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Crime and Unequal Punishment: Proving Discriminatory Intent in Felony Disenfranchisement

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Crime and Unequal Punishment: Proving Racial Intent in Felony Disenfranchisement

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I. Introduction

Marion Scraggs is a 57-year-old former felon who started using drugs after high school.[3] She served her sentence in jail, and, while she was incarcerated, her son was murdered. Upon her release, Marion went to school and got a master's degree specializing in addiction, and she now works as a supervisor for the housekeeping division of a luxury hotel. Marion has not touched drugs since her conviction. She changed her life. She is the model for rehabilitation. She is entirely out of the criminal justice system and is a fully functioning citizen, except for one thing: she is not allowed to vote.[4]

Felony disenfranchisement, or barring convicted felons from voting, is a punishment used in almost every state. Although states

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3 Kelly McEvers, *In Florida, People With Past Felony Convictions Can't Vote, But That Could All Change*, National Public Radio, (Nov. 2, 2018, 5:52 PM), https://www.npr.org/2018/11/02/663655567/in-florida-people-with-past-felony-convictions-cant-vote-but-that-could-all-chan.

4 *Id*.

differ in their severity of felony disenfranchisement, these laws resulted in 5.1 million Americans being unable to participate in the 2020 national election.[5] The United States Supreme Court ruled in *Richardson v. Ramirez* that the language of the 14th Amendment, specifically the condition of "participation in rebellion or other crime," offers a clear legal path for felony disenfranchisement to exist outside of legal contentions, such as the 14th Amendment's equal protection clause.[6] The Court later found in *Hunter v. Underwood* that felony disenfranchisement would violate the equal protection clause if it contained "both [an] impermissible racial motivation and racially discriminatory impact."[7] Recent scholarship has found felony disenfranchisement to disproportionately affect marginalized racial groups.[8] As such, it becomes the burden of felony disenfranchisement constitutional challenges to prove racial intent, a process that has been markedly difficult. This paper argues that felony disenfranchisement's constitutionality should be determined using a more comprehensive racial intent qualification that accounts for not only explicit intent, but also an expanded definition of intent: lethargic intent.

5 Christina Maxouris, *More than 5 million people with felony convictions can't vote in this year's election, advocacy group finds*, Cable News Network, (Oct. 15, 2020, 4:17 AM), https://www.cnn.com/2020/10/15/us/felony-convictions-voting-sentencing-project-study/index.html.

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

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

8 Angela Behrens, Christopher Uggen, and Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 American Journal of Sociology 559, 559 (2003).

II. Background

A. Disenfranchisement History

The United States derived the concept of disenfranchisement from its colonial history, specifically the medieval principle of "civil death".[9] Given to the equivalents of felony offenders, civil death described a state in which an individual forfeited all legal protections, even those pertaining to murder.[10] English law maintained this ideal with strict punishments for felony-level offenders, "which resulted in forfeiture of all property, inability to inherit or devise property, and loss of all civil rights".[11] The British colonies in the Americas were influenced by this heritage in 1792 when Kentucky began the trend of legislatures writing felony disenfranchisement provisions into their respective state constitutions.[12] Following 1792, twenty-four out of thirty-three states wrote felony disenfranchisement provisions into their constitutions.[13]

Following the ratification of the Fifteenth Amendment in 1870, a large portion of the U.S. had a newfound interest in finding ways to disenfranchise Black voters.[14] In addition to overtly punitive and Black-targeting black codes, felony disenfranchisement's expansion following the Fifteenth Amendment allowed states to erase

9 Alec Ewald, *'Civil Death': The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002, Wisc. L. Rev. 1045, 1045 (2012).

10 Debra Parkes, *Ballot Boxes behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*¸ 13 Temp. Pol. & Civ. Rts. L. Rev. 71, 74 (2003).

11 *Id.*

12 ProCon.org, *Historical Timeline: US History of Felon Voting/Disenfranchisement*, Britannica. (Sep. 23, 2020) https://felonvoting.procon.org/historical-timeline/.

13 *Id*.

14 We'd like to acknowledge Erin Kelly and their article *Racism & Felony Disenfranchisement: An Intertwined History* for being a valuable resource throughout the research and writing process.

