DON'T DO THE CRIME IF YOU EVER INTEND TO VOTE AGAIN:[1] CHALLENGING THE DISENFRANCHISEMENT OF EX-FELONS AS CRUEL AND UNUSUAL PUNISHMENT

Mark E. Thompson

INTRODUCTION

Meet Joe Smith. Joe lives in Richmond, Virginia with his wife and two young sons. He teaches history in the local high school. Like many classrooms throughout the nation, Joe's class watched with interest as the 2000 presidential election[2] unfolded. As he fielded questions from his students about dangling chads and butterfly ballots, Joe was caught off guard by a question from one student, who asked, "Mr. Smith, who did you vote for?"

The question presented a dilemma for the history teacher, who had repeatedly stressed the importance of the right to vote to his students. You see, Joe himself had never cast a ballot. In 1969, Joe was drafted for military service but, due to religious beliefs and a conscientious opposition to military action of any kind, he refused to report for his assignment.[3] This decision resulted in a conviction for violation of the Selective Service Act,[4] for which Joe served one year in prison. Rather than truthfully answering the student's question and appearing hypocritical, Joe chose instead to lecture the class about the impropriety of such a question.

In the United States, participation in the electoral process is considered "vital to the maintenance of [our] democratic

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[1] SAMMY DAVIS JR., BARETTA'S THEME (KEEP YOUR EYE ON THE SPARROW) (Leeds Music Corporation 1975).

[2] *See generally* Bush v. Gore, 531 U.S. 98 (2000) (detailing the complications that arose in Florida during the 2000 Presidential election).

[3] Joe's hypothetical scenario is based on the facts of *Otsuka v. Hite*, 414 P.2d 412 (Cal. 1966). The plaintiffs in *Otsuka* had been convicted of failing to report for military service during World War II. *Id.* at 414-15. Twenty years after their release from prison, the plaintiffs, who in all other respects were qualified to vote, were refused voter registration due to their previous felony convictions. *Id.* at 415.

[4] 50 U.S.C. § 456(j) (2001).

institutions."[5] Once viewed as a privilege granted by the state,[6] the "right" to vote has been continuously expanded over the last 150 years through constitutional amendments,[7] legislative action,[8] and judicial opinions.[9] The thrust of this expansion is that certain restrictions on the right to vote can no longer be tolerated in a society based on democratic principles.[10] This expansionist view of the franchise, however, has not been entirely extended to ex-felons, who remain permanently excluded from the electoral process in nine states.[11]

Joe is but one of 1.4 million Americans that cannot vote[12] because of their status as an ex-felon.[13] Despite having paid his debt

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[5] Carrington v. Rash, 380 U.S. 89, 94 (1965) (*quoting* Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

[6] Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 974 (1970) [hereinafter *Collateral Consequences*].

[7] *See, e.g.*, U.S. CONST. amend. XV (ensuring the vote regardless of race, color, or condition of servitude); U.S. CONST. amend. XIX (extending suffrage to women); U.S. CONST. amend. XXIV (abolishing the poll tax in federal elections).

[8] *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. § 1971 (2001) (ensuring minorities access to the franchise).

[9] *See* cases cited *infra* note 14.

[10] *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969) (finding a law limiting school district elections to "property taxpayers" and parents of enrolled school children impermissible); Dunn v. Blumenstein, 405 U.S. 330 (1972) (declaring Tennessee's durational residency requirement for voting violative of equal protection).

[11] The constitutions and/or statutory provisions of the following nine states preclude ex-felons from voting. ALA. CONST. art. VIII; FLA. CONST. art. VI, § 4; FLA. STAT. ch. 97.041 (2001); IOWA CONST. art. II, § 5; IOWA CODE § 48A.6 (2001); KY. CONST. § 145; KY. REV. STAT. ANN. § 116.025 (Michie 2001); MISS. CONST. art. 12, § 241; MISS. CODE ANN. § 23-15-11 (2001); NEV. CONST. art. 2, § 1; TENN. CODE ANN. § 2-2-102 (2001); VA. CONST. art. II, § 1; WYO. CONST. art. 6, § 6; WYO. STAT. ANN. § 6-10-106 (Michie 2001).

[12] Approximately 3.9 million citizens are denied the right to vote as the result of a felony conviction. Patricia Allard & Marc Mauer, *Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws*, *at* http://www.sentencingproject.org (last visited Aug. 5, 2002). Approximately 1.4 million of these citizens reside in states that extend the denial of suffrage to citizens that have completed their term of incarceration. *Id.* This approximation of disenfranchised ex-felons may be slightly lower, as New Mexico restored the franchise to ex-felons as of July 1, 2001. N.M. STAT. ANN. § 31-13-1 (Michie 2001).

[13] "Ex-felon," as used throughout this Comment, refers to citizens who have completed their term of incarceration or have otherwise satisfied their sentence for conviction of a crime. This Comment focuses on the disenfranchisement of ex-felons and does not challenge the disenfranchisement of felons who are still under some form of state supervision. Although the distinction this Comment draws between the disenfranchisement felons and ex-felons may seem tenuous, states do have seemingly legitimate, non-punitive reasons for denying the vote to those still under state supervision. *See, e.g.*, Steve Chapman, *Give Ex-Convicts the Vote: It's a Crime to Deny Offenders Their Full Rights of Citizenship* (March 30, 2000), *at*

to society and leading an exemplary life since his infraction at the age of eighteen, Joe cannot help but feel like a sub-citizen come election day. As fellow citizens freely exercise this "fundamental" right,[14] Joe must idly sit by, watching as others choose those who will govern him and the laws by which he must obey. Alienation and embarrassment lead to confusion[15] as he wonders why he is not allowed to do something that textbooks call a fundamental right. He asks, "is this punishment for something I did years ago, and, if so, isn't that punishment cruel and unusual?"

In light of the fundamental nature of the right to vote,[16] as well as the unconvincing non-penal justifications espoused for denying this right to persons no longer under state supervision,[17] this Comment proposes that the disenfranchisement of ex-felons constitutes cruel and unusual punishment as proscribed by the Eighth Amendment.[18]

An individual wishing to establish that such disenfranchisement is cruel and unusual punishment must demonstrate the following. First, because the Cruel and Unusual Punishments Clause applies only to "punishment," the individual must demonstrate that disenfranchisement is, in fact, additional punishment for the commission of a crime and not simply a regulatory measure enacted for a legitimate, non-punitive purpose.[19] Once established as

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http://slate.msn.com/default.aspx?id=78066 (citing problems in determining the inmate's residence for election purposes); *Collateral Consequences*, *supra* note 6, at 978 (discussing the unavailability of election machinery and absentee ballots in prisons). In light of these justifications, this Comment does not challenge the constitutionality of disenfranchising felons that have yet to complete their sentences.

[14] Numerous decisions have espoused the fundamental nature of the right to vote. *See, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 676 (1966) ("[t]he right to vote is . . . precious, . . . fundamental . . . ."); Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (the right to vote is fundamental "because [it is] preservative of all rights") (alteration added).

[15] *See generally* Alice E. Harvey, Comment, *Ex-Felon Disenfranchisement and its Influence on the Black Vote: The Need For a Second Look*, U. PA. L. REV. 1145, 1170-73 (1994) (discussing in detail the psychologically detrimental effects on the individual disqualified from voting); *Collateral Consequences*, *supra* note 6, at 1174 (discussing the emotional impact that civil disabilities such as disenfranchisement often produce). For a more detailed discussion of the psychological effects that disenfranchisement has on the ex-felon, see *infra* notes 73-80 and accompanying text.

[16] *See* cases cited *supra* note 14.

[17] For a complete discussion of the purported non-penal justifications for ex-felon disenfranchisement, see *infra* PART III.

[18] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[19] *See* Ingraham v. Wright, 430 U.S. 651, 671 (1977) (finding the Cruel and

punishment, the individual must further establish that the denial of voting rights falls within the characterization of methods of punishment that are cruel and unusual.[20]

The idea that disenfranchisement may constitute cruel and unusual punishment is by no means novel. In 1966, the California Supreme Court stated that if a law disenfranchising ex-felons were intended as additional punishment for the commission of a crime, then "such . . . punishment . . . is of doubtful constitutionality . . . ."[21] While the United States Supreme Court has never examined the merits of such a claim,[22] lower courts have heard challenges to ex-felon disenfranchisement as cruel and unusual punishment.[23] These challenges have been summarily dismissed, however, as the courts either refused to recognize disenfranchisement as a form of punishment,[24] or misinterpreted the Supreme Court's opinion in

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Unusual Punishments Clause inapplicable to disciplinary paddling of students because scholastic discipline is not punishment for Eighth Amendment purposes).

[20] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (stating that even if disenfranchisement was imposed as an additional punishment for the commission of a crime, "the framers of the Bill of Rights would not have regarded it as cruel and unusual").

[21] Otsuka v. Hite, 414 P.2d 412, 416 (Cal. 1966). While not stating why such punishment would likely be unconstitutional, the court cited to *Trop v. Dulles*, 356 U.S. 86 (1958), where the Supreme Court held that denaturalization was a form of cruel and unusual punishment. *Id.* It seems that *Otsuka* was implying that, like denaturalization, disenfranchisement would violate the Eighth Amendment if imposed as punishment. *See id*; *see also* Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (observing that the characterization of disenfranchisement as punishment "creates its own constitutional difficulties").

[22] The Supreme Court did issue a summary affirmance in *Fincher v. Scott*, 411 U.S. 961 (1973), *aff'g* 352 F. Supp. 117 (M.D.N.C. 1972), where the district court denied the plaintiff's cruel and unusual challenge to North Carolina's disenfranchisement law. *Fincher*, 352 F. Supp. at 119-20. The plaintiff, however, in *Fincher* relied primarily on Fourteenth Amendment equal protection, and the lower court's treatment of his cruel and unusual punishment claim was limited to one paragraph at the end of the opinion. *Id.* at 118-20. Moreover, the Court has stated "summary affirmances are obviously not of the same precedential value as would be an opinion of this Court treating the question on the merits." Richardson v. Ramirez, 418 U.S. 24, 83 (1974) (Marshall, J., dissenting); *cf.* Dillenburg v. Kramer, 469 F.2d 1222, 1225 (9th Cir. 1972) (stating that a summary affirmance by the Supreme Court is of "very little precedential significance").

[23] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997); Kronlund v. Honstein, 327 F. Supp. 71 (N.D. Ga. 1971) (three-judge court).

[24] *See, e.g.*, *Green*, 380 F.2d at 450 (stating that disenfranchisement is not punishment); *Kronlund*, 327 F. Supp. at 74 (same). In both *Greene* and *Kronlund*, the courts incorrectly cited *Trop v. Dulles*, 356 U.S. 86 (1958), as holding that disenfranchisement is not punishment. *See Green*, 380 F.2d at 450; *Kronlund*, 327 F. Supp. at 74. This was not the holding of *Trop*, however, as the issue of felon disenfranchisement was not before the Court. For a detailed discussion of the

Richardson v. Ramirez[25] as granting constitutional immunity to ex-felon disenfranchisement.[26] Thus, any conclusion that the Eighth Amendment does not forbid the disenfranchisement of ex-felons is grounded upon unsteady precedent.

Part I of this Comment provides an overview of the exclusion of ex-felons from the franchise throughout the nation. This Part begins with a brief history of disenfranchisement and examines the state provisions that deny the vote to ex-felons,[27] along with the effect that such laws have upon both the ex-felon and the community. Part II documents the various, but infrequent, challenges to disenfranchisement.[28] Part III analyzes whether disenfranchisement is a non-penal regulation, enacted to protect the purity of the ballot box,[29] or a form of additional punishment that accompanies a felony conviction.[30] This Comment proposes that the only plausible

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Supreme Court's decision in *Trop*, see *infra* PART III.

[25] 418 U.S. 24 (1974). *Richardson* involved a Fourteenth Amendment equal protection challenge to California's disenfranchisement provision. *Id.* at 26. The Court held that the disenfranchisement of ex-felons is not violative of the Equal Protection Clause. *Id.* at 56. *See infra* notes 120-34 and accompanying text for a detailed discussion of *Richardson*.

[26] In *Farrakhan*, 987 F. Supp. at 1314, the court noted that the "language in *Richardson* suggests that the facial validity of felon disenfranchisement may be absolute." While the language in *Richardson* may *suggest* that the validity of disenfranchisement is absolute, the holding most certainly did not. *See Richardson*, 418 U.S. at 26-27.

[27] *See supra* note 11.

