
Volume 24 | Issue 2

Summer 2021

Reviving the Civic Body: Campaign for Suffrage Inside Prisons, Felony Enfranchisement in D.C., and Lawyering for Abolition

Uruj Sheikh
CUNY School of Law

Follow this and additional works at: <https://academicworks.cuny.edu/clr>



Part of the [Law Commons](#)

Recommended Citation

Uruj Sheikh, *Reviving the Civic Body: Campaign for Suffrage Inside Prisons, Felony Enfranchisement in D.C., and Lawyering for Abolition*, 24 CUNY L. Rev. F. 31 (2021).

The CUNY Law Review is published by the Office of Library Services at the City University of New York. For more information please contact cunylr@law.cuny.edu.

Reviving the Civic Body: Campaign for Suffrage Inside Prisons, Felony Enfranchisement in D.C., and Lawyering for Abolition

Acknowledgements

The author gives her sincere thanks to Professor Frank Deale for his feedback on earlier drafts, and whose guidance and expertise in voting rights was invaluable. The author also thanks Sarah Bradford, Rachel Goldman, Rashika Rakibullah, and the other editors of CUNY Law Review for their careful reading and generous engagement with this article. And a special thank you to the Washington Lawyers' Committee for Civil Rights and Urban Affairs for their encouragement on writing this piece.

**REVIVING THE CIVIC BODY:
CAMPAIGN FOR SUFFRAGE INSIDE PRISONS,
FELONY ENFRANCHISEMENT IN D.C., AND
LAWYERING FOR ABOLITION**

Uruj Sheikh[†]

PREFACE	32
I. INTRODUCTION	33
II. WHAT THE D.C. VOTING RIGHTS AMENDMENT DOES	36
A. <i>Background</i>	36
B. <i>Statutory Analysis</i>	38
C. <i>Implementation Challenges: Federal Bureau of Prisons vs. D.C. Dep’t of Corrections</i>	40
III. MOVEMENT BUILDING TO REVIVE THE COLLECTIVE CIVIC AND SOCIAL BODY	43
A. <i>2020 Summer of Resistance Reckoning with System of Racial Apartheid</i>	43
B. <i>Debt Peonage and Felony Disenfranchisement</i>	44
C. <i>Constitutional Justifications for Felony Disenfranchisement</i>	47
D. <i>Recent Voter Restoration Litigation</i>	49
E. <i>The Purpose of the Restore the Vote Amendment Was to Address Civic and Social Death</i>	52
IV. BUILDING MOMENTUM TO INTERVENE IN FELONY DISENFRANCHISEMENT NATIONWIDE	55
A. <i>Points of Intervention</i>	56
1. <i>Designated Facility Appointee to Help Incarcerated Persons Exercise Franchise</i>	56
2. <i>Connecting Disability Justice and Targeted Incarceration</i>	57
3. <i>Prison Polling Locations</i>	57

[†] Uruj Sheikh is a third-year student at CUNY School of Law. The author gives her sincere thanks to Professor Frank Deale for his feedback on earlier drafts, and whose guidance and expertise in voting rights was invaluable. The author also thanks Sarah Bradford, Rachel Goldman, Rashika Rakibullah, and the other editors of *CUNY Law Review* for their careful reading and generous engagement with this article. And a special thank you to the Washington Lawyers’ Committee for Civil Rights and Urban Affairs for their encouragement on writing this piece.

4. Mandate Voting Plans.....	58
5. Residency Requirement	59
6. Federal Prisons.....	60
V. CONCLUSION.....	60

PREFACE

This article is intended to offer inspiration to advocates of voter enfranchisement of incarcerated individuals who are guided by a political north star: abolition.

In July 2020, in the midst of a global uprising proclaiming Black Lives Matter, Washington, D.C. became the first incorporated jurisdiction of the United States to abolish felony disenfranchisement by restoring voting rights for individuals in prison.¹ Originally proposed in 2019, D.C.’s Restore the Vote Amendment Act (“Amendment”) finally passed in 2020 in a package of policing reforms called the “Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020.”² Only two states and Puerto Rico allow people caged in prisons to vote.³

The abolition of felony disenfranchisement in D.C. is best understood through a vision of abolition of a different kind—the abolition of carceral state violence, of prisons, of punitive measures under the guise of justice. I will discuss the Amendment as a case study of legal advocacy in tandem with movements for structural change. By employing traditional methods of statutory construction, I discuss the absence of mechanisms to carry out the voting process in prisons. I will reinterpret the Amendment by contextualizing it against a backdrop of the pressures exerted by the Movement for Black Lives and the grassroots coalition work of community, prison, nonprofit, and legal organizations.

Drawing on the movement lawyering framework developed by generations of lawyers before my time, Movement Law Lab, and Law for Black Lives, I examine the role that movement lawyers played to pass the Amendment and to ensure stronger provisions for its enactment. I discuss voting rights as a recurring terrain of grassroots work to dismantle White

¹ Robert C. White, Jr. (@RobertWhite_DC), TWITTER (July 8, 2020, 5:25 PM), <https://perma.cc/6MPC-RACM>; see also Rebecca Tan, *D.C. Bill to Restore Vote to Imprisoned Felons Receives Support at Public Hearing*, WASH. POST (Oct. 10, 2019, 3:40 PM), perma.cc/AFH5-JMFE.

² Comprehensive Policing & Justice Reform Second Emergency Amendment Act of 2020, D.C. Act 23-336, 67 D.C. Reg. 9148 (July 31, 2020).

³ Maine and Vermont never took away the right to vote, and Puerto Rico enfranchised the population in 1977. Vann R. Newkirk II, *Polls for Prisons*, ATLANTIC (Mar. 9, 2016), perma.cc/DB25-LH2B.

supremacy and anti-Black racism⁴ and connect felony disenfranchisement to civic and social death. I argue that by orienting voter enfranchisement on the trajectory for full abolition, the process of movement building, in turn, revives the civic and social collective, and the civic agent, simultaneously. Finally, I draw lessons from grassroots work to reform D.C.'s enfranchisement laws and the national project to abolish felony disenfranchisement.

I hope the content of this article may be useful for movement practitioners on the frontlines—inside prisons, in the courtroom, and on the streets—of enfranchisement and guided by a vision of abolition.

I. INTRODUCTION

But what does abolition demand? Not only does it demand the abolition of prisons and police, bosses and borders, . . . it's "the abolition of a society that could have prisons, that could have slavery, that could have the wage, and therefore not abolition as the elimination of anything but abolition as the founding of a new society."⁵

On July 7, 2020, Washington, D.C. unanimously passed the Amendment and reinstated the franchise for all D.C. residents confined in jails and prisons.⁶ The District of Columbia is the first incorporated jurisdiction in the United States to fully abolish felony disenfranchisement by restoring voting rights to all incarcerated individuals; an estimated 6,200 people are now eligible.⁷ The District has the highest incarceration rate in the country, and about 90% of its incarcerated population

⁴ Sexton writes:

[B]lack life is not social life in the universe formed by the codes of state and civil society, of citizen and subject, of nation and culture, of people and place, of history and heritage, of all the things that colonial society has in common with the colonized, of all that capital has in common with labor Black life is not lived in the world that the world lives in, but it is lived underground

See generally Jared Sexton, *The Social Life of Social Death: On Afro-Pessimism and Black Optimism*, 5 *INTENSIONS J.* (2011).

⁵ *DECOLONIZE THIS PLACE*, perma.cc/V7DM-36V7 (last visited Apr. 14, 2021) (citing STEFANO HARNEY & FRED MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY* 42 (Erik Empson ed., 2013)).

⁶ *D.C. Council Approves Voting in Prison Ahead of November Election*, SENT'G PROJECT (July 8, 2020), <https://perma.cc/A99C-R5K6>; Comprehensive Policing & Justice Reform Second Emergency Amendment Act of 2020, D.C. Act 23-336, 67 D.C. Reg. 9148 (July 22, 2020).

⁷ Maine, Vermont, and Puerto Rico are the only other U.S. jurisdictions that allow incarcerated individuals to vote regardless of incarceration. Notably, these jurisdictions have never disenfranchised incarcerated individuals. See Newkirk, *supra* note 3; Fenit Nirappil, *Felons from DC Could Be Able to Vote from Prison Under Proposed Bill*, WASH. POST (June 3, 2019,

is Black, although Black people make up only 46.4% of the city's population.⁸

The Amendment is temporary legislation and will expire 90 days after being signed into law.⁹ The enactment period was set to end near the 2020 Presidential Election, to allow incarcerated persons to vote and to give the D.C. Council—Washington, D.C.'s city council—time to review and draft a permanent law. With pressure from currently and formerly incarcerated individuals, reentry groups, community and nonprofit organizations, and legal advocacy firms, the D.C. Board of Elections (“BOE”) sent voter registration forms to 2,400 residents serving felony sentences.¹⁰ Over 400 individuals registered to cast their vote, some for the first time in their lives.¹¹

On October 20, 2020, the D.C. Council unanimously passed the “Restore the Vote Amendment Act of 2020” (“Act”), a permanent piece of legislation to guarantee voting rights to all eligible residents confined in jails and prisons, and amended the temporary legislation with enforcement and accountability mechanisms.¹² After the bill was signed by D.C. Mayor Muriel Bowser, like all D.C. legislation, it must first pass congressional review to become law.¹³ The 2020 Act became law on November 27, 2020, and was published in the D.C. Registrar.¹⁴

4:00 PM), perma.cc/CDN8-G82F; JEFFREY S. DEWITT, OFF. OF THE CHIEF FIN. OFFICER, FISCAL IMPACT STATEMENT – RESTORE THE VOTE AMENDMENT ACT OF 2020, 2 (2020), <https://perma.cc/68CW-YGA4>.

⁸ While the Department of Corrections data shows that of the incarcerated population, 90.4% of men are Black and 78.4% of women are Black, the total rate of incarceration of Black individuals in D.C. jails is near 90% and 95% of individuals in prison under D.C. Code are Black. *States of Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE, perma.cc/SVF6-HMY9 (last visited May 23, 2021); DEP’T OF CORR., FACTS AND FIGURES 5 (2020), perma.cc/SU2V-Q45B.

⁹ The amendment became effective on July 22, 2020, and expired 90 days later. Comprehensive Policing & Justice Reform Second Emergency Amendment Act of 2020 tit. 3, § 304.

¹⁰ Martin Austermuhle, *For the First Time, D.C. Sends Voter Registration Forms to Residents Incarcerated for Felonies*, DCIST (Sept. 3, 2020, 11:46 AM), <https://perma.cc/D3XZ-K79D>.

