

DEFEATING DE FACTO DISENFRANCHISEMENT OF CRIMINAL DEFENDANTS

*Neil L. Sobol**

Abstract

In a democracy, voting is not only an important civic duty but also a right that governments owe to their citizens. However, by operation of law, forty-eight states deny voting rights to individuals based on criminal convictions. Activists and scholars attack de jure disenfranchisement as an improper collateral consequence that disproportionately impacts people of color. Although recent years show substantial reforms to re-enfranchise defendants, an estimated 5.17 million defendants remained ineligible to vote in 2020.

While efforts to address de jure disenfranchisement remain necessary, a problem that has received considerably less attention is the de facto disenfranchisement of criminal defendants who have the legal right to vote but are prevented from exercising it. De facto disenfranchisement applies to defendants who have regained their voting rights as well as defendants who have never lost their rights. Although de jure disenfranchisement excludes millions from voting, confusing restoration requirements, lack of information, misinformation, and physical barriers prevent millions of eligible voters from voting. For example, while most of the nearly 750,000 people in jail have the right to vote, they face informational and access hurdles to exercising their voting rights. Moreover, distrust of the political system and fear of arrest for voting exacerbates the issue. As with de jure disenfranchisement, de facto disenfranchisement disproportionately impacts people of color.

As states decide to restore voting rights to more individuals, de jure disenfranchisement will fade, but de facto disenfranchisement threatens to keep the same restrictive policies alive. As a result, more progress is necessary to go beyond merely providing criminal defendants with the right to vote and instead actually empowering them with the ability to vote. This Article addresses the problems associated with de facto disenfranchisement. Further, this Article suggests and analyzes the national, state, and local reforms and practices necessary to ensure that defendants with voting rights have meaningful notice of their rights and access to voting.

* Professor of Law, Texas A&M University School of Law; M.S. and B.A. (with distinction), Stanford University; J.D. (cum laude, Order of the Coif), Southern Methodist University. I am grateful for the feedback that I received at a discussion group organized by Professors Cynthia Alkon and Catherine Hancock and held at the 2021 Southeastern Association of Law Schools Conference. I appreciate the invaluable help from my research assistants, Sarah Abdel-Motaleb and Kaylie Hidalgo.

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INTRODUCTION

“Too many people struggled, suffered and died to make it possible for every American to exercise their right to vote.”¹

“Before I was stripped of my rights because of a conviction back in 2015, I didn’t vote. A lot of minorities, particularly people in the black community here in Mobile do not vote for a variety of reasons. People feel disconnected from the political process and many are confused about who can and can’t vote. Many people here think that a crime disqualifies them from voting, even misdemeanors. The state has not put much effort into educating citizens about this.”²

In 2018, Crystal Mason, a Black woman, was sentenced to a five-year term for illegally voting in the 2016 presidential election in Texas.³ At the time of the election, Mason was on supervised release for a federal

1. Representative John Lewis, Address at the 2012 Democratic National Convention (Sept. 6, 2012) (transcript available at <https://www.pbs.org/newshour/show/rep-john-lewis-your-vote-is-precious-almost-sacred> [<https://perma.cc/3C4A-NUX3>]).

2. Rodney Lofton, *Military Veteran Rodney Lofton on What Voting for the First Time Meant to Him*, CAMPAIGN LEGAL CTR. (Jan. 7, 2019), <https://campaignlegal.org/story/military-veteran-rodney-lofton-what-voting-first-time-meant-him> [<https://perma.cc/V4WX-34K3>].

3. Karen Brooks Harper, *Crystal Mason, Jailed for Illegal Voting After Casting Provisional Ballot, Seeks to Have Conviction Overturned*, TEX. TRIB. (Dec. 1, 2020, 1:00 PM), https://www.texastribune.org/2020/12/01/crystal-mason-voting-conviction-texas/?utm_source=articleshare&utm_medium=social [<https://perma.cc/8FEX-5MBC>].

conviction and claims she neither knew nor was told she was ineligible to vote.⁴ Mason asserted that poll workers even encouraged her to vote and helped her fill out a provisional ballot.⁵ Although her provisional ballot was never counted, she was arrested, convicted, and received a five-year sentence.⁶

Mason's case illustrates several concerns that critics have raised about the voting rights of criminal defendants: laws that deny voting rights as a collateral consequence of a criminal conviction,⁷ the disproportionate impact of disenfranchisement on people of color,⁸ and the confusion and lack of accurate information that criminal defendants face regarding voting eligibility.⁹

Forty-eight states have de jure disenfranchisement provisions that deny voting rights based on criminal convictions.¹⁰ Reports reflect that an estimated 5.17 million people in 2020 were ineligible to vote due to felony convictions.¹¹ These 5.17 million individuals represent nearly 2.3% or one out of every forty-four otherwise eligible voters in the United States.¹² Based on mass incarceration and the denial of voting rights for people convicted of felonies, the United States has been categorized as the leader among democracies in penal disenfranchisement.¹³ A 2006

4. *Id.*; Cynthia Alkon, *The Lost Promise of Lambert v. California*, 49 STETSON L. REV. 267, 285–86 (2020).

5. Alkon, *supra* note 4, at 286; Harper, *supra* note 3.

6. Alkon, *supra* note 4, at 286; Harper, *supra* note 3. On appeal, the Texas Court of Criminal Appeals remanded the case to determine if the evidence was sufficient to show that Mason actually knew whether she was ineligible to vote. Eduardo Medina, *Court Must Reconsider Case of Woman Sentenced to 5 Years for Voter Fraud*, N.Y. TIMES (May 11, 2022), <https://www.nytimes.com/2022/05/11/us/crystal-mason-texas-voting.html> [https://perma.cc/F7NQ-LBF2].

7. *E.g.*, CHRISTOPHER UGGEN ET AL., THE SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION (2020), <https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf> [https://perma.cc/UC2W-WN3R].

8. *E.g.*, Dyjuan Tatro, *Felony Disenfranchisement Suppresses the Votes of Black and Latinx Americans*, VERA (Oct. 26, 2020), <https://www.vera.org/news/felony-disenfranchisement-suppresses-the-votes-of-black-and-latinx-americans> [https://perma.cc/V5RX-GU4N].

9. *E.g.*, Nicole Lewis & Andrew Rodriguez Calderón, *Millions of People with Felonies Can Now Vote. Most Don't Know It.*, MARSHALL PROJECT (June 23, 2021, 6:00 AM), <https://www.themarshallproject.org/2021/06/23/millions-of-people-with-felonies-can-now-vote-most-don-t-know-it> [https://perma.cc/EX3F-5EDP].

10. *Felon Voting Rights*, NAT'L CONF. STATE LEGS. (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [https://perma.cc/C2XH-BHPX].

11. UGGEN ET AL., *supra* note 7, at 4.

12. *Id.*

13. Gilda Daniels, *Democracy's Destiny*, 109 CALIF. L. REV. 1067, 1090 (2021). Although most commentators use "felony disenfranchisement" because the vast majority of jurisdictions

study classified the United States as “an outlier” because “[i]n other democracies, many inmates vote, and it is extremely rare for anyone who is not in prison to lose the right to vote.”¹⁴

Advocates, litigants, scholars, and legislators have actively debated whether disenfranchisement laws imposed on criminal defendants should be relaxed or eliminated.¹⁵ Although state disenfranchisement laws are facially race-neutral, scholars argue that they were racially motivated.¹⁶ In practice, these laws have produced a disproportionate impact on Black Americans.¹⁷ Blacks face a disenfranchisement rate 3.7 times greater than non-Blacks, with approximately one in sixteen Blacks of voting age denied the right to vote.¹⁸

On the positive side, public support exists to restore voting rights.¹⁹ Recent reforms have allowed many disenfranchised defendants to regain their right to vote, including reforms enacted in the four years following

that disenfranchise defendants do so based on felony convictions, some jurisdictions disenfranchise defendants for certain misdemeanors as well. See U.S. DEP’T OF JUST., GUIDE TO STATE VOTING RULES THAT APPLY AFTER A CRIMINAL CONVICTION 2 (2022), <https://www.justice.gov/voting/file/1507306/download> [<https://perma.cc/F6QV-D8N5>]. Accordingly, this Article adopts Professor Beth A. Colgan’s nomenclature, “penal disenfranchisement.” Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 VAND. L. REV. 55, 59 n.12 (2019); see also Lynn Adelman, *Suppressing Votes the Old Fashioned Way*, 210 SALMAGUNDI 24, 24 (2021) (adopting Professor Colgan’s terminology).

14. LALEH ISPAHANI, ACLU, OUT OF STEP WITH THE WORLD: AN ANALYSIS OF FELONY DISENFRANCHISEMENT IN THE U.S. AND OTHER DEMOCRACIES 4 (2006), https://www.aclu.org/sites/default/files/pdfs/votingrights/outofstep_20060525.pdf [<https://perma.cc/DC76-E5B6>]; see also Daniels, *supra* note 13, at 1091.

15. See, e.g., Daniel A. Gross, *Why Shouldn’t Prisoners Be Voters?*, NEW YORKER (Feb. 27, 2020), <https://www.newyorker.com/news/the-future-of-democracy/why-shouldnt-prisoners-be-voters> [<https://perma.cc/NB6U-7WBQ>]; Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & C.R. L. REV. 71, 73–74 (2003); ERIKA WOOD, BRENNAN CTR. FOR JUST., RESTORING THE RIGHT TO VOTE 1 (2d ed. 2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf [<https://perma.cc/WSY6-HWS5>].

16. See, e.g., Erin Kelley, BRENNAN CTR. FOR JUST., RACISM & FELONY DISENFRANCHISEMENT: AN INTERTWINED HISTORY 1–3 (2017), https://www.brennancenter.org/sites/default/files/2019-08/Report_Disenfranchisement_History.pdf [<https://perma.cc/997E-SKAW>]; Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”*: Racial Threat and Felon Disenfranchisement in the United States, 1850–2002, 109 AM. J. SOCIO. 559, 569 (2003); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RESV. L. REV. 727, 738–43 (1998); Ryan A. Partelow, *The Twenty-First Century Poll Tax*, 47 HASTINGS CONST. L.Q. 425, 444–46 (2020).

17. WOOD, *supra* note 15, at 7.

18. UGGEN ET AL., *supra* note 7, at 4.

19. See Sam Levine & Ariel Edwards-Levy, *Most Americans Favor Restoring Felons’ Voting Rights, but Disagree on How*, HUFFINGTON POST (Mar. 21, 2018, 6:56 PM), https://www.huffpost.com/entry/felons-voting-rights-poll_n_5ab2c153e4b008c9e5f3c88a [<https://perma.cc/D92V-XKDT>] (reporting that sixty-three percent of the public agree that states should restore voting rights after completion of felony sentences and that only twenty percent disagree).

the 2016 election in at least thirteen states.²⁰ The 5.17 million disenfranchised defendants in 2020 were down from a record high of over 6.1 million in 2016.²¹ Reforms to restore rights have also occurred since the 2020 election.²² In 2021, of the forty-eight states that disenfranchised defendants, twenty-one allowed for automatic restoration of voting rights upon release from incarceration.²³

However, restoring voting rights to individuals without providing them the ability to vote may have a limited impact. A problem that has received considerably less attention than de jure disenfranchisement is the de facto disenfranchisement of criminal defendants who have the legal right to vote but are prevented from exercising it.²⁴ Those affected by de facto disenfranchisement include those who have had their voting rights restored and those who never lost their voting rights but face hurdles that effectively deny them the right to vote.²⁵

Whether defendants have regained their voting rights varies significantly from state to state. Some states allow re-enfranchisement upon release from prison, some require completion of parole or probation, some require payment of outstanding criminal justice debt, and some require additional time or actions before restoration of voting rights.²⁶ Despite the restoration of voting rights, reports reflect that millions with restored voting rights do not register to vote and that their registration rate is “significantly lower than the registration rate among the general public.”²⁷

Similarly, many others in the criminal justice system who have not been disenfranchised do not participate in elections.²⁸ For example, most

20. See *Felon Voting Rights*, *supra* note 10 (“Over the last few decades, the general trend has been toward reinstating the right to vote [for felons] at some point . . .”); Lewis & Calderón, *supra* note 9 (“At least [thirteen] states have expanded voting rights for people with felony convictions between 2016 and 2020.”).

21. UGGEN ET AL., *supra* note 7, at 4.

22. For a summary of recent state actions involving disenfranchisement laws, see *Felon Voting Rights*, *supra* note 10.

23. *Id.*

24. Professor Colgan identified several of the sources that address formal disenfranchisement. Colgan, *supra* note 13, at 61 n.20. For some sources that have addressed de facto disenfranchisement, see generally Emily Rong Zhang, *New Tricks for an Old Dog: Deterring the Vote Through Confusion in Felon Disenfranchisement*, 84 MO. L. REV. 1037 (2019), and ERIKA WOOD & RACHEL BLOOM, ACLU & BRENNAN CTR. FOR JUST., DE FACTO DISENFRANCHISEMENT (2008), https://www.aclu.org/sites/default/files/field_document/default_disenfranchisement_report.pdf [<https://perma.cc/ZJX8-YUBS>].

25. See *infra* Section II.A.

26. *Felon Voting Rights*, *supra* note 10.

27. See Lewis & Calderón, *supra* note 9 (reporting that, after millions of formerly incarcerated voters received the right to vote, only one in four formerly incarcerated voters actually registered).

28. See *infra* Section II.A.1.

of the nearly 750,000 individuals in jail retain the right to vote because they have never been convicted of a crime or their conviction does not subject them to disenfranchisement.²⁹ However, less than one percent of those in most jails vote, even though most are eligible to vote.³⁰

The obstacles to registration and voting take many forms, including defendants not knowing their rights, polling or correctional institution officials providing inaccurate information, and physical and psychological barriers preventing defendants from registering or voting.³¹ For example, defendants with voting rights may distrust the justice system or fear that voting may subject them to arrest for voting fraud.³² Mason's five-year sentence for illegal voting was a national story.³³ Mason said that after her story was reported, she heard from people "across the world" about the fear it created even for eligible voters; as Mason stated, "[p]eople who were not felons were intimidated by my situation and didn't want to vote."³⁴

The obstacles are heightened for incarcerated individuals who are eligible to vote.³⁵ The physical lockup creates additional hurdles to registration and voting based on, among other things, limited access to voting and registration materials, inaccurate information from jail and election officials, registration deadlines, problems associated with mail services in jail, and restrictive laws that do not recognize jail detention as cause for an absentee ballot.³⁶ Given their disproportionate arrest and incarceration rates, Black and Latinx populations are particularly vulnerable to de facto disenfranchisement.³⁷

29. Ginger Jackson-Gleich & S. Todd Yeary, *Eligible, but Excluded: A Guide to Removing the Barriers to Jail Voting*, PRISON POL'Y INITIATIVE (Oct. 2020), https://www.prisonpolicy.org/reports/jail_voting.html [<https://perma.cc/ZQ8E-TBRC>]; see also Nefertari Elshiekh, 'Third Wave' of Bail Reform: Creating a Pretrial and Bail System That Fosters Racial and Financial Equity, 3 U. CENT. FLA. DEP'T LEGAL STUD. L.J. 109, 112 (2020) (explaining that most of the U.S. jail population consists of pretrial detainees).

30. Nora Demleitner, *Felon Disenfranchisement*, 49 U. MEM. L. REV. 1275, 1277-78 (2019).

31. See *infra* Section II.B.

32. See *infra* Section II.B.2.d.

33. See Lauren Lantry & Cheyenne Haslett, *Texas Woman Faces Jail Time After Being Convicted of Voting Illegally While on Supervised Release in 2016*, ABC NEWS (June 19, 2021, 6:00 AM), <https://abcnews.go.com/US/texas-woman-faces-jail-time-convicted-voting-illegally/story?id=78343619> [<https://perma.cc/2B72-6YGN>].

34. *Help Us Fight*, CRYSTAL MASON "THE FIGHT," <https://www.crystalmasonthefight.org/fight-services> [<https://perma.cc/WD4D-FLSR>].

35. See *infra* Section II.B.

36. Jackson-Gleich & Yeary, *supra* note 29.

37. See, e.g., Dana Paikowsky, Note, *Jails As Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 HARV. C.R.-C.L. L. REV. 829, 835 (2019) (explaining that, although African American and Latino individuals make up thirty percent of the general

This Article analyzes the development of de facto disenfranchisement and suggests methods to reduce its incidence. As background, Part I presents a brief history of penal disenfranchisement. It explains the origins of disenfranchisement laws and their development in the United States, including their disproportionate impact on Black Americans. Part II moves away from formal disenfranchisement to the concept of de facto disenfranchisement. It describes the defendants who are subject to de facto disenfranchisement and why they do not vote. As discussed in Part II, incarcerated defendants face heightened obstacles, and de facto disenfranchisement disproportionately impacts people of color.

Having presented the problems of de facto disenfranchisement, the remainder of this Article discusses potential remedies. Part III briefly analyzes case law challenges to de facto disenfranchisement practices and explains the limitations of using litigation. Finally, Part IV suggests and analyzes federal, state, and local reforms and practices to combat de facto disenfranchisement.

While it is essential to battle the disenfranchisement of over five million defendants in the criminal justice system, restoring voting rights will not increase voter turnout if practical obstacles, fear, confusion, and misunderstandings prevent voting. Moreover, de facto disenfranchisement also impacts those who face obstacles despite never being formally disenfranchised.³⁸ As a result, effective voting reforms need to address the right to vote and practical concerns that inhibit the exercise of voting.

I. BRIEF HISTORY OF PENAL DISENFRANCHISEMENT

Understanding the trajectory of de jure disenfranchisement is necessary to identify the causes and potential solutions to reducing de facto disenfranchisement. This Part briefly discusses the history of penal disenfranchisement.³⁹ It addresses the development of

population, together they account for fifty-one percent of the jailed population); Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L.J. 549, 561 (2011) (“[W]hile disenfranchisement policies generally affect people of color disproportionately, this is even more true for the disenfranchisement of incarcerated people since the racial/ethnic disparities in prison are most extreme within the criminal justice system.”).

38. See Marc Meredith & Michael Morse, *Do Voting Rights Notification Laws Increase Ex-Felon Turnout?*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 241 (2014) (“[P]arties interested in increasing ex-felon political participation may find it more valuable to use their resources to develop more effective protocols with which to inform ex-felons about their voting rights than fighting legislative battles to extend legal voting rights.”).

39. A detailed discussion of the history of penal disenfranchisement is beyond this Article’s scope. For more information, see generally KATHERINE IRENE PETTUS, *FELONY DISENFRANCHISEMENT IN AMERICA* (2d ed. 2013) (providing an in-depth historical analysis of felony disenfranchisement and the collective moral and political impact that has occurred as a result).

disenfranchisement laws, its disproportionate impact on people of color, and recent reforms.

A. *Disenfranchisement as Punishment*

Disenfranchisement can be traced back to ancient Greece, where the decision to deny the right to vote to an individual convicted of a crime was made on a case-by-case basis.⁴⁰ Convicted defendants were declared “infamous” in Greece and lost certain rights, including the right to vote.⁴¹ Similarly, under Roman law, defendants “tagged with *infamia*” could lose their voting rights.⁴² Over time, European countries would adopt “civil death” penalties that would remove the rights of criminal defendants.⁴³ In England, civil death meant the convicted defendant “was said to be ‘dead in law’ because he could not perform any legal function—including, of course, voting.”⁴⁴ As with ancient Greek and Roman law, European judges had to make a specific finding to deny the loss of rights in each case.⁴⁵

Civil death concepts also made their way to the American colonies.⁴⁶ The colonial laws varied based on the specific offenses that could qualify for the loss of rights and the period for which rights would be denied.⁴⁷ In Massachusetts and Connecticut, if a colony authorized the loss of voting rights for an offense, the judge had discretion to add denial of voting rights to the defendant’s punishment.⁴⁸ The loss of voting rights was considered punishment for the crime.⁴⁹

B. *Disenfranchisement as a Collateral Consequence*

Over time, the focus of disenfranchisement laws in the United States changed from case-by-case applications of punishment to collateral

40. Nicole Austin-Hillery, *Perspectives on Racial Justice in the Era of #BlackLivesMatter: Voting Disenfranchisement*, 40 W. NEW ENG. L. REV. 415, 421 (2018).

41. Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–60 (explaining that criminals who were declared “infamous” were unable to appear in court, vote, or serve in the army).

42. *Id.* at 1060.

43. *Id.*; accord Erin Kelly, Note, *Do the Crime, Do the Time—and Then Some: Problems with Felon Disenfranchisement and Possible Solutions*, 51 U. TOL. L. REV. 389, 391 (2020).

44. Ewald, *supra* note 41, at 1060.

45. *Id.* at 1061; see also Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN. ST. L. REV. 349, 359 (2012) (noting that “disenfranchisement law originally resulted from specific violations of the moral code rather [than] the general *status* of felon”).

46. Cammett, *supra* note 45, at 358; Kelly, *supra* note 43, at 391.

47. Cammett, *supra* note 45, at 358.

48. See Ewald, *supra* note 41, at 1061–62.

49. Cammett, *supra* note 45, at 358–59.

consequences based on the conviction of certain offenses without regard to the specific defendant's case.⁵⁰ In 1792, Kentucky became the first state to adopt a constitutional provision denying voting rights based on a conviction.⁵¹ Specifically, Kentucky declared that those "convicted of bribery, perjury, forgery, or other high crimes or misdemeanors" would lose the right to vote.⁵² By 1821, ten more states constitutionally prohibited voting based on certain convictions.⁵³ Following the Civil War, by 1868, convictions served as the basis for disenfranchisement in eighteen more states.⁵⁴ Accordingly, at the adoption of the Fourteenth Amendment to the U.S. Constitution in 1868, over seventy-eight percent of states had penal disenfranchisement laws.⁵⁵

Following the passage of the Fourteenth Amendment, state disenfranchisement laws continued to evolve and "broad felon disenfranchisement laws became the nationwide norm."⁵⁶ Currently, forty-eight states provide that conviction for certain offenses (typically felonies) results in losing voting rights.⁵⁷ As a result, states generally treat the loss of voting rights as a collateral consequence of the conviction instead of punishment for a specific crime.⁵⁸

Collateral consequences associated with convictions extend far beyond disenfranchisement and adversely impact, among other things, the ability to obtain employment, housing, benefits, and education.⁵⁹ Often the collateral consequences create a more "severe and long-lasting effect" than the incarceration term or fine imposed.⁶⁰ Professor Gabriel Chin argues that the growth of collateral consequences has led to a

50. *See id.* at 359; Ewald, *supra* note 41, at 1062.

51. Emmett Sanders, *Full Human Beings: An Argument for Incarcerated Voter Enfranchisement*, PEOPLE'S POL'Y PROJECT, <https://www.peoplespolicyproject.org/projects/prisoner-voting/> [<https://perma.cc/9G4X-Q59R>].

52. *Id.* (quoting KY. CONST. of 1792, art. VIII, § 2).

53. Ewald, *supra* note 41, at 1063 & n.65.

54. *Id.* at 1063 & n.67.

55. *See also* Martha Guarnieri, Comment, *Civil Rebirth: Making the Case for Automatic Ex-Felon Voter Restoration*, 89 TEMP. L. REV. 451, 458 (2017) (stating that twenty-nine of the thirty-seven existing states had adopted disenfranchisement provisions).

56. Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1628 (2012). In 1974, the Supreme Court relied on Section 2 of the Fourteenth Amendment to uphold the constitutionality of state disenfranchisement laws. *Richardson v. Ramirez*, 418 U.S. 24, 53–56 (1974). For a discussion of *Richardson*, see *infra* notes 374–75 and accompanying text.

57. UGGEN ET AL., *supra* note 7, at 6; WOOD & BLOOM, *supra* note 24, at 1.

58. Cammett, *supra* note 45, at 359; Ewald, *supra* note 41, at 1061–62.

59. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012). A searchable database of collateral consequences is available at *Collateral Consequences Inventory*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/E5MR-KDQG>].

60. Chin, *supra* note 59, at 1791.

reemergence of the notion of civil death.⁶¹ Additionally, treating disenfranchisement as an administrative consequence rather than punishment has allowed courts to avoid the application of constitutional safeguards related to sentencing.⁶²

C. *The Racial Impact of Disenfranchisement*

The treatment of penal disenfranchisement as a collateral consequence, as opposed to a specific punishment, has also allowed supporters of disenfranchisement to argue that the laws are race-neutral.⁶³ While penal disenfranchisement provisions are facially race-neutral because they apply the same restriction on voting rights to all convicted people, their development has arguably not been race-neutral.⁶⁴ In practice, they have created a disproportionate impact on people of color.⁶⁵ Scholars have compared the disproportionate impact of penal disenfranchisement on minorities to the disproportionate impact that minorities have faced with literacy tests⁶⁶ and poll taxes.⁶⁷ Professor Gilda Daniels has written about racism and discrimination evident in the development of penal disenfranchisement in the United States.⁶⁸ She concluded that “[f]elon disenfranchisement remains one of the oldest and most entrenched mechanisms to ensure that voters of color and African Americans in particular are barred from the ballot box.”⁶⁹ Analogizing to the Constitution’s devaluation of enslaved persons in Article I,⁷⁰ Professor Daniels states that the current disenfranchisement law “serve[s] as a modern-day three-fifth compromise,” discounting the votes of Black Americans.⁷¹

This subsection briefly discusses the role that racial politics have played in developing disenfranchisement laws and the disproportionate impact of such laws.

61. *Id.* at 1790.

62. See Stephanie L. Williams, *A Most Undemocratic Practice: Felony Disenfranchisement and Its Effects on Communities of Color*, 46 N. KY. L. REV. 1, 1 (2019).

63. See Kelly, *supra* note 43, at 410.

64. JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 67–68 (2006).

65. Partelow, *supra* note 16, at 445.

66. *E.g.*, Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611 (2004).

67. *E.g.*, Partelow, *supra* note 16; J. Wyatt Mondesire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & C.R. L. REV. 435 (2001).

68. GILDA R. DANIELS, *UNCOUNTED: THE CRISIS OF VOTER SUPPRESSION IN AMERICA* 148–55 (paperback ed. 2021); see also Daniels, *supra* note 13, at 1091.

69. DANIELS, *supra* note 68, at 148.

70. U.S. CONST. art. I, § 2, cl. 3, amended by U.S. CONST. amend. XIV, § 2; see DANIELS, *supra* note 68, at 148–51, 153.

71. DANIELS, *supra* note 68, at 153.

1. Race in the Development of Disenfranchisement Laws

The growth in penal disenfranchisement laws after the Civil War is associated with the Jim Crow laws that followed the adoption of the Fourteenth Amendment in 1868 and the Fifteenth Amendment in 1870.⁷² The Fourteenth Amendment required states not to deny persons “the equal protection of the laws.”⁷³ The Fifteenth Amendment mandated that states should not deny persons the right to vote based on “race, color, or previous condition of servitude.”⁷⁴ To many individuals, giving citizenship and voting rights to Black Americans was perceived as a threat that would “undermine the political power of the white majority.”⁷⁵

Scholars argue that in response to the threat to voting power, many southern states enacted provisions to practically restrict voting rights of Blacks, including poll taxes and literacy test requirements.⁷⁶ Additionally, states adopted disenfranchisement provisions that applied to a broader range of crimes, and, in some instances, pardons were necessary to be re-enfranchised.⁷⁷ Although the provisions passed were race-neutral on their face, Professors Angela Behrens, Jeff Manza, and Christopher Uggen reported “a strong conclusion about the political significance of race in driving the adoption of felon disenfranchisement laws.”⁷⁸

Specifically, they focused on whether racial threat theories could explain the passage of disenfranchisement laws.⁷⁹ Racial threat theories are a subset of group threat theories that posit a majority group will seek to diminish perceived threats by minority groups.⁸⁰ For example, a majority group could enact barriers to voting to reduce the political power of minority groups.⁸¹ The professors examined racial threat theories based on economic competition, the size of the minority population, and the racial composition of state prisons.⁸² Their analysis revealed that “[w]hen African Americans make up a larger proportion of a state’s prison population, that state is significantly more likely to adopt or extend

72. See MANZA & UGGEN, *supra* note 64, at 51, 55–57.

73. U.S. CONST. amend. XIV, § 1.

74. U.S. CONST. amend. XV, § 1.

75. Behrens et al., *supra* note 16, at 598.

76. See, e.g., MANZA & UGGEN, *supra* note 64, at 56–58; Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. REV. 857, 870 (2021). Professor Rabia Belt argued that the non-criminal mass institutionalization of individuals has also played an important role in disenfranchisement. See Belt, *supra*, at 862–67.

77. MANZA & UGGEN, *supra* note 64, at 55–56.

78. *Id.* at 67 (Professor Behrens was a co-author of Chapter 2, which contained these conclusions); see also Behrens et al., *supra* note 16, at 596.

79. Behrens et al., *supra* note 16, at 561.

80. *Id.* at 573.

81. *Id.* at 573–74.

82. *Id.* at 574–75.

felon disenfranchisement.”⁸³ They concluded that “the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws.”⁸⁴

Moreover, anecdotal evidence illustrates racial motives in passing the laws to prevent formerly enslaved people from voting.⁸⁵ For example, Mississippi and other southern states focused their disenfranchisement laws on crimes that “black men were more likely to commit.”⁸⁶ Testimony before state conventions revealed the racial motivations of some state delegates.⁸⁷ The 1901 Alabama Constitutional Convention expanded disenfranchisement from felonies to crimes of “moral turpitude,” including misdemeanors and “acts not punishable by law.”⁸⁸ The Convention’s President declared that the “manipulation of the ballot” was necessary to prevent “the menace of negro domination.”⁸⁹ Similarly, a delegate to the 1903 Virginia Constitutional Convention stated, “I told the people of my county before they sent me here that I intended, as far as in me lay, to disenfranchise every negro that I could disenfranchise under the Constitution of the United States, and as few white people as possible.”⁹⁰

2. Disproportionate Impact

While scholars have asserted racial biases in developing disenfranchisement laws, statistics demonstrate the disproportionate impact of disenfranchisement on people of color. The disproportionate impact of penal disenfranchisement mirrors the racial impact of voter suppression laws and racial disparities in the criminal justice system.⁹¹

83. MANZA & UGGEN, *supra* note 64, at 67 (Professor Behrens was a co-author of Chapter 2 which contained these conclusions); *see also* Behrens et al., *supra* note 16, at 596.

84. Behrens et al., *supra* note 16, at 596.

85. DANIELS, *supra* note 68, at 151–52. Anecdotal evidence also indicates that southern legislators at the end of the nineteenth century looked at giving White women the right to vote as a method of reducing the impact of Black male voters. Taunya Lovell Banks, *Commemorating the Forgotten Intersection of the Fifteenth and Nineteenth Amendments*, 94 ST. JOHN’S L. REV. 899, 915 (2020).

86. DANIELS, *supra* note 68, at 152.

87. *Id.* at 151–52.

88. Behrens et al., *supra* note 16, at 569.

89. *Id.* (quoting John B. Knox, Opening Address at the 1901 Alabama Constitutional Convention (May 21, 1901), in JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 12 (1901)).

90. DANIELS, *supra* note 68, at 152.

91. *See* ELIZABETH HIRA ET AL., BRENNAN CTR. FOR JUST., EQUITY FOR THE PEOPLE: S.1/H.R.1 AND THE FIGHT FOR AN INCLUSIVE DEMOCRACY 8 (2021), https://www.brennancenter.org/sites/default/files/2021-06/2021.6.14_Equity%20paper_0.pdf [<https://perma.cc/VJ5B-WRQW>] (stating that, given the overrepresentation of people of color among those incarcerated, it is “not surprising that when state law disenfranchises individuals with felony convictions,

Voter suppression of racial minorities is well documented in the United States.⁹² For example, voter identification laws reflect a lasting “race effect” even after controlling for socioeconomic status as “people of color are less likely [than Whites] to have” identification.⁹³ According to one survey, twenty-five percent of voting-age Blacks do not have a government-issued photo identification, compared to eight percent of White citizens.⁹⁴ Moreover, reports reflect that polling officials are more likely to request photo identification for people of color and that the requested identification types create a further disproportionate impact.⁹⁵ For example, Texas recognizes handgun licenses as sufficient identification, but Whites hold over eighty percent of such licenses.⁹⁶ In contrast, social service cards, more often held by Blacks and Latinx persons, do not qualify as identification.⁹⁷ Additionally, voter restrictions enacted since *Shelby County v. Holder*⁹⁸ reflect a disproportionate impact on people of color.⁹⁹

Similarly, racial disparities exist at all levels in the criminal justice system, “from policing to prosecutorial decisions, pretrial release

people of color bear a disproportionate loss of voting rights”); Mauer, *supra* note 37, at 552 (noting that “[r]acial disparities in the criminal justice system translate into disparities in the disenfranchised population”); Somil Trivedi & Julie Ebenstein, *Mass Disenfranchisement*, INQUEST (Feb. 11, 2022), <https://inquest.org/mass-disenfranchisement/> [<https://perma.cc/D5QR-DFZW>] (describing the relationship between plea bargaining and felony disenfranchisement and identifying the disproportionate loss of voting rights for Black Americans).

92. See, e.g., DANIELS, *supra* note 68, at 9–26. A detailed discussion of suppression of voting rights for minorities is beyond this Article’s scope. For more detail, see generally DANIELS, *supra* note 68, and Hench, *supra* note 16. The Brennan Center for Justice maintains a section on its website describing projects and resources addressed to voter suppression. *Vote Suppression*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression> [<https://perma.cc/M5NR-GL2E>].

93. *Voting in America: The Potential for Voter ID Laws, Proof-of-Citizenship Laws, and Lack of Multi-Lingual Support to Interfere with Free and Fair Access to the Ballot: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.*, 117th Cong. 1 (2021) [hereinafter *Hearing*] (statement of Dr. Matt Barreto, Faculty Director, UCLA Voting Rights Project), <https://docs.house.gov/meetings/HA/HA08/20210524/112670/HHRG-117-HA08-Wstate-BarretoM-20210524.pdf> [<https://perma.cc/T22C-MXBQ>].

94. BRENNAN CTR. FOR JUST., *CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS’ POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION* 3 (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf [<https://perma.cc/5CRY-NG5F>].

95. HIRA ET AL., *supra* note 91, at 10.

96. *Id.*

97. *Hearing*, *supra* note 93, at 3.

98. 570 U.S. 529 (2013); see *infra* notes 264–65 and accompanying text.

99. Kyle Pitzer et al., *Voting Infrastructure and Process: Another Form of Voter Suppression?*, 95 SOC. SERV. REV. 175, 177 (2021), <https://www.journals.uchicago.edu/doi/10.1086/714491> [<https://perma.cc/UZ9U-C2RU>].

processes, sentencing, correctional discipline, and even reentry.”¹⁰⁰ In particular, the criminal justice system disproportionately impacts Black communities.¹⁰¹ For example, statistics reflect that Blacks have disproportionately higher arrest and booking rates than Whites.¹⁰² Although Blacks comprise only twelve percent of the population aged sixteen years or older, they account for twenty-one percent of people arrested and booked once during the year and twenty-eight percent of people arrested and booked more than once during the year.¹⁰³ On the other hand, Whites comprise sixty-five percent of the population aged sixteen years or older, but only fifty-three percent of people arrested and booked once during the year and forty-six percent of the people arrested and booked more than once during the year.¹⁰⁴ Studies also reflect that Blacks face higher rates of pretrial detention and higher bail bond amounts than Whites.¹⁰⁵

The disproportionate impact continues in incarceration and sentencing relative to their percentage of the population: “Blacks are overrepresented in jails, state and federal prisons, life and life without parole sentences, and death penalty sentences.”¹⁰⁶ While Blacks make up twelve percent of the overall population, they account for thirty-eight percent of Americans

100. Wendy Sawyer, *Visualizing the Racial Disparities in Mass Incarceration*, PRISON POL’Y INITIATIVE (July 27, 2020), <https://www.prisonpolicy.org/blog/2020/07/27/disparities/> [<https://perma.cc/BK7M-RCLT>]; accord Abigail E. Horn, *Wrongful Collateral Consequences*, 87 GEO. WASH. L. REV. 315, 318 (2019) (stating that “[s]ystemic racial bias accumulates over the course of a criminal prosecution,” and “people of color suffer disproportionate treatment at the hands of police, prosecutors, and judges”); *Incarceration Trends*, VERA (Mar. 24, 2022, 9:51 PM), <https://trends.vera.org/> [<https://perma.cc/N2H6-X8JN>] (“[R]acial disparities [in incarceration] reflect a system that treats Black people more harshly than white people at every stage of the criminal legal process.”).

101. Artika R. Tyner, *The Racial Wealth Gap: Strategies for Addressing the Financial Impact of Mass Incarceration on the African American Community*, 28 GEO. MASON L. REV. 885, 886–87 (2021). Although this Article focuses on the disproportionate impact on Black Americans, disproportionate impact also occurs in Hispanic communities. For example, the ratio of Hispanics imprisoned by states to Whites is 1.3 to 1. ASHLEY NELLIS, THE SENT’G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 6 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/D3DA-72C5>]. Moreover, the disparity is probably understated because some states do not report on ethnicity, so Hispanics are included in the data reported for the White prison population. *Id.* at 8.

102. Sawyer, *supra* note 100.

103. *Id.*

104. *Id.*

105. Wendy Sawyer, *How Race Impacts Who Is Detained Pretrial*, PRISON POL’Y INITIATIVE (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/ [<https://perma.cc/X728-C8E3>].

106. Alison Walsh, *The Criminal Justice System Is Riddled with Racial Disparities*, PRISON POL’Y INITIATIVE (Aug. 15, 2016), <https://www.prisonpolicy.org/blog/2016/08/15/cjrace/> [<https://perma.cc/KUZ7-8YFV>].

incarcerated.¹⁰⁷ Blacks experience longer periods of incarceration and parole than Whites.¹⁰⁸ Statistics reflect that race plays a significant role in incarceration, with one in seventeen White men likely to be imprisoned during their lifetimes, compared to rates of one in six and one in three for Latinx and Black men, respectively.¹⁰⁹

These racial disparities in the criminal justice system, in turn, are reflected in the inequalities in penal disenfranchisement.¹¹⁰ For example, Black people represent more than one-third of adults subject to penal disenfranchisement, yet only twelve percent of the population.¹¹¹ While one in every forty-four adults in the overall population is disenfranchised due to a felony conviction, one in every sixteen Black adults is disenfranchised such that Blacks are disenfranchised at a “rate 3.7 times greater than” that of other Americans.¹¹² “[M]ore [Black men] are disenfranchised today than in 1870, the year the Fifteenth Amendment was ratified.”¹¹³

Similarly, although the data is not as well developed, Latinx communities also face a disproportionate disenfranchisement rate.¹¹⁴ Recognizing the limitations in data, and with the caveat that its estimate likely undercounts actual disenfranchisement, the Sentencing Project “conservatively estimate[s] that over 560,000 Latinx Americans (over two percent of the voting-eligible population) are disenfranchised.”¹¹⁵ Indeed, it predicts “that Latinx disenfranchisement will comprise an

107. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL’Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> [<https://perma.cc/U8U9-AKKL>].

108. Juan Moreno Haines, *To Act Like a Democracy*, 68 UCLA L. REV. 88, 90 (2021).

109. THE SENT’G PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 5 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/06/Trends-in-US-Corrections.pdf> [<https://perma.cc/Z8MB-WQK5>]. For more detailed information about racial disparities in incarceration in jails and prisons, see *Incarceration Trends*, *supra* note 100.

110. HIRA ET AL., *supra* note 91, at 8; Mauer, *supra* note 37, at 552.

111. UGGEN ET AL., *supra* note 7, at 16–17 (finding Black people account for 1.8 million of the 5.17 million defendants subject to felony disenfranchisements); Sawyer & Wagner, *supra* note 107.

112. UGGEN ET AL., *supra* note 7, at 4.

113. Partelow, *supra* note 16, at 446 (alteration in original) (quoting MICHELLE ALEXANDER, *THE NEW JIM CROW* 175 (rev. ed. 2012)).

114. See MARTIN J. DEMEO & STEVEN A. OCHOA, MALDEF, *DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES* ii (2003), <https://www.maldef.org/assets/pdf/feb18-latinovotingrightsreport.pdf> [<https://perma.cc/BGU6-M79H>] (concluding that, although more information is needed, a significant number of Latinx Americans are unable to vote because of felony convictions, and like African Americans they are “negatively affected at disproportionate rates by felony disenfranchisement laws”).

115. UGGEN ET AL., *supra* note 7, at 11–12.

increasing share of those disenfranchised due to felony convictions in coming years.”¹¹⁶

Penal disenfranchisement disproportionately impacts Black people with convictions and depresses voting in Black communities in general.¹¹⁷ Studies show that the more restrictive a state’s disenfranchisement law is, the more significant the reduction in voter turnout by Black people not convicted of felonies.¹¹⁸ One study looking at the spillover effect of disenfranchisement found that “neighborhoods that are home to lost voters—and particularly neighborhoods with large Black populations—systematically turn out for local elections at lower rates than otherwise similar neighborhoods.”¹¹⁹ The disenfranchisement of community members creates a “damaging message to others about the legitimacy of democracy and the respect given to their voices.”¹²⁰

Moreover, a recent study “suggest[s] that disproportionate Black felony disenfranchisement likely undermines the health of Black Americans.”¹²¹ The study found an association between the disproportionate nature of penal disenfranchisement law and “worse mental and physical health among Black older adults” than their White counterparts.¹²² In particular, the study found that residing in states with “higher levels of racialized disenfranchisement . . . [was] associated with more depressive symptoms, more functional limitations, more difficulty performing [instrumental activities of daily living], and more difficulty performing [activities of daily living] among Black older adults.”¹²³

D. *Current Status of Disenfranchisement*

Concerns about the inequities in disenfranchisement laws have led to litigation and legislative proposals in the United States. Despite many legal challenges, the courts have traditionally upheld the rights of states

116. *Id.*

117. *The For the People Act: Hearing on S.1 Before the S. Comm. on Rules & Admin.*, 117th Cong. 20 (2021) [hereinafter *Hearing*] (statement of Michael Waldman, President, Brennan Ctr. for Just.).

118. See, e.g., Shadman Zaman, Note, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 240 (2015); Williams, *supra* note 62, at 11.

119. Kevin Morris, *Neighborhoods and Felony Disenfranchisement: The Case of New York City*, 57 URB. AFFS. REV. 1203, 1221 (2021).

120. *Hearing*, *supra* note 117, at 20.

121. Patricia A. Homan & Tyson H. Brown, *Sick and Tired of Being Excluded: Structural Racism in Disenfranchisement as a Threat to Population Health Equity*, 41 HEALTH AFFS. 219, 224 (2022).

122. *Id.* at 224.

123. *Id.* at 223–24.

to disenfranchise convicted defendants.¹²⁴ With one narrowly limited exception, the Supreme Court of the United States has denied claims that state disenfranchisement provisions violate the Equal Protection Clause.¹²⁵ Additionally, courts have generally denied disenfranchisement challenges based on alleged claims under the Constitution's First, Eighth, Fifteenth, Nineteenth, and Twenty-Fourth Amendments.¹²⁶ Similarly, courts have generally rejected state constitutional claims.¹²⁷

Litigants have also relied on the Voting Rights Act of 1965¹²⁸ to challenge disenfranchisement.¹²⁹ Although the Supreme Court has not confronted issue, at least three circuits have ruled that felon disenfranchisement provisions do not violate the Act.¹³⁰ Additionally, the U.S. Court of Appeals for the Ninth Circuit, citing these cases, found that a claim under the Act would require a showing "that the criminal justice system is infected by *intentional* discrimination or that the felon

124. 29 C.J.S. *Elections* § 47 (2022) (stating that courts generally find that disenfranchisement laws do not violate Equal Protection or impose cruel and unusual punishment under the Constitution); Robin Miller, Annotation, *Validity, Construction, and Application of State Criminal Disenfranchisement Provisions*, 10 A.L.R. 6th, at 31 (2006) ("While criminal disenfranchisement provisions have been subjected to a multiplicity of legal attacks, they have withstood most challenges."). A detailed discussion of the constitutionality of penal disenfranchisement provisions is beyond this Article's scope. For more information, see Miller, *supra*.

125. Miller, *supra* note 124, § 10; see U.S. CONST. amend. XIV, § 1. In *Hunter v. Underwood*, the Court created a limited exception based upon a showing of "racially discriminatory intent or purpose." 471 U.S. 222, 227 (1985) (quoting lower court approvingly). However, in practice, litigants have generally been unsuccessful in applying *Hunter*. See Giovanni Padilla, *Disenfranchisement of People with Felony Records and the Racial Discrimination Behind It*, 26 PUB. INT. L. REP. 111, 123 (2020) (concluding that "[t]he standard set by *Hunter* is one that will likely never be met by plaintiffs"); see also, e.g., *Harness v. Watson*, 47 F.4th 296, 303–11 (5th Cir. 2022) (en banc) (per curiam) (agreeing with the approach of the U.S. Courts of Appeal for the Second and Eleventh Circuits and finding that Mississippi's disenfranchisement amendments did not meet either of *Hunter's* two steps because plaintiffs failed to establish that the legislation was motivated by discriminatory intent, and the state showed that the legislation removed the discriminatory taint associated with the original 1890 legislation).

126. Miller, *supra* note 124, at §§ 2, 6–13; Daniel R. Correa, *The Slavery Clause and Criminal Disenfranchisement: How the Thirteenth Amendment Informs the Debate on Crime-Based Franchise Restrictions*, 53 LOY. U. CHI. L.J. 89, 95 & nn.20–21 (2021) (identifying courts denying claims under the First and Eighth Amendment).

127. See, e.g., *Schroeder v. Simon*, 962 N.W.2d 471, 478–87 (Minn. Ct. App. 2021) (finding that disenfranchisement provision did not violate Minnesota's constitutional protections for the right to vote, equal protection, and due process); see also Martine J. Price, Note, *Addressing Ex-Felon Disenfranchisement: Legislation vs. Litigation*, 11 J.L. & POL'Y 369, 393–95 (2002).

128. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10702).

