

Seton Hall University

eRepository @ Seton Hall

Student Works

Seton Hall Law

2022

History Repeating: How Jim Crow-Type Laws Continue to Disenfranchise Black Women

Deanna Brizak

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the Law Commons

History Repeating: How Jim Crow-Type Laws Continue to Disenfranchise Black Women

Deanna Brizak

The right to vote is one that, by law, all American citizens have a fundamental right to exercise. But when you look under the surface, or into our criminal justice system, this right had been made a conditional right for Black women in America. This paper analyzes how from the inception of the United States, Black women have been fighting for their right despite the existing challenges. In the 20th century, these challenges were put in place by Jim Crow laws and the beginnings of mass incarceration. Today, in the 21st century, these challenges are put in place through disenfranchisement laws, some of which have the potential to disenfranchise Black women for life based on felony convictions. Because of the sense of community that Black women have had to their communities combating racial discrimination dating back to colonial times, Black women have emerged as the strongest, most cohesive voting bloc. However, their power to vote on issues important to their communities are purposely hindered by a system built on top of a Jim Crow foundation.

This paper will begin by discussing the history of the Black women's right to vote, including the women's suffrage movement, the passage of the Fifteenth and Nineteenth Amendments, the Voting Rights Act of 1965, and subsequent Supreme Court cases which drew back these protections. Then it discusses the rise of mass incarceration and the new target on Black women relating to substance abuse. Finally, it discusses how this history comes full circle with the implementation of disenfranchisement laws, how these laws vary by state, and what it means societally for the Black women to lose her right to vote. This paper argues that these laws are violating the Fifteenth Amendment, the Nineteenth Amendment, and the Voting Rights Act of 1965, and the only way to permanently end these violations for Black women is to adopt the approach of Maine, Vermont, and Washington D.C., which never disenfranchise for felony convictions.

Table of Contents

Part I: Introduction	1
A. Impact of the Nineteenth Amendment for Black Women versus White Women.....	8
B. The Positives of the Voting Rights Act and Subsequent Blows to Those Protections	11
C. Linking the Past with the Present: Subsequent Blows to the Voting Rights Act by the Supreme Court.....	12
Part III: The Disproportionate Mass Incarceration of Black People Leads to a Disproportionate Impact on the Disenfranchisement of Black People	16
A. The Issue of Mass Incarceration	16
B. The Effect of Mass Incarceration on Disenfranchisement Disparities	18
Part IV: The State-by-State Landscape of Voting Rights	19
A. The Current Legal Landscape	22
i. <i>Rationales for Disenfranchisement Laws</i>	22
ii. <i>State-by-State Approaches: The Majority Approach</i>	24
iii. <i>State-by-State Approaches: The Minority Approach</i>	27
B. Black Women Challenging Disenfranchisement Laws	29
C. Consequences of Losing the Right to Vote.....	31
i. <i>Black Women as a Voting Bloc</i>	32
ii. <i>What is Lost in Losing the Right to Vote</i>	35
Part V: The Need to End Disenfranchisement Laws in Order to Fully Grant the “Fundamental Right” to Vote for Black Women	40
A. The Benefits of Maine, Vermont, and D.C.’s Approach	41
B. Barriers and Opposition to Maine, Vermont, and Washington D.C.’s Approach	46
C. The Need to Overcome Barriers and Counterarguments: Constitutional and Legislative Violations through Enforcement of Disenfranchisement Laws on Black Women	47
Part VI: Conclusion	49

Part I: Introduction

The right to vote was deemed a fundamental right by the Supreme Court of the United States as early as 1886.¹ Despite this fundamental right, many people are losing this right based on felony convictions.² There are currently about 19 million people who have a felony conviction on their record.³ As a result of these felony convictions, people are losing their right to vote while on probation, while incarcerated, while on parole, or some combination of these

¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“the political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights”); *see also* *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) (expanding on *Yick Wo*’s “preservative of all rights” in that the right to vote is “a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized”).

² *Felon Voting Rights*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.

³ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POLICY INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html>.

based on the state’s law.⁴ In some states, the right to vote may be lost for life upon conviction.⁵

The United States Constitution grants the state the right to implement disenfranchisement laws.⁶

Disenfranchisement upon felony conviction, whether it be while incarcerated, extend to encompass probation, parole, or both, or permanent disenfranchisement, is the majority approach across states.⁷ The only exceptions are Maine, Vermont, and most recently Washington D.C., which never disenfranchise.⁸ Although the right to vote is a fundamental right, lawyers are not required to inform their clients that a criminal conviction may result in the loss of that right.⁹ Therefore, people who are convicted and incarcerated may be unaware of the potential consequence of losing the right to vote while incarcerated, which sometimes extends post-release, hindering full participation in the democratic process. As of 2020, there were

⁴ See, e.g., CAL. CONST. Art. II, § 2(b) (“An elector disqualified from voting while serving a state or federal prison term, as described in Section 4, shall have their right to vote restored upon the completion of their prison term”); FLA. CONST. Art. VI, § 4(a) (“No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights . . . [and] any disqualification from voting arising from a felony conviction shall terminate and voting rights shall be restored upon completion of all terms of sentence including parole or probation”); ALASKA STAT. § 15.05.030(a) (“A person convicted of a crime that constitutes a felony involving moral turpitude under state or federal law may not vote in a state, federal, or municipal election from the date of the conviction through the date of the unconditional discharge of the person”); 730 ILL. COMP. STAT. ANN. 5/5-5-5(c) (“A person sentenced to imprisonment shall lose his right to vote until released from imprisonment”); NEB. REV. STAT. ANN § 29-112 (“Any person sentenced to be punished for any felony, when the sentence is not reversed or annulled, is not qualified to vote until two years after he or she has completed the sentence, including any parole term”); H.B. 282, Reg. Sess. (Ala. 2017); see generally *Criminal Disenfranchisement Laws Across the United States*, THE BRENNAN CENTER FOR JUSTICE (Jan. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/criminal-disenfranchisement-laws-across-united-states>.

⁵ See, e.g., FLA. CONST. Art. VI, § 4(b) (“No person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights”); ARIZ. REV. STAT. § 13-907(A) (“On final discharge, any person *who has not previously been convicted of a felony* offense shall automatically be restored any civil rights that were lost or suspended as a result of the conviction if the person pays any victim restitution imposed”) (emphasis added); TENN. CODE ANN. § 40-29-204 (providing a list of convictions that permanently disenfranchise); see generally *Criminal Disenfranchisement Laws Across the United States*, *supra* note 4.

⁶ U.S. CONST., amend XIV, § 2; Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (“[T]he exclusion of felons from the vote has an affirmative sanction in s 2 of the Fourteenth Amendment.”).

⁷ *Criminal Disenfranchisement Laws Across the United States*, *supra* note 4.

⁸ *Id.*

⁹ See *Padilla v. Kentucky*, 559 U.S. 356, 376-77 (2010) (Alito, J., concurring in the judgment) (“[c]riminal convictions can carry a wide variety of consequences . . . the loss of the right to vote . . . but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters”).

approximately 5.2 million currently and formerly incarcerated persons in the U.S. who could not vote.¹⁰

Mass incarceration has hugely contributed to the current disenfranchisement numbers that exist today within the United States. In 1980 approximately 500,000 people were incarcerated and by 1990 there were over 1.1 million people incarcerated.¹¹ This number continued to grow exponentially, increasing to 1.9 million by 2000, peaking in 2008 to 2.3 million, and decreasing to about 1.7 million in 2020.¹²

Historically, men have been primarily involved in the criminal justice system and incarcerated.¹³ However, mass incarceration had a unique impact on women as their imprisonment rate significantly increased in unprecedented numbers.¹⁴ Since 1978, the growth of women imprisoned has outpaced that of men.¹⁵ The rate of women in prison has grown 834% since 1978, while the overall incarceration rate for women has grown over 700% between 1980 and 2019.¹⁶

Women have not been equally affected by mass incarceration and disenfranchisement as Black women were, and continue to be, incarcerated at higher rates than White women.¹⁷ From

¹⁰ Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, THE SENTENCING PROJECT (July 28, 2021), <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/>.

¹¹ *Key Statistics: Total Adult Correctional Population, 1980-2020*, U.S. DEPT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/data/key-statistics>.

¹² *Id.*

¹³ Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 3 (2015); Aleks Kaistura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>; Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PEW RESEARCH CENTER (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

¹⁴ *Incarcerated Women and Girls*, THE SENTENCING PROJECT (2019),

<https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>; Sawyer, *supra* note 10.

¹⁵ Sawyer, *supra* note 10.

¹⁶ *Incarcerated Women and Girls*, *supra* note 14; Sawyer, *supra* note 10.

¹⁷ See Marc Mauer, *the Changing Racial Dynamics of Women's Incarceration*, THE SENTENCING PROJECT (Feb. 27, 2013), <https://www.sentencingproject.org/publications/the-changing-racial-dynamics-of-womens-incarceration/>.

1986, within 20 years the rise of incarcerated Black women rose 800%, compared with a 400% rise for women overall.¹⁸ One reason Black women as compared to White women are much more likely to be convicted and thus disenfranchised is that the law treated substance use differently depending on the substance used.¹⁹ In 2000, the ratio of Black women to White women incarcerated was 6:0.²⁰ At the time, about 676,730 women were disenfranchised, making up about .63% of voting aged women.²¹ Disenfranchised Black women represented 1.92% of the Black female community, which was about one in every fifth Black women, while only .45% represented the non-Black community.²²

By 2009, the incarceration ratio between Black women and White women had decreased to about 2.8:1.²³ Today, in 2022, this disparity is about 2:1.²⁴ Concerns related to this disproportionality have been addressed, such as voter dilution²⁵ and reproductive rights,²⁶

¹⁸ Deborah J. Vagins & Lesselyn McCurdy, *Cracks in the System: Twenty Years of Unjust Federal Crack Cocaine Law*, AMERICAN CIVIL LIBERTIES UNION, 2 (Oct. 2006).

¹⁹ This disparity is seen particularly between crack cocaine, which was more common in urban areas, and powder cocaine which was more common amongst White people and seen as less dangerous and less addictive. *See Id.*

²⁰ Mauer, *supra* note 17.

²¹ *Felony Disenfranchisement Rates for Women*, THE SENTENCING PROJECT, <https://static.prisonpolicy.org/scans/sp/fvr-women.pdf>, (last visited May 1, 2022).

²² *Id.*

²³ Mauer, *supra* note 17.

²⁴ Eli Hager, *A Mass Incarceration Mystery*, THE MARSHALL PROJECT (2017), <https://www.themarshallproject.org/2017/12/15/a-mass-incarceration-mystery>; Mauer, *supra* note 17; *see also* Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, THE SENTENCING PROJECT (Oct. 30, 2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/> [hereinafter Uggen, *Locked Out 2020*]. In 2020, the Sentencing Project reported that about 5.2 million are currently disenfranchised, 1.3 million of which were Black. Of the 5.2 million disenfranchised, about 1.24 million were women. However, there is not a breakdown by both race and gender.

²⁵ *See, e.g.*, Julie A. Ebinstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323 (Feb. 2018) (addressing the imbalance created by treating inmates as "residents" of the district in which they are located while in prison and the skewed legislative effects by increasing the voting power of predominantly white areas).

²⁶ *See* Ahrens, *supra* note 13, at 3 (discussing regulation of pregnancy and childbirth in context of mass incarceration); Elizabeth Chen, *Gender Matters: Women, Social, Policy, and the 2012 Election: Restoring Rights for Reproductive Justice*, 22 AM. U.J. GENDER SOC. POL'Y & L. 281 (2014) (considering disenfranchisement laws for women and the collateral impact on reproductive rights); Robin Levi et al., *Creating the "Bad Mother": How the U.S. Approach to Pregnant in Prison Violates the Right to Be a Mother*, 18 UCLA WOMEN'S L.F. (2010) (discussing barriers for pregnant women in prison, with a focus on the shackling of pregnant women).

however the consequences to Black women of being disenfranchised has scarcely been addressed, despite the community harm that results from Black female disenfranchisement.²⁷ A potential reason for this scarcity is the fact that Black women, as a whole, are not only more likely to vote, but they have voted the most cohesively as a bloc compared to other demographics of races and gender over the past decade.²⁸ This can be explained, at least in part, by the strong sense of community that Black women feel and the lack of adequate consideration by Congress of issues directly affecting themselves and their communities.²⁹ When voting, Black women tend to collectively focus on concerns such as measures to ending discrimination and ensuring access to health care.³⁰

Black women are significantly more likely than White women to be convicted of a crime and to be disenfranchised as a result thereof. This paper argues that the disenfranchisement of Black women violates the Fifteenth Amendment, Nineteenth Amendment, and the Voting Rights Act and proposes that states level the playing field for all incarcerated people by eliminating any and all voting restrictions stemming from a criminal conviction as Vermont, Maine, and Washington D.C. did recently. Following Vermont, Maine, and Washington D.C.'s lead and abolishing these restrictions would allow Black women to participate fully in the democratic process throughout their incarceration and post-release. This paper focuses on Black women because the law's suppression of their right to vote historically led to their current disenfranchisement. Consequently, it focuses primarily on potential solutions to address their

²⁷ See discussion *infra* Part IV.C.ii discussing consequences of the right to vote for Black women.