¹¹ Kira Lerner, *What It’s Like to Vote from Prison*, SLATE (Oct. 28, 2020, 2:08 PM), <https://perma.cc/HP94-4VZW>; Marcella Robertson, *Hundreds of DC Inmates Registered to Vote in Upcoming Election*, WUSA9, <https://perma.cc/4S2K-BMTQ> (last updated Nov. 2, 2020, 7:34 AM).

¹² For a timeline of the lifecycle of the bill, see *B23-0324 – Restore the Vote Amendment Act of 2019*, COUNCIL OF THE D.C., <https://perma.cc/92TW-CHF7> (last updated May 7, 2021).

¹³ *How a Bill Becomes a Law*, COUNCIL OF THE D.C., perma.cc/M636-4483 (last visited Apr. 14, 2021).

¹⁴ *B23-0324 – Restore the Vote Amendment Act of 2019*, COUNCIL OF THE D.C., <https://perma.cc/92TW-CHF7> (last updated May 7, 2021). Laws in D.C. require mayoral approval, after which they are submitted to a Congressional committee to be approved. *How*

The Amendment reforms a 1955 congressionally-imposed felony disenfranchisement law.¹⁵ While the bill was originally proposed on June 4, 2019, the Amendment passed among a package of police reforms in the “Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020,” during the movement for racial justice and Black lives in the wake of police murders of George Floyd, Breonna Taylor, Tony McDade, and countless other Black individuals.¹⁶ Simultaneously, people contended worldwide—in public streets, in homes, and in our hearts—with the White supremacist roots of systems of punishment like police, prisons, and criminal and family courts.¹⁷ What are those systems actually punishing? Whom do they exist to punish?

Contextualized by the Movement for Black Lives, the connection between disenfranchisement and punishment for assumed criminality illuminates a system of racial apartheid. In *Abolition as Praxis of Human Being: A Foreword*, Professor Dylan Rodríguez explains that incarceration is rooted in the idea that “criminal justice”

has produced a social logic, jurisprudence, cultural structure, and militarized policing apparatus that naturalize the condition of state captivity for criminalized people, populations, and geographies. This is to suggest, conversely, that in any given historical moment there are also *generally decriminalized* people, populations, and geographies whose incarceration — however temporary — may seem dissonant, scandalous, and inherently unjust, hence *unnatural*. In fact, the dynamic reproduction of this circuit of criminalization-decriminalization — a state-governed and extrastate process that relies on multiple methods of incarceration as the physiological and symbolic executions of an alleged social order — is precisely what coheres the normative cultural legibility of such “American” notions as freedom, citizenship, peace, safety, respectability, nation, and community.¹⁸

In this article, I argue that the Amendment could not have passed without the global movement of reckoning with anti-Black racism as an

a Bill Becomes a Law, *supra* note 13.

¹⁵ D.C. Election Code of 1955, ch. 862, 69 Stat. 699.

¹⁶ Comprehensive Policing & Justice Reform Second Emergency Amendment Act of 2020, D.C. Act 23-336, 67 D.C. Reg. 9148 (July 31, 2020); Damien Cave, et. al., *Huge Crowds Around the Globe March in Solidarity Against Police Brutality*, N.Y. TIMES (June 9, 2020), <https://perma.cc/ZQC4-48GP>.

¹⁷ Alan Taylor, *Images from a Worldwide Protest Movement*, ATLANTIC (June 8, 2020), <https://perma.cc/9XVP-AC6T>.

¹⁸ Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1586 (2019).

organized and elaborate system of racial apartheid.¹⁹ Most notably, a little over one year after it was proposed, the Amendment passed with a package of policing reforms and at a time of grassroots calls for abolition of police and the prison-industrial complex.²⁰ Rodriguez defines abolition as “a dream toward futurity vested in insurgent, counter-Civilizational histories — genealogies of collective genius that perform liberation under conditions of duress.”²¹ By framing voter restoration and enfranchisement as a systemic intervention on the prison system, felony disenfranchisement is a step towards actualizing our wildest abolitionist dreams.

II. WHAT THE D.C. VOTING RIGHTS AMENDMENT DOES

A. Background

Before delving into the legislation’s provisions, let’s lay some important groundwork. If D.C. were a state, it would have the highest rate of incarceration in the country at 1,153 per 100,000 people—even higher

¹⁹ This analytical framework was first introduced to me through the work of Lawrence Brown, public intellectual, researcher and professor at University of Wisconsin Population Health Institute and former associate professor at Morgan State University in Baltimore, Maryland. Brown writes extensively about Baltimore Apartheid, a current reality produced by interlocking public and private policies that inflict structural violence and create hyper segregation. Baltimore is one example of a hyper-segregated U.S. city; others include Cleveland AND St. Louis. Lawrence Brown, *American Apartheid: The Struggle for Black Space*, YouTube (July 13, 2015), <https://perma.cc/3FMT-AXFL>. Brown calls this “American Apartheid”—a borrowed phrase from Douglas Massey and Nancy Denton’s book *American Apartheid* (1993) and further defined by Mindy Fullilove—meaning “the government enforcement of both segregation by race and repeated forced uprootings of colonized and enslaved people.” Lawrence Brown, *THE BLACK BUTTERFLY*, 8 (2021).

²⁰ According to Critical Resistance, the term “prison-industrial complex” describes “the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems.” *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <https://perma.cc/Y3EH-LRTK> (last visited Apr. 14, 2021). To understand the prison industrial complex, scholar, activist, and founder of Critical Resistance, Angela Davis explains that one must understand the proliferation of prisons by conceptually delinking it from “crime and punishment.” ANGELA DAVIS, *ARE PRISONS OBSOLETE?* 85 (2003). Even though prisons are forcibly linked to crime and to punishment, the prison-industrial complex, is, as Davis writes,

a set of symbiotic relationships among correctional communities, transnational corporations, media conglomerates, guards’ unions, and legislative and court agendas. If it is true that the contemporary meaning of punishment is fashioned through these relationships, then the most effective abolitionist strategies will contest these relationships and propose alternatives that pull them apart.

Id. at 107. See also Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), <https://perma.cc/KX89-FVJS>.

²¹ Rodríguez, *supra* note 18, at 1575.

than the U.S. itself, which is at 698 per 100,000 people.²² It would also have a higher per capita Black population than any other state.²³

The D.C. Department of Corrections (“DOC”) operates jails within city limits, but D.C. has not operated any of its own prisons since 2001.²⁴ Individuals incarcerated for some misdemeanors, in pre-trial detention, or awaiting transfer to a Federal Bureau of Prisons (“BOP”) facility are confined in D.C. DOC jails. However, the Federal BOP houses and maintains the conditions of confinement for D.C. residents convicted of felonies. There are no BOP prisons in D.C. and residents are held in Federal BOP prisons all over the country, some of them hundreds of miles away from D.C.²⁵ About 95% of D.C. residents in prisons are Black.²⁶

Being denied full democratic participation is nothing new for D.C. residents. Before the 1970s, local D.C. laws were decided by Congress. The District of Columbia has a unique relationship to voting rights in particular, because, having been denied statehood, it lacks a voting representative in the U.S. Congress.²⁷ In 1955, Congress imposed a disenfranchisement law that outlawed voting by D.C. residents confined for felony convictions.²⁸ In 1971, Congress created a delegate position to represent D.C. residents in the federal legislature.²⁹ Congress soon passed the District of Columbia Home Rule Act of 1973, which granted “certain legislative powers” to a newly elected local government and D.C. residents the right to elect officials to preside over local matters.³⁰ However, Congress still retains ultimate legislative authority with a veto power to review and

²² Peter Wagner & Wendy Sawyer, PRISON POL’Y INITIATIVE, INCARCERATION RATES: COMPARING THE DISTRICT OF COLUMBIA AND FOUNDING NATO COUNTRIES, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018 (2018), <https://perma.cc/LLW6-3P47>.

²³ Sonya Rastogi, et al., U.S. CENSUS BUREAU, THE BLACK POPULATION: 2010 at 8 tbl.5 (2011), <https://perma.cc/2ZSE-W56Y>.

²⁴ Peter Wagner & Wendy Sawyer, PRISON POL’Y INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018 app. n.1 (2018), <https://perma.cc/HR4X-L9ZC>.

²⁵ Martin Austerhuhle, *D.C. Inmates Serve Time Hundreds of Miles from Home. Is It Time to Bring Them Back?*, WAMU 88.5, AM. U. RADIO (Aug. 10, 2017), <https://perma.cc/9NRU-3YZJ>.

²⁶ Lerner, *supra* note 11.

²⁷ Elisa Epstein, *A Step Toward Equal Voting Rights for DC Residents*, HUM. RTS. WATCH (June 26, 2020, 1:51 PM), <https://perma.cc/5E2C-7PBZ>.

²⁸ D.C. Election Code of 1955, ch. 862, 69 Stat. 699, *partially repealed by* Comprehensive Policing & Justice Reform Second Temporary Amendment Act of 2020, D.C. Law 23-151 tit. 2, 67 D.C. Reg. 14603 (Dec. 18, 2020).

²⁹ Congresswoman Eleanor Holmes Norton (D-DC-At Large) has served as the district’s non-voting delegate since 1991. Jonathan Franklin, *Eleanor Holmes Norton Re-elected as DC’s Delegate to the House of Representatives*, WUSA9 (Nov. 3, 2020, 10:43 PM), <https://perma.cc/UXR7-EVC9>. See Barbara Gamarekian, *WORKING PROFILE: WALTER E. FAUNTROY; A Legislator with Statehood on His Mind*, N.Y. TIMES (Nov. 30, 1986), <https://perma.cc/97S9-QZBB>.

³⁰ District of Columbia Home Rule Act of 1973 § 102, D.C. CODE § 1-201.02(a) (2021).

override any D.C. legislation.³¹ The purported “Jim Crow Congress”³² of bygone years and the continued non-voting representation in Congress, doubly disenfranchises D.C.’s incarcerated residents. Thus, voting rights is linked to self-determination and, in D.C., is a contentious and ever-present issue.³³

B. *Statutory Analysis*

The July 2020 temporary Amendment made provisions to grant voting rights for D.C.’s 6,200 incarcerated persons before the November Presidential Elections, while the Act makes permanent provisions to implement the voting process in jails and prisons and amends the District of Columbia Election Code of 1955, which restricted the right to vote for incarcerated individuals who are otherwise eligible.³⁴ Implementation of the temporary Amendment during the 2020 general election provides a look into the limitations of its operation, and deserves close attention by voting rights advocates and prison abolitionists alike.

