Giving Ex-Felons the Right to Vote

Scott M. Bennett*
Cite as 6 Cal. Crim. L. Rev. 1
Pincite using paragraph numbers, e.g. 6 Cal. Crim. L. Rev. 1, ¶11

I. Introduction

¶1 All but two states punish convicted felons by taking away their right to vote, either for a limited period or for the rest of their lives. As a result, 3.9 million adult Americans – about 2 percent of the voting-age population – have lost their right to participate in a fundamental part of the political process. The racial impact of these laws is even more staggering: 13 percent of black men in America cannot vote because of a felony conviction.

¶2 There are several possible grounds for a court challenge to felon disenfranchisement laws, including the 14th Amendment,[1] the Voting Rights Act,[2] and international law.[3] It also might be possible for Congress to permit convicts to vote in federal elections.[4] However, the most effective way to abolish felon disenfranchisement laws is probably to take the debate to state legislatures, which enacted the laws in the first place. This article maps out a strategy for persuading state legislators to give ex-felons the right to vote.[5]

¶3 Advocates for ex-felons must be able to explain the impact of felon disenfranchisement laws to state legislators and their constituents. Part I of this paper examines the nature of the problem. It gives a brief history of disenfranchisement laws and details their current impact upon the population in general and people of color in particular.

¶4 Conservative interest groups will arm state legislators with a number of arguments as to why ex-felons should not have the right to vote. Part II explains why there is no persuasive reason to exile ex-felons from the political process.

¶5 It is not enough for advocates to explain why felon disenfranchisement laws are bad; they also must be able to give legislators persuasive reasons to give ex-felons the right to vote. Part III examines the five most persuasive, non-racial arguments against disenfranchisement that appeared in the news media in states that recently relaxed restrictions on ex-felons' right to vote. It details the limits of these arguments and suggests ways for advocates to make them resonate on a deeper level with legislators and their constituents.

II. The Nature of the Problem

A. A Brief History of Felon Disenfranchisement Laws

¶6 Felon disenfranchisement laws are an unpleasant inheritance from the past. These laws existed as far back as ancient Greece.[6] Later in England, felon disenfranchisement was part of the process of "civil death," which stripped convicted felons of many civil rights.[7] The American Colonies imported felon disenfranchisement laws from Britain.[8] Disenfranchisement laws "gained new political salience at the end of the nineteenth century when disgruntled whites in a number of Southern states adopted them and other ostensibly race-neutral voting restrictions in an effort to exclude blacks from the vote."[9] Felon

disenfranchisement laws, therefore, exist in America today because of historical inertia or racial prejudice, and not because of any rational policy decision.

B. The Impact of Felon Disenfranchisement Laws

¶7 In a debate during the 2000 Democratic presidential primary campaign, candidates Al Gore and Bill Bradley revealed that they knew little about the current state of disenfranchisement laws.[10] Gore stated: "Now, the principle that convicted felons do not have a right to vote is an old one. It is well established…I believe in the established principle that felonies - certainly heinous crimes - should result in a disenfranchisement."[11] Gore seemed to favor permanent disenfranchisement, a harsh approach that is the law in only a handful of states. He also overlooked the startling racial disparities in disenfranchisement, which contrasts sharply with the commitment to African-Americans he claimed earlier in the debate, when he insisted that South Carolina remove the Confederate flag from its capitol building.

¶8 Bradley did slightly better. He acknowledged racial disparities in incarceration rates, then stated: "If someone is in on a nonviolent offense, and comes out and is able to go straight for two years, three years, I think that that person ought to be able to wipe his record clean and start the day anew. And that's what I would attempt to achieve." That approach is also harsher than the laws of most states: all but 13 states restore all felons' right to vote once they have completed their sentences. Neither candidate, moreover, seemed to understand that the states, and not the federal government, are the source of felon disenfranchisement laws.

¶9 If two candidates for the presidency, who presumably are well informed about the issues, need a lesson about disenfranchisement laws, it is clearly important for advocates who want to abolish these laws to arm themselves with the information necessary to educate state legislators and the public about the nature of the problem.

¶10 Nearly all states restrict the voting rights of convicted felons. Only two states permit convicted felons to vote while in prison.[12] Thirty-five states continue to disenfranchise felons after they leave prison, while they are still on parole. Thirteen states disenfranchise some ex-felons who have fully completed their sentences, including probation or parole. In eight states, those convicted of a felony permanently lose their right to vote. [13]

¶11 The number of people disenfranchised reveals the magnitude of the problem. It is important for advocates to focus on these numbers in order to show that this is not merely a problem confined to a small segment of the population. In 1998, The Sentencing Project and Human Rights Watch released a report that estimated the numerical impact of state disenfranchisement laws.[14] According to that report, 3.9 million Americans have currently or permanently lost their right to vote because of a felony conviction. That number is 2 percent of the voting-age population of the United States,[15] which is significant on its own but takes on a new importance in light of the 2000 presidential election: George Bush won by approximately 537 votes in Florida,[16] where at least 200,000 ex-felons could not vote.[17]

¶12 The numbers also show the impact of permanent disenfranchisement. In the United States, 1.4 million ex-felons cannot go to the polls, even though they have already completed their sentences. In five states, at least 4 percent of adults have permanently lost the right to vote.[18]

¶13 The raw number of people disenfranchised is shocking in a democracy. Even more appalling is the disparate racial impact of disenfranchisement. Of the 3.9 million disenfranchised, 1.4 million are black men – 13 percent of the black men in America.[19] That is a large portion of the black male population, and even larger in relation to the total number of black male voters. While 1.4 million black men are disenfranchised, only 4.6 million voted in the 1996 federal election.[20] If all those currently disenfranchised could vote, and exercised that right, the nationwide voting strength of black men would increase by 30 percent.

¶14 Statistics from individual states paint a startling picture of the effects of disenfranchisement laws upon racial minorities. In Alabama and Florida, 31 percent of all black men are permanently disenfranchised.[21] One in four black men are permanently disenfranchised in Iowa, Mississippi, Virginia and Wyoming.[22] And the situation could get worse: "Given current rates of incarceration, three in ten of the next generation of black men will be disenfranchised at some point in their lifetime. In states with the most restrictive voting laws, 40 percent of African American men are likely to be permanently disenfranchised."[23]

¶15 A disparate racial impact, by itself, might not be a problem. There is an argument that if minorities commit felonies at a higher rate than whites, then it logically follows that more minorities will be convicted, and therefore more will lose the right to vote.[24] Even if it is true that a higher crime rate among minorities is responsible for some of the disparities in incarceration, as "most criminal scholars agree,"[25] the alarming rate at which black men in America are losing their right to vote raises "serious questions about the fairness of our criminal justice policy."[26]

¶16 Professor David Cole suggests that reversing the statistics makes the problem clear.[27] Imagine the public reaction if 13 percent of white men in America could not vote because of a felony conviction, and as many as 31 percent of white males were disenfranchised in some states. There would be enormous public support to abolish disenfranchisement laws, and conservative and liberal politicians alike would make it a top priority. Regardless of the cause, the mere fact that black men in America are disenfranchised at a rate seven times the national average[28] indicates a serious problem that requires immediate attention.

III. The Arguments for Disenfranchising Felons are not Persuasive

¶17 Advocates must be able to disarm the arguments of the opposition. Fortunately, there is no persuasive reason to deprive all ex-felons of their right to vote. The U.S. Court of Appeals for the Ninth Circuit, in fact, has noted that it is difficult to identify any reason to disenfranchise felons. [29] This section examines the most common arguments in favor of disenfranchisement and their flaws.

