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# THE MODERN-DAY POLL TAX: How Economic Sanctions Block Access to the Polls

By Erika L. Wood and Neema Trivedi

**Erika L. Wood**  
Project Director/Counsel

Right to Vote Project  
Brennan Center for Justice  
161 Ave. of the Americas  
New York, NY 10013  
212.992.8638  
erika.wood@nyu.edu

**Neema Trivedi**  
Former Research Associate,  
Brennan Center for Justice

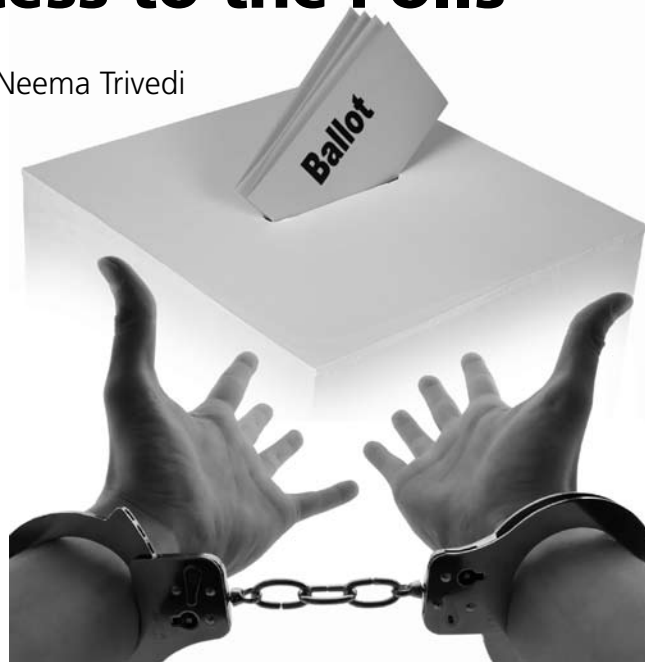
2233 E. Quiet Canyon Drive  
Tucson, AZ 85718  
203.507.5575  
neema.trivedi@aya.yale.edu

*[W]ealth or fee paying has ... no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.<sup>1</sup>*

**O**ver the past two centuries, several de jure restrictions on the American franchise have been lifted, expanding suffrage to white men without property, African Americans and other racial minorities, and women. Yet a large segment of the American public is still barred from the political process because of felony convictions. Forty-eight states and the District of Columbia have laws limiting the voting rights of people who are convicted of felonies, resulting in the disenfranchisement of 5.3 million American citizens.<sup>2</sup> Nearly four million of those individuals are not in prison, and two million have fully served their felony sentences but are still unable to vote.<sup>3</sup>

The past decade saw movement in the states to restore the vote to people with criminal convictions. Since 1997, sixteen states have reformed their laws to expand the franchise or ease voting rights restoration procedures.<sup>4</sup>

Litigation efforts to challenge felony disenfranchisement have focused on its discriminatory history and impact in the United States. Many states originally enacted felon voting bans alongside literacy tests and poll taxes in the Jim Crow era as a way to bar African Americans from voting. Today, because of racial disparities in the criminal justice system, these laws continue to affect people of color disproportionately, diluting the voting strength of their communities.



<sup>1</sup>*Harper v. Virginia State Board of Elections*, 383 U.S. 663, 670 (1966).

<sup>2</sup>For an overview of state laws regarding felon disenfranchisement, see SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), available at [www.sentencingproject.org/Admin/Documents/publications/fd\\_bs\\_fdlawsinus.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf); BRENNAN CENTER FOR JUSTICE, FELONY DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES (2006), available at [www.brennancenter.org/dynamic/subpages/download\\_file\\_47267.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_47267.pdf).

<sup>3</sup>JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 248–50 (2006).

<sup>4</sup>RYAN KING, SENTENCING PROJECT, A DECADE OF REFORM: FELONY DISENFRANCHISEMENT POLICY IN THE UNITED STATES (2006), available at [www.sentencingproject.org/Admin/Documents/publications/fd\\_decade\\_reform.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_decade_reform.pdf).

While the disturbing racial impact of felony disenfranchisement has rightfully been at the center of the legal debate, there has been less consideration of the effect of such laws on low-income individuals. Like African Americans and Latinos, poor people are overrepresented in the criminal justice system and thus disproportionately affected by felony disenfranchisement laws.<sup>5</sup> Low-income individuals face felon voting bans when they are required to pay all the fines, fees, court costs, restitution, and other legal financial obligations associated with a conviction before regaining the right to vote, resulting in the de facto permanent disenfranchisement of countless individuals who cannot pay.<sup>6</sup> There has been a notable increase in the variety, use, and size of economic sanctions imposed on such individuals in recent years, thus resulting in an even larger number of low-income people who have felony convictions and are being denied the franchise under this modern incarnation of the poll tax.<sup>7</sup>

### I. A Brief History of Felony Disenfranchisement

Felony disenfranchisement laws in the United States are deeply rooted in the difficult history of race relations in America. Criminal disenfranchisement dates back to colonial times; some states wrote the restrictive provisions into their constitu-

tions as early as the 18th century. These laws followed European models and were generally limited to a few specific offenses.<sup>8</sup> But by the end of the Civil War, lawmakers found new uses for felony disenfranchisement. The period following Reconstruction saw not only a surge in the number of states enacting such laws but also an expansion of disqualifying crimes in already existing laws. These changes achieved the intended result: removal of large segments of the African American population from the democratic process for sustained periods and in some cases for life.<sup>9</sup>

The spread of felony disenfranchisement laws in the late 1800s was part of a larger backlash against the adoption of the Reconstruction Amendments.<sup>10</sup> Despite newfound eligibility, many freedmen remained practically disenfranchised as a result of organized efforts to prevent them from voting. Violence and intimidation were rampant, especially early on. Over time, Democrats from the southern states sought to solidify their hold on the region by modifying voting laws to exclude African Americans from the polls without overtly violating the Fourteenth and Fifteenth Amendments.<sup>11</sup> The legal barriers employed (including literacy tests, residency requirements, grandfather clauses, and poll taxes), while facially race-neutral, were designed to prevent African Americans from voting.<sup>12</sup>

<sup>5</sup>For instance, the U.S. Department of Justice reported in 1997 that “68 percent of people in prison had not completed high school, 53 percent earned less than \$1,000 in the month prior to their incarceration, and nearly one half were either unemployed or working only part-time prior to their arrest.” MARC MAUER, RACE TO INCARCERATE 178 (2006).

<sup>6</sup>For a complete discussion of state statutes imposing legal financial obligations, see Brief for the Brennan Center for Justice at New York University School of Law et al. as Amici Curiae Supporting Respondents 4–7, *Madison v. Washington*, No. 78598-8 (Wash. Sup. Ct. April 21, 2006), available at [www.brennancenter.org/dynamic/subpages/download\\_file\\_36290.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_36290.pdf).

<sup>7</sup>See, e.g., JON WOOL & DON STEMEN, VERA INSTITUTE OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES? SENTENCING AND CORRECTIONS REFORMS IN 2003, at 4 (2004), available at [www.vera.org/publication\\_pdf/226\\_431.pdf](http://www.vera.org/publication_pdf/226_431.pdf); FAHY G. MULLANEY, NATIONAL INSTITUTE OF CORRECTIONS, U.S. DEPARTMENT OF JUSTICE, ECONOMIC SANCTIONS IN COMMUNITY CORRECTIONS 1 (1988), available at [www.nicic.org/pubs/pre/006907.pdf](http://www.nicic.org/pubs/pre/006907.pdf).

