

Reintegrating Citizens: Felon Enfranchisement, Realignment, and the California Constitution

Hadar Aviram

Jessica L. Willis

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REINTEGRATING CITIZENS: FELON ENFRANCHISEMENT, REALIGNMENT, AND THE CALIFORNIA CONSTITUTION

HADAR AVIRAM* AND JESSICA L. WILLIS** ***

ABSTRACT

In 1974, California voters amended the State Constitution to extend voting rights to Californians with criminal records, with the exception of those “imprisoned or on parole for the conviction of a felony.” In 2011, following a serious fiscal crisis and the Supreme Court decision in *Brown v. Plata*, the State restructured its correctional regime. Under the new regime, known as Criminal Justice Realignment, felons convicted of non-violent, non-serious, non-sexual offenses, are to serve their sentence, entirely or in part, in county jails in lieu of state prisons. The Secretary of State maintained that, despite this change in status, these inmates would remain disenfranchised. The California Court of Appeals and the California Supreme Court have perfunctorily denied petitions against this policy.

This Article aims to provide the broad, critical examination the Courts failed to undertake. It argues that principles of Constitutional construction require a broad reading of the right to vote. Moreover, any analysis of felon disenfranchisement after Realignment should take into account the broad context of penological reform, recidivism reduction, and empowerment of communities of color who are typically marginalized by mass incarceration. The article advocates moving away from a view of Realignment as a mere cost-saving mechanism, and toward a model of real

* Harry and Lillian Hastings Research Chair and Professor of Law, UC Hastings College of the Law.

** JD Candidate, UC Hastings College of the Law.

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penal reform; the latter perspective requires a serious consideration of the contribution of voting rights to reintegration, and the promotion of civic engagement among incarcerated and formerly incarcerated people.

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TABLE OF CONTENTS

INTRODUCTION.....	621
WHO CAN VOTE? POLITICS, RACE, AND THE CALIFORNIA CONSTITUTION.....	624
FELON DISENFRANCHISEMENT IN THE UNITED STATES: LAW, PRACTICES, AND CONSEQUENCES.....	624
FELON VOTING RIGHTS AND THE CALIFORNIA CONSTITUTION.....	630
INTERPRETING THE CONSTITUTION: WHO COUNTS AS “IMPRISONED?”.....	633
THE CRIMINAL JUSTICE REALIGNMENT.....	636
BACKGROUND: FISCAL AND HUMANITARIAN CRISIS.....	636
TWO VISIONS OF REALIGNMENT.....	638
TWO PRACTICES OF REALIGNMENT.....	644
EMBRACING A BROAD VISION OF REALIGNMENT THROUGH VOTING RIGHTS.....	646
PROMOTING REINTEGRATION.....	646
PROMOTING SOCIAL EQUALITY AND EMPOWERMENT.....	649
REDUCING RECIDIVISM.....	652
CONCLUSION.....	653

If you miss me in the picket lines, and you can find me nowhere,
Come on down the city jail; I'll be roomin' over there.
If you miss me at the cotton fields, and you can't find me nowhere,
Come on over to the courthouse; I'll be voting right there.
-Pete Seeger, *If You Miss Me at the Back of the Bus*

Introduction

Proposition 10, passed by California voters in 1974, amended Article II, section 3¹ of the California Constitution, to extend voting rights to Californians with criminal records, with the exception of those “imprisoned or on parole for the conviction of a felony.” A recent substantial change in California’s criminal justice policy provided the California Court of Appeals, and subsequently the California Supreme Court, an opportunity to strengthen our commitment to the fundamental right to vote and endorse a new approach to corrections, recidivism reduction, and reintegration of felons into civil society.

This paper examines the application of Article II, Section 3 of the California Constitution to inmates whose sentence has been affected by the recent Criminal Justice Realignment (hereinafter: “the Realignment”). Under this new regime, now codified as Penal Code 1170(h),² non-serious, non-violent, and non-sexual offenders no longer serve their sentences in state prisons, nor are they subjected to state parole following the completion of their sentences. Instead, they are held in county jails and are supervised, following their release, by local authorities. This new change brings up a serious question of constitutional interpretation: Are the Realigned felons still to be regarded as “imprisoned” or “on parole” for the purposes of determining their voting rights?

A recent litigation effort on behalf of felons held in county jails, or under community supervision, addressed the California Secretary of State’s official policy on the matter. While Realignment legislation does not explicitly address inmate voting rights, the Secretary of State has instructed inmates that, in order to vote, they must “[n]ot be in prison, on parole, or under post-release community supervision as a result of a felony conviction; [n]ot be serving a sentence in county jail for the conviction of a low-level felony as defined by the Criminal Justice Realignment Act of 2011 (CJRA); and “[n]ot be on probation as an alternative to serving the

¹ See Cal. Const. Art. II, § 3, amended by Cal. Const. Art. II, § 4 (LexisNexis, through 2014).

² 2011 Cal. A.B. 109, 116-118.

concluding portion of a sentence in county jail for the conviction of a CJRA-defined low-level felony.” Inmates who “[a]re in a local jail as a result of a misdemeanor conviction” or “as a condition of probation when entry of judgment and sentencing have been suspended following a felony conviction,” however, may vote.³

Several civil rights organizations, as well as presently and formerly incarcerated people in jails or post-community supervision,⁴ disputed this interpretation and submitted a petition for original writ at the California Court of Appeals, asking the Court to instruct the Secretary of State to allow these inmates to register to vote.⁵ The Secretary of State submitted a brief in opposition,⁶ while the second respondent, the Director of Elections for the City and County of San Francisco, submitted a brief that supported Petitioners’ position and urged the court to rule on the matter to avoid confusion.⁷ The Court of Appeals rejected the petition without providing any reasoning.⁸ The organizations appealed the decision to the California Supreme Court.⁹ The Court rejected the appeal without providing any reasoning;¹⁰ only Justice Kennard dissented, stating that she would have remanded the case to the Court of Appeals.¹¹ This Article is the product of our concern that the two Courts’ perfunctory rejection shows a refusal to engage in a pressing constitutional issue and raises concerns about our commitment to civic engagement and civil rights. Because silence from the courts allows further misapprehension of the scope of change envisioned under the Realignment, we undertake the task disregarded by California courts and provides a thorough critical analysis of the Secretary of State’s position.

³ Debra Brown, SEC’Y OF STATE OF THE STATE OF CAL., Voting Rights for Californians with Criminal Convictions or Detained in Jail or Prison (2012), available at <http://www.sos.ca.gov/elections/sharing-ideas/a-voting-guide-for-inmates.pdf>.

⁴ See Petition for Review After An Order From the Court of Appeal, First Appellate District, Division Three, AOUON v. Bowen (2012) (No. A134775). Petitioners’ list included All Of Us or None, Legal Services for Prisoners with Children, League of Women’s Voters of California, Alisha Coleman, ACLU of Northern California, Lawyers’ Committee for Civil Rights, A New Way of Life Reentry Project, and Social Justice Law Project. This Article’s authors composed an amicus brief on behalf of thirty criminal justice scholars in support of Petitioners’ position. See Brief for Criminal Justice Scholars as Amici Curiae Supporting Petitioners, AOUON v. Bowen (2012).

⁵ Brief in Support of Petition for Writ of Mandate, AOUON v. Bowen (2012).

⁶ Brief on Behalf of Respondent Secretary of State Debra Bowen, AOUON v. Bowen (2012).

⁷ Brief of Respondent John Arntz’s Verified Response to Petition for Writ of Mandate, AOUON v. Bowen (2012) (“Respondent Arntz agrees with Petitioners that the Constitution does not disenfranchise low level felony offenders who are sentenced to county jail or mandatory supervision under Penal Code Section 1170(h) or are subject to post-release community supervision under Penal Code section 3451”).

⁸ AOUON v. Bowen, California Court of Appeals (2012).

⁹ Petition, *supra* note 4.

¹⁰ AOUON v. Bowen, 2012 Cal. LEXIS 7130 (Cal. 2012) (denying petition for review).

¹¹ *Id.*

The importance of the right to vote hardly needs introduction,¹² but its meaning in the context of currently and formerly incarcerated people merits some elaboration. Part I of the paper introduces the practice of felon disenfranchisement in the United States, and in California in particular, discussing voting rights in a comparative perspective and highlighting the implications of felon disenfranchisement on the political process and on socio-economic and racial stratification. As the paper explains, U.S. courts have been typically unresponsive to these larger implications.

In Part II, the paper examines the specific context of the Criminal Justice Realignment. In this part we lay out two factors that contributed to the Realignment – the state’s financial crisis and the United States Supreme Court decision in *Brown v. Plata* – and explain the main tenets and principles behind this shift in correctional policy. The paper examines two increasingly divergent models of Realignment: (1) A short-term cost-shifting solution to a budgetary crisis, focused solely on canceling out the “correctional free lunch”¹³ and holding counties fiscally responsible for the inmates they incarcerate; and (2) a long-term shift in our perception of punitiveness, dangerousness and rehabilitation. These models characterize not only the thoughts and policy perspectives behind the Realignment, but also the very different approaches of California counties to its implementation. Drawing on ample scholarship about the California correctional crisis, the paper argues that the intent behind Realignment was not merely savings-related, but also oriented toward a shift in correctional policy, and that, while policies based on the second model would be wiser, even the savings rationale supports enfranchisement.

Part III discusses the intersection of the Realignment and felon disenfranchisement. It starts with the constitutional interpretation argument - voting rights should be broadly interpreted – which means that, had the California legislature wanted to deny felons placed in jail post-realignment the right to vote, it should have explicitly done so. The paper then presents the dilemma whether to allow jailed felons to vote as a choice between the two models of Realignment presented in Part II. If Realignment is merely a short-term solution designed to hold the counties fiscally responsible for

¹² See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

¹³ See FRANKLIN ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT* 211 (1991). This term, which will be explicated later in more detail, originates in Zimring’s and Hawkins’ classic book. “The parable of the free lunch is relevant to the discussion of prison population because prisons in the United States are . . . paid for at the state level of government out of state correctional budgets, but prison populations are determined by the number of prisoners referred by local officials and the length of sentences imposed at the local level. Since localities do not contribute to central state correctional budgets, the marginal cost of an extra prisoner may be zero at the local level of government, where the decision to confine is made.” *Id.* at 211-212.

warehousing the people they convict and sentence, then arguably it should only transform inmates' voting rights to the extent that enfranchisement might help lower recidivism rates and thus save money in the long run. However, if Realignment presents a real, positive shift from a dysfunctional and cumbersome incarceration enterprise of mammoth proportions toward community-based corrections designed to reintegrate tens of thousands of Californians back into their communities, civic engagement through voting is an essential component of the new approach.

Finally, the conclusion offers policy suggestions for courts and activists, as well as some avenues for future empirical research.

