁸ In Norway, citizens are eligible to vote once they have turned eighteen years old.⁵⁹ However, there are two exceptions.⁶⁰ If a citizen is mentally ill or has been convicted of a crime "against the Constitution and Head of State, such as treason or electoral fraud," they can be disenfranchised⁶¹—but, the disenfranchisement cannot exceed ten years.⁶² Additionally, the punishment is seldom enforced.⁶³ In Finland, every citizen who has reached the age of eighteen can vote in national elections, referendums, European Parliamentary elections, and municipal elections.⁶⁴ There are no voting exceptions in the Constitution's language.⁶⁵ However, via a subsequent act, Finnish citizens can be disenfranchised for a few years after their sentence is completed if their charge involved corruption of civic participation, such as buying or selling votes.⁶⁶ As in Norway, this provision is rarely enforced.⁶⁷

II. United States: Fourteenth Amendment

Following its passing after the Civil War, the EPC quickly became the avenue through which felons could challenge the constitutionality of disenfranchisement laws.⁶⁸ *Richardson v. Ramirez* was a landmark case in which the United States Supreme Court ruled that disenfranchisement laws are constitutional under the Fourteenth Amendment.⁶⁹

57. *Id.*, tbl.1.

58. See GRUNNLOVEN [CONSTITUTION] May 17, 1814, art. 50 (Nor.); SUOMEN PERUSTUSLAKI [CONSTITUTION] March 1, 2000, 2 luku, § 14 (Fin.).

59. GRUNNLOVEN [CONSTITUTION] May 17, 1814, art. 50 (Nor.).

60. See OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES, *supra* note 28.

61. *Id.* at 7; GRUNNLOVEN [CONSTITUTION] May 17, 1814, art. 50, 53 (Nor.).

62. See OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES, *supra* note 28, at 7.

63. *Id.* (Even though disenfranchisement in Norway and similar countries seem rare, the offenses are usually serious and specific).

64. SUOMEN PERUSTUSLAKI [CONSTITUTION] March 1, 2000, 2 luku, § 14 (Fin.).

65. *Id.*

66. Hersom, *supra* note 1 (Notably, even if an offender is convicted of corruption of civic participation, they would still be able to vote while incarcerated. The disenfranchisement would not take place until they are reintegrated back into society).

67. See OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES, *supra* note 26.

68. Baugh-Dash, *supra* note 2, at 128 (noting even though the language of the Fourteenth Amendment appeared to limit why a citizen can be disenfranchised, it actually strengthened felony disenfranchisement laws); see U.S. CONST. amend. XIV; Ewald, *supra* note 16, at 1065–66; see U.S. CONST. amend. XIV.

69. *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) ("We therefore hold that the

In 1972, three ex-felons in California attempted to register to vote but were refused due to their prior convictions.⁷⁰ They argued an article of the California constitution was in violation of the EPC.⁷¹ The alleged unconstitutional article in California's constitution read, "no person convicted of any infamous crime, no person hereafter convicted of the embezzlement or misappropriation of public money . . . shall ever exercise the privileges of an elector in this State."⁷² The California Supreme Court agreed with the plaintiffs and found the article unconstitutional, but the United States Supreme Court would later reverse this decision.⁷³ The Court found that Section 2 of the Fourteenth Amendment allows for felony disenfranchisement because it denies voting rights for "participation in rebellion, or other crime."⁷⁴ Moreover, the Court held felony disenfranchisement laws were distinct from other voting restrictions.⁷⁵ Disenfranchisement laws need not be narrowly tailored to serve compelling state interests, but instead only rationally related to the voting restraint or distinction.⁷⁶

There are two arguments the Supreme Court and other federal courts have recognized in successful challenges of felony disenfranchisement under the EPC.⁷⁷ The first is to prove a pattern of unequal enforcement with regard to the law, as successfully argued in *Williams v. Taylor*.⁷⁸ The second approach is to prove the law was created to intentionally discriminate, which was successfully argued in *Hunter v. Underwood*.⁷⁹

Supreme Court of California erred in concluding that California may no longer, consistent with the EPC of the Fourteenth Amendment, exclude from the franchise convicted felons who have completed their sentences and paroles").

70. *Id.* at 31.

71. See U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws").

72. CAL. CONST. art. II, § 1; *Richardson v. Ramirez*, 418 U.S. at 27–28.

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

74. U.S. CONST. amend. XIV, § 2; *Richardson v. Ramirez*, 418 U.S. at 45 (relying primarily on the plain language of the text and how the practice has been historically viewed as valid).

75. *Richardson v. Ramirez*, 418 U.S. at 54 ("We hold that the understanding of those who adopted the Fourteenth Amendment . . . is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the EPC by this Court").

76. *Id.* at 77 (Marshall, J., dissenting) (asserting disenfranchisement laws are not "forever immunized from evolving standards of equal protection scrutiny," which is typically strict scrutiny. In this highest level of scrutiny, the state must show a compelling interest in the law and that the law is either narrowly tailored or the least restrictive means available).

77. Liles, *supra* note 20, at 619–20; see Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R.6th 31 (2021).

78. Liles, *supra* note 20, at 619; see *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982).

79. Liles, *supra* note 20, at 620; see *Hunter v. Underwood*, 471 U.S. 222 (1985).

In *Williams v. Taylor*, the Fifth Circuit considered the issue of unequal enforcement of the law under the EPC.⁸⁰ Many years after the plaintiff's felony conviction, the county board of election commissioners disenfranchised him.⁸¹ The plaintiff argued he was selectively disenfranchised because of a political grudge held by the local mayor.⁸² The court ruled in favor of the plaintiff, asserting a state must treat all citizens equally.⁸³ The state's decision to disenfranchise the plaintiff was arbitrary, as other felons were similarly convicted before and after the plaintiff but still retained the right to vote.⁸⁴ Nevertheless, the court reasoned if a state was going to draw distinctions between offenders, the distinctions must be rational.⁸⁵

