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Journal

UCLA Criminal Justice Law Review, 4(1)

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Publication Date

2020-05-31

DOI

10.5070/CJ8.59683

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DEMOCRACY, IF YOU CAN AFFORD IT:
How Financial Conditions Are Undermining the Right to Vote

Thea Sebastian, Danielle Lang, and Caren E. Short

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Introduction

Today, public awareness of the cruelty, unfairness, and antidemocratic implications of felony disenfranchisement has reached its highest point, helping to drive successful reenfranchisement campaigns nationwide that are loosening such restrictions and restoring voting rights to people who are formerly incarcerated. Less acknowledged, though, is the role that money plays in determining who ultimately can cast a ballot. Through both direct and indirect mechanisms—ranging from explicit requirements that hinge rights restoration on satisfying sentence-related fines, fees, and restitution ("legal financial obligations") to the ways that criminal-legal debt may undercut civic participation—the vast majority of U.S. states have created a two-tiered system of voting that leaves potentially millions of Americans too poor to vote. As we work to identify and address the many ways that legal financial obligations (LFOs) are devastating families nationwide, we cannot ignore this basic and under-explored impact on our democratic system: The people most affected by LFOs are often rendered voiceless—and voteless—in our political process.

This Article summarizes three ways that LFOs undermine the fundamental right to vote. Part I explores the direct and indirect impact of debt-based voting restrictions, including laws that *explicitly* condition postconviction reenfranchisement on satisfying financial obligations and those that *implicitly* do so through mechanisms requiring payment as a condition of parole or probation completion. Part II discusses the voting barriers faced by individuals who are detained in local jails, which constructively deny them the right to vote. Part III describes the literature surrounding criminal-legal involvement and civic participation,

suggesting that high levels of criminal-legal debt may undermine civic participation broadly. Finally, Part IV offers policy recommendations to lower the wealth-based barriers at the intersection of criminal justice and our nation's elections.

I. Debt-Based Voting Barriers

When Amendment 4 passed in November 2018, automatically restoring voting rights to the vast majority of formerly incarcerated Floridians, people in Florida and nationwide celebrated the reenfranchisement of an estimated 1.4 million Floridians who had previously been denied voting rights due to a felony conviction.[1] This historic victory was made possible by many individuals who were formerly incarcerated and themselves directly affected.[2] And it garnered resounding bipartisan support from 65 percent of Florida voters.[3]

In early May 2019, this celebration turned to outrage when Florida lawmakers passed S.B. 7066 to "clarify" that the individuals impacted by Amendment 4 would be automatically reenfranchised *only if* they had satisfied all of the LFOs that were associated with their sentences.[4] Since this population owes an average of $1,500 per capita,[5] S.B. 7066 is projected to disenfranchise more than half a million people. Indeed, an estimate from an expert analyst suggests it could disenfranchise as many as a million people or more.[6]

This unfolding Florida saga provides a poignant and timely example of how debt-based voting barriers are disenfranchising the very people whom reenfranchisement efforts are designed to help. But debt-based voting restrictions are not just a Florida problem: Thirty states

1. Lori Rozsa, *'A Joyous Day' Ahead as 1.4 million Florida Ex-Felons Have Voting Rights Restored*, Wash. Post (Jan. 5, 2019, 3:40 PM), https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898adc28fa2_story.html [https://perma.cc/GUB8-UZXD].
2. Ari Berman, *"This Is What Democracy Is All About": Florida Ex-Felons Can Finally Register to Vote*, Mother Jones, (Jan. 8, 2019), https://www.motherjones.com/politics/2019/01/florida-voting-rights-ex-felons-register-amendment-four-voting-rights-act [https://perma.cc/T6P9-ALY6].
3. Sarah Almukhtar et al., *Florida Election Results*, N.Y. Times (May 15, 2019, 2:09 PM), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-florida-elections.html [https://perma.cc/2B76-YGCF].
4. S.B. 7066, 2019 Leg., 121st Sess. (Fla. 2019).
5. Cecile Scoon, *Florida's Change to Amendment 4 is a Travesty and a Transgression of the People's Will*, Wash. Post, (May 15, 2019, 1:19 PM), https://www.washingtonpost.com/opinions/floridas-change-to-amendment-4-is-travesty-and-a-transgression-of-the-peoples-will/2019/05/15/3b859318-75bf-11e9-b7ae-390de4259661_story.html [https://perma.cc/BV3T-8LE6].
6. *See* Gray Rohrer, *Amendment 4: Professor Testifies Law Prevents 80% of Ex-Felons from Registering to Vote*, Orlando Sentinel, (Oct. 7, 2019, 4:58 PM), https://www.orlandosentinel.com/politics/os-ne-amendment-4-federal-court-20191007-fwvhhgc7q5htnf6clo5jszxjz4-story.html [https://perma.cc/AA3D-THGT].

nationwide currently impose some debt-based barrier to voting.[7] Understanding these policies, as well as their implications for the low-income, Black, and Latinx individuals who are disproportionately affected, is essential for restoring democratic access.

A. *Criminal Legal Debt*

Today, an estimated 10 million people in the United States owe more than $50 billion in fines and fees that are related to criminal convictions.[8] These financial penalties are imposed alongside other punishments such as probation, custodial incarceration, and community service, and vary markedly between jurisdictions. However, LFOs generally fall into three categories: restitution, fines, and fees.[9]

Restitution involves court-ordered payments that are intended to compensate the crime victim and make her "whole" for her losses. However, in some cases—such as drug offenses and other cases that do not have any clear victims or where the victim's harm was entirely mitigated—the "restitution" ordered is to the state.[10] And the amounts involved are often staggering: In some cases, restitution can total hundreds of thousands or even *millions* of dollars.[11] For an individual whose employment prospects are hampered by a criminal conviction, this amount is one that they might never fully pay.

Criminal fines are financial penalties that are intended to punish the criminal defendant. Usually authorized by statute, these fines can be either mandatory or discretionary, and may prescribe a minimum and/or maximum dollar amount. For example, in Alabama, drug trafficking offenses require a mandatory $50,000 fine—an amount that is objectively unaffordable for most criminal defendants who are

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7. Campaign Legal Ctr., Can't Pay, Can't Vote: A National Survey on the Modern Poll Tax 41–50 (2019), https://campaignlegal.org/sites/default/files/2019-07/CLC_CPCV_Report_Final_0.pdf [https://perma.cc/WT53-N2VB].
8. Douglas N. Evans, John Jay Coll. of Criminal Justice, Research & Evaluation Center, The Debt Penalty: Exposing the Financial Barriers to Offender Reintegration 7 (2014), https://jjrec.files.wordpress.com/2014/08/debtpenalty.pdf [https://perma.cc/2KST-R6F7].
9. For additional information on different types of LFOs, *see* Rachel L. McLean & Michael D. Thompson, Council of State Gov'ts Justice Ctr., Repaying Debts (2007), https://csgjusticecenter.org/wp-content/uploads/2020/02/repaying_debts_full_report-2.pdf [https://perma.cc/6FJD-QHTS]; Monica Llorente, *Criminalizing Poverty Through Fines, Fees, and Costs*, A.B.A. Child. Rts. Litig. Articles (Oct. 3, 2016), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2016/criminalizing-poverty-fines-fees-costs [https://perma.cc/ZBT7-7CZ9].
10. *See* Cortney Lollar, *What is Criminal Restitution*, 100 Iowa L. Rev. 93, 137–138 (2014) (describing restitution awards to third parties and governmental agencies).
11. *See, e.g.*, *Restitution*, U.S. Attorney's Office, Dist. of Alaska, U.S. Dep't of Justice, https://www.justice.gov/usao-ak/restitution [https://perma.cc/YFK5-5BY9] (last visited Apr. 3, 2020) ("In federal cases, restitution in the hundreds of thousands or millions of dollars is not unusual.").

overwhelmingly indigent.[12] Although some states are beginning to rethink their fine frameworks—by, for example, building systems that take into account an individual's financial resources—many states impose standard fines *regardless* of an individual's financial circumstances.[13] The result is a regressive system that imposes disproportionately more financial hardship and punishment on low-income individuals.

The final category—fees—actually encompasses a sprawling set of criminal-legal fees, costs, surcharges, and other assessments that are imposed on criminal defendants as a way to raise revenue. Unlike fines, which purportedly have a punitive purpose, fees are broadly designed to raise money to fund the administration of courts, other aspects of the criminal-legal system, or unrelated municipal services.[14] In Florida, many court-related functions are funded entirely by these fees and costs.[15] As a result, criminal defendants are charged for the very system that is detaining and prosecuting them, including charges for investigation, prosecution, drug testing, electronic monitoring, arrest warrants, payment plans, probation supervision, community service, expert witnesses, medical care, nightly stays in jail, and even their public defense.[16] In some places, people must pay a fee just to *apply* for a public defender.[17] In Florida, felony convictions usually trigger a *minimum* of approximately $698 in court costs and fees if a defendant is represented by a court-appointed lawyer.[18]

These LFOs add up quickly, particularly in jurisdictions that assess fees for late payments or charge interest. In one study, the average family of a returning citizen owed approximately $13,600 in fines and fees alone.[19] The result is a debt-load that many formerly incarcerated individuals may never be able to pay. In fact, the median earnings of an individual who was formerly incarcerated is $10,090 annually—approximately $3000 *less* than he or she probably owes in debt.[20] And these

12. *See* Ala. Code § 13-A-12-231 (West, Westlaw through Act 2020-21).
13. *See* Matthew Menendez et. al., Brennan Ctr. for Justice, The Steep Costs of Criminal Justice Fees and Fines 9 (2019), https://www.brennancenter.org/sites/default/files/2019-11/2019_10_Fees%26Fines_Final5.pdf [https://perma.cc/D2N5-PEK5].
14. *See infra* Subpart IV.A.
15. *See* Fla. Const. art. V, § 14; Crist v. Ervin, 56 So. 3d 745, 752 (Fla. 2010) ("[C]ourt-related functions of the clerks' offices are to be funded entirely from filing fees and service charges . . . .").
16. Rebekah Diller, Brennan Ctr. for Justice, The Hidden Costs of Florida's Criminal Justice Fees (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_The%20Hidden-Costs-Florida%27s-Criminal-Justice-Fees.pdf [https://perma.cc/QPR7-4KRX].
17. *Id.* at 7.
18. Jones v. DeSantis, 410 F.Supp.3d 1284, 1306 (N.D. Fla. 2019).
19. Saneta deVuono-powell et al., Ella Baker Ctr. for Human rights, Forward Together & Research Action Design, Who Pays? The True Cost of Incarceration on Families 9 (2015), http://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf [https://perma.cc/Y3SU-YL8B].
20. Adam Looney & Nicholas Turner, Brookings Inst., Work and Opportunity

courtimposed debts fall disproportionately on minority and poor communities who are often least able to pay them.[21] These racialized impacts, as well as the proliferation and expansion of criminal-legal debt, is discussed in more detail *infra* in Part III on "pocketbook policing." Here, the key takeaway is this: Conditioning voting rights restoration on full payment of one's LFOs can result in permanent disenfranchisement for poor and minority individuals who cannot afford to pay.

B. *The Landscape of Debt-Based Voting Barriers*

At present, forty-eight states and the District of Columbia have laws limiting the voting rights of individuals convicted of felonies.[22] All forty-eight states provide a mechanism for voting rights restoration—although some *only* provide a discretionary route via clemency or legislative relief—but most states either explicitly or implicitly hinge voting rights restoration on paying LFOs.[23] Indeed, a recent report conducted by Campaign Legal Center concluded that at least thirty states

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Before and After Incarceration 7 (2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf [https://perma.cc/H6TC-7TKT].

21. *See* Evans, *supra* note 8, at 7, 11; McLean & Thompson, *supra* note 9, at 8 ("In one study, three-fourths of people released from prison owing child support, restitution, and supervision fees reported having difficulty paying off these debts.").

22. Two states—Maine and Vermont—do not disenfranchise felons. *See* Jean Chung, The Sentencing Project, Felony Disenfranchisement: A Primer (2018), https://www.sentencingproject.org/wp-content/uploads/2015/08/Felony-Disenfranchisement-Primer.pdf [https://perma.cc/9CVU-HLPB].