The temporary Amendment requires the D.C. DOC to notify all eligible electors that their voting rights have been restored within ten days

³¹ District of Columbia Home Rule Act of 1973 § 601, D.C. CODE § 1-206.01 (2021).

³² James R. Jones III, *Black Capitol: Race and Power in the Halls of Congress* (Feb. 15, 2017) (unpublished Ph.D. dissertation, Columbia University) (on file with thesis advisor).

³³ See *Political Power*, MOVEMENT FOR BLACK LIVES, <https://perma.cc/JT5H-2EBX> (last visited Mar. 17, 2021) (linking Black self-determination to Black political power by supporting voting rights reforms as a means of furthering self-determination; reforms like including enfranchising formerly and currently incarcerated people and banning all disenfranchisement laws, as well as other election reforms such as public financing of elections, same day voter registration, and net neutrality to address election disinformation). See Press Release, Muriel Bowser, D.C. Mayor, Mayor Bowser Calls on Congress to Grant DC Residents Their Full Democratic Rights by Making Washington, DC the 51st State (Sept. 19, 2019), <https://perma.cc/93F3-AUN3> (testifying at a House Oversight and Reform Committee hearing on a D.C. statehood bill, Mayor Muriel Bowser discusses the fundamental problems of taxation without equal and full representation in Congress, including Supreme Court decisions that are binding on D.C. residents, who lack a Senate representative that participates in the confirmation hearings).

³⁴ Comprehensive Policing and Justice Reform Second Emergency Amendment Act of 2020, D.C. Act 23-336 tit. 3, § 304, 67 D.C. Reg 9148 (July 22, 2020) (providing that the legislation is temporary for no longer than 90 days). The Restore the Vote Amendment Act bill followed D.C.’s legislative process to become a law under the District’s charter. See *B23-0324 – Restore the Vote Amendment Act of 2019*, COUNCIL OF THE D.C., <https://perma.cc/92TW-CHF7> (last updated May 7, 2021). For D.C.’s legislative process see *How a Bill Becomes a Law*, *supra* note 13.

of the passage of the Amendment.³⁵ The BOP is required to inform eligible electors starting on January 1, 2021.³⁶ Prior to the 2020 general election, the D.C. BOE will provide voter registration forms and information to eligible electors in D.C. jails and will “endeavor to provide” the same information to those in BOP custody.³⁷ With D.C.’s incarcerated population across the U.S., those individuals who are eligible to vote may not learn about their eligibility until *after* the election.³⁸

Under the permanent legislation, the D.C. DOC and the Department of Youth Rehabilitation Services, which operates the juvenile jail system, will become automatic voter registration agencies, like the Department of Motor Vehicles.³⁹ Eligible voters will be automatically registered unless they choose to opt out; the Act also updates voter information for already registered individuals.⁴⁰ The BOE will then provide voter guides and ballots to each eligible person in D.C.’s adult and juvenile jail.⁴¹

However, D.C. residents in BOP facilities are not automatically registered. Instead, D.C. BOE will “endeavor to provide” every elector in BOP prisons “a voter registration form and postage-paid return envelope.”⁴² Once registered, electors in BOP prisons are sent a voter guide with educational materials, and “[w]ithout first requiring an absentee ballot application to be submitted, an absentee ballot and postage-paid return envelope.”⁴³ The voting process must be administered in accordance with D.C. law, so, if applicable, voter registration forms must be submitted 21 days prior to the election,⁴⁴ and absentee ballots must be postmarked on or before Election Day.⁴⁵

³⁵ Comprehensive Policing & Justice Reform Second Emergency Amendment Act of 2020 § 202.

³⁶ *Id.* § 201(b).

³⁷ *Id.*

³⁸ See *Restore the Vote Amendment Act of 2019: Hearing on B23-0324 Before the Comm. on the Judiciary & Pub. Safety*, 23d Sess. (D.C. Council 2019), <https://perma.cc/57LU-L2YM> (statement of Nassim Moshiree, Policy Director, ACLU of D.C.) [hereinafter *Hearing on B23-0324*].

³⁹ Restore the Vote Amendment Act of 2020, A23-484 § 3, § 4(b), 67 D.C. Reg. 13867 (Nov. 27, 2020).

⁴⁰ *Id.*

⁴¹ *Id.* § 2(b)(1).

⁴² *Id.*

⁴³ *Id.* Under D.C. Code § 24-211.08 (2021), D.C.’s Department of Corrections is required to send voting information to anyone in jail and anyone with a criminal record who has completed their sentence.

⁴⁴ *When Is the Deadline for Registration?, Voter Registration*, D.C. BD. OF ELECTIONS, <https://perma.cc/8UVZ-378C> (last visited Apr. 14, 2021).

⁴⁵ *Vote Absentee*, D.C. BD. OF ELECTIONS, <https://perma.cc/AT3Q-7CB2> (last visited Apr. 14, 2021).

C. *Implementation Challenges: Federal Bureau of Prisons vs. D.C. Dep't of Corrections*

The slight difference in language between the provisions pertaining to the D.C. DOC and those in which the BOE will endeavor to provide to the BOP raises deep issues for implementation and enforcement. By bifurcating the incarcerated population according to facility, voting opportunities are subject to the will of the facility operator. Since the BOP is not subject to D.C. Council authority, enforcement of the Amendment is ad hoc and voluntary at best.

In the 2020 Presidential Election, for example, the BOP refused to release information on D.C. residents to the D.C. BOE who, under the Amendment, may send voter guides and other materials to newly eligible electors on how to exercise the franchise.⁴⁶ There is even discrepancy in the number of D.C. residents that BOP claims are in its custody, sometimes claiming 2,600 people and at other times 4,500, depending on whether it counts those convicted of D.C. Code violations or federal felony laws.⁴⁷

While there is no official voting rights information on the BOP's website, a "spokesman for the Bureau of Prisons . . . noted its policies allow for inmates to receive absentee ballots with prepaid return envelopes."⁴⁸ The D.C. Corrections Information Council ("D.C. CIC")—responsible for monitoring conditions of confinement for all district residents—has information on the location of D.C. residents in prisons but is banned from sharing the information with local elections administrators.⁴⁹

The BOP emailed D.C. residents voter registration forms and voting information on three occasions but refused to send the D.C. BOE names and locations of D.C. residents in their custody, citing federal regulations requiring them "to protect individual privacy."⁵⁰ D.C. BOE has said it's working with the BOP directly to send registration forms to 107 federal

⁴⁶ Scott MacFarlane et al., *Efforts to Register and Provide Ballots to DC Felons in Federal Prisons Face Hurdles*, NBC4 WASH. (Oct. 14, 2020, 5:08 PM), <https://perma.cc/W2NW-QW8S>.

⁴⁷ 2,600 individuals in BOP facilities are charged with federal crimes; an additional 1,900 have been charged under the D.C. criminal code and are being held in BOP prisons. See Fenit Nirappil, *D.C. on the Brink of Allowing Inmates to Vote from Prison*, WASH. POST (July 8, 2020, 3:20 PM), <https://perma.cc/4Z9W-P8RH>.

⁴⁸ Nirappil, *supra* note 47. See also Samantha Michaels, *Racist Laws Took the Vote Away from Prisoners. After Serving Time, One Man Is Fighting to Give It Back to Them*, MOTHER JONES (June 13, 2019), <https://perma.cc/2ZXE-9J3D> ("A spokesperson for the Federal Bureau of Prisons confirmed that the agency already has policies in place to facilitate this.").

⁴⁹ MacFarlane, *supra* note 46.

⁵⁰ Press Release, Eleanor Holmes Norton, D.C. Congresswoman, Norton Releases BOP Response to Her Concerns About Registering Eligible D.C. Inmates to Vote, Calls for Additional Coordination with D.C. (Oct. 6, 2020), <https://perma.cc/9EUA-WUJ8>.

prisons where D.C. residents are likely held.⁵¹ The BOP said it has also provided these hard-copy voter registration forms and other voter information to each institution.⁵² By October 14, 2020, of the 2,600, only about 300 have registered.⁵³ According to the BOP, 50 people committed errors on their registration forms, which raises concerns for activists and local D.C. officials about the potential lack of guidance and information to correctly complete the forms.⁵⁴ Poor coordination and the BOP's lack of cooperation with the District's election officials is a notable problem raised by formerly incarcerated individuals, other voter restoration advocates, and the DC BOE.⁵⁵ Approximately 400 people have registered from inside District jails.⁵⁶

Implementation challenges in prisons are not more burdensome as, say, voting mechanisms required for the general populace. Case in point: the quickly implemented solutions to mitigate the spread of COVID-19 during the 2020 Presidential Election, specifically for absentee voting. The 2020 General Election saw an overall record-breaking voter turnout.⁵⁷ Opponents of what the Massachusetts Institute of Technology's Election Data and Science Lab calls "convenience voting methods," for example vote-by-mail, allege that these mechanisms increase voter fraud, but these allegations are unfounded.⁵⁸ Allegations of voter fraud and other justifications for the state's inability to implement more convenient voting processes, such as burdensome administration, hark back to Jim Crow ideology that the right to vote is only inalienable for some.⁵⁹ President

⁵¹ Auster Muhle, *supra* note 10.

⁵² MacFarlane, *supra* note 46.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See *Hearing on B23-0324*, *supra* note 38, at 14 (statements of Kara Gotsch, Director of Strategic Initiatives, Sentencing Project); *id.* at 50 (statements of Margaret Martin Barry, Visiting Professor of Law and Director of Re-Entry Clinic at American University Washington College of Law and by Xena Hinson, Dean's Fellow); *id.* at 96 (statements of Stacey Litner, Washington Lawyers' Committee for Civil Rights and Urban Affairs); *id.* at 101 (statements of D.C. Board of Elections).

⁵⁶ Scott MacFarlane et al., *DC Jail Registers Hundreds of Inmates to Vote*, NBC4 WASH. (Oct. 20, 2020, 6:26 PM), <https://perma.cc/4CPF-EJY7>.

⁵⁷ Domenico Montanaro, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NPR (Nov. 25, 2020, 9:06 AM), <https://perma.cc/W5BX-5VQW>.

⁵⁸ *Voting by Mail and Absentee Voting*, MIT ELECTION DATA + SCI. LAB, <https://perma.cc/BY5X-A7CB> (last updated Mar. 16, 2021).