<sup>8</sup>See Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AMERICAN JOURNAL OF SOCIOLOGY 559, 563 (2003), available at [www.journals.uchicago.edu/AJS/journal/issues/v109n3/080073/080073.web.pdf](http://www.journals.uchicago.edu/AJS/journal/issues/v109n3/080073/080073.web.pdf).

<sup>9</sup>*Id.* at 560–61; see also Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WISCONSIN LAW REVIEW 1045, 1087–88 (2002).

<sup>10</sup>MANZA & UGGEN, *supra* note 3, at 56–57; Behrens et al., *supra* note 8, at 560; Ewald, *supra* note 9, at 1087.

<sup>11</sup>ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 111 (2000); Ewald, *supra* note 9, at 1087.

<sup>12</sup>See, e.g., *Harper*, 383 U.S. 663 (poll tax); *Guinn v. United States*, 238 U.S. 347 (1915) (grandfather clause). See also KEYSSAR, *supra* note 11, at 111–12; Behrens et al., *supra* note 8, at 563; Ewald, *supra* note 9, at 1087.

Felony disenfranchisement laws were part of this effort to maintain white control over access to the polls. Between 1865 and 1900 eighteen states adopted laws restricting the voting rights of criminal offenders. By 1900 thirty-eight states had some type of felon voting restriction, most requiring a pardon before voting rights could be restored.<sup>13</sup>

At the same time states expanded the criminal codes to punish offenses that they believed freedmen were most likely to commit, including vagrancy, petty larceny, miscegenation, bigamy, and receiving stolen goods.<sup>14</sup> Aggressive arrest and conviction efforts followed, motivated by the practice of “convict leasing,” whereby former slaves were convicted of crimes and then leased out to work the plantations and factories from which they had ostensibly been freed.<sup>15</sup>

This mass incarceration produced not only reenslavement but also mass disenfranchisement, usually for life. Those state laws and constitutions that specified disqualifying crimes focused on the often petty offenses that white lawmakers associated with freedmen—leaving out more serious crimes, such as murder, then considered to be “white” crimes.<sup>16</sup> Thus felony disenfranchisement, though ancient in its origins, was pressed into service to suppress the political power of African Americans.<sup>17</sup>

## II. The Racial Impact of Felony Disenfranchisement

Not surprisingly, given the historical origins of felony disenfranchisement laws in the United States, these laws continue to affect people of color disproportionately. Regardless of the discriminatory intent behind a given state’s felony disenfranchisement provision, the continuing disparate effect on racial minorities cannot be disputed.

Nationwide 13 percent of African American men have lost the right to vote, a rate that is seven times the national average.<sup>18</sup> In fourteen states more than one in ten African Americans may not vote due to a felony conviction, and four of those states disenfranchise more than 20 percent of the African American voting-age population.<sup>19</sup> Similarly, in nine out of ten states with significant Latino populations, Latinos are overrepresented among the disenfranchised. For instance, in New York, Latinos make up 34 percent of the disenfranchised population but only 10 percent of the citizen voting-age population.<sup>20</sup>

These trends mirror stark racial disparities in the criminal justice system. Nearly half of U.S. prison inmates are African American and 20 percent are Latino even though they make up only 13 percent and 12.5 percent of the national population, respectively.<sup>21</sup> And African Americans are seven times more likely to be incarcerated than whites.<sup>22</sup>

<sup>13</sup>MANZA & UGGEN, *supra* note 3, at 55, 238–39 (a typo in the text indicates twenty-eight states, but the table correctly lists thirty-eight).

<sup>14</sup>ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 593 (1988); Ewald, *supra* note 9, at 1088–89.

<sup>15</sup>FONER, *supra* note 14, at 205; MAUER, *supra* note 5, at 131–32.

<sup>16</sup>MANZA & UGGEN, *supra* note 3, at 43, 55; Ewald, *supra* note 9, at 1088–89.

<sup>17</sup>See *Hunter v. Underwood*, 471 U.S. 222 (1985).

<sup>18</sup>See SENTENCING PROJECT, *supra* note 2, at 1.

<sup>19</sup>MANZA & UGGEN, *supra* note 3, at 79–80.

<sup>20</sup>MARISA J. DEMEO & STEVEN A. OCHOA, MALDEF [MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND], *DIMINISHED VOTING POWER IN THE LATINO COMMUNITY: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN TEN TARGETED STATES* 16 (2003), available at [www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf](http://www.maldef.org/publications/pdf/FEB18-LatinoVotingRightsReport.pdf).

<sup>21</sup>See PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, *PRISONERS IN 2005* (2006), available at [www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf); U.S. CENSUS BUREAU, *POPULATION BY RACE ALONE, RACE IN COMBINATION ONLY, RACE ALONE OR IN COMBINATION, AND HISPANIC OR LATINO ORIGIN, FOR THE UNITED STATES: 2000* (2001), available at [www.census.gov/population/cen2000/phc-t1/tab03.pdf](http://www.census.gov/population/cen2000/phc-t1/tab03.pdf).

<sup>22</sup>MAUER, *supra* note 5, at 139.

These disparities are at least partially attributable to the “war on drugs.” Overall the prioritization of combating illegal drug use and trade in the United States has caused prison populations to skyrocket; the number of inmates incarcerated for drug offenses at all levels has risen by more than 1,000 percent from 40,000 in 1980 to 453,000 by 1999.<sup>23</sup> At the same time the “war on drugs” has disproportionately affected minority communities. Between 1985 and 1995 there was a 707 percent increase in the number of African Americans imprisoned for felony drug offenses; this compares to a 306 percent increase for whites.<sup>24</sup>

Proponents of felony disenfranchisement argue that these disparities are merely the result of a higher propensity among members of minority communities to commit crime. Yet the overrepresentation of African Americans and Latinos in the criminal justice system cannot be explained by differing crime rates alone. For instance, nationwide 56 percent of those incarcerated on felony drug charges are African American, while African Americans constitute only 13 percent of monthly drug users. Whites make up only 19 percent of drug prisoners but 74 percent of monthly users.<sup>25</sup>

### III. Equal Protection and Voting Rights Act Challenges

The disproportionate racial impact of felony disenfranchisement laws has not

gone unchallenged. The laws in Alabama, California, Florida, New York, and Washington State have all been challenged over the last thirty years with decidedly mixed results.

The landmark U.S. Supreme Court decision on felony disenfranchisement is *Richardson v. Ramirez*, holding that state laws that disenfranchise people with felony convictions do not violate the equal protection clause of the Fourteenth Amendment.<sup>26</sup> In so holding, the Court said that Section 2 of the Fourteenth Amendment, which reduces a state’s representation in Congress if the state denies the right to vote for any reason “except for participation in rebellion, or other crime,” distinguishes felony disenfranchisement from other forms of voting restrictions.<sup>27</sup> The Court interpreted this phrase to exempt felony disenfranchisement laws effectively from the heightened scrutiny given to other voting restrictions.<sup>28</sup>

*Richardson’s* sweeping ruling does not preclude challenges alleging that felony disenfranchisement statutes intentionally discriminate on the basis of race. More than a decade later, the Court decided *Hunter v. Underwood*, holding that Alabama’s felony disenfranchisement scheme had been passed with racial animus and was therefore unconstitutional.<sup>29</sup> The Court concluded that Section 2 of the Fourteenth Amendment was “not designed to permit the purposeful racial

<sup>23</sup>RYAN S. KING & MARC MAUER, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 1 (2002), available at <http://sentencingproject.org/pdfs/9038.pdf>.