129. See Miller, *supra* note 124, §§ 14–15; Correa, *supra* note 126, at 95.

130. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc); *Simmons v. Galvin*, 575 F.3d 24, 41–42 (1st Cir. 2009); *Hayden v. Pataki*, 449 F.3d 305, 323, 328 (2d Cir. 2006) (en banc).

disenfranchisement law was enacted with such intent.”¹³¹ As a result, successful caselaw challenges to penal disenfranchisement are rare.¹³²

While judicial challenges have generally not been successful, since 1995, at least fifty percent of states have enacted reforms to expand the restoration of rights for defendants convicted of felonies.¹³³ As a result, the number of disenfranchised defendants fell from a high of 6.11 million in 2016 to 5.17 million in 2020.¹³⁴ Since 2020, additional legislation has continued to relax disenfranchisement laws. For example, in 2021, Connecticut, New York, and Washington enacted legislation expanding voting rights to defendants released from prison.¹³⁵

The following chart depicts the status of state disenfranchisement laws. Each “ballot” has a number reflecting the number of states in the listed disenfranchisement category. The footnotes list the individual states, and Part II develops the details of the categories.

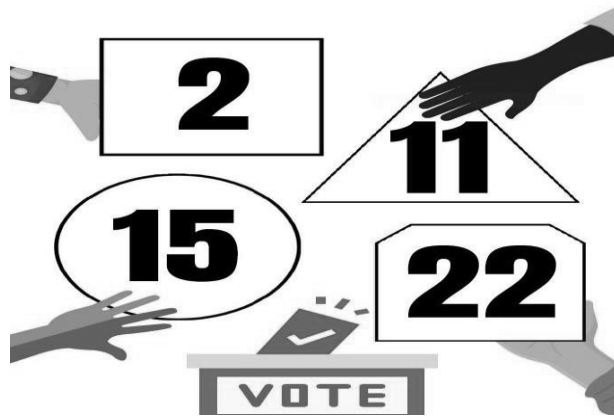
131. *Farrakhan v. Gregoire*, 623 F.3d 990, 993 (9th Cir. 2010) (en banc) (per curiam).

132. Padilla, *supra* note 125, at 123 (reporting that “the circuits make it virtually impossible to challenge the practice of felon disenfranchisement”).

133. UGGEN ET AL., *supra* note 7, at 4. For a state-by-state guide to voting rights after conviction, see U.S. DEP’T OF JUST., *supra* note 13, https://www.justice.gov/d9/fieldable-panel-panes/basic-panes/attachments/2022/05/19/voting_with_a_criminal_conviction.pdf [https://perma.cc/Y2JG-NA93].

134. UGGEN ET AL., *supra* note 7, at 4.

135. NICOLE PORTER, THE SENT’G PROJECT, *SUCCESSSES IN CRIMINAL LEGAL REFORMS, 2021*, at 3 (2021), <https://www.sentencingproject.org/wp-content/uploads/2021/12/Successes-in-Criminal-Legal-Reforms-2021.pdf> [https://perma.cc/8BBZ-CQH9].



- States where defendants are not disenfranchised.¹³⁶
- States where voting rights are restored upon release.¹³⁷
- States where voting rights are restored following probation/parole.¹³⁸
- States where voting rights are restored following additional time or actions.¹³⁹

136. Maine and Vermont. *Felon Voting Rights*, *supra* note 10. Additionally, Puerto Rico and the District of Columbia do not have restrictions. JEAN CHUNG, THE SENT'G PROJECT, VOTING RIGHTS IN THE ERA OF MASS INCARCERATION: A PRIMER 1 (2021), <https://www.sentencingproject.org/app/uploads/2022/08/Voting-Rights-in-the-Era-of-Mass-Incarceration-A-Primer.pdf> [<https://perma.cc/893H-28XK>].

137. California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington. *State Voting Laws & Policies for People with Felony Convictions*, PROCON.ORG (Aug. 1, 2022), <https://felonvoting.procon.org/state-felon-voting-laws/> [<https://perma.cc/X6GP-MKQ2>]. Virginians' voting rights are restored by gubernatorial order once their sentences are completed, *id.*, but because this is dependent on the governor's continuing assent, Virginia is not included in this category. Effective July 1, 2023, Minnesota will restore defendants' voting rights upon release from prison. Sydney Kashiwagi, *Minnesota Governor Signs Bill Expanding Voting Rights for Ex-felons*, CNN: POL. (Mar. 3, 2023, 1:32 PM), <https://www.cnn.com/2023/03/03/politics/tim-walz-minnesota-voting-rights/index.html> [<https://perma.cc/X48C-FKDZ>].

138. Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Mexico, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. *Felon Voting Rights*, *supra* note 10; Gary D. Robertson, *Thousands of North Carolina Felons Can Now Register and Vote*, AP NEWS (July 27, 2022), <https://apnews.com/article/voting-rights-elections-north-carolina-raleigh-b16b3e2011be229d92b40a0e2615883f> [<https://perma.cc/AP2E-AZUK>] (reporting that felons in North Carolina are eligible to vote upon release from prison after a state court invalidated a disenfranchisement statute). Effective July 1, 2023, Minnesota restored voting rights for defendants upon release from prison. Kashiwagi, *supra* note 137. Payment of fines, fees, or restitution may also be a condition of restoration of voting rights. *Felon Voting Rights*, *supra* note 10.

139. Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Felon Voting Rights*, *supra* note 10.

II. DEFINING DE FACTO DISENFRANCHISEMENT

Although legislative reforms have expanded the pool of eligible voters, many criminal defendants with the right to vote face barriers that prevent them from exercising their voting rights. Merely securing the right to vote without providing the means, access, and information to actually vote effectively keeps defendants disenfranchised. This Part describes the subjects, sources, and disproportionate impact of de facto disenfranchisement.

A. *Subjects of De Facto Disenfranchisement*

De facto disenfranchisement affects defendants who have regained or are eligible to regain the right to vote and defendants who were never disenfranchised but, as a practical matter, are denied the right to vote. Understanding the categories of individuals subject to de facto disenfranchisement is essential in determining how to combat it.

1. Defendants Who Were Never Disenfranchised

Many defendants face voting barriers even though they have never formerly lost the right to vote. They are not subject to formal disenfranchisement because they reside in jurisdictions that do not disenfranchise defendants, have not been convicted of a criminal offense, or have been convicted of a crime not subject to disenfranchisement.

a. Defendants in Jurisdictions that Do Not Disenfranchise

A small number of jurisdictions do not remove voting rights for criminal defendants. For example, Maine and Vermont are the only states that do not disenfranchise defendants, allowing even those incarcerated for felony convictions the right to vote.¹⁴⁰ The voting rights granted to people in prison in these states are based on long-established interpretations of their state constitutions.¹⁴¹ Attempts to legally disenfranchise incarcerated individuals convicted of serious crimes in Maine and Vermont have not succeeded.¹⁴² Similarly, in 2020, the District of Columbia approved legislation granting voting rights to people incarcerated for felony convictions.¹⁴³ Additionally, while the U.S.

140. Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do*, MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do> [https://perma.cc/DK73-8EGL].

141. *Id.*

142. *Id.*

143. Julie Zauzmer Weil & Ovetta Wiggins, *D.C. and Maryland Have New Policies Allowing Prisoners to Vote. Making It Happen Is Hard*, WASH. POST (Sept. 28, 2020, 7:00 AM), <https://www.washingtonpost.com/dc-md-va/2020/09/28/dc-maryland-prisoners-voting/> [https://perma.cc/5R9M-HPFU]; *Felon Voting Rights*, *supra* note 10.

Constitution prohibits citizens of territories, such as Puerto Rico, from voting in presidential elections,¹⁴⁴ all citizens of Puerto Rico, even if incarcerated, are eligible for voting in presidential primaries.¹⁴⁵

b. Defendants Who Are Not Convicted

Although Maine and Vermont do not disenfranchise defendants, the remaining forty-eight states do for certain criminal convictions.¹⁴⁶ In these states, hundreds of thousands of charged, but not convicted, individuals face obstacles to voting.¹⁴⁷ Many of these defendants are detained in jail or have been in the past.¹⁴⁸ For example, in 2017, more than 480,000 individuals, representing nearly sixty-five percent of the jail population, were in jail—not convicted—but awaiting trial because they lacked the means to pay bail.¹⁴⁹ The United States, with only four percent of the world’s population, has about twenty percent of the world’s pre-trial jailed population.¹⁵⁰ Like the incarcerated individuals in Maine and Vermont, defendants in jail who have not been convicted retain their voting rights.¹⁵¹

144. See U.S. Const. art. II, § 1, cl. 2 (granting only “State[s]” the power to appoint Electors for President).

145. Ron Stefanski, *Can a Felon Vote in Puerto Rico?*, FELONY REC. HUB (Oct. 21, 2021), <https://www.felonyrecordhub.com/rights/puerto-rico/> [<https://perma.cc/72LZ-KLSS>]; Vann R. Newkirk II, *Polls for Prisons*, ATL. (Mar. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/03/inmates-voting-primary/473016/> [<https://perma.cc/T5RW-EBAP>].

146. UGGEN ET AL., *supra* note 7, at 6.

147. Jackson-Gleich & Yeary, *supra* note 29.

148. *Id.* For a more detailed discussion of the problems with the jail system in the United States, see generally RAM SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION’S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA (2015), https://www.vera.org/downloads/publications/incarcerations-front-door-report_02.pdf [<https://perma.cc/QMT3-P97P>].

149. NICOLE PORTER, THE SENT’G PROJECT, VOTING IN JAILS 5 (2020), <https://www.sentencingproject.org/publications/voting-in-jails/> [<https://perma.cc/AU2A-2D2C>]; see also Sawyer & Wagner, *supra* note 107 (reporting that 67% of the 658,000 individuals in jails were not convicted).

150. Elshiekh, *supra* note 29, at 115. Although the number of individuals in jail decreased during the COVID-19 pandemic, the United States still leads the world in incarceration and data reflects that jail populations are back on the rise. JACOB KANG-BROWN ET AL., VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN SPRING 2021, at 2–4, 8 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-spring-2021.pdf> [<https://perma.cc/FT75-H4GD>]; Weihua Li et al., *Jail Populations Creep Back Up After COVID-19*, MARSHALL PROJECT (June 7, 2021, 10:00 AM), <https://www.themarshallproject.org/2021/06/07/jail-populations-creep-back-up-after-covid-19> [<https://perma.cc/J77D-4EUX>].

151. Jackson-Gleich & Yeary, *supra* note 29.

c. Defendants with Convictions that Do Not Result in Disenfranchisement

While nearly sixty-five percent of people in jail are not disenfranchised because they have not been convicted, the overwhelming majority of the remaining thirty-five percent, or 263,000 individuals, in jail are also not subject to disenfranchisement because their convictions, typically for misdemeanors, do not subject them to the denial of the right to vote.¹⁵² As a result, most of the nearly 750,000 individuals in jail are eligible to vote.¹⁵³

Although all states that disenfranchise criminal defendants require a conviction to deprive defendants of their right to vote, not all convictions result in disenfranchisement. Disenfranchisement generally only occurs when defendants receive felony convictions.¹⁵⁴ In forty-four states, convictions for misdemeanors do not result in disenfranchisement.¹⁵⁵ Even in the six states that permit disenfranchisement for misdemeanors, disenfranchisement is limited to only certain misdemeanors.¹⁵⁶ As a result, most defendants convicted of misdemeanors do not lose their voting rights.¹⁵⁷

Additionally, some states have modified these general rules about disenfranchisement for felonies. The main modifications focus on restricting disenfranchisement to specific felonies or those where the defendant faces incarceration in prison. For example, Alabama restricts disenfranchisement to felonies that involve moral turpitude and, in 2017, Alabama enacted legislation to list the specific felonies that fall within this classification.¹⁵⁸ Similarly, Mississippi limits the denial of voting

152. PORTER, *supra* note 149, at 5. While some in jail may face disenfranchisement based on a prior conviction, many with prior convictions may have had their rights restored upon release from prison and the number of jailed individuals subject to disenfranchisement based on remaining on probation or parole is “relatively small.” Jackson-Gleich & Yeary, *supra* note 29.

153. Jackson-Gleich & Yeary, *supra* note 29; Mauer, *supra* note 37, at 560.

154. WOOD & BLOOM, *supra* note 24, at 2. For a state-by-state description of how states define felonies, their associated sentences, and where inmates serve their sentences, see OHIO CRIM. SENT’G COMM’N, A NATIONAL PERSPECTIVE: 50 STATE LOW-LEVEL FELONY SENTENCING SUMMARY (2017), <https://www.sconet.state.oh.us/Boards/Sentencing/resources/general/50StateLowLevelFelonySentencingSummary.pdf> [<https://perma.cc/G5GA-92UQ>].

155. Jackson-Gleich & Yeary, *supra* note 29 (listing Illinois, Indiana, Kentucky, Michigan, Missouri, and South Carolina as the exceptions).

156. See U.S. DEP’T OF JUST., *supra* note 13, at 2 (noting that these states “strip the right to vote from people convicted of *some* misdemeanors—especially ones connected with elections” (emphasis added)).

157. *Id.*; Jackson-Gleich & Yeary, *supra* note 29.

158. Connor Sheets, *Gov. Ivey Signs Bill Restoring ‘Thousands’ of Alabama Felons’ Right to Vote*, ADVANCE LOC. (May 25, 2017, 3:48 PM), https://www.al.com/news/2017/05/gov_ivey_signs_bill_restoring.html [<https://perma.cc/X2CT-BRRT>]; ALA. CODE § 17-3-30.1 (Westlaw through 2022 Reg. and 1st Spec. Sess.).

rights to ten enumerated felonies.¹⁵⁹ In Oregon, defendants convicted of felonies who receive sentences of less than a year are sent to county jails and retain their voting rights.¹⁶⁰ Similarly, California does not disenfranchise those convicted of felonies if they are serving their sentences in county jails rather than prisons.¹⁶¹

2. Defendants Who Have Regained Voting Rights

While the first group of defendants subject to *de facto* disenfranchisement was never formally disenfranchised, the second group was disenfranchised but has regained their right to vote. As described in this subsection and depicted on the chart in Part I, the re-enfranchisement of defendants can take several forms.

a. Automatic Restoration Upon Release from Incarceration

Of the forty-eight states that disenfranchise defendants, twenty-two permit automatic restoration of rights when defendants with felony convictions are no longer incarcerated.¹⁶² In the remaining twenty-six states, release from prison, by itself, is insufficient to restore voting rights.¹⁶³

b. Automatic Restoration After Completion of Probation or Parole

Fifteen of these twenty-six states require completion of a sentence before automatic restoration of rights.¹⁶⁴ Depending on the state, completing a sentence may require probation or parole.¹⁶⁵

Probation generally refers to court-ordered supervision instead of incarceration; however, a defendant may receive a sentence that includes

159. ALEC EWALD, THE SENT'G PROJECT, A 'CRAZY-QUILT' OF TINY PIECES: STATE AND LOCAL ADMINISTRATION OF AMERICAN CRIMINAL DISENFRANCHISEMENT LAW 7 (2005), <https://static.prisonpolicy.org/scans/crazyquilt%2011:9.pdf> [<https://perma.cc/R8E9-HSHZ>]; MISS. CONST. art. 12, § 241.

160. EWALD, *supra* note 159, at 4; OR. REV. STAT. §§ 137.124(1)(a), .281, .285 (2021).

161. *Felon Voting Rights*, *supra* note 10; ACLU OF N. CAL. ET AL., VOTING IN CALIFORNIA JAILS: A COMMUNITY TOOLKIT 4 (2020), https://www.aclunc.org/sites/default/files/Jail_Voting_Toolkit_Final.pdf [<https://perma.cc/Q4PB-SEBJ>]; CAL. ELEC. CODE § 2101(a), (1) (West, Westlaw through Oct. 15, 2022).

162. *See supra* note 137 and accompanying text. While Maryland is included in the list of states that provide for restoration upon release, Maryland does provide that restoration following a conviction for buying or selling votes is not permitted unless the defendant receives a pardon. *Felon Voting Rights*, *supra* note 10; MD. CODE ANN., ELEC. LAW § 3-102(b)(3) (West, Westlaw through 2022 Reg. Sess.).

163. *See supra* notes 138–39 and accompanying text.

164. *See supra* note 138 and accompanying text.

165. *Felon Voting Rights*, *supra* note 10; PROCON.ORG, *supra* note 137.

post-incarceration community supervision in some situations.¹⁶⁶ On the other hand, parole refers to conditional supervision following incarceration.¹⁶⁷

c. Restoration After Completion of Additional Steps

The remaining eleven states require additional measures before restoring voting rights.¹⁶⁸ The processes generally vary by state.¹⁶⁹ For example, Nebraska requires a two-year waiting period after probation before re-enfranchising people with felony convictions.¹⁷⁰ Mississippi, which has the country's top rate of penal disenfranchisement, has one of the most challenging legislative restoration processes.¹⁷¹ Defendants seeking to restore their voting rights must secure the passage of a private bill specific to them, which requires two-thirds approval in both chambers of Mississippi's Congress.¹⁷² Tennessee has a complicated procedure for restoring voting rights and excludes restoration for convictions based on certain felonies.¹⁷³

Defendants may also regain voting status by petition through executive, judicial, or administrative means.¹⁷⁴ For example, Iowa, Kentucky, and Virginia allow restoration of voting rights based on the executive's constitutional pardon or clemency powers.¹⁷⁵ Similarly,

166. DANIELLE KAEBLE & MARIEL ALPER, U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2017-2018, at 2 (2020), <https://www.bjs.gov/content/pub/pdf/ppus1718.pdf> [<https://perma.cc/GWC7-N9ND>].

167. *Id.*

168. *Felon Voting Rights*, *supra* note 10.

169. *Id.* at tbl.2 (describing the restoration details for the eleven states).

170. *Id.*; NEB. REV. STAT. ANN. § 29-2264(1) (West, Westlaw through 2d Reg. Sess. of 107th Leg.).

171. Sam Levine, *The Racist 1890 Law That's Still Blocking Thousands of Black Americans from Voting*, GUARDIAN (Jan. 8, 2022, 5:00 AM), <https://www.theguardian.com/us-news/2022/jan/08/us-1890-law-black-americans-voting> [<https://perma.cc/L87V-4M69>].

172. MISS. CONST. art. 12, § 253; *see* Levine, *supra* note 171; ONE VOICE ET AL., FELONY DISENFRANCHISEMENT IN MISSISSIPPI 2 (2018), <https://www.sentencingproject.org/policy-brief/felony-disenfranchisement-in-mississippi/> [<https://perma.cc/279Y-VMTE>]. Although a defendant can also request a gubernatorial pardon, such a request has not been granted in almost a decade. Levine, *supra* note 171.

173. TENN. CODE ANN. §§ 40-29-202(b)–(c), -204 (LEXIS through 2022 Reg. Sess.); *see* TENN. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., THE RIGHT TO VOTE AND EX-FELON DISENFRANCHISEMENT IN TENNESSEE 1 (2014).

174. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 550 (2020).

175. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., WHO MUST PAY TO REGAIN THE VOTE? A 50-STATE SURVEY 15–16 (2020), https://ccresourcecenter.org/wp-content/uploads/2020/11/Who-Must-Pay-Nov_2020.update.pdf [<https://perma.cc/MJL6-WDUB>]; *see* Griffin v. Pate, 884 N.W.2d 182, 194–95 (Iowa 2016); KY. CONST. §§ 145(1), 150; VA. CONST. art. V, § 12; *see also* MISS. CONST. art. 5, § 124. For more

expungement of a conviction can result in the restoration of voting rights.¹⁷⁶ Although most states provide methods to remove or expunge certain convictions, reports reflect that only a small percentage of individuals take advantage of such methods.¹⁷⁷ In one study of twelve states, typically less than twenty percent of those eligible for expungement sought or obtained relief.¹⁷⁸ Exoneration offers defendants another option for restoring voting rights.¹⁷⁹ For example, Anthony Ray Hinton, a wrongly convicted Black man who spent decades on death row in Alabama, was exonerated in 2015 and regained his right to vote.¹⁸⁰

B. Sources of De Facto Disenfranchisement

Section A illustrated the circumstances where criminal defendants have the right to vote; however, many such defendants do not vote.¹⁸¹ This Section explains the primary reasons that defendants do not vote: misinformation or lack of information about the voting process, demands for payment of financial obligations, physical barriers, and distrust of the criminal justice system.

Incarcerated defendants who are eligible to vote do so at substantially lower rates than the general population. For example, all defendants can vote in Vermont and Maine.¹⁸² A study of people incarcerated in Vermont found voting rates of about eight percent in the 2018 election and thirteen

detail about the pardon policies of states, see generally *50-State Comparison: Pardon Policy & Practice*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> [<https://perma.cc/BR4C-MT6R>].

176. See, e.g., Annie Lord, *Snoop Dogg Says He Will Vote for First Time in 2020: 'I Can't Stand to See This Punk in Office One More Year.'* INDEP. (June 9, 2020, 8:50 AM), <https://www.independent.co.uk/artsentertainment/music/news/snoop-dogg-vote-2020-election-trump-joe-biden-a9555736.html> [<https://perma.cc/6AZE-QHWP>] (explaining how celebrity Snoop Dogg's voting rights were restored by expungement). For more detail about the expungement policies of states, see generally *50-State Comparison: Expungement, Sealing & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/> [<https://perma.cc/YA3Y-V3EM>] [hereinafter *Expungement Report*]. For a discussion of expungement efforts in 2021, see generally *Dozens of New Expungement Laws Already Enacted in 2021*, COLLATERAL CONSEQUENCES RES. CTR. (July 7, 2021), <https://ccresourcecenter.org/2021/07/07/dozens-of-new-expungement-laws-already-enacted-in-2021/> [<https://perma.cc/TNG7-8H33>].

177. Chien, *supra* note 174, at 524.

178. *Id.* at 524, 555.

179. For example, Georgia and Tennessee restore voting rights following exoneration. *Expungement Report*, *supra* note 176.

180. Darren Sands, *Wrongly Convicted, He Was on Death Row for Decades. On Tuesday, He Cast a Vote for President*, WASH. POST (Nov. 3, 2020, 11:56 PM), <https://www.washingtonpost.com/politics/2020/11/03/anthony-ray-hinton-vote-election/> [<https://perma.cc/W5GZ-EZS8>].

181. WOOD & BLOOM, *supra* note 24, at 1 (stating that de facto disenfranchisement impacts “untold hundreds of thousands of eligible would-be voters throughout the country”).

182. See *supra* Section II.A.1.a.

percent in the 2016 general election, compared to a turnout of over fifty-five percent and sixty-five percent for eligible nonincarcerated people, respectively.¹⁸³ Similarly, in Maine in 2018, the voting rate of incarcerated people was under six percent,¹⁸⁴ and yet the overall turnout rate was over sixty percent.¹⁸⁵

In other jurisdictions, jails represent the primary place where incarcerated defendants have the right to vote. As described in Section A, the vast majority of the nearly 750,000 individuals detained in jail have the right to vote, either because they are not convicted or, if convicted, have been convicted of offenses not subject to disenfranchisement.¹⁸⁶ They face obstacles that effectively deny their rights and make voting rare while incarcerated.¹⁸⁷ One estimate finds that voting rates are less than one percent in most jails.¹⁸⁸ A report about Ohio's most populated county found that only eleven out of 2,100 jailed persons voted in the 2016 presidential election, and none voted in the 2018 election.¹⁸⁹ Similarly, in stark contrast to a seventy percent overall turnout rate in the 2020 New York election, a study of the voting-eligible jail population in ten New York counties and Rikers Island found a turnout rate of 0.52%.¹⁹⁰

1. Information Issues

A significant obstacle to voting is whether defendants have accurate information about their rights. With an estimated 8,000 different jurisdictions administering elections, American election laws are

183. Ariel White & Avery Nguyen, *How Often Do People Vote While Incarcerated? Evidence from Maine and Vermont*, 84 J. POL. 568, 571 (2022).