⁵⁹ While election regulations that require voter identification, place restrictions on registration, or limit early voting, for example, appear to be about election integrity, they actually embody what Professor Carol Anderson calls "white rage," or policies that have a cumulative diminishing effect on Black achievement and advancement—not just on the power to vote. As Anderson and Cineas discuss,

These policies sanction the violence that accompanies white rage to make that environment look legitimate. . . . Fabiola Cineas: What are these voter suppression

Donald Trump made this clear by attempting to defund the United States Postal Service and appointing one of his biggest donors, Louis DeJoy, as Postmaster General, all in a conceded effort to undermine mail-in and absentee voting.⁶⁰ Jim Crow-coded administrative burdens placed on the franchise are a concerted effort to strip collective political power and explain why voting rights remain a recurring opportunity for dismantling White supremacy.

policies that are apparently so central to white rage? Carol Anderson: Voter ID laws. It sounds race neutral and it sounds like it's in support of strengthening democracy. But voter ID laws are based on the lie of voter fraud. We have to have people be themselves to make sure they're not stealing the election. So you create the lie, then you create the obstacle of IDs. We've got evidence of this. It's like what happened in North Carolina — they requested data by race on the types of IDs people held, and then wrote the law to privilege the IDs that whites had and to disqualify the IDs that African Americans had.

Fabiola Cineas, *White Rage Won't Just Go Away: African American Studies Scholar Carol Anderson on the Policies That Legitimize White Rage*, VOX (Jan. 27, 2021, 8:00 AM), <https://perma.cc/5Z5P-V69M>. In a study on states' restrictive voter access legislation between 2006 and 2011, researchers found that policy developments in the criminal legal system and social welfare policy have the effect of reducing access to the ballot among already marginalized communities. Keith Gunnar Bentele & Erin E. O'Brien, *Jim Crow 2.0?: Why States Consider and Adopt Restrictive Voter Access Policies*, SOC. FAC. PUBL'N SERIES, U. MASS. BOS. PAPER 11, 1 (2013), <https://perma.cc/N4XQ-ZV64>. These policies are more likely to be proposed and passed in areas with higher Black populations and higher turnout rates among non-White voters. *Id.* at 17. Overall, "the racial composition of a state is strongly related to the proposal of changes which would restrict voter access." *Id.* at 17-18. As Bentele and O'Brien contend,

[T]he recent policy changes examined [in the study] are analogous to the restrictive laws and practices in the Jim Crow era designed to achieve discriminatory impacts without violating the 15th Amendment "Administrative complexities justified as race-neutral necessities for deterring voter fraud are also opportunities for administrative error that have come to replace opportunities for vote suppression by other means. This is the context for the proliferation of unsupported fraud allegations today Thus, it is these voters who stand in for the criminal voters conjured up by the spurious voter fraud allegations and imagined by the U.S. cultural myth of voter fraud."

Id. (citing LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* 88-89 (2010)). See also Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999 (2019) (discussing state and local election administration and the implications of administrative burdens on voting rights restoration for people with felony convictions).

⁶⁰ Sam Levine, *Trump Admits He Is Undermining USPS to Make It Harder to Vote by Mail*, GUARDIAN (Aug. 13, 2020, 12:25 PM), <https://perma.cc/8FEB-SBVU>; Michael D. Shear et al., *Mail Delays Fuel Concern Trump Is Undercutting Postal System Ahead of Voting*, N.Y. TIMES (Nov. 4, 2020), <https://perma.cc/WCE4-FLNE>.

III. MOVEMENT BUILDING TO REVIVE THE COLLECTIVE CIVIC AND SOCIAL BODY

Strategy is a long-range plan for accelerating the movement of contradictions among political forces to achieve the desired goal of transformation. Strategy has five components—analyze the overarching political and economic contradictions of the system in the period within which you are working; identify the political forces against whom you are bringing your demands; determine the strategic aim, the most fundamental objectives you are fighting for; determine how to align your main forces and your allies; and develop clear programmatic demands that can rally a long-term movement.⁶¹

A. *2020 Summer of Resistance Reckoning with System of Racial Apartheid*

After the temporary legislation was enacted and the permanent bill was proposed, an ad hoc coalition of community groups, legal advocates, and experts coalesced to push D.C. Councilmembers on the lack of enforcement mechanisms and best practices to protect the franchise.⁶² The work to end felony disenfranchisement was led and stewarded by formerly incarcerated persons through groups D.C.'s Reentry Action Network, Justice Policy Institute, and The National Reentry Network for Returning Citizens.⁶³ Black Lives Matter D.C. contextualized felony disenfranchisement within the racist origins of the U.S. and its carceral state and situated voter restoration in the movement for Black liberation and structural change.⁶⁴ Legal advocacy organizations and the attorneys

⁶¹ ERIC MANN, PLAYBOOK FOR PROGRESSIVES: 16 QUALITIES OF THE SUCCESSFUL ORGANIZER 31 (2011).

⁶² See *Hearing on B23-0324*, *supra* note 38, at 42 (statements of Makia Green, Working Families Party (advocating that that postage stamped envelopes be provided with absentee ballots and converting Department of Corrections to an automatic voter registration agency)); *id.* at 21 (statements of Tyrone Walker, Associate, Justice Policy Institute); *id.* at 28 (statements of Paula Thompson, Co-Chair, D.C. Reentry Action Network); *id.* at 74-76 (statements of Jimmie Williams, President/Executive Director, The Washington Literacy Center (explaining that low literacy rates and lack of participation in election process has an intergenerational effect on justice-impacted communities)).

⁶³ See *id.* at 21 (statements of Tyrone Walker, Associate, Justice Policy Institute); *id.* at 28 (statements of Paula Thompson, Co-Chair, D.C. Reentry Action Network); *id.* at 61 (statements of Courtney Stewart, Founder/CEO, The National Reentry Network for Returning Citizens).

⁶⁴ Video: *Restore the Vote Amendment Act of 2019: Hearing on B23-0324 Before the Comm. on the Judiciary & Pub. Safety*, 23d Sess. (D.C. Council Oct. 10, 2019) (1:34:58), <https://perma.cc/E35G-2PME> (statement of April Goggans, Core Organizer, Black Lives Matter D.C.).

of people in confinement, like Campaign Legal Center and the Washington Lawyers' Committee for Civil Rights and Urban Affairs, used their legal skills (finding, reading and interpreting statutes, conducting a comparative analysis of laws in different jurisdictions, and sharing their expertise publicly) to advocate for decoupling criminal convictions from civic rights in this way.⁶⁵ They used their expertise to advise legislators on the issue of how formerly incarcerated people can meet residency requirements due to missing or unknown addresses and bolster frontline demands that the Department of Corrections should be an automatic voter registration agency.⁶⁶ Even a group of police, judges, prosecutors, and other criminal legal system professionals testified in support of the Amendment at a public hearing on the bill.⁶⁷ The D.C. Department of Corrections and the District's Office of the Attorney General also testified in support of restoring voting rights.⁶⁸

The voter enfranchisement effort in D.C. is a case study for lawyers interested in movement work. It is better understood through a theory of change that centers those most proximate to the violence of the carceral state and by applying client-centered lawyering beyond the attorney-client dyad. How can we apply client-centered lawyering on a broad scale, where movements for social justice define the goals? What possibilities open up when lawyers imagine themselves guided by a theory of change and political vision rooted in abolition and dreams of an alternative? What can our radical imagination channel through lawyering with movements?

B. *Debt Peonage and Felony Disenfranchisement*

Conditioning full emancipation on paying off legal financial obligations does not just have roots in the Jim Crow era. In the United States, felony disenfranchisement is part of the nation's inheritance from English colonizers who brought with them their common law tradition, which connected criminal conviction with the loss of civil rights.⁶⁹

During the post-Civil War Reconstruction period and following the expansion of suffrage to Black men, felony disenfranchisement laws

⁶⁵ See also *Hearing on B23-0324*, *supra* note 38.

⁶⁶ *Id.*

⁶⁷ See *id.* (statements of Officer Ronald E. Hampton (Ret.), D.C. Metropolitan Police Department & Maj. Neill Franklin (Ret.), Maryland State Police, Executive Director, Law Enforcement Action Partnership).

⁶⁸ See COUNCIL OF D.C. COMM. ON THE JUDICIARY & PUB. SAFETY, REPORT ON B23-0324, THE "RESTORE THE VOTE AMENDMENT ACT OF 2020," 23d Sess. 13, 30 (2020), <https://perma.cc/E2QQ-58Y5> (including statements of Quincy Booth, Director of Department of Corrections & Karl Racine, Att'y Gen. of D.C.).

⁶⁹ Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT (June 27, 2019), <https://perma.cc/PE33-NQCS>.

served as an alternate means for White property owners to substitute race and class for citizenship.⁷⁰ By 1870, 28 out of 38 states instituted felony disenfranchisement laws, up from 1850 when only 11 of the then 32 states had such laws.⁷¹

Following the abolition of slavery, not only did the number of felony crime laws increase, but they were integrated into a system of laws aimed at criminalizing the freedom of Black citizens.⁷² This system of “Black Codes,” which “criminalized a range of actions—such as vagrancy, being

⁷⁰ Richard Rothstein articulates the history of systemic segregation and subjugation following the end of a period of Black liberation known as Reconstruction in 1877, when northern Republicans seeking to resolve a disputed presidential race compromised with Southern Democrats. See RICHARD ROTHSTEIN, *THE COLOR OF LAW* 39 (2017). “In return for southern Democratic support of their presidential candidate, Republicans agreed to withdraw federal troops who had been protecting African Americans in the defeated Confederacy.” *Id.* at 39. Rothstein writes about how Southern Democrats institutionalized violence via:

segregation statutes—Jim Crow laws. Denied the right to vote, segregated in public transportation, schools, and private accommodations, and victimized by lynching and other forms of brutality, African Americans in the South were reduced again to a lower-caste status. Plantation owners redefined their former slaves as sharecroppers to maintain harsh and exploitative conditions . . . [W]hite paramilitary groups mobilized to regain control of state governments. Their aim was simple: prevent African Americans from voting.

Id. at 40. Sharecroppers had their cost of living and food deducted from their wages, which were insufficient to cover their costs. See *id.* at 154. Law enforcement, Rothstein states:

enforced . . . peonage, preventing sharecroppers from seeking work elsewhere, by arresting, assaulting, or murdering those who attempted to leave, or by condoning violence perpetrated by owners. In many instances, African Americans were arrested for petty and phony offenses (like vagrancy if they came to town when off work), and when they were unable to pay fines and court fees, wardens sometimes sold prisoners to plantations, mines and factories.