Black political power.[15] These felony disenfranchisement provisions remain in several states and continue to systematically and disproportionately affect the Black population and have been repeatedly documented. For instance, today, "one in 16 African Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-African Americans."[16]

Table 1

Status of Felony Disenfranchisement Laws At Year End 2021

Final Stage of Felony Disenfranchisement	N	States
None	3	Maine, Vermont, District of Columbia
Prison Inmates	18	Oregon, California, Nevada, Utah, Colorado, Montanna, North Dakota, Michigan, Illinois, Indiana, Ohio, Pennsylvania, Maryland, New Jersey, Massachusetts, New Hampshire, Rhode Island, Hawaii
Parolees	2	New York, Connecticut
Probationers	19	Washington, Idaho, Minnesota, Wisconsin, South Dakota, Nebraska, Kansas, Missouri, Arkansas, Oklahoma, Texas, New Mexico, Alaska, Louisiana, Georgia, South Carolina, West Virginia, Delaware
Some or All Ex-Felons	9	New Mexico, Wyoming, Iowa, Tennessee, Mississippi, Alabama, Florida, Virginia, Kentucky

Source: ACLU

15 Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 American Journal of Sociology. 559, 598 (2003).

16 Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,* The Sentencing Project (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.

As shown in Table 1, felony disenfranchisement differs significantly by state. Felons are re-enfranchised at different points in their sentences. A few rare states never disenfranchise felons, while most re-enfranchise felons at either parole or probation. A fair number never restore voting rights or only restore them after special requirements are met, such as after the felons pay a fee or receive the governor's permission. The 5.1 million Americans disenfranchised by these laws are not evenly distributed.[17] For example, "in seven states—Alabama, Florida, Kentucky, Mississippi, Tennessee, Virginia, and Wyoming—more than one in seven African Americans is disenfranchised, twice the national average for African Americans."[18]

B. Felony Disenfranchisement in Court

The first case in which the Supreme Court considered the constitutionality of felony disenfranchisement was *Richardson v. Ramirez* in 1974. In this case, three individuals who had previously been convicted of felonies and completed their sentences and parole were denied voter registration in California.[19] The case was brought to the California Supreme Court under the argument that it violated the Equal Protection Clause of the Fourteenth Amendment.[20] The Court agreed, stating that California's disenfranchisement of ex-felons could not pass strict scrutiny. However, the United States Supreme Court reversed the California Supreme Court's decision on the grounds that the disenfranchisement of felons was not to be held

17 Christina Maxouris, *More than 5 million people with felony convictions can't vote in this year's election, advocacy group finds*, Cable News Network, (Oct. 15, 2020, 4:17 AM), https://www.cnn.com/2020/10/15/us/felony-convictions-voting-sentencing-project-study/index.html.

18 Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,* The Sentencing Project (Oct. 30, 2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/.

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

20 *Ramirez v. Brown*, 507 P.2d 1345 (Cal. 1973).

to the same standards as other voting rights cases.[21] The majority opinion held that Section 2 of the Fourteenth Amendment explicitly makes an exception for denying the right to vote "for participation in rebellion, or other crime",[22] and since this language remained unaltered throughout much debate on the syntax of the Amendment, those who wrote it clearly intended for states to be able to disenfranchise felons.[23] Thus, the Court determined that felony disenfranchisement need not be held under strict scrutiny and allowed these laws to continue.

Only months after *Richardson*, in *Thiess v. State Administrative Board of Election Laws,* the District Court of Maryland found that Maryland's felony disenfranchisement law was not unconstitutional.[24] Although the law was not overturned, it did leave open the possibility for disenfranchisement laws to be ruled unconstitutional if they were arbitrarily enforced. Selective enforcement was examined once again in *Williams v. Taylor*, in which the Fifth Circuit Court of Appeals also decided that an otherwise constitutional disenfranchisement law could be ruled unconstitutional in the case of selective enforcement.[25] Even without overturning felony disenfranchisement laws, these cases illustrated that there is a path for determining these laws unconstitutional.

The constitutionality of felony disenfranchisement was examined once again by the Supreme Court with *Hunter v. Underwood* in 1985.[26] In this case, Alabama's felony disenfranchisement laws were challenged after two men were convicted of presenting a worthless check and lost the right to vote under a new provision to the Alabama Constitution allowing for disenfranchisement after crime of any kind. Plaintiffs challenged this disenfranchisement under the Equal

21 *Richardson,* 418 U.S. 24 at 25.