I. WHO CAN VOTE? POLITICS, RACE, AND THE CALIFORNIA CONSTITUTION

A. Felon Disenfranchisement in the United States: Law, Practices, and Consequences

The notion that felons, or inmates, should be temporarily or permanently deprived of the right to vote is far from universal, and raises philosophical questions of personhood, worthiness, and citizenship. One scholar has identified two main arguments in support of denying people convicted of criminal offenses the right to vote: A conservative argument, under which the convicted criminal lacks "civic virtue" and therefore does not deserve to vote, and a liberal argument, under which the convicted criminal has forfeited his or her right to vote by violating the social contract.¹⁴ In addition to these arguments, some scholars have identified anti-democratic fears about voters who might create "anti-law-enforcement" voting blocs in communities that experience high crime rates.¹⁵

Opponents of felon disenfranchisement respond to the conservative argument by stating that voting would help felons develop civic virtue, in line with the republican commitment to character formation and to political activity as a central means by which such character development is achieved.¹⁶ The response to the liberal argument relies on the fundamental nature of the right to vote, an inexorable part of the social contract. Opponents also argue that the concern that criminals might vote to weaken

¹⁴ Jeffrey Reiman, *Liberal and Republican Arguments Against the Disenfranchisement of Felons*, CRIM. JUST. ETHICS 3 (2005).

¹⁵ Roger Clegg, *Who Should Vote?*, TEX. REV. L. & POL. 6, 159-78 (2001).

¹⁶ Alec C. Ewald, *Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, WIS. L. REV. 1045-1132 (2002); see also Alec C. Ewald, *Punishing at the Polls: The Case Against Disenfranchising Citizens with Felony Convictions*, PRISON POL'Y INITIATIVE (2012) available at http://www.prisonpolicy.org/scans/demos/punishing_at_the_polls.pdf.

the criminal justice system lacks empirical support.

Voting rights advocates respond with various counterpoints and emphasize the insidious social effects of felon disenfranchisement. Advocates claim that during and after incarceration, citizens are deprived of political power, which is particularly troubling given the overrepresentation of disempowered groups in the criminal process.¹⁷ The experience of incarceration, disenfranchisement and other corollaries to incarceration render formerly incarcerated people a “negative status group,”¹⁸ who face numerous challenges in reintegration into society.¹⁹ The alienation from society that occurs as a byproduct of socialization into the incarcerated population is cultivated and reinforced by felon disenfranchisement.²⁰ These concerns are not alleviated in jurisdictions that only temporarily disenfranchise felons; in many jurisdictions, administrative practices such as petitions to re-register as a voter, the need for photo ID, and extensive and confusing paperwork, coupled with a lack of information about one’s rights, often turn temporary disenfranchisement into permanent disenfranchisement.²¹

Felon disenfranchisement practices vary worldwide, but scholarship on electoral policies has identified a few noticeable trends. Usually, countries that enfranchise voters are likely to have passed liberal voting laws, are democratic with particular respect for political rights, and either have no history of colonization or are no longer troubled by such matters. General attitudes toward punishment and incarcerated persons also matter; less punitive countries are less likely to disenfranchise felons.²² Most European countries that deny incarcerated people the right to vote for the duration of their incarceration return the civil rights of their offenders after release.²³

The United States is an outlier to this trend, and its restrictions on felon voting are on the severe end of the spectrum. The United States Constitution, in Section 2 of the 14th Amendment, explicitly allows the states to deny the right to vote “for participation in rebellion, or other

¹⁷ See *infra* p. 49.

¹⁸ Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. OF POL. & SOC. SCI. 281-310. (2006).

¹⁹ Regina Austin, “*The Shame of it All*”: *Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 36 COLUM. HUM. RTS. L. REV., 173-192 (2004).

²⁰ Mandeep K. Dhami, *Prisoner Disenfranchisement Policy: A Threat to Democracy?*, 5 ANALYSES OF SOC. ISSUES & PUB. POL’Y 235-47 (2005).

²¹ Jessie Allen, *Documentary Disenfranchisement*, 86 TUL. L. REV. 389-464 (2011).

²² Brandon Rottinghaus & Gina Baldwin, *Voting Behind Bars: Explaining Variation in International Enfranchisement Policies*, 26 ELECTORAL STUDIES 688-98 (2007).

²³ R.A. Duff, *Crime and Citizenship*, 22 J. APPLIED PHIL. 211 (2005).

crime.”²⁴ In *Richardson v. Ramirez*,²⁵ the Supreme Court decided that Section 2 indeed allowed states broad discretion in denying felons the right to vote. Subsequently, in *Fincher v. Scott*, the Supreme Court ruled that disenfranchisement was not cruel and unusual punishment.²⁶

The Constitutional language and the aforementioned Supreme Court decisions have made the issue of felon disenfranchisement state-specific, and the practices and reform prospects in a given state are therefore heavily dependent upon the state’s political makeup.²⁷ Indeed, 46 states and the District of Columbia prohibit prisoners from voting while serving a felony sentence; four states – Maine, Massachusetts, Utah, and Vermont – permit persons in prison to vote; 32 states prohibit voting by persons on parole, and 29 exclude persons on felony probation. Additionally, the authors document that 10 states disenfranchise all persons who have completed their criminal sentence, while four others disenfranchise some ex-offenders and Texas disenfranchises ex-offenders for two years after they have completed their sentences.²⁸

States controlled by the Democratic Party are more likely to reform or repeal disenfranchisement laws, since the majority of disenfranchised persons with felony convictions would vote for Democratic candidates.²⁹ The partisan political process is the greatest impediment to restoration of voting rights in states controlled by Republican legislators and the greatest hope for them in Democratic controlled states.³⁰ This is not particularly surprising given that studies predict that, if felons were allowed to vote,

²⁴ U.S. CONST. amend. XIV, § 2. The full text reads: “Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

²⁵ 418 U.S. 24 (1974). Notably, Justice Marshall’s dissent highlighted the racial undertones. *Id.* at 73-74.

²⁶ 352 F.Supp. 117 (1972). Criticized at the time, the *Fincher* decision held that the denial of voting rights violated the Equal Protection Clause. See Gary L. Reback, *Disenfranchisement of Ex-Felons: A Reassessment*, 25 STAN. L. REV. 845, 846 (1973).

²⁷ A.C Ewald., *Criminal Disenfranchisement and the Challenge of American Federalism*, 39 THE STATE OF AM. FEDERALISM 527-56 (2009).

²⁸ Jamie Fellner & Mark Mauer, HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 3, 5 (1998), available at http://www.sentencingproject.org/doc/File/FVR/fd_losingthevote.pdf.

²⁹ Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States, 1960-99*, 37 ST. & LOC. GOV’T REV. 49, 50 (2005).

³⁰ Jason Belmont Conn, *Felon Disenfranchisement Laws: Partisan Politics in the Legislatures*, 10 MICH. J. RACE & L. 495, 537 (2005).

most of them would vote Democrat. A stunning study by Jeff Manza and Christopher Uggen argues that, if felons voted nationwide, the result of two Presidential elections and eight Congressional elections would have been different.³¹

As in the case of the death penalty,³² the United States' severe restrictions on felon voting are a stark example of American exceptionalism. This uniqueness goes beyond the pervasiveness of the restrictions. Race, which has little effect on disenfranchisement policies on the international scale,³³ is inexorably related to felon disenfranchisement; the practice in the United States is rooted in the painful historical context of slavery and Jim Crow.³⁴ While, in general, the realities of the racialized criminal justice system and correctional apparatus are more subtle,³⁵ in the context of voting, a solid body of scholarship supports the historical connection between felon disenfranchisement and the Fifteenth Amendment, which ostensibly enfranchised the population of former slaves.³⁶ State disenfranchisement laws were passed on the basis of racial threat; many of them were passed at a time when extending the franchise to African-Americans was still a matter of vigorous debate.³⁷ These laws served to ameliorate the effect of the official enfranchisement under the Fifteenth Amendment; their seemingly race-neutral restrictions on voting rights served as proxies for race and systematically hindered the full implementation of voting equality.³⁸ This was no coincidence; abundant literature on Jim Crow and enfranchisement clearly demonstrates that the racially discriminatory effects of felon disenfranchisement in the United States were not merely a byproduct of the overrepresentation of inmates of color. Rather, it was a strategy devised to target crimes that the Black

³¹ JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006). Naturally, one has to take into account turnout rates, which arguably could be low among an alienated and disengaged community.

³² DAVID GARLAND, DAVID MCGOWEN & MICHAEL MERANZE, *AMERICA'S DEATH PENALTY: BETWEEN PAST AND PRESENT* (N.Y. Univ. Press, 2011); See FRANKLIN ZIMRING, *THE CONTRADICTION OF AMERICAN CAPITAL PUNISHMENT* (Oxford Univ. Press, 2003).

³³ Rottinghaus & Baldwin, *supra* note 22, at 696.

³⁴ Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 *GEO. L.J.* 259, 260 (2004).

³⁵ James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 *N.Y.U. L. REV.* 21, 27 (2012).

³⁶ U.S. CONST. amend. XVI, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude".

³⁷ Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 *AM. J. OF SOC.* 559, 573 (2003).

³⁸ Katherine Shaw, *Invoking the Penalty: How Florida's Felon Disenfranchisement Law Violates the Constitutional Requirement of Population Equality in Congressional Representation, and What to Do About It*, 100 *NW. U. L. REV.* 1439, 1443 (2006).

community was thought to disproportionately engage in.³⁹ Moreover, felon disenfranchisement was an important tool in a broad arsenal of legal constructions and requirements used in Southern states to systematically restrict the right of African American citizens to vote.⁴⁰ In a study examining 114 records of disenfranchisement debate in constitutional conventions between 1814-1984, the arguments made in support of disenfranchisement included explicit references to suppression of African-American political power in addition to ostensibly race-neutral explanations such as punishment and deterrence, character assessment, potential for electoral fraud, and the need to deny support of criminal interests.⁴¹

The effects of felon disenfranchisement on racial stratification extend beyond the felon community. In a classic 1993 Article, Andrew Shapiro notes that not only do the laws deny the right to vote to a class of individuals who are disproportionately nonwhite, but they also dilute the voting strength of minority communities.⁴² The pervasiveness of voting restrictions dampens the propensity to vote among African-Americans without felony convictions and of persons with low levels of income.⁴³ A study comparing states through cross-sectional data concluded that disenfranchisement policies could be explained by size of minority population, ratio of minorities incarcerated compared to percentage in general population, and degree of legislative professionalism. These factors lead to a future in which minority participation in the democratic process is bleak.⁴⁴

The concerns about the issue of racial disempowerment through felon disenfranchisement have yielded a spectrum of responses. Supporters of felon disenfranchisement argue that the problem should not be addressed with regard to voting rights, which are race neutral, but rather by directly addressing prison overrepresentation.⁴⁵ Others have noted that the criminal process is so rife with racial bias, from policing through trial practices and sentencing, the effects of felon disenfranchisement amount to a “new Jim

³⁹ Behrens, et al., *supra* note 37, at 559.