²⁸ See discussion *infra* Part IV.C.i discussing Black women as a voting bloc.

²⁹ See discussion *infra* Part IV.C.i discussing studies of Black women's voting concerns.

³⁰ *Understanding the Priorities of Women of Color Voters: Survey Findings—April 2019*, INTERSECTIONS OF OUR LIVES & SKDKNICKERBOCKER, 23 (2019), <https://intersectionsofourlives.org/wp-content/uploads/2019/04/The-Intersections-of-Our-Lives-Survey-Findings-FINAL.pdf> [hereinafter *April 2019 Survey Findings*].

disenfranchisement. However, this paper recognizes that the law had has a similar discriminatory effect on Black men as well as other minority groups with disproportionately high rates of incarceration.

Section 1 of the Fifteenth Amendment of the United States Constitution states that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³¹ The Nineteenth Amendment states that the “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”³² However, the ability of black women to exercise their right to vote is one that has been an uphill battle since the ratification of the Nineteenth Amendment as measures such as poll taxes, literacy tests, and racial violence were put in place by states to restrict the Black vote.³³ While women advocated for their right to vote, White women dominated this narrative and left Black women at the margins of these efforts for equality in voting despite Black women reaching out for their help post Nineteenth Amendment ratification.³⁴ The Voting Rights Act of 1965 provided some relief for Black women by outlawing discriminatory voting practices, however the Voting Rights Act continues to be cut back by the Supreme Court.³⁵

Today, Black women are still being left at the margins of the democratic process through state disenfranchisement laws. This paper seeks to address how the law got to this point and how

³¹ U.S. CONST. amend. XV, § 1.

³² U.S. CONST. amend. XIX.

³³ Liette Gidlow, *More Than Double: African American Women and the Rise of a “Women’s Vote,”* 32 J. WOMEN’S HIST. 52, 54-6 (2020); Angelys Torres McBride, *The Evolution of Voting Rights in America*, NATIONAL CONSTITUTION CENTER (May 27, 2021), <https://constitutioncenter.org/interactive-constitution/blog/the-evolution-of-voting-rights-in-america>.

³⁴ Gidlow, *supra* note 33, at 57-8.

³⁵ See discussion *infra* Part II.C.

to fix the problem going forward despite opposition. Part II will address the history of the women's suffrage movement, including the passage of the Fifteenth Amendment, the Nineteenth Amendment, and the Voting Rights Act of 1965. It will further discuss Supreme Court cases that have had the effect of making certain Voting Rights Act protections null. Part III will discuss the rise of mass incarceration and the racialized laws that drove the movement, including the racial disparities created by the law regarding drugs and how this drove up Black women's incarceration to unprecedented levels. Part IV will provide an overview of the rationales for disenfranchisement laws, how they vary state by state, and how these laws are constantly in flux. It goes on to discuss how political isolation while incarcerated and upon release harms Black women by not allowing them a say in their community. It also discusses how Maine, Vermont, and Washington D.C. are outliers by having no disenfranchisement law. Part V discusses how current disenfranchisement laws are constituting both Constitutional and legislative violations, and that adopting the approach of Maine, Vermont, and Washington D.C. would allow Black women to not only overcome the voting oppression they have experienced throughout history, but also to fully participate in the political process and remain connected with their communities throughout their involvement in the criminal justice system.

Part II: The History of the Right to Vote and the Current Voting Landscape

Voting rights for Black women has been laced with obstacles and discrimination. While the methods of obstruction have changed over time, the end result still remains the same: Black women are essentially shut out of the voting process, currently by the overly punitive effects of conviction and incarceration. Part A discusses the initial granting of suffrage to women via the Nineteenth Amendment, the different impact on Black women versus White women, and how

White women were reluctant to step in and help Black women break down barriers that were broken down for White women when the Nineteenth Amendment was ratified. This dynamic between White women being given easy access to voting versus the barriers that Black women faced foreshadows the effect today that incarceration has on disenfranchisement by virtue of state law. This leads into Part B which addresses the impact the Voting Rights Act of 1965 had for Black women and how it helped Black women make headway in their right to vote by giving Black women the rights that White women gained in 1920 with the ratification of the Nineteenth Amendment. Part C discusses how the Supreme Court in *Richardson v. Ramirez* and *Shelby County v. Holder* retracted the progress that Black women by re-erecting voting barriers which the Voting Rights Act of 1965 sought to amend. This history of the ratification of the Nineteenth Amendment through today's current litigation surrounding voting issues sets the stage for what Black women are up against today in attempting to assert their right to vote.

A. Impact of the Nineteenth Amendment for Black Women versus White Women

The history of the women's right to vote is an important backdrop for analyzing the current schema of mass incarceration and resulting disenfranchisement. The Jim Crow-era barriers put in place for Black women manifest themselves in the guise of disenfranchisement laws today.

The idea of women's suffrage had started being discussed in the early 1800s, but the women's suffrage movement is generally known to have begun at the Seneca Falls Convention in 1848.³⁶ Elizabeth Cady Stanton and Susan B. Anthony were feminist advocates who helped

³⁶ Tracy Thomas, *Reclaiming the Long History of the "Irrelevant" Nineteenth Amendment for Gender Equality*, 105 MINN. L. REV. 2623, 2628 (May 30, 2021); Becky Little, *How Early Suffragists Left Black Women Out of their Fight: Susan B. Anthony and Elizabeth Cady Stanton focused on white women's suffrage over voting rights for all women*, HISTORY (Jan. 28, 2021), <https://www.history.com/news/suffragists-vote-black-women>.

pioneer the women's suffrage movement.³⁷ Stanton advocated for women's right to vote on the basis of being able to protect their rights that men would not, and that if women were equal to men that they should have a say in the political process.³⁸ The two women formed the National Women Suffrage Association in response to the lack of women's voting rights being included.³⁹

Since the beginning, however, a racial divide has existed among the women. This split was foreshadowed by the fact that there were only White men and White women at the Seneca Falls Convention.⁴⁰ Both Stanton and Anthony took issue with Black men's voting rights and neither were quiet about it.⁴¹ Stanton did not want Black men to have voting rights before women and stated "it is better to be the slave of an educated White man, than of a degraded, ignorant black one."⁴² Anthony had also infamously stated that she would rather "cut off this right arm of mine before I will ever work for or demand the ballot for the negro and not the woman."⁴³

Ratification of the Nineteenth Amendment was not an easy process, as federal amendments to ensure the right to vote for women failed five times prior to the Congressional passage in 1919.⁴⁴ During state ratification, there was a lot of opposition and rejection by the South.⁴⁵ When the Nineteenth Amendment did eventually pass, the New York Times was quick

³⁷ SUE DAVIS, *THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON* 64 (2008); Thomas, *supra* note 36, at 2628 ("At Seneca Falls, pioneering feminist Elizabeth Cady Stanton revived this idea of suffrage as central to women's citizenship and equality"); Nancy Hayward, *Susan B. Anthony*, NAT'L WOMEN'S HIST. MUSEUM (2018), <https://www.womenshistory.org/education-resources/biographies/susan-b-anthony>.

³⁸ DAVIS, *supra* note 37.

³⁹ Hayward, *supra* note 37.

⁴⁰ Olivia B. Waxman, *How History Classes on the Women's Suffrage Movement Leave Out the Work of Black Voting Rights Activists*, TIME (Dec. 8, 2020), <https://time.com/5917131/seneca-falls-myth/>.

⁴¹ Ama Ansah, *Votes for Women Means Votes for Black Women*, NAT'L WOMEN'S HIST. MUSEUM (Aug. 16, 2018), <https://www.womenshistory.org/articles/votes-women-means-votes-black-women>.

⁴² ANGELA Y. DAVID, *WOMEN, RACE & CLASS* (1981).

⁴³ Ansah, *supra* note 41.

⁴⁴ Robert A. Kutcher, *President's Message: If at First You Don't Succeed...*, 67 LA BAR JNL. 318, 318 (Mar. 2020).

⁴⁵ *Id.*

to declare that it would “be almost universally taken as ending the long struggle for woman suffrage in this country.”⁴⁶ This proved false for Black women as the South ensured that there were measures in place to restrict Black women from accessing their new right to vote.⁴⁷

Despite the fact that the women’s movement ran on the premise promulgated by Elizabeth Cady Stanton that women deserved the same equal access to the political process as men, Black women struggled for the right to vote.⁴⁸ They called upon the White suffragists leaders to help them access equal suffrage rights, but groups like the National Women’s Party and the League of Women Voters failed to address the inequality.⁴⁹ For example, the National Women’s Party did not see Black women’s lack of access to the voting process as a women’s issue, but rather a “race issue” that was deemed “unrelated to the women’s rights agenda.”⁵⁰

Compounding the marginalization of Black women by the White suffrage leaders, measures were used to ensure that Black women were denied access ran rampant. White women began to support poll taxes, supported the idea that Black women’s denial to suffrage was merely a “race issue,” and some even joined the Ku Klux Klan to target Black women attempting to vote through violence and intimidation.⁵¹ Overall, women failed to stand up for women’s rights, instead standing up solely cohesively for White women’s rights.⁵² This same Black-White dichotomy split has continued over time and exists today through state disenfranchisement laws,

⁴⁶ *Another Amendment Ratified*, N.Y. TIMES, 8 (Aug 19, 1920).

⁴⁷ Gidlow, *supra* note 33, at 57-8; McBride, *supra* note 33.

⁴⁸ DAVIS, *supra* note 37, at 64.

⁴⁹ Chinyere Ezie, *Not Your Mule? Disrupting the Political Powerlessness of Black Women Voters*, 92 U. COLO. L. REV. 659, 667 (2021); Gidlow, *supra* note 33, at 57-9.

⁵⁰ Gidlow, *supra* note 33, at 58 (noting also that the League of Women Voters was unhelpful by avoiding the racial component altogether and failing to address the racial discrimination tied into the disenfranchisement efforts, particularly in the South).

⁵¹ Ezie, *supra* note 49, at 667-68.

⁵² *Id.*

as women are similarly blocked from exercising their right to vote by a variety of state systems that are kept in place to disproportionately keep Black women from guarding their interests.⁵³

B. The Positives of the Voting Rights Act and Subsequent Blows to Those Protections

It was not until the Voting Rights Act of 1965 (“VRA”) that Black women gained some headway in their fight for suffrage by the elimination of racial discrimination in accessing voting rights.⁵⁴ Prior to the passage of the VRA, the Supreme Court seemed unwilling to budge from the enforcement of racial discriminatory practices in restricting the Black woman vote. In *Lassiter v. North Hampton County*, a Black woman brought suit to have North Carolina’s literacy tests declared unconstitutional and void.⁵⁵ The Supreme Court acknowledged that the literacy tests could potentially be used in a discriminatory manner, but since it applied to all races to ensure one can read and write it was a fair assessment of literacy and therefore not unconstitutional.⁵⁶ After the VRA was passed, it helped Black women break down barriers like these that they had been facing when registering to vote. In short, the VRA provides as follows: section 2 forbids all states from denying rights to vote based on race; section 4(a) eliminated the need for any “test or device” to vote, including the literacy tests, and section 4(b) created a coverage formula for determining which jurisdictions need preclearance from Department of Justice ; and section 5 requires preclearance from the Department of Justice for covered jurisdictions before making changes to election practices, policies, and procedures of the jurisdictions .⁵⁷ After the VRA was

⁵³ Chung, *supra* note 10.

⁵⁴ *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966) (“The Voting Rights Act of 1965 reflects Congress’ firm intention to rid the country of racial discrimination in voting”); VOTING RIGHTS ACT OF 1965, 89 P.L. 110, 79 STAT. 437 (Aug. 6, 1965); *Voting Rights Act of 1965*, NAACP, <https://naacp.org/find-resources/history-explained/legislative-milestones/voting-rights-act-1965> (last visited Mar. 17, 2022).

⁵⁵ *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959).

⁵⁶ *Id.* at 53-54.

⁵⁷ Voting Rights Act of 1965, 89 P.L. 110, 79 Stat. 437, §§ 4, 5 (Aug. 6, 1965);

passed, the Supreme Court did change its stance on literacy tests by striking them down as unconstitutional and acknowledged that “blight of racial discrimination in voting” had “infected the electoral process in parts of our country for nearly a century.”⁵⁸

Support from the Supreme Court has dwindled over time. State laws and court rulings have reinstated barriers that Congress sought to break down with the VRA, exemplified Congress by amending and readopting the Act several times over the years to keep racial discrimination out of voting.⁵⁹ Despite Congressional support, the Supreme Court has delivered three major setbacks to the VRA: one in 1974 with *Richardson v. Ramirez*, one in 2013 with *Shelby County v. Holder*, and one in 2021 with *Brnovich v. Democratic National Committee*.

