

VIRGINIA LAW REVIEW ONLINE

VOLUME 110

NOVEMBER 2024

341–366

SYMPOSIUM

RECONSTRUCTING CITIZENSHIP

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In our republican democracy, voting is a central right of citizenship. Yet millions of voters are routinely disenfranchised as a result of convictions or because their carceral status creates barriers to voting. In the past decade, academic scholarship has focused on the impact of disenfranchisement based on conviction. This work has mapped the legal and social implications of policies that deny voting rights to over five million otherwise eligible voters nationwide. Yet this work has some gaps. First, by focusing solely on conviction-based

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Please note: in this Essay, the segments written in the first person singular represent James's or Jenny's personal experiences, while the use of the first person plural represents the two Authors (James and Jenny) speaking together.

disenfranchisement, the existing scholarship has largely ignored fatal barriers to voting created (and at times perpetuated) by incarceration alone. Second, the lived experiences of those denied the right to vote are notably absent from the literature. This paper seeks to re-center the conversation about the right to vote in the lives of those impacted by the policies that restrict the franchise.

To do so, this paper uses the participatory law scholarship (“PLS”) methodology to draw heavily from the shared experiences of the co-authors, who collaborated in 2022 on an unsuccessful attempt to overturn Connecticut’s felon disenfranchisement law and open pathways to voting for incarcerated people. Specifically, this paper lays out the historical and theoretical bases that inform policies of conviction- or incarceration-based disenfranchisement. It then turns to two critical and novel claims. First, it challenges the bases and scope of such policies, noting their broad impact. Second, it grounds the story of conviction- or incarceration-based disenfranchisement in the lives of affected individuals and their communities. This second point is critical; we seek to marry the lived experience of a co-author, James Jeter, with the academic treatment of that experience.

Vital claims emerge from James’s firsthand narrative. First, disenfranchisement creates a ripple effect that moves through communities, impacting not only the incarcerated and convicted person but also all those who love and depend on them. Second, disenfranchisement that is the product of contact with criminal legal systems creates and perpetuates a gap in representation. Disenfranchised people do not exist in a vacuum. They are parents, spouses, children, and partners. Denying their right to vote denies their ability to directly represent not only themselves, but also their communities. Instead, disenfranchisement creates a secondary representation model in which those who live in affected communities depend on others to represent and defend their interests. At best, someone else’s vote aligns with the interests of those in disenfranchised communities. More often, the votes of those outside the community become acts of charity and otherizing. This is clear in descriptions of social policy. Through rhetorical tropes ranging from “welfare queens” to “law and order,” those in power promulgate policies constructed around the suggestion that there are populations requiring support, saving, and protection through secondary representation as

opposed to enjoying the ability to represent themselves and their own interests.

And so, this paper joins an existing conversation about power, representation, and exclusion with a conjoined narrative—a firsthand account of disenfranchisement, community organizing, and the democratic harm wrought by current policies.

INTRODUCTION

The United States incarcerates more people than any other country in the world.¹ In the process, we also disenfranchise the single largest class of eligible voters, either explicitly—through laws that bar voting for those who have been convicted or are currently incarcerated—or implicitly, by creating barriers to voting even for eligible incarcerated or convicted voters.²

We, the authors, are a law professor and former Director of Yale Law School’s Liman Center (Jenny) and the Director of Dwight Hall’s New Haven Civic Allyship Initiative and the Full Citizen Coalition (James). In 2022, we worked as part of a grassroots coalition to urge the Connecticut legislature to repeal laws that disenfranchised those serving sentences for felony convictions and to create greater access to the ballot for currently

¹ See Growth in Mass Incarceration: Prison Populations Over Time, Sent’g Project, <https://www.sentencingproject.org/research/> [<https://perma.cc/YX7W-VXHU>] (last visited July 7, 2024). These figures do not include people incarcerated pretrial. For those figures, see Pretrial Detention, Prison Pol’y Initiative, https://www.prisonpolicy.org/research/pretrial_detention/ [<https://perma.cc/NGC6-4F2K>] (last visited July 7, 2024). Combined, both sets of data reveal that Black and brown men are incarcerated at disproportionately high rates. See Fact Sheet: Felony Disenfranchisement, Sent’g Project, <https://www.prisonpolicy.org/scans/sp/Felony-Disenfranchisement-Laws-in-the-US.pdf> [<https://perma.cc/L9MT-K5HD>] (last updated Apr. 2014).

² The precise number of individuals excluded from voting as a result of conviction and/or carceral status is difficult to pinpoint given movement within the population (in and out of custody) and variances in jurisdiction regarding disenfranchisement. It is agreed, however, that this population represents the single largest excluded group of otherwise eligible voters. See Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 308 (2000). For population in custody, see Wendy Sawyer & Peter Wagner, Prison Pol’y Initiative, *Mass Incarceration: The Whole Pie 2024* (Mar. 14, 2024), https://www.prisonpolicy.org/reports/pie2024.html?c=pie&gad_source=1&gclid=Cj0KCQjwwMqvBhCtARIsAIXsZpYlQqVoshNko3krB3_MBj-rkXE00wdS9rZXcg7iO2MXt5TVJt4DIL0aAmJ6EALw_wcB [<https://perma.cc/3XZJ-Z8TR>] (estimating that over 1.9 million people are incarcerated in the United States); Sentencing Project, *supra* note 1 (estimating that 5.85 million people have lost their right to vote as a result of felony conviction).

incarcerated individuals.³ The effort was part of an ongoing campaign across the nation to repeal or alter laws that deny or suppress the voting rights of over one million voters.⁴ Ultimately, our efforts in Connecticut were unsuccessful. The bill we proposed never even received a number or a committee hearing. As James noted, it died without ever seeing the light of day. Nonetheless, our work continues.

This paper offers a firsthand account of this work by examining the nexus between criminal legal systems in the United States and disenfranchisement. While we cannot cover all aspects of this expansive topic, we offer one account that unfolds in three Parts. First, we offer a brief history of voting, focusing particularly on what role voting plays in defining citizenship and facilitating democratic representation. This history provides evidence of the race- and class-based impetuses for disenfranchisement based on conviction or carceral status—a reality that continues in modern disenfranchisement and voting qualification policies. Beyond this, the history of voting offers insights into constructions of the franchise as a privilege or a right. While the authors of this paper treat voting as a right and refer to it as such, the inconsistent legal construction of voting as either a privilege or a right is critical to understanding justifications for the historical absence of universal suffrage in the United States. At the end of Part I, we consider the significance of such a conceptualization of voting.

Next, we offer a lived account of James's disenfranchisement and both authors' shared commitment to ensure voting rights for convicted and incarcerated people. In this second Part, the effect of the rhetoric and

³ In 2021, Connecticut altered its restrictions on voting rights for people with felony convictions. See Off. of Legis. Rsch., Conn. Gen. Assembly, Issue Brief: Voting Rights After Felony Conviction (Nov. 23, 2021), <https://www.cga.ct.gov/2021/rpt/pdf/2021-R-0188.pdf> [<https://perma.cc/48ZM-3LGZ>] (describing changes to voting rights based on 2021 law). James both worked as an activist and organizer on the 2021 law and had his own voting rights restored as a result of its passage. See Kelan Lyons, *The Vote, Unlocked: Why This Election Day Is Special for Those on Parole*, CT Mirror (Nov. 2, 2021, 7:44 PM), <https://ctmirror.org/2021/11/02/the-vote-unlocked-why-this-election-day-is-special-for-those-on-parole/> [<https://perma.cc/XYV2-YPTF>]. Buoyed by the passage of the 2021 bill, in 2022 a coalition of criminal justice and election reform advocates formed to extend voting reform to cover incarcerated people. Both authors worked on this effort.

