Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt

Ann Cammett*

Abstract

The disenfranchisement of felons has long been challenged as anti-democratic and disproportionately harmful to communities of color. Critiques of this practice have led to the gradual liberalization of state laws that expand voting rights for those who have served their sentences. Despite these legal developments, ex-felons face an increasingly difficult path to regaining the franchise. This article argues that, for ex-felons in particular, criminal justice *debt* can serve as an insurmountable obstacle to the resumption of voting rights and broader participation in society. This article uses the term "carceral debt" to identify criminal justice penalties levied on prisoners, "user fees" assessed to recoup the operating costs of the justice system, and debt incurred during incarceration, including mounting child support obligations.

In recent years, another disturbing voting rights challenge has emerged that has received little attention from scholars. State appellate and federal courts across the country have affirmed the constitutionality of statutes that require ex-felons to satisfy the payment of *all* carceral debts in order to resume voting privileges. Such a paradigm has a clearly differential impact on the poor: if only those who can pay their debts after a criminal conviction can regain the right to vote, those who cannot will remain perpetually disenfranchised, rendering them "shadow citizens" and raising a host of policy and constitutional questions.

* Associate Professor of Law, Co-Director, Family Justice Clinic, William S. Boyd School of Law, University of Nevada Las Vegas. Many thanks to Marcia M. Gallo, Jules Lobel, Elizabeth L. MacDowell, Marc Mauer, and Nancy Rapoport for helpful comments. Thanks also to the participants of the 2011 Emerging Family Law Scholars and the Lutie A. Lytle Black Women Law Faculty Writing Workshop for feedback on earlier iterations of this project. I owe gratitude to Jeanne Price, the Wiener-Rogers Library and, in particular, Jennifer B. Anderson for excellent research assistance. All errors are my own.

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INTRODUCTION

Debt is the slavery of the free.
– Publius Syrus (Roman author, 1st Cent. B.C.)

Felony disenfranchisement[1] is a crisis of democracy. An estimated 5.85 million Americans, or 2.5 percent of the total U.S. voting age population, have lost the right to vote in some capacity in all but two

1. *See* CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT IN THE UNITED STATES, 2010 (2012), *available at* http://bit.ly/NkIVsc; *see also* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY vii (2006) ("[W]e use the phrase 'disenfranchisement' to describe the loss of voting rights [arising from a felony conviction]. This usage is predominant in the contemporary scholarly and journalistic literature. However, in the extensive nineteenth-century debates over the extension or contraction of the franchise, 'disfranchisement' was the sole word used to describe the loss of voting rights, and most historians still employ that word today. Most dictionaries consider the two words identical.").

states because they have a criminal conviction.[2] Powerful critiques by activists and scholars alike have highlighted the anti-democratic and racially disproportionate effects[3] of shrinking electoral participation.[4] This article will demonstrate that, for ex-felons in particular, the problem of mounting criminal justice *debt* can also serve as an insurmountable

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2. *See* THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2011), *available at* http://bit.ly/PdAXY8 [hereinafter FELONY DISENFRANCHISEMENT LAWS]. The Sentencing Project reports that 48 states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense. Only two states, Maine and Vermont, permit inmates to vote. In addition, 35 states prohibit persons on parole from voting, and 30 of these states exclude persons on probation as well. Four states deny the right to vote to all persons with felony convictions, even after they have completed their sentences. Eight others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after a prescribed waiting period. *See* NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2010, at 1 (2010).

3. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (persuasively arguing that mass incarceration has created a racial caste system where a significant segment of subordinated communities is relegated to second class citizenship by social exclusion stemming from criminal convictions); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1292 (2004) ("The geographic concentration of mass incarceration translates the denial of individual felons' voting rights into disenfranchisement of entire communities."); S. David Mitchell, *Undermining Individual and Collective Citizenship: The Impact of Exclusion Laws on the African-American Community*, 34 FORDHAM URB. L.J. 833 (2007) (arguing that felon exclusion laws are not race neutral and that the application of the laws has a racially discriminatory effect and should be abolished); Alice E. Harvey, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need for a Second Look*, 142 U. PA. L. REV. 1145, 1147 (1994) (noting that felon disenfranchisement laws disproportionately affect the black vote to a significant degree).

4. *See, e.g.*, MANZA & UGGEN, *supra* note 1, at 74; JAMIE FELLNER & MARC MAUER, HUM. RTS. WATCH & THE SENTENCING PROJ., LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 2 (1998) [hereinafter LOSING THE VOTE], *available at* http://bit.ly/QvhjUz (arguing that the scale of felony voting disenfranchisement in the United States is far greater than in any other nation and has serious implications for democratic processes and racial inclusion); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1156 (2004) ("Virtually every contemporary discussion of criminal disenfranchisement in the United States begins by noting the sheer magnitude of the exclusion, and its racial salience."); Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity Of The Ballot Box*,*'* 102 HARV. L. REV. 1300, 1301 (1989) [hereinafter *Disenfranchisement of Ex-Felons*] (arguing felony disenfranchisement is an act of scapegoating and self-delusion and is therefore illegitimate as a policy); Eric J. Miller, *Foundering Democracy: Felony Disenfranchisement in the American Tradition of Voter Exclusion*, 19 NAT'L BLACK L.J. 32, 33-34 (2005) ("Felony disenfranchisement is a national scandal. . . . [It] reveals the theoretical underpinnings of an exclusionary version of American democracy in which more or less widespread disenfranchisement is an acceptable or necessary political tactic."). *But see* Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001) ("It is not unreasonable to suppose that those who have committed serious crimes may be presumed to lack this trustworthiness and loyalty.").

obstacle to the resumption of voting rights and broader participation in society.

Voting rights advocates are correctly intent on eradicating state laws that disenfranchise felons.[5] However, if the goal for felons who have "paid their debt to society" is the restoration of social citizenship,[6] then this is an incomplete strategy. A focus on direct disenfranchisement obscures the broader discourse about access to economic resources that are becoming increasingly scarce, a problem largely exacerbated by mass criminalization.[7] For example, even if universal suffrage suddenly manifested, ex-felons would still be unable to navigate the vast array of civil barriers that present unique challenges to political *and* economic survival after being convicted of a crime. Criminal convictions set in motion a variety of social conditions and regulatory schemes that are mutually and negatively reinforcing and, taken together, render convicted felons "shadow citizens."[8] It is useful to envision a dual paradigm for these key exclusionary features: first, informal obstacles arising from social subordination; and second, formal legal barriers to voter

5. *See* McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995) ("The United States Supreme Court has chosen to apply the strict scrutiny standard to voting because of the significance of the franchise as the guardian of all other rights."). Although it is true that concerted efforts to repeal onerous disenfranchisement laws is not a complete solution, the repeal of these laws would in fact have a significant positive effect by allowing the transfer of advocacy resources toward the goal of addressing other obstacles to citizenship.

6. The term social citizenship, as used here, is derived generally from British Sociologist T.H. Marshall's theory of social citizenship, which articulates the notion that public well-being in a democratic society depends on economic security, in addition to political and civil rights. T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 10-11 (1950); *see* Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 784 (2003) (arguing that social citizenship stands against a powerful and pervasive neoliberal ideology which asserts that state abstention from economic protection is the foundation of a good society); *see also* MARTIN BULMER & ANTHONY M. REES, CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL (1996).

7. *See* discussion *infra* Part II and accompanying notes (discussing the social, political, and economic context that inform obstacles to re-enfranchisement).

8. By using the term citizen in this context, the author does not intend to ignore the subject of nation-state citizenship. This article, though it does not confront the issue of immigration, does not use the phrase social citizenship in any exclusionary sense whatsoever, including against non-citizens. *See* McCluskey, *supra* note 6, at 797 ("[F]raming the debate over economic welfare questions as social citizenship risks solidifying the exclusionary boundaries of national citizenship that reflect some of history's biggest moral failures."). Rather, the author intends to frame citizenship within a broader socio-economic paradigm than is currently contemplated in the dominant formalist conception of equality. *See* ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 2 (2001) ("[A]ntidiscrimination law has also . . . sustained a deep insensitivity to entrenched social inequalities.").

restoration based on debt that serves as "back door" voter disenfranchisement.

Informal obstacles are informal in the sense that they do not exist in law with the express purpose of directly inhibiting access to the vote. Rather, they are propounded through practice, custom, and indirect regulation of the lives of ex-felons.[9] They function to stagnate a person's ability to exercise broader participation in society, which is contrary to society's implicit promise of redemption for those convicted of crimes.[10] The first of these obstacles is stigma that redounds to the detriment of convicted felons; such stigma developed historically within a race paradigm and persists because of the development of a race-neutral jurisprudence that gives rise to mass incarceration.[11] Moreover, race is intertwined with the question of class status, specifically poverty, which serves as a self-perpetuating drag on social mobility in the context of criminalized communities. A second major obstacle is the wide range of civil legal disabilities, or what is commonly known as "collateral consequences." These are legal barriers arising from criminal convictions, which limit access to various aspects of citizenship such as voting, but which also include barriers to employment, housing, and other critical life supports.[12] The third are Kafkaesque state re-enfranchisement processes that prisoners must navigate to restore voting privileges. These processes are often so onerous that the Justice Department has described them as "a national crazy-quilt of disqualifications and restoration procedures."[13] Finally, for people in the criminal justice system, a distinct and potent obstacle has emerged in the form of untenable "carceral debt,"[14] a term this article uses to describe civil debt associated with criminal justice penalties or debt incurred during incarceration, or both. Much of this debt is euphemistically referred to as "user fees" that attempt to recoup from prisoners the operating costs of the criminal justice system. These fees are not connected to the underlying crime in the way that restitution or fines are, but rather are part of state cost-recovery systems. Nevertheless, these invisible surcharges are imposed on convicts at every stage of criminal

9. *See infra* Part II and accompanying notes.

10. The Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008), is national legislation with broad bi-partisan support, which is designed to improve outcomes for people returning to communities from prisons and jails.

11. *See* discussion *infra* Parts I.B, II.A.

12. *See* discussion *infra* Part II.B.

13. MARGARET COLGATE LOVE & SUSAN M. KUZMA, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY 1 (1996), *available at* http://1.usa.gov/QyAafc.

14. "Carceral, *adj*., of or belonging to a prison." OXFORD ONLINE ENGLISH DICTIONARY, http://bit.ly/RIVHmp (last visited Oct. 18, 2012).

justice processing and can become a substantial obstacle to reentry.[15] Notably, this debt is borne by those least able to pay, foreshadowing a cycle of re-incarceration and cyclical recidivism for low-income ex-felons.[16]

Informal obstacles are but one aspect of the modern re-enfranchisement paradigm. Debt also routinely hinders the formal resumption of voting rights after criminalization, even after state disenfranchisement schemes no longer serve that function. Restrictive re-enfranchisement statutes have quietly supplanted the lifetime disenfranchisement statutes that heretofore served as direct prohibitions on voting by felons, but which are now slowly disappearing. Despite these important developments, debt-related re-enfranchisement barriers have received surprisingly little attention from scholars.[17] In recent years, courts across the country have affirmed the constitutionality of statutes that require felons to satisfy the payment of carceral or other debts in order to resume voting privileges.[18] Interestingly, child support debt has recently emerged as a specific obstacle to re-enfranchisement, as is demonstrated in *Johnson v. Bredesen*,[19] wherein the Sixth Circuit upheld a Tennessee statute that authorizes an exception to re-enfranchisement when petitioners are not current in child support obligations.[20] Remarkably, the court upheld the constitutionality of this

15. Recidivism rates are extraordinarily high. The Bureau of Justice Statistics reports that, in a 15-year study, 67.5% of released prisoners were rearrested within 3 years. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., REENTRY TRENDS IN THE U.S. 20 (2002).

16. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DAEDALUS 8, 14 (2010) (arguing that incarceration significantly reduces economic opportunities).

17. A few student comments have explored the subject. *See, e.g.*, Jill E. Simmons, Comment, *Beggars Can't Be Voters: Why Washington's Felon Re-Enfranchisement Law Violates the Equal Protection Clause*, 78 WASH. L. REV. 297 (2003); Cherish M. Keller, Note, *Re-Enfranchisement Laws Provide Unequal Treatment: Ex-Felon Re-Enfranchisement and the Fourteenth Amendment*, 81 CHI.-KENT L. REV. 199 (2006); Jason H. Weber, Comment, *Equal Protection—Felon Disenfranchisement Scheme That Requires Completion of All Terms of Sentence Including Full Payment of Any Legal Financial Obligations Is Constitutional Under Both Washington's Privileges and Immunities Clause and the Equal Protection Clause of the Federal Constitution*, 39 RUTGERS L.J. 1101 (2008); J. Whyatt Mondeshire, *Felon Disenfranchisement: The Modern Day Poll Tax*, 10 TEMP. POL. & CIV. RTS. L. REV. 435 (2001).

18. *See* discussion *infra* Part III.A and accompanying notes.

19. *See* Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010).

20. *Id.* at 745. The Code

> restores felons' eligibility "to apply for a voter registration card and have the right of suffrage restored" upon receipt of a pardon, discharge from custody after serving the maximum sentence imposed, or final discharge by the relevant county, state, or federal authority. The statute, however, carves out two exceptions to re-enfranchisement eligibility. It provides that: (b) . . . a person shall not be eligible to apply for a voter registration card and have the right of

particular statute even though child support debt typically has no connection to the underlying criminal conviction for which an individual has been disenfranchised.

To date, voter restoration statutes that require the payment of criminal justice-related debt have been routinely upheld, even as they restrict access to the vote, because payment of criminal justice debt is deemed rationally related to legitimate state interests, an extremely deferential constitutional standard.[21] Such a paradigm has a clearly differential impact on the poor: if *only* those who can pay their debts after a felony conviction can regain the right to vote, those who cannot will remain perpetually disenfranchised. This paradigm, therefore, raises a host of constitutional questions.[22]

The emerging debt paradigm also has troubling implications for the adoption of future civil schemes that might further restrict post-conviction social and political participation for people in poverty. Theoretically, almost any debt can become a barrier to the resumption of voting rights, so long as the debt is *criminalized*.[23] Imprisonment for failure to pay a fine, restitution, or court costs can occur when repayment is made a condition of probation or parole and the defendant defaults. In an era of continued fiscal crisis, it is ever more likely that failure to pay consumer debts will begin to factor into this equation. Although debtors' prison has long been abolished for civil debt,[24] failure to pay consumer debt now mimics a criminal act, as many people are legally subject to arrest due to their inability to satisfy the terms of their financial obligations. This dynamic triggers inappropriate contact with the criminal justice system and raises the specter of an emerging twenty-first century debtors' prison.

Part I of this article will set forth the shocking scope of mass criminalization and will situate American disenfranchisement law and

> suffrage restored, unless the person has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence [, and] (c) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person is current in all child support obligations.

Id.; *see also* TENN. CODE. ANN. § 40-29-202 (a)-(c) (2010).

21. *See* discussion *infra* Part IV.A.

22. *See Bredesen*, 624 F.3d at 754 (Moore, J., dissenting).

23. *See* discussion *infra* Part IV.B and accompanying notes.

24. *Id.*; *see also Recent Legislation: Criminal Law—Alabama Raises The Rates at Which Individuals in Jail for Non-Payment of Fines Earn Out Their Debts—H.B. 95, Reg. Sess. (Ala. 2002) (codified at Ala. Code § 15-18-62 (1995 & Supp. 2002))*, 116 HARV. L. REV. 735, 735 (2002) ("Incarceration for 'public,' not 'private,' debts is typically not considered 'imprisonment for debt' within the meaning of state constitutional prohibitions, however, and in the many states that incarcerate individuals for their failure to pay fines, debtor's prison is in effect neither antique nor alien.").

policy within a discourse of democratic participation for ex-felons. Next, it will describe the historical roots and purposes of civil disabilities or "civil death," and will briefly chart the progressive expansion of the suffrage class over time to include many marginalized groups, *except* felons. Part I will also explain modern conceptions of felony disenfranchisement jurisprudence by exploring the Supreme Court's constitutional approval of state disenfranchisement laws through the foundational case of *Richardson v. Ramirez*,[25] a case that relies on a narrow textual reading of Section Two of the Fourteenth Amendment to justify state disenfranchisement schemes.[26] Although this section of the Amendment was designed to force Confederate states to permit African Americans citizenship after the Civil War, *Richardson*, in the modern era, has given way to a race-neutral interpretation that sanctions the denial of voting rights to all felons by obviating the requirement of heightened scrutiny for their voting rights claims. Such an interpretation exacts a particularly high toll on African American communities.

Part II of this article will explore the first part of the dual paradigm that has led to "shadow citizens": informal obstacles to re-enfranchisement. Such obstacles include (1) class and race stigma and the disproportional burden of incarceration; (2) civil collateral consequences of criminal convictions; (3) onerous re-enfranchisement processes that discourage voter restoration; and (4) the emergence of debilitating "carceral" debts, including criminal justice legal financial obligations (LFOs) and child support debt incurred during incarceration. All of these overlapping and interrelated aspects of subordination serve to create informal, but nonetheless profound, barriers to the restoration of political citizenship through the right to vote, as well as the pursuit of broader socio-economic citizenship expressed through roadblocks to successful reintegration.

In Part III, this article will then explore the second paradigm of exclusion: formal legal barriers to re-enfranchisement arising from criminal justice-related debt obligations. This Part will trace a recent trajectory in the law of re-enfranchisement, where courts have routinely upheld statutes that condition felon re-enfranchisement itself on the payment in full of fines, restitution, court fees, and other debt. Such statutes serve as a barrier to re-enfranchisement even after a state's restrictive disenfranchisement laws have been amended. This Part will

25. *See* Richardson v. Ramirez, 418 U.S. 24 (1974).

