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Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative

Nora V. Demleitner†

Lyndon La Rouche, a perennial presidential candidate, in 1992 ran for the highest office in the country from his prison cell in Minnesota; yet he was not allowed to vote in the presidential election.1 La Rouche is not alone in this dilemma. As of December 31, 1998, 1.3 million men and women were incarcerated in federal and state prisons, amounting to over 1.8 million individuals in custody across the United States.2 Almost 50 million Americans have a criminal record.3 Based on these

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numbers, approximately 3.9 million people—about two percent of the voting population—are currently disenfranchised either because they are currently imprisoned or because of their felony records. In the future, denial of voting rights will impact an even larger group of people as the number of individuals under the supervision of the criminal justice system continues to rise.

Denial of voting rights is only one of numerous collateral sentencing consequences that await ex-offenders. Other effects of criminal convictions include prohibitions on serving on a jury or holding public office, denial of occupational licenses, bans on the possession of handguns, and registration and notification requirements. Although in the United States collateral sentencing consequences were extensively debated in the late 1950s and the 1960s, they have not been discussed in recent years. Policy-makers and citizens have taken it for granted that offenders continue to be deprived of certain rights long after having completed their sentences. Only the 1998 report Losing the Vote: The Impact of Felony Disenfranchisement Laws issued jointly by Human Rights Watch and The Sentencing


5. During the impeachment of President Clinton, one of the penalties demanded by the House prosecutors was a life-long ban on holding office. See, e.g., Ian Brodie, Damning List of Abuses Drawn Up for Impeachment, THE TIMES, Dec. 11, 1998, at 4M; Paul Leavitt, Presenting the Case: How Long, Who Will Testify, USA TODAY, Jan. 11, 1999, at 8A. To many people, that request seemed unprecedented because it went much farther than the sanctions ever contemplated against former President Nixon. See, e.g., Alan Hirsch, Contorting the Constitution, WASH. TIMES, Jan. 1, 1999, at A17. However, public discussion almost never acknowledges that many convicted offenders remain under a lifetime ban to hold state public office.

6. In the name of retribution and incapacitation, state and federal governments have recently passed further legislation that supplements this array of collateral consequences. Among the most notable are offender registration and notification statutes. For a more complete listing of collateral sentencing consequences, see Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL’Y REV. 77 (1999).

Felon disenfranchisement project has triggered a partial reconsideration of felon disenfranchisement in a number of states and in Congress.\(^8\)

Even in a very punitive political climate, many collateral consequences, and especially denial of voting rights, fit only uncomfortably, if at all, into the existing sanctioning framework and its justifications. The dominant justifications underlying disenfranchisement are empirically unsound and have become defunct. Most civilized countries have, therefore, limited or abolished voting restrictions imposed on ex-offenders. Specifically, Germany and a number of states in the United States have acknowledged the unfairness of exclusion from the ballot box in a democratic society and have also recognized that such unfairness creates the potential for inequality. For example, in the United States racial minorities are substantially overrepresented among those subject to disenfranchisement, largely because of the unequal enforcement of criminal law and the repercussions of the "War on Drugs."\(^9\) In fact, 1.4 million black men, out of a total of 3.9 million ex-offenders, are barred from voting.\(^10\) The racial disparity has caused some state legislatures in recent months to consider measures that would severely limit or eliminate the disenfranchisement of ex-felons.\(^11\) Despite strong support by civil rights groups, these proposed bills have run into severe opposition from some lawmakers.\(^12\)

To counter the negative effects of large-scale disenfranchisement, this Article suggests the German approach as a model for changes in American law. In comparing and contrasting the avenues chosen in the United States and Germany, this Article illuminates the different attitudes societies have taken toward ex-offenders. In most American states, denial of the franchise applies automatically to a vast panoply of offenses, including relatively minor crimes. Often disenfranchisement continues for many years after conviction and release or even for life. In Germany, however, deprivation of voting rights is limited to serious, legislatively enumerated of-

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9. See FELLNER & MAUER, supra note 4, at 8-11.
10. See id. at 7.
11. See Allard & Mauer, supra note 8.
fenses, must be assessed directly by the sentencing judge at the
time of sentencing, and can be imposed only for a limited and
relatively short period of time.