23. This Article relies upon a recent study conducted by Campaign Legal Center (CLC), *supra* note 7, where Danielle Lang, a coauthor of this Article, directs the voting rights program. Beth Colgan has also written an authoritative piece on this topic, *see* Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 Vand L. Rev. 55 (2019). Professor Colgan correctly notes that arguably *every* state that has felony disenfranchisement has legal restrictions that could lead to wealth-based disenfranchisement. *Id.* at 79–80. However, the study conducted by CLC used a different methodology for determining which states pose the greatest risk of wealth-based disenfranchisement. First, the CLC study did not take into account clemency procedures that look at outstanding LFOs unless a pardon is the only available option for voting rights restoration. This is because where automatic restoration is available, it will be the primary mechanism for restoring voting rights for most people. Indeed, most people will become eligible for automatic restoration before they meet the guidelines for a clemency-based restoration of voting rights. Second, the CLC study categorizes states that enfranchise individuals upon release from incarceration as states without the modern poll tax. Colgan's article argues that even these states could lead to wealth-based disenfranchisement because parole or probation might be revoked—and the individual may return to prison—because of failure to pay. *Id.* Under *Bearden v. Georgia*, 461 U.S. 660 (1983), a state cannot constitutionally reincarcerate a person on parole or probation for failure to pay LFOs without consideration of their ability to pay. Thus, a state acting constitutionally will not disenfranchise individuals under these regimes unless there is a willful failure to pay. This Article addresses the common violations of *Bearden* that lead to disenfranchisement, *infra* Part II on jail-based disenfranchisement.

implicitly or explicitly condition voting rights on paying LFOs—a modern-day poll tax in all but name.[24]

1. Explicit LFO Requirements

The most obvious form of this modern-day poll tax is the explicit requirement that LFOs be paid prior to regaining voting rights. Eight states have such an explicit requirement in their election laws, though each state's policy has its own idiosyncrasies.[25] Alabama requires payment of all LFOs (including restitution, fines, and fees) imposed *at the time of sentencing* for disqualifying felony convictions involving moral turpitude, but the state excludes payment of LFOs that were imposed *after* sentencing or imposed for non-disqualifying felony convictions.[26] In Arizona, people who have one felony conviction have their voting rights restored after sentence completion, including parole and probation, and payment of all outstanding restitution.[27] But the state does not require payment of fines or fees.[28] In Arkansas, a citizen seeking voting rights restoration must pay *all* LFOs—including those imposed after sentencing—and bears the burden of providing *proof* of such payment, as well as her completion of her sentence, to the local registrar.[29] As noted above, Florida requires payment of all LFOs imposed at conviction if they are included within the "four corners of the sentencing document."[30] And in Tennessee, citizens must not only have paid all restitution and court costs (but not fines), but also be current on child support.[31] Tennessee is the only state in the United States to have such a requirement.[32]

While an LFO requirement is not explicit in Georgia's election code, an Attorney General opinion makes clear that to regain voting rights, Georgia citizens with past convictions must pay statutory fines that are imposed as part of the sentence, but they need not pay restitution, costs, or fines connected with parole or probation.[33] In Connecticut, curiously, the election code requires payment of fines for voting rights restoration *only* for those with out-of-state or federal convictions.[34] Finally, the state

24. Campaign Legal Ctr., *supra* note 7, at 41–50.
25. *Id.* at 21.
26. Ala. Code § 15-22-36.1 (West, Westlaw through Act 2020-38).
27. Ariz. Rev. Stat. § 13-907 (formerly cited as § 13-912, renumbered and amended by L. 2019, ch. 149, § 7) (West, Westlaw through Mar. 27, 2020, 54th Leg., 2d Reg. Sess.).
28. *See id.* Arizona recently amended its law to remove the requirement of payment of all fines in addition to restitution. *See* H.R. 2080, 54 Leg., 1st Reg. Sess. (Ariz. 2019), https://apps.azleg.gov/BillStatus/GetDocumentPdf/470934.
29. Ark. Const. amend. 51, § 11(a)(4), (d)(2)(A)–(B).
30. S.B. 7066 § 25, 2019 Leg., 121st Sess. (Fla. 2019).
31. Tenn. Code Ann. § 40-29-202(b)–(c) (West, Westlaw through Pub. Act 532, Mar. 10, 2020, 111th Tenn. Gen. Assemb., 2020 1st Reg. Sess.).
32. *See* Campaign Legal Ctr., *supra* note 7, at 41–50 (listing state LFO-related statutes).
33. Ga. Att'y Gen., Advisory Opinion on Voting Rights Restoration No. 84-33 (May 24, 1984).
34. Conn. Gen. Stat. Ann. § 9-46a (West, Westlaw current through Pub. Act 20-1).

of Washington has a unique system wherein the right to vote is provisionally restored upon completion of incarceration and parole, but the right to vote can be revoked if a court finds that the citizen has willfully failed to pay outstanding LFOs.[35]

In addition to the eight states described above, two states that retain a permanent felony disenfranchisement model require payment of LFOs in order to qualify for *discretionary* rights restoration through clemency. In both Iowa and Kentucky, the only way to regain the right to vote after a felony conviction is through executive clemency. In Iowa, the Governor has instructed that individuals can only apply for voting rights restoration if they have either paid their LFOs or are currently on a payment plan for their LFOs.[36] Likewise, in order to apply for rights restoration in Kentucky, citizens cannot have any outstanding restitution and the Governor also considers outstanding fines and fees in exercising his discretion.[37]

2. LFO-Related Administrative Barriers to Voting

As one can imagine, these complicated requirements are not only onerous, *see supra* Subpart II.A and *infra* Subpart IV.A but create substantial confusion and bureaucratic difficulties. In the words of Judge Hinkle in the Northern District of Florida, the result can be an "administrative nightmare"[38] and result in spillover disenfranchisement effects even on those who *should* be eligible under the state's requirements. A few examples illustrate this point.

In Alabama, only LFOs imposed at sentencing should be disqualifying.[39] But the Board of Pardons and Paroles often errs in administering this requirement, informing potential voters that they must

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In early 2019, the Connecticut House of Representatives introduced and passed a bill that would have removed the financial restrictions and reenfranchised all citizens, postincarceration, regardless of whether their conviction was in-state, out-of-state, or federal. However, the Senate did not vote on it before the end of the January session. *See* H.B. 7213 , 2019 Gen. Assemb., Jan. Sess. (Conn. 2019), https://www.cga.ct.gov/2019/TOB/h/pdf/2019HB-07213-R00-HB.pdf; *see also* Substitute H.B. No. 7160, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019) (as amended by H. Amend. Sched. A), https://www.cga.ct.gov/2019/FC/pdf/2019HB-07160-R001015-FC.PDF.

35. Wash. Rev. Code Ann. § 29A.08.520 (West, Westlaw current though Ch. 92 of the 2020 Wash. Leg. Reg. Sess.).

36. *Voting Rights Restoration*, Iowa Off. of the Governor, https://governor.iowa.gov/services/voting-rights-restoration (last visited Apr. 4, 2020).

37. *See* Div. of Prob. & Parole, Ky. Dep't of Corr., Application for Restoration of Civil Rights (Rev. Mar. 2020), https://corrections.ky.gov/Probation-and-Parole/Documents/Restoration%20of%20Civil%20Rights%20Application%20Final.pdf [https://perma.cc/B7DX-8A3B].

38. Lawrence Mower, *Lawmakers Made Amendment 4 an 'Administrative Nightmare,' Federal Judge Says*, Tampa Bay Times (Oct. 8, 2019), https://www.tampabay.com/florida-politics/buzz/2019/10/08/lawmakers-made-amendment-4-an-administrative-nightmare-federal-judge-says [https://perma.cc/J3R5-PSAM].

39. Ala. Code § 15-22-36.1(3) (West, Westlaw through Act 2020-38).

pay *all* outstanding LFOs, including late penalties, in order to qualify for voting rights restoration.[40] As a result, Alfonso Tucker was wrongly disenfranchised in the 2018 midterm elections.[41] At the time of his conviction in 1992, Mr. Tucker was assessed $1,515 in fines and fees.[42] He signed up for a payment plan and paid $1,511 towards his fines and fees.[43] But because he failed to pay just four dollars of the total amount, the state imposed a late fee of $135.[44] When Mr. Tucker applied for voting rights restoration, he was informed he could not regain his right to vote until he paid the late penalty.[45] He did not have the money to pay the full $139 and thus lost the opportunity to vote in 2018.[46] By law, Mr. Tucker should have been required only to pay the four dollars remaining from his original fines and fees to be eligible for rights restoration.[47]

In Florida, state officials as of yet have been unable to define which LFOs fall within the "four corners of the sentencing document" or even what "the sentencing document" referred to in the statute is.[48] As of now, the Secretary of State has no plan for the uniform implementation or enforcement of SB7066's requirements.[49] And records of outstanding LFOs are not readily available to impacted Floridians.[50] Despite having a team of lawyers to assist him, at least one of the Plaintiffs in a case challenging the LFO requirement in Florida has still not been able to obtain the necessary records of his decades-old convictions to ascertain what LFOs he must pay in order to vote.[51] Many others remain confused as to what precisely they owe, given inconsistencies in the records and the lack of disaggregation of LFOs imposed as a result of felony and misdemeanor convictions.[52]

In Georgia, there is significant deviation in state and local officials' explanations of what is required for a person with a conviction to restore

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40. Alfonso Tucker, *Alabama Took My Voting Rights Away for Owing 4 Dollars*, Campaign Legal Ctr. (Apr. 5, 2019), https://campaignlegal.org/story/alabama-took-my-voting-rights-away-owing-4-dollars [https://perma.cc/V2ZE-57AX]; Campaign Legal Ctr., *supra* note 7 at 10.
41. Tucker, *supra* note 40.
42. Campaign Legal Ctr., *supra* note 7 at 10.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. Brief of Plaintiffs-Appellees at 22–23, Jones v. Governor of Fla., 950 F.3d 795 (11th Cir. 2020) (No. 19-14551); *see also* Plaintiffs' Motion for Preliminary Injunction, Jones v. DeSantis, 410 F.Supp.3d 1284 (N.D. Fla 2019) (No. 4:19-cv-300), ECF No. 98-1.
49. Brief of Plaintiffs-Appellees, *supra* note 48.
50. Jones v. DeSantis, 410 F.Supp.3d 1284, 1306-07 (N.D. Fla. 2019). In some states, this modern-day poll tax is compounded by the state charging people with convictions to obtain their own criminal records identifying their convictions and outstanding LFOs.
51. *Id.*
52. *Id.*

his or her voting rights. Despite the Attorney General opinion explaining that only statutory fines must be paid, many county officials routinely inform people with convictions that they must pay all fines, fees, and restitution to register to vote.[53] Campaign Legal Center has identified similar misinformation in Connecticut, where some officials have improperly expanded the fines requirement—which, according to Connecticut law, only applies to people who have out-of-state convictions—to people who have *in-state* convictions.[54]

It should not take a lawyer for a person to determine her eligibility to vote. But the rights restoration schemes in many states are so complicated that, in practice, a law degree is required. So long as these laws remain complex and difficult to navigate, election officials are likely to make mistakes and misinform potential voters—and voters, facing this maze of rules, are likely to assume their ineligibility and remain disenfranchised.

