

Article

Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota

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INTRODUCTION

Civil death is a legal status with roots in ancient Greece and brought to the American colonies from England. It deprived individuals convicted of certain offenses, often those with capital or life sentences, of all of their legal rights. Although civil death mostly disappeared in the mid-twentieth century,¹ one of its vestiges is the disenfranchisement of individuals convicted of a felony offense, enshrined in various forms in most state constitutions and statutes, including Minnesota's.

Minnesota has retained essentially the same disenfranchisement law adopted upon gaining statehood in 1857. However, since that time, Minnesota's criminal justice system has undergone massive changes, especially in its expansion in scope—resulting in one of the highest rates of correctional control in the country, and therefore one of the highest rates of felony disenfranchisement in the country and by far in the region.

This Article proposes that Minnesota's essentially unchanged 157-year-old policy warrants careful reconsideration. An analysis of the modern manifestation of the policy reveals

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1. Civil death has also reemerged in the form of numerous limitations upon individuals with criminal records, known as collateral consequences. See Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA L. REV. 1789, 1790 (2012). Disenfranchisement is just one example of the many collateral consequences in Minnesota to which some or all of the analysis in this Article, as well as other arguments for and against, could be applied.

that its modern impact is greatly divergent from its original intent and impact, the product of a greatly expanded criminal justice system. A cost-benefit analysis also reveals that there essentially are no tangible benefits to Minnesota's current disenfranchisement policy, that its costs are high, and that there are tangible benefits to reform. The policy provides no public safety benefit, may even reduce public safety, perpetuates racial disparities, confuses elections, and unnecessarily expends government resources.² These negative policy impacts weighed against little to no benefit, combined with changes in criminal justice politics and recent national events, may provide a ripe time for reform.

Part I of this Article describes Minnesota's disenfranchisement law, including its history, current impact, and a comparison to other states and countries. Part II describes some of the relevant changes in Minnesota's criminal justice system since becoming a state. Part III provides a cost-benefit analysis of Minnesota's felony disenfranchisement policy.³ Finally, Part IV describes the status of current reform efforts.

I. FELONY DISENFRANCHISEMENT IN MINNESOTA

Felony disenfranchisement is dictated by state law.⁴ The residents of the Minnesota Territory chose a fairly common and

2. This Article will focus on the issue mostly as it relates to public safety and other pragmatic public policy implications. For an analysis of the political theory arguments, see Jason Schall, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53 (2006). Schall concludes that felony disenfranchisement is inconsistent with the individual and rights oriented view of liberal thought, but that the civic-bond oriented republic philosophy can supply arguments for and against the practice. *Id.* at 53.

3. The issue of constitutionality will not be addressed; this Article will instead focus on policy analysis. Challenges to the constitutionality of felony disenfranchisement under the U.S. Constitution have been unsuccessful. See Liles Macro, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future*, 58 ALA. L. REV. 615 (2007). However, challenging Minnesota's felony disenfranchisement law under the Minnesota Constitution may warrant consideration, especially under equal protection arguments. See *State v. Russell*, 477 N.W.2d 886, 891 (Minn. 1991) (ruling that the disparate impact of Minnesota's crack cocaine sentencing laws upon African Americans was unconstitutional under Minnesota's Constitution based upon evidence of discriminatory impact alone, without requiring proof of intentional discrimination as required by felony disenfranchisement cases brought under the U.S. Constitution); see also Jeffery A. Kruse, *Substantive Equal Protection Analysis Under State v. Russell, and the Potential Impact on the Criminal Justice System*, 50 WASH. & LEE L. REV. 1791 (1993).

4. Section 2 of the U.S. Constitution's Fourteenth Amendment has been found to allow disenfranchisement by the states "for participation in rebellion,

uncontroversial policy for the state when creating its constitution, but today that policy makes Minnesota an outlier in several ways. This Part will describe the current policy and its impact and history in more detail.

A. CURRENT POLICY

Minnesota's Constitution prohibits from voting any person "convicted of treason or felony, unless restored to civil rights."⁵ Minnesota Statutes § 609.165 is the mechanism that restores the "full right to vote and hold office,"⁶ upon discharge from sentence. In other words, once a resident of Minnesota has completed their entire sentence for a felony conviction,⁷ including any term of probation or parole, their right to vote is automatically restored.

Minnesota's policy is not an uncommon approach in the United States. Eighteen states currently share Minnesota's policy of disenfranchisement until completion of felony probation or parole.⁸ Twenty states have less restrictive policies, either never disenfranchising, as is the case in Maine and Vermont, or allowing those on parole or probation to vote.⁹ Only eleven states have more restrictive policies in that they somehow limit voting even after community supervision is completed.¹⁰

However, Minnesota, along with the rest of the United States, disenfranchises many more of its citizens than much of

or other crime." *Richardson v. Ramirez*, 418 U.S. 24, 54–55 (1974).

5. MINN. CONST. art. VII, § 1.

6. Section 609.165 is entitled "Restoration of Civil Rights; Possession of Firearms." MINN. STAT. § 609.165 (2014). The right to possess firearms is denied for life under Minnesota law for those convicted of a "crime of violence." *Id.* § 624.713; *see also id.* § 624.712 (defining "crime of violence").

7. A felony is any offense with a sentence of greater than one year. *Id.* § 609.02.

8. The other states that share Minnesota's policy are Alaska, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Maryland, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, Washington, West Virginia, and Wisconsin. COUNCIL ON CRIME & JUSTICE, FELON DISENFRANCHISEMENT 1 (2014), *available at* <http://www.crimeandjustice.org/pdffiles/disenfranchisement%20FAQ%20Jan%202014.pdf>.