22 U.S. Const. Amend. XIV, § 2.

23 *Richardson,* 418 U.S. 24 at 45.

24 *Thiess v. State Administrative Board of Election Laws*, 387 F. Supp. 1038 (D. Md. 1974).

25 Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982).

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

Protection Clause, arguing that its purpose was discriminatory.[27] The District Court ruled that the law was constitutional because although it did have discriminatory effects, it could not be proven to have racist intent.[28] However, the 11th Circuit Court of Appeals reversed the decision on the grounds that the defendants could not prove that the outcome was not dependent on having a discriminatory purpose.[29] The Supreme Court upheld the Circuit Court's decision that the provision did violate the Equal Protection Clause. The Court argued that since the law was facially neutral with racially disproportionate effects, its constitutionality depended on whether the law was passed with a discriminatory purpose.[30] Using statements by those who adopted this provision that advocate for white supremacy in Alabama, the Court showed that the purpose of the law was discriminatory.[31] This case established that for a felony disenfranchisement to be ruled unconstitutional, it must have "both [an] impermissible racial motivation and racially discriminatory impact".[32]

The impact portion specified in *Hunter v. Underwood* has been shown through decades of modern scholarship. The impact is not only limited to individual voting rights loss; the effects of felony disenfranchisement are correlated with other social contentions. For instance, studies have shown that felony disenfranchisement also reduces turnout amongst those eligible to vote, hurting not only felony offenders, but the community at large.[33] The racial impact of felony disenfranchisement is not a matter of debate; the overwhelming scholarly consensus rules in favor of impermissible racial impact on

27 *Id.*

28 *Id.* at 224.

29 *Id.* at 225.

30 *Id.* at 227.

31 *Id.* at 229.

32 *Id.* at 232.

33 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, 739-740 (2009).

all accounts.[34] Although the racist impacts of felony disenfranchisement have been proven through scholarship, the question of what constitutes racial intent is left unanswered.

C. The Development of Discriminatory Intent

Before discriminatory intent became a necessity for determining constitutionality, racially disparate impacts were more often considered as enough to overturn a law. *Yick Wo v. Hopkins* established that facially neutral laws can still be unconstitutional under the Equal Protection Clause.[35] In this case, a law regulating laundries in wooden buildings was implemented so that it gave permits to virtually all white applicants and no Chinese applicants; additionally, Chinese applicants who did not comply were arrested, while comparable white applicants were not. The Supreme Court ruled this regulation unconstitutional based on these effects.[36] Thus, this case established that racially disparate impacts, even in light of facially neutral laws, can demonstrate the constitutionality of a law under the Equal Protection Clause. Although intent was not used to determine the ruling, it became clear that such obvious racial impacts demonstrated racially discriminatory intent to some extent. If the racial impacts were so obvious, the legislative body clearly meant for these impacts to occur.

The importance of considering racial impacts was further established in later cases, such as the Supreme Court's ruling in *Brown v. Board of Education*. This case was largely based on the effects that segregated schooling would have on children, such as a feeling

34 *E.g.*, Angela Behrens, Christopher Uggen, and Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 American Journal of Sociology 559, 559 (2003); Debra Parkes, *Ballot Boxes behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 Temp. Pol. & Civ. Rts. L. Rev. 71, 74 (2003); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 196 (2004-2005).

35 *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

36 *Id*.

of inferiority and the possibility of permanent stigmatizing mentalities.[37] This consideration of effects became even more important in *Palmer v. Thompson*. The Supreme Court's opinion discussed the importance of considering impact over motive, arguing that previous cases focused on the "actual effects of the enactments," rather than "the motive which led states to behave as they did".[38] To the Court, intent need not be considered on its own because the impacts could demonstrate whether a law violated the Equal Protection Clause.

The current standard for intent is described in *Washington v. Davis*, which established that intent must be discerned by observing the "totality of relevant facts."[39] The Court argued that racial discrimination must be shown to be a motivating factor behind the law's enactment for it to be ruled unconstitutional. Discriminatory intent was further solidified into constitutional law when the Supreme Court decided that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact".[40] There must also be racial motivation behind the law for it to be a violation of the Equal Protection Clause.[41]

Determining this intent can be difficult and problematic. Often, intent is determined through direct evidence, such as quotes stated directly by those who create the laws; however, those who create discriminatory laws are rarely straightforward about such intent, so explicit evidence is not found often. Thus, the relevant facts for determining intent include statistics that demonstrate an undeniable discriminatory impact, the historical background of the decision, the sequence leading up to the decision, and the legislative history or statements made by those who created the action.[42]

37 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

38 *Palmer v. Thompson*, 403 U.S. 217 (1971).

