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The Ballot as a Bulwark: The Impact of Felony Disenfranchisement on Recidivism

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INTRODUCTION

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

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

Policy makers, philosophers, and jurists have given various rationales both in support of and in opposition to disenfranchisement. A frequently-made argument against disenfranchisement is that further isolating and segregating ex-felons who are reintegrating into society by denying them the ability to participate in the political process would only hamstring

² Disenfranchisement refers to the ability and process of states to remove the voting rights of individuals convicted of serious criminal offenses.
³*¹ THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2010), http://www.sentencingproject.org/doc/publications/fd_bs_fdlawsinusMar11.pdf (Disenfranchisement refers to the ability and process of states to remove the voting rights of individuals convicted of serious criminal offenses.)
⁴*¹ Id.
⁵*¹ THE SENTENCING PROJECT, supra note 3.
⁶ See Trop v. Dulles, 356 U.S. 86 (1958) (Note that the treatment of disenfranchisement provisions as nonpenal in nature has been criticized elsewhere, e.g. Pamela A. Wilkins, The Mark of Cain: Disenfranchised Felons and the Constitutional No Man’s Land, 56 SYRACUSE L. REV. 85 (2005)).
the efforts of those individuals to become law-abiding citizens. In other words, if the goal of the American criminal justice system – in the broad sense – is to reduce crime, then policies that result in increased rates of crime are counter-productive.

Although there have been numerous legal challenges to disenfranchisement laws, courts have not found the practice to be unconstitutional as a general matter. In these challenges, however, an argument that has not been meaningfully advanced is that disenfranchisement is intricately tied to recidivism. This article will establish that a strong argument can and should be made that the disenfranchisement of ex-felons is a practice that results in increased crime and should be abandoned as a draconian and costly practice of a bygone era.

In Part I of this article, we briefly discuss the historical origins of disenfranchisement and its evolution to modern American disenfranchisement statutes. In Part II, we focus on the philosophical, political and practical justifications that have traditionally been offered in support of disenfranchisement, and also briefly discuss mechanisms by which disenfranchisement can actually serve to increase criminal activity. Part III contains a discussion of the legal challenges that have been made against the practice of felony disenfranchisement and posits a new legal argument against disenfranchisement. Part IV utilizes data collected by the Department of Justice Bureau of Justice Statistics to demonstrate that state disenfranchisement policies are significantly associated with recidivism. Part V contains a brief discussion of the implications of these findings.

I. A CIVIL DEATH: HISTORICAL ORIGINS OF DISENFRANCHISEMENT

A. The Beginnings of Disenfranchisement

Disenfranchisement, while it has evolved over time, is far from a novel practice. Its roots are historic, dating back to ancient Greece where practice called atimia (“dishonor”) existed. Atimia was generally imposed only for failing to comply with orders that came from governmental authorities or crimes against the state (such as failure to pay taxes), and not for crimes by individuals against other individuals. In modern parlance, atimia was essentially a form of constructive exile, much more expansive than modern disenfranchisement, wherein those subjected to atimia were unable to participate in the public life in any meaningful way. They were prohibited from petitioning their government, voting, holding office, instituting any criminal or civil actions against citizens, fighting in the army, or receiving any sort of welfare-type public assistance. In Roman society, a similar practice known as infamia was carried out. Infamia was similar to atimia in that it was imposed in response to socially unacceptable behavior of a citizen, though the list of behavior that would lead to the imposition of infamia was

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10 Id. at 23.
11 Id. at 24.
12 Id. at 26.
considerably broader. The consequences of infamia were quite severe, as once it was imposed, Roman citizens faced forfeiture of their property, a loss of all civil rights, and could even be killed with impunity.

These practices served as the basis for medieval European practices of outlawry and civil death. Civil death was similar to the Greek and Roman practices in that the individual who was affected by it was stripped of his or her civil rights. A similar phenomenon, known as outlawry, was practiced in medieval Germany. In outlawry, the offender would either be forced into exile or would otherwise be forced to live as an animal in the forests, and would lose all the benefits and protections that society could offer. In England, disenfranchisement took the form of attainer, wherein those convicted of certain crimes would have three different penalties imposed on them: forfeiture of property, corruption of the blood (relating to a prohibition on passing property to heirs through inheritance), and a loss of civil rights. The severity of attainer in England varied from case to case, depending on the circumstances of the offense, but attainer would invariably involve a prohibition on voting in Parliamentary elections.

As with much of the American legal system, antebellum views on disenfranchisement were borrowed from English common law, including the practice of civil death. Eventually, the practice of civil death became much more focused. Following the American Revolution, many states enacted statutes or constitutional provisions that only prohibited offenders from voting, as opposed to imposing the full panoply of restrictions that civil death entailed. The duration of disenfranchisement varied, with some localities denying felons the franchise only temporarily whereas others would permanently bar felons from voting, especially if the crime was related to the administration of elections. The practice of disenfranchisement became much more common following the Civil War as a means of disenfranchising African-Americans. Since the passage of the Fourteenth and Fifteenth Amendments to the United States Constitution, felony disenfranchisement became one favored method of states in preventing African-Americans from voting. After 1890, many states began enacting disenfranchisement statutes and constitutional provisions that listed crimes for which African-Americans were most often prosecuted—such as burglary, theft, perjury, and arson—as disqualifying offenses. Disenfranchisement essentially

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13 Id at 27-28.  
14 Pettus supra note 9, at 28.  
15 Id. at 29-30.  
16 Id.  
18 Id. at 616-617.  
19 JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (Dedi Felman ed. 2006) at 23.  
20 Id. at 617.  
21 Id. at 618.  
24 Id. at 18.  
was one aspect of the Jim Crow laws used by political power structures in reconstruction-era America.\textsuperscript{26}

The views that early American colonists brought with them from England, which were in turn borrowed from medieval Europe, Rome, and Greece were not necessarily motivated out of concerns about limiting repeat offenses. Rather, much of the motivation behind the adoption of these laws appeared to be consistent with the adoption of a type of status citizenship whereby criminal offenders would lose essential aspects of citizenship by virtue of the crime committed.\textsuperscript{27} Recidivism was generally treated more as a peripheral issue in that it did not appear to be the primary motivating force behind disenfranchisement. That is not to say, however, that it would make no sense to view disenfranchisement as having a relationship with recidivism. Given that disenfranchisement’s effects were often quite pervasive as applied to criminal offenders, and because all societies can be said to have an interest in general crime control, then it makes sense to view disenfranchisement as a deterrent to criminal activity.