Hunter v. Underwood is arguably the most influential case concerning the ability to challenge the constitutionality of disenfranchisement laws under a discriminatory lens.⁸⁶ In the case, the Supreme Court held that disenfranchisement laws demonstrating "purposeful racial discrimination" violated the EPC.⁸⁷ The language at issue was a provision in Alabama's Constitution, which stated individuals convicted of "any crime . . . involving moral turpitude" would be disenfranchised.⁸⁸ The Court found that the provision was enacted to prohibit Black Americans from voting, and the disenfranchised population in Alabama due to this provision was racially disparate.⁸⁹ Furthermore, the Court clarified its previous *Richardson* ruling in stating that while it is constitutional for states to disenfranchise their felons under Section 2 of the Fourteenth

80. *Williams v. Taylor*, 677 F.2d at 517; see U.S. CONST. amend. XIV, § 2.

81. *Williams v. Taylor*, 677 F.2d at 513.

82. *But see id.* ("The commissioners maintain, however, that they did not find out about his conviction until the circuit clerk told them. The circuit clerk stated in deposition that she discovered the conviction after someone left records of his conviction at the courthouse").

83. *Id.* at 517 ("We conclude that appellant should be given a chance to prove his claim of selective and arbitrary enforcement of the disenfranchisement procedure. While he has no right to vote as a convicted felon . . . he has the right not to be the arbitrary target of the Board's enforcement of the statute").

84. *Id.* ("Appellant's affidavit asserts that he knows felons who have not been disenfranchised who are white and who do not share his political beliefs. He also claims that certain members of the Election Board knew of his felony conviction for many years and acted only when his political activities became controversial").

85. *Id.*

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

87. *Id.* at 233; see U.S. CONST. amend. XIV, § 2.

88. ALA. CONST. art. VIII, § 182; *Hunter v. Underwood*, 471 U.S. at 223.

89. *Hunter v. Underwood*, 471 U.S. at 227, 232 (stating Black Americans are at least ten times more likely to lose their right to vote than their White counterparts in Alabama) ("In addition to the general catchall phrase 'crimes involving moral turpitude' the suffrage committee selected such crimes as vagrancy, living in adultery, and wife beating that were thought to be more commonly committed by blacks").

Amendment, it is unconstitutional for disenfranchisement laws to discriminate on the grounds of race.⁹⁰

Moreover, the Third Circuit case *Owens v. Barnes* supports the rationale of the two previous cases.⁹¹ The plaintiffs contended Pennsylvania's laws, which disenfranchised only convicted and incarcerated felons, violated the EPC.⁹² Even though the court sided against the plaintiff, it reaffirmed the ruling of *Richardson*.⁹³ The court stated felony disenfranchisement laws did not have to withstand the heightened scrutiny customarily administered to voting constraints, rather a state's reasonable relation to a legitimate state interest is adequate.⁹⁴

In summary, to favorably denounce a disenfranchisement law, there must be evidence that the law was unequally enforced, the law engendered discrimination on account of race, or the disenfranchisement was based on arbitrary characteristics, such as disenfranchising "similarly situated blue-eyed felons but not brown-eyed felons."⁹⁵

III. United States: Fifteenth Amendment & VRA

Even though there has been some success in challenging felony disenfranchisement laws under the EPC, the Fourteenth Amendment alone will not be sufficient grounds upon which to outlaw disenfranchisement in the United States.⁹⁶ Instead, the Fifteenth Amendment in conjunction

90. *Id.* at 233.

91. *See Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983).

92. *Id.* at 26 (Though, the plaintiff did concede that Pennsylvania could disenfranchise all convicted felons under the ruling of *Richardson*); Miller, *supra* note 79, at 21.

93. *Owens v. Barnes*, 711 F.2d at 28 (asserting Pennsylvania can not only disenfranchise all felons but distinguish among them as well); Miller, *supra* note 79, at 21.

94. *Owens v. Barnes*, 711 F.2d at 28 (This ruling essentially allows states to disenfranchise felons however they see fit, as evidenced by the court's explanation that "[t]he state could rationally decide that one of the losses, in addition to the basic deprivation of liberty, to which a prisoner who is incarcerated should be subject is that of participation in the democratic process which governs those who are at liberty. At the same time, Pennsylvania could rationally determine that those convicted felons who had served their debt to society and had been released from prison or whose crimes were not serious enough to warrant incarceration in the first instance stand on a different footing from those felons who required incarceration, and should therefore be entitled to participate in the voting process.")

95. *Id.* at 27; *e.g.* *Thiess v. St. Admin. Bd. of Election Laws*, 387 F.Supp. 1038 (D. Md. 1974) (Even though the court ultimately ruled in favor of the defense for lack of evidence, it reaffirmed the rulings of *Richardson* and *Owens*. Specifically, arbitrary and unequal enforcement are valid claims to challenge voting laws under the EPC).

96. Liles, *supra* note 20, at 628 (pointing to a different solution, "if Equal Protection Clause and Voting Rights Act challenges are expected to have only minimal success, if any, how does the abolition of such an unpopular practice occur? The answer is simple: the legislature.")

with the VRA should be used to argue that ex-felony disenfranchisement is unconstitutional and, thus, should be outlawed.⁹⁷

Several felony disenfranchisement cases have been litigated around what the Fifteenth Amendment's language means.⁹⁸ Section 1 of the Fifteenth Amendment reads, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or *previous condition of servitude*."⁹⁹ In *United States v. Kozminski*, the Supreme Court defined servitude as, "A condition in which a person lacks liberty, especially to determine one's course of action or way of life – 'slavery' – the state of being subject to a master."¹⁰⁰ Proponents of ex-felony disenfranchisement law abolishment assert that felons fall under the aforementioned condition of servitude, and thus that the Fifteenth Amendment forbids disenfranchisement laws.¹⁰¹