⁴⁰ See Lori A. Wagner, *Introduction: The Civil Rights Commission's Lasting Impact on Voting*, in U.S. COMM'N ON C.R.: REP. ON VOTING 8 (Gabriel J. Chin & Lori Wagner eds., 2005).

⁴¹ John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. OF POL'Y HIST. 282, 295 (2007).

⁴² Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 544 (1993).

⁴³ 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, 723-727 (2009).

⁴⁴ Robert Preuhs, *State Felon Disenfranchisement Policy*, 82 SOC. SCI. Q., 733, 733 (2001).

⁴⁵ Clegg, *supra* note 15, at 159.

Crow.”⁴⁶

Some doctrinal solutions include a constitutional interpretation under which the Fifteenth Amendment implicitly repealed Section 2 of the Fourteenth Amendment and granted people with felony convictions the right to vote.⁴⁷ A less radical proposition is that of a “sliding scale” approach to felon disenfranchisement that would allow plaintiffs to provide substantial evidence that they are being disenfranchised due to racial discrimination.⁴⁸

Recent years have seen a worldwide trend toward easing restrictions on felon voting,⁴⁹ most famously in the recent decision by the European Court of Human Rights that required the United Kingdom to change its blanket disenfranchisement policy.⁵⁰ Some scholars have advised an adoption of the German model, under which voting rights are deprived only to serious, legislatively enumerated offenses that must be assessed directly by a judge at the time of sentencing, and can be imposed only for a limited and relatively short period of time.⁵¹ This trend manifests itself in United States policies as well. In a comparative report on state policies between 1997 and 2010, it was found that nine states either repealed or revised lifetime disenfranchisement laws, two states expanded voting rights to persons on probation and parole, and five states eased the restoration process for persons seeking to have their right to vote restored after completing their sentence.⁵²

These attitudes and recommendations are not merely part of the academic discourse: Survey studies show that the public generally supports enfranchising people with felony convictions.⁵³ Moreover, persons with felonies themselves question the extent to which they are considered community members as a result of their disenfranchisement.⁵⁴ Among the

⁴⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012). For a judicial decision holding that, in the context of a racially discriminatory criminal justice system, felon disenfranchisement violates the Voting Rights Act, see *Farrakhan v. Gregoire*, 590 F.3d 989, 1016 (9th Cir. 2010).

⁴⁷ Chin, *supra* note 34.

⁴⁸ Thomas G. Varnum, *Let's Not Jump to Conclusions: Approaching Felon Disenfranchisement Challenges Under the Voting Rights Act*, 14 MICH. J. OF RACE & L. 109 (2008).

⁴⁹ Michael Plaxton & Heather Lardy, *Prisoner Disenfranchisement: Four Judicial Approaches*, 28 BERKELEY J. INT'L L. 101, 102 (2010).

⁵⁰ See *Case of Hirst v. The United Kingdom* (No. 2), Eur. Ct. H.R. (2005).

⁵¹ Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 MINN. L. REV. 753, 755-756 (2000).

⁵² Nicole D. Porter, THE SENTENCING PROJECT, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010*, 3 (2010), available at http://www.sentencingproject.org/doc/publications/publications/vr_ExpandingtheVoteFinalAddendum.pdf.

⁵³ Cherie Dawson-Edwards, *Enfranchising Convicted Felons: Current Research on Opinions toward Felon Voting Rights*, 46 J. OF OFFENDER REHABILITATION 13, 27 (2008).

⁵⁴ *Id.* at 24.

general public, 82% support restoration of voting rights after completion of sentence; 68% support the right to vote on probation or parole, and 10% think people in prison should vote too.⁵⁵

The severity of voting restrictions on felons in the United States, the variation in state responses, the scale of imprisonment nation-wide,⁵⁶ and the underlying racial context endemic to the United States, all make felon disenfranchisement a particularly sensitive subject in terms of socio-economic and racial stratification. The following subsections examine how this issue was dealt with in California, which has the largest prison population of any American state.

B. Felon Voting Rights and the California Constitution

California's treatment of felons and their rights, while perhaps atypical, makes for an interesting case study for several reasons. First, California is home to the nation's largest population of inmates in total numbers (in terms of inmates per capita, it is somewhere in the middle of the range.)⁵⁷ The total numbers are meaningful in the context of voting rights because any deprivation of voting rights would disenfranchise a fairly large number of California residents. In 2004, 1.09% of the California population (and 7.42% of its African-American population) was disenfranchised.⁵⁸

Second, California has long been a pioneer of criminal justice and correctional policies. It was the first state to introduce a mandatory sentencing scheme,⁵⁹ thus despairing from years of at least paying lip service to the idea of rehabilitation in corrections.⁶⁰ It was also the first state to adopt a particularly punitive version of a habitual offender law.

And third, California has been home to a radical prison movement. Much of what has occurred in litigation of inmates' rights happened in the

⁵⁵ Brian Pinaire, Milton Heumann & Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URB. L. J.* 1519, 1545 (2003).

⁵⁶ Tyjen Tsai & Paola Scommegna, *POPULATION REFERENCE BUREAU, U.S. Has World's Highest Incarceration Rate* (2012) available at <http://www.prb.org/Articles/2012/us-incarceration.aspx> (last checked Jan 11, 2013).

⁵⁷ PEW CENTER ON THE STATES, *One in 100: Behind Bars in America 2008*, 11 (2008) available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf (last accessed Jan 11, 2013).

⁵⁸ *Felon Disenfranchisement by State in 2004*, FAIRPLAN 2020 (March 11, 2008), <http://www.fairvote2020.org/2008/03/felon-disenfranchisement-by-state.html> (last accessed January 11, 2013).

⁵⁹ Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 *CAL. L. REV.* 61 (1993).

⁶⁰ In this respect, California stands in stark contrast to Texas and Arizona, in which the rehabilitative ideal was never touted, and the emphasis was on "tough and cheap" policies. See generally MONA LYNCH, *SUNBELT JUSTICE: ARIZONA AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2009).

California context.⁶¹

Prior to 1974, the California constitution disenfranchised all those ‘convicted of any infamous crime.’⁶² The extent of deprivation was left to the jurisdiction of the counties, some of which opted to restore rights to felons and some permanently restricted felons from voting.⁶³ The definition of “conviction,” however, was hotly debated. In 1953, the California Supreme Court stated that the term “conviction” should be interpreted as encompassing both a verdict and a final judgment.⁶⁴ Subsequently, in 1959, the California Supreme Court stated that people who have been found guilty and received a suspended sentence have not been “convicted” for the purpose of the disenfranchisement clause, because if they successfully completed probation the proceedings would be expunged from the record.⁶⁵ After an unsuccessful attempt in 1960 to change the phrase “infamous crime” to “felony”, in 1966, the Supreme Court limited “infamous crimes” to those involving moral corruption and dishonesty.⁶⁶ Then, in 1973, a petition to ease the restrictions on voting was brought before the California Supreme Court.⁶⁷ The petitioners argued that the differences between counties with regard to the extent of disenfranchisement violated the Equal Protection Clause, and prevailed. The decision was subsequently reversed by the Supreme Court.⁶⁸

In response to the reversal, the California Legislature proposed and voters adopted a felony disenfranchisement provision creating a uniform regime. Under the new Article II, Section 3 (renumbered in 1976 to Article II, Section 4) of the California Constitution, the only category of people to remain disenfranchised were those “imprisoned or on parole for the conviction of a felony.” The Election Code was amended accordingly.⁶⁹

The arguments distributed to voters at the time reveal the unmistakable intent behind the initiative: Re-entry and reintegration. The Legal Analyst’s office provided the following analysis:

The California Constitution requires the Legislature to pass laws to prevent persons convicted of specified crimes from voting. The

⁶¹ See generally ERIC CUMMINS, *THE RISE AND FALL OF CALIFORNIA’S RADICAL PRISON MOVEMENT* (1994).

⁶² Cal. Const. of 1849, art. II, § 5 (adopted in Cal. Const. of 1879 as art. II, § 1).

⁶³ See A. Alan Post, OFF. OF THE SEC’Y OF STATE, *California Voters Pamphlet, General Election 37* (Nov. 1974).

⁶⁴ *Truchon v. Toomey*, 254 P.2d 638, 642 (Cal. Dist. Ct. App. 1953).

⁶⁵ *Stephens v. Toomey*, 338 P.2d 182, 185-86 (Cal. 1959).

⁶⁶ *League of Women Voters v. McPherson*, 52 Cal. Rptr. 3d 585, 590 (Cal. Ct. App. 2006) (citing *Otsuka v. Hite*, 51 Cal. Rptr. 284, 286 (1966)).

⁶⁷ *Ramirez v. Brown*, 507 P.2d 1345, 1346 (Cal. 1973).

⁶⁸ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

⁶⁹ See CAL. ELEC. CODE §§ 2101, 2106, 2300 (West 2012).

Constitution does not allow the Legislature to restore voting rights to such persons when their prison sentences have been completed. The loss of the right to vote continues throughout life, unless restored by pardon.

This proposition will require the Legislature to pass laws which deny the right to vote to persons when they are in prison or on parole for committing a felony. The right of convicted felons to vote would be restored, however, when their prison sentences, including time on parole, have been completed.⁷⁰

The proponents' arguments defined the right to vote as a "fundamental right," arguing that restricting the right to vote was unfair and abusive. They maintained that the differences between counties amounted to discrimination, and that the original justification behind permanent disenfranchisement – concerns about election fraud – no longer existed in an era of modern regulation of the voting process. Proponents also relied on studies of felon disenfranchisement, all of which supported restoration. The language used by proponents emphasized the importance of reintegration without stigma:

"An ex-felon returned to society and released from parole has fully paid the price society has demanded. A basic sense of justice demands that a person not be punished repeatedly, for a lifetime, by denying the right to vote." The deprivation from voting becomes "a lifelong reminder of second class citizenship—inferiority—often because of one mistake committed years earlier . . . Full citizen participation in these decisions should be encouraged, not prevented."⁷¹

A successful move to amend the Constitution and restore voting rights to felons seems, in the context of today's society, quite remarkable, and perhaps is best understood in the context of the correctional climate of the mid-1970s. At the time, crime rates had already risen enough nationwide to be noticed and used in the Nixon electoral campaign.⁷² The mid-1970s also saw the emergence of dissatisfaction, nationally,⁷³ as well as specifically in California⁷⁴ with the indeterminate sentencing regime and

⁷⁰ Post, *supra* note 63, at 36.

⁷¹ *Id.* at 38. The opponents' arguments relied on the "deep-rooted tradition" of disenfranchisement, and on the availability of a restoration process that allowed a case-by-case award of the right to vote for rehabilitated felons.

⁷² KATHERINE BECKETT, MAKING CRIME PAY 38-39 (1997).

⁷³ Robert Martinson, *What Works?*, in 4 CRIME: CRITICAL CONCEPTS IN SOCIOLOGY 200 (Philip Bean ed., 1974); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA (1971).