\textbf{B. Current Practices in America and Abroad}

Felony disenfranchisement remains an active practice in the United States. Forty-Eight states and the District of Columbia practice some form of felony disenfranchisement.\textsuperscript{28} Current disenfranchisement laws mean that approximately 5.3 million Americans who have a prior felony conviction are unable to vote in local and national elections.\textsuperscript{29}

Although states differ in their approaches to disenfranchisement, they generally fall into one of several broad categories.\textsuperscript{30} At one end of the spectrum are states that do not disenfranchise at all like Maine and Vermont.\textsuperscript{31} In those states, felons are allowed to vote even while incarcerated via absentee ballot.\textsuperscript{32} On the other extreme are states such as Iowa, Kentucky, and Virginia that permanently disenfranchise all ex-felons, even after the expiration of their criminal sentence.\textsuperscript{33} In those states, the only way for an individual to regain the ability to vote is through executive action, such as a pardon or restoration of civil rights. Most states, however, fall somewhere in between these two extremes and allow for the automatic restoration of voting rights to occur after the completion of incarceration and parole or probation.\textsuperscript{34}

Nearly three-fourths of individuals who are prevented from voting are not incarcerated.\textsuperscript{35} Although every state has procedures in place for obtaining a restoration of voting rights, many of these procedures are so involved and technical as to operate as \textit{de facto} bars to restoration for

\textsuperscript{26} PETTUS, \textit{supra} note 19, at 33.

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} \textit{THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011)}

\textsuperscript{29} \textit{Id.}

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} \textit{Id.}

\textsuperscript{32} Vermont Dep’t Corr. Directive 324.01, available at
http://www.doc.state.vt.us/about/policies/rpd/324.01%20Voting.pdf/view?searchterm=voting

\textsuperscript{33} \textit{THE SENTENCING PROJECT, supra} note 28.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} Robben, \textit{supra} note 23, at 20.
those ex-offenders with limited resources and education.\textsuperscript{36,37} Indeed, the characterization of restoration as a hollow remedy is further supported by the fact that very few individuals subject to disenfranchisement ever successfully get the right to vote back – in 11 different states that practice disenfranchisement, fewer than 3\% of ex-felons who were disenfranchised have successfully gotten their voting rights restored.\textsuperscript{38}

Despite the shared historical roots of atamia and civil death with other nations, the United States is something of an outlier when it comes to disenfranchisement. No other country disenfranchises more of its citizens on a per capita basis than the United States.\textsuperscript{39} Many other democratic nations have ceased the sort of automatic disenfranchisement of criminal offenders seen in the United States.\textsuperscript{40} Disenfranchisement in other first-world democracies, if employed at all, is limited in period and imposed on individuals who were involved in offenses directly related to elections.\textsuperscript{41} Disenfranchisement tends to be a practice associated more often with non-democratic regimes that have high incarceration rates and tend to be economically underdeveloped.\textsuperscript{42} Despite the practice’s status as somewhat of an outlier in the international community, disenfranchisement is nevertheless a practice that retains popularity amongst American politicians and their respective constituents.\textsuperscript{43} Contemporary examples of this sentiment are not hard to come by. Indeed, as of the writing of this article, state officials in Florida have taken steps that would disenfranchise a greater number of ex-felons for longer periods of time.\textsuperscript{44}

II. PHILOSOPHICAL, PRACTICAL, AND POLITICAL PERSPECTIVES ON DISENFRANCHISEMENT

A. Philosophical Underpinnings

Given the long tradition of disenfranchisement policies through much of civilized society, it comes as no surprise that the practice has found support amongst classical theorists and philosophers as far back as Aristotle.\textsuperscript{45} One way that disenfranchisement has traditionally been viewed is the consequence of the breach of a “contract” between society and the individual: the social contract – an agreed on set of norms of behavior meant to facilitate the functioning of

\begin{thebibliography}{99}
\bibitem{36} Id.
\bibitem{37} Marquardt, supra note 22, at 295.
\bibitem{39} Robben, supra note 23, at 20.
\bibitem{40} Nora V. Demleitner,\textit{ U.S. Felon Disenfranchisement: Parting Ways with Western Europe} in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus, eds. 2009) at 80.
\bibitem{41} Id.
\bibitem{42} Christopher Uggen, Mischelle Van Brakle & Heather McLaughlin, \textit{Punishment and Social Exclusion: National Differences in Prisoner Disenfranchisement} in CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus, eds. 2009) at 59.
\bibitem{43} Elizabeth A. Hull, \textit{Our 'Crooked Timber': Why is American Punishment So Harsh?} In CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE (Alec C. Ewald & Brandon Rottinghaus, eds. 2009) at 136.
\bibitem{45} MANZA & UGGEN, supra note 19.
\end{thebibliography}
society. Thomas Hobbes and John Locke, for example, have characterized the criminal as one not fit for citizenship – that by transgressing against fellow citizens and the state through violation of the criminal law, they have violated the social contract and thereby lose the benefits of civilization and, in effect, become a non-citizen. Support from influential thinkers and philosophers provided a theoretical basis for disenfranchisement which helped to perpetuate the phenomenon of felony disenfranchisement. Many of these ideas, however, are representative of systems of thought concerning citizenship that are regarded as anathema to the idea of universal suffrage:

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

B. Practical and Policy Considerations of Disenfranchisement

In addition to the theoretical underpinnings of disenfranchisement, there are several practical arguments that proponents have made in defense of the practice. One such argument is that, if allowed access to the ballot box, ex-felons would represent a voting bloc that could alter the administration and enforcement of the criminal law. There are two major underlying assumptions in such an argument: first, that there would actually be politicians that would run on a “soft on crime” platform and who would advocate the repeal of some aspects of criminal law and, second, that ex-felons are a homogeneous group who would advocate for the weakening of the criminal law.

Although these may be the refrains of those who support disenfranchisement, such concerns appear to be bereft evidentiary support. Indeed, many individuals convicted of crimes would not seek to do away with the criminal justice system or to weaken its enforcement. Offenders have actually lobbied members of Congress for tougher criminal laws. There have been cases of felons who have served on juries who, rather than use their opportunity to sabotage the enforcement of the criminal law by forcing a hung jury, returned guilty verdicts when the prosecution had met their burden of proof.