⁴ For a summary of these efforts, see Voting Rights, Sent'g Project, https://www.sentencingproject.org/issues/voting-rights/?gad_source=1&gclid=Cj0KCQjwwMqvBhCtARIsAIXsZpZSLKU_yBgWxj9eNxx1FkUqpOy2EycTB08tJfML6ovK2un-a3HiuEcaAix9EALw_wcB [<https://perma.cc/8ECZ-6JFM>] (last visited July 7, 2024) (summarizing voting reform efforts around the nation focused on disenfranchisement due to conviction and/or incarceration).

theory of Part I is rendered real. Denial of voting rights, barriers to voting created by carceral systems, and misinformation about voting status not only redefine the citizenship of those subject to criminal legal systems and handicap reintegration of such individuals, but also dilute the representation of the communities such individuals call their own.

The conclusion urges a reconceptualization of voting rights and, by extension, citizenship. This final part is critical not only because it reimagines our democracy as more representative through the repeal of disenfranchisement statutes and policies but also because it pushes reform conversations to think broadly about how such representation is achieved. Certainly, repealing statutes and policies that explicitly deny individuals the right to vote because of conviction or carceral status is critical, but repeal alone will not resolve the problem this paper seeks to highlight. Barriers to voting abound for incarcerated and convicted people even if they remain eligible to vote. Until such barriers are addressed, denial of citizenship and the representation it promises will linger.

Before addressing any of these Parts, however, we offer a word about our choice of methodology: the PLS methodology.⁵ The choice was intentional. At its core, PLS offers the opportunity to meld our experiences (the firsthand account) with the theory that informs this piece—and which this piece seeks to dismantle.⁶ In this way, this Essay tells a story in ways that other methodologies might preclude. PLS also offered us an opportunity for self-reflection about the work we do and who we are. Our identities are integral to the narrative we seek to lift up in this work. As authors, activists, colleagues, friends, teachers, scholars, a lawyer (Jenny), and an organizer who is also a formerly incarcerated Black man (James), our perspectives are driven by the world as we know it and as we engage with it through our different identities. Our experiences are simultaneously unique to us and rendered more global as we layer them with legal and political theory in an effort to push back against the existing paradigm.

This self-reflection mirrors the topic we chose. As we sought to weave together our stories with the history and theory of voting in the United States—and more accurately, voting exclusion and the construction of citizenship—we also had to work not to obscure or elevate a single voice.

⁵ See Rachel López, *Participatory Law Scholarship*, 123 *Colum. L. Rev.* 1795, 1795 (2023) (“PLS is legal scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience.”).

⁶ *Id.* at 1807.

We speak both for ourselves collectively and individually here, just as we advocate a model of enfranchisement that permits each person to contribute to the body politic directly, as an individual. A model of inclusive voting allows each person to speak for themselves.

Finally, in choosing to write a PLS piece, we also sought to democratize legal scholarship. Legal academic writing tells a particular story. It can distill law and its boundaries to singularities. In this, it carries a unique value, but it, like the law it examines, is exclusive in its constructions. Not everyone reads legal scholarship, as Chief Justice Roberts has helpfully noted.⁷ Similarly, not everyone gets to write legal scholarship, much less publish it in pages as auspicious as these. On a recent walk, James voiced his dislike of academic writing to Jenny. He described it as a *National Geographic* show in which a lion (the state) attacks and kills a gazelle (the subject/the marginalized person). The narrator is the legal scholar. The narrator describes the attack in painful detail: the lion's claws are exactly this long; his fur is this color; etc., and in the end the gazelle dies. The description is not wrong, but it is also incomplete. We never hear the gazelle's story. It does not get to say to the viewer "these claws really hurt" or "I don't want to die." PLS offers a space for the gazelle's story in the gazelle's own voice. Our Essay is not just about voting exclusion. It is not just about the value of a voice in our nation's participatory democracy or a defined identity of citizen. It is not just about who makes laws and who is subject to law. It is about all of those things. It is the story of rights denied told from the perspective of those denied.

I. THE CIVIC STORY OF VOTING

The United States has never boasted universal suffrage. At the time of the founding, age, wealth, property ownership, gender, and race all served

⁷ See A Conversation with Chief Justice Roberts, C-SPAN, at 30:40–48 (June 25, 2011), <https://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts> [<https://perma.cc/JYY3-4PZS>] ("There is a great disconnect between the academy and the profession.").

as prerequisites for voting.⁸ The nation's founders,⁹ who were of European ancestry, deemed property-owning, taxpaying, mostly white men over the age of majority to be the only individuals worthy of the honor of voting and the duty of representation.¹⁰ Ours was a participatory democracy, but only some were deemed worthy to participate. Even as suffrage expanded in the periods prior to and immediately after the Civil War and later in 1920 with the ratification of the Nineteenth Amendment, universal suffrage has never been achieved. Nor was the path of voting expansion ever linear.¹¹ Instead, voting rights expanded and contracted with waves of racism, xenophobia, classism, and sexism and the constructions of citizenship and rights they spawned. This Part offers a brief glimpse into the imperfect construction of voting in the United States.

A. Constructing the Citizen Around the Vote

For a country founded on the premise of “no taxation without representation,” the founders’ vision of representation was limited.¹²

⁸ For an example of such a restriction, see An Act Concerning Election of Members of General Assembly, ch. 17 (1785), *reprinted in* A Collection of All Such Acts of the General Assembly of Virginia, of a Public and Permanent Nature, as Are Now in Force 19, 19–20 (Richmond, Samuel Pleasants & Henry Pace 1803). For a discussion of restrictions on voting at the time of the founding, see Keyssar, *supra* note 2, at xvi–xviii; Joshua A. Douglas, The Right to Vote Under Local Law, 85 Geo. Wash. L. Rev. 1039, 1046–48 (2017); Elizabeth M. Yang, History of Voting in the United States, 20 Update on L.-Related Educ. 4, 4 (1996).

⁹ While we use the term “founders” throughout this piece to describe those in government at the time the United States was “founded,” we also acknowledge that the use of the term “founders” not only suggests that prior to or without their actions the nation might not exist or had never existed but also that it seeks to erase all those without power in the colonial and early days of our country. The term conjures images of white men who owned property and, in many cases, were already members of government or economic ruling classes at the time they founded the United States. Servants and slaves, paupers and women, Native Americans, and free Black and brown people are erased by the term, even as their labor, their presence, and their resistance forged the new nation as surely as the men we call “founders.”

¹⁰ See Keyssar, *supra* note 2, at 8 (noting that keeping the franchise narrow allowed those in power to retain economic and social advantage); J. R. Pole, Paths to the American Past 245 (1979) (describing the nexus between property, political interest, and power in the post-Revolutionary United States).

¹¹ Keyssar, *supra* note 2, at xxiii.

¹² The slogan responded to the Stamp Act of 1765, which imposed a sales tax on Britain’s American colonies while denying residents of the colonies representation in the Parliament that would tax them despite their British citizenship. See The Rt Hon Lord Judge, “No Taxation Without Representation”: A British Perspective on Constitutional Arrangements, 88 Denv. U. L. Rev. 325, 330 (2011). The slogan has been repeatedly invoked in support of expanding suffrage. See generally Juliana Tutt, “No Taxation Without Representation” in the

Constitutional debates questioned the wisdom of a federally constructed voter qualification.¹³ As a result, the Constitution that emerged to replace the Articles of Confederation did not grant anyone the right to vote. The task of defining voters' qualifications was left to states and municipalities.¹⁴ Even as the founders described voting as a—if not *the*—fundamental right of citizenship, in the end voting was jettisoned from the federal definition of citizenship itself and became the province of state and local governments.¹⁵ This segregation between the federal government's definition of what it meant to be a “citizen” and the state's or municipality's determination of who was qualified to vote had broad implications—not the least of which that it served as an undergirding narrative for race, class, and gender-based policies that would exclude large swaths of citizens from the right to vote.¹⁶

American Woman Suffrage Movement, 62 Stan. L. Rev. 1473 (2010) (describing the invocation of the Revolution-era phrase to support suffrage movements).