9. Thirteen states disenfranchise only those who are incarcerated—Hawaii, Illinois, Indiana, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah. *Id.* Five states disenfranchise those in prison or on parole but allow those on probation to vote—California, Colorado, Connecticut, New York, and South Dakota. *Id.*

10. The following states require waiting periods after discharge from sentence or completion of some type of restoration process—Alabama, Arizona, Delaware, Florida, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, and Wyoming. *Id.*

the rest of the world. Prisoners can vote in countries such as the Czech Republic, Denmark, France, Israel, Japan, Kenya, Netherlands, Norway, Peru, Poland, Romania, Sweden, and Zimbabwe.¹¹ Other countries disenfranchise only those who have committed crimes of treason or related to election fraud, or for short periods following a prison term.¹² The European Court of Human Rights has ruled that automatic disenfranchisement based on conviction is a violation of the European Declaration of Human Rights.¹³ Important to the comparison of these policies, the United States' incarceration rate is vastly higher, and Minnesota's somewhat higher, than most of the rest of the world.¹⁴

The impact of these policies in the United States and Minnesota is large. According to a 2012 report, 5.85 million citizens nationally can no longer vote due to a felony conviction.¹⁵ In 2011, approximately 57,000 Minnesotans were unable to vote due to a felony conviction.¹⁶ This constitutes 1.5% of Minneso-

11. JAMIE FELLNER ET AL., HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 18 (1998), available at http://www.sentencingproject.org/doc/file/fvr/fd_losingthevote.pdf.

12. *Id.*

13. See EUR. COURT OF HUMAN RIGHTS, FACTSHEET – PRISONERS' RIGHT TO VOTE (2014), available at http://www.echr.coe.int/Documents/FS_Prisoners_vote_ENG.pdf. The court ruled that the rights guaranteed under Article 3 of Protocol No. 1 of the European Convention on Human Rights (concerning the right to free elections) are “crucial to establishing and maintaining the foundations of an effective and meaningful democracy,” and that blanket criminal disenfranchisement policies, without regard for the particular crime or circumstances, violate this Article. *Id.* (quoting *Hirst v. United Kingdom* (No. 2), Grand Chamber judgment of Oct. 6, 2005, § 58). The Court also ruled that the rights bestowed by Article 3 of Protocol No. 1 are not absolute and that there is room for implied limitations. *Id.*

14. According to the International Centre for Prison Studies, the world average incarceration rate is 155 per 100,000 inhabitants. ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed. 2013), available at http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wtpl_10.pdf. The United States incarcerates 716 per 100,000. *Id.* According to the Sentencing Project, Minnesota incarcerates 184 per 100,000. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 4 (2013), available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

15. CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1 (2012), available at http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

16. Christopher Uggen & Suzy McElrath, Draft Report on Felon Disenfranchisement in Minnesota 1 (Oct. 14, 2012) (on file with the University of Minnesota Department of Sociology), available at http://www.soc.umn.edu/~uggen/MNReport_2012.pdf.

ta's voting age population.¹⁷ Because, as will be discussed later, Minnesota relies heavily on community supervision, approximately 82% of those disenfranchised in Minnesota were not behind bars—nearly 5800 were on parole and over 41,000 were on probation.¹⁸ They come from all over the state. Thirty-three percent of the felonies committed in 2012 were in the counties of Ramsey and Hennepin, where 32% of the state population resides, and the remaining 67% were committed throughout the rest of the state.¹⁹

Relative to other states, Minnesota's disenfranchisement rate of 1.5% is higher than most, and two-to-three times higher than most states in the north central region of the United States. Twenty-eight states have lower rates than Minnesota.²⁰ Comparing Minnesota to all of the other states in the north central region of the country highlights the fact that Minnesota's rate is by far one of the highest in the area.²¹ Wisconsin's rate is roughly the same,²² but rates in all other states in the region are lower, some much lower. For example, North Dakota's disenfranchisement rate is 0.3%, Iowa's and Kansas's are both 0.9%, and Indiana's and Michigan's are 0.6%.²³

B. POLICY ORIGINS AND ADOPTION

Minnesota's Constitution was created in a time when the elective franchise was much more limited than it is today. That changed drastically during the first century of statehood. However, the felony disenfranchisement provision, based on ancient concepts, has stayed essentially the same since then.

When citizens of the Minnesota Territory were enabled by the United States Congress to become a state in 1857, the politics of the time were so contentious that the constitutional convention split into two factions. Two constitutions were written, one by the Republican Party and one by the Democratic Party.²⁴ The most contentious point of disagreement was whether to al-

17. *Id.* at 3.

18. *Id.*

19. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE 2 (2013), available at <http://mn.gov/sentencing-guidelines/images/2013%2520Leg%2520Report%2520Repost.pdf>.

20. UGGEN ET AL., *supra* note 15, at 16.

21. *Id.*

22. *Id.*

23. *Id.* Other states in the region include Montana (0.5%), South Dakota (1.1%), Illinois (0.5%), and Nebraska (1.3%). *Id.*

24. See WILLIAM ANDERSON & ALBERT J. LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA 69–86 (Univ. of Minn. 1921).

low African American males to vote—Republicans supported African American suffrage but Democrats did not.²⁵ The Democrats prevailed on that point,²⁶ so when one version was adopted, Minnesota's Constitution limited the right to vote to white males over age twenty-one and "Persons of Indian blood, who have adopted its customs and habits of civilization."²⁷ The provision prohibiting those convicted of treason or felony from voting, however, was apparently not debated.²⁸ Minnesota's Constitution, adopted on August 29, 1857, barred from voting, like it still does today, those "convicted of treason, or any felony, unless restored to civil rights."²⁹

The absence of debate is not surprising given the fact that the concept of disenfranchising citizens based on conduct already had its roots deeply embedded in western law, first in ancient Greece and Rome, then in medieval Europe.³⁰ In ancient Greece the status of "infamy" denied citizens convicted of crimes the right to vote, appear in court, serve in the army, make speeches, or attend assemblies.³¹ The Romans adopted this tradition, and prohibited the "infamous" from holding office or voting.³² Roman influence spread through Europe, and in England those who had violated society's norms lost its rights and protections,³³ typically resulting in a death sentence.³⁴ The tradition of infamy developed into the practice of "attainder" and "corruption of blood."³⁵ Attainted criminals lost the ability to transfer land to heirs,³⁶ and could not sue, testify in court, or

25. *Id.* at 72.