⁷⁴ Lowenthal, *supra* note 59.

with the parole mechanisms. It was a costly correctional apparatus,⁷⁵ which conservatives disliked for its perceived lenient treatment of offenders and liberals repudiated for its arbitrariness, resulting in sentencing disparities. Nonetheless, determinate sentencing, mandatory minimums, and habitual offender laws were still not in existence; the reigning correctional philosophy, albeit only on paper, was rehabilitative, and in practice an inmate's return to the community could occur at any point within the broad range set by the judge and depended on the parole board's determination that the inmate was no longer dangerous to society. In the absence of determinate sentencing and the punitive legislation of the 1980s and 1990s, the prison inmate population was much smaller (in total numbers and per capita), and the extent of deprivation of rights stemming from the sheer number of inmates, as well as their number per capita, would have been unimaginable to the average 1974 voter.

The historical context of the 1974 Amendment informs the key constitutional provision at issue here in a number of ways: first, to the extent that voting propaganda represents "legislative intent" (And to the extent that such intent exists), the impetus behind the initiative seems to be essentially rehabilitative and non-punitive; second, and more contextually, that the Amendment was one in a series of political and legal moves that expanded, rather than narrowed, the franchise; third, that the Legislature and the California Supreme Court were, at least rhetorically, in agreement about the importance of voting rights for felons; and fourth, that the voters at the time were not in any position to appreciate the implications of any disenfranchisement regime on the prison population five decades after the Amendment.

C. Interpreting the Constitution: Who Counts as "Imprisoned"?

For a while, the California government supported the expansion of voting rights. In 1976, two years after the amendment was adopted, the Secretary of State explained to the state's county clerks and registrars of voters that: any convicted felon who is presently in State prison or on parole is not eligible to register or vote regardless of the felony involved. (Do not confuse 'probation' with 'parole'. A person on probation may register to vote.) In 1979, the Secretary of State clarified to the Fairfield Elections Supervisor the constitutional provision did not disenfranchise a person convicted of a felony and who is on probation. It speaks only to those felons imprisoned or undergoing an unexpired term of parole. The

⁷⁵ See, e.g., MONA LYNCH, SUNBELT JUSTICE 22-51 (2010).

Secretary of State has also taken the position that the conviction must be for a felony which results in confinement in a state prison. Therefore, persons convicted of a felony but sent to the county jail are not ineligible to register to vote.⁷⁶

The breadth of the restriction was further refined in *League of Women Voters v. McPherson*.⁷⁷ There, the California Supreme Court decided a petition for writ that addressed the status of people who were confined to local jails as a condition of their probation. The Court summarized the policy as follows:

For many years the Secretary of State took the position that the emphasized language disenfranchises only persons who, as a result of a felony conviction, are serving a sentence in state prison or are on parole from a felony conviction. In December 2005, however, after requesting and receiving an opinion from the Attorney General on the question, the Secretary of State took the opposite position. The Secretary of State notified local officials, including the Director of San Francisco's Department of Elections, which the constitutional provision also applies to persons incarcerated in a local detention facility for the conviction of a felony, including persons serving that term as a condition of probation.⁷⁸

The Court disagreed with the Attorney General's opinion, and drew distinctions between felons covered by the disenfranchisement clause and those who were allowed to vote:

"Where the court suspends imposition of sentence and places a defendant on probation, the defendant has not suffered a conviction for purposes of article II, section 4. In addition, where a probationer is ordered to serve time in a local facility because either imposition or execution of sentence has been suspended, he or she has not been imprisoned for the conviction of a felony, but has been confined as a condition of probation. Finally, where by virtue of Penal Code section 18, a felony offense is punishable by fine or imprisonment in county jail, and the trial court, pursuant to Penal Code section 17, subdivision (b)(1), enters judgment imposing something other than imprisonment in state prison, the crime is a misdemeanor for purpose of article II, section 4."⁷⁹

The distinction depended, to a large degree, on the Court's interpretation of voters' intent; the 1974 amendment was seen as a move to enfranchise,

⁷⁶ *McPherson*, 52 Cal. Rptr. 3d at 597, fn 1.

⁷⁷ *Id.*

⁷⁸ *Id.* at 564 (quoting Secretary of State Bruce McPherson's letter to all county clerks/registrar of voters dated Dec. 28, 2005).

⁷⁹ *Id.* at 588.

rather than disenfranchise, felons. Moreover, the Court highlighted the differences between jail and prison sentences:

By focusing solely on the word “imprisoned,” and on a dictionary definition of that term, the Attorney General’s opinion ignored a critical distinction between the situation of persons confined to jail as a condition of felony probation and that of persons imprisoned in state prison. The former are under the jurisdiction of the court. The latter are not. The jurisdiction of the court over the defendant does not end with an adjudication of guilt, nor is the defendant imprisoned at that time as a result of a verdict or plea of guilt. The court retains jurisdiction over the defendant until it orders execution of sentence and directs that the defendant be delivered into the custody of the Director of Corrections. . . Upon conviction of a felony, the court may suspend imposition or execution of sentence and order the conditional release of the defendant under the supervision of the probation officer. . . Apart from the term of imprisonment in state prison that the Legislature has decreed be served for the conviction of a felony offense, the trial court has independent authority to cause a defendant who has been convicted of a felony and is eligible for probation, to be imprisoned in a local facility as a condition of probation

. . . The defendant who has been placed on probation, therefore, is imprisoned by the court in a local facility as a condition of probation, not as a result of the conviction of a felony. If a probationer violates the terms of probation, the court has the power “to reimprison the probationer in the county jail□” . . . In such a case, the defendant again is confined for violating the terms of his or her probation, not for the conviction of a felony. Such a defendant is imprisoned as a result of the felony conviction only if probation is revoked or terminated, the court orders imposition and/or execution of judgment and the defendant is delivered to the Department of Corrections and Rehabilitation.⁸⁰

There was one particular population that the Court addressed in more detail and which has direct bearing on the situation at the crux of this Article: People convicted of “wobblers.” Wobblers are offenses that can be punishable either as felonies or misdemeanors. Upon conviction of a “wobbler”, the trial court has discretion to sentence the defendant either to state prison or to a county jail.⁸¹ People receiving the latter sentence are regarded as misdemeanants after judgment. The Court reasoned that, prior to judgment, the status of the defendant was analogous to that of a person whose sentence was suspended, and thus he or she should be allowed to

⁸⁰ *Id.* at 593.

⁸¹ CAL. PENAL CODE § 17 (West 2011).

vote; after judgment, defendants were misdemeanants and thus allowed to vote.

The McPherson court's distinction between jails and prisons, and its interpretation of the word "imprisoned" as referring to the latter, became of crucial importance when the Criminal Justice Realignment shifted large numbers of non-violent, non-serious and non-sexual offenders from state prisons to jails. Before addressing the voting rights of this population, it is necessary to understand the background to the Realignment, its principles and goals, and its practices in the field.

II. THE CRIMINAL JUSTICE REALIGNMENT

A. Background: Fiscal And Humanitarian Crisis

The Criminal Justice Realignment is the product of decades of dysfunctional, unsustainable correctional practices. Home to the nation's largest population of inmates,⁸² California has 33 state correctional institutions and many more county jails. Prison population steadily increased after the introduction of mandatory sentencing,⁸³ increasing further after the state committed funds to the construction of new institutions, and even further in the aftermath of the Three Strikes Law. The growth in prison population was not necessarily in long-term violent inmates; rather, it was the product of the increased negotiation power of the prosecutor in the era of strikes and mandatory minimums.⁸⁴ The difficulties of managing the immense inmate population in distant, large institutions, became more complicated the more populated they became;⁸⁵ this was particularly problematic in the context of the prison medical and mental health system, which were the subject of lengthy litigation efforts⁸⁶ and, in

⁸² Numbers before realignment reached 170,000 inmates. *Plata v. Schwarzenegger*, 3:01-cv-01351-TEH (N.D. Cal.) (2008).

⁸³ LITTLE HOOVER COMMISSION, *Solving California's Corrections Crisis: Time is Running Out*, (2007), available at <http://www.lhc.ca.gov/lhc/185/Report185.pdf> (last accessed Jan. 11, 2013)

⁸⁴ See STEPHANO BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

⁸⁵ In *Brown v. Plata*, the Court referred to the relationship between the use of lockdowns, increased violence, and impediments to medical care for inmates. As the Court noted, "[i]ncreased violence also requires increased reliance on lockdowns to keep order, and lockdowns further impede the effective delivery of care. In 2006, prison officials instituted 449 lockdowns. The average lockdown lasted 12 days, and 20 lockdowns lasted 60 days or longer. During lockdowns, staff must either escort prisoners to medical facilities or bring medical staff to the prisoners. Either procedure puts additional strain on already overburdened medical and custodial staff. Some programming for the mentally ill even may be canceled altogether during lockdowns, and staff may be unable to supervise the delivery of psychotropic medications." 131 S.Ct 1910, 1934 (2011) (internal citations omitted).

⁸⁶ See *Coleman v. Schwarzenegger*, 2010 WL 99000 *1; *Plata v. Schwarzenegger*, docket no. 3:01-cv-01351-TEH (N.D. Cal.).

2006, the province of a federal Receivership.⁸⁷ Eventually, a federal three-judge panel constructed under the provisions of the Prison Litigation Reform Act (PLRA)⁸⁸ ordered the California Department of Corrections and Rehabilitation to substantially decrease its prison population.⁸⁹ The panel had found that the abysmal health care conditions were inexorably linked to the prison overpopulation, which at the time was at 200% of design capacity.⁹⁰ The State appealed to the Supreme Court, which approved, in a 5-4 majority, the panel's decision, pronouncing health care conditions in California prisons unconstitutional to a degree that must be remedied by a population reduction order.⁹¹ The Court found no error in a three-judge panel's interpretation of the PLRA and upheld the panel's order to reduce the prison population to 137.5% of design capacity within two years to guarantee adequate health care for state prisoners.⁹² Writing for the majority, Justice Kennedy commented on the dual challenge of California's fiscal emergency and prison overcrowding crisis: "California's Legislature has not been willing or able to allocate the resources necessary to meet [the prison crisis] absent a reduction in overcrowding. There is no reason to believe it will do so now, when the State of California is facing an unprecedented budgetary shortfall."⁹³

Plata and *Coleman* were not litigated in a vacuum. The state budgetary crisis led then-Governor Arnold Schwarzenegger to propose a plan to shift certain categories of felonies to "wobblers,"⁹⁴ so that defendants could be convicted as misdemeanants and serve their sentences in county jails, rather than state prisons, thus alleviating the serious overcrowding in state institutions.⁹⁵ This notion provoked some ire from local counties, who

⁸⁷ *Plata v. Schwarzenegger*, No. C01-1351 TEH (N.D. Cal. Feb. 14, 2006) (order appointing receiver).

