THE PERSISTENCE OF FELON DISENFRANCHISEMENT THROUGH THE PERPETUATION OF LEGAL MORALISM

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INTRODUCTION

Angel Sanchez lost his right to vote before he was ever granted the right to vote.[1] Convicted of attempted murder at the age of sixteen in the state of Florida, Sanchez was sentenced to thirty years in state prison. He was released after serving twelve of those years, and even after successfully maintaining a minimum wage job and enrolling in law school at the University of Miami, Florida law still deems Sanchez ineligible of exercising the right to vote.[2] Sanchez is one member of a group of citizens who, after paying their "debt" to society, choose to pursue a path of work and education, but are still denied the right to true and full civic engagement as a United States citizen. If society views the debt of criminal conduct as repaid through completing a prison sentence and seeking re-entrance into society, then what is left for the state to gain through felon disenfranchisement?[3]

Even when a state could potentially reinstate the right to vote for a formerly convicted individual, such disenfranchisement policies degrade an individual's trust in the politicians and policies they would be voting

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1. Shirin Jaafari, *I Lost My Right to Vote Before I Ever Had the Right to Vote*, THE WORLD (Oct. 9, 2018, 11:00 AM), https://www.pri.org/stories/2018-10-09/i-lost-my-right-vote-i-ever-had-right-vote **[**https://perma.cc/T5NW-WCXM].

2. *Id*. During his second year in law school, Sanchez had advocated for the passing of Florida Amendment 4, which was a referendum on the laws of disenfranchisement that existed at the time this article was published. *Id*. After having been successfully passed by ballot initiative in 2018, Amendment 4 restored voting rights to those who had been convicted of certain felonies as long as those individuals' sentences had been served. German Lopez, *Florida votes to restore ex-felon voting rights with Amendment 4*, VOX (Nov. 7, 2018, 1:15 PM), https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results [https://perma.cc/T5SK-NASR]. However, individuals convicted of murder or felony sex offenses, a category which includes Sanchez, are excluded from the restoration of voting rights under Amendment 4. *Id.*

3. In this Note, the term "felon disenfranchisement" refers to the practice and policy of excluding individuals who have been convicted of felony crimes from voting in local, state, and federal elections. A "felon" is someone who has been convicted of a felony crime. I do not personally ascribe to labeling individuals based upon their conviction history or their history within the criminal justice system, and I strongly believe that "[e]ach of us is more than the worst thing we've ever done." BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17-18 (2014).

for. Salvador Solorio, who is currently incarcerated in San Quentin State Prison in California and had enjoyed and exercised the right to vote prior to his conviction, expressed despondence at the prospect of voting after spending twenty-eight years without the right to vote:[4] "'I essentially lost my voice,' he says speaking on a phone from prison. 'There's a sense of helplessness, being cut off. Why would a politician listen to me? I am a prisoner. I can't vote for him. Why would he bother?'"[5] Through accounts like Solorio's, it is clear that disenfranchisement not only creates a sense of individual despondence in being ineligible to vote but also erodes a convicted individual's trust in the democratic process as a whole.

As of October 14, 2020, there were an estimated 5.2 million individuals who lost the right to vote because of felon disenfranchisement laws in their respective states.[6] In perhaps what was the most important Presidential election we have had in decades, the loss of 5.2 million votes in 2020 raised questions as to why states still disenfranchise their voters on the basis of a felony conviction. States that still have felon disenfranchisement laws on the books must have some purpose for why they employ such measures as criminal punishment when disenfranchisement erodes citizens' trust in governmental processes. This reasoning is still largely up for debate, but the theory of legal moralism may provide a suitable answer.

By providing a comprehensive history of felon disenfranchisement in the United States, a state-by-state comparison of felon disenfranchisement statutes, and an explanation of how legal moralism functions in American jurisprudence, this Note seeks to explain why felon disenfranchisement survives in modern law. Analyzed through the lens of legal moralism, it will become evident that such laws persist today as a means of labelling all criminal conduct rising to the level of a felony as inherently immoral. It is dangerous to strip the right to vote from those who do not conform to a society's definition of morality.

I. OVERVIEW OF FELON DISENFRANCHISEMENT STATUTES

A. History of Felon Disenfranchisement

Disenfranchisement laws, in general, are not exclusive to voting rights, nor is their use as punishment for a criminal offense new. In

4. Jaafari, *supra* note 1. Solorio, while eligible to vote and before his conviction, had been particularly active in politics; he attended city council meetings, wrote letters to his community's local representatives, and voted in any election he could. *Id.*

5. *Id.*

6. Chris Uggen, Ryan Larson, Sarah Shannon, & Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/ [https://perma.cc/YW97-65WK].

medieval Europe, disenfranchisement was used frequently as a form of penalty, and such practices are now aptly characterized as "civil death."[7] These policies regarded as civil death—which applied to "infamous offenders"—were first implemented in England and then transported by English colonizers to the United States.[8] Some of the first disenfranchisement laws that appeared in the United States in the seventeenth century were those that explicitly punished "morality crimes such as drunkenness . . ."[9] Disenfranchisement was one of the "civil disabilities"[10] that could be imposed for violating a social norm, and such disenfranchisement was largely based on various "moral qualifications,"[11] such as properly employing "sober and peaceable conversation" or incorrectly exhibiting behavior that was "grossly scandalouse, or notoriously vitious . . ."[12] Using disenfranchisement as a punishment for various social violations, either legal or moral in nature, "deprived the offender of whatever civil rights the society offered to its inhabitants."[13] Thus, prior to the writing and ratification of the United States Constitution and prior to creating established election law, the founding communities of America wanted to maintain a society that fit their preconceived notion of what was morally acceptable. Disenfranchisement's initiation in the United States was largely a tool of those in power to define who would enjoy the full benefits of society, and people were disenfranchised on the basis of subjective moral qualifications. It is no surprise that those who did not meet such moral qualifications, and thus were not deemed full citizens within their communities, were of the lower socioeconomic classes, racial minorities, and, most significantly for the purpose of felon disenfranchisement, those who violated the criminal code.[14] The ruling

7. Marc Mauer, *Felon Voting Disenfranchisement: A Growing Collateral Consequence of Mass Incarceration*, 12 FED. SENT'G REP. 248, 248 (2000). "Civil death" is characterized as such because the criminal whose rights were being stripped away was considered to be "dead in law" in regards to "perform[ing] any legal function - including, of course, voting." Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060 (2002).

8. Mauer, *supra* note 7, at 248.

9. George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 FORDHAM URB. L.J. 851, 853 (2005); *see also* Angela Behrens, Note, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 236 (2004) [hereinafter Behrens, *Voting*].

10. Behrens, *Voting*, *supra* note 9, at 236; *see also* Howard Itzkowitz & Lauren Oldak, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 721–24 (1973) (describing other civil disabilities in response to crime such as outlawry, infamy, and attainder).

11. *See* Ewald, *supra* note 7, at 1061 (explaining other examples of laws that implemented disenfranchisement based upon "moral qualifications").

12. Cortlandt F. Bishop, *History of Elections in the American Colonies, in* 3 STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW 1, 54–55 (Univ. Fac. of Pol. Sci. of Colum. Coll. ed., 1893).

13. *See* Itzkowitz & Oldak, *supra* note 10, at 726.

14. *See* Ewald, *supra* note 7, at 1052 ("Inegalitarian ascriptive ideologies, Roger M. Smith

elite used disenfranchisement to maintain class dominance.

When the Constitution was ratified in 1787, the Founders included a provision on the creation of voter qualifications to ensure that the various states could maintain their own laws regarding either inclusionary or exclusionary qualifications.[15] Specifically, the Founders provided that "the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the state Legislature."[16] Leaving various voter qualifications to the hands of state officials ensured that each state could define or perpetuate the system of disenfranchisement that existed prior to the ratification and implementation of the Constitution. As the country took shape in the nineteenth century, many of the states began writing criminal disenfranchisement provisions into their constitutions.[17] By 1850, eleven out of thirty-one existing states had passed laws that provided for felon disenfranchisement by stipulating a loss of one's right to vote upon a felony conviction.[18] By 1870, no more than twenty years later, twenty-eight of the thirty-seven existing states had passed such laws.[19] Felon disenfranchisement was growing rapidly as an expected provision amongst the states, and was one to which the majority of states ascribed.[20] Many states entered the Union already having a felon disenfranchisement law with language referencing morality in place; this demonstrates how these longstanding provisions establishing voter qualifications served as a means to maintain a specific state's standard of morality.[21] As the number

writes, 'always have the potential to support exclusionary . . . citizenship policies.'").