¹³ See Keyssar, *supra* note 2, at 21–22.

¹⁴ Article I, Section 2 does not grant the right to vote, but only sets qualifications for presidential electors. U.S. Const. art. I, § 2, cl. 1. Article IV, Section 4 guarantees to every state a “Republican Form of Government.” Id. art. IV, § 4. Nowhere does the body of the federal Constitution establish the qualification of voters. For a history of this decision, see Michael Schudson, *The Good Citizen: A History of American Civic Life* 77 (1998); Richard S. Greene, *Congressional Power Over the Elective Franchise: The Unconstitutional Phases of Oregon v. Mitchell*, 52 B.U. L. Rev. 505, 516–28 (1972); Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 115 (1997); Douglas, *supra* note 8, at 1088.

¹⁵ See, e.g., Mark David Hall, *The Political and Legal Philosophy of James Wilson 1742–1798*, at 108–09 (1997) (noting that Wilson described suffrage as the “darling privilege of freemen”).

¹⁶ See Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 U.C. Davis L. Rev. 1081, 1091–92 (2018) (describing the use of state-based restrictions on voting to suppress and deny Black suffrage); Johanna Kalb & Didi Kuo, *Reassessing American Democracy: The Enduring Challenge of Racial Exclusion*, 117 Mich. L. Rev. Online 55, 56–57 (2018); Patty Ferguson-Bohnee, *The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression*, 47 Ariz. St. L.J. 1099, 1101–02 (2015); JoEllen Lind, *Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right*, 5 UCLA Women's L.J. 103, 128 (1994). We would also be remiss not to note that at the time of the founding, the identity of citizenship eluded Black and Native American populations. See U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const. amend. XIV, §§ 2–3 (identifying Black Americans as three-fifths of one person and excluding “Indians not taxed” from legislative apportionment).

As Professor Franita Tolson notes, Congress attempted to reclaim some power to define citizenship and control elections during Reconstruction. In addition to the passage of constitutional amendments prohibiting discrimination based on race and granting voting rights to newly freed Black men, Congress passed the Reconstruction Acts and “aggressively policed the state procedures for ratifying . . . new constitutions, seeking to ensure that former confederates did not use violence and intimidation to defeat the will of a majority of the

These implications would have been apparent and intended at the time of the founding. Allowing state and local actors to determine the parameters of suffrage was not new. Prior to the Constitution's ratification, states (and before them, colonies) had been constructing voting law based on English counterparts that restricted suffrage by age, race, gender, and property ownership.¹⁷ While voting qualifications between states and municipalities varied significantly, qualifications based on age, race, gender, and property were fairly constant.¹⁸ A definitive listing of voting qualifications in each state and municipality at the time of the founding is both beyond the scope of this paper and unnecessary for the crucial points this Section seeks to assert.¹⁹ First, even at the time of the founding, the democratic vision of the United States was not one of suffrage for all, but rather suffrage for few. Second, restrictions of suffrage were premised on the notion that only those who had a stake in the community's affairs ought to be able to vote, and, by extension, those without the defined stake could and should be represented by others.²⁰

This conception of voting as a privilege at the time of the founding is important because it laid the groundwork for a construction of voting that may be denied or qualified. It was also not universally shared by the founders. Benjamin Franklin, Thomas Young, and Ethan Allen all argued that voting was a natural right inherent to men and not property, though even these founders did not imagine the franchise extending beyond free men; the right to vote was one literally inherent to men alone.²¹ Even as state reformists pushed back on property qualifications—altering them to taxpaying qualifications—voting was available to men, and most commonly white men, alone.²² Perhaps this view was tied to the notion that men had a greater stake in society. Men, after all, owned the property,

qualified electors.” Franita Tolson, “In Whom Is the Right of Suffrage?”: The Reconstruction Acts as Sources of Constitutional Meaning, 169 U. Pa. L. Rev. 2041, 2049 (2021).

¹⁷ See Keyssar, *supra* note 2, at 5; Chilton Williamson, *American Suffrage: From Property to Democracy 1760–1860*, at 11–12 (1960).

¹⁸ Williamson, *supra* note 17, at 12, 19.

¹⁹ For such a summary, see Keyssar, *supra* note 2, at app. tbl.A.1.

²⁰ See Michael Levin, *The Spectre of Democracy: The Rise of Modern Democracy as Seen by Its Critics* 45 (1992); Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 178–79 (1969); Pole, *supra* note 10, at 245.

²¹ See Harold F. Gosnell, *Democracy: The Threshold of Freedom* 16 (1948) (noting that voting was a natural right inherent to men and distinct from property ownership); Keyssar, *supra* note 2, at 12–15.

²² See Keyssar, *supra* note 2, at 13, app. tbl.A.2.

paid the taxes, and served as soldiers, and so were entitled to have some say in the laws that would bind them.²³ However, this limitation defies reality even at the founding. Women, non-property-owning men, slaves, and servants were all subject to and bound by the law. They could be convicted, sentenced, and constrained by laws they had no privilege or right to vote for or against.²⁴ Further, even as voting was described by the founders and participants in state constitutional conventions as a primary obligation of citizenship, people who were not eligible to vote were nonetheless counted as citizens under federal and state definitions.²⁵ These citizens, denied the franchise, were forced to rely on others to express their communal interests.²⁶ They became charities and burdens rather than full and equal actors, and the metric of full citizenship was tied to property, race, gender, and class.

²³ See *id.* at 16–19, 24–25, app. tbls.A.1 & A.2; Lawrence Delbert Cress, *Citizens in Arms: The Army and the Militia in American Society to the War of 1812*, at 59 (1982). As Professor Judith Shklar notes, the adoption of virtual representation by the founders was premised in part on the notion that men, as eligible voters, could represent the interests of all those in their sphere who could not vote. Judith N. Shklar, *American Citizenship: The Quest for Inclusion* 7–8 (1991).

²⁴ See, e.g., Susan B. Anthony, *Is It a Crime for a Citizen of the United States to Vote?* (Apr. 3, 1873), in *Is It a Crime to Vote?: A Speech by Susan B. Anthony*, PBS, <https://www.pbs.org/kenburns/not-for-ourselves-alone/is-it-a-crime-to-vote> [<https://perma.cc/MLZ5-W4TB>] (last visited July 7, 2024).

²⁵ Even the definition of “citizenship” is a chimera in the United States’ legal canon. The citizenship definition used here is based on place of residence, as opposed to immigration status. Indeed, throughout the nation’s history, immigrants or non-native born “citizens” were permitted to vote despite lacking naturalized status. See Gabriela Evia, *Consent by All the Governed: Reenfranchising Noncitizens as Partners in America’s Democracy*, 77 *S. Cal. L. Rev.* 151, 154–55 (2003). Citizenship is defined in the Constitution by place of residence, see U.S. Const. art. III, § 2 (defining judicial jurisdiction by state citizenship based on residency); amend. XIV, § 1 (defining citizenship by place of residency). It wasn’t until 1964 that the Supreme Court began to define state citizenship both in terms of residency in the states and in terms of suffrage. See *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) (describing voting as a right that is held by the state citizen); *Baldwin v. Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (holding that suffrage is “tied to an individual’s identification with a particular State” as a citizen of that state). Prior to the ratification of the Reconstruction Amendments, not every voting-age person was considered a citizen or even, in some cases, a full person. See U.S. Const. art. I, § 2, cl. 3, *amended by* U.S. Const. amend. XIV, § 2 (identifying Black Americans as three-fifths of one person); *id.* (excluding “Indians not taxed” from legislative apportionment). It is therefore unsurprising that twentieth-century civil rights movements focused on creating “full,” rather than “second-class,” citizenship, of which suffrage was a critical component. See Shklar, *supra* note 23, at 15, 17.