3. Implicit LFO Requirements

Twenty states have built implicit poll taxes into their provisions for voting rights restoration.[55] These states do *not* explicitly require that individuals pay fines and fees to restore their right to vote, but they do require completion of parole and/or probation before a person can regain her voting rights.[56] Since the length of a person's parole and/or probation sentence may depend on whether the person has complied with all supervision conditions, including payment of LFOs, the right to vote in these states can be delayed through extended parole and/or probation because of an inability to pay off legal debts.[57]

Conditioning voting rights restoration on completion of parole and/or probation inevitably creates the potential for wealth-based disenfranchisement. For example, in Missouri, individuals may not vote unless they

53. *See*, *e.g.*, Dep't of the Columbus, Ga. Consol. Gov't, *Elections & Registration: Frequently Asked Questions*, https://www.columbusga.gov/elections/elect-FAQ.htm [https://perma.cc/U7NF-RB5X] (last visited Apr. 4, 2020) ("Can a felon vote? Yes, once all aspects of your felony sentence is completed to include probation, restitution, or fines."); Wilkinson Cty., Ga., *Elections and Registrations*, https://wilkinsoncounty.net/index.php/elections-and-registrations [https://perma.cc/5HSQ-L9VQ] (last visited Apr. 4, 2020) ("You may NOT register if you . . . [h]ave been convicted of a felony and you are currently serving your sentence, this includes any fines and probation.").
54. Email from Hope Metcalf, Supervising Attorney, Rule of Law Clinic at Yale Law School, to Peggy Reeves, Conn. Asst. to the Sec'y of the State for Elections (Oct. 29, 2018), https://campaignlegal.org/sites/default/files/2018-10/Follow-Up%20Letter%20to%20Peggy%20Reeves.pdf [https://perma.cc/2V3K-XVCT].
55. Campaign Legal Ctr., *supra* note 7, at 25. The states with implicit poll taxes are Alaska, California, Delaware, Idaho, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, South Dakota, Texas, Virginia, West Virginia, Wisconsin, and Wyoming.
56. *Id.*
57. *Id.*

have completed parole and probation.[58] Missouri also requires individuals to pay any restitution imposed as a result of their conviction *before* they are released from supervision.[59] If restitution is not paid within the original term of the probation, the court will impose the maximum term for probation allowed for that offense.[60] Similarly, a person will not be released from parole until restitution is paid, or until the maximum term for parole under that offense is served.[61] This wealthbased prolongment of supervision is not limited to restitution. Completion of probation and parole may also be conditioned on the payment of supervision fees of up to sixty dollars per month.[62]

Alaska, California, Delaware, Idaho, Kansas, Minnesota, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, South Dakota, Texas, West Virginia, Wisconsin, and Wyoming all have similar statutory frameworks, requiring that individuals pay certain LFOs before they may be released from probation or parole.[63] These states require payment of LFOs as a condition for securing early release and/or create the risk that probation or parole will be extended because LFOs are outstanding.[64] In some jurisdictions, "pay-only" probation specifically refers to probation that lasts until the individual can satisfy his or her LFOs—and that exists only because the individual has not paid his or her LFOs rather than for any other reason.[65] In Georgia, "pay-only probation" is explicitly recognized in statute.[66] Anyone on "pay-only" probation will not be considered to have completed his or her sentence because they remain on probation. Also, over and above these statutory requirements, some Departments of Corrections have policies requiring payment of all LFOs to be eligible for early release from supervision. For example, the Wisconsin Department of Corrections states that people with convictions are only eligible for early discharge from probation if they have "[f]ulfilled *all* financial obligations his or her victims, the court, and the department, including the payment of any fine, forfeiture, fee or surcharge, or order of restitution."[67]

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58. *See* Mo. Rev. Stat. § 217.690 (West, Westlaw through 100th Gen. Assemb., 2019 1st Reg. and 1st Extraordinary Sess.).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Campaign Legal Ctr., *supra* note 7, at 41–50.
64. *See id.*
65. *See* Chris Albin-Lackey, Human Rights Watch, Profiting from Probation, America's "Offender-Funded" Probation Industry 25–27 (2014), https://www.hrw.org/report/2014/02/05/profiting-probation/americas-offender-funded-probation-industry [https://perma.cc/G94Z-EJ69].
66. *See* Ga. Code Ann. § 42-8-103 (West, Westlaw through L. 2020, Act 322).
67. *Community Corrections—General Information*, Wisc. Dep't of Corr. (emphasis added), https://doc.wi.gov/Pages/AboutDOC/CommunityCorrections/GeneralInformation.aspx [https://perma.cc/5MKG-53VQ] (last visited Apr. 5, 2020).

All of these schemes create a possibility that an inability to pay LFOs will prolong disenfranchisement. Indeed, it is well-established that inability to pay LFOs often does prolong supervision and thus disenfranchisement.[68]

C. *Legal Challenges to the Modern-Day Poll Tax*

The evolution of this modern-day poll tax is surprising given that it is at odds with a basic premise of our modern post–civil rights era democracy: Wealth should not be a factor in access to the ballot box.[69]

This was not always the case. The U.S. Supreme Court first heard a challenge to poll taxes in 1937: A white male citizen in Georgia brought suit after he was not allowed to register to vote for declining to pay the tax.[70] In *Breedlove v. Suttles*, the U.S. Supreme Court upheld the payment of poll taxes as a prerequisite of voting, finding that poll taxes did not "deny any privilege or immunity protected by the Fourteenth Amendment."[71] Rather, the Court viewed poll taxes as "familiar and reasonable regulation[s] long enforced in many states . . . ."[72] Georgia abolished its poll tax in 1945, but *Breedlove* remained good law until it was overturned in 1966.[73]

Poll taxes were abolished nationwide in the 1960s during the height of the Civil Rights Movement. The TwentyFourth Amendment, ratified in 1964, prohibited the use of poll taxes in federal elections.[74] Four states continued to require citizens to pay to vote in state elections until 1966.[75] In *Harper v. Virginia State Board of Elections*, however, the U.S. Supreme Court held that the use of poll taxes in state elections violated the Fourteenth Amendment.[76] Because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process," the Court found that poll taxes constitute invidious discrimination against individuals based on socioeconomic status.[77] The Court explicitly overruled *Breedlove*,[78] holding that "once the franchise [has been] granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause."[79]

Harper is not the only line of Supreme Court precedent relevant to the wealth restrictions at issue in this Part. A long line of precedent

68. *See* Albin-Lackey, *supra* note 65, at 27–30.
69. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
70. Breedlove v. Suttles, 302 U.S. 277 (1937).
71. *Id.* at 283.
72. *Id.*
73. *Harper*, 383 U.S. at 669.
74. U.S. Const. amend. XXIV, § 1. The Amendment guarantees that the right to vote in federal elections "shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."
75. *Harper*, 383 U.S. at 680.
76. *Id.*
77. *Id.* at 668.
78. *Id.* at 669.
79. *Id.* at 665.

established that the state cannot apply penalties or withhold access to a significant interest because a person cannot afford to pay LFOs. To do so "would be little more than punishing a person for his poverty"[80] in violation of "the fundamental fairness required by the Fourteenth Amendment."[81] For this reason, the Supreme Court has held that indigent defendants have the right to receive a free transcript to enable an appeal of their conviction, the state cannot revoke probation for failure to pay a fine or fee that the person is unable to pay, and the state cannot deny the right to an appeal of revocation of parental rights simply because a person cannot afford to pay the requisite fees.[82] All of these cases—from *Griffin* and *Harper* to *Bearden* and *M.L.B.*—establish the principle that when the state confers a substantial right, it cannot do so "in a way that discriminates against some convicted defendants on account of their poverty."[83]

Nonetheless, until recently, wealth restrictions on voting for people with convictions have been left unscathed. Two prior cases challenging these restrictions in Arizona and Tennessee unfortunately failed,[84] leaving the state of the law on this issue in limbo and many affected voters without much hope of a change. But the tide may be turning. In *Thompson v. Alabama*, the district court denied the state's motion to dismiss a challenge of the LFO-based voting restriction as applied to people who are unable to pay their outstanding LFOs.[85] The district court distinguished the Arizona case, *Harvey v. Brewer*, which did not raise an inability to pay claim, and cast doubt on the state's interest in imposing such a requirement.[86]

Moreover, the court in the recent challenges to the new Florida LFO requirement recently issued a landmark decision in its order granting a preliminary injunction by holding unequivocally that it is unconstitutional for a state to "deny the right to vote to a felon who would be allowed to vote but for the failure to pay amounts the felon has been genuinely unable to pay."[87] Moreover, the court cast considerable doubt on the state's ability to condition the right to vote on payment of various administrative court fees and costs without running afoul of the Twenty-Fourth Amendment's prohibition on requiring payment of a "poll tax or any other tax" to vote.[88] Hopefully, this turn in the courts will soon

80. Bearden v. Georgia, 461 U.S. 660, 671 (1983).
81. *Id.* at 673.
82. Griffin v. Illinois, 351 U.S. 12, 17–18 (1956); *Bearden*, 461 U.S. at 671; M.L.B. v. S.L.J., 519 U.S. 102, 123–24 (1996).
83. *Griffin*, 351 U.S. at 18.
84. Harvey v. Brewer, 605 F.3d 1067, 1079 (9th Cir. 2010); Johnson v. Bredesen, 624 F.3d 742, 746–50 (6th Cir. 2010).
85. Thompson v. Alabama, 293 F.Supp.3d 1313 (M.D. Ala. 2017).
86. *Id.* at 1332–33 (citing *Harvey*, 605 F.3d 1067).
87. Jones v. DeSantis, 410 F.Supp.3d 1284, 1304 (N.D. Fla. 2019) (citing Johnson v. Governor of Fla., 405 F.3d 1214 (11th Cir. 2005)).
88. *Id.* at 1290, 1305–06.

be the death knell of this modern-day poll tax. As the judge in *Jones v. DeSantis* explained:

> Suppose a state adopted a statute automatically restoring the right to vote for felons with a net worth of $100,000 or more but not for other felons. Would anyone contend this was constitutional? One hopes not. An official who adopts a constitutional theory that would approve such a statute needs a new constitutional theory.[89]

II. Jail-Based Disenfranchisement[90]

Alongside laws that explicitly hinge voting eligibility on satisfying criminal-legal debts, essentially *all* states have laws, policies, or practices that effectively disenfranchise a large swathe of eligible voters: people detained in local jails.[91]

The majority of the nearly 750,000 people filling local jails nationwide[92] can legally cast a ballot.[93] While some individuals may have immigration statuses or previous felony convictions that preclude voting eligibility, most people incarcerated are merely detained pretrial or serving misdemeanor sentences that do not result in legal disenfranchisement.[94] And yet, as practical matter, few people serving jail sentences are able to cast a ballot. As explored in this Part, for many people who are detained pretrial or serving misdemeanor sentences, the barriers to casting a ballot may be state and local policies and practices that inhibit incarcerated individuals from successfully casting absentee ballots or in-person ballots at the jail. For others, the restriction may be explicit: In Ohio, for example, where the Campaign Legal Center, Dēmos, and the Roderick & Solange MacArthur Justice Center have filed suit, a person arrested a few days before Election Day cannot get an absentee ballot

89. *Id.* at 1302.
90. There is often confusion around the difference between jails and prisons. Although definition may vary by state, typically, jails are under the jurisdiction of a local government and are used to confine people detained pretrial or those convicted of minor crimes, usually those serving one year or less. *See* Bureau of Justice Statistics, *FAQ Detail* (last visited Nov. 1, 2019) https://www.bjs.gov/index.cfm?ty=qa&iid=322 [https://perma.cc/WYR8-P76L]. Prisons are state or federal facilities that house people convicted of felonies who are serving more than one year. *Id.*
91. *See generally* Dana Paikowsky, *Jails as Polling Places: Living Up to the Obligation to Enfranchise the Voters We Jail*, 54 Harv. Civ. Rts.-Civ. Liberties L. Rev. 829 (2019).
92. Wendy Sawyer & Peter Wagner, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2019 2 (2019) (explaining that on any given day, there are 731,000 people held in local jails).
93. Zhen Zeng, Bureau of Justice Statistics, Jail Inmates in 2016 2 (2018).
94. In a few states, including Alabama and Mississippi, only certain felony convictions are disenfranchising. *See* Chung, *supra* note 22. Felony Disenfranchisement: A Primer (2019). This means that otherwise eligible voters held in prison for non-disqualifying felonies are able to register and vote while serving time in prison.

because pretrial detention is not an "emergency" that warrants an exception to the three-day cutoff.[95]

At first glance, this "jail-based disenfranchisement" may not appear to be wealth-based, but the disproportionate effects on the poor become apparent on examining the jail population and our current money bail system. Over the last forty years, our jail population has grown substantially because people are too poor to afford money-bail, are serving jail time because they could not pay a financial obligation, or are swept into a misdemeanor system that disproportionately punishes crimes of poverty.[96] In this way, jail-based disenfranchisement *is* fundamentally a wealth-based restriction on the franchise. The following Subpart will explore this argument in depth: by first examining wealth-based detention in U.S. jails; and second identifying the main factors driving jail-based disenfranchisement.

A. *Wealth-Based Detention in U.S. Jails*

The U.S. jail population cannot be understood without understanding the role that money plays in determining who is incarcerated and why. This Subpart—though certainly not an exhaustive account of how the U.S. criminal-legal system criminalizes poverty—summarizes two mechanisms through which wealth directly determines who sits behind bars.