[28] Felon disenfranchisement has been challenged as violative of Fourteenth Amendment equal protection, *e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that section two of the Fourteenth Amendment allows states to deny the vote to those convicted of "participation in rebellion, or other crime") (quoting U.S. CONST. amend. XIV, § 2); as violative of The Voting Rights Act of 1965, 42 U.S.C. § 1971, *e.g.*, Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986) (holding Tennessee's disenfranchisement of felons did not violate Voting Rights Act); and as violative of the First, Fifth, and Eighth Amendments, *e.g.*, Farrakhan v. Locke, 987 F. Supp 1304, 1314 (E.D. Wash. 1997) (summarily disposing of First, Fifth, and Eighth Amendment challenges to disenfranchisement in light of *Richardson v. Ramirez*, 418 U.S. 24 (1974)).

[29] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445, 450 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (stating that disenfranchisement is not a punishment, but merely a state's regulation of the franchise); Washington v. State, 75 Ala. 582, 585 (1884) (stating that "[t]he manifest purpose [of disenfranchisement] is to preserve the purity of the ballot box . . . ."). *But cf.*, Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (observing that "courts have been hard pressed to define the state interest served by laws disenfranchising persons convicted of crimes").

[30] Both Delaware and New Jersey expressly provide that the loss of the franchise is additional punishment for those convicted of a crime. DEL. CONST. art. V, § 2; N.J. STAT. ANN. § 19:4-1 (West 2001). Other states that disavow a punitive purpose for disenfranchisement nevertheless locate those provisions amongst their penal, rather than election, statutes, intimating that disenfranchisement is intended as a punitive

rationale underlying disenfranchisement is the infliction of additional punishment on those convicted of crime. Part IV examines Eighth Amendment jurisprudence and concludes that, as punishment, the permanent exclusion of ex-felons from the franchise is cruel and unusual when measured by "evolving standards of decency that mark the progress of a maturing society."[31]

I. OVERVIEW OF DISENFRANCHISEMENT

A. History of Civil Disabilities.

Disenfranchisement in the United States is a vestige of ancient Greece and Rome, where a pronouncement of "infamy" entailed the loss of one's right to participate in the functioning of the city state.[32] As citizenship was highly coveted during this period, the imposition of these civil disabilities[33] was a logical and effective means of restraining criminal behavior.[34] Similar practices were introduced throughout Europe with the rise of the Roman Empire.[35]

The English adopted a comparable version of civil disabilities in the form of outlawry,[36] and later, attainder.[37] The offender's criminal act was viewed as a declaration of war on the community.[38] The community, therefore, was justified in avenging the criminal act by any means it felt necessary.[39] Generally, this meant death for the

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measure. *See, e.g.*, N.M. STAT. ANN. § 31-13-1 (Michie 2001); WYO. STAT. ANN. § 6-10-106 (Michie 2001). Courts have also recognized the punitive purpose and effect of disenfranchisement. *See, e.g.*, Sweeny v. Burns, 377 A.2d 338, 340 (Conn. C.P. 1977) (declaring that "[t]he statute [disenfranchising felons] is clearly penal in nature"); Crutchfield v. Collins, 607 S.W.2d 478 (Tenn. Ct. App. 1980) (finding "it is clearly anticipated that the legislature shall provide in advance for the punishment of disenfranchisement").

[31] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[32] *Collateral Consequences*, *supra* note 6, at 941-42.

[33] Examples of civil disabilities included the prohibition of criminals from "appearing in court, voting, making speeches, attending assemblies, and serving in the army." *Id.* at 941.

[34] *Id.* at 942.

[35] *Id.*

[36] For a more detailed description of outlawry, see Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1301-02 & 1317 n.6 (1989) [hereinafter *Disenfranchisement of Ex-Felons*].

[37] *Collateral Consequences*, *supra* note 6, at 942. A person convicted of a felony or treason was deemed "attainted," which entailed the loss of civil and proprietary rights. *Id.* at 942-43. Attainder and civil death eventually came to be synonymous. *Id.* at 943.

[38] *Id.* at 942.

[39] *Id.*

offender.[40] Those that managed to escape death were nevertheless declared "attainted" or "civilly dead"[41] and stripped of all civil and proprietary rights.[42] Additionally, the offender's criminal act tainted his family through the doctrine of "corruption of blood."[43] These severe tactics served the dual objectives of punishment at that time—retribution and deterrence.[44]

Early American penal laws adopted the English imposition of civil disabilities for those convicted of crime.[45] Drafters of these early provisions, however, did not indicate the intended purpose of penalties such as disenfranchisement.[46] Disenfranchisement may have been employed not as punishment of the individual but for the protection and benefit of society.[47] Yet perhaps a more plausible explanation is that civil disabilities, such as the denial of the franchise to criminals, were "the result of the unquestioning adoption of the English penal system by our colonial forefathers . . ." similarly employed to punish and deter criminal behavior.[48] Whatever the

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[40] *Id.*

[41] *See Collateral Consequences*, *supra* note 6, at 943-44. A few states still retain "civil death" statutes. *See, e.g.*, N.Y. CIV. RIGHTS LAW § 79-a (McKinney 2002); R.I. GEN. LAWS § 13-6-1 (2001). The penalties imposed by these statutes are not as severe as their English predecessors, though it is unclear exactly what rights are affected by their imposition. *Collateral Consequences*, *supra* note 6, at 950-51. Typically, civil death statutes provide a blanket cessation of certain rights, such as the right to contract, file a civil suit, inherit property, and also often impose a forfeiture of all public offices and private trusts. *Id.* Earlier interpretations of these statutes deemed that even the marriage of the convict was dissolved upon the imposition of a life sentence. *See, e.g.*, *In re* Lindewall's Will, 39 N.E.2d 907, 912 (N.Y. 1942) (overruled by N.Y. CIV. RIGHTS LAW § 79-a (McKinney 2002)).

[42] *Collateral Consequences*, *supra* note 6, at 943.

[43] The doctrine of "corruption of blood" was based on the notion that the offender's family was vicariously corrupted by the criminal's immoral act. *Disenfranchisement of Ex-Felons*, *supra* note 36, at 1301-02. This eliminated any possibility of inheriting from or through the offender. *Id.*

[44] *Collateral Consequences*, *supra* note 6, at 944-45.

[45] For a more descriptive account of civil disabilities in the American colonies, see *id.* at 949-50.

[46] *Id.* at 950.

[47] *Id.* It has been suggested that, to protect society, the disenfranchisement of ex-felons is necessary to "preserve the purity of the ballot box." Washington v. State, 75 Ala. 582, 585 (1884). See *infra* Part III. for an examination of the states' purported need to protect the ballot from ex-felons.

[48] *Collateral Consequences, supra* note 6, at 950; *see also* Byers v. Sun Sav. Bank, 139 P. 948, 949 (Okla. 1914) (stating that while the plain meaning of the statute would require imposition of "[civil death], . . . the principles of law which this verbiage literally imports had its origin in the fogs and fictions of feudal jurisprudence and doubtless has been brought forward into modern statutes without fully realizing either the effect of its literal significance or the extent of its infringement upon the spirit of our system of government").

theory behind the purpose of these disabilities, their imposition had a decidedly punitive effect.[49]

In time, society questioned the utility and humanity of such practices, resulting in constitutional and judicial prohibitions of many civil disabilities.[50] The disenfranchisement of criminals, however, received no such treatment and was incorporated into eleven state constitutions between 1776 and 1821.[51]

B. Ex-Felon Disenfranchisement Today

The United States imprisons an estimated two million people—more than any other country in the world.[52] Since 1980, the rate of incarceration has more than tripled,[53] due in large part to the combined effect of three-strikes laws[54] and the "war on drugs."[55]

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[49] *See generally* S. RUBIN, THE LAW OF CRIMINAL CORRECTION 24 (1963) (discussing the harsh and socially degrading punishments of colonial America).

[50] *See, e.g.*, U.S CONST. art. III, § 3 (prohibiting corruption of blood and forfeiture except in cases of treason and, even in such circumstances, limiting those disabilities to the lifetime of the traitor); U.S CONST. art. I, § 9 (prohibiting bills of attainder); Davis v. Laning, 19 S.W. 846, 846 (Tex. 1892) (stating "civil death" is not a consequence of criminal conviction); Frazer v. Fulcher, 17 Ohio 260, 260-61 (1848) (stating that Ohio did not adopt the English practice of civil death).

[51] Green v. Bd. of Elections, 380 F.2d 445, 450 & n.4 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (listing the following constitutional provisions, which either expressly prohibited, or authorized the legislature to prohibit, convicted felons from voting. VA. CONST. art. III, § 1 (1776); KY. CONST. art. VIII, § 8 (1799); OHIO CONST. art. IV, § 4 (1802); LA. CONST. art. VI, § 4 (1812); IND. CONST. art. VI, § 4 (1816); MISS. CONST. art. VI, § 5 (1817); CONN. CONST. art. VI, § 2 (1818); ILL. CONST. art. II, § 30 (1818); ALA. CONST. art. VI, § 5 (1819); MO. CONST. art. III, § 14 (1820); N.Y. CONST. art. II, § 2 (1821)).

[52] *See* Kate Randall, *Voting Rights Denied to 3.9 Million Americans Due to Criminal Convictions*, *at* http://www.wsws.org/articles/2000/nov2000/vote-n08.shtml (Nov. 8, 2000) (on file with author). As of 2001, federal and state prisons accounted for 1,962,220 inmates. Bureau of Justice Statistics, U.S. Dep't of Justice: Corrections Statistics (2001), *at* http://www.ojp.usdoj.gov/bjs/welcome.html (on file with author). Local jails incarcerated an additional 631,240 inmates. *Id.* Factoring in the 4.6 million persons on probation and parole, the number of persons under some form of supervision totals almost 7.2 million. *Id.*

[53] *See* Bureau of Justice Statistics, U.S. Dep't of Justice: Corrections Statistics (2001), *at* http://www.ojp.usdoj.gov/bjs/welcome.html (on file with author).

[54] Recidivist laws are more commonly referred to as "three strikes laws." Robert Heglin, Note, *A Flurry of Recidivist Legislation Means: "Three Strikes And You're Out"*, 20 J. LEGIS. 213, 214 (1994). The principle underlying these laws is, once convicted of a third felony, the offender is imprisoned for life. *Id. See also, e.g.*, DEL. CODE ANN. tit. 11, § 4214(b) (2001) (imposing life imprisonment following third felony conviction). For a detailed discussion of the efficacy of three strikes laws, see David Schultz, *No Sleep in Mudville Tonight: The Impact of "Three Strike" Laws on State and Federal Corrections, Policy, Resources, and Crime Control*, 9 CORNELL J.L. & PUB. POL'Y 557 (2000).

[55] The "war on drugs," which began in the 1980's to combat the escalating use of

Consequently, the United States disenfranchises more convicted felons than any other democratic nation.[56] Moreover, the disenfranchisement of *ex*-offenders for relatively minor crimes has become an almost uniquely American phenomenon.[57] Even England, the country from which America adopted this practice, automatically restores the right to vote to offenders once they have completed their sentence.[58] As other nations have moved toward allowing even those under state supervision to participate in their electoral process,[59] the retention of ex-felon disenfranchisement in America has drawn international criticism.[60]

The state statutes and constitutional provisions that disenfranchise ex-felons vary in terminology and application, but the underlying premise is simple. Once convicted of a "felony,"[61] a

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drugs in the United States, resulted in a "tenfold" increase in the number of federal and states prisoners between 1980 and 1993. Note, *Winning the War on Drugs: A "Second Chance" for Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1487 (2000).

[56] *See Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, ch. I., (1998), http://www.hrw.org/reports98/vote/usvot98o.htm (on file with author) [hereinafter *Losing the Vote*].

[57] *See* Mike Tidwell, *Too Many Americans Can't Vote*, BALT. SUN, Oct. 29, 2000, at 3C. Israel, Sweden, Peru, Germany, and Zimbabwe are representative of countries that allow even those in prison the opportunity to vote. *See* Jon Shure & Rashida MacMurray, *Restoring the Right to Vote: Isn't it Time?* (Oct. 2000), *at* http://www.njpp.org/archives/vote.html. By comparison, only two states, Maine and Vermont, currently extend the franchise to inmates. ME. REV. STAT. ANN. tit. 21-A, § 112 (West 2001); VT. STAT. ANN. tit. 17, § 2122 (2001).

[58] *See* Representation of the People Act, 1983, c. 2, § 3(1) (Eng.).

[59] For example, the Constitutional Court of South Africa recently ruled that inmates are not to be denied the franchise as a condition of their incarceration. August v. Electoral Comm'n, 199 (4) BCLR 363 (SA).