26. *Id.* at 99. The Republicans did, however, prevail in making the constitution easier to amend, with the hope that the franchise could be expanded to African Americans at a later date. *Id.*

27. *Id.* at 231.

28. A review of two texts detailing the creation of Minnesota's Constitution did not discover any mention of debate regarding felony disenfranchisement. See generally ANDERSON & LOBB, *supra* note 24; MARY JANE MORRISON, *THE MINNESOTA STATE CONSTITUTION: A REFERENCE GUIDE* (2002).

29. MINN. CONST. art. VII, § 1.

30. See George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics*, 32 *FORDHAM URB. L.J.* 851, 852–53 (2004).

31. Walter Matthews Grant et al., Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 *VAND. L. REV.* 929, 941 (1970).

32. Alec C. Ewald, "Civil Death": *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 *WIS. L. REV.* 1045, 1059 (2002); Grant, *supra* note 31, at 942.

33. Grant, *supra* note 31, at 942.

34. *Id.*

35. *Id.* at 942–43.

36. *Id.* at 943.

serve as jurors; they suffered “civil death.”³⁷ According to William Blackstone, attainder was used “when it is . . . clear beyond all dispute, that the criminal is no longer to live upon the earth, but is to be exterminated as a monster and a bane to human society.”³⁸ American colonists brought some of these traditions with them, and limited the franchise based upon conduct in various ways.³⁹ After the Revolution, bills of attainder, forfeiture for treason, and corruption of blood were constitutionally prohibited.⁴⁰ But many states continued to disenfranchise based upon felony conviction. As of 1868, twenty-nine of thirty-seven states prohibited citizens convicted of felonies from voting.⁴¹

Minnesota was one of the states that adopted felony disenfranchisement before the Civil War. After the Civil War, former slave states were required to allow Blacks to vote, and so more states passed disenfranchisement laws with the intent of disenfranchising Blacks in particular.⁴² Three years after the Civil War, ten years after its adoption, Minnesota’s Constitution was amended to allow Black males to vote.⁴³ In later years, the franchise was expanded to women, all Native Americans, and eighteen- to twenty-year-olds.⁴⁴ The process for having civil rights restored after felony conviction went through some changes through the years, during one period requiring application to the governor or district court.⁴⁵ However, Minnesota’s

37. See Chin, *supra* note 1, at 1793–94.

38. 4 WILLIAM BLACKSTONE, COMMENTARIES 373.

39. Schall, *supra* note 2, at 55–60.

40. U.S. CONST. art. III, § 3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

41. Brooks, *supra* note 30, at 853.

42. See generally Angela Behrens et al., *Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOC. 559 (2003).

43. ANDERSON & LOBB, *supra* note 24 at 178–79.

44. *Id.* at 179–80.

45. It is not clear what the process was before 1907. A review of the statutes found no provision explicitly restoring civil rights, though it is possible that a pardon would have been a mechanism for this. In 1907 a statute was enacted providing that those convicted of a felony and fined or sent to county jail could have their rights restored one year after judgment by applying to the district court with three witnesses to testify to his or her “good character.” Act of Mar. 7, 1907, ch. 34, § 1, 1907 Gen. Laws Minn. 40, 40. In 1919 those who had been sentenced to a state reformatory or prison “may be restored by the governor, in his discretion, to civil rights, upon certification to him by the judge, officer or board having jurisdiction, custody or supervision of such person at the time such jurisdiction, custody or supervision is terminated . . .”

constitutional provision disenfranchising those convicted of a felony remained unchanged.⁴⁶

II. A CHANGED LANDSCAPE

While the underlying law regarding felony disenfranchisement has remained essentially unchanged, the surrounding landscape, particularly in the criminal justice arena, has gone through massive changes in the last 157 years.

One major change has been the reach and impact of the criminal law into Minnesotans' lives and conduct. A great increase in criminally defined conduct has been seen throughout the country, Minnesota not excepted.⁴⁷ In the 1860s, there were approximately seventy-five felony level crimes in Minnesota statutes.⁴⁸ Today there are over 375.⁴⁹

Minnesota's overall criminal justice system policies have changed significantly as well. At the time of the adoption of Minnesota's Constitution, there was no such thing as stayed sentences or probation. Conviction of a felony only had one outcome—time in the state prison. But as Minnesota has added felony crimes to the statutes, and joined and often led national criminal justice reform trends, it has also come to rely heavily on community supervision rather than incarceration.⁵⁰ In 1909, Minnesota became one of the first states to adopt a stayed sentence statute, meaning that a judge could sentence someone convicted of a felony to probation or fines rather than only prison.⁵¹ In 1973, Minnesota became the first state to create a community corrections act, designed to develop and deliver

Act of Apr. 17, 1919, ch. 290, § 1, 1919 Minn. Laws 299, 299. The current “automatic” restoration provision was not created until 1963. *See* Criminal Code of 1963, ch. 753, § 609.165, 1963 Minn. Laws 1185, 1198.

46. The word “any” was removed as part of a 1974 constitutional amendment to revise the organization and language of the Constitution. Act of Apr. 10, 1974, ch. 409, § 1, 1974 Minn. Laws 787, 800. This change, however, did not alter the substance of the provision.

47. *See* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING (Gene Healy ed., 2004).