²⁶ Pole, *supra* note 10, at 245 (describing the founders’ construction of the voter who had a stake in society).

Even as states moved to make voting more egalitarian by reducing property and tax requirements or waiving them altogether,²⁷ this strange dichotomy of the identity of suffrage remained. States restricted suffrage as if it were a privilege for which a voter had to demonstrate eligibility.²⁸ Yet they enshrined voting in their constitutions as opposed to rendering voting a statutory right or privilege, suggesting that these state actors conceived of voting akin to other rights articulated in their constitutions—not as a privilege, but a right.²⁹ In doing this, however, the states often took pains to distinguish between citizens and mere residents, with only citizens enjoying suffrage—and even then, not all citizens.³⁰

For their part, some municipalities proved more egalitarian than their state counterparts in constructing voting qualifications.³¹ In these municipal elections, with fewer voters and so more power accompanying each vote, voting qualifications proved more inclusive, perhaps recognizing the inherent interests of those who lived in a community regardless of their social status, gender, or racial identity.³²

In the period leading up to the Civil War and during Reconstruction, support for state voting restrictions explicitly based on race waned among Republicans, even prior to the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments,³³ though as Professor Alexander Keyssar notes, “[m]ost white Americans . . . did not share such views.”³⁴ Even as the Reconstruction Amendments barred explicit exclusions based on race,

²⁷ This is not to say that all tax requirements disappeared. Poll taxes passed in the wake of Reconstruction were designed to exclude Black voting. See Vanessa Wright, *Voter Identification and the Forgotten Civil Rights Amendment: Why the Court Should Revive the Twenty-Fourth Amendment*, 67 *UCLA L. Rev.* 472, 477–80 (2020).

²⁸ Michelle D. Deardorff, *Constructing the Franchise: Citizenship Rights Versus Privileges and Their Concomitant Policies*, Keynote Address at Mississippi College Law Review Symposium, *Readdressing the Voting Rights Act: Where Is Our Nation After Shelby County v. Holder?*, in 33 *Miss. Coll. L. Rev.* 161, 166 (2014).

²⁹ Keyssar, *supra* note 2, at 20, 42–44 (discussing the shift in treatment of voting as a right among states).

³⁰ See, e.g., *id.* at 32–33 (“Between 1800 and 1830, moreover, numerous states opted to clarify ambiguous wording in their constitutions to protect themselves against a perceived or potential influx of (undesirable) foreign-born voters. While revising their constitutions, New York, Massachusetts, Connecticut, Vermont, Maryland, and Virginia all replaced ‘inhabitant’ with ‘citizen.’”).

³¹ *Id.* at 6, 30.

³² This is not to say there were no restrictions in municipal elections or that such restrictions varied greatly. *Id.* at 30.

³³ *Id.* at 87–88.

³⁴ *Id.* at 89.

other methods to disenfranchise newly freed Black, non-white, and immigrant voters took their place.³⁵ Certainly, disenfranchisement based on prior conviction or incarceration played a role in this exclusion. The proliferation of Black Codes, coupled with the over-policing of Black, brown, and non-native men of voting age, disenfranchised many of the same individuals that earlier, explicitly racist policies had.³⁶

This reality in and of itself is worth noting for the number of people denied the ballot. Yet the proliferation of such laws also offers insights into the reconstruction of voting as a privilege, not a right. Alabama, for example, redrafted the preamble of its constitution in 1901 to reflect this, substituting “privilege” for “right” to describe voting.³⁷ Alabama was not the only state to redraft its constitution in the period following Reconstruction to transform voting from a right to an honor, privilege, or duty of citizenship.³⁸ Under this new construction, denial of the opportunity to vote was rendered both the prerogative of the state and a commentary on who was a citizen with the chance to weigh in on matters of governance through their ballot and who was merely a subject to be governed.

Even as citizenship expanded with the Reconstruction Amendments, voting rights for Black and newly freed citizens contracted as state-imposed restrictions took the place of explicit race-based exclusions.³⁹ The rise and evolution of registration requirements, literacy and education tests, residency and identification requirements, and even polling hour all reflect the desire to curtail suffrage.⁴⁰ Each has been, and in many cases continues to be, justified as a mechanism necessary to preserve the integrity of the vote.⁴¹ Carceral disenfranchisement—whether the product

³⁵ *Id.* at app. tbls.A.8, A.9, A.10, A.11, A.12, A.13, A.14 & A.16.

³⁶ See Rachel Ruderman, *Evaluating Felony Disenfranchisement Rationales Under the Rational Basis Test*, 30 *Va. J. Soc. Pol’y & L.* 206, 207–08 n.4 (2023).

³⁷ See Wayne Flynt, *Alabama’s Shame: The Historical Origins of the 1901 Constitution*, 53 *Ala. L. Rev.* 67, 70–71 (2001); Keyssar, *supra* note 2, at 113.

³⁸ See Keyssar, *supra* note 2, at 112–13; Perea, *supra* note 16, at 1097–100 (describing how southern states used felony disenfranchisement to disenfranchise Black voters after the passage of the Reconstruction amendments).

³⁹ See Perea, *supra* note 16, at 1091–93.

⁴⁰ *Id.*

⁴¹ For its part, the Supreme Court has recognized and upheld this justification for restrictions on voting. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 193–97 (2008) (plurality op.) (upholding a state voter identification law as necessary to address in person voter fraud); *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring in part and concurring in the judgment); *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (“A State indisputably has a compelling interest in preserving the integrity of its election process.”)

of a conviction or incarceration alone—was and is similar. While most states reject the claim that this disenfranchisement is meant to punish, many seek to justify these policies as mechanisms to preserve the integrity of the vote by ensuring the morality of the voter.⁴² Such justifications, of course, ignore the inequity of systems that produce incarceration and the impact of such barriers on marginalized populations.⁴³ Even as modern scholars and legislators have renewed the characterization of voting as the most basic civic right, states continue to cling to antiquated justifications for disenfranchisement based on conviction and/or incarceration.⁴⁴ In doing this, they define complete citizenship—those entitled to the panoply of civic rights—and incomplete citizenship, which is possessed by those denied the privilege of voting because they are deemed unworthy. Even the Fourteenth Amendment, which sought to break racial barriers to fundamental rights, permits in Section 2 the denial of voting rights based on “participation in rebellion, or other crimes.”⁴⁵ The Supreme Court has interpreted this clause to constitutionalize

(quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989))). It should be noted that there is often a disconnect between the proof of fraud presented and the regulation justified by the fraud. In *Crawford*, for example, while the Court held that the state had an interest in preventing voter fraud, it observed that the evidence of fraud was “scattered.” 553 U.S. at 195 n.12.

⁴² See Note, *Of Ballot Boxes and Bank Accounts: Rationalizing the Jurisprudence of Political Participation and Democratic Integrity*, 131 Harv. L. Rev. 1443, 1455–56 (2018).

⁴³ There are volumes of studies and firsthand accounts of this disparity. See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 2 (2010) (describing racial inequality in criminal legal systems); Randall Kennedy, *Race, Crime and the Law* 351 (1997) (noting racial inequities in the war on drugs). See generally Vesla M. Weaver, Andrew Papachristos & Michael Zanger-Tishler, *The Great Decoupling: The Disconnection Between Criminal Offending and Experience of Arrest Across Two Cohorts*, 5 Russell Sage Found. J. Soc. Scis. 89 (2019) (describing inequity in policing). See Nat’l Conf. of State Legislatures, *Racial and Ethnic Disparities in the Justice System* 1–3, <https://www.ncsl.org/civil-and-criminal-justice/racial-and-ethnic-disparities-in-the-criminal-justice-system> [<https://perma.cc/UXU5-TC53>] (last updated May 24, 2022) (highlighting data that demonstrates criminal justice disparities); Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System, Sent’g Project (Apr. 19, 2018), <https://www.sentencingproject.org/reports/report-to-the-united-nations-on-racial-disparities-in-the-u-s-criminal-justice-system/> [<https://perma.cc/Z8JN-C3HH>].