Aside from these shortcomings of worries concerning “sabotage” or moral worthiness, perhaps the strongest argument against disenfranchisement comes from the Supreme Court itself. In Carrington v. Rash, the Supreme Court of the United States was faced with deciding the

47 Id. at 155.
48 MANZA & UGGEN, supra note 19, at 25. (emphasis in original).
49 Frazier, supra note 25, at 484-485.
50 MANZA & UGGEN, supra note 19, at 143.
constitutionality of a provision of the Texas state constitution that prohibited members of the military from voting if they were not residents of Texas prior to joining and remaining in the armed services.\textsuperscript{52} The stated concern of the Texas state legislature in enacting the constitutional provision was that individuals aligned with the military might not share the same concerns as civilian members of the community and that large groups of military members could essentially take over local elections, and because of this military members should be restricted from the franchise.\textsuperscript{53} The Supreme Court held, however, that “‘[f]encing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.”\textsuperscript{54} In other words, even if the underlying assumptions of the sabotage argument were granted \textit{arguendo}, such a justification for disenfranchisement would not pass Constitutional muster.\textsuperscript{55}

Another oft-repeated argument is that disenfranchisement is a means of preventing voter fraud or other election-related offenses.\textsuperscript{56} In other words, the idea amongst some proponents of disenfranchisement is that ex-felons, in having demonstrated criminality in the past, would be more likely to commit election-related offenses such as voter fraud or vote buying.\textsuperscript{57} There is, however, no empirical evidence that suggests ex-felons, either as a group or in individual capacities, are at a higher risk of committing election-related offenses.\textsuperscript{58}

\textbf{C. Disenfranchisement as an Obstacle: Towards a Redemptive Theory of Criminal Justice}

Underlying many of the collateral consequences of convictions, especially disenfranchisement, is the implicit assumption that is communicated to the offender that such sanctions are permissible because total rehabilitation is impossible.\textsuperscript{59} It has been argued and is the ultimate idea of this article that disenfranchisement is a policy whose harms far outweigh its benefits because it only serves to further alienate and isolate a group of individuals at a time when they are trying to re-integrate into society.\textsuperscript{60} It is therefore reasonable to hypothesize that such alienation and isolation can only serve to \textit{increase} further incidences of criminal activity. In other words, if one has no stake in the community of which they are a part, then there is little incentive to behave in a pro-social manner other than avoidance of punishment in the form of re-incarceration – a deterrent which, for many individuals, may be a threat that is more rote than daunting. Indeed, the issue of rehabilitation was one mentioned by Justice Thurgood Marshall in his dissenting opinion in \textit{Richardson v. Ramirez}.\textsuperscript{61}

\begin{thebibliography}{99}
\bibitem{52} Carrington \textit{v. Rash}, 380 U.S. 89 (1965).
\bibitem{53} Id.
\bibitem{56} Fellner \& Mauer, \textit{supra} note 7, at 15.
\bibitem{57} Id.
\bibitem{58} \textit{Manza \& Uggen}, \textit{supra} note 19.
\bibitem{59} Demleitner, \textit{supra} note 40, at 82.
\bibitem{60} Fellner \& Mauer, \textit{supra} note 7, at 19.
\end{thebibliography}
Research strongly supports the notion that ex-felons who are able to re-enter society with stable work and familial relationships are less likely to return to a life of criminal activity.\(^{62}\) Many of the collateral consequences of a felony conviction, including disenfranchisement, function as an obstacle to achieving and maintaining that stability by way of concerns such as ineligibility for certain types of public assistance or through stigma.\(^{63}\) Indeed, prior research has also supported the notion that active participants in the democratic process are more likely to adopt the shared values of the community-at-large.\(^{64}\) Many individuals who are subject to disenfranchisement laws speak of disenfranchisement in terms of a symbol – that they are not, in fact, citizens, but outsiders.\(^{65}\) In this sense, disenfranchisement can be fairly characterized as a modern form of outlawry. While not, for example, forced to live in the forests as in medieval Germany, the message is nevertheless the same: that ex-felons are not deserving of the benefits of the law.

The empirical research, although limited, supports these notions. For example, one study found that voting behavior (which, of course, is prohibited by disenfranchisement) was significantly correlated with subsequent measures of incarceration, re-arrest, and self-reported criminality.\(^{66}\) The basic idea is that:

Disenfranchisement cannot help to foster the skills and capabilities that will rehabilitate offenders and help them become law-abiding citizens. Indeed, on the contrary, it is more likely that “invisible punishments” such as disenfranchisement act as barriers to successful rehabilitation. It is much more plausible to think that participation in elections as stakeholders might reduce recidivism, at least for those former offenders who participate.\(^{67}\)

There are several plausible theoretical models that have been developed that can help to describe how collateral consequences such as disenfranchisement impair the successful reintegration of offenders into society. One such model is reintegrative shaming, developed by Australian criminologist John Braithwaite.\(^{68}\) The crux of reintegrative shaming is that the stigmatization behind punishment for criminal offenses can be thought of as falling into one of two categories: reintegrative and disintegrative.\(^{69}\) Reintegrative shaming essentially consists of a type of stigma that denunciates the offense rather than the offender and serves to decrease crime, whereas disintegrative shaming consists of stigma that denunciates the offender themselves, thereby increasing the likelihood of crime.\(^{70}\)


\(^{64}\) Uggen & Manza, supra Note 62, at 198.

\(^{65}\) Id. at 212.

\(^{66}\) Id. at 213.

\(^{67}\) MANZA & UGGEN, supra note 19, at 37. (Internal citations omitted, emphasis in original).

\(^{68}\) JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (9th prtg. 1999).

\(^{69}\) Toni Makkai & John Braithwaite, Reintegrative Shaming and Compliance with Regulatory Standards, 32 CRIMINOLOGY 361 (1994).

\(^{70}\) Id.
punishment that is tied in any meaningful way to the offense, but only to the offender, it is
disintegrative and serves to further isolate the offender from society.