48. *See* MINN. STAT. chs. 93–101 (1866).

49. *See* MINN. SENTENCING GUIDELINES AND COMMENTARY 96–123 (Aug. 1, 2014), available at <http://mn.gov/sentencing-guidelines/images/2014%2520Guidelines.pdf>.

50. RESEARCH DEPT, HOUSE OF REPRESENTATIVES, MANDATORY SENTENCING LAWS 2 (2011), available at <http://mn.gov/sentencing-guidelines/images/2012ControlledSubstanceReport.pdf> (describing the modern stayed sentencing regime in Minnesota).

51. *See* Act of Apr. 22, 1909, ch. 93, 1910 Revised Laws Minn. 919 (codifying stayed sentences).

sanctions for criminal offenders in lieu of incarceration.⁵² Then, in 1980, Minnesota became the first state to adopt legally-binding sentencing guidelines.⁵³ The state used guidelines and a permanent guidelines commission to develop a sentencing policy that stays within the limits of available prison capacity.⁵⁴ This was a major contributing factor in Minnesota's prison populations growing much more slowly in the 1980s than the national prison population.⁵⁵ However, the emphasis on regulating prison sentences and limiting the high costs of prison may have contributed to increased use of jail terms combined with probation.⁵⁶ The goal throughout has been cost savings and emphasizing rehabilitation, but this process has *not* led to a relatively lower conviction rate. Minnesota has one of the lowest incarceration rates in the United States,⁵⁷ but it has the seventh highest rate of correctional control and the fourth highest rate of probation.⁵⁸ The relatively greater use of community supervision, notwithstanding conviction for a felony offense, has therefore been a significant factor in Minnesota having a relatively high disenfranchisement rate.⁵⁹

Another major contributor to the increase in number and length of felony sentences has been the war on drugs as waged in Minnesota.⁶⁰ As noted above, Minnesota's sentencing guidelines, adopted in 1980, limited the use of prisons in Minnesota compared to other states.⁶¹ Ultimately, however, case law and legislative changes led to Minnesota's developing some of the

52. MARY K. SHILTON, COMMUNITY CORRECTIONS ACTS FOR STATE AND LOCAL PARTNERSHIPS 5 (1992), available at <https://s3.amazonaws.com/static.nicic.gov/Library/010132.pdf>.

53. G. LARRY MAYS & L. THOMAS WINFREE, JR., ESSENTIALS OF CORRECTIONS 360 (2009).

54. Richard Frase, *Sentencing Policy and Criminal Justice in Minnesota: Past, Present, and Future*, COUNCIL ON CRIME & JUST., <http://www.crimeandjustice.org/councilinfo.cfm?pID=52> (last visited Apr. 6, 2015).

55. *Id.*

56. *Id.*

57. See PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 34 tbl.A-6 (2008), available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2008/one20in20100pdf.pdf.

58. See PEW CTR. ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 42 tbl.A-3, 44 tbl.A-5 (2009), available at <http://www.convictcriminology.org/pdf/pew/onein31.pdf>.

59. Relatively high rates of conviction have implications for the impact of other collateral consequences of conviction as well.

60. Scott G. Swanson, *Minnesota's Controlled Substances Law: A History*, BENCH & B. MINN. (Dec. 1999), <http://www2.mnbar.org/benchandbar/1999/dec99/drugs.htm>.

61. See Frase, *supra* note 54.

harshest drug sentencing laws in the country.⁶² “Courts [were] faced with the situation where a person selling \$1200 worth of cocaine receives (per the guidelines) the same sentence as a person who approaches a stranger at gunpoint and commits a rape.”⁶³ An individual convicted of possession with intent to sell thirteen grams of powder cocaine in 1981 would have received a twelve month stayed sentence, but by 1998, that same individual could have a presumptive sentence of 158 months in prison.⁶⁴ In 1991, the average prison sentence for drug offenses was thirty-five months, but in 2003 it reached a peak of fifty-two months and was at forty-four months in 2012.⁶⁵ The increase in disenfranchisement during the same time period shows the impact of these policies. In 1974, the percentage of Minnesota’s voting age population disenfranchised was 0.35% percent.⁶⁶ It more than quadrupled by 2011, when it had increased to 1.5%.⁶⁷

Due primarily to the criminal justice system changes described above, the numbers and percentage of the population affected by Minnesota’s disenfranchisement law have changed dramatically since statehood. In the 1860 census, thirty-two prisoners were recorded (sixteen “native” and sixteen “foreign”).⁶⁸ As noted previously, there was no such thing as probation or parole in Minnesota until 1909, so there were no additional people convicted of felonies serving their sentence in the community.⁶⁹ This means only about 0.04% of Minnesota’s voting age population was disenfranchised.⁷⁰ With today’s disenfranchisement rate of 1.5%, that is a 3,650% rate increase.

Minnesota adopted its felony disenfranchisement policy

62. See MINN. SENTENCING GUIDELINES COMM’N, UPDATED REPORT ON DRUG OFFENDER SENTENCING ISSUES 1–3 (2007), available at <http://mn.gov/sentencing-guidelines/images/2012ControlledSubstanceReport.pdf>.

63. Swanson, *supra* note 60.

64. *Id.*

65. MINN. SENTENCING GUIDELINES COMM’N, SENTENCING PRACTICES, CONTROLLED SUBSTANCE OFFENSES SENTENCED IN 2012, at 13 (2013), available at <http://mn.gov/sentencing-guidelines/images/2012ControlledSubstanceReport.pdf>.

66. Uggen & McElrath, *supra* note 16, at 3.

67. *Id.*

68. 1 FRANCIS A. WALKER, DEP’T OF THE INTERIOR, NINTH CENSUS, 569 tbl.XIX (1870).

69. The Minnesota legislature enacted a general law authorizing probation in 1909. HOMER CUMMINGS, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES 573 (1939).