C. Linking the Past with the Present: Subsequent Blows to the Voting Rights Act by the Supreme Court

After facing betrayal by White suffragist leaders and a new wave of racialized violence by the KKK in attempting to access their right to vote, Congress stepped in to help Black women exercise their right to vote with the Voting Rights Act. The VRA appeared to finally provide the relief Black women were seeking after decades of their right to vote being marginalized. Not even a decade after the VRA was passed, the Supreme Court in *Richardson v. Ramirez* erected a new barrier: upholding denial of the right to vote to felons, even if they have completed their sentence.⁶⁰ The majority relied on Section 2 of the Fourteenth Amendment which allows

⁵⁸ *South Carolina v. Katzenbach*, 383 U.S. 301, 308, 337(1966) (upholding sections 4 (a)-(d), 5, 6 (b), 7, 9, 13 (a), and certain procedural portions of § 14 of the Voting Rights Act, as valid means for carrying out the commands of the Fifteenth Amendment”).

⁵⁹ Voting Rights Act of 1965 was readopted and strengthened in 1970, 1975, and 1982. See VOTING RIGHTS ACT OF 1965, *supra* note 57.

⁶⁰ *Richardson v. Ramirez*, 418 U.S. 24, 54-55(1974).

disenfranchisement “for participation in rebellion, or other crime” which the Court held a felony conviction falls under.⁶¹

Richardson v. Ramirez was remedied, partially, by *Hunter v. Underwood* which held Alabama’s Constitutional provision that disqualified from voting any citizen convicted of a “crime involving moral turpitude” as unconstitutional.⁶² The court found that the drafters “intentionally sought to subvert the [Fourteenth] and [Fifteenth] Amendments’ protection against racial discrimination in voting by using the moral turpitude provision, in conjunction with discriminatory criminal justice enforcement, to target Alabama’s Black citizens.”⁶³ However, as seen by later decisions *Shelby County* and *Brnovich*, the Supreme Court appears to ignore the pervasive racial discrimination still prevalent in voting.

In *Shelby County v. Holder*, sections 4(b) and 5 of the VRA were challenged by Shelby County, Alabama, as unconstitutional. Section 4 of the VRA was initially enacted in response to the fact that certain states and jurisdictions had a history of employing racially discriminatory voting laws.⁶⁴ Section 5 of the VRA, the “preclearance requirement,” ensured that the states that had a history of racially discriminatory voting laws could not change their laws without approval of federal authorities.⁶⁵ Section 4(b) create a coverage formula for which states would be subject to the preclearance requirement of Section 5.⁶⁶ The Supreme Court held that the VRA had been successful in improving Black voter registration, but the formula for preclearance was based on

⁶¹ *Id.* at 2671.

⁶² *Hunter v. Underwood*, 471 U.S. 222, 233(1985).

⁶³ *Id.* at 229 (emphasis added).

⁶⁴ *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (May 5, 2020).

⁶⁵ *About Section 5 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (Nov. 29, 2021).

⁶⁶ *Id.*; *Section 4 of the Voting Rights Act*, U.S. DEP’T OF JUSTICE (May 5, 2020).

“decades-old data and eradicated practices.”⁶⁷ The court therefore held section 4(b) as unconstitutional for being outdated and no longer necessary, functionally making section 5 nonfunctional without making an express ruling on its constitutionality.⁶⁸ Justice Ginsberg, joined by Justice Breyer, Justice Sotomayor, and Justice Kagan, dissented on the premise that the court had terminated “the remedy that proved to be best suited to block that discrimination.”⁶⁹ This intuition was correct as the *Shelby County* holding allowed states to immediately enact new laws which worked to suppress minority voting.⁷⁰ For example, Texas, the same day that *Shelby County* was decided, enacted stricter voter registration requirements which had previously failed under Section 5 of the VRA.⁷¹

In *Brnovich v. Democratic National Committee*, two Arizona voting laws were being challenged regarding precinct-based election day voting and an early mail-in voting law. The question of whether these laws were racially discriminatory in violation of Section 2 of the VRA made its way up to the Supreme Court, which made a ruling consistent with *Shelby County*: the laws did not violate Section 2 and were not enacted with a discriminatory purpose.⁷² Justice Kagan, joined by Justice Breyer and Justice Sotomayor, issued a dissent critical of the majority’s

⁶⁷ *Shelby Cty. v. Holder*, 570 U.S. 529, 551 (2013) (noting that voter registration and turnout has increased dramatically since 1960 and therefore the disparity which justified the preclearance requirement no longer exists).

⁶⁸ *Id.* at 557; *Shelby County v. Holder*, BRENNAN CENTER FOR JUSTICE (Aug. 4, 2018), <https://www.brennancenter.org/our-work/court-cases/shelby-county-v-holder>; *The Shelby County Decision*, DEP’T OF JUSTICE, <https://www.justice.gov/crt/shelby-county-decision#:~:text=On%20June%2025%2C%202013%2C%20the,Ct.>

⁶⁹ *Shelby County*, 570 U.S. at 560 (Ginsburg, J., dissenting).

⁷⁰ *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2355 (2021) (Kagan, J., dissenting in the judgment).

⁷¹ *Id.* at 2355 (Kagan, J., dissenting) (noting that Alabama, Virginia, and Mississippi also quickly enacted. For examples of states enacting stricter voter ID laws *see, e.g.*, ALA. CODE § 17-9-30; VA. CODE ANN. § 24.2-643; MISS. CODE ANN. § 23-15-563.

⁷² *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. at 2350 (2021).

undermining Section 2 and making it appear as if minority voter suppression was no longer an issue.⁷³

The Voting Rights Act of 1965 attempted to equalize the vote, especially for Black women, after years of voter suppression after they should have had full access to voting through the intersection of the Fifteenth and Nineteenth Amendments. However, the Supreme Court through *Shelby County* and *Brnovich*, have arguably rendered the VRA nonfunctional. This is allowing states to implement laws which restrict the vote of Black women in violation of the Fifteenth and Nineteenth Amendments, as well as violate the protection that the VRA sought to enact. These laws set back the suffrage movement for Black women voters 60 years, a consequence that both Ginsburg and Kagan considered when the Supreme Court decided to draw back the protections offered under the VRA.

This movement towards stricter laws has not slowed down. In 2021 alone, 34 laws across 19 states enacted laws to restrict access to voting.⁷⁴ Based on *Richardson*, *Shelby County*, and *Brnovich*, it is unlikely that the Supreme Court would see issue with the State's current disenfranchisement laws.

⁷³ *Id.* at 2354 (Kagan, J., dissenting).

⁷⁴ Will Wilder & Stuart Baum, *5 Egregious Voter Suppression Laws from 2021*, THE BRENNAN CENTER FOR JUSTICE (Jan. 31, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/5-egregious-voter-suppression-laws-2021>.

Part III: The Disproportionate Mass Incarceration of Black People Leads to a Disproportionate Impact on the Disenfranchisement of Black People

Mass incarceration began to take hold in the United States in the 1970s with Nixon’s “war on drugs,” which resulted in disproportionate, racialized punishments.⁷⁵ States were very complicit in this incarceration as state imprisonment, rather than federal, had the highest growth as a result of the implementation of harsh criminal penalties.⁷⁶ This section goes over the history of mass incarceration and how that history paved the way for the disenfranchisement laws that exist today. Part A will analyze how the history of the United States, from the ratification of the Thirteenth Amendment which freed the slaves to how Black Codes spread throughout the States, to the necessity of the Civil Rights Act of 1964 to help Black people access their right to vote. Part B explains how mass incarceration had a novel effect on women, particularly Black women, as they began to be incarcerated and disenfranchised at extremely high rates.

A. The Issue of Mass Incarceration

Through the history of the United States, Black people have been targeted through racist rhetoric which characterized minorities as dangerous and resulted in policies targeting them based on these racist stereotypes.⁷⁷ Post-civil war in the late 1860s, the South implemented Black Codes which restricted newly freed Black freedom,⁷⁸ despite the passage of the Thirteenth

⁷⁵ *Race and the Drug War*, DRUG POLICY ALLIANCE, <https://drugpolicy.org/issues/race-and-drug-war> (last visited Apr. 25 2022); James Cullen, *The History of Mass Incarceration*, THE BRENNAN CENTER FOR JUSTICE (July 20, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration>.

⁷⁶ Cullen, *supra* note 75.

⁷⁷ See Ruth Delaney et al., *American History, Race, and Prison*, THE VERA INSTITUTE, <https://www.vera.org/reimagining-prison-web-report/american-history-race-and-prison> (last visited Mar. 23, 2022); see also *Zero Disenfranchisement: The Movement to Restore Voting Rights*, COMMON CAUSE, <https://www.commoncause.org/wp-content/uploads/2019/08/FelonyDisenfranchisementReportv4-1-1.pdf/> (last visited Apr. 25, 2022).

⁷⁸ These codes outlawed conduct seen as common to Black people such as “walking without a purpose,” “walking at night,” or “settling on public or private land which had the purpose and effect of sweeping Black people into prison.” See *Id.*; see also Stephen Middleton, *Repressive Legislation: Slave Codes, Northern Black Laws, and*

Amendment in 1865.⁷⁹ These laws clearly had the intent of stripping Black people of their citizenship rights by institutionally implementing policies to block their access to social and political life, keeping them powerless in society.⁸⁰ As Black Americans moved from the South to the North in the early 20th century, the North began to reflect the South's fear of Black crime and resulting policies that lead to an influx of the incarceration of Black Americans.⁸¹

In 1964, nearly a century after gaining their freedom, Black Americans made a significant stride towards their social and political freedom with the Civil Rights Act of 1964.⁸² However, their social and political progress was limited by war on drugs that began in the 1970s, where racist stereotypes and rhetoric were still prevailing and began to hit Black women harder than ever through the rise in mass incarceration.⁸³

Southern Black Codes, OXFORD RESEARCH ENCYCLOPEDIAS, AMERICAN HISTORY (Feb. 28, 2020), <https://doi.org/10.1093/acrefore/9780199329175.013.634> (looking at the history of Black Codes and their impact across the country).

⁷⁹ U.S. CONST. amend. XIII.

⁸⁰ Kevin Muhitch & Nazgol Ghandnoosh, *Expanding Voting Rights to All Citizens in the Era of Mass Incarceration*, THE SENTENCING PROJECT, 1 (Mar. 2021), <https://www.sentencingproject.org/wp-content/uploads/2021/03/Expanding-Voting-Rights-to-All-Citizens-in-the-Era-of-Mass-Incarceration.pdf>; Christopher R. Adamson, *Punishment after Slavery: Southern State Penal Systems, 1865-1890*, OXFORD JOURNALS, 559 (June 1983); Middleton, *supra* note 78.

⁸¹ Delaney, *supra* note 77.

⁸² *See, e.g.*, *Blow v. North Carolina*, 379 U.S. 684, 684, 85 S. Ct. 635 (1965) (reversing the convictions, which were affirmed by the North Carolina Supreme Court, of Black persons convicted under a North Carolina statute which made it a crime to enter upon the lands of another without a license after being forbidden to do so, based on the Civil Rights Act of 1964 legalizing their conduct).

⁸³ Cullen, *supra* note 75; Michele Goodwin, *The New Jane Crow: Women's Mass Incarceration, Just Security* (July 20, 2020), <https://www.justsecurity.org/71509/the-new-jane-crow-womens-mass-incarceration/>; *see also* Press Release, *Top Adviser to Richard Nixon Admitted that 'War on Drugs' was Policy Tool to Go After Anti-War Protesters and 'Black People'* (Mar. 22, 2016) (on file with Drug Policy Alliance). Within the past several years, a quote from President Richard Nixon's domestic policy chief, John Ehrlichman, had resurfaced where he referred to Black people as the enemy and stated that the purpose of the War on Drugs was that "by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities."

B. The Effect of Mass Incarceration on Disenfranchisement Disparities

The 1970s initiation of the “war on drugs” policies looked similar to Black Codes, with a new focus on Black women. In line with Nixon administration’s intent to disrupt Black communities, Black women became targets and were incarcerated at higher rates than ever before, largely due to drug charges.⁸⁴ One of the most well-known examples is the crack versus powder cocaine 100:1 sentencing disparity which arose out of the Anti-Drug Abuse Act of 1986.⁸⁵ Black women became targets due to the fear of Black women giving birth to “crack babies.”⁸⁶ In 1988, the attack on crack cocaine usage intensified with the Omnibus Anti-Drug Abuse Act of 1988, where convictions for five grams or more of crack cocaine had a sentencing guideline of a 5-year mandatory minimum with a 20-year maximum sentence.⁸⁷ These low-level offenses were giving Black women either the same or harsher sentences than major drug dealers.⁸⁸ It was not until 2010 with the passage of the Fair Sentencing Act which reduced this 100:1 disparity to 18:1.⁸⁹

Between 1980 and 2019, the rates of incarcerated women grew by over 700%, from around 26,378 to 222,455.⁹⁰ 2000 marked a peak for Black women’s incarceration with a rate of 205 per 100,000 for Black women compared to 34 per 100,000 for White women.⁹¹ Since 2000,

⁸⁴ See Vagins & McCurdy, *supra* note 18, at 2.

⁸⁵ *Id.* at i.

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 2.

⁸⁸ *Id.* at 3.