Section 2 of the Fifteenth Amendment is significant because it authorized Congress to enforce Section 1 through legislation.¹⁰² Thus, the VRA was enacted.¹⁰³ It prohibited literacy tests, allocated federal oversight of both state and local registration sites, and empowered the United States Attorney General to pursue charges against any election utilizing poll taxes.¹⁰⁴ Even though it was a substantial improvement for the civil rights of Black Americans, the VRA could only disband voting restrictions if the high standard of proving discriminatory intent could be met.¹⁰⁵ Fortunately, Congress later amended the act to require proof of discrimination in voting restrictions against a class of citizens based on the totality of the circumstances.¹⁰⁶

The subsequent cases of *Farrakhan v. Washington* ("Farrakhan I") and *Farrakhan v. Gregoire* ("Farrakhan II") shaped the approaches in which felony disenfranchisement lawsuits under the Fifteenth

97. Thedford, *supra* note 3, at 94.

98. See *United States v. Kozminski*, 487 U.S. 931 (1988); *Mobile v. Bolden*, 446 U.S. 55 (1980); *Malnes v. Arizona*, No. CV-16-08008-PCT-GMS, 2016 U.S. Dist. LEXIS 86637, at *5 (D. Ariz. July 5, 2016).

99. U.S. CONST. amend. XV, § 1 (emphasis added).

100. *United States v. Kozminski*, 487 U.S. at 937 (quoting App. to Pet. for Cert. 109a-110a).

101. Thedford, *supra* note 3, at 110.

102. U.S. CONST. amend. XV, § 2.

103. Thedford, *supra* note 3, at 107; see Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

104. Jonathan Kwortek, *Guilty Beyond a Reasonable Vote: Challenging Felony Disenfranchisement Under Section 2 of The Voting Rights Act*, 93 S. CAL. L. REV. 849, 852 (2020).

105. Thedford, *supra* note 3, at 107.

106. *Id.*; 52 U.S.C.S. § 10301(b) ("A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice"); see Kwortek, *supra* note 106.

Amendment and VRA have been argued.¹⁰⁷ In *Farrakhan I*, incarcerated felons in Washington brought suit against state officials, alleging the state's disenfranchisement laws were racially motivated.¹⁰⁸ Further, they claimed Washington's criminal justice system had a disproportionate impact on people of color, violating the VRA.¹⁰⁹ The Ninth Circuit held the plaintiffs must show that Washington's voting restriction engenders racial discrimination based on the totality of the circumstances.¹¹⁰ It was novel for the court at the time to consider evidence of racial discrimination in the criminal justice system itself.¹¹¹ This decision created a circuit split on the question of whether a VRA felony disenfranchisement challenge could use evidence of a criminal justice system's participation in discriminatory practices.¹¹²

In *Farrakhan II*, the court declared the previous case “swe[pt] too broadly” and discussed the relationship between felony disenfranchisement and the criminal justice system.¹¹³ It reasoned disenfranchisement occurs after conviction, which is dictated by the criminal justice system that has its own protections and policies.¹¹⁴ The court held that plaintiffs bringing a felony disenfranchisement suit under the VRA that pertains to the criminal justice system must, at a minimum, prove the “criminal justice system is infected by *intentional* discrimination or that the felon disenfranchisement law was enacted with such intent.”¹¹⁵ These cases are meaningful because the court drew the distinction between intentional discrimination related to felony disenfranchisement and intentional discrimination related to a state's criminal justice system.¹¹⁶

Mobile v. Bolden is a Supreme Court case that analyzed the “sparse” legislative history of the VRA.¹¹⁷ The case transpired when citizens of

107. See *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

108. *Farrakhan v. Washington*, 338 F.3d at 1013.

109. *Id.* at 1021.

110. *Id.* at 1011–1012 (describing the totality of the circumstances test as a consideration of “how a challenged voting practice interacts with external factors,” such as historical or social components).

111. Thedford, *supra* note 3, at 107–08.

112. *Id.* at 108; see *Farrakhan v. Gregoire*, 623 F.3d at 993 (“Three circuits—two sitting en banc—have disagreed with *Farrakhan I* and concluded that felon disenfranchisement laws are categorically exempt from challenges brought under section 2 of the VRA.”)

113. *Farrakhan v. Gregoire*, 623 F.3d at 993.

114. *Id.*

115. *Id.*

116. Thedford, *supra* note 3, at 108.

117. *Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (quoting H. R. Rep. No. 439, at 23 (1965)) (“The House Report on the bill simply recited that [formerly section 2 of the VRA] ‘grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color.’ The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings”).

color sued the city and its commissioners for violating the VRA, claiming they could not register and vote without significant hindrances.¹¹⁸ Even though the Court ruled in favor of the defendants largely due to the lack of evidence, it said the VRA “makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.”¹¹⁹ This declaration supports the claim that the VRA works in conjunction with the Fifteenth Amendment, which protects individuals from discrimination based on race, color, or previous conditions of servitude.¹²⁰ Thus, disenfranchisement based on an individual’s classification as a “felon” is discrimination against a class of protected people under the Fifteenth Amendment.¹²¹

IV. Penal Systems of the United States, Norway, & Finland

The United States’ criminal justice system is distinct from those in Norway and Finland.¹²² The country has the “most restrictive disenfranchisement laws of any democratic nation,” as felons in fourteen states lose the right to vote forever.¹²³ In other democratic nations, disenfranchisement is imposed for a shorter period of time, must be enforced by a judge, and only relates to specific offenses.¹²⁴ From the early 1970s to the present day, the number of inmates in both state and federal prisons has increased from 200,000 to 2.3 million.¹²⁵ Considering only probation, the amount has risen from 900,000 to 3.4 million.¹²⁶ Regarding parole, the number has increased from 150,000 to 700,000.¹²⁷ Since these figures are the highest they have ever been in United States history, the number of disenfranchised felons is at an all-time high as well.¹²⁸ It is estimated there are about 5.2 million Americans (2.3 percent of the voting-age population) disenfranchised as ex-felons.¹²⁹ To put it blatantly, “America has long had a love affair with punishment . . . At virtually every decision point in the criminal justice system, we choose the more punitive option

118. *Id.* at 58 (For example, minorities were allegedly discriminated against because minority representatives were not elected in proportion to its population).