Another model that can describe the interaction between disenfranchisement and
recidivism is classical labeling theory.\textsuperscript{71} Labeling theory is a model by which deviance is
explained by virtue of labels or traits that are ascribed to the individual by society and their
interaction with the psychology of the individual.\textsuperscript{72} While many labels are active only within
certain contexts, others – such as the label of criminal or deviant – are more salient and have a
greater impact on the psychology of the individual. The salient impact of the criminal label
trumps all other labels that society ascribes, causing the individual to be viewed as “generally
deviant, rather than specifically deviant” which will then transition into a “self-fulfilling
prophecy.”\textsuperscript{73} In other words, once a individual is labeled as a criminal or as a deviant, the very
label is the mechanism by which the demonized behavior is elicited.\textsuperscript{74}

There are, in turn, hypothesized to be significant consequences for the individual and
society once the deviant / criminal label has been applied and internalized:

\begin{itemize}
  \item [d]eviant labeling, official labeling in particular, is seen as a transitional event that
can substantially alter the life course by reducing opportunities for a conventional
life []. Thus, labeling is seen as being indirectly related to subsequent behavior
through its impact on conventional opportunities . . . [L]abeling is one factor that
leads to “cumulative disadvantage” in future life chances and, thereby, increases
the probability of involvement in delinquency and deviance during adulthood.\textsuperscript{75}

Disenfranchisement can, in turn, be seen as an extension of the label criminal. The
offender is essentially told that, in a very meaningful sense and closely akin to ancient meanings
of civil death and \textit{atamia}, that they are no longer members of American society on a basic,
fundamental level. Consistent with labeling theory, that label of outsider or outcast could then
become a self-fulfilling prophecy and result in increased criminal activity.

III. THE LEGAL FRAMEWORK OF DISENFRANCHISEMENT IN THE UNITED STATES

Despite the paucity of policy justifications for disenfranchisement, the judiciary in the
United States has provided a strong legal foundation for states to engage in the practice.
Challenges against disenfranchisement policies have generally fallen into one of two categories:
those based on the Equal Protection Clause of the Fourteenth Amendment to the United States
Constitution and those based on the Voting Rights Act.

A. Equal Protection Challenges to Felony Disenfranchisement

\textsuperscript{71} HOWARD BECKER, OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE (New York Free Press 1963).
\textsuperscript{72} \textit{Id.} at 25-40.
\textsuperscript{73} \textit{Id.} at 34.
\textsuperscript{74} FRANK TANNENBAUM, CRIME AND THE COMMUNITY (1938).
\textsuperscript{75} Jön Gunnar Bernburg & Marvin D. Krohn, \textit{Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects
The first and most widely-recognized case establishing the constitutionality of felony disenfranchisement is *Richardson v. Ramirez*. In *Ramirez*, the Supreme Court of the United States considered a case involving a petition for a writ of mandamus by three ex-felons, all of whom who had “served their time” and were disenfranchised by operation of a provision of the California constitution that broadly excluded all who had been convicted of a felony from voting. The respondents contended that their disenfranchisement was a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution – an argument that the California Supreme Court found to be convincing. Then-Chief Justice Rehnquist, writing for the Court, disagreed, holding that – ironically enough – the very same Amendment under which the Respondents argued the unconstitutionality of disenfranchisement actually allowed states to disenfranchise felons as they pleased. The Fourteenth Amendment of the United States Constitution provides, in part, that:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

The Court honed in on the phrase “or other crime” in holding that disenfranchisement was allowable under the Fourteenth Amendment to the United States Constitution, and that, consequently, it was allowable under the California State Constitution. In reaching this determination, the Court heavily relied on the floor debates in both the House and Senate to illuminate the contemporary understanding of Section 2 of the Fourteenth Amendment in finding that disenfranchisement was allowable. Interestingly enough, the Court directly addressed the issue of disenfranchisement and rehabilitation:

Pressed upon us by the respondents, and by amici curia, are contentions that these notions are outmoded, and that the more modern view is that it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term. We would by no means discount these arguments if addressed to the legislative forum which may properly weigh and balance them against those advanced in support of California’s present constitutional provisions. But it is not for us to choose one set

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77 Id.
78 Id.
79 Id. at 56.
80 U.S. Const. Amend. XIV § 2 (emphasis added).
81 418 U.S. at 56.
82 Id. at 45.
of values over the other. If respondents are correct, and the view which they advocate is indeed the more enlightened and sensible one, presumably the people of the State of California will ultimately come around to that view.83

The Court’s holding in Ramirez, however, did not completely insulate state disenfranchisement law from attack under the Equal Protection Clause of the Fourteenth Amendment. Commentators have suggested, and indeed other courts have noted, that disenfranchisement provisions would still be subject to attack under the Fourteenth Amendment, even under Ramirez should one of two conditions be met: that disenfranchisement is unequally enforced amongst felons, or if it can be demonstrated that the primary motivating factor in the enactment of a particular state’s disenfranchisement provisions was racial discrimination.84

Hunter v. Underwood provides an example of this sort of an analysis.85 Underwood is a Supreme Court case that concerned a provision of the Alabama state constitution that disenfranchised individuals who were convicted of “‘any…crime involving moral turpitude.’”86 In addition to the moral turpitude provision, the constitution specifically set forth several crimes for which disenfranchisement would result.87 Underwood dealt with the plights of Carmen Edwards and Victor Underwood, two citizens of Alabama who had been subject to disenfranchisement for writing bad checks.88 Even though these offenses were misdemeanors, it was nevertheless determined by state authorities that they were crimes involving moral turpitude and therefore brought them under the ambit of the disenfranchisement provision of the Alabama Constitution.89 The allegation of the plaintiffs in Underwood was that these provisions of the Alabama constitution were enacted with the intention of excluding African-Americans from the franchise, that this was their effect on the electorate, and that as a consequence they violated the Equal Protection Clause of the Fourteenth Amendment.90 The Supreme Court agreed in a unanimous opinion delivered by Justice Rehnquist, finding that “the original enactment [of § 182 of the Alabama Constitution] was motivated by a desire to discriminate against blacks on the account of race and that the section continues to this day to have that effect....”91 The Court further explained that its earlier holding in Ramirez was not inconsistent with finding the Alabama constitutional provisions at odds with the Fourteenth Amendment: “we are confident that § 2 [of the Fourteenth Amendment] was not designed to permit the purposeful racial discrimination attending the enactment and operation of § 182 which otherwise violates § 1 of the Fourteenth Amendment. Nothing in our opinion in Richardson v. Ramirez [] suggests the contrary.”92

83 Id. at 55.
84 Liles, supra note 17.
86 Id. at 226 citing ALA. CONST. § 182 (1901)
87 Id. (“treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subordination of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, [and] crime sic against nature”)
88 Id.
89 Id. at 223-224.
90 471 U.S. 222.
91 Id. at 233 (emphasis in original).
92 471 U.S. at 233 (internal citations omitted, emphasis in original).
Collectively, Ramirez and Underwood indicate that state disenfranchisement laws or constitutional provisions are vulnerable to an Equal Protection challenge only if a racial animus motivated their enactment and if they continued to operate in a way that was discriminatory in nature (as was the case in Underwood).93 Otherwise, § 2 of the Fourteenth Amendment would permit states to disenfranchise felons in line with the Court’s reasoning in Ramirez.