⁸⁹ S. 1789, 111th Congress, 2nd Sess. (2010); *Fair Sentencing Act*, ACLU, <https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act#:~:text=Because%20crack%20and%20powder%20cocaine,fair%20ratio%20is%201%3A1> (last visited May 1, 2022); *see also* *Dorsey v. United States*, 567 U.S. 260 (2012) (holding that the new 18:1 ratio would apply to all of those who were convicted prior to, but sentenced after, the passage of the Fair Sentencing Act on Aug. 3, 2010); H.R.5, 117th Congress (2021) (passing through the House and currently in the Senate, the EQUAL Act would permanently end the sentencing disparity if it becomes law).

⁹⁰ *Incarcerated Women and Girls*, *supra* note 14.

⁹¹ Hager, *supra* note 24.

the incarceration rate for Black women compared to White women decreased from a ratio of 6:1 to 2:1.⁹² However, Black women make up a smaller percentage of the population yet are incarcerated at higher rates than White women. According to the 2020 census, Black people made up about 13% of the population compared to the 60% White population.⁹³ In 2019, Black women were incarcerated at a rate of 83 per 100,000, compared to White women who were incarcerated at a rate of 48 per 100,000.⁹⁴ Additionally, Black women aged 18 to 19 are three times more likely to be incarcerated than White women.⁹⁵ It is believed that if current incarceration trends continue, 1 in 18 Black women will be imprisoned at some point in their lifetime.⁹⁶ While the incarceration rates have declined for Black women since 2000, the ramifications of convictions are felt both inside and outside prison through the disenfranchisement that follows.

Part IV: The State-by-State Landscape of Voting Rights

Disenfranchisement laws have a history that goes back to colonial times.⁹⁷ By 1821, eleven states had enacted disenfranchisement laws.⁹⁸ These laws originally were not intended as a method for racialized disenfranchisement, using broad language to penalize all felonies.⁹⁹ Post-

⁹² Hager, *supra* note 24.; Mauer, *supra* note 17.

⁹³ *QuickFacts: Population Census April 2020*, U.S. CENSUS BUREAU (Apr. 2020), <https://www.census.gov/quickfacts/fact/table/US/POP010220#POP010220>.

⁹⁴ Mauer, *supra* note 17.

⁹⁵ Danielle Solomon & Connor Maxwell, *Mass Incarceration, Stress, and Black Infant Mortality*, CENTER FOR AMERICAN PROGRESS (June 5, 2018), <https://www.americanprogress.org/article/mass-incarceration-stress-black-infant-mortality/>.

⁹⁶ *Id.*

⁹⁷ *Green v. Bd. of Elections*, 380 F.2d 445, 450 (2d Cir. 1967).

⁹⁸ *Id.* at 450 n.4 (citing the following: “Va.Const. Art. 3, § 1 (1776); Ky.Const. Art. 8, § 8 (1799); Ohio Const. Art. 4, § 4 (1802); La.Const. Art. 6, § 4 (1812); Ind.Const. Art. 6, § 4 (1816); Miss.Const. Art. 6, § 5 (1817); Conn. Const. Art. 6, § 2 (1818); Ill.Const. Art. 2, § 30 (1818); Ala.Const. Art. 6, § 5 (1819); Mo.Const. Art. 3, § 14 (1820); N.Y.Const. Art. 2, § 2 (1821)”).

⁹⁹ *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1251 n. 28 (11th Cir. 2005) (“The prevalence of [disenfranchisement] laws before African-Americans were granted the right to vote indicates that states have historically maintained these laws for race-neutral reasons”); Erin Kelly, *Racism & Felony Disenfranchisement: An*

Civil War these statutes took on a racialized purpose.¹⁰⁰ The intended purpose was to keep Black people out of social and political life, a remnant of slavery that would continue through disenfranchisement laws.¹⁰¹

Since the 1990s, states have made strides in order to decrease felony disenfranchisement due to increased public awareness of voting restrictions and resulting public support for expanding voting rights which allowed state-level reform efforts to occur.¹⁰² Between 1997 and 2021, 25 states have rolled back some of their disenfranchisement laws in a variety of ways, and in some states more than once.¹⁰³ For example, States have restored voting rights to people on parole, such as California in 2020, Colorado in 2019, Connecticut in 2021, Maryland in 2016, Nevada in 2019, New Jersey in 2019, New York in 2021, Rhode Island in 2006, and Washington most recently in 2022.¹⁰⁴ Additionally, a couple states removed financial barriers to financial barriers to voting rights restoration, including Arizona in 2019 and Delaware in 2016.¹⁰⁵

Despite the declination in rates of mass incarceration since the 2000 spike and decreased disenfranchised people over the last several years, disenfranchisement rates remain high. In

Intertwined History, THE BRENNAN CENTER FOR JUSTICE, <https://www.brennancenter.org/our-work/research-reports/racism-felony-disenfranchisement-intertwined-history> (last visited Mar. 25 2022).

¹⁰⁰ Mich. State A. Philip Randolph Inst. v. Johnson, 749 F. App'x 342, 356 (6th Cir. 2018) (“In 1870, the Fifteenth Amendment to the United States Constitution was passed to prevent states from denying the right to vote on grounds of “race, color, or previous conditions of servitude.” U.S. Const. amend. XVI. Almost immediately, states began enacting laws and supporting practices to disenfranchise African American voters”); DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II 53 (2008) (criminal laws were implemented “essentially intended to criminalize black life”); Angela Behrens, *Voting--Not Quite a Fundamental Right? a Look at Legal and Legislative Challenges to Felon Disfranchisement Laws*, 89 MINN. L. REV. 231, 233 (Nov. 2004).

¹⁰¹ See Kelly, *supra* note 99.

¹⁰² Chung, *supra* note 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

2016, there were about 6.1 million people disenfranchised due to state laws.¹⁰⁶ This number has dropped about 15% since 2016 to about 5.2 million in 2021 due to states loosening some of their disenfranchisement laws.¹⁰⁷ Out of the 5.2 million disenfranchised Americans, 1.8 million are Black citizens.¹⁰⁸ Studies have shown that Black Americans are still “nearly four times as likely to lose their voting rights than the rest of the adult population, with one of every 16 Black adults disenfranchised nationally.”¹⁰⁹ In 2020, seven states have even higher rates of one in seven Black Americans being disenfranchised.¹¹⁰

This section will explain the current State approaches for disenfranchisement laws and the impact on Black women voters. Part A will explain the different State approaches, how Vermont and Maine have taken an outlier position in implementing no voting restrictions for felons, and how recently Washington D.C. has followed this same approach. Part B will look at recent challenges to state disenfranchisement laws brought by Black women making arguments as to the constitutionality of the laws as well as unlawful denials of voting restoration. Part C will analyze voting turnouts of Black women and how, despite Black women being the strongest voting bloc across the United States, the consequences of disenfranchisement laws weaken their voting power by not allowing them to vote on issues directly affecting their communities that are not taken into account by White voters.

¹⁰⁶ Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, THE SENTENCING PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/>.

¹⁰⁷ Uggen, *Locked Out 2020*, *supra* note 24.

¹⁰⁸ Chung, *supra* note 10.

¹⁰⁹ *Id.*

¹¹⁰ These states are Alabama; Florida; Kentucky; Mississippi; Tennessee; Virginia; Wyoming. *See* Chung, *supra* note 10.

A. The Current Legal Landscape

There are currently around 5.2 million Americans disenfranchised as a result of state disenfranchisement laws.¹¹¹ 1 out of every 16 Americans disenfranchised is African American.¹¹² Since 1997, 25 states have made advancements in their laws, such as: remove financial barriers, extend the right to vote to those on probation or parole, create automatic restoration where it did not exist prior.¹¹³ However, disenfranchisement laws remain in flux. Between 2011 and 2012 alone, 27 measures were passed and implemented between 19 states that made it harder to vote.¹¹⁴ This section seeks to break down these state laws to give an overview of the current legal landscape. Part i will discuss previous state Supreme Court rationales for disenfranchisement laws, and how these ideas persist today through laws. Part ii will analyze the variety of State laws which create the current categorical approaches regarding disenfranchisement and restoration. Part iii will look at the minority approach that both Maine and Vermont take of no disenfranchisement, which Washington D.C. has newly adopted, and other state attempts to follow that approach.

i. Rationales for Disenfranchisement Laws

A majority of the States have articulated that felons deserve to be disenfranchised by proxy of their convictions. These rationales for disenfranchisement laws date back court opinions from the 1800s and state Constitutional text. In *Washington v. State* from 1884, the Supreme Court of Alabama expressed its distaste for felony voting by explain that the “manifest purpose” of disenfranchisement “is to preserve the purity of the ballot box, which is the only sure

¹¹¹ Chung, *supra* note 10.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Voting Rights*, ACLU, <https://www.aclu.org/issues/voting-rights> (last visited Mar. 24, 2021).

foundation of republican liberty, and which needs protection against the invasion of corruption, just as much as against that of ignorance, incapacity, or tyranny.”¹¹⁵ The Court explained that 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*” and therefore it is “proper . . . that this class should be denied a right, *the exercise of which might sometimes hazard the welfare of communities, if not that of the State itself*, at least in close political contests.”¹¹⁶

Other state courts began citing *Washington v. State* in utilizing their power to mold which groups they wanted to allow to vote. For example, in *Oregon-Wisconsin Timber Holding Co. v. Coos County* the Supreme Court of Oregon cited *Washington* for the proposition that under the Fifteenth Amendment, which prohibits the States from denying individuals voting on the basis of “race, color, or previous condition of servitude,”¹¹⁷ “the states have exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote.”¹¹⁸

Other jurisdictions have likewise relied on *Washington*’s theory of denying those who are “morally corrupt” from accessing the ballot box. *Washington v. State*’s “moral corruption” fear was a fear supported by the Supreme Court of California. In *Otsuka v. Hite*, the Supreme Court of California acknowledged and agreed with Alabama’s fears of denying “morally corrupt” people from accessing their right to vote, stating “[a]voidance of such a danger, when present, is an adequately compelling state interest to justify an appropriate restriction on the right to

¹¹⁵ *Washington v. State*, 75 Ala. 582, 585 (1884).

¹¹⁶ *Id.* (emphasis added).

¹¹⁷ U.S. CONST. amend. XV, § 1.

¹¹⁸ *Or.-Wisconsin Timber Holding Co. v. Coos Cty.*, 465, 142 P. 575, 576 (1914) (citing *Washington v. State*, 75 Ala. 582, 585 (1884)).

vote.”¹¹⁹ The public safety concern of *Washington v. State* was supported by the Supreme Court of North Dakota in *State ex rel. Olson v. Langer*, where the court discusses *Washington* and supported the disenfranchisement of persons convicted of felonies for purpose of public safety, as well as the “purity of the ballot box.”¹²⁰

The “purity of the ballot box” and other language suggesting that the States can circumvent the Fifteenth Amendment restrictions on denying voter access, have perpetuated State laws which target Black women and their right to vote, which can be better visualized and assessed after laying out the current legal landscape of disenfranchisement laws.

ii. State-by-State Approaches: The Majority Approach

State disenfranchisement laws range from disenfranchisement for life to no disenfranchisement, but the laws generally fall within three main categories: voting rights restored upon release from prison, voting rights restored completion of sentence which includes probation and parole, and permanent disenfranchisement for at least certain criminal convictions unless the government approves restoration.¹²¹ These categories illustrate the fact that the majority approach in the United States is some level of disenfranchisement.

The largest category of disenfranchisement laws is voting rights restored upon release from prison with 21 states: California, Colorado, Connecticut, Hawaii, Illinois, Indiana,

¹¹⁹ *Otsuka v. Hite*, 414 P.2d 412, 417 (1966); *see also Snyder v. King*, 958 N.E.2d 764, 781-2 (Ind. 2011) (explaining that the Supreme Court of California came to a narrower conclusion than Alabama because *Washington* held that “most convicted criminals are deemed to be too morally corrupt to vote on the basis that since they have committed crimes of moral turpitude in the past they are likely to commit election fraud” while *Otsuka* “held that the California Constitution disenfranchised convicted criminals only if a closely drawn nexus existed between the elements of the crime and the risk to the integrity of elections — i.e., only convicts who reasonably may have been deemed to pose an actual bona fide threat to the integrity of elections could be disenfranchised”).

¹²⁰ *State ex rel. Olson v. Langer*, 256 N.W. 377, 385-86 (1934).

¹²¹ Chung, *supra* note 10; *Criminal Disenfranchisement Laws Across the United States*, *supra* note 4.

Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Utah, Virginia, and Washington.¹²² Washington is the newest addition to this list having in 2021 passing a new bill to automatically restore the voting rights to those on probation and parole which took effect January 1, 2022.¹²³ This measure restored the voting rights for about 20,000 people.¹²⁴

The second largest group consists of 16 states which restore the right to vote upon completion of probation, prison, and parole.¹²⁵ This group differs from the first group because while the first group will automatically have their right to vote restored upon completion of their prison sentence, this group includes disenfranchisements for all points where the justice system is involved. The states that comprise this group include: Alaska, Arkansas, Georgia, Idaho, Kansas, Louisiana, Minnesota Missouri, New Mexico, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.