119. *Id.* at 61.

120. U.S. CONST. amend. XV, § 1; 52 U.S.C.S. § 10301(a).

121. Thedford, *supra* note 3, at 110; *see* Brnovich v. Democratic Nat’l Committee, 141 S. Ct. 2321, 2332 (2021) (quoting 52 U.S.C.S. § 10301(a)) (After the decision in *Mobile*, Congress amended Section 2 of the VRA replacing ‘to deny or abridge the right . . . to vote on account of race or color,’ with ‘in a manner which results in a denial or abridgment of the right . . . to vote on account of race or color’).

122. *See* Hersom, *supra* note 1; *see also* Mauer, *supra* note 16.

123. Mauer, *supra* note 16, at 248; *see* Chung, *supra* note 32.

124. *Id.* at 248.

125. Nelson & Segil, *supra* note 26, at 343 (“America locks up an average of 698 per 100,000 people, which is four to eight times the per capita incarceration rate of other liberal democracies”).

126. Mauer, *supra* note 16, at 249 (About half of those on probation are considered felons).

127. *Id.*

128. *Id.*

129. Hersom, *supra* note 1.

over any available alternative . . . In the criminology field, this tendency even has its own term: people call it ‘American penal exceptionalism.’”¹³⁰

The United States incarcerates more individuals than any other country in the world.¹³¹ However, despite mass incarceration rates, crime rates in the United States are still high.¹³² In 2009, the United States had 5 murders per 100,000 people, whereas Norway had 0.6 homicides per 100,000 people.¹³³ Similarly in 2012, the United States’ homicide-by-firearm rate was 29.7 per one million people, and Finland’s was 4.5 per one million people.¹³⁴

Furthermore, mass incarceration tends to dehumanize ex-felons, as they are often discriminated against when trying to find housing, searching for employment, and applying for public benefits.¹³⁵ Consequently, they become more likely to recidivate.¹³⁶

In Norway, progressive reforms in the criminal justice system continued throughout the 1900s.¹³⁷ Capital punishment was outlawed in 1902, and life sentences were outlawed in 1981.¹³⁸ The country’s recidivism rates remained high at about 60 percent, thus Norway reformed its prison system.¹³⁹ Shifting from a focus on punishment and security to rehabilitation, the prisons instituted educational programs, new cell designs, and workshops.¹⁴⁰ Additionally, Norway transformed the concept of a prison guard into one closely resembling that of coaches and mentors.¹⁴¹ Today, Norway has one of the lowest recidivism rates worldwide.¹⁴²

Norway also practices restorative justice.¹⁴³ This theory concentrates on repairing harm to the victim, the community, and the offender.¹⁴⁴

130. DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR* 51 (2019).

131. Nelson & Segil, *supra* note 26, at 343.

132. *Id.* at 344 (“If incarceration worked to stop violence, the United States would have one of the lowest crime rates in the world, given its penchant for punishment”).

133. Zaid Jilani, *As The Right Bemoans Norway’s Criminal Justice System, It Is One Of The Safest Countries On Earth*, THINKPROGRESS (July 25, 2011, 4:20 PM), <https://archive.thinkprogress.org/as-the-right-bemoans-norways-criminal-justice-system-it-is-one-of-the-safest-countries-on-earth-f181a7585493> [<https://perma.cc/9RFS-WFPU>].

134. Zack Beauchamp, *America doesn’t have more crime than other rich countries. It just has more guns.*, VOX, <https://www.vox.com/2015/8/27/9217163/america-guns-europe-homicide-rates-murder-crime>, (last updated Feb. 15, 2018) [<https://perma.cc/3HHS-KYUE>].

135. Pinard, *supra* note 25, at 491–94; *see generally* Mauer, *supra* note 16.

136. Nelson & Segil, *supra* note 26, at 345 (describing how criminologists postulate ex-offenders become more criminally oriented due to their stigmatization).

137. *See* Hersom, *supra* note 1.

138. *Id.*

139. Sterbenz, *supra* note 26.

140. Hersom, *supra* note 1.

141. *Id.*

142. *Id.*; Sterbenz, *supra* note 26; Yukhnenko et al., *supra* note 26, at 7 tbl.2.

143. Sterbenz, *supra* note 26.

144. *See* Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 *BUFF. L. REV.* 635 (2021).

The restoration is done via victim-offender mediation, family group conferencing, sentencing circles, and citizen-supervised probation.¹⁴⁵ These tools ensure that re-entering society will be less difficult.¹⁴⁶ Furthermore, the theory focuses on the idea that individuals are more apt to abide by the law when they believe they were treated fairly by the criminal justice system, further reducing recidivism.¹⁴⁷

Finland also targets rehabilitation.¹⁴⁸ In the latter half of the 1900s, Finland experienced much higher incarceration and recidivism rates than its neighboring countries.¹⁴⁹ The high rates at the time were likely attributable to the country's punitive sentencing policies.¹⁵⁰ The country sought reform, focusing on the concept that both lenient (but fair) punishment and the offender's belief in equitable justice would lower crime rates.¹⁵¹ Accordingly, Finland's penal view focuses on proportionality and predictability.¹⁵² Inmates with short sentences work for wages, and inmates with longer sentences usually work a traditional job or enroll in vocational training.¹⁵³ A third of Finland's prisons function as "open prisons," which authorize inmates to leave the premises for education or work.¹⁵⁴

Currently, Finland's recidivism rate is almost half of the United States'.¹⁵⁵ Additionally, Finland provides social welfare support to prisoners, as well as reintegration programs to help newly released citizens rejoin society.¹⁵⁶ Consequently, these reforms allowed Finland to achieve

145. *Id.* at 649 (Family group conferences are normally "facilitated by professional social workers and typically include the offender and their family, the victim and their supporters, a police representative, and sometimes a specially-trained lawyer called a youth advocate," while sentencing circles often include the aforementioned parties as well as "volunteers drawn from interested members of the community who serve as facilitators and participants").