184. *Id.*

185. *Voter Turnout in United States Elections*, BALLOTPEDIA, https://ballotpedia.org/Voter_turnout_in_United_States_elections [<https://perma.cc/75MS-4BAM>].

186. *See supra* Sections II.A.1.b.–c.

187. Nicole Lewis & Aviva Shen, *Unlocking the Vote in Jails: The Majority of the 745,000 People Held in Local Jails Can Vote, but Few Do. Advocates Say It's Voter Suppression on a National Scale*, MARSHALL PROJECT (Oct. 26, 2020, 5:45 AM), <https://www.themarshallproject.org/2020/10/26/unlocking-the-vote-in-jails> [<https://perma.cc/9WS4-GKKK>]; CAMPAIGN LEGAL CTR. & GEO. L. C.R. CLINIC, *CAN'T PAY, CAN'T VOTE: A NATIONAL SURVEY ON THE MODERN POLL TAX 4* (2019), https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf [<https://perma.cc/S7N4-XH8P>].

188. Demleitner, *supra* note 30, at 1278.

189. Melissa Gira Grant, *Getting Out the Vote in the Maze of Mass Incarceration*, NEW REPUBLIC (Oct. 28, 2020), <https://newrepublic.com/article/159974/getting-vote-maze-mass-incarceration> [<https://perma.cc/W7H9-ULX3>].

190. Madalyn Stewart, *Voting Rights Behind Bars: Election Accessibility for Voting-Eligible Populations in New York Jails*, CRITIQUE, Spring 2022, at 4–5.

significantly decentralized and complicated.¹⁹¹ The process allows for substantial discretion among administrators and, in turn, creates confusion and misunderstanding for citizens and election officials.¹⁹²

These problems extend to the disenfranchisement and restoration process as well.¹⁹³ Defendants are often unaware of their rights, are not provided information, and, if provided, the information is often misleading, confusing, or inaccurate. One estimate indicates that more than eighteen million defendants are unaware that they are eligible to vote.¹⁹⁴ As described below, incarcerated defendants are particularly vulnerable to information concerns.

a. Lack of Information

Given the complexity and variety of disenfranchisement laws, the lack of awareness of voting rights is not surprising. Disenfranchisement laws have gone through significant changes, resulting in what has been described as a “crazy-quilt”¹⁹⁵ and a “complicated legal patchwork.”¹⁹⁶ The laws vary based on, among other things, the jurisdiction, the particular convictions, and whether the defendant is in prison, on probation, or on parole.¹⁹⁷ Even within states, variations exist because local election rules often govern the procedures and access to voting.¹⁹⁸ Moreover, significant complications arise when dealing with defendants with out-of-state convictions.¹⁹⁹

As a result, de facto disenfranchisement “operate[s] through confusion.”²⁰⁰ Many defendants who are eligible to vote are simply

191. Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1005 (2019). See generally ALEC C. EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* (2009) (providing a detailed discussion of the development and consequences of the decentralized American election system).

192. Selin, *supra* note 191, at 1006–09.

193. *Id.* at 1007–09.

194. Stacy M. Brown, *NNPA and Transformative Justice Coalition Announce National GOTV Campaign Targeting 10 Million More Black Voters*, OBSERVER (June 28, 2022), <https://sacobserver.com/2022/06/nnpa-and-transformative-justice-coalition-announce-national-gotv-campaign-targeting-10-million-more-black-voters/> [<https://perma.cc/4KBF-TXLY>].

195. EWALD, *supra* note 159, at 1 (quoting MARGARET COLGATE LOVE ET AL., U.S. DEP’T OF JUST., *CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 1* (1996)).

196. Ryan W. Miller, *Many People in Jail are Eligible to Vote. But Casting a Ballot Behind Bars Isn’t Easy*, USA TODAY (Nov. 1, 2020, 5:58 PM) (quoting Dana Paikowsky, a legal fellow at the Campaign Legal Center), <https://www.usatoday.com/story/news/politics/elections/2020/10/30/voting-jail-2020-covid-barriers-disenfranchise-eligible-voters/3748263001> [<https://perma.cc/YYC2-CMNL>].

197. See *supra* Section II.A.2.

198. See Miller, *supra* note 196.

199. See EWALD, *supra* note 159, at ii.

200. Zhang, *supra* note 24, at 1038.

unaware or confused by disenfranchisement laws.²⁰¹ The lack of knowledge about their eligibility prevents many defendants from voting.²⁰² For example, Alabama's 2017 legislative enactment that limited disenfranchisement to forty-seven enumerated felonies demonstrates the importance of awareness of voting rights.²⁰³ Although the specific enumeration of felonies subject to disenfranchisement means that those convicted of other, non-enumerated felony offenses could vote, the state failed to notify these defendants of their voting rights.²⁰⁴ As a result, in the 2017 special election, an estimated 60,000 defendants were subject to de facto disenfranchisement because they "could not effectively exercise a right that they did not know about."²⁰⁵

Similarly, a study of four states that had restored voting rights for people with felony convictions found that none of the states required notification to defendants of their eligibility to vote.²⁰⁶ Devyn Roberts, a formerly incarcerated defendant in the study, discovered her restored voting rights from the study questions and remarked: "They should have told us. There should have been a commercial about this."²⁰⁷

Lack of information about voting is a significant problem for incarcerated defendants.²⁰⁸ Those in jail or prison are often unaware of their eligibility and the process for registering and voting.²⁰⁹ Correctional officials typically do not provide voting information to incarcerated people.²¹⁰ For example, a survey of fifteen counties in Arizona found that "[o]nly one county provided sufficient information for detainees [in jail] to register and vote. The vast majority had no documented voter education or registration procedures at all."²¹¹ Likewise, sixty-seven of

201. Demleitner, *supra* note 30, at 1286–87; Ryan S. King, *Challenging Disenfranchisement for Felony Convictions*, HUM. RTS., Spring 2009, at 18, 19; Zhang, *supra* note 24, at 1040–47; Cammett, *supra* note 45, at 377.

202. See Paikowsky, *supra* note 37, at 839.

203. ALA. CODE § 17-3-30.1 (Westlaw through 2022 Reg. and 1st Spec. Sess.).

204. *Felon Disenfranchisement—Notice Requirements—District Court Finds No Irreparable Injury from the State's Lack of Notice to People with Felony Convictions upon Re-Enfranchisement*, 131 HARV. L. REV. 2065, 2065 (2018).

205. *Id.* at 2069, 2072.

206. Lewis & Calderón, *supra* note 9.

207. *Id.*

208. See Lewis & Shen, *supra* note 187.

209. See DANIELLE ROOT & LEE DOYLE, CTR. FOR AM. PROGRESS, PROTECTING THE VOTING RIGHTS OF AMERICANS DETAINED WHILE AWAITING TRIAL 2 (2018), https://cdn.americanprogress.org/content/uploads/2018/08/21114117/PretrialDetaineesVotingRights-brief.pdf?_ga=2.130800456.671144179.1606776777-1092090282.1606776777 [<https://perma.cc/5EPN-5GCT>]; PORTER, *supra* note 149, at 5.

210. Lewis & Shen, *supra* note 187.

211. *Id.*

sixty-eight counties surveyed in Wisconsin provided those jailed with “vague guidance or no guidance” regarding voting.²¹²

Incarcerated defendants may not have access to information about election timing, deadlines for registering, or submitting absentee ballots.²¹³ Absentee ballot programs often ignore eligible incarcerated defendants or send information to registration address locations rather than jails or prisons.²¹⁴ Such defendants often lack access to online sources.²¹⁵

For example, in Maine and Vermont, where all prisoners are eligible to vote, many incarcerated people are unaware of their rights and lack access to online or other news sources to find information.²¹⁶ Moreover, prison rules prevent campaigning, further decreasing access to election information.²¹⁷

b. Misinformation

Receiving inaccurate information about voting rights may be even more troubling than lack of information. When an election official provides incorrect information, the criminal defendant will likely not question the information or seek a second opinion, leaving the possibility that the defendant may never realize he is eligible to vote.²¹⁸ Moreover, the defendant may disseminate the inaccurate information to others in the community, resulting in more individuals believing they cannot vote, even though they may be eligible.²¹⁹

Just as the rules can confuse defendants, complicated disenfranchisement and restoration provisions often confuse election officials.²²⁰ Election officials who are unaware of the rules may provide inaccurate or misleading guidance to defendants that effectively denies

212. *Id.*

213. *See* ROOT & DOYLE, *supra* note 209, at 2.

214. *See* NAILA S. AWAN & SHRUTI BANERJEE, DEMOS, HOW TO END *DE FACTO* DISENFRANCHISEMENT IN THE CRIMINAL JUSTICE SYSTEM 5–6 (2020), https://www.demos.org/sites/default/files/2020-05/How%20to%20End%20De%20Facto%20Disenfranchisement%20in%20the%20Criminal%20Justice%20System_0.pdf [<https://perma.cc/VV8X-BPQA>].

215. PORTER, *supra* note 149, at 5; Amanda McGinn & Zara Shore, *Convicted Felons Are Still Denied the Right to Vote. Here's What Lawyers Can Do About It.*, LAW.COM: NAT'L L.J. (Dec. 28, 2020, 11:03 AM), <https://www.law.com/nationallawjournal/2020/12/28/convicted-felons-are-still-denied-the-right-to-vote-heres-what-lawyers-can-do-about-it/> [<https://perma.cc/KH28-BHPC>].

216. Lewis, *supra* note 140.

217. *Id.*

218. WOOD & BLOOM, *supra* note 24, at 1.

219. *Id.*

220. *Id.* at 6–8.

them their voting rights.²²¹ Reports reflect that officials are often mistaken about eligibility requirements and that their statements can prevent otherwise eligible voters from voting.²²² For example, a survey of election officials found that “[m]ore than one-third (37%) of local officials interviewed in ten states either described their state’s fundamental eligibility law incorrectly, or stated that they did not know a central aspect of that law.”²²³

Reports from New York revealed that election officials were often confused about eligibility requirements.²²⁴ Thirty-eight percent of election officials interviewed stated that those on probation were not eligible to vote, even though New York law provided otherwise at the time.²²⁵ Similarly, surveys reveal that election officials are often confused about the role that the type of conviction (misdemeanor or felony) or the reason for release (probation or parole) plays in eligibility.²²⁶ Additionally, many election officials misunderstand the restoration procedures and associated waiting period requirements.²²⁷ For example, none of the ninety-five election officials interviewed in Tennessee could name the four requirements that individuals must meet to restore their voting rights.²²⁸ Similarly, reports from Arizona revealed that only one of the county election officials interviewed was aware of the two-year waiting period for people with multiple felonies.²²⁹

Additionally, in 2016, the Arkansas Secretary of State sent county election officials a list of 7,700 individuals to purge from their voter rolls based on felony convictions; however, the list contained over 4,000 people who were actually eligible to vote because their convictions were not for felonies or because their rights had been restored.²³⁰ Even after counties recognized the Secretary’s error, many lacked the resources to correct the mistake.²³¹

Given that election officials often misunderstand the rules for in-state convictions on disenfranchisement, it is not surprising that many election

221. *Id.* at 1; King, *supra* note 201, at 19; EWALD, *supra* note 159, at ii (“The complexity of state disenfranchisement policies results in frequent misidentification of voter eligibility, largely because officials differ in their knowledge and application of disqualification and restoration law and procedures.”).

222. *See, e.g.*, EWALD, *supra* note 159, at i.

223. *Id.*

224. *See* WOOD & BLOOM, *supra* note 24, at 3.

225. *Id.*

226. *Id.* at 2–3.

227. *Id.* at 3–5.

228. *Id.* at 4.

229. *Id.* at 4–5.

230. JONATHAN BRATER ET AL., BRENNAN CTR. FOR JUST., PURGES: A GROWING THREAT TO THE RIGHT TO VOTE 5 & 16 n.35 (2018), <https://www.brennancenter.org/publication/purges-growing-threat-right-vote> [<https://perma.cc/Q6VH-48WZ>].

231. *Id.* at 5.

officials are unaware of the impact of out-of-state and federal convictions.²³² For example, interviews in Tennessee revealed that only ten percent of election officials were aware of the correct voter eligibility rules for defendants with federal felonies and only twenty-five percent knew the proper rules for defendants with out-of-state convictions.²³³ Similarly, reports from Colorado showed that only about thirty percent of election officials were aware of the accurate rules for defendants with federal or out-of-state convictions.²³⁴

Inaccurate information on registration forms also deters voting.²³⁵ A 2008 study found that nearly two-thirds of the states and the District of Columbia used “registration forms that provide[d] inaccurate, incomplete or misleading information about whether individuals with criminal records [were] eligible to vote.”²³⁶ The report found the following errors in registration forms:

(1) Twenty-two states’ and the District of Columbia’s registration forms provide inaccurate, incomplete[,] or misleading explanations of who is ineligible to vote and for how long.

....

(2) Eleven states’ registration forms contain incorrect or misleading references to how voting rights are restored.

....

(3) Four states’ registration forms use confusing or misleading formats to present state disfranchisement policy.

....

(4) Four states’ registration forms contain no guidance on registering to vote with a criminal record, despite the existence of state disfranchisement policies.²³⁷

A recent Colorado report illustrates the problems arising from inaccurate information on registration materials.²³⁸ Colorado’s voter

232. WOOD & BLOOM, *supra* note 24, at 6–7.

233. *Id.* at 6.

234. *Id.* at 7.

235. See NICOLE KIEF, ACLU VOTING WITH A CRIMINAL RECORD: HOW REGISTRATION FORMS FRUSTRATE DEMOCRACY 3 (2008), https://www.aclu.org/sites/default/files/field_document/votingwithacriminalrecord_report.pdf [<https://perma.cc/4BSQ-MCW6>].

236. *Id.*

237. *Id.* at 4–5 (italics removed).

238. Ilica Mahajan et al., *Paroled People Can Vote in Colorado. Why Did Forms Say They Couldn't?*, MARSHALL PROJECT (Mar. 24, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/03/24/paroled-people-can-vote-in-colorado-why-did-forms-say-they-couldn-t> [<https://perma.cc/2XKZ-SAMU>].

registration choice forms included a statement that those on parole could not vote even though the state had restored the right to vote to those on parole in 2019.²³⁹ Although the Colorado Secretary of State's website provided the correct information, the Denver government website displayed the inaccurate statement and included a warning that formerly incarcerated people registering to vote while ineligible faced a Class 1 state misdemeanor, punishable by up to eighteen months in jail.²⁴⁰ Since the passage of the 2019 legislation, less than twenty-eight percent of the nearly 30,000 people on parole have registered to vote, despite the state having an overall eighty-eight percent registration rate.²⁴¹

The misinformation problems can be exacerbated for incarcerated defendants who typically rely on information from jail officials, including sheriffs and county clerks.²⁴² These jail officials are neither focused on voting rights nor trained regarding voter eligibility.²⁴³ Some jail officials mistakenly believe that those in jail cannot vote.²⁴⁴ Additionally, the jail officials are typically not subject to any oversight as to the information they provide incarcerated persons.²⁴⁵ As a result, incarcerated defendants receive misinformation leading them to believe they cannot vote.²⁴⁶

2. Barriers to Voting Beyond Information Concerns

Even if defendants have access to accurate information about voting rights, they may face other obstacles to voting. These hurdles include payment obligations, physical barriers, affirmative steps to deny voting, and legal estrangement or distrust in the system. This Section describes these hurdles and identifies the heightened obstacles that incarceration creates.

a. Payment Obligations

Outstanding criminal justice debt, including fines, fees, and restitution, significantly impacts the exercise of voting rights.²⁴⁷

239. *Id.*

240. *Id.*

241. *Id.*

242. *See* ROOT & DOYLE, *supra* note 209, at 2.

243. *See id.* at 2.

244. LALEH ISPAHANI & TRICIA FORBES, ACLU & RIGHT TO VOTE, VOTING WHILE INCARCERATED: A TOOLKIT FOR ADVOCATES SEEKING TO REGISTER, AND FACILITATE VOTING BY, ELIGIBLE PEOPLE IN JAIL i (2005), https://www.aclu.org/sites/default/files/field_document/votingwhileincarc_20051123.pdf [<https://perma.cc/XA36-T857>].

245. Paikowsky, *supra* note 37, at 832.

246. *See* Lewis & Shen, *supra* note 187.

247. ALLYSON FREDERICKSEN & LINNEA LASSITER, ALLIANCE FOR A JUST SOC'Y, DISENFRANCHISED BY DEBT: MILLIONS IMPOVERISHED BY PRISON, BLOCKED FROM VOTING 13–14 (2016), <http://allianceforajustsociety.org/wp-content/uploads/2016/03/Disenfranchised-by-Debt->

According to the National Center for Access to Justice (NCAJ), as of November 2022, twenty states condition defendants' restoration of voting rights on payment of criminal justice debts.²⁴⁸ This payment requirement may arise explicitly from statutory restoration provisions or implicitly when re-enfranchisement requires completion of parole or probation, and payment is a condition of completing parole or probation.²⁴⁹

In her report, Professor Beth A. Colgan took a broader view of wealth-based provisions to address the additional impact of federal and out-of-state convictions as well as incarceration arising from the failure to pay criminal justice debt.²⁵⁰ Professor Colgan found that “wealth-based penal disenfranchisement is sanctioned under the laws of forty-eight states and the District of Columbia, potentially preventing up to a million people or more from voting.”²⁵¹ Accordingly, many states prevent defendants—who are otherwise eligible for restoration of voting rights—from voting unless they can make full payment or, if permitted, obtain a waiver of the payment requirement.²⁵²

Financial obligations are a significant issue because defendants face criminal justice debt at every step in “the criminal justice process, including pre-conviction, sentencing, incarceration, probation, and parole.”²⁵³ Financial obstacles are especially challenging for incarcerated defendants to overcome because they have a limited ability to earn income, and their incarceration causes additional fees. For example, many correctional institutions charge defendants for room and board and

FINAL-3.8.pdf [<https://perma.cc/A25C-KZ57>]; see Colgan, *supra* note 13, at 71–72. Outstanding child support may also prevent re-enfranchisement for criminal defendants. Cammett, *supra* note 45, at 354–55 (discussing a Tennessee statute that was upheld by a federal appellate court).

248. *Fines and Fees*, NCAJ, <https://www.ncaj.org/state-rankings/2020/fines-and-fees> [<https://perma.cc/H6K2-T9FZ>]. Criminal justice debt includes “fines, fees, costs, assessments, or surcharges, [and] any payments that are a condition of probation or parole.” *Id.* Conditioning re-enfranchisement on payment of criminal justice debt has a disproportionate impact on poor and minority voters. *NCAJ Launches Fines and Fees Index*, NCAJ (May 18, 2021), <https://ncaj.org/ncaj-launches-fines-and-fees-index> [<https://perma.cc/RD6F-ZXGP>].

249. CAMPAIGN LEGAL CTR. & GEO. L. C.R. CLINIC, *supra* note 187, at 21.

250. Colgan, *supra* note 13, at 79–86.

251. *Id.* at 60 (footnote omitted). Colgan provides a table reflecting a jurisdictional review of wealth-based penal disenfranchisement, as well as appendices providing detail for such jurisdictions. *Id.* at 85–86, 149–89.

252. See CAMPAIGN LEGAL CTR. & GEO. L. C.R. CLINIC, *supra* note 187, at 29–31 (describing the process of obtaining waivers of payment requirements).

253. Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 492 (2016). The impact of criminal justice debt on defendants is a significant issue that is beyond this Article's scope. For more information, see generally ALEXIS HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016), and TONY MESSENGER, *PROFIT AND PUNISHMENT: HOW AMERICA CRIMINALIZES THE POOR IN THE NAME OF JUSTICE* (2021).

other basic services.²⁵⁴ And, in some states, defendants are paid only cents per hour, if at all, for their work while incarcerated.²⁵⁵ Additionally, defendants often have to pay for supervision, monitoring, and even participation in community service after release from incarceration.²⁵⁶ Defendants unable to pay criminal justice debt timely often face additional charges for payment plans, interest, collection, and late payments.²⁵⁷ Some jurisdictions charge additional fees for inquiries about debts owed.²⁵⁸

Conditioning voting rights based on payment of criminal justice debt can also compound informational issues, as exhibited by Florida's charging of ten people, eight of whom were Black, with voting fraud because they voted without satisfying their debts.²⁵⁹ After Florida passed a state constitutional amendment restoring voting rights to those convicted of a felony, the legislature passed a law requiring convicted people to satisfy criminal justice debts before being re-enfranchised.²⁶⁰ Some of the defendants who voted while in jail claim they received help from local election officers and were never informed that they had to pay their outstanding debts.²⁶¹ Moreover, Florida fails to maintain a database that allows defendants and election officials to determine the status of

254. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-in-mates-fees-behind-bars-may-violate#co_footnote_F19404910944_1 [<https://perma.cc/76BP-9Y7Z>]; see also MESSENGER, *supra* note 253, at xvi–xvii.

255. For instance, in 2017, the national average minimum daily wage in prisons was eighty-six cents and the average maximum daily wage was \$3.45, while those in prisons in Texas and four other states were generally not paid. Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/> [<https://perma.cc/8KGY-ACAV>]. Relatedly, and further contributing to financial obstacles, pre-incarceration incomes are significantly lower compared to income for people who have not been incarcerated. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/2F8W-PHTL>].

256. Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 865 (2017).

257. Neil L. Sobol, *Griffin v. Illinois: Justice Independent of Wealth*, 49 STETSON L. REV. 399, 421 (2020). Such additional fees have been labeled as “poverty penalties.” *Id.*

258. Bianca Fortis, *A Government Official Helped Them Register. Now They've Been Charged with Voter Fraud*, PROPUBLICA (July 21, 2022, 10:55 AM), <https://www.propublica.org/article/florida-felonies-voter-fraud> [<https://perma.cc/9PWG-8886>] (reporting that “[f]our in [ten] Florida counties charged either a payment or processing fee to look at their databases, and [fifteen percent] charged a fee to access certain records”).

259. *Id.*

260. *Id.*

261. *Id.*

outstanding criminal justice debts owed to interstate, intrastate, or federal sources.²⁶²

b. Physical Barriers

Defendants also often face physical barriers that make it difficult to vote. Such barriers include registration requirements, lack of access to polling and registration venues, voter identification requirements, and literacy concerns.²⁶³

Voting restrictions, in general, create hurdles for defendants involved with the criminal justice system. In 2013, in *Shelby County v. Holder*,²⁶⁴ the Supreme Court undermined the requirement that states seek federal preclearance of changes to voting laws on the basis that the formula defining the covered jurisdictions was outdated and unconstitutional.²⁶⁵ As a result, since *Shelby*, states have adopted and are considering many changes to voting laws.²⁶⁶ In 2021 alone, state legislatures in at least nineteen states have enacted thirty-four restrictive voting laws.²⁶⁷ These restrictive laws include voter identification requirements, reductions in polling hours and locations, measures that make erroneous voter roll purges more probable, and limitations on absentee ballots and assistance at polling locations.²⁶⁸ Additional restrictions on voting access are likely in 2022.²⁶⁹

262. Gabriella Sanchez, *In Florida, the Right to Vote Can Cost You*, BRENNAN CTR. FOR JUST. (Sept. 7, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/florida-right-vote-can-cost-you> [https://perma.cc/ARN4-ZC3P]; Amy Gardner & Lori Rozsa, *In Florida, Felons Must Pay Court Debts Before They Can Vote. But with No System to Do So, Many Have Found It Impossible.*, WASH. POST (May 13, 2020, 9:36 AM), https://www.washingtonpost.com/politics/in-florida-felons-must-pay-court-debts-before-they-can-vote-but-with-no-system-to-do-so-many-have-found-it-impossible/2020/05/13/08ed05be-906f-11ea-9e23-6914ee410a5f_story.html [https://perma.cc/34XC-KF5W].