A. Prevent Election-Related Offenses

¶18 One argument for disenfranchisement is that states should be able to keep ex-felons from voting in order to prevent election-related offenses.[30] According to this view, ex-felons have demonstrated a tendency to violate the law, and therefore are more likely to violate the laws that govern elections and voting.[31]

¶19 It is questionable whether this is a realistic concern. The fact that a person chose to commit one crime does not necessarily make him or her more likely to commit a different kind of crime in the future. Consider a concrete example: It would be hard to claim with a straight face that someone who cheated on tax returns would be more likely than anyone else to commit murder. There is simply no logical connection between tax evasion and murder. Likewise, there is no logical connection between most felonies and election-related crimes. As one commentator has written, "it is difficult to imagine why a car thief or drug dealer would have an interest in, or knowledge of, committing electoral fraud."[32] The election-fraud argument has some strength in the abstract, but seems absurd in the world of concrete examples. The best way for advocates to counter it is by using concrete examples such as the ones given above.

¶20 Even if it were true that ex-felons are more likely to commit election-related offenses, current disenfranchisement laws are clearly both over-inclusive and under-inclusive. Disenfranchisement laws are over-inclusive because many states disenfranchise all convicted felons, regardless whether their crimes have any logical relationship to elections or voting.[33] Disenfranchisement laws are also under-inclusive because many states that disenfranchise ex-felons do not take the right to vote away from those convicted of election-related offenses.[34] Blanket disenfranchisement provisions, therefore, are not an effective way to protect the electoral system. A better method would be to limit disenfranchisement to those convicted of offenses that have some logical relationship to voting and elections.[35]

B. Prevent Irresponsible People from Voting

¶21 Another argument for disenfranchisement is that, by committing a crime, ex-felons have shown that they are not responsible enough to vote.[36] This argument surfaced multiple times during the testimony regarding House Bill 906, which would have given ex-felons the right to vote in federal elections. Todd Gaziano of the Heritage Foundation stated: "Criminal disenfranchisement allows citizens to decide law enforcement issues without the dilution of voters who are deemed…to be less trustworthy."[37] Roger Clegg of the Center for Equal Opportunity echoed this concern: "We do not want people voting who are not trustworthy and loyal to our republic … Criminals are, in the aggregate, less likely to be trustworthy, good citizens."[38] This argument also has been popular in states that have recently expanded the voting rights of ex-felons. In Virginia, for example, one state senator argued: "Just because you have spent time in prison does not mean your judgment has changed."[39]

¶22 This argument is similar to the claim that ex-felons are more likely to commit election-related crimes. It is reasonable when phrased in abstract terms, but crumbles when it runs into concrete examples. Consider, for example, the convicted car thief or drug dealer. Stealing the car or selling the drugs was certainly a bad choice. There is no logical connection, however, between the choice to steal a car or sell drugs and the choices between competing candidates and issues that face voters in the voting booth.

¶23 Even if the decision to commit a crime reveals a fundamental inability to make a reasonable choice in the voting booth, that flaw is not necessarily permanent. Past behavior does not always indicate present potential.[40] One purpose of criminal punishment, in fact, is to teach offenders to make responsible choices in the future. Convicts who have served their time, therefore, should be able to make better decisions than in the past. Participating in the political process also might facilitate the rehabilitative process by instilling a sense of responsibility in ex-offenders. [41]

¶24 The best way to deal with this argument is to shift the debate to concrete terms. It is easy for legislators to claim that those who choose to commit crimes generally have made bad decisions. It is impossible, however, for those same legislators to produce a persuasive argument as to why the convicted drug dealer cannot go into the voting booth and make a reasonable choice between Al Gore and George W. Bush. As one commentator has stated, "No one has put forward a convincing reason explaining why [ex-felons] cannot make political decisions just as well or badly as the rest of us can."[42]

C. Prevent Harmful Changes to the Law

¶25 Another argument is that disenfranchisement is necessary to prevent harmful changes to the law. The concern is that ex-felons would alter the content or administration of the criminal law by electing officials who would be soft on crime.[43] The most effective form of this argument frames the issue in terms of the rights of non-felons:

"Given that many poor and minority communities are ravaged by crime, [enfranchisement] could have a perverse effect on the ability of law abiding citizens to reduce the deadly and debilitating crime in their communities…[I]t could be argued that those communities that currently have the highest level of state disenfranchisement are the most protected by those laws and would be the most adversely affected by the vote of "unreformed" convicts in their communities."[44]

¶25a When the Connecticut legislature was considering a bill that gave ex-felons the right to vote after release from prison, an opponent of the measure offered a less academic but more viscerally appealing version of this argument: "I don't want the convicted felons to determine our policies on criminal justice. That's my opinion, but one I think a lot of people share."[45]

¶26 The first problem with this argument is practical. There is no realistic possibility that allowing ex-felons to vote would alter the content or administration of most of the criminal law. Even if all convicted felons were firmly committed to using their votes to elect soft-on-crime judges, district attorneys and other officials, there is no practical way they could accomplish this. One commentator gives a particularly amusing illustration of the difficulties ex-felons would face:

"[L]et us imagine what the process might look like. Suppose…a group of burglars in the neighborhood wants to reduce the criminal penalties for burglary. First, they would have to field a candidate (either one of their own or someone else who is "pro-burglar") to run for state office. They would then have to run a rather effective campaign in this era of "get tough" politics in order to secure 51 percent of the vote for their candidate. Once elected, the new office-holder would have to convince a majority of the state legislature and the governor to support legislation to reduce penalties for burglary."[46]

¶26a The bottom line is that there is no realistic possibility that convicted felons could alter the content or administration of most aspects of the criminal law, even if they wanted to, because there is not enough support for those changes among the rest of the political community.

¶27 Giving ex-felons the right to vote, however, could lead to limited changes in the criminal law because it could shift the political balance within an area. There is widespread concern among Republicans that ex-felons are more likely to vote Democratic. The head of the New Mexico Republican Party, for example, expressed concern that if the legislature gave ex-felons the right to vote, "those eligible under the bill would register with the Democratic Party."[47] If ex-felons are more likely to vote Democratic, then giving them the right to vote could give shift control of some jurisdictions to Democrats. That political shift could lead to changes in the criminal law, but only with regard to issues on which Republicans and Democrats tend to disagree. There is no realistic chance, for example, that a Democratic legislature would decriminalize burglary. A more realistic possibility is that a Democratic legislature would scale back harsh drug laws, by decriminalizing simple possession or eliminating mandatory minimum sentences.[48] This is not a problem, but merely the democratic process in action. Giving ex-felons the right to vote would simply allow them to participate in the political process, and perhaps become part of a majority that would shape policy. That is what democracy is all about: giving all citizens an equal voice in the process that creates the laws that they must obey.