70. The state population was 172,023. WALKER, *supra* note 68, at 569. Of that population, 57,089 were under the age of ten. *Id.* at 741. If we roughly estimate that another 30,000 were age ten to twenty-one, this gives a voting age population of 84,934.

based on ancient law in a time when felony conviction was reserved for a much smaller range of conduct than today, and only applied to the small number of Minnesotans in prison at the time. Today its scope is so much greater that in effect it has become a policy altogether different from what it was originally, which warrants taking a close look at whether its goals and any benefits of its current manifestation outweigh the costs.

III. REVISITING FELONY DISENFRANCHISEMENT

We cannot know if the founders of Minnesota would support the modern impact of the policy they gave the State with seemingly little controversy, but the change in impact certainly raises the question. Regardless of the answer, the question warrants a close reexamination of the policy and careful consideration of its goals and costs and benefits, rather than simply allowing the policy to be maintained with little scrutiny, as it has for so long.

There are several main arguments for maintaining current felony disenfranchisement law, two of which seem to predominate.⁷¹ One is that felony disenfranchisement maintains the “purity of the ballot box” by preventing harmful changes to the law, and the other is that disenfranchisement is simply deserved punishment for violation of the social contract.⁷²

First, some argue that allowing felons to vote runs the risk of election outcomes that would be harmful, particularly if they might elect “lenient judges and prosecutors.”⁷³ It is not clear if this was part of the goal of the original policy adoption, although, as noted above, even if it was, it would have only impacted the small number serving prison sentences.⁷⁴ Many other states at the time more narrowly tailored their policies to meet this goal, only disenfranchising based upon specified crimes thought to have some relationship to the electoral process, such as perjury, bribery, or betting on elections.⁷⁵ Today, this fear of influence is based on speculation—there has been no evidence put forward to support it. Regardless, the idea of

71. Brooks, *supra* note 30, at 896.

72. *Id.*

73. Jim Ragsdale, *Hot Dish Politics: Felons' Rights All Over the Map*, STAR TRIBUNE, <http://www.startribune.com/politics/statelocal/255038151.html> (last updated Apr. 12, 2014, 5:05 PM) (“Defenders of the current system, including Minnesota Majority . . . say[] felons are ‘outlaws’ who should not have a hand in creating laws ‘that the law-abiding live under.’ Such voters would, they contend, have an interest in electing lenient judges and prosecutors.”).

74. See *supra* notes 68–70 and accompanying text.

75. ALEXANDER KEYSAR, *THE RIGHT TO VOTE* 162 (2000).

denying citizens the fundamental act of voting in our democracy because of how they might vote is dangerous territory, especially for those whom the policy decision has already been made to allow them to live in the community where they are subject to the laws under which they are living, including the payment of taxes. Additionally, there are many types of behaviors that may make us question the wisdom of someone's electoral choices but we do not disenfranchise or propose to disenfranchise them. One could argue that behavior deemed criminal is different, but even if one agrees that criminal behavior should be the determining factor, again we must consider if the current scope of the policy is appropriate and worth reaching this goal, as discussed later. However, regardless of one's belief in the merits of this argument, excluding voters because of how they might vote has been found unconstitutional.⁷⁶

Second, some argue that felony disenfranchisement is simply part of the cost of committing a crime—disenfranchisement is an appropriate cost because felony offenders have broken the social contract and voting is one of a number of privileges that can be taken away as a consequence.⁷⁷ Based upon the ancient origins of the policy this was certainly one of the original goals of Minnesota's policy, but again would have only applied to the small number serving prison sentences.⁷⁸ Counter arguments include questioning whether a state may punish offenders by depriving them of any right it chooses without consideration for the reasons; and suggesting that such punishment must conform to the fundamental principles of criminal sanctions, including being imposed by a judge following trial, and being proportionate to the offense.⁷⁹ It is also important to note that, as a form of punishment, felony disenfranchisement only satisfies one of the goals of punishment—retribution. There is no evidence that it assists in the realization of three of the other goals—deterrence, rehabilitation, or restoration. And the fifth goal, incapacitation, would only apply to a very small number of individuals convicted of electoral crimes. Some supplement the punishment argument by stating that Minnesota's current policies do not punish people enough, and if we do not punish them by taking their voting

76. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (“Fencing out’ a sector of the population from the franchise because of the way they may vote is constitutionally impermissible.”).

77. See *supra* note 72 and accompanying text.

78. See *supra* notes 68–70 and accompanying text.

79. FELLNER ET AL., *supra* note 11, at 16.

rights away, they will not be punished at all.⁸⁰ This supplemental argument minimizes the impact of other sanctions, including terms of probation and the many collateral sanctions and consequences placed upon those convicted of felonies. In the context of these other consequences, such as difficulty in finding a job or housing, loss of voting would most likely be one of the lesser punishments in the mind of the offender, and not a significant source of any overall deterrent effect. However, if one truly believes that more punishment for punishment's sake alone is needed, regardless of the consequences or lack of tangible benefits, denying people the ability to take part in choosing their government certainly will help achieve that goal.⁸¹

Even if one agrees with either or both of these arguments in principle, two questions still need to be asked: (1) is the modern scope of Minnesota's felony disenfranchisement policy appropriate; and (2) is the policy justified given its effects?