<sup>24</sup>MAUER, *supra* note 5, at 168.

<sup>25</sup>KING & MAUER, *supra* note 23, at 11.

<sup>26</sup>*Richardson v. Ramirez*, 418 U.S. 24 (1974) (Clearinghouse No. 8,241). The decision overturned the California Supreme Court, which had found that the state’s permanent disenfranchisement law violated the equal protection clause. See *Ramirez v. Brown*, 507 P.2d 1345 (1973). California’s law has since been amended to disenfranchise only those who are in prison or on parole. See CAL. ELEC. CODE § 2212 (2006).

<sup>27</sup>*Richardson*, 418 U.S. at 54.

<sup>28</sup>*Id.* For a discussion of theories on which *Richardson* might be overruled, see Jason Morgan-Foster, *Transnational Judicial Discourse and Felon Disenfranchisement: Re-Examining Richardson v. Ramirez*, 13 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 279 (2006); John R. Cosgrove, *Four New Theories Against the Constitutionality of Felony Disenfranchisement*, 26 THOMAS JEFFERSON LAW REVIEW 157 (2004).

<sup>29</sup>*Hunter*, 471 U.S. at 222. The Alabama statute challenged in *Hunter* disqualified, from voting, persons convicted of crimes of “moral turpitude,” a category including minor misdemeanor offenses such as petty larceny and omitting more serious offense such as second-degree manslaughter. *Id.* at 226–27. The U.S. Supreme Court affirmed the lower court’s finding that the Alabama state legislature had deemed crimes of “moral turpitude” as those that warranted disenfranchisement because they were crimes more often committed by African Americans. *Id.* at 224, 233.

discrimination attending the enactment and operation of [the felony disenfranchisement statute] which otherwise violates Section 1 of the Fourteenth Amendment.”<sup>30</sup> The standard set forth in *Hunter* is a stringent one, requiring plaintiffs to prove that a felony disenfranchisement law was passed with racially discriminatory legislative intent—an extremely difficult showing to make.

Because of the constitutional hurdles created by *Richardson*, advocates have sought to challenge felony disenfranchisement under Section 2 of the Voting Rights Act, which prohibits all state practices denying or abridging the right to vote on account of race or color and does not require a plaintiff to prove discriminatory intent when challenging a voting qualification or practice with discriminatory effects.<sup>31</sup> Advocates argue that felony disenfranchisement laws violate Section 2 of the Act because they deprive a disproportionately minority population of the right to vote.

Most recently, challenges under the Act were brought in Washington, New York, and Florida with varied results. While the Ninth Circuit held that felony disenfranchisement laws could be challenged under the Act, the Eleventh and Second Circuits held that such a claim was not valid.

In the Washington case *Farrakhan v. Gregoire* the Ninth Circuit Court of Appeals reasoned that, to the extent racial bias in the criminal justice system contributes to the conviction of minorities for disenfranchising crimes, felon disen-

franchisement would “clearly hinder the ability of racial minorities to participate effectively in the political process.”<sup>32</sup> Upon remand, the district court stated that it had “no doubt that members of racial minorities have experienced discrimination in Washington’s criminal justice system” but concluded that “Washington’s history, or lack thereof, of racial bias in its electoral process and in its decision to enact the felony disenfranchisement provisions, counterbalance[s] the contemporary discriminatory effects that result from the day-to-day functioning of Washington’s criminal justice system.”<sup>33</sup> The district court decision is now back on appeal to the Ninth Circuit.

*Johnson v. Bush* challenged Florida’s constitutional provision that bars persons with felony convictions from voting for life unless the governor grants an individual clemency application.<sup>34</sup> In sharp contrast to the Ninth Circuit’s ruling, the Eleventh Circuit ruled en banc that Florida’s felony disenfranchisement law could not be challenged under the Voting Rights Act.<sup>35</sup> Following *Richardson*, the Eleventh Circuit read Section 2 of the Fourteenth Amendment to sanction felony disenfranchisement explicitly. Based on this, the court concluded that if it applied the Act to Florida’s felony disenfranchisement law, it would be allowing a congressional statute to contradict the Fourteenth Amendment as interpreted by *Richardson*. If Congress had intended the Act to cover felony disenfranchisement, Congress should have done so explicitly, and the court found no evidence in the congressional record that the Act

<sup>30</sup>*Id.* at 233.

<sup>31</sup>Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

<sup>32</sup>*Farrakhan v. Gregoire*, 338 F.3d 1009 (9th Cir. 2003) (Clearinghouse No. 55,376), rehearing and rehearing en banc denied, 359 F.3d 1116 (9th Cir. 2004).

<sup>33</sup>*Id.*, No. CV-96-076-RHW, 2006 WL 1889273, at \*9 (E.D. Wash. July 7, 2006).

<sup>34</sup>*Johnson v. Bush*, 405 F.3d 1214 (11th Cir. 2005) (Clearinghouse No. 53,644) (en banc). Florida’s law provides “[n]o person convicted of a felony ... shall be qualified to vote or hold office until restoration of civil rights or removal of disability.” FLA. CONST. art. VI, § 4. A person with a felony conviction may apply for clemency to have his civil rights restored. FLA. STAT. § 940.03 (2006). The Clemency Board is made up of the governor of Florida and members of the cabinet. See [Florida] Rules of Executive Clemency (2004), available at <https://fpc.state.fl.us/Policies/ExecClemency/ROEC12092004.pdf>.

<sup>35</sup>*Johnson*, 405 F.3d at 1234. Plaintiffs also argued that racial animus motivated the adoption of Florida’s felony disenfranchisement provision in violation of the equal protection clause. *Id.* at 1217. Although the court acknowledged evidence of racial animus behind certain constitutional provisions, it determined that a 1968 reenactment of the Florida Constitution “eliminated any taint from the allegedly discriminatory [earlier] provision ....” *Id.* at 1224 (citing *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998)).

was meant to apply to felony disenfranchisement laws.<sup>36</sup>

*Hayden v. Pataki* and *Muntaqim v. Coombe* are consolidated cases challenging New York's felony disenfranchisement law barring people with felony convictions from voting while they are in prison or on parole.<sup>37</sup> Plaintiffs argued, among other claims, that discrimination in the criminal justice system resulted in minority groups being disenfranchised at much higher rates than whites and that the law therefore denied—in violation of the Voting Rights Act—the right to vote on account of race.<sup>38</sup> The court rejected this claim, siding with the Eleventh Circuit in *Johnson* by concluding that “Congress did not intend or understand the Voting Rights Act to encompass” felony disenfranchisement statutes.<sup>39</sup>

The Eleventh and Second Circuits seem to have strayed far from the Voting Rights Act's plain meaning and legislative history to find a basis upon which to dismiss plaintiffs' claims under the Act. There is substantial evidence that Congress intended for the Act to apply to all practices resulting in the denial or limitation of the right to vote on account of race or color, which could include felony disenfranchisement. Even in the absence of intentional race discrimination underlying enactment of the disenfranchisement provision, the facially neutral practice of felon disenfranchisement can interact with social and historical conditions to result in the denial of the right to vote “on account of race.” Moreover, the history of

the Act cannot be ignored. It was passed in response to rampant violations of the Fifteenth Amendment. African Americans were often robbed of opportunities to participate in the political process because of widespread exclusionary policies, including felony disenfranchisement. History demonstrated that discrimination in voting was too resilient for the Fifteenth Amendment alone to rectify, so Congress adopted the Act as a comprehensive means of enforcing the Fifteenth Amendment's promise.<sup>40</sup>

#### IV. The Modern-Day Poll Tax

The effects of felony disenfranchisement laws continue to expose the laws' deep roots in the troubled history of American race relations. But many felon disenfranchisement laws also expose a more subtle form of discrimination: a distinction based on wealth and class. A number of states, either explicitly or implicitly, require individuals to pay all fees, fines, and restitution before allowing them to register to vote, a burden that falls disproportionately on the poor, thereby establishing a modern-day poll tax.