¶28 No matter how ex-felons would vote, disenfranchising them because of their opinions contradicts important democratic principles. A democracy is supposed to be a government of the people. This means that citizens determine the role of government, and perhaps the most important voice that the people have in this process is the right to vote.[49] Preventing ex-felons from voting distorts the democratic process because it excludes a group that might have a unique perspective. As one commentator has written, "[e]xcluding from the electorate those who have felt the sting of the criminal law obviously skews the politics of criminal justice toward one side of the debate."[50] Fencing out ex-felons, therefore, harms democracy. Beyond the normative appeal of this argument, commentators have suggested that disenfranchising felons because of how they might vote violates the Supreme Court's holding in Carrington v. Rash that " 'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[51]

D. Legitimate Punishment for Crime

¶29 The final argument for disenfranchisement is that it is part of legitimate punishment for crime.[52] If this is true, then disenfranchisement should be consistent with at least one of the

current justifications for punishment: retribution, deterrence, denunciation or rehabilitation. None of these justifications, however, supports disenfranchisement of all ex-felons.

1. Retribution

¶30 The idea behind retribution is that "a criminal owes a debt to society. It is fair to require payment of the debt, i.e., punishment equal or proportional to the debt owed (i.e. the crime committed)."[53] The most important aspect of retribution is that the penalty must be proportional to the debt. "Retribution exacts punishment commensurate to the offense."[54]

¶31 Disenfranchisement violates the principles of retribution. Many states strip the right to vote from all those convicted of any felony. This kind of blanket disenfranchisement might make sense if all felonies were equally serious. The crimes that trigger disenfranchisement, however, range in severity from murder to "possession of gambling records."[55] The problem, then, is that the same penalty applies to all those who commit a "felony," no matter how serious the actual crime.[56]

¶32 It is possible to adjust disenfranchisement laws in order to make them consistent with the principles of retribution, rather than simply eliminating them. To make the punishment fit the crime, legislators could limit disenfranchisement to those "whose actions were aimed at undermining the democratic character of the state,"[57] which might include those who commit treason or election-related crimes. Even with these offenders, though, permanent disenfranchise would be excessive in some circumstances.

2. Deterrence

¶33 According to the theory of deterrence, "punishment is meant to deter future misconduct."[58] Disenfranchisement, however, does not effectively deter convicted felons – or the rest of the community – from future criminal conduct. First, deterrence depends on the potential criminal performing a cost-benefit analysis and deciding that the costs of the criminal act would outweigh their benefits. Deterrents, however, are often ineffective because "potential offenders do not usually weigh the costs and benefits of their actions."[59]

¶34 Even if potential offenders attempt to weigh costs and benefits, the second problem is that few people know about disenfranchisement provisions. Therefore, "given its extremely low visibility, disenfranchisement cannot significantly deter lawbreakers."[60] The obvious response is that disenfranchisement might be an effective deterrent if legislatures devised a way to publicize it, but that argument fails because disenfranchisement is far less significant than the other forms of punishment that the criminal justice system imposes.

¶35 Disenfranchisement is only one of many punishments in store for those who break the law. Time in prison or jail is, of course, the most important of these punishments. If the possibility of a prison or jail term and the accompanying horrors is not enough to deter potential criminals, it is highly unlikely that the thought of disenfranchisement will be an effective deterrent.[61] Just imagine that interior monologue: "I think I'll go rob that convenience store. I can deal with prison. Oh wait – I would also lose my right to vote if convicted! Forget it. I'll go to a movie

instead." Disenfranchisement, on the other hand, would be a more effective deterrent in situations where there is no substantial probability of incarceration.

3. Denunciation

¶36 Denunciation is an increasingly popular theory of punishment. It is "probably the most frequently suggested alternative basis of punishment. According to this view, punishment is justified as a means of expressing society's condemnation of a crime."[62] Denunciation is the theory behind shaming penalties. According to Professor Dan Kahan, shaming penalties work by expressing the community's moral condemnation of a crime, which instills a sense of shame in the offender and lowers his or her social status.[63] Disenfranchisement could serve as a shaming penalty because it symbolizes a temporary or permanent exile from the political community, lowering the status of the disenfranchised person to that of a political outcast.

¶37 If shaming penalties work by instilling a sense of shame and lowering the offender's social status,[64] they can only be effective with those who care about the loss of social status and have some status to lose. Shaming through disenfranchisement, therefore, would work best with middle-class offenders, who tend to be concerned with their relatively precarious social status.[65] Professor Toni Massaro suggests that shaming penalties are most likely to be effective for crimes such as "drinking offenses, driving offenses, embezzlement, drug offenses, spouse abuse, child abuse, and tax fraud," which "are likely to be committed by middle-class people."[66]

¶38 One problem with disenfranchisement as a form of shaming penalty is that disenfranchisement is a hidden process, and is therefore "unlikely to impose any public stigma" because members of the community simply do not know when someone is disenfranchised because of a felony conviction.[67] Only 54.2 percent of the voting-age population in America, after all, took the time to vote in the 1996 presidential election.[68] Disenfranchisement, then, is obviously not the only reason why voting-age Americans do not exercise their right to vote.

¶39 Shaming penalties, however, do not have to be public in order to be effective.[69] As Professor James Whitman has written, "it is wrong to think of shame solely as public shame, solely as an emotion triggered by the gaze of others. Shame, as recent philosophical and psychological commentators have insisted, can also be triggered by the sound of an inner voice or the gaze of an inner eye."[70] Disenfranchisement is a potentially useful shaming penalty because it might trigger private shame every time election day comes around and an ex-offender cannot participate in the process.

¶40 Although disenfranchisement might be an effective shaming penalty for middle-class offenders, the loss of voting rights should only be temporary, in order to allow the offenders to reintegrate into their communities. Otherwise there is a risk of transforming offenders into permanent political exiles, giving them even less reason to care about their communities, making them more likely to commit criminal acts.[71] Once temporary disenfranchisement ends, moreover, it would be helpful to have some kind of re-integration ceremony to restore the offender's status as a member of the political community.[72]

¶41 Another problem with using disenfranchisement to shame middle-class offenders is that it will only be an effective deterrent when there is no significant probability of incarceration. As discussed above, if the threat of prison does not deter an offender, then the threat of disenfranchisement certainly will not.[73] Disenfranchisement, therefore, should only apply to people such as first-time offenders and those who commit relatively minor offenses. Not only is it less likely that these offenders will face incarceration, but they might be more susceptible to the symbolic message of a shaming penalty because it is a warning that they are "flirting with a deep, and deeply undesirable, status change" from the "respectable" to the "criminal segment" of society. [74]

¶42 In conclusion, although disenfranchisement might have some usefulness as a shaming penalty, there are several important conditions for it to be effective. First, it is probably only effective with middle-class offenders. Second, it should only be a temporary penalty. Finally, it is only appropriate where there is no significant probability of incarceration.

4. Rehabilitation

¶43 The final theory of punishment is rehabilitation. "[A]dvocates of this model prefer to use the correctional system to reform the wrongdoer rather than to secure compliance through fear or 'bad taste' of punishment."[75] The basic idea is to give criminals the tools to become law-abiding members of society.

¶44 Disenfranchisement certainly does not contribute to rehabilitation. Instead of helping ex-felons reintegrate into the community, disenfranchisement turns them into political exiles:

"Ultimately, exclusion from the political, economic and social spheres of life undermines the notion that offenders can ever be successfully rehabilitated. In conjunction with the exponential increase in the number and length of incarcerative sentences during the last two decades, collateral sentencing consequences have contributed to the exiling of ex-offenders within their country, even after expiration of their maximum sentences."[76]

¶44a Disenfranchisement gives ex-felons less reason to care about their communities, which could interfere with rehabilitation. Giving ex-felons the right to vote, on the other hand, would have just the opposite effect. Part III examines rehabilitation and other arguments available to persuade legislators to give ex-felons the right to vote.