⁸⁸ Prison Litigation Reform Act of 1995, 18 U.S.C. § 1326 (1997); 28 U.S.C. § 1932 (1996).

⁸⁹ *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P; *Plata v. Schwarzenegger*, No. C01-1351 TEH, (E.D. Cal & N.D. Cal Aug. 4, 2009) (three-judge court opinion and order reducing prison population), available at www.caed.uscourts.gov/caed.

⁹⁰ As recounted by Justice Kennedy in *Plata*, "Prisoners are crammed into spaces neither designed nor intended to house inmates. As many as 200 prisoners may live in a gymnasium, monitored by as few as two or three correctional officers. As many as 54 prisoners may share a single toilet." *Plata*, 131 S. Ct. at 1923-24

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1939.

⁹⁴ Per California Penal Code section 17, a wobbler is a crime punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail. Therefore, crimes classified as "wobblers" can be charged either as misdemeanors or felonies and judges may use discretion in sentencing defendants to misdemeanor or felony terms. CAL. PENAL CODE § 17 (Deering 2014)

⁹⁵ A.B. 14X3, 3d Extraordinary Sess. (C.A. 2009); see also Anthony York, *Assembly to unveil revamped prisons plan*, CAPITOL WEEKLY, Aug. 24, 2009, available at <http://www.capitolweekly.net/article.php?xid=y7xvvgaspixfd9>.

protested that local institutions were overcrowded as well,⁹⁶ and expressed concerns about funding.⁹⁷

The final version of realignment, enacted during the tenure of Governor Jerry Brown, consisted of a new regime, under which persons convicted of nonserious, nonviolent, nonsexual offenses (colloquially known now as the “non-non-non” group) would be sentenced to serve their term in county jails, rather than in state facilities. This change would not impact the sentences of offenders already in prison at the time of enactment.⁹⁸ Moreover, there are no provisions in the law that control the length of sentences; merely the location. It would be possible to sentence certain inmates to serve their term partly in state prison and partly in county jail, as well.⁹⁹ After completion of the incarceration term, “non-non-non” inmates would no longer be supervised by state parole agents; instead, they would be subject to post-release supervision in their counties and communities, under the auspices of probation authorities.¹⁰⁰

B. Two Models of Realignment

What we know about the process of enacting the various codes that constitute the Realignment is a bit like the Indian tale of the four blind men and the elephant; each of the actors has a different impression of its essence. Margo Schlanger’s masterful analysis of the different stakeholders¹⁰¹ makes it clear that there is no one single vision behind the legislation.

For the purposes of this paper, however, it is important to distinguish between two ways to perceive and interpret the depth of Realignment. Regardless of the intent behind the legislation, once enacted, Realignment can be regarded by the courts merely as a cost-saving measure. This idea, that merely warehousing people elsewhere would generate change, is closely related to the funding structure of the criminal justice system in California, and in particular, to the problem referred to by Franklin Zimring

⁹⁶ Bobby White, *California Inmate Plan Draws Ire*, WALL ST. J., June 13, 2009, available at <http://online.wsj.com/article/SB124485349609411619.html> (last visited Jan. 11, 2013).

⁹⁷ *Id.*

⁹⁸ Adam Weintraub, *California Prison Overcrowding: Brown Unveils Plan to Slash Prison Population*, HUFFINGTON POST LOS ANGELES, June 7, 2011, available at: http://www.huffingtonpost.com/2011/06/07/california-prison-overcrowding_n_872785.html (last visited Jan 11, 2013).

⁹⁹ See CAL. PENAL CODE §§ 1203.016-1203.18; CAL. PENAL CODE § 2900.5(f) (West 2011).

¹⁰⁰ Postrelease Community Supervision Act of 2011, CAL. PENAL CODE § 3450(5) (West 2011).

¹⁰¹ Margo Schlanger, *Plata v. Brown and Realignment: Jails, Prisons, Courts, and Politics*, 48 HARV. C.R.-C.L. L. REV. 165 (2013).

and Gordon Hawkins as the “correctional free lunch.”¹⁰² The increasingly punitive sentencing regime, complete with sentencing enhancements, habitual offender laws and mandatory minimums, was used by county prosecutors and county judges, but the eventual bill for corrections was picked up by the state, where felons were housed. By shifting responsibility for a larger percentage of the state inmates’ population to the counties, Governor Brown intended to hold the criminal justice system more directly accountable for the way it meted out punishment.¹⁰³ In addition, the perception was that health care and programming could be provided in smaller, local facilities with community support at a lesser cost.¹⁰⁴ The legislation explicitly responds to the state of fiscal emergency that Governor Brown has declared in California.¹⁰⁵ From 1988/1989 to 2009, spending on corrections increased by roughly 450% and had increased from 5% to 11% of total state spending.¹⁰⁶ Yet as a result of Realignment, Governor Brown has announced \$1.1 billion in budget savings on corrections expected for the 2012-2013 fiscal year; this marks the first decline in correctional expenditure in over 20 years.¹⁰⁷

But it is more than plausible that Realignment, as enacted, can support a much broader vision, a vision that sees long-term efficiency and savings are best served by a system that prioritizes a rehabilitative, integrative model that tied offenders to their communities of origin and invested in non-carceral and post-carceral solutions that would make them into productive citizens. At least some of the minds behind Realignment would be in agreement with this broader vision; much of the language and policy goals of the Realignment legislation signal a retreat from the retributivist discourse that has controlled criminal justice and corrections culture in this state. Testifying in a congressional hearing about changes to the PLRA, former prison warden Jeanne Woodford described the formidable political obstacles to prison reform in California. She explained that, “[t]he political

¹⁰² ZIMRING & HAWKINS, *supra* note 13, at 211.

¹⁰³ Alan Greenblatt, *States Handing Off More Responsibilities to Cities*, GOVERNING (2011), available at: <http://www.governing.com/topics/mgmt/States-Handing-Off-More-to-Cities.html> (last visited Jan 11, 2013).

¹⁰⁴ To this end, the Legislature has found that “*California must reinvest its criminal justice resources to support community corrections programs and evidence-based practices that will achieve improved public safety returns on this state’s substantial investment in its criminal justice system.*” CAL. PENAL CODE § 3450(b)(4) (emphasis added).

¹⁰⁵ A.B. 109 § 638, Reg. Sess. (C.A. 2011).

¹⁰⁶ LEGISLATIVE ANALYST’S OFFICE, *Corrections Spending and Impact of Possible Inmate Reduction* (Feb. 24, 2009), available at www.lao.ca.gov/handouts/crimjust/2009/02_24_09_corrections_spending_population_reduction.pdf.

¹⁰⁷ Marisa Lagos, *Gov. Jerry Brown plans \$1 billion in prison cuts*, S.F. CHRON., Jan. 15, 2012 at A1.

ramifications that result when a government official appears to choose prisoners and prisons over other state needs continue to prevent the . . . state government from adopting policies and appropriating money to address grossly deficient prison conditions.”¹⁰⁸ The *Plata* mandate made rehabilitation a criminal justice policy goal that would not lead to disastrous “political ramifications.” The passage of Realignment legislation is proof of a fundamental political shift in California criminal justice policy.

Proponents of Realignment have spoken about the powerful role rehabilitation must play in *Plata* compliance measures. In a press conference days before Realignment took effect, Governor Jerry Brown spoke to the legal command as well as the policy potential that underlie Realignment. He said, “we can’t overturn the Supreme Court’s decision, but we can work together to fix our broken system and protect public safety. . . [w]e’re responding with a well-crafted plan that is the result of. . . academic inquiries. . . that have critiqued our prison system and have said that it needs some kind of realignment.”¹⁰⁹ Governor Brown explicitly stated that the success of Realignment depended upon leaders in rehabilitation and traditional law enforcement fields to coordinate their efforts.¹¹⁰ Similarly, AB 109 sponsor and California Assembly Budget Committee Chair Bob Blumenfeld wrote: “Realignment offers us the chance to end the cycle of putting more money into a broken system. Now . . . counties will provide innovative rehabilitation services to non-violent offenders. By redirecting funding and responsibilities through this framework, our criminal justice system can operate at significantly lower cost and achieve better results.”¹¹¹ These quotes show that even the cost-saving effects were seen through a broader prism of long-term rehabilitative goals.

Examining realignment merely through the prism of short-term solutions to the budget crisis underscores the utility of rehabilitation as a long-term cost-saving measure. As a cost-saving strategy, rehabilitation is consistent with a fiscally conservative policy agenda.¹¹²

¹⁰⁸ Prison Abuse Remedies Act of 2007: Hearing on H.R. 4109 Before the H. Subcomm. on Crime, Terrorism, & Homeland Security of the H. Comm. on the Judiciary, 110th Cong. 4 (2008) (statement of Jeanne Woodford, former warden of San Quentin State Prison).

¹⁰⁹ OFFICE OF GOVERNOR BROWN, *Governor Brown Pledges State Support as Local Leaders Launch Realignment* (Sept. 29, 2011), available at <http://gov.ca.gov/news.php?id=17245>.

¹¹⁰ *Id.*

¹¹¹ Bob Blumenfeld, *Enough with Getting Tough on CA Prisons*, THE DAILY CALIFORNIAN (Oct. 10, 2011), available at <http://www.dailycal.org/2011/11/01/enough-with-getting-tough-on-ca-prisons/>.

¹¹² See Hadar Aviram, *Humonetarianism: The New Correctional Discourse of Scarcity*, 7 HASTINGS RACE & POVERTY L.J. 1, 3, 20-26 (2010).

Yet these dual legal and fiscal mandates presented a unique political opportunity to reform the structure of California's ineffectual correctional system. With the impetus provided by *Plata*, rehabilitation has been an implicit theme throughout the legislative focus on Realignment. And as discussed below, rehabilitation as the over-arching policy goal is apparent in the decentralization of state decision-making, and the enactment of proven recidivism-reducing measures at the pre-trial, sentencing and post-release stages.¹¹³

A shift toward community corrections is apparent in every structural change adopted under the Realignment. The legislation dramatically expands the authority of counties to administer locally controlled criminal justice systems. Specifically, the legislation gives more discretion to counties regarding pretrial justice, limits the jurisdiction of the state Board of Parole, and strengthens the power of the Community Corrections Partnership.

The sentencing alternatives made available under Realignment promote two complementary goals: preventing county jail over-crowding and keeping disproportionately affected communities intact.¹¹⁴ The law allows county officials to authorize correctional administrators to expand types of quasi-custody that count toward mandatory minimums and give offenders the ability to stay connected with their communities.¹¹⁵ For example, counties may authorize a program of electronic monitoring in lieu of bail and give courts the discretion to sentence a defendant to involuntary home detention.¹¹⁶ The opportunity for mixed modality sentencing extends to the Pregnant and Parenting Woman's Alternative Sentencing Program as well.¹¹⁷ The statute ensures that courts can impose a county jail sentence and still recommend the alternative sentence of a program.¹¹⁸ The increase of creative sentencing alternatives that encourage offenders to stay connected to their families and communities demonstrates that community empowerment is a strong value under Realignment.