⁴⁴ See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1790 (2012); Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. Pa. J. Const. L. 1071, 1071 (2019); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 Penn St. L. Rev. 349, 349 (2012).

⁴⁵ U.S. Const. amend. XIV, § 2.

disenfranchisement based on conviction even in the face of a race-based Equal Protection challenge to such a policy.⁴⁶

Today, barriers to voting persist. Following the Supreme Court's decision in *Shelby County v. Holder*,⁴⁷ states rushed to enact and implement changes to voting laws. Many of these changes, such as voter identification laws and voting roll purges, disproportionately impact marginalized voters—including those who are incarcerated.⁴⁸ Increasingly complex registration processes, identification requirements, proof of residency, and absentee ballot processes implemented in the wake of *Shelby County* create special challenges for those in carceral facilities. In Connecticut, for example, an unregistered voter must go through a complex process in order to register to vote, request an absentee ballot, and cast that ballot.⁴⁹ Other states boast equally complicated processes.⁵⁰ Given the time sensitivity of the process (registration, ballot requests, and the ballot itself all must be received on a designated timeline), incarcerated people face greater challenges registering to vote than many free-world citizens. Mechanisms of voting such as proving identity (which requires access to a birth certificate or state-issued identification) or submitting a ballot in a timely fashion (which requires access to reliable mail systems) may also pose challenges for non-incarcerated voters. But for those in custody who are denied agency of

⁴⁶ *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974).

⁴⁷ 570 U.S. 529 (2013).

⁴⁸ See, e.g., Ala. Code §§ 17-9-30, 17-3-30.1, 17-3-50, 17-4-30, 17-17-14 (2019). These statutes passed in Alabama following the Court's decision in *Shelby County* are similar to those passed in other states. See, e.g., Effects of *Shelby County v. Holder* on the Voting Rights Act, Brennan Ctr. for Just. (June 21, 2023), <https://www.brennancenter.org/our-work/research-reports/effects-shelby-county-v-holder-voting-rights-act> [<https://perma.cc/7WV4-FUUB>]; Jasleen Singh & Sara Carter, States Have Added Nearly 100 Restrictive Laws Since SCOTUS Guttled the Voting Rights Act 10 Years Ago, Brennan Ctr. for Just. (June 23, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/states-have-added-nearly-100-restrictive-laws-scotus-guttled-voting-rights> [<https://perma.cc/3KRR-25KG>].

⁴⁹ For a description of required procedures to register to vote and cast an absentee ballot in Connecticut, see Off. of the Sec'y of State, State of Conn., Absentee Voting Information, <https://portal.ct.gov/SOTS/Election-Services/V5-Side-Navigation/ELE---Voter-Information> [<https://perma.cc/82YG-HQBC>] (last visited July 17, 2024); see also Gabby DeBenedictis, What Are Connecticut's Absentee Ballot Rules? We've Outlined Them Here, CT Mirror (Oct. 9, 2023, 7:30 AM), <https://ctmirror.org/2023/10/09/ct-absentee-ballot-voting-bridgeport-primary-election/> [<https://perma.cc/Z9K6-VEMQ>] (describing absentee ballot procedures and eligibility in Connecticut).

⁵⁰ For an overview of state-by-state and federal voting registration requirements and voting procedures, see, for example, Voter Registration Rules, <https://www.vote.org/voter-registration-rules/> [<https://perma.cc/9JX2-N27B>] (last visited July 17, 2024).

movement—either because they may be moved with little notice from one facility to another or may not have freedom of movement within a facility—these challenges may be insurmountable and so materially equate to disenfranchisement.⁵¹ This is true for individuals who have non-disenfranchising convictions as well as for those held in pretrial detention who have not been convicted at all.⁵²

Beyond these barriers to voting that result from incarceration, laws disenfranchising based on conviction status have been part of voting disqualification laws in the United States since the founding.⁵³ Such laws, often referred to by the misnomer “felon[] disenfranchisement,” vary from state to state and may include non-felony disqualifiers.⁵⁴ This variance creates confusion around voting rights, as disqualifying convictions and restoration of voting rights processes vary. Our work in Connecticut, for example, revealed that courts were not consistently informing defendants at sentencing whether their conviction produced disenfranchisement or what the terms of restoration, if any, are.⁵⁵ In Alabama, individuals do not receive information about voter restoration at sentencing and are instead told that some felony convictions may affect the right to vote.⁵⁶ In Florida, recent efforts to re-enfranchise those who

⁵¹ See, e.g., Rabia Belt, *Mass Institutionalization and Civil Death*, 96 N.Y.U. L. Rev. 857, 869–70 (2021) (explaining the procedural barriers to voting while incarcerated); Margaret Barthel, *Getting Out the Vote from the County Jail*, *The Atlantic* (Nov. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783> [<https://perma.cc/4Q2C-N8AX>]; *O’Brien v. Skinner*, 414 U.S. 524, 528–29 (1974) (noting the barriers to voting in jail that render those in jail unable to vote by any means other than an absentee ballot).

⁵² See, e.g., Zina Makar, *Detention, Disenfranchisement, and Doctrinal Integration*, 95 S. Cal. L. Rev. 365, 377 (2021) (noting that, despite pretrial detainees being disenfranchised without absentee voting, the Supreme Court refused to see it that way).

⁵³ See Keyssar, *supra* note 2, at app. tbls.A.7 & A.15.

⁵⁴ For a state-by-state comparison of such laws, see, for example, *Felon Voting Rights*, Nat’l Conf. of State Legislatures, <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights> [<https://perma.cc/42KJ-QHXR>] (last updated June 6, 2024).

⁵⁵ Author’s notes on sentencing policies in Connecticut based on in-court observations and conversations with judges and practitioners (on file with authors); see also Chin, *supra* note 43, at 1828–29 (describing the need for courts to advise defendants of the consequences of conviction, including the loss of the right to vote); Erika Wood & Rachel Bloom, *ACLU & Brennan Ctr. for Just., De Facto Disenfranchisement 2–8* (2008), <https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> [<https://perma.cc/EX67-JT93>] (noting misinformation among courts and attorneys regarding disenfranchising offenses and methods of restoration).

⁵⁶ Author’s notes on sentencing policies in Alabama based on in-court observations and conversations with judges and practitioners (on file with authors); see also Wood & Bloom, *supra* note 55, at 3–4 (noting that “restoration of voting rights [in Alabama is] contingent upon

have served periods of incarceration after conviction suffered setbacks because individuals had not yet paid fines and fees imposed at sentencing.⁵⁷

Barriers to voting that are the result of conviction and incarceration are the product of criminal legal systems that disproportionately impact Black, brown, and poor voters.⁵⁸ Such voters are policed, prosecuted, convicted, and incarcerated both before and after conviction at higher rates than others.⁵⁹ As a result, they are denied access to the ballot at higher rates.⁶⁰ It is impossible to disentangle these policies from their racist origins.

Whether considering barriers to voting based on carceral status or disenfranchisement as a result of conviction, this body of election law mirrors a construction of voting as a privilege that the citizen must earn and can lose. This construction, in turn, both defines who gets to be a representative and, by extension, who is represented in government decisions and how.