In the United States legal financial obligations generally accompany probation or incarceration sentences.<sup>41</sup> Most criminal defendants face multiple legal financial obligations at the same time, making it difficult for them ever to pay their debts in full.<sup>42</sup> Legal financial obligations are most commonly imposed on people serving probation, and full payment can be a condition of discharge.

<sup>36</sup>*Id.*, 405 F.3d at 1234.

<sup>37</sup>*Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (en banc). *Muntaqim v. Coombe* was subsequently dismissed for lack of standing. See 449 F.3d 371, 376–77 (2d Cir. 2006) (Clearinghouse No. 55,722) (per curiam). New York Election Law provides that no person convicted of a felony “shall have the right to register for or vote at any election” unless he has been pardoned, his maximum sentence of imprisonment has expired, or he has been discharged from parole.” N.Y. ELEC. LAW § 5-106 (2006). *Hayden* and *Muntaqim* were not the first cases to challenge New York's felony disenfranchisement law. In 1996 the Second Circuit, sitting en banc, decided *Baker v. Pataki*, 85 F.3d 919 (1996). The ten appellate judges who heard the appeal were deadlocked, issuing three opinions and ultimately affirming the district court's dismissal of the plaintiff's claim. *Baker*, 85 F.3d at 921. Because the court was evenly divided, the opinions have no precedential effect.

<sup>38</sup>*Hayden*, 449 F.3d at 311. New York's law disenfranchises over 4 percent of the state's African American population. See MANZA & UGGEN, *supra* note 3, at 252.

<sup>39</sup>*Hayden*, 449 F.3d at 310.

<sup>40</sup>See *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 328 (1966); see also KEYSSAR, *supra* note 11, at 264.

<sup>41</sup>R. Barry Ruback & Mark H. Bergstrom, *Economic Sanctions in Criminal Justice: Purposes, Effects, and Implications*, 33 CRIMINAL JUSTICE AND BEHAVIOR 243 (2006).

<sup>42</sup>For a further discussion of these obligations, see generally MULLANEY, *supra* note 7.

Requiring payment of these obligations before discharge can prolong the amount of time one is under supervision. Because failure to pay in most states results in an extension of the supervision period, individuals may fulfill all other obligations of their probation, except for the legal financial obligations, and still be forced to remain under supervision.<sup>43</sup>

### A. Types of Economic Sanctions

Economic sanctions can be viewed on a continuum from those that serve to punish the offender to those that serve to restore the victim.<sup>44</sup> Restitution orders are geared almost entirely toward the victim's needs, while fines are imposed primarily to punish the offender. In the middle of that spectrum are fees and costs, which can be seen as reparations for society—shifting the financial burden of criminal justice operations from the public to the defendants themselves.<sup>45</sup> Increasingly, however, economic sanctions are no longer aimed solely at benefiting victims and punishing offenders. Instead policymakers are using legal financial obligations “simply to keep the system in the black.”<sup>46</sup> All in all, researchers estimate that economic sanctions provide up to \$2 billion in revenue a year nationwide.<sup>47</sup>

#### 1. Restitution

A “court-ordered payment to compensate the victim for loss or damage,” restitution can include payments for medical

expenses or stolen property.<sup>48</sup> Nationally restitution is ordered in 14 percent of all felony convictions, most commonly for property-related offenses.<sup>49</sup> According to one study conducted in thirty-two counties, the average order imposed per felony probationer is \$3,368.<sup>50</sup> Since 1990, all states have implemented restitution statutes.<sup>51</sup> At the federal level the Victim Witness and Protection Act allows federal courts to order restitution at their own discretion as a condition of probation; this is in addition to prison terms and other fines.<sup>52</sup> The Mandatory Victim Restitution Act goes even further and now requires that federal judges impose restitution “without consideration of the economic circumstances of the defendant.”<sup>53</sup>

#### 2. Fines

Monetary penalties, fines are imposed usually at a fixed rate based on the severity of the crime. Most states establish maximum and minimum fines for each degree of crime, ranging from serious felonies to misdemeanors—the amounts of the fines decreasing with the seriousness of the offense. Fines provide general revenue for a number of state programs. For example, in the federal system most fines are deposited in the Crime Victims' Fund to support state victim compensation programs.<sup>54</sup> “Forfeiture,” or the government seizure of property obtained through or connected in some way to illegal activity, is also usually considered

<sup>43</sup>*Id.* at 15.

<sup>44</sup>Ruback & Bergstrom, *supra* note 41, at 249.

<sup>45</sup>*Id.*

<sup>46</sup>Kirsten D. Levingston, *Making the “Bad Guy” Pay: Growing Use of Cost Shifting as an Economic Sanction* 4, in *PRISON PROFITEERS* (Tara Herivel & Paul Wright eds., forthcoming Nov. 2007) (in Erika L. Wood's files).

<sup>47</sup>MULLANEY, *supra* note 7, at 13.

<sup>48</sup>*Id.* at 2.

<sup>49</sup>Ruback & Bergstrom, *supra* note 41, at 251.

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at 249.

<sup>52</sup>Victim Witness and Protection Act of 1982, 18 U.S.C. § 3663 (2000); see also Brian Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA Through the Lens of the Ex Post Facto Clause, the Abatement Doctrine, and the Sixth Amendment*, 73 *FORDHAM LAW REVIEW* 2711, 2712 (2005).

<sup>53</sup>18 U.S.C. § 3664(f)(1)(A); see also Kleinhaus, *supra* note 52, at 2712.

<sup>54</sup>Ruback & Bergstrom, *supra* note 41, at 258.



in this category, although forfeiture is not usually part of the criminal sentence.<sup>55</sup>

Fines are most commonly imposed for traffic offenses. In other contexts, setting a standardized fine amount large enough to serve a punitive value without being unfair to indigent criminal defendants is difficult.<sup>56</sup> Fines are imposed for approximately 25 percent of all felony convictions, including 20 percent of violent offenses, 24 percent of property offenses, 27 percent of drug offenses, 19 percent of weapons offenses, and 27 percent of other offenses.<sup>57</sup>

### 3. Costs and Fees

Both costs and fees are charged to “reimburse the state for the administrative cost of operating the criminal justice system.”<sup>58</sup> Costs are blanket charges, imposed by the courts on all convicted persons. Fees, by contrast, are charged in exchange for individual services.