First, as already discussed, the scope of this policy in Minnesota reaches a far greater percentage of our population than it did when implemented.⁸² Changes to the criminal justice landscape, as noted, have created a practical policy impact that is drastically different than it was in 1857. A vastly larger proportion of Minnesota's citizens are disenfranchised for a far wider scope of behavior. The great majority are living in the community rather than being incarcerated because other state policies have been created, despite conviction of a felony under current law, to allow these individuals to live in the community because it is better for rehabilitative purposes. These individuals live in the community and are subject to the laws that apply to everyone else, including taxes and fundamentally important things like school policies that impact how their children will

80. Dan McGrath, Executive Director of Minnesota Majority, told KARE 11 news that "a lot of people that are convicted of felony crimes never serve a day in jail So deprivation of their rights is how we punish them. So if you take away this deprivation of rights, what is the punishment then? Are felons just to go scot free with no punishment whatsoever?" John Croman, *Voting Rights for Released Felons Debated in Minn.*, KARE 11 (Jan. 31 2012), <http://www.kare11.com/news/article/959567/391/Voting-rights-for-released-felons-debated-in-Minn> (internal quotation marks omitted).

81. Continuing to disenfranchise those in prison (2,200,300 persons nationally) as opposed to including those serving a community supervision sentence (6,899,000 persons) will still allow those who have already been deemed to have violated the social contract to such a degree as to warrant a prison term to continue to be punished through felony disenfranchisement. See BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2013, at 2 (2014), <http://www.bjs.gov/content/pub/pdf/cpus13.pdf>.

82. See *supra* Part II.

be educated. Minnesota's relatively greater use of correctional control overall, as already noted, also has created a scope for this policy that is greater than most of the country and much greater than most states in the region.⁸³ Again, some may argue that its current scope is appropriate for retributive purposes, but the numbers make it difficult to argue it is consistent with original intent. For retributive purposes, disenfranchising only those in prison rather than including those on community supervision would seem to be more consistent with the original intent for the scope of the policy. Finally, when it comes to the important consideration of when it is appropriate for a fundamental liberty like voting to be denied, thereby prioritizing the rights of the state over the rights of the individual, the increased extent to which our government is able to curtail this liberty through the criminal law is concerning.

Second, as is the case when considering any public policy, we need to consider whether the benefits of the policy outweigh the costs. Other than addressing speculative fears of harmful influences in elections and being a means of retribution as noted above, no other potential benefits have been identified. On the costs side of the equation, there are a number of pragmatic issues that need to be considered, including the impact upon public safety, the fairness of application to different groups, the impact upon elections administration, and the financial cost.

Minnesota's current policy may actually be harming public safety, and there is no evidence that it is helpful. Allowing people to vote while on community supervision may help to reduce recidivism—research links pro-social activities like voting to desistence in crime; individuals interviewed about losing the right to vote express a feeling of being an “outsider” because they cannot vote; and empirical studies show some correlation between voting and lower recidivism.⁸⁴ A 2011 report by the Florida Parole Commission found that ex-prisoners who had their voting rights restored had recidivism rates of eleven percent compared to thirty-three percent for those who did not have their rights restored.⁸⁵ The public safety benefit of pro-social activity is a primary reason allowing those on community supervision to vote is supported by the American Probation and

83. See *supra* Part I.A.

84. Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 212–15 (2004).

85. FLA. PAROLE COMM'N, STATUS UPDATE: RESTORATION OF CIVIL RIGHTS (RCR) CASES GRANTED 2009 AND 2010, at 7, 10 (2011), available at <https://www.fcor.state.fl.us/docs/reports/2009-2010ClemencyReport.pdf>.

Parole Association.⁸⁶ The evidence shows that disenfranchisement does not deter crime or lower recidivism. Public safety is thus not advanced and may actually be undermined by felony disenfranchisement.

Minnesota's policy also perpetuates racial disparities. At the time Minnesota adopted its constitution, felony disenfranchisement was a racially neutral policy. It was not until after the Civil War when former slave states were required to allow Blacks to vote that they began passing disenfranchisement laws with the intent of disenfranchising Blacks in particular.⁸⁷ However, due to racial disparities in the criminal justice system in general, and in Minnesota in particular, felony disenfranchisement is yet another area of great racial disparities. Disenfranchisement of African Americans is 7.7% of the African American, voting age population in Minnesota compared to 1.1% of white, voting age Minnesotans.⁸⁸ Minnesota's African American disenfranchisement rate is the fifteenth highest in the country, putting Minnesota in the highest 30% of African American disenfranchisement rates, higher than former slave states such as Louisiana, Missouri, and Texas.⁸⁹ Allowing those on community supervision to vote would reduce this rate to just over 2%.⁹⁰ Similarly, disenfranchisement of Native Americans is 5.9% of the Native American voting age population in Minnesota, but could also be reduced to just over 2%.⁹¹ There are many proximate reasons for these disparities, but the root source is the disadvantages created by the treatment of these groups throughout the history of the United States.⁹² If recidivism is in fact increased through disenfranchisement, then it will clearly continue the disparities in crime and the resulting disparities in employment and housing and potentially other areas impacted by the collateral consequences. It also contributes to the overall marginalization of these communities. This touches on the public safety argument for reform as well. Large

86. *Restoration of Voting Rights Resolution*, AM. PROBATION & PAROLE ASS'N (Sep. 2007), http://www.appa-net.org/eweb/Dynamicpage.aspx?site=APPA_2&webcode=IB_Resolution&wps_key=3c8f5612-9e1c-4f60-8e8b-1bf46c00138e ("WHEREAS, disenfranchisement laws work against the successful reentry of offenders.").

87. Behrens et al., *supra* note 42, at 560–61.

88. Uggen & McElrath, *supra* note 16, at 4–5.

89. UGGEN ET AL., *supra* note 15, at 17.

90. Uggen & McElrath, *supra* note 16, at 9.

91. *Id.*

92. Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 339–40 (1997).

disparate impact on some communities leads to community exclusion that can undermine perceptions of system legitimacy, which in turn could have an adverse impact on public safety.⁹³ Reducing the rate of disenfranchisement for people of color would be one way to address racial disparities in the overall criminal justice system, allow for increased civic involvement for these communities, and provide some redress for the historical treatment that led to disparate levels of disenfranchisement in the first place.