Louisiana stands out in this group for their history of disenfranchisement and unique method of restoring voting rights. Louisiana's 1921 State Constitution, a product of the Jim Crow South, permanently disenfranchised people convicted of felonies.¹²⁶ When Louisiana adopted its new Constitution in 1974, the permanent disenfranchisement of felons was repealed and replaced it with Article 1, §10(A), which partially loosened the restriction and provided for suspension of the right when the person "is under an order of imprisonment for conviction of a

¹²² Chung, *supra* note 10.

¹²³ H.B. 1078, 67th Leg. (Wa. 2021); Chung, *supra* note 10.

¹²⁴ *Voting Rights Restoration Efforts in Washington*, THE BRENNAN CENTER FOR JUSTICE (Jan. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-washington>.

¹²⁵ Chung, *supra* note 10.

¹²⁶ LA. CONST. art VIII, § 6 (1921), *repealed* by LA. CONST. art I, § 10 (1974).

felony.”¹²⁷ An “order of imprisonment” was defined as including probation and parole.¹²⁸ In 2018, Louisiana’s disenfranchisement laws loosened again with House Bill 265 passed and became effective January 1, 2019, restoring voting rights to people on probation and parole after a five year waiting period.¹²⁹

The smallest group, yet the most intrusive into one’s right to vote, is the group of eleven states which use their own unique combination of prison, parole, and probation disenfranchisement, with the potential for permanent disenfranchisement. The States included in this group are: Alabama, Arizona, Delaware, Florida, Iowa, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming.¹³⁰ All of these States take different approaches, yet have the effect of potentially disenfranchising someone for life.

Alabama exemplifies Jim Crow-era disenfranchisement dating back to its 1901 state Constitution, which remains active today, stating: “those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution” and listing a host of applicable crimes including “any infamous crime or crime involving moral turpitude.”¹³¹ In 2017, the legislature clarified “moral turpitude” by passing House Bill 282 which defined

¹²⁷ LA. CONST. art I, § 10(A) (1974); *Voice of the Ex-Offender v. State*, 255 So. 3d 575, 575 (La. 2018) (Johnson, C.J., dissenting).

¹²⁸ LA. CONST. art I, § 10(A) (1974); *Voice of the Ex-Offender v. State*, 255 So. 3d at 575 (La. 2018) (Johnson, C.J., dissenting) (“The court found the meaning of ‘under an order of imprisonment’ is unambiguous and that a convicted felon serving a term of probation or parole is clearly under an order of imprisonment because he is still in a custodial setting and still serving a portion of a criminal sentence”).

¹²⁹ H.B. 265 (La. 2018); LA. REV. STAT. ANN. § 18:102.

¹³⁰ Chung, *supra* note 10.

¹³¹ ALA. CONST. art VIII, § 182 (1901) (“those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude.”).

what crimes would not fall into “moral turpitude,” and therefore would make people convicted of certain offenses eligible to apply for restoration.¹³²

One barrier put in place in these jurisdictions are financial. For example, Florida requires that, in order to have the right to vote restored, all restitution, fees, and fines must be paid.¹³³ However, Arizona has taken the opposite approach and in 2019 removed the financial barrier to restoration by eliminating the requirement that outstanding fines need be paid off for voting rights restoration, but this only applies to a first-time felony offense.¹³⁴ However, Arizona has one of the most complicated voting rights restoration policies in the country, making restoration difficult.¹³⁵

iii. State-by-State Approaches: The Minority Approach

Only two states, Vermont and Maine, have never implemented disenfranchisement laws against persons convicted of felonies because both States have interpreted their State constitution to include the right to vote for all citizens, including those incarcerated.¹³⁶ Both states allow those imprisoned to vote by absentee ballot in the place where they last resided, so long as they

¹³² DEFINITION OF MORAL TURPITUDE ACT, H.B. 282 (Ala. 2017); *Crimes of Moral Turpitude*, ACLU OF ALABAMA (May 1, 2018), <https://www.aclualabama.org/en/crimes-moral-turpitude>; *HB282 (2017) – Definition of Moral Turpitude Act*, ACLU OF ALABAMA (June 5, 2017), <https://www.aclualabama.org/en/legislation/hb282-2017-definition-moral-turpitude-act> [hereinafter *Definition of Moral Turpitude Act*]

¹³³ ELECTION ADMINISTRATION, S.B. 7066 (2018); *Voting Rights Restoration Efforts in Florida*, THE BRENNAN CENTER FOR JUSTICE (Sept. 11, 2020).

¹³⁴ Chung, *supra* note 10, at n.3.

¹³⁵ *Felony Disenfranchisement in Arizona*, ACLU OF ARIZONA, <https://www.acluaz.org/en/felony-disfranchisement-arizona> (last visited Mar. 25, 2022).

¹³⁶ Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, AMERICAN JOURNAL OF SOCIOLOGY 559, 565 (Nov. 2003); Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here’s Why Few Do*, THE MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do>.

were Vermont or Maine residents.¹³⁷ This means that they needed to have an established residence in either state, no merely be incarcerated in one of those two states.¹³⁸ Washington D.C., effective January 1, 2021, became the first jurisdiction to adopt the method of both Maine and Vermont by lifting all disenfranchisement laws, and providing people incarcerated with a voter registration form, a voter’s guide, as well as other educational materials regarding the importance of voting.¹³⁹

Other states have attempted to adopt this minority approach by introducing House Bills or Senate Bills, however these bills have all failed or lapsed thus far. In 2019, several states were considering bills that would remove disenfranchisement laws. In Massachusetts, Senate Bill 12 was introduced by Senator Adam Hinds who wanted to amend the state Constitution by striking the disenfranchisement provision, “excepting persons who are incarcerated in a correctional facility due to a felony conviction,” recognizing the discriminatory impact of disenfranchisement.¹⁴⁰ Similarly, Hawaii had introduced Senate Bill 1503 which would allow incarcerated people to cast absentee ballots, just as Maine and Vermont allow.¹⁴¹ The bill made it through the first legislative committee, but the deadline expired and was therefore tabled for a year.¹⁴² Like Hawaii, New Mexico had introduced House Bill 57, which would strike “a felony

¹³⁷ 28 V.S.A. § 807; *Maine Voting Residence Fact Sheet*, DEP’T OF THE SEC’Y OF STATE: BUREAU OF CORP., ELECTIONS & COMM’N, STATE OF MAINE (2020), <https://www.maine.gov/sos/cec/elec/voter-info/resident.html>; Lewis, *supra* note 136.

¹³⁸ Lewis, *supra* note 136.

¹³⁹ D.C. Act 23-336. Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020.

¹⁴⁰ S.B 12, 191st Gen. Court (Mass. 2019); Katie Lannan, *Mass. Senator wants to restore voting rights for incarcerated felons*, BOSTON GLOBE (Apr. 12, 2019, 5:03 PM).

¹⁴¹ S.B. 1503, 30th Leg. (Haw. 2019); Daniel Nichanian, *Hawaii Proposal to End Disenfranchisement Stalls as Advocates Vow To Press Ahead*, THE APPEAL (Mar. 7, 2019) [hereinafter *Hawaii Proposal*]

¹⁴² *Hawaii Proposal*, *supra* note 141.

conviction of the voter” as reason for disenfranchisement, which passed the first committee but ultimately did not go further.¹⁴³

B. Black Women Challenging Disenfranchisement Laws

From the time that the Supreme Court in *Yick Wo v. Hopkins* in 1886 declared voting a “fundamental right,” this right has been undercut severely for Black women in a constant battle for equal access to the ballot. Disenfranchising, whether for life, while involved in the criminal justice system, or while imprisoned, is violative of the “fundamental right” to vote. However, courts have been reluctant to strike down these measures by overlooking the history and extent these laws are disenfranchising in a discriminatory way by continuing to uphold measures that embody racially discriminatory barriers for Black women exercising their right to vote.

Florida has remained a hotspot for litigation in recent years after Florida citizens voted to amend their state Constitution to automatically “restore[] voting rights to ex-felons who had completed all of the terms of their sentences.”¹⁴⁴ This came to be known as Amendment 4.¹⁴⁵ This Amendment applied to all felons other than those convicted of murder or a felonious sexual offense.¹⁴⁶

After Amendment 4 passed, the legislature determined a “completed” sentence looked to the four corners of the sentence, including the payment of restitution, fines, fees related to the conviction.¹⁴⁷ Rosemary McCoy and Sheila Singleton were two Black women who challenged

¹⁴³ H.B. 57, 54th Leg., First Sess. (N.M. 2019); Mary Hudetz, *New legislation would give felons right to vote while incarcerated, on parole*, LAS CRUCES SUN NEWS (Jan. 23, 2019, 4:41 PM).

¹⁴⁴ *Voting Rights Restoration Efforts in Florida*, *supra* note 133.

¹⁴⁵ *Id.*

¹⁴⁶ S.B. 7066 (Fl. 2019) (codified in FLA. STAT. ANN. § 98.0751).

¹⁴⁷ *Id.* (codified in FLA. STAT. ANN. § 98.0751(5)).

this interpretation, represented by the Southern Poverty Law Center, arguing that it violates Equal Protection, violates protection from poll taxes and excessive fines, and violates the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁴⁸

McCoy and Singleton’s case was consolidated with several others in the United States District Court for the Northern District of Florida.¹⁴⁹ The District Court held the interpretation of Amendment 4 unconstitutional as a poll tax and discrimination based on wealth and issued a preliminary injunction.¹⁵⁰ The case was overturned on appeal to the 11th circuit because the court found that the felons failed to prove a Constitutional violation.¹⁵¹ The Supreme Court denied an application to vacate the stay of the injunction, however Justice Sotomayor dissented to the denial and cited the Court’s inaction as continuing “a trend of condoning disenfranchisement.”¹⁵²

Angelique Harris, of Alabama, is another Black woman fighting against the system of disenfranchisement. Rather than challenging the law itself, she is challenging her denial of re-enfranchisement by the State.¹⁵³ In 2015, Harris was convicted of “theft or receipt of government

¹⁴⁸ *Mcco, et al. v. Desantis, et al.*, SOUTHERN POVERTY LAW CENTER (last visited Apr. 22, 2022).

¹⁴⁹ *Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1289 (N.D. Fla. 2019) (“The plaintiffs in these five consolidated federal actions are 17 individuals and three organizations. The individuals have been convicted of felonies, have completed their terms of imprisonment and supervision, and would be entitled to vote based on Amendment 4 and SB7066 but for one thing: they have not paid financial obligations imposed when they were sentenced”).

¹⁵⁰ *Jones v. Governor of Fla.*, 950 F.3d 795, 800 (11th Cir. 2020) (explaining the case’s procedural history and affirming the preliminary junction on interlocutory appeal); *Federal Judge Rules Florida Law Restricting Voting Rights For Felons Unconstitutional*, NPR (2020) <https://www.npr.org/2020/05/24/861776313/federal-judge-rules-florida-law-restricting-voting-rights-for-felons-unconstitut> (discussing how the law was ruled unconstitutional); Patriciz Mazzei, *Ex-Felons in Florida Must Pay Fines Before Voting, Appeals Court Rules*, THE NEW YORK TIMES (2020) <https://www.nytimes.com/2020/09/11/us/florida-felon-voting-rights.html> (discussing how the ruling was overturned on appeal).

¹⁵¹ *Jones v. Governor of Fla.*, 950 F.3d at 1016.

¹⁵² *Raysor v DeSantis*, 591 US ___ (2020) (Sotomayor, J. dissenting); US Supreme Court denies application to vacate stay, disenfranchising almost one million would-be voters in Florida, HUMAN RIGHTS LAW CENTRE (2020), <https://www.hrlc.org.au/human-rights-case-summaries/2020/12/4/us-supreme-court-denies-application-to-vacate-stay-disenfranchising-almost-one-million-would-be-voters-in-florida>.

¹⁵³ *Harris v. State of Alabama*, SOUTHERN POVERTY LAW CENTER (last visited Apr. 22, 2022) [hereinafter *Harris v. State*]

property and money laundering.”¹⁵⁴ In 2017, Alabama clarified what convictions fall under being a crime of moral turpitude that would therefore disenfranchise for life. Harris’s convictions do not fall under being crimes of moral turpitude, however her voter registration was wrongly denied and she was unable to vote in the 2020 election.¹⁵⁵ The Southern Poverty Law Center has filed an appeal to her registration denial which is currently in the Circuit Court.¹⁵⁶ Harris states: “I’m just a regular person that made a mistake and that wants my rights to be restored so that I can continue to work in the community on issues that matter to me . . . [my] voice needs to be heard.”¹⁵⁷ Harris’s case is just one instance in which voting rights are not being restored for Black women when they should be, by either being improperly denied or not automatically restored.

C. Consequences of Losing the Right to Vote

The history discussed thus far has shown that the discriminatory methods of disenfranchising a targeted group of citizens has been intentional to restrict access to political life for Black women. This section analyzes the current schema of the Black women voter. Section i looks at Black women as a voting bloc, which has become the most cohesive bloc among different factions of race and gender. This in large part has been due to a sense of community in voting, which dates back the women’s suffrage movement, and has led Black women to focus on issues that they feel exist in their communities and the lack of adequate response by Congress of

¹⁵⁴ DEFINITION OF MORAL TURPITUDE ACT, H.B. 282 (Ala. 2017); Crimes of Moral Turpitude, ACLU OF ALABAMA (May 1, 2018), <https://www.aclualabama.org/en/crimes-moral-turpitude>; *Definition of Moral Turpitude Act*, *supra* note 132.