[60] *See, e.g.*, Desmond Fernandes, *Democracy in Action*, INDEPENDENT (London), Nov. 13, 2000, at 2 (labeling Florida's disenfranchisement laws "draconian"); Lord McCluskey, *Festive Rush Gets Me Out of Mothballs*, TIMES NEWSPAPER LIMITED (London), Dec. 17, 2000, at Features (using disenfranchisement to exemplify America's faulty penal system); Tom Teepen, *Clinton has the Right Views on Prison Reform*, HAMILTON SPECTATOR (Toronto), Jan. 4, 2001, at A11 (equating disenfranchisement with Jim Crow laws).

[61] The qualifications for disenfranchisement in the nine states that permanently deny the franchise to ex-felons can be summarized as follows: Iowa, Mississippi, and Tennessee specifically enumerate the crimes that result in disenfranchisement. IOWA CODE § 701.7 (2001); MISS. CONST. art. 12, § 241; TENN. CODE ANN. § 40-20-112 (2001). Alabama disenfranchises those convicted of a "felony involving moral turpitude." ALA. CONST. art. VIII. Florida, Kentucky, Nevada, Virginia, and Wyoming disenfranchise persons convicted of a "felony," and felonies are determined by the sentence imposed. In each of these states, a sentence of death denotes a felony. FLA. STAT. § 775.08 (2001); KY. REV. STAT. ANN. § 431.060 (Michie 2001); NEV. REV. STAT. ANN. § 193.120 (Michie 2001); VA. CODE ANN. § 18.2-8 (Michie 2001); WYO. STAT. ANN. § 6-10-101 (Michie 2001). Additionally, Florida and Wyoming each classify a term of imprisonment for more than one year as a felony, FLA. STAT. § 775.08 (2001); WYO. STAT. ANN. § 6-10-101 (Michie 2001), while in Kentucky, Nevada, and Virginia,

citizen is denied the right to vote unless his civil rights are restored by the jurisdiction that issued the conviction.[62] Although the term felony is typically reserved for serious crimes that are punished by imprisonment or death,[63] it has been expanded to include crimes that are neither notably serious[64] nor necessarily result in actual imprisonment.[65] As one court observed, "since conspiracy to commit a misdemeanor is itself a felony, disenfranchisement would automatically follow from conviction of conspiracy to operate a motor vehicle without a muffler . . . ."[66] Furthermore, Florida, for example, shows no leniency to minors convicted of a felony, resulting in the denial of a right that may never have been exercised.[67] Thus, "an eighteen-year-old first-time offender who trades a guilty plea for a lenient nonprison sentence (as almost all first-timers do, whether or not they are guilty) may unwittingly sacrifice forever his right to vote."[68]

C. The Effect of Disenfranchisement Upon the Individual

The detrimental effects that disenfranchisement impart on the ex-felon are readily apparent. Rather than permitting the individual to reestablish himself as a viable participant in his community, disenfranchisement labels the ex-felon as a politically insignificant being.[69] Psychologists have observed that "no more fiendish punishment could be devised" than to treat a person as if he were a

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any term of imprisonment in a state penitentiary constitutes a felony. KY. REV. STAT. ANN. § 431.060 (Michie 2001); NEV. REV. STAT. ANN. § 193.120 (Michie 2001); VA. CODE ANN. § 18.2-8 (Michie 2001).

[62] See *infra* PART I.E for a discussion of the voting restoration process.

[63] Felony is defined as "[a] serious crime usu[ally] punishable by imprisonment for more than one year or by death." BLACK'S LAW DICTIONARY 633 (7th ed. 1999).

[64] See TENN. CODE ANN. § 40-20-112 (2001), for examples of less serious crimes that nevertheless result in disenfranchisement. Such crimes include: "breaking into a business house, outhouse, . . . incest, . . . receiving stolen property . . . and destroying a will." *Id.*

[65] Only two of every five felony convictions result in imprisonment. *See* Nicholas Thompson, *Locking up the Vote*, The Washington Monthly Online (Jan./Feb. 2001), *at* http://www.washingtonmonthly.com/features/2001/0101.thompson.html; *see also Losing the Vote*, *supra* note 56, at ch. II (stating that while individuals often plead guilty to lesser felonies in order to avoid prison, these individuals may still be disenfranchised).

[66] Otsuka v. Hite, 414 P.2d 412, 418 (Cal. 1966).

[67] Fla. Op. Att'y Gen. 078-45 (March 10, 1978) (involving a minor convicted of a felony ineligible to vote).

[68] *Losing the Vote*, *supra* note 56, at ch. II.

[69] *See* McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995) (stating that those disenfranchised are "severed from the body politic and condemned to the lowest form of citizenship").

nonexistent thing.[70] Permanent disenfranchisement leads to a feeling of perpetual alienation, and implies to the individual that no matter how exemplary his life may become, he will never be fully accepted as a part of his community.[71] Already faced with adversity in the areas of employment[72] and education,[73] the denial of the franchise serves as an additional reminder to the individual and the public of the ex-felon's sub-citizen status.[74]

Another disturbing aspect of disenfranchisement stems from its general assumption regarding an ex-felon's measure of character. Commentators have recognized that "[a] fixation with what may be an isolated incident in a person's past . . . fails to further the goal of measuring a person's virtue in the present."[75] One needs only to look to prominent politicians who have admitted indiscretions to support the proposition that one can progress beyond the mistakes of his past.[76]

Disenfranchisement has had the most severe impact on the African-American community.[77] An estimated 1.4 million African-American men, or thirteen percent of all black adult males, are currently or permanently excluded from voting by such laws.[78] Most disturbing is the well-documented discriminatory intent that surrounded the adoption and expansion of disenfranchising

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[70] *Collateral Consequences*, *supra* note 6, at 1228 & n.366 (quoting W. JAMES, THE PRINCIPLES OF PSYCHOLOGY 293 (1890)).

[71] *See* Chapman, *supra* note 13.

[72] A survey conducted in 1963 revealed that, generally, the public was unwilling to employ ex-felons. *See Collateral Consequences*, *supra* note 6, at 1229-30 & n.373 (quoting JOINT COMMISION ON CORRECTIONAL MANPOWER AND TRAINING, THE PUBLIC LOOKS AT CRIME AND CORRECTIONS 15 (1968)).

[73] *See, e.g.*, 20 U.S.C. § 1091(r) (2002) (suspending federal financial aid eligibility for drug related convictions). Additionally, many college applications require the disclosure of criminal arrests and convictions. *See, e.g.*, University of Illinois, Application for Admission to the Graduate College, *available at* http://www.cba.uiuc.edu/msba/application_forms/iparta.pdf (last visited Oct. 10, 2002) (on file with author).

[74] *See Collateral Consequences*, *supra* note 6, at 1230.

[75] *Disenfranchisement of Ex-Felons*, *supra* note 36, at 1309.

[76] Nancy J. Northup, *Votes That Will Never Be Counted*, CHI. TRIB., Nov. 12, 2000, at 19. Indeed, George W. Bush was arrested in Maine in 1976 for driving while intoxicated. Mark Z. Barabak, *Campaign 2000: Bush's 1976 Arrest In Maine Is Revealed*, L.A. TIMES, Nov. 3, 2000, § A1 at 28. When asked about the drunk driving conviction, then presidential candidate Bush candidly responded, "I do not have a perfect record as a youth . . . . When I was young, I did a lot of foolish things." J. Dionne Jr., *Next-Door Politics*, WASH. POST, Nov. 7, 2000, at A27.

[77] See Harvey, *supra* note 15, at 1150-59, for a statistical analysis of the effect that disenfranchisement has on the African-American community.

[78] *Losing The Vote*, *supra* note 56, at ch. I.

provisions following the Civil War.[79] By tailoring these provisions to include what were perceived as "black crimes,"[80] states were able to exclude blacks from the ballot without violating the newly adopted Fifteenth Amendment.[81] Despite these discriminatory origins, challenges to disenfranchisement have not fared well.[82]

D. The Effect on the Community

The negative impact that disenfranchisement imparts on the individual can also have adverse effects on the community. Simply stated, if society chooses not to treat ex-felons as full-fledged, law-abiding citizens, then the ex-felon may choose not to act like such a citizen.[83] If ex-felons were allowed to participate in elections and thereby gain a sense of community, it seems less likely that they would commit acts detrimental to *their* community.[84] As the Secretary of State of California observed, "the denial of the right to vote to [ex-felons] is a hindrance to the efforts of society to rehabilitate former

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[79] "And what is it we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this state." Hunter v. Underwood, 471 U.S. 222, 229 (1985) (quoting 1 Official Proceedings of the Constitutional Convention of Alabama, May 21, 1901 to May 3, 1901, at 8 (1901) (statement of Delegate John B. Knox)). For a more extensive sample of the racially discriminatory commentary surrounding the adoption of southern states' constitutions, see Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727 (1998).

[80] Certain crimes, such as "thievery, adultery, arson, wife beating, housebreaking, and attempted rape" were perceived as more likely to be committed by blacks than whites, and were therefore included as crimes that disqualified one from voting. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993). Robust crimes, such as robbery and murder, were thought of as likely committed by whites not blacks, and were therefore not included as grounds for disenfranchisement. *Id.* The framers of the Alabama constitution distinguished "white" crimes from "black" crimes based on a report prepared by a justice of the peace that presided over cases involving predominantly black defendants. Hunter v. Underwood, 471 U.S. 222, 232 (1985).

[81] Andrew L. Shapiro, *The Disenfranchised*, AM. PROSPECT, Nov., 1997-Dec., 1997, at 60, *available at* http://www.prospect.org/print/V8/35/shapiro-a.html.

[82] *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that disenfranchisement does not violate equal protection); Wesley v. Collins, 605 F. Supp. 802 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986) (disenfranchisement does not violate the Voting Rights Act). A successful challenge to felon disenfranchisement, based on discriminatory intent and effect, was announced in *Hunter v. Underwood*, 471 U.S. 222 (1985). For a discussion of the Court's reasoning in *Hunter*, see *infra* note 136.

[83] Thompson, *supra* note 65.

[84] *Civil Participation and Rehabilitation Act of 1999: Hearing on H.R 906 Before the House Comm. on the Judiciary* (1999) (statement of Marc Mauer, Assistant Director, The Sentencing Project).

felons and convert them into law-abiding and productive citizens."[85] The degradation of being labeled unfit to vote deteriorates the ex-felon's self esteem.[86] Unsurprisingly, commentators cite low self-esteem as a likely contributor to recidivist behavior.[87]

The community is also be harmed by the disenfranchisement of a group with a unique perspective of the criminal justice system. Perhaps such an informed individual could use this knowledge to effect meaningful improvements in the system, which may someday be of consequence to other members of the community. Without the ability to cast a vote, however, it is unlikely that an ex-felon would choose to become involved.[88]

E. Regaining the Vote

In some states, only a gubernatorial pardon can restore one's right to vote.[89] Other states assign the restoration of civil rights to courts,[90] a board of pardons,[91] or the legislature.[92] Thus, one's right to vote is not technically lost forever.[93] Restoration of the franchise is the exception, however, not the rule.[94] As noted by The Sentencing Project, a human-rights advocate, most ex-felons do not have "the financial or political resources needed to succeed"[95] in restoring the vote, and many incorrectly believe that their vote is permanently lost.[96] Moreover, those seeking to reclaim voting rights are often

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[85] Memorandum of the Secretary of the State of California in Opposition to Certiorari, Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting) (No. 73-324) [alteration added].

[86] Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 732 (1973).

[87] *See, e.g.*, *id.* at 732 & n.87.

[88] *See* Tidwell, *supra* note 57, at 3C (observing that without the ability to vote, ex-felons are powerless to address the very laws that denied them the vote).

[89] *See, e.g.*, IOWA CODE § 48A.6 (2001); KY. CONST. § 145. For federal felony convictions, a pardon from the President of the United States may be necessary to restore the vote. *See, e.g.*, IOWA CODE § 48A.6 (2001).

[90] *See, e.g.*, TENN. CODE ANN. § 40-29-105 (2001).

[91] *See, e.g.*, ALA. CODE § 17-3-10 (2001).

[92] *See, e.g.*, MISS. CONST. art. XII, § 253.

[93] *Supra* notes 90-92. *But see* TENN. CODE ANN. § 40-29-105(c)(2)(B) (2001) (making restoration of suffrage unavailable for persons convicted of "murder, rape, treason or voter fraud").

[94] *See Losing the Vote*, *supra* note 56.

[95] *Id.* To illustrate the improbability of regaining the vote, only 404 of a total of 200,000 Virginia ex-felons were returned the franchise in 1996 and 1997. *Id*; *cf.* TENN. CODE ANN. § 40-29-105(c)(6) (2001) (stating that all costs for restoration are borne by the applicant).