1. Money-Bail

Nearly two-thirds of the jail population is legally innocent and simply awaiting trial, amounting to about half a million people nationwide.[97] In many cases, these individuals are incarcerated because they could not afford to pay a preset amount ("money-bail") set according to a bond schedule.[98] This epidemic of pretrial detention, most of which uses the "money-bail" system, has been a key driver of U.S. jail population growth: Since 2000, pretrial detention has driven 95 percent of U.S. jail population growth.[99]

The money-bail system usually operates as follows. Following arrest, an individual is set a predetermined money-bail that is based on the particular charge.[100] In setting this amount, judges generally do not conduct an individualized inquiry into whether the person can pay the sum

95. *Ohio is Depriving Late-Jailed Citizens from Exercising Constitutional Rights, Lawsuit Says*, Campaign Legal Center (Nov. 6, 2018), https://campaignlegal.org/press-releases/ohio-depriving-late-jailed-citizens-exercising-constitutional-rights-lawsuit-says [https://perma.cc/5CWK-G6MV]
96. Bernadette Rabuy & Daniel Kopf, Prison Policy Initiative, Detaining the Poor (2016).
97. Zeng, *supra* note 93.
98. Rabuy & Kopf, *supra* note 96.
99. Todd D. Minton & Zhen Zeng, Bureau of Justice Statistics, Jail Inmates at Midyear 2014 1 (2015).
100. Adureh Onyekwere, *How Cash Bail Works*, Brennan Center for Justice (Dec. 10, 2019), https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works [https://perma.cc/A3KT-NECV]

specified.[101] The result is that individuals with money can pay the predetermined sum and walk free, but individuals without enough money remain incarcerated until they plead guilty or the case is otherwise adjudicated.[102] And people can be and *are* held pretrial for months, even years, at a time; indeed, in Hinds County, Mississippi, the average length of detention for people in the county jail is 469 days—over a year and three months.[103]

Over the past few decades, the use of money-bail has increased dramatically in the United States. A study of the 75 largest counties found that from 1990 to 2009, the proportion of felony pretrial releases carrying financial conditions grew from 37 percent to 61percent.[104] Compounding this trend, the average amount of money-bail has *doubled* over twenty years, far outstripping the rate of inflation.[105] Now more than 70 percent of felony defendants receive money-bail that is $5000 or more.[106]

Given the sums involved, it is no wonder that the pretrial population now hovers around a half a million.[107] Nationwide, four in ten adults would either not be able to cover a $400 emergency expense or would have to sell something or borrow money.[108] And, for people arrested, access to immediate cash is particularly challenging. Approximately 80 percent of people charged cannot afford a lawyer and must use court-appointed counsel.[109] In New York City, only 26 percent of defendants who received bail under $500 posted bail at arraignment, and only 7 percent made bail that was set at $5000.[110] In a recent study covering Philadelphia and Miami-Dade, the typical pretrial arrestee earned less than $7000 in the year proceeding arrest[111] and only half could post bail that was $5000 or less.[112]

Wealth-based pretrial detention deeply harms all those who are arrested and cannot satisfy a financial condition that is needed to secure

101. *Id.*
102. *Id.*
103. *Mississippi Jail Records: May 2019—Days in Jail per County Map*, MacArthur Justice Center, https://www.msjaildata.com/data/201905-may-2019/length-of-stay-per-county-map [https://perma.cc/6632-WW92] (last visited Oct. 27, 2019).
104. Brian A. Reaves, U.S. Dep't of Justice, Felony Defendants in Large Urban Counties, 2009—Statistical Tables 1 (2013).
105. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201 (2018).
106. *See id.*
107. Onyekwere, *supra* note 100.
108. Board of Governors of the Federal Reserve System, Report on the Economic Well-Being of U.S. Households in 2017 2 (2018).
109. Christopher Zoukis, *Indigent Defense in America: An Affront to Justice*, Crim. Legal News (Mar. 16, 2018) https://www.criminallegalnews.org/news/2018/mar/16/indigent-defense-america-affront-justice [https://perma.cc/55UW-C6CS].
110. Mary T. Phillips, N.Y.C. Crim. Just. Agency, Inc., A Decade of Bail Research in New York City 51 tbl.7 (2012).
111. Dobbie et al., *supra* note 105, at 201–02.
112. *Id.* at 202.

pretrial freedom, but the impacts are particularly extreme for Black and Latinx communities. In general, people of color are both arrested more and have higher bonds set compared to white people for allegedly committing the same offense.[113] One study analyzing data from Philadelphia and Miami found that for those who could have almost as easily been released as detained (i.e., were "on the margin" between release and detention), white defendants were approximately 22–23 percent more likely to be rearrested than Black defendants.[114] This discrepancy implies harsher treatment of Black defendants pretrial.[115]

In recent years, courts have overwhelmingly ruled that this wealth-based pretrial detention violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[116] Due to these decisions and increased advocacy nationwide, many states are reforming their systems to ensure that financial conditions are no longer—or are less of—a barrier to pretrial freedom.[117] While wealth-based pretrial detention systems remain in effect, though, the voting implications are clear: People who can pay money-bail will ordinarily not experience the disenfranchising effects of pretrial detention while people who cannot satisfy a financial obligation, set using a bond schedule that has limited relationship to their circumstances, will be disenfranchised notwithstanding their constitutional right to vote.[118]

2. Failure to Pay

Outside of the pretrial context, many individuals are jailed simply because they were financially unable to satisfy a court-ordered debt.[119] The debt-related incarceration cycle generally begins when a person receives a fine for a driving-related or quality-of-life offense, such as saggy pants, speeding, walking in the roadway, or having dogs that barked too much.[120] This is no exaggeration: In Amarillo, Texas, a woman spent fifty-two days in jail because she received a "barking ticket" for a rescue dog and was unable to pay.[121]

113. David Arnold et al., *Racial Bias in Bail Decisions*, 133 Q. J. ECON. 1885, 1917–1920 (2018).
114. *See id.*
115. *See id.*
116. *See, e.g.*, O'Donnell v. Harris Cty., 892 F.3d 147 (5th Cir. 2018).
117. *See e.g. SPLC Prompts Alabama Cities to Reform Discriminatory Bail Practices*, Southern Poverty Law Center (Dec. 6, 2016), https://www.splcenter.org/news/2016/12/06/splc-prompts-alabama-cities-reform-discriminatory-bail-practices [https://perma.cc/2VXU-8SSA] (noting that "[a]s of December 13, 2017, a total of 78 Alabama cities have reformed their bail practices").
118. *See* O'Brien v. Skinner, 414 U.S. 524 (1974).
119. *See* Am. Civ. Liberties Union, In for a Penny: The Rise of America's New Debtors' Prisons (2010).
120. *See* Mark Garrison, *How the Poor are Ending Up Stuck in Modern-day Debtors' Prisons*, Marketplace.org (Aug. 17, 2016), https://www.marketplace.org/2016/08/17/debtor-prisons-vice [https://perma.cc/9S5K-MLFZ].
121. Johnathan Silver, *Advocates Hope to End Policy in Texas of Jailing Poor for Unpaid Fines*, Texas Trib. (Mar. 14, 2017, 12:00 AM), https://www.texastribune.

These fines may total hundreds or even thousands even though the person is too poor to pay.[122] When the person fails to pay the fine or is late on a court-ordered payment plan, the judge may issue an arrest warrant.[123] Still worse, the amount owed only increases during their time in detention. In Washington, for example, court debt carries 12 percent interest.[124] And in many jurisdictions, local officials outsource debt to private companies that charge high fees to supervise poor debtors.[125] This outsourcing further increases individuals' debt-loads.[126]

The number of such debt-based incarcerations is striking. In Benton County, Washington, in 2013, approximately one-quarter of people in jail serving misdemeanor sentences were detained because they had not paid their court debt.[127] In Tulsa, Oklahoma, in 2013, nearly 30 percent of jail bookings involved failure to pay costs.[128] In many jurisdictions nationwide, individuals lose their driver's licenses over unpaid fees and fines even when they simply cannot afford to pay this debt.[129] Then, when they are found driving without a license out of necessity and lack of adequate public transportation, they are prosecuted and jailed.[130]

A similar phenomenon occurs in the child support enforcement and probation contexts. Noncustodial parents who owe child support, whether or not they have the income to make these payments, are often thrown in jail.[131] In Georgia, for example, 3500 individuals were jailed

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org/2017/03/14/thousands-texans-any-moment-face-arrest-unpaid-fines [https://perma.cc/NT7C-P83W].

122. Saki Knafo, *The U.S. is Locking People Up for Being Poor*, Huffpost (Feb. 14, 2014, 11:21 AM), https://www.huffpost.com/entry/debtors-prisons-report_n_4768320 [https://perma.cc/V8SR-GDDU].
123. *Id.*
124. Am. Civ. Liberties Union, *supra* note 119, at 10; *see also* Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. Times Mag. (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html [https://perma.cc/CM7L-5WWA?type=image].
125. *Debtors' Prisons: Life Inside America's For-Profit Justice System*, Fines & Fees Justice Center (Aug. 16, 2016), https://finesandfeesjusticecenter.org/articles/debtors-prisons-america-for-profit-justice-vice [https://perma.cc/8VUJ-HBTY].
126. *See* "Set up to Fail": The Impact of Offender-Funded Private Probation on the Poor, Human Rights Watch (Feb. 20, 2018), https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor [https://perma.cc/X3KY-BXC8].
127. *Id.*
128. Casey Smith & Cary Aspinwall, *Increasing Number Going to Jail for Not Paying Fines*, Tulsa World, (November 3, 2013) https://www.tulsaworld.com/news/local/increasing-number-going-to-jail-for-not-paying-fines/article_8b8d2229-c7ad-5e7f-aea2-baeb13390880.html [https://perma.cc/VDS6-L74N].
129. *See* Mario Salas & Angela Ciolfi, *Driven by Dollars: A State-by-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, Legal Aid Justice Center (Fall 2017), *https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf*.
130. *See Resources*, Free to Drive, (Jan. 24, 2020) https://www.freetodrive.org/resources/#page-content [https://perma.cc/TW6D-9E6W].
131. Matthew Clarke, *Poor Parents Fail to Pay Child Support, Go to Jail*, Prison

in 2010 on the basis of unpaid child support.[132] The prevalence of such incarcerations is unsurprising: Since 70 percent of arrears nationwide are owed by people earning less than $10,000 annually, many noncustodial parents find themselves facing jail time because they cannot afford their payments.[133] In the probation context, paying fees is often an explicit condition of probation.[134] When people fail to make their monthly payments, they may be considered to have committed a "technical violation" that warrants rearrest.[135] In other circumstances, failure to make probation-related payments may be considered "contempt of court" and also sufficient to justify jail time.[136]

To be constitutionally sound, these debt-based incarcerations may occur only after a judge makes a finding of "willfulness."[137] This "willfulness" finding requires a court, before ordering nonpayment-based incarceration, to determine that a person has the present ability to pay.[138] If a person is truly unable to pay, the court cannot constitutionally order incarceration for nonpayment.[139] The underlying rationale, as set forth most notably in *Bearden v. Georgia* and its progeny, is that a person cannot be punished "solely because of his lack of financial resources."[140] Jailing a person who is indigent for nonpayment is, by definition, violating this constitutional mandate.[141]

Notwithstanding this constitutional requirement, ability-to-pay determinations often fail to materialize or do not pass constitutional muster. In some jurisdictions, judges purport to conduct ability-to-pay inquiries, but use proxies that render this process meaningless. In Michigan, for example, judges are encouraged to ask people how often they get

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Legal News (Sept. 2, 2016), https://www.prisonlegalnews.org/news/2016/sep/2/poor-parents-fail-pay-child-support-go-jail[https://perma.cc/NK6L-DKCC].