A sampling of costs and fees includes the following:<sup>59</sup>

- Supervision fee—most people on parole and probation have to pay either a flat fee or a monthly fee to help cover the cost of their supervision.
- Presentence report fee—defendants typically pay a flat fee that goes toward gathering data that will affect the sentencing outcome.<sup>60</sup>
- Restitution collection fee—many jurisdictions typically charge an additional percentage of the total restitution amount to cover collection costs.<sup>61</sup>
- Public defender fee—usually set by the judge, this fee reimburses court-appointed attorneys for their work on an individual’s criminal defense.<sup>62</sup>
- Alcohol or drug counseling fee—typically people convicted of drug and alcohol-related offenses pay a weekly fee for counseling services, imposed as a condition of their probation.<sup>63</sup>
- Drug-testing fee—this can be assessed as a flat fee or on a weekly basis to cover the costs of periodic drug testing for people undergoing substance abuse treatment.<sup>64</sup>
- DNA fee—defendants are sometimes charged for the cost of DNA analyses used in their case.<sup>65</sup>
- Electronic monitoring fee—individuals may be charged for the costs of being monitored electronically.<sup>66</sup>

The National Institute of Corrections aptly notes that most defendants are charged several of these fees and costs, creating an especially burdensome financial debt. The institute identifies other assessments as well, such as late payment interest fees, charged when legal financial obligations are not paid by

<sup>55</sup>*Id.* at 257.

<sup>56</sup>*Id.* at 259–260. Judges generally impose fines at a fixed “going rate,” depending on the crime type, with no individualized evaluation of a person’s ability to pay. See, e.g., Susan Turner & Judith Greene, *The Fare Probation Experiment: Implementation and Outcomes of Day Fines for Felony Offenders in Maricopa County*, 21 JUSTICE SYSTEM JOURNAL 1, 3 (1999).

<sup>57</sup>Ruback & Bergstrom, *supra* note 41, at 260.

<sup>58</sup>*Id.* at 253.

<sup>59</sup>Recent data on the “typical” amounts of fees and costs are little. In this section, unless otherwise noted, the “typical” amounts listed are from 1988, as reported by the National Institute of Corrections. See MULLANEY, *supra* note 7, at 1.

<sup>60</sup>*Id.* at 3, 7.

<sup>61</sup>*Id.*

<sup>62</sup>Typically these costs are calculated as the number of hours worked multiplied by an hourly rate. *Id.* at 3.

<sup>63</sup>*Id.* at 3, 7.

<sup>64</sup>*Id.* at 3.

<sup>65</sup>See, e.g., Ruback & Bergstrom, *supra* note 41, at 254.

<sup>66</sup>*Id.*

the deadline, and victim advocate fees used to support a victim's advocate office in the jurisdiction.<sup>67</sup>

### B. Growth in the Use of Economic Sanctions

Although economic sanctions are not new in the criminal context, their use in the United States has been growing in the past few decades. Scholars cite three reasons for this increase. First, as the costs of the criminal justice system continue to rise, individuals are increasingly expected to share the financial burden of their own incarceration or supervision.<sup>68</sup> Economic sanctions are viewed as an alternative source of revenue for corrections operations in lieu of raising taxes. As costs shift to defendants, the public is relieved of bearing the financial responsibility of the criminal justice system.<sup>69</sup>

Second, because of the successful victims' rights movement, courts are more likely to order restitution out of concern for the needs and rights of crime victims.<sup>70</sup> Third, economic sanctions are increasingly seen as an alternative to incarceration. To defray the rising costs of building and maintaining prisons, and to deal with the limited space availability in current facilities, jurisdictions are considering monetary sanctions as a stand-alone punitive measure.<sup>71</sup>

These trends have persisted in recent years, particularly because states are dealing with heightened budget pressure. In the 2004 fiscal year states faced

an aggregate budget deficit of \$78 billion, and several jurisdictions responded by cutting corrections expenditures.<sup>72</sup> To compensate, costs have been shifted to the criminal defendants subject to the correctional system. In 2003 twenty states introduced bills shifting corrections costs to defendants either by introducing new economic sanctions or by increasing the amounts of costs and fees.<sup>73</sup> For instance, Florida introduced a \$40 fee to apply for appointed counsel; Illinois enacted an interstate parole transfer fee of up to \$125 and doubled monthly probation fees to \$50; Oklahoma quadrupled monthly electronic monitoring fees to \$300; and Tennessee increased its monthly probation fee by \$10.<sup>74</sup>

The growth of economic sanctions has a particularly devastating effect on African Americans and Latinos—groups disproportionately represented in the criminal justice system and the lowest economic brackets. Latest estimates show that 60 percent of state and federal prisoners were African American or Latino.<sup>75</sup> In 2005 the poverty rate for African Americans was 24.9 percent, with 9.2 million living in poverty; for Latinos, 21.8 percent, with 9.4 million living in poverty.<sup>76</sup> By contrast, the poverty rate for non-Latino whites was 8.3 percent, with 16.2 million people living in poverty.<sup>77</sup>

### C. Economic Sanctions and the Right to Vote

By themselves economic sanctions create a substantial hurdle for people com-

<sup>67</sup>MULLANEY, *supra* note 7, at 4.

<sup>68</sup>R. Barry Ruback, *The Imposition of Economic Sanctions in Philadelphia: Costs, Fines, and Restitution*, 68 FEDERAL PROBATION 21, 21 (2004); see also Levingston, *supra* note 46, at 8–9.

<sup>69</sup>MULLANEY, *supra* note 7, at 2; see also Levingston, *supra* note 46, at 11–12.

<sup>70</sup>For a discussion of the victims' rights movement, see Ruback & Bergstrom, *supra* note 41, at 21.

<sup>71</sup>*Id.*

<sup>72</sup>In the 2003 fiscal year 2003 at least nine states decreased their actual expenditures for corrections. WOOL & STEMEN, *supra* note 7, at 2.

<sup>73</sup>*Id.* at 4.

<sup>74</sup>*Id.*

<sup>75</sup>HARRISON & BECK, *supra* note 21, at 8; see also Levingston, *supra* note 46, at 7.

<sup>76</sup>CARMEN DeNAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2005, at 13–15 (2006), available at [www.census.gov/prod/2006pubs/p60-231.pdf](http://www.census.gov/prod/2006pubs/p60-231.pdf).

<sup>77</sup>*Id.*

ing out of prison and trying to reenter the community. When coupled with voting qualifications, legal financial obligations can and do result in a person's lifelong exclusion from the political process. Ten states explicitly condition the restoration of voting rights on an applicant's full payment of at least some of the court-ordered costs associated with the conviction.<sup>78</sup> In at least two of those states, Arkansas and Washington, the requirement of the full payment of all legal financial obligations is the only legal provision that may extend disenfranchisement beyond the completion of correctional supervision.

Beyond these explicit requirements, many states have "implicit" legal financial obligation requirements in two forms. One, in some states there is no explicit mention of these obligations in the voting qualification provision, but those states require that the individual complete all correctional supervision before regaining the right to vote, and in order to be discharged from supervision the individual may not have any outstanding legal financial obligations. By virtue of any outstanding monetary obligation, the individual may be forced to remain under correctional supervision despite fulfilling all other requirements of the probation or parole term. Thus, although not explicitly required by statute, the legal financial obligation remains the sole bar to discharge from supervision and to voting rights restoration.

The other form of implicit legal financial obligation requirements is found in those states that restore voting rights "upon completion of sentence." Some of

these states specifically include fines and restitution as part of the sentence. Others do not define the term "sentence," and whether individuals in those states have to satisfy their legal financial obligations in order to vote is unclear.