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

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

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

Numerous federal plaintiffs have challenged disenfranchisement provisions under the Voting Rights Act, and several of these cases have reached the Circuit Courts of Appeals. So far, the Supreme Court has not granted certiorari in any of these cases, but these cases have established a new potential avenue of attack on disenfranchisement provisions that is outside of the Equal Protection Clause.98

In a general sense, the plaintiffs in cases attacking state disenfranchisement regimes under the Voting Rights Act have asserted that state criminal justice systems operate to a discriminatory effect in that a disproportionate number of minorities are saddled with felony convictions as compared with their white counterparts. The end result of this is a concomitant disproportionate disenfranchisement of minority voters, which plaintiffs allege violates Section 2 of the Voting Rights Act. Along these lines, for example, in Farrakhan v. Washington, the Ninth Circuit Court of Appeals found that Section 2 of the Voting Rights Act did, in fact, present a potential means by which an ex-felon could challenge felony disenfranchisement.99 According to the court, a plaintiff would have to demonstrate a discriminatory racist bias within the criminal justice system that would translate to a discriminatory effect in terms of disenfranchisement which, ultimately, could run afoul of Section 2 of the Voting Rights Act.100 The court then remanded the case back to the district court for further proceedings and fact-finding.101 On remand, the district court found that there was evidence of racial discrimination within the Washington state criminal justice system, but that this was insufficient under the test mandated

93 See Liles, supra Note 17, at 620.
95 Farrakhan v. Washington, 338 F.3d 1009 (9th Cir. 2003) at 1014.
96 Frazier, supra note 25, at 494.
98 See Liles, supra note 17.
99 338 F.3d at 1017.
100 Id. at 1021.
101 Id.
by the Voting Rights Act to constitute a redressable injury.\textsuperscript{102} The plaintiffs appealed this finding to the Ninth Circuit Court of Appeals.\textsuperscript{103}

When \textit{Farrakhan} reached the Ninth Circuit a second time, several years had passed. In the intervening time, several other circuits issued opinions that did not follow the reasoning used by the Ninth Circuit and, ultimately, came to opposite conclusions. For example, in \textit{Johnson v. Governor of the State of Florida}, the Court of Appeals for the Eleventh Circuit precluded challenges to state disenfranchisement laws under the Voting Rights Act by employing the doctrine of constitutional avoidance.\textsuperscript{104} They essentially found that interpreting the Voting Rights Act to allow state level challenges to disenfranchisement under the Fourteenth Amendment would needlessly raise a constitutional issues under the Fourteenth and Fifteenth Amendments (the interpretation of a federal statute to limit delegated state powers when another interpretation of the Voting Rights Act would not raise those issues), which would not be appropriate for review.\textsuperscript{105}

The Second Circuit Court of Appeals, in \textit{Hayden v. Pataki}, dealt with a class of plaintiffs who were challenging the constitutionality of the disenfranchisement regime in New York State\textsuperscript{106} on the basis that it violated Section 2 of the VRA.\textsuperscript{107} The Second Circuit, in addressing the matter \textit{en banc}, held that Section 2 of the VRA was not a viable means by which state inmates could challenge disenfranchisement.\textsuperscript{108} In so holding, the \textit{Hayden} court actually went a step further than the Eleventh Circuit in \textit{Johnson} with respect to its interpretation of the VRA: court applied the “clear statement” doctrine, which is similar but broader than the constitutional avoidance doctrine relied upon in \textit{Johnson}.\textsuperscript{109} In applying the clear statement doctrine to the VRA within the context of disenfranchisement regimes, the court found that plaintiffs had no grounds under the VRA on which to challenge felon disenfranchisement, holding:

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

In light of the opinions after \textit{Farrakhan v. Washington}, the Ninth Circuit Court of Appeals retreated significantly from its earlier holding, now stating that “plaintiffs bringing a section 2 VRA challenge to a felon disenfranchisement law based on operation of a state’s criminal justice system must at least show that the criminal justice system is infected by

\begin{footnotesize}
\textsuperscript{102} \textit{Farrakhan v. Gregoire}, 623 F.3d 990 (9th Cir. 2010) at 992-993.
\textsuperscript{103} \textit{Id}.
\textsuperscript{104} \textit{Johnson v. Governor of the State of Florida}, 405 F.3d 1214 (11th Cir. 2005).
\textsuperscript{105} \textit{Id}.
\textsuperscript{106} The New York approach, at the time of \textit{Hayden}, was that only those felons who were serving a sentence were disenfranchised from the polls.
\textsuperscript{107} \textit{Hayden v. Pataki}, 449 F.3d 305 (2nd Cir. 2005)
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} The clear statement rule is “a canon of interpretation which requires Congress to make its intent “’unmistakably clear’” when enacting statutes that would alter the usual constitutional balance between the Federal Government and the States.” \textit{Id} at 323.
\textsuperscript{110} \textit{Id} at 328.
\end{footnotesize}
intentional discrimination or that the felon disenfranchisement law was enacted with such intent."\(^{111}\)

Until the Supreme Court grants certiorari in a Voting Rights Act case, doubt will continue to remain about whether the VRA is an appropriate means by which disenfranchisement can be challenged. Given the recent decisions that appear to entirely foreclose or significantly limit the possibility of a plaintiff’s victory under the VRA, however, any doubt that the Supreme Court could resolve by taking up a VRA case may be minimal at best.

**C. Disenfranchisement as Cruel and Unusual Punishment**

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”\(^{112}\) For a law to violate the Eighth Amendment, as an initial and perhaps intuitive matter, it must constitute a form of punishment. The judiciary’s traditional understanding is that disenfranchisement laws are not punishments and therefore are not subject to an Eighth Amendment challenge.\(^{113}\)

The commonly cited authority for this proposition comes from the Supreme Court in *Trop v. Dulles*.\(^{114}\) *Trop* was not actually a voting-rights case, but instead dealt with the Nationality Act of 1940 and the constitutionality of its authorization of expatriation of a United States Army soldier who was convicted of desertion and received a dishonorable discharge during wartime.\(^{115}\) In *Trop*, the Court had occasion to discuss the nature of statutes and punishment and offered the following:

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

But while the view that disenfranchisement is not a punishment has been the position taken by the judiciary, it has not been without criticism. For instance, the *Trop* court rested the

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\(^{111}\) *Farrakhan, supra* Note 70 at 993 (emphasis in original).