132. Frances Robes & Shaila Dewan, *Skip Child Support. Go to Jail. Lose Job. Repeat. Skip Child Support. Go to Jail. Lose Job. Repeat.*, N. Y. Times (April 19, 2015) https://www.nytimes.com/2015/04/20/us/skip-child-support-go-to-jail-lose-job-repeat.html [https://perma.cc/G4W7-GTQN].
133. Elaine Sorensen, Liliana Sousa & Simone G. Schaner, *Assessing Child Support Arrears in Nine Large States and the Nation*, Urban Institute (Jan. 14, 2009), https://www.urban.org/sites/default/files/publication/29736/1001242-Assessing-Child-Support-Arrears-in-Nine-Large-States-and-the-Nation.PDF.
134. *See* Eli Hager, *Debtors' Prisons, Then and Now: FAQ*, The Marshall Project, (Feb. 24, 2015), https://www.themarshallproject.org/2015/02/24/debtors-prisons-then-and-now-faq [https://perma.cc/V39D-V9HQ].
135. *Id.*
136. Set up to Fail, *supra* note 126.
137. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660 (1983).
138. *Id.*
139. *Id.*
140. *Id.*
141. Turner v. Rogers, 564 U.S. 431 (2011) also requires that, absent the appointment of counsel for indigent noncustodial parents at civil contempt hearings for nonpayment of child support, a court must provide certain procedural safeguards to comply with the due process requirements of the Fourteenth Amendment.

manicures and even whether the manicures are regular, gel, or acrylic.[142] The wrong answer to these questions—or accidentally wearing the wrong sneakers—may be considered enough to make someone "able to pay" a LFO. In other jurisdictions, judges explicitly reject the constitutional requirement to conduct these inquiries.[143] In El Paso, Texas, for example, a man was jailed for twenty-one days because he could not pay his traffic tickets.[144] The judge never asked whether he had the money to pay and, when confronted about this, replied, "I'm not required by law to ask anything."[145]

B. *Causes of Jail-Based Disenfranchisement*

As explained in Subpart III.A, our current criminal-legal system criminalizes poverty by maintaining wealth-based systems of detention and punishment and criminalizing behavior that is tied to lack of resources. This system—much of which is designed to generate revenue for the government—traps people in a cycle of debt and incarceration and has driven the increase in the country's jail population. But state and local officials have failed to ensure that the three-quarters of a million people sitting in our jails on any given Election Day, most of whom are eligible voters, can register to vote, cast a ballot, and have it counted. As the next Part explores, these failures materialize as lack of education of and from public officials, explicit restrictions on voting while in jail, and practical barriers to casting a ballot. The result is massive disenfranchisement, disproportionately borne by people who simply cannot afford their freedom and, consequently, cannot afford to vote.

1. Public Officials and Misinformation

A major cause of jail-based disenfranchisement is the prevalent misconception of state and local officials that people detained in jail are ineligible to vote.[146] Likewise, the general public—including those detained in jail—incorrectly assume that so long as they are detained, they cannot vote.[147] This misconception and failure to educate has concrete

142. *Appendix A: Ability-to-Pay Checklists*, Michigan Courts, https://courts.michigan.gov/Administration/SCAO/Resources/Documents/Publications/Reports/ATP-AppendixA.pdf.
143. *See, e.g.*, Kendall Taggart & Alex Campbell, *In Texas It's a Crime to Be Poor*, Buzzfeed News (Oct. 7, 2015), https://www.buzzfeednews.com/article/kendalltaggart/in-texas-its-a-crime-to-be-poor [https://perma.cc/2N6C-YPF5].
144. *Id.*
145. *Id.*
146. Danielle Root & Lee Doyle, *Protecting the Voting Rights of Americans Detained While Awaiting Trial*, Center for Am. Progress (Aug. 23, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/08/23/455011/protecting-voting-rights-americans-detained-awaiting-trial [https://perma.cc/C7NQ-YD-NX] ; *see also* Erika Wood and Rachel Bloom, *De Facto Disenfranchisement*, Brennan Center for Justice (2008).
147. Margaret Barthel, *Getting Out the Vote from the County Jail*, Atlantic (Nov. 4, 2018), https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783 [https://perma.cc/2X52-5XAT].

effects: State and local election officials fail to create and maintain systems to allow people in jail to register to vote and to request and receive an absentee ballot or vote in person at the jail.[148] Accordingly, local jail officials fail to ensure that their detained population has access to the ballot. And when neither the eligible voters detained in jails nor their loved ones know that they in fact have the right to vote, they will make no efforts to register and vote.

There is no excuse for the ignorance of state and local officials on this point. The United States Supreme Court held forty-five years ago in *O'Brien v. Skinner* that prohibiting eligible voters in jail from registering to vote and/or voting by absentee ballot violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution.[149] But the Court gave no guidance to state and local jurisdictions on *how* to comply with the law, so for the most part, they have failed to comply at all.

Misinformation persists despite advocates bringing suit in numerous jurisdictions to enforce the rights of eligible voters in jail who were prevented from registering or casting a ballot.[150] In Mississippi, for example, a federal court in 1984 permanently enjoined the state from denying current and future eligible voters the right to vote by absentee ballot.[151] Yet today, neither the Mississippi Secretary of State nor local election officials provide information to the public about jail voting, allowing the misconception of ineligibility to persist in Mississippi where officials routinely fail to safeguard the voting rights of jailed voters.[152] Even in the handful jurisdictions that have taken steps to ensure eligible voters in jail are not disenfranchised, the processes vary widely, sometimes even from institution to institution, which contributes to the widespread confusion regarding whether and *how* jailed eligible voters can register and cast a

148. Root & Doyle, *supra* note 146.

149. O'Brien v. Skinner, 414 U.S. 524 (1974); *see also* Goosby v. Osser, 409 U.S. 512 (1973).

150. *See, e.g.*, Tate v. Collins, 496 F. Supp. 205, 210–11 (W.D. Tenn. 1980) (permanently enjoining Tennessee from preventing jailed eligible voters from voting via absentee ballot).

151. Murphree v. Winter, 589 F. Supp. 374, 382 (S.D. Miss. 1984). In 1986, the absentee ballot law at issue in *Murphree* was repealed, and in 1987, the absentee ballot statute was codified as Section 23-15-627 of the Mississippi Code. The new statute at Section 23-15-627 no longer includes the language that those who are "physically unable" to vote in person can request an absentee ballot but provides that a person who has a "temporary or permanent physical disability" may request an absentee ballot (one of thirteen excuses sufficient to vote by absentee ballot in the current law). Although Mississippi's absentee ballot statute has undergone changes since the *Murphree* decision, the rationale behind *Murphree* and *O'Brien* applies with full force to the existing statute.

152. Nsombi Lambright, Maryum Jordan & Arekia Bennet, *Pretrial detainees not convicted of crimes can vote, but Mississippi makes it impossible*, Clarion Ledger (Nov. 2, 2018), https://www.clarionledger.com/story/opinion/columnists/2018/11/02/pre-trial-detainees-mississippi-denied-right-vote/1845808002 [https://perma.cc/F344-TL3N].

ballot.[153] In Louisiana, where jailed eligible voters are explicitly included on the absentee ballot application, failure of officials to educate the public and provide meaningful registration and absentee ballot access has resulted in very few jailed voters successfully voting.[154] The registrar of voters for Lafayette Parish, for example, noted that in her ten years as registrar, she has never counted a ballot from the parish jail.[155]

2. Explicit Barriers to Voting in Jail

Some jurisdictions have laws that make voting from jail an impossibility, either on the face of the law or as a direct effect of the law. Such restrictions are usually found in the state's absentee ballot laws, and because many states require an absentee ballot to be mailed *before* an election takes places, voters detained after the deadline but before the election are disenfranchised. In Ohio, for example, state law allows detained voters to request absentee ballots, but the law requires those detained in jail to request an absentee ballot before "twelve noon of the third day before the day of the election at which the ballot is to be voted."[156] Thus, in Ohio, no one arrested after close of business the Friday before an election (and kept in custody through the election) can vote by absentee ballot in Ohio.[157] In New York State, as another example, the deadline for requesting an absentee ballot for 2019 was October 29, though the election was on November 4.[158] The result is that anyone who is arrested after October 29 and is subsequently detained pretrial is effectively disenfranchised—even though they are constitutionally entitled to cast a ballot.

Although most states, including Ohio, have emergency ballot laws that allow voters who miss the absentee ballot deadline but cannot vote

153. Margaret Barthel, *Getting Out the Vote from the County Jail*, Atlantic (Nov. 4, 2018), https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783 [https://perma.cc/3B8M-9PJV]; *see also Secretary Merrill Responds to Inaccurate Alabama Political Reporter Op-Ed*, Ala. Sec'y of State (Oct. 3, 2019), https://www.sos.alabama.gov/newsroom/secretary-merrill-responds-inaccurate-alabama-political-reporter-op-ed [https://perma.cc/X2BN-END4] (providing completely incorrect statement of Alabama's felony disenfranchisement law and suggesting that people *not* convicted of crimes of moral turpitude lose their right to vote while incarcerated when, in fact, those people never lose their right to vote).

154. Lanie Lee Cook, *Inmates awaiting trial have right to vote, but few do in Lafayette, other Louisiana parishes, officials say*, Acadiana Advocate (Nov. 13, 2015), https://www.theadvocate.com/acadiana/news/politics/elections/article_c90053b5-1804-5110-afa7-d76c4a18f702.html [https://perma.cc/W6RE-LXV9].

155. *Id.*

156. Ohio Rev. Code § 3509.08(A) (2012); *see also* Complaint, Mays v. Husted, 2:18-cv-10376 (Nov. 6, 2018), available at https://campaignlegal.org/sites/default/files/2018-11/1_Complaint.pdf [https://perma.cc/J478-EZQH].

157. Complaint, Mays v. Husted, *supra* note 156.

158. *Voter Registration Deadlines*, N. Y. State Bd. of Elections, https://www.elections.ny.gov/VotingDeadlines.html [https://perma.cc/N5TF-C62P] (last visited Apr. 4, 2020).

in person on Election Day, most of these laws exclude people detained in jail awaiting trial from the list of eligible voters.[159] Ohio's law, for example, allows certain individuals to request an absentee ballot by special application anytime between noon on Saturday before the election and 3:00 PM on Election Day.[160] But this option is only available for people who are hospitalized, who have minor children hospitalized, or who have an unforeseen accident or illness after the absentee ballot application deadline has passed.[161] Although this law is currently the subject of federal litigation,[162] jailed voters should not have to bring suit in each state that fails to protect their right to vote.

3. Logistical and Practical Barriers to Voting in Jail

In addition to state laws creating explicit or constructive jail-based disenfranchisement, logistical and practical barriers also prevent eligible voters in jail from casting a ballot. Some of the most challenging current barriers are: the inability for advocates to access jailed voters, the uncertain nature of a jailed elector's time in custody, and the failure of elected officials to create voting-related forms that consider jailed voters.

In the face of widespread government inaction to safeguard the voting rights of jailed eligible voters, voting rights advocates have attempted to fill the void and conduct voter registration and absentee ballot programs in jails. While some organizations have had success, an advocate's access to eligible voters in jail is at the sole discretion of jail officials, and many jail officials are less than accommodating. Cook County Jail in Chicago is one of only a few jails around the country that allow incarcerated eligible voters in the jail to register and vote in-person at the jail; but this change only came about because of months of advocacy by staff at the Sargent Shriver National Center on Poverty Law who were able to spend every weekend registering and educating voters at the jail.[163]

Because voting from jail is a multistep process, advocates must have consistent access to the jail and those it houses to ensure that voters are completing each step and have assistance if needed. And most registration forms, absentee ballot applications, and absentee ballots are not

159. *See Absentee Voting in Case of a Personal Emergency*, Nat'l Conf. State Legislatures, http://www.ncsl.org/research/elections-and-campaigns/absentee-voting-in-case-of-a-personal-emergency.aspx [https://perma.cc/9MN3-DYP2] (last visited Oct. 26, 2019).

160. Ohio Rev. Code § 3509.8(B) (2012). If the person is in the hospital in the county where they vote, they can opt to have two election officials or a family member pick up, deliver, and return the absentee ballot. *Id.* For those in the hospital outside of the county where they vote, the voter receives and returns the ballot by mail, as long as it is postmarked the day before the election. *Id.*

161. *Id.*

162. Complaint, Mays v. Husted, *supra* note 156.

163. *See* La Risa Lynch, *Ability to Vote Compromised for Thousands Behind Bars*, Chicago Reporter (July 10, 2017), https://www.chicagoreporter.com/ability-to-vote-compromised-for-thousands-behind-bars [https://perma.cc/TC8K-5F5G].

written with jailed voters in mind.[164] Determining the jailed elector's address, for example, will typically require including their last place of residence[165] to determine in which location the voter will vote and the jail's address for mailing back an absentee ballot.[166] In states that require an excuse to vote absentee, the absentee ballot applications do not clearly indicate which category the jailed voter should select. In Mississippi, for example, caselaw has held that an eligible voter held in jail can vote absentee because their detention constitutes a temporary disability,[167] which is an excuse to vote absentee and exempts the applicant from the requirement to have the application (and their ballot) notarized.[168] But Mississippi's absentee ballot application does not direct jailed voters to select the "temporary disability" option; as a result, voters in jail may fill out the application incorrectly or may not think they are able to vote at all.[169] Finally, voters in jail may not be able to complete forms that require social security numbers or a copy of a picture ID if they do not have ready access to such information or documents.[170] If jail officials prevent jailed voters from accessing the personal documents needed to complete these steps, registration and voting will not be possible. Thus, the presence of voting rights advocates is critical for voters in the jail to complete each step correctly and anticipate problems.