The intent to promote a broader, rehabilitative vision through Realignment is particularly evident in the "Post-release Community Supervision Act of 2011," which expressly promotes the expansion of community-based corrections.¹¹⁹ With its passage, the California

¹¹³ Post release Community Supervision Act of 2011, CAL. PENAL CODE § 3450 (West 2011).

¹¹⁴ See CAL. PENAL CODE § 1203 (West 2012).

¹¹⁵ See CAL. PENAL CODE §§ 1203.016-1203.18; CAL. PENAL CODE § 2900.5(f) (West 2011).

¹¹⁶ CAL. PENAL CODE §§ 1203.016-1203.18 (West 2014).

¹¹⁷ CAL. PENAL CODE § 1174.4 (West 2012).

¹¹⁸ *Id.*

¹¹⁹ CAL. PENAL CODE § 3450 (West 2014).

Legislature has, “reaffirm[ed] its commitment to reducing recidivism among criminal offenders.”¹²⁰ The Postrelease Community Supervision Act supports this commitment by declaring, “California must reinvest its criminal justice resources to support community corrections programs and evidence based practices . . .”¹²¹ Evidence-based practices refer to “supervision policies, procedures, programs, and practices demonstrated by scientific research to reduce recidivism among individuals under probation, parole or postrelease supervision.”¹²²

The law also sets out tools that may be used to keep a supervisee in his community. They include flash incarceration, intensive community supervision, home detention with electronic monitoring, mandatory community service, victim-offender reconciliation, furlough programs, work in lieu of confinement, substance abuse treatment, and mother-infant care programs.¹²³ Importantly, the law also calls for residential programs offering structure, supervision, drug treatment, alcohol treatment, literacy programming, employment counseling, psychological counseling, mental health treatment, or any combination of these and other interventions.¹²⁴ This comprehensive list of evidence-based “policies, procedures, programs and practices” involves the full implementation and integration of rehabilitative services and community involvement.¹²⁵

Another strong indication that the Realignment is intended to achieve a long-term, rehabilitative vision are the tools set out in the Post-Release Community Supervision Act, which have been proven via rigorous meta-analysis to reduce recidivism, substance abuse and/or antisocial behavior.¹²⁶ These community-based programs incorporate evidence-based methods to reduce recidivism and are associated with average recidivism reduction rates. Some particularly startling examples come from the juvenile justice context.¹²⁷ Included among the programs proven to reduce recidivism among juvenile offenders are behavioral programs that reward selected behaviors (22% reduction in recidivism), group counseling led by a therapist (22% reduction in recidivism), mentoring by a volunteer or paraprofessional (21% reduction in recidivism), case management (20%

¹²⁰ CAL. PENAL CODE §3450(b)(1) (West 2014).

¹²¹ CAL. PENAL CODE §3450(b)(4) (West 2014).

¹²² CAL. PENAL CODE § 3450(b)(9) (West 2014).

¹²³ CAL. PENAL CODE §§ 3450(b)(8)(A)–(L) (West 2014).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See CAL. PENAL CODE § 3450(b)(8) (West 2014); Francis T. Cullen & Cheryl Lero Johnson, *Rehabilitation and Treatment Programs*, in CRIME & PUB. POL’Y 293-344 (James Q. Wilson & Joan Petersilia eds., 2011).

¹²⁷ Peter W. Greenwood & Susan Turner, *Juvenile Crime and Juvenile Justice*, in CRIME & PUB. POL’Y at 110-11.

reduction in recidivism), counseling/psychotherapy (16.6% reduction in recidivism), mixed counseling that combines individual, group, or family therapy (16% reduction in recidivism), restorative justice for low-level offenders (8%-10% reduction in recidivism), and academic training (10% reduction in recidivism).¹²⁸

Other successful recidivism-reducing measures authorized under Realignment target specific criminogenic traits. For example, evidence-based vocational and educational training programs are encouraged under Realignment.¹²⁹ When implemented properly, participation in work and education programs increase the likelihood of employment and further education when an offender reenters society.¹³⁰ Offenders typically have less education and poorer work histories than the general public. Successful programming works because it blunts stigma and enhances reintegration. These activities reduce recidivism through the development of pro-social activities.¹³¹ The causal relationship between social integration and recidivism reduction demonstrates the critical importance of community engagement in post-release supervision reform.

Realignment recognizes that the co-occurrence of drug use and criminality is another opportunity to reduce recidivism through effective rehabilitation.¹³² Drug treatment intervention is likely to succeed when the program adheres to certain methods—long-term, structured and “multi-modal, so as to deal with other problems that offenders have . . .”¹³³ While the effectiveness of drug treatment programs varies widely depending on programs’ adherence to evidence-based practices, the clinical results seem to be promising.¹³⁴

The Legislature has acknowledged that California’s “above the national average” recidivism rate is unacceptably high.¹³⁵ To this end, the Legislature has found that “California must reinvest its criminal justice resources to support community corrections programs and evidence-based practices that will achieve improved public safety returns on this state’s substantial investment in its criminal justice system.”¹³⁶ The shift toward community corrections at the pre-trial, sentencing and post-release stages shows that lawmakers recognize the important nexus between

¹²⁸ *Id.*

¹²⁹ CAL. PENAL CODE § 3450(b) (West 2014).

¹³⁰ Cullen & Johnson, *supra* note 126, at 311.

¹³¹ *Id.* at 307-316.

¹³² CAL. PENAL CODE § 3450(b) (West 2014).

¹³³ Cullen & Johnson, *supra* note 126 at 315.

¹³⁴ *Id.*

¹³⁵ CAL. PENAL CODE § 3450(b)(2) (West 2014).

¹³⁶ CAL. PENAL CODE § 3450(b)(4) (West 2014).

rehabilitation, recidivism and broader social benefits.

In summary, while Realignment was adopted in the context of a serious budgetary crisis and in the face of a court order demanding population reduction, its goals and provisions indicate that it aims for a holistic solution to the problem of prison population, by counting on local jails, and particularly on post-sentence community supervision, to implement evidence-based programs to reduce recidivism. In the next section, the paper reviews the extent to which California counties have followed this mandate.

C. Two Practices of Realignment

Critically, shifting significant responsibility from the state to the counties is provides the latter with a great degree of independence to choose how they house the new inmates.¹³⁷ California counties, and as a result, county jails, dramatically differ in their approaches toward corrections.

The conditions in jails are also rather diverse, and were shaped by the relatively little attention they received in the early days of prison litigation. Most inmate rights' early cases occurred in the context of state prisons; the relatively short sentences jail inmates served made abuses less dramatic, and since the decentralized administration precluded statewide lawsuits, any relief obtained against them was not so far reaching.¹³⁸ However, jails also became a focus of court attention, due to the fact that jails had proportionally fewer educational programs due to the shorter sentences; also, resources to provide vocational programs, recreational facilities, and medical services, were more constrained.¹³⁹ Different jails have responded differently to challenges of overpopulation and programming,¹⁴⁰ with some local facilities becoming pioneers in recidivism reduction.¹⁴¹

These differences manifest themselves in the counties' preparation for,

¹³⁷ Structurally, jails rely on local budgets and answer to local government, rather than to the state. See, e.g., Sean McConville, *Local Justice: The Jail*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 267 (Norval Morris & David J. Rothman eds., 1998).

¹³⁸ See MALCOLM FEELEY & EDWARD RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 27-50 (2000).

¹³⁹ BD. OF CORR., JAIL PLANNING & CONSTR. DIV., Report No. 4, Jail Profile Data Summary: State of the Jails in California (1987).

¹⁴⁰ Wayne N. Welsh & Henry N. Pontell, *Counties in Court: Interorganizational Adaptations to Jail Litigation in California*, 25 LAW & SOC'Y REV. 73-102 (1991); Wayne N. Welsh, *The Dynamics of Jail Reform Litigation: A Comparative Analysis of Litigation in California Counties*, 26 LAW & SOC'Y REV. 591-626 (1992).

¹⁴¹ For an inspiring example, look to the violence prevention programs implemented in the San Francisco jails. See SUNNY SCHWARTZ & DAVID BOODELL, DREAMS FROM THE MONSTER FACTORY (2009).

and implementation of, the Realignment.¹⁴² Some counties have embraced the short-term, cost-saving vision of Realignment, tackling cost issues through short-term jail expansions and program cuts. Los Angeles County, for example, has directed the funds it received to undertake a massive jail expansion to absorb its new inmates.¹⁴³ Even more problematic is Riverside County's plan to charge inmates for their time in jail – at an astounding rate of \$140 per night – by placing a lien on their post-incarceration earnings, which surely cannot work wonders for their reintegration into the job market.¹⁴⁴

Several counties, however, have committed to the second vision, exploring alternatives to incarceration, and investing in reentry and reintegration.¹⁴⁵ For example, Alameda County, which operated “in the spirit of realignment” by sending less people to state prison prior to the Realignment, proceeded by creating a probation and programming plan aimed at reducing recidivism in the long run by increasing access to services.¹⁴⁶ Similarly, San Francisco County, which focused on re-entry prior to realignment, has sought job training and drug treatment in lieu of imprisonment.¹⁴⁷

Ironically, the funding structure for counties is based on the number of inmates they sent to state prisons prior to Realignment. This structure rewards punitive counties and creates more challenges for rehabilitative counties in coming up with innovative alternatives to mass incarceration at the local government level.¹⁴⁸

To conclude, California counties are faced with their choice of vision for

¹⁴² See, e.g., Vauhini Vara, *Jail Shift Makes Waves in California Counties Forced to Take on State Inmates Release Their Low-Level Offenders, Chafing Some Residents*, WALL ST. J., Jul. 8, 2012, available at <http://online.wsj.com/article/SB10001424052702304458604577491100435436414.html>.

¹⁴³ *Hundreds Protest LA County Jail Expansion Plan*, CBS.COM (Los Angeles), Jan. 24, 2012, available at <http://losangeles.cbslocal.com/2012/01/24/hundreds-protest-la-county-jail-expansion-plan/>.

¹⁴⁴ Jennifer Medina, *In California, a Plan to Charge Inmates for Their Stay*, N.Y. TIMES, Dec. 11, 2011, available at http://www.nytimes.com/2011/12/12/us/in-riverside-california-a-plan-to-charge-inmates.html?_r=2&src=ISMR_AP_LI_LST_FB). Astoundingly, a Senate bill along the same lines has been proposed. See S.B. 1124, Reg. Sess. (C.A. 2011-2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_1101-1150/sb_1124_bill_20120217_introduced.html.

¹⁴⁵ Jackie Goldberg, *Fear Mongers were Wrong about Prison System's 'Realignment'*, THE SACRAMENTO BEE, May. 29, 2012.