¹⁵⁵ *Harris v. State*, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ Connor Sheets & Sarah Whites-Koditschek, *In Alabama, some felons are wrongly being barred from voting*, AL NEWS (Oct. 30, 2020), <https://www.al.com/news/2020/10/in-alabama-some-felons-are-being-wrongly-barred-from-voting.html>.

taking into account the intersectional existence of Black women. Section ii focuses on Black women who have felt the repercussions of disenfranchisement, including both the familial and community aspects, who are now heavily involved in helping others access their right to vote.

i. Black Women as a Voting Bloc

Black women have faced many obstacles in exercising their right to vote since the passage of the Nineteenth Amendment. However, despite the hardships, Black women are exercising their right to vote now in a very cohesive bloc.¹⁵⁸ This trend started in 2012 where 74% of eligible Black women voted, compared with 64% of eligible White women, 45% of Latinx women, 61% of Black men, 63% of White men, and 46% of Latinx men.¹⁵⁹ Of those who voted, 96% of Black women voters voted in support of Obama, compared with 42% of White women and 76% of Latinx women who voted in support of Obama.¹⁶⁰

The number of Black women who voted in 2016 slightly declined to 66%, compared with 67% of White women who voted, however Black women still remained higher than other demographic groups.¹⁶¹ Despite the fact that a slightly higher rate of White women voted, Black women almost unanimously voted for Hillary Clinton, with 96% voting for Clinton and less than 4% voting for Trump.¹⁶² Only 43% of White women voted for Clinton.¹⁶³ Likewise, in the 2018

¹⁵⁸ Danyelle Solomon & Connor Maxwell, *Women of Color: A Collective Powerhouse in the U.S. Electorate*, CENTER FOR AMERICAN PROGRESS, 9 (2019), <https://www.americanprogress.org/article/women-color-collective-powerhouse-u-s-electorate/>.

¹⁵⁹ Ezie, *supra* note 49, at 670.

¹⁶⁰ *Id.*

¹⁶¹ Compared with the 47% Latinx women, 54% black men, 64% white men, 45% Latinx men who voted. *See Id.* at 671; Solomon & Maxwell, *supra* note 158.

¹⁶² Ezie, *supra* note 49, at 673.

¹⁶³ *Id.*

midterms, 92% of Black women voted for Democratic candidates, compared with 68% of Latinx women and 47% White women.¹⁶⁴

While there have only been few studies of Black women voting perspectives, these studies lead to similar conclusions regarding the policy concerns while voting for Black women voters. In April 2019, Intersections of Our lives interviewed 2,663 registered women of color voters who reported voting in the 2018 midterms.¹⁶⁵ For Black women, this study found that their top three priorities are “[e]nding racial/ethnic/cultural discrimination,” “[e]nsuring people with pre-existing conditions can still get health insurance [and] ensuring everyone has access to affordable healthcare,” and “[e]nsuring access to clean water.”¹⁶⁶

Ahead of the midterms, the study found that Black women expressed dissatisfaction with Congress. One example is that 93% of Black women agreed that “[e]lected officials need to understand that there [are] differences in the [INSERT RACE/ETHNICITY] community - not everyone thinks the same.”¹⁶⁷ Additionally, 89% of Black women agreed that “[a]s a woman of color, I want my elected officials to understand how my experience and my needs differ from their white women constituents.”¹⁶⁸ Third, 65% of Black women wanted Congress to “[s]top making it harder for certain groups of people to vote.”¹⁶⁹

In 2019, two authors for the Center for American Progress Danyelle Solomon, Vice President, and Connor Maxwell, Senior Policy Analyst, have built upon the work of Intersections

¹⁶⁴ *Id.* at 673-74.

¹⁶⁵ These voters were all women of color, including those who identify as “Black or African American; of Hispanic, Latino, or Spanish-speaking background; or Asian American/Pacific Islander (AAPI) or of any ethnicity/national origin recognized in the Asian race category by the U.S. Census Bureau.” See *April 2019 Survey Findings, supra* note **Error! Bookmark not defined.**, at 5.

¹⁶⁶ *April 2019 Survey Findings, supra* note **Error! Bookmark not defined.**, at 23.

¹⁶⁷ *Id.* at 25.

¹⁶⁸ *Id.* at 19.

¹⁶⁹ *Id.* at 24.

of Our Lives by analyzing and synthesizing data from voter studies to determine the most pressing concerns for Black women.¹⁷⁰ They looked at several areas of concern, including : health care, the economy and jobs, public safety, and racial and gender discrimination.¹⁷¹ Looking at these four categories shows some specific areas where Black women are concerned about Congress not doing enough and issues within their communities that need attention. Regarding health care, 80% of Black women believe that the federal government should ensure that all Americans have coverage.¹⁷² Black women are also concerned about the opioid epidemic, illustrated by 78% being “somewhat or very concerned about the use of opioids such as prescription pain medications and drugs such as heroin and fentanyl in their community.”¹⁷³ Black women are also concerned about the economy, with 65% wanting Congress to make the creation of well-paying jobs a national priority in light of the fact that they recognize that the currently state of the economy is not working for everyone.¹⁷⁴ Additionally, Black women are very concerned about gun violence and the threat that gun violence is imposing on their family and community.¹⁷⁵ 82% believe that gun laws should be stricter.¹⁷⁶ Lastly, Black women are concerned about the impact that racial and gender discrimination is having on Black women getting jobs and being promoted within current jobs.¹⁷⁷ Citing to the Understanding the Priorities of Women in Color Voters survey, 75% of Black women “consider it extremely important for the

¹⁷⁰ Solomon & Maxwell, *supra* note 158, at 9.

¹⁷¹ *Id.* at 10-13.

¹⁷² *Id.* at 10.

¹⁷³ Solomon & Maxwell, *supra* note 158, at 11.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 12.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 13.

current Congress to make progress on ending racial, ethnic, and cultural discrimination in America.”¹⁷⁸

In 2021, Intersections of Our Lives conducted another survey, this time of 1,617 women of color who reported voting in the 2020 general election which covered similar topics and questions.¹⁷⁹ The results of this study show similar concerns still ongoing for the Black female community. One issue that Black women are still very heavily concerned about, at 91%, is that “[a]s a woman of color, I want my elected officials to understand how my experience and my needs differ from white women.”¹⁸⁰ Likewise, some issues deemed extremely important include: “[e]nd discrimination against people because of their race, ethnicity, immigration status, or culture,” “[r]eform our criminal justice system so it operates fairly and equitably,” “[e]nsure that people with pre-existing conditions can still get health insurance,” and “[r]eform policies to address and prevent police violence against people.”¹⁸¹ Concerns of Black women over these issues exceeds that of the other women of color groups in the study.¹⁸²

ii. What is Lost in Losing the Right to Vote

Since the beginning of the woman’s suffrage movement, concerns among eligible voters have been racially split. While White women were initially more concerned about the individual right and protecting women’s rights more generally, Black women were concerned about obtaining and utilizing the right to vote to benefit their communities and the ongoing racial

¹⁷⁸ *Id.* at 14.

¹⁷⁹ *Understanding the Priorities of Women of Color Voters: Survey Findings—July 2021*, Intersections of Our Lives, 3 (2021), <https://intersectionsourlives.org/wp-content/uploads/2021/07/Intersections-Poll-Report-July-2021-PDF.pdf> [hereinafter *July 2021 Survey Findings*].

¹⁸⁰ *Id.* at 35.

¹⁸¹ *Id.* at 39.

¹⁸² *Id.*

discrimination of Black men.¹⁸³ Mary Church Terrell—a Black women’s suffragist and civil rights advocate—explained how the “double burden” of blackness and womanhood led Black women to approach the suffrage movement with different goals than White women.¹⁸⁴

Today it is apparent that this is still the case for Black women. When Black women lose their right to vote based on convictions, they are losing their say in their communities on issues the White electorate and Congress tend to not be as concerned with or have perspective of, in the eyes of Black women.¹⁸⁵ This has a ripple effect on their families and communities as disenfranchisement is diluting the political power of Black women.¹⁸⁶ An individual’s family is negatively impacted by a parent’s incarceration because a parent’s participation in the democratic process is a “significant factor” for children in their decision to become engaged politically and vote.¹⁸⁷ Additionally, disenfranchisement has a negative effect on the community for two reasons. First, those who are disenfranchised while incarcerated feel socially and politically isolated, which ultimately leads to a distrust in government.¹⁸⁸ Second, and relatedly, voting tends to be communal, therefore areas with higher incarceration rates and thus lower voting rates leads to an overall lower voter participation among those eligible.¹⁸⁹

¹⁸³ Catherine Powell & Camilee Gear Rich, *The “Welfare Queen” Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 19TH AMEND. SPECIAL EDITION 105, 145 (June 2020); Lois Carlisle, *Black Women’s Fight for Suffrage*, ATLANTA HISTORY CENTER (Aug. 21, 2020), <https://www.atlantahistorycenter.com/blog/black-womens-fight-for-suffrage/>.

¹⁸⁴ Ansah, *supra* note 41; Powell & Rich, *supra* note 183, at 145.

¹⁸⁵ See *April 2019 Survey Findings*, *supra* note **Error! Bookmark not defined.**, at 24; *July 2021 Survey Findings*, *supra* note 179, at 35.

¹⁸⁶ See Muhitch & Ghandnoosh, *supra* note 80, at 1; Emily Widra, *It’s not just the franchise: Mass incarceration undermines political engagement*, PRISON POLICY INITIATIVE (Mar. 10, 2017), <https://www.prisonpolicy.org/blog/2017/03/10/politicalprocess/>; Erika Wood, *Restoring the Right to Vote*, THE BRENNAN CENTER FOR JUSTICE, 12 (2009), https://www.brennancenter.org/sites/default/files/2019-08/Report_Restoring-the-Right-to-Vote.pdf.

¹⁸⁷ Wood, *supra* note 186, at 12.

¹⁸⁸ Widra *supra* note 186; COMMON CAUSE, *supra* note 77, at 3.

¹⁸⁹ Widra *supra* note 186; Wood, *supra* note 186, at 12.

States with disenfranchisement laws vary on whether disenfranchisement extends after the period of incarceration. In states where the right to vote may be restored upon release, there may be complications with restoration, such as confusion about how to apply for restoration or systematic failures to restore the right, leading to further, unnecessary disenfranchisement and thus political silence.¹⁹⁰ In states where incarceration extends post release, these women are additionally living in their community where they are paying taxes and raising families yet are losing their say in locality elections directly affecting their lives.¹⁹¹ The stories of Black women after incarceration illustrate the personal and community impacts that disenfranchisement, and how Black women are on the front lines of speaking out against these laws by getting involved in non-profit foundations.

Avalon Batts-Gatson, an Illinois resident, is one Black woman who has lost her right to vote and now advocates on behalf of others as Project Manager of the Illinois Alliance for Reentry & Justice.¹⁹² Batts-Gatson was convicted in 2015 on two counts of wire fraud which led to a 57-month sentence in relation to a mortgage fraud scheme.¹⁹³ Batts-Gatson contends that she was wrongly convicted, which caused her to lose her right to vote while she was incarcerated.¹⁹⁴ Losing the right to vote, as Batts-Gatson recognizes, not only affects the person but their surrounding community as well, including the individual's children.¹⁹⁵ She stated that

¹⁹⁰ Wood, *supra* note 186, at 14.

¹⁹¹ Kelly, *supra* note 99.

¹⁹² Avalon Betts-Gaston, *Project Manager*, ILLINOIS ALLIANCE FOR REENTRY & JUSTICE, <https://www.ilarj.org/abgbio> (last visited Apr. 24, 2022).

¹⁹³ United States v. Betts-Gaston, 142 F. Supp. 3d 716 (N.D. Ill. 2015); *Disbarred Illinois Attorney Sentenced to More Than Four Years in Prison for Deceiving Homeowners in Mortgage Fraud Scheme*, DEP'T OF JUSTICE (Apr. 28, 2016), <https://www.justice.gov/usao-ndil/pr/disbarred-illinois-attorney-sentenced-more-four-years-prison-deceiving-homeowners>.

¹⁹⁴ Ash-har Quraishi, *Activists fight for voting rights of convicted felons serving time*, DENVER ABC 7 (Apr. 22, 2015, 10:36 AM), <https://www.thedenverchannel.com/news/national/activists-fight-for-voting-rights-of-convicted-felons-serving-time>.