B. The Legacy of Representation

Restrictions on voting rights and the construction of voting as a privilege, not a right, are linked to notions of who is qualified to represent

an individual's offense or number of convictions"). In addition, after a recent law change, at least one judge likely provided misinformation about voting rights to formerly convicted people. See Connor Sheets & Sarah Whites-Koditschek, *In Alabama, Some Felons Are Wrongly Being Barred from Voting*, AL.com (Oct. 30, 2020, 7:13 AM), <https://www.al.com/news/2020/10/in-alabama-some-felons-are-being-wrongly-barred-from-voting.html> [<https://perma.cc/9RCM-D24C>].

⁵⁷ See Ashley Lopez, *Advocates in Florida Clamor for a Fix for the Formerly Incarcerated Who Want to Vote*, NPR (May 4, 2023, 5:01 AM), <https://www.npr.org/2023/05/04/1173786694/felon-voting-database-florida-registration-card-disclaimer> [<https://perma.cc/3XH6-7TKA>].

⁵⁸ See Christopher Uggen, Ryan Larson, Sarah Shannon & Robert Stewart, *Locked Out 2022: Estimates of People Denied Voting Rights*, Sent'g Project (Oct. 25, 2022), <https://www.sentencingproject.org/reports/locked-out-2022-estimates-of-people-denied-voting-rights/> [<https://perma.cc/WY3U-XM99>].

⁵⁹ *Id.* (noting that racial and ethnic "disparities in the criminal justice system are linked to disparities in political representation"); Margaret E. Finzen, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 *Geo. J. on Poverty L. & Pol'y* 299, 299–301 (2005) (noting "the disproportionate number of Black people, with respect to their total share of the population, that have been arrested, prosecuted, and imprisoned").

⁶⁰ Uggen et al., *supra* note 58 (showing that, among the adult population, 5.3 percent of African Americans are disenfranchised compared to 1.5 percent of the non-African American population).

others in government, who deserves representation, and who was excluded from full citizenship. Historic restrictions and qualifications based on property, wealth, education, age, gender, and race were premised on the ideal of benign representation by white, educated, propertied, adult men who would vote on behalf of those less capable of independently asserting their interests in governance.⁶¹ Modern voting requirements that impose burdens on potential voters and/or exclude whole swaths of people are premised on this same idea.

Disenfranchisement based on criminal conviction and/or carceral status allows the state to use the criminal legal system to strip critical components of citizenship. That system disproportionately impacts marginalized populations, including Black, brown, and poor populations.⁶² As a result, their use as a means to curtail voting rights ensures a continuation of diminished citizenship akin to that produced by historic voting restrictions.⁶³ We have witnessed this legacy of disenfranchisement legislated and maintained first through explicitly race- and class-based restrictions and later through restrictions that carry disproportionate impacts. We have seen the intergenerational impact in our communities and in the communities of those we serve—Black, brown, and poor communities.⁶⁴ As organizers and those who imagine a

⁶¹ See Keyssar, *supra* note 2, at 5–9. Similar arguments were made at the time of the founding as to why state and local representation was necessary. In Cornelius, Anti-Federalists describe the ideal elected state representative as a servant to his constituents but also, because of his lived proximity to the community, as someone able to understand the poverty and wants of those unable to vote. See Essay by Cornelius, *Hampshire Chron. (Mass.)*, Dec. 18, 1787, *reprinted in* 4 *The Complete Anti-Federalist* 138, 141 (Herbert J. Storing ed., 1981).

⁶² See Uggen et al., *supra* note 58; Teddy Okechukwu, *Disenfranchisement, Democracy, and Incarceration: A Legislative End to Felony Disenfranchisement in United States Prisons*, 170 *U. Pa. L. Rev.* 1303, 1312 (2022).

⁶³ See generally Alexander, *supra* note 41 (describing how mass incarceration in the United States serves as the “New Jim Crow” in that it achieves the same aims—diminishing citizenship for African Americans—through disenfranchisement and legal forms of discrimination).

⁶⁴ In her book *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander offers a similar account of a legacy of exclusion from the full rights of citizenship through systems of mass incarceration. *Id.* One study also notes that children who grow up in households where adults are disenfranchised are less likely to be civically engaged themselves as adults. See Melanie Bowers & Robert R. Preuhs, *Collateral Consequences of a Collateral Penalty: The Negative Effect of Felon Disenfranchisement Laws on the Political Participation of Nonfelons*, 90 *Soc. Sci. Q.* 722, 724–25 (2009); see also Kevin Morris, *Neighborhoods and Felony Disenfranchisement: The Case of New York City*, 57 *Urb. Affs. Rev.* 1203, 1205–15 (2021) (finding that neighborhoods with high numbers of disenfranchised voters also had lower turnout among enfranchised voters).

new legal reality, we recognize that even as progress around voting rights has been made, the legacy of past restrictions lingers, and with it the vision of benign representation by a voting elite. This is particularly true in the context of disenfranchisement based on carceral status and conviction.

In justifying the disqualification of voters, state actors describe those incarcerated or convicted as less deserving or having forfeited voting privileges or rights because of immorality or failure to abide by social expectations.⁶⁵ Their conviction or incarceration defines their eligibility to be full citizens. Consider Alabama: like many states, it draws its list of disenfranchising felonies from crimes of “moral turpitude.”⁶⁶ Other states broadly disenfranchise those convicted of *any* felony, a startlingly broad range of offenses.⁶⁷ Some states deny suffrage based on both felony and misdemeanor convictions.⁶⁸ For those in custody, regardless of their conviction status, the right to vote may lose meaning without the ability to actually access the means to cast the ballot.⁶⁹

These exclusions carry downstream consequences. Others have described, in sweeping terms, the ties between disenfranchisement and economic and social depression in marginalized and majority-minority communities.⁷⁰ For our part, we have witnessed in our work and lives the power of political disenfranchisement. In communities with disproportionately high rates of incarceration, those in custody lack representation, but so do the people whose interests they might champion with their vote. Families, friends, and neighbors of the incarcerated—including children excluded from the franchise because of their age—lose their political representation as a result of carceral restrictions on voting.

⁶⁵ See Keyssar, *supra* note 2, at 304; Okechukwu, *supra* note 61, at 1316–17.

⁶⁶ Ala. Code § 17-3-30.1 (2024); see also, e.g., Miss. Code Ann. § 23-15-19 (2024); Alaska Stat. § 15.05.030 (2023); Tenn. Code Ann. § 40-20-112 (2023) (all disenfranchising based on particular felony convictions).

⁶⁷ See National Conference of State Legislatures, *supra* note 53; Md. Code Ann., Elec. Law § 3-102 (LexisNexis 2023); Mass. Const. art. III; Minn. Stat. § 201.014 (2023) (all disenfranchising for all felony convictions).

⁶⁸ See, e.g., Mich. Comp. Laws § 168.758b (2024); Ind. Code Ann. § 3-7-13-4 (West 2024); 730 Ill. Comp. Stat. 5/5-5-5 (2024) (all disenfranchising until release from prison based on felony or misdemeanor convictions).

⁶⁹ See, e.g., Belt, *supra* note 50, at 869–70; Barthel, *supra* note 51; O’Brien v. Skinner, 414 U.S. 524, 527–31 (1974).

⁷⁰ See Alexander, *supra* note 41, at 156–58 (quoting from communities who expressed frustration that by losing their right to vote they “lost all voice or control over [their] government”).

For these communities, representation is once again reduced to an act of charity and paternalism from those outside the community. Less heavily policed and prosecuted communities decide for these marginalized subjects how government ought to proceed. The result is evident in social policies and their rhetoric that echo the nation's history of racism, sexism, xenophobia, and classism. Tropes ranging from “welfare queens” to “law and order” reveal the idea that marginalized populations require support, saving, and protection through secondary representation, and that they are not able to enjoy the ability to represent themselves and their own interests — and that powerful state actors ought to enact policies with this principle in mind.⁷¹ If a theory of suffrage policy in the United States exists, that theory is *not* that everyone deserves to vote.