For states or localities that provide access to registration or absentee ballot applications in jails, absentee ballot deadlines may be hard to meet for those detained due to delays in processing mail in and out of jails. In Louisiana, the absentee ballot application includes an option for incarcerated voters, but requires that the application be certified by the

164. For example, in states that allow emergency absentee ballots, most do not include "incarceration" as an acceptable reason for an emergency absentee ballot. *See Absentee Voting in Case of a Personal Emergency*, *supra* note 159.

165. One population that faces particular challenges around jail voting is voters who are transient or experiencing homelessness. Even if a state has a functional system for voter registration and receiving absentee ballots in jail, essentially all states require a current address to complete voter registration or absentee ballot applications. While states and local jurisdictions vary greatly in their practices here, lack of a permanent "outside" address can create additional complications for jailed homeless and/or transient voters. More research is needed to fully understand how widespread this issue is.

166. *See, e.g.*, Advisory Cmte. U.S. Comm'n on Civil Rights, Barriers to Voting in Louisiana 24 (June 2018), https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf.

167. *See* Murphree v. Winter, 589 F. Supp. 374.

168. *Official Application for Absentee Elector's Ballot*, Miss. Sec'y of State, https://www.sos.ms.gov/Elections-Voting/Documents/Absentee%20Voting%20Forms17.pdf (last visited Apr. 4, 2020).

169. *See id.*

170. *See* Barthel, *supra* note 153 (noting that because jail populations can skew younger, many eligible voters in jail are unfamiliar with voting processes, and advocates often encounter younger registrants who did not know their own Social Security number).

sheriff to be valid.[171] Considering likely delays in mail received and sent from jails, this requirement adds further delay and may result in a jailed voter missing the absentee ballot application deadline, which is 4:30 PM four days before the election in Louisiana.[172] Delays in processing mail in local jails means that jailed voters, in reality, face much earlier deadlines than other voters. The uncertain timing of criminal cases may also interfere with the ability of jailed voters to vote. For example, if a voter is registered to vote by an advocacy organization while in jail but is released prior to filling out an absentee ballot, the advocates will be unable to track those registered to ensure that they are able to vote. Further, if a person is released from jail after requesting an absentee ballot, but before the ballot is mailed out to the jail, they will not receive the absentee ballot and may face challenges when trying to vote in person.[173]

While LFOs and "jail-based disenfranchisement" policies suppress voting through formal mechanisms and practical barriers, focusing on these explicit restrictions would understate the ways that a monetized criminal-legal system ultimately deters civic engagement. The following Part therefore explores a second set of indirect ways that LFOs—and the process used to enforce these LFOs—may be suppressing voting even when an individual formally has access to the ballot.

III. The Democracy-Suppressing Effects of Pocketbook Policing

Even for individuals who are not formally disenfranchised either through debt-based voting restrictions or jail-based disenfranchisement, criminal-legal debt may take another toll on their democratic engagement: "Pocketbook policing"—the use of a jurisdiction's policing apparatus not to maximize safety, but to maximize revenue—increasingly drives policing decisions, causing disproportionate criminal-legal contact in certain neighborhoods and a perception that the government is simply bent on extorting poor Black and Latinx individuals.[174] Empirical and ethnographic research increasingly suggests that contact with this revenue-focused system dampens voter turnout and civic participation generally.[175]

The following Part provides a brief overview of how fees and fines have increasingly built the "pocketbook policing" culture of today. It will then present and explain the research on how this system is suppressing voter turnout.

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171. Advisory Cmte. U.S. Comm'n on Civil Rights, *supra* note 166.
172. *Vote by Mail*, La. Sec'y of State, https://www.sos.la.gov/ElectionsAndVoting/Vote/VoteByMail/Pages/default.aspx [https://perma.cc/GD36-QR62] (last visited Oct. 27, 2019).
173. Advisory Cmte. U.S. Comm'n on Civil Rights, *supra* note 166, at 24–25.
174. Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, Am. Pol. Sci. Rev. 104, 817–833 (2010).
175. *See id.*

A. *Pocketbook Policing*

Over the last thirty years and particularly the past decade, fines and fees have risen dramatically across the country, coinciding with an unprecedented jail and prison boom that has driven the soaring U.S. incarcerated population.[176] This timing is not accidental: As jails, prisons, probation departments, and court systems expanded due to rising incarceration, governments used fines and fees as an explicit strategy to cover these increased costs.[177] Local governments, to meet the demand for new programs without raising taxes, began imposing more and more financial obligations on criminal defendants. When the recession hit, this imperative increased: As state grants to courts and local governments fell, reflecting steep drops in tax revenue, judicial officers and policymakers began using LFOs to fill this shortfall.[178]

The numbers tell the story of this transition: At every level of government, fees and fines have increased. Since 2010, 48 states have increased fees in the criminal and civil systems.[179] Since 1996, for example, Florida has created twenty new categories of financial obligations *and* has increased fee amounts.[180] This revenue focus creates an unconstitutional conflict of interest, as was vindicated in the *Cain* case in New Orleans, because it distorts the purported neutrality of judicial decisionmakers.[181] In other cases, court fees are ultimately deposited into municipalities' general funds. In 2017, municipal courts in New Jersey collected $400 million in fines and fees, half of which padded municipalities' general coffers.[182] More broadly, states and local governments have increasingly used LFOs to fund their operations. In Ferguson, Missouri, fees and fines came to comprise 13 percent of the overall municipal budget.[183] In some jurisdictions, this proportion is 30 percent or

176. *See* Menendez *supra* note 13; *see also* Alana Semuels, *The Fines and Fees That Keep Former Prisoners Poor*, Atlantic (July 5, 2016), https://www.theatlantic.com/business/archive/2016/07/the-cost-of-monetary-sanctions-for-prisoners/489026 [https://perma/cc/6VT3-UDRJ].
177. *See* Patrick Liu et al, Nine Facts About Monetary Sanctions in the Criminal Justice System (2019), https://www.hamiltonproject.org/assets/files/Bail-Facts_20190314.pdf [https://perma.cc/8HJP-LMWA].
178. *See id.*
179. Joseph Shapiro, *As Court Fees Rise, The Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), https://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor [https://perma.cc/USX2-FKNF].
180. *See* Diller, *supra* note 16, at 7.
181. *See* Cain v. City of New Orleans, 281 F. Supp. 3d 624 (2017).
182. *See* New Jersey Courts, Report of the Supreme Court Committee on Municipal Court Operations, Fines, and Fees 12 (2018).
183. *See* U.S. Dep't of Justice, Investigation of the Ferguson Police Department 9 (2015).

more.[184] In Colorado, some courts obtain more than 50 percent of their funding from fees and fines.[185]

As state and local governments relied more heavily on fines and fees, they began structuring their operations to maximize revenue collection. In Ferguson, Missouri, the Department of Justice's Ferguson Report painted a searing picture of this fee-collection culture.[186] Between 2010 and 2014, the Ferguson Police Department issued more than 90,000 citations and municipal violation summonses as a way to generate revenue that would fund city operations.[187] The entire government became an apparatus to extract revenue. As the Justice Department put it, the court did not act as a "neutral arbiter of the law" but instead used its authority to compel payment—and used this authority disproportionately against African Americans.[188] The Police Executive Research Forum, after conducting a survey that examined policing in St. Louis city and county, put it like this: "In many municipalities, policing priorities are driven not by the public safety needs of the community, but rather by the goal of generating large portions of the operating revenue for the local government."[189]

Nationwide, the racial disparities of fines and fees collection are overwhelming. Cities with large African American populations are most likely to levy heavy fines.[190] Of the fifty cities that have the highest proportion of fine-based revenues, the median size of the African American population—as measured by percentage—is over five times greater than the national median.[191] In Washington State, Latinx receive higher fines than non-Latinx for similar offenses.[192] A four-year analysis of parking ticket issuance in Las Vegas showed that more than two-thirds of the most-ticketed addresses in residential areas were located in the city's traditionally Black and Latinx neighborhoods.[193] And in Ferguson itself,

184. *See* Dan Kopf, *The Overlooked Reason Why Some Cities Have Strained Relationships with Cops,* Bus. Insider (July 11, 2016, 10:01 AM), http://static5.businessinsider.com/reason-for-strained-relationship-with-police-2016-7 [http://perma.cc/EDY2-DCR5].
185. Editorial, *Limit Cities' Reliance on Revenue from Traffic Fines*, Denver Post (May 15, 2015, 11:01 AM), https://www.denverpost.com/2015/05/15/limit-cities-reliance-on-revenue-from-traffic-fines [https://perma.cc/4CCD-QDT3].
186. *See* U.S. Dep't of Justice, *supra* note 183, at 7.
187. *Id.*
188. *Id.* at 3–4.
189. Police Exec. Research Forum, Overcoming the Challenges and Creating a Regional Approach to Policing in St. Louis City and County 2 (2015) https://www.policeforum.org/assets/stlouis.pdf.
190. *See* Dan Kopf, *The Fining of Black America*, Priceonomics (Jun. 24, 2016), https://priceonomics.com/the-fining-of-black-america [https://perma.cc/Q6VK-YP4F].
191. *Id.*
192. *See* Katherine A. Beckett et al. The Assessment and Consequences of Legal Financial Obligations in Washington State 2 (2008).
193. *See* James DeHaven, *Las Vegas' Low-Income Areas Hit Harder by Parking Tickets, Analysis Shows*, L.V. Rev. J. (Jan. 17, 2015, 4:50 PM), https://www.reviewjournal.com/local/local-las-vegas/las-vegas-low-income-areas-hit-harder-by-parking-tickets-analysis-shows [https://perma.cc/9DGY-ZWNB].

the arrest data are stark: The Justice Department found that African Americans accounted for 85 percent of vehicle stops, 90 percent of citations, and 93 percent of arrests, despite comprising only 67 percent of the population.[194]

This racialized system of "pocketbook policing" is having devastating effects on families, especially Black families, nationwide.[195] Also, pocketbook policing is negatively affecting U.S. democracy by suppressing civic engagement.[196] As jurisdictions increase criminal-legal contact to levy fines and fees, they distort people's views of government generally and, as this Part argues, their propensity for civic engagement.

B. *Voter Turnout Research*

An increasing body of research suggests that even brief contact with the criminal-legal system, such as short periods of incarceration, may be linked to reduced voter turnout in the future. Ariel White, a professor at the Massachusetts Institute of Technology, found the following results in a project examining Harris County, Texas: As compared to people who were *not* jailed, people jailed on misdemeanor charges—even if such incarceration lasted only a short time—were a few percentage points less likely to vote.[197] Among Black individuals, the effect was markedly stronger: Black individuals' postrelease voting participation fell from 26 percent to 13 percent. White estimated that if this effect were extended nationwide, jail incarceration may be dissuading 100,000 to 150,000 eligible Black voters from participating each cycle.

These findings echo related work by Vesla Weaver, a professor at Yale University, who has explored how criminal-legal engagement interacts with civic participation. Weaver found that people who were convicted in adult court but did not serve time were 8 percent less likely to vote.[198] People who were convicted in adult court and served *less* than a year were 16 percent less likely to vote.[199] And people who were convicted in adult court and served *more* than a year were 29 percent less likely to vote.[200] Importantly, Weaver found that the effects of incarceration increased as criminal-legal contact increased, with incarceration itself having the greatest effect.[201] Her findings are particularly significant

194. U.S. Dept. of Justice, *supra* note 183, at 4.
195. *See generally* Kopf, *supra* note 190.
196. *See* Vesla M. Weaver et al., *Detaining Democracy? Criminal Justice and American Civic Life*, 651 Annals of the Am. Acad. of Pol. & Soc. Sci. 6 (2014). *See* Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 Am. Pol. Sci. Rev. 293, 311 (2019).
197. *See* Ariel White, *Misdemeanor Disenfranchisement? The Demobilizing Effects of Brief Jail Spells on Potential Voters*, 113 Am. Pol. Sci. Rev. 293, 311(2019). *See* Weaver & Lerman, *supra* note 174.
198. *See* Weaver & Lerman, *supra* note 174.
199. *Id*.
200. *Id*.
201. *Id.*

because they dwarf the effects of other factors, such as unemployment (less than 3 percent decline) or receiving welfare (7 percent decline), which are often associated with reduced turnout.[202] Further, Weaver found similar, though smaller declines when using a different dataset.[203]

Research also suggests that the criminal-legal system may be linked to lower voting even when people simply *reside in* high-incarceration communities or have incarcerated kin. Traci Burch, a professor at Northwestern, examined the ways that incarceration rates affect voting participation at the community level.[204] In her work, Burch found that the density of community supervision and incarceration affected both voting turnout and civic participation.[205] In North Carolina neighborhoods with high concentrations of imprisonment and community supervision, people are 50 percent less likely to vote than people who live in neighborhoods that have no individuals imprisoned, even when controlling for race, residential mobility, poverty, crime, county, and citizenship.[206] In addition, Burch found that people residing in these neighborhoods are more than 38 percent less likely to protest, sign petitions, and otherwise partake in activities that are considered evidence of civil and political participation.[207] Along a similar vein, Hedwig Lee, Lauren Porter, and Megan Comfort found that the children of incarcerated parents are 332 percent less likely to vote.[208] They are also less likely to trust the government and undertake community service.[209] This research is significant because it extends "jail-based disenfranchisement" and felony disenfranchisement to individuals who have no criminal convictions and are not actually incarcerated: Individuals who simply *reside in* high-incarceration communities or have loved ones who move through the system are negatively affected.