Ultimately, these differences indicate that denial of the
franchise in the United States aims at exiling ex-offenders
upon release from prison and disables them from actively par-
ticipating in the political arena. Because of these effects, denial
of the franchise must be viewed as a penalty. The historic ori-
gin of this sentencing consequence and its statutory placement
in some states support this claim. The official justification pro-
vided for denial of the franchise to ex-offenders, however, is
frequently the “purity of the ballot box.” As a comparative
analysis will demonstrate, this argument can be read either as
prevention-based or as retributive. In either case, the German
provision permitting the deprivation of the franchise is prefer-
able to the current legal situation in many American states.
Even though the German approach has been controversial, it
provides a model that permits the temporary exclusion of only a
small number of offenders, and ultimately promises all of them
reintegration. The most beneficial effects of such a framework
in the United States would be that it should not only dramati-
cally decrease the number of ex-offenders who are disenfran-
chised but also remedy the currently existing racial imbalance.

The final part of this Article will consider paths to reform
in the United States and suggest lessons derived from guideline
sentencing. Judges will need to be provided with guidance as
to the types of fact scenarios that trigger denial of voting rights
and the length of time for which such a denial is to be effective.
This Article recommends that appellate courts develop a com-
mon law, analogous to the English guideline judgments, out-
lining the factors lower courts should consider in their decision-
making. Such rules should help prevent unwarranted disparity
in the imposition of voting bans on offenders.

I. THE GERMAN MODEL

A. DISENFRANCHISEMENT OF OFFENDERS UNDER GERMAN LAW

1. Historical Overview

Continental European countries have recognized collateral
sentencing consequences for centuries. Such collateral effects
have generally been styled as sanctions affecting personal
honor (Ehrenstrafen). Historically, they grew out of two differ-
ent traditions. Under the Roman tradition, honor implied possessing all rights of a citizen, i.e., the panoply of political rights available. The loss of honor, therefore, connoted the loss of one's position as a citizen. Largely irrelevant to this understanding of honor were considerations of equal treatment and human rights that attach to an individual by virtue of his humanity rather than his citizenship. The Teutons, however, developed a right of personhood that allowed for individual liberty and honor independent of the state but tied to the individual's standing in society. In their understanding a dishonorable crime deprived the offender of honor. It is assumed that the German Ehrenstrafen grew out of this conceptualization of individual honor.

Early doubts about Ehrenstrafen arose during the Enlightenment. The French mort civile, which declared an offender legally dead and thus deprived him of all civil, political and economic rights, was harshly criticized during the nineteenth century. It was challenged as impractical and unjust because it did not accord with any penological goals. Its critics noted that it was unnecessary and ineffective for the attainment of general preventive aims and could not be reconciled with individual deterrence, especially when the latter was viewed as intertwined with rehabilitation. The unjust character of the mort civile arose in part also from its application to a wide variety of disparate offenses.

Nevertheless, Germany, like the United States, allowed for restrictions on a vast array of an offender's civil rights until the late 1960s. Since the founding of the German Empire, those effects were considered Nebenstrafen (collateral penalties). They were based on the assumption that an offender lost his honor and concomitant rights not through the sentence imposed but rather through his dishonorable conduct. Frequently such deprivations were a direct consequence of a conviction to Zucht-.

15. See Schwarz, supra note 13, at 22, 26.
16. See id. at 23-24.
18. See Kühne, supra note 14, at 16.
haus, an aggravated form of prison, which entailed the automatic loss of civil rights.\textsuperscript{19}

Nebenstrafen were based on retributive and denunciatory concepts. They were designed to allow the state to condemn dishonorable conduct as well as the dishonored offender.\textsuperscript{20} While the deed itself was viewed as determinative of the offender's loss of honor, the offender's moral blameworthiness also played a role. Therefore, the imposition of three months imprisonment (Gefängnis) was the prerequisite for a loss of civil rights.\textsuperscript{21}

As early as 1931, legislators proposed a change that would have prohibited a permanent loss of rights. The length of the loss would have depended on whether the offender could be assumed to abuse his rights. The temporary nature of the proposed loss signaled the proponents' belief in the possibility of the offender's rehabilitation.\textsuperscript{22} Had this proposal been adopted, it would have dramatically changed the justification for collateral penalties in Germany. The nefarious deed itself would no longer automatically disqualify the offender from exercising his rights. No longer would retributive goals dominate. Instead, safety and prevention would play a substantial role in the imposition of collateral penalties.\textsuperscript{23}

After World War II, loss of voting rights became a discretionary judicial decision, even when Zuchthaus was imposed. The only exception was conviction for perjury, which entailed an automatic loss of voting rights.\textsuperscript{24} Voting rights could be denied only temporarily: the loss was restricted to a period of two to ten years for Zuchthaus penalties and one to five years for prison sentences.\textsuperscript{25}