II. THEORY AND PRACTICE

Our own sense of this theory bears out in our work and lived experience. We met in 2022 when we worked together as part of a grassroots coalition to overturn Connecticut's felony disenfranchisement laws and increase access to voting for incarcerated people who retained their right to vote. While we each came to this work from different backgrounds, we had both witnessed the impact of disenfranchisement and its accompanying political disempowerment, particularly in over-policed, marginalized communities.

⁷¹ Terrell Carter & Rachel López, *If Lived Experience Could Speak: A Method for Repairing Epistemic Violence in Law & the Legal Academy*, 109 *Minn. L. Rev.* (forthcoming 2024) (manuscript at 38–39), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4741795# [<https://perma.cc/MRB5-YTJU>] (noting that the trope of “welfare queen” is often credited to Daniel Patrick Moynihan's 1965 report *The Negro Family: The Case for National Action*). The use of these tropes as a means to influence voters, however, is widespread:

[C]onservative politicians arguing for eradication of a welfare safety net “triumphed intellectually in the 1980s because they offered ordinary Americans a convincing narrative that explained their manifold worries.” . . . “In this narrative, welfare, the undeserving poor, and the cities they inhabited became centerpieces of an explanation for economic stagnation and moral decay.” To this end, the metaphor of the Welfare Queen has proven to be a devastatingly effective master “narrative” of the dysfunctional Black family that takes more than its fair share of public resources. Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 *B.C. J.L. & Soc. Just.* 233, 246–47 (2014) (footnotes omitted) (first quoting Michael B. Katz, *The Undeserving Poor: America's Enduring Confrontation with Poverty* 167 (2013); then quoting *id.*; and then quoting Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision-Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 *S. Cal. Interdisc. L.J.* 259, 305 (2009)).

Jenny

As a former public defender and advocate, Jenny saw clients lose access to the vote either through disenfranchisement as a result of conviction or when the mechanics of voting were rendered impossible by a lack of freedom of movement or access to personal documents in prisons and jails. For some clients, I saw the loss of the right appear to receive relatively little focus in the face of a long sentence and a correspondingly long absence from the community. Some clients confessed to me that they had never voted because they believed their vote carried no power, so its loss was insignificant compared to other carceral realities. I understood their perspective that government was distant and law was a condition to live under rather than to construct. For others, the loss of the right to vote was described to me as equivalent to a death of identity—the loss of a marker of citizenship and, by extension, humanity. Like so much they experienced in the criminal legal system, they were rendered voiceless or never had a voice to begin with.⁷²

James

For James, the work was personal in a different way. Even though I had grown up in an educated family with a middle-class income, before I even had a chance to vote, I lost my right to vote as a result of a conviction. I entered the carceral system ten months before my eighteenth birthday. I exited days after my thirty-seventh. It wasn't until I left prison that I understood the importance of civic engagement and what I had lost under Connecticut's carceral disenfranchisement laws. I left prison with an internship as a policy analyst for a community development financial institution. It was there that I learned of the consequences of under-banking and housing disparity in marginalized communities. Learning this was valuable, but it was not why I took the job.

⁷² Jenny and others have written in the past about the isolating and excluding nature of legal systems that leave the people impacted by them voiceless. For examples of this work, see, for example, Carter & López, *supra* note 70, at 23–26; M. Eve Hanan, *Invisible Prisons*, 54 U.C. Davis L. Rev. 1185, 1217 (2020); Jenny E. Carroll, *The Resistance Defense*, 64 Ala. L. Rev. 589, 594 (2013); Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1450–52 (2005); Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 Yale L.J. 259, 261 (1993); Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 Hofstra L. Rev. 533, 535 (1992).

I took the job because I wanted to understand the underlying issues in my community. I wanted to understand the creation of my community through policy that accounts for the culture I encountered and the culture that encountered me. I wanted to look simultaneously inside at my own motivations and outside at the catalysts of those motivations. I wanted to know: What led me to see street crime as a viable economic outlet? What were the pressures that I felt that made me feel crime was the path to my survival and success? Where did those pressures come from?

To further my search for these answers, I also volunteered at several community organizations in an effort to find civic engagement that might help me name the motives and existence that led me to incarceration. I knew I didn't have the right to vote under Connecticut law because I was on parole, but I was unfazed.⁷³ My vote didn't seem to matter. Even as I searched for my own answers, I never thought voting was pivotal to developing my community or combatting the harm I had suffered and inflicted.

It wasn't until my former boss sent me to the Legislative Office Building to observe a Housing Committee meeting within the Connecticut legislature that I understood the power of voting to my identity as a citizen and member of a community.⁷⁴ During the meeting, I remember that the Committee was considering changes to the state's zoning act. The zoning act gave every city and town autonomy to create their zoning laws and, in the process, to determine who could and could not live in a community.⁷⁵ At the hearing, the first thing I noticed was that no one looked like me—no representative on the Committee and no one there to testify about the zoning act change. As I listened to the proceedings, I quickly learned that this legislative change would affect how much low-income housing would be required in Connecticut's suburban towns, particularly those often referred to as Connecticut's

⁷³ See Kelan Lyons, *Unlocking the Vote of Connecticut's Formerly Incarcerated*, PBS (June 9, 2020), <https://www.pbs.org/wgbh/americanexperience/features/vote-unlocking-vote-connecticuts-formerly-incarcerated/> [<https://perma.cc/R44K-URZS>].

⁷⁴ Housing Committee: Connecticut General Assembly, Ballotpedia, https://ballotpedia.org/Housing_Committee,_Connecticut_General_Assembly [<https://perma.cc/JM6Q-TLZF>] (last visited July 13, 2024); Housing Committee, Conn. Gen. Assembly, <https://www.cga.ct.gov/hsg/> [<https://perma.cc/EC7X-EXNH>] (last visited July 13, 2024).

⁷⁵ See Off. of Pol'y & Mgmt., *Intergovernmental Pol'y Div., State of Conn., Report on Planning and Zoning Statutes 44, 98–102 (2005)*, <https://portal.ct.gov/-/media/opm/igpp/pz/planningandzoningstatutesdoc.doc> [<https://perma.cc/YJ94-CXGZ>].

“Gold Coast” for their concentration of wealth compared to the rest of the state.⁷⁶

I remember that citizens of these towns showed up en masse. I heard them voice concerns about people like me, a Black man, and other members of my community. To me, it sounded like they thought our presence in their towns would be the beginning of the fall of their communities. They used these arguments to urge the legislature to allow them to zone affordable and low-income housing out of their wealthy enclaves. To be Black or poor was to bring ruin. It was also to be denied a place in the most well-resourced towns in the state.

It was after this encounter that I realized that we, the very marginalized people these changes to the zoning law would exclude from the most resourced towns, were absent where it most mattered. We marched and volunteered for change, but we had no say in the laws that govern our communities. I was not a voter because of my conviction. Many members of my community were not voters because of their convictions or carceral status. As a result, we had no say, no voice, and no true allies. We could bear witness, but we could not speak as full citizens. We could not move legislators to change in our own voices because we lacked the currency and identity of citizenship—the vote. Even as others might speak for or about us, they were not us.

That feeling inflamed my passions and led me to join Kennard Ray to form the Full Citizens Coalition (“FCC”).⁷⁷ A Connecticut-based action group, FCC aspires to ensure that all Connecticut citizens are treated as *full* citizens by working to undo the harm of disenfranchisement based on conviction and incarceration.⁷⁸ In doing this work, I realized that the reason I never thought about voting was because I couldn’t remember anyone in my life suggesting that civic participation ought to occur through voting. At school I learned about white, European, benevolent founders, freedom of speech, and emancipation, but never about building power through our own communities by controlling the politics of Black- and brown-majority cities. I never learned of the need to participate in

⁷⁶ See “The Gold Coast”: Fairfield County, Ct., NYC 2 CT, <https://nyc2ct.com/suburban-living/ct-commuter-towns-of-nyc/> [<https://perma.cc/GX6Z-YLLS>] (last visited July 6, 2024); Paul Harris, Connecticut’s Wealthy Gold Coast: Where Life Is Good, if You Can Afford It, *The Guardian* (Feb. 15, 2013, 11:38 AM), <https://www.theguardian.com/world/2013/feb/15/connecticut-gold-coast-life-afford> [<https://perma.cc/4HHX-TEGA>].