26. The second section of the Fourteenth Amendment refers specifically to voters in the southern states disenfranchised for "participation in rebellion, or other crime." U.S. CONST. amend. XIV, § 2.

further examine the expansion of the conditions that limit voter restoration, which now extend to payment of child support obligations.

Finally, Part IV will challenge the continuation of these policies even under rational basis analysis, the most deferential standard of review. This article takes the position that statutes creating wealth-based conditions, which directly discriminate against poor ex-felons and burden their right to vote, should fail to survive a rational basis review based on a range of pragmatic legal and policy arguments. This article will conclude with envisioning the future of our emerging debt paradigm by exploring the modern trend of criminalizing debt in this era of fiscal crisis and mass criminalization.

I. DISENFRANCHISEMENT AS A COLLATERAL CONSEQUENCE OF CRIME

The growing number of people directly affected by mass incarceration puts the scope and impact of voter disenfranchisement into perspective. The prison population in the United States currently stands at more than 2.3 million. According to a report by the Pew Charitable Trust, this statistic amounts to a 1:100 ratio of all adults in the United States.[27] In the aggregate, including all probationers, parolees, prisoners, and jail inmates, America now holds more than 7.3 million adults under some form of correctional control.[28] As the report notes, "That whopping figure is more than the populations of Chicago, Philadelphia, San Diego and Dallas put together, and larger than the populations of 38 states and the District of Columbia." People who are convicted of felonies, in every state except Maine and Vermont, will be confronted with some limitations on their right to vote.[29] Thus, in the context of widespread imprisonment, concerns about the implications for democracy are not specious. Limited participation in U.S. democratic processes is in stark contrast to European countries, where the debate is centered around *which prisoners* should be barred from voting, not how long states should deny suffrage after release.[30] Moreover, the

27. The United States outstrips China, which is far more populous. The United States imprisons five to eight times as many people as other western democracies. PEW CHARITABLE TRUST, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 5 (2008), *available at* http://bit.ly/PdJ9YA.

28. *Id.*

29. *See* FELONY DISENFRANCHISEMENT LAWS, *supra* note 2.

30. ERIKA WOOD, BRENNAN CTR. FOR JUST., RESTORING THE RIGHT TO VOTE 5 (2009) ("In almost all cases, the debate stops at the prison walls. . . . While researchers differ over how to categorize certain laws, in most European nations, some or all prisoners are entitled to vote; in the remainder (mainly countries of the former Eastern Bloc), prisoners are barred from voting but are generally re-enfranchised upon release."); *see also* MANZA & UGGEN, *supra* note 1, at 41 ("Felon disenfranchisement laws in the

disproportionate impact on African Americans has caused some to question whether disenfranchisement has a legitimate purpose or whether the paradox created by vote suppression in minority communities runs counter to fundamental equality principles.[31]

A. *Historical Dimensions*

The disenfranchisement of convicts is not a modern concept but rather derives its roots from ancient Greece where "[c]riminals pronounced infamous were prohibited from appearing in court, voting, making speeches, attending assemblies, and serving in the army."[32] Indeed, the American system is heir to the common law concept of disenfranchisement inherited from Europeans during the medieval era. In England, "[A] person pronounced 'attainted' after conviction for a felony or . . . treason [faced] forfeiture corruption of the blood [meaning that land owned by the criminal would pass not to heirs but to king or lord], and loss of civil rights."[33] As political scientist Alec Ewald notes, "[T]hese practices were known in England as 'civil death,' and the attainted criminal was said to be 'dead in law' because he could not perform any legal function—including, of course, voting."[34]

English colonists in North America incorporated these civil disabilities into statutes—the impact of which varied greatly depending on the types of offenses that would qualify for suspending rights—and also in designating the length of time for loss of "freeman" status and the ballot.[35] Nonetheless, what was clearly contemplated during the early

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United States are unique in the democratic world. Nowhere else are millions of offenders who are not in prison denied the right to vote.").

31. *See* Mitchell, *supra* note 3, at 834-35 (noting felon exclusion laws relegate African Americans to second class citizenship); *see also* Miller, *supra* note 4, at 33 ("[F]elony disenfranchisement is most readily comprehensible as a means of reserving political participation for a privileged social and intellectual class.").

32. *See* Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059-60 (2002); *see also Disenfranchisement of Ex-Felons*, *supra* note 4, at 1301; *see also* FELLNER & MAUER, *supra* note 4.

33. *See* Ewald, *supra* note 32, at 1060 n.45 (citing Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721 (1972)).

34. *See id.*

35. Indeed, Ewald states:

> In Plymouth the diminishment seems to have been permanent, but Connecticut law stated that "good behaviour shall cause restoration of the privilege." In both Massachusetts and Connecticut, the decision to restore voting rights was left to the court, but in pre-Revolutionary Rhode Island, anyone convicted of bribing an election official was "forever thereafter . . . excluded from being a Freeman, or voting, or bearing an public Office, whatsoever, in this Colony."

Id. at 1062.

disenfranchisement period was the punitive and public purpose of the laws.[36] Ewald observes this dynamic:

> Originally, the removal of criminals from the suffrage had a visible, public dimension; its purposes were articulated in the law; and it was a discrete element in punishment which required the deliberation of courts to implement. Moreover, crimes subject to the penalty of disenfranchisement were either linked to voting itself . . . or defined as egregious violations of the moral code.[37]

Stated differently, disenfranchisement law originally resulted from specific violations of the moral code rather the general *status* of felon, as is the case with modern disenfranchisement.[38]

As Ewald insightfully notes, "[A]merican political thought has always been characterized by paradoxes of inclusion and exclusion."[39] As such, the exclusionary purposes of civil disabilities were brought to bear on convicted felons from the outset, justified by a variety of social theories questioning the moral competency of felons to exercise the franchise.[40] Even so, voting was a privilege reserved for few.[41] During the colonial period and in the aftermath of the American Revolution, franchise rights were vested only in white, male property owners over the age of 21;[42] and exclusionary practices arising from felony convictions would logically apply only to them. People outside of this narrow class of "citizens" had no voting rights whatsoever. Nevertheless, over time, voting privileges would be extended to larger segments of the population, including all classes, racial minorities, women, and young adults.[43] The democratic base was broadened through struggle,[44] and

36. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 162-63 (2000) ("[T]he punitive thrust clearly was present for much of the nineteenth century.").

37. *See* Ewald, *supra* note 32, at 1062. Conversely, Ewald opines, "Modern disenfranchisement laws—automatic, invisible in the criminal justice process, considered 'collateral' rather than explicitly punitive, and applied to broad categories of crimes with little or no common character—do not share any of these characteristics." *Id*.

38. *See id.*

39. *See id.* at 1045.

40. *See* discussion *infra* Part IV.A and accompanying notes.

41. Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 50 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter *Mass Imprisonment*] (noting that, at the founding of the republic, the vote was "granted to only wealthy white male property owners who represented only 120,000 of the 2 million 'free' Americans, not counting the more than one million slaves and indentured servants.").

42. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1346 (2003) (providing an excellent history of the expansion of voting rights through war efforts).

43. *See* FELLNER & MAUER, *supra* note 4, at 2. Constitutional provisions and statutes expanded the franchise for groups other than propertied white males. *See* U.S.

ultimately through legislation, each time providing for expansion of the suffrage class. For example, after the Civil War ended, Congress passed a number of Reconstruction Amendments between 1865 and 1870 to ensure that newly freed slaves would not be denied basic entitlements. These post-Civil War Amendments included the Thirteenth Amendment, which abolished slavery;[45] the Fourteenth Amendment, the source of the due process and equal protection limitations on the exercise of state power;[46] and the Fifteenth Amendment, which prohibited the denial of the right to vote on account of race or color.[47] Each of these Amendments were intended to shore up rights that were critical for the exercise of citizenship in the post-war landscape.

Despite this enlargement of voting power, specifically for African American men, laws that mandated criminal disenfranchisement also existed concurrently in most jurisdictions.[48] By the time of the Fourteenth Amendment's adoption, 29 States had provisions in their constitutions that prohibited, or authorized the legislature to prohibit, voting by persons convicted of felonies or "infamous crimes."[49] Further, though franchise rights were extended to newly freed slaves after the Civil War, states soon after enacted "Black Codes" to control freedman by transforming criminal codes into legislation that specifically targeted

CONST. amend. XIV, § 2 (linking representative apportionment to the right of all male citizens at least 21 years of age to vote, ostensibly granting the franchise to non-white citizens); U.S. CONST. amend. XV, § 1 (protecting the right of citizens to vote regardless of race, color, or previous condition of servitude); U.S. CONST. amend. XIX (granting women the right to vote); U.S. CONST. amend. XXIV, § 1 (protecting the right of citizens to vote regardless of ability to pay any poll or other tax); U.S. CONST. amend. XXVI, § 1 (granting citizens 18 years of age and older the right to vote); Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006) (prohibiting tests or devices to determine voter eligibility, the alteration of voting qualifications and procedures, and the denial of the right to vote on account of race or color).

44. *See* Karlan, *supra* note 42, at 1345-46. Karlan contends:

> [W]hile the conventional story of the right to vote in America describes a pattern of gradual and inevitable progress . . . that is not what happened. The history of right to vote in America is one of expansion and contraction . . . rather than gradual evolution.

Id. at 1345. She also notes that "virtually every major expansion in the right to vote was connected intimately to war." *Id.* at 1346. *See generally* KEYSSAR, *supra* note 36 (asserting that the primary factor promoting the expansion of the suffrage has been war and the primary factors promoting contraction or delaying expansion have been class tension and class conflict).

45. U.S. CONST. amend. XIII.

46. U.S. CONST. amend. XIV.

47. U.S. CONST. amend. XV.

48. *See* MANZA & UGGEN, *supra* note 1, at 41-44.

49. *See* Richardson v. Ramirez, 418 U.S. 24, 48 (1974). In *Richardson*, the Court notes that the majority of states had disenfranchisement laws at the time of the Fourteenth Amendment's enactment.

Blacks.[50] In this context, it is interesting to note that the Thirteenth Amendment, which abolished slavery, also made an exception for punishment for those convicted of a crime.[51] Criminal disenfranchisement, along with terror and violence, was routinely used in the South after Reconstruction to suppress the votes of African Americans.[52] Outright voter suppression through these means continued for nearly a century until the enactment of the Voting Rights Act of 1965.[53] The passage of the Voting Rights Act finally secured the voting rights of African Americans, which the Fifteenth Amendment originally guaranteed.

B. Modern Disenfranchisement Law

In the modern era, criminal disenfranchisement laws persist and largely withstand constitutional scrutiny.[54] Courts closely analyze the constitutionality of state restrictions on the right to vote under fundamental rights jurisprudence.[55] Since voting has been deemed a

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50. ERIC FONER, GIVE ME LIBERTY!: AN AMERICAN HISTORY VOL. II 535 (2d ed. 2009) (noting that the Black Codes were laws that granted freedman certain rights "but denied them the right to testify against whites, serve on juries or in state militias, or to vote . . . [t]he Black codes declared that those who failed to sign yearly labor contracts could be arrested and hired out to white landowners."); *see also* Angela Y. Davis, *Racialized Punishment and Prison Abolition*, *in* THE ANGELA Y. DAVIS READER 96, 100 (1998) ("[T]he Black Codes . . . criminalized such behavior as vagrancy, breech of job contracts, absence from work, the possession of firearms, insulting gestures or acts. . . ."); ALEXANDER, *supra* note 3, at 28 ("Although . . . convict laws . . . are rarely seen as part of the black codes, that is a mistake . . . the main purpose of the codes was to control the freedman, and the question of how to handle convicted black lawbreakers was very much at the center of the control issue.").

51. Section 1 provides that "[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1 (emphasis added); *see, e.g.*, Ryan S. Marion, *Prisoners for Sale: Making the Thirteenth Amendment Case Against State Private Prison Contracts*, 18 WM. & MARY BILL OF RTS. J. 213, 214 (2009) ("As such, the Punishment Clause renders any current prisoner's argument that they are slaves or involuntary servants void and frivolous.").

52. *See* Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did The Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 261 (2004) ("Criminal disenfranchisement was widely used in the South after Reconstruction to suppress the vote of African-Americans."). It is important to note that the Fifteenth Amendment did not grant suffrage to African American women, or any other women for that matter. That right came pursuant to the ratification of the Nineteenth Amendment in 1920, which prohibited denial of the right to vote based on sex. *See* U.S. CONST. amend. XIX.

53. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

54. The exception is for laws enacted for a racially discriminatory purpose. *See* Hunter v. Underwood, 471 U.S. 222, 233 (1985).

55. *See* U.S. CONST. amend. XIV. § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor

fundamental right,[56] states must show that restrictions on voting are necessary pursuant to a compelling governmental interest, are narrowly tailored, and are the least restrictive means of achieving the state's objective.[57] However, felon disenfranchisement laws have been exempted from the standard fundamental rights/equal protection analysis since the Supreme Court's decision in *Richardson v. Ramirez.*[58]

In *Richardson*, the Court upheld felon disenfranchisement laws under Section Two of the Fourteenth Amendment ("Section Two"), a provision that was never previously enforced.[59] Section Two provides, in relevant part:

> "[W]hen the right to vote at any election . . . 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. . . ."[60]

The Supreme Court in *Richardson* construed Section Two as granting states an "affirmative sanction" to disenfranchise anyone convicted of criminal offenses, an interpretation that arises solely from the reference to "*rebellion, or other crime.*"[61] In a narrow textual reading, the Court concluded that the language of Section Two "is as much a part of the Amendment as any of the other sections, and how it became a part of the Amendment is less important than what it says and what it means." Justice Thurgood Marshall vehemently objected to this

deny to any person within its jurisdiction the equal protection of the laws."); *see also* LOSING THE VOTE, *supra* note 4, at 18.

56. Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

57. The Court recognized voting as a fundamental right and directed courts to apply strict scrutiny, stating, "[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 562.

58. Richardson v. Ramirez, 418 U.S. 24 (1974). *See* Karlan, *supra* note 4, at 1153-54; *see also* Chin, *supra* note 52, at 313; FELLNER & MAUER, *supra* note 4, at 18.

59. *See* Chin, *supra* note 52. Chin asserts: "[T]his clause was designed to encourage former Confederate states to enfranchise African-Americans by excluding former slaves from the state's population for the purpose of apportioning Congress if former slaves were denied the right to vote." *Id*. at 259. He notes, "[Y]et . . . no discriminating state lost even a single seat in the House of Representatives when Congress reapportioned itself." *Id*. Chin goes on to assert, "Congress proposed the Fifteenth Amendment in 1869 because Section 2 had failed." *Id*. at 260-61. Consequently, he concludes that, rather than being consistently unenforced because of federal indifference to Jim Crow, the explanation for its disuse is that it was effectively *repealed* upon ratification of the Fifteenth Amendment in 1870.

60. U.S. CONST. amend. XIV, § 2 (emphasis added).

61. *See* Chin, *supra* note 52, at 261 ("The Court reasoned that Section 2 . . . was inapplicable if individuals were disenfranchised for conviction of "rebellion [] or other crime."); Karlan, *supra* note 4, at 1154.

interpretation and issued a stinging dissent.[62] Agreeing that felon disenfranchisement was commonplace in nineteenth century America, Justice Marshall nonetheless decried the majority's literal application of the clause as unauthorized by the purpose or language of the provision,[63] noting the following:

> "It is clear that [Section] 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment. Section 2 provides a special remedy-reduced representation to cure a particular form of electoral abuse—the disenfranchisement of Negroes. There is no indication that the framers of the provisions intended that special penalty to be the exclusive remedy for all forms of electoral discrimination.[64]

Justice Marshall was referencing the primary goal of the clause, which was to create incentives for Confederate states to participate voluntarily in extending the vote to their newly freed former slaves. As Marshall explained, "Section 2 . . . put Southern States to a choice—enfranchise Negro voters or lose congressional representation."[65] Nevertheless, in *Richardson*, the Court's construction of Section Two had the effect of affirming the constitutionality of state disenfranchisement laws *generally*. In doing so, the Court negated the need to apply strict scrutiny in any analysis of voting rights based solely on state disenfranchisement statutes. As the logic goes, if felons are expressly precluded from the right to vote by the Amendment, then a

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62. *Richardson*, 418 U.S. at 56 ("The Court today holds that a State may strip ex-felons who have fully paid their debt to society of their fundamental right to vote without running afoul of the Fourteenth Amendment.").

63. Justice Marshall, in his dissent, opines:

> The historical purpose for [Section] 2 itself is, however, relatively clear and, in my view, dispositive of this case. The Republicans who controlled the 39th Congress were concerned that the additional congressional representation of the Southern States which would result from the abolition of slavery might weaken their own political dominance. There were two alternatives available—either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised; but an explicit grant of suffrage to Negroes was thought politically unpalatable at the time. Section 2 of the Fourteenth Amendment was the resultant compromise. It put Southern States to a choice-enfranchise Negro voters or lose congressional representation.

Id. at 73-74; *see also* FONER, *supra* note 50, at 538 ("The Fourteenth Amendment offered the leaders of the white South a choice allow black men to vote and keep their state's full representation in the House of Representatives, or limit the vote and sacrifice part of their political power.").

64. *See Richardson*, 418 U.S. at 74.