Id. at 154–55. Over 100,000 became enslaved in this way. *Id.* at 155. After Reconstruction, “Black Codes and Jim Crow laws . . . conspired to deliver newly freed blacks to the statutory status of nonslaves but not to the equal rights of American citizenship; they were still the bondsmen of subjugation and exploitation.” HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM* 14 (1977).

⁷¹ Angela Behrens, *Voting—Not Quite a Fundamental Right? A Look at Legal and Legislative Challenges to Felon Disenfranchisement Laws*, 89 MINN. L. REV. 231, 237 (2004).

⁷² On a podcast, Muhammad states:

One of the really powerful expressions of how important policing and punishment were in the conception of the end of slavery was that the 13th Amendment abolished slavery except as punishment for crime. So in some ways, the genius of the former Confederate states was to say, oh, well, if all we need to do is make them criminals and they can be put back in slavery, well, then that’s what we’ll do. And that’s exactly what the black codes set out to do. The black codes, for all intents and purposes, criminalized every form of African American freedom and mobility, political power, economic power, except the one thing it didn’t criminalize was the right to work for a white man on a white man’s terms.

Throughline: American Police, NPR (June 4, 2020, 12:08 AM), <https://perma.cc/9UYU-A3WE>.

outside after a certain hour, absence from work, unemployment, possessing a firearm,” petty thievery, and domestic violence—were disproportionately enforced against Black residents.⁷³ In *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Khalil Gibran Muhammad writes, “At the dawn of the twentieth century, in a rapidly industrializing, urbanizing, and demographically shifting America, Blackness was refashioned through crime statistics. It became a more stable racial category in opposition to whiteness through racial criminalization.”⁷⁴ Anti-Black racism “became part of the initiation rite into citizenship in America,” explains Isabel Wilkerson in *Caste: The Origins of Our Discontents*.⁷⁵ Through civic and social death, “Blackness” became equated with anti-citizen.

In this period, anti-Black racism was reorganized into debt slavery, or debt peonage, and labor exploitation to maintain a system of power that relegated the Black community to the lowest socioeconomic status and prohibited class mobility.⁷⁶ Slavery-era White supremacy today is reconstituted into a new system of debt peonage by connecting fees and fines with sentencing for criminal convictions.⁷⁷ Like in Florida, where S.B. 7066 prevented hundreds of thousands of otherwise eligible Floridians from voting, the criminal legal system persists as a system of racial control. Thus, decoupling criminality from civil rights is critical to restore voting rights and to protect the franchise for everyone.

This system is an opportunity for social justice-minded lawyers to work with movements, through public defense, policy change, and impact

⁷³ VICTORIA LAW, RESISTANCE BEHIND BARS: THE STRUGGLES OF INCARCERATED WOMEN 160 (2d ed. 2009).

⁷⁴ KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 5 (2010).

⁷⁵ ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS 50 (2020); see also Isabel Wilkerson, *Isabel Wilkerson on the Legacies of American Chattel Slavery*, LITERARY HUB (Nov. 30, 2020), <https://perma.cc/YCX4-W8EN>.

⁷⁶ See ROTHSTEIN, *supra* note 70, at 154-55; HILL, *supra* note 70, at 10-11, 14 (explaining that the system of racial occupational eviction accelerated after Reconstruction, displacing Black workers working in the skilled trades and leading to mass unemployment and underemployment of this skilled worker population. Explaining that enslaved persons were critical for southern slaveowners to preserve their “hegemony over the flow of capital in the South and secur[e] their class position” and that emancipation of enslaved persons would therefore cause slaveowners to lose the ideological underpinnings to support their business of land and labor exploitation).

⁷⁷ See ALICIA BANNON ET AL., BRENNAN CTR. FOR JUST., CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 19 (2010), <https://perma.cc/W54R-FUUT> (“[B]eginning soon after the Civil War and continuing through the 1930s, many Southern states used criminal justice debt collection as a means of effectively re-enslaving African-Americans, allowing landowners and companies to ‘lease’ black convicts by paying off criminal justice debt that they were too poor to pay on their own.”)

litigation, to eliminate cash bail and post-conviction financial debt in continuity with the civic and social revival that is at the heart of abolition. It is notable that Maine and Vermont, the only two states that do not disenfranchise persons with felony convictions, *are among states with the largest White population*.⁷⁸ By contrast, Puerto Rico and Washington D.C. are not states, lack a voting member in Congress, are largely Hispanic and Black respectively, and have enacted voter reenfranchisement laws.⁷⁹

C. *Constitutional Justifications for Felony Disenfranchisement*

The promise of equal protection and suffrage under the Fourteenth and Fifteenth Amendments has had the contrary effect of expanding felony disenfranchisement laws. Facially neutral felony disenfranchisement laws disproportionately impact communities of color, a point that is a difficult basis for challenging these laws in court.⁸⁰ Litigation that challenges felony disenfranchisement on Equal Protection grounds often relies on other classifications, such as wealth and confinement generally.⁸¹

The Supreme Court first addressed the constitutionality of felony disenfranchisement laws in *Richardson v. Ramirez*.⁸² There, the Court relied on textualism to hold that Section 2 of the Fourteenth Amendment

⁷⁸ Table: 1-year American Community Survey Estimate, Percentage of the Total Population Who Are White Alone, U.S. CENSUS BUREAU (2019), <https://perma.cc/9TYG-936Q>.

⁷⁹ According to 2019 Census estimates, 98.7% of Puerto Ricans identify as Hispanic or Latino; while 65.9% selected “White” from the Census’ racial categories, 1% identified as White only. *QuickFacts: Puerto Rico*, U.S. CENSUS BUREAU, <https://perma.cc/K6SX-NN65> (last visited May 25, 2021).

⁸⁰ Despite the well-documented relationship between felony disenfranchisement laws and the targeting of newly emancipated enslaved persons, they are facially neutral laws. For data on felony disenfranchisement laws’ disparate impact on African Americans, see Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT’G PROJECT (Oct. 30, 2020), <https://perma.cc/5NJ4-ZTR6> (“One in 16 African Americans of voting age is disenfranchised, a rate 3.7 times greater than that of non-African Americans. Over 6.2 percent of the adult African American population is disenfranchised compared to 1.7 percent of the non-African American population.”). Litigation arguing their disparate impact on Black and brown eligible voters has not had widespread success. Since courts are a difficult forum to challenge felony disenfranchisement laws, advocating for policy change, through the legislative process and grassroots organizing through social movements, like this piece argues, along with litigation, can be a more effective strategy. This article argues that along with using a multi-part strategy to address the racially disparate impact of felony disenfranchisement laws, we need a vision too. See *Criminal Disenfranchisement Key Litigation to Know*, ADVANCEMENT PROJECT, <https://perma.cc/H534-VRSD> (last visited May 25, 2021) (“However, while many cases are lost in court, litigation remains useful when brought alongside and as part of overall strategy in a grassroots campaign in communities of color especially a campaign led by formerly incarcerated and directly impacted people, which can win in legislatures or through other means.”).

⁸¹ See ADVANCEMENT PROJECT, *supra* note 80.

⁸² *Richardson v. Ramirez*, 418 U.S. 24 (1974).

includes an “affirmative sanction” for states to deny persons “convicted of infamous crimes” the opportunity to vote.⁸³ The Court explained that the Equal Protection Clause could not be read to “bar outright a form of disenfranchisement that was expressly” permissible under Section 2.⁸⁴ Thus, California did not need a compelling reason to justify felony disenfranchisement. In his dissent, Justice Marshall argued that the *Richardson* majority would not only enable the exclusion of persons with felony convictions from voting, but also those who have “fully paid their debt to society.”⁸⁵

However, Section 2 of the Fourteenth Amendment does not permit states to enact criminal disenfranchisement laws for the purpose of discriminating on the basis of race. In *Hunter v. Underwood*, the plaintiffs challenged the constitutionality of a 1901 Alabama constitution provision, which enumerated crimes punishable by disenfranchisement as violating the Equal Protection Clause.⁸⁶ While the law was facially neutral, it disproportionately disenfranchised Black residents up to ten times more than their White counterparts.⁸⁷ Speaking for the Majority, Justice Rehnquist held that the law violated Equal Protection under *Arlington Heights v. Metro. Housing* because intent to discriminate against Black residents was a motivating factor for adopting the disenfranchisement law.⁸⁸ The Court affirms the District Court finding that the 1901 Alabama constitutional convention gathered as “part of a movement that swept the post-Reconstruction South to disenfranchise [B]lacks” for the explicit

⁸³ *Id.* at 28 n.4, 54.

⁸⁴ *Id.* at 55.

⁸⁵ *Id.* at 56 (Marshall, J., dissenting).

⁸⁶ *Hunter v. Underwood*, 471 U.S. 222 (1985). The challenged provision of the 1901 Alabama State Constitution provides:

The following persons shall be disqualified both from registering, and from voting, namely: . . . [T]hose who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on the wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary, or of any infamous crime or crime involving moral turpitude; also, any person who shall be convicted as a vagrant or tramp, or of selling or offering to sell his vote or the vote of another, or of buying or offering to buy the vote of another, or of making or offering to make a false return in any election by the people or in any primary election to procure the nomination or election of any person to any office, or of suborning any witness or registrar to secure the registration of any person as an elector.

ALA. CONST. OF 1901, § 182.

⁸⁷ *Hunter v. Underwood*, 471 U.S. at 227.

⁸⁸ *Id.* at 233.

purpose of “‘establish[ing] White supremacy’” in the state.⁸⁹ Based on statements made at the convention, the Court found the enumerated crimes of vagrancy, living in adultery, and the catchall “crimes involving moral turpitude,” were expressly selected because those crimes “were thought to be more commonly committed by [B]lacks.”⁹⁰ While the convention also aimed to disenfranchise poor Whites, the law “certainly would not have been adopted by the convention or ratified by the electorate in the absence of the racially discriminatory motivation.”⁹¹ Nothing in *Richardson* should be construed to permit “purposeful racial discrimination.”⁹²

D. Recent Voter Restoration Litigation

Under *Hunter*, disenfranchisement laws are unconstitutional if “its original enactment was motivated by a desire to discriminate against [B]lacks on account of race, and the section continues to this day to have that effect.”⁹³ For equal protection challenges to facially neutral laws, discriminatory purpose is difficult to prove without an express motive to disenfranchise on the basis of race.⁹⁴ Courts are reluctant to find discriminatory intent even when ample evidence of overt racial bias exists. For example, the Fifth Circuit held in *Cotton v. Fordice* that while the Mississippi’s disenfranchisement law had been adopted to discriminate

⁸⁹ Rehnquist, J. quotes from the trial court record and appellees’ briefs, statements made by John B. Knox, president of the Alabama Constitutional Convention of 1901, including the following: “And what is it that we want to do? Why is it within the limits imposed by the Federal Constitution, to establish white supremacy in this State.” *Id.* at 229 (citing 1 Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 to September 3rd, 1901 at 8 (1940)).