15. U.S. CONST. art. I, § 2.

16. *Id.*

17. Behrens, *Voting*, *supra* note 9, at 236; *see also* Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOCIO. 559, 565–66 (2003) [hereinafter Behrens et al., *Ballot Manipulation*]. Table 2 provides the "Origins of and Changes to State Felon Disenfranchisement Laws," comparing the year of statehood for each of the 50 states with the year of enactment for each state's first felon disenfranchisement law. *Id*. at 565. The earliest established state to pass its first felon disenfranchisement law was Connecticut, which became an official state pursuant to the Constitution in 1788 and passed its first felon disenfranchisement law in 1818. *Id*. Some states, such as Alaska, New Hampshire, and Utah, did not pass their respective first felon disenfranchisement statutes until the mid- to late-1900s. *Id*. Table 2 also provides a column of years of major amendments to such felon disenfranchisement statutes for each state; one interesting point to note is that at the time this table was published in 2003, many states had not amended their original felon disenfranchisement statutes at all, with some of these statutes having been passed in the mid-to-late 1800s. *Id.*

18. Behrens et al., *Ballot Manipulation*, *supra* note 17, at 565–66. These states that enacted such felon disenfranchisement laws prior to 1850 included California, Connecticut, Delaware, Iowa, Louisiana, New Jersey, New York, Ohio, Rhode Island, Virginia, and Wisconsin.

19. *Id.* In addition to the eleven states mentioned in the previous footnote, the additional 17 states that enacted felon disenfranchisement laws by 1870 now included Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Nevada, Oregon, Pennsylvania, South Carolina, Texas, and West Virginia. *Id.*

20. *Id.*

21. *Id.* This is documented in Table 2 as those states whose "Year of Statehood" and "Year of First Felon Disenfranchisement Law" are the same year, or the "Year of First Felon

of states with felon disenfranchisement laws steadily increased in the mid-to-late nineteenth century, the substance and nature of the laws began to change. Disenfranchisement laws were becoming broader in that the prohibition on voting "encompass[ed] all felonies, without attention to the underlying crime."[22] Most states also passed felon disenfranchisement laws that had a chilling, indefinite effect on an individual's right to vote—even to the point that in some states, a felony conviction was an absolute lifetime bar on the convicted individual's right to vote.[23]

In the mid-twentieth century, individuals disadvantaged by statutory voting restrictions—especially Black individuals, who faced de facto limitations on their right to vote, and whose franchise had been stripped by explicit felon disenfranchisement laws – began seeking judicial remedy for the their ineligibility to vote.[24] For example, literacy tests were distributed at the polls to discriminate against those Black individuals who would have otherwise been eligible to vote; courts deemed such tests discriminatory because of the large deficit in access to education that Black individuals faced at the hands of white lawmakers.[25] Such literacy tests were challenged in the Supreme Court on the theory that the discriminatory application of such tests violated the Fourteenth Amendment.[26] The U.S. Supreme Court, in an opinion by Justice William O. Douglas, held that the applications of such tests were "subject to the imposition of state standards which are not discriminatory"[27] and therefore

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Disenfranchisement Law" is an earlier year than the "Year of Statehood." *Id.* States that fall into this category include Alaska, Arizona, California, Colorado, Hawaii, Idaho, Iowa, Kansas, Minnesota, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

22. *See* Behrens, *Voting*, *supra* note 9, at 237.

23. *Id. See* Behrens et al., *Ballot Manipulation*, *supra* note 17, at 563 (gives a more detailed description of the state statutory language indicating the indefinite nature of felon disenfranchisement laws in the United States during the mid-to-late 1800s).

24. *See infra* notes 25–26, 35 and accompanying text.

25. Berl I. Bernhard, *The Federal Fact-Finding Experience—A Guide to Negro Enfranchisement*, 27 L. & CONTEMP. PROBS 468, 472 (1962). Bernhard uses Alabama as an example of a state who employed such literacy tests at the polls, which "require[d] an applicant to be able to read and write in English any Article of the Constitution submitted to him by the Board of Registrars." *Id.* And in the state of Alabama, after successfully passing a literacy test, an additional requirement to vote provided that only those individuals who were of "good character" and "embrace[d] the duties and obligations of citizenship under the constitutions of the United States and Alabama" were thus fully eligible to vote. *Id.* This again shows a clear tie to moral character being of the utmost importance to a state in determining who has a voice in that state's democratic process.

26. Lassiter v. Northampton Cnty. Bd. of Elections, 360 U.S. 45 (1959). Louise Lassiter was a Black citizen of North Carolina who sued to have literacy tests deemed unconstitutional and void on the premise that their discriminatory application violated the Fourteenth, Fifteenth, and Seventeenth Amendments to the Constitution. *Id.* Ms. Lassiter met all other qualifications to vote under North Carolina law—she had been a resident of North Carolina for eighteen consecutive years and was of voting age. Lassiter v. Northampton Cnty. Bd. of Elections, 102 S.E.2d 853, 854 (N.C. 1958). However, she had failed to submit a valid literacy test pursuant to North Carolina law at the time. *Id.*

27. *See Lassiter*, 360 U.S. at 51.

"did not contravene any restriction that Congress, acting pursuant to its Constitutional powers, has imposed."[28] States were deemed to have "broad powers to determine the conditions under which the right of suffrage may be exercised, . . .absent of course the discrimination which the Constitution condemns."[29] This is again consistent with the Constitution's broad grant of power to the respective states to determine voter qualifications for that state's citizenry,[30] and the U.S. Supreme Court clearly did not condemn felon disenfranchisement in this broad affirmation of state power regarding the right to vote.[31]

In fact, the U.S. Supreme Court explicitly stated that "residence[] requirements, age, [and] previous criminal record . . . are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters."[32] The acknowledgment of disenfranchising those with felony convictions as an "obvious example"[33] of how a state may abridge the right to vote solidifies felon disenfranchisement as a legally legitimate method for a state to use defining which members of the citizenry's voices are worthwhile to include within the political process of that state.[34]

However, although the Court was willing to uphold a state's power to set voter qualifications, the Court later explicitly recognized in *Reynolds v. Sims* that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[35] With the growing judicial recognition that the right to vote is one of fundamental importance to a democratic society, coupled with the "continuing expansion of the scope of the right of suffrage in this country,"[36] it was a natural conclusion that the right to suffrage would be expanded. But to whom? And could a right that forms the "essence"[37] of the United States' political process still be taken away from a subset of the population?

One year after the Court's decision in *Reynolds* that deemed the right to vote fundamental, Congress passed the Voting Rights Act of 1965 to ensure that the right to vote was safeguarded through federal statutory law.[38] When the Voting Rights Act of 1965 was passed, many de facto measures of voter discrimination were deemed unconstitutional because

28. *See id.*
29. *See id.* at 50.
30. U.S. CONST. art. I, § 2.
31. *Lassiter*, 360 U.S. at 51.
32. *See id.*
33. *See id.*
34. But ask yourself: Does legal legitimacy always coincide with societal benefit?
35. *See* Reynolds v. Sims, 377 U.S. 533, 555 (1964).
36. *See id.*
37. *See id.*
38. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

such discrimination violated the Fifteenth Amendment's[39] guarantee that one's right to vote shall not be "abridged . . . on account of race . . .."[40] Although the Voting Rights Act of 1965 is an incredibly momentous and necessary piece of legislation to ensure that racial discrimination is not legally cognizable, the Voting Rights Act of 1965 did not make any strides as to felon disenfranchisement. In fact, the Voting Rights Act of 1965 makes no statutory mention of criminal convictions and the right to vote.[41] The Voting Rights Act of 1965 evidences the government's significant interest in protecting the right to vote, but this Act did nothing to affirmatively prohibit states from including felon disenfranchisement statutes in their codes and constitutions.

In the 1960s and 1970s, despite the sweeping win for voting rights under the Voting Rights Act of 1965, challenges to felon disenfranchisement provisions under the Fourteenth Amendment and the Voting Rights Act were largely unsuccessful.[42] Almost every case challenging such state laws resulted in judicial opinions claiming that such felon disenfranchisement laws were constitutional.[43] One exception to these unsuccessful rulings came from the United States District Court in New Jersey in the case *Stephens v. Yeomans*, in which the court held a New Jersey felon disenfranchisement law violated the Equal Protection Clause of the Fourteenth Amendment.[44] The court could not conceive of a "rational basis for the . . . classification" of felons as a group that was undeserving of the right to vote.[45] However, this ruling only extended to the

39. *Id.*

40. *See* U.S. CONST. amend. XV, § 1. The full text of Section 1 of the Fifteenth Amendment reads, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.*

41. *Supra* note 38. A computer search function on the Voting Rights Act of 1965 revealed that the Act does not include the words "felon," "disenfranchisement," or "conviction." *Id.*

42. Brooks, *supra* note 9, at 860.

43. *Id.* at 860 n.76 (in which Brooks provides a thorough list of such cases in which felon disenfranchisement laws were deemed constitutional, including cases that made challenges to felon disenfranchisement laws under theories of the First Amendment, the Twenty-Fourth Amendment, and the Eighth Amendment).

44. Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970). Plaintiff Stephens had been convicted of larceny at age nineteen, and under New Jersey's felon disenfranchisement statute, larceny was one of the few listed crimes that were deemed worthy of losing one's right to vote. *Id.* at 1183. Section 2 of New Jersey's felon disenfranchisement statute, which has since been removed via amendment as a result of this holding, listed the following crimes as being an exclusionary qualification for disenfranchisement: "blasphemy, treason, murder, piracy, arson, rape, sodomy, or the infamous crime against nature, committed with mankind or with beast, robbery, conspiracy, forgery, perjury or subornation of perjury." N.J. STAT. ANN. § 19:4-2 (West 2020) (removed from the current statute via amendment). Section 4 of New Jersey's felon disenfranchisement statute, which has also since been removed via amendment as a result of this holding, stated that anyone "convicted of the crime of larceny of the value of $200.00 or more" also met the exclusionary qualification for disenfranchisement. N.J. STAT. ANN. § 19:4-4 (West 2020) (removed from the current statute via amendment).

45. *See Stephens*, 327 F. Supp. at 1188.

application of this New Jersey felon disenfranchisement law and did not stand as a nationwide, federal ban on similar state felon disenfranchisement statutes.

The U.S. Supreme Court, in *Richardson v. Ramirez*, disagreed with the New Jersey District Court's finding that such felon disenfranchisement laws were violative of the Fourteenth Amendment's Equal Protection Clause.[46] In 1972, three convicted felons who served their sentences and successfully completed probation in California were still denied the right to vote and contended in a class-action suit that such disenfranchisement was violative of the Equal Protection Clause of the Fourteenth Amendment[47]—an argument congruent to that which the petitioners in *Stephens v. Yeoman* successfully asserted.[48] The California Supreme Court had agreed with petitioners and held that disenfranchisement of an individual with a felony conviction who had served their sentence and completed parole—under the provisions of California's state constitution of 1879[49]—violated the Equal Protection Clause of the Fourteenth Amendment as California could not articulate a "compelling state interest" to justify the practice.[50]

The U.S. Supreme Court, however, reversed the California Supreme Court and held that Section 2 of the Fourteenth Amendment[51] exempts felon disenfranchisement from the same level of scrutiny as other restrictions on the right to vote, meaning that states do not have to show a "compelling state interest" that is being served by its felon disenfranchisement law in order for such law to be constitutional.[52] With this holding, each state government may legally abridge the right to vote due to "participation in rebellion, or other crime."[53] The Court, looking to the history of the Fourteenth Amendment, held that the framers of the

46. Richardson v. Ramirez, 418 U.S. 24 (1974). *See also* Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) ("The decision in *Richardson* is generally recognized as having closed the door on the equal protection argument.").

47. *Richardson*, 418 U.S. at 26–27.

48. *Stephens*, 327 F. Supp. at 1188.

49. *See* CAL. CONST. art. II, § 1; CAL. CONST. art. XX, § 11.

50. *Richardson*, 418 U.S. at 27, 54.

51. U.S. CONST. amend. XIV, § 2.

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state . ..State . . . . But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. *Id.*

52. *Richardson*, 418 U.S. at 54.

53. U.S. CONST. amend. XIV, § 2.

Amendment intended to exclude felons from the franchise of suffrage.[54] According to the Court, felon disenfranchisement is distinguishable from other voting restrictions because it receives an "affirmative sanction" within Section Two of the Fourteenth Amendment.[55] Therefore, it follows that the Equal Protection Clause—Section One of the Fourteenth Amendment[56]—could not have been meant to exclude a form of disenfranchisement that is expressly permitted in Section Two of the same amendment.[57] Therefore, without clear constitutional support to challenge felon disenfranchisement, the institution of felon disenfranchisement stands today as a wholly legal endeavor that each state can choose to partake in or not without federal admonition so long as its state constitution or state election code allows.

Currently, the United States Code provides a uniform set of regulations that compile the provisions of various federal acts regarding the right to vote that each state must follow.[58] There is nothing in this statute—entitled "voting rights"[59]—that alludes to felon disenfranchisement.[60] Felon disenfranchisement remains the product of those state laws that serve to define the character of voting qualifications for each state and is one of the only surviving mechanisms of disenfranchisement that the United States does not expressly prohibit in its statutory scheme.[61] If all other methods of disenfranchisement are unconstitutional, and if the right to vote has been considered throughout United States history as an inherently fundamental right, why does nearly every state still write felon disenfranchisement into their voter qualification statutes?

B. State-by-State Evaluation of Felon Disenfranchisement Statutes

In the United States, as of June 2021, forty-seven states enforce disenfranchisement statutes that strip convicted individuals of the right to vote either on a conditional or unconditional basis.[62] The National

54. *Richardson*, 418 U.S. at 54.

> We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of s 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court. *Id.*

55. *Id.*
56. U.S. CONST. amend. XIV, § 1.
57. *Richardson*, 418 U.S. at 55.
58. 52 U.S.C. § 10101.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Felon Voting Rights*, NAT'L CONF. OF STATE LEG., https://www.ncsl.org/research/elections-

Conference of State Legislatures divides these forty-seven states with existing felon disenfranchisement statutes into three categories, distinguished by when the right to vote is rescinded and the conditions upon which the right to vote is reinstated.[63] The remaining states without felon disenfranchisement statutes exist in a separate fourth category. Each category will be analyzed below as to how it is represented statutorily in certain state codes.

1. "Never Lose Right to Vote"[64]

The first category of states do not have any codified felon disenfranchisement statutes as of June 2021 and never rescind a convicted individual's right to vote on the basis of that conviction alone.[65] Only two states—Maine and Vermont—and the District of Columbia fall into this category, making these states the exception to the majority rule of limiting a convicted individual's right to vote in the United States.[66] For example, in Maine, the only mention of one's status as an incarcerated individual is in reference to providing an address to meet voting qualification requirements: "The residence of a person incarcerated in a correctional facility . . . or in a county jail does not include the municipality where a person is incarcerated unless the person had resided in that municipality prior to incarceration."[67] There are no express limitations in the voter registration sections of these three statutory codes that revoke one's right to vote based on the mere existence of a criminal record.[68]

With no express limitations on one's right to vote, the policies in these three jurisdictions create a profoundly rehabilitative effect towards civic engagement in one's community by reinstating individuals' feelings of value and legitimacy in having a voice in the governance of the local, state, and federal communities to which they belong.[69] Some Republicans who defend laws propagating felon disenfranchisement argue that

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and-campaigns/felon-voting-rights.aspx [https://perma.cc/7QFH-KCCF] (last updated on June 28, 2021) [hereinafter Nat'l Conf.].

63. *Id.* Table One on the NCSL website titled "Restoration of Voting Rights After Felony Convictions" outlines the four categories as such: "Never Lose Right to Vote"; "Lost Only While Incarcerated | Automatic Restoration After Release"; "Lost Until Completion of Sentence (Parole and/or Probation) | Automatic Restoration After"; and "Lost Until Completion of Sentence | In Some States a Post-Sentencing Waiting Period | Additional Action Required for Restoration."

64. *Id.*

65. *Id.*

66. *Id.* These states and D.C. fall under the "Never Lose Right to Vote" category within Table One.

67. ME. REV. STAT. ANN. tit. 21-A, § 112-14 (West 2009).

68. *See* ME. REV. STAT. ANN. tit. 21-A, § 111 (West 2009) (where one's criminal record is not mentioned in the statutory language of the general qualifications to vote in the state of Maine).

69. *See* Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote from Prison*, NBC NEWS (Feb. 26, 2018), https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406 [https://perma.cc/ZSC3-TXDY].

applying for the right to vote following successful completions of court-imposed sentences would be a more rehabilitative process;[70] however, when one is convicted and incarcerated by their own community, having to overcome additional barriers to be "awarded back" a *fundamental* right does nothing to rehabilitate or inspire an individual to participate in a community that does not recognize nor respect their basic rights.