2. Current Law

By the mid-1960s the usefulness of such additional sentencing consequences was increasingly questioned in Germany, other European countries, and the United States. At the end of

\begin{itemize}
\item \textsuperscript{19} See \textsc{Claus Roxin}, \textit{I Strafrecht: Allgemeiner Teil 87} (3d ed. 1997).
\item \textsuperscript{20} See \textsc{Köhne}, \textit{supra} note 14, at 23.
\item \textsuperscript{21} See \textit{id}. No such prerequisite existed for Zuchthaus penalties because any Zuchthaus sentence connoted moral blameworthiness.
\item \textsuperscript{22} Cf. \textsc{Albert Esser}, \textit{Die Ehrenstrafe 7}, 89 (1956) (describing how "civil death" in France assumed the impossibility of rehabilitation).
\item \textsuperscript{23} See \textsc{Köhne}, \textit{supra} note 14, at 28.
\item \textsuperscript{24} See \textsc{Schwarz}, \textit{supra} note 13, at 35.
\item \textsuperscript{25} See \textit{id}. at 36.
\end{itemize}
that decade, the German Parliament was ready to entertain a major overhaul of the Criminal Code (Strafgesetzbuch) that also impacted collateral sentencing consequences. Based on a multi-year in-depth study by two different groups of legal academics and a subsequent separate analysis presented by a special committee of the German legislature, the German Parliament passed the first and second reform laws to the Criminal Code in 1969. The first reform law eliminated the distinction between prison and Zuchthaus.26 Legislators justified this decision with a finding that the harsher life in the Zuchthaus and the additional, automatically-imposed collateral consequences hindered the reintegration of the ex-offender into society without presenting any countervailing advantages.27

Despite this reform, denial of the franchise remains as an optional collateral sentencing consequence in the German Criminal Code.28 Although one of the two academic study groups proposed eliminating those sanctions in their entirety, the legislature opted against this because it would have entailed modifying about 150 federal and state laws—a feat considered impossible at the end of the legislative session that year.29 Even though the legislature had planned on taking up this issue in the following year, it has not done so to this day, and no apparent political or public pressure exists to revisit this topic.30 The overall lack of interest in the provision may be connected to the fact that the number of cases adjudicated annually that deprive the offender of voting rights is minuscule.31 Moreover, the legislative set-up seems to find favor in the eyes of international law scholars.32

The decrease in the number of pardon applications indicates the dramatic change the revision of the Criminal Code

26. See ROXIN, supra note 19, at 83, 87.
27. See id. at 87.
28. See § 45(5) Strafgesetzbuch [StGB].
30. Academic criticism of the provision, however, exists. See generally SCHWARZ, supra note 13; Jürgen Jekewitz, Der Ausschluss vom aktiven und passiven Wahlrecht zum Deutschen Bundestag und zu den Volksvertretungen der Länder auf Grund richterlicher Entscheidung, 1977 GOLTDAMMER’S ARCHIV FÜR STRAFRECHT 161 (1977); Nelles, supra note 29.
31. In 1987, for example, the provision was used only 11 times. See SCHWARZ, supra note 13, at 19.
has brought to Germany. Until 1969, a relatively large number of pardon applications were filed annually because courts were unable to remove the permanent collateral consequences that accompanied a conviction and sentence of Zuchthaus.\textsuperscript{33} Requests for pardons decreased substantially in subsequent years, largely due to the severe limits placed on collateral sentencing consequences in the two sentencing reform laws of 1969.\textsuperscript{34}

Collateral consequences of a criminal conviction as they pertain to active and passive voting rights are covered in section 45 of the German Criminal Code.\textsuperscript{35} Any offender, sentenced to more than one year of imprisonment,\textsuperscript{36} will automatically lose his passive voting rights for a period of five years.\textsuperscript{37} The court also has the opportunity to deny passive voting rights to any offender sentenced to a shorter period of imprisonment or to probation.\textsuperscript{38} This is only possible, however, if the specific law under which the offender is being sentenced explicitly permits the court to impose the additional offense consequence.\textsuperscript{39}