[96] *Losing the Vote*, *supra* note 56, at ch. II.

misinformed about the restoration process.[97] Finally, the differences in voting restrictions and restoration throughout the states make it necessary for the ex-felon to investigate a state's position before choosing to relocate to that state.[98] For example, a person convicted of burglary in New Jersey would regain the vote upon completion of his sentence,[99] but would once again lose the vote if he relocated to Tennessee.[100]

The requirements and questions asked of the applicant for restoration range from the curious — Alabama requires DNA samples[101] — to the irrelevant—the cause of death of the ex-felon's parents.[102] Other questions are seemingly invidious—Florida requires the applicant to provide the names and a description of any organizations he is affiliated with, along with the nature of that affiliation.[103] Such requirements and questions have little bearing on whether the applicant "has sustained the character of a person of honesty, respectability and veracity,"[104] and is therefore worthy of reentering the political process. Nevertheless, those denied restoration are given no explanation, and the decision is not subject to review.[105]

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[97] In Nevada, for example, a letter sent to ex-felons states there is a ten year waiting period before they can apply for restoration of the vote. Allard & Mauer, *supra* note 12, at 4. The waiting period, however, is only five years. *Id.*

[98] In some states, a conviction from another jurisdiction will be measured according to the laws of the state in which the ex-felon currently resides. If the offense is classified as a felony in that state, it results in disenfranchisement. *See, e.g.*, Gutterman v. State, 141 So. 2d 21, 27 (Fla. Dist. Ct. App. 1962) (holding that a conviction of second degree assault in New York did not constitute a disqualifying felony under the laws of Florida). In other states, any felony conviction, regardless of whether the offense would constitute a felony in that state, results in disenfranchisement. *See, e.g.*, NEV. CONST. art. 2, § 1 (felony convictions from foreign jurisdictions result in disenfranchisement, even if not considered a felony in Nevada); Mills v. Campbell County Canvassing Bd., 707 P.2d 747, 750-51 (Wyo. 1985) (stating a felony conviction in Kansas results in disenfranchisement in Wyoming, regardless of whether the offense would be punishable as a felony in Wyoming).

[99] N.J. STAT. ANN. § 19:4-1 (West 2001) (suffrage denied only during sentence).

[100] TENN. CODE ANN. § 40-20-112 (2001). To regain the right to vote in Tennessee, the individual convicted of a felony in New Jersey would first need to secure a pardon from governor of New Jersey and then submit to the restoration process of Tennessee. *See* TENN. CODE ANN. §§ 2-19-143, 40-29-105 (2001).

[101] *See* Allard & Mauer, *supra* note 12, at 4.

[102] Thompson, *supra* note 65.

[103] *Id.*

[104] TENN. CODE ANN. § 40-29-102 (2001).

[105] *See, e.g.*, Beacham v. Braterman, 300 F. Supp. 182, 184 (S.D. Fla. 1969) (stating that the restoration of civil rights is beyond judicial review); *see also* Elizabeth Du Fresne & William Du Fresne, *The Case for Allowing "Convicted Mafiosi to Vote for Judges": Beyond Green v. Board of Elections of New York City*, 19 DEPAUL L. REV. 112, 134-35 (1969) (criticizing the "unfettered discretion" of the voting restoration process).

II. CHALLENGES TO DISENFRANCHISEMENT

As the Warren Court expanded the constitutional conception of the *fundamental* nature of the right to vote during the 1960's,[106] challenges arose concerning the constitutionality of felon disenfranchisement.[107] Prior to 1974, the Fourteenth Amendment's guarantee of equal protection was viewed as the most logical and capable approach of eliminating (or at least restricting) the denial of the franchise to ex-felons.[108] This view was based on the Supreme Court's edict that any state action infringing upon an individual's fundamental right to vote "must be carefully and meticulously scrutinized."[109]

In *Stephens v. Yeomans*,[110] the United States District Court for the District of New Jersey employed this "enhanced" scrutiny and declared New Jersey's disenfranchisement of ex-felons violative of equal protection.[111] After reviewing the list of disenfranchising crimes and noting the inconsistencies therein,[112] the court held that New Jersey's purported purpose for denying the vote to ex-felons — protection of the "purity of the electoral process"[113] — was not accomplished "by the totally irrational and inconsistent classification set forth" by the law.[114] The court noted that the classification was not drawn with "the exacting standards of precision required by the equal protection clause" that accompany any infringement of the right to vote.[115]

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[106] Du Fresne & Du Fresne, *supra* note 105, at 117; *see also, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 676 (1966) ("[t]he right to vote is . . . precious, . . . fundamental . . . ."); Reynolds v. Sims, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . .").

[107] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (challenging disenfranchisement of ex-felons as violative of the Eighth and Fourteenth amendments, as well as a bill of attainder); Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970) (three-judge court) (challenging disenfranchisement under Fourteenth Amendment Equal Protection Clause); Otsuka v. Hite, 414 P.2d 412 (Cal. 1966) (same).

[108] *See* Itzkowitz & Oldak, *supra* note 86, at 740.

[109] Reynolds v. Sims, 377 U.S. 533, 562 (1964).

[110] 327 F. Supp. 1182 (D.N.J. 1970) (three-judge court).

[111] *Id.* at 1186.

[112] *Id.* at 1188. The court noted that convictions for fraud, embezzlement, extortion by a public official, bribery of a judge or legislator, attempted murder, kidnapping, loan sharking, and inciting insurrection would not result in disenfranchisement, while larceny, murder, and theft would result in disenfranchisement. *Id.*

[113] *Id.*

[114] *Id.*

[115] *Stephens*, 327 F. Supp. at 1188; *see also* Dillenburg v. Kramer, 469 F.2d 1222,

Two contemporary cases, *Green v. Board of Elections*[116] and *Kronlund v. Honstein*,[117] did not support the contention that enhanced scrutiny analysis was required for challenges to disenfranchisement laws. Instead, these courts found that the disenfranchisement of individuals that may pose a threat to the electoral process was rationally related to the legitimate state purpose of protecting the purity of that process.[118] Unlike *Stephens*, therefore, these decisions did not closely scrutinize the disenfranchisement laws to determine if they were narrowly drawn to achieve the purported state interest.[119]

The debate over the proper level of scrutiny to apply to challenges of the states' disenfranchisement laws was rendered inconsequential by the Supreme Court's ruling in *Richardson v. Ramirez*.[120] In *Richardson*, three ex-felons challenged the validity of California's disenfranchisement law.[121] The California Supreme Court had declared the law a violation of equal protection.[122] In its decision, the California Court acknowledged the state's interest in preventing election fraud,[123] but found that the blanket disenfranchisement of all ex-offenders was not "necessary in the sense that it is the least burdensome means available to achieve that goal."[124] The court noted that election reform and technical advances in the electoral process had drastically reduced the possibility of fraudulent elections.[125] Furthermore, the court determined that if such fraud should occur, California's extensive penal laws concerning election crime provided an adequate and less

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1224 (9th Cir. 1972) (stating that the state interest served by disenfranchisement has never been adequately explained).

[116] 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

[117] 327 F. Supp. 71 (N.D. Ga. 1971) (three-judge court).

[118] *See Green*, 380 F.2d at 451; *Kronlund*, 327 F. Supp. at 73.

[119] *See Green*, 380 F.2d at 451-52 (stating it is not unreasonable for states to deny convicted mafiosi the right to vote); *Kronlund*, 327 F. Supp. at 73 (finding the state *might* have a legitimate concern that ex-offenders *may* be more likely to commit election crime).

[120] 418 U.S. 24 (1974).

[121] *Id.* at 26-27.

[122] Ramirez v. Brown, 507 P.2d 1345, 1357 (Cal. 1973), *rev'd*, Richardson v. Ramirez, 418 U.S. 24 (1974).

[123] *Id.* at 1349.

[124] *Id.* at 1353.

[125] *Id.* at 1355.

> [I]t may have been feasible in 1850 to influence the outcome of an election by rounding up the impecunious and the thirsty, furnishing them with free liquor, premarked ballots, and transportation to the polls; to do so in 1973, if possible at all, would require the coordinated skills of a vast squadron of computer technicians.

Id.

burdensome means of dealing with the occasional dishonest voter.[126]

In reversing the California Supreme Court's decision, the United States Supreme Court held that despite the recent expansion of equal protection under section one of the Fourteenth Amendment to the area of voting rights,[127] the "exclusion of felons from the vote has an affirmative sanction in [section] two[128] of the Fourteenth Amendment . . . ."[129] Justice Rehnquist, writing for the majority, conceded that the legislative history of section two, specifically the phrase "except for participation in rebellion or other crime,"[130] shed little light on the reasons for including this section.[131] Nevertheless, the majority's examination of the limited history of section two led it to conclude that the language of that section "was intended by Congress to mean what it says."[132] The majority did acknowledge that

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[126] *Id.* The court observed that there were seventy-six acts punishable as felonies, and another sixty misdemeanors, related to elections. *Ramirez*, 507 P.2d at 1355.

[127] *See Richardson*, 418 U.S. at 54 (collecting cases).

[128] Section two of the Fourteenth Amendment provides in part the following:

> [W]hen the right to vote at any election . . . is denied to any of the male inhabitants of [a] State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

[129] *Richardson*, 418 U.S. at 54. The respondents relied on recent Supreme Court decisions holding that state imposed infringements on the right to vote must be justified by a compelling state interest. *Id.* The Court refused to extend this enhanced scrutiny to the disenfranchisement of felons, reasoning that "section one [of the Fourteenth Amendment] . . . could not have been meant to bar outright a form of disenfranchisement which was expressly exempted from the less drastic sanction of reduced representation which section two imposed for other forms of disenfranchisement." *Id.* at 55.

[130] U.S. CONST. amend. XIV, § 2.

[131] *Richardson*, 418 U.S. at 43.

[132] *Id.* The Court cited the readmission process of southern states following the Civil War to support the contention that Congress expressly intended section two to allow states to deny the vote to felons. *Id.* at 48-52. As a "fundamental condition" of readmission, each state was required to guarantee that suffrage would not be deprived to those otherwise entitled, "except as a punishment" for certain crimes. *Id.* at 49-51. Justice Marshall, in a dissenting opinion, disagreed with the majority's assessment of the legislative history of section two. *Id.* at 72-77 (Marshall, J., dissenting). In Justice Marshall's view, section two was included merely to ensure that Northern Republicans retained control of Congress following the readmission of southern states. *Id.* at 73 (Marshall, J., dissenting). That section, according to Justice Marshall, gave southern states the choice of allowing blacks to vote (with the expectation that they would sympathize with northern Republican ideals) or suffering reduced representation in Congress. *Richardson*, 418 at 73-74 (Marshall, J., dissenting). This political motivation, Justice Marshall explained, did not support

disenfranchisement of ex-offenders might be an outmoded practice, one in discord with the modern trend of rehabilitation and inclusiveness,[133] but added that such a determination was the domain of a state's legislature.[134]

Richardson was damaging to future challenges of disenfranchisement in two respects.[135] First, it virtually foreclosed a challenge of disenfranchisement under the most logical and able avenue of attack—equal protection.[136] For example, the California Supreme Court's decision in *Ramirez* plainly demonstrated the irrationality of restricting an ex-felon's fundamental right to vote because he might commit election fraud.[137] Furthermore, *Ramirez*

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the interpretation that section two expressly precludes the application of section one's equal protection analysis to disenfranchisement for the commission of crime. *Id.* at 74-75 (Marshall, J., dissenting).

[133] *Id.* at 55.

[134] *Id.* California apparently took heed of the Supreme Court's implication. In 1974, shortly after the decision in *Richardson*, California amended its constitution to restore the vote to felons once they completed their sentence. CAL. CONST. art. II, § 4 (amended 1974). In strikingly similar circumstances, the New York legislature repealed the state's ex-felon disenfranchisement provision shortly after the Second Circuit upheld that law in *Green v. Bd. of Elections*, 380 F.2d 445 (2d Cir. 1967), *cert denied*, 389 U.S. 1048 (1968); N.Y. ELEC. LAW § 152 (McKinney 1973); *see also Richardson*, 418 U.S. at 83 n.28 (Marshall, J., dissenting) (noting New York's subsequent repeal of its ex-felon disenfranchisement provision following the decision in *Green*).

[135] For a general criticism of the *Richardson* Court's refusal to extend equal protection analysis to disenfranchisement, see *The Supreme Court, 1973 Term—Disenfranchisement of Former Criminal Offenders*, 88 HARV. L. REV. 101 (1974).