Unfortunately, this approach still includes some restrictions on the full exercise of convicted individuals' right to vote. For example, "[i]n Maine and Vermont, inmates must register to vote wherever they most recently lived, which ensures that a prison doesn't become a political force . . . "[71] Additionally, inmates struggle to register to vote while incarcerated in prison. The numbers of successfully registered incarcerated voters remain low because of the lack of resources available to register the eligible voters in prison. In Maine State Prison, one inmate recalled how only a couple hundred men were registered, though the prison population included 916 eligible voters.[72] Statistics from the 2016 election show that this trend replicated in Vermont, where less than half of inmate populations eligible to vote successfully registered to vote across various state correctional centers.[73] Even when inmates cast absentee ballots from prison within this framework, "[n]either Maine nor Vermont track inmates' absentee ballots, and registration records are spread out across each state . . . "[74] This data demonstrates that even when a state does not deprive convicted felons the right to vote, those convictions still create barriers to exercising full suffrage that is uniquely felt by inmates alone. This provides greater support to the idea that a criminal conviction may act as a mechanism to propagate a larger message about whose rights deserve full respect. When society accepts these individuals by protecting their right to vote, convicted felons need no longer feel as though they are demarcated as immoral members of society undeserving of a say in what laws govern others in that same society.

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70. *Id.* "[Roger Clegg, president of the Center for Equal Opportunity, a conservative think tank] argued that it would be more rehabilitative for ex-offenders to have to apply to get their rights back after completing both their court-mandated sentences and a waiting period." *Id.* However, the Republican Party in Vermont has been vocal about its dedication to ensuring that inmates' right to vote is not stripped away during the time in which they are incarcerated. "'The last thing we want to do is start putting up insurmountable barriers to participation in civic life because someone may have been convicted of a crime,' a spokesman for the state Republican Party, Mike Donahue, told NBC News. 'People's right to vote is sacred.'" *Id.*

71. *Id.*

72. *Id.*

73. *Id.* "At a women's prison in Burlington, Vermont, 58 registered to vote out of an average population of 155. At a prison in Windsor, Vermont, that closed last year, 30 of the 100 inmates registered to vote. At a prison in St. Johnsbury, Vermont, 22 registered to vote out of an average population of 129" *Id.*

74. *Id.*

2. "Lost Only While Incarcerated | Automatic Restoration After Release"[75]

The second category of states revoke an individual's right to vote only during incarceration served as a result of a felony conviction, and such rights are statutorily restored automatically upon release from incarceration. This means that even if one is released from incarceration before the formal completion of a sentence—for example, if one is released from incarceration but is still placed on parole—that individual's right to vote would be restored even if parole still has to be successfully completed.[76] Twenty-one states currently have statutes that follow this model of felon disenfranchisement, and such statutes are the most permissive in re-granting the right to vote; this is because, as automatic restoration, as described above, does not require the formal completion of one's sentence.[77] Whether or not incarceration following a conviction for a misdemeanor—rather than a conviction for a felony—is grounds for disenfranchisement varies by state.[78] For example, in Illinois, this is codified within the state's provisions on "Qualification of Voters"[79] with a specific subsection titled "Convicts."[80] Such statutes include provisions that rescind the right to vote only upon being "legally convicted" and automatically restore said right upon "release from confinement," as is the case in Illinois.[81] Automatic restoration of such a right is codified in language that expressly excludes being released on parole as being included within the definition of incarceration or confinement.[82] Michigan Election Law provides another example. In Michigan, the right to vote is only denied to an "individual who is confined in a jail after being

75. Nat'l Conf., *supra* note 62.

76. *Id.*

77. *Id.* These twenty-one states include California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, and Washington.

78. *Compare* 25 PA. STAT. AND CONS. STAT. ANN. § 1301 (West 2002) (allowing individuals with misdemeanors the right to vote even if incarceration time is being served as a portion of sentencing), *with* 10 ILL. COMP. STAT. ANN. 5/3-5 (West 2018) (disenfranchises those with misdemeanor convictions that result in a sentence of incarceration).

79. 10 ILL. COMP. STAT. ANN. 5/3 (West 2018).

80. 10 ILL. COMP. STAT. ANN. 5/3-5 (West 2018).

81. *See id.* The "Convicts" subsection containing Illinois's felon disenfranchisement statute states:

> No person who has been legally convicted, in this or another state or in any federal court, of any crime, and is serving a sentence of confinement in any penal institution, or who has been convicted under any Section of this Code and is serving a sentence of confinement in any penal institution, shall vote, offer to vote, attempt to vote or be permitted to vote at any election until his release from confinement. *Id.*

82. *See id.* Illinois's statute gives an example of how automatic restoration of the right to vote is codified, through further defining what "confinement" means for the purpose of rescinding the right to vote to those legally confined based on a criminal conviction: "Confinement shall not include any person convicted and imprisoned but released on parole." *Id.*

convicted and sentenced."[83] Such a scheme, which illustrates how this second category operates, only denies the right to vote when an individual is physically confined or incarcerated as a result of a legal conviction. Specifically, Michigan's statutory language allows those who are incarcerated "before trial or sentence"[84] to register to vote in any local, state, or federal election.

In addition, the definition of "incarceration" in some of these statutes does not rescind the right to vote for those incarcerated in jail during the time in which they are awaiting either an acquittal or a conviction; .For example, Illinois' felon disenfranchisement statute notes that "[c]onfinement or detention in a jail pending acquittal or conviction of a crime is not a disqualification for voting."[85] This has interesting implications in the realm of legal moralism that will be discussed further in Sections II and III of this article, in that denying one's right to vote is contingent on an actual conviction. This is because a conviction is an affirmative and tangible showing of one's betrayal to the morality of a jurisdiction. Without a conviction, merely being incarcerated does not revokes one's right to vote in this framework.

Although automatic restoration of the right to vote is not specifically codified or mentioned in many of the state statutes within this category,[86] the statutory language still makes clear that upon release from incarceration during one's sentence, there are no limits, conditions, or additional qualifications (beyond those typically required by state law, such as voting age and citizenship) one must satisfy to no longer face voter disenfranchisement on the basis of a conviction.[87] Some states

83. MICH. COMP. LAWS ANN. § 168.492a (West 2018).

84. *See id.* The full language of Michigan's disenfranchisement statute is as follows:

> An individual who is confined in a jail and who is otherwise a qualified elector may, before trial or sentence, register to vote. The individual is considered a resident of the city or township, and address, at which he or she resided before confinement. An individual who is confined in a jail after being convicted and sentenced is not eligible to register to vote. *Id.*

85. 10 ILL. COMP. STAT. ANN. 5/3-5 (West 2018).

86. *But see* CAL. CONST. art. II, § 2(b) (where the section titled "Voters; qualifications" directly states that those disenfranchised of the right to vote during incarceration "shall have their right to vote restored upon the completion of their prison term.").

87. *See* CAL. CONST. art II, § 2; COLO. REV. STAT. ANN. § 1-2-103 (West 2019); HAW. CONST. art. II, § 2; IND. CODE ANN. § 3-5-8-2 (West 2014); 10 ILL. COMP. STAT. ANN. 5/3-5 (West 2018); MD. CODE ANN. ELEC. LAW § 3-102 (West 2016); MASS. GEN. LAWS ANN. ch. 51, § 1 (West 2008); MICH. COMP. LAWS ANN. § 168.492a (West 2018); MONT. CODE ANN. § 13-1-111 (West 2019); NEV. CONST. art. II, § 1; N.H. REV. STAT. ANN. § 607-A:2 (2019); N.J. CONST. art. II, § 1; N.D. CONST. art. II, § 2; OHIO CONST. art. V, § 4; OR. REV. STAT. ANN. § 137.281(1)–(3)(d) (West 2008); 25 PA. STAT. AND CONS. STAT. ANN. § 1301 (West 2002); 17 R.I. GEN. LAWS ANN. § 9.2-3 (West 2006); UTAH CODE ANN. § 20A-2-101.3, 20A-2-101.5 (West 2020); S.B. 1202, 2021 Leg., June Spec. Sess. (Conn. 2021); S.B. 830, 2021 Leg., 244th Sess. (N.Y. 2021); S.B. 5086, 67th Leg., Reg. Sess. (Wash. 2021). These are this category's twenty-one states' voting qualification statutes or state constitutional provisions in regard to disenfranchisement based on the status of a conviction.

specifically outline in their restoration provisions the lack of additional qualifications that could burden an individual when re-registering to vote upon being released from incarceration. Additionally, some even call upon state government officials to enforce and ensure that these individuals face no such barriers in the re-registration process on the basis of their convictions.[88] However, some states—even within this more permissive category of disenfranchisement statutes—may choose to single out certain offenses that permanently disenfranchise an individual. For example, in Maryland, an individual convicted of "buying or selling votes" will never have the right to vote restored, regardless of incarceration status.[89]

It also must be noted that "automatic restoration" for the purpose of these categories does not mean automatic registration to vote. Automatic restoration refers to the restoration of only the right to vote.[90] This means that those released from prison would still need to re-register to vote and do so according to state protocols in place. The state does not have responsibility for providing the individual with any guidance or assistance in doing so, but nothing stops a state from drafting and passing legislation voluntarily adopting such responsibility.[91]

Although this category of felon disenfranchisement provisions and statutes is technically the most permissive of the three categories in which states limit the right to vote based on one's criminal conviction, the way such states rationalize or justify only denying such a right during a period of imprisonment served following a lawful conviction must still be evaluated. This justification must contain some sort of explanation as to why a conviction is deemed such a stain within a state's community that it should deprive an individual of the very practice of civic engagement. Legal moralism might be the nexus.