The following discussion of Washington State's law is one example of how a legal financial obligation requirement disenfranchises otherwise eligible individuals.<sup>79</sup>

**The Effect of Interest Payments in Washington State.** In Washington State persons convicted of a felony are disenfranchised until their civil rights are restored.<sup>80</sup> After they complete all the requirements of their sentence "including any and all legal financial obligations," they are granted from the sentencing judge a certificate of discharge that restores their right to vote.<sup>81</sup> As such, citizens who complete their sentences but have outstanding legal financial obligations *may not* vote—a scheme that the *New York Times* aptly labels "Dickensian Democracy."<sup>82</sup>

Over the past twenty years Washington State has been adding many new categories of legal financial obligations. Today people with felony convictions in the state may be responsible for paying some or all of the following assessments: restitution to the victim; crime victims' compensation fees; court costs; county or interlocal drug funds; court-appointed attorney fees; costs of defense; expenses related to emergency response; costs of supervision and incarceration; DNA database costs; and various fines.<sup>83</sup> The size

<sup>78</sup>See Brief for the Brennan Center for Justice, *supra* note 6, at 5.

<sup>79</sup>Although we use Washington State as a case study in how legal financial obligations constitute a poll tax—type of voting restriction, other states impose similar requirements. For instance, in Alabama more than half of applicants to that state's Board of Pardons and Paroles are denied reinstatement of voting rights due to outstanding legal financial obligations. See ALABAMA ALLIANCE TO RESTORE THE VOTE & BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, VOTING RIGHTS DENIED IN ALABAMA 4 (2006), available at [www.brennancenter.org/dynamic/subpages/download\\_file\\_9361.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_9361.pdf). Tennessee takes an unprecedented and unique approach by requiring that offenders pay not only all legal financial obligations but also be current on any outstanding child support obligations. See TENN. CODE ANN. § 40-29-202(c) (2006).

<sup>80</sup>See WASH. CONST. art. VI, § 3.

<sup>81</sup>See WASH. REV. CODE § 9.94A.637(1)(a), (4) (2006).

<sup>82</sup>Editorial, *Dickensian Democracy*, N.Y. TIMES, Feb. 27, 2006, at A18.

<sup>83</sup>See WASH. REV. CODE §§ 9.94A.030(28), .760(2), .780; 43.43.7541. See also Brief of Plaintiffs 4, *Madison v. Washington*, No. 04-2-33414-4-SEA (Wash. Super. Ct. Oct. 20, 2004), available at [http://brennancenter.org/dynamic/subpages/download\\_file\\_36283.pdf](http://brennancenter.org/dynamic/subpages/download_file_36283.pdf).

of the economic sanctions imposed has also increased dramatically: for example, in 1977 offenders paid \$25 into the crime victim compensation fund; today they pay \$500.<sup>84</sup>

On top of these heavy sanctions, interest accrues on any unpaid legal financial obligation debt at a rate of 12 percent from the date of entry of judgment.<sup>85</sup> County clerks can impose fees and surcharges on outstanding legal financial obligation balances. For instance, King County may charge \$100 per year, per case, for the collection of outstanding payments.<sup>86</sup> Policies like this lead to the imposition of interest and collection fees resulting in an ever-increasing outstanding debt.

This payment structure permanently disenfranchises people who cannot afford to pay higher monthly sums. Because their debt continues to increase due to interest accrual and collection surcharges, some individuals may never be able to pay their legal financial obligations fully and therefore will never regain their right to vote.

This is the case for Beverly DuBois. When she was convicted of manufacturing and delivering marijuana in 2002, she was ordered to pay legal financial obligations totaling \$1,610 (\$500 victim assessment fee, \$110 in court costs, and \$1,000 to a county drug enforcement fund).<sup>87</sup> She has now completed all the nonfinancial elements of her sentence. Despite a permanent disability that rendered her unable to work, DuBois manages to make

regular monthly payments of \$10 toward the legal financial obligations.<sup>88</sup>

Thus far DuBois has paid \$190 in accordance with the \$10 a month payment schedule set by the court. However, due to accrued interest, her debt has increased to nearly \$1,900.<sup>89</sup> At the rate she currently pays, her debt will continue to grow each year even as she continues to make payments. Under this structure, DuBois will never pay off her full debt and thus is denied the right to vote indefinitely.

In 2004 the ACLU of Washington sued the state on behalf of DuBois and others similarly situated by challenging the state's felony disenfranchisement scheme. The case, *Madison v. Washington*, argues that denying individuals the right to vote unless and until they satisfy all legal financial obligations violates both the equal protection clause of the Fourteenth Amendment and the privileges and immunities clause of Article I of the Washington Constitution.<sup>90</sup> In April 2006 the King County Superior Court, finding that the legal financial obligation requirement discriminated on the basis of wealth in violation of the equal protection clause of the Fourteenth Amendment, ruled in favor of the plaintiffs.<sup>91</sup>

People with felony convictions have no fundamental interest in the right to vote under *Richardson v. Ramirez*, the superior court ruled. Consequently, while the equal protection clause of the Fourteenth Amendment applies to plaintiffs'

<sup>84</sup>See WASH. REV. CODE § 7.68.35. See also Brief of Plaintiffs, *supra* note 83, at 4.

<sup>85</sup>See WASH. REV. CODE §§ 10.82.090(1), 4.56.110(3), 19.52.020(1). See also Brief of Plaintiffs, *supra* note 83, at 4: "In 2004, the legislature enacted RCW 10.82.090(2) to give judges discretion to waive or reduce interest, but only after a hearing in which the Court determines that the offender has made a good faith attempt at payment of the full amount with interest." *Id.*

<sup>86</sup>See Brief of Plaintiffs, *supra* note 83, at 5.

<sup>87</sup>*Id.* at 10.

<sup>88</sup>*Id.* at 11.

<sup>89</sup>*Id.*

<sup>90</sup>WASH. CONST. art. I, § 12 provides: "No law shall be passed granting any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." WASH. CONST. art. I, § 19 provides: "All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

<sup>91</sup>*Madison v. Washington*, No. 04-2-33414-4-SEA, slip op. at 12 (Wash. Super. Ct. Mar. 27, 2006), available at [www.brennancenter.org/dynamic/subpages/download\\_file\\_36282.pdf](http://www.brennancenter.org/dynamic/subpages/download_file_36282.pdf).

claims, “the proper analysis is to determine whether there exists any rational basis for the state to deny [plaintiffs] the right to vote, while granting that right to others who have been convicted of felony offenses.”<sup>92</sup> The court found none.

Continuing to disenfranchise those individuals who have not completed all terms and conditions of their sentences is rational, the state argued in defending its fees and fines, because the failure to complete those terms and conditions proves the individuals unwilling to abide by the laws that result from the electoral process.<sup>93</sup> The court rejected this argument; the issue in the case is not the “broad question of whether the state may properly distinguish between those who have completed all sentence conditions and those who have not,” the court stated.<sup>94</sup> Instead, the court explained, the issue before the court is “the narrower question of whether there is a rational justification for the state to grant the right to vote to felons who are able to pay their legal financial obligations immediately, while denying the right to those ... who, by reason of indigency, require a period of time to pay.”<sup>95</sup>

Washington’s requirement that individuals satisfy all legal financial obligations before they may vote violates, the court concluded, the Fourteenth Amendment as well as Article I of the Washington State Constitution; the court found “no logic in the assumption that a person in

possession of sufficient resources to pay the obligation immediately is the more law-abiding citizen” and “simply no rational relationship between the ability to pay and the exercise of constitutional rights.”<sup>96</sup> *Madison* is now on appeal before the Washington Supreme Court.<sup>97</sup>

## V. Other Approaches

Two approaches under U.S. Supreme Court jurisprudence were not discussed in the *Madison* decision but may provide grounds on which to challenge legal financial obligation requirements. One is to argue that the equal protection clause prohibits states from extending individuals’ criminal sentences when their indigency prevents them from paying court-imposed economic sanctions. The other is to claim that the imposition of legal financial obligations as a prerequisite to voting amounts to a poll tax in violation of the Twenty-fourth Amendment.