65. *See* Chin, *supra* note 52, at 259.

fundamental right to vote does not exist *for them*.[66] *Richardson* remains good law and is a critical obstacle in contemporary voting rights law.[67] Because of *Richardson*, individuals with felony convictions remain the primary exception[68] to the historical expansion of voting rights for U.S. citizens.[69]

II. INFORMAL OBSTACLES AS SUBORDINATION

A. *The Persistence of Race and Class in Mass Incarceration*

1. Disparate Racial Impact

Throughout much of U.S. history, the power to vote has been intertwined with the hopes and aspirations of African Americans. This remains the case today. The Fourteenth Amendment was the centerpiece of legislation designed to guarantee due process to freedmen after centuries of servitude. As historian Eric Foner aptly notes, "[T]he Reconstruction Amendments transformed the Constitution from a document primarily concerned with federal-state relations and the rights of property into a vehicle through which members of vulnerable minorities could stake a claim to freedom and protection against misconduct by all levels of government."[70] Indeed, the great irony of *Richardson* is that an Amendment adopted in the wake of the Civil War to guarantee the franchise to African Americans would later be

66. Richard W. Bourne, *Richardson v. Ramirez: A Motion to Reconsider*, 42 VAL. U. L. REV. 1, 5 (2007). Bourne conducts an exhaustive analysis of the legislative history of Section 2 and argues that the Court misread the section. He concludes that Section 2 "should not be construed as an explicit endorsement of felon disenfranchisement statutes, much less as an authorization for the states to adopt them." *Id*. at 1.

67**.** In *Hunter v. Underwood*, 471 U.S. 222 (1985), the Court clarified that felon disenfranchisement laws are not entirely immune from all Equal Protection challenges, in particular if they are enacted for an impermissible, racially discriminatory purpose. In *Hunter*, the Court struck down an Alabama provision that disenfranchised persons convicted of crimes "involving moral turpitude." The Court cited the unusual selection of crimes and legislative history demonstrating that the constitutional provision was enacted with the purpose of disenfranchising blacks. The *Hunter* Court held that felon disenfranchisement laws that are enacted with "the desire to discriminate" against persons on account of race and that in fact have a discriminatory effect violate the Equal Protection Clause. *Id.* at 233; *see also* Chin, *supra* note 52, at 261.

68. Another exception, not relevant for the purposes of this article, includes those deemed mentally incompetent. *See* Shepard v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978) (noting that felons, "like insane persons, have raised questions about their ability to vote responsibly").

69. Note that this expansion, in this context, contemplates only U.S. citizens in their capacities as residents in the United States.

70. FONER, *supra* note 50, at 541 ("Many of the Supreme Court decisions expanding the rights of American citizens were based on the Fourteenth Amendment, including the *Brown* decision that outlawed school desegregation.").

interpreted by the Supreme Court in a way that severely limits the voting power of minorities well into the twenty-first century.[71]

Of all minority groups, laws that disenfranchise have a particularly onerous effect on African Americans,[72] who make up approximately 13 percent of the population but comprise 40 percent of the prison population.[73] With respect to mass incarceration, analyses of its root causes and its racialized impact abound in legal literature.[74] But, as asserted by legal scholar Michelle Alexander, race-neutrality in disenfranchisement law masks the impact of political dislocation and powerlessness in low-income communities of color.[75] As a result, the disproportional effect of crime on African Americans appears to be primarily self-caused, rather than the result of interlocking criminal justice policies that specifically plague African Americans.[76] Moreover, challenges to felony disenfranchisement under the disparate impact provisions of the Voting Rights Act[77] have been largely unsuccessful as a strategy to combat the onerous effects of mass incarceration on African

71. *See* Bourne, *supra* note 66, at 4; *see also* Chin, *supra* note 52, at 261.

72. Ewald, *supra* note 32, at 1054 ("Criminal disenfranchisement policy in the United States is located squarely at the intersection of voting rights and criminal justice—and it is tainted by the racial history of both policy areas in the United States. Despite its roots in liberal and republican ideologies, this Article concludes, criminal disenfranchisement runs contrary to the essential commitments of modern American political thought.").

73. CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2 (2009) ("African Americans make up 13% of the general US population, yet they constitute 28% of all arrests, 40% of all inmates held in prisons and jails, and 42% of the population on death row."); *see also* HEATHER C. WEST & WILLIAM J. SABOL, U.S. DEP'T OF JUST., PRISON INMATES AT MIDYEAR 2008—STATISTICAL TABLES 17 (2009), *available at* http://1.usa.gov/XDcBHo (reporting that, in 2008, 60% of 2,103,500 inmates in state or federal prisons, or in local jails, were Black or Hispanic).

74. *See, e.g.*, MARC MAUER, RACE TO INCARCERATE (1999) (recounting runaway growth in the number of prisons and noting overreliance on imprisonment to stem problems of economic and social development); *see* Ewald, *supra* note 32, at 1048 ("[T]he most powerful critique of criminal disenfranchisement begins by appreciating the policy's deep roots in American political ideology. . . . [O]nly a combination of contractarian liberal, civic-virtue republican, and racially discriminatory ideologies explains the persistence of criminal disenfranchisement in the United States.").

75. *See, e.g.*, ALEXANDER, *supra* note 3, at 196-97.

76. *See id.* at 180-82 (providing an excellent summary of criminal justice policies that ensnare black communities, primarily resulting from the "War on Drugs"); *see also* Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 4, 12 (David Garland ed., 2000) ("The most significant change within the criminal justice system is the loss of the individual in the sentencing process, as determinate sentencing and other 'reforms' have taken us from an offender-based to an offense-based system.").

77. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

Americans.[78] As Alexander points out, "[M]ore African Americans are under correctional control today—in prisons or jail, on probation or parole—than were enslaved in 1850."[79] In another shocking statistic, Alexander further notes, "[M]ore [black men] are disenfranchised today than in 1870, the year the Fifteenth Amendment was ratified."[80] All told, 13 percent of all African American men today have been *permanently* disenfranchised under state laws.[81] Moreover, about 30 percent of African American men are automatically banned from jury service for life.[82]

The politics of social exclusion brought about by disenfranchisement has an impact that transcends any given individual who is denied the franchise. Denial of voting rights has a profound influence on entire communities through vote dilution and further economic displacement from the redistribution of federal resources.[83] Thus, mass incarceration does not simply remove human resources from neighborhoods but also redirects financial resources, which are tied to population, away from these same disadvantaged neighborhoods. Mass incarceration also redirects political power: in the 2010 census, incarcerated individuals are counted by the U.S. Census Bureau at the locations where they are incarcerated rather than at their prior addresses in their home communities.[84] As the Brennan Center for Justice has

78. Federal courts have differed on whether, and how, the Voting Rights Act applies to felony disenfranchisement. The Ninth and Sixth Circuit Courts have held that the Act applies, whereas the Second and Eleventh Circuits have held that it does not. *See* MANZA & UGGEN, *supra* note 1, at 226-27 ("The debate focuses on the meaning of the racial disparity. . . . Given the failure of the numerous legal challenges and the uncertainty of theories based on the VRA . . . proponents of re-enfranchisement have had far less success in the courts than they have had in state legislature.").

79. ALEXANDER, *supra* note 3, at 175.

80. *See id.*; *see also* Karlan, *supra* note 42, at 1371 ("In 1870, the Fifteenth Amendment safeguarded the opportunity to vote of slightly less than one million black men. Today, felon disenfranchisement statutes deny that opportunity to nearly 1.4 million black men."). No doubt, the number of black men disenfranchised is even higher today.

81. *See Felony Disenfrachisement*, THE SENTENCING PROJECT, http://bit.ly/2E9sID (last visited Oct. 20, 2012) ("An estimated 5.3 million Americans are denied the right to vote because of laws that prohibit voting by people with felony convictions. Felony disenfranchisement is an obstacle to participation in democratic life which is exacerbated by racial disparities in the criminal justice system, resulting in 1 of every 13 African Americans unable to vote.").

82. *See* ALEXANDER, *supra* note 3, at 119; *see infra* Part II.B.

83. *See* Roberts, *supra* note 3, at 1292 ("Excluding such huge numbers of citizens from the electoral process substantially dilutes African American communities' voting power."); *see also* Harvey, *supra* note 3, at 1147.

84. *See U.S. Census and Incarceration*, BRENNAN CTR. FOR JUST., http://bit.ly/RRev6t (last visited Oct. 20, 2012) ("These two addresses are usually far from each other, and coupled with the nation's rising incarceration rate, lead to a systematic distortion of the population picture.").

shown, prison districts contain "ghost voters, prisoners who count toward the district size but who, with few exceptions, are not permitted to vote and who, with few exceptions, have no connection whatsoever to the other residents of the district. This situation artificially inflates the political power of residents in prison districts, and artificially deflates the power of residents everywhere else,"[85] especially the beleaguered neighborhoods of prisoners' origins.[86]

The effects of mass incarceration are self-perpetuating. An emerging theory among political scientists argues that "concentrated inequality exacerbates existing patterns of criminal justice punishment"[87] and suggests that the "perceptions of dangerousness attached to stigmatized and spatially concentrated minority groups [in particular, African Americans] . . . increase the intensity of both unofficial beliefs about social disorder and official decisions to punish through incarceration."[88] Accordingly, prisoners from communities of concentrated disadvantage "are themselves stigmatized and are more likely to be incarcerated when compared to those in less disadvantaged communities with similar crime rates,"[89] thus demonstrating the perpetuation of subordination. Professor Dorothy Roberts posits three main theories that explain the social mechanisms through which mass incarceration harms the African American communities where it is

85. *See id.* (internal quotations omitted). As the Brennan Center notes:

> [T]he skew can become quite extreme: in 2006, for example, voters in three of the city council wards of Anamosa, Iowa, were busily engaged in the democratic process. But 1300 of the 1358 individuals allotted to ward 2 were incarcerated—and so the city councilman was elected with one write-in vote from his wife and one from his neighbor.

Id. While this situation is an anomaly, it demonstrates the potential for antidemocratic voting tied to census counting practices. However, in recent months, "The U.S. Census Bureau has agreed to identify which census blocks contain group quarters such as correctional facilities as early as May 2011, so that state and local redistricting bodies can *choose* to use this data to draw fair districts and avoid prison-based gerrymandering." *Id.* (emphasis added).

86. *See, e.g.*, Eric Cadora et al., *Criminal Justice and Health and Human Services: An Exploration of Overlapping Needs, Resources, and Interests in Brooklyn Neighborhoods*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 285 (Jeremy Travis & Michelle Waul eds., 2003).

87. Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 20, 20, 26 (2010).

88. *See id.*

89. *See id.* at 26-27 ("What we appear to observe, then, is a mutually reinforcing social process: disadvantage and crime work together to drive up the incarceration rate. This combined influence in turn deepens the spatial concentration of disadvantage, even if at the same time it reduces crime through incapacitation."); *see also* Cadora et al., *supra* note 86, at 288.

concentrated: mass imprisonment damages social networks,[90] distorts social norms,[91] and destroys social citizenship.[92] On the issue of social citizenship, Roberts observes, "As these communities disengage from the national political economy, the rest of society stigmatizes them as criminal, deprives them of social supports, and treats their members as noncitizens."[93] One way that this theory has been effectively demonstrated is through a famous audit study[94] conducted by Princeton Sociologist Devah Pager. In Pager's study, she compared job prospects of black and white men who were recently released from jail. Her key

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90. *See* Roberts, *supra* note 3, at 1282 ("Damage to social networks starts at the family level and reverberates throughout communities where the families of prisoners are congregated. Locking up someone places an immediate financial and social strain on the rest of the family, and the burden falls primarily on the shoulders of women caregivers, who customarily shore up families experiencing extreme hardship."). However, it is important to recognize that, while criminal justice policies have impacted African American men to great effect, the fastest growing class of prisoners over the last generation are actually women, whose numbers have risen over 757% between 1977 and 2004. *See* NATASHA A. FROST ET AL., INST. ON WOMEN & CRIMINAL JUSTICE, HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004, at 7 (2006), *available at* http://bit.ly/TGDB4u; *see also US: World's Leading Jailer, New Numbers Show*, HUM. RTS. WATCH (December 11, 2008), http://bit.ly/VojC19 (black females are incarcerated at approximately three times the rate of white females and twice that of Hispanic females). The ramifications of incarceration in this instance are even greater, as women tend to be primary caretakers of children and others, and results in an even more direct dislocation. *See* FROST, *supra* note 90, at 8; *see also Women in the Justice System*, THE SENTENCING PROJ., http://bit.ly/mUtaI8 (last visited Oct. 20, 2012) ("The number of women in prison, a third of whom are incarcerated for drug offenses, is increasing at nearly double the rate for men. These women often have significant histories of physical and sexual abuse, high rates of HIV infection, and substance abuse. Large-scale women's imprisonment has resulted in an increasing number of children who suffer from their mother's incarceration and the loss of family ties.").

91. Roberts, *supra* note 3, at 1285 ("By straining social networks, mass incarceration also affects communities' social norms. Drawing upon social disorganization theory, researchers have shown that weakening infrastructure threatens a community's foundation of informal social control. Disorganized communities cannot enforce social norms because it is too difficult to reach consensus on common values and on avenues for solving common problems. Because informal social controls play a greater role in public safety than do formal state controls, this breakdown can seriously jeopardize community safety.").

92. *See id.* at 1291 ("Mass incarceration dramatically constrains the participation of African American communities in the mainstream political economy . . . through 'invisible punishments' . . . felon disenfranchisement . . . labor market exclusion . . . [and] civic isolation."); *see also* Mitchell, *supra* note 3, at 835 ("[Felon exclusion] laws also diminish the collective citizenship of many African-American communities.").

93. *See* Roberts, *supra* note 3, at 1295.

94. An audit study creates an artificial pool of people among whom there are no average differences by race. In this study, groups of white and black auditors are matched on every category other than their race, trained to act in identical ways with identical resumes, and are sent to interview for the same jobs. Comparisons can yield strong evidence of discrimination. *See* Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937 (2003).

finding was that blacks were significantly discriminated against when applying for service jobs.[95] Moreover, whites *with* a criminal record had about the same prospect of getting an interview as blacks *without* one.[96] One can reasonably argue that simply being African American is strongly correlated with incarceration in the public imagination and occurs through a pattern of mutual reinforcement. Consequently, for many low-income African Americans, incarceration creates not just shadow citizens in an individual sense but shadow communities as well.

2. Class Matters

People of color, especially African Americans, tend to be overrepresented among the poor. This racialized economic divide is growing.[97] However, as race is surely a predicative factor of poverty as well as of mass imprisonment, we must interrogate the question of class. Statistical data on economic status for prisoners is difficult to obtain.[98] Nevertheless, more than 80 percent of prisoners qualify for indigent legal services, and this fact is a strong indication that, generally speaking, the poor are disproportionately represented among people in the criminal justice system.[99] But accounting for poverty as a co-recurring factor in incarceration is complicated because the meanings associated with class are myriad and do not necessarily illuminate the complexities arising from the intersection of race and class within the criminal justice system.

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95. *Id.* at 937-58.

96. *Id.* at 937, 958 ("The findings of this study reveal an important, and much under-recognized, mechanism of stratification. A criminal record presents a major barrier to employment, with important implications for racial disparities.").

97. *See Disturbing Racial Wealth Gap*, ECON. POLICY INST., http://bit.ly/TGGfHq (last visited Oct. 20, 2012) ("Wealth for the median black household has all but vanished, decreasing by more than 65[%] from $6,300 in 1983 to $2,200 in 2009. . . . [W]hile median wealth has fallen substantially among both white and black households since 2007, at $97,900, white median wealth remains higher than the 1983 level of $94,100. White median wealth is now 44.5 times higher than black median wealth."); *see also* Amanda Logan & Tim Westrich, *The State of Minorities: How are Minorities Fairing in the Economy*, CTR. FOR AM. PROGRESS (Apr. 29, 2008), http://bit.ly/RatBTX ("African Americans' median income declined by an average of 1.3[%] per year from 2000 to 2006, after having risen by an average of 2.2[%] per year in the 1990s. . . . In 2006, whites' median income was $52,423, which is 1.6 times greater than African Americans' median income in that year.").

98. *See* Erica J. Hashimoto, *Class Matters*, 101 J. CRIM. L. & CRIMINOLOGY 31 (2011) (arguing that there is virtually no data on the economic profiles of defendants and that the states and federal government should collect that data to ascertain whether laws target poor people).

99. N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS (2006), *available at* http://bit.ly/RepUef; *see also Indigent Defense Resource Guide*, NAT'L CTR. FOR STATE COURTS, http://bit.ly/RRvGEP (last visited Oct. 20, 2012).

While audit studies like Pager's *Mark of a Criminal Record*[100] demonstrate how criminality is associated with race in the employment context, less is known about how class status specifically keeps one tied to criminality, or at least how one's class status engenders resistance to escaping criminal identity.

Legal scholars argue that class is under-theorized in the modern era, especially as compared to race.[101] Americans tend to think of class as an economic location rather than as an identity because class status appears to be fluid with respect to income and access to upward mobility.[102] However, as cautioned by legal scholar Trina Jones, it is important not to equate income with class. "[A]lthough people tend to fixate on income, income is not the only indicator of class. Wealth, educational background, occupational skill and status, consumption patterns and practices, and residential location, among other things, are also used to assign class."[103] This insight is particularly relevant because these other features of class, when they indicate poverty status, are already correlated with incarceration. That is, prisoners tend to be poor, underemployed, uneducated, and from disadvantaged neighborhoods; these conditions are all associated with criminal activity and incarceration.[104] Moreover, a prisoner's status, and by implication his or her class mobility, is even more diminished after a felony conviction. As the following sections demonstrate, legal obstacles arising from criminal convictions keep felons in a cycle of poverty and thus act as a drag on class status that have onerous implications for the resumption of social citizenship. Low-income status indicates a reinforced ineffectiveness in navigating the terms of incarceration and subsequent social and political reintegration.