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88. *See* 17 R.I. GEN. LAWS ANN. § 9.2-3(f) (West 2006) (stating that "[t]he secretary of state shall ensure that persons who have become eligible to vote because of their discharge from incarceration face no continued barriers to registration or voting resulting from their felony convictions.").

89. *See* MD. CODE ANN. ELEC. LAW § 3-102(b)(3) (West 2016) (outlining this specific conviction as the only one in which individuals are permanently disenfranchised from the right to vote). *See also* MASS. GEN. LAWS ANN. ch. 51, § 1 (West 2008) (putting forth a similar provision that permanently disenfranchises those individuals convicted of "corrupt practices in respect to elections").

90. Nat'l Conf., *supra* note 62.

91. *Id. But see* CAL. ELEC. CODE § 2105.5 (West 2018). California passed a bill in 2017 that effectively amended § 2105.5 of California's Elections Code (effective since 2018) that requires the California Department of Corrections to provide those individuals released from prison with voting rights restoration information and to make such information easily accessible and available on their website.

3. "Lost Until Completion of Sentence (Parole and/or Probation) | Automatic Restoration After"[92]

The third category of state felon disenfranchisement statutes goes one step further in requiring the successful completion of one's sentence, including successful completion of parole or probation, even if that individual has been released from incarceration in jail or prison.[93] This previously was the most widely employed framework among the states until New York, Connecticut, and Washington revised their statutes.[94] Now sixteen states fall into this category, disenfranchising their convicted citizens until a full completion of the individual's sentence, whether or not that sentence called for formal incarceration.[95]

In 2016, nearly 4.5 million individuals were subject to conditions of probation or parole subsequent to a criminal conviction–nearly double the 2016 United States prison population of 2.2 million individuals.[96] Assuming this trend exists from state to state, which means that in the states that employ this framework of felon disenfranchisement, it could be expected that the number of individuals disenfranchised from the right to vote would nearly double in comparison to those states where the right to vote is instituted upon release from incarceration.

The length of sentence one could face on probation or parole can vary anywhere from six months to ten years based on state penal laws and the

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92. Nat'l Conf., *supra* note 62. *See also Probation and Parole*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/probation-and-parole **[**https://perma.cc/8DC9-PRHZ**]** (last visited Jan. 8, 2021) (explaining the difference between probation and parole in relation to sentences imposed upon conviction of a crime) [hereinafter, Legal Information Institute]. Probation is a form of sentence following conviction "subject to incarceration upon violation of the conditions that are imposed." *Id.* "[O]thers who are jailed may subsequently qualify for release on parole before completing their sentence, and are subject to reincarceration upon violation of imposed conditions."

93. Nat'l Conf., *supra* note 62.

94. *Id.*

95. *Id.* Those sixteen states include Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin. The state of New York fell into this category of statutes until recently. Governor Andrew Cuomo of New York passed an executive order in 2018 that restored voting rights to parolees and allowed those on probation to exercise the right to vote. N.Y. Exec. Order No. 181 (Apr. 18, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf [https://perma.cc/B569-FG54]. Legal experts have predicted that such a provision will face challenges in court, so New York may return to this category if such challenges are successful. Nat'l Conf., *supra* note 62.

96. Allison Frankel & Aryeh Neier, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, HUMAN RIGHTS WATCH (Jul. 31, 2020), https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states **[**https://perma.cc/FKY4-WXWY]. It is estimated that as of 2018, 28% of the current United States jail and prison populations are comprised of individuals whose supervision had been revoked. *Id.*

offense with which one is convicted.[97] However, the length of probation or parole is never a fixed range of time, as revocations of probation and parole occur when the conditions of such sentences are violated. This leads to further time in incarceration, which can sometimes result in extreme punishment resulting in an additional ten to twenty years or even life imprisonment depending on the severity of the "new offense."[98] Revocation of probation or parole could occur due to violations of conditions such as failure to report a new address, drug or alcohol use, or failure to pay fines associated with supervision.[99] Such revocation could also occur if the individual had been arrested for a new offense.[100] Indeed, an overwhelming number of new offenses are possession charges. While these have largely been decriminalized in many states, a number of individuals are still experiencing time in incarceration and, therefore, continued disenfranchisement for an offense that is no longer punishable.[101]

Of the states that disenfranchise felons under this framework, the necessity of completing one's sentence may be codified differently. Wisconsin's felon disenfranchisement statute provides a clear example of the effect intended by the promulgation of statutes in this category.[102] For example, Wisconsin explicitly gives a definition of imprisonment that includes "parole and extended supervision."[103] Furthermore, Wisconsin's statute also clearly states that "every person who is convicted of a crime obtains a restoration of his or her civil rights by serving out his or her term

97. *See id.* While numerous experts agree that supervision terms should last only a couple of years, many states allow probation sentences of up to five years. In states including Wisconsin, Pennsylvania, and Georgia, probation terms can be as long as the maximum sentence for the underlying offense, in some cases 10 or 20 years, or even life—and consequences for failing are severe. *Id.* This is notable considering that Wisconsin and Georgia both have felon disenfranchisement statutes on the books that deny an individual the right to vote until their sentence of supervision is successfully completed. This could result in up to 20 years in which an individual is not allowed a civic voice within one's community; or, worse, it could result in permanent disenfranchisement if revocation meets its extreme.

98. Frankel & Neier, *supra* note 96. "New offense" is in quotation marks as a majority of individuals' supervision is revoked because of failure to meet the conditions of supervision set forth from the sentence of the original offense—not because of the committal of a new offense in addition to the one the individual was originally convicted of. *Id.*

99. *Id.* Specifically, "[i]n Wisconsin from 2017 to 2019, rule violations accounted for more than 61 percent of all supervision sanctions." *Id.*

100. *Id.* The Human Rights Watch discovered a state-by-state trend—through statistical and anecdotal evidence in the states of Wisconsin, Georgia, and Pennsylvania, two of which fall into this category of felon disenfranchisement practices—in the types of offenses that are committed during a period of supervision that leads to subsequent incarceration. These offenses included public order offenses (such as disorderly conductor resisting arrest), misdemeanor assaultive conduct, shoplifting, and drug offenses. *Id.* It is important to note that many of these offenses have roots in the socioeconomic circumstances that are faced by those who are already targeted by socioeconomically abusive or racially discriminatory practices and policies that are rampant within the criminal justice system.

101. *Id.*

102. *See* WIS. STAT. ANN. § 304.078(1)(a) (West 2020) (under the section titled "Restoration of civil rights of convicted persons").

103. *Id.*

of imprisonment or otherwise satisfying his or her sentence."[104] Texas, however, explains that the right to vote is stripped away from any individual who has not been "fully discharged . . . including any term of incarceration, parole, or supervision, or completed a period of probation ordered by any court."[105] Whether language is framed in a way surrounding disenfranchisement or the restoration of the right to vote, the effect remains the same in states disenfranchising citizens on the basis of a criminal conviction for as long as that conviction will legally allow.

Georgia's statute ties directly to legal moralism in that it disenfranchises those individuals "convicted of a felony involving moral turpitude"[106] of the right to vote and reinstates said right "upon completion of the sentence."[107] This direct tie to moral character will be discussed in Sections II and III, but it is worth mentioning that this is a blatant attempt by a state legislature to determine which individuals deserve fundamental rights on the basis of one's "moral" character, even when states may define offenses "involving moral turpitude"[108] differently. Nevertheless, Georgia's language necessitating the completion of one's sentence in order to be restored to full suffrage is generally consistent with this third framework of felon disenfranchisement statutes.[109]

As mentioned before, proponents of felon disenfranchisement statutes that advocate for including the statutory language of "restoration upon full

104. *See* WIS. STAT. ANN. § 304.078(2) (West 2020). This subsection also provides that one's rights are not restored without proof of "[t]he certificate of the department or other responsible supervising agency that a convicted person has served his or her sentence or otherwise satisfied the judgment against him or her . . ." *Id.* This places the impetus on the correctional agencies to ultimately provide its convicted individuals with the requisite materials in having the right to vote restored. Interestingly, the statute also states that "[t]he department or other agency shall list in the person's certificate rights which have been restored and which have not been restored." *Id.* This seems to raise red flags about the power of such a department or agency in determining which rights are to be restored after having been disenfranchised because of a conviction. Further research would need to be done to determine how this provision manifests itself in practice.