[136] *See, e.g.*, Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1981) (observing "*Richardson* is generally recognized as having closed the door on the equal protection" challenge to felon disenfranchisement). In 1985, however, the Court did rule that Alabama's disenfranchisement provision violated Fourteenth Amendment equal protection. Hunter v. Underwood, 471 U.S. 222 (1985). In *Hunter*, the Court determined that the provision was adopted solely for discriminatory purposes and that it "continues to this day to have that effect." *Id.* at 233. Thus, the Court distinguished *Hunter* from *Richardson*, declaring "that [section two] was not designed to permit the purposeful racial discrimination attending the enactment and operation of [Alabama's disenfranchising provision] which otherwise violates [section one] of the Fourteenth Amendment." *Id.* (alteration added). Subsequent challenges have been unable to establish a similar discriminatory motivation surrounding the initial adoption of their state's disenfranchisement laws. *See, e.g.*, Wesley v. Collins, 791 F.2d 1255, 1263 (6th Cir. 1986) (finding no discriminatory intent surrounding the adoption of Tennessee's disenfranchisement statute). Furthermore, even where such initial discriminatory intent has been established, challengers have been unable to demonstrate that it was carried forward into the modern counterparts of the original laws. *See, e.g.*, Cotton v. Fordice, 157 F.3d 388, 391 (5th Cir. 1998) (finding amendments to Mississippi's constitution effectively removed the "discriminatory taint associated with the original version.").

[137] *See supra* notes 122-25 and accompanying text; *see also* Richardson, 418 U.S. at 79 (Marshall, J., dissenting) (stating that disenfranchisement is not necessary to

found that even if such fraud did occasionally occur, a blanket restriction on ex-felon voting was wholly unnecessary where less intrusive means were available to effectively manage the situation.[138] *Richardson's* declaration that section two of the Fourteenth Amendment cannot be "overridden" by section one, however, renders any such analysis of a state's denial of the vote to ex-felons superfluous for equal protection purposes.[139]

The second impediment created by *Richardson* is that it has inhibited challenges to disenfranchisement under other sections of the Constitution as well. Although the Court mentioned in dicta that the "exclusion of convicted felons from the franchise violates no constitutional provision," it did not rule that the disenfranchisement of felons is per se constitutional.[140] The sole issue decided in *Richardson* was whether California's practice of disenfranchising ex-felons violated the Equal Protection Clause.[141] The Court did not examine this provision under any other section of the Constitution.[142] Yet this dicta, when combined with the majority's holding that section one of the Fourteenth Amendment is inapplicable to challenges of felon disenfranchisement in light of section two, has led courts to make the inaccurate assumption that the disenfranchisement of ex-felons is immune from challenge under *any* Constitutional provision.[143] The danger of such an assumption is that, on occasion, the Court has upheld a practice under one section of the Constitution and subsequently declared that same practice to be violative of another section.[144]

Thus, the laws of the nine states that currently disenfranchise ex-felons can be challenged under sections of the Constitution that the

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prevent voter fraud).

[138] *See supra* note 126 and accompanying text; *see also* Richardson, 418 U.S. at 80 (Marshall, J., dissenting) (detailing the panoply of less intrusive means available to protect the electoral process from voter misconduct).

[139] *See* Thiess v. State Admin. Bd. of Election Laws, 387 F. Supp. 1038, 1041 (D. Md. 1974) (noting that equal protection analysis was not required in light of *Richardson*).

[140] *Richardson*, 418 U.S. at 53.

[141] *Richardson*, 418 U.S. at 26-27.

[142] *Id.*

[143] *See e.g.*, Farrakhan v. Locke, 987 F. Supp. 1304, 1314 (E.D. Wash. 1997) (refusing to consider challenges to disenfranchisement under the First, Fifth, and Eighth Amendments in light of *Richardson*).

[144] *Compare* McGautha v. California, 402 U.S. 183 (1971) (holding that standardless jury discretion in death penalty cases did not violate the Due Process Clause), *with* Furman v. Georgia, 408 U.S. 238 (1972) (holding that standardless jury discretion in death penalty cases was a violation of the Cruel and Unusual Punishments Clause).

Supreme Court has not yet considered. The Eighth Amendment's protection against cruel and unusual punishments[145] presents a plausible ground for such a challenge.

III. PUNISHMENT OR REGULATION?

To be violative of the Eighth Amendment, disenfranchisement must be classified as punishment rather than a regulatory provision.[146] In *Trop v. Dulles*,[147] the Supreme Court addressed whether the denaturalization of a citizen for wartime desertion was violative of the Eighth Amendment's prohibition of cruel and unusual punishments.[148] Before reaching the issue of whether denaturalization was cruel and unusual, the Court first had to determine if this "disability" following a conviction for desertion was in fact a form of punishment.[149] The government argued that the law in question was "technically . . . not a penal law"[150] but simply a regulatory provision enacted by Congress under its war powers.[151]

Rejecting the government's invitation to defer to the Congressional classification of the law,[152] the Court explained that, generally, the evident *purpose* behind a law that imposes a disability will dictate whether it is penal or regulatory.[153] If the purpose of the disability is to "reprimand the wrongdoer, to deter others, etc.," the law is punitive.[154] On the other hand, a law enacted to "*accomplish* some other *legitimate* governmental purpose" is considered a non-penal regulation, despite the disability to the individual that accompanies its imposition.[155] To illustrate, the Court employed a

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[145] U.S. CONST. amend. VIII.

[146] *See supra* note 19 and accompanying text.

[147] 356 U.S. 86 (1958).

[148] *Id.* at 87.

[149] *Id.* at 94; *cf.* Ingraham v. Wright, 430 U.S. 651, 671 (1977) (disciplinary paddling of students not considered punishment for Eighth Amendment purposes).

[150] *Trop*, 356 U.S. at 94.

[151] *Id.* at 97.

[152] *Id.* at 94. The Court admitted that its task would be far easier if the label attached to a law by Congress, and not the content of the law, was the sole consideration in determining the law's validity. *Id.* The Court noted that Congressional classification of a law as penal or regulatory was one relevant factor in determining the purpose of the law. *Id.* The Court added, however, that it is "[d]oubtless even a clear legislative classification of a statute as 'non-penal' would alter the fundamental nature of a plainly penal statute." *Id.* at 95.

[153] *Trop*, 356 U.S. at 96.

[154] *Id.*

[155] *Id.* (emphasis added). The Court incorporated the test for distinguishing between penal and non-penal laws from cases dealing with ex-post facto laws and bills of attainder, which also addressed this threshold question. *Id.*

hypothetical person convicted of bank robbery.[156] That person, the Court stated, "loses his right to liberty and often his right to vote."[157] Unlike the deprivation of liberty, the Court continued, where the purpose is clearly penal, the loss of the bank robber's right to vote would be "a nonpenal exercise of the power to regulate the franchise."[158]

Courts have relied on the above hypothetical from *Trop* as precedent for the proposition that disenfranchisement is not punishment.[159] Such reliance on *Trop* is flawed in two respects. First, the constitutionality of ex-felon disenfranchisement was not before the Court in *Trop*.[160] The loss of the vote was merely used to juxtapose a disability that is clearly penal, and this "example" is no more than illustrative dictum.[161] Second, by jumping ahead in the opinion and selecting the above quotation as the basis for their decisions, courts have missed the implicit equal protection concept of *Trop*, specifically, that a law imposing disabilities on a select group is a non-penal regulation only if shown "to *accomplish* some other *legitimate* governmental purpose."[162] In *Kronlund*, for example, the court summarily dismissed the plaintiff's Eighth Amendment challenge, neither explaining the non-penal state interest served by disenfranchising ex-felons nor illustrating how such an interest might be accomplished by disenfranchisement.[163] The court merely cited to *Trop* for the proposition that the Supreme Court has held

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[156] *Id.*

[157] *Id.*

[158] *Trop*, 356 U.S. at 96-97. Implicit in this example is that, if the purpose of disenfranchisement was to punish the offender, the law would constitute a cruel and unusual punishment. *See* Du Fresne & Du Fresne, *supra* note 105, at 121.

[159] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967) *cert. denied*, 389 U.S. 1048 (1968) (declaring that disenfranchisement is not punishment for Eighth Amendment purposes based on *Trop*); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997) (same); Kronlund v. Honstein, 327 F. Supp. 71 (N.D. Ga. 1971) (three-judge court) (same).

[160] *Trop*, 356 U.S. at 87 (Court only presented with the constitutionality of denaturalization).

[161] *See, e.g.*, Otsuka v. Hite, 414 P.2d 412, 419 (recognizing *Trop's* statements concerning felon disenfranchisement as "mere illustrative dicta."). As Justice Marshall reminded in *Richardson v. Ramirez*, "dictum is not precedent . . . ." 418 U.S. 24, 84 (Marshall, J., dissenting).

[162] *Trop*, 356 U.S. at 96 (emphasis added).

[163] 327 F. Supp. at 74. Perhaps this "oversight" in *Kronlund* occurred because the Court in *Trop* had little trouble determining that the only evident purpose served by denaturalization was to punish the offender. *See Trop*, 356 U.S. at 96-97. Because the Court could find no legitimate, non-penal purpose served by denaturalization, it was thus unnecessary to decide if the law in fact accomplished that purpose. *Id.* at 97.

disenfranchisement to be a non-penal regulation of the franchise.[164]

Thus, while courts have contended that disenfranchisement is not punishment, their opinions lack proper analysis to support this conclusion.[165] This necessitates an examination of disenfranchisement to determine first, if there is a legitimate, non-penal state interest underlying the law, and second, whether that interest is accomplished by the blanket exclusion of all ex-felons from participation in the franchise.[166] If a legitimate, non-penal purpose can be found, and the punitive impact of the law is "an inevitable consequence of the regulatory provision . . ." then disenfranchisement is properly classified as regulatory, despite its punitive impact.[167] If, however, a non-penal purpose for the law cannot be found, or, if "the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purpose,"[168] then disenfranchisement is a penal measure and subject to the requirements of the Eighth Amendment.[169]

The legislative intent of the provisions in the nine states that permanently disenfranchise ex-felons is not apparent on the face of these laws.[170] While none of these provisions expressly indicate that disenfranchisement serves a punitive purpose,[171] they also fail to

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[164] *Kronlund*, 327 F. Supp. at 74.

[165] *See, e.g.*, Green v. Bd. of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968) (failing to discuss the non-penal state interest accomplished by ex-felon disenfranchisement); Farrakhan v. Locke, 987 F. Supp. 1304 (E.D. Wash. 1997) (same); Kronlund v. Honstein, 327 F. Supp. 71 (N.D. Ga. 1971) (three-judge court) (same).

[166] *See Trop*, 356 U.S. at 96; *see also infra* notes 166-68 and accompanying text.

[167] Doe v. Poritz, 142 N.J. 1, 46, 662 A.2d 367, 390 (1995).

[168] *Id.*

[169] This analysis is not inconsistent with *Richardson*, which simply held that, in light of section two's express language, no analysis of a state's disenfranchisement provision need be undertaken for equal protection purposes. Richardson v. Ramirez, 418 U.S. 24, 54 (1974).

[170] *See, e.g.*, IOWA CODE § 48A.6 (2001) (only prescribing voter qualifications); MISS. CODE ANN. § 23-15-11 (2001) (same); TENN. CODE ANN. § 40-20-112 (2001) (same). But compare the state constitution of New Mexico, a state that does not preclude ex-felon voting, which provides, "[t]he legislature shall enact such laws as will secure the secrecy of the ballot, the purity of elections and guard against the abuse of elective franchise." N.M. CONST. art. VII, § 1. Bound by this constitutional mandate, the New Mexico legislature restored the right to vote to ex-felons in 2001, apparently confident that ex-felons did not pose a threat to the secrecy and purity of elections. N.M. STAT. ANN. § 1-4-27.1 (Michie 2001).

[171] *See supra* note 170. Curiously, the disenfranchising statute of Wyoming is located among that state's penal laws, indicating a punitive intent on the part of the legislature. WYO. STAT. ANN. § 6-10-106 (Michie 2001); *cf.* DEL. CONST. art. V, § 2 (disenfranchisement of felons imposed as punishment); N.J. STAT. ANN. § 19:4-1 (West 2001) (same).

indicate the non-penal purpose they seek to achieve.[172] Moreover, legislative findings surrounding the original adoption of these provisions are virtually nonexistent.[173] The history of disenfranchisement shows that it was a decidedly punitive measure in the civilizations from which America inherited the practice.[174] Courts have nevertheless disregarded this historically punitive understanding of disenfranchisement and instead "prescribe[d] tenable regulatory grounds" to justify the states' right to deny the vote to ex-felons.[175] It is necessary, therefore, to examine both the legitimacy of these tenable regulatory grounds and whether disenfranchisement is necessary for their accomplishment.