⁷⁷ See Full Citizens Coalition, <https://www.fullcitizenscoalition.org/> [<https://perma.cc/BJH6-MPJJ>] (last visited July 6, 2024).

⁷⁸ *Id.*

government, only that I was governed. I never learned about why voting mattered or even *how* to vote. I never knew what the Democratic Town Committee was or how it affected elections. I didn't even know how to get a ballot or register.

My first campaign with FCC was personal. I now understood more about the power of voting. I also knew I wanted to vote but couldn't. I went to prison too young to vote and returned with more than ten years on parole. In Connecticut, I could not have my voting rights restored until I completed my sentence, including my period of parole.⁷⁹ As a result, I wouldn't be able to cast my first vote until I was fifty-two, and I wouldn't be able to hold office.⁸⁰ More than half my life would be spent as an incomplete citizen in the community I knew and called home.

As the FCC started running civic workshops to encourage voting and civic participation, we chose not to separate these efforts from the people we sought to serve. We ran them in the community itself at the places where people work and meet. We conducted workshops at barbershops, community and state colleges, churches, grocery stores, and Walmarts. It was sometimes chaotic, but wherever members of the community gathered, we tried to be there. At FCC meetings and in daily life, nearly every community member I met told the story of their fathers, brothers, grandfathers, uncles, husbands, and friends in prison, as well as stories of their mothers, grandmothers, aunts, and sisters who had been incarcerated. Each of these people represented a vote lost in our community.

These community members often expressed disdain for a government that did little to address the lack of livable, affordable housing stock in their communities. Community members complained that the very government that should represent them would lock them out of city government contract bids for construction, flagging, or industrial cleaning. But when FCC organizers would point out that places such as Bridgeport and Hartford have majority-minority populations, these same community members would fail to connect voting as the means to shift power and render government responsive to *our* community's needs.⁸¹

⁷⁹ See Conn. Gen. Stat. § 9-46a(b)(1) (2023) (denying the right to vote to those on parole for certain felony convictions).

⁸⁰ See *id.* § 9-46(c) (prohibiting a person convicted of a felony from running for office).

⁸¹ See Race and Ethnicity of Bridgeport City, Connecticut, U.S. Census Bureau, https://data.census.gov/profile/Bridgeport_city,_Connecticut?g=160XX00US0908000#race-and-ethnicity [<https://perma.cc/QUS4-8RFY>] (last updated 2020); Demographics of Hartford

When I and other FCC organizers would tell people that if they elected the mayor and the council, they could push to get members of the community like themselves on the commissions that awarded the contracts and set zoning policies, the response would be the same: “Voting don’t change anything, it’s rigged.” People who had lived so long without power couldn’t see the power that had been taken from them and their incarcerated loved ones. I knew this because I had felt the same way. The vote I lost with my conviction mattered to me most when I learned the power it held.

In intimate Black spaces, our conversations focused primarily on the ramifications of civil death through felony disenfranchisement and the disengagement that engulfed our community. In my Black family, all redirect was in defense of party lines and the candidates who asked for support but offered little in return. When I confronted these defenses with questions about whether our community’s interests were actually being represented, I grew tired of the response: “Well, the alternative is far worse.” Yet even those who defended the status quo in fear of what was “far worse” were wholly dissatisfied and indifferent to the process that left so few real choices.

What became far more distressing than what I witnessed in our workshops and in my family was the growing coalition of self-interested organizational advocates that have begun to clutter the field of rights restoration.⁸² The paternalism that penned, proposed, and pushed the policies that harmed these very communities had stripped them of representation by laws that disenfranchised and, for those who remained enfranchised, processes that made voting impossible. I saw advocacy work propped up and heavily funded to challenge and give voice to issues of disenfranchisement. Yet the people who did this work had no actual skin in the game; they were neither disenfranchised themselves nor did they come from the neighborhoods that suffered the most because of disproportionate levels of incarceration. They were hailed as the experts, as if we in the community couldn’t understand or know our own worth, power, and loss. Their efforts remind me of the rhetoric of voting on behalf of the disenfranchised as an act of charity, not community.

City, Connecticut, U.S. Census Bureau, https://data.census.gov/profile/Hartford_city,_Connecticut?g=160XX00US0937000 [<https://perma.cc/VHF3-5RYH>] (last updated 2020).

⁸² Such organizations included the ACLU’s Connecticut branch, the Brennan Center for Justice, the Prison Policy Initiative, the Sentencing Project, and Secure Democracy.

I remember that these experts compromised easily. They quickly jettisoned a complete repeal of disenfranchising policies in favor of enfranchising a few—those with less offensive convictions. The irony was not lost on me that what they carved out of the legislation was a compromise that sacrificed enfranchisement for those who sat in prisons on the same charges I had just five years earlier. In doing this, they made judgments about the impact of leaving some people disenfranchised. They made these judgments without taking into account the lived costs of such disenfranchisement—the incomplete citizenship and the denial of representation. Denying the power to vote meant that decisions about the future of some communities were being made without the input of large swaths of imprisoned and convicted people who lived in and made up that community.

In the room where these compromises were being discussed, I often found myself having to defend and shine light on the value of the very people that everyone in the room was supposed to be advocating for. And often, nobody in the room full of advocates understood that I was advocating for myself.

CONCLUSION

We authors met in one of those rooms in the midst of a heated discussion as to how far re-enfranchisement should go. We found ourselves both arguing from our different perspectives for the same position—that no one should be denied their right as a citizen to vote because of conviction or incarceration. We come from different backgrounds, but we were joined by a shared commitment to voting rights. Based on this, we worked to draft a bill to restore voting rights to all convicted and incarcerated people in Connecticut.

Ultimately, the bill failed. It died in committee without even a bill number. The 2022 legislature was unwilling to consider restoring voting rights to all voting aged citizens and making voting accessible to those in custody. In the midst of the dominant discussion about concerns regarding the logistics of facilitating the vote of those incarcerated, there was a quieter question about whether those convicted of crimes or incarcerated deserved the full rights of citizenship.

This work in 2022 was part of a national effort to expand enfranchisement to convicted and incarcerated people.⁸³ And as we know from our experience, this work has had limited success. Looking forward, as the nation seeks to confront the twin realities of criminal legal systems that disproportionately impact marginalized populations—particularly young, Black and brown, poor, and male populations—and electoral systems that dilute the vote of large swaths of citizens, it must also confront the power of disenfranchisement. Without the political power of the vote, those subject to these systems lose the ability to weigh in on their validity or to push for their change as equal participants in our representative democracy. Whatever precious little difference we may imagine a single vote makes in an election, it is hard to deny the power of the identity the vote confers. A voter is a full citizen. A voter has not only a stake, but a voice in governance. By extension, those denied the vote are not full citizens, and whatever stake they may claim in government is insufficient to warrant a voice. As we look forward and dare to imagine different systems—criminal or otherwise—we know that the right to vote must be central both as a mechanism to change and a pathway to power.

⁸³ See Nicole D. Porter & Morgan McLeod, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997–2023*, Sent’g Project (Oct. 18, 2023), <https://www.sentencingproject.org/reports/expanding-the-vote-state-felony-disenfranchisement-reform-1997-2023/> [<https://perma.cc/8EMH-NPUJ>].