¶45 In conclusion, there is no persuasive reason to prevent felons who have paid their debt to society from voting. Disenfranchisement is simply not an effective or appropriate means of criminal punishment. In the words of the lone Republican in the New Mexico Senate who voted to let ex-felons vote, "If we want to punish criminals more, put them in jail longer."[77]

IV. Arguments to Persuade State Legislators to Give Ex-Felons the Right to Vote

¶46 The previous section demonstrates how advocates can counter any argument in favor of the disenfranchisement of ex-felons. The next question is what arguments are likely to persuade legislators to give ex-felons the right to vote.

¶47 In the past two years, several states have expanded the voting rights of ex-felons. These legislative changes sparked lively debates in the news media of these states, with legislators, commentators and ordinary citizens expressing their opinions about felon disenfranchisement. These media accounts provide an excellent indication of what arguments might have been effective.

¶48 The arguments against disenfranchisement fall into two main categories: racial and non-racial. As discussed in Part I, the statistics on racial disparities in disenfranchisement are startling. These disparities alone are probably enough to persuade liberals and people of color that disenfranchisement laws are fundamentally unfair. It is not necessary for advocates to use their resources to reach these groups. Instead, advocates must work to persuade conservative whites.

¶49 There is evidence that "[b]eliefs regarding crime and punishment are highly correlated with…racial attitudes."[78] Specifically, those who support a harshly punitive approach to criminal justice issues tend to be hostile toward any measure that would benefit racial minorities.[79] Race-based arguments against disenfranchisement, therefore, are not likely to persuade some members of the target audience, and might even alienate them. The solution, then, is for advocates to maintain an arsenal of non-racial arguments.[80]

¶50 The numbers alone might be enough to persuade a significant number of moderates and conservatives that disenfranchisement laws are fundamentally unfair. As Professor David Cole suggests,[81] advocates can reveal the fundamental problem by asking legislators and citizens to consider the statistics in reverse: Would they favor disenfranchisement if 13 percent of white men nationwide – and as many as 31 percent in some states – could not vote because of a felony conviction?

¶51 Although race-based arguments might be effective in some situations, advocates still must be able to produce non-racial arguments in order to reach those who are not sympathetic for whatever reason, whether racial hostility or merely the belief that a disparate racial impact alone is not a problem.[82] This section examines the five most persuasive, non-racial arguments that appeared frequently in the media debates surrounding changes to state disenfranchisement laws, and suggests ways to improve these arguments in order to make them resonate on a deeper level with legislators and their constituents.

¶52 It is important to understand the political contexts in which these arguments appeared. In Connecticut, convicted felons previously lost the right to vote during incarceration, probation and parole. In May 2001, the legislature passed a bill that restored the right to vote upon release from prison.[83] The arguments in Connecticut, therefore, focused on whether those on probation or parole should have the right to vote. As for the political dynamics in the legislature, the Senate had 21 Democrats and 15 Republicans.[84] The bill passed 22-14, with three Republicans joining the majority.[85] In the House, which also had a Democratic majority,[86]

the bill passed 80-63.[87] One newspaper columnist suggested that one of the reasons the bill passed was because of the support of "a coalition of more than 40 community, church and civil rights organizations."[88] This highlights the fact that in all states – even those with Democratic majorities in the legislature – it is important for advocates to gather coalitions of sympathetic organizations. These organizations can shoulder some of the burden of educating legislators and the public about the impact of disenfranchisement laws, and their involvement demonstrates to legislators that there is public support for giving ex-felons the right to vote.

¶53 In New Mexico, a felony conviction previously led to permanent disenfranchisement. In March 2001, the legislature softened the provision so that felons can now vote once they complete their entire sentences, including probation or parole.[89] As for the political situation, the Senate was significantly Democratic; the bill passed 25-17, with only one Republican voting for it.[90] The House had 42 Democrats and 28 Republicans; the bill passed 39-20.[91]

¶54 Finally, in Virginia, the legislature altered the procedure that ex-felons must follow to regain the right to vote. Virginia permanently disenfranchises convicted felons. The only way to regain the right to vote is through a pardon by the governor,[92] which is not available until 5 years after felons complete their sentences. In 2000, the legislature modified the process so that, after 5 years, some ex-felons may apply to a circuit court to restore their right to vote. If the court recommends that the governor restore the applicant's right to vote, the governor must decide within 90 days whether to grant the pardon.[93] The main advantage for ex-felons is the time limit; in the past, many ex-felons applied to the governor for a pardon and never received a response.[94]

¶55 The change in Virginia is notable because it demonstrates that Republicans might be willing to extend greater rights to ex-felons. The legislature that passed the bill had a Republican majority,[95] and the governor who signed the bill was also Republican.[96]

A. Retribution: Ex-Felons Have Already "Paid Their Debt" to Society

¶56 The first argument – and by far the most popular one in the media debates – is that states should not continue to punish felons after they have "paid their debt to society." In academic terms, this argument expresses the idea of the limiting function of retribution – that is, the punishment must be not be more severe than the crime.[97]

¶57 In New Mexico, both Democrats and Republicans voiced this argument. Senator Richard Romero stated: "I personally think once you have done your time, you should have the right to vote."[98] John Dendahl, chairman of the New Mexico Republican Party, stated: "Fair is fair. When people have served their time, all of it, it very hard for me intellectually to say that person should not be restored to full citizenship."[99] In Virginia, this argument appeared in editorials[100] and newspaper opinion pieces.[101] The Rev. Jesse Jackson might have phrased the argument most effectively: "once you serve your sentence to society,you should have your vote restored. If you don't, it's a lifetime sentence."[102]

¶58 This argument appeals to a basic sense that punishment is only fair if it is proportional. The argument, therefore, is most appealing when disenfranchisement seems clearly

disproportionate to the crime, as with first-time offenders and those who committed relatively minor offenses. Advocates should use examples of real people who committed one burglary, or possessed drugs for personal use, and now cannot vote. The less serious the crime, the more disproportionate and unfair disenfranchisement seems.

¶59 There is a limit to the effectiveness of this argument. It is extremely effective against permanent disenfranchisement, which extends far beyond the termination of criminal punishment in the form of imprisonment, probation or parole. The argument, however, is not as strong against disenfranchisement during probation or parole when, arguably, people are still paying their debt to society. That limitation explains why this argument appeared only once during the media debate in Connecticut, where the legislature extended the vote to those on probation and parole.[103]

B. Rehabilitation: Teach Ex-Felons to Make Responsible Choices

¶60 The second argument is that giving ex-felons the right to vote promotes rehabilitation by instilling a sense of responsibility. This taps into one of the most common arguments in favor of disenfranchisement – that felons demonstrated a fundamental lack of responsibility when they freely chose to commit a criminal act. If irresponsibility led to crime, then the state needs to remedy this problem in order to prevent future crimes. The state, in other words, must "foster a sense of obligation and responsibility among" ex-felons.[104] One way to do this is to allow ex-felons to participate in the electoral process. Giving ex-felons the right to vote would give them a stake in their communities, a sense of responsibility to others, and "persons who believe they have a stake in the welfare of their community are less likely to engage in illegal activities that will bring harm to individuals."[105]

¶61 In Connecticut, Rep. Kenneth P. Green, the chief sponsor of the bill that gave ex-felons the right to vote upon release from prison, took up this argument as his main theme. "I think people who are trying to re-acclimate to the community can be helped if they're allowed to have the civic responsibility of voting," said Green.[106] In another statement, Green made the point more explicitly: "When you're out of jail, we're trying to re-integrate and rehabilitate you in the community. Part of that is we want you to make healthy choices."[107]

¶62 This argument is likely to resonate with voters because of the deeply ingrained American belief in individualism, which is the idea that people freely choose their actions, and therefore must be responsible for what they have done.[108] In the words of a Republican state representative in Connecticut, "It's a choice an individual makes when he walks into a bank with a gun and decides to rob it."[109] The rehabilitation argument appeals to this sense of individualism because it does not try to shift the blame for criminal activity away from the individual. Instead, it acknowledges that people are fully responsible for their choices, and simply reasons that giving ex-felons the right to vote helps them make responsible choices that do not harm others.