105. *See* TEX. ELEC. CODE ANN. § 11.002(4)(A) (West 2011).

106. *See* GA. CODE ANN. § 21-2-216(b) (West 2019).

107. *See id.*

108. *Id. See also* ALASKA STAT. ANN. § 15.05.030 (West 2020) (in which Alaska directly disenfranchises those "convicted of . . . a felony involving moral turpitude" of the right to vote in its voter disenfranchisement statute, using the same language as seen in the Georgia code).

109. *See* ALASKA STAT. ANN. § 15.05.030 (West 2020); ARK. CONST. amend. 51, § 11(d)(2)(A) (similarly stating the affirmative duty of the "convicted felon"—not the corrections officials or state government—to provide proof to the county clerk that all components of one's sentence have been completed successfully); GA. CONST. art. II, § 1, ¶ III(a); IDAHO CONST. art. IV, § 3; KAN. CONST. art. V, § 2; LA. CONST. art. I, § 10; MINN. STAT. ANN. § 201.014, subdiv. 2(a) (West 2020); MO. ANN. STAT. § 115.133 (West 2020); N.M. STAT. ANN. § 1-4-27.1 (West 2011); N.C. CONST. art. VI, § 2; OKLA. STAT. ANN. tit. 26, § 4-120.4 (West 2020); S.C. CODE ANN. § 7-5-120(B)(2)–(3); S.D. CODIFIED LAWS § 12-4-18 (2020); TEX. ELEC. CODE ANN. § 11.002(4)(A)–(B) (West 2011); W. VA. CODE ANN. § 3-1-3 (West 2013); WIS. STAT. ANN. § 304.078 (West 2020). These are this category's sixteen states' voting qualification statutes or state constitutional provisions in regard to disenfranchisement based on the status of a conviction.

completion of one's sentence" argue that such measures are more rehabilitative than simply restoring such right upon release from incarceration or never revoking the right to vote during incarceration.[110] However, this ignores the fact that supervision requires individuals meet multiple conditions in order to successfully, complete the supervision. Successful completion of such conditions vary in degree of difficulty depending on one's socioeconomic status, race, and gender.[111] This can be indicative of moral disapproval of one's identity in these protective categories through an intersectional lens of what is deemed "moral" in the eyes of the law.

4. "Lost Until Completion of Sentence | In Some States a Post-Sentencing Waiting Period | Additional Action Required for Restoration"[112]

The fourth category of state felon disenfranchisement laws is the most restrictive of these pre-determined categories as the restoration of the right to vote necessitates not only the successful completion of a sentence after a lawful conviction but also the successful completion of additional state-sanctioned qualification measures.[113] Eleven states impose this strict framework of felon disenfranchisement and impose additional conditions before fully restoring one's right to vote.[114] The statutes within this category intentionally disenfranchise more individuals than in other states and for longer periods of time.[115]

Within this category, Florida is colloquially known as the state that "leads [the] nation in voter disenfranchisement,"[116] with more than 1.6 million Florida citizens "unable to vote because they have felony convictions or owe court debts . . ."[117] The Sentencing Project, in a 2016 report on felon disenfranchisement, estimated that approximately 6.1

110. *See* Timm, *supra* note 69.

111. Legal Information Institute, *supra* note 92.

112. Nat'l Conf., s*upra* note 62.

113. *Id.* Some states also impose a post-sentencing waiting period that does not necessarily require any affirmative action on behalf of the convicted individual. *Id.*

114. *Id.* These eleven states are Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming. *Id.*

115. *Id. See also infra* note 117.

116. Lawrence Mower, *Florida Leads Nation in Voter Disenfranchisement, Criminal Justice Group Says*, *Tampa Bay Times* (Oct. 14, 2020), https://www.tampabay.com/news/florida-politics/elections/2020/10/14/florida-leads-nation-in-voter-disenfranchisement-criminal-justice-group-says/ [https://perma.cc/LGF4-XCZB].

117. *See id.* One study even cited that Florida houses "20 percent of the estimated 5.2 million Americans" who are disenfranchised on the basis of a criminal conviction. *Id.* The same study also cites disproportionate racial effects within Florida's system of felon disenfranchisement that are likely derivative of the inherent racial discrimination that permeates the nation's criminal justice system; "[a]bout 15 percent of the state's Black voting-age population is disenfranchised because of a felony . . . compared to about 6 percent for the state's non-Black population." *Id.*

million Americans were prevented from voting on the basis of a criminal conviction.[118] The same report attributed 1.68 million of those individuals to Florida's system of disenfranchisement.[119] The Florida statute behind the staggering numbers of disenfranchised individuals requires the successful completion of any sentence following a criminal conviction, and, up until 2020, used to require individuals to pay a number of outstanding fees or fines.[120] Although this statute had been amended to eliminate one of those additional conditions that places Florida within this framework of felon disenfranchisement,[121]

> Republican lawmakers [later] drew a hard line . . . defining 'all terms' to include court fees, fines and restitution to victims. An estimated 80 percent of felons owe court fees or fines in Florida, making the Legislature's action perhaps the biggest single instance of voter disenfranchisement in the country.[122]

In fact, only an estimated 31,400 people who had previously been disenfranchised as a result of Florida's disenfranchisement framework (out of approximately 1.5 million remaining disenfranchised Florida citizens) have successfully registered to vote since the recent amendment, which is well below what proponents of anti-felon disenfranchisement legislation anticipated.[123]

Similarly, Alabama holds the sixth-highest number of individuals affected by its state felon disenfranchisement statute, with nearly 290,000 individuals disenfranchised from the right to vote.[124] Alabama's felon disenfranchisement provisions are found in Alabama's state constitution and directly tie to the concept of legal moralism; the Alabama state constitution states that "[n]o person convicted of a felony involving moral turpitude . . . shall be qualified to vote."[125] This provision was added via

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118. Christopher Uggen, Ryan Larson, & Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT (Oct. 6, 2016), https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ [https://perma.cc/N42E-6U4K].

119. *Id.* at 15.

120. *See* FLA. STAT. ANN. § 98.0751 (West 2019), *amended by* H.R. 6007, 122d Reg. Sess. (Fla. 2020). This amendment to the statute eliminated the phrase requiring "[f]ull payment of fines or fees ordered by the court as a part of the sentence or that are ordered by the court as a condition of any form of supervision, including, but not limited to, probation, community control, or parole." *Id.*

121. *Id.*

122. *See* Mower, *supra* note 116.

123. *Id.*

124. Uggen, *supra* note 118, at 15. The five states with higher numbers of disenfranchisement are as follows: Kentucky with approximately 312,000 individuals, Tennessee with approximately 421,000 individuals, Texas with approximately 495,000 individuals, Virginia with approximately 508,000 individuals, and Florida with approximately 1.68 million individuals. *Id.*

125. ALA. CONST. art. VIII, § 177(b).

amendment in 2017 and created a comprehensive list of those felonies that would be considered violative enough of moral turpitude to strip away one's right to vote.[126] This list includes murder, manslaughter, assault, kidnapping, rape, sodomy, sexual torture, sexual abuse, enticing a child or solicitation of a child, human trafficking, terrorism, endangering water supply, possession or manufacture of a dangerous device, use of explosives, treason, child pornography, drug trafficking, bigamy, incest, aggravated child abuse, burglary, robbery, theft of property, and forgery.[127] In other words, almost any crime that a first year law student could find in their criminal law casebook would constitute grounds for felon disenfranchisement in the state of Alabama, as such a comprehensive list makes it clear that nearly all criminally penalized conduct is violative of moral turpitude.

Unlike other states in which release from incarceration or completion of a sentence automatically restores one's right to vote, this category of states requires additional conditions be satisfied beyond the mere end of sentencing. For example, in Arizona, a convicted individual's right to vote is restored upon both successful completion of a sentence, including probation or parole, as well as successful payment of a fine or restitution to the victim of the crime if one exists.[128] Also in Arizona, if an individual is convicted of more than one felony, that individual must apply to the court for a restoration of his or her rights, and such request must be approved by a judge at the successful completion of one's sentence.[129] In Iowa, there is a unique provision in which those individuals convicted of "infamous crime[s]"[130] may only have the right to vote restored upon the Iowan governor's pardoning power; otherwise, the offense would be considered worthy of permanent disenfranchisement.[131] In Tennessee, in order to restore one's right to vote, an individual must both successfully complete his or her sentence in full and also petition the courts for the restoration of that right.[132]

Some states still impose waiting periods that begin running after one's conviction is completed and could be deemed moot if that individual were

126. ALA. CODE § 17-3-30.1 (2019). Article VIII of the Constitution of Alabama of 1901, now appearing as Section 177 of Article VIII of the Official Recompilation of the Constitution of Alabama of 1901, as amended, provides that Alabama citizens shall lose the right to vote when convicted of a crime only if the conviction was for a felony involving moral turpitude. *Id.*

127. *Id.*

128. ARIZ. REV. STAT. ANN. § 13-907 (2019) (formerly codified as A.R.S. § 13-912).

129. ARIZ. REV. STAT. ANN. § 13-905 (2019) (formerly codified as A.R.S. § 13-907).

130. IOWA CONST. art. II, § 5.

131. State v. Richardson, 890 N.W.2d 609, 624 n.11 (2017). The Court in *Richardson* upheld the ability of the governor to restore voting rights to persons convicted of infamous crimes through pardoning power pursuant to the Iowa state constitution. IOWA CONST. art. II, § 5. This has not been challenged in court successfully as of January 2020.