In contrast to the denial of passive voting rights, the deprivation of the right to vote never automatically follows a conviction.\textsuperscript{40} If the law under which the offender is convicted permits it, the court has the option of depriving the offender of his right to vote for a period of two to five years.\textsuperscript{41} The time period begins to run only after the offender finishes serving the prison sentence imposed, even though it becomes legally effective upon

\begin{quote}
\textsuperscript{33.} See HANS-GEORG SCHÄTZLER, HANDBUCH DES GNADENRECHTS 24, 68-69 (2d ed. 1992).
\textsuperscript{34.} See id. at 24.
\textsuperscript{35.} Active voting rights imply the right to vote, passive voting rights the right to be elected. The latter are only covered here to provide a comprehensive picture of section 45 StGB.
\textsuperscript{36.} Under the German Criminal Code, a crime (Verbrechen) is defined as a legally sanctionable act that carries a prison sentence of one year or more. Any legally sanctionable offense that carries a lesser penalty is a Vergehen. See § 12 StGB; see also JOHANNES WESSELS, STRAFRECHT ALLGEMEINER TEIL 4 (27th ed. 1997).
\textsuperscript{37.} See § 45(1) StGB. For a critique of this provision as incompatible with the more differentiated disenfranchisement provision under section 45(5), see Jekewitz, supra note 30, at 169.
\textsuperscript{38.} See § 45(2) StGB.
\textsuperscript{39.} See id.
\textsuperscript{40.} The right to vote is construed broadly and not limited only to local, state and national elections. Rather, it also encompasses other public elections. See SCHWARZ, supra note 13, at 60.
\textsuperscript{41.} See § 45(5) StGB. While not mandatory, disenfranchisement should be imposed for full years. See HERBERT TRÖNDLE & THOMAS FISCHER, STRAFGESETZBUCH UND NEBENGESETZE 289 (49th ed. 1999).
\end{quote}
conviction.\textsuperscript{42} The offenses which allow the court to deny an offender the right to vote are assumed to be those whose commission will or is likely to undermine the foundation of the state\textsuperscript{43} or constitutes tampering with elections. Such offenses include: preparation of a war of aggression, treason, use of insignia of a prohibited political organization, sabotage, espionage, election fraud, bribery of voters, and similar crimes.\textsuperscript{44} Attempt, complicity and attempted complicity in such offenses are also covered.\textsuperscript{45} Even if convicted of one of these offenses, the offender must be sentenced to a period of at least six months of imprisonment before the court may consider depriving him of the franchise.\textsuperscript{46}

A pardon can restore active voting rights as long as it covers that sanction explicitly.\textsuperscript{47} However, a judicial remedy also exists. The sentencing court may reinstate the offender's voting rights when at least half the time for which the deprivation of the franchise was assessed has passed, and the court does not expect the offender to commit other intentional crimes.\textsuperscript{48} In deciding on a reinstatement request, the court is to consider whether the restoration of voting rights will assist in rehabilitating the offender in light of the crime committed and the offender's background, whether the offender will use the rights, and whether she can be trusted with the execution of such functions.\textsuperscript{49} Therefore, the judicial assessment encompasses safety and rehabilitative concerns.

\textsuperscript{42} See § 45a StGB. For a critique of this provision, see Jekewitz, supra note 30, at 166. In this respect the denial of the franchise differs from the deprivation of a driver's license which becomes effective on the day of sentencing, with the time of imprisonment counting fully toward the period during which the offender is banned from driving.

\textsuperscript{43} See TRÖNDLE & FISCHER, supra note 41, at 289.

\textsuperscript{44} The denial of the right to vote as a Nebenstrafe is mentioned in sections 92a (covering §§ 80-90b StGB), 101 (covering §§ 93-100a StGB), 102(II) (covering § 102 StGB), 109i (covering §§ 109e-109f StGB), and 108c StGB. Membership in a terroristic organization is not a ground for denial of voting rights. See SCHWARZ, supra note 13, at 50-54.

\textsuperscript{45} See KARL LACKNER & KRISTIAN KÜHL, STRAFGESETZBUCH 283 (22nd ed. 1997).

\textsuperscript{46} TRÖNDLE & FISCHER, supra note 41, at 289.

\textsuperscript{47} See ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH—KOMMENTAR (Theodor Lenckner et al. eds., 25th ed. 1997).

\textsuperscript{48} See § 45b StGB (noting the potential future commission of intentional offenses as a factor in reinstating the offender's voting rights); see also SCHÖNKE & SCHRÖDER, supra note 47, at 634. This provision, which was primarily grounded in rehabilitation ideals, was legally unprecedented.

\textsuperscript{49} See TRÖNDLE & FISCHER, supra note 41, at 291. If the denial of voting
Another indication of the concern that denial of voting rights can obstruct rehabilitation is that section 45 cannot be applied to youths (i.e., those under eighteen). Moreover, those between eighteen and twenty-one are generally not subjected to that provision even though they are not explicitly excluded from its coverage.