C. Crime Reduction: Voting means rehabilitation means safer streets

¶63 The third argument is that giving ex-felons the right to vote will help reduce the crime rate by contributing to the rehabilitation of ex-felons. This argument connects to the previous one, that the right to vote helps teach ex-felons to make responsible choices. The difference between the two arguments is that the responsible-choices argument focuses on ex-felons, while the crime-reduction argument focuses on how enfranchisement would benefit the entire community.

¶64 The key to this argument is to avoid overstating it. Advocates will lose all credibility if they claim there is a simple and direct connection between felon enfranchisement and a lower crime rate. Any conscious opponent will point out how absurd it is to claim that having the right to vote would instantly reform a felon. Advocates should instead emphasize that the right to vote contributes to the process of rehabilitation; it is not a panacea or even likely to be effective by itself.

¶65 This argument has appeared often in the debates regarding disenfranchisement. A Connecticut representative said she supported enfranchisement of ex-felons in order to reconnect them to society "so they do not go back to a life of crime."[110] A New Mexico civil rights lawyer argued: "When someone gets out of prison, we want them to be involved enough in the system and care about the community."[111] Crime-prevention was also a common theme in editorials by the Virginian-Pilot: "The more the state does to help steer ex-convicts into productive, contributing lives, the fewer who will end up committing crimes and returning to prison."[112] Or, more bluntly, "Society wins whenever wrongdoers abandon wrongdoing."[113]

¶66 Crime is an important issue. In 1994, 29 percent of Americans said that crime was the most important problem facing their communities.[114] By 2001, that number had dipped to 12 percent, but respondents still viewed crime as the second most important issue (education was first).[115] The crime-reduction argument appeals both to citizens and to legislators. Citizens feel safer in their homes and communities, and legislators get to take credit for a lower crime rate.

¶67 Opponents might claim that the best way to reduce crime is not to expand the rights of ex-felons, but to punish them more harshly. The response is simple: If the threat of a prison sentence does not deter a potential criminal, the threat of losing the right to vote will certainly not be a deterrent. The right to vote is unique in that it has little value as a deterrent, but significant potential as a rehabilitative measure.

D. Cost: Eliminate Bureaucracy and Let Taxpayers Keep Their Money

¶68 The fourth argument is that giving ex-felons the right to vote reduces bureaucracy and the cost of government. Giving felons the right to vote eliminates levels of bureaucracy, which appeals to the conservative desire for more limited government. Eliminating bureaucracy also saves tax dollars, an idea that should have nearly universal appeal.[116]

¶69 Two Connecticut legislators made this argument in support of a bill that gave all felons the right to vote upon release from prison: "The end-of-incarceration standard would be much more rational and administratively simpler."[117] The old process in Connecticut illustrates how

disenfranchisement can consume a significant amount of government resources and tax dollars. The process had three steps. First, the judicial branch notified the Secretary of State each month of every felony conviction in Connecticut courts. Second, the Secretary of State notified voting registrars in each of the state's 169 municipalities. Third, felons who completed their sentences had to prove their eligibility in order to get back on the voter lists.[118] Although the process of disenfranchisement is not necessarily the same in every state, it will always require some amount of bureaucracy, and consume some amount of tax dollars.

¶70 The simplest solution is to allow all convicted felons to vote, even while incarcerated. Under this system, it is not necessary for any agency to devote resources to determining whether any particular voter is ineligible because of a felony conviction. There are, however, two problems with this approach. The first problem is the expense. States would have to bear the expense of creating and maintaining a system to allow inmates to vote. The second problem is politics. Only two states currently allow inmates to vote, which suggests that allowing inmates to vote is not politically feasible.

¶71 The next best solution is to restore voting rights automatically once people leave prison. This system is relatively simple because there is no need for machinery to exclude ex-felons from polling places. Any person who shows up obviously is not incarcerated, and therefore is qualified to vote as long as he or she is a qualified voter. The only difficulty with this system is the need to prevent inmates from voting with absentee ballots.

¶72 Although the cost-saving argument is strong, it cannot stand on its own. Any smart opponent will point out that the fact that something costs money is not a reason to abandon it. Maintaining prisons or the military, for example, is enormously expensive, yet few people would suggest abolishing them. Advocates, therefore, must connect this argument with two other ideas. First, disenfranchisement is a waste of taxpayer money because there is no persuasive reason for it, as Part II demonstrated. Second, disenfranchisement is wasteful because there are so many reasons to give felons the right to vote, as this section demonstrates.

E. No Taxation Without Representation: Ex-Felons Should Have Both the Rights and Responsibilities of Citizenship

¶73 The fifth and final argument is that disenfranchisement is fundamentally unfair to those ex-felons who become productive members of the community. It is essentially "taxation without representation" because those ex-felons who leave prison, learn to make responsible choices and fulfill their obligations as citizens have no voice in a fundamental part of the political process.

¶74 Advocates should work to locate people who make good examples. This includes people who have turned their lives around and fulfilled their responsibilities as citizens, which might include working and paying taxes, raising children, performing community service, or being involved in religious or other community activities.

¶75 As one Connecticut newspaper columnist wrote, it is fundamentally unfair when ex-felons "are out on the street, working and paying taxes, but disqualified from exercising the most basic

of civil rights."[119] In Virginia, Jesse Jackson made the point explicit when he called permanent disenfranchisement "taxation without representation."[120]

¶76 The limit to this argument is that it does not apply to those currently incarcerated, who do not bear the responsibilities of citizenship because they cannot contribute to their families or communities.

F. An Important Part of All Arguments: Show, Don't Tell

¶77 There is one suggestion that is common to all these arguments. Journalists and writers have a saying: "Show, don't tell." In political arguments as well as news stories, specific details have more impact than sweeping abstractions. That means that advocates must put a face on the issue. Two Virginians on opposite sides of the disenfranchisement issue offered excellent examples of this approach. A Republican Senator stated: "I don't want to go back home to the PTA and say someone who sold drugs to kids on the schoolyard will now have an opportunity to participate as a registered voter."[121] An opponent of disenfranchisement offered himself as an example. He was a 75-year-old man, a veteran of World War II, who was convicted of making a false statement to the government during a business deal. After his release, he was active in Republican politics despite the fact that he could not vote.[122]

¶78 There are two important reasons for advocates to use personal narratives to support their arguments. First, it is easier for legislators and their constituents to relate to actual people rather than abstract principles. Second, because journalists prefer concrete stories to abstract analysis, advocates who can point to actual people as examples are more likely to get their arguments into the news. In short, advocates should show the man who was convicted of a simple drug possession when he was an irresponsible 18 year old and now cannot vote even though he works, pays taxes, and attends church every week with his wife and two children. That concrete example is much more effective than merely arguing to legislators and their constituents about the unconscionable injustice of disenfranchisement.