132. TENN. CODE ANN. § 40-29-101, § 2-19-143 (2021).

to commit another offense within that waiting period.[133] In Nebraska, the state legislature imposed a two-year waiting period to restore one's right to vote that begins at the successful completion of probation or parole.[134] A waiting period such as this one does not seem to serve any purpose; one would most likely feel devalued in his or her community because of both the anguish of serving the entirety of a criminal sentence and the continued loss of a fundamental right even after that sentence was successfully served.

Although felon disenfranchisement statutes vary in the severity of sanctions across the United States, the fact that such statutes have deep roots in American jurisprudence and still persist today provides credence to the idea that such statutes seem to serve some theoretical purpose to these communities. Legal moralism can explain why such laws have existed and have not been widely repealed. Therefore, an explanation is necessary as to what legal moralism proposes and how this theory has manifested itself in United States law.

II. LEGAL MORALISM AND ITS RELEVANCE IN UNITED STATES LAW

A. Defining Legal Moralism

Legal scholar Kenneth Himma defines legal moralism as "the view that the law can legitimately be used to prohibit behaviors that conflict with society's collective moral judgments . . . "[135] According to this theory, a state or governmental entity would be allowed and encouraged to restrict its citizens' freedom if their behavior or conduct somehow conflicts with a community's collective sense of morality.[136] And, according to Patrick Devlin, a scholar who has studied and written extensively on the subject, a shared morality is essential to the existence of a society.[137]

> [I]f men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A

133. Nat'l Conf., *supra* note 62. This is referring to those states in the category of "Lost Until Completion of Sentence | In Some States a Post-Sentencing Waiting Period | Additional Action Required for Restoration," and Nebraska is an example of such a state. *Id.*

134. NEB. REV. STAT. § 29-2264 (2021).

135. Kenneth E. Himma, *Philosophy of Law*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, https://iep.utm.edu/law-phil/#SSH2a.i [https://perma.cc/7FU8-2BAW] (last visited Jan. 29, 2021).

136. *Id.*

137. PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 10 (Oxford University Press 1965).

> common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.[138]

John Stanton-Ife, another scholar promulgating legal moralism, similarly believes that "society needs its morality as it needs a government and it is therefore, for the sake of self protection, entitled to 'use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.'"[139]

However, because the United States has always deeply upheld the right to vote as essential to promulgate the morals of a democratic society, there is a clear conflict in inhibiting the right to vote.[140]

B. Legal Moralism in United States Jurisprudence

Within United States jurisprudence, various state courts and the Supreme Court have upheld the theory of legal moralism. In *Otsuka v. Hite*, after Los Angeles County refused to register defendants as voters because of Otsuka's criminal conviction,[141] Otsuka challenged the constitutionality of losing his right to vote for being labeled as an "infamous" criminal.[142] Because Otsuka's conviction was not one in which his conduct would have "involve[d] moral corruption,"[143] Otsuka's right to vote was restored by the court.[144] The restoration of Otsuka's right to vote evidences a direct tie between California's conception of morality and its decision to limit the freedom of those individuals in the form of disenfranchisement should society's morality be at stake.

In the case *Washington v. State*, an Alabama court upheld the importance of restricting the freedom of those individuals who committed what the Alabama legislature believed to be "infamous crimes."[145] The Alabama Supreme Court reasoned such in a lengthy discourse on the complexities of morality:

> It is quite common also to deny the right of suffrage, in the

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138. *Id.*

139. John Stanton-Ife, *The Limits of Law*, STAN. ENCYCLOPEDIA OF PHIL. (2016 edition), https://plato.stanford.edu/archives/win2016/entries/law-limits/ [https://perma.cc/A22A-MHNR].

140. Reynolds v. Sims, 377 U.S. 533, 555 (1964). "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Id.*

141. Otsuka v. Hite, 64 Cal. 2d 596, 599 (1966). Otsuka "was classified . . . [as] a conscientious objector subject to noncombatant service in the armed forces of the United States" and "was convicted of a violation of the Selective Service and Training Act of 1940 (former 50 U.S.C. App. § 311) and was sentenced by the federal district court to three years in the penitentiary. He served his term of imprisonment and was duly released." *Id.*

142. *Id.* at 599.

143. *Id.* at 599.

144. *Id.* at 615.

145. Washington v. State, 75 Ala. 582 (1884).

> various American states, to such as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity or tyranny. The evil infection of the one is not more fatal than that of the other. The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship. It is proper, therefore, that this class should be denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests.[146]

The court in this case directly tied "moral turpitude"[147] to "the purity of the ballot box."[148] This presents a clear disconnect in the proposition later set forth in *Reynolds v. Sims* that "any restrictions on that right [to vote] strike at the heart of representative government."[149] However, felon disenfranchisement statutes illustrate that when certain individuals seemingly violate the moral turpitude of a larger society, this directly ties that society's conventions of morality to the rights that that society wants to afford its members. In other words, a community is willing to strip someone of an essential right of democratic government at the first signal of immoral conduct or behavior. This shows an inextricable historical link between the right to vote and morality that reflects itself in the perpetuation of statutorily coding disenfranchisement following a criminal conviction in most of the United States.

III. LEGAL MORALISM AND ITS IMPLICATIONS IN SUSTAINING DISENFRANCHISEMENT

Because of this inextricable historical link between the right to vote and morality, the philosophy underpinning legal moralism may provide an explanation for why such statutes still exist and persist beyond the late nineteenth century and into our current jurisprudence.[150] Legal moralism, however, also sets a dangerous precedent in the form of felon

146. *Id.* at 585.
147. *Id.*
148. *Id.*
149. Reynolds v. Sims, 377 U.S. 533, 555 (1964).
150. Washington v. State, 75 Ala. 582 (1884). *Washington* was decided in 1884, and its rationale still extends to the proliferation of existing felon disenfranchisement statutes in 2021.

disenfranchisement, as it places societal power in the hands of few and punishes citizens for failing to adhere to a common sense of morality that they had no hand in defining.

A. Theories of Punishment and Their Disconnect in Furthering Felon Disenfranchisement

To explain how legal moralism is the guiding principle behind creating and sustaining such a policy, it is necessary to first rule out why other jurisprudential theories cannot sufficiently explain the persistence of felon disenfranchisement. Almost all criminal sanctions could be explained away by one of the theories of punishment popularly touted in the study of criminology: retribution, deterrence, and rehabilitation.[151] However, imposing disenfranchisement as a punishment for a criminal offense lacks a clear, strong nexus to any one of those theories.[152]

Retribution does not provide a clear rationale for sustaining felon disenfranchisement statutes, since many felonies that qualify an individual to be stripped of their right to vote are not at all commensurate with the severity of losing one's ability to fully participate in a democratic society. For example, the continuation of disenfranchisement as a punishment for one's inability to pay fees and fines criminalizes poverty, and the felony does not warrant the severe penalty of the loss of a fundamental civic right.[153]

Deterrence also does not explain away the existence of such statutes as there is little empirical support for the claim that punishment deters criminal conduct of any kind, regardless of the crime committed.[154] This is because "the presence of many intervening factors makes it difficult to prove unequivocally that a certain penalty has prevented someone from committing a given crime."[155] And, in order for deterrence to be considered potentially effective, punishment must be swift, severe, and certain.[156] The

151. Matt S. Whitt, *Felon Disenfranchisement and Democratic Legitimacy*, 43 SOC. THEORY & PRAC. 283, 284 (2017).

152. Thomas J. Bernard, *Punishment*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/punishment/additional-info#history [https://perma.cc/T7PP-FLG5] (last visited Feb. 1, 2021). Retribution is defined as a theory of punishment in which "the severity of a punishment should be proportionate to the gravity of the offense." *Id.* Deterrence proposes "that, because most individuals are rational, potential offenders will calculate the risk of being similarly caught, prosecuted, and sentenced for the commission of a crime." *Id.* Rehabilitation is defined as "the idea that the purpose of punishment is to apply treatment and training to the offender so that he is made capable of returning to society and functioning as a law-abiding member of the community." *Id.*

153. *See* Uggen, *supra* note 6. Although this specific statute recently was amended to eliminate the provision on paying fees and fines, many individuals adversely affected by this provision while it was in effect have still been unable to restore their right to vote. *Id.*

154. *See* Bernard, *supra* note 152.