Additionally, research suggests that children are more likely to vote as adults if they are raised by parents who engage in the voting process.⁹⁴ This means the negative effects of felony disenfranchisement on public safety and racial disparities described above will have a deeper and longer effect if maintained.

Felony disenfranchisement also confuses elections and has a significant financial cost. According to a survey of Minnesota county attorneys, in the 2008 elections, 1179 voters were investigated for voting while serving a felony sentence, resulting in thirty-eight new felony convictions for voting or registering to vote while ineligible.⁹⁵ Many people are confused and disenfranchised due to confusion and misinformation about the law.⁹⁶ This is due to the various state laws and to misinformation that sometimes is even provided by government officials. For example, in the 2012 election, a probation officer told a young woman that her marijuana possession charge, even though the judge had stayed the felony conviction for five years pending successful completion of probation, prevented her from voting.⁹⁷ It was not until the case was taken to the Minnesota

93. See Michael Rocque, *Racial Disparities in the Criminal Justice System and Perceptions of Legitimacy: A Theoretical Linkage*, 1 RACE & JUST. 292, 306 (2011).

94. See Marilyn Gittell, *Participation, Social Capital, and Social Change*, in SOCIAL CAPITAL AND SOCIAL CITIZENSHIP 3, 6–7 (Sophie Body-Gendrot et al. eds., 2003).

95. KATHY BONNIFIELD & CAROL JOHNSON, FACTS ABOUT INELIGIBLE VOTING AND VOTER FRAUD IN MINNESOTA 12, 16 (2010), available at http://ceimn.org/files/Facts%20about%20Ineligible%20Voting%20and%20Voter%20Fraud%20in%20Minnesota_with%20appendix.pdf.

96. See Editorial, *Wrongly Turning Away Ex-Offenders*, N.Y. TIMES (Nov. 3, 2012), <http://www.nytimes.com/2012/11/04/opinion/sunday/voting-rights-former-felons.html> (“With so much confusion among those who administer the laws, it is no surprise that people who are legally entitled to vote either don’t try out of fear that they would be committing a crime or are wrongly turned away.”).

97. Order at 2–4, Council on Crime and Justice v. Ritchie, No. A12-1871, (Minn. Oct. 31, 2012), available at <http://www.crimeandjustice.org/misc/>

Supreme Court that clarification was provided that she and the thousands of other Minnesotans in her situation (individuals who had received a felony stay of adjudication) in fact can legally vote.⁹⁸ The Minnesota Task Force on Election Integrity, established by executive order by Governor Mark Dayton in 2011, found that “current Minnesota law has resulted in significant confusion to the courts, law enforcement and probation officials, and to individuals convicted of a felony.”⁹⁹ The cost of this confusion and prosecution is difficult to measure. However, time spent by law enforcement personnel, county attorneys and staff, judges and court staff, and elections officials responding to it is clearly significant.

In summary, the only clear and supportable goal of felony disenfranchisement appears to be retribution. While this is a principled position, it has nothing to offer in the way of benefits from a public policy perspective other than retribution for retribution’s sake. Balanced against the many costs of Minnesota’s disenfranchisement policy, it is clear that the costs far outweigh any benefits.

IV. MOVING FORWARD

Given the above case for reforming Minnesota’s felony disenfranchisement law, what support and opportunity is there for doing so? Reforms in other states have gone back and forth in recent decades, with more of a trend toward easing felony voting restrictions.¹⁰⁰ Two states, Connecticut and Rhode Island, are the only states to have expanded the franchise to those serving probation or parole sentences in recent history.¹⁰¹

Efforts have been made to expand voting rights in Minnesota in the past but only some progress has been made. In the 2013–2014 biennium, with a DFL majority in the Minnesota legislature and Governor’s Office, a bill was introduced and passed two committees, but it was not heard by the additional

Order%20-%20Dismiss%20-%20Not%20Stipulated%20Entire%20Case.pdf.

98. *Id.*

99. MINN. TASK FORCE ON ELECTION INTEGRITY, SECOND REPORT AND FURTHER RECOMMENDATIONS OF THE MINNESOTA TASK FORCE ON ELECTION INTEGRITY 1 (2013), available at <http://www.ceimn.org/sites/default/files/Second%20Report.pdf>.

100. NICOLE D. PORTER, THE SENTENCING PROJECT, EXPANDING THE VOTE: STATE FELONY DISENFRANCHISEMENT REFORM, 1997-2010, at 1–2 (2010), available at http://www.sentencingproject.org/doc/publications/publications/vr_expandingthevotefinaladdendum.pdf.

101. *Id.* at 2.

committees it needed to pass.¹⁰² However, there is growing and more organized support for reform. A group of over sixty organizations have formed a coalition called Restore the Vote—Minnesota.¹⁰³ The coalition advocates for “changes to the law that would allow people who have served their time and are living in their community to vote.”¹⁰⁴ From the faith perspective, supporters include representation from all major perspectives—they include the Minnesota Catholic Conference, several Protestant groups, Jewish Community Action, and Muslims represented in the Joint Religious Legislative Coalition. The shared position of these groups on this issue can probably best be articulated by the Catholic concept of “solidarity,” which, in part, calls on Catholics to “insist on responsibility and seek alternatives that do not simply punish, but rehabilitate, heal, and restore.”¹⁰⁵ From the public safety and legal perspective, supporters include not only criminal defense and reentry focused groups, but corrections professionals represented by the Minnesota Community Corrections Association and the Minnesota Corrections Association.¹⁰⁶ Minnesota’s prosecutor organization, the Minnesota County Attorneys Association, is also a member.¹⁰⁷ From a political perspective, Liberty Minnesota and the Republican Liberty Caucus Minnesota are also coalition members.¹⁰⁸ The coalition also includes a wide array of direct service and advocacy, civic engagement, good government, and civil rights focused groups like the NAACP.¹⁰⁹ The only organized resistance to reform seems to have been a group called Minnesota Majority, which in the past had spoken out against reform in the press and raised allegations of people with felony convictions voting illegally while still serving their sentence.¹¹⁰ The current extent and source of their support in the communi-

102. H.R. 491, 88th Sess. (Minn. 2013); S. 107, 88th Sess. (Minn. 2013).

103. General information about the coalition can be found at <http://www.restorethevotemn.org>.

104. *About Us*, RESTORE VOTE—MINN., <http://restorethevotemn.org/about> (last visited Apr. 6, 2015).