G. The Two Most Important Political Obstacles to a Campaign to Give Ex-Felons the Right to Vote

¶79 There are two political obstacles that might stand in the way of a campaign to give ex-felons the right to vote: the political leanings of ex-felons and the notion that members of the public will only support "tough on crime" policies.

¶80 Republicans tend to be concerned that ex-felons will vote Democratic. The head of the New Mexico Republican Party, for example, "initially considered opposing" the bill that gave felons the vote once they complete their sentences. He was "worried that those eligible under the bill would register with the Democratic Party."[123] This might be the biggest obstacle that stands between ex-felons and the right to vote. Advocates cannot ignore this difficulty, but there are two ways to minimize it.

¶81 The first strategy is to focus on the appropriate audiences. Legislatures with Democratic majorities are more likely to give the vote to ex-felons, so advocates should focus on these

legislatures first. Once the tide turns and there is a trend among states toward enfranchisement, advocates can point to that trend in order to strengthen their arguments to more conservative legislatures. The second strategy is to focus on the arguments that are most likely to appeal to conservative legislators. Conservatives – like all politicians – want to reduce the crime rate. Advocates should also use the rehabilitation and cost arguments, because individualism and the desire for a smaller government are important conservative themes. Finally, advocates should try to find examples of disenfranchised felons who might be more willing to vote Republican, such as those convicted of white-collar offenses.

¶82 The second political obstacle is the belief among politicians that voters will only support criminal justice policies that are "tough on crime," and will not support policies aimed at rehabilitation. During the debate in Virginia, for example, one Republican senator expressed concern that he would infuriate his constituents if he supported a bill that would expand the rights of convicted felons.[124] Although many politicians seem to share the belief that the public will only support "tough on crime" policies, this might not be accurate. According to criminologist Katherine Beckett:

While there is evidence that public opinion has shifted in this direction, popular attitudes regarding crime and punishment have historically been – and continue to be – more complex and ambiguous than this view allows. The belief that criminals should be severely punished, for example, coexists with widespread support for policies aimed at rehabilitation.[125]

¶83 There is hard evidence behind the claim that the public will support measures aimed at rehabilitation. According to a 1994 survey, 64 percent of Americans believe that rehabilitation is possible for most or some violent offenders; only 6 percent believe that rehabilitation is not possible for any violent offender.[126] A Gallup poll taken in 2000 asked Americans which was the best way to reduce crime: attack the social and economic problems that lead to crime, or deter crime through more prisons, police and judges. Sixty-eight percent said they favored spending more to attack the social and economic root causes of crime.[127] The poll gives the responses to the same question since 1989. Every year, a majority favored spending more to attack the root causes of crime.

¶84 Although the Gallup poll does not directly address support for rehabilitation, the position that crime is a result of "environmental and social conditions" is "typically associated with support for prevention and rehabilitation rather than punishment."[128] Advocates, therefore, should use these and similar statistics to inform legislators that there is significant public support for measures aimed at rehabilitation, which means that legislators would not have to risk losing an election by supporting a measure to give ex-felons the right to vote.

VII. Conclusion

¶85 Felon disenfranchisement laws are embarrassing relics of the past. Because of these laws, 3.9 million Americans have lost their right to vote, either permanently or temporarily. More than one-third of the disenfranchised – 1.4 million – are black men. That means that 13 percent of black men in America cannot vote because of a felony conviction. In some states, up to 31 percent of black men are permanently disenfranchised.

¶86 There is no persuasive reason to disenfranchise felons, particularly those who have completed their sentences. Disenfranchisement is not necessary to prevent harmful changes to the law or election-related crimes, or to keep irresponsible people from voting. Disenfranchisement of all ex-felons, moreover, is not consistent with any theory of criminal punishment, which means it does nothing to prevent crime and keep the public safe. There is, therefore, a startling imbalance between the costs and benefits of disenfranchisement: the cost is unacceptably high in a democracy, because it prevents 3.9 million Americans from participating in the political process, and yet disenfranchisement produces no benefit. Legislators cannot even claim that public opinion requires them to appear tough on crime and maintain disenfranchisement; there is significant evidence that the public will support rehabilitative policies.

¶87 The disenfranchisement debates that have raged recently in several states are a valuable resource for advocates because they reveal non-racial arguments that could persuade state legislators to give ex-felons the right to vote. First, disenfranchisement runs contrary to the popular idea that ex-felons have "paid their debt to society." Second, the right to vote would help teach ex-felons to make responsible choices. Third, giving felons the right to vote would help reduce crime, because communities are safer when wrongdoers give up wrongdoing. Fourth, disenfranchisement wastes valuable tax dollars because it requires a bureaucracy to keep ex-felons from voting. Fifth, there should be no "taxation without representation." With all these arguments, advocates must avoid abstract discussions of policy, and instead tell the stories of real people who suffer because of disenfranchisement laws.

¶88 It will be difficult, in this age of punitive politics, to persuade legislators to give greater rights to ex-felons. But advocates must persevere. Giving ex-felons the right to vote would help them turn their lives around, would make communities safer, and is simply the right thing to do in a democracy.

* J.D. Candidate, University of California, Berkeley School of Law (Boalt Hall), 2003.

[1] The 14th Amendment generally does not prohibit states from disenfranchising felons. Richardson v. Ramirez, 418 U.S. 24 (1974). However, the 14th Amendment does prohibit disenfranchisement laws with a racially discriminatory intent and effect. Hunter v. Underwood, 471 U.S. 222 (1985). It would be difficult to challenge the laws currently in effect, because they "contain no such direct racial intent." Civil Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the House Subcomm. on the Const. of the House Comm. on the Judiciary, 106th Cong. (1999) (testimony of Marc Mauer), available at www.house.gov/judiciary/maue1021.htm.

[2] See Andrew L. Shapiro, Note, Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy, 103 Yale L.J. 537 (1993).

[3] See Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 Stan. L. & Pol'y Rev. 153, 159-60 (1999).

[4] States have the authority to determine voter eligibility requirements for federal as well as state elections. SeeU.S. Const. art. I, § 2. cl. 1 (states determine voter qualifications for House elections); art. II, § 1, cl. 2 (states appoint presidential electors); amend. XVII (states determine voter qualifications for Senate elections). In 1999, the House Judiciary Committee's Subcommittee on the Constitution considered House Bill 906, which would have given all felons the right to vote in federal elections after they completed their sentences. Several legal experts who testified regarding the bill questioned whether Congress had the authority to enact it. Civil Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 106th Cong. (1999) (testimony of Roger Clegg, Viet Dinh and Todd Gaziano), available at www.house.gov/judiciary/con1021.htm.

[5] Many of the arguments for giving ex-felons the right to vote apply with equal force to people currently in prison or jail. It would be much more difficult, however, to convince state legislators – and their constituents – that inmates should be able to vote. This paper, therefore, focuses on the more politically feasible option: giving the vote to those no longer incarcerated, including those on probation or parole.

[6] Note, The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box," 102 Harv. L. Rev. 1300, 1301 (1989).

[7] Demleitner, supra note 3, at 160.

[8]The Sentencing Project & Human Rights Watch, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States (1998) [hereinafter Losing the Vote], available at www.sentencingproject.org/pubs/hrwfvr.htm.

[9] Id.