B. Civil Collateral Consequences

Disenfranchisement is not part of an offender's sentence and is therefore a "collateral" consequence of a felony conviction.[105] In fact, because this particular sanction is not levied during sentencing in the

100. *See* Pager, *supra* note 94.

101. Trina Jones, *Foreword to Race and Socioeconomic Class: Examining an Increasingly Complex Tapestry*, 72 LAW & CONTEMP. PROBS. i, v (2009).

102. *See id.*

103. *See id.*

104. According to a 1997 survey of state prisoners conducted by the U.S. Department of Justice, three-fourths of state inmates did not complete high school, almost one-half reported incomes of less than $1,000 in the month before arrest, and two-fifths were either unemployed or working only part-time before their arrest. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., EDUCATION AND CORRECTIONS POPULATIONS (2003), *available at* http://1.usa.gov/uHQMoq.

105. *See generally Mass Imprisonment*, *supra* note 41, at 50.

same way as incarceration, fines, and probation,[106] disenfranchisement resulting from a criminal conviction is not considered *punishment* at all.[107] Rather, all non-criminal sanctions are deemed civil disabilities,[108] which have been automatically triggered by the state as a consequence of the conviction. Nevertheless, scholars have noted that "virtually every felony conviction carries with it a life sentence"[109] through the effects of civil collateral consequences such as disenfranchisement, which continue to punish long after the criminal sentence is served. In Mauer and Chesney-Lind's influential volume, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*,[110] author Jeremy Travis refers to disenfranchisement and other civil sanctions collectively as "invisible punishment,"[111] in part because they operate hidden from public view, outside of the process of criminal sentencing.[112] The effects are widespread, and voter disenfranchisement is not the only civil disability arising from criminal convictions. Other civil collateral consequences include: significant limitations on employment, restrictions on occupational licenses, barriers to public and private housing, thwarted access to legal immigration, ineligibility for public benefits, limited access to educational loans, the inability to maintain parental rights or act

106. Incarceration is not always an inevitable result of a criminal conviction. Plea agreements can often result in a period of probation. It is important to note, however, that the civil disabilities still attach because the conviction itself is what triggers the sanction. As Alexander points out, social exclusion depends on the felon label, not on prison time. *See* ALEXANDER, *supra* note 3, at 92-94.

107. *See* Karlan, *supra* note 4, at 1150 ("One of the linchpins of current doctrine regarding criminal disenfranchisement statutes is the assumption that these laws are essentially regulatory, rather than punitive. . . . The current conception so undercuts originally regulatory justifications for disenfranchising offenders that only penal justifications remain. Thus, if felon disenfranchisement is to be justified, it must be justified as a permissible form of punishment.").

108. *See* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15-16 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("[P]unishment that is accomplished through the diminution of the rights and privileges of citizenship and legal residency in the United States. . . . Through judicial interpretation, legislative fiat, and legal classification, these forms of punishment have been defined as 'civil' rather than criminal in nature, as 'disabilities' rather than punishments, as the 'collateral consequences' of criminal convictions rather than the direct results.").

109. *See* Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006).

110. INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

111. *See* Travis, *supra* note 108, at 16.

112. *See id.* Over the same period that prisons and criminal justice supervision have significantly increased, so too have laws and regulations that serve to diminish the rights and privileges of defendants.

as a foster parent, qualifications for jury service,[113] and child support enforcement for debt accrued during a period of incarceration.[114] Thus, civil sanctions are not collateral at all in at least one important sense: they *directly* limit participation in critical areas of life as the result of a criminal conviction.[115]

As Travis points out, the lack of visibility surrounding the proliferation of these collateral consequences has another dimension: civil sanctions are not conceived of and developed in the same milieu as criminal legislative enactments.[116] They are often added as riders to other pieces of legislation, not considered by judiciary committees, and not typically codified with other criminal sanctions.[117] As a result, their effects are not openly debated to determine their efficacy in public policy.[118] Yet, they have multiplied in tandem with "tough on crime" criminal sentencing throughout the country within federal statutes and the legislative schemes in every single state.[119] Similarly, under the

113. *See Collateral Consequences*, THE SENTENCING PROJ., http://bit.ly/RLf5iV (last visited Oct. 20, 2012) ("Increasingly, laws and policies are being enacted to restrict persons with a felony conviction (particularly convictions for drug offenses) from employment, receipt of welfare benefits, access to public housing, and eligibility for student loans for higher education. Such collateral penalties place substantial barriers to an individual's social and economic advancement.").

114. *See* Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 315 (2006) (arguing that child support debt incurred by incarcerated obligors is yet another collateral consequence of criminal conviction, which serves as a barrier to successful reentry).

115. *See id.* at 314.

116. *See* Travis, *supra* note 108, at 16-17.

117. *See id.*

118. *See id.* at 17 ("[Collateral consequences] should be openly included in our debates over punishment policy, incorporated in our sentencing jurisprudence, and subjected to rigorous research and evaluation."). It should also be noted that perpetuating civil roadblocks has an impact on the ability of ex-felons to manage effective reentry after they have "paid their debt to society" and runs counter to the goal of encouraging them to live crime-free lives after release.

119. In 2003, the American Bar Association promulgated a new chapter of its Criminal Justice Standards that called on each U.S. jurisdiction to collect and analyze the collateral consequences in its laws and regulations. *See* AM. BAR ASS'N, ABA STANDARDS FOR COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.1 (2003). The ABA Standards identified two types of collateral consequences: (1) "collateral sanctions," defined as penalties imposed automatically upon conviction, and (2) "discretionary disqualifications," defined as penalties that are authorized but not required to be imposed. *Id.* This distinction between automatic and discretionary collateral consequences was carried forward into a uniform law presently under consideration by the National Conference of Commissioners on Uniform State Laws and, more recently, into Section 510 of the Court Security Act, both of which also call for a comprehensive inventory and study of collateral consequences. *See* AM. BAR ASS'N, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 9 (2009).

American system of federalism, the application of sanctions is not uniform because states have each developed their own sanctioning priorities. The effect on any given individual depends on the jurisdiction in which he or she resides, as well as whether the conviction occurred previously in another state with different penalties.[120] Consequently, a working knowledge of collateral consequences is beyond the expertise of most criminal defense attorneys,[121] even when they are inclined to counsel defendants in this regard. Moreover, as a rule, courts do not require attorneys to inform clients entering into plea agreements of these sanctions.[122] Accordingly, people with criminal convictions are often surprised when they encounter these roadblocks after release and are left to fend for themselves in navigating them. And there are plenty of people confronting civil barricades: more than 700,000 people are released from prison each year,[123] and this number does not account for people disabled by felony convictions who received probation in lieu of incarceration.

This contradiction sheds light on an important but oft-ignored feature of collateral consequences that relates to the perpetuation of diminished class status. Civil barriers that result from criminal convictions, in most instances, *only* target the poor.[124] Although it seems unimaginable that facially neutral regulations are actually designed to discriminate against the poor, a cursory examination of its differential effects demonstrates that this is so, largely because these regulations

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120. *See* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY (2004), *available at* http://bit.ly/eN80np (a 50-state survey of laws affecting reentry); *see also* Archer & Williams, *supra* note 109, at 546, 547 ("To dismantle this crippling web of collateral sanctions, advocates must engage in a comprehensive, citizenship-freeing litigation attack on reentry barriers. . . . [T]he most effective form of attack is state-by-state impact litigation, particularly in vulnerable states: those with extensive, challenge-worthy mazes of collateral sanctions and constitutional and statutory provisions.").

121. *See* Travis, *supra* note 108, at 17 ("Little wonder, then, that defense lawyers cannot easily advise their clients of all of the penalties that will flow from a plea of guilty.").

122. Courts have generally not required attorneys to inform defendants about civil collateral consequences. The one exception to this rule is *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), concluding that an attorney provided ineffective assistance of counsel when the attorney failed to counsel his non-citizen client on the consequences of a plea agreement resulting in deportation.

123. WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUST., BULLETIN: PRISONERS IN 2008, at 4 (2009), *available at* http://1.usa.gov/QGFjlE (showing that 735,454 prisoners were released from state and federal prisons in 2008).

124. *See* Cammett, *supra* note 114, at 319 ("One aspect of these civil disabilities should be of particular interest to anti-poverty advocates. Collateral sanctions, particularly against people with drug convictions, affect poor people *almost exclusively* . . . sanctions themselves deprive formerly incarcerated people of opportunities to lift themselves out of poverty. . . .").

target income supports used by low-income people.[125] For example, an ex-offender may be banned from living with a family member in public housing, denied eligibility for federal welfare and food stamp benefits, subjected to limits on financial aid for higher education, and faced with far reaching restrictions on employment opportunities.[126] Because prisoners tend to have fewer social networks to rely upon,[127] these broad restrictions on low-wage employment and occupational licenses tend to have more of a direct effect.[128]

The pernicious effects of collateral consequences are now becoming known.[129] The American Bar Association has released a database identifying more than 38,000 punitive provisions that currently affect people convicted of crimes.[130] Travis observed in 2002 that these punishments serve as "instruments of 'social exclusion,'" creating a "permanent diminution in social status of convicted offenders, a distancing between 'us' and 'them.'"[131] The "perpetual marginality"[132]

125. *See id.*

126. *See* Archer & Williams, *supra* note 109, at 530.

127. *See* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 259 (2004) ("The ex-offender population has tended to recidivate due in part to an unavailability of economic and social supports.").

128. *See id.* Archer and Williams also make the point that drug offenders bear a disproportionate burden of collateral consequences and that "such barriers have created an absurd result: ex-offenders convicted of rape or murder are nonetheless eligible for a number of rights denied to drug offenders." *See* Archer & Williams, *supra* note 109, at 530.

129. Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 461 (2010) ("[T]he problem of postconviction collateral consequences is rapidly becoming more severe for three interrelated reasons. First, collateral consequences have increased in number, scope, and severity since the 1980s. Second, record numbers of individuals are now exiting U.S. correctional facilities. Finally, collateral consequences hinder reentry and exacerbate the risks of recidivism; in fact, most individuals will be rearrested within three years of release.").

130. Alfred Blumstein & Kiminori Nakamura, Op-Ed., *Paying a Price, Long after the Crime*, N.Y. TIMES, Jan. 9, 2012, *available at* http://nyti.ms/RggT3H (noting that even arrests that did not result in conviction can be used to deny employment). "The impact of these arrests is felt for years. The ubiquity of criminal-background checks and the efficiency of information technology in maintaining those records and making them widely available, have meant that millions of Americans—even those who served probation or parole but were never incarcerated—continue to pay a price long after the crime." *Id.*

131. *See* Travis, *supra* note 108, at 19*; see also* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 753 (2011) ("[T]he goal of the justice system must be the full and early reintegration of a convicted person into free society—with the same benefits and opportunities available to any other member of the general public—free of unreasonable status-generated penalties and the stigma of conviction."). Love describes relief provisions in the Uniform Collateral Consequences of Conviction Act (UCCCA) that provides some restoration of legal rights and social status. *See id.* at 784-88.

caused by collateral consequences is a cruel manifestation of shadow citizenship.[133]

C. The Mysteries of Re-enfranchisement

Political disenfranchisement must be examined in tandem with co-occurring civil sanctions that isolate felons from the economic fabric of society by burdening them with unseen and inscrutable barriers to life's necessities.[134] This *aggregate* harm affects ex-felons' ability to navigate reentry and masks the larger problem of economic marginalization that characterizes the lives of prisoners, who are disproportionately poor to begin with.[135] Nevertheless, the liberalization of disenfranchisement law has also led to more states allowing for restoration procedures for voting rights. The legal corollary to disenfranchisement is re-enfranchisement, a process of reclaiming franchise rights where the law permits. However, there is widespread confusion about state re-enfranchisement processes, which occur in an overwhelming maze of regulations.[136] State laws vary widely on when and how voting rights may be restored.[137] For instance, Maine and Vermont do not deny prisoners the right to vote, but Kentucky, Virginia, Iowa, and Florida permanently disenfranchise all felons.[138] The 44 remaining states maintain a patchwork of laws that vary significantly: some states restore voting rights upon release from prison, others upon completion of probation and parole, and others

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132. *See, e.g.*, Loïc Wacquant*, The New 'Peculiar Institution': On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIM. 377, 384 (2000) ("a closed circuit of perpetual marginality").

133. *See* Pinard, *supra* note 129, at 457 ("[D]ecisionmakers in the United States failed to foresee the collective impact of these consequences when they expanded them dramatically in the 1980s and 1990s. They also failed to account for the disproportionate impact these consequences would have on individuals and communities of color.").

134. *See, e.g.*, Thompson, *supra* note 127, at 258 ("[A]n overwhelming number of ex-offenders entered prison with disabilities that continue to plague them upon reentry into their communities. A prison record, in addition to minimal education and a lack of job skills, limits ex-offenders' employability in many cases.").

135. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 100-01 (2006) (noting that about a third of inmates were not working before being admitted to prison or jail based on correctional surveys between 1979 and 1997). "[U]nderscoring their low levels of ability and poor employment records, prison and jail inmates earn significantly less at the time of their incarceration than other young men aged twenty-two to thirty with the same level of education." *Id.*; *see also* ALEXANDER, *supra* note 3, at 84 ("Approximately 80% of criminal defendants are indigent and thus unable to hire a lawyer.").

136. *See* Ewald, *supra* note 32, at 1054.

137. ERIKA WOOD & RACHEL BLOOM, BRENNAN CTR. FOR JUST. & ACLU., DE FACTO DISENFRANCHISEMENT 1 (2008).

138. *See id.* Disenfranchisement is permanent unless they receive "individual, discretionary clemency" from the governors of those states. *See also* PORTER, *supra* note 2.

impose waiting periods or other contingencies before restoring voting rights.[139]

Adding to the confusion, state re-enfranchisement laws constantly change. In 2007, the state of Florida amended its voting restoration procedure to approve automatically the reinstatement of rights for many persons convicted of non-violent offenses.[140] The amended restoration procedure was rescinded in 2011 by Florida Governor Rick Scott, along with three other elected officials, all acting as the state's executive clemency board. "Under the new . . . rules, even nonviolent offenders would have to wait five years after the conclusion of their sentences to apply for the chance to have their civil rights restored."[141] The new policy was drafted by state Attorney General Pam Bondi, who asserted that the rule would be "fair and restore a proper respect for the rights of law-abiding citizens."[142] She further claimed that "felons deserved their rights only after they have demonstrated a commitment to living a crime-free life."[143] Although a race-neutral rationale for the change was asserted, the racial impact could not be clearer: more than 100,000 felons who had completed their sentences, largely African American, were able to register before the 2008 elections.[144] Today, however, released felons in Florida are forced to apply—and in many cases wait years—for a clemency board hearing for a chance to have their voting rights restored or obtain occupational licenses.[145] Currently, more than one in ten voting-age African Americans in Florida lack the ability to vote.[146]

Re-enfranchisement, as a legal matter, is further complicated by the fact that, even in states where resumption of voting rights is possible, a national trend of *de facto* disenfranchisement[147] occurs through a deficit of competent administration regarding restoration processes.[148] For example, research shows that many "election officials do not understand the basic voter eligibility rules governing people with criminal convictions," nor do they understand the "basic registration procedures for people with criminal convictions."[149] Although eligibility and

139. *See* WOOD & BLOOM, *supra* note 137, at 1.
140. *See* FELONY DISENFRANCHISEMENT LAWS, *supra* note 2.
141. *See* Peter Wallsten, *Fla. Republicans Make it Harder for Ex-Felons to Vote*, WASH. POST, Mar. 10, 2011, *available at* http://wapo.st/fQnz5F.
142. *See id.*
143. *See id.*
144. *See id.*
145. *See id.*
146. *See id.*
147. *See* WOOD & BLOOM, *supra* note 137, at 1.
148. *See id.* at 2.
149. *See id.*

registration laws vary, some root causes have been identified for *de facto* disenfranchisement.[150] Further, "administering these laws requires election officials to be experts in the criminal justice system";[151] conversely, "informing individuals of their rights requires criminal justice officials to be experts in voting laws."[152] Yet, few educational materials explaining these laws are available, and "there is a severe lack of communication between criminal justice agencies and election officials."[153] *De facto* disenfranchisement can also arise from ignorance among prisoners themselves, who often have no idea that they can vote in their state or how to engage the process.[154] Relatively few ex-felons take the necessary steps, which range from administrative procedures to a full pardon, to regain the right to vote.[155] Consequently, hundreds of thousands may not be able to vote, even though they are entitled to do so under the law.[156] Failure to register operates at a psychological level as well. As Michelle Alexander points out, "Even those who knew they were eligible to register worried that registering to vote would somehow attract attention to them—perhaps land them back in jail."[157] Although this idea may seem paranoid at first glance, Alexander points out that "many Southern blacks have vivid memories of the harsh consequences that befell their parents and grandparents who attempted to vote in defiance of poll taxes, literacy tests and other devices adopted to suppress the black vote."[158]

While re-enfranchisement law, in all its iterations, presents obstacles to the legal resumption of rights, it does not occur in a vacuum.

150. *See id.*

151. *See id.* at 8.

152. *See id.*

153. *See* WOOD & BLOOM, *supra* note 137, at 9.

154. *See* ALEXANDER, *supra* note 3, at 154 ("Even those former prisoners who are technically eligible to vote frequently remain disenfranchised for life."); *see also* WOOD & BLOOM, *supra* note 137, at 1 ("Without further public education or outreach, the citizen will mistakenly believe that he is ineligible to vote for years, decades, or maybe the rest of his life. And that same citizen may pass along that same inaccurate information to his peers, family members and neighbors, creating a lasting ripple of de facto disenfranchisement across his community.").