### A. Equal Protection Argument

Under a line of Supreme Court cases, a plaintiff may argue that disenfranchisement by legal financial requirements may violate the equal protection clause. The first of these cases is *Williams v. Illinois*, which overturned the Illinois Supreme Court’s judgment requiring the appellant to remain in jail to “work off” the monetary obligations that he was unable to pay.<sup>98</sup> Although the maximum term of imprisonment for the crime at issue was

<sup>92</sup>*Id.*, slip op. at 8.

<sup>93</sup>*Id.* at 8–9.

<sup>94</sup>*Id.* at 9.

<sup>95</sup>*Id.*

<sup>96</sup>*Id.* at 10–12. The court did not separately examine the state constitutional claims. *Id.* at 12 n.4. Although not cited by the *Madison* court, the Second Circuit also recognized that a legal financial obligation requirement might be vulnerable to an equal protection challenge. In *Bynum v. Connecticut Commission on Forfeited Rights*, 410 F.2d 173 (2d Cir. 1969) (Clearinghouse No. 1,187), the Second Circuit reversed a district court ruling that a challenge to Connecticut’s \$5 filing fee for petitions to restore voting rights was not substantial enough to merit review by a three-judge court. The Second Circuit distinguished previous challenges to Connecticut’s felony disenfranchisement law and stated that “[t]he focal question is whether Connecticut, once having agreed to permit ex-felons to regain their vote and having established administrative machinery for this purpose, can then deny access to this relief, solely because one is too poor to pay the required fee.” *Id.* at 175–76. The court concluded that “the issue raised here is so closely intertwined with the exercise of the political franchise ... that we cannot dismiss the problem out of hand.” *Id.* at 177. There is no available subsequent history in this case; Connecticut’s law was amended in 1972 to provide for automatic restoration of voting rights after release from prison and discharge from parole. See CONN. GEN. STAT. § 9-46 (2006).

<sup>97</sup>The appeal was heard on June 27, 2006. No decision has been issued at this writing.

<sup>98</sup>*Williams v. Illinois*, 399 U.S. 235 (1970) (Clearinghouse No. 2,948).

one year, the trial court required appellant to be confined for 101 days beyond the maximum sentence.<sup>99</sup>

Finding that the judgment below resulted in “an impermissible discrimination that rest[ed] on ability to pay,” the Supreme Court vacated the judgment.<sup>100</sup> States have “wide latitude” to establish punishment for state crimes, the Court acknowledged, but “once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.”<sup>101</sup> Although the Court acknowledged that its holding in *Williams* did not reach the question whether a state would be precluded in any other circumstances from using a penal sanction to hold an indigent defendant accountable for a fine, it did state in dicta that the state’s interest in collecting revenues in the case was “not unlike the State’s interest in collecting a fine from an indigent person in circumstances where no imprisonment is included in the judgment.”<sup>102</sup>

A year later the Court decided *Tate v. Short*, where the petitioner appealed his sentence to serve time in the municipal prison farm to work off unpaid traffic fines when the traffic offenses themselves imposed no prison time.<sup>103</sup> Relying on *Williams*, the Court found that the

sentence violated the equal protection clause; because the state had legislated a “fines only” policy for traffic offenses, “the statutory ceiling cannot, consistently with the Equal Protection Clause, limit the punishment to payment of the fine if one is able to pay it, yet convert the fine into a prison term for an indigent defendant without the means to pay his fine,” the Court explained.<sup>104</sup>

In *Bearden v. Georgia* the Court barred the state from revoking an indigent defendant’s probation for failure to pay a fine and restitution.<sup>105</sup> Conducting what appears to be a rational-basis analysis, the Court balanced appellant’s “significant interest” in remaining on probation against the state’s interest in punishment and deterrence.<sup>106</sup> Finding that the state’s interest could be served by other means, the Court determined that the state’s policy was “little more than punishing a person for his poverty.”<sup>107</sup>

While the threat of going to prison clearly weighs in favor of plaintiffs in these cases, the denial of the right to vote remains a grave and serious injury. As the Supreme Court explains, “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which ... we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.”<sup>108</sup> The extension of a criminal sentence that results in the continued disenfranchisement of some citizens

<sup>99</sup>*Id.* at 236–37. The Illinois Supreme Court held that “there is no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine.” *Id.* at 238 (quoting *People v. Williams*, 517 N.E.2d 197, 200 (Ill. 1969)).

<sup>100</sup>*Williams*, 399 U.S. at 240–41.

<sup>101</sup>*Id.* at 241–42. The Court concluded: “By making the maximum confinement contingent upon one’s ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.” *Id.* at 243.

<sup>102</sup>*Id.* at 238, 243–44.

<sup>103</sup>*Tate v. Short*, 401 U.S. 395 (1971).

<sup>104</sup>*Id.* at 399.

<sup>105</sup>*Bearden v. Georgia*, 461 U.S. 663 (1983).

<sup>106</sup>*Id.* at 671.

<sup>107</sup>*Id.*

<sup>108</sup>See *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964).

solely because they cannot afford to pay the economic sanctions imposed against them directly contradicts the basic equal protection principles established by *Williams, Tate, and Bearden*.

## B. Twenty-fourth Amendment Argument

Another possible theory argues that requiring individuals to satisfy all legal financial obligations before being allowed to vote amounts to a poll tax in violation of the Twenty-fourth Amendment.

The Twenty-fourth Amendment, ratified in 1964, provides: “The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax.”<sup>109</sup> To enforce the Constitutional provision, Congress enacted Section 10 of the Voting Rights Act of 1965, which also prohibits imposition of a poll tax as a precondition to voting.<sup>110</sup>

An argument can be made that the Twenty-fourth Amendment and Section 10 of the Voting Rights Act are not subject to the Supreme Court’s holding in *Richardson* because the Twenty-fourth Amendment comes after the Fourteenth Amendment and does not limit its coverage to those who otherwise have a fundamental right to vote. However, the extent of the Twenty-fourth Amendment’s protection may be limited by its own terms. As quoted above, the amendment protects “the right of citizens of the United States to vote in any primary or other election . . . .” Consequently, a claim under the amendment may first have to show that the plaintiff has a right to vote—a showing that, when brought by a person with

a felony conviction, may be precluded by common readings of *Richardson*.

Very few opinions explain the operation or coverage of the Twenty-fourth Amendment. Of the few, two reject challenges to legal financial obligation requirements. Nevertheless, there is hope for success if the attendant circumstances are right.