155. *Id.*

156. Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 33–34 (2016).

effects of felon disenfranchisement are not felt swiftly by those individuals who fall victim to such statutes, as many of the harrowing effects are not felt until completion of one's criminal sentence, which could potentially take several years.[157] In addition, some states that have amended their felon disenfranchisement statutes to be seemingly more favorable to disenfranchised individuals have failed to retroactively reinstate many individuals' right to vote when, according to statute, that right should be restored.[158]

Lastly, rehabilitation clearly is not the driving theory behind such felon disenfranchisement statutes as rehabilitation is predicated on affirmative actions taken to enhance individuals' chances at re-entering society as "law-abiding" citizens.[159] Stripping away the right to vote produces the opposite outcome.[160] Why would one feel compelled to become a law-abiding citizen if that individual does not have a voice in the democratic process through which such laws are written or enforced? Felon disenfranchisement certainly provides no benefit to the disenfranchised individual.[161]

Analyzing such well-known theories of punishment closely shows that they do little to fully explain why felon disenfranchisement statutes have remained on the books as viable sanctions to criminal conduct. If disenfranchisement is not an effective form of punishment according to traditional criminology and criminal law jurisprudence—which has been used to explain away nearly all forms of criminal punishment—then what purpose does it serve as a criminal sanction? Legal moralism is the key.

B. Felon Disenfranchisement and the Problem of Legal Moralism

If legal moralism stands for the proposition that a state or governmental entity could restrict its citizens' fundamental democratic rights to perpetuate a collective sense of morality,[162] then felon disenfranchisement is potentially a vehicle to ensure that this moral standard never changes. If those who disagree with a societal moral code

157. *See* Nat'l Conf., *supra* note 62.
158. *See* Uggen, *supra* note 118, at 13.
159. *See* Bernard, *supra* note 152.
160. Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J. dissenting).
161. See *id*. (1974). As Justice Thurgood Marshall stated:

> It is doubtful… ...whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote. [Ex-offenders] have fully paid their debt to society. They are as much affected by the actions of government as any other citizens, and have as much of a right to participate in governmental decision-making. Furthermore, the denial of the right to vote to such persons is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens. *Id.* at 78.

162. Himma, *supra* note 135.

exercise such disagreement through violating those laws that outline such a code, felon disenfranchisement assures that these individuals will never have a political voice in altering this moral code. When the right to vote is denied to such a category of individuals, undoubtedly, "liberal democracies undermine their own legitimacy."[163]

A reliance on legal moralism in sustaining felon disenfranchisement is dangerous "because it undermines the force of legitimate moral criticism to morally blameworthy agents and states of affairs."[164] Silencing opposition to a potentially unjust law or unjust criminalization of conduct by restricting the right to vote of those groups who have been victimized by such criminalization is an abuse of legislative power. More importantly, felon disenfranchisement statutes open the door to further punishments for individuals who are unable to meet an arbitrary standard of morality without the recourse of voting such individuals out of office who are defining such a moral code inappropriately.[165] And what does such a moral code lead to? "A moral code that demands that people achieve a standard of moral behaviour that is beyond the level that most people are capable of achieving will lead to a situation in which people regularly violate their moral obligations."[166] In a system in which laws that are not respected on a moral level are continuously violated, a de facto lifetime ban on one's right to vote results as felon disenfranchisement statutes will still apply to such felony convictions.[167]

Legal moralists propose that criminal penal codes are based upon standards of morality that are written and passed into law by those government officials with legislative power.[168] Denying the vote of those who violate that moral code in the form of a felony conviction is a means of ensuring that same moral code stays in place, as its opponents will rarely have the opportunity to express their disapproval against it at the ballot box. Such disenfranchisement "erodes the power of our most important means of taking a stand against morally unacceptable forms of behaviour"—the "morally unacceptable forms of behaviour"[169] in this scenario being the choice of lawmakers to codify what morality should look like within their jurisdictions' criminal codes and to silence any opposition to such policies in the form of felon disenfranchisement.

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163. Whitt, *supra* note 151, at 285.

164. Alfred Archer, *The Problem with Moralism*, RATIO 342, 343 (2018).

165. *Id.* at 346.

166. *Id.* This problem inherent within legal moralism can also be connected to past laws connected to the morality of conduct or behavior—such as prohibition laws—because such "laws asked too much of the American people and were consequently broken systematically; and as people got used to breaking the law a general lowering of respect for the law naturally followed; it no longer seemed that a law was something that everybody could be expected to obey." *Id.* at 347.

167. *Id.* at 346.

168. Himma, *supra* note 135.

169. Archer, *supra* note 164, at 348.

CONCLUSION

Felon disenfranchisement exists to repudiate a voice in democracy for those who deviate from a set system of morality; however, the inquiry should shift to whether or not those lawmakers should even have the ability to gatekeep who can or cannot speak through a vote. Felon disenfranchisement ensures that a voice in civic action is given to only those who seemingly deserves it through abiding by the laws set by those in power; however, being deserving of an inherent democratic right should not be predicated on a community's conception of morality symbolized through a state's criminal penal code through which those in power can arbitrarily criminalize conduct they personally do not find moral.

If states were to reinstate convicted felons' right to vote, this would invariably instill a sense of agency in those individuals who have been deprived of one of their most basic democratic rights, and it might help in altering the public's perception of the supposed immorality of those with convictions on their records. Take the story of Steve Phalen, for example. Phalen is a middle-aged Florida citizen who had been convicted of a felony while he was in college, and he was disenfranchised from voting under Florida's strict felon disenfranchisement statute.[170] Phalen shared that "'[n]ot being able to cast a vote is something that feels like my civic identity, my identity as a citizen, is just completely erased. Made irrelevant. It's, like, you're never going to fully be a part of this country anymore.'"[171] Phalen also noted that human beings change over the course of our lifetimes and should not be unfairly and indefinitely punished by a standard that they may have violated at one moment in that lifetime.[172] When Phalen's voting rights were reinstated through Florida's passage of Amendment 4 in 2018,[173] he immediately sent a text message saying "'I've got one of those full, involuntary smiles and a feeling of agency I haven't

170. Daniel A. Gross, *What It Felt Like for a Florida Man With a Felony to Regain His Voting Rights*, THE NEW YORKER (Nov. 7, 2018), https://www.newyorker.com/news/as-told-to/what-it-felt-like-for-a-florida-man-with-a-felony-to-regain-his-voting-rights [https://perma.cc/8MP4-37Z5]. Phalen had been convicted of "first-degree arson and reckless public endangerment in the second degree" after setting a bar in Wisconsin to flames "while under the influence of antidepressants and alcohol." *Id.* Phalen attributes his substance abuse that day to delayed trauma associated with the death of his father. This adds a complex layer to the moralism debate in that certain criminal conduct often has roots in mental illness or trauma, and criminal penal codes should be more attentive to the root causes of behavior if we want to truly create a criminal system centered on justice and rehabilitation.

171. *Id.*

172. *Id.* "I think people change over the course of a life. We become different people as we age. We become different people as we get different experiences. It seems incredibly backward, in our current day and age, that this element of my citizenship would hinge on this twenty-three-year-old version of me that made a terrible decision." *Id.*

173. *Id.* Amendment 4 reinstated the right to vote for individuals like Phalen who had successfully completed their sentences, including being satisfactorily discharged from probation or parole.

felt in nearly 13 years.'"[174]

Perhaps instead of focusing solely on the effect of felon disenfranchisement statutes in maintaining a collective standard of morality within communities, we should consider that such statutes have the direct effect of stripping individuals like Phalen from that ever-important "feeling of agency".[175] That feeling is essential to democracy in the United States as it provides for the expression of one's beliefs at the ballot box. Allowing individuals to regain their civic identities through eliminating felon disenfranchisement statutes will not only create a more collective sense of community but will also avoid the injection of legal moralism in our democratic system by no longer silencing the voices of those who oppose lawmakers' attempts at codifying morality in the first place.[176]

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174. *Id.*

175. *Id.*

176. Reinstating the right to vote and eliminating felon disenfranchisement statute directly addresses this problem of moralism in silencing the votes of those who allegedly violate an arbitrary code of morality—Phalen expressed this himself through his stated intention to vote for positive change within his community: "I'm big on social rights. I'm big on social justice. Candidates who don't promote hate, who don't promote violence, who instead promote compassion, are going to get my vote." *Id.*