263. See Terry Ao Minnis & Niyati Shah, *Voter Registration in Today's Democracy: Barriers and Opportunities*, AM. BAR ASS'N (Feb. 9, 2020), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-rights/-use-it-or-lose-it---the-problem-of-purges-from-the-registration/ [https://perma.cc/KX8U-SEXE].

264. 570 U.S. 529 (2013).

265. *Id.* at 557. For general information about the impact of *Shelby County*, see P.R. Lockhart, *How Shelby County v. Holder Upended Voting Rights in America*, VOX (June 25, 2019, 7:49 PM), <https://www.vox.com/policy-and-politics/2019/6/25/18701277/shelby-county-v-holder-anniversary-voting-rights-suppression-congress> [https://perma.cc/KS6Q-2FP6].

266. Lockhart, *supra* note 265.

267. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [https://perma.cc/9AGU-JTEQ]. On the other hand, in 2021, at least twenty-five states passed legislation to increase voting access. *Id.*

268. *Id.*; Lockhart, *supra* note 265.

269. *Voting Laws Roundup: February 2022*, BRENNAN CTR. FOR JUST. (Feb. 9, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-february-2022> [https://perma.cc/8A4F-BVT5].

Criminal defendants are often vulnerable to these voting restrictions. Although a state may label restoration of rights as automatic, it is not uncommon for a state to require other steps. For example, formerly disenfranchised defendants may have to re-register before voting.²⁷⁰ One study of four states that restored voting rights for formerly incarcerated individuals found that none of the states registered more than twenty-five percent of these eligible voters, despite a registration rate of almost seventy-five percent among the general population.²⁷¹ Moreover, registration efforts may not reach incarcerated individuals because nonprofit groups tend to focus on other populations or share confusion about voter eligibility.²⁷²

Defendants often face practical problems that prevent them from registering or voting, including transportation and childcare. A Harvard University study reported that fourteen percent of nonvoters claim transportation issues as a “major factor” in their lack of voting.²⁷³ In Michigan’s 2018 midterm election, sixty-six percent of voters with a car voted, while only thirty-six percent of those without a car voted.²⁷⁴ A Duke University study shows that recently incarcerated individuals are less likely to own a vehicle.²⁷⁵ In particular, only 45.3% of recently incarcerated fathers and 49.6% of recently incarcerated mothers own a vehicle while 79.5% and 69.5% of other fathers and mothers do, respectively.²⁷⁶ Even if they own a vehicle, many defendants face driver’s license suspension or revocation due to unpaid criminal justice debt.²⁷⁷

Shuttering voting locations compounds problems for those facing physical barriers to voting, such as not being able to take time off from work to wait in long lines at polling locations or having transportation

270. *Felon Voting Rights*, *supra* note 10.

271. Lewis & Calderón, *supra* note 9.

272. Molly Smith, *Felons Face Difficulties in Regaining Voting Rights*, REPORTING TEX. (Nov. 3, 2016), <https://reportingtexas.com/felons-face-difficulties-in-regaining-voting-rights/> [<https://perma.cc/764L-KM4U>].

273. Julia Reinstein, *Just Getting to the Polls Is a Huge Problem for Many Voters This Year*, BUZZFEED NEWS (Nov. 1, 2020, 12:00 PM), <https://www.buzzfeednews.com/article/juliareinstein/people-without-cars-struggle-vote-polls-election> [<https://perma.cc/M4BW-653Y>].

274. Cameron Joseph & Rob Arthur, *The US Eliminated Nearly 21,000 Election Day Polling Locations for 2020*, VICE NEWS (Oct. 22, 2020, 7:56 AM), <https://www.vice.com/en/article/pkdenn/the-us-eliminated-nearly-21000-election-day-polling-locations-for-2020> [<https://perma.cc/457K-NAJD>].

275. Kristin Turney & Daniel Schneider, *Incarceration and Household Asset Ownership*, 53 DEMOGRAPHY 2075, 2086 (2016).

276. *Id.*

277. *See Free to Drive: National Campaign to End Debt-Based License Restrictions*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/campaigns/national-drivers-license-suspension-campaign-free-to-drive/> [<https://perma.cc/K56A-P6K9>] (“[M]ore than half of U.S. states still suspend, revoke[,] or refuse to renew driver’s licenses for unpaid traffic, toll, misdemeanor[,] and felony fines and fees.”).

issues.²⁷⁸ Since 2016, an estimated twenty percent of polling locations have been closed.²⁷⁹

Incarceration of defendants exacerbates the physical barriers and creates additional obstacles to voting.²⁸⁰ Defendants typically have to rely on absentee voting.²⁸¹ However, many cannot comply with their jurisdictions' requirements that absentee ballot requests be made in person or be notarized.²⁸² Similarly, registration or absentee ballot applications may require identification, which is likely unavailable to defendants while in jail because it may have been seized or confiscated when the defendants were jailed.²⁸³ Additionally, guidance for completing absentee ballot requests is often unavailable, resulting in errors.²⁸⁴

Furthermore, being arrested close to an election day can prevent eligible voters from voting because they may be in jail during the absentee voting period.²⁸⁵ Although some states offer emergency voting procedures for those who become suddenly incapacitated close to an election, they tend to either directly exclude jailed voters or effectively preclude them from voting through procedural hurdles.²⁸⁶

Delays and problems in mail services in correctional facilities create additional burdens that prevent incarcerated defendants from meeting deadlines.²⁸⁷ Even if jail officials have good intentions, logistical and timing challenges based on deadlines for submitting documents may prevent incarcerated individuals from timely receiving, completing, and sending documents.²⁸⁸

Literacy concerns further increase the barriers to voting and compound comprehension issues.²⁸⁹ Literacy problems are especially significant for incarcerated defendants because they often do not receive

278. See Joseph & Arthur, *supra* note 274.

279. *Id.*

280. See CAMPAIGN LEGAL CTR., CHALLENGING JAIL-BASED DISENFRANCHISEMENT: A RESOURCE GUIDE FOR ADVOCATES 2 (2019), <https://campaignlegal.org/sites/default/files/2019-12/Jail%20Voting%20Advocacy%20Manual.pdf> [<https://perma.cc/7JSN-U2L7>] (explaining that the “election infrastructure was not built to serve jailed voters”).

281. FREDERICKSEN & LASSITER, *supra* note 247, at 11; CAMPAIGN LEGAL CTR., *supra* note 280, at 2.

282. See CAMPAIGN LEGAL CTR., *supra* note 280, at 2.

283. Lewis & Shen, *supra* note 187; FREDERICKSEN & LASSITER, *supra* note 247, at 11; see also AWAN & BANERJEE, *supra* note 214, at 6 (recommending that corrections facilities be required to “copy and make available any identification documents a voter may need to provide in order to cast an absentee ballot”).

284. CAMPAIGN LEGAL CTR., *supra* note 280, at 2; Miller, *supra* note 196.

285. CAMPAIGN LEGAL CTR., *supra* note 280, at 2.

286. *Id.*

287. *Id.*; Miller, *supra* note 196.

288. See Paikowsky, *supra* note 37, at 840–42.

289. See KIEF, *supra* note 235, at 3.

help in understanding written materials describing voting eligibility and procedures.²⁹⁰ As a result, difficulties in reading and writing severely restrict their ability to register and vote.²⁹¹ Estimates for illiteracy rates in prison range from sixty to seventy-five percent.²⁹² In Vermont, where all prisoners have the right to vote, low literacy rates have been recognized as a significant reason for failure to vote.²⁹³ Similarly, incarcerated defendants with disabilities face additional obstacles to voting.²⁹⁴ About forty percent of jailed defendants have disabilities and, as such, may require assistance in voting.²⁹⁵

c. Affirmative Actions that Deny or Discourage Voting

While physical barriers can prevent voting, reports also show that some election officials take deliberate actions to deny voting rights to eligible defendants.²⁹⁶ For example, election officials can discourage voting by requiring documentation that the law does not require.²⁹⁷ Most states do not require defendants with past convictions to show documentation to register; however, reports reflect that election officials have insisted on such documentation.²⁹⁸ Reports from New Jersey and Washington demonstrate that many election officials have illegally required documentation from defendants with felony convictions.²⁹⁹ Before re-registering to vote, some defendants have been required to provide nonexistent documents or endure onerous application processes.³⁰⁰ Professor Jessie Allen has described the problem as “documentary disenfranchisement” when election officials require re-enfranchised defendants “to produce documents they could not obtain

290. See Jackson-Gleich & Yeary, *supra* note 29.

291. See Lewis, *supra* note 140.

292. See Michael Sainato, *US Prison System Plagued by High Illiteracy Rates*, OBSERVER (July 18, 2017, 6:00 AM), <https://observer.com/2017/07/prison-illiteracy-criminal-justice-reform/> [<https://perma.cc/S82R-QGF4>]; *Illiteracy by the Numbers*, LITERACY PROJECT, <https://literacyproj.org> [<https://perma.cc/6P66-2FYK>]; ELIZABETH GREENBERG ET AL., U.S. DEP'T OF EDUC., *LITERACY BEHIND BARS: RESULTS FROM THE 2003 NATIONAL ASSESSMENT OF ADULT LITERACY PRISON SURVEY* (2007), <https://nces.ed.gov/pubs2007/2007473.pdf> [<https://perma.cc/KMQ6-BAN4>].

293. Lewis, *supra* note 140 (citing the law librarian at Southern State Correctional Facility as saying that the “shockingly high illiteracy rate among Vermont’s prisoners” is the “biggest issue” in explaining why prisoners do not vote).

294. See ROOT & DOYLE, *supra* note 209, at 2.

295. *Id.*

296. See WOOD & BLOOM, *supra* note 24, at 6.

297. *Id.*

298. *Id.*

299. *Id.*

300. WOOD, *supra* note 15, at 14. For example, in the early 2000s in New York, even after corrective instructions from the State Board of Elections, “a third of the local boards still continued to require improper documentation.” *Id.*

readily, or at all.”³⁰¹ She concluded that documentary disenfranchisement can create “permanent voting bans.”³⁰²

Similarly, interviews also reflect that some election officials have affirmatively refused to provide voting assistance to defendants with convictions.³⁰³ For example, some election officials who received phone calls from defendants with convictions abruptly ended the calls, claimed that no one at the office could answer their questions, and engaged in other unhelpful behavior.³⁰⁴ Six officials in Tennessee said that they would not help formerly incarcerated people who were having issues restoring their voting rights, including one official who said, “I uphold the good people, and criminals can take care of themselves[]. . . I’m not going to bend over backwards to help a felon.”³⁰⁵ Prison and jail officials who believe defendants should not vote can affirmatively deny voting rights by not providing documents.³⁰⁶

d. Psychological Barriers

Fear and distrust of the system may further discourage voting.³⁰⁷ Many defendants feel that their vote will not make a difference.³⁰⁸

The fear of incarceration results in de facto disenfranchisement for many eligible voters, who are afraid they would violate the law by voting.³⁰⁹ Reports of convictions for those who voted or attempted to vote under the mistaken belief that they were eligible create fear.³¹⁰ As discussed in the Introduction, Crystal Mason’s five-year sentence for

301. Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389, 418 (2011).

302. *Id.*

303. WOOD & BLOOM, *supra* note 24, at 7.

304. *Id.* at 7 (“Interviewers in Colorado, New York, New Jersey, Oklahoma, Pennsylvania, and Rhode Island all experienced difficulty in getting basic questions answered. Some officials in these states did not answer the phone, hung up on callers, advised that there was no staff to answer the questions, or referred interviewers to other offices that were also unable to answer the questions.”).

305. *Id.* (ellipsis in original).

306. Paikowsky, *supra* note 37, at 841 (suggesting that such denial can result because “some officials do not believe voters entangled in the criminal justice system should vote” (emphasis omitted)).

307. Selin, *supra* note 191, at 1022–23.

308. See, e.g., Rachel Dissell et al., *Who’s Electing Judges in the Cleveland Area? Not Those Ensnared in the System*, MARSHALL PROJECT (Jan. 27, 2022, 6:01 AM), <https://www.themarshallproject.org/2021/01/27/who-s-electing-judges-in-the-cleveland-area-not-those-ensnared-in-the-system> [<https://perma.cc/2GLG-SJBH>] (commenting that distrust in the criminal justice system contributes to a reluctance to voting for judges).

309. HIRA ET AL., *supra* note 91, at 9 (“[P]articipation may be chilled . . . because of fear that they may be mistaken about their eligibility, and could subsequently suffer under the over-zealous and punitive enforcement of disenfranchisement laws.”); Lewis & Calderón, *supra* note 9 (“One of the most enduring barriers to registering more people is the criminalization of voting for the formerly incarcerated.”); Zhang, *supra* note 24, at 1047–48; Lewis & Shen, *supra* note 187.

310. See Zhang, *supra* note 24, at 1048–49; Paikowsky, *supra* note 37, at 839.

illegally voting by submitting a provisional ballot in the 2016 presidential election was a national story that caused fear of voting even among eligible voters.³¹¹ Similarly, citing Florida's arrest of formerly incarcerated defendants for voter fraud, eligible voters in Alabama declined efforts to restore their voting rights.³¹²

The added threat of felony charges for voting improperly can powerfully deter defendants, who are already often wary and untrusting of the criminal justice system, from exercising their legal right to vote.³¹³ Many defendants feel that the criminal justice system has mistreated them and that participation in the political system is not likely to benefit them.³¹⁴ Often, they distrust political candidates or find that the candidates do not address their concerns.³¹⁵

Defendants convicted of a crime, especially those who have been incarcerated, are less likely to vote, even if they are eligible.³¹⁶ They may experience a "legal estrangement," which involves both cynical views of the law and those who enforce it as well as structural conditions that cause those views.³¹⁷ This legal estrangement contributes to institutional avoidance, including avoidance of democratic participation through voting.³¹⁸

The fear and trust concerns are especially evident among "communities that are and long have been over[-]policed, underinvested in, and targeted by disenfranchisement."³¹⁹ As developed in the next Section, these concerns contribute to the disproportionate impact of de facto disenfranchisement on Black communities. The distrust in the

311. See *supra* notes 3–6, 33–34 and accompanying text.

312. Nicole Lewis & Alexandra Arriaga, *Florida's Voter Fraud Arrests Are Scaring Away Formerly Incarcerated Voters*, MARSHALL PROJECT (Nov. 4, 2022, 2:10 PM), <https://www.themarshallproject.org/2022/11/04/florida-s-voter-fraud-arrests-are-scaring-away-formerly-incarcerated-voters> [https://perma.cc/DHH5-LPDH].

313. Chien, *supra* note 174, at 584.

314. Lewis & Calderón, *supra* note 9 (stating that "[p]olitical alienation is one of the hardest barriers to overcome"); CAMPAIGN LEGAL CTR., *supra* note 280, at 2; Will Sullivan, *Making Voting Easier for Previously Incarcerated People*, MIT NEWS (Aug. 2, 2021), <https://news.mit.edu/2021/making-voting-easier-previously-incarcerated-people-0802/> [https://perma.cc/FS44-JPWX].

315. See Lewis, *supra* note 140.

316. Kevin Morris, *Turnout and Amendment Four: Mobilizing Eligible Voters Close to Formerly Incarcerated Floridians*, 115 AM. POL. SCI. REV. 805, 806 (2021) ("It is well established that a criminal conviction—and, more specifically, a period of incarceration—decreases turnout even when individuals are no longer legally disenfranchised.").

317. *Id.* (citing Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2066–67 (2017)).

318. *Id.*

319. CAMPAIGN LEGAL CTR., *supra* note 280, at 2.

criminal justice system reflects that defendants' voting barriers are not only physical but also "social and political in nature."³²⁰

C. *Disproportionate Impact*

Given the general statistics about the racial disparities at every stage of the criminal justice system and the statistics about the disproportionate impact of de jure disenfranchisement, it is not surprising that Black people also face a disproportionate impact of de facto disenfranchisement.

As described in Section II.B, jails represent a significant source of defendants subject to de facto disenfranchisement.³²¹ Jails also detain a disproportionate number of people of color.³²² For example, forty-eight percent of the people in jail are either Black or Latinx.³²³ Blacks are "five times more likely than whites" to be in jail.³²⁴ Studies show that Blacks are less likely than Whites to be released on recognizance and more likely to have bail set at higher amounts.³²⁵ Accordingly, it is no surprise that Blacks have higher pretrial detention rates than Whites.³²⁶

Being in jail not only impacts defendants ability to vote but also their future voting participation.³²⁷ Based on the disproportionate number of Blacks in jails, the effect is especially significant for voter turnout for Blacks.³²⁸ As one commentator warns, "the persistence of jail's effect on voting mean that misdemeanor sentencing could be producing lower [B]lack turnout . . . for years to come."³²⁹ Moreover, racial disparities exist for defendants who serve jail time.³³⁰ One study shows that while White defendants who served jail time voted "a bit less often, . . . [B]lack people turned dramatically away from voting" with "participation rates [dropping] from roughly [twenty-six] percent to [thirteen] percent."³³¹

320. *Id.*

321. *See supra* Section II.B.1.

322. Sawyer & Wagner, *supra* note 107; ACLU & RIGHT TO VOTE, *supra* note 244, at 1. For more detailed information about racial disparities in jails, see *Incarceration Trends*, *supra* note 100.

323. PORTER, *supra* note 149, at 5.

324. ACLU & RIGHT TO VOTE, *supra* note 244, at 1.

325. Elshiekh, *supra* note 29, at 113.

326. *See id.* (reporting that approximately forty-two percent of Black defendants are detained prior to trial compared to thirty-four percent of White defendants).

327. *See* Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 AM. POL. SCI. REV. 311, 322–23 (2019).

328. *See id.*

329. *Id.* at 323.

330. Ariel White, *Even Very Short Jail Sentences Drive People Away from Voting*, WASH. POST (Mar. 28, 2019), <https://www.washingtonpost.com/outlook/2019/03/28/even-very-short-jail-sentences-drive-people-away-voting> [<https://perma.cc/5CBS-M2T3>].

331. *Id.*

The increased time in jail also leads to additional fees, as one report reflects that “pretrial detainees accrue forty[-]one percent more non-bail court fees than their counterparts who were released.”³³² As a result, this creates an additional hurdle to voting in states that condition voting rights on payment of criminal justice debt.³³³

Wealth-based penal disenfranchisement “disproportionately affects the voting rights of people of color due to inherent racial disparities in socioeconomic status and the American criminal justice system.”³³⁴ A report from Alabama reflects that Blacks “with felony convictions were 9.4 percentage points more likely than people with felony convictions overall to be ineligible to vote due to outstanding criminal debt.”³³⁵

Reports reflect that voting restrictions are more likely to impact people of color negatively.³³⁶ Anecdotal evidence also indicates that people of color may be intimidated and dissuaded from voting due to racial slurs and other actions by law enforcement, poll workers, and poll observers.³³⁷

Further adding to distrust and fear issues of Blacks, evidence reflects a disproportionate number of cases filed against Blacks for voting when they are not eligible to vote.³³⁸ For example, one report found more than seventy percent of Texas voter fraud cases involved people of color.³³⁹ Moreover, sentencing may also reflect racial disparities. For example, while Crystal Mason, the Black woman discussed in the Introduction, was sentenced to five years of imprisonment for her mistaken offense, a White man in Pennsylvania received five years of probation for intentionally voting in the 2020 election on behalf of his dead mother.³⁴⁰ Similarly, a

332. Elshiekh, *supra* note 29, at 116–17.

333. *See supra* Section II.B.2.a.

334. Partelow, *supra* note 16, at 425–26; *see also* Colgan, *supra* note 13, at 60–61.

335. Colgan, *supra* note 13, at 87 (citing Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 311, 327–28 (2017)).

336. *See, e.g.*, Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, ATL. (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> [<https://perma.cc/K8KL-65EL>].

337. LAWS. COMM. FOR C.R. OF THE S.F. BAY AREA, *VOTING RIGHTS BARRIERS & DISCRIMINATION IN TWENTY-FIRST CENTURY CALIFORNIA: 2000-2013*, at 8–9 (2014).

338. *See* Taylor Goldenstein, *At Least 72% of AG Ken Paxton’s Voter Fraud Prosecutions Target People of Color, Analysis Shows*, HOUS. CHRON. (Mar. 24, 2021, 5:22 PM), <https://www.houstonchronicle.com/politics/texas/article/Ken-Paxton-voter-fraud-minorities-target-election-16049496.php> [<https://perma.cc/SGK8-UCFQ>].

339. *Id.*

340. *Would a Woman Have Been Sentenced to Prison for Illegal Voting if She Were White? Unlikely.*, WASH. POST (May 9, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/crystal-mason-illegal-voting-case-race/2021/05/08/a22037d2-aea1-11eb-b476-c3b287e52a01_story.html [<https://perma.cc/DK9V-2BRS>].

White woman in Iowa was given two years of probation and a \$750 fine for attempting to vote twice.³⁴¹

III. LEGAL CHALLENGES

Just as defendants have challenged de jure disenfranchisement in the courts, defendants facing de facto disenfranchisement have sought judicial relief.³⁴² This Part will briefly describe some of these cases and discuss the limitations of using case law to reduce the incidence of de facto disenfranchisement.

A. *Litigation Claims*

Equal protection claims have been the primary litigation tactic for attacking de facto disenfranchisement. Three Supreme Court cases that focused on measures that restricted the exercise of voting by detainees who had the right to vote serve as the basis for many of these claims.³⁴³

In *McDonald v. Board of Election Commissioners of Chicago*,³⁴⁴ jailed individuals awaiting trial alleged that Illinois law absentee ballot provisions violated the Equal Protection Clause.³⁴⁵ Illinois law provided that absentee ballots were available to individuals who: (1) were absent from their county of residence; (2) had a physician's affidavit declaring that they were physically incapacitated; (3) were observing a religious holiday; or (4) were serving as poll watchers in a precinct that was not their precinct.³⁴⁶ The jailed individuals who were residents of the county filed a request for absentee ballots that was supported by a warden's affidavit about their inability to appear at the polls; however, the Chicago Board of Election Commissioners denied the request.³⁴⁷ The Supreme Court, applying a rational basis review, upheld the provisions' constitutionality, finding that the provisions were not based on wealth or race, and while they impacted a purported right to an absentee ballot, they did not deny the fundamental right to vote.³⁴⁸ For example, the state could provide means to allow voting in jails or supervised transportation to polling places.³⁴⁹ Moreover, the Court recognized other individuals in the state similarly faced situations where "voting may be extremely difficult,

341. *Id.*

342. *ROOT & DOYLE*, *supra* note 209, at 3–4 (describing "some of the several decades' worth of court cases brought by detained people alleging violations of their right to vote").

343. *See id.* at 3. For more detail about these cases, see Paikowsky, *supra* note 37, at 848–52.

344. 394 U.S. 802 (1969).

345. *Id.* at 803, 806.

346. *Id.* at 803–04.