146. *Id.* at 640.

147. *Id.* at 647–48 ("Under this theory, offenders' voice, participation, and meaningful input in a restorative process that they perceive to be fair will improve their respect for and compliance with the law"); see Nelson & Segil, *supra* note 26, at 345 n.40 (explaining how incarceration deteriorates "the social and family bonds that guide individuals away from crime, remove adults who would otherwise nurture children, deprive communities of income, reduce future income potential, and engender a deep resentment toward the legal system").

148. Hersom, *supra* note 1.

149. Marie Gottschalk, *Dismantling the Carceral State: The Future of Penal Policy Reform*, 84 TEX. L. REV. 1693, 1747 (2006).

150. *Id.* at 1747 n.401; Lilith Houseman, *Reducing Reliance on Incarceration in Texas: Does Finland Hold Answers?*, 46 TEX. INT'L L.J. 209, 212 (2010).

151. Houseman, *supra* note 152, at 213.

152. *Id.* ("The criminal justice system is expected to meet certain minimum requirements, namely standards of certainty and adequacy of punishment, legitimacy of procedure, and appropriateness in the scope of criminal laws").

153. Pinard, *supra* note 25, at 477 n.91.

154. Hersom, *supra* note 1.

155. Yuhnenko et al., *supra* note 26, at 7 tbl.2.

156. Pinard, *supra* note 25, at 477.

one of the lowest prison populations in the world: approximately 3,000 citizens out of a national population of 5,556,421.¹⁵⁷

V. Correlation Between Disenfranchisement & Recidivism Rates Internationally

Disenfranchisement has the unintended consequence of making ex-offenders more likely to recidivate.¹⁵⁸ It is necessary to note that recidivism is a mass epidemic that plagues the United States regardless of the effects felony disenfranchisement may have.¹⁵⁹ The Bureau of Justice Statistics reported that approximately 77 percent of formerly incarcerated individuals will be arrested again within five years.¹⁶⁰ There is no singular explanation for this high reoffense rate.¹⁶¹ Possible factors include age at discharge, geographic environment, and lack of employment.¹⁶² Nevertheless, disenfranchisement certainly appears to be correlated to the likelihood of one reoffending.¹⁶³

Global differing systems of felony disenfranchisement allow for comparative analysis.¹⁶⁴ Studies suggest the ability to vote has a negative impact on recidivism rates.¹⁶⁵ A literature review of studies examining the connection between disenfranchisement and recidivism suggests a causal relationship.¹⁶⁶ At a minimum, the findings suggest there is an association that has substantial ramifications for the criminal justice system and policymakers.¹⁶⁷

157. Hersom, *supra* note 1 (compared to the United States' aforementioned prison population of 2.3 million).

158. *See id.*; *see also* Pinard, *supra* note 25.

159. Hadar Aviram et al., *Felon Disenfranchisement*, 13 ANN. REV. L. SOC. SCI. 295, 303 (2017); *see* Pinard, *supra* note 25; *see* Yukhnenko et al., *supra* note 26.

160. Charles Tarwater, Jr., *The Mind Oppressed: Recidivism As A Learned Behavior*, 6 WAKE FOREST J.L. & POL'Y 357, 358 (2016) (The Bureau of Justice Statistics also indicated about 68 percent of those formerly incarcerated will be re-arrested within three years); *see* Aviram et al., *supra* note 159.

161. Aviram et al., *supra* note 159, at 304.

162. Tarwater, Jr., *supra* note 162, at 359; *see* Hersom, *supra* note 1 (stating those who retain the right to vote while in prison often struggle with reading and writing, making it essentially impossible to register to vote and fill out the ballot themselves. Even being unable to do this has been linked to high recidivism rates. The author argues that disenfranchisement only worsens the problem, adding additional obstacles to civic engagement. Thus, there is a higher likelihood to reoffend).

163. *See* Manza & Uggen, *supra* note 31; James Call, *Study shows ex-cons benefit from rights restoration*, WFSU PUB. MEDIA (July 29, 2011, 4:06 PM), <https://news.wfsu.org/show/capital-report/2011-07-29/study-shows-ex-cons-benefit-from-rights-restoration> [<https://perma.cc/VBM4-DAGT>]; Aviram et al., *supra* note 159.

164. *See* Hersom, *supra* note 1; *see also* Yukhnenko et al., *supra* note 26.

165. *See* Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193 (2004); *see also* Yukhnenko et al., *supra* note 26.

166. *See* Uggen & Manza, *supra* note 165.

167. *Id.* at 214 ("Voting appears to be part of a package of pro-social behavior that is linked to desistance from crime. Though the unique independent contribution

The connection between civic participation and recidivism can be observed through longitudinal studies.¹⁶⁸ Jeff Manza and Christopher Uggen, well-cited scholars in the field of felony disenfranchisement, conducted a study of 1,000 22- and 23-year-old residents of St. Paul, Minnesota from 1996 to 2000.¹⁶⁹ Of the disenfranchised ex-offenders, 27 percent recidivated, while only 12 percent of ex-offenders who were able to vote recidivated.¹⁷⁰ In Minnesota at the time, the right to vote was lost until one's sentence had been completed, including parole and probation.¹⁷¹ The study is not without its limitations, as there was approximately a 25 percent decrease in the number of remaining participants by the study's conclusion.¹⁷² Overall, this study suggests that the ability to vote at least somewhat corresponds to the likelihood of reoffending.¹⁷³

A report by the Florida Parole Commission studied the cases of 30,672 offenders released between April 2007 and March 2011.¹⁷⁴ About 33 percent of those who were disenfranchised recidivated, while only 11 percent of those who retained their voting rights recidivated.¹⁷⁵ These findings are considered provisional because, in Florida, the right to vote is automatically restored for specific crimes, whereas others may need to petition the commission, and some may even be permanently ineligible to regain the right.¹⁷⁶ Notwithstanding, these findings support the notion that civic participation has a negative relationship with reoffending.¹⁷⁷ The Florida Parole Commission also found that out of seventy-five applicants who applied for restoration of their civil rights in 2011, forty-eight of them expressed a desire to regain “their right to vote, sit on a jury, or hold public office.”¹⁷⁸

of voting participation is likely to be small relative to pressing . . . other factors, the right to vote remains the most powerful symbol of stake-holding in our democracy”).