⁹⁰ *Id.* at 232 (quoting ALA. CONST. OF 1901, § 182).

⁹¹ *Id.* at 231.

⁹² *Id.* at 233.

⁹³ *Id.*

⁹⁴ See *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Farrakhan v. Locke*, 987 F. Supp. 1304 (E.D. Wa. 1997); *North Carolina State Conference of the NAACP v. Raymond*, 981 F.3d 295, 311 (4th Cir. 2020) (reversing preliminary injunction on a 2018 North Carolina law requiring photo identification to vote because, weighing all other *Arlington Heights* factors and presuming the legislature’s good faith, discriminatory intent was not a motivating factor behind its enactment); *Hayden v. Paterson*, 594 F.3d 150 (2d Cir. 2010) (holding no intentional discrimination in New York State’s felony disenfranchisement provisions, even though they had a disproportionate effect on Black and Latino individuals). While it is beyond the scope of this article, others have argued that Section 2 of the Voting Rights Act should cover felony disenfranchisement. See *Hayden v. Pataki*, 449 F.3d 305, 367 (2d Cir. 2006) (Sotomayor, J., dissenting). See also Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 273-75 (2004) (arguing that the Fifteenth Amendment amended Section 2 of the Fourteenth Amendment by prohibiting state voter qualifications executed for their discriminatory purpose and effect).

against Black residents, its amendment and re-enactment “removed the discriminatory taint associated with the original version.”⁹⁵ Even though the previous Mississippi disenfranchisement provision was “enacted in an era when southern states discriminated against blacks by disenfranchising convicts for crimes that, it was thought, were committed primarily by blacks,” the amended provision, according to the Court, applies equally to everyone.⁹⁶

The challenge here is proving that the original “taint” is not removed. In 2017, Alabama residents convicted of felonies did just that after they filed suit claiming a Fourteenth Amendment violation by the disenfranchisement provision in the state constitution, which had been amended since *Hunter*.⁹⁷ The Alabama legislature enumerated the catchall “felony of moral turpitude”—a phrase that remained in its constitution since 1901.⁹⁸ The plaintiffs survived a motion to dismiss because the court found the original discriminatory intent discussed in *Hunter* “infects” the current constitution because it “lifts the phrase ‘moral turpitude’ directly from the 1901 Alabama Constitution.”⁹⁹

In Florida, individuals convicted of felonies who completed their prison sentence challenged Florida law S.B. 7066, which prohibited returning citizens from voting unless they paid the legal financial obligations associated with their felony conviction.¹⁰⁰ The law amended a 2018 ballot initiative, Amendment 4, in which 65% of Floridians voted to reinstate the franchise to nearly 1.4 million citizens who were convicted of felonies and completed all the terms of their sentence.¹⁰¹

The Florida district court held that the law, as applied to a subclass of individuals who are unable to pay the financial requirements, is unconstitutional under the Fourteenth and Twenty-Fourth Amendments because it imposes a tax on the franchise.¹⁰² The district court to applied heightened scrutiny on the wealth-based classification implicating the fundamental right to vote.¹⁰³ However, the Eleventh Circuit Court of Appeals reversed the district court decision, and found the Florida law is rationally related to conceivable legitimate interests in both disenfranchising those

⁹⁵ *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998).

⁹⁶ *Id.*

⁹⁷ *Thompson v. Alabama*, 293 F. Supp. 3d 1313, 1323 (M.D. Ala. 2017).

⁹⁸ *Id.* at 1318.

⁹⁹ *Id.* at 1322.

¹⁰⁰ First Amended Complaint at ¶ 46, *Jones v. DeSantis*, Nos. 4:19-CV-300, 4:19-CV-301, 4:19-CV-302, 4:19-CV-304, 4:19-CV-272, 2019 WL 8360491 (N.D. Fla. July 16, 2019).

¹⁰¹ *Voting Rights Restoration Efforts in Florida*, BRENNAN CTR. FOR JUST., <https://perma.cc/FA2B-C3K2> (last updated Sept. 11, 2020).

¹⁰² *Jones v. DeSantis*, 462 F.Supp.3d 1196 (N.D. Fla. 2020), *rev'd and vacated*, *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020).

¹⁰³ *Id.*

who have committed felonies and reenfranchising those who have completed all terms of their sentence.¹⁰⁴ The Circuit Court viewed heightened scrutiny as only applicable to invalid voter requirements.¹⁰⁵ Since the Supreme Court upheld disenfranchisement as civil punishment for a felony conviction in *Richardson v. Ramirez*, the Eleventh Circuit found Florida's law to be well within the state's plenary power and held that no Equal Protection rights could be violated.¹⁰⁶

After the Eleventh Circuit Court of Appeals upheld a Florida felony disenfranchisement law, almost 800,000 people with felony convictions became ineligible to vote.¹⁰⁷ In the 2020 Presidential Election, Donald Trump won the electoral votes in the state of Florida by 371,686 votes.¹⁰⁸ The *Jones* case could have been a gamechanger in the swing state.

But felony disenfranchisement continues to persist as a voter suppression tool that prevents 5.2 million people with felony convictions from voting nationwide.¹⁰⁹ While recent litigation challenging felony disenfranchisement has been limited, its efficacy in restoring the franchise has proved difficult.¹¹⁰

¹⁰⁴ The Court held:

We hold that rational basis review applies and overrule the contrary holding by the panel in the earlier appeal from the preliminary injunction . . . Florida unquestionably has an interest in disenfranchising convicted felons, even those who have completed their sentences . . . But Amendment 4 and Senate Bill 7066 also reflect a different, related interest. They advance Florida's interest in *restoring* felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system. The policy Florida has adopted reflects the "more modern view" described in *Richardson* that "it is essential to the process of rehabilitating the ex-felon that he be returned to his role in society as a fully participating citizen when he has completed the serving of his term." . . . The twin interests in disenfranchising those who disregard the law and restoring those who satisfy the demands of justice are both legitimate goals for a State to advance.

Jones, 975 F.3d at 1033-34 (internal citations omitted) (citing *Richardson*, 418 U.S. at 55-56).

¹⁰⁵ *Id.* at 1031.

¹⁰⁶ *Id.* at 1028-37.

¹⁰⁷ Lawrence Mower & Langston Taylor, *In Florida, the Gutting of a Landmark Law Leaves Few Felons Likely to Vote*, PROPUBLICA (Oct. 7, 2020, 5:00 AM), <https://perma.cc/MPN6-F2RA>.

¹⁰⁸ *Florida Presidential Election Results*, N.Y. TIMES (Jan. 26, 2021), <https://perma.cc/JR9T-TXE8>.

¹⁰⁹ Uggen et al., *supra* note 80.

¹¹⁰ *Id.*; ADVANCEMENT PROJECT, *supra* note 80.

E. The Purpose of the Restore the Vote Amendment Was to Address Civic and Social Death

Civic death is the structural eradication of civil rights that are necessary to participate in a democracy.¹¹¹ Prisons demand civic death by disposing of and excluding from society those it “ensnares.”¹¹² The effect is what Orlando Patterson calls social death—the continued alienation of Black persons from “‘rights’ or claims of birth . . . ceas[ing] to belong . . . to any legitimate social order.”¹¹³ By contextualizing disenfranchisement in Patterson’s concept of social death, it is form of punishment that leaves an intergenerational stain of criminality, which then justifies the state’s authoritarian control of its subjects and reinforces the hegemony of civic death and denial of political representation.¹¹⁴ The feedback loop from revoking civic rights to White supremacy reconstitutes the social death of people who are denied their humanity.

While “[t]he bodies of people in America’s prisons are counted in the design of our political infrastructure, . . . their voices are not.”¹¹⁵ This organized system of cruelty actively denies civic life beyond the right to vote; additional civil collateral consequences include ineligibility to run for office, losing custody of children, loss of housing, exploitation of productive and reproductive abilities, inability to find employment, and loss of dignity.¹¹⁶

¹¹¹ See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 139-42 (2010).

¹¹² Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the ‘Race Question’ in the U.S.*, 13 *NEW LEFT REV.* 41, 57 (2002).

¹¹³ ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 5 (1982).

¹¹⁴ See RYAN S. KING & MARC MAUER, SENT’G PROJECT, *THE VANISHING BLACK ELECTORATE: FELONY DISENFRANCHISEMENT IN ATLANTA, GEORGIA* 15-17 (2004) (using Atlanta, Georgia as a case study to research the localized impact of felony disenfranchisement laws in communities acutely affected by incarceration and finding that disenfranchisement laws affect entire communities’ ability to express their political voice); see also Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 283 (2007).

¹¹⁵ Clint Smith, *Let the Incarcerated Vote*, *ATLANTIC* (Oct. 31, 2020), <https://perma.cc/27YP-B7SW>.