347. *Id.* at 803–05.

348. *Id.* at 807–10.

349. *Id.* at 808 n.6.

if not practically impossible,” including individuals who could not afford childcare or doctors performing emergency services.³⁵⁰

In two subsequent cases, however, the Court recognized potential equal protection violations for restricting the ability of those jailed to vote. In *Goosby v. Osser*,³⁵¹ the Court remanded a case that the lower courts found meritless: a constitutional challenge by defendants detained pretrial that the Pennsylvania Election Code was unconstitutional because it prevented them from voting absentee.³⁵² The Court distinguished *McDonald* because the Pennsylvania law specifically prevented incarcerated individuals from absentee voting, and election officials had denied requests to vote at polling places inside or outside of prisons.³⁵³

In 1974, the Supreme Court in *O'Brien v. Skinner*³⁵⁴ recognized that denying absentee ballots or other alternative means of voting to jailed individuals who were not otherwise disenfranchised violated equal protection guarantees.³⁵⁵ The New York Court of Appeals found that New York provisions prevented county residents with misdemeanors or in jail awaiting trial from registering to vote or obtaining an absentee ballot but allowed non-county residents similarly situated to obtain an absentee ballot.³⁵⁶ The Supreme Court found that the provisions as construed by the highest court in New York allowed “two citizens awaiting trial[] or even awaiting a decision . . . side by side in the same cell” to “receive different treatment as to voting rights.”³⁵⁷ Accordingly, the Court concluded that the provision violated the “equal protection of the laws guaranteed by the Fourteenth Amendment.”³⁵⁸

McDonald, *Goosby*, and *O'Brien* created substantial hurdles for detainees denied the right to vote from proving equal protection violations—namely, a detainee had to show that the law denied an absentee ballot; that the detainee submitted a ballot; and that upon rejection of the ballot, defendant made and was denied requests for alternative methods of voting.³⁵⁹ As a result, relying on the rules from these cases, “only a small handful of voters have been able to successfully win judicial relief.”³⁶⁰

350. *Id.* at 810 & n.8.

351. 409 U.S. 512 (1973).

352. *Id.* at 521–22.

353. *Id.*

354. 414 U.S. 524 (1974).

355. *Id.* at 530–31.

356. *Id.* at 525–29.

357. *Id.* at 529.

358. *Id.* at 531.

359. Paikowsky, *supra* note 37, at 853.

360. *Id.*

For example, in 2020, the U.S. Court of Appeals for the Sixth Circuit denied the equal protection and First Amendment claims that were alleged by jailed defendants who were denied access to absentee ballots in Ohio.³⁶¹ The equal protection claim was based on the disparate treatment of individuals confined in hospitals compared to individuals confined in jail.³⁶² However, the court found that the state had met its burden because the disparate treatment of denying late absentee ballot requests to “unexpectedly jail-confined electors,” while allowing such requests from “hospital-confined electors,” furthered “the State’s interest in orderly election administration.”³⁶³ Similarly, the court denied the First Amendment claim because “Ohio’s important regulatory interest in the orderly administration of election outweighs the minimal burden” of the deadline for requests for absentee ballots.³⁶⁴ Finally, the court denied class certification based on failure to meet the commonality and typicality requirements of Federal Rule of Civil Procedure 23.³⁶⁵

Courts have also generally denied equal protection claims challenging statutes that condition re-enfranchisement on payment of criminal justice debt.³⁶⁶ For example, in 2020, the U.S. Court of Appeals for the Eleventh Circuit addressed the constitutionality of requiring payment of monetary obligations before restoring voting rights to people convicted of felonies.³⁶⁷ Two years prior, in 2018, Florida voters approved a constitutional amendment to restore voting rights for offenders convicted of felonies who had completed their sentences and had not been convicted of murder or a felony sexual offense.³⁶⁸ Then, in 2019, new legislation defined sentence completion to include release from incarceration, termination of probation and supervision, and full payment of restitution, fines, fees, or costs.³⁶⁹

361. *Mays v. LaRose*, 951 F.3d 775, 782–93 (6th Cir. 2020).

362. *Id.* at 780.

363. *Id.* at 790–91.

364. *Id.* at 792–93.

365. *Id.* at 793–94; *see* FED. R. CIV. P. 23(a)(2), (3).

366. *E.g.*, *Johnson v. Bredesen*, 624 F.3d 742, 746–47 (6th Cir. 2010); *Harvey v. Brewer*, 605 F.3d 1067, 1079–80 (9th Cir. 2010); *Madison v. State*, 163 P.3d 757, 766–72 (Wash. 2007); *Coronado v. Napolitano*, No. CV-07-1089, 2008 WL 191987, at *2–*4 (D. Ariz. Jan. 22, 2008); *see also* Cammett, *supra* note 45, at 387–91. Professor Colgan advocates that wealth-based disenfranchisement should be viewed as punishment and unconstitutional under the equal protection and due process analyses provided in *Bearden v. Georgia*, 461 U.S. 660 (1983). *See generally* Colgan, *supra* note 13.

367. *Jones v. Governor of Fla.*, 975 F.3d 1016, 1025 (11th Cir. 2020) (en banc).

368. FLA. CONST. art. VI, § 4(a); *see Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST. (Aug. 10, 2022), <https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> [<https://perma.cc/5MUY-V7ST>].

369. FLA. STAT. § 98.0751(1), (2)(a)5. (2022); *Voting Rights Restoration Efforts in Florida*, *supra* note 368.

Subsequently, a federal district court found that the Florida legislation was unconstitutional because it created an impermissible tax on voting under the Twenty-Fourth Amendment³⁷⁰ by conditioning voting on payment of costs and fees.³⁷¹ The court also held that the legislation violated the Equal Protection Clause of the Fourteenth Amendment by preventing defendants from voting who were unable to pay restitution or fines.³⁷² However, the Eleventh Circuit reversed, finding the legislation did not violate the Constitution's Twenty-Fourth Amendment or the Equal Protection Clause.³⁷³ Specifically, the court, relying on *Richardson v. Ramirez*,³⁷⁴ held that requiring defendants to complete criminal justice payments before restoring voting rights survived rational basis review under the Fourteenth Amendment and found that the financial obligations were part of the criminal sentence.³⁷⁵

In a related case addressing the Florida law, the Eleventh Circuit denied an equal protection challenge to the law as applied to “low-income women of color who face unemployment, low wages, and difficulty paying off their financial debts at much higher rates than their male and white female counterparts.”³⁷⁶ The court denied the petitioners’ request to apply the *Anderson–Burdick* test rather than equal protection principles because the petitioners argued that the claim implicated the fundamental right to vote.³⁷⁷ The court found that the case involved a “traditional Equal Protection Clause claim,” which was “cognizable in the voting context if the plaintiff allege[d] that discriminatory animus motivated the legislature to enact a voting law” and explained that the petitioners could only prevail if they could show that gender was a motivating factor in the adoption of the law.³⁷⁸

370. U.S. CONST. amend. XXIV, § 1.

371. *Jones v. DeSantis*, 462 F. Supp. 3d 1196, 1216–34 (N.D. Fla. 2020), *rev'd in part, vacated in part sub nom. Jones v. Governor of Fla.*, 975 F.3d 1016.

372. *Id.*

373. *Jones*, 975 F.3d at 1028–46. For a more detailed discussion of the litigation surrounding section 98.0751, see Joshua H. Winograd, *Let the Sunshine in: Floridian Felons and the Franchise*, 31 U. FLA. J.L. & PUB. POL'Y 267, 295–303 (2021).

374. 418 U.S. 24 (1974); *see supra* note 56.

375. *Jones*, 975 F.3d at 1028–37.

376. *Jones v. Governor of Fla.*, 15 F.4th 1062, 1064 (11th Cir. 2021); *see id.* at 1065–67.

377. *Id.* at 1065–66. The *Anderson–Burdick* test comes from two cases establishing that greater scrutiny applies when a claim is based on the right to vote under the First and Fourteenth Amendments rather than traditional Equal Protection principles. *Id.*; *see Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992).

378. *Jones*, 15 F.4th at 1066 (quoting *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1319 n.9 (11th Cir. 2019)).

B. *Limitations of Judicial Relief*

In addition to the difficulty of success under the equal protection cases, legal challenges to de facto disenfranchisement face many limitations. Practical obstacles often prevent the filing of lawsuits. Moreover, even if lawsuits are filed, litigation provides only a piecemeal approach to addressing a broad issue impacting hundreds of thousands of potential defendants with varying claims for why they could not vote.³⁷⁹

As discussed in Part II, defendants are often unaware of their right to vote because they lack knowledge of the right, have not been provided notice of the right to vote, or have been given inaccurate or confusing information about their right to vote.³⁸⁰ As a result, many defendants may not be aware of their potential claims. Additionally, newly enacted and pending election legislation threatens to increase voting obstacles for defendants.³⁸¹

The Court's holding in *Shelby County v. Holder*³⁸² will likely create uphill battles to challenge state law voting restrictions and increase the likelihood of additional voting restriction laws.³⁸³ In 2021, the Court had an opportunity to reverse course on *Shelby County*, but instead, in *Brnovich v. Democratic National Committee*,³⁸⁴ the Court held that Arizona's voting restrictions did not violate the federal Voting Rights Act³⁸⁵ and were not "enacted with a racially discriminatory purpose."³⁸⁶ *Brnovich* is just one example of a post-*Shelby County* case where the

379. See Paikowsky, *supra* note 37, at 855–56 (describing the limitations of the “*McDonald* framework” and “discuss[ing] six avenues for challenging jail-based disenfranchisement: equal protection, procedural due process, uniformity, the Voting Rights Act, wealth-based claims, and substantive due process claims”). For more information describing potential claims against de facto disenfranchisement in jails, see generally CAMPAIGN LEGAL CTR., CHALLENGING JAIL-BASED DISENFRANCHISEMENT: A RESOURCE GUIDE FOR ADVOCATES (2019), <https://campaignlegal.org/sites/default/files/2019-12/Jail%20Voting%20Advocacy%20Manual.pdf> [<https://perma.cc/TD6Z-E7QE>].

380. See *supra* Section II.B.1.

381. See *supra* notes 264–69 and accompanying text.

382. 570 U.S. 529 (2013).

383. See *supra* notes 264–69 and accompanying text.

384. 141 S. Ct. 2321 (2021).

385. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. §§ 10301–10702).

386. *Brnovich*, 141 S. Ct. at 2350.

Court has upheld state law voting restrictions.³⁸⁷ As a result, challenges to state election laws based on federal law are unlikely to be successful.³⁸⁸

Even if defendants know their rights, litigation is time-consuming, requires representation, and is costly. Additionally, the election in which defendants want to vote will typically occur before the lawsuit is resolved. Thus, once the election is held, efforts to seek injunctive relief will likely face mootness issues.³⁸⁹

As discussed, many defendants are subject to de facto disenfranchisement because they are in jail due to the inability to pay bail.³⁹⁰ As a result, they are likely unable to afford counsel to fight for their right to vote.³⁹¹ Moreover, contingency fee representation is not generally available because most claims are for injunctive relief rather than damages.³⁹² Defendants in jail often face standing issues and must also exhaust administrative remedies before filing a lawsuit, causing further delays and expenses.³⁹³ While some nonprofit advocacy groups have brought lawsuits, they often face difficulties establishing standing.³⁹⁴

IV. REFORMS & SUGGESTIONS

Recognizing the problems associated with addressing de facto disenfranchisement via court challenges,³⁹⁵ this Part addresses other measures to reduce the incidence of de facto disenfranchisement and identifies mechanisms to implement and provide accountability for such measures.

387. Derek Muller, Brnovich, *Election-Law Tradeoffs, and the Limited Role of the Courts*, SCOTUSBLOG (July 6, 2021, 11:14 AM), <https://www.scotusblog.com/2021/07/brnovich-election-law-tradeoffs-and-the-limited-role-of-the-courts/> [<https://perma.cc/3ZUM-LX6F>] (“*Brnovich* is the latest in a line of cases suggesting that the federal courts should play a smaller role in patrolling how states administer elections.”).

388. *See id.*; Debra Cassens Weiss, *Supreme Court Upholds Arizona Voting Restrictions, Including ‘Ballot Harvesting’ Ban*, ABA J. (July 1, 2021, 9:30 AM), <https://www.abajournal.com/news/article/supreme-court-rules-on-arizona-voting-restrictions> [<https://perma.cc/XC58-8RAH>].

389. Paikowsky, *supra* note 37, at 852.

390. *See supra* Section II.A.1.b.

391. Paikowsky, *supra* note 37, at 852–53.

392. *See id.* *But see* ROOT & DOYLE, *supra* note 209, at 4 (identifying a 2017 case “believed to be the first class-action lawsuit requesting monetary damages, as opposed to injunctions, for systematic disenfranchisement for detained people awaiting trial”).

393. Lewis & Shen, *supra* note 187; Paikowsky, *supra* note 37, at 852 (stating that jailed defendants “may be subject to all of the restrictions of the Prison Litigation Reform Act that [have] so severely impeded access to justice for incarcerated people”).

394. Paikowsky, *supra* note 37, at 853.

395. *See, e.g.*, DANIELS, *supra* note 68, at 168 (recognizing that litigation “has proven to be the least effective [tool] in the felon disenfranchisement arena”).

A. Reduce Incarceration

Reducing incarceration rates will reduce the voting hurdles that incarceration creates.³⁹⁶ Research reflects that a person's likelihood of voting decreases after incarceration, even after a short jail term.³⁹⁷ As described in Part II, physical lockup creates heightened barriers to voting for eligible voters, especially for the vast majority of the estimated 750,000 individuals in jail.³⁹⁸

Bail reform has the potential to decrease jail populations appreciably.³⁹⁹ Nearly 500,000 individuals remain in jail not because they are convicted but because they lack the means to pay bail.⁴⁰⁰ Measures to end or limit cash bail could release many of these individuals. Studies have shown that such reforms are unlikely to increase crime rates or threats to public safety.⁴⁰¹ The results of such reforms in New Jersey seem initially promising. In 2017, New Jersey switched from cash bail to a risk assessment program and, by 2019, experienced a forty-five percent reduction in the number of people in jail.⁴⁰² At the same time, violent crime decreased and there was a “negligible difference in the number of people arrested while on pretrial release.”⁴⁰³

Another way to reduce the number of defendants in jail is to decriminalize misdemeanors and establish non-incarceration alternatives.⁴⁰⁴ Decriminalization can be either “full” or “partial.”⁴⁰⁵

396. Lewis & Shen, *supra* note 187.

397. Sullivan, *supra* note 314 (citing White, *supra* note 330).

398. *See supra* Sections II.B.2.b.–c.

399. The Criminal Justice Policy Program at Harvard Law School has released a report to help jurisdictions with bail reform issues. COLIN DOYLE ET AL., CRIM. JUST. POL'Y PROG., BAIL REFORM: A GUIDE FOR STATE AND LOCAL POLICYMAKERS (2019), <https://docslib.org/doc/2562074/bail-reform-a-guide-for-state-and-local-policymakers-by> [<https://perma.cc/FG2Q-XVBT>].

400. PORTER, *supra* note 149, at 5.

401. *See, e.g.*, Tiana Herring, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POL'Y INITIATIVE (Nov. 17, 2020), <https://www.prisonpolicy.org/blog/2020/11/17/pretrial-releases/> [<https://perma.cc/HLD5-X54Q>] (describing a review of data from four states and nine cities and counties that implemented pretrial reforms for release of defendants pending trial, finding that all but one of these jurisdictions experienced “decreases or negligible increases in crime after implementing reforms,” and noting that the limited data from the thirteenth jurisdiction made the impact of reforms unclear); Holmes Lybrand & Tara Subramaniam, *Fact-Checking Claims Bail Reform Is Driving Increase in Violent Crime*, CNN: POL. (July 7, 2021, 4:10 PM), <https://www.cnn.com/2021/07/07/politics/bail-reform-violent-crime-fact-check/index.html> [<https://perma.cc/XJ3L-AWTL>] (concluding that no clear evidence exists linking bail reform to rise in crime during the COVID-19 pandemic and identifying studies on the impact of bail reform on crime rates, but recognizing conflicting results from two studies of bail reform in Cook County, Illinois).

402. Herring, *supra* note 401.

403. *Id.*

404. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 220–22 (2018).

405. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1067 (2015).

Under full decriminalization, a low-level criminal offense is converted to a civil offense (similar to receiving a traffic ticket), and the defendant is often subject to a penalty rather than a criminal record and incarceration.⁴⁰⁶ For partial decriminalization, the more common alternative, the offense remains a criminal infraction; however, incarceration is not an available sanction.⁴⁰⁷ Alternatives to incarceration include supervision, community service, and electronic monitoring.⁴⁰⁸ Such options would help alleviate the physical obstacles to registration and voting in jail.

Diversion efforts designed to avoid a conviction can also reduce incarceration.⁴⁰⁹ Such efforts take many forms, including community support programs for police, prosecutors, and judges.⁴¹⁰ For example, support programs can include pre-police diversion programs allowing community or non-law enforcement agencies to address substance abuse and mental health issues.⁴¹¹ Police diversion programs encourage officers to use alternatives to arrest, including warnings or referrals to support groups for minor offenses involving substance abuse or public order.⁴¹² Prosecution diversion programs encourage prosecutors to file charges only if a defendant cannot complete specific steps.⁴¹³ Such steps could include community service, restitution, and expressing remorse. Judges can also divert defendants to treatment centers and offer deferred adjudication plans to reduce incarceration.⁴¹⁴ Advocates suggest judges should use diversion instead of incarceration for low-risk offenses, including traffic violations and minor drug crimes.⁴¹⁵ Similarly, diversion

406. *Id.*

407. *Id.*

408. Neil L. Sobol, *Connecting the Disconnected: Communication Technologies for the Incarcerated*, 53 WAKE FOREST L. REV. 559, 592–93 (2018). For a discussion of reforms aimed at improving community supervision, see THE PEW CHARITABLE TRS., POLICY REFORMS CAN STRENGTHEN COMMUNITY SUPERVISION: A FRAMEWORK TO IMPROVE PROBATION AND PAROLE (2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/04/policy-reforms-can-strengthen-community-supervision> [<https://perma.cc/979Q-Y45V>].

409. See Leah Wang & Katie Rose Quandt, *Building Exits off the Highway to Mass Incarceration: Diversion Programs Explained*, PRISON POL’Y INITIATIVE (July 20, 2021), <https://www.prisonpolicy.org/reports/diversion.html> [<https://perma.cc/8T7Z-VMYX>].

410. *Id.*

411. *Id.*; THE PEW CHARITABLE TRS., *supra* note 408, at 10.

412. Wang & Quandt, *supra* note 409; THE PEW CHARITABLE TRS., *supra* note 408, at 10–11.

413. Wang & Quandt, *supra* note 409. For a more detailed discussion of prosecutor efforts to reduce incarceration and racial disparities, see generally NILA BALA ET AL., R ST., PROSECUTORIAL ROLES IN REDUCING RACIAL DISPARITIES IN THE JUSTICE SYSTEM (2021), https://www.rstreet.org/wp-content/uploads/2021/07/Final_RSTREET235.pdf [<https://perma.cc/M6JU-FKSK>].

414. Wang & Quandt, *supra* note 409.

415. *E.g.*, THE PEW CHARITABLE TRS., *supra* note 408, at 5.

can serve as an alternative to arrest and incarceration for technical violations of supervision.⁴¹⁶

Given the disproportionate number of Black people who are incarcerated, reducing the number of incarcerated individuals could help reduce the disparate impact of de facto disenfranchisement.⁴¹⁷ That said, legislators, judges, police, prosecutors, and other government officials must take care to ensure that the alternatives do not negatively impact people of color.⁴¹⁸ For example, some have raised concerns that risk assessment tools used with bail reform may reflect racial bias.⁴¹⁹ Similarly, decriminalization efforts can negatively impact lower income defendants and people of color.⁴²⁰ Decriminalization can be a “net widener,” making it easier for authorities to charge defendants with offenses.⁴²¹ In such circumstances, typically, defendants do not have legal representation, and studies reveal racial disparities in arrest rates following decriminalization efforts.⁴²² Additionally, decriminalization efforts that rely on fines or assessing fees for participation in alternatives to incarceration can adversely impact those who cannot afford the monetary assessments.⁴²³

B. Legislative and Regulatory Reforms

Legislative and regulatory reforms to penal disenfranchisement provisions can reduce de facto disenfranchisement.⁴²⁴

1. Abolish Disenfranchisement

The wide variety of state and local disenfranchisement provisions significantly contribute to the problem of de facto disenfranchisement. A uniform end to de jure disenfranchisement would create a clear rule and

416. *Id.* at 45–47.

417. *See supra* Section II.C.

418. *See, e.g.,* DOYLE ET AL., *supra* note 399, at 13–21 (expressing concerns that bail reform measures could have disparate impact on people of color and suggesting safeguards to prevent such disparate impact).

419. *See, e.g.,* PRETRIAL JUST. INST., THE CASE AGAINST PRETRIAL RISK ASSESSMENT INSTRUMENTS 4–5 (2020), <https://static1.squarespace.com/static/61d1eb9e51ae915258ce573f/t/61df300e0218357bb223d689/1642017935113/The+Case+Against+Pretrial+Risk+Assessment+Instruments--PJI+2020.pdf> [<https://perma.cc/25CC-NARK>] (discussing the racial biases in risk assessment instruments); CHRISTOPHER SLOBOGIN, JUST ALGORITHMS: USING SCIENCE TO REDUCE INCARCERATION AND INFORM A JURISPRUDENCE OF RISK 90–95 (2021) (noting these concerns and discussing how assessment tools can be designed to address racial bias).

420. *See* NATAPOFF, *supra* note 404, at 220.

421. *Id.* at 223.

422. *Id.* (referring to reports from Illinois and North Carolina).

423. *Id.*; Sobol, *supra* note 256, at 849.

424. To help with drafting of legislation, the Brennan Center has created a memorandum that provides examples of, and addresses the components of, a voting rights restoration bill. WOOD, *supra* note 15, at 19–25.

reduce the confusion that defendants, law enforcement agents, and election officials have about registration and voting.⁴²⁵ It would permit defendants to vote without jumping through the often confusing and burdensome procedures associated with restoration.⁴²⁶ Further, it would eliminate conditioning of restoration based on payment of criminal justice debt.⁴²⁷ Also, it would benefit those eligible to vote but who are facing de facto disenfranchisement because of misunderstandings about the right to vote for people with misdemeanors or for people who have been arrested but not convicted.⁴²⁸

Ending disenfranchisement would also help reduce defendants' fears that registration or voting would lead to arrest and prosecution for voter fraud.⁴²⁹ Providing the right to vote to individuals, including those incarcerated, allows them to participate in the democratic process and helps improve transitions to society upon release.⁴³⁰ Studies reflect that the restoration of voting rights has been associated with reducing arrest and recidivism rates.⁴³¹

As discussed, Maine, Vermont, and the District of Columbia do not disenfranchise defendants.⁴³² After the District of Columbia ended its practice of disenfranchising defendants, the Board of Elections sent voter registration forms to 2,400 District of Columbia residents in prisons across the country, resulting in about a quarter of them registering to vote and half of those voting.⁴³³ Another 512 people were registered, and 333 voted, in the jail in the District of Columbia.⁴³⁴

425. *Id.* at 13; Kelly, *supra* note 43, at 419–20; see also CAMPAIGN LEGAL CTR. & GEO. L. C.R. CLINIC, *supra* note 187, at 33 (explaining that automatic restoration of voting rights upon release from incarceration is “easier to administer and on stronger constitutional footing”).