\(^{112}\) U.S. CONST. AMEND. IX

\(^{113}\) *See Green v. Board of Elections of New York*, 380 F.2d 442 at 450 (2nd Cir. 1967).


\(^{115}\) *Id.*

\(^{116}\) *Id.* at 96-97.
above analysis on two cases that now represent a significant outmoded view of what the right to vote represents, particularly the view that states should be afforded nearly unfettered ability to restrict the franchise.\textsuperscript{117} Furthermore, the 39\textsuperscript{th} Congress – the same Congress that passed the Fourteenth Amendment on which the analysis in \textit{Ramirez} so heavily relies – would, in laws readmitting the Southern states to the union, typically “include[] the ‘fundamental condition’ that the state constitution ‘shall never be so amended or changed as to deprive any citizen or class of citizens of the United States who are entitled to vote by the constitution herein recognized, except as a punishment for such crimes as are now felonies at common law...’”\textsuperscript{118} In other words, the view of the Reconstruction Era Congress was essentially that disenfranchisement was a politically acceptable practice only when it was viewed as a punishment, and not as a regulatory measure.\textsuperscript{119}

Nevertheless, courts have continued to reference \textit{Trop} and the analysis contained therein when confronted with an Eighth Amendment claim in finding that not only is disenfranchisement not cruel and unusual punishment, but that it is not punishment at all.

\textit{D. Recidivism, Proportionality, and Policy – A Novel Approach}

While some briefs and arguments dealing with disenfranchisement have addressed rehabilitation generally as a concern, none have squarely argued that disenfranchisement hinders rehabilitation in such a way as to \textit{increase} recidivism.\textsuperscript{120} While there has been research in this area, it has been limited in that it was performed using community samples and criminal behavior was measured against voting behavior.\textsuperscript{121}

The argument concerning recidivism, in a legal context, is important in two respects. First, given that one of the stated rationales of many disenfranchisement provisions is the prevention of recidivism,\textsuperscript{122} it may be subject to attack under the Fourteenth Amendment using the congruent and proportional analysis put forth in \textit{City of Boerne v. Flores}: “While preventative rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented.”\textsuperscript{123}

An across-the-board, one-size-fits-all approach to disenfranchisement is neither congruent nor proportional to the intended goal of preventing future offenses, election-related or otherwise. This is especially so since, as will be detailed in the next section, felony

\textsuperscript{117} Pamela S. Karlan, \textit{Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement}, 56 STAN. L. REV. 1147, 1150-1151 (2004) (the two cases relied on were \textit{Davis v. Beason}, 113 U.S. 333 (1890), and \textit{Murphy v. Ramsey}, 114 U.S. 15 (1885), wherein the Supreme Court affirmed the ability of states to exclude polygamists from the franchise on the proposition that the state’s ability to restrict the franchise was virtually unlimited. That reasoning, however, has since been rejected in subsequent decisions).

\textsuperscript{118} \textit{Id.} at 1154 (emphasis added).

\textsuperscript{119} \textit{Id.}

\textsuperscript{120} See Amicus Brief, American Civil Liberties Union of Southern California in Supp’t of Respondents, \textit{Richardson v. Ramirez}, 1973 WL 172332

\textsuperscript{121} See MANZA & UGGEN, supra Note 20.

\textsuperscript{122} E.g., the concern over ex-felons being more likely to engage in election-related offenses

\textsuperscript{123} \textit{City of Boerne v. Flores}, 521 U.S. 507 at 530.
disenfranchisement is actually associated with higher levels of recidivism. If any state law disenfranchisement provisions were motivated, either in whole or in part, by the fear of election-related offenses, then an argument under Boerne could prove to be fruitful indeed.

In addition to the Constitutional argument, the direct effect of disenfranchisement on recidivism is an issue that can resonate powerfully with state legislatures. If it can be conclusively demonstrated that disenfranchisement increases crime in communities by impairing rehabilitation and reintegration in exchange for no obvious social benefit, then elected officials would be placed in the position of either defending a policy with dubious criminal justice utility, or scrapping it altogether.

The objective in the next section is to examine the link between recidivism and disenfranchisement using somewhat different methodology than prior research. All fifty states and the District of Columbia take a stance with respect to disenfranchisement and keep data on recidivism, as well. The analysis that follows uses this data to examine whether states that take a more draconian approach to disenfranchisement (e.g. permanent disenfranchisement) actually see an increase in recidivism.

IV. IMPACT OF DISENFRANCHISEMENT ON RECIDIVISM: AN EMPIRICAL ANALYSIS

A. Data

Data for this analysis are drawn from the Department of Justice Recidivism of Prisoners Released in 1994 study\textsuperscript{124} a nationally representative sample of individuals released from prison in 15 states in 1994.\textsuperscript{125} States chosen for the sample provided basic information on all prisoners released in that year, which amounted to data on 302,309 prisoners.\textsuperscript{126} The Department of Justice then drew a clustered sample of 38,624 releasees based on offense type and state of release. This final sample is representative of roughly two-thirds of all prisoners released in 1994.

The primary sources of demographic and criminal history information were state and federal RAP\textsuperscript{127} sheets. The type of data included on these include prisoners’ date of birth, race and sex as well as detailed information on past arrests, including type of offense, date, and arrest outcome. The RAP sheets were reported to the Department of Justice spanning a minimum of three years following the 1994 release. In other words, these data account for the entire criminal histories of 38,624 individuals released from prison in 1994 from the date of their first arrest through at least 1997.

\begin{itemize}
\item \textsuperscript{124} Hereinafter, RPR94
\item \textsuperscript{126} Id.
\item \textsuperscript{127} Record of Arrest and Prosecution
\end{itemize}
Although these data were collected in the later part of the 1990s, it is important to note that this is the most comprehensive national study of recidivism in existence. Since the publication of this data, several states have conducted their own recidivism studies; however the utilization of different measures, time points, and samples of offenders makes it incredibly difficult to conduct interstate comparisons. The only other national data on recidivism was recently published by the PEW Center on the States\textsuperscript{128}; however this report contained only aggregated state trends and focused exclusively on subsequent incarcerations. While this was an impressive enterprise, the lack of individual-level (i.e. – prisoner) data makes it difficult to take into account factors that are likely driving observed differences across states. Moreover, not all 50 states complied with the data collection procedures, and the PEW report contains no information on half of the states the permanently disenfranchisement or either of the states that have no disenfranchisement policy.\textsuperscript{129} While the Department of Justice recidivism data is now somewhat dated, it is still the most comprehensive study of recidivism in the United States and the most appropriate data to examine the effect of state disenfranchisement policies on individual recidivism.