¹¹⁶ See, e.g., *Public Office* Consequences, *NYCOURTS.GOV* (July 13, 2016), <https://perma.cc/5EXW-A53K> (discussing in New York, a criminal conviction may make one ineligible to run for public office). See Fact Sheet: Parents in Prison, SENT’G PROJECT, at 3 (Sept. 27, 2012), <https://perma.cc/X4T7-DF84> (discussing The Adoption and Safe Families Act of 1997 authorizes termination of parental rights); Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security for People with Criminal Records*, *CTR. FOR AMERICAN PROGRESS* (Dec. 2014), <https://perma.cc/HNL8-HSKV> (discussing barriers to housing and public assistance); Chrystal M. Hayes, et. al, *Reproduction Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, *AM. J. OF PUB. HEALTH* (2020), <https://perma.cc/TSF5-77TH> (discussing system of mass incarceration through reproductive justice lens and explains that mass incarceration undermines

Given that 1 in 16 Black citizens are unable to vote due to a felony conviction, felony disenfranchisement disproportionately affects neighborhoods that are predominantly Black.¹¹⁷ The result is voter suppression of the entire community. When voting eligible individuals are incarcerated or lose the right post-release, the remaining community is still “plagued by aspects of . . . ‘civil death.’”¹¹⁸ The voting bloc potential and political influence is diminished.¹¹⁹ In D.C., communities acutely affected by felony disenfranchisement are Black, meaning predominantly Black communities are less likely to have a political say at the ballot box.¹²⁰ At public hearings on the Amendment, formerly incarcerated people and other advocates who were testifying repeatedly emphasized the imperative to address civil and social death by restoring the right to vote to D.C.’s incarcerated citizens.¹²¹

Rooting the work of winning back voting rights in an abolitionist framework, the whole system of civic and social death becomes fodder for reimagination. Civic revival is only possible amid a collective movement that envisions prison and police abolition. Without a political north star, civic revival is impossible and risks accommodating oppressive institutions. Abolitionist Ruth Wilson Gilmore examines how life is organized into competing and cooperating systems, where the features in one reproduce themselves in others to create a carceral geography.¹²² Abolition, Gilmore explains, is a political vision—a theory of change for transforming social relationships and informing a political strategy—rather than a single political demand.¹²³ If we approach voter restoration through

“motherhood and safe pregnancy care, denying access to abortion and contraception, and preventing people from parenting”); Chidi Umez & Joshua Gaines, *After the Sentence, More Consequences: A National Report of Barriers to Work*, COUNCIL OF ST. GOV’T. JUST. CTR., (Jan. 2021), <https://perma.cc/6SJE-CBSM> (finding most collateral consequences, 72%, effect employment opportunities).

¹¹⁷ Uggen et al., *supra* note 80.

¹¹⁸ *Hearing on B23-0324*, *supra* note 57 (including statement of Tyrone Walker, Associate, Justice Policy Institute).

¹¹⁹ KING & MAUER, *supra* note 114.

¹²⁰ COUNCIL OF D.C. COMM. ON THE JUDICIARY & PUB. SAFETY, REPORT ON B23-0324, THE “RESTORE THE VOTE AMENDMENT ACT OF 2020,” 23d Sess. 3 (2020), <https://perma.cc/E2QQ-58Y5> (citing testimony of Paula Thompson, Co-chair, Reentry Action Network) (“In the District, African Americans account for less than half of the total population, but they account for approximately 96% of people convicted of felonies.”).

¹²¹ *See id.* at 5 (statement of Justice Policy Initiative); *id.* at 18-19 (including statements of Black Lives Matter D.C. & Common Cause).

¹²² Clément Petitjean, *Prisons and Class Warfare: An Interview with Ruth Wilson Gilmore*, VERSO (Aug. 2, 2018), <https://perma.cc/MT3C-RXQT>. *See also* Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://perma.cc/CU62-ERYC>.

¹²³ Kushner, *supra* note 122.

a conceptual framework of holism where social, political, cultural, kinship, and environmental spheres of life are complementary, reenfranchisement is then the floor, not the ceiling, in a movement to end civic and social death. It is a struggle for collective liberation that rests on changing the conditions under which civil and social death occur.¹²⁴

D.C.'s groundbreaking Amendment provides a critical model on the importance of a legal strategy that includes movement building for abolition in tandem with voter restoration litigation and legislation. Legislation in particular offers a crucial opportunity to codify the goals and vision of movements for justice and equity. Since the legislative process is more public than courtroom litigation and is directly connected to voting, there are more opportunities for social movements to educate the public about targeted incarceration and the social and civil death of communities most impacted.

In D.C., the very fact that many returning citizens and those currently inside spent years fighting for voter restoration is a challenge to civil and social death and embodies a counterhegemonic civic revival. Through the leadership of frontline communities, felony disenfranchisement laws were moved out of the purview of the Department of Corrections by demanding the Board of Elections instead administer the voting process in prisons.¹²⁵

Felony laws tie criminal convictions to civil and social death. Other First Amendment rights, such as freedom of religion and free speech, and citizenship remain regardless of incarceration, though in diminished form.¹²⁶ By disentangling voting rights from criminal convictions, advocates were able to frame voter restoration as promoting reentry into society and basic conceptions of human dignity and fairness.¹²⁷ Social justice movements play a significant role in shaping public conversation by, more democratically, making the case for political change and addressing societal assumptions about criminality.¹²⁸ D.C. advocates also moved the

¹²⁴ *Id.*

¹²⁵ See *Restore the Vote Amendment Act of 2019: Hearing on B23-0324 Before the Comm. on the Judiciary & Pub. Safety*, *supra* note 64, at 1:44:50 - 1:46:21 (statement of Qiana Johnson, Executive Director of Life After Release) (explaining that her organization initially supported similar legislation in Maryland but pulled support when the Maryland legislature wanted the Department of Corrections to be the administering body rather than the Board of Elections).

¹²⁶ See Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 *How. L.J.* 549, 556 (2011).

¹²⁷ Additionally, voter restoration has been tied to decreased recidivism rates and thus works to depopulate prisons. *Id.* at 562.

¹²⁸ See BRENNAN CTR. FOR JUST., *LEGAL CHANGE: LESSONS FROM AMERICA'S SOCIAL MOVEMENTS* 19 (Jennifer Weiss-Wolf et al. eds., 2015), <https://perma.cc/DS9V-4QGQ>.

conversation from the Courts into the halls of legislature—a more accessible and public sphere.

In addition, successful legislative efforts that include social movements challenging the status quo and the subsequent administration of the voting process in other jurisdictions will make it harder to argue that administrative burdens justify denying the right to vote or voter protections. Because the *Richardson* Court left open the possibility that the means by which a state enforces the right to vote could be subject to Equal Protection claims, complementary litigation may allow future plaintiffs the ability to argue that there are relatively low administrative burdens to providing minimal protections for incarcerated voters.¹²⁹

IV. BUILDING MOMENTUM TO INTERVENE IN FELONY DISENFRANCHISEMENT NATIONWIDE

Using abolition as a political vision and theory of change, social justice lawyers who work alongside movements can support efforts to reform current disenfranchisement laws in tandem with transforming social conditions that enable the laws in the first place. By disentangling the right to vote and other fundamental rights from criminal convictions, confinement, and criminality, we can address social and civil death. Because civic revival happens in the collective, social movements oriented towards a broad political vision of abolition are the routes by which collective liberation takes place. Civic participation is not limited to voting, but engaging in voting restoration is one means of engaging in collective action.

Movement lawyering understands this approach. Movement lawyers are “[a] growing sector of lawyers and legal organizations, deeply invested in the questions of justice” who “see their role as that of conscious tacticians” and who “creatively use legal tools to build the power of, make space for, validate, bolster, defend, and protect social movements and the activists and communities within them.”¹³⁰ Social movements “engage the public in thinking about the full meaning of democratic participation in regard to felony disenfranchisement”¹³¹ and presuppose full democratic participation on collective freedom and liberation.

Some reforms provide relief to the least marginalized while legitimizing the system and make little or no material changes to the conditions

¹²⁹ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (finding Alabama’s disenfranchisement provision for crimes involving moral turpitude violates equal protection).

¹³⁰ Purvi Shah, *Rebuilding the Ethical Compass of Law*, 41 HOFSTRA L. REV. 11, 14 (2018).

¹³¹ Mauer, *supra* note 126, at 566.

that cause civil and social death.¹³² Reforms to felony disenfranchisement, if not understood through a lens of power relationships, make minimal impact and accommodate oppression instead of uprooting its underlying causes.¹³³ Voter restoration as a reform does not necessarily legitimize the system. Like mutual aid, which supports people surviving their present conditions, voter restoration can be a powerful tool to not only enable a person's ability to participate in society, but also "to plant seeds about the need for transformative policy solutions."¹³⁴ Fighting for voting rights in prisons is a means to redistribute power because it necessitates support outside of prison through lawyers, social workers, formerly incarcerated persons, and other community groups and advocates.

A. *Points of Intervention*

Voter restoration laws must be coupled with mechanisms that create meaningful opportunities to vote. Reforms that intervene on a lack of enforcement mechanisms and have led to access to the ballot include:

1. Designated Facility Appointee to Help Incarcerated Persons Exercise Franchise

The most significant barrier to voter engagement in prisons is limited access to information.¹³⁵ Lawyers who represent clients on the inside can advocate for their clients and all other eligible voters to receive educational materials by appealing to the state Board of Elections. In Mississippi, where convictions based on certain felonies disenfranchise voters—sometimes for life—little to no guidance is provided to incarcerated individuals who can vote.¹³⁶ The problem is both low staffing and lack of education.

¹³² See Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 100–01, 104 (2020) (contrasting "non-reformist reforms," a term coined by André Gorz, which "provides a framework for demands that will undermine the prevailing political, economic, social system from reproducing itself and make more possible a radically different political, economic, social system" with "reformist reforms," which "aim to improve, ameliorate, legitimate, and even advance the underlying system.").

¹³³ See, e.g., Movement Law Lab, *Build Power Fight Power*, FACEBOOK, at 31:22–35:20 (Oct. 23, 2020), <https://perma.cc/38BA-447V> (discussing the problematic role of lawyers in movement work due to their decision-making, deal-making, and demobilizing power).

¹³⁴ See Harmony Goldberg, *Stepping into the Moment: The Corona-Crisis*, ORGANIZING UPGRADE (Apr. 8, 2020), <https://perma.cc/JJ4T-U8FT>.

¹³⁵ See Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do.*, MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://perma.cc/7WWK-VM4M> (discussing incarcerated persons' lack of access to information on candidates).

¹³⁶ Anna Wolfe & Michelle Liu, *Not All Ex-Felons Are Barred from Voting in Mississippi, but No One Is Telling Them That*, MISS. TODAY (Nov. 1, 2018), <https://perma.cc/8ALZ-DHDR>.