39 *Washington v. Davis*, 426 U.S. 229 (1976).

40 *Arlington Heights v. Metropolitan Housing Dev. Corp*., 429 U.S. 252 (1977).

41 *Id*.

42 *Id*.

Even with this definition of intent, it is still unclear how exactly it can be proven, especially because of issues of facial neutrality. Courts can easily consider only the facts that they view as relevant when it comes to the entirety of relevant facts, while they fail to consider others that are also relevant. Often, discriminatory impacts and discriminatory intent are considered separately, as seen in *Underwood,* rather than considering how impacts may reveal intent. However, it is important to consider how these effects prove intent when considering all the evidence, particularly when they have been in place for years. Although impacts are "not the sole touchstone of invidious racial discrimination,"[43] they can demonstrate intent when the only impacts of a law are discriminatory.

The standard idea of intent is often rudimentary and fails to look at the totality of factors, focusing arbitrarily on obvious ones, such as statements made by policymakers and selective enforcement. By failing to look at the complete picture, discriminatory laws often stay in place despite racially motivated intent. The Supreme Court has already established that obvious racial impacts at the start of a law can clearly demonstrate a racial motivation;[44] however, it is important that courts consider the complete lifespan of these laws, not only their creation. Lethargic intent is necessary to consider when observing the history of felony disenfranchisement laws, as it explains how the actions, or lack thereof, of legislatures in regard to these laws displays their intent just as much as the facts regarding the creation of these laws do.

III. Proof of Claim

A. Explicit Intent

Before examining the framework of a more lateral definition of intent, it remains pertinent to understand the role that explicit discriminatory intent played in the institution of felony disenfranchisement. Just after the Civil War, the criminalization of the newly freed

43 *Arlington,* 429 U.S. 252 at 253.

44 *Williams v. Taylor*, 677 F.2d 510 (5th Cir. 1982).

Black population was of the highest priority to the White South, which relied on slave labor to maintain its economy.[45] The Thirteenth Amendment's slavery exemption for "punishment for crime whereof the party shall have been duly convicted," allowed the South to over-criminalize and over-convict Black populations to maintain its forced-labor economy. Most laws did not specifically target Black individuals by name, but it was "widely understood that these provisions would rarely if ever be enforced on whites."[46] In fact, eight-five to ninety percent of those convicted and sentenced to labor were Black.[47] These individuals were then "leased" out as cheap labor to the very institutions that had enslaved them prior.[48] This targeted criminalization of the Black population would be used in tandem with felony disenfranchisement laws to erase Black political power in the following decades.

As mentioned before, felony disenfranchisement laws had been instituted prior to the Civil War and had historical precedence. However, in the decade following both the enfranchisement of Black males, felony disenfranchisement laws were expanded in almost every state.[49] This new wave of disenfranchisement provisions promoted all felonies to disenfranchisement status, while the prior definitions usually only included robbery and murder.[50] This combination of overcriminalization and punitive disenfranchisement show that felony disenfranchisement's utility was intentionally discriminatory.

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45 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).

46 *Id*.

47 Eric Foner, Reconstruction: America's Unfinished Revolution, 1863-1877 205 (2002).

48 *Id*.

49 Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 American Journal of Sociology. 559, 597 (2003).

50 *Id*. at 565-566.

There are cases where explicit intent was both found and considered by the Court. For instance, Mississippi's legislature altered its felony disenfranchisement law in 1890 to include only crimes that the legislature assumed Black men would commit. These crimes included bigamy, forgery, burglary, arson, and perjury, all of which were easier to over-criminalize within specific communities.[51] It was only six years later that while upholding these new provisions, the U.S. Supreme Court explicitly stated the racially discriminatory intent of the law: "restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker member were prone."[52] While explicit intent was found in a timely manner in Mississippi, there are very few cases in which an obvious timely statement of discriminatory intent can be found. Even when the Court did recognize explicit intent, felony disenfranchisement was upheld, making historical context exceedingly important to consider for any felony disenfranchisement challenge.