¹⁹⁵ *Id.*

disenfranchisement is “not just hurting that person, we're actually hurting their family and as an extension, their community . . . [because] we're saying your voice doesn't matter and you're no longer part of this community.”¹⁹⁶ Illinois is currently considering Senate Bill 828 which would restore the right to vote to those serving sentences for felony convictions.¹⁹⁷ Betts-Gatson is a supporter of this bill due to her own experience of disenfranchisement while incarcerated, for three main reasons. First, she states that “voting is a right and not a privilege,” and that “[valuing] our democracy means the unequivocal valuing of everyone’s right to vote regardless of custody status.”¹⁹⁸ Second, she states that there is no “legitimate legal or moral purpose” to disenfranchisement upon a felony conviction because there is no deterrence in it nor rehabilitative effect.¹⁹⁹ Third, she interprets Article III, Section 2 of the Illinois Constitution to require that “automatic restoration of voting rights must happen by the completion of the sentence and not upon the completion of the sentence.”²⁰⁰ In other interviews, she explains the personal effects disenfranchisement had on her.²⁰¹ For example, she states “[i]f I had kept the ability to vote, at least that would have been a way for me to stay on top of what was going on in my community and stay connected with them.”²⁰² Additionally, she stated: “When you don't

¹⁹⁶ *Id.*

¹⁹⁷ S.B. 828, 102nd Gen. Assembly (Ill. 2021). Currently, Illinois is a state where only those incarcerated lose the right to vote. *See Felony Disenfranchisement Laws* (MAP), ACLU, <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map> (last visited May 1, 2022).

¹⁹⁸ Avalon Betts-Gaston, *It's time to unlock democracy for incarcerated Illinoisans*, THE DAILY LINE (Sept. 27, 2021), <https://www.thedailyline.com/it-s-time-to-unlock-democracy-for-incarcerated-illinoisans>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See Illinois legislation would allow people to vote while serving felony sentences*, 6PARK NEWSDESK (Mar. 22, 2022), <https://6park.news/newjersey/illinois-legislation-would-allow-people-to-vote-while-serving-felony-sentences.html>.

²⁰² *Id.*

have power at the ballot box, then you don't have power over your everyday conditions. And so, people who are incarcerated lack that necessary power.”²⁰³

Dawn Harrington, an advocate highlighted by the Sentencing Project,²⁰⁴ has experienced disenfranchisement due to conviction as a Tennessee resident.²⁰⁵ In Tennessee, residents may permanently lose the right to vote for “infamous” crimes, but may regain the right to vote for other felonies upon approval of application.²⁰⁶ Harrington had been carrying a gun in New York which was registered in Tennessee, leading to a gun possession charge in 2008 with a one-year sentence.²⁰⁷ After release Harrington returned to Tennessee, but due to Tennessee’s complicated restoration process she had to repeatedly go back to New York to get paperwork signed, but New York officials kept refusing her request.²⁰⁸ It took until 2020 to get the paperwork completed in order for her voting rights to be restored.²⁰⁹

Harrington’s experience of disenfranchisement led her to create Free Hearts, a non-profit organization “led by formerly incarcerated women that provides support, education, and advocacy in organizing families impacted by incarceration, with the ultimate goals of reuniting families and keeping families together,” with a focus on helping women.²¹⁰ Her work has gotten

²⁰³ Quraishi, *supra* note 194.

²⁰⁴ The Sentencing Project is a non-profit organization whose mission is to “advocate[] for effective and humane responses to crime that minimize imprisonment and criminalization of youth and adults by promoting racial, ethnic, economic, and gender justice.” *About the Sentencing Project*, THE SENTENCING PROJECT (last visited May 1, 2022).

²⁰⁵ Dawn Harrington is the Executive Director of Free Hearts, an advocacy organization aimed at providing support, education, and advocacy for families who are impacted by incarceration in Tennessee. *See Impacted Advocates Use Their Experience to Raise Awareness Around Female Incarceration*, THE SENTENCING PROJECT (May 10, 2018), <https://www.sentencingproject.org/news/6186/>.

²⁰⁶ *Restoration of Voting Rights*, TENNESSEE SEC’Y OF STATE (last visited Apr. 24, 2022).

²⁰⁷ Nicole Lewis, *Tennessee’s Voter Restoration Gauntlet: The state’s byzantine felony disenfranchisement laws keep hundreds of thousands of formerly incarcerated residents from registering to vote*, THE MARSHALL PROJECT (Sept. 19, 2019), <https://www.themarshallproject.org/2019/09/19/tennessee-s-voter-restoration-gauntlet>.

²⁰⁸ *Id.*

²⁰⁹ *Free the Vote*, THE SENTENCING PROJECT (Oct. 14, 2020), <https://www.sentencingproject.org/publications/free-the-vote/>.

²¹⁰ *Mission & Vision*, FREE HEARTS, <https://freeheartsorg.com/about/> (last visited Apr. 24, 2022).

her recognition by The Sentencing Project, where Harrington was recognized as one of four Americans who had lost and regained their right to vote.²¹¹ As part of the project, Harrington stated: “Our vote does matter. Our vote is important. And it is a part of our collective power.”²¹²

Harrington works alongside Keeda Haynes, Senior Legal Counsel, who was incarcerated for nearly four years for a crime she claims she did not commit.²¹³ Her experience motivated her to advocate for those affected by systematic voter suppression and to run for Congress and used this platform to help people restore their right to vote.²¹⁴

Part V: The Need to End Disenfranchisement Laws in Order to Fully Grant the “Fundamental Right” to Vote for Black Women

Black women, after over a century of disenfranchisement, are still working as hard as they were in 1920 when the Nineteenth Amendment was passed to exercise their right to vote. While the poll taxes, literacy tests, and other discriminatory measures utilized by the Jim Crow South have been outlawed, today the barrier to voting exists in the form of disenfranchisement laws, a consequence of racially discriminatory laws born out of mass incarceration. This section proposes that the solution to ending this system of discriminatory disenfranchisement is to end the system of disenfranchisement upon conviction altogether and goes on to explain the benefits of this approach. Section A addresses how the benefit of ending disenfranchisement would have benefits for those disenfranchised both inside and outside of prison. Section B addresses some

²¹¹ *Free the Vote*, *supra* note 209.

²¹² *Id.*

²¹³ David Plazas, *Tennessee Voices, Episode 64: Keeda Haynes, attorney and congressional candidate*, TENNESSEAN (July 16, 2020, 9:15 AM), <https://www.tennessean.com/story/opinion/columnists/david-plazas/2020/07/16/tennessee-voices-keeda-haynes-candidate-for-congress/5450093002/>.

²¹⁴ Brinley Hineman, *Tennessee nonprofit launches fund to pay fines so formerly incarcerated people can vote*, TENNESSEAN (Oct. 3, 2020, 5:01 AM), <https://www.tennessean.com/story/news/2020/10/03/2020-election-tennessee-voting-rights-nashville-free-hearts/5885066002/>.

drawbacks to the approach in relation to voting, such as low voter turnouts and lack of access to information, as well as partisan opposition. Section C, however, seeks to redress these potential drawbacks by showing the importance of ending disenfranchisement by discussing what is gained for those who have experienced disenfranchisement to be able to vote.

A. The Benefits of Maine, Vermont, and D.C.’s Approach

Disenfranchisement has had negative effects on the Black female community ever since the passage of the Nineteenth Amendment. In all but two states and one jurisdiction, Maine, Vermont, and Washington D.C., these issues continue to exist and set back Black women by not allowing them full participation in the democratic process which continues to hinder the growth of their communities and upbringing of their children. Maine and Vermont remove these barriers by allowing anyone convicted of felonies to fully participate in the democratic process. This has shown to have benefits both while incarcerated, as well as outside incarceration in states where disenfranchisement extends to probation, parole, and/or permanently.

Maine, Vermont, and Washington D.C. have all addressed the rationales and benefits for those incarcerated of retaining the right to vote despite a felony conviction. Former Secretary of State of Maine, Matthew Dunlap, has stated that nothing in the state Constitution or United States Constitution makes Constitutional rights, including the right to vote, a conditional right.²¹⁵ Despite the reason for incarceration, Dunlap states that “they’re still people, they’re still human beings, they’re still American citizens, and I think this is a process that should belong to every American citizen. And in no small way it helps keep them connected to the real world.”²¹⁶ He

²¹⁵ Daniel Nichanian, “A Sliver of Light”: Maine’s Top Election Official On Voting From Prison, THE APPEAL (May 2, 2019), <https://theappeal.org/politicalreport/matthew-dunlap-on-voting-in-maine-interview/>.

²¹⁶ *Id.*

refers to voting as a “sliver of light” for those incarcerated.²¹⁷ Senator Bernie Sanders, of Vermont, shares similar sentiments with Secretary of State Dunlap. Sanders explains that American citizenship is not lost upon going to jail and the right to vote is “inalienable” from that citizenship.²¹⁸ Washington D.C. Councilman, Robert C. White Jr., introduced the Restore the Vote Amendment Act of 2019 which passed on November 2, 2020.²¹⁹ White recognized that, if Washington D.C. were a state, it would have the highest Black incarceration rate of all the states, and the Act’s passage would make the Washington D.C. electorate the most diverse of all major United States cities.²²⁰ White also stresses that the passage of the bill would positively extend civil rights by bringing more attention to policies directly affecting incarcerated people, such as their prison conditions, and would help to create policies to assist with reintegration back into society upon completion of sentence.²²¹

Organizations provide additional insight in allowing those incarcerated to continue to engage in political life. According to the ACLU of Maine, granting the right to vote for people incarcerated would help encourage “civic engagement, strengthen[] the base of our democracy,” and also have the potential to “reduce recidivism by encouraging community investment.”²²² The Sentencing Project’s studies show that allowing people to vote while incarcerated would

²¹⁷ *Id.*

²¹⁸ Daniel Nihanian, *Bernie Sanders Explains Why He Supports Voting Rights For All Citizens*, THE APPEAL (Apr. 30, 2019), <https://theappeal.org/politicalreport/bernie-sanders-explains-why-he-supports-voting-rights-for-all-citizens/>.

²¹⁹ RESTORE THE VOTE AMENDMENT ACT OF 2019, DC B 23-0324 (2020); Kira Lerner, *How A D.C. Lawmaker Is Challenging the Racist Roots Of Prison Voting Restrictions*, THE APPEAL (June 12, 2019).

²²⁰ Lerner, *supra* note 219.

²²¹ *Id.*

²²² Alysia, *Felony Re-Enfranchisement - Where Maine Leads, Many Falter*, ACLU OF MAINE (Aug. 11, 2009), <https://www.aclumaine.org/en/news/felony-re-enfranchisement-where-maine-leads-many-falter>.

help them transition back into their communities and lower recidivism rates.²²³ Thus, by keeping Black women connected to their communities while in prison can lead to greater political participation in prison, an easier transition back into their communities post-release, and encourage further political participation to their family and friends both while incarcerated and post-release.²²⁴

Ending disenfranchisement laws would also have a significant impact on those who remain disenfranchised outside of incarceration. As of 2020, only about 25% of disenfranchisement was made up of individuals incarcerated.²²⁵ This means that 75% of those disenfranchised are being disenfranchised outside of prison or jail, the current makeup being: 22% probation, 10% parole, and 43% post-sentence.²²⁶ When the time for voter restoration comes at the end of a sentence, it is common for there to be confusion regarding applications for voting restoration due to the constant changes regarding voting rights laws.²²⁷ The confusion ranges from states requiring documentation that is not actually required by law, how to deal with out of state convictions, lack of information and communication resources for those trying to regain the right, or outright denial by the state.²²⁸

²²³ Chung, *supra* note 10; Uggen, *Locked Out 2020*, *supra* note 24.; *see also* Muhitch & Ghandnoosh, *supra* note 80, at 3 (“Around 95% of incarcerated people will return home someday and research suggests that people with strong community connections, which can be promoted through electoral participation, are less likely to reoffend”).

²²⁴ *See* Uggen, *Locked Out 2020*, *supra* note 24.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Erika Wood & Rachel Bloom, *De Facto Disenfranchisement*, ACLU & THE BRENNAN CENTER FOR JUSTICE, 6-8 (2008), https://www.aclu.org/sites/default/files/pdfs/racialjustice/defactodisenfranchisement_report.pdf; Ginger Jackson-Gleich, *Eligible, but excluded: A guide to removing the barriers to jail voting*, PRISON POLICY INITIATIVE (last visited Apr. 27, 2022), https://www.prisonpolicy.org/reports/jail_voting.html; Wood, *supra* note 186, at 13-15.

²²⁸ Wood & Bloom, *supra* note 227, at 6-8; Wood, *supra* note 186, at 14-15 (analyzing different state failures in voting restoration, including: New York where certain local Boards of Elections are misinformed, require paperwork when not required by law, and improperly tell people they cannot vote while on probation; Washington and Wisconsin which have not restored voting rights when voter became eligible).

Due to the confusion surrounding restoring one’s voting rights upon release from prison or jail, or completion of sentence, these Black women, who are trying to regain their right to vote, are falling into the “voter—tricksters” trap.²²⁹ The narrative has become that they are attempting to trick the system by deceiving officials, which leads to the unintended consequence of conviction, incarceration, and disenfranchisement.²³⁰ One example is Crystal Mason.²³¹ Mason is a Texas resident who had been imprisoned as the result of a tax fraud conviction.²³² As she was finishing her supervised release, she mistakenly believed she was eligible to vote in the 2016 election and filled out a provisional ballot.²³³ However, because her supervised release was not yet complete, she had not yet finished her “sentence” for purposes of restoring voting rights.²³⁴ As a result, she was convicted of voter fraud and sentenced to another five years.²³⁵ Mason was never told that she was not yet eligible to vote until her full sentence, including her supervised release, was completed.²³⁶ In a similar case, Lanisha Bratcher of North Carolina was on probation and mistakenly thought she was eligible to vote in the 2016 election.²³⁷ Like Texas, North Carolina required that the completion of the entire sentencing, including probation and parole, be completed prior to restoration of voting rights.²³⁸ Despite the State of North Carolina recognizing the fault in their system of failing to inform convicted felons of their voting rights,

²²⁹ Powell & Rich, *supra* note 183, at 121.