Recent work is still exploring whether these effects are causal or merely driven by underlying factors that result in selection bias.[210] Regardless of causality, though, the results should give some pause: The United States is increasingly a country of two tiers—one comprised of

202. *See id.* at 2.
203. When using the "Add Health" dataset, Weaver found that police stops triggered an 8 percent drop in the probability that a person will vote, that arrest history triggered a 16 percent drop, and that incarceration triggered a 22 percent drop. *Id.* at 11.
204. *See* Traci R. Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, 651 Annals of the Am. Acad. of Pol. & Soc. Sci., 184–201 (2014).
205. *See id.*
206. *See id.* at 186.
207. *See id.* at 186.
208. Hedwig Lee et al., *Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government*, 651 Annals of the Am. Acad. of Pol. & Soc. Sci. 44, 53 (2014).
209. *See id.*
210. Alan S. Gerber et al., *Does Incarceration Reduce Voting? Evidence about the Political Consequences of Spending Time in Prison*, 79 J. of Pol. 1130 (2017).

those never incarcerated, who face no barriers to democratic engagement, and the other comprised of the over-incarcerated and democratically isolated.

C. *Understanding the Impacts on Voter Turnout*

The literature provides two primary theories to help understand why the criminal-legal system may suppress civic participation.

The first theory posits that criminal-legal contact reduces trust in state institutions.[211] In their work, Christopher Muller and Daniel Schräge indicate that people living in neighborhoods with high rates of incarceration more often view criminal-legal institutions as biased and illegitimate.[212] This erosion of public trust may reduce peoples' democratic participation, as they no longer see the state as fundamentally fair.[213] Hedwig Lee, Lauren Porter, and Megan Comfort reach a similar conclusion, finding that the corrections system provides a "powerful mechanism for political socialization"—not just for the people incarcerated, but for their families.[214] In some communities, "people have their only real contact with government" in "hostile confrontations" involving the police.[215] These negative experiences, Weaver writes in her piece examining this topic, become a "bridge" to other government entities: Because people see the government as "one big system" rather than distinct components, their negative experiences with the criminal-legal system give them a "broader cynicism about government authorities as a whole."[216]

Weaver, in her recent research using information from "Portals" that captured conversations about people's experiences involving police, finds that fines and fees are an essential component of this negative socialization.[217] In many dialogues, participants in the Portals noted that the system was structured to "make money off of them" and that "their communities endured disproportionate taxation and financial drain."[218] Their statements reflected a clear belief that the criminal-legal apparatus is structured not to advance justice, but to make a dime.[219] One man,

211. Christopher Muller et al., Mass Imprisonment and Trust in the Law, 651 Annals of the Am. Acad. of Pol. & Soc. Sci., 139–158 (2014), [https://perma.cc/FWY4-75HQ].
212. *See id.*
213. *See id.*
214. *See* Lee et al., *supra* note 208.
215. Weaver et al., *supra* note 196 at 819.
216. *See id.*
217. Natalie Weber, *Speaker Critiques Policing Methods*, The Notre Dame Observer, Mar. 22, 2017, at 1.
218. Amar Bakshi et al., *Portals to Politics: Perspectives on Policing from the Grassroots at 10* (Nov. 27, 2017) (unpublished manuscript) (on file with the New York University School of Law), [https://perma.cc/DH5S-96UA].
219. *See id.* Different statements included the following:
    "We're nothing but a check to them."
    "They lock people up to make money."
    "Jailing is big business here."
    "We're cheaper to imprison than educate."

whose statement Weaver transcribed in full, captured his perspective on the criminal-legal system as follows:

> We're being locked up and held at a ransom. I call that a ransom, not a bail because this is a system that's created for the rich to get richer, you understand what I'm saying? We're not the rich . . . . I feel as though that system is created, why? To generate more money for, for commissaries, for my family to spend more money on commissary food and other families for other inmates who are in there . . . I have a four-year-old son. I don't wish to spend my money on commissaries. I don't wish [to pay] lawyer's fees, and court fees, and pawns, and things like that. No, I want to give this money to my son.

Beyond the heightened distrust, a second theory posits that criminal-legal contact often teaches people negative lessons about their political efficacy.[220] According to Weaver, criminal-legal contact involves a passive interaction in which individuals are "objectified and dependent" as opposed to equal participants.[221] This hierarchical and authoritarian relationship is a "one way transaction" that leaves individuals doubting their capacity to make political change or affect decisionmaking.[222] Such an impression has a dampening effect on voting rights and civic engagement generally, as the political system is no longer viewed as a possible avenue for effecting change.

IV. Policy Reforms

A. *Global: Decarcerate*

Changing the criminal-legal paradigm to reduce incarceration and punishment-focused responses, namely through upfront, noncarceral investments that prevent criminal-legal involvement in the first place, is the only way to address fully the ways that the criminal-legal system is undermining civic participation. Although this Article cannot address comprehensively the sweeping reforms needed to transform the criminal-legal system, it identifies a few reforms that will particularly address the financialization of the criminal-legal system.

First, reforms must include abolition of the many fines, fees, and costs that were described in Subparts I.A and IV.A. These fees, which often are earmarked to fund governments' general operations, are a regressive source of public finance—both because flat fees impact poorer people disproportionately *and* because more than 80 percent of court-involved individuals are indigent.[223] These fees also create the profit-motive that entices private actors to enter the criminal-legal system. Given the ability to charge direct-to-consumer fees, private companies have access

220. Weaver et al., *supra* note 196.
221. *See id.*
222. *See id.*
223. *Defending Communities in Service—A New AmeriCorps VISTA Project through NLADA*, Nat. Leg. Aid & Def. Ass'n, http://www.nlada.org/vista [https://perma.cc/EH2P-7JJD].

to a revenue model that can prove lucrative.[224] The provision of prepaid cards that prisons can use to make calls, for example, is a $1.2 billion business.[225] This revenue model, besides extracting money from those who can least afford it, creates perverse incentives for public policy: Public officials often choose the service provider that will provide the best kickbacks while companies are incentivized to extract more money—even when this extraction is hurting families and setting back reentry goals.[226] For example, private providers of probation services charge people not only supervision fees, but also fees for electronic monitoring and for each drug test that a person takes.[227] As jurisdictions move toward fee abolition, states and the federal government will need to critically rethink how they fund courts and government operations. Centralized funding disconnected from direct-to-consumer fees must be provided.

Second, jurisdictions must dramatically reduce their reliance on fines and, where fines exist, ensure that they are proportional to individual financial circumstances and the offense. "Pocketbook policing" exists largely because local governments are levying fines to raise revenue. If municipalities cannot keep the revenue collected from fines or can keep the revenue only to a certain limit that is fixed by a cap, they will have less incentive to view policing activities as a revenue-generation enterprise. Missouri passed a version of this "cap" idea in 2015, following the activism in Ferguson, Missouri. The legislation limited how much money municipalities could collect from traffic fines, setting this ceiling for St. Louis County at 12.5 percent of local revenue and at 20 percent elsewhere.[228] This number was likely not low enough to achieve the results desired, but provides a baseline on which future efforts can build. Other jurisdictions can implement more aggressive reforms that further reduce local governments' potential reliance on fines and fees. The second reform, introducing the idea of proportionality, addresses the regressive nature of flat assessments. Under proportional models, such as the "day fine" model used in Western Europe, people are assessed fines in a manner that reflects their incomes.[229] Each offense is assigned a certain

224. Peter Wagner, *Uncovering Securus' Profits*, Prison Policy Initiative Blog (June 19, 2015), https://www.prisonpolicy.org/blog/2015/06/19/securus-profits [https://perma.cc/JQG4-MK5S].
225. Katie Rose Quandt, *LawsuitReveals How Tech Companies Profit off the Prison-Industrial Complex*, Think Progress, (February 9, 2018), [https://perma.cc/CZ87-USBL].
226. Alicia Bannon et al., Brennan Ctr. for Justice, Criminal Justice Debt: A Barrier to Reentry (2010).
227. First Am. Compl., McNeil et al. v. Comty. Prob. Servs., LLC et al., No. 1:18CV00033 (M.D. Tenn. Jul. 13, 2018), 2019 WL 298474.
228. Mitch Smith, *Missouri Lawmakers Limit Revenue From Traffic Fines in St. Louis Area*, N.Y. Times (May 8, 2015), https://www.nytimes.com/2015/05/09/us/missouri-lawmakers-agree-to-limit-revenue-from-traffic-fines.html [https://perma.cc/ND78-3AKS].
229. Sally T. Hillsman, *Fines and Day Fines*, Crime and Just. 12, 49–98 (1990).

number of punishment units that indicate the severity of the behavior.[230] Then, an arrested person's fine is equal to these "punishment units" multiplied by how much the person earns, on average, in a single day.[231] This individualized fine model is both an escape from the affordability trap, where people are charged fines that they will never have the resources to pay, and a reduced incentive to target low-income individuals as revenue sources.

Third, jurisdictions must enact reforms that end the financial conditioning of pretrial freedom. Such reforms should include, at least, the abolition or extreme deprioritization of money-bail and other financial conditions (e.g., required payments for electronic monitors). Although many jurisdictions have pursued reforms requiring ability-to-pay determinations, these reforms often prove inadequate, difficult to implement, and even prone to entrench the legitimacy of fee fine-based systems.[232] Variability between different jurisdictions' ability-to-pay assessments creates vast discrepancies, meaning that a person's fortunes may turn substantially on where she is arrested.[233] Ability-to-pay reforms also can fail to address the issues surrounding commercial bail, as bail bonds agencies may continue playing a crucial role in providing upfront cash—for nonrefundable 10 percent premiums that the arrested individuals will never get back.[234] Given the millions that the money-bail system is currently extracting from low-income and Black communities, addressing money-bail injustice is an essential starting place to end people's perceptions that the criminal-legal system is an unfair mechanism for extracting capital.

B. *Addressing Debt-Based Voting Restrictions*

The surest way to eliminate the impact of wealth on access to the ballot for people with convictions is to abolish felony disenfranchisement. Right now, only two states—Maine and Vermont—allow all people with convictions to vote.[235] But there is good reason for that to change. Depriving people with convictions of the right to vote does not serve our criminal justice system, but undermines it. Evidence suggests that voting rights restoration improves reentry and reduces recidivism.[236]

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230. *See id.*
231. *See id.*
232. *See* Theresa Zhen, *(Color)Blind Reform: How Ability-to-Pay Determinations are Inadequate to Transform a Racialized System of Penal Debt*, 43 N.Y.U. Rev. L. & Soc. Change 175 (2019).
233. *See id*. at 202–05.
234. Jessica Silver-Greenberg et al., *When Bail Feels Less Like Freedom, More like Extortion*, N.Y. Times (Mar. 31, 2018), https://www.nytimes.com/2018/03/31/us/bail-bonds-extortion.html [https://perma.cc/6UAU-3SKB].
235. Can't Pay, Can't Vote, *supra* note 7, at 7.
236. *See*, *e.g.*, Christopher Uggen et al., *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 Colum. Hum. Rts. L. Rev. 193 (2004); Fl. Parole Comm'n, Status Update: Restoration of Civil Rights' (RCR) Cases Granted 2009 and 2010, (2011). https://www.fcor.state.fl.us/docs/reports/2009-2010ClemencyReport.pdf [https://perma.cc/M2MT-FN83].