In Maine and Vermont, volunteers run voter registration drives and correctional facility appointees oversee the voting process.¹³⁷ Volunteers have been effective in informing individuals of their right to vote and of the proper steps to exercise the franchise.¹³⁸ The Vermont Department of Corrections employs volunteer services under the leadership of a Volunteer Services Coordinator to staff the clinic and provide critical support such as ensuring relevant voting documents are updated, promoting voting clinics, and helping to fill out registration cards or any other essential documents.¹³⁹ In Maine, volunteers inside the facility, such as other incarcerated individuals, and volunteers outside the facility, such as the NAACP, contact the prison administrations to ensure incarcerated individuals know they can vote.¹⁴⁰

2. Connecting Disability Justice and Targeted Incarceration

Another significant barrier is low literacy rates—almost 60% of incarcerated people are estimated to be illiterate.¹⁴¹ Lawyers can support disability justice advocates and incarcerated individuals by demanding specific reasonable accommodations that enable illiterate individuals to vote without compromising their agency and voter privacy. Movements for disability justice and abolition have long recognized the inextricable connection between incarceration and criminalization of disabled people.¹⁴² The Washington Lawyers' Committee for Civil Rights and Urban Affairs won a consent decree requiring a Virginia federal prison to provide reasonable accommodations to the voting process for disabled individuals in its custody.¹⁴³

3. Prison Polling Locations

Setting up polling locations inside prisons can dramatically increase voter participation because it lifts barriers to mailing ballots and ensures oversight through the Board of Elections. In Maine, a state prison set up

¹³⁷ Daniel Nichanian, "A Sliver of Light": Maine's Top Election Official on Voting From Prison, *THE APPEAL* (May 2, 2019), <https://perma.cc/8JNE-BKDA>; VT. AGENCY OF HUM. SERVS. DEP'T OF CORR., VOLUNTEER SERVICES AND MANAGEMENT # 376 (2016), <https://perma.cc/TRL6-5EVP>.

¹³⁸ See Nichanian, *supra* note 137.

¹³⁹ VT. AGENCY OF HUM. SERVS. DEP'T OF CORR., *supra* note 137.

¹⁴⁰ See Nichanian, *supra* note 137.

¹⁴¹ Lewis, *supra* note 135.

¹⁴² *Talila Lewis and Disability Justice*, AT THE INTERSECTION, at 17:53 (Mar. 11, 2019), <https://perma.cc/2778-R8MR>; see also LIAT BEN-MOSHE, *DECARCERATING DISABILITY: DEINSTITUTIONALIZATION AND PRISON ABOLITION* (2020).

¹⁴³ Partial Consent Judgment and Decree, *Gary v. Virginia*, No. 1:20-CV-860, 2020 WL 6589326 (E.D. Va. Aug. 28, 2020).

a polling station in the prison's chapel for the 2016 Presidential Election.¹⁴⁴ In Chicago, Illinois, a Cook County jail, one of the largest jails in the country booking nearly 100,000 people each year and serving 6,100 people daily, was authorized to serve as an official early polling location.¹⁴⁵ After the Cook County jail became a designated polling site, nearly 1,200 people held in the jail voted early in the 2020 primary election.¹⁴⁶ Over the past decade, volunteers from organizations like the National Reentry Network have administered polling stations in D.C. jails.¹⁴⁷ While polling stations have largely been located in jails, prisons in Puerto Rico provide a promising example of administering the process inside.¹⁴⁸ In the 2016 Republican primary, 6,195 incarcerated people—half of Puerto Rico's prison population—voted from polling stations in one of the island's 24 correctional facilities.¹⁴⁹

4. Mandate Voting Plans¹⁵⁰

Voting plans, including guidance on how to register voters and distribute ballots, are critical for meaningful engagement. Leading up to the June 2, 2020 primary election, the D.C. BOE failed to mail absentee ballots to every voter who requested one.¹⁵¹ The BOE must have an implementation plan that has full cooperation of the DOC or the BOP and includes mandatory protocols that ensure administration of the process like in polling stations outside of correctional facilities. In 2019, Colorado and Arizona began mandating sheriffs to coordinate with county clerks to facilitate voting processes in jails.¹⁵² D.C.'s Amendment provides a schedule for regular reviews, and reports that the D.C. BOE must submit to the Mayor and D.C. Council, which includes information on the number of

¹⁴⁴ Jessica Sarhan, *2016 Election: America's Prison Voters*, AL JAZEERA (Oct. 1, 2016), <https://perma.cc/UNY6-QYBQ>.

¹⁴⁵ NICOLE D. PORTER, SENT'G PROJECT, *VOTING IN JAILS* 7 (2020), <https://perma.cc/GQD7-G3QV>.

¹⁴⁶ *Id.*

¹⁴⁷ COUNCIL OF D.C. COMM. ON THE JUDICIARY & PUB. SAFETY, REPORT ON B23-0324, THE "RESTORE THE VOTE AMENDMENT ACT OF 2020," 23d Sess. (2020), <https://perma.cc/CF8D-SH8X> (testimony of Courtney Stewart, Chairman/CEO of The National Reentry Network for Returning Citizens).

¹⁴⁸ Newkirk II, *supra* note 3.

¹⁴⁹ *Id.* ("Republican Party of Puerto Rico spokesperson Kevin Romero-Díaz indicated to me that voting patterns within prisons were similar to those of nonincarcerated people on the island, discounting one major defense of civil death—that prisoners are deficient in responsibility or decision-making as compared to other citizens.")

¹⁵⁰ PORTER, *supra* note 145, at 13.

¹⁵¹ Julie Zauzmer, *After Primary Debacle, D.C. Elections Board Mails Ballots to Every Voter in Ward 2 Special Election*, WASH. POST (June 15, 2020, 4:01 PM), <https://perma.cc/Z8TU-JE2M>.

¹⁵² PORTER, *supra* note 145, at 6.

incarcerated qualified electors and any policy or legislative recommendations “to ensure that all incarcerated qualified electors have a meaningful opportunity to register to vote.”¹⁵³ The mandate could be strengthened by imposing an obligation to the Department of Corrections and correctional facilities to develop and submit a voting plan that meets state mandated minimum requirements for an operable plan. Lawyers representing clients who can vote on the inside can make formal complaints on behalf of their client and file suit requiring a facility wide remedy, such as requiring a voting plan be put in place arguing that their client’s fundamental right to vote is being violated. If other eligible voters can otherwise vote, the failure of the prison or jail to implement the voting process may be challenged on equal protection grounds.¹⁵⁴

5. Residency Requirement

Maine and Vermont use pre-incarceration residential addresses to register voters without consideration of how much time has passed since they lived at that address.¹⁵⁵ Opponents of voter enfranchisement argue that if incarcerated individuals use their correctional facility address, they will have an undue influence over the area where the prison is located, an area incarcerated persons may have no prior connection.¹⁵⁶ There are some arguments, however, to allow individuals who are serving long sentences to vote where they are held if they did not have a permanent address prior to incarceration or their loved ones may no longer be living at the location.¹⁵⁷

¹⁵³ Restore the Vote Amendment Act of 2020, D.C. Act 23-484 § 2(b)(2), 67 D.C. Reg. 13867 (Nov. 27, 2020).

¹⁵⁴ The Court held:

It has not been seriously contended that *Richardson* precludes any equal protection analysis when the state legislates regarding the voting rights of felons. In the first place, in *Richardson* itself the Court acknowledged that unequal enforcement, if proven, could be unconstitutional and remanded so that the California courts could consider the claim “that there was such a total lack of uniformity in county election officials’ enforcement of the challenged state laws as to work a separate denial of equal protection.” . . . Disenfranchisement distinctions among prisoners made on the basis of race are precluded by the Fifteenth Amendment, but the Equal Protection Clause in § 1 of the Fourteenth Amendment must be relied on to protect prisoners against invidious distinctions based on sex or other arbitrary classifications It follows that the Equal Protection Clause remains applicable, even after *Richardson*, to some voting classifications affecting convicted felons.

See Owens v. Barnes, 711 F.2d 25, 26-27 (3d Cir. 1983) (internal marks omitted) (citing *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974)).

¹⁵⁵ *See Lewis*, *supra* note 135.

¹⁵⁶ *See Debra Parkes, Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 102-03 (2003).

¹⁵⁷ *See id.*

Residency requirement laws should be shaped by centering those who would have the most difficulty meeting the requirement to ensure they are not treated differently than those who had a permanent address. In D.C., the Board of Elections is tasked with promulgating rulemaking to define “residency” for purposes of implementation and asked to consider challenges formerly unhoused individuals may experience meeting address requirements.¹⁵⁸ One important consideration for defining residency is that individuals housed in out-of-state facilities may be denied the right to vote if they are required to use the facility’s address.¹⁵⁹ In addition, incarcerated individuals may be more inclined to use their last place of residence because they have an established connection to the area, or have family or children currently living there.¹⁶⁰

6. Federal Prisons

The Federal BOP has repeatedly failed to cooperate with local efforts to enfranchise newly eligible individuals in their custody.¹⁶¹ In the short term, holistic defense models can incorporate voting rights in know-your-rights work for prisoners, and civil law practitioners can include voter rights protection among the body of other work and information given to incarcerated individuals. In addition, lawyers representing clients in BOP facilities can use their position to ensure their clients and all those similarly situated receive voter information that is accessible and timely. Finally, local officials are best suited to distribute voter information because they can track where D.C. residents are located.

V. CONCLUSION

While this article does not attempt to argue the benefits of jail- or prison-based voting and presupposes civic engagement by incarcerated persons at least furthers rehabilitative goals, it does attempt to place voter restoration as a necessary means of addressing the civic and social death caused by the carceral system. D.C.’s Restore the Vote Amendment passed amidst what is likely the largest protest movement in United States history in the summer of 2020.¹⁶² The call to end the last embodiment of

¹⁵⁸ COUNCIL OF D.C. COMM. ON THE JUDICIARY & PUB. SAFETY, REPORT ON B23-0324, THE “RESTORE THE VOTE AMENDMENT ACT OF 2020,” 23d Sess. at 12 (2020), <https://perma.cc/CF8D-SH8X>.

¹⁵⁹ Parkes, *supra* note 156, at 105.

¹⁶⁰ *Id.* at 103.

¹⁶¹ Norton, *supra* note 50; *see also* Gaspard Le Dem, *D.C. Residents in Federal Prisons Can Vote This Year, But Hurdles to Casting Ballots Remain*, WASH. CITY PAPER (Oct. 26, 2020), <https://perma.cc/UNC7-C2WX>.

¹⁶² Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://perma.cc/8W2N-RJ5L>.

felony disenfranchisement in D.C. was led by currently and formerly incarcerated people, whose goals were supported by movement-minded lawyers utilizing their legal skills to ensure access to the franchise. Through calls for defunding the police and prison abolition, the Movement for Black Lives created a public dialogue about abolition as a vision for collective liberation.¹⁶³ Ending nationwide felony disenfranchisement on the trajectory towards abolition forwards a transformative approach to freedom and liberation by movement-minded lawyers by decentering lawyers as agents of change.¹⁶⁴ Instead, frontline communities working in mass social movements, guided by an abolitionist vision, are the drivers of legal change. Now is the time to use an abolitionist framework to imagine together what is possible both in the law and our society—and along the way let's ensure a critical tool for civic participation is protected and accessible to all voters.

¹⁶³ See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 429-32 (2018).

¹⁶⁴ See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207-18 (2015).