²³⁰ *Id.*

²³¹ *Id.* at 122; Amrit Cheng, *Crystal Mason Thought She Had the Right To Vote. Texas Sentenced Her to Five Years In Prison For Trying*, ACLU, <https://www.aclu.org/issues/voting-rights/fighting-voter-suppression/crystal-mason-thought-she-had-right-vote-texas> (last visited Apr. 26, 2022).

²³² Powell & Rich, *supra* note 183, at 122.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Cheng, *supra* note 231.

²³⁶ *Id.*

²³⁷ Sam Levine, *A Black Woman Faces Prison Because of a Jim Crow-Era Plan to ‘Protect White Voters,’* THE GUARDIAN (Dec. 16, 2019), <https://www.theguardian.com/us-news/2019/dec/16/north-carolina-felony-vote-law-black-woman>.

²³⁸ *Post-Election Audit Report: General Election 2016*, NORTH CAROLINA STATE BD. OF ELECTIONS, 2 (Apr. 21, 2017) [hereinafter *Audit Report*].

Bratcher still faced a potential felony charge and 19 months in prison for her mistake.²³⁹ The prosecutors dropped the initial illegal voting charge, and brought two new felony charges against her which would hold a maximum of 19 months per charge, both related to swearing a false statement in an election.²⁴⁰ A third case which gained national attention is Pamela Moses of Tennessee who initially received 6 years in prison for attempting to vote while on probation.²⁴¹ At the time, Moses was actually entitled to vote and was therefore granted a new trial.²⁴² The charges ultimately dropped due to an error made by corrections officials.²⁴³

For these and many other Black women, the injury from disenfranchisement is seen through their feelings of isolation from their communities that dates back over a century.²⁴⁴ This injury is compounded by the fact that when they do become eligible for voting restoration upon release or completion of their sentence, they may be further victimized by a racist system that leads to further incarceration and disenfranchisement due to confusing and fluctuating state laws, as exemplified by Crystal Mason, Lanisha Bratcher, and Pamela Moses.²⁴⁵ These women are living in their communities, paying taxes, raising families, and sending their children to school, yet their rights in these areas were stripped.²⁴⁶ The States can remedy this history of oppression

²³⁹ *A Black Woman Faces Prison Because of a Jim Crow-Era Plan to ‘Protect White Voters,’* *supra* note 237; Sam Levine, *A black woman faces prison for a voting mistake. Prosecutors just doubled the charges*, THE GUARDIAN (July 21, 2020), <https://www.theguardian.com/us-news/2020/jul/21/voting-arrest-racist-law-north-carolina-lanisha-bratcher>; *see also* *Audit Report*, *supra* note 238.

²⁴⁰ Indictment, *State of North Carolina v. Lanisha D. Bratcher*, No. 20CRS 0095 (N.C. Super. Ct. 2016), https://drive.google.com/file/d/1i615MFjflSseAm2dA6oQc4_bne6FUuxl/view; *A black woman faces prison for a voting mistake. Prosecutors just doubled the charges*, *supra* note 239; *see also* Allison Gaines, *Throwing Black Women In Jail for Voting Puts Racism On Full Display*, CULTURED, <https://readcultured.com/throwing-black-women-in-jail-for-voting-puts-racism-on-full-display-6b954c635024> (last visited Apr. 27, 2022).

²⁴¹ Sam Levine, *The Black woman sentenced to six years in prison over a voting error*, THE GUARDIAN (Feb. 3, 2022), <https://www.theguardian.com/us-news/2022/feb/03/fight-to-vote-tennessee-pamela-moses-convicted>.

²⁴² *Id.*

²⁴³ Gaines, *supra* note 240.

²⁴⁴ *See* discussion *supra* Part V.A.

²⁴⁵ *See* discussion *supra* Part V.A.

²⁴⁶ *See* Kelly, *supra* note 99.

and stop the further political isolation of Black women by following the approach of Maine, Vermont, and Washington D.C. Adopting this approach would stop the constant legislative changes occurring in states, end confusion surrounding voting rights for both officials and Black women, and stop diluting Black women's votes.

B. Barriers and Opposition to Maine, Vermont, and Washington D.C.'s Approach

While ending all disenfranchisement laws would solve confusion surrounding restoration of voting rights and ensure that Black women remain connected to their communities, there are some potential drawbacks as well as pushback by officials.

For those who are incarcerated in Maine and Vermont, they have always had the right to vote, however it is unclear how many people incarcerated are actually utilizing the right because they are using their residential address, not the facility's address.²⁴⁷ However, it appears that the voting rates for those incarcerated are low, for several reasons.²⁴⁸ First, inmates do not have access to the internet, which cuts them off from news where they live and information about potential candidates running both locally and nationally.²⁴⁹ Even when they are aware of candidate platforms, they are not able to campaign within the jails or prisons, or show any other signs of political affiliation or support.²⁵⁰ Organizations, such as League of Women Voters and the NAACP, attempt to bridge this information gap and encourage voting among inmates,

²⁴⁷ See Lewis, *supra* note 136; Riley Board, *What does an election look like inside a prison?*, BURLINGTON FREE PRESS (Aug. 24, 2020), <https://www.burlingtonfreepress.com/story/news/politics/elections/2020/08/24/vermont-inmates-can-vote-how-elections-prison-mail-in-ballot/3326694001/>.

²⁴⁸ See Jackson-Gleich, *supra* note 227; Lewis, *supra* note 136; Nicole D. Porter, *Voting in Jails*, THE SENTENCING PROJECT, 5 (May 7, 2020), <https://www.sentencingproject.org/publications/voting-in-jails/>.

²⁴⁹ Lewis, *supra* note 136.

²⁵⁰ *Id.*

however, other barriers thwart these efforts such high rates of illiteracy among prisoners which impede their ability to read, understand, and fill out ballots.²⁵¹,

There is also partisan pushback relating to voting in prison as well as post-sentence restoration. For example, in 2008 Florida Attorney General Bill McCollum had written for the Orlando Sentinel:

The revolving-door effect of restoring felons' rights only then to revoke them due to a new criminal offense would diminish the integrity of our democratic government and the rule of law. According to the Florida Department of Corrections, nearly 40 percent of offenders commit another crime within three years of release and 45 percent do so within five years. The proposal to automatically restore civil rights when leaving prison would restore rights without providing a reasonable period of time to determine if felons are truly rehabilitated or still leading a life of crime.²⁵²

In a similar vein, the argument has been made that “[i]f you aren’t willing to follow the law yourself, then you can’t demand a role in making the law for everyone else, which is what you do when you vote” and essentially do not deserve a role in self-government.²⁵³

C. The Need to Overcome Barriers and Counterarguments: Constitutional and Legislative Violations through Enforcement of Disenfranchisement Laws on Black Women

Black women have historically been disenfranchised through state disenfranchisement laws. Today these measures are implemented through mass incarceration and

²⁵¹ *Id.*; see also Michael Sainato, *US Prison System Plagued by High Illiteracy Rates: Inability to read traps inmates in the criminal justice system*, OBSERVER (July 18, 2017) (“The Literacy Project Foundation found that three out of five people in U.S. prisons can’t read and 85 percent of juvenile offenders have trouble reading. Other research has estimated that illiteracy rates in prisons are as high as 75 percent of the prison population”).

²⁵² Bill McCollum, *McCollum: Be responsible about felons’ rights*, ORLANDO SENTINEL (Apr. 1, 2007), <https://www.orlandosentinel.com/news/os-xpm-2007-04-01-myword01-story.html>.

²⁵³ Roger Clegg, *Hang in There Governor Hogan*, CENTER FOR EQUAL OPPORTUNITY (Feb. 2, 2016), <https://www.ceousa.org/2016/02/02/hang-in-there-governor-hogan/>; see also Roger Clegg & Hans A. Von Spakovsky, *There Are Good Reasons for Felons to Lose the Right to Vote*, NATIONAL REVIEW (Apr. 8, 2018), <https://www.nationalreview.com/corner/there-are-good-reasons-for-felons-to-lose-the-right-to-vote/> (“If you’re not willing to follow the law, then you should not have a role in making the law for everyone else, which is what you do when you vote — either directly (in the case of a referendum or ballot initiative) or indirectly (by choosing lawmakers and law enforcers”).

disenfranchisement. This current schema of disenfranchisement laws, between all the varieties and barriers in place to restoration, are violating the Fifteenth, Nineteenth, and Voting Rights Act. The Fifteenth and Nineteenth Amendments are being violated by the systematic hinderance of the fundamental, Constitutional right to vote. Stripping the right to vote upon convictions, and barriers that exist in voting restoration by the spread of misinformation, the lack of information, and/or the failure to reinstate voting rights when the individual becomes eligible all contribute to the Constitutional violation.²⁵⁴ The Voting Rights Act is likewise violated because of racialized laws still lingering as a result of mass incarceration and the war on drugs, causing Black women to continually be incarcerated and disenfranchised, and then placed in a perilous position of further incarceration due to flaws in restoration of voting rights schemas which lead to voter fraud charges. Despite the kinks within states which allow those convicted to vote, whether it be low prison voting rates or issues regaining the vote afterwards, these barriers can be overcome, and should be overcome, by the elimination of disenfranchisement laws in order to correct these Constitutional and legislative violations.

As previously discussed, in *Richardson v. Ramirez*, the Supreme Court held that felons can be disenfranchised post-incarceration for essentially rebelling against the State, a similar argument that that which lingers today by those in opposition to restoration of voting rights.²⁵⁵ However, there have been studies conducted that show political participation while in prison may actually be lowering recidivism rates by keeping people well connected with their communities, having the result of strengthening democracy by encouraging political involvement.²⁵⁶ Adopting the approach of Maine, Vermont, and Washington D.C. would open the door to full political

²⁵⁴ See discussion *supra* Part IV.C.ii discussing stories of previously disenfranchised Black women.

²⁵⁵ See discussion *supra* Part V.B. discussing partisan arguments supporting disenfranchisement.

²⁵⁶ Muhitch & Ghandnoosh, *supra* note 80, at 3.

involvement for Black women without fear of voting fraud which would either deter voting or lead to further charges.

Further arguments against Maine, Vermont, and Washington D.C.'s approach is that those convicted of felonies do not deserve the right to self-govern. However, this argument ignores that Black women's power to self-govern has never fully been granted and other voting groups fail to take into account the issues that Black women are considering, which ultimately has a negative effect on their communities.²⁵⁷ Illustrative of this is that Black women are currently on the front lines today advocating for Black women's' right to vote and the importance of their right to them and their communities after their voting oppression for over one hundred years.²⁵⁸ As a result, States need to invest in Black women and take into account their concerns. As studies found, Black women are not trustful of Congress to take into concern issues affecting their communities.²⁵⁹ If State legislatures were to end all disenfranchisement laws, they would be tackling an extremely important issue affecting Black women and confront such a large concern within the Black female community, finally granting them full participation in the political process.

Part VI: Conclusion

Disenfranchisement is one of the many consequences that follow from the United States' obsession with incarceration; a consequence that defendants may not consider when accepting plea deals, a common facet of our criminal justice system flowing from mass incarceration.

While disenfranchisement reaches across different intersections of race and gender, Black

²⁵⁷ See discussion *supra* Part IV.C.ii discussing negative effects of disenfranchising Black women.

²⁵⁸ See discussion *supra* Part IV.C.ii discussing stories of previously disenfranchised Black women.

²⁵⁹ See Solomon & Maxwell, *supra* note 158; *April 2019 Survey Findings*, *supra* note **Error! Bookmark not defined.**; *July 2021 Survey Findings*, *supra* note 179.

women have been left in the margins for over a century fighting for their right to vote. While the law has made strides to help Black women fulfill this goal, mass incarceration has been the most recent pushback against Black women exercising their rights.

The right to vote is one that has been deemed a fundamental right by the Supreme Court since 1886. However, despite the Fifteenth Amendment, the Nineteenth Amendment, and the Voting Rights Act, this fundamental right has been systematically denied to Black women through faults in the disenfranchisement system that range from barriers to voting, denial of the right to vote when eligible, and potentially further convictions of voter fraud due to misinformed officials or a lack of guidance altogether. Black women in the other 48 states are cognizant of the fact barriers exist to exercise their right to vote, and there are powerful Black women getting involved in organizations to help spread awareness of this issue affecting Black women as well as helping other Black women recognize and exercise their rights.

Maine, Vermont, and Washington D.C. avoid these Constitutional and legislative violations by not disenfranchising felons at all. This is thought to lead to healthier democracy, further community connections by allowing them to vote on issues that directly affect their community that other demographics and Congress fail to consider, help Black women reintegrate back into society after they complete their incarceration sentence, and reduce recidivism. Were all states to adopt this approach, Black women would benefit tremendously, which would trickle down into their communities by fostering political participation among their family and friends.