[10] Excerpts from Jan. 17 Democratic Debate, Nando Times, Jan. 18, 2001, at http://archive.nandotimes.com/

[11] Gore's statement is painfully ironic. If ex-felons had been allowed to vote in the 2000 presidential election, and had exercised that right, Gore probably would have defeated George W. Bush. See infra text accompanying notes 16-17.

[12] Maine and Vermont currently allow prisoners to vote. For a state-by-state breakdown of voting restrictions, see the Appendix.

[13] The eight states that permanently disenfranchise convicted felons are Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia and Wyoming. Two other states – Arizona and Maryland – permanently disenfranchise those convicted of a second felony. Tennessee permanently disenfranchises those convicted before July 1, 1986, and those convicted after that date of first-degree murder, aggravated rape, treason or voter fraud. Washington permanently disenfranchises those convicted before July 1, 1984. Finally, Delaware prevents convicted felons from voting until 5 years after they complete their sentences.

[14]Losing the Vote, supra note 8. Several states have changed their disenfranchisement laws since the publication of this report in 1998. Still, this report provides the most recent estimate of the numbers of disenfranchised felons.

[15] Id.

[16] According to the Federal Election Commission, George W. Bush received 2,912,790 votes in Florida, while Al Gore received 2,912,253. Federal Election Commission, 2000 Official Presidential General Election Results (2001), available at www.fec.gov/pubrec/fe2000/2000presge.htm#FL.

[17]The Sentencing Project, Felony Disenfranchisement Laws in the United States (2001) available at www.sentencingproject.org/brief/brief.htm.

[18] The states are Alabama (7.5 percent of the adult population), Florida (5.9 percent), Mississippi (7.4 percent), Virginia (5.3 percent) and Wyoming (4.1 percent). Losing the Vote, supra note 8.

[19] Id.

[20]Lynne M. Casper & Loretta E. Bass, Voting and Registration in the Election of November 1996 (U.S. Dep't of Commerce, Bureau of the Census, Economics and Statistics Administration, No. P-20-504, 1998).

[21]Losing the Vote, supra note 8.

[22] The precise rates of permanent disenfranchisement among black men are: Iowa (26.5 percent), Mississippi (28.6 percent), Virginia (25 percent), and Wyoming (27.7 percent). Losing the Vote, supra note 8. In 1998, 24.1 percent of black men were permanently disenfranchised in New Mexico. In March 2001, however, the New Mexico legislature gave ex-felons the right to vote once their sentences are complete. SeeN.M. Stat. Ann. § 31-13-1(A) (Michie 2001).

[23]Losing the Vote, supra note 8.

[24] See, e.g., Roger Clegg, Felon Voting, Legal Times, Sept. 18, 2000, at 70 ("The fact that these statutes disproportionately disenfranchise men and the young is not cited as a reason for changing them, and neither does it matter that some racial or ethnic groups at this or that point in time may be more affected than others.").

[25] David Cole, Two Systems of Criminal Justice, inThe Politics of Law: A Progressive Critique 411 (David Kairys ed., 3d ed. 1998). However, there is also significant evidence of widespread racial bias in the criminal justice system. See Comment, Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look, 142 U. Pa. L. Rev. 1145, 1155 (1994); Ruth Marcus, Racial Bias Widely Seen in Criminal Justice System: Research Often Supports Black Perceptions, Wash. Post, May 12, 1992, at A4.

[26] Cole, supra note 25, at 426.

[27] Id. at 426-27. Professor Cole deals specifically with disparate rates of incarceration.

[28]Losing the Vote, supra note 8.

[29] Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) ("Courts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of a crime.").

[30] See, e.g., Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) ("A State may…legitimately be concerned that persons convicted of certain types of crimes may have a greater tendency to commit election offenses.").

[31] Note, supra note 6, at 1303.

[32] Marc Mauer, Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration, 12 Fed. Sent. R. 248, 250 (Mar./Apr. 2000).

[33] See, e.g.,Alaska Stat. §§ 15.05.030(a)(2000) (disenfranchisement for a "felony involving moral turpitude"), 15.60.010(7)(2000) (examples of felonies involving moral turpitude; none relate to elections or voting). For an example of the argument that many state statutes are over-inclusive, see Note, supra note 6, at 1303.

[34] See, e.g.,Miss. Const. art. 12, § 241 (disenfranchising only those convicted of "murder, rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy"). For an example of the argument that many state statutes are under-inclusive, see Note, supra note 6, at 1303.

[35] At least one state already recognizes the distinction between those convicted of election-related offenses and those convicted of unrelated felonies. In Missouri, all convicted felons lose their right to vote while in prison or on probation. Mo. Rev. Stat. §§ 115.133(2),

561.026(1)(1999). Only those convicted of election offenses, however, permanently lose their right to vote. Mo. Rev. Stat. § 561.026(2)(1999).

[36] See, e.g., Shepherd v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (stating that, by committing crimes, felons "have raised questions about their ability to vote responsibly.").

[37] Civil Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 106th Cong. (1999) (testimony of Todd F. Gaziano).

[38] Civil Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 106th Cong. (1999) (testimony of Roger Clegg).

[39] Jennifer Peter & Holly A. Heyser, Minority Lawmakers Unveil Several Reform Bills, The Virginian-Pilot, Feb. 2, 2000, at B4.

[40] Note, supra note 6, at 1309.

[41] See infra Part III(B).

[42] Daniel R. Ortiz, Pursuing a Perfect Politics: The Allure and Failure of Process Theory, 77 Va. L. Rev. 721, 731 (1991).

[43] See, e.g., Green v. Bd. of Elections, 380 F.2d 445, 451 (2d Cir. 1967) ("it can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases."); Nora V. Demleitner, Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative, 84 Minn. L. Rev. 753, 772 (2000) ("The claim that ex-offenders vote in an anti-democratic manner is largely based on the fear that they would elect pro-offender judges and district attorneys.")

[44] Civil Participation and Rehabilitation Act of 1999: Hearing on H.R. 906 Before the Subcomm. on the Const. of the House Comm. on the Judiciary, 106th Cong. (1999) (testimony of Todd F. Gaziano).

[45] John Springer, Encouraging Former Felons to Vote, The Hartford Courant, Sept. 21, 2000, at B9.

[46] Mauer, supra note 32.

[47] Donovan Kabalka, Felons Might Be Able to Vote Again, Albuquerque Trib., June 29, 2001, at A2.

[48] Mauer, supra note 32 (suggesting that those convicted of low-level drug offenses might combine with their neighbors in order to elect "candidates who support scaling back harsh drug laws").

[49] Demleitner, supra note 43, at 772 ("A hallmark of democracy is that the state is constantly re-inventing itself through the input of voters.").

[50] George P. Fletcher, Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia, 46 UCLA L. Rev. 1895, 1906 (1999). See also Mauer, supra note 32 ("Is there a policy rationale that justifies excluding persons who have experienced the impact of [harsh drug laws] from deliberating about their wisdom?").

[51] 380 U.S. 89, 94 (1965). For an example of this argument, see Note, supra note 6, at 1309.

[52] Disenfranchisement of Former Criminal Offenders, 88 Harv. L. Rev. 101, 111 (1974).

[53]Joshua Dressler, Understanding Criminal Law § 2.03[C][2] at 13 (2d ed. 1995).

[54] Demleitner, supra note 43, at 789.

[55]Alaska Stat. § 15.60.010(7) (2000).