168. *E.g., id.*

169. *Id.* at 201 (The study also focused on the specific demographics of the offenders, as well as the types of both the prior and subsequent crimes (for example, violent crimes and property crimes)).

170. *Id.* at 205–06 (stating the results suggest “there is at least some correlation between voting in 1996 and recidivism in 1997/2000 among people who have had some official contact with the criminal justice system”).

171. *Id.* at 206; *but see* Chung, *supra* note 32, at 1 (Minnesota subsequently changed its law to only restrict a felon's right to vote while incarcerated).

172. Uggen & Manza, *supra* note 165, at 201 (An additional flaw is that recidivism was measured by self-reported crime and arrest data. Self-reports are subject to bias because the participants may prioritize being socially acceptable over being truthful).

173. *Id.* at 213 (“We find consistent differences between voters and non-voters in rates of subsequent arrest, incarceration, and self-reported criminal behavior”); Chung, *supra* note 32, at 1 tbl.1.

174. Call, *supra* note 163.

175. *Id.*; Aviram et al., *supra* note 159, at 299.

176. Aviram et al., *supra* note 159, at 299–300; *see* Chung, *supra* note 32; *see also* Call, *supra* note 163.

177. Aviram et al., *supra* note 159, at 299–300; Call, *supra* note 163.

178. FLA. PAROLE COMM'N, ANNUAL REPORT 2010–2011 57 (2011).

On a national scale, the United States has a recidivism rate of 60 percent after two years, which is one of the highest in the world.¹⁷⁹ One cannot ignore the stark differences between the United States' recidivism rate and that of Norway and Finland.¹⁸⁰ Norway's two-year recidivism rate is 20 percent, and Finland's is 36 percent.¹⁸¹ Additionally, Norway and Finland practice felony disenfranchisement for specific offenses in rare circumstances.¹⁸² This is compared to the United States' routine practice of disenfranchising both felons and ex-felons for widespread crimes, where an offender may lose their right to vote forever.¹⁸³

VI. The Disparate Impact of Felony Disenfranchisement on People of Color

Disenfranchisement laws and race have been inextricably tied to each other since the post-Reconstruction era.¹⁸⁴ Felony disenfranchisement has a disproportionate influence on people of color.¹⁸⁵ For example, Black Americans are about four times more likely to be disenfranchised than the rest of the population, and comprise 38 percent of the national felony disenfranchised population, though they only comprise 13 percent of the overall national population.¹⁸⁶ This disparity is also observed at the state level.¹⁸⁷ The Black American population in Kentucky, a state that practices permanent felony disenfranchisement, constitutes approximately 7 percent of the state's total population but 24 percent of the state's disenfranchised population.¹⁸⁸ The Black American population in Nebraska, a state that only restores the right to vote upon completion of one's sentence, constitutes about 4 percent of the state's total population, but 23 percent of its disenfranchised population.¹⁸⁹ Therefore, the

179. Yuhnenko et al., *supra* note 26, at 8 tbl.2.

180. *See id.*

181. *Id.*; *see* Hersom, *supra* note 1.

182. *See* Hersom, *supra* note 1; *see also* Ispahani, *supra* note 28.

183. *See* Chung, *supra* note 32, at 1 tbl.1.

184. *See* Baugh-Dash, *supra* note 2; Ewald, *supra* note 16; Mauer, *supra* note 16; Pinard, *supra* note 25.

185. *See* Baugh-Dash, *supra* note 2; *see also* Mauer, *supra* note 16; Nelson & Segil, *supra* note 26; Karina Schroeder, *How Systemic Racism Keeps Millions of Black People from Voting*, VERA INST. JUST. (Feb. 16, 2018), <https://www.vera.org/news/how-systemic-racism-keeps-millions-of-black-people-from-voting> [<https://perma.cc/EHY2-Y9NL>].

186. Chung, *supra* note 32, at 2; Schroeder, *supra* note 185 ("An estimated one in 13 black Americans does not have the right to vote due to past convictions").

187. *See* King & Erickson, *supra* note 32.

188. *Id.* at 807 tbl.2 (Similarly, Iowa's Black American population comprises 2 percent of the state's total population but comprises 34 percent of the state's disenfranchised population. Arizona's Black American population makes up 3 percent of the state's total population. However, the demographic makes up 21 percent of its disenfranchised population); Hersom, *supra* note 1.

