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“We Are Still Citizens, Despite Our Regrettable Past”¹:

Why A Conviction Should Not Impact Your Right to Vote

Jaime M. Hawk
Breanne M. Schuster*

“The denial of the right to vote makes a statement that a prisoner is somehow less than any other person in this country. . . . Being able to vote says to all that a prisoner is paying a debt to society for negative actions, but is still a citizen after all.”

— David John Lennon, Prisoner at Monroe Correctional Facility

INTRODUCTION

Incarcerated members of the Concerned Lifers Organization (CLO) and the Black Prisoners Caucus (BPC) meet weekly in the Monroe Correctional Complex, as well as inside several other prisons across Washington, to attend committee meetings and strategize about the need for legal and policy reforms statewide.² They organize an annual summit and conference focused

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¹ Written statement of David John Lennon, Monroe Correctional Facility, in Monroe, Wash. (May 28, 2019).

² As a volunteer for the Washington Department of Corrections, co-author Jaime Hawk met with members of the Concerned Lifers Organization (CLO) and the Black Prisoners Caucus (BPC) at the Washington State Reformatory in Monroe, Washington, to amplify their voices for this article.

on topics such as breaking the cycle of incarceration, trauma, and the school-to-prison pipeline—attendees often include members of the state legislature, judges, lawyers, and advocates.

Members of CLO and BPC, along with many other prisoners throughout Washington State, routinely watch Television Washington (TVW) to monitor bills introduced throughout the legislative session, oral arguments before the Washington Supreme Court, and other programs around the state that air on TVW. There is enormous talent and potential behind prison walls. And many incarcerated people are more engaged and informed on legislative issues and matters of civics and government than members of the electorate: their lives and futures are at stake.

However, the voices of people incarcerated, as well as people living in our communities under the supervision of the Department of Corrections, have been silenced in Washington State’s electoral process for too long. Voter disenfranchisement has racially discriminatory foundations that continue today in existing law and government practices. The Washington legislature must act to dismantle these structures of injustice and expand access to our democracy.

It is time that those convicted of felony offenses be heard, especially at the ballot box. This article will review the history of disenfranchisement in America, provide a brief overview of its racist legacy, discuss how disenfranchisement laws in Washington State continue to keep those convicted of a felony conviction from integrating into society, and explain why these laws must change: a conviction should not impact a Washingtonian’s right to vote.

“The denial of voting rights for incarcerated people, like myself, causes a situation where elected officials have a population who they have power over, but no accountability to . . . I argue that mass incarceration has been supported and enabled by the disenfranchisement of incarcerated people.”

– Amber Kim, Prisoner at Monroe Correctional Facility

RACIAL DISCRIMINATION THROUGH VOTER DISENFRANCHISEMENT

The 15th Amendment of the U.S. Constitution was enacted in 1870 as part of Reconstruction to enfranchise those previously denied the right to vote “on account of race, color, or previous condition of servitude”—*i.e.*, Black men. But, like so many promises this country has made to Black Americans, full enfranchisement never materialized. Instead, state legislatures have countered those Reconstruction-era protections by passing laws that reduce Black voting power. Courts have struck down many of these restrictions—such as literacy tests and poll taxes—but other forms of voter disenfranchisement continue to sprout up in their place.

Discriminatory policies and practices are not relics of the past. In the wake of President Barack Obama’s election, propelled by record turn-out of young voters and voters of color, “state lawmakers nationwide started introducing hundreds of harsh measures making it harder to vote.”³ At least 25 states succeeded in putting new restrictions in place.⁴ These laws include racially-motivated voter-identification requirements, limitations on early voting, and voting registration restriction bills.⁵ These concerted efforts have created significant obstacles to voting, especially for poor people and voters of color. Indeed, the greater the increase in voter turnout among people of color and low-income voters, the more likely it is for a state to enact legislation that curtails voting rights.⁶ h According to a 2014 study conducted by the Brennan

³ BRENNAN CTR. FOR JUSTICE, *NEW VOTING RESTRICTIONS IN AMERICA* (2019), <https://www.brennancenter.org/sites/default/files/legal-work/New%20Voting%20Restrictions.pdf> [<https://perma.cc/FX6J-LK3X>].

⁴ *Id.*

⁵ *Id.*

⁶ WENDY WEISER & ERIK OSPAL, *THE STATE OF VOTING IN 2014*, 3 (2014), https://www.brennancenter.org/sites/default/files/analysis/State_of_Voting_2014.pdf (“Of the 11 states with the highest African-American turnout in 2008, 7 have new restrictions in place.” And “[o]f the 12 states with the largest Hispanic population growth between 2000 and 2010, 9 passed laws making it harder to vote.”).