### B. Measures

1. Recidivism

Recidivism is measured as whether an individual was rearrested within the three year period following his or her release from prison. Roughly 66 percent of individuals in the sample experienced at least one arrest post-release.\textsuperscript{130} Although the RPR94 also contains detailed information on the number of re-arrests, re-convictions, and returns to prison, this dichotomous re-arrest measure is preferred as a measure of recidivism for several reasons. First, a single post-release arrest could have lead to a conviction and ultimately a subsequent prison sentence, thus removing an individual from the sample and biasing the interpretation of a large number of subsequent arrests (as these are likely to be relatively minor offenses). Given the relatively short observation period, the measures of conviction and incarceration are likely to vary as a function of a state’s criminal justice processing time. The process leading from arrest to eventual incarceration is lengthy, and many of those arrested towards the end of the observation period are unlikely to have been arraigned or sentenced, and therefore may be excluded from the analysis if a conviction or incarceration measure is preferred.

2. Individual Controls

Our models incorporate several individual-level controls that are traditionally associated with criminal behavior and consistently implicated as static predictors of recidivism. We took into account the effects of sex, age, and race on our models.

We also control for two criminal history factors: most recent offense, and number of prior offenses. Most recent offense captures the specific offense for which the individual was


\textsuperscript{129} Id.

\textsuperscript{130} Lanagan & Levin, supra note 125.
incarcerated that led to the 1994 release. This variable is collapsed into seven categories: murder, sexual offenses, assault, robbery, property offenses, drug offenses and other.\footnote{131} In instances where individuals were serving time for multiple offenses, we took the value of the most severe offense. Number of prior offenses is measured as the number of arrests on an individual’s record excluding the arrest leading to the 1994 release. A score of zero would signify that the released prisoner was a first time offender when released. The average number of priors in this sample is 7.09.

3. State Level Predictors

State Disenfranchisement is measured as a dichotomous variable that distinguishes whether a state permanently restricted the right to vote and states that returned the right to vote post-release in 1994. This variable is intended to differentiate states that permanently disenfranchise from those who do not. Roughly 25 percent of prisoners in the sample (N = 9,854) were released in five states that permanently disenfranchised felons in 1994.\footnote{132} We also control for state-level unemployment (measured as the average unemployment rate over the three year period) to account variation in state-level factors that may contribute to differences in recidivism. Criminological research indicates that the crime rate varies with the unemployment rate, and we therefore expect the recidivism rates to be higher in states with higher levels of unemployment.\footnote{133}

<table>
<thead>
<tr>
<th>Table 1: Descriptive Statistics (N=33,790)</th>
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<tbody>
<tr>
<td><strong>State Covariates</strong></td>
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<td></td>
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<tr>
<td>Disenfranchisement</td>
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<tr>
<td>Unemployment Rate</td>
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<tr>
<td><strong>Individual Covariates</strong></td>
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<tr>
<td>Subsequent Arrest</td>
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<tr>
<td>Age</td>
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<tr>
<td>Female</td>
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<tr>
<td>Black</td>
</tr>
<tr>
<td>Other Race</td>
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<tr>
<td>Number of Prior Convictions</td>
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<tr>
<td>Homicide Conviction</td>
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<tr>
<td>Sex Offense</td>
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<tr>
<td>Robbery Conviction</td>
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<tr>
<td>Assault Conviction</td>
</tr>
<tr>
<td>Property Crime Conviction</td>
</tr>
</tbody>
</table>

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

\footnote{131}{The other category contains various public order, weapons, and DWI offenses.}
\footnote{132}{Note that the Arizona and Maryland laws only apply to repeat offenders. We also computed the reported models excluding first time offenders in these states and noted no differences from the full models reported here.}
\footnote{133}{Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 J.L. & Econ. 259 (2001).}
**Statistics presented here are not weighted.**

### C. Analytic Strategy

The following analyses utilize multilevel level logistic regression models to estimate the effect of disenfranchisement laws on recidivism while simultaneously accounting for unobserved differences across states and adjusting for the characteristics of releasees within those states.\(^\text{134}\) Our approach was to estimate whether an individual was rearrested post-release as a function of his or her background characteristics (race, gender, age, criminal history) as well as the characteristics of the state where he or she was released. This general method is popular in social-science research to estimate differences in individual outcomes across aggregate units (states, counties, schools) while also accounting for the possibility that individuals within each unit systematically different from those in other units.\(^\text{135}\)

We estimated our models using a two step approach. The first model, presented in table 2,
estimates the difference in the likelihood of being rearrested across states. This model indicates that there are statistically meaningful differences in the probability of being rearrested depending on which state an individual is released. Approximately 7 percent of the variation is due to state-level differences. Essentially, this means that it is appropriate to model individual variation in subsequent arrests as a function of state-level factors.

We next considered whether variation in state disenfranchisement policies accounted for this observed variation in recidivism across states. A transformation of the coefficient for a state’s disenfranchisement law reveals that individuals who are released in states that permanently disenfranchise are roughly 19% more likely to be rearrested than those released in states that restore the franchise post-release.\(^\text{136}\) This finding provides initial evidence consistent with the thesis that disenfranchisement is directly related to recidivism.

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

In order to account for this possibility, we adjusted the models for each individual’s demographic characteristics and criminal history. As evidenced in model 2, we find that being black, younger and having prior felony convictions are all positively associated with an individual’s likelihood of experiencing a subsequent arrest. Conversely, being female, white and older are negatively associated with the likelihood of arrest. Of particular interest here, the

\(^{134}\) See RAUDENBUSH, S.W. & BRYK A.S., HIERARCHICAL LINEAR MODELS: APPLICATIONS AND DATA ANALYSIS METHODS (2nd ed., 2002)

\(^{135}\) For a more technical discussion of the statistical models, refer to the Appendix.

\(^{136}\) See Appendix
positive effect of permanent disenfranchisement policy on recidivism was slightly diminished once controlling for these individual factors, but remained a significant predictor nonetheless. Results of this model indicate that net of the effects of race, gender, criminal history and state unemployment rate, individuals released in states that permanently disenfranchise are roughly 10 percent more likely to reoffend than those released in states that restore the franchise post-release. This association is displayed graphically in figure 1.