189. King & Erickson, *supra* note 32, at 807–08 tbl.2 (In Idaho, Black Americans make up less than 1 percent of the population and 6 percent of the total disenfranchised population, with Wisconsin and New Mexico having similar

United States' widespread disenfranchisement is not commensurate with the Black American population.¹⁹⁰

The lowest racial disparities exist in states that only disenfranchise felons for the duration of their incarceration.¹⁹¹ In Ohio, Black Americans comprise 12 percent of the population and only 3 percent of the disenfranchised population.¹⁹² Similarly, Massachusetts' Black Americans make up 5 percent of the total population and only 2 percent of its disenfranchised population.¹⁹³ If current trends continue, 30–40 percent of Black American men born today will be disenfranchised for at least part of their lives.¹⁹⁴ Thus, there is an association between stricter felony disenfranchisement laws and a greater racial disparity in most states.¹⁹⁵

However, data for Latino and Hispanic Americans is limited.¹⁹⁶ Only within the past few years have states begun to report relevant figures for Latino populations in the United States.¹⁹⁷ It is estimated that over 560,000 Latino Americans (over 2 percent of the voting-age population) are disenfranchised.¹⁹⁸ Furthermore, thirty-four states reported an increased rate of disenfranchisement in the Latino American population compared to the total population in 2020.¹⁹⁹

VII. The Role of Shaming & Labeling Theories Related to Disenfranchisement and Recidivism

Researchers have found that both shaming and labeling theories likely play a role in the increased likelihood of recidivism when one has been disenfranchised.²⁰⁰ Reintegrative shaming theory emphasizes the influence of humiliation in criminal punishment.²⁰¹ The idea is that com-

figures.); Hersom, *supra* note 1.

190. See King & Erickson, *supra* note 32.

191. See *id.*; see also Hersom, *supra* note 1.

192. King & Erickson, *supra* note 32, at 807 tbl.2.

193. *Id.* at 807–08 (Virginia's Black American population makes up 19 percent of the state's total population but makes up 20 percent of the state's disenfranchised population. Additionally, California's statistics are also 7 percent and 8 percent respectively).

194. Mauer, *supra* note 16, at 249.

195. See *id.*; see also Hersom, *supra* note 1.

196. Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction> [<https://perma.cc/46KT-ZDTB>].

197. *Id.*

198. *Id.* at 4.

199. *Id.* at 12 (The authors note these figures are high even with likely undercounting).

200. See Hamilton-Smith & Vogel, *supra* note 34, at 428; see Ted G. Chiricos et al., *The Labeling Of Convicted Felons And Its Consequences For Recidivism*, 45 CRIMINOLOGY 547, 571 (2007); see also Kristina Murphy & Nathan Harris, *Shaming, Shame and Recidivism: A Test of Reintegrative Shaming Theory in the White-Collar Crime Context*, 47 BRIT. J. CRIMINOLOGY 900, 910 (2007).

201. Hamilton-Smith & Vogel, *supra* note 34, at 414; Chad Flanders, *Shame and the Meaning of Punishment*, 54 CLEV. ST. L. REV. 609, 612 (2006).

munities will have lower crime rates if they communicate a message of societal disapproval toward crime.²⁰² This type of shaming is supposed to be different from stigmatization, where the offender might be shamed in a way that only makes things worse.²⁰³ The difference is that with reintegrative shaming theory, the individual is treated as a good person who committed a bad act.²⁰⁴ With stigmatization, the individual is treated as a bad person who also committed a bad act.²⁰⁵ But, these lines can become blurred, and shaming offenders may no longer have the intended effect.²⁰⁶

The premise of reintegrative shaming theory is that humiliation discourages crime.²⁰⁷ However, there is evidence that disenfranchisement as a form of shaming is not reintegrative but actually stigmatizing.²⁰⁸ The shaming has an adverse effect, where the stigma attaches to the offender instead of the offense and actually serves to increase crime, otherwise known as disintegrative shaming theory.²⁰⁹ Instead of making ex-offenders feel welcomed back into the community, disenfranchisement further isolates them.²¹⁰

An example of shaming theory utilized in the legal setting is the Ninth Circuit case *United States v. Gementera*.²¹¹ The judge from the lower court imposed a sentence for mail theft that included the offender wearing a sandwich board sign declaring “I stole mail. This is my punishment.”²¹² The man was to wear it outside of the San Francisco post office for eight hours.²¹³ On appeal, counsel for the offender argued the shaming punishment could not be rehabilitative, as it would prompt his client to withdraw from society and would inflict psychological harm.²¹⁴ However, the court was unpersuaded due to the insufficient scientific support of the claim.²¹⁵ Ultimately, the Ninth Circuit held a judge has the statutory authority to institute a sentence involving public reintegrative shaming.²¹⁶ The court reasoned the punishment “aimed to break the defendant

202. *Flanders, supra* note 201, at 615.

203. *Id.* at 633.

204. John Braithwaite, *Reintegrative Shaming*, AUSTRALIAN NAT'L UNIV. 1, 1.

205. *Id.*

206. Hamilton-Smith & Vogel, *supra* note 34, at 414.

207. *Id.*

208. *Id.* at 415; *Flanders, supra* note 201, at 615 (“The offender is put in public, made to recognize that his crime invites social stigma, and left to dwell on what this means. There is no guarantee that he will not get the wrong message and instead become embittered at the state and society”).

209. Hamilton-Smith & Vogel, *supra* note 34, at 415; see Toni Makkai & John Braithwaite, *Reintegrative Shaming and Compliance with Regulatory Standards*, 32 CRIMINOLOGY 361 (1994).

210. Hamilton-Smith & Vogel, *supra* note 34, at 415.

211. See *United States v. Gementera*, 379 F.3d 596 (9th Cir. 2004).

212. *Id.* at 598.

213. *Id.* at 599.

214. *Id.* at 604.

215. *Id.* at 605.