¹⁴⁶ Micky Duxbury, *Alameda County Ahead of Curve With Realignment*, KQED NEWS (June 26, 2012) available at http://www.kqed.org/news/story/2012/06/26/99100/alameda_county_ahead_of_curve_with_realignment?category=bay+area&source=oakland+local.

¹⁴⁷ Demian Bulwa, *S.F. ahead of curve on jail realignment*, S. F. GATE (July 16, 2012) available at <http://www.sfgate.com/crime/article/S-F-ahead-of-curve-on-jail-realignment-3709099.php>.

¹⁴⁸ THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, *Public Safety Realignment: California at a Crossroads* 9-10 (2012), available at https://www.aclunc.org/sites/default/files/public_safety_realignment_california_at_a_crossroads.pdf

the future of local corrections. While some counties have opted for jail expansions and absurd cost-saving mechanisms, others have embraced the challenge of ending mass incarceration in a sustainable way that provides inmates with hope and tools to rebuild their lives. The last part of this Article shows how providing realigned inmates with voting rights would support this desirable second vision.

III. EMBRACING A BROAD VISION OF REALIGNMENT THROUGH VOTING RIGHTS

Assuming that a long-term strategy of creating alternatives to mass incarceration and reducing recidivism is more desirable than duplicating the state's mass incarceration epidemic at the local level, the California Supreme Court in *All Of Us Or None v. Bowen* was faced not only with a question of voting rights, but also with the opportunity to support the broader version of Realignment by giving Realigned inmates the right to vote. We believe that, by neglecting to enfranchise this population, the court has missed an opportunity to positively impact recidivism rates and civic engagement. This final chapter undertakes the analysis in which the Court should have engaged, reaching the conclusion that voting rights for Realigned inmates further the central goals of Realignment goals: fostering reintegration into society, promoting greater social and racial equality, and, as some empirical evidence suggests, contributing to recidivism reduction.

A. Promoting Reintegration

As mentioned in Part I above, few developed democracies restrict voting rights for current and formerly incarcerated people to the same extent as the United States.¹⁴⁹ It is valuable to keep in mind that countries that enfranchise felons to a greater degree than the United States do so under the assumption that enfranchisement promotes reintegration into society. In the past two decades, the Supreme Court of Canada, the Constitutional Court of South Africa, the Supreme Court of Israel and the European Court of Human Rights have overturned voting restrictions for incarcerated people, invoking principles of rehabilitation and promotion of civic life.¹⁵⁰

In 1999, the South African Constitutional Court required that the

¹⁴⁹ AMERICAN CIVIL LIBERTIES UNION, *See Out of Step with the World: An Analysis of Felony Disenfranchisement in the U.S. and Other Democracies* (May 2006), available at https://www.aclu.org/files/images/asset_upload_file825_25663.pdf.

¹⁵⁰ *Sauvé v. Canada*, [2002] S.C.R. 519 (Can.); *August v. Electoral Comm'n*, 1999 (3) SA 1 (CC) (S.Afr.); *HC 2757/06 Hilla Alrai v. Minister of Interior*, PD 18 [1996] (Isr.); *Case of Hirst v. The United Kingdom* (No. 2), Eur. Ct. H.R. 8 (2005).

government provide prisoners with the right to vote, and invoked the principle that a democracy is a “a single interactive polity.”¹⁵¹ That Court held “[t]he vote of each and every citizen is a badge of dignity and personhood. Quite literally, it says everybody counts.”¹⁵² Similarly, the Israeli High Court held that “every society should take great care not to interfere with the right to elect except in extreme circumstances” because without the franchise, the foundation of other basic rights begins to crumble.¹⁵³

The Canadian Supreme Court endorsed the right to vote as essential to effective rehabilitation.¹⁵⁴ Striking down a statute that disenfranchised inmates serving a sentence of two years or more, the *Sauvé* Court asserted that disenfranchisement neither deters crime nor rehabilitates criminals. Instead, the *Sauvé* Court recognized that the franchise is a tool of rehabilitation and held that to deny prisoners the right to vote is to lose an important means of “teaching democratic values and social responsibility.”¹⁵⁵

Even countries that deny inmates the right to vote are discouraged from doing so too broadly. The United Kingdom is in the process of changing its disenfranchisement policy to comply with a recent decision by the European Court of Human Rights, which found that wholesale disenfranchisement of inmates violated the inmates’ human rights and, moreover, “[ran] counter to the rehabilitation of the offender as a law-abiding member of the community and undermines the authority of law as derived from a legislature which the community as a whole votes into power.”¹⁵⁶

Experts in law enforcement fields consider voter disenfranchisement an impediment to community policing goals.¹⁵⁷ Community policing, a law enforcement strategy that relies on collaboration between the police and the public, breaks down when “an entire group of people are effectively excluded from the community.”¹⁵⁸ Existence of this “pariah class” prevents meaningful community-police partnerships and “the police’s ability to

¹⁵¹ *August*, 1999 (3) SA at 3.

¹⁵² *Id.*

¹⁵³ *Hilla Alrai*, PD 18 at 24.

¹⁵⁴ *Sauvé*, [2002] S.C.R. 519 at 38.

¹⁵⁵ *Id.*

¹⁵⁶ Steve Foster, *Reluctantly Restoring Rights: Responding to the Prisoner’s Right to Vote*, 9 HUM. RTS. L. REV. 489, 495 (2009).

¹⁵⁷ See Hubert Williams, Executive Director of the Police Foundation, *Remarks at Voting Rights and Reintegration: A Role for Law Enforcement Convening*, New York University School of Law (June 8, 2007).

¹⁵⁸ *Id.*

prevent and deter crime suffers as a result.”¹⁵⁹

Many California law enforcement officials recommend that correctional policy involve voter education and civic engagement. The Santa Cruz Chief Probation Officer explains that part of law enforcement intervention is to “ask [offenders] to step up and be productive responsive citizens.”¹⁶⁰ Therefore, “facilitating a prisoner’s right to vote engenders in them a sense of responsibility and inclusion, both of which are essential ingredients to successful reentry.”

Law enforcement officials also recognize that the rehabilitative benefits of civic engagement contribute to public safety.¹⁶¹ For example, Nick Gregoratos, an official in the San Francisco Sheriff’s Department, encourages voter education and registration in San Francisco county jails.¹⁶² He points to the power that pro-social experience plays in reducing recidivism: “[w]e’ve had people who are shocked they can vote and feel really good about it. Anything we can do to help them feel like they’re part of society and not want to reoffend, it’s the right thing to do.”¹⁶³

While much of the voter disenfranchisement discourse has centered on restoring the vote for the formerly incarcerated, the principle holds true for county jail inmates as well. In Rhode Island, Providence Police Chief Dean Esserman explained, “[d]enying the vote to people who have completed their prison sentence disrupts the re-entry process and weakens the long-term prospects for sustainable rehabilitation.”¹⁶⁴ The American Probation and Parole Association has taken the official position that “disenfranchisement laws work against the successful re-entry of offenders.”¹⁶⁵ And in a related vein, the National Black Police Association

¹⁵⁹ *Id.*

¹⁶⁰ *Californians Sentenced Under Realignment Have The Right to Vote, Argue Civil Rights Advocates*, CAL. COAL. FOR WOMEN PRISONERS, <http://www.womenprisoners.org/news.html> (last visited Sept. 24, 2014).

¹⁶¹ See Dean Esserman & H. Philip West, *Yes on Question 2 – Freed Felons Should Have a Voice*, PROVIDENCE J., Sept. 25, 2006, at C4; 42 Brief for The National Black Police Association et al. as Amici Curiae Supporting Appellants, *Farrakhan v. Gregoire*, No. CV-96-076 (filed Dec. 11, 2006); Voter Registration Protection Act: Hearing on S.B. 488 Before the S. Comm. on Education, Health & Environmental Affairs, 2007 Leg., 423rd Sess. (Md. 2007) (written testimony of Ron Stalling, National Black Police Assoc.); See, e.g., *Right to Vote Bill: Testimony on A.B. 301 Before the Assemb. Legis. Operations & Elections Comm.*, 2011 Leg., 76th Sess. 2 (Nev. 2011) (testimony of Lee Rowland of the Brennan Center for Justice) (discussing prolific law enforcement support for the right to vote), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/AB301%20Testimony%203%2018%2011_final.pdf

¹⁶² Trey Bundy, *Lawsuit: Some Convicted Felons Should Be Allowed to Vote*, THE BAY CITIZEN, Mar. 7, 2012 at <http://www.baycitizen.org/prisons/story/lawsuit-some-convicted-felons-should-be/>.

¹⁶³ *Id.*

¹⁶⁴ Esserman & West, *supra* note 159.

¹⁶⁵ *Resolution Supporting Restoration of Voting Rights*, *supra* note 159.

has made clear that voter enfranchisement “promotes the successful reintegration of formerly incarcerated people, preventing further crime and making our neighborhoods safer.”¹⁶⁶ The rehabilitative benefits of voter education and enfranchisement do not change when a person’s custody status moves from currently to formerly incarcerated. The right to vote remains critical to promote civic engagement, community involvement, and social integration

B. Promoting Social Equality and Empowerment

Encouraging voting and civic engagement is an inexorable component of re-entry oriented policies, as it helps inmates become law-abiding and productive members of their communities.¹⁶⁷ Emphasizing the importance of recidivism-reduction and rehabilitation, the American Bar Association (ABA) has challenged collateral sanctions that further isolate people with criminal convictions.¹⁶⁸ The disqualification from benefits or opportunities on the basis of a criminal conviction “may just as surely prevent or discourage convicted persons from successfully reentering the free community, and impose on the community the costs of their recidivism.”¹⁶⁹ The disenfranchisement of county jail inmates typifies the “collateral sanction” that creates barriers to reentry and perpetuates inmates’ continued alienation from the community.¹⁷⁰ Echoing the positions of Realignment’s proponents, the ABA concludes that “[t]his is not only a problem of fairness to offenders, but of public safety and fiscal responsibility as well.”¹⁷¹

As detailed above, because Realignment diverts offenders to county jails and keeps them closer to their homes, the opportunity to promote civic engagement is particularly ripe. When inmates exit state prison, the social alienation and detachment that accompanies re-entry often contributes to high rates of recidivism. By virtue of their proximity to home, however, county jail inmates need not experience the same social isolation as those incarcerated in state prison. Restoring the franchise to county jail inmates

¹⁶⁶ Williams, *supra* note 157.

¹⁶⁷ Erika Wood, *Restoring the Right to Vote*, BRENNAN CENTER FOR JUST. 9 (2008); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence From a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 213 (2004) [hereinafter Uggen: “Evidence”]; *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 13 (3rd ed. 2004).