105. Jason Adkins, *Finishing Prison Sentence Should Bring Back Voting Rights*, CATH. SPIRIT (Dec. 18, 2013), <http://thecatholicspirit.com/commentary/faith-in-the-public-arena/finishing-prison-sentence-bring-back-voting-rights>.

106. *About Us*, *supra* note 104.

107. *Id.*

108. *Id.*

109. *Id.*

110. Jim Ragsdale, *Voter Fraud: Stuffing Ballot Boxes or the Stuff of Myth?*, STAR TRIB. (Oct. 29, 2012), <http://www.startribune.com/politics/statelocal/176195981.html>.

ty and politically is unknown.¹¹¹ Despite this large and diverse coalition supporting reform, success of the efforts will only be known once another effort at legislation has been made with a new legislature, which is now comprised of a Republican majority in the House and a Democrat majority in the Senate.¹¹²

It also remains to be seen whether changes and events nationally will have an impact on these reform efforts in Minnesota. Once the leaders of the tough on crime movement, conservatives are reconsidering the results of that movement through a conservative lens.¹¹³ This shift is epitomized and to a large degree led by a group called Right on Crime, led by Newt Gingrich and other high profile national conservatives.¹¹⁴ They are criticizing America's criminal justice system as wasteful of both taxpayer dollars and human potential, and leading reforms around the country primarily to reduce incarceration.¹¹⁵ Although this group has not weighed in specifically on voting disenfranchisement, the new approach has opened the door for a strongly bipartisan critique of the current system and its consequences in the entirety, including felony disenfranchisement. Another national conservative leader, Rand Paul, has advocated for creating less restrictive felony disenfranchisement policy in his home state of Kentucky.¹¹⁶

The recent responses to grand jury acquittals of police officers who killed unarmed African American men in New York and Ferguson, Missouri, could potentially have an impact on these efforts as well. Impetus to reform all aspects of the criminal justice system, especially as it affects people of color, could

111. See Joe Kimball, *Minnesota Majority and Minnesota Voters Alliance Merge Their 'Election Integrity' Programs*, MINNPOST (Sept. 25, 2014), <http://www.minnpost.com/political-agenda/2014/09/minnesota-majority-and-minnesota-voters-alliance-merge-their-election-integ> (reporting that Minnesota Majority merged their election integrity program with Minnesota Voters Alliance).

112. J. Patrick Coolican et al., *Minnesota House Flips to GOP Control; at Least 11 DFLers Ousted*, STAR TRIB. (Nov. 7, 2014), <http://www.startribune.com/politics/statelocal/281524671.html>.

113. See David Dagan et al., *The Conservative War on Prisons*, WASH. MONTHLY (Nov.–Dec. 2012), http://www.washingtonmonthly.com/magazine/novemberdecember_2012/features/the_conservative_war_on_prison041104.php (“Right-wing operatives have decided that prisons are a lot like schools: hugely expensive, inefficient, and in need of root-and-branch reform.”).

114. *Id.*

115. *Id.*

116. Sam Brodey, *Kentucky Makes It Almost Impossible for Felons To Vote. Rand Paul Wants To Change That.*, MOTHER JONES, (Jan. 14, 2015, 6:00 AM), <http://www.motherjones.com/politics/2015/01/rand-paul-kentucky-felon-voting>.

come from all political perspectives.¹¹⁷ Rand Paul also recently spoke out on this issue, saying, “given the racial disparities in our criminal justice system, it is impossible for African-Americans not to feel like their government is particularly targeting them.”¹¹⁸

Finally, a 2002 national opinion poll showed that sixty percent of Americans surveyed supported restoring voting rights to parolees and probationers.¹¹⁹ Polling data that would show any changes in public opinion since that time are not available.

CONCLUSION

Outside of a call for retribution with no tangible benefit, there are no strong arguments for maintaining Minnesota’s disenfranchisement policy. The vast divergence from the impact of the original policy combined with its modern expansive scope and resultant costs make a strong argument for reform. The support from a broad and large coalition of groups from faith-based, public-safety, racial-justice, and other perspectives; combined with recent changes in national criminal justice reform politics and events, may allow for the strong public policy arguments for reform to win the day. But long-standing policies can be difficult to reform, regardless of the arguments against them, so only time will tell if Minnesota will maintain this vestige of the ancient practice of civil death.

117. Mark Sappenfield, *Why Impact of Eric Garner Case Might Be Much Bigger than Ferguson*, CHRISTIAN SCI. MONITOR (Dec. 7, 2014), <http://www.csmonitor.com/USA/Justice/2014/1207/Why-impact-of-Eric-Garner-case-might-be-much-bigger-than-Ferguson-video>.

118. Janet Hook, *Rand Paul Blames ‘Big Government’ for Militarized Police*, WALL ST. J. WASH. WIRE (Aug. 14, 2014), <http://blogs.wsj.com/washwire/2014/08/14/rand-paul-blames-big-government-for-militarized-police>.

119. Jeff Manza et al., *Public Attitudes Toward Felon Disenfranchisement in the United States*, 68 PUB. OPINION Q. 275, 283 (2004).