B. A CRITIQUE OF SECTION 45 STGB: SYSTEMIC CHARGES

Critics have declared that section 45 violates the German Constitution. They argue that any denial of voting rights following a criminal conviction contradicts a fundamental value of the German Constitution: universal and equal suffrage. The German Constitutional Court has not yet directly addressed this question.

Critics also argue that the provision fails to fit tightly into the catalog of sanctions. Legal academics have developed the German Criminal Code and its modifications with internal logical coherence and completeness. Section 45 fits only uneasily into this analytical system. First, the German Criminal Code distinguishes between penalties and Massregeln, protective measures. Textually, the deprivation of voting rights is grouped with penalties and is considered a collateral rather than a primary penalty. To de-emphasize the penal character of voting rights is considered a criminal sanction, the severity of the offense and considerations of general prevention may be decisive. See SCHÖNKE & SCHRÖDER, supra note 47, at 634-35.  

50. See SCHÖNKE & SCHRÖDER, supra note 47, at 632; TRÖNDLE & FISCHER, supra note 41, at 290.  

51. See SCHWARZ, supra note 13, at 40.  


53. See SCHWARZ, supra note 13, at 95; Meyer, supra note 52, at 270.  

54. See SCHWARZ, supra note 13, at 93. The constitutional arguments made in Germany parallel the U.S. challenges to the denial of the franchise under the Equal Protection Clause and the Voting Rights Act of 1965. See infra notes 107-13, 130 and accompanying text. The German Constitutional Court implicitly upheld section 45. See infra note 64 and accompanying text.  

55. See TRÖNDLE & FISCHER, supra note 41, at 249.  

56. See id. at 250; see also Nelles, supra note 29, at 21 (arguing that the deprivation of voting rights cannot be considered a Massregel—a measure designed to protect public safety—because it is textually grouped with penalties rather than security-based restrictions on an individual's freedom and fails to accomplish any significant preventive purpose).
of disenfranchisement, however, the provision is entitled "collateral consequences."  

Second, under German law, penalties are generally assessed based on the hierarchy of penological goals outlined in section 46, which focuses initially on the guilt of the offender and the proportionality between the penalty and the offender's guilt. The German sanctioning system also considers general deterrence and ultimately specific deterrence of the offender through rehabilitation. Excluding an offender from the right to vote, however, does not seem conducive to attaining either of these two goals. Because of these tensions and internal contradictions, some have claimed that section 45(5) serves solely preventive purposes, making proportionality considerations irrelevant.

Section 45's harshest critics have used the absence of a clear-cut justification as an argument against the retention of this collateral consequence. They have contended that Nebenstrafen are unjustified because they severely stigmatize the ex-offender without providing a strong countervailing purpose. Those supporting section 45, however, view the suggested abolition of these collateral consequences as an attack on the ethical and moral foundations of the criminal law. They assert that without such consequences, a rise in crime could be expected. For them, the temporary disenfranchisement of select offenders aims at protecting the social good by keeping the criminals from exercising political power. In that respect, section 45 contributes to the Reinhaltung des öffentlichen Lebens, the "purity of public life."

57. LACKNER & KÜHL, supra note 45, at 282.
58. Section 46 does not explicitly list this goal. Instead it has been read into other sections of the Criminal Code. See, e.g., FRANZ STRENG, STRAFZUMESSUNG UND RELATIVE GERECHTIGKEIT 162-64 (1984).
59. See TRÖNDLE & FISCHER, supra note 41, at 293-94. The German legislature intentionally avoided providing a clear hierarchy of penological goals in section 46. See, e.g., DANIEL J. FISCHER, DIE NORMIERUNG DER STRAFZWECKE NACH VORBILD DER U.S. SENTENCING GUIDELINES—EINE CHANCE FÜR DAS DEUTSCHE (STEUER-)STRAFRECHT? 33-34 (1999). Frequently resocialization is viewed as the highest goal. See id. at 59. However, the German courts have adhered to the so-called Vereinigungstheorie (combination theory) which attempts to balance all penological goals. See, e.g., BVerfGE 45, 187 (239); BVerfGE [NStZ] (1994), 558. The recent decline of resocialization as a sentencing goal has increased uncertainty. See FISCHER, supra, at 63-64.
60. See SCHWARZ, supra note 13, at 47-48.
61. See id. (recounting arguments on both sides).
Even if a collateral sanction could be justified, critics argue that its imposition in individual cases is not well-regulated. Generally, the Penal Code admonishes the sentencing court to prevent unnecessary harshness in