In the years immediately after the Twenty-fourth Amendment was ratified, there was a handful of cases invalidating explicit poll taxes, the most notable of which is *Harman v. Forssenius*.<sup>111</sup> In that case the Court addressed the question of whether Virginia could constitutionally require voters in federal elections to either pay the poll tax required for state elections or file a certificate of residence.<sup>112</sup> The Court found this requirement to be unconstitutional, explaining that it imposed “a material requirement solely upon those who refuse to surrender their constitutional right to vote . . . without paying a poll tax.”<sup>113</sup>

One year later Virginia’s poll tax was abolished in its entirety in the landmark case *Harper v. Virginia State Board of Elections*.<sup>114</sup> By relying on the equal protection clause, rather than the Twenty-fourth Amendment, *Harper* struck down Virginia’s poll tax for state and local elections. *Harper*’s sweeping language provides a foundation for all subsequent challenges to wealth-based voting qualifications. A state violates the equal protection clause, the Supreme Court held in ruling Virginia’s poll tax unconstitutional, “whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”<sup>115</sup> The Court concluded, “[W]ealth

<sup>109</sup>U.S. CONST. amend. XXIV.

<sup>110</sup>42 U.S.C. § 1973h(a) (2000).

<sup>111</sup>*Harman v. Forssenius*, 380 U.S. 541 (1965).

<sup>112</sup>*Id.* at 538.

<sup>113</sup>*Id.* at 1185. Note that, in addition to the specific language of the Twenty-fourth Amendment, the wording chosen by the Court in *Harman* implies that the Amendment’s protections may be limited to those who can first establish a right to vote.

<sup>114</sup>*Harper*, 383 U.S. at 663.

<sup>115</sup>*Id.* at 666. The court in *Madison* relied on *Harper*’s broad language. See *Madison*, slip op. at 11 (citing *Harper* to support the conclusion that “the lack of a rational relationship between wealth and one’s ability to intelligently participate in the electoral process is well-established”).

or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”<sup>116</sup>

The Twenty-fourth Amendment is rarely applied outside of “classic” poll tax cases. The cases that are relevant here are two felony disenfranchisement cases, *Howard v. Gilmore* and *Johnson v. Bush*.<sup>117</sup>

*Howard* is an unpublished Fourth Circuit opinion that rejects a *pro se* plaintiff’s challenge to Virginia’s felony disenfranchisement law. The court summarily disposes of plaintiff’s challenge to the \$10 fee necessary to restore his civil rights (and hence his right to vote) by stating, “[I]t is not his right to vote upon which payment of a fee is being conditioned; rather, it is the restoration-of his civil rights upon which the payment of a fee is being conditioned. Consequently, [plaintiff] states no claim under the Twenty-fourth Amendment.”<sup>118</sup>

The court’s reasoning in *Howard* is unclear. The label that the state chooses to describe the rights restoration process seems likely to determine whether a claim can be made under the Twenty-fourth Amendment. Possibly the court believed that the plaintiff had no constitutional right to vote under *Richardson* unless and until his civil rights were restored, so the fee was not objectionable under the Twenty-fourth Amendment.<sup>119</sup> *Howard* could then be read as extending *Richardson*’s holding from the Fourteenth Amendment to the Twenty-fourth

Amendment—a reading that clearly presents obstacles for a poll-tax challenge to legal financial obligation requirements. But *Howard*, being brief and opaque and an unpublished opinion, should not be persuasive on this point.

In *Johnson v. Bush* plaintiffs claimed that the Florida Clemency Board’s requirement that applicants pay all victim restitution to be eligible for restoration of rights constituted a poll tax. The district court relied on *Howard* in rejecting this claim on two grounds. First, the court found that the restitution requirement “does not unduly burden” the right to vote because “[t]he State is not constitutionally obligated to return [the] right [to vote] to [plaintiffs] on completion of their sentence.”<sup>120</sup> Because the right to vote is “stripped” from persons with convictions, they no longer have any such right, and consequently that right cannot be abridged by a poll tax.<sup>121</sup> Second, the state had provided a waiver process, so that failure to pay did not necessarily preclude restoration.<sup>122</sup> The court then seemed to conduct a rational-basis analysis, finding that “victim restitution is a crucial part of the debt the convicted felon owes to both the victim and society” and that “[p]ayment of that debt is directly related to the question of the applicant’s rehabilitation and readiness to return to the electorate.”<sup>123</sup>

The *Johnson* district court’s reasoning is slightly more elaborate than the *Howard* decision, but it is no more convincing. Moreover, while the Eleventh Circuit,

<sup>116</sup>*Id.* at 670.

<sup>117</sup>*Howard v. Gilmore*, No. 99-2285, 2000 U.S. App. LEXIS 2680 (4th Cir. Feb. 23, 2000); *Johnson v. Bush*, 214 F. Supp. 2d 1333 (S.D. Fla. 2002). Claims under the Twenty-fourth Amendment were also asserted in recent challenges to voter identification requirements. See *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826–27 (S.D. Ind. 2006) (holding that, because the identification card itself was free, the requirement was not a poll tax), *aff’d sub nom. Crawford v. Marion County Elections Board*, 472 F.3d 949 (7th Cir. 2007); but see *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1370 (N.D. Ga. 2005) (finding the voter ID requirement “constitutes a poll tax” in violation of the Twenty-fourth Amendment).

<sup>118</sup>*Howard*, 2000 U.S. App. LEXIS 2680, at \* 4–\*5.

<sup>119</sup>This would be consistent with the Fourth Circuit’s earlier en banc holding in *Allen v. Ellisor*, 664 F.2d 391, 395 (1981) (Clearinghouse No. 30,954), that “[t]he decision in *Richardson* is generally recognized as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime.”

<sup>120</sup>*Johnson*, 214 F. Supp. 2d at 1343.

<sup>121</sup>*Id.*

<sup>122</sup>*Id.*

<sup>123</sup>*Id.*



finding that applicants could have their rights restored even if they still owed restitution through the waiver process, affirmed on the second, narrower holding of the district court in *Johnson*, it rejected the part of the district court's opinion that echoed *Howard*'s simplistic semantics. The Eleventh Circuit explained, "As one of the civil rights to be restored, clearly the right to vote depends on any conditions that apply to the restoration of civil rights in general."<sup>124</sup> Relying on the availability of a waiver in affirming the district court, the en banc court noted that, "[i]n doing so, we say nothing about whether conditioning an application for clemency on paying restitution would be an invalid poll tax."<sup>125</sup>

In the end the Twenty-fourth Amendment theory remains untested. There is little precedential history on which to build, but that also means that the slate is nearly clean. In framing the argument, the advocate must persuade the court to look beyond simple labels and perform an in-depth functional analysis, which examines the purpose and history of the Amendment, along with the practical reality of long-term disenfranchisement caused by economic sanctions.



The United States is a country that prides itself on its democratic ideals. However, lurking beneath these worthy principles are stark inequities and entrenched discrimination rooted in history, exposing the tenuousness and infirmity of these basic democratic standards. Across the country—from Arizona to Delaware, from Washington to Florida—voters are being shut out of our democracy because they are poor. Denying the vote to fellow citizens who are living, working, paying taxes, and raising families in our communities is undemocratic. Denying the vote to fellow citizens who cannot afford to pay is probably unconstitutional. This modern-day poll tax undermines not only our democratic ideals but also years of jurisprudence aimed at defending the right to vote.

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<sup>124</sup>*Johnson v. Bush*, 353 F.3d 1287, 1303 n.28 (11th Cir. 2003) (citation omitted).

<sup>125</sup>*Johnson v. Bush*, 405 F.3d 1214, 1216 n.1 (11th Cir. 2005) (en banc).

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