216. *Id.* at 606 (while it is debatable whether the shaming is actually reintegrative rather than disintegrative).

of the illusion that his theft was victimless or not serious.”²¹⁷ In other words, public shaming would force him to understand the significance of the crime committed.²¹⁸ The court also stated this punishment would have deterrent, rehabilitative, and improved public safety effects.²¹⁹ One month after Gementera completed his shaming sentence, he committed another mail-related theft.²²⁰ This demonstrates that shaming punishments can incite the opposite intended effect, making it more likely the ex-offender recidivates.²²¹

There are several theories that can help explain how felony disenfranchisement creates a class of outcasts that struggle to fully reintegrate into society.²²² Labeling theory focuses on the ways in which external judgments, or labels, attach stigmatizing stereotypes to individuals, as well as how those individuals alter their behavior after being labeled.²²³ Moreover, labeling theory attributes deviance to the traits assigned to, in this case, felons by society.²²⁴ Researchers allege that branding an ex-felon as someone who no longer has the right to vote produces a self-fulfilling prophecy, as illustrated by the following quote: “[O]nce an individual is labeled as a criminal or as a deviant, the very label is the mechanism by which the demonized behavior is elicited.”²²⁵ Within the labeling theory is a concept called the “looking-glass self” which postulates that the way in which individuals perceive themselves depends partly on how others perceive them.²²⁶ For instance, if society treats an ex-felon as a low-life criminal that has nothing to offer to society, they are more likely

217. *Id.* at 602; *id.* at 605 (“The fact that a condition causes shame or embarrassment does not automatically render a condition objectionable; rather, such feelings generally signal the defendant’s acknowledgment of his wrongdoing”).

218. *Id.* at 602.

219. *Id.*

220. Pam Smith, ‘Scarlet Letter’ Mail Thief Gets Less Creative Sentence Second Time Around, ALM LAW.COM (May 25, 2006, 12:00 AM), <https://www.law.com/almID/900005549326> [<https://perma.cc/745T-R55X>].

221. See Hamilton-Smith & Vogel, *supra* note 34, at 429; Flanders, *supra* note 201; Makkai & Braithwaite, *supra* note 209.

222. See Hersom, *supra* note 1 (discussing how incarcerated people have to not only overcome the systemic injustices in prison but also overcome the mistreatment of society after they are released. Ex-felons are treated as less than human beings, meaning someone who does not deserve to fully participate in society).

223. Charlotte Nickerson, *Labeling Theory*, SIMPLYPSYCHOLOGY (Oct. 8, 2021), <https://www.simplypsychology.org/labeling-theory.html> [<https://perma.cc/8FFU-7VDU>].

224. *Id.*; Hamilton-Smith & Vogel, *supra* note 34, at 415; see Nelson & Segil, *supra* note 26, at 345 n.40 (explaining that there is also evidence incarceration in itself is criminogenic; in other words, an offender spending time behind bars increases their chance of recidivating).

225. Hamilton-Smith & Vogel, *supra* note 34, at 415.

226. Nickerson, *supra* note 223 (stating as those labeled as “deviants” encounter more interactions in a society where they receive the stereotypical assumption of deviance, that individual’s concept of themselves is further molded).

to internalize that label, even if they don't see themselves that way.²²⁷ Such internalization leads to an increase in criminal activity, and hence recidivism.²²⁸

Conclusion

The United States should outlaw ex-felony disenfranchisement because it is unconstitutional under the Fifteenth Amendment in conjunction with the VRA.²²⁹ Norway and Finland are two countries that seldom practice felony disenfranchisement and have consequently seen a decrease in their recidivism rates.²³⁰ Thus, the United States should prohibit ex-felony disenfranchisement to decrease the national rates of recidivism.²³¹ Unsurprisingly, disenfranchisement laws have also disproportionately impacted people of color.²³² Criminological theories, such as shaming and labeling theories, can aid in understanding how felony disenfranchisement permanently isolates ex-felons from society, which in turn leads to recidivism.²³³

Looking toward the future, many scholars believe ex-felony disenfranchisement laws, compared to narrower felony disenfranchisement laws, are more vulnerable to overturn.²³⁴ Such an approach is also in line with the general public's view that collateral consequences of a criminal conviction should not be permanent.²³⁵ A survey conducted in 1999 by the Joint Center for Political and Economic Studies found that 85 percent of Black Americans and 70 percent of White Americans opposed the practice of ex-felony disenfranchisement.²³⁶ About five years later, a national study found that, of approximately 500 citizens, 81.7 percent believed the right to vote should not be permanently taken away from felons.²³⁷ The findings of the aforementioned surveys reflect the conclu-

227. *Id.*

228. *Id.*

229. Thedford, Jr., *supra* note 3, at 94; U.S. CONST. amend. XV (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”); Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437; *see* United States v. Kozminski, 487 U.S. 931 (1988); *Mobile v. Bolden*, 446 U.S. 55 (1980); *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986); *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003); *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

230. Hersom, *supra* note 1; *see* Ispahani, *supra* note 28, at 6.

231. Manza & Uggen, *supra* note 31, at 502 (“Denying voting rights to ex-felons, or to felons living in their communities on probation and parole, undermines their capacity to connect with the political system and may thereby increase their risk of recidivism”); *see* Hamilton-Smith & Vogel, *supra* note 34.

232. *See* Chung, *supra* note 32; *see also* King & Erickson, *supra* note 32.

233. *See* Hamilton-Smith & Vogel, *supra* note 34; Chiricos et al., *supra* note 200; *see* Flanders, *supra* note 201; *see* Makkai & Braithwaite, *supra* note 209.

234. Mauer, *supra* note 16, at para. 23; *see* Thedford, Jr., *supra* note 3; Liles, *supra* note 20.

235. Mauer, *supra* note 16, at 251.

236. *Id.*

237. Brian Pinaire et al., *Twelfth Annual Symposium On Contemporary*

sion that many individuals consider ex-felons as having paid their debt to society, so they should be able to rejoin as “full members.”²³⁸ Ex-felons being disenfranchised symbolizes that their debts can never be fully paid, making it a Herculean feat to reintegrate back into the community.²³⁹

Urban Challenges: Barred From The Vote: Public Attitudes Toward The Disenfranchisement Of Felons, 30 *FORDHAM URB. L.J.* 1519, 1540 (2003) (About 10 percent of those surveyed felt that felons should never lose the right to vote, 31.6 percent felt that felons should lose the right only while imprisoned, 5 percent felt that felons should lose the right only while on parole or probation, and 35.2 percent felt that felons should lose the right only while imprisoned or on parole or probation); see Liles, *supra* note 20.

238. Mauer, *supra* note 16, at 250.

239. *Id.*