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

<table>
<thead>
<tr>
<th></th>
<th>Model 1: Baseline</th>
<th>Model 2: Within States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Fixed Effects</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Between States</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Intercept</td>
<td>.283 .126 ***</td>
<td>.434 .066 ***</td>
</tr>
<tr>
<td>Permanent Disenfranchisement</td>
<td>.604 .220 ***</td>
<td>.385 .117 **</td>
</tr>
<tr>
<td>Unemployment Rate</td>
<td>----- -----</td>
<td>.083 .035 *</td>
</tr>
<tr>
<td>Within States</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Age at Release</td>
<td>----- -----</td>
<td>-.059 .004 ***</td>
</tr>
<tr>
<td>Sex</td>
<td>----- -----</td>
<td>-.479 .009 ***</td>
</tr>
<tr>
<td>Black</td>
<td>----- -----</td>
<td>.491 .061 ***</td>
</tr>
<tr>
<td>Other Race</td>
<td>----- -----</td>
<td>-.392 .303</td>
</tr>
<tr>
<td>Number of Prior Convictions</td>
<td>----- -----</td>
<td>.077 .009 ***</td>
</tr>
<tr>
<td>Homicide Conviction</td>
<td>----- -----</td>
<td>-.651 .054 ***</td>
</tr>
<tr>
<td>Sex Offense</td>
<td>----- -----</td>
<td>-.504 .123 ***</td>
</tr>
<tr>
<td>Robbery Conviction</td>
<td>----- -----</td>
<td>-.058 .050</td>
</tr>
<tr>
<td>Assault Conviction</td>
<td>----- -----</td>
<td>-.051 .049</td>
</tr>
<tr>
<td>Property Crime Conviction</td>
<td>----- -----</td>
<td>.284 .056 ***</td>
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<tr>
<td><strong>Random Effects</strong></td>
<td></td>
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</tr>
<tr>
<td>VCb</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Between States</td>
<td>0.0723 415.48 (1)***</td>
<td>0.066 259.61 (12)***</td>
</tr>
<tr>
<td>Statistics</td>
<td></td>
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<tr>
<td>Likelihood (Estimated Parameters)</td>
<td>-54864.62</td>
<td>-54650.59</td>
</tr>
<tr>
<td>χ²c (df)d</td>
<td></td>
<td>426.82 (11) ***</td>
</tr>
</tbody>
</table>

***p < 0.001; **p < 0.01, * p < 0.05
Disenfranchisement is a policy that cuts large swaths of American citizens from the voting rolls, excluding them from participating in the political process. The philosophical views that underlie disenfranchisement are reflective of a pre-modern era; one not characterized by the ideals of democracy and universal suffrage.\textsuperscript{137} Disenfranchisement also serves as a stark example of American exceptionalism as there are no other first-world democracies that disenfranchise their citizens to the extent that is seen in the United States.

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

One argument which has never been fully examined, however, is that disenfranchisement is linked to recidivism. Consistent with theories of labeling and shaming, the natural outgrowth of disenfranchisement is to create a perpetual criminal underclass unable to fully rejoin society after their sentence is served, and to an extent must live as outcasts. It is not unreasonable to argue that the cumulative effect of this would lead to an increase in criminal activity.

In addition to disenfranchisement being a poor social policy, it also fails the test set forth by the Supreme Court in \textit{Boerne}. Many disenfranchisement schemes were enacted, at least in part, to prevent crime – either as a deterrent to criminal offenses, or to prevent election-related

\textsuperscript{137} MANZA & UGGEN, supra Note 19.
offenses. Being that disenfranchisement appears to increase criminal activity and that it is applied across-the-board to all criminal offenders, regardless of class or type of offense, it can and should be argued that disenfranchisement is neither proportional, nor congruent to the ends sought.

Taken as a whole, our findings indicate that states which permanently disenfranchise ex-felons experience significantly higher rates of repeat offenses than states that do not. If it is the case that disenfranchisement policy has a causal relationship with recidivism, then states that disenfranchise permanently can expect to see a significant reduction in the re-arrest rates of ex-felons. A reduction of this sort would be a potential boon for states, not only in terms of the general principles of crime control, but economically as well.\textsuperscript{138}

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

In conclusion, while disenfranchisement is a practice that has been a part of many political and social traditions, it is a vestige of a pre-democratic era. Disenfranchisement makes little sense given that the justifications for it are marginal, its history dubious, and its effects on those trying to make amends for their crimes and rejoin the ranks of society onerous, all while providing no obvious benefit to society.

\textsuperscript{138} See PEW CENTER ON THE STATES, supra note 128.
APPENDIX

The following provides a more technical discussion of the hierarchical logistic regression models presented in Table 2. As reflected in Eq. 1, the outcome variable in each model is the natural logarithmic transformation of the odds being re-arrested in the 3-year observation period, denoted here as \( p \).

\[
\eta_{ij} = \log(p/1-p)
\]

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

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

\[
\eta_{ij} = \beta_{0j}
\]

and the level two model as:

\[
\beta_{0j} = \gamma_{00} + U_{0j}
\]

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

\[
\eta_{ij} = \beta_{0j} + \beta_{1j} \cdot \text{(Race)}_{ij} + \beta_{3j} \cdot \text{(Age)}_{ij} + \beta_{4j} \cdot \text{(Gender)}_{ij} + \beta_{5j} \cdot \text{(Priors)}_{ij} + \beta_{5j} \cdot \text{(Offense Type)}_{ij}
\]

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

The level-two model incorporates the intercept from the level-one model as a dependent variable such that:
In this equation, $\gamma_{00}$ is the mean log odds of recidivism across states, $\gamma_{01}$ is the effect of the state’s disenfranchisement law, $\gamma_{02}$ is the effect unemployment rate and $U_{0j}$ is the error term for the effect of the $j$th state on the mean log-odds of recidivism. The final models were weighted for survey design. The application of these probability weights adjusts our results to be representative of over 300,000 prisoners released in 1994, which accounts for over two-thirds of all prisoners released in the United States that year. We excluded missing variables list-wise, which reduced our final sample to roughly 92 percent of all available cases.

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

The random effects portion of the models presents the variation in subsequent arrests due to state-level characteristics. In the first model, the variance component indicates that roughly 7 percent of the variation in arrests is due to differences across states. That is to say that although most of the observed variation in arrests is due to individual characteristics, an appreciable portion can be attributed to state-level differences. In the second model, this figure drops slightly once controlling for individual-factors and unemployment, suggesting we have explained part of the state differences in subsequent arrest by controlling for unemployment rates.

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

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