A. The Purity of the Ballot Box

The primary justification espoused for allowing states to deny the vote to ex-felons is the need to protect the "purity of the ballot box."[176] This phrase first appeared in 1884 in *Washington v. State*.[177] The court there stated:

> It is quite common also to deny the right of suffrage . . . to such [persons] as have been convicted of infamous crimes. The manifest purpose is to preserve the purity of the ballot box, which is the only sure foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against ignorance, incapacity, or tyranny . . . . The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage . . . upon terms of equality with freemen who are clothed by the state with the toga of political citizenship. It is proper, therefore, that this class should be

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[172] *See supra* note 170.

[173] *Collateral Consequences*, *supra* note 6, at 1191-92. Evidence of a punitive purpose for disenfranchisement, however, is found in the "fundamental condition" that was imposed on states seeking readmission to representation in Congress following the Civil War. Richardson v. Ramirez, 418 U.S. 24, 51-52 (1974). In searching for an historical understanding of disenfranchisement, the Court in *Richardson* noted that readmission to the Union was contingent upon guarantying the vote to otherwise eligible citizens, with the exception that the vote could be denied "as *punishment* for such crimes as are now felonies . . . ." *Id.* (emphasis added).

[174] *Supra* PART I. A.

[175] *Collateral Consequences*, *supra* note 6, at 1191-92. In light of this history, however, it seems more plausible that disenfranchisement was simply brought forward into early American jurisprudence with the same punitive intent attributed to its English counterpart. *Id.* at 1192.

[176] *See, e.g.*, Stephens v. Yeomans, 327 F. Supp. 1182, 1188 (D.N.J. 1970) (three-judge court); Otsuka v. Hite, 414 P.2d 412, 417 (Cal. 1966); Washington v. State, 75 Ala. 582, 585 (Ala. 1884).

[177] 75 Ala. 582 (Ala. 1884).

> denied a right, the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself, at least in close political contests.[178]

Two rationales have emerged from this language to support the state interest in denying the vote to ex-offenders in order to protect the ballot.

First, proponents of ex-felon disenfranchisement have claimed that it is necessary to prevent voter fraud, which, if present, could have detrimental effects on the outcome of elections.[179] Second is the contention that the state has a legitimate interest in denying the vote to citizens whose "proven anti-social behavior . . ."[180] "might be subversive of the interests of an orderly society."[181] This rationale posits that, given the opportunity to vote, ex-felons would do so irresponsibly[182] or elect candidates that would decriminalize their activities.[183] Although these non-penal rationales for preserving the purity of the electoral process appear legitimate at first glance, any such legitimacy comes undone when closely examined.

1. Voter Fraud

The first justification for disenfranchisement posits that the ex-felon, having shown his propensity for immorality, is likely to engage in voter fraud if given the opportunity to vote by either selling his vote or otherwise frustrating the outcome of elections.[184] The contention that states have an interest in preventing voter fraud seems legitimate until one considers that, due to advances in the way citizens vote, "election fraud may no longer be a serious danger."[185] As noted in *Ramirez*, a case decided in 1973, the prevalence of fraudulent voting practices in earlier times may have necessitated the disenfranchisement of persons with questionable morality in order to ensure an accurate measure of the will of the people.[186] *Ramirez* added, however, that election reform and technological advances in the elective process have "radically diminished the possibility of

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[178] *Id.* at 585.

[179] Itzkowitz & Oldak, *supra* note 86, at 737-38.

[180] *Kronlund*, 327 F. Supp. at 73.

[181] *Richardson*, 418 U.S. at 81 (Marshall, J., dissenting).

[182] *The Disenfranchisement of Ex-Felons*, *supra* note 36, at 1307-08.

[183] *See, e.g.*, *Green*, 380 F.2d at 451-52 (stating it is not unreasonable to forbid "convicted mafiosi" from voting for judges and district attorneys).

[184] Itzkowitz & Oldak, *supra* note 86, at 737-38.

[185] *Richardson*, 418 U.S. at 81 (Marshall, J., dissenting).

[186] Ramirez v. Brown, 507 P.2d 1345, 1353-55 (Cal. 1973).

election fraud"[187] to the point where "deliberate irregularities, if present today, are rare and have negligible effects on election results."[188] There is no reason to believe that the prevalence of voter fraud has not further diminished in the thirty years since *Ramirez*.

A further indication that disenfranchisement is not enacted to curb fraudulent voting practices is the underinclusive nature of the disenfranchising laws.[189] If prevention of voter fraud were truly the purpose of disenfranchisement, then one would expect that the commission of any crime involving the electoral process would result in the loss of the vote. Surely one who violently intimidates voters or causes a candidate to withdraw from an election poses a grave danger to the integrity of the electoral process. Yet in many states, these and other election related offenses do not result in a denial of the franchise.[190] Such underinclusiveness undermines the contention that disenfranchisement is intended as a regulatory measure designed to protect the purity of a state's electoral process.

Whereas the omission of certain election related offenses from the states' disenfranchising provisions renders those laws underinclusive, the inclusion of disqualifying crimes that have no correlation to election crime or voter fraud renders the laws overinclusive.[191] If revocation of the vote were limited to crimes associated with the electoral process, the contention that disenfranchisement is designed to prevent voter fraud would appear more plausible.[192] Crimes such as bigamy, destruction of a will, and breaking into an outhouse,[193] however, simply have no correlation with the electoral process, and do not logically indicate a greater propensity on the part of the ex-offender to commit election crime.[194]

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[187] *Id.* at 1355.

[188] *Id.* The court based this conclusion on a report from the Los Angeles County Registrar of Voters, which stated there had been no reported incidents of deliberate voting misconduct in the previous 41 years. *Id.*

[189] *Disenfranchisement of Ex-Felons*, *supra* note 36, at 1303.

[190] *See, e.g.*, NEV. REV. STAT. § 293.710 (2001) (classifying intimidation of voters as a gross misdemeanor); NEV. REV. STAT. § 293.750 (2001) (classifying destruction of election equipment as a gross misdemeanor); WYO. STAT. ANN. § 22-26-112 (Michie 2001) (classifying "causing or attempting to cause" a candidate's withdrawal from an election as a misdemeanor).

[191] Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

[192] *See* Tidwell, *supra* note 57. *But see* Itzkowitz & Oldak, *supra* note 86, at 738 (stating conviction for election crime does not necessarily predetermine that similar crimes will be committed by the individual upon release from state supervision).

[193] *See, e.g.*, TENN. CODE ANN. § 40-20-112 (2001) (listing bigamy, destruction of a will, and breaking into an outhouse as crimes that result in disenfranchisement).

[194] Itzkowitz & Oldak, *supra* note 86, at 738. Moreover, even if such a correlation could be shown, the preemptive denial of the vote to curb potential fraud does not

There has been no substantiation that "ex-felons generally are any more likely to abuse the ballot than the remainder of the population."[195] Therefore, even accepting the state's interest in preventing the fraudulent outcome of elections as legitimate, the blanket exclusion of ex-felons from the ballot regardless of the nature of their crime is not necessary to accomplish that end.

To further emphasize the overinclusive nature of the disenfranchisement of ex-felons, it is helpful to examine a provision found to be both legitimate and narrowly tailored to accomplish its intended purpose. In many states, convicted sex-offenders are required to register with local officials upon their reentry into the community.[196] Courts have agreed with the legislative determination that the state has a legitimate interest in protecting the community from the threat of sex crimes, especially crimes directed at minors.[197] The registration requirement is imposed not to punish the individual by invading his right to privacy, but as a means to safeguard the community from the threat of recidivism posed by the proven sex-offender.[198] The restriction of the individual's fundamental right to privacy is merely "an inevitable consequence of the regulatory provision . . . ."[199] As such, courts have labeled the registration of sex-offenders as a legitimate, non-penal regulatory measure.[200]

Applying the above observation to the denial of the vote, it

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comport with the notion underlying American jurisprudence—that a person is innocent until proven guilty. *Id.* at 739. It has been noted that "[o]ur criminal justice system is based on the premise that once a criminal has completed his sentence, society has the burden of proving guilt of a new crime beyond a reasonable doubt and does not have the right to punish the ex-criminal in advance on the basis of probability." *Id.*

[195] *Richardson*, 418 U.S. at 80 (Marshall, J., dissenting).

[196] *See, e.g.*, CAL. PENAL CODE § 290 (Deering 2001); N.J. STAT. ANN. §§ 2C: 7-1 to –11 (West 2001). These laws are more commonly referred to as Megan's law, in remembrance of Megan Kanka, a seven year old who was raped and murdered by a twice-convicted sex-offender. Steve Marshall, *Megan's Law Upheld // N.J. Sex-Offender Notifications Can Resume*, USA TODAY, July 26, 1995, at 2A.

[197] *See, e.g.*, State v. Burr, 598 N.W.2d 147, 158-59 (N.D. 1999), *aff'd* 234 F.3d 1052 (8th Cir. 2000) (stating sex registration is designed to assist in the legitimate purpose of protecting the public); *see also* Doe v. Poritz, 142 N.J. 1, 73, 662 A.2d 367, 404 (1995) (upholding Megan's law, because, inter alia, the state has a legitimate interest in preventing sex offenses). *But cf.*, Koresh A. Avrahmian, Note, *A Critical Perspective: Do "Megan's Laws" Really Shield Children From Sex-Predators?*, 19 J. JUV. L. 301 (1998) (discussing the ineffectiveness and continuing constitutional uncertainty of sex-offender laws).

[198] *Doe*, 142 N.J. at 73, 662 A.2d at 404; McDonald v. Marin County Sheriff, No. 98-16144, 1999 U.S. App. LEXIS 10923, at *2 (9th Cir. May 25, 1999).

[199] *Doe*, 142 N.J. at 75, 662 A.2d at 405.

[200] *See, e.g.*, *id.*; McDonald, 1999 U.S. App. LEXIS 10923, at *2 (9th Cir. May 25, 1999).

becomes clear that the disenfranchisement of all ex-felons, irrespective of their crime, is grossly overinclusive.[201] Whereas the registration of sex-offenders is limited to persons who have demonstrated a propensity for committing the very crime the state seeks to prevent,[202] disenfranchisement draws no such distinction.[203] Rather, the ex-felon is deemed likely to commit voter fraud, even when convicted of an offense that is wholly unrelated to the electoral process.[204]

But why stop at denying these "dangerous" individuals the right to vote? If one were to accept the rationale that all felons are likely to engage in election fraud if returned the vote, it would seem reasonable for the state to require all ex-felons to register as sex-offenders, regardless of their previous offense. The state interest in protecting the community from future sex offenses is certainly as compelling as protecting the integrity of elections from fraud. Since the ex-felon's past infraction is deemed indicative of his future propensity for crime, all ex-felons could be thought to pose a danger to their respective communities and thus, be required to register as sex-offenders.

This illustration demonstrates the irrationality of a provision that would require an individual convicted of burglary, for example, to register as a sex-offender. There is simply no connection between the two offenses that would justify such an intrusion of the ex-felon's right to privacy. In a sense, this same irrationality is manifest when the state denies the vote to ex-felons for the purpose of preventing fraudulent voting. The state effectively labels the ex-felon potentially dangerous to the electoral process, despite any nexus between his past offense and the evil the state seeks to prevent. Just as there is no reason to believe that a burglar is likely to commit sex offenses upon his release from state supervision, there is similarly no reason to believe that this individual would commit election crime. Therefore, for the same reason the state cannot indiscriminately classify all ex-felons as potential sex-offenders,[205] it should not be permitted to classify all ex-felons a potential threat to the electoral process.

Another reason that disenfranchisement is not necessary to protect against voter fraud is the sheer number of laws that the states

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[201] *Richardson*, 418 U.S. at 79 (Marshall, J., dissenting).

[202] *Doe*, 142 N.J. at 74, 662 A.2d at 404.

[203] *See supra* text accompanying notes 191-95.

[204] *Id.*

[205] *Doe*, 142 N.J. at 74, 662 A.2d at 404 (noting that Megan's law is only applicable to those "found to be repetitive and compulsive [sex-]offenders").

have at their disposal to combat voter misconduct.[206] In *Dunn v. Blumstein*,[207] a decision invalidating Tennessee's durational residency requirement for voting, the Court rejected the state's argument that a one year residency requirement for all voters was necessary to prevent election fraud.[208] The Court stated that Tennessee's election code, and not the "broadly imposed political disabilit[y]" of residency requirements, was better suited to detect and deter instances of voter fraud.[209] It seems clear that the same mechanisms that prevent fraudulent voting by citizens failing to meet a state's durational requirements would also adequately prevent fraudulent voting committed by ex-felons. If these mechanisms are inadequate, then additional laws should be passed to curtail voter fraud[210] rather than denying the vote to otherwise eligible citizens. Because the states have adequate means to deal with voter misconduct, the disenfranchisement of ex-felons is thus unnecessary in the quest to protect the purity of the ballot.