426. Kelly, *supra* note 43, at 420.

427. CAMPAIGN LEGAL CTR. & GEO. L. C.R. CLINIC, *supra* note 187, at 33 (concluding that “[t]he surest way to eliminate the impact of wealth on access to the ballot for people with convictions is to abolish felony disenfranchisement”).

428. See *supra* Sections II.A.1.b.–c.

429. See *supra* Section II.B.2.

430. See Joel Castón, *A Seat at the Table*, INQUEST (July 26, 2021), <https://inquest.org/commissioner-joel-caston-a-seat-at-the-table/> [<https://perma.cc/K3BU-NDKB>] (statement from the first incarcerated person elected to public office in Washington, D.C.); Colgan, *supra* note 13, at 147–48 (“Allowing people to vote provides them with agency, a meaningful connection to their community and its laws, and confirmation that society values their membership and participation in the democratic enterprise.” (footnotes omitted)).

431. Colgan, *supra* note 13, at 147 & nn.480–81 (citing studies and reports discussing the impact of restoration on rehabilitation efforts).

432. See *supra* Section II.A.1.a.

433. Jenny Gathright & Martin Austermuhle, *Amid a Wave of Legislation Suppressing the Vote, The D.C. Region Makes Significant Strides in Expanding Access*, DCIST (Aug. 27, 2021, 1:19 PM), <https://dcist.com/story/21/08/27/dc-maryland-virginia-make-strides-in-expanding-voting-rights-access/> [<https://perma.cc/76CG-QA9X>].

434. *Id.*

The United States should also look at European examples, where nearly half of the countries permit incarcerated defendants to vote at correctional institutions or by absentee ballots.⁴³⁵ Similarly, incarcerated defendants can vote in Canada, Indonesia, Kenya, and South Africa.⁴³⁶

2. Automatic Restoration of Voting Rights

If jurisdictions do not abolish disenfranchisement, they should follow the lead of other countries and states that automatically restore voting rights after release from incarceration. In a study of forty-five countries, only four countries (including the United States) continued to ban people with convictions from voting after release from prison.⁴³⁷ The other ninety percent of the countries either had no voting restrictions on incarcerated persons or allowed voting upon release from prison.⁴³⁸ Additionally, following the 2018 U.S. elections, seven states adopted automatic restoration of voting rights following release from incarceration, representing a fifty percent increase in states allowing automatic restoration.⁴³⁹ Twenty-one states now automatically restore voting rights after incarceration.⁴⁴⁰

Automatic restoration of voting rights upon release from incarceration in all states would reduce de facto disenfranchisement.⁴⁴¹ Such a measure would help clarify the ability to vote for individuals who are no longer incarcerated.⁴⁴² As with ending disenfranchisement, automatic restoration would help reduce improper denials of the right to vote and decrease the fear associated with allegations of voter fraud.⁴⁴³ Automatic restoration would also reduce administrative concerns, burdens, and costs

435. ISPAHANI, *supra* note 14, at 4; Daniels, *supra* note 13, at 1091.

436. Gross, *supra* note 15.

437. Williams, *supra* note 62, at 18.

438. *Id.* (citing *International Comparison of Felon Voting Laws*, PROCON, <https://felonvoting.procon.org/international-comparison-of-felon-voting-laws/> [<https://perma.cc/3WXT-58VZ>]).

439. Zach Montellaro, *States Moving Fast After Congress Failed to Expand Felon Voting Rights*, POLITICO (Feb. 2, 2022, 4:30 AM), <https://www.politico.com/news/2022/02/02/felon-voting-rights-states-00004372> [<https://perma.cc/9GKJ-796C>].

440. *Id.* But see Graham Moomaw, *Va. House Republicans Kill Proposal on Felon Voting Rights Despite Bipartisan Support*, VA. MERCURY (Feb. 8, 2022, 7:46 AM), <https://www.virginiamercury.com/2022/02/08/va-house-republicans-kill-felon-voting-rights-proposal-despite-bipartisan-support/> [<https://perma.cc/N726-J8MP>] (describing the state congressional committee's vote to block a pending constitutional amendment for automatic restoration of voting rights after release from incarceration).

441. CAMPAIGN LEGAL CTR. & GEO. L. C.R. CLINIC, *supra* note 187, at 33.

442. Kelly, *supra* note 43, at 420; cf. WOOD, *supra* note 15, at 15 (“Allowing people to vote as soon as they are released from prisons simplifies election administration—if they are not in prison, they are eligible to vote.”).

443. See Kelly, *supra* note 43, at 420; WOOD, *supra* note 15, at 13.

associated with systems that require the submission of requests for re-enfranchisement.⁴⁴⁴

3. Explicit Restoration Requirements

If neither penal disenfranchisement is abolished nor the automatic restoration of rights provided after release from incarceration, states and localities should simplify and clarify the requirements for restoration of rights and set forth the impact of out-of-state convictions.⁴⁴⁵ Administrative guidance and resources would help reduce confusion and misunderstanding among defendants and officials.⁴⁴⁶ This would, in turn, help ease the administrative burdens associated with re-enfranchisement.⁴⁴⁷ Specific provisions setting forth restoration requirements written in clear language can help combat the fear of arrest for election fraud for defendants confused about their eligibility to vote.

C. Address Physical and Informational Barriers

In addition to modifying rules and statutes regarding restoration, legislators, judges, police, prosecutors, correctional facility employees, election officials, and other government officials should address the physical and informational hurdles contributing to de facto disenfranchisement. This Section describes measures to reduce the general hurdles that defendants subject to de facto disenfranchisement face and the specific barriers that incarceration creates.

1. Remove Financial Hurdles

States should address the financial hurdles that defendants face when trying to vote.⁴⁴⁸ In particular, states should consider ending the practice of conditioning the right to vote on paying outstanding criminal justice debt.⁴⁴⁹ As Professor Colgan has reported, ending wealth-based disenfranchisement could open up voting for more than a million people, primarily from “low-income communities and communities of color.”⁴⁵⁰

444. See WOOD, *supra* note 15, at 15; see also Chien, *supra* note 174, at 574–75 (discussing the benefits of automatic systems for removal of collateral consequences over petition-based systems).

445. EWALD, *supra* note 159, at iv.

446. See Selin, *supra* note 191, at 1035–36 (recognizing the importance of providing administrative guidance to help with implementation of rules and laws).

447. See *id.* at 1009–17.

448. Professor Colgan’s article provides a detailed listing of the pervasive legislation, rules, procedures, and policies that create wealth-based penal disenfranchisement in America. Colgan, *supra* note 13, at 149–79.

449. See FREDERICKSEN & LASSITER, *supra* note 247, at 19; WOOD, *supra* note 15, at 18; Amy Ciardiello, Note, *Prohibiting the Punishment of Poverty: The Abolition of Wealth-Based Criminal Disenfranchisement*, 54 U. MICH. J.L. REFORM 917, 942 (2021).

450. Colgan, *supra* note 13, at 60–61.

States that fail to abolish requirements that condition re-enfranchisement on payment of criminal justice debts should adopt specific procedures to reduce financial obstacles and create effective waiver procedures for those unable to pay.⁴⁵¹

To further reduce voting barriers, states that still suspend driver's licenses for outstanding criminal justice debt for actions unrelated to driving should join the growing list of states ending this practice.⁴⁵² Moreover, states could provide financial aid for defendants who cannot pay outstanding criminal justice debt. For example, following the Eleventh Circuit's decision upholding Florida's law requiring payment of criminal justice debt, various celebrities and organizations created funds to help pay off monetary obligations necessary to restore voting rights.⁴⁵³ Florida's Free Our Vote organization reported that voter turnout increased by twenty-six percent following the organization's payment of defendants' criminal debts to create voter eligibility.⁴⁵⁴ Resolving outstanding criminal justice debt would also increase community involvement by reducing the reluctance to attend public events based on a fear of arrest for unpaid debt.

2. Simplify Registration

Although restoration provides defendants with the right to vote, many re-enfranchised defendants often face burdensome registration requirements that, as a practical matter, prevent them from voting. States should remove the burdens of re-registration by permitting automatic voter registration upon re-enfranchisement, similar to how many states now permit automatic voter registration based on interactions with the Department of Motor Vehicles (DMV).⁴⁵⁵ Since 2016, when Oregon became the first state to enact automatic voter registration for citizens who interact with the DMV, at least twenty-one other states and the District of Columbia have enacted or implemented automatic voter

451. See FREDERICKSEN & LASSITER, *supra* note 247, at 19. For a more detailed discussion of reforms related to criminal justice debt, see Sobol, *supra* note 256, at 896–911.

452. For an interactive map detailing state laws regarding suspension of driver's licenses for unpaid fines and fees, see Debt-Based Driving Restrictions, FREE TO DRIVE, <https://www.freetodrive.org/maps/#page-content> [<https://perma.cc/9VLJ-5TAS>].

453. Winograd, *supra* note 373, at 304–05, 305 n.343 (referring to contributions by celebrities such as former New York City Mayor Michael Bloomberg and LeBron James).

454. Neel U. Sukhatme et al., *Felony Financial Disenfranchisement*, 76 VAND. L. REV. (forthcoming 2023) (manuscript at 22), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4090995 [<https://perma.cc/4G5R-5VNK>].

455. See FREDERICKSEN & LASSITER, *supra* note 247, at 20. See generally KEVIN MORRIS & PETER DUNPHY, BRENNAN CTR. FOR JUST., AVR IMPACT ON STATE VOTER REGISTRATION (2019), https://www.scribd.com/document/405908517/AVR-Impact-on-State-Voter-Registration#full-screen&from_embed [<https://perma.cc/GA5T-YW7C>] (discussing increased voter registration in jurisdictions with automatic voter registration).

registration based on interactions with state agencies.⁴⁵⁶ A review of seven states that had enacted automatic voter registration reflects increases in registration rates ranging from 16% to 93.7%.⁴⁵⁷ Allowing automatic voter registration would allow individuals in states that permit re-enfranchisement upon release from incarceration to be registered automatically upon release from incarceration.⁴⁵⁸ In states with other conditions on re-enfranchisement, automatic voter registration should occur upon satisfying such conditions.

States that do not permit automatic voter registration should simplify and clarify registration and voting requirements. Registration forms need to provide accurate information in an easily understandable format.⁴⁵⁹ The American Civil Liberties Union (ACLU) has outlined general principles and provided model language to help states make their registration forms more accessible.⁴⁶⁰

Some states have also enacted measures to help defendants released from incarceration comply with voter-identification laws.⁴⁶¹ For example, Florida now provides Florida-born prisoners with copies of their driver's licenses and birth certificates upon release from incarceration.⁴⁶²

3. Improve Access for Incarcerated Defendants

Defendants eligible to vote while incarcerated should not face registration or voting obstacles.⁴⁶³

Establishing jails as polling and registration locations can reduce hurdles and avoid issues associated with requesting, receiving, and submitting absentee ballots.⁴⁶⁴ In 2019, Illinois enacted legislation to

456. *Automatic Voter Registration*, NAT'L CONF. STATE LEGISLATURES (June 23, 2022), <https://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> [https://perma.cc/TQG4-URDB]; *History of AVR & Implementation Dates*, BRENNAN CTR. FOR JUST. (June 30, 2021), https://www.brennancenter.org/our-work/research-reports/history-avr-implementation-dates?_ga=2.189236459.1780596680.1643239332-1003258727.1639866611 [https://perma.cc/XL3C-YPSE].

457. MORRIS & DUNPHY, *supra* note 455, at 2.

458. *See* KIEF, *supra* note 235, at 16.

459. *See id.* at 15.

460. *Id.* at 16–18.

461. FREDERICKSEN & LASSITER, *supra* note 247, at 12.

462. *Id.*; *see* FLA. STAT. § 944.605(7)(a) (2022).

463. *See* Uruj Sheikh, Comment, *Reviving the Civic Body: Campaign for Suffrage Inside Prisons, Felony Enfranchisement in D.C., and Lawyering for Abolition*, 24 CUNY L. REV. F. 31, 56 (2021).

464. *See* Miller, *supra* note 196; Mauer, *supra* note 37, at 560; ALL VOTING IS LOC. ET AL., *BALLOTS FOR ALL: ENSURING ELIGIBLE WISCONSINITES IN JAIL HAVE EQUAL ACCESS TO VOTING 16* (2021), https://allvotingislocal.org/wp-content/uploads/2021/06/EDITED-20210614_WI_Jail-Based-Voting-02.pdf [https://perma.cc/X4BC-NNNC] (recommending that election administrators “[h]ost registration and absentee ballot request events in county jails”).

make Cook County Jail a polling location, allowing registration and voting while in jail.⁴⁶⁵ In the November 2020 election, approximately 2,200 defendants voted at the Cook County jail.⁴⁶⁶ While Cook County Jail was the first to serve as a polling place, it can serve as the model for other jails, just like jails in other countries that permit voting for incarcerated defendants have.⁴⁶⁷ For example, a jail in the District of Columbia “serves as an agency that can register people to vote upon intake.”⁴⁶⁸ Similarly, Maryland requires its Baltimore City booking facility to maintain a ballot box to allow jail voting,⁴⁶⁹ and Harris County, Texas, has established the Harris County Jail as a polling location.⁴⁷⁰

If in-person registration or voting is not permitted in jails, those detained should have access to alternative registration formats and absentee ballots.⁴⁷¹ Legislation that permits jail identification cards to satisfy voter identification requirements would help those with limited access to other forms of identification.⁴⁷² Additionally, registration processes should be set up to help prevent missed deadlines because of incarceration. For example, same-day voter registration could help reduce such hurdles.⁴⁷³

465. Lewis & Shen, *supra* note 187.

466. Matt Vasilogambros, *Many in Jail Can Vote, but Exercising That Right Isn't Easy*, PEW: STATELINE (July 16, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/16/many-in-jail-can-vote-but-exercising-that-right-isnt-easy> [https://perma.cc/2Z64-KMXS].

467. See Miller, *supra* note 196; Lewis & Shen, *supra* note 187; Vasilogambros, *supra* note 466. For a more detailed discussion about how Illinois's legislation to allow in-person voting in jail can serve as a model for other jurisdictions, see Glenna Siegel, Note, *Illinois Public Act 101-0442: Unlocking Education, Registration, and Participation of Voters in Pretrial Detention*, 2022 U. ILL. L. REV. 1603, 1628–35.

468. Miller, *supra* note 196.

469. Md. Code Ann., Elec. Law § 1-303.1(b)–(c) (West, Westlaw through 2022 Reg. Sess.).

470. Jasper Scherer & St. John Barned-Smith, *For the First Time in Texas, Inmates Now Have a Polling Place of Their Own at Harris County Jail*, HOUS. CHRON. (Nov. 3, 2021, 9:42 AM), <https://www.houstonchronicle.com/politics/houston/article/For-the-first-time-in-Texas-inmates-now-have-a-16588331.php> [https://perma.cc/W5Y8-5BPZ]. The establishment of the Harris County Jail polling location has led to requests for jail polling locations in other Texas counties, including Dallas County. Andrew Little, *Activists Are Pushing for a Polling Station in the Dallas County Jail*, DALL. MORNING NEWS (Aug. 18, 2022, 5:31 AM), https://www.dallasnews.com/news/elections/2022/08/18/activists-are-pushing-for-a-polling-station-in-the-dallas-county-jail/?fbclid=IwAR18PYuOfcL1kw4QE79QKxfsjTkJ9NPsbkOy_7ruPF65BPw4GaEVyyIEZR4 [https://perma.cc/KK75-9HPM].

471. See Mauer, *supra* note 37, at 560.

472. ALL VOTING IS LOC. ET AL., *BALLOTS FOR ALL: HOLDING PENNSYLVANIA COUNTY JAILS ACCOUNTABLE FOR PROVIDING BALLOT ACCESS 16 (2021)* [hereinafter *PENNSYLVANIA BALLOT ACCESS*], https://allvotingislocal.org/wp-content/uploads/2021/09/EDITED-2021_PA_Jail-Based-Voting-03-1-1.pdf [https://perma.cc/7E5Z-RKMQ].

473. See AWAN & BANERJEE, *supra* note 214, at 5; HIRA ET AL., *supra* note 91, at 17–18.

Just as states have established methods to allow people in nursing homes and hospitals to vote, jails should have similar methods to allow voting for incarcerated individuals.⁴⁷⁴ They should have access to absentee ballots, postage, and envelopes.⁴⁷⁵ People detained after the deadline to access absentee ballots should be entitled to request an emergency absentee ballot.⁴⁷⁶

While absentee ballots allow those incarcerated to vote while in custody, a barrier to casting those ballots can be returning them.⁴⁷⁷ State laws vary on which persons are eligible to return an absentee ballot on behalf of a voter.⁴⁷⁸ At the extremes, some states require absentee voters to return the ballot themselves, while others allow voters to designate any person.⁴⁷⁹ States between these extremes have specific designations on who can return the ballots besides the voter.⁴⁸⁰ The designations vary and may include specific family members or caregivers.⁴⁸¹ States should follow Georgia's lead and allow correctional facilities to return absentee ballots.⁴⁸²

Another hurdle to voting for incarcerated individuals is establishing residency for voting purposes.⁴⁸³ Maine and Vermont allow pre-incarceration addresses to meet residency requirements.⁴⁸⁴ The argument against using jail or prison addresses for residency is that it allows too much influence for incarcerated individuals in an area where "they may have no prior connection."⁴⁸⁵ On the other hand, if individuals are

474. Lewis & Shen, *supra* note 187; *see also* ALL VOTING IS LOC. ET AL., *supra* note 464, at 15 (noting that voting deputies and agents are allowed for hospitalized patients and residents in retirement homes and residential care facilities, and advocating that their use be expanded to include eligible voters in jail).

475. *See* ALL VOTING IS LOC. ET AL., *supra* note 464, at 13; Jackson-Gleich & Yeary, *supra* note 29.

476. PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 15.

477. For a more detailed discussion of alternatives to polling places, *see* *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. STATE LEGISLATURES (JULY 12, 2022), <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx> [<https://perma.cc/Y6D6-9R8V>].

478. *See* Table 10: *Ballot Collection Laws*, Part of *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, NAT'L CONF. STATE LEGISLATURES (May 17, 2022), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-10-who-can-collect-and-return-an-absentee-ballot-other-than-the-voter.aspx> [<https://perma.cc/2LA6-69YZ>] (providing state-by-state information on who can return ballots on behalf of voters).

479. *Id.*

480. *Id.*

481. *Id.*

482. Ga. Code Ann. § 21-2-385(a) (West, Westlaw through 2022 Reg. Sess.); *see also* ALL VOTING IS LOC. ET AL., *supra* note 464, at 16 (advocating that jail officials should receive training in "registering voters and supporting absentee ballot requests").

483. Parkes, *supra* note 15, at 102.

484. Sheikh, *supra* note 463, at 59.

485. *Id.*

incarcerated in states other than their pre-incarceration state, additional burdens exist in determining registration and voting requirements if pre-incarceration addresses are used for voting purposes.⁴⁸⁶ States should specify residency requirements for incarcerated individuals to register and vote and describe the treatment of defendants with pre-incarceration out-of-state addresses.

States should also consider using technology to provide voting and registration alternatives. For example, astronauts can submit their ballots while in space.⁴⁸⁷ Similarly, internet availability and computer tablets in prisons and jail could provide methods to check registration status, register, and vote.⁴⁸⁸ Indigent defendants detained in jails should have free internet access to accomplish these measures.⁴⁸⁹

Counties and correctional institutions should establish formal written policies and procedures to facilitate registration and voting in jails.⁴⁹⁰ Reports reflect that many counties do not have such policies. For example, a 2021 report from Ohio found that although more than 150,000 people are jailed annually, none of the seven major metropolitan counties had written jail policies or procedures for voting and registration.⁴⁹¹ States should follow Colorado's lead in requiring that county clerks work with jail officials to submit written plans regarding voting and registration in jail.⁴⁹² In 2022, Massachusetts passed The VOTES Act,⁴⁹³ increasing voter information, access, and assistance for those incarcerated. The law requires officials to: (1) display voting rights and procedures before all elections; (2) provide assistance to those eligible in registering and applying for a mail-in ballot; (3) give information regarding voting status to those whose sentences are discharged; and (4) track voters' issues and progress in registering and casting their ballots.⁴⁹⁴

486. *Id.* at 60; Parkes, *supra* note 15, at 105.

487. Danny Baird, *How NASA Transmits Votes from the Space Station*, NASA (Nov. 2, 2020), <https://www.nasa.gov/image-feature/goddard/2020/how-nasa-transmits-votes-from-the-space-station> [<https://perma.cc/2UCE-T294>].

488. ALL VOTING IS LOC. ET AL., *supra* note 464, at 12–13.

489. *See id.*

490. *Id.* at 3, 12; PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 14.

491. ALL VOTING IS LOC., VOTER POLICIES ARE NONEXISTENT IN OHIO JAILS 1–3 (2021), available at https://allvotingislocal.org/wp-content/uploads/2021/12/2021_OH_Jail-Based-Voting-02-1-1-1-1.pdf [<https://perma.cc/ZQD6-GDVB>]. Deficiencies in jail voting policies and procedures have also been reported in other states. *See, e.g.*, ALL VOTING IS LOC. & ACLU OF FLA., ENSURING THAT ELIGIBLE VOTERS IN FLORIDA JAILS HAVE ACCESS TO THE BALLOT 2–3 (2021), <https://allvotingislocal.org/wp-content/uploads/2022/03/2022-FL-Jail-Based-Voting-Report-03-17-22.pdf> [<https://perma.cc/J44H-5KJJ>]; PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 2.

492. *See* PORTER, *supra* note 149, at 8; Colo. Election Rules, 8 CCR 1501-1, Rule 7.4.

493. 2022 Mass. Legis. Serv. Ch. 92 (S.B. 2924) (West) (codified in scattered sections of Mass. Gen. Laws chs. 51, 54 (2022)).

494. *Id.*

Detailed procedures should provide a framework to promote consistency and compliance with policies even when personnel change.⁴⁹⁵ Policies and procedures should help incarcerated defendants determine their voting eligibility and comply with registration requirements.⁴⁹⁶ Institutions should inquire about voting registration status on intake forms and have mechanisms that allow defendants to register and track their registration status.⁴⁹⁷ Institutions should help defendants comply with voter-identification requirements when defendants have limited access to proof of identification because of their confinement or because the institution seized their materials upon incarceration.⁴⁹⁸

4. Training for Election and Law Enforcement Officials

Even if laws, policies, and procedures are adopted to help defendants with registration and voting, such measures will be ineffective if officials are unaware or refuse to comply with such requirements. Under the current system, many law enforcement and election officials are confused or lack information about disenfranchisement and restoration requirements.⁴⁹⁹ As a result, eligible voters often receive inaccurate information about registration and voting.

Education is necessary, and training should be ongoing and incorporate changes as voting laws change. Proper training can reduce inaccurate information and misunderstandings. Election officials need to be aware of current eligibility provisions and ensure that such information is accurately communicated to individuals via websites, telephone conversations, and in-person discussions.⁵⁰⁰

Similarly, training for correctional staff is essential because they may serve as the primary contacts for detainees.⁵⁰¹ In-person interactions between case managers and individuals in jail describing the voting and registration process can be “one of the most effective ways to get voters registered, rather than relying on only passive measures like posting fliers.”⁵⁰² Each correctional institution should train and designate individuals to serve as contacts for officials and defendants with questions about registration and voting.⁵⁰³

495. ALL VOTING IS LOC. ET AL., *supra* note 464, at 3, 12.

496. *Id.* at 12–13; PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 14–15.