In the absence of a legislature's explicit intent, the timing and placement of these laws can speak to their true intentions. An argument could be made that felony disenfranchisement laws cannot have discriminatory intent because they are equally applied to all felons. The historical context is essential for refuting this point. While the law itself might apply equally across all convicted felons within a given state, the history of over-criminalizing Black individuals as a mechanism of disenfranchisement makes felony disenfranchisement a de facto discriminatory practice. However, we acknowledge that discriminatory intent is unlikely to be proven by historical context alone, which is why a more expansive definition of intent is necessary.

B. Lethargic Intent

A more expansive definition of intent would not only consider the foundational context of the law, but also the totality of facts that

51 Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 540 (1993).

52 *Williams v. Mississippi*, 170 U.S. 213 (1898).

become visible once the law is enforced. This is possible by considering lethargic intent, which is the intent demonstrated by policymakers' contentment with or defense of a policy. This intent, though largely based on effects, is not the same as simply considering effects. It contains an important distinction: it considers whether or not the law fulfills its stated purpose. Discriminatory side effects alone are not a violation of the Equal Protection Clause, but in the absence of a law's intended consequences, side effects, when prevalent, become the primary effects. When laws are upheld and defended for a long period of time, legislatures are implying that they are content with the results and that these laws are fulfilling their intended purpose. Once effects become discernible, legislatures should replace laws that do not fulfill their purpose with laws that do.

Though legislators do not always follow this principle, there are instances in which they have changed or repealed laws that had primarily discriminatory impacts. A clear example of this is the Massachusetts 1913 law, which prevented non-residents from getting married in Massachusetts if their marriage would be invalid in their home state.[53] At the time of enactment, the intent behind the law was not completely clear, though many have argued that it was to prevent interracial marriages.[54] The law remained in place long after interracial marriages were made legal nationwide, making the intended purpose defunct. Despite its obsolete purpose, the law continued to be discriminatory in a way not originally intended by preventing many same-sex couples from getting married.[55] These unintended discriminatory effects became the driving factor behind the law's repeal in 2008.[56] The legislature observed the harmful effects of the law, and rather than continuing to be complacent in them, decided to

53 Mass. Gen. Law, ch. 207, § 11 (1913) (repealed 2008).

54 Zebulon Miletsky, *The Dilemma of Interracial Marriage: The Boston NAACP and the National Equal Rights League*, 44 Hist. J. Mass. 136, 139 (2016).

55 Eric Moskowitz, *Senate Votes to Repeal 1913 Law,* Boston.com, (July 16, 2008), http://archive.boston.com/news/local/articles/2008/07/16/senate_votes_to_repeal_1913_law/.

56 *Id*.

repeal it. In doing so, they demonstrated that the discriminatory side effects were not the intended effects of the law.

The standard for discriminatory intent relies on determining a racial motivation behind the enactment of a law. Lethargic intent expands upon this by examining the effects of a law years later. Although this measure focuses on the intent of legislatures long after the law was created, it can also reveal the motivation behind its creation. The current narrow concept of intent assumes that intent is always stated intentionally and cannot account for its often-unconscious nature.[57] By observing whether legislators are complacent in a law's discriminatory effects, courts can determine reasoning behind its enactment that may be more implicit. Even if policymakers do not state their racist motivation or even realize they have it, lethargic intent can reveal this intention by demonstrating contentment with discriminatory effects while the stated purpose is not fulfilled.

C. Lethargic Intent and Felony Disenfranchisement

Establishing racial intent proves to be a difficult hurdle when challenging felony disenfranchisement. Although disenfranchisement policies can have a palpable racist stench, they do not often announce themselves as such. This makes it imperative to outline causal avenues on which racial intent can be proven. Inquiries should focus upon the role of lethargic intent when challenging felony disenfranchisement provisions.