Finally, it is important to note that possession of the right to vote is not required to commit the majority of election offenses. Crimes such as intimidating voters,[211] disrupting a polling place,[212] or tampering with election equipment,[213] for example, can be committed by any citizen, regardless of his eligibility to vote. The only crime that that is dependent upon possession of the vote for its commission is the sale of that vote.[214] Yet it cannot be seriously contended that the possibility of the ex-felon selling his one vote necessitates the blanket exclusion of all ex-felons from the franchise in order to ensure the validity of elections.[215] Such a contention takes the "one bad apple" adage to illogical and unjust extremes.[216]

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[206] *See, e.g.*, FLA. STAT. ch. 104.011-.42 (2001) (listing 37 separate election offenses); WYO. STAT. ANN. §§ 22-26-101 to –121 (Michie 2001) (listing 21 separate election offenses).

[207] 405 U.S. 330 (1971).

[208] *Id.* at 345-46. The Court acknowledged that durational residency requirements may have been necessary in earlier times to prevent fraudulent voting by non-residents. *Id.* at 346. Given the modern system of registration employed by Tennessee, however, the Court observed that such durational requirements "add[] nothing to . . . the effort to stop fraud." *Id.*

[209] *Id.* at 353.

[210] Du Fresne & Du Fresne, *supra* note 105, at 123.

[211] *See, e.g.*, NEV. REV. STAT. § 293.710 (2001).

[212] *See, e.g.*, WYO. STAT. ANN. § 22-26-114 (Michie 2001).

[213] *See, e.g.*, NEV. REV. STAT. § 293.755 (2001).

[214] *See, e.g.*, FLA. STAT. ch. 104.045 (2001) (proscribing offers to sell and sale of votes).

[215] Itzkowitz & Oldak, *supra* note 86, at 737.

[216] *Id.*

As the above discussion illustrates, the state interest in preventing voter fraud is tenuous, considering the remote possibility of such fraud occurring, much less affecting the outcome of an election. Moreover, even if the prevention of voter fraud is accepted as a legitimate interest of the state, the blanket disenfranchisement of ex-felons is neither necessary nor able to accomplish that interest. The prevention of voter fraud, therefore, cannot suffice as a non-penal justification for denying the vote to ex-felons.

2. The Anti-Social Voter

The anti-social voter justification for denying the vote to ex-felons can be divided into two separate but similar contentions. The first is that the ex-felon's propensity for immorality has "raised questions about [his] ability to vote responsibly."[217] The second is that ex-felons must be deprived of the vote "for fear they might vote to repeal or emasculate provisions of the criminal code."[218]

The first contention rests on the assumption that the ex-felon has demonstrated a lack of the virtue necessary to responsibly participate in the determination of those that will govern.[219] The fear here is not that the ex-felon will disrupt the electoral process through fraud or other criminal activity, but that his very participation in that process "is somehow impure in and of itself."[220]

The disenfranchisement of ex-felons based on their inability to vote responsibly "fits easily within th[e] exclusionary tradition" that once kept "blacks, women, and the poor from the political process."[221] Although the merit of such "tradition" has since been extinguished with respect to the aforementioned classes of individuals,[222] it has survived as a tenable justification for excluding ex-felons from the political process.[223] Despite this generalized conception that ex-felons lack the moral capability to vote responsibly, it has never been demonstrated "why [felons] cannot make political decisions just as well or badly as the rest of [society] can."[224] Proof of the ex-felon's inability to vote responsibly is unlikely

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[217] Shepard v. Trevino, 575 F.2d 1110, 1115 (5th Cir. 1978).

[218] Richardson v. Ramirez, 418 U.S. 24, 81 (1974) (Marshall, J., dissenting).

[219] *The Disenfranchisement of Ex-Felons*, *supra* note 36, at 1307-08.

[220] Du Fresne & Du Fresne, *supra* note 105, at 123.

[221] *The Disenfranchisement of Ex-Felons*, *supra* note 36, at 1308.

[222] See *supra* note 7 for the constitutional amendments that expanded the guarantee of suffrage.

[223] *See, e.g.*, Kronlund v. Honstein, 327 F. Supp. 71, 73 (N.D. Ga. 1971) (stating the ex-felon's proven anti-social behavior threatens society's aims).

[224] Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*,

to surface, as the term "responsible voting" evades definition. Thus, the exclusion of the ex-felon from the electoral process to prevent "irresponsible" voting cannot be deemed a legitimate, non-penal regulation of the franchise.

While the aforementioned justification for disenfranchisement can be summarized as a fear of "how" the ex-felon will vote, the following justification can aptly be summarized as a fear of "what" or "for whom" the ex-felon will elect. *Green v. Board of Elections*[225] announced that a state has a legitimate interest in preventing ex-felons from participating in the election of members of the criminal justice system.[226] Implicit in this statement is the fear that the ex-felon might support a dishonest candidate, who, in turn, would decriminalize his activities, or at least empathize with the perpetrator of such crimes.[227]

Before discussing the constitutional infirmities that accompany this attempt to legitimize ex-felon disenfranchisement, two common-sense observations are in order. First, there are many ways in which the ex-felon — or anyone else for that matter — could support a dishonest candidate without actually casting a ballot.[228] As previously mentioned, the ability to influence or frustrate the outcome of elections is not contingent on possessing the right to vote.[229] Second, a politician running on a platform of "crime is good" would engender little support from the majority of voters, including criminals, who realize the utility and necessity of the criminal code.[230] As a practical matter, therefore, the "imaginary horrible" of "the criminal element

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77 VA. L. REV. 721, 731 (1991).

[225] 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

[226] *Id.* at 451. *Green* was decided before the Supreme Court's ruling in *Richardson v. Ramirez*, 418 U.S. 24 (1974), which held that section two of the Equal Protection Clause affirmatively sanctioned disenfranchisement for those convicted of crime. It was therefore necessary for the court to examine the state interest purportedly served by disenfranchisement to determine the validity of the plaintiff's equal protection challenge. *Id.* at 451-52. The court noted that due to the likelihood of recidivism and the threat of organized crime:

> [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.

Id. at 451.

[227] *Richardson*, 418 U.S. at 81 (Marshall, J., dissenting).

[228] *See* Itzkowitz & Oldak, *supra* note 86, at 738.

[229] *Supra* text accompanying notes 211-16.

[230] *See* Itzkowitz & Oldak, *supra* note 86, at 737-38.

controlling a town through the ballot"[231] cannot suffice as the non-penal reason for denying the vote to ex-felons.

In addition to lacking in common sense, a justification for denying the franchise to an otherwise eligible citizen based on a fear of how or for whom that person might vote is also constitutionally infirm.[232] Numerous decisions have denounced the denial of the vote to otherwise eligible citizens who hold political views contrary to the status quo.[233] *Carrington v. Rash*[234] held that the right to vote can not "be obliterated because of a fear of the political views of a particular group . . . ."[235] Such reasoning flows from the notion that our republican system of government is founded on majority rule.[236] The benefits and consequences of such a system are that "the will of the greater number of citizens . . . determines which candidate shall be elected."[237] When the majority of citizens votes for a particular candidate, "the democratic process must prevail,"[238] regardless of the particular views of the majority or the candidate they have chosen.[239]

Those that feel compelled to attempt to change the current state of the law should be allowed to do so.[240] If the majority does not

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[231] Du Fresne & Du Fresne, *supra* note 105, at 123.

[232] *See* Carrington v. Rash, 380 U.S. 89, 94 (1965) (stating that the right to vote cannot be denied based on fear of a voter's political viewpoint).

[233] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996) (stating that the vote cannot be denied to "persons advocating a certain practice," even if that practice is currently illegal); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969) (differing opinions cannot justify disenfranchisement); Carrington v. Rash, 380 U.S. 89, 94 (1965) (holding that fencing voters out from the franchise for fear of how they might vote is impermissible).

[234] 380 U.S. 89 (1965). In *Carrington*, Texas argued that all military personnel stationed within that state, whether intending to reside in Texas or elsewhere, should be denied the vote in order to avoid a takeover of local politics by a concentrated military voting bloc. *Id.* at 93. The Court conceded that Texas had a legitimate interest in limiting the franchise to bona-fide residents. *Id.* at 93-94. The Court added, however, that the denial of the vote to persons that qualify as bona-fide residents, when done for a "fear of the political views" held by those residents, was constitutionally impermissible. *Id.* at 94.

[235] *Id.* at 94.

[236] Itzkowitz & Oldak, *supra* note 86, at 738.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] As Justice Marshall noted:

> Although, in the last century, this Court may have justified the exclusion of voters from the electoral process for fear that they would vote to change laws considered important by a temporal majority, I have little doubt that we would not countenance such a purpose today. The process of democracy is one of change. Our laws are not frozen into immutable form, they are constantly in the process of revision in response to the needs of a changing society. The public interest, as

agree that a law warrants revisal, it will remain unchanged. Thus, any law designed to silence a particular group or political viewpoint is unnecessary, and "strikes at the very heart of the democratic process."[241] From this it follows that when a state denies the vote to ex-felons, it cannot do so for fear of how or for whom the ex-felon will vote.

The above examination of the "legitimate" state interests in denying the vote to ex-felons reveals the flaws in such contentions. Due to further advances in the electoral process, fraudulent voting no longer presents a serious threat in modern day America.[242] Yet even if such fraud were rampant, the denial of the vote to ex-felons is neither necessary nor able to alleviate this evil.[243] Additionally, excluding citizens from the franchise for fear of how or for whom they might vote is not only constitutionally infirm and inconsistent with principles of majority rule,[244] but devoid of common sense. While the punitive impact of denying a citizen the fundamental right to vote is readily apparent, a non-penal interest that is served by these provisions has not been demonstrated. Therefore, the only state interest demonstrably served by disenfranchisement is the infliction of additional punishment for the commission of crime. As such, it is subject to the requirements of the Eighth Amendment's prohibition of cruel and unusual punishment.[245]

IV. CRUEL AND UNUSUAL?

The United States Supreme Court has found the exact content and scope of the Cruel and Unusual Punishments Clause difficult to define.[246] The Framers of the Constitution tell us very little as to why this clause was included among the enumerated Bill of Rights.[247]

> conceived by a majority of the voting public, is constantly undergoing reexamination.

Richardson, 418 U.S. at 82 (Marshall, J., dissenting).

[241] *Id.* Justice Marshall also observed that if the right to vote were limited to those who were not hostile to the current state of the law, persons who supported the repeal of prohibition would have been powerless to change that provision. *Id.* A similar result could occur today with respect to supporters of the legalization of marijuana. *See id.*

[242] *See supra* PART III. A.1.

[243] *Id.*

[244] *See supra* PART III. A.2.

[245] U.S. CONST. amend. VIII.

[246] Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring). For a historical analysis of possible reasons for the inclusion of the Cruel and Unusual Punishments Clause in the Bill of Rights, see Anthony F. Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969).

[247] *Furman*, 408 U.S. at 258 (Brennan, J., concurring).

Early decisions posited that the Eighth Amendment condemned only "manifestly cruel and unusual punishments," such as "burning at the stake, crucifixion, and breaking on the wheel."[248] In *Weems v. United States*,[249] however, the Supreme Court denounced this limited interpretation of the Eighth Amendment, stating "the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that [the] government should authorize or justify such atrocious conduct."[250] The Court in *Weems* thus declared that punishment of twelve years at hard labor for the crime of falsifying official documents was cruel and unusual,[251] despite a lack of torture or barbarousness. This rationale has extended the Clause to methods of punishment other than those that are blatantly barbaric or tortuous.[252]

In *Trop v. Dulles*,[253] for example, the Court declared that revocation of one's citizenship as punishment for a crime was cruel and unusual, stating that "[c]itizenship is not a license that expires upon misbehavior."[254] In reaching this conclusion, the Court noted that punishments other than "death, imprisonment, and fines" are "constitutionally suspect."[255] The Court declared that the determination of what constitutes cruel and unusual punishment

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[248] *In re* Kemmler, 136 U.S. 436, 447 (1809).

[249] 217 U.S. 349 (1910).

[250] *Id.* at 371; *see also Furman*, 408 U.S. at 265 (Brennan, J., concurring) (noting that if the Cruel and Unusual Punishments Clause were limited to inhumane or barbarous punishment, that Clause would be effectively eliminated from the Bill of Rights).