Progress in this direction is marching forward. The District of Columbia is poised to restore the voting rights of all people who have convictions.[237] Likewise, last term, New Mexico considered a complete reenfranchisement bill[238] and advocates in New Jersey are similarly seeking complete rights restoration.[239] These measures will benefit thousands of individuals, particularly in the Black and Latinx communities that have been disproportionately affected by felony disenfranchisement. Nationwide, 1 in every 13 African Americans lacks voting rights because of felony disenfranchisement; among non-Black individuals, this number is 1 in 56.[240]

But states can take important steps short of abolishing felony disenfranchisement to ensure that wealth does not pose a barrier to the ballot box. Absent abolition, the most effective way to ensure that inability to pay does not preclude ability to vote is to restore voting rights automatically upon release from incarceration because current forms of postincarceration supervision are inextricably bound up with legal debt, as discussed in Part I. Not only is automatic restoration easier to administer and on stronger constitutional footing, it is sound policy for everyone. As noted above, rights restoration is a public good that reduces racial disparities in voting access, affirms the dignity of returning citizens, and eliminates the modern-day poll tax.

States are slowly moving in this direction. Both Colorado and Nevada adopted automatic restoration statutes in 2019.[241] Absent automatic restoration upon release from prison, states that condition rights restoration on completion of probation or parole must introduce policies that ensure individuals are never kept on supervision due to unpaid legal debt and introduce robust and easy to access waiver programs for those who cannot afford to pay. Similarly, states that explicitly condition voting rights restoration on payment of outstanding legal financial obligations must eliminate those requirements and introduce the programs described above. Governors in states where the Legislature refuses to act can also use their clemency powers to achieve many of the aims described above, albeit on a more temporary basis.[242]

Absent such steps, states will continue to violate the U.S. Supreme Court's mandate in *Harper* that "[w]ealth, like race, creed, or color, is

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237. *See* Fenit Nirappil, *Bill Would Let Felons Vote While in Prison*, Wash. Post, June 4, 2019, 2019 WLNR 17074662.
238. H.B. 57, 2019 Reg. Sess. (N.M. 2019).
239. N.J. Inst. for Soc. Justice, 1844 No More (2017), https://www.njisj.org/1844nomorereport2017 [https://perma.cc/W6KW-UXP6].
240. Chung, *supra* note 22.
241. *See* Nat'l Conf. of State Legs., *Restoration of Voting Rights for Felons*, (Oct. 14, 2019), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx [https://perma.cc/T9WN-5WCM].
242. *See, e.g.*, Relating to the Restoration of Civil Rights for Convicted Felons, Ky. Exec. Order No. 2019-003 (Dec. 12, 2019); Restoring the Right to Vote for New Yorkers on Parole, N.Y. Exec. Order No. 181 (Apr. 18, 2018); Iowa Exec. Order No. 42 (July 4, 2005).

not germane to one's ability to participate intelligently in the electoral process."

C. *Addressing Jail-Based Disenfranchisement*

To ensure access to the ballot for anyone detained in jail who wishes to vote, state and local election officials must begin to include detained eligible voters as their constituency. Election officials must take affirmative steps to remove the myriad barriers to registering and casting a ballot while held in jail.

1. Let Jails Serve as Polling Locations

The only way to ensure that no eligible voter detained in jail is disenfranchised is for states to allow and implement same day, in-person registration and voting in local jails. States should pass legislation requiring that jails serve as polling locations, while reforming voting eligibility so that jailed voters are registered in their home precinct and *not* at the jail address. Where states have not enacted this policy, jail officers and other actors should work together to implement jail-by-jail reforms. In Cook County Jail in Chicago, for example, months of advocacy efforts led the county clerk's office, volunteers, and jail officials to create in-jail polling places—one for men and one for women.[243] These solutions require cooperation from all parties involved, including state and local officials, particularly election officials, and jail staff.[244]

2. Amend Absentee and Emergency Ballot Laws to Enfranchise Detained Voters

Unless and until states and local jurisdictions allow jails to serve as polling locations and ensure robust participation by local election and jail officials, jailed voters' access to the ballot will remain through states' absentee and emergency ballot laws. Yet many states' absentee ballot laws contain deadlines for mailing back applications and absentee ballots that make compliance impossible for voters in jail.[245] And although at least thirty-eight states permit emergency absentee ballots, few state emergency ballot laws apply to voters held in jail awaiting trial.[246]

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243. *See* Lynch, *supra* note 163.
244. *See* Campaign Legal Center, Letter to Harris County, TX on Jail Polling Location Initiative (Sept. 23, 2019), https://campaignlegal.org/document/letter-harris-county-tx-jail-polling-location-initiative-0 [https://perma.cc/FVZ4-W677] (urging judge and county commissioners' court to move forward with previously-approved plan to turn Harris County Jail into polling location and provide voting machines to the eligible voters incarcerated there).
245. *See* Nat'l Conf. of State Legs., *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx [https://perma.cc/UX47-LRUZ] (last visited Mar. 23, 2020); *Absentee Ballot Deadlines*, Vote.org, https://www.vote.org/absentee-ballot-deadlines [https://perma.cc/WXB7-FRUW] (last visited Oct. 26, 2019).
246. *See* Absentee Voting in Case of a Personal Emergency, *supra* note 159.

States should revise their absentee and emergency ballot laws to include eligible voters in jail and impose no deadlines that will be impossible or unrealistic for jailed voters. In addition, absentee ballots and applications must have clear instructions and impose no requirements (such as notarization) that jailed voters cannot complete. For example, in New York, voters detained in jail or confined in prison for a nonfelony conviction can apply for an absentee ballot by mail.[247] The application can be postmarked by the seventh day prior to the election or delivered in person by the day before the election.[248] The voted absentee ballot must be postmarked by the day before the election and received no later than seven days after the election.[249] Emergency ballot laws must provide for absentee ballots to be requested, received, and mailed in by voters detained in jail between the deadline to apply and the election.

3. Increase Public Awareness of Jail Voting Rights, Educational Outreach to Jails, and Participation with Voter Registration Drives

Even with positive legislative and administration reform, the ability of jailed eligible voters to vote requires supportive jail administrators and election officials to implement reforms and help facilitate voter education and registration drives.[250] In Alabama, for example, after years of effort by voting rights activists to clarify which felonies are disenfranchising under the state's incomprehensible felony disenfranchisement law and provide a real path for restoration, the state finally recognizes the right of jailed (and some incarcerated) voters to vote while incarcerated.[251] But the state refuses to meaningfully implement these changes to ensure access to the franchise from jail (or prison), and activists—led by The Ordinary People Society—must continue extensive outreach and

247. NY State Bd. of Elections, *Absentee Voting*, The Official Website of New York State, https://www.elections.ny.gov/VotingAbsentee.html [https://perma.cc/G6S7-9BNB] (last visited Oct. 26, 2019).

248. *Id.* An eligible absentee voter may also request and absentee ballot by sending a letter to their county board of elections.

249. NY State Bd. of Elections, New York State Absentee Ballot Application (2015).

250. *Illinois Jail Allows In-Person Voting*, The Sentencing Project: Disenfranchisement News (July 20, 2017) https://www.sentencingproject.org/news/5426 [https://perma.cc/9ZLX-WYBJ]; *see also* Barthel, *supra* note 147. *See generally* ACLU & Right to Vote, Voting While Incarcerated: A Tool Kit for Voting Rights Advocates (2005) https://www.aclu.org/sites/default/files/pdfs/votingrights/votingwhileincarc_20051123.pdf [https://perma.cc/YBC4-43YW].

251. Ala. State Advisory Commm to the U.S. Comm'n on Civil Rights', Access to Voting in Alabama: A Summary of Testimony received by the Alabama Advisory Committee to the United States Commission on Civil Rights 16–21 (2018), https://www.usccr.gov/pubs/2018/08-08-AL-Voting-Access.pdf [https://perma.cc/CSH8-QELJ] (citing SOS Merrill's testimony regarding voting while incarcerated).

education to make voting an option for those held in Alabama's prisons and jails.[252]

Registration drives are a key to ensuring access to the ballot is not denied to jailed voters; if those in jail cannot register to vote, changes in a state's absentee and emergency ballot laws will be meaningless. In Los Angeles County, a key component to successful registration drives has been training local officials—sheriff's deputies, public defenders, probation officers, reentry personnel—and other community groups to understand California's election laws and assist people in jail with filling out registration forms.[253]

To fully dismantle jail-based disenfranchisement, reforms in policy and practice are insufficient. Public officials—state and county election officials and local sheriffs—must (1) provide accurate and consistent information on the process for voting while in jail to the public, jail officials, and those detained; (2) create voter registration and absentee ballot programs inside jails (and prisons in states where not all felonies are disenfranchising) conducted by a voting coordinator inside the jail;[254] and (3) ensure that advocates seeking to conduct registration and/or absentee ballot drives have the full support of election and jail officials and can access those detained in jail year-round. In addition, state Secretaries of State, election officials, and jail officials should design and implement comprehensive programs to make election-related information available. This information dissemination should include information not only about the election and candidates, but also about political events, particularly events relating to the criminal-legal system. Debates and the news should be made available wherever possible. In addition, jails should make civic education and related programming available to the maximum extent possible.

4. Address Civic Disengagement

Unlike debt-based voting restrictions and voting access within jails, the civic engagement-related effects of LFOs and pocketbook policing lack simple, targeted fixes: The United States will not address this issue without addressing the broad criminalization of poverty. In seeking these changes, though, subtle differences in advocacy approaches may diminish the negative "educative effects" of the current system: Centering reform efforts in those communities that have been directly impacted,

252. Greg Garrison, *Kenneth Glasgow: Al Sharpton's Brother Promotes Voting Rights for Inmates, Felons*, AL.com (June 28, 2019), https://www.al.com/news/2019/06/kenneth-glasgow-al-sharptons-brother-promotes-voting-rights-for-inmates-felons.html [https://perma.cc/S6GE-4V6Q].

253. Margaret Barthel, *Getting Out the Vote from the County Jail*, Atlantic (Nov. 4, 2018), https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783 [https://perma.cc/69GL-57W2].

254. *See, e.g.*, L.A. Cty. Registrar-Recorder/County Clerk, Voting While Incarcerated (2017) https://www.lavote.net/docs/rrcc/documents/Voting-While-Incarcerated.pdf?v=1 [https://perma.cc/2D6X-BWGL].

as occurred with the successful Amendment 4 campaign, may take a step toward blunting the civic engagement-related impacts.[255]

Although discussions about policy advocacy often privilege political expediency only, recent years have seen an increase in groups that are directly led by and center people who have been directly impacted by incarceration and other issues.[256] These conversations are driven not only by an acknowledgment that people who are directly impacted by an issue—whether that issue is incarceration, sexual assault, gun violence, or whatever else—are the most powerful and efficacious spokespeople on their issue, but also by an awareness that the advocacy process itself can have empowering effects. If the literature discussed in this Article is correct, people who are directly impacted often disengage because they feel alienated and powerless vis-à-vis the system. A system so lacking in basic fairness, they come to believe, cannot possible be one that would respect their voices. Channeling these frustrations and negative experiences into reform efforts may become a powerful, long-lasting antidote to the sense that civic engagement will not yield real results. In this sense, the impacted individual-led Amendment 4 campaign in Florida may provide a blueprint not only for making substantive policy change, but also for addressing the disenfranchising effects of the carceral system itself.

Conclusion

Over the next few years, we are likely to see continued campaigns that seek to dismantle felony-based disenfranchisement laws. These campaigns are ultimately the surest way to address money-based voting restrictions and ensure that all individuals can cast a ballot. But, we should be mindful that these campaigns take time and that, at this exact moment, thousands of people nationwide are being disenfranchised simply because they cannot pay a monetary sum. Advocates should consider addressing these specific barriers when doing state, local, and federal advocacy. In addition, we should be mindful that even full reenfranchisement will not avoid all of the ways that the criminal-legal system is suppressing voter turnout: To ensure that all communities are heard equally, we must address the underlying inequities in the American criminal-legal system and, as we do so, center the voices of those individuals and communities that have been most impacted.

255. Frances Robles, *1.4 Million Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. Times (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/6UFP-STGZ].

256. *See, e.g.*, Just Leadership USA, Florida Rights Restoration Coalition, Dream Corps, Initiate Justice, National Council for Incarcerated and Formerly Incarcerated Women and Girls, etc.