155. *See* Ewald, *supra* note 32, at 1056-57 ("Each . . . state establishes some procedure by which ex-convicts may petition to regain the right to vote, but restoration procedures often make regaining the vote 'extremely difficult,' in some cases purposely so."); *see also* WOOD & BLOOM, *supra* note 137, at 1 ("Once a single local election official misinforms a citizen that he is not eligible to vote because of a past conviction, it is unlikely that citizen will ever follow up or make a second inquiry.").

156. WOOD & BLOOM, *supra* note 137, at 8 ("Potentially hundreds of thousands of *eligible* voters may be denied their right to vote.").

157. *See* ALEXANDER, *supra* note 3, at 155.

158. *See id.* at 155-56 (probing this fear more deeply, Alexander goes on to note that "[t]oday, ex-offenders live in constant fear of a different form of racial oppression—racial profiling, police brutality, and revocation of parole.").

Regaining the right to vote is contextual and tied to factors outside of and beyond the legal re-enfranchisement regulatory scheme. Such critical factors include debt, which has become an increasingly critical barrier to social citizenship.

D. The Emergence of Carceral Debt

Carceral debt is debt that is associated with or incurred pursuant to criminalization. This type of debt can be viewed as consisting of two distinct variants, both stemming from involvement with the justice system. The first variant includes criminal financial penalties, such as restitution, court costs, and other fees that are directly associated with criminal convictions;[159] the second variant, which includes lingering debt accumulated during or as a result of incarceration, often acts as a gateway to re-incarceration.[160] Finally, child support debt, which is routinely accrued during incarceration, presents difficult challenges for reentry and family reunification.[161]

1. Criminal Justice Debt

Criminal justice-related debts are levied on offenders in three primary ways: (1) fines levied to punish the offender, (2) penalties levied for restitution to victims, and (3) assessments with the goal of public cost-recovery.[162] Fines are formal penalties imposed on people convicted of crimes by the court as part of the judgment and sentence. They are typically a monetary penalty and are usually imposed as

159. *See generally* Kirsten D. Levingston & Vicki Turetsky, *Debtors' Prison: Prisoners' Accumulation of Debt as a Barrier to Reentry*, 41 CLEARINGHOUSE REV. J. OF POVERTY L. & POL'Y 187 (2007) (focusing on the accumulation of debt during a prison stay, the authors note that such policies are ill-advised and undermine the criminal justice system's rehabilitation goals, the child support system's goals to support children, and society's interest in fully reintegrating people after release from prison); *see also* ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 4 (2010) (examining practices in the 15 states with the highest prison populations, which together account for more than 60 percent of all state criminal filings and focuses primarily on the proliferation of "user fees," financial obligations imposed not for any traditional criminal justice purpose such as punishment, deterrence, or rehabilitation but rather to fund tight state budgets).

160. Levingston & Turetsky, *supra* note 159, at 187.

161. *See* REBECCA MAY & MARGUERITE ROULET, CTR. FOR FAMILY POL'Y & PRACTICE, A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT 6 (2005) ("One of the issues of particular concern to low-income noncustodial [parents] is the relationship between child support enforcement and incarceration, and the effect of both on their lives and their families. There are distinct ways in which child support enforcement and incarceration are linked . . . there has been an increasing effort by states to criminalize the nonpayment of support (both as misdemeanors and as felonies).").

162. Levingston & Turetsky, *supra* note 159, at 188.

punishment based on the severity of the crime.[163] Restitution is court ordered payment by the offender directly to the victim to compensate for financial losses.[164] The cost of restitution is levied at sentencing but can be collected during a period of probation or parole.[165] Finally, public cost-recovery fees reflect the efforts of states to pass the costs of criminal justice and other state deficits onto prisoners.[166] These "user fees" differ greatly from other kinds of court-imposed legal financial obligations (LFOs).[167] "Unlike fines, whose purpose is to punish, and restitution, whose purpose is to compensate victims, user fees are explicitly intended to raise revenue" for state coffers.[168] A report from the Brennan Center for Justice indicates that "[c]ash-strapped states have increasingly turned to user fees to fund their criminal justice systems, as well as to provide general budgetary support."[169] States now charge defendants for everything from probation supervision, to jail stays, to the use of a constitutionally-required public defender."[170] These surcharges are

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163. *See id.* ("According to researchers, nationally, fines are imposed in 25% of all felony convictions: 20% of violent offenses, 24% of property offenses, 27% of drug offenses, 19% of weapons offenses, and 27% of other offenses.") (internal quotations omitted).

164. *See id.* at 188-89 ("Restoration is rooted in a restorative justice approach that emphasizes repairing the harm of criminal behavior. It embodies both the just deserts notion of offense-based penalties and concern for the victim.") (internal quotations omitted).

165. *See id.* at 189.

166. *See* BANNON ET AL., *supra* note 159 ("What emerges is a disturbing uptick in both the dollar amount and the number of criminal justice fees imposed on offenders, as well as increased pressure on officials to collect fees, fines, and other forms of criminal justice debt. The result is a broad array of collateral consequences that policy makers have seldom considered in the rush to raise revenue.").

167. *See* Levingston & Turetsky, *supra* note 159, at 189 ("Increasingly courts also are imposing costs against convicted persons to cover basic court expenses, such as maintenance of court facilities, service of warrants, and law enforcement officers' retirement funds.").

168. BANNON ET AL., *supra* note 159, at 4 ("Sometimes deployed as an eleventh hour maneuver to close a state budget gap, the decision to raise or create new user fees is rarely made with much deliberation or thought about the consequences.").

169. *See id.*

170. *See id.*; *see also* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 323 (2009) ("The practice of ordering recoupment or contribution . . . of public defender attorney's fees is widespread, although collection rates are unsurprisingly low . . . not only is recoupment not cost-effective, but it too easily becomes an aspect of punishment, rather than legitimate cost-recovery. In a number of jurisdictions, defendants are ordered to repay the cost of their attorney regardless of their ability to pay and without any notice or opportunity to be heard. Many are ordered to pay as a condition of probation or parole, which means they pay under threat of incarceration.").

imposed at every stage of the criminal justice system;[171] and, while perhaps inconsequential individually, they create large debt loads in the aggregate.[172] Because prisoners are typically poor and chronically underemployed, they are the class of people least able to afford these costs after release,[173] especially after incarceration has rendered them less employable.[174] Moreover, once these fees are levied, those who are unable to pay them are subject to the additional costs of recoupment in the form of interest, late fees, payment plan fees, and collection fees.[175] Despite the dramatic increase in the number of criminal justice fees, none of the states studied by the Brennan Center[176] maintained any process whatsoever for tracking or measuring the cost-effectiveness or impact of criminal justice debt and related collection practices on former offenders, their families, or their communities.[177] In the end, criminal justice-

171. *See* Anderson, *supra* note 170, at 372-73. Costs include: pre-conviction fees, such as an application fee to obtain public defender and jail fee for pretrial incarceration; sentencing fees like those for court administrative costs; fees for designated funds (*e.g*., libraries, prison construction, *etc*.); public defender reimbursement; prosecution reimbursement; fees for the cost of incarceration in prison or jail; and the costs of probation, parole, or other supervision fees; drug testing; vehicle interlock device fees (DUIs); mandatory treatment, therapy, and class fees.

172. *See* ALAN ROSENTHAL & MARSHA WEISSMAN, CTR. FOR CMTY. ALTS., SENTENCING FOR DOLLARS: THE FINANCIAL CONSEQUENCES OF A CRIMINAL CONVICTION 17 (2007), *available at* http://bit.ly/XE6Jxy (detailing how these small amounts can potentially add up to big debt). The report analyzed the financial consequences of two common felony convictions and found that someone convicted in New York in 2007 of driving while intoxicated (a felony) and operating a motor vehicle with no insurance (a misdemeanor) could end up facing a bill of almost $7,670.00 upon leaving the system. *Id.*

173. *See* BANNON ET AL., *supra* note 159, at 4 ("Employment rates for those coming out of prison are also notoriously low—up to 60 percent of former inmates are unemployed one year after release.").

174. *See* WESTERN, *supra* note 135 and accompanying text.

175. *See* BANNON ET AL., *supra* note 159, at 5.

176. *See id.* at 4. The Brennan Center report discusses the national landscape of criminal justice debt and collection practices by surveying the 15 states with the largest prison populations. According to the report, "Individuals incarcerated in these fifteen states represent 69 percent of all state prisoners nationally, and these states together have more than 60 percent of all state criminal filings." *Id.*

177. *See id.* at 5 ("When states impose debt that cannot be paid they are charting a path back to prison . . . [s]uspended driver's licenses lead to criminal sanctions if debtors continue to drive. Aggressive collection tactics can disrupt employment, make it difficult to meet other obligations such as child support, and lead to financial insecurity—all of which can lead to recidivism."); *see also* Tina Rosenberg, Op-Ed., *Paying for Their Crimes Again*, N.Y. TIMES (June 6, 2011, 9:15 PM), http://nyti.ms/T4ScWD ("State legislatures that impose fees calculate how much money they bring in, but seldom look at the costs of collecting them. It is high enough so that the fees often end up costing the state more than they produce. They take up the time of probation and parole officers. Numerous collection-associated court dates burden the courts. Most important, these fees increase the chance that people will end up back behind bars—either for failure to pay, or because the need to find a lot of money right away pushes people back into crime.").

related debt has the effect of turning prisoners into perpetual debtors, which has obvious implications for successful reentry, and less obvious implications for leaving prison at all.[178]

2. Debt Accumulation and Incarceration

It might come as a surprise to many to discover that debtors' prison still exists. Historically, every U.S. colony, and later every state, permitted imprisonment for debt.[179] Individual states began to repeal these laws in the nineteenth century.[180] Incarceration of civil debtors was later abolished under federal law as well.[181] However, debtors' prison has persisted in other ways and, like mass incarceration, is based on race and class status. After the Civil War, many Southern states used criminal justice debt collection "as a means of effectively re-enslaving African Americans, allowing landowners and companies to 'lease' black convicts by paying off criminal justice debt that they were too poor to pay on their own."[182] Today, despite contrary Supreme Court precedent constraining a state's ability to incarcerate poor obligors[183] and constitutional provisions explicitly forbidding imprisonment for civil debts in most states,[184] *de facto* debtors' prisons persist.[185] "Imprisonment for failure

178. *See* BANNON ET AL., *supra* note 159, at 5 ("Against this backdrop, criminal justice debt adds yet one more barrier to getting on one's feet. What at first glance appears to be easy money for the state can carry significant hidden costs—both human and financial—for individuals, for the government, and for the community at large . . . [i]t is time to reconsider the wisdom of turning persons with criminal convictions into debtors . . . the hidden costs of imposing and collecting user fees and other forms of criminal justice debt are profound."); *see also* Rosenberg, *supra* note 177 ("We know that states rarely offer former prisoners the help they need to change their lives, such as drug treatment, job search help, stable housing or schooling. What's less widely known is that all over the country, states give newly released prisoners something that immediately sabotages their chances of going straight: a bill for hundreds or thousands of dollars in court costs that they must pay or risk going back to prison.").

179. *See* BRUCE H. MANN, REPUBLIC OF DEBTORS 79 (2002) ("The only consistency among debt laws in the eighteenth century was that every colony, and later every state, permitted imprisonment for debt.").

180. *See* Vern Countryman, *Bankruptcy and the Individual Debtor—and a Modest Proposal to Return to the Seventeenth Century*, 32 CATH. U. L. REV. 809, 814 (1983) ("A wave of reform in the 1830's . . . led to state constitutional provisions forbidding imprisonment for debt. Today, such prohibitions appear in the constitutions of most states and in the statutes of several where the constitutions are silent.").

181. *See* 28 U.S.C. § 2007 (2006) ("A person shall not be imprisoned for debt [through] process issued from a court of the United States in any State wherein imprisonment for debt has been abolished.").

182. BANNON ET AL., *supra* note 159, at 19.

183. *See infra* Part IV.B.

184. *See infra* Part IV.B.

185. Ann K. Wagner, *The Conflict Over* Bearden v. Georgia *in State Courts: Plea-Bargained Probation Terms and the Specter of Debtors' Prison*, 2010 U. CHI. LEGAL F. 383, 384 (2010).

to pay a fine, restitution, or court costs can occur when repayment is made a condition of probation or parole and the defendant defaults."[186] In the modern era, the Supreme Court has opined that incarceration can be used to collect criminal justice debt only when a person has the *ability* to make payments but refuses to do so. In *Bearden v. Georgia*,[187] the Court ruled that the Fourteenth Amendment bars courts from revoking probation for a failure to pay a fine without first inquiring into a person's ability to pay and considering whether there are adequate alternatives to imprisonment.[188] The Court noted, "[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it."[189] However, the cautionary warning set forth by the Court has been largely ignored.

According to a report by the American Civil Liberties Union,[190] "[C]ourts across the United States routinely disregard the protections and principles the Supreme Court established in *Bearden*,"[191] noting that "[i]n the wake of the recent fiscal crisis, states and counties now collect legal debts more aggressively from men and women who have already served their criminal sentences, regardless of whether they demonstrate the ability to pay these debts."[192] States run afoul of the spirit, if not the

186. *See id.*; *see, e.g.*, ALA. CODE § 15-18-62 (2012) ("In cases of willful nonpayment of the fine and costs, the defendant shall either be imprisoned in the county jail or, at the discretion of the court, sentenced to hard labor for the county.").

187. Bearden v. Georgia, 461 U.S. 660 (1983).

188. *See id.* at 661-62 ("We conclude that the trial court erred in automatically revoking probation because petitioner could not pay his fine, without determining that petitioner had not made sufficient bona fide efforts to pay or that adequate alternative forms of punishment did not exist.").

189. *See id.* at 667-68. The Court was relying on its earlier decision in *Williams v. Illinois*, 399 U.S. 235, 240-41 (1970) (holding that extending a maximum prison term because a person is too poor to pay fines or court costs violates the right to equal protection under the Fourteenth Amendment). Nevertheless, the Court clarified, "[N]othing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs." *Bearden*, 461 U.S. at 668 (quoting *Williams*, 399 U.S. at 242 n.19).

190. AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTORS' PRISONS (2010) [hereinafter DEBTORS' PRISONS], *available at* http://bit.ly/9EQBMd.

191. *See id.* at 5; *see also* BANNON ET AL., *supra* note 159, at 20. The report stated:

> [S]ome jurisdictions ignore the requirement that courts inquire into ability to pay before utilizing debtors' prison, while many others skirt the edges of the law by failing to evaluate a defendant's ability to pay until after he or she has been arrested, or even jailed, for criminal justice debt, or by allowing defendants to 'volunteer' to be incarcerated.

Id. at 20.

192. DEBTORS' PRISONS, *supra* note 190, at 5. The report shows how "indigent defendants are imprisoned for failing to pay legal debts they can never hope to manage." *Id.* "In many cases, poor men and women end up jailed or threatened with jail though they have no lawyer representing them." *Id.* The ACLU contends that "[t]hese sentences

constitutional requirements, of *Bearden* in a variety of ways.[193] Some states make criminal justice debt a condition of probation, parole, or other correctional supervision; when individuals fail to pay their debt, they may face re-arrest and may ultimately be sent to prison.[194] Some "states have statutes or practices that authorize incarceration as a penalty for a willful failure to pay criminal justice debt, often under the guise of civil contempt."[195] Many jurisdictions "arrest people for failing to pay criminal justice debt or appear at debt-related hearings," often leading "to multi-day jail terms pending an ability to pay hearing."[196] Finally, in several states, programs operate where defendants can request to spend time in jail as a way of paying down court-imposed debt.[197] Programs such as these are not truly voluntary if a defendant has no way to make payment.[198]

Mounting debt from direct criminal justice costs is one type of debt accumulation. States laud income from criminal justice fee revenues, but such a paradigm has the paradoxical result of engendering more incarceration because the poor are unable to pay, and the monetary costs of such punitive jailing is still ultimately borne by the state.[199] A true cost-benefit analysis of user fees would reveal that costs imposed on sheriffs' offices, local jails and prisons, prosecutors and defense attorneys, and the courts themselves surpass what the states take in as revenue[200] and create a cycle of re-incarceration for poor defendants.[201]

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are illegal, create hardships for men and women who already struggle with re-entering society after being released from prison or jail, and waste resources in an often fruitless effort to extract payments from defendants who may be homeless, unemployed, or simply too poor to pay." *Id.*

193. *See* BANNON ET AL., *supra* note 159, at 20.

194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.* at 23. For example, some jurisdictions allow people to "volunteer" to sit in jail as a way of fulfilling debt obligations. *Id.* In California, defendants can choose to sit out fines at a daily rate set by the county pursuant to CAL. PENAL CODE § 1205(a). *Id.* at 50 n.138. In Missouri, the circuit judge has the power, at the request of a defendant, to commute fine and costs to imprisonment in the county jail, credited at $10 per day pursuant to MO. REV. STAT. § 543.270(1). *Id.* at 50 n.139.

198. BANNON ET AL., *supra* note 159, at 20 ("[O]ther common collection practices, such as extending probation or suspending driver's licenses, also lead to new offenses rooted in debt.").

199. *See* RACHEL L. MCLEAN & MICHAEL D. THOMPSON, COUNCIL OF STATE GOV'TS, REPAYING DEBTS 7 (2007), *available at* http://bit.ly/RLDV25 ("[A]n examination of court-ordered obligations in 11 states found an average of $178 million per state in uncollected court costs, fines, fees, and restitution. . . . [Additionally,] administrators in one state report that only 23 percent of fines are successfully collected, and no action is taken on uncollected payments.").

200. *See id.*

The reinforcing vortex of poverty, civil collateral consequences, and criminal justice debt should give us pause. The ultimate cost of creating shadow citizens via these interlocking social conditions and ill-conceived policies could be the acceleration of a withering democracy as more people with fewer economic resources are denied voting.

Nevertheless, there is another type of mounting debt accumulation by prisoners, not typically associated with incarceration, that in and of itself threatens to become a unique barrier to voter re-enfranchisement into the future: child support debt.

3. Child Support Arrears

Child support debt is the bane of prisoners everywhere.[202] Most people in prison are parents who have minor children to whom they owe a duty of support.[203] Failing to support those children can result in contempt and, later, incarceration. Recently, the U.S. Supreme Court decided the case of *Turner v. Rogers*,[204] holding that an indigent defendant does not have an automatic constitutional right to counsel in civil contempt cases that may result in imprisonment. In *Turner*, which involved non-payment of child support as the basis of contempt, the majority required "procedural safeguards" to be put in place by the trial court to insure that the defendant's incarceration would be predicated on a finding that his or her failure to pay was willful.[205] Stated differently, the Court attempted to insure that low-income obligors were not incarcerated simply because they did not have the capacity to pay. It is uncertain whether these safeguards required by the Supreme Court will be an adequate substitute for representation by counsel. Nevertheless, *Turner*, and all of the media attention focused on the right to counsel in civil matters, has shed light on a practice that has been relegated to the

201. *See id.* at 2 ("[T]he ability of people to meet their court-imposed financial obligations immediately upon their return to the community from prisons and jails is typically unrealistic.").

202. *See* Ann Cammett, *Deadbeats, Deadbrokes, and Prisoners*, 18 GEO. J. ON POV. L. & POL'Y 127 (2011) (arguing that mass incarceration has radically skewed the "family wage" paradigm on which the child support system is based, removing millions of parents from the formal economy entirely, diminishing their income opportunities after release, and rendering them ineffective economic actors); *see also* Steve Yoder, *Prisoner's Dilemma*, THE AM. PROSPECT (Mar. 14, 2011), http://bit.ly/Vp0Fvu ("[S]tates are looking to end policies that allow prisoners to accrue child-support debt while in prison and have most of their wages garnished when they get out—policies that drive many ex-prisoners to re-offend.").

203. *See* MCLEAN & THOMPSON, *supra* note 199, at 7.

204. Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011).

205. *See id.* at 2520.

shadows: the routine criminalization[206] of low-income child support obligors.

Criminalization is multifaceted, as mounting debt from child support obligations also occurs as a result of incarceration for criminal offenses other than non-support. For instance, debt from child support orders accrue because, in some states, a prisoners' status as a felon precludes him or her from obtaining a modification based on reduced income while in prison.[207] This policy prerogative is referred to as "voluntary unemployment," a term of art in family law that dictates that a person's reduced income through incarceration is self-caused through criminal acts. Therefore, child support orders are not eligible for modification. This policy, which is no longer embraced by all states,[208] reflects the perspective that a prisoner's criminal acts should not warrant consideration when evaluating an obligation to provide for a child, notwithstanding the fact that child support orders are typically tied to parental income.[209] States that embrace this policy use child support as a "proxy for further punishment."[210] Moreover, even in states that do not embrace an absolute ban on the reduction of existing child support orders, prisoners must still affirmatively petition a court to reduce their

206. As *Turner* indicates, failure to pay child support results in a risk of repeated incarceration. *See id.* at 2509. Every single jurisdiction in the United States has statutes criminalizing the willful or "knowing" failure to support children. The criminal penalties often come in the guise of civil contempt statutes under which, as *Turner* now makes clear, incarceration may ensue. These criminal penalties have expanded to encompass criminalization under federal law as well. Armed with overwhelming bipartisan support for increasing punishment for delinquent obligors, President Clinton subsequently signed into law the "Deadbeat Parents Punishment Act." *See* 18 U.S.C. § 228 (2006). The Act made it a federal felony for any person to cross state lines for willful evasion of a child support obligation for a child in another state if the obligation is unpaid or is in an amount over $5,000. *Id.* The Act passed both chambers by overwhelming margins.

207. *See* Jessica Pearson, *Building Debt While Doing Time: Child Support and Incarceration*, 43 JUDGES J. 5, 6 (2004).

208. *See* Cammett, *supra* note 202, at 151-52. The article stated:

> Other states articulate a different approach: incarceration as a "complete justification" for suspending arrears, thus suggesting that child support orders should be tied to earning capacity, of which there is very little during incarceration. Jurisdictions that follow this approach often note that, as a policy matter, forcing a prisoner to accumulate . . . insurmountable[] arrears during a period of incarceration acts as a disincentive to engaging the child support system and providing support and engagement with families after release. Finally, a third evaluative method treats incarceration as "one factor" to be considered in determining whether a modification is warranted.

Id.; *see also* Pearson, *supra* note 207, at 6.

209. Cammett, *supra* note 202, at 152 ("The diverging case law . . . on the question of state practices contributing to arrears . . . has a peculiar result. Whether a prisoner amasses debt is often tied to what state in which he or she happens to be imprisoned. . . .").

210. *See id.* at 130.

orders, or face debt that is unreviewable after it accrues under federal law.[211] In any event, it is unlikely that the vast majority of incarcerated parents will know that they are prohibited by federal law from obtaining a reduction of debt that has accumulated during incarceration.[212] Perhaps this is why, according to one study, "[p]arents in one state were shown to leave prison owing a[] [staggering] average of more than $20,000 in child support arrears."[213]

Low-income people are most likely to be ensnared by the state's regulation of criminal justice debt because failure to satisfy these obligations often stems from a lack of resources rather than willful disregard. Child support is a huge addendum to this debt problem. Policies continue to persist that lead to debt accumulation.[214] These policies should give us pause because the children who are the intended beneficiaries will never receive financial support that was not actually earned during incarceration.[215] Moreover, child support debt can become a formidable barrier to reentry through aggressive enforcement and, as the next section demonstrates, the resumption of social citizenship, including the right to vote.

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211. *See* 42 U.S.C. § 666(a)(9) (2006). The "Bradley" Amendment, named after former New Jersey Senator Bill Bradley, is a 1986 amendment to Title IV of the Social Security Act. The practical effect of this Amendment is that child support awards become a judgment by operation of law, and courts are prohibited from reducing or eliminating a support order once it is issued, for any reason. *See* Cammett, *supra* note 202, at 130.

212. *See* Cammett, *supra* note 202, at 152 ("[P]risoners often have significant child support debt upon release, either because their state does not allow for modifications at all or because they are unaware that they must affirmatively petition for them under the notification requirement of the Bradley Amendment.").

213. *See* MCLEAN & THOMPSON, *supra* note 199, at 7. The author can confirm, through anecdotal evidence and experience, that high arrears are the norm for prisoners across the country. It is typical for an inmate with an existing child support order to leave prison with $30,000-$50,000 of arrears after just a few years of confinement.

214. *See* Cammett, *supra* note 202, at 129 ("Such a debt does not relate to real income since prisoners earn little or no money, the debt will likely never be collected, and the support arrearage will not ultimately redound to the benefit of their children.").

215. *See* Esther Griswold & Jessica Pearson, *Twelve Reasons for Collaboration Between Departments of Correction and Child Support Enforcement Agencies*, 65 CORRECTIONS TODAY 87, 88 (2003) (noting that inmates in Massachusetts may earn as little as $1 per day, and inmates in Colorado earn between 25¢ and $2.50 per day); *see also* Elizabeth J. Patterson, *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*, 18 CORNELL J.L. & PUB. POL'Y 95, 140 (2008). The article stated:

> [T]he idea of child support orders and their vigorous enforcement as a means to a better life for the children of absent parents has sometimes gotten ahead of the reality. Increasing the amount of a child support award provides no benefit to the child if there is no prospect of payment.

Id.

III. FORMAL LEGAL BARRIERS AS BACK DOOR DISENFRANCHISEMENT

Thus far, this article has examined overlapping aspects of subordination, which creates informal but profound obstacles to an ex-felon's restoration of political citizenship through voting rights, as well as the pursuit of broader socio-economic citizenship and successful reintegration. Part III explores the second aspect of this dual paradigm. An ex-felon who has the good fortune or social capital to transcend all of the informal boundaries set forth in the previous section[216] must still contend with the formal legal barriers to re-enfranchisement arising from debt obligations. While the number of states that erect formal legal barriers is small, it represents a potential trend that has been largely ignored. Moreover, it provides a window into the various ways that debt and civil collateral consequences have become mutually and negatively reinforcing.

A. *Repayment of Fees, Fines, and Restitution*

In the last decade, states have embarked on a quiet but disturbing trajectory in the law of re-enfranchisement. Appellate courts in the federal and state systems have upheld statutes that condition felon re-enfranchisement on the full payment of restitution, court fees, or other debt.[217] Ex-felons have the practical difficulty of navigating a maze of re-enfranchisement processes, but this problem can potentially be remedied by information and assistance. However, ex-felons can also be stymied when they attempt to register to vote, only to discover that they are officially barred by statute until their substantial LFOs are satisfied. A number of states have enacted legislation that requires the payment of LFOs before regaining the right to vote. In jurisdictions where there

216. As Michelle Alexander points out, "Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits." ALEXANDER, *supra* note 3, at 92.

217. In addition to the states outlined in this article that have faced constitutional challenges conditioning re-enfranchisement on payment of LFOs, three states have enacted such legislation with no legal challenges to date. *See* ALA. CODE § 15-22-36.1(a), (g) (2012) (stating that a person convicted of a crime who applies for certificate of eligibility to register to vote must pay all fines, court costs, fees, and victim restitution; persons convicted of certain crimes are not eligible to apply for certificate of eligibility to register to vote); ARK. CONST. amend. 51, § 11(d)(2)(A) (noting that a felon who wants to register to vote must provide proof that he or she "has been discharged from probation or parole, has paid all probation or parole fees, or has satisfied all terms of imprisonment, and paid all applicable court costs, fines, or restitution."); KY. REV. STAT. ANN. § 196.045 (2012) (stating that all restitution must be paid and no outstanding warrants, charges, or indictments for felony offenders to restore their civil rights).

have been constitutional challenges, courts have given their imprimatur to these types of statutes.

In 2000, the Fourth Circuit foreshadowed judicial assent to statutes conditioning voting rights on payment by upholding Virginia's practice of requiring convicted felons to pay a $10 fee to begin the process of having civil rights fully restored.[218] In an unpublished opinion, the court dismissed *pro se* appellant William Howard's claim that requiring payment to start the process to restore the right to vote was an unconstitutional poll tax in violation of the Twenty-fourth Amendment.[219] While the court agreed that the Supreme Court's decision in *Harper v. Virginia State Board of Elections*[220] precluded conditioning the right to vote upon payment of a fee,[221] the court distinguished the appellant's claim by asserting that "it is not his right to vote upon which payment of the fee is being conditioned; rather, it is the *restoration* of his civil rights upon which the payment of a fee is being conditioned."[222] This may be a distinction without a difference for Mr. Howard, who sought to exercise the important right to vote by challenging the process of re-enfranchisement in his state. Nevertheless, this case foreshadowed a standard approach to addressing the dilemma of wealth based conditions on voting: that courts would embrace a jurisprudence which foregoes the rigorous analysis applied to the constitutionally protected right to vote in favor of the less probing scrutiny accorded a state's civil *restoration* statute.[223]

218. *See* Howard v. Gilmore, No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000). Virginia remains one of the few remaining states that permanently disenfranchises felons. The fee at issue here goes toward an application for gubernatorial clemency, the only option available for restoring voting rights in Virginia.

219. The Twenty-fourth Amendment prohibits the use of a state poll tax or any other tax to "deny or abridge" the right of citizens to vote in federal primary and general elections. U.S. CONST. amend. XXIV. In *Harman v. Forssenius*, the Supreme Court held that the Twenty-fourth Amendment also prohibits requirements that are the functional equivalent of a poll tax. *See* Harman v. Forssenius, 380 U.S. 528, 540-41 (1965).

220. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966). The Supreme Court declared that poll taxes serving as a prerequisite for voting in state elections were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 670.

221. In *Harper*, the court noted:

> When it comes to voting, [the state] is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored . . . and we say nothing to impair its validity so long as it is not made a condition to the exercise of the franchise.

Id. at 668-69.

222. *Howard*, 2000 U.S. App. LEXIS 2680, at *4-5 (emphasis added).

223. *See supra* discussion of *Richardson v. Ramirez*, 418 U.S. 24 (1974) (finding that there is no fundamental right to vote for felons), at notes 54-69 and accompanying text.

The issue continued to present itself in both state and federal court systems. For instance, in 2007, a divided Washington Supreme Court, sitting *en banc*, upheld a Washington state statute[224] that conditioned felons' re-enfranchisement upon completion of all terms of their sentences, including payment of all LFOs such as court costs, fees, and victim restitution.[225] Importantly, the court characterized the financial conditions for re-enfranchisement as a continuing part of the requirement of discharging a felon's criminal sentence, rather than a restoration of rights *after* a criminal sentence.[226] Moreover, in continuing to distinguish *Harper* and rejecting respondents' claim that the statute's payment requirements function as an unconstitutional poll tax, the court noted that the Virginia citizens in the *Harper* case possessed a fundamental right to vote, whereas the respondents in the instant case did not. The court noted, "Convicted felons . . . no longer possess that fundamental right as a direct result of their decisions to commit a felony."[227] Having affirmed the essential rationale of *Richardson v. Ramirez*, that felons possess no fundamental right to vote, the court then proceeded to undertake a rational basis analysis of Washington's re-enfranchisement scheme.

Rejecting arguments that payment of LFOs are not a legitimate state interest that provide a rational basis for the re-enfranchisement statute, the court opined that "[t]he State clearly has an interest in ensuring that felons complete all of the terms of their sentence, and there is no requirement that the State restore voting rights to felons until they do so."[228] The court also quickly dispensed with the important underlying question animating the challenge to the statute: whether the statute discriminated against *low-income felons* unable to pay their LFOs by creating an unconstitutional wealth-based condition. On this issue, the court engaged in a bit of circular logic. The court noted that ex-felons had failed to establish that a felon's right to vote qualifies as an important right under federal case law based on the rationale of *Richardson* and noted that "even though low-income felons may not be accountable for their wealth status, they have been adjudicated

It stands to reason that, if strict scrutiny analysis is not to be applied to felons' voting rights, then it cannot be applied to the restoration of those rights either.

224. *See* WASH. REV. CODE § 9.94A.637(1) (2012).

225. Madison v. State, 163 P.3d 757, 770 (Wash. 2007) (en banc). The court rejected challenges based on the Privileges and Immunities Clause of the Washington Constitution and the Equal Protection Clause of the U.S. Constitution. *See id.*

226. *See id.* at 771 ("[It] is not Washington's *re-enfranchisement* statute that denies felons the right to vote but rather the continuing applicability of its *disenfranchisement* scheme.").

227. *See id.*

228. *See id.* at 772.

responsible for their status as felons. . . ."[229] While the court conceded that the requirement that felons pay their LFOs in full might affect felons disparately "based on their differing income statuses," they pronounced that "this alone does not establish an equal protection violation."[230]

Similarly, in the Ninth Circuit case of *Harvey v. Brewer*, the court upheld an Arizona law that automatically restores the right to vote to one-time felons who complete their sentences and pay any fines or restitution imposed upon them.[231] The crux of the plaintiffs' argument challenging the law was that, because they had served the entirety of their prison terms for a lone felony conviction, the only thing preventing them from having their voting rights automatically reinstated was their failure to pay the criminal fines and restitution orders included in their sentences.[232] This requirement, they argued, discriminated based on wealth and conditioned the right to vote on payment of a fee. Like the Supreme Court of Washington, the Ninth Circuit upheld the repayment requirement on ground that "Arizona has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders."[233] The panel continued:

> Just as States might reasonably conclude that perpetrators of serious crimes should not take part in electing government officials, so too might it rationally conclude that only those who have satisfied their debts to society through fulfilling the terms of a criminal sentence [including payment of criminal justice-related financial obligations] are entitled to restoration of their voting rights.[234]

In sum, all of the appellate courts that have considered the issue[235] have concluded that payment of LFOs before the restoration of voting

229. *Madison*, 163 P.3d at 769.

230. *See id.*

231. Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010) ("We have little trouble concluding that Arizona has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders.").

232. *See* ARIZ. REV. STAT. ANN. § 13–912(A)(2) (2011).

233. *Harvey*, 605 F.3d at 1079.

234. *See id.*

235. Other circuits dodged the question of wealth-based restoration of voting rights when confronted with the issue. *See* Johnson v. Governor of Florida, 405 F.3d 1214 (11th Cir. 2005) (en banc). This case primarily involved a Fourteenth Amendment Equal Protection Clause and Voting Rights Act challenge to Florida's felon disenfranchisement law which provides that "[n]o person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights or removal of disability." FLA. CONST. art. VI, § 4 (1968). Plaintiffs also alleged discrimination in Florida's re-enfranchisement process based on the imposition of improper poll tax and wealth qualifications. The court rejected the argument that the voting rights restoration scheme violated the prohibition

rights is constitutional, regardless of a person's ability to pay. Because *Richardson v. Ramirez* allows courts to render felons' voting rights less than fundamental, courts have engaged in the use of this legal formality and have avoided the implications of permanent or long-term disenfranchisement of low-income ex-felons who cannot pay LFOs.[236]

B. *Child Support: The Curious Case of* Johnson v. Bredesen

The 2010 case of *Johnson v. Bredesen*[237] represents a stark expansion of re-enfranchisement schemes requiring payment of LFOs prior to the restoration of voting rights.

The history of the *Bredesen* case is intriguing. Before 2006, Tennessee had perhaps one of the "most irrational and confusing felony disenfranchisement laws in the nation."[238] The Brennan Center for Justice worked with state advocates and the American Civil Liberties Union in 2005 to draft a bill that would streamline and standardize these complex restoration procedures.[239] The originally proposed bill failed in the Tennessee House of Representatives, but, in the following year, the legislature passed an amended version of the bill standardizing

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against poll tax, noting that, under Florida's Rules of Executive Clemency, the right to vote *could* still possibly be granted to felons who cannot afford to pay restitution. *Johnson*, 405 F.3d at 1216 n.1. In this instance, the 11th Circuit declined to address whether conditioning an application for clemency on paying restitution would be an invalid poll tax under the law, since the court did not need to reach that question. *Id.*

236. In 2006, the ACLU in Washington State discovered that "[s]tatistics from the Washington Department of Corrections (DOC) show that only a fraction of the individuals released from prison have been issued a Certificate of Discharge" and that "[t]he primary obstacle is their inability to satisfy legal financial obligations." *See* AM. CIVIL LIBERTIES UNION OF WASH., VOTING RIGHTS RESTORATION STATISTICS FOR WASHINGTON STATE (2006), *available at* http://bit.ly/Sb2YOr. Consequently, the Washington State legislature adopted new rules to allow for automatic voter restoration. However, the ACLU noted that, under the new provisions: "If you miss 3 scheduled LFO payments in a year, a court may revoke your right to vote. This is a provision of the new law, and it is unclear how it will work in practice." *See* AM. CIVIL LIBERTIES UNION OF WASH., WASHINGTON'S NEW VOTING RIGHTS RESTORATION PROCESS (2010).

237. Johnson v. Bredesen, 624 F.3d 742 (6th Cir. 2010).

238. *See Voting Rights Restoration Efforts in Tennessee: Current Felony Disenfranchisement Laws*, BRENNAN CTR. FOR JUST., http://bit.ly/PcIlPW (last visited Oct. 20, 2012) [hereinafter RESTORATION EFFORTS IN TENNESSEE] ("People who were convicted before July 1, 1986, must petition a court for restoration of voting rights, and various prosecutors are given an opportunity to object. People convicted after June 30, 1996, are subject to the same rules, except that those convicted of murder, rape, treason, or voter fraud are permanently disenfranchised. These exceptions pertain also to people convicted between July 1, 1986 and July 1, 1996, but others convicted during that period may petition for administrative restoration of rights, without a potentially adversarial court hearing.").

239. *See id.* ("That bill passed in the state senate but failed by eleven votes in the house.").

restoration by allowing for a certificate of discharge upon release[240] after completion of a maximum prison sentence or probation or parole terms.[241] As was its goal, the legislature managed to adopt a greatly simplified restoration procedure.[242] But there was a catch. Tennessee's amended bill added two new exceptions to re-enfranchisement eligibility.[243] The new legislation provided that:

> (b) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person:
>
> > (1) Has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence [and] . . .
>
> (c) . . . a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, *unless the person is current in all child support obligations*.[244]

A requirement for payment of restitution is in keeping with earlier cases, where statutes were upheld because financial obligations were considered an ongoing part of the underlying criminal conviction.[245] Here, the restitution provision of the amended statute has a relationship to the completion of the terms of one's criminal sentence. However, the

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240. *See id*. ("[The bill] eliminates any adversarial proceeding. Now, any person convicted of an infamous crime, except some of those convicted of murder, treason, rape, voter fraud, and sexual offenses, receives a certificate of discharge upon completion of their maximum prison sentence or their probation or parole terms. This certificate verifies that the individual is qualified to register and vote.").

241. *See id*. ("This certificate verifies that the individual is qualified to register and vote.").

242. *See* discussion *supra* Part II.C.

243. The re-enfranchisement statute at issue restores felons' eligibility "to apply for a voter registration card and have the right of suffrage restored" upon receipt of a pardon, discharge from custody after serving the maximum sentence imposed, or final discharge by the relevant county, state, or federal authority. *See* TENN. CODE ANN. § 40-29-202 (2010). The statute, however, carves out two exceptions to re-enfranchisement eligibility. *Id.*

244. TENN. CODE ANN. § 40-29-202 (2010) (emphasis added).

245. The statute was later amended to require payment of court costs as well. The full text of the amended bill is as follows:

> (b) Notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person:
>
> > (1) Has paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence; and
> >
> > (2) Beginning September 1, 2010, notwithstanding the provisions of subsection (a), a person shall not be eligible to apply for a voter registration card and have the right of suffrage restored, unless the person has paid all court costs assessed against the person at the conclusion of the person's trial, except where the court has made a finding at an evidentiary hearing that the applicant is indigent at the time of application.

TENN. CODE ANN. § 40-29-202(b) (2010).

requirement of paying all outstanding child support obligations was entirely novel. A court has never required payment of a debt that was completely unrelated to the underlying crime in order to reestablish voting privileges. In this sense, *Bredesen* represents a wide departure and an expansion from previous cases.

The *Bredesen* plaintiffs, child support obligors who were too poor to satisfy current obligations, challenged Tennessee's statutory provision conditioning felons' right to vote on their ability to pay LFOs, namely child support arrears or restitution.[246] In their complaint, the plaintiffs alleged violations of the Equal Protection Clause, Twenty-fourth Amendment, and Ex Post Facto and Privileges and Immunities Clauses of federal and state constitutions.[247] In a split-panel opinion issued by the Sixth Circuit, the court upheld Tennessee's amended law requiring payment of restitution and all child support obligations before restoring the right to vote to ex-felons.

With respect to the equal protection claim, the majority applied the rational basis test, rejecting the plaintiffs' contention that strict scrutiny should be the standard for reviewing a statute restricting the fundamental right to vote. Like the earlier fee and restitution cases, the court noted the restraint on voting by felons that was articulated in *Richardson v. Ramirez*,[248] opining that "[t]he state may, within the bounds of the Constitution, strip convicted felons of their voting rights," and, having "lost their voting rights, Plaintiffs lack any fundamental interest to assert."[249] Then, after applying the rational basis standard, the panel found that "the state's interests of encouraging payment of child support and compliance with court orders, and requiring felons to complete their entire sentences, including paying victim restitution, supply a rational basis for the challenged statutory provisions sufficient to pass constitutional muster."[250] The fact that the child support debt was unrelated to the underlying crime for which the felons were disenfranchised was of no consequence, as the court declined to require

246. *See* RESTORATION EFFORTS IN TENNESSEE, *supra* note 238. The Brennan Center brief argued that Tennessee's law functions as an illegal poll tax in violation of the 24th Amendment, relying on the Amendment's legislative history, case law interpreting the Amendment, and policy arguments.

247. *See* Johnson v. Bredesen, 579 F. Supp. 2d 1044 (M.D. Tenn. 2008). The United States District Court for the Middle District of Tennessee granted Defendant's motion for judgment on pleadings. This article analyzes the Equal Protection and 24th Amendment challenges at the Sixth Circuit. The court upheld the statute against all of the constitutional challenges.

248. *See* discussion *supra* Part I.B and accompanying notes.

249. *See Bredesen*, 624 F.3d at 746.

250. *See id.* at 747.

any nexus between the disenfranchising crime and the state's interest in collecting child support.[251]

Regarding the Twenty-fourth Amendment claim, the majority concluded that the right to vote was not being abridged for "failure to pay any poll tax or other tax." The court reasoned, as in *Howard v. Gilmore*, that the Tennessee statute "does not deny or abridge any rights; it only restores them."[252] In short, "Plaintiffs possess no right to vote and, consequently, have no cognizable Twenty-fourth Amendment claim."[253] The court further noted that the challenged provisions "do not disenfranchise them or anyone else, poor or otherwise," reasoning that, "Tennessee's indisputably constitutional disenfranchisement statute accomplished that."[254]

Circuit Judge Karen Nelson Moore issued a powerful dissent, arguing that, by law, Tennessee "may curtail a felon's right to vote, or even forever deny it, but once a state enacts a process by which a felon may regain suffrage, that process must comport with the demands of the Constitution."[255] Judge Moore articulated a clear rationale for her

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251. *See* Gerald L. Neuman, *Equal Protection, "General Equality" and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 292 (1999) ("The rationale need not demonstrate a close relationship between the distinction and its underlying purpose . . . the Court is very tolerant of overbroad generalizations that may be instrumentally useful, and does not require employment of less restrictive alternatives or a proportionality test.").

252. *See Bredesen*, 624 F.3d at 753 ("Significantly, Tennessee child support law, which conditions payment on the payor's ability to earn a living so as to *avoid* imposing a penal obligation, exists to protect children; and restitution payments aim to restore crime victims to the position they would have been in had the crime not occurred—not to punish the perpetrator.").

253. *See id.* at 751. Disenfranchisement laws are considered regulatory rather than punitive. In *Trop v. Dulles*, the Supreme Court expressly stated that felon disenfranchisement laws serve a regulatory, non-penal purpose. *See* Trop v. Dulles, 356 U.S. 86, 96-97 (1958). Scholars have vigorously questioned this contention. *See, e.g.*, Karlan, *supra* note 4 at 1150 ("The view that disenfranchisement is not punitive rests on a long-since-repudiated conception of the right to vote."); Miller, *supra* note 4, at 32 ("[F]elony disenfranchisement should not be characterized as a sanction for criminal conduct: It fits none of the usual justifications for punishment.").

254. TENN. CONST. art. 1, § 5. Elections and suffrage, Tennessee's disenfranchisement statute, states: "The elections shall be free and equal, and the right of suffrage, as hereinafter declared, shall never be denied to any person entitled thereto, except upon conviction by a jury of some infamous crime, previously ascertained and declared by law, and judgment thereon by court of competent jurisdiction."

255. *Bredesen*, 624 F.3d at 754 (Moore, J., dissenting). In her dissent, Judge Moore stated:

> Contrary to the majority's conclusion, I would hold that Tennessee Code § 40-29-202(b) and (c) violate the Equal Protection Clause of the U.S. Constitution and the Ex Post Facto Clause of the Tennessee Constitution. I further believe that the Plaintiffs have alleged sufficient factual matter to state a claim for relief under the Twenty-Fourth Amendment to the U.S. Constitution such that

dissent: that individuals who can afford to satisfy financial obligations and those who cannot are not similarly situated, and that the law cannot justify wealth-based distinctions in restricting voting rights even under the rational basis test. Judge Moore concluded, "The effective result of the State's attempt to justify [the statute's exceptions to re-enfranchisement] as a legitimate way to limit access to the ballot box is that the State has injected wealth as a determinative factor in an arena where it simply has no place."[256] She further asserted, "It is indisputable that the Plaintiffs are now unable to access the ballot box simply because they are too poor to pay."[257]

The same Tennessee re-enfranchisement statute was further amended in 2010 to also require payment of *all* court costs assessed against a person.[258] This is but one indication that the expansion of legal barriers to re-enfranchisement continues unabated, as none of the constitutional challenges in these cases have been successful or even subject to rigorous debate. It remains to be seen whether Tennessee's approach, requiring payment of debts other than LFOs, will be adopted by other jurisdictions. However, there is reason to be concerned about this development. Mounting carceral debt owed by prisoners serves to bring to the surface important constitutional and pragmatic questions about the effect of debt as a barrier to the franchise and highlights courts' use of legal doctrine to sidestep the critical ramifications of restoring the important right to vote *only* to those who can pay their debts.

IV. OUT FROM THE SHADOWS: THE IMPLICATIONS OF CRIMINALIZING DEBT

Illuminating the contradictions of limiting voting rights to those who can afford to pay allows us to foresee the broader implications of carceral debt. In the modern era, courts maintain an incongruous and

> dismissal on the pleadings was improper. For the following reasons, I must respectfully dissent.

Id.

256. *See id.* at 758-59 (Moore, J., dissenting); *see also* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) (stating that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process . . . ," and wealth, as a measure of a voter's qualification, is nothing more than a "capricious or irrelevant factor" that cannot withstand constitutional scrutiny).

257. *See Bredesen*, 624 F.3d at 755, 757 (Moore, J., dissenting) ("[T]he Tennessee statute here is 'ludicrously ineffectual' at encouraging the payment of child-support arrears as it makes no accommodation for individuals like the Plaintiffs who simply cannot pay despite a willingness to do so.") (quoting Plyer v. Doe, 457 U.S. 202, 228 (1982)).

258. TENN. CODE ANN. § 40-29-202(b) (2010) (providing that these costs are assessed "at the conclusion of the person's trial, except where the court has made a finding at an evidentiary hearing that the applicant is indigent at the time of application.").

self-perpetuating two-tier voting rights jurisprudence. The right to vote is fundamental for non-felons, requiring strict scrutiny analysis of state laws that infringe on that right. Simultaneously, courts allow a deferential rational basis analysis for would-be voters with felony convictions, framed as the regulatory *restoration* of voting rights. Such an approach amounts to an analytical trick, which shields courts from a more exacting inquiry into the rationality of the laws that separate felons from their important exercise of voting rights. Despite the historical antecedents for doing so,[259] these divergent approaches run counter to the modern notion of an expanding democracy. They also legalize discrimination.

A. *Irrational Basis: Wealth Based Conditions on the Right to Vote*

> The attempt to incentivize payments that an individual is simply incapable of making by linking those payments to the right to vote . . . advances no purpose and embodies nothing more than an attempt to exercise unbridled power over a clearly powerless group, which is not a legitimate state interest.[260]

Judge Moore offered this observation in her dissent in *Bredesen*, highlighting an important issue. With rare exceptions, courts do not analyze the state's *purpose* for upholding laws under rational basis review. It is true that contemporary jurisprudence allows for almost automatic assent to legislative policy prerogatives. Therefore, courts in these cases fail to confront the disparate impact of carceral debt on low-income obligors, choosing instead to focus on their "voluntarily" incurred status as felons.[261] Nevertheless, as Judge Moore's quote above indicates, a court might reasonably conclude that the state's purpose—*i.e.*, making voting rights contingent on paying debt that an ex-felon cannot afford—is simply irrational. While the level of deference accorded to lawmakers is staggering, it is not the case that all legislation must survive a rational basis analysis.

259. These justifications for disenfranchisement primarily take two forms: "The first is that ex-felons should be disenfranchised because they have broken the social contract; the second is that they should be excluded because only the virtuous are morally competent to participate in governing society." *See Disenfranchisement of Ex-Felons*, *supra* note 4, at 1304. However, these rationales do not resonate in the modern era of expanding democratic participation.

260. *See Bredesen*, 624 F.3d at 757 (Moore, J., dissenting) ("I find entirely unconvincing the majority's conclusion that [the bill] constitute[s] a rational way to encourage Tennessee's legitimate interest in the collection of outstanding financial obligations or encourage compliance with court orders imposing such obligations.").

261. *See id.*

For example, in *Romer v. Evans*,[262] the U.S. Supreme Court used the rational basis test to invalidate Colorado's Amendment Two, an initiative that encouraged discrimination based on sexual orientation.[263] Although lesbians and gays are not a suspect class for the purpose of equal protection analysis, the court opined that the initiative failed to survive even rational basis review because "the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation."[264] Animating the decision to strike down Amendment Two is the Court's conclusion that the ostensible purpose behind the law was *animus* against gays and lesbians, an impermissible motivation.[265] No doubt the *Bredesen* majority would deny animus in upholding the state's expressed purpose for the Tennessee amendment,[266] which is described therein as the state's interest in "protecting the ballot box from convicted felons who continue to break the law by failing to comply with court orders, encouraging payment of child support, and requiring felons to complete their entire sentences, including paying victim restitution."[267] Nevertheless, it is difficult to see how at least some of those justifications are not motivated by animus. Within these cases, and throughout modern and historical jurisprudence, ex-felons are referred to disparagingly and suffer a particular kind of stigma, social exclusion, and opprobrium that provides a rationale for disparate treatment. At the same time, the application of the law operates at cross-purposes with some of society's loftier goals, such as encouraging widespread democratic participation.

What then, of the disparate impact of re-enfranchisement laws on *poor* felons generally, given the strong correlation of incarceration with poverty? Can poor ex-felons, as a class, challenge the disparate effects of laws that reinforce shadow citizenship? Unfortunately, when the

262. Romer v. Evans, 517 U.S. 620 (1996).
263. *See id.* at 620.
264. *See id.* at 632.
265. *Id.* ("[The] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").
266. The *Bredesen* court uses Sixth Circuit jurisprudence quoting *Romer* to justify its rationale for upholding the statute, as well as problems arising from wealth disparity. *See* E. Brooks Books, Inc. v. Shelby Cnty., Tenn., 588 F.3d 360, 364 (6th Cir. 2009) ("'[A] law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.'") (quoting Romer v. Evans, 517 U.S. 620 (1996)). The *Bredesen* court opines, "While the dissent would prefer that the state not discriminate on the basis of wealth when providing statutory benefits, this is an argument that must be resolved by the legislature, not this Court." *See Bredesen*, 624 F.3d at 748.
267. *See id.* at 747.

Supreme Court has considered the rights of the poor as a group under equal protection doctrine, "it has not been predisposed to consider class as a suspect category that can or should be specially protected."[268] Most scholars concede that the Supreme Court has held that the poor are not a suspect class under equal protection doctrine and, therefore, are not entitled to heightened scrutiny of laws.[269] But re-enfranchisement statutes have a particularly acute disparate impact on poor debtors in that they serve as a barrier to regaining suffrage, a burden on an undoubtedly important right. Interestingly, in the Ninth Circuit case of *Harvey v. Brewer*,[270] Justice Sandra Day O'Connor, sitting by designation, hints that such a disproportionate negative impact *might* compel a different result, noting that "[p]erhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass this rational basis test. . . ."[271] However, the court sidestepped the issue in that case, stating, "[W]e do not address that possibility because no plaintiff in this case has alleged that he is indigent."[272] Thus, even under the deferential rational basis standard, Justice O'Connor was correct to question the legitimacy of laws that stand as an obstacle to voting for low-income felons specifically. Many, if not most, ex-felons are in fact indigent, not to mention politically powerless. Moreover, these laws cannot be reconciled with legitimate state interests for a number of important reasons.

First, as Judge Moore insightfully observed, conditioning restoration of voting rights on the payment of LFOs and other debts, such as child support, provides no incentive value whatsoever if ex-felons are *unable* to pay them, even if the state's collection of these financial

268. Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 112-13 (2009) ("[T]he Court has questioned whether certain denials of services and benefits to the poor even merit constitutional consideration. This position is compounded by the fact that, for equal-protection claims, the Court is generally concerned only with the government's purposeful use of invidious classifications.").

269. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 806 (4th ed. 2012) ("In *San Antonio School Dist. v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review."); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) ("[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification."). *But see* Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 407 (2010) (arguing that "the Supreme Court has not yet decided whether the poor are a quasi-suspect class or a suspect class under Equal Protection.").

270. Harvey v. Brewer, 605 F.3d 1067 (9th Cir. 2010).

271. *See Brewer*, 605 F.3d at 1080.

272. *See id.*

obligations would typically constitute a legitimate interest.[273] Such an approach lays bare an alternative motivation for these conditions: to continue punishing ex-felons for their crimes. Such a motivation is an inappropriate use of civil restoration procedures, which are intended to be regulatory rather than punitive, and should not be sustained in circumstances where demonstrated indigency is the only barrier to the restoration of voting rights. Further, many of the debts incurred by felons are not directly related to their criminal acts, and so are not "incurred" by them in the way that we normally understand the accrual of debt. For instance, state "user fees" constitute a growing percentage of debt owed by prisoners, but are assessed to prisoners to shore up state coffers rather than designated as a part of an offender's criminal sentence. Similarly, child support arrears tend to mount heavily during incarceration,[274] despite the fact that prisoners earn little or no money. While the debt accrued technically becomes an obligation that is owed by prisoners, the debt is not tied to a parent's earning capacity, as is required under traditional family law concepts, and therefore represents an illegitimate debt. Here, as with criminal justice debt, arrears are linked to punishment of prisoners for their bad acts, in this case being imprisoned and unable to provide support for children. Moreover, there is no reason that debt should become a *barrier* to voting, because the debt, illegitimate or otherwise, will continue to remain an obligation after release. If prisoners can afford to pay, they will likely risk re-arrest if their failure to pay is willful.[275] If they cannot pay, incarceration runs afoul of the tenets of *Bearden v. Georgia*,[276] which require an inquiry into a person's ability to pay and whether there are adequate alternatives to imprisonment.[277] Re-enfranchisement laws that condition voting on the repayment of LFOs are irrational in the sense that they are both punitive and unlikely to achieve their stated purposes.

Second, as noted earlier in this article, the costs of LFOs and child support debt can be enormous in the aggregate. As a practical matter, conditioning re-enfranchisement on the payment of these debts in full, as

273. *See Bredesen*, 624 F.3d at 756 (Moore, J., dissenting) ("I fail to see how preconditioning suffrage on a payment that a person is unable to make is in any rational way related to the government's interest in promoting that payment.").

274. In addition to child support order mounting, many states apply compounded interest to child support, which become judgments by operation of law immediately after they go unpaid.

275. *See* discussion *supra* Part II.D.

276. Bearden v. Georgia, 461 U.S. 660 (1983).

277. *See id.* at 672 ("Only if the sentencing court determines that alternatives to imprisonment are not adequate in a particular situation to meet the State's interest in punishment and deterrence may the State imprison a probationer who has made sufficient bona fide efforts to pay.").

many statutes require, can render ex-felons *permanently* disenfranchised because they will never be able to satisfy them. In most states, this level of disenfranchisement is no longer tolerated, as they have adjusted their disenfranchisement laws to allow for re-enfranchisement at some point after release, a path that states have chosen as a deliberate policy prerogative. Allowing debt that is keyed to financial capacity to become a barrier to re-enfranchisement constitutes an end run around the conscious liberalization of disenfranchisement laws, which are publicly altered through statutory amendment or executive order.

Third, requiring the payment of all LFOs is not rationally related to a legitimate state interest because it is steeped in bad public policy. Just because the law permits courts to require payment of fees does not mean that it is wise to do so.[278] Because it is clear that financial obligations will become a practical barrier for many ex-felons, this requirement undermines another equally important public purpose: the successful reintegration of ex-offenders. As a society, it is in the collective interest to embrace people with criminal convictions and encourage a return to civic participation. In fact, this prerogative is articulated in many places, not least of which is the Second Chance Act,[279] federal legislation that directly articulates the need for and funds supportive services to foster effective reentry. The resumption of voting rights is tied to this overall process of reintegration. As felons are defined by their legal relationship with the state and their separation from their fellow citizens,[280] restricting the right to vote along with other barriers makes *performing* the duties of citizenship difficult.[281] Moreover, the rights of citizenship have an important effect on the reduction of crime, prompting sociologists Manza and Uggen to remark, "The basic relationship between crime and voting is now clear: Those who vote are less likely to be arrested and incarcerated, and less likely to report committing a range of property and violent offenses."[282] Given the importance of democratic participation to

278. *See* Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 380 ("The issue of felon voting, and . . . automatic re-enfranchisement of ex-felons . . ., is an area in which the values of administrative ease, finality, and ensuring voting integrity do not conflict with the values of opening up the process and ensuring voting rights.").

279. *See* Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008). This first-of-its-kind legislation authorizes federal grants to government agencies and nonprofit organizations to provide employment assistance, substance abuse treatment, housing, family programming, mentoring, victim support, and other services that can help reduce recidivism.

280. *See* MANZA & UGGEN, *supra* note 1, at 125 ("[L]imitations and disqualifications [on voting rights] hinder reintegrative efforts . . . [and] affect recidivism.").

281. *See id.* at 127.

282. *See id.* at 133.

crime reduction, it is surprising that questions about the legitimacy of wealth-based conditions for ex-felons that threaten reintegration remains an issue that the courts have thus far refused to engage with any depth.

Finally, the intractable relationship among race, class, and criminalization provide an opportunity to acknowledge the potential crisis of conditioning voter restoration on payment of financial obligations and other debt. African Americans are statistically more likely to live in poverty and are disproportionately impacted by incarceration.[283] Therefore, the co-recurring effect of incarceration and poverty would greatly exacerbate the effects of social inequality in a way that would harshly affect African Americans, an effect that clearly does not represent a legitimate state interest. In fact, the nexus among race, class, and incarceration could reasonably compel a greater level of equal protection scrutiny than class analysis alone receives. To this end, legal scholars Mario L. Barnes and Erwin Chemerinsky suggest that the intersection of race and class might require a heightened scrutiny and posit, "One should need no other basis to call for closer scrutiny than the obvious truth that poverty takes on the character of a stigmatizing identity category. This stigma alone is powerful but also interacts in myriad and complex ways with race, a classification that receives strict scrutiny."[284] In any event, the enhanced negative effect of criminal justice-related debt on African Americans creates an additional and profound concern for a community already shouldering the disproportional effects of mass incarceration and further calls into question the rationality of restoration statutes that condition voting rights on the payment of debt.

For these reasons, the requirement that ex-felons pay all LFOs or other debt before they are allowed to restore voting rights is simply not rationally related to a legitimate state interest and also runs counter to significant policy prerogatives that should be further illuminated within the policy discourse surrounding prisoners and reentry. While courts have upheld legislation that conditions re-enfranchisement on payment of LFOs,[285] there have been strong signs of dissent within the judiciary.

283. *See* Western & Pettit, *supra* note 16, at 9.

284. Barnes & Chemerinsky, *supra* note 268, at 119-21 ("Poverty certainly shares many of the characteristics that warrant heightened scrutiny for race. There has been a long history of discrimination against the poor, often in ways that are invisible to those with resources. The poor are politically powerless.").

285. The *Bredesen* court, for example, is unabashed in its approval of the Tennessee statute authorizing an exception to re-enfranchisement when petitioners are not current in child support obligations, despite its adverse effects on the poor, noting that "[t]he statute is not aimed at encouraging the collection of payments from *indigent* felons, but from *all* felons. The legislature may have been concerned, for instance, that a specific exemption for indigent felons would provide an incentive to conceal assets and would result in the

These dissenting voices, as well as others rejecting the current analysis of this problem, can point the way to a more nuanced discourse should the issue ultimately present itself in other jurisdictions for consideration, or ultimately find its way to the Supreme Court.

B. Looking Forward: Debtors' Prison Redux

The obstacles faced by ex-felons who seek to contribute to the national polity through the resumption of voting rights demand attention. However, the specter of debt and its negative effects has consequences beyond the rights and obligations of former prisoners: mounting debt has far-reaching repercussions for low-income people generally.

People on the economic margins are always *potential* shadow citizens, as their circumstances may at any time tip over into the realm of economic vulnerability that leads to a lessened privacy status and state intervention.[286] Scholar Kaaryn Gustafson has asserted that welfare recipients are relegated to an inferior status of citizenship with diminished constitutional protections. She compares their treatment and status to that of parolees and probationers,[287] observing, "Government welfare policies increasingly treat the poor as a criminal class. . . ."[288] Gustafson uses the term criminalization in this context to describe a web of state policies and practices related to welfare involving the "stigmatization, surveillance, and regulation of the poor."[289]

For many working class Americans, the status of being poor, with all its attendant indignities, is increasingly close at hand. In September 2011, the Census Bureau reported that the number of Americans living in poverty was the highest number recorded in 52 years.[290] The ongoing financial crisis and recession has taken a significant toll on Americans in the middle and lower income brackets.[291] These families have a tenuous

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state being unable to compel payments from some non-indigent felons. That the state used a shotgun instead of a rifle to accomplish its legitimate end is of no moment under rational basis review." *Bredesen*, 624 F.3d at 748.

286. *See* Robin Morris Collin & Robert William Collin, *Are the Poor Entitled to Privacy?*, 8 HARV. BLACKLETTER L.J. 181, 181 (1991) ("[T]here is no governmental duty to provide the necessities of life and no governmental omission which can be thought to be a constitutional violation.").

287. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 646-47 (2009).

288. *See id.* at 644.

289. *See id.* at 647.

290. *See* Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES, Sept. 14, 2011, *available at* http://bit.ly/T7Y4CL ("Economists pointed to a telling statistic: It was the first time since the Great Depression that the median household income, . . ., had not risen [in 13 years].").

291. *See id.* The Census Bureau also indicates that a 15.1% poverty level was the highest since 1993, with the poverty line in 2010 set at $22,314 for a family of four. *Id.*

hold on survival and are increasingly mired in debt. As noted earlier, state laws have historically shielded debtors from incarceration, while criminal justice debt provides constitutional cover to enforce obligations arising from criminal justice involvement. However, that civil-criminal distinction may not be as clear-cut as one might imagine. Recent developments pertaining to the enforcement of commercial debt provides a cautionary tale and potentially blurs the line.

In 2011, an article by the *Wall Street Journal* exposed a common practice of the U.S. debt-collection industry's copious use of arrest warrants to recoup money owed by borrowers who are behind on credit-card payments, auto loans, and other bills.[292] While incarceration for civil debt is specifically prohibited in most jurisdictions, "[m]ore than a third of all U.S. states allow borrowers who can't or won't pay to be jailed" under certain circumstances.[293] A judge can generally issue arrest warrants if a borrower defies a court order to repay a debt or does not show up in court.[294] One problem is that many of those who fail to appear have not received proper notice of the court appearance, as some are not even aware that lawsuits have been filed against them.[295] This woman's story is fairly common:

> She was driving home when an officer pulled her over for having a loud muffler. But instead of sending her off with a warning, the officer arrested [her] and she was taken right to jail. "That's when I found out [that] I had a warrant for failure to appear in Macoupin County. And I didn't know what it was about." She owed $730 on a medical bill. She says she didn't even know a collection agency had filed a lawsuit against her . . . She spent four days in jail waiting for her father to raise $500 for her bail. That money was then turned over to the collection agency[296]

Debt collectors use harsh tactics, such as routinely requesting warrants against debtors to leverage some kind of payment.[297] The number of debt-related warrants has increased so dramatically that states are beginning to investigate abuses of the court system that are used to

292. *See* Jessica Silver-Greenberg, *Welcome to Debtors' Prison, 2011 Edition*, WALL ST. J. (Mar. 17, 2011, 6:15 PM), http://on.wsj.com/eshXHz ("[L]awmakers, judges and regulators are trying to rein in the debt-collection industry's use of arrest warrants to recoup money owed by borrowers who are behind on credit-card payments, auto loans and other bills.").
293. *See id.*
294. *See id.*
295. *See* Susie An, *Unpaid Bills Land Some Debtors Behind Bars*, NPR (Dec. 12, 2011), *available at* http://n.pr/rp5pWO.
296. *See id*.
297. *See id.*

compel compliance with financial judgments.[298] The Federal Trade Commission received more than 140,000 complaints related to debt collection in 2010, almost 25,000 more than the previous year.[299] While many civil debtors are not incarcerated for more than a few days when arrested, incarceration can have a psychologically debilitating effect, occurring without notice, with arrests taking place in front of loved ones, including children.[300] It can also disrupt employment and sometimes result in the loss of jobs, an event that leads to further economic marginalization. A single arrest, even without a conviction for any crime, has the potential to affect an individual's overall employability moving forward.[301] For example, 36 states allow all employers and occupational licensing agencies to inquire about, consider, and make hiring decisions based on arrests that never led to a conviction.[302]

As earlier sections of this article demonstrate, once a person is caught in the vortex of criminalization, debt arises from the criminal justice system itself through the imposition of court costs, fees, and restitution. Thus, the emerging practice of incarcerating civil debtors, no matter how short a time, foreshadows trouble for those living on the economic margins, in numbers that have increased significantly during an era of economic recession. We have seen, over time, how society has embraced an economic paradigm where the costs of incarceration have shifted to those people who are subject to its indignities, namely prisoners, and increasingly to their family members as well. In 2011, the state of Arizona enacted new legislation—the first in the nation—allowing its Department of Corrections to impose a $25 fee, designated as a "background check fee," on adults who wish to visit inmates at any of the 15 prison complexes in the state.[303] Officials confirmed that these fees were intended to compensate for a $1.6 billion deficit that the state

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298. *See id.*

299. *See id.*

300. *See* Silver-Greenberg, *supra* note 292 (describing how one man, who claims that he did not know that he was being sued over a $4,024.88 debt, was handcuffed in front of his four children and spent two nights in jail, where he was strip-searched and sprayed for lice).

301. *See* Mike Brunker, *Unable to Pay Child Support, Poor Parents Land Behind Bars*, MSNBC.COM (Sept. 12, 2011, 6:11 AM), http://nbcnews.to/r9hI9O (stating that, as previously noted, child support obligors are routinely arrested for failing to pay court-ordered child support).

302. *See Prohibit Inquiries About Arrests That Never Led to Conviction*, LEGAL ACTION CTR., http://bit.ly/WSHqs3 (last visited Oct. 20, 2012) (noting that, in addition to employers, many housing authorities and other non-criminal justice agencies also ask about and use arrests without convictions).

303. *See* Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES, Sept. 4, 2011, *available at* http://nyti.ms/OSs5Wy.

faced in 2011.[304] Thus, the criminalization of debt continues to have its most direct impact on those in the criminal justice system and other members of the community who can least afford it.

CONCLUSION

It is important to eradicate laws that mandate the disenfranchisement of felons, but this alone is not enough to fulfill the promise of reintegration and the resumption of social citizenship. To fully appreciate the widespread negative impact of felony disenfranchisement on democracy in the United States, the self-perpetuating and mutually reinforcing aspects of subordination that characterize the disenfranchisement/re-enfranchisement paradigm must be rendered visible. Class and race-based stigma, collateral consequences, onerous re-enfranchisement requirements, and burgeoning carceral debt create obstacles that have rendered a growing segment of the U.S. population, and their families, "shadow citizens."

These informal obstacles and shadow citizen status are further buttressed by a formalistic legal framework that allows courts to affirm specific barriers to re-enfranchisement that are conditioned on payment of criminal justice-related and other unrelated debt, such as child support obligations. Such conditions foster a constitutionally suspect paradigm whereby some people are denied the restoration of the fundamental right to vote simply because they cannot pay their debts. This emerging justice framework offers an opportunity to shed light on the nature of criminal justice debt in the twenty-first century, a prelude to the resurgence of debtors' prison.

304. *See id.* According to the *New York Times*, the Arizona Corrections Department "has run perfunctory checks on visitors for years. In its application form, the department requires visitors to provide their name, date of birth and a driver's license or other photo identification number. Providing a Social Security number on the application is optional, and no fingerprints are required." *Id.* Prison officials also noted, "[T]he money would not actually pay for background checks but would go to a fund for maintenance and repairs to the prison." *Id.*