497. *See* PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 14.

498. ALL VOTING IS LOC. ET AL., *supra* note 464, at 13; PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 15.

499. *See supra* Section II.B.1.

500. *See* KIEF, *supra* note 235, at 15.

501. Miller, *supra* note 196.

502. *Id.*

503. ALL VOTING IS LOC. ET AL., *supra* note 464, at 12; PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 13.

5. Notice and Education for Defendants

Many defendants do not vote because they are unaware of the process of registration or voting. Reports reflect that “turnout is greater in states that have actively informed formerly incarcerated defendants about their rights.”⁵⁰⁴ Defendants need to receive notice of voting and registration rights. In addition to having access to materials, defendants should receive help with understanding the process and should receive notice of submission deadlines. Education for defendants is necessary to “help to dispel the fear of retaliation and incarceration for exercising the right to vote.”⁵⁰⁵

Correctional facilities and probation and parole offices should be required to notify defendants of their eligibility to register and vote.⁵⁰⁶ A 2021 Executive Order requires the U.S. Attorney General to establish procedures that provide defendants in federal custody or under supervision with instructional materials regarding voting and to provide assistance in complying with state voter-identification requirements.⁵⁰⁷ Under the Order, local jails contracting with the U.S. Marshalls Service must agree to provide voter education materials.⁵⁰⁸

Additionally, some states have requirements to assist defendants with notice and registration. For example, New Jersey’s parole board requires its officers to “distribute and review voter registration materials with all parolees upon release into the community.”⁵⁰⁹ Moreover, the probation department keeps a record “of every conversation about rights restoration and offers a one-hour credit toward community service for people who register and vote.”⁵¹⁰ Similarly, Maryland now requires that individuals released from incarceration receive notice of restored voting rights via registration documents provided upon discharge and through notices posted in parole and probation offices and on the Department of Public Safety and Correctional Services’ website.⁵¹¹ Additionally, the Maryland Board of Elections is required to promulgate regulations to establish

504. Lewis & Calderón, *supra* note 9.

505. DANIELS, *supra* note 68, at 168; *see also* Sullivan, *supra* note 314.

506. ALL VOTING IS LOC. ET AL., *supra* note 464, at 12.

507. Exec. Order No. 14,019, § 9, 86 Fed. Reg. 13, 623, 13626 (Mar. 10, 2021). For a more detailed analysis of the Order, see David Schlusell, *President Biden Orders DOJ to Facilitate Voting for People in Federal Custody or Under Supervision*, COLLATERAL CONSEQUENCES RES. CTR. (Mar. 12, 2021), <https://ccresourcecenter.org/2021/03/12/president-biden-orders-doj-to-facilitate-voting-for-people-in-federal-custody-or-under-supervision/> [<https://perma.cc/WU9E-KYTH>].

508. Exec. Order No. 14,019, § 9(b), 86 Fed. Reg. at 13626.

509. Lewis & Calderón, *supra* note 9. Similarly, Colorado requires that the division of adult parole provide parolees with voting and registration information at their initial meeting. COLO. REV. STAT. § 17-2-102(14) (2022).

510. Lewis & Calderón, *supra* note 9.

511. MD. CODE ANN., CORR. SERVS. § 2-502 (West, Westlaw through 2022 Reg. Sess.).

programs to notify voters of upcoming elections and necessary steps for voting.⁵¹² Similarly, the 2021 Maryland legislation establishing a ballot box in its Baltimore City booking facility provides defendants with voting materials.⁵¹³

Jail and election officials should coordinate their activities to facilitate registration and voting and prevent the spread of conflicting information.⁵¹⁴ The type of notice given is also critical. For example, New Mexico, New York, and North Carolina studies found “little evidence that notification increases registration and turnout rates.”⁵¹⁵ In contrast, an Iowa study found statistically significant increases in registration and turnout following notification.⁵¹⁶ Explanations for the differences include concerns about timing and clarity of notices provided.⁵¹⁷ The authors of the non-Iowa studies expressed doubts about whether “street-level criminal justice officials adhered to the date of implementation specified by their superiors.”⁵¹⁸

Furthermore, the notices provided in North Carolina and New York were “buried in densely worded pamphlets” that were part of exit packets containing information unrelated to voting rights.⁵¹⁹ On the other hand, the Iowa notices were included in a two-paragraph letter that discussed only voting rights and was written in large font that was personally addressed and sent to the defendant separately from their other discharge papers.⁵²⁰ The letter encouraged defendants to vote.⁵²¹

Similarly, notice and training to defendants should also address concerns about literacy and disabilities.⁵²² For example, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs “won a consent

512. MD. CODE ANN., ELEC. LAW § 1-303.2(b) (West, Westlaw through 2022 Reg. Sess.).

513. MD. CODE ANN., CORR. SERVS. § 2-501(b)(3) (West, Westlaw through 2022 Reg. Sess.).

514. Jackson-Gleich & Yeary, *supra* note 29.

515. Meredith & Morse, *supra* note 38, at 222.

516. Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 Q.J. POL. SCI. 41, 65 (2015); see also Michael Morse, *The Future of Felon Disenfranchisement Reform: Evidence from the Campaign to Restore Voting Rights in Florida*, 109 CALIF. L. REV. 1143, 1179 (2021) (“Iowans with felony convictions who are provided notice about their eligibility to vote are about one-third more likely to vote than their peers who were also restored voting rights but were not notified.” (citing Meredith & Morse, *supra*, at 63 fig.2, 66 tbl.4)).

517. Meredith & Morse, *supra* note 38, at 240.

518. *Id.*

519. *Id.*

520. *Id.*

521. *Id.*

522. Although beyond this Article’s scope, health literacy programs could be a model to help with literacy training for defendants. See generally Alissa Rubin Gomez, *Demand Side Justice*, 28 GEO. J. ON POVERTY L. & POL’Y 411 (2021) (arguing that health literacy programs have enjoyed great success, and educators could easily adapt health literacy education models to legal literacy concepts).

decree requiring a Virginia federal prison to provide reasonable accommodations to the voting process for disabled individuals,” focusing on the need to combat the illiteracy barrier to voting in prisons.⁵²³ Jail and election officials should also create videos to provide notice and training for defendants.

D. *Coordinate Efforts with Federal and Local Sources*

Efforts are necessary to attack de facto disenfranchisement issues at the federal, state, and local levels. Additionally, public and private groups can help increase registration and voter turnout.

1. National Reforms

The federal government can play a significant role in addressing voter rights concerns; however, federal lawmakers should also consider federalism issues.

Federal solutions offer the advantage of uniformity among the states. As discussed, variations in state and local laws create confusion and misunderstanding for officials and defendants.⁵²⁴ A federal uniform mandate would help simplify the law and allow guidance applicable to all defendants.⁵²⁵

Federal actions can come from executive orders, legislation, or regulation. While President Joseph Biden’s March 2021 Order primarily applies to defendants who have been in federal custody, it also establishes conditions for jails that contract with the U.S. Marshalls Service.⁵²⁶ Accordingly, an executive order can encourage action by non-federal institutions.⁵²⁷

Federal legislation could also impose voting requirements on states regarding penal disenfranchisement and access to registration and voting. For example, the proposed For the People Act⁵²⁸ not only would have provided that all formerly incarcerated defendants who have been convicted of a felony be entitled to vote in federal elections, but it also would have required states to notify released defendants of their voting rights.⁵²⁹ The For the People Act included additional provisions that would have helped reduce de facto disenfranchisement and the disparate impact on minorities, including automatic, same-day, and online voter

523. Sheikh, *supra* note 463, at 57.

524. *See supra* Section II.B.1.

525. DANIELS, *supra* note 68, at 157–58.

526. *See supra* notes 507–08 and accompanying text.

527. Exec. Order No. 14,019, § 9, 86 Fed. Reg. 13623, 13626 (Mar. 10, 2021).

528. H.R. 1, 117th Cong. (2021).

529. *Id.*; HIRA ET AL., *supra* note 91, at 6, 9.

registration.⁵³⁰ Similarly, the proposed Freedom to Vote Act⁵³¹ sought to set national standards for voting practices.⁵³² Along with requiring all states to have early voting for at least ten hours a day, allowing anyone to vote by mail, and making Election Day a national holiday, the Act would have automatically restored voting rights to formerly incarcerated people upon release.⁵³³ It would also have allowed for automatic and same-day voter registration.⁵³⁴ However, given the current composition of Congress and the requirement for at least sixty votes in the Senate, broad federal legislative reform is probably unlikely.⁵³⁵

A likely objection to a federal mandate would be the resultant federalism concerns.⁵³⁶ Traditionally, state and local reforms are the primary source of criminal justice reforms.⁵³⁷ Moreover, as discussed earlier, given the Court's holdings in *Shelby County* and *Brnovich*, the Court is not likely to require that states seek federal approval before adopting voting restrictions.⁵³⁸ Similarly, federal legislation such as the John R. Lewis Voting Rights Advancement Act, designed to re-impose some federal guidance for state law, did not pass.⁵³⁹

Alternatives to a federal mandate would be federal legislation that provides guidelines and incentives or grants to encourage state participation.⁵⁴⁰ Similarly, federal grant programs can help fund state

530. HIRA ET AL., *supra* note 91, at 17–18.

531. S. 2747, 117th Cong. (2021).

532. *The Freedom to Vote Act*, BRENNAN CTR. FOR JUST. (Jan. 4, 2022), <https://www.brennancenter.org/our-work/research-reports/freedom-vote-act> [<https://perma.cc/93B3-AMXR>].

533. *Id.*

534. *Id.*

535. See *What Is Happening with the Freedom to Vote Act?*, LEAGUE WOMEN VOTERS (Oct. 27, 2021), <https://www.lwv.org/blog/what-happening-freedom-vote-act> [<https://perma.cc/BAZ4-VSQB>]; cf. Savannah Behrmann, *Republicans Block John Lewis Voting Rights Act in Senate Vote*, USA TODAY (Nov. 3, 2021, 3:34 PM), <https://www.usatoday.com/story/news/politics/2021/11/03/john-lewis-senate-democrats-push-vote-election-reform-bill/6240611001/> [<https://perma.cc/WA82-LS5J>].

536. A detailed discussion of the federalism concerns associated with penal disenfranchisement laws is beyond this Article's scope. For more information, see generally Alec C. Ewald, *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 PUBLIUS 527 (2009).

537. See Eric P. Lesser, *Criminal Justice Reform Starts and Ends with the States*, HARV. L. REV.: BLOG (Jan. 11, 2018), <https://blog.harvardlawreview.org/criminal-justice-reform-starts-and-ends-with-the-states/> [<https://perma.cc/KQ2Z-JX93>].

538. See *supra* notes 382–88 and accompanying text.

539. Behrmann, *supra* note 535.

540. See, e.g., Lauren-Brooke Eisen & Hernandez D. Stroud, *How the Federal Government Can Incentivize States to Reverse Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 14, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-federal-government-can-incentivize-states-reverse-mass-incarceration> [<https://perma.cc/ZY3W-N37P>] (discussing programs in which the federal government offered financial incentives to states to adopt criminal justice reforms).

efforts.⁵⁴¹ Following the 2000 presidential election, Congress enacted the Help America Vote Act of 2002 (HAVA),⁵⁴² which, among other things, permitted federal grant funds for election administration programs in states and localities.⁵⁴³ Since 2002, various grant programs have been established under HAVA, including “replacing lever and punch card voting systems, . . . improving electoral access for individuals with disabilities, conducting election technology research, encouraging youth voter participation, and facilitating poll worker recruitment.”⁵⁴⁴ Congress also used HAVA grants to address election issues associated with the COVID-19 pandemic.⁵⁴⁵ States can access HAVA funding to clarify registration forms and educate criminal defendants and corrections and election officials about voter eligibility laws.⁵⁴⁶

2. Local Reforms

While federal and state reforms can help establish an overall framework for reducing disenfranchisement,⁵⁴⁷ efforts at the local level are also necessary to provide effective notice and education to reduce the fear and distrust that often leads to de facto disenfranchisement. Community advisory groups can bring a local perspective to issues and help foster more effective community engagement.⁵⁴⁸ Public and private groups can play an influential role at the local level.⁵⁴⁹ Civic groups can work with correctional staff to help promote voter education efforts.⁵⁵⁰

For example, Metro Organization for Racial and Economic Equity (MORE2) has combated misinformation and disinformation by engaging with the community and local government in Kansas City, Missouri.⁵⁵¹ MORE2 established a program to dispel the widespread misconception that people with felony convictions in Missouri could never vote and

541. KAREN L. SHANTON, CONG. RSCH. SERV., ELECTION ADMINISTRATION: FEDERAL GRANT FUNDING FOR STATES AND LOCALITIES 1 (2020). See generally ROBERT JAY DILGER, CONG. RESEARCH SERV., FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES (2019).

542. Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 36 U.S.C. §§ 152601–152612, 52 U.S.C. §§ 20901–21145).

543. SHANTON, *supra* note 541, at 2.

544. *Id.* Shanton’s report gives a comprehensive review of grant programs under HAVA. *Id.*

545. *Id.* at 4, 7.

546. ACLU & RIGHT TO VOTE, *supra* note 244, at 33.

547. See, e.g., Vasilogambros, *supra* note 466.

548. See, e.g., Julian Clark & Barry Friedman, *Community Advisory Boards: What Works and What Doesn’t (Lessons from a National Study)*, 47 AM. J. CRIM. L. 159, 161–62 (2020).

549. See ACLU & RIGHT TO VOTE, *supra* note 244, at 10–11 (advocating local action).

550. See PORTER, *supra* note 149, at 14.

551. Celisa Calacal, *Formerly Incarcerated People Can Still Vote in Missouri. This KC Group Shows Them How*, MO. INDEP. (Sept. 28, 2021, 11:08 AM), <https://missouriindependent.com/2021/09/28/formerly-incarcerated-people-can-still-vote-in-missouri-this-kc-group-shows-them-how/> [https://perma.cc/KT3S-PYFJ].

works to register eligible defendants with convictions.⁵⁵² Similarly, Out for Justice, an advocacy group in Maryland, serves as an absentee ballot designee for incarcerated defendants in Baltimore City⁵⁵³ and, in 2020, helped over 400 citizens released from incarceration with voter registration.⁵⁵⁴

Advocacy groups have also created toolkits setting forth specific proposals and steps to help communities combat de facto disenfranchisement.⁵⁵⁵ For example, All Voting is Local Wisconsin and the ACLU of Wisconsin have created a toolkit to persuade Wisconsin counties to adopt policies to allow all eligible voters in jail to vote.⁵⁵⁶ The toolkit identifies policies to promote jail voting, county sheriff websites, and talking points.⁵⁵⁷ It also includes sample documents to send to sheriffs and newspaper editors.⁵⁵⁸

Volunteers can also assist incarcerated defendants directly. For example, volunteers in Maine and Vermont work with correctional authorities to notify defendants of their right to vote and assist them (including those who may not be able to read) with securing and filling out necessary documents.⁵⁵⁹ As part of efforts to increase voting, rights advocacy groups and universities provided civics education at Cook County Jail.⁵⁶⁰ Additionally, candidate forums held in jails can help stimulate civic inclusion and election participation.⁵⁶¹

Incorporating formerly incarcerated people to help with registration and voting can also be effective as they “know first-hand the stigma that accompanies a felony conviction, which allows them to be more persuasive.”⁵⁶² Defendants who have had their rights restored can be

552. *Id.*

553. Mariya Strauss, “*This Messed Up System Was Not Designed for You*”: Women, Freed from Prison and Organizing for Their Rights, 29 NEW LAB. F. 93, 96 (2020).

554. *Our Executive Director*, OUT FOR JUST., <https://www.out4justice.org/executive-director> [<https://perma.cc/D3Y2-ZYL8>]. Similarly, the Voting Access for All Coalition has worked with local election and detention officials to provide voter education and registration for individuals in Michigan jails. DURREL DOUGLAS, THE SENT’G PROJECT, VOTING IN JAILS: ADVOCACY STRATEGIES TO #UNLOCKTHEVOTE 2–3 (2022), <https://www.sentencingproject.org/app/uploads/2022/10/Voting-in-Jails-Advocacy-Strategies-to-Unlock-the-Vote.pdf> [<https://perma.cc/DW7L-NCZG>].

555. *See, e.g.*, ACLU OF N. CAL, *supra* note 161.

556. MOLLY COLLINS ET AL., ALL VOTING IS LOC. & ACLU OF WIS., *BALLOTS FOR ALL TOOLKIT: ENSURING ELIGIBLE WISCONSIN VOTERS IN JAIL HAVE EQUAL ACCESS TO VOTING* 3 (2020), <https://allvotingislocal.org/press-releases/toolkit-offers-guide-to-increase-voting-in-wisconsin-jails/> [<https://perma.cc/A3FU-DWYC>].

557. *Id.* at 6–7, 11.

558. *Id.* at 8–10.

559. Sheikh, *supra* note 463, at 57.

560. Miller, *supra* note 196; Vasilogambros, *supra* note 466.

561. DOUGLAS, *supra* note 554, at 5.

562. Lewis & Calderón, *supra* note 9.

effective spokespeople for stressing the importance of participating in elections.⁵⁶³ For example, following the election reforms in the District of Columbia, Joel Castón became the first incarcerated individual elected to public office and now advocates for incarcerated defendants.⁵⁶⁴ One advocacy group, One Pennsylvania, tweeted a picture of Snoop Dogg and Martha Stewart, two formerly incarcerated individuals, to help spread the word about the voting rights of individuals who had felony convictions.⁵⁶⁵

E. *Accountability Measures*

Adopting reforms alone is likely not enough to prevent de facto disenfranchisement. Instead, accountability measures must also be established. Monitoring, reporting, and enforcement are necessary to ensure systems are implemented and effective.

The first step in addressing accountability is establishing transparency. Reporting and transparency are significant issues given that, currently, “few states keep track of how many people with felony convictions register to vote.”⁵⁶⁶ Andrew Calderón, a journalist at the Marshall Project, has identified a process to help collect and analyze registration and voter turnout data for defendants who have regained their right to vote.⁵⁶⁷ The data he collected includes information about barriers to voting.⁵⁶⁸ Similarly, Professor Ariel White at the Massachusetts Institute of Technology is working with researchers from the New Jersey Institute for Social Justice to determine the voting barriers that formerly incarcerated people face.⁵⁶⁹

Programs should also track the implementation and execution of reforms to reduce de facto disenfranchisement. Advocacy groups have used public record requests to follow up on correctional institutions’ registration and voting policies and procedures. For example, All Voting Is Local, an advocacy group with divisions in at least eight states, seeks, among other things, to increase voting for eligible jailed individuals.⁵⁷⁰ In 2020, the Wisconsin divisions of the ACLU and All Voting Is Local

563. Miller, *supra* note 196); ACLU & RIGHT TO VOTE, *supra* note 244, at 9.

564. Castón, *supra* note 430.

565. One Pennsylvania (@OnePennsylvania), TWITTER (Aug. 15, 2022, 8:30 AM), <https://twitter.com/OnePennsylvania/status/1559170546658553857?s=20&t=a5dacygnhS815HXhke13fg>.

566. Lewis & Calderón, *supra* note 9.

567. Andrew Rodriguez Calderón, *Checking the Success of Your State's Efforts to Restore Voting Rights to the Formerly Incarcerated*, MARSHALL PROJECT (July 1, 2021, 4:07 PM), <https://www.themarshallproject.org/2021/07/01/how-many-people-convicted-of-felonies-are-registered-to-vote-in-your-state> [https://perma.cc/TT2D-5YL9].

568. *Id.*

569. Sullivan, *supra* note 314.

570. See ALL VOTING IS LOCAL, <https://allvotingislocal.org/> [https://perma.cc/S73A-NGJH].

reported on a study of voting and registration policies in Wisconsin jails.⁵⁷¹ Based on the results of the study, the groups advocated for reforms.⁵⁷² In 2021, the same groups and the League of Women Voters of Wisconsin updated the study.⁵⁷³ The update reported an increase in county jails reporting policies for jail-based voting from 47.5% to over 70%.⁵⁷⁴ Additionally, forty percent of the counties surveyed had “[c]reated or improved a written policy regarding jail-based voting.”⁵⁷⁵ Similarly, advocacy groups in Florida, Ohio, and Pennsylvania have filed public record requests to determine the status of policies and procedures for voting in jails.⁵⁷⁶ The efforts of such groups should continue, and states should further adopt more formalized efforts to report such information at least annually.

Procedures should be established to monitor reform efforts, track registration and voting turnout, and allow for reporting of violations or abuses.⁵⁷⁷ Correctional facilities should establish hotlines and complaint databases to allow the reporting of purported violations.⁵⁷⁸

Review and resolution of violations are necessary to help with the effective implementation of reform efforts. Community review advisory boards and independent oversight committees offer review possibilities. Similarly, federal law can also establish the oversight necessary to review potential violations of federal voting laws.⁵⁷⁹ Sanctions and disciplinary actions should be imposed and publicized to help address and deter violations.

CONCLUSION

*“Re-enfranchisement is clearly necessary, but it is not sufficient.”*⁵⁸⁰

Defendants in the criminal justice system, especially people of color, face legal and practical hurdles to voting. True reform requires attention to both de jure and de facto disenfranchisement. Court challenges and

571. COLLINS ET AL., *supra* note 533.

572. ALL VOTING IS LOC. ET AL., *supra* note 464, at 2, 12–14.

573. *Id.* at 1.

574. *Id.* at 4.

575. *Id.* at 5.

576. ALL VOTING IS LOC. & ACLU OF FLA., *supra* note 491, at 2; ALL VOTING IS LOC., *supra* note 491, at 3; PENNSYLVANIA BALLOT ACCESS, *supra* note 472, at 2.

577. *See* ALL VOTING IS LOC. ET AL., *supra* note 464, at 14.

578. *See* Jackson-Gleich & Yeary, *supra* note 29; *cf.*, e.g., *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/consumer-complaints/> [<https://perma.cc/2U98-5LAC>] (establishing a complaint database for the reporting and resolution of complaints against debt collectors).

579. *See*, e.g., FREDERICKSEN & LASSITER, *supra* note 247, at 20 (arguing that the Department of Justice should investigate state disenfranchisement laws for conflict with federal voting laws).

580. MORRIS, *supra* note 316, at 818.

legislative reforms seeking to end disenfranchisement and restore the voting rights of criminal defendants should continue.⁵⁸¹ At the same time that states have decreased the number of individuals subject to formal disenfranchisement, they have also expanded the number now subject to de facto disenfranchisement. As a result, efforts are necessary to ensure that individuals with voting rights also have the knowledge, access, and means to exercise their rights.

581. In 2022, the Rutgers Law School Clinic filed an action before the Inter-American Commission on Human Rights claiming that America's practice of penal disenfranchisement violates human rights. Carrie Stetler, *Law School Team Challenges Felony Disenfranchisement Laws*, RUTGERS TODAY (Feb. 3, 2022), <https://www.rutgers.edu/news/rutgers-law-school-team-challenges-felony-disenfranchisement-laws> [<https://perma.cc/C8XM-373N>].