The most common reasoning behind disenfranchisement laws is a causal story guided by the following logic: felons have broken the social contract and have shown that they have poor judgment; therefore, they should not vote. This intended result has never been the reality. At its best, this line of thinking is misguided, at its worst, systemic discrimination. For instance, research has shown that the effects of increased voting by ex-felons have not been successful in keeping away incapable voters. Rather, the effects have been impermissibly negative for people of color. For example, a study of felony

57 Sylvia A. Law, *Where Do We Go from Here- The Fourteenth Amendment, Original Intent, and Present Realities,* 13 Temp. Pol. & Civ. Rts. L. Rev. 691, 697-698 (2004).

disenfranchisement over the years 1850-2002 found obvious racial impacts of felony disenfranchisement laws. It found that just a ten percent increase in a state's nonwhite prison population increased the odds of passing ex-felon disenfranchisement laws by almost fifty percent.[58] These laws do not only have influence over ex-felons, but even on Black individuals who have not committed a crime. In states with lifetime disenfranchisement laws, eligible and registered Black voters are twelve percent less likely to vote than in states without those laws, whereas white voters are only one percent less likely.[59] This is likely to happen because felony disenfranchisement "exacerbates the bias against low socioeconomic status racial and ethnic minorities in electoral outcomes and policy responsiveness."[60]

Felons can often re-enter society without further incidents, and research has found that offenders who vote are less likely to be rearrested than those who do not.[61] A 2011 report by the Florida Parole Commission found that ex-prisoners who did not have their voting rights restored had recidivism rates of thirty-three percent, while those who did have their rights restored saw that rate drop to eleven percent.[62] Felony disenfranchisement, rather than a method of keeping incapable voters away from the voting booths, is a tool that causes ex-felons to be seen and treated as illegitimate and apart

58 Angela Behrens et al., *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 American Journal of Sociology. 559, 588 (2003).

59 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, 739-740 (2009).

60 *Id*. at 741.

61 Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193, 196 (2004-2005).

62 Fla. Parole Comm'n, Status Update: Restoration Of Civil Rights (Rcr) Cases Granted 2009 And 2010, at 7-10 (2011), available at https://www.fcor.state.fl.us/docs/reports/2009-2010ClemencyReport.pdf.

from society.[63] Another stated purpose of these disenfranchisement laws is to deter people from committing felonies; however, there is no evidence that they act as a deterrent at all.[64]

As mentioned earlier, the most common reasoning behind felony disenfranchisement policies is a form of protecting the social contract; these goals are abstract and shield the actual, discriminatory results. This intent should not be permissible in light of extensive racially discriminatory impact. Were these laws to fulfill their intended purposes of preventing people with poor judgment from voting and deterring people from crime, the racially disproportionate impacts could possibly be argued to be side effects of these laws. However, they cannot be considered side effects if they are the only significant impacts. Since most of these laws extend back to the 1800s, legislatures can easily observe whether these laws fulfill their purpose and what their effects have been and continue to be. Since the purposes are not fulfilled and the effects have a racially disproportionate impact, legislatures' inaction in altering these laws demonstrates their intentional contentment with the harmful effects. This lethargic intent must be considered when determining the constitutionality of intent under the Equal Protection Clause.

IV. Application to Farrakhan v. Gregoire

In an effort to apply lethargic intent to recent felony disenfranchisement discourse, we will now examine the applicability of lethargic intent through the case history of *Farrakhan v. Gregoire* (2010). Although this case's contentions center around the Voting Rights Act, it serves an example of a court attempting to meter different measures of both discriminatory intent and impact. *Farrakhan v. Gregoire* (initially *Farrakhan v. Locke*) involved a challenge to Washington State's felony disenfranchisement laws, specifically if

63 Bryan Lee Miller & Laura E. Agnich, *Unpaid Debt To Society: Exploring How Ex-Felons View Restrictions On Voting Rights After The Completion Of Their Sentence*, 19 Cont. Jus. Rev. 1, 1,2 (2015).

64 Bryan Lee Miller & Joseph F. Spillane, *Civil Death: An Examination of Ex-Felon Disenfranchisement and Reintegration*, 14 Punishment and Society. 402, 407 (2012).

said laws violated section two of the federal Voting Rights Act. The various rulings in this case directly relate to the topic of racial intent within felony disenfranchisement challenges.

The initial Farrakhan ruling occurred on December 1st, 2000 within the Eastern District of Washington.[65] In their decision to uphold these laws, the court held that the plaintiffs did not prove that Washington's felony disenfranchisement laws were "motivated by racial animus, or that its operation *by itself* has a discriminatory effect."[66] The court did not feel as if proper racist impact and intent were demonstrated, a decision similar to that of *Hunter v. Underwood*. The three essential rulings in this case are known to those familiar as Farrakhan I, Farrakhan II, and Farrakhan III.