[251] *Weems*, 217 U.S. at 363, 382.

[252] *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 667 (1977) (collecting cases).

[253] 356 U.S. 86 (1958).

[254] *Id.* at 92. The petitioner in *Trop* was convicted of wartime desertion during World War II. *Id.* at 87. Upon applying for a passport, he was informed that his citizenship had been revoked as a consequence of that conviction. *Id.* at 88. In declaring denaturalization a cruel and unusual punishment, the Court explained that:

> [Denaturalization is] more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. Th[e] punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him . . . . He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id. at 101-02.

[255] *Id.* at 100.

cannot be decided by simply deferring to what was historically accepted as a method of punishment.[256] The Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[257] Thus, while revocation of one's citizenship was historically permitted as a method of punishment,[258] standards of decency had evolved to where such punishment was no longer acceptable.[259]

In *Furman v. Georgia*,[260] Justice Brennan provided four principles for courts to examine when determining whether a particular punishment is unconstitutional for failing to meet society's standards of decency.[261] The overriding principle, explained the Justice, is that "a punishment must not by its severity be degrading to human dignity."[262] In addition, courts should consider whether the punishment is arbitrarily imposed;[263] whether the punishment is excessive in the sense that it is unnecessary;[264] and whether contemporary society would find the punishment unacceptable.[265] Justice Brennan noted that a particular form of punishment was unlikely to stand in blatant violation of any one of these principles.[266] Rather, a cumulative analysis of all four principles is necessary to determine a punishment's constitutionality.[267]

An analysis of ex-felon disenfranchisement under the four principles espoused by Justice Brennan in *Furman* supports the conclusion that such punishment is not in conformity with societal standards of decency and is thus, cruel and unusual.[268] It must be remembered that because disenfranchisement does not fit within the traditional modes of punishment — death, imprisonment, or fines — it is already "constitutionally suspect."[269]

First, the severity of a provision that permanently denies the

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[256] *Trop*, 356 U.S. at 100.

[257] *Id.* at 101; s*ee also Weems*, 217 U.S. at 373 (stating that to be vital, a constitutional provision "must be capable of wider application than the mischief that gave it birth.").

[258] *See Collateral Consequences*, *supra* note 6, at 942.

[259] *Trop*, 356 U.S. at 102.

[260] 408 U.S. 238 (1972).

[261] *Id.* at 281.

[262] *Id.*

[263] *Id.* at 274.

[264] *Id.* at 279.

[265] *Id.* at 277.

[266] *Furman*, 408 U.S. at 281.

[267] *Id.* at 282.

[268] *Id.* at 281.

[269] *See* Trop v. Dulles, 356 U.S 86, 100 (1958).

franchise to citizens who have paid their debt to society does not comport with notions of human dignity.[270] Similar to the punishment of denaturalization, disenfranchisement "involves a denial by society of the individual's existence as a member of the human community."[271]

Second, the arbitrary selection of crimes that result in a loss of ones voting rights further indicates that disenfranchisement does not measure up to society's standards of decency. There is no consistency in a law that would deny the right to vote to persons convicted of abusing a female child, for example, yet impose no such denial on those convicted of abusing male children.[272]

Third, because it has not been demonstrated that disenfranchisement is necessary to achieve any legitimate state interest,[273] those provisions are "nothing more than the pointless infliction of suffering."[274] Disenfranchisement is thus excessive in that a citizen's ability to exercise a fundamental right is obliterated without any benefit provided to society.

Finally, although the vote was once regarded as a right granted by the state to only those deemed worthy of its possession,[275] the contemporary view posits that voting is a fundamental right, one that is "preservative of all [other] rights."[276] This final point is reinforced by an examination of the following two cases.

In *Green v. Bd. of Elections*,[277] decided in 1967, an ex-felon challenged New York's disenfranchisement provisions as, *inter alia*, a violation of the Cruel and Unusual Punishments Clause.[278] After summarily dismissing disenfranchisement as a punitive measure, the court added that even if imposed as punishment, disenfranchisement would not be cruel and unusual because it was not offensive to the

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[270] For a discussion of the adverse effects that disenfranchisement has on the individual and the community, see *supra* PART I. C & D .

[271] *Furman*, 408 U.S. at 273-74.

[272] *See, e.g.*, TENN. CODE ANN. § 40-20-112 (2001) (listing abuse of a female child as grounds for disenfranchisement, with no similar provision for abuse of male children).

[273] *See supra* PART III. for discussion of the non-penal state interests purportedly served by disenfranchisement.

[274] *Furman*, 408 U.S. at 279; *see also* Itzkowitz & Oldak, *supra* note 86, at 739 (noting that none of the basic objectives of punishment are accomplished by disenfranchising ex-felons).

[275] *See Collateral Consequences*, *supra* note 6 and accompanying text.

[276] Reynolds v. Sims, 377 U.S. 533, 562 (1964) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

[277] 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968).

[278] *Id.* at 447-48.

"evolving standards of decency" of society.[279] In support of this conclusion, the court noted that forty-two states had provisions in effect at that time denying the vote to persons convicted of a criminal offense.[280] From this, the court concluded that society's standards of decency were not offended by this practice.[281]

The *Green* court's conclusion that 1967 America was not offended by the disenfranchisement of felons was a correct interpretation and application of *Trop*.[282] The fact that forty-two states disenfranchised those convicted of crime in 1967 was overwhelming evidence that society did not consider felon disenfranchisement offensive. Rather, national opinion clearly endorsed such disenfranchisement.[283]

More recently, the Supreme Court declared the execution of mentally retarded defendants to be cruel and unusual punishment in *Atkins v. Virginia*.[284] The defendant in *Atkins* was convicted of murder and sentenced to death,[285] despite evidence that he was mentally retarded and thus less culpable than a killer of ordinary intelligence.[286] The Virginia Supreme Court upheld Atkins' death sentence, rejecting the contention that the mentally retarded could not be executed.[287]

The United States Supreme Court reversed, holding that "in light of our 'evolving standards of decency,'" such punishment was forbidden by the Eighth Amendment.[288] In reaching this conclusion, the Court examined objective indicators of contemporary values,[289] "the clearest and most reliable of [which] is the legislation enacted by the country's legislatures."[290] The Court noted that prior to 1986, none of the states that permitted capital punishment prohibited the

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[279] *Id.* at 451 (quoting *Trop*, 356 U.S. at 101).

[280] *Id.* at 450.

[281] *Id.* at 450-51. The court also pronounced that while "the voting rights of convicted felons had not been a very live issue" during the founding of the nation, the Framers of the Constitution would not have found disenfranchisement to be a cruel and unusual punishment. *Id.* at 450. This conclusion, however, misses the point of *Trop*, which declared that a punishment's validity cannot be measured by simply deferring to historical notions of acceptable punishment. *See supra* notes 256-57 and accompanying text.

[282] 356 U.S. 86 (1958).

[283] *See Green*, 380 F.2d at 450-51.

[284] 122 S. Ct. 2242 (2002).

[285] *Id.* at 2244.

[286] *Id.* at 2245.

[287] *Id.* at 2246.

[288] *Id.* at 2252.

[289] *Id.* at 2247.

[290] *Atkins*, 122 S. Ct. at 2247 (alteration added).

execution of a mentally retarded offender.[291] In June of that year, however, the public outcry following the execution of a mentally retarded murderer in Georgia[292] led eighteen states to pass laws forbidding such executions.[293] Relying primarily on the "large" number of states that had recently passed such legislation,[294] combined with the "overwhelming" passage rate of the legislation and the infrequency with which the mentally retarded were executed in those states that permitted such executions,[295] the Court concluded that the practice of executing the retarded had "become truly unusual, and it is fair to say that a national consensus has developed against it."[296]

A similar national consensus has developed against the punishment of disenfranchising ex-felons.[297] While forty-eight states currently deny the vote to offenders under some form of state or federal supervision,[298] only nine of these states continue to exclude *ex*-offenders from the franchise.[299] The country's legislatures — the "clearest and most reliable" indicators employed by the Court in gauging society's standards of decency[300] — have thus clearly declared that society no longer condones the exclusion of citizens from the ballot once their debt to society has been paid.[301] Moreover, under the reasoning of *Green*, the fact that forty-one states now allow ex-

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[291] *Id.* at 2248.

[292] *Id.* Jerome Bowden was convicted of murder and executed on June 24, 1986, despite being diagnosed as mentally retarded. *Id.* at 2248 n.8; *see also Humanity wins in Georgia*, ST. PETERSBURG TIMES, April 18, 1988, at 10A (detailing Bowden's execution and applauding Georgia's subsequent prohibition of similar executions of the mentally retarded).

[293] *Atkins*, 122 S. Ct. at 2248 & nn.9, 12-15.

[294] *Id.* at 2249.

[295] *Id.*

[296] *Id.* The Court found additional support for this conclusion in the memoranda solicited from groups with germane expertise in death penalty jurisprudence, as well as the views of a coalition of religious leaders, all of whom opposed the execution of the mentally retarded. *Id.* at 2249 n.21. The Court also noted that such executions were "overwhelmingly disapproved" in the world community. *Id.*

[297] *See infra* notes 299-301 and accompanying text.

[298] Only Maine and Vermont currently allow felons to vote. *Supra* note 57.

[299] *See supra* note 11.

[300] *Atkins*, 122 S. Ct. at 2247.

[301] By comparison, Justice Scalia observed in *Atkins* that of the thirty-seven states that permitted executions, only eighteen prohibited executions of the mentally retarded. *Id.* at 2261 (Scalia, J., dissenting). Justice Scalia was not persuaded that this figure — less than half of all death penalty jurisdictions — evinced the nation's moral repugnance of executing the mentally retarded. *Id.* at 2261-62 (Scalia, J., dissenting). The majority nevertheless found this figure "large" enough to declare that a national consensus had indeed developed against such executions. *Id.* at 2249.

felons to vote overwhelmingly indicates that societal standards of decency are no longer offended by the participation of ex-felons in elections. To the contrary, society has evolved to where the denial of the franchise to ex-felons no longer measures up to the standards of decency of 2002 America. As such, the disenfranchisement of ex-felons constitutes cruel and unusual punishment and is violative of the Eighth Amendment.

CONCLUSION

The disenfranchisement of individuals who have paid their debt to society is nothing more than additional punishment for the conviction of certain crimes. There is simply no merit in the contention that a state's electoral process is somehow threatened by allowing these otherwise eligible citizens the right to vote.

Supporters of disenfranchisement have failed to show how the ex-felon's past infraction is in any way indicative of his inability to lawfully participate in the electoral process. The exclusion of all ex-felons from voting for fear they might commit election crime makes no more sense than would a law forbidding all ex-felons from driving for fear they might drive recklessly. There is no reason to think that elections are less reliable because of ex-felon participation, or that occasional voter misconduct committed by these individuals cannot be effectively managed by a state's election laws. Rather, disenfranchisement is a remnant of the past, carried forward into modernity with the same punitive purpose that these laws served in ancient times.

Because the United States Supreme Court has precluded the more applicable equal protection challenge[302] to a restriction that "strike[s] at the heart of representative government,"[303] the Eighth Amendment's Cruel and Unusual Punishments Clause must be employed to remove this obstacle to "universal" suffrage. As demonstrated, the disenfranchisement of ex-felons is cruel and unusual because it fails to measure up to the standards of decency that have evolved in modern America. That a national consensus has developed against such disenfranchisement is clearly confirmed by the forty-one states that no longer condone the practice, electing instead to include ex-felons in their electoral process.

There is no question that crime is a serious matter, and criminals

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[302] *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (holding that section two of the Fourteenth Amendment precludes analysis of disenfranchisement under section one's equal protection clause).

[303] Reynolds v. Sims, 377 U.S. 533, 555 (1964).

must be required to pay for their indiscretions against society. Yet there is no reason to extend this debt beyond the individual's judicially imposed sentence. Like the right of citizenship, the right to vote should not "expire[] upon misbehavior."[304] Joe Smith and thousands of others like him have turned their lives around after their convictions and become productive members of society. These men and women are active in our communities, contributing to our economy and making the nation a better place to live. As such, they should be relieved of this "scarlet letter" and allowed to completely rejoin society as voting citizens. Their exclusion from the franchise only serves as a divisive reminder that the ex-felon is not entirely one of "us." While the nation has made great strides by securing the vote to persons once considered unworthy or incapable of exercising this fundamental right, the denial of the franchise to individuals who have paid their debt to society demonstrates that the journey is not yet complete.

[304] Trop v. Dulles, 356 U.S 86, 100 (1958).