¹⁶⁸ *Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE 13 (3rd ed. 2004).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

would encourage pro-social behavior by promoting investment in their home communities.¹⁷² Participation in the polity “helps to rebuild the ties to fellow citizens that motivate law-abiding behavior” by reminding offenders of the reciprocal responsibilities that citizens share.¹⁷³ Voter disenfranchisement, however, “stymies reintegration by treating people with conviction histories as a ‘pariah class.’”¹⁷⁴ The right to vote gives ex-offenders access to a civic community that incentivizes successful reentry. The intuitive link between voting, recidivism reduction and public safety is an important tool for lawmakers working to reduce crime.

Studies reveal that many convicted offenders plan to volunteer time, coach youth sports, speak publicly about their crimes, or engage in some other form of civic participation.¹⁷⁵ However, disenfranchisement and other exclusionary policies may lead inmates’ interest in community involvement to wane. Uggen and Manza quote Susan, a woman in her thirties imprisoned for murder:

I was thinking about, like, getting involved with politics when I get out, and how I’d love to, and then I’m like, “Well, I can’t vote,” so it’s so discouraging. Um, *I’m not gonna read this article on this candidate’s views or, you know, I’m not going to research on it.* But then the only thing that motivates me is that the people around me don’t know I’m an ex-con and can’t vote, and so I don’t want them to think I’m just like, lame and ignorant because *I can’t participate in their political conversations.* So that’s like my only motivation, and that’s not a lot of motivation because, like, I mean being able to vote, my vote making a difference would be more motivation than the rare political conversation.¹⁷⁶

An experience of loss of trust in the state and local governments after incarceration holds true when controlling for demographic variables, and is a discouraging deviation from the goals supporting Realignment.¹⁷⁷

As explained in Part I above, one of the more distressing effects of mass incarceration is the overrepresentation of low income and people of color, particularly African Americans, among incarcerated and formerly incarcerated individuals. A report by the Pew Center on the States revealed that, as of 2008, one in 100 individuals in California were behind bars. This startling figure rises to one in 9 individuals for African American men

¹⁷² See Erika Wood, *Restoring the Right to Vote*, BRENNAN CENTER FOR JUSTICE 13 (2008).

¹⁷³ *Id.* at 10.

¹⁷⁴ *Id.* at 12.

¹⁷⁵ Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons* in CIVIL PENALTIES, SOCIAL CONSEQUENCES 77 (Christopher Mele & Teresa A. Miller eds., 2004) [hereinafter CIVIL PENALTIES].

¹⁷⁶ *Id.* at 77 (emphasis in the original).

¹⁷⁷ *Id.* at 78-80.

aged 20-34.¹⁷⁸ Moreover, one in 31, and one in 11 African American people in the U.S. are under parole or probation supervision, respectively. The overrepresentation of African Americans among inmates is true for California as well; African Americans make up 6% of the adult population but 29% of both the male and female prison population. Moreover, inland and poorer areas of the state tend to have the highest incarceration rates.¹⁷⁹

In light of the current policy of felon disenfranchisement, this data is deeply disturbing. Historically, passage of disenfranchisement legislation has correlated with the passage of the Fourteenth and Fifteenth Amendments, and later with the Nineteenth Amendment.¹⁸⁰ Some recent commentators have drawn convincing connections between the segregation regime during the post-bellum nadir of race relations and current felon disenfranchisement.¹⁸¹ The disproportionate effect of disenfranchisement on underserved communities has led some scholars to label members of said communities as a lower “caste”.¹⁸²

Formerly incarcerated individuals, as such, do not constitute an explicit racial category, and therefore do not trigger strict scrutiny for purposes of equal protection doctrine.¹⁸³ Nonetheless, it is important to keep in mind that given the overrepresentation of minorities in the pool of convicted and incarcerated individuals, poor communities and communities of color are harmed by proxy. A review of statistical data comparing black and white voters shows that, due to the disproportionate percentage of black convicted felons removed from the already-limited pool of eligible black voters, disenfranchisement disproportionately affects the black vote.¹⁸⁴

The impact on poor communities, in fact, is double: Not only do they suffer overrepresentation in incarceration, but their interests are not properly represented in changing policies and fund allocations that would reverse the trend of over-incarcerating and stigmatizing poor people of color.¹⁸⁵ This adverse impact, resulting in low turnout rates, is compounded by the abounding misinformation about voting rights as well as the need to

¹⁷⁸ See PEW CENTER, *supra* note 57.

¹⁷⁹ Amanda Bailey & Joseph M. Hayes, *Who's In Prison: The Changing Demographics of Incarceration*, PUB. POL'Y INSTITUTE OF CAL., 6 (Aug. 2008).

¹⁸⁰ Christopher Uggen & Jeff Manza, *In a Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 795 (2002).

¹⁸¹ See ALEXANDER, *supra* note 46.

¹⁸² Uggen, Manza & Thompson, *supra* note 18, at 292, 299-301.

¹⁸³ Elena Saxonhouse, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1626-27 (2004).

¹⁸⁴ Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. PENN. L. REV. 1145, 1151 (1994).

¹⁸⁵ ELIZABETH HULL, *THE DISENFRANCHISEMENT OF EX-FELONS*, 130 (2006).

focus on immediate post-release needs, which leads to low turnout rates.¹⁸⁶ A less obvious effect of disenfranchisement is its negative impact on democracy as a whole in the community. Overall rates of voter registration and turnout for the community as a whole tend to be lower in states with strict felon disenfranchisement laws than in states lacking such laws. While the differences are not statistically significant, even small differences may have great practical significance in a given election year.¹⁸⁷

While these factors apply to the issue of felon disenfranchisement in general, rather than to the specific issue of realigned inmates in jail, there are some specific aspects of this.

C. Reducing Recidivism

California has an alarmingly high recidivism rate. Sixty-seven percent of felons released from CDCR institutions return to prison within three years of release, for parole violations or for new crimes.¹⁸⁸ Nonetheless, these rates point to an urgent need to act in a way that might discourage formerly incarcerated individuals from reentering the carceral “revolving door.”

Studying the effects of disenfranchisement on recidivism is difficult, as it requires controlling for a variety of factors, as well as contending with differing definitions of recidivism.¹⁸⁹ However, the data that has been collected supports the hypothesis that broader disenfranchisement policies are correlated with higher recidivism rates.

In a study using longitudinal data from the Youth Development Study in Minnesota, researchers relied on democratic theory and insights from criminology to predict lower arrest rates among enfranchised individuals in comparison with their disenfranchised counterparts. And, indeed, voting was inversely correlated with re-arrest, especially among those with arrest histories.¹⁹⁰ Non-voters reported having committed significantly more property and violent crimes than voters.¹⁹¹ The effect remains when controlling for other variables, but is stronger for voters of lower socioeconomic status and self-reported criminal behavior.¹⁹²

¹⁸⁶ See *id.* at 128.

¹⁸⁷ Uggen & Manza, *supra* note 180, at 783.

¹⁸⁸ See CAL. DEPT. OF CORR. & REHAB., OFFICE OF RESEARCH, *2010 Adult Institutions Outcome Evaluation Report* 3, fig. 2 (2010), available at http://www.cdcr.ca.gov/Adult_Research_Branch/Research_Documents/ARB_FY0506_Outcome_Evaluation_Report.pdf

¹⁸⁹ CIVIL PENALTIES, *supra* note 175, at 80.

¹⁹⁰ Uggen: Evidence, *supra* note 167, at 205-206.

¹⁹¹ See *id.* at 207-208.

¹⁹² See *id.* at 211.

Another study examined the differences between individuals who, under Florida law, were withheld adjudication of guilt after having been found guilty of a felony. Such individuals lose no civil rights and may lawfully assert they had not been convicted of a felony. Reconviction data for 95,919 men and women who were either adjudicated or had adjudication withheld showed that those formally labeled were significantly more likely to recidivate in 2 years than those who are not. While these data look at stigma in general, it suggests that disenfranchisement may be part of the “package” of collateral consequences that stigmatizes individuals and may consequently push them to reoffend.¹⁹³ As we continue to understand the impact of felon disenfranchisement, these studies suggest that any move toward relaxing enfranchisement restrictions is a step in the right direction.

There is one more comment to be made about realignment and voting, which has more of a temporary and practical nature. Current law counts inmates, for the purpose of redistricting, in the county in which they are incarcerated, rather than in their community of origin.¹⁹⁴ As a result, if state prison inmates were to be enfranchised, their collective vote would possibly overwhelm the small community in which they are incarcerated. By contrast, jail inmates usually serve their sentence close to where they live. Consequently, their vote would count in their own communities, in which they live, and about which they care.

Conclusion and Future Agenda

Since the Court of Appeals and the state’s Supreme Court refrained from providing reasons for their decision in *AUOUN v. Bowen*, it is difficult to speculate about the grounds for their refusal to grant the petitioners’ writ. But it is possible, and important, to think about its meaning.

Beyond the doctrinal problem of narrowly interpreting a Constitutional right, and in particular, deviating from the interpretive trend in *McPherson*, the Court has failed to see the problem of voting rights of felons in the broader prism of long-term correctional reform. California faces a unique opportunity to reverse forty years of growth in incarceration. The Criminal

¹⁹³ See, e.g., Ted Chiricos, *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 *CRIMINOLOGY* 547 (2007); see also Christopher Uggen, Jeff Manza & Angela Behrens, ‘Less than the average citizen’: stigma, role transition, and the civic reintegration of convicted felons, in *AFTER CRIME & PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION* 261-90 (Shadd Maruna & Russ Immarigeon eds., 2004).

¹⁹⁴ But see A.B. 420, Reg. Scss. (C.A. 2011) (stating that this practice may only change in 2020, when AB 420 will come into effect, requesting citizen redistricting committees to seek information about inmates’ home communities and take those into account when planning district maps).

Justice Realignment can be the vehicle for promoting evidence-based, long-term solutions that will return many Californians from a life enmeshed with the prison experience to their communities and families. The first step along that path is to view our incarcerated citizens as just that – citizens who are being punished for their crimes, but who will eventually have to rejoin society as full-fledged citizens, not a lower caste.

In his classic book *Crime, Shame and Reintegration*, John Braithwaite promotes what he refers to as a “Republican theory of justice”.¹⁹⁵ Under this theory, social response to crime should consist of “reintegrative shaming”: A penalty for having violated the rules, with set mechanisms for redemption at the end of punishment. By perpetuating the stigma without promoting reintegration, California unfortunately loses and alienates a significant portion of its population, rendering it tainted and unredeemable.

While a strategy for enfranchising Realigned inmates has failed in the courts, not all is lost. In 1974, California voters approved a constitutional amendment that awarded the vote to more felons. The social and political climates have changed, but the current financial dire straits might provide an impetus to rethink the ways in which stigmatizing tens of thousands of Californians have been impacting our wallets and our lives. We may learn to see that extending a hand to our fellow citizens, whose liberty is temporarily deprived, is not such a terrible, unthinkable idea, and may reward us with engaged, caring and passionate neighbors and friends.

195 JOHN BRAITHWAITE, *CRIME, SHAME AND REINTEGRATION* (1989).