Center for Justice, more than 63 percent of states with the highest African-American turnout in the 2008 election passed laws making it harder to vote.⁷

At the same time, this country is witnessing a chipping away of the federal Voting Rights Act, the political gerrymandering of districts, the purging of voters from state voter rolls, and the closing of hundreds of polling places across the United States. In 2013, the U.S. Supreme Court increased the authority of states to create barriers to voting in *Shelby County, Ala. v. Holder*.⁸ Within just a year of the *Shelby County* decision, the majority of states that used to be closely monitored under the Voting Rights Act due to a history of racial discrimination in elections passed new restrictions on accessing the ballot, including shortening voting hours and days, making it more difficult to register to vote, purging eligible voters from rolls, implementing strict voter identification laws, reshaping districts, and closing polling places.⁹ Within five years, nearly 1,000 polling places were closed, many of which were in states and localities with a history of racial discrimination in voting; like most efforts to suppress the vote, these closures disproportionately impact people of color.¹⁰

And the most longstanding form of voter suppression in our country—felony disenfranchisement—continues to cost increasing rates of otherwise eligible residents the right to vote. As of 2016, more than 6 million Americans in 48 states, including Washington, remain unable to access the polls because of a felony conviction.¹¹ Disenfranchisement is uniquely

⁷ *Id.*

⁸ *Shelby Cty. Ala. v. Holder*, 570 U.S. 529 (2013).

⁹ Wendy R. Weiser, *In 22 States, a Wave of New Voting Restrictions Threatens to Shift Outcomes in Tight Races*, AMERICAN PROSPECT (Oct. 1, 2014), <https://prospect.org/article/22-states-wave-new-voting-restrictions-threatens-shift-outcomes-tight-races> [https://perma.cc/R99Z-2VV4]; THE LEADERSHIP CONFERENCE EDUC. FUND, *DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 10* (2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf>.

¹⁰ *Id.* at 12, 20-22.

¹¹ Christopher Uggen, Ryan Laeson, & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT (Oct. 6, 2016),

American: the United States has one of the highest rates of incarceration in the world and has some of the most severe disenfranchisement laws of any democracy.¹² This must change.

“The restriction of my voting rights did not accomplish any public good.”

—Scott Alan Gordon, Prisoner at Monroe Correctional Facility

VOTER DISENFRANCHISEMENT BY FELONY CONVICTION

While the origins of disenfranchisement can be traced back to early colonial law,¹³ disenfranchisement as we know it today was largely a response to the emancipation of slaves and suffrage extended to Black men after the end of the Civil War.¹⁴ Shortly thereafter, states began to enact laws targeted at limiting African Americans’ access to the ballot.

This restriction was accomplished in two ways. First, lawmakers implemented a plethora of new laws “essentially intended to criminalize

<https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> [<https://perma.cc/VGB3-ZZP7>].

¹² BRANDON ROTTINGHAUS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM 24-26 (2003), https://www.prisonpolicy.org/scans/08_18_03_Manatt_Brandon_Rottinghaus.pdf (identifying only 8 nations that disenfranchise citizens during incarceration and for varying periods of time afterwards and noting that the United States disenfranchises many more of its citizens than any of these countries); *see also* JAMIE FELLNER & MARC MAUER, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES, 17-18 (1998), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf> [<https://perma.cc/85GK-7B8H>]; JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELONY DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 37-39 (2006).

¹³ Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059-1061 (2002).

¹⁴ MANZA & UGGEN, *supra* note 12, at 51-56 (“Between 1840 and 1865, all 16 states adopting felon disenfranchisement measures did so after establishing full white male suffrage by eliminating property tests. . . . It is also important to note that in this early period, the criminal justice system was still quite underdeveloped, although entering a phase of rapid development Most states maintained a single state penitentiary, and incarcerated only a small number of offenders”).

black life.”¹⁵ These laws—as they continue to be—were selectively enforced by a nearly all-white criminal justice system.¹⁶ During this time, “the number of Black Americans arrested and incarcerated surged” and disparities in incarceration skyrocketed.¹⁷ In Alabama, for example, as African Americans gained freedom from plantation enslavement, the percentage of non-white prisoners jumped from 2 percent to 74 percent of the prison population between 1850 and 1870.¹⁸

Simultaneously, states enacted laws that revoked voting rights from anyone convicted of these criminal offenses. “[W]hen African Americans [made] up a larger proportion of a state’s prison population,” the “state [was] significantly more likely to adopt or extend felon disenfranchisement.”¹⁹ Many states enacted broad felony disenfranchisement laws and selectively enforced them in a deliberately discriminatory manner.²⁰ Other jurisdictions targeted offenses that were perceived as most likely to be committed by African American men.²¹ For example, party leaders in Mississippi called for disenfranchisement of offenses like theft crimes, bigamy, forgery, arson, and

¹⁵ DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 53 (2008).

¹⁶ *Id.* at 13 (“Few laws specifically enunciated their applicability only to blacks, but it was widely understood that these provisions would rarely if ever be enforced on whites.”); ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863-1877*, at 205 (2002).

¹⁷ Ruth Delaney, Ram Subramanian, Alison Shames & Nicholas Turner, *American History, Race, and Prison*, VERA REIMAGINING PRISON WEB REP. (Oct. 2018), <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> [<https://perma.cc/E6U8-NM4H>].

¹⁸ See 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. SOC. 559, 598 (2003).

¹⁹ Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUST. 5, n.24, https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf (last visited Jan. 2, 2020) [<https://perma.cc/49M2-KC9Q>].

²⁰ *Id.* at 5, nn. 22-23.

²¹ See Andrew L. Shapiro, *Challenging Criminal Disenfranchisement under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537 n.20 (1993).

perjury that they believed African Americans were more likely to commit.²² In contrast, robbery, murder, and other violent crimes did not result in the loss of voting rights.²³ Within 15 years after the Civil War, the majority of states had enacted felony disenfranchisement laws.²⁴

Black political suppression was not an accident or a mistake: it was a central purpose of these laws. For example, in Virginia, when the commonwealth redrafted its constitution to include a poll tax, a literacy test, and a lifetime ban on voting for people with a felony conviction, State Senator Carter Glass stated: “[t]his plan will eliminate [Black people] as a political factor in the state in less than 5 years.”²⁵ Another delegate, R.L. Gordon, told fellow delegates at the state constitutional convention, “I told the people of my country before they sent me here that I intended, as far as in me lay, to disenfranchise every [Black man] that I could disenfranchise under the Constitution of the United States, and as few white people as possible.”²⁶ In Alabama, the president of the state’s constitutional convention noted that the goal of the convention was to “establish white supremacy.”²⁷

Disenfranchisement for criminal convictions was not and is not limited to the South—other states quickly followed suit. For example, Washington

²² *See id.*

²³ *Id.* at 540.

²⁴ Jean Chung, *Felony Disenfranchisement: A Primer*, THE SENTENCING PROJECT (June 27, 2019), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> [<https://perma.cc/ZQK9-CRVU>].

²⁵ *An Election Agenda for Candidates, Activists, and Legislators*, BRENNAN CTR. FOR JUST. 10 (2018) https://www.brennancenter.org/sites/default/files/publications/2018_05_Agendas_DEmocracy_FINAL.pdf [<https://perma.cc/K5BD-ZLL7>] (quoting *Report of the proceedings and debates of the Constitutional Convention, state of Virginia: held in the city of Richmond June 12, 1901, to June 26, 1902, Vol. II* (Richmond: Heritage Press, 1906), 3076).

²⁶ Matt Ford, *The Racist Roots of Virginia’s Felon Disenfranchisement*, THE ATLANTIC (April 27, 2016) <https://www.theatlantic.com/politics/archive/2016/04/virginia-felon-disenfranchisement/480072/> [<https://perma.cc/9WLD-52U3>].

²⁷ Behrens et al., *supra* note 18, at 598; *Constitutional Convention, 1901*, May 22, 1901, THE ALABAMA LEGISLATURE, http://www.legislature.state.al.us/aliswww/history/constitutions/1901/proceedings/1901_proceedings_voll/day2.html (last visited Sept. 24, 2019) [<https://perma.cc/DN8J-AEJQ>].

embedded felony disenfranchisement into its State Constitution in 1889, which still provides that all persons convicted of an “infamous crime” are prohibited from voting in any election unless their civil rights have been restored.²⁸ All felonies are considered to be “infamous crimes” in Washington because they are “punishable . . . by imprisonment in a state correctional facility.”²⁹

Along with other forms of voter suppression, disenfranchisement laws expanded throughout the United States over the next century, often in response to other forms of voter suppression being deemed unlawful. By 2008, 95 percent of states had limited the right to vote for those with a felony conviction.³⁰

[D]espite the expansion of the right to vote during the mid-to-late twentieth century for African Americans and other groups, the War on Drugs and other “tough on crime” policies implemented over the last 40 years have resulted in a drastic increase in the number of disenfranchised individuals, from 1.17 million in 1976 to 6.1 million in 2016.³¹

Between 2010 and 2016 alone, the number of disenfranchised Americans grew more than a quarter of a million.³²

While disenfranchisement laws vary some throughout the country, only two states—Maine and Vermont—have not enacted prisoner

²⁸ WASH CONST. art. VI, § 3 (“All persons convicted of infamous crime unless restored to their civil rights . . . are excluded from the elective franchise.”).

²⁹ WASH. REV. CODE § 29A.04.079 (2011).

³⁰ *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT (April 28, 2014), <https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/> [<https://perma.cc/2GEE-E8A5>].

³¹ JEAN CHUNG, THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT: A PRIMER 1, 3 (updated May 2016).

³² Uggen et al., *supra* note 11; Christopher Uggen, Sarah Shannon, & Jeff Manza, THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES 2010, (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/State-Level-Estimates-of-Felony-Disenfranchisement-in-the-United-States-2010.pdf>. [<https://perma.cc/UR6N-A7MV>].

disenfranchisement laws.³³ They also happen to be some of the whitest states in America.³⁴ In every other state, the right to vote of a person with a felony conviction is revoked to some degree: in 10 states revocation is permanent; in 23 states the right to vote is restored after certain conditions like parole or probation are completed; and in 15 states the right to vote is restored once someone is no longer incarcerated.³⁵

Even in states where restoration is technically an option, the right can be effectively meaningless. In Mississippi, those with a felony conviction can seek restoration of their voting rights only through a process of proving themselves to the legislative entity that took away their basic rights in the first place.³⁶ Specifically, a formerly incarcerated person must petition his or her state representative and convince the legislator to write and pass a bill to restore his or her voting rights, or petition the Governor to grant re-enfranchisement.³⁷ Between 2000 and 2015, approximately 0.2 percent of people who had completed their sentence had their right to vote restored.³⁸

Restoration laws are also often a patchwork of ambiguously drafted laws that result in widespread confusion about who can vote, how, and when. For example, in the 2004 gubernatorial election in Washington state, widespread confusion over implementation of the law regarding restoration at the time led to the counting of 1,678 “illegal” ballots, 1,392 of whom were from

³³ *Felony Disenfranchisement Laws*, *supra* note 27; Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here’s Why Few Do.*, THE MARSHALL PROJECT (Jun. 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> (in both Maine and Vermont, the state constitutions “guarantee voting rights for all citizens, interpreted to include incarcerated people from the earliest days of statehood (in Vermont, a legal decision dates from 1799).”).

³⁴ Reid Wilson, *America’s white population shrinks for the first time as nation ages*, THE HILL (Jun. 21, 2018, 12:01 AM), <https://thehill.com/homenews/state-watch/393322-americas-white-population-shrinking-as-nation-ages> [<https://perma.cc/D3QJ-JLN3>].

³⁵ *Felony Disenfranchisement Laws*, *supra* note 30.

³⁶ *Felony Disenfranchisement in Mississippi*, THE SENTENCING PROJECT (Feb. 13, 2018), <https://www.sentencingproject.org/wp-content/uploads/2018/02/Felony-Disenfranchisement-in-Mississippi.pdf> [<https://perma.cc/VXZ9-ZRGE>].

³⁷ *Id.*

³⁸ Uggen et al., *supra* note 11.

people with felony convictions who had unpaid court debt. The declared victor of the race, Christine Gregoire, won by a record close margin of 133 votes.³⁹

“When someone returns to the community after serving a prison sentence, the greater degree they are reintegrated back into the community will dictate what kind of neighbor you can expect them to be. Do we really want them living on the fringes of society, afraid to fully engage? A better outcome is to insist they become responsible citizens. Affording them the right to vote will go a long way towards helping them realize this goal.”

– Timothy Pauley, Prisoner at Monroe Correctional Facility

THE HARMFUL LEGACY OF DISENFRANCHISEMENT

Today, felony disenfranchisement remains a significant factor restricting American voter participation. More than 6 million Americans—approximately 1 in 40 adults—are currently denied the right to vote due to a felony conviction.⁴⁰ This group of six million people is greater than the entire population of the state of Missouri, and the largest single group of American citizens barred explicitly by law from participating in elections. Disenfranchised voters live in our community—they work, pay taxes, raise families—but are barred from having a voice at the polls about matters concerning workers’ rights, taxation schemes, health care protocols, access

³⁹ Gregory Roberts, *Judge Upholds Gregoire’s Election; Rossi Won’t Appeal*, SEATTLE P.I. REP. (June 5, 2005, 10:00 PM), <https://www.seattlepi.com/local/article/Judge-upholds-Gregoire-s-election-Rossi-won-t-1175262.php> [<https://perma.cc/4DHD-C9ST>]. Initial results indicated Christine Gregoire won by 129 votes. See David Ammons, *Gregoire Declared Governor-Elect, But Rossi Wants New Vote*, SEATTLE TIMES (Dec. 30, 2004, 12:00 AM), <http://community.seattletimes.nwsourc.com/archive/?date=20041230&slug=webguvrace30> [<https://perma.cc/KJP6-83B7>]. However, after months of further investigation, the Chelan County Superior Court ruled the final margin to be 133 votes. Kit Oldham, *Christine Gregoire wins nation’s closest-ever governor’s race after recounts and a court battle while Washington voters re-elect Senator Patty Murray and favor John Kerry for president on November 2, 2004*, HISTORYLINK.ORG (Jun. 07, 2005), <https://historylink.org/File/7336>.

⁴⁰ Uggen et al., *supra* note 11.

to education, and the criminal justice system. “In fact, 77 percent of disenfranchised voters live in their communities, either under probation or parole supervision or having completed their sentence.”⁴¹

Like many other forms of voter suppression, disenfranchisement continues to target people of color. “Black Americans constitute 2.2 million of the disenfranchised, banned from voting at four times the rate of all other racial groups combined. Its history betrays a truth the nation has continuously refused to recognize in the experience of its most intimately reviled child: enslaved Africans and their descendants.”⁴²

Nationally, 1 in 13 African Americans of voting age are prevented from voting because of a criminal conviction.⁴³ In at least four states, more than 1 in 5 African Americans are disenfranchised.⁴⁴ And more than five percent of the African-American adult citizen population in 23 states are prohibited from voting.⁴⁵ Nationally, African Americans of voting age are more than four times more likely to lose their voting rights than the rest of the adult population.⁴⁶

These disparities hold true in Washington State as well. Prior to passage of the Voting Rights Restoration Act in Washington, more than seventeen percent of the state’s Black voting-age population—more than twice the rate of California—and more than ten percent of Washington’s Latinx voting age population were ineligible because of a felony conviction.⁴⁷ The state’s

⁴¹ Chung, *supra* note 24.

⁴² Jennifer Rae Taylor, *Jim Crow’s Lasting Legacy At The Ballot Box*, MARSHALL PROJECT (Aug. 20, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box> [<https://perma.cc/Z6PR-257P>].

⁴³ Uggen et al., *supra* note 11.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Chung, *supra* note 24.

⁴⁷ Nicolas L. Martinez, *Debt to Society? The Washington State Legislature’s Efforts to Restore Voting Rights to Persons with Felony Convictions*, 22 STAN. L. & POL’Y REV. 329, 331 (2011) (citing *State Map of National and State Prison Statistics*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [<https://perma.cc/4YRW-RCV6>] (last visited Jan. 2, 2020) (highlighting that Washington’s

disenfranchisement rate was 1.5 times the national average and seven times as high as Oregon.⁴⁸

Revocation negatively affects voter participation in communities of color, even for those who have the right to vote.⁴⁹ For example, one study found that eligible and registered African-American voters were nearly twelve percent less likely to cast ballots if they lived in a state with a lifetime disenfranchisement law, while White voters were only one percent less likely to vote.⁵⁰

Whether a state is willing to adopt disenfranchisement restrictions depends a lot upon how many non-white prisoners reside there. For example, a 2002 study determined that for every one percent increase in the percentage of non-white prisoners, a state is ten percent more likely to pass its first felony disenfranchisement law.⁵¹ For those directly affected by disenfranchisement, being denied the right to vote denies them a sense of being a part of society, even when they are being expected to re-integrate into it.

“Of the myriad collateral consequences inherent in a criminal conviction, disenfranchisement is one of the most insidious, and simply serves no valid ethical purpose. It serves only to limit and to ostracize individuals, based on the apparent belief that those who

felony disenfranchisement rate previously stood at 3.6%, compared to the national average of 2.4%; the rates in Oregon, California, and Idaho are 0.5%, 1.1%, and 1.8% respectively. The data available on the Sentencing Project’s website now reflects current disenfranchisement rates.).

⁴⁸ *Id.* at 330-331.

⁴⁹ See Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 SOC. SCI. Q. 722, 739-40 (2009) (arguing that strict felony disenfranchisement policies tend to dampen the probability of voting for Blacks, but not for non-Hispanic whites); see also Erika Wood, *Restoring the Right to Vote*, BRENNAN CTR FOR JUSTICE 12 (2009), <http://www.brennancenter.org/sites/default/files/legacy/Democracy/Restoring%20the%20Right%20to%20Vote.pdf> [<https://perma.cc/Z8SF-QPL4>].

⁵⁰ *Id.*

⁵¹ See Behrens et al., *supra* note 17, at 586.

fail to respect the law should be divested of the opportunity to participate in its creation or process.”

— Steve Spurgeon, Prisoner at Monroe Correctional Facility

UNDOING DISENFRANCHISEMENT

Despite numerous attempts, successful efforts to restore voting rights have often happened at the polls or in the legislature, rather than the courts. In 1974, three men with felony convictions challenged California’s disenfranchisement policies, claiming a deprivation of the right to equal protection of the laws under the U.S. Constitution.⁵² The case ended up before the Supreme Court, which ultimately upheld the state’s disenfranchisement policies as constitutional.⁵³ Justice Rehnquist wrote for the Court that Section 2 of the 14th Amendment—which was arguably intended to protect the voting rights of freed slaves by sanctioning states that disenfranchised them—nonetheless allows disenfranchisement based on a felony conviction.⁵⁴

In 1985, the U.S. Supreme Court struck down Alabama’s constitutional provision that disenfranchised people who had “committed crimes of moral turpitude” as discriminatory against African Americans, holding it unlawful due to an intent to discriminate.⁵⁵ Unfortunately, the Court’s analysis has now been adopted as a litmus test for whether a disenfranchisement law is constitutional—although states still cannot discriminate against any protected class in the enactment or enforcement of provisions depriving people with criminal convictions as a group from access to the franchise, even absent an intent to discriminate.⁵⁶

The Washington State Supreme Court has also opined that people with felony convictions do not have a constitutionally protected right to vote. In

⁵² *Richardson v. Ramirez*, 418 U.S. 24, 52-55 (1974).

⁵³ *Id.*

⁵⁴ *Id.* at 54-55, 73.

⁵⁵ *Hunter v. Underwood*, 471 U.S. 222, 227 (1985).

⁵⁶ *Id.* at 227-28.

2007, the Court upheld a requirement that people with felony convictions must pay all court fines prior to getting their right to vote back under the state constitution's privileges and immunities clause and the federal constitution's equal protection clause.⁵⁷

In the Washington-based Ninth Circuit case *Farrakhan v. Gregoire*, the plaintiffs argued that because of the racial discrimination inherent in our criminal justice system, the state's laws revoking the right to vote based on a felony conviction effectively denied citizens of Washington the right to vote on account of race, thereby violating the federal Voting Rights Act, which prohibits racial discrimination in voting.⁵⁸ While the district court "recognized that challenges to felony disenfranchisement laws were cognizable under section 2" of the Voting Rights Act,⁵⁹ the Ninth Circuit ultimately upheld the state's scheme, determining that "plaintiffs . . . must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent."⁶⁰

Thus, rather than turning to the courts, many are turning to their policy makers to restore voting rights; and there is a growing public interest in legislative action to enfranchise and give voice to those the law currently excludes. More than five years ago, former Attorney General Eric Holder called on states to repeal laws that prohibit people with felony convictions from voting after release.⁶¹

⁵⁷ *Madison v. State*, 161 Wash. 2d 85, 110-11, 163 P.3d 757, 773 (2007).

⁵⁸ *Farrakhan v. Gregoire*, 590 F.3d 989, 993 (9th Cir. 2010), *rev'd*, 623 F.3d 990 (9th Cir. 2010) (en banc) (per curiam).

⁵⁹ BRENNAN CTR. FOR JUSTICE, *Court Case Tracker: Farrakhan v. Gregoire* (Oct. 8, 2019), <https://www.brennancenter.org/our-work/court-cases/farrakhan-v-gregoire> [<https://perma.cc/7V4Q-A5MV>].

⁶⁰ *Farrakhan*, 590 F.3d at 993.

⁶¹ Att'y Gen. Eric Holder, Remarks on Criminal Justice Reform at Georgetown University Law Center (Feb. 11, 2014) (transcript available at <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-on-criminal-justice-reform-georgetown> [<https://perma.cc/EKH3-SGSM>]).

“The voices of individuals that might otherwise be ignored, could bring valuable insight into the country’s true moral character . . . If you want someone to learn to participate in a representative democracy, then they need to be allowed to participate in that democracy.”

— Steve Spurgeon, Prisoner at Monroe Correctional Facility

THE LAW IN WASHINGTON AND WHERE WE’RE HEADED

In Washington, there are approximately 50,000 people prohibited from voting due to the state’s felony disenfranchisement laws.⁶² About 8,000 are African American, representing almost four percent of the state’s African American population.⁶³ Washington prohibits those convicted of felonies from voting while incarcerated or while they remain under DOC community custody.⁶⁴ This means that no one currently in prison or released from prison but still under DOC supervision can vote.

In 2009, Washington passed H.B. 1517, the Voting Rights Restoration Act (VRR), to allow anyone previously convicted of a felony to “regain the right to vote upon completion of sentence, including prison, parole and probation, without requiring payment.”⁶⁵ Prior to the VRR, the voting rights of a person convicted of a felony were restored only upon completing one’s sentence, after the full payment of any legal financial obligations (LFOs).⁶⁶ Tens of

⁶² *State Map of National and State Prison Statistics*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [<https://perma.cc/4YRW-RCV6>] (last visited Jan. 2, 2020).

⁶³ *Id.*

⁶⁴ WASH. CONST. art. VI, § 3; WASH REV. CODE § 29A.08.520(1).

⁶⁵ WASH. REV. CODE § 29A.08.520(2); BRENNAN CTR. FOR JUSTICE, *Voting Rights Restoration Efforts in Washington* (April 20, 2018), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-washington> [<https://perma.cc/J5VR-3G4K>].

⁶⁶ Jill E. Simmons, *Note & Comment, Beggars Can’t Be Voters: Why Washington’s Felon Re-enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297, 302 (2003); H.B. 1517, 61st Leg., Reg. Sess. (Wash. 2009), <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/1517%20HBR%20FBR%2009.pdf> [<https://perma.cc/98T9-8NCS>].

thousands of people otherwise permitted to vote were excluded from voting simply because they were too poor to pay their LFOs.⁶⁷

Now, upon completion of their full sentence, persons previously convicted of felony offenses may have the right to vote “provisionally” restored.⁶⁸ This full sentence requirement includes both time in physical custody and the completion of all community custody, which is Washington’s term for probation.⁶⁹ Provisional restoration can be revoked if, after completing one’s full sentence, the person fails to comply with the terms of the order to pay LFOs.⁷⁰ Fortunately, since the passage of the VRR, there are no reported instances of prosecutors in the state seeking to revoke provisional restoration based on someone’s failure to pay LFOs—but the law technically still allows such revocation.

Moreover, despite efforts to educate the public about this change in the law now more than ten years old, many Washingtonians with old felony convictions do not know they can vote. Some have been wrongly informed that because they have a felony they can never vote, and others think they must pay off all their LFOs before being eligible to vote. Many people have not been adequately advised of their voting rights. As a result, there are likely thousands of Washington residents who remain de facto disenfranchised due to confusion about the current law. Ultimately, the VRR restored voting rights to approximately 167,000 Washingtonians who had previously been

⁶⁷ Simmons, *supra* note 66, at 306.

⁶⁸ WASH. REV. CODE § 29A.08.520(2).

⁶⁹ As of 2019, felony offenses that involve community custody include as follows: sex offenses or serious violent offenses (36 months community custody); other violent offenses (18 months community custody); crimes against persons (12 months community custody); gang members unlawfully possessing a firearm (12 months community custody); controlled substance violations (12 months community custody); failure to register as a sex offender (12 months community custody). WASH. REV. CODE § 9.94A.

⁷⁰ WASH. REV. CODE § 29A.08.520(2).

disenfranchised, but it is unclear how many of those who are now “provisionally” eligible to vote have registered to vote or cast a ballot.⁷¹

Under current Washington law, persons may “permanently” restore their voting rights after completion of their sentences only if: (1) the sentencing court issues a Certificate of Discharge; (2) a court issues an Order to Restore Voting Rights; (3) the Indeterminate Sentence Review Board issues a Final Order of Discharge; or (4) the Governor issues a Certificate of Restoration.⁷²

The current legislative scheme is both confusing and out-of-reach for those being released from prison; and does not lead to expanding the number of new voters who are likely eligible to vote. Momentum is building to simplify these laws and permanently remove barriers to voting.

“Prisoners possessing the right to vote will be empowered to practice citizenry [and] exercise their civic duties . . . “

— Vincent Jamal Sherrill, Prisoner at Monroe Correctional Facility

NEW LEGISLATION IN WASHINGTON

During the 2019 Washington State Legislative Session, House⁷³ and Senate⁷⁴ versions of a bill were introduced that proposed the permanent restoration of voting rights for all citizens formerly incarcerated when they are released from physical confinement. Under this legislation, those currently under the supervision of the Washington Department of Corrections

⁷¹ H.B. 1517, 61st Leg., Reg. Sess. (Wash. 2009). <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bill%20Reports/House/1517%20HBR%20FBR%2009.pdf> [<https://perma.cc/98T9-8NCS>].

⁷² WASH REV. CODE § 29A.08.520(6).

⁷³ H.B. 1924, 66th Leg., Reg. Sess. (Wash. 2019) (introduced by Representative Laurie Dolan (D-Olympia)).

⁷⁴ S.B. 5076, 66th Leg., Reg. Sess. (Wash. 2019) (introduced by Senator Patty Kuderer (D-Bellevue)).

would be allowed to vote.⁷⁵ The Washington Department of Corrections currently supervises approximately 20,000 people who reside in communities around the state.⁷⁶

The House version of the bill passed the House State Government and Tribal Affairs Committee but failed to reach the House floor.⁷⁷ The Senate version of the bill also passed the Senate State Government Committee but was not brought to a vote when it reached the Senate floor.⁷⁸ The bill is still alive in the 2020 legislative session and amended versions have been introduced in both the House and Senate.

This legislation would streamline the restoration process, allowing all citizens to register to vote upon their release from incarceration. The bill will not restore the right to vote for those currently incarcerated in Washington, but it would eliminate the current court and gubernatorial restoration processes for permanent registration by providing permanent and automatic voter restoration for all citizens at the time of their discharge from physical custody.⁷⁹

Washington would not be alone in passing this type of legislation. Nevada and Colorado passed legislation in 2019 that not only expands voting rights to people on probation and parole but also provides automatic registration

⁷⁵ H.B. 1924, 66th Leg., Reg. Sess. (Wash. 2019) (introduced by Representative Laurie Dolan (D-Olympia)); S.B. 5076, 66th Leg., Reg. Sess. (Wash. 2019) (introduced by Senator Patty Kuderer (D-Bellevue)).

⁷⁶ WASHINGTON STATE DEPARTMENT OF CORRECTIONS, FACT SHEET (Sep. 30, 2019), <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>.

⁷⁷ H.B. 1924, 66th Leg., Reg. Sess. (Wash. 2019).

⁷⁸ Senate Bill 5076 faced multiple Republican floor amendments, including the exclusion of those committing sex offenses (by Senator Randi Becker), S.B. 5076, 66th Leg., Reg. Sess. (Wash. 2019); the exclusion of those committing violent offenses against a judge, prosecutor, sheriff, or law enforcement officer (by Senator Jeff Holy), S.B. 5076, 66th Leg., Reg. Sess. (Wash. 2019); required audits of the Department of Corrections regarding early release of offenders (by Senator Steve O'Ban), S.B. 5076, 66th Leg., Reg. Sess. (Wash. 2019); and the exclusion of those committing serious violent offenses (by Senator Mike Padden), S.B. 5076, 66th Leg., Reg. Sess. (Wash. 2019).

⁷⁹ S.B. 6228, 66th Leg., Reg. Sess. (Wash. 2020); H.B. 2292, 66th Leg., Reg. Sess. (Wash. 2020).

upon release.⁸⁰ Approximately 77,000 Nevadans and 10,000 Coloradans are being re-enfranchised based on these new laws.⁸¹ On the west coast, both California and Oregon have already passed similar less restrictive voter enfranchisement laws.⁸² New Jersey just passed a bill to enfranchise 80,000 people upon their release from physical confinement, joining 16 other states and Washington D.C. to provide automatic voting right restoration upon release from prison.⁸³ This New Jersey law will go into effect in 2020. Two more states—Maine and Vermont—never took away the right to vote in the first place.⁸⁴ Even Kentucky through a December 2019 executive order automatically restored voting rights to about 140,000 people who had completed non-violent felony sentences.⁸⁵ By failing to amend its outdated laws, Washington has fallen well behind other states.

“The people that I speak on behalf of today are those who are the invisible members of society—those who are the voiceless members of society, who have needs, who have cries, who have issues that need to be expressed . . . and yet we remain voiceless when it comes to the ballot..”

— Cyril Walrond, Prisoner at Stafford Creek Correctional Center⁸⁶

⁸⁰ NEV. REV. STAT. § 176A.850; COLO. REV. STAT. § 1-1-104.

⁸¹ *Disenfranchisement News: Nevada & Colorado restore voting rights to people on community supervision*, THE SENTENCING PROJECT (July 1, 2019), <https://www.sentencingproject.org/news/7380/> [<https://perma.cc/U276-Q3FP>].

⁸² Chung, *supra* note 24.

⁸³ *One Week’s Work: New Jersey and Kentucky Restore Voting Rights to More than 200,000*, THE APPEAL POLITICAL REPORT (Dec. 18, 2019),

<https://theappeal.org/politicalreport/new-jersey-and-kentucky-restore-voting-rights/>; N.J. REV. STAT. § 19:4-1; Chung, *supra* note 24.

⁸⁴ *Supra* note 33.

⁸⁵ *Supra* note 83.

⁸⁶ Voting by Persons with Prior Felony Convictions: Work Session Before the S. Comm. on State Government, Tribal Relations and Elections (Oct. 22, 2019) (statement of Cyril Walrond, Black Prisoners Caucus President), *available at* <https://www.tvw.org/watch/?clientID=9375922947&eventID=2019101062>.

THE FUTURE OF PRISONER VOTING RIGHTS IN WASHINGTON

Washington should do more than merely clean up its current statutory framework to catch up to other states by providing permanent restoration of voting rights to those released from DOC incarceration. It should stop the antiquated practice of prisoner disenfranchisement entirely. Disenfranchisement is rooted in racism. Current disenfranchisement is not a strong deterrent to crime; it does not prevent future crimes and it is not rehabilitative. It ostracizes people with convictions from the political process rather than re-integrating them into society. Voting rights “are essential for successful reintegration into society after incarceration” and in fact new voters may be less likely to face re-arrest.⁸⁷ Indeed, “while the single behavioral act of casting a ballot is unlikely to be the sole factor that turns [people with felony convictions]’s lives around, the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.”⁸⁸

Allowing incarcerated people to vote improves re-entry, facilitates civic reintegration, and provides a greater sense of belonging and connection to the community. If people who are incarcerated and on probation have the ability to vote, they would become constituents to elected officials and have access to the electoral process. Lawmakers may spend time in prisons to meet with their constituents and learn about the issues most important to them. It could also increase lawmakers’ efforts to include the voices of incarcerated and formerly incarcerated constituents during testimony before House and Senate hearings. This could result in the passage of more meaningful and expansive criminal justice reform bills. And it would make government more representative of the entire population it serves. Some experts estimate that

⁸⁷ Michael Campagna, Cheyenne Foster, Stephanie Karas, Mary K. Stohr & Craig Hemmens, *Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration*, 4 J. L. & CRIM. JUST. 22, 22-29 (2016); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 195-97, 213 (2004).

⁸⁸ Uggen et al., *supra* note 87, at 213.

since 1970, at least seven senate elections and one presidential election would have turned out differently if people with felony convictions were allowed to vote.⁸⁹

There are approximately 19,000 people under DOC confinement in prisons, work release, and in-state rented beds in Washington.⁹⁰ And there are another approximately 20,000 Washington residents on community custody who are not allowed to vote.⁹¹ Washington can no longer ignore the growing recognition of the role of structural and institutional racism in the development of felony disenfranchisement laws and practices. Washington should join Maine and Vermont, the two states where the right to vote is never affected by conviction history. Several nations also allow incarcerated persons to vote, including a majority of European countries, Canada, and South Africa, and there is growing international support along these lines.⁹² Washington should amend its current legal limitations and allow for full voting access. Every Washingtonian should maintain their right to vote regardless of a criminal conviction. It is time for Washington to show leadership on this issue.

⁸⁹ See generally Christopher Uggin & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 789-92 (2002) (analyzing the effect of felon disenfranchisement provisions on major U.S. elections from 1970–2000).

⁹⁰ WASH. STATE DEPT. OF CORRECTIONS, FACT SHEET (Sep. 30, 2019), <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf>.

⁹¹ *Id.*

⁹² Emmett Sanders, Full Human Beings: An argument for incarcerated voter enfranchisement, PEOPLE'S POL. PROJECT (last visited April 4, 2020), <https://www.peoplespolicyproject.org/projects/prisoner-voting/> [<https://perma.cc/W69H-QU9J>]; see generally Penal Reform Int'l, *The rights of prisoners to vote: a global overview* (March 2016), https://cdn.penalreform.org/wp-content/uploads/2016/08/The-right-of-prisoners-to-vote_March-2016.pdf.