[56] Note, supra note 6, at 1307 ("permanent expulsion from the political community is imposed equally on all felons without regard for the relative severity of their crimes ").

[57] Demleitner, supra note 43, at 790.

[58] Dressler, supra note 53, § 2.03[B][2] at 10.

[59] Demleitner, supra note 3, at 161.

[60] Note, supra note 6, at 1307.

[61] Demleitner, supra note 3, at 161.

[62] Dressler, supra note 53, § 2.03[D] at 13.

[63] Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591, 635-37 (1996).

[64] Id.

[65] Toni M. Massaro, Shame, Culture, and American Criminal Law, 89 Mich. L. Rev. 1880, 1933-35 (1991). See also Kahan, supra note 63, at 644 ("It is plausible, though, to think that shaming will be less effective for offenses typically committed by the poor and disaffected than

for offenses more likely to be committed by middle class or affluent individuals, for whom the cost of stigma is likely to be the largest.").

[66] Massaro, supra note 65, at 1934.

[67] Demleitner, supra note 43, at 786-87 (emphasis added).

[68] Casper & Bass, supra note 20, at 1 (Table 1).

[69] Theorists disagree as to whether a punishment without an audience can actually cause "shame." Compare James Q. Whitman, What is Wrong with Inflicting Shaming Sactions?, 107 Yale L.J. 1055, 1065-66 (1998) (shame can be a private emotion) with Stephen P. Garvey, Can Shaming Punishments Educate?, 65 U. Chi. L. Rev. 733 (1998) (shame requires an audience; private penalties actually create guilt). The label on the emotion is not important here; the result is. Disenfranchisement creates an unpleasant emotion – perhaps guilt, perhaps shame – that might deter future criminal activity.

[70] Whitman, supra note 69, at 1065-66.

[71] Both opponents and advocates of shaming penalties have recognized the danger that a permanent loss of status could lead to recidivism. See Massaro, supra note 65, at 1919; Kahan, supra note 63, at 644.

[72] Kahan, supra note 63, at 645 (suggesting re-integration ceremonies as a way to ameliorate stigma). This would not have to be a public ceremony, which would be objectionable because of the expense. Disenfranchisement is a private punishment, so the re-integration ceremony could also be private – perhaps something as inexpensive and simple as a formal letter informing the offender that he or she can now vote.

[73] Demleitner, supra note 3, at 161.

[74] Whitman, supra note 69, at 1067-68.

[75] Dressler, supra note 53, § 2.03[B][2].

[76] Demleitner, supra note 3, at 153.

[77] Steve Terrell, Senate OKs Voting for Reformed Felons, The Santa Fe New Mexican, Mar. 3, 2001, at A7.

[78]Katherine Beckett, Making Crime Pay 84 (1997).

[79] Id.

[80] Campaigns against disenfranchisement should not take for granted the support of liberals and people of color. Community and public-policy groups such as the NAACP and ACLU can

mobilize support among these groups in a low-profile manner, without voicing the kind of race-based arguments in the news media that might alienate conservative whites.

[81] Cole, supra note 25, at 426.

[82] E.g., Clegg, supra note 24.

[83] SeeConn. Gen. Stat. § 9-45 (2001).

[84] Lisa Chedekel, House Approves Bill Restoring Voting Rights to Felons, The Hartford Courant, April 12, 2001, at A10.

[85] Lisa Chedekel, State Felons Move Closer to Voting Booth, The Hartford Courant, Apr. 26, 2001, at A1.

[86] Id. (describing "Democratic majorities" in the legislature) (emphasis added).

[87] Chedekel, supra note 85.

[88] Stan Simpson, Out of Jail, But Barred From Voting, The Hartford Courant, Nov. 13, 2000, at A3.

[89] See N.M. Stat. Ann. § 31-13-1.

[90] Terrell, supra note 77.

[91] New Mexico Legislature, at legis.state.nm.us (last visited Dec. 14, 2001).

[92]Va. Const. art. II, § 1 (2000).

[93]Va. Code Ann. § 53.1-231.2 (2000).

[94] Holly A. Heyser, Assembly Bills Center On Restoring Felons' Vote, The Virginian-Pilot, Feb. 7, 2000, at A1 (suggesting that applications for restoration of civil rights often went into an administrative "black hole").

[95] Ruth S. Intress, Voting Measure Revived, The Richmond Times Dispatch, Mar. 6, 2000, at A8 (describing the "newfound Republican majority").

[96] The governor might have supported the bill in order to fend off the criticism of black legislators, who had complained that the governor, although he claimed to be committed to racial inclusion, had failed to support any of the bills that were most important to the black legislators. Id.; Ruth S. Intress, Snubs Alleged By Black Caucus, The Richmond Times Dispatch, Mar. 3, 2000, at A1.

[97] Demleitner, supra note 43, at 789.

[98] S.U. Mahesh, 2 Options Would Let Some Felons Vote, Albuquerque J., Feb. 2, 2001, at A10.

[99] Kabalka, supra note 47.

[100] Editorial, Forward Steps, The Virginian-Pilot, Feb. 17, 2000, at B10.

[101] Jeff E. Schapiro, Sodomy, Vote Bills Could Be Political Issues, The Richmond Times Dispatch, Mar. 5, 2000, at F2.

[102] Jesse Jackson: Recent Laws Mirror Pre-Civil Rights Era Voting Practices, Corrections Professional, Oct. 6, 2000.

[103] Editorial, Give Voting Rights to Ex-Felons, The Hartford Courant, Mar. 24, 2000, at A14.

[104] Mauer, supra note 32.

[105] Id.

[106] Chedekel, supra note 85.

[107] Simpson, supra note 88.

[108] Beckett, supra note 78, at 81.

[109] Daniela Altimari, House Would Let Convicts Vote Sooner, The Hartford Courant, April 19, 2000, at A3.

[110] Julie Ha, Nafis Highlights First-Term Record, The Hartford Courant, Oct. 25, 2000, at B1.

[111] Anne Constable, Felonies Have Cost Thousands the Right to Vote, The Santa Fe New Mexican, Nov. 19, 2000, at A1.

[112] Editorial, Enfranchisement, The Virginian-Pilot, July 8, 2000, at B6.

[113] Editorial, Voting Rights and Felons, The Virginian-Pilot, Feb. 11, 2000, at B10.

[114]U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2000, at 101 (2001) (Table 2.3).

[115] Id.

[116] According to a 2001 Gallup poll, for example, 65 percent of Americans believe that federal income taxes are too high. The Gallup Organization, Gallup Poll Topics A-Z: Taxes, at www.gallup.com (last visited Dec. 9, 2001).

[117] Miles S. Rapaport & Kenneth Green, Restoring Felons' Voting Rights: The Right Thing to Do, The Hartford Courant, Jan. 9, 2000, at C3.

[118] Springer, supra note 45.

[119] Stan Simpson, Correction Initiatives Worth A Look, The Hartford Courant, Jan. 17, 2001, at A3. See also Simpson, supra note 88 ("They can work and pay taxes, but they can't vote.").

[120] Editorial, supra note 112.

[121] Heyser, supra note 94.

[122] Id.

[123] Kabalka, supra note 47.

[124] Heyser, supra note 94.

[125] Beckett, supra note 78, at 79.

[126]U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 1994, at 176 (Table 2.45) (1995).

[127]U.S. Dep't of Justice, supra note 11, at 131 (Table 2.46).

[128] Beckett, supra note 78, at 79.