A. Farrakhan I

The Ninth Circuit later overturned the district ruling on July 25th, 2003.[67] This ruling found that racial bias in the criminal justice system is relevant under Section 2 of the Voting Rights Act.[68] This decision promotes the use of historical racial analysis in felony disenfranchisement decisions.

B. Farrakhan II

Upon transfer to the Eastern Court of Washington in 2006, and after denial of review by the U.S. Supreme Court, the second Farrakhan ruling found "Washington's history, or lack thereof, of racial bias in its electoral process and in its decision to enact the felon disenfranchisement provisions, counterbalance the contemporary discriminatory effects that result from the day-to-day functioning of Washington's criminal justice system."[69] Farrakhan II's refutation

65 *Farrakhan v. Locke*, 987 F. Supp. 1304 (E. D. Wash. 2000).

66 *Id*.

67 *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003).

68 *Id*.

69 *Farrakhan v. Gregoire*, 590 F.3d 989 (E.D. Wash. 2006).

of Farrakhan I's reasoning demonstrates the legal elasticity when considering racial impacts and intent in felony disenfranchisement challenges, further promoting the use of a more expansive measure of intent.

C. Farrakhan III

In 2010, the Ninth Circuit reviewed the Eastern Court's decision and initially found felony disenfranchisement to violate Section 2 of the Voting Rights Act.[70] The Ninth Circuit later ordered the case to be read En Blanc and finds that disenfranchisement laws "predate the Jim Crow era and, with a few notable exceptions … have not been adopted based on racial considerations," and thus the court found that "felon disenfranchisement laws are categorically exempt from challenges brought under Section 2 of the VRA."[71]

D. Application to Lethargic Intent

Farrakhan v. Gregoire is a clear example of a felony disenfranchisement case that lethargic intent could be effectively applied to. Legal arguments in defense of felony disenfranchisement usually follow a similar line of logic to that of Farrakhan III. The court held in Farrakhan III that because most felony disenfranchisement laws were passed in the far past, we cannot definitively define any specific law as being passed with racist intent.[72] This ruling, even with its questionable logic, strikes at the core of why racial intent is a problematic requirement for challenging felony disenfranchisement and why lethargic intent is a helpful counter-argument to this line of thinking.

Farrakhan I is an example of a ruling that sides with a more expansive definition of racial intent and racial impact, specifically the allowance to view larger historical bias and racism as relevant when challenging felony disenfranchisement. Lethargic intent takes this more expanded view and applies it directly to the logic seen in

70 *Farrakhan v. Gregoire*, 623 F.3d 990 (9th Cir. 2010).

71 *Id*. at 3-4.

72 *Id*.

Farrakhan III. Even if the court's logic in Farrakhan III held true, that initial intent was not discriminatory, lethargic intent would still be a viable pathway for challenging felony disenfranchisement. Within the lethargic intent framework, the initial authors' intent is considered but does not ultimately decide the intent of the policy. Rather, as the policy ages, and discriminatory effects reveal themselves, the intent now falls upon the current agents of the law (i.e., the legislature). If the receiving agents of intent do not alter a law when its discriminatory effects are clear, this racially discriminatory intent is then assumed. An expanded definition of intent is necessary in the light of issues like racism, in which those who enact racially discriminatory laws often do so without indicating their racist intent, or without realizing it themselves.

V. Conclusion

The intent qualification for determining the constitutionality of felony disenfranchisement should be determined by analyzing the totality of facts. This analysis should include lethargic intent, or the intent established by the lack of action by legislatures after these laws are in place. When legislatures' inaction allows discriminatory impacts to persist, they demonstrate their support for these unintended effects and thus illustrate their intent for these laws to be continually discriminatory.

This does not mean that all felony disenfranchisement laws are to be immediately removed. Instead, these laws should be faced with this expanded definition of intent when they are challenged in courts. When held under the test of lethargic intent, it is unlikely that these laws will be held constitutional under the Equal Protection Clause of the Fourteenth Amendment. Furthermore, legislatures themselves should reflect upon the discriminatory impact of felony disenfranchisement laws and examine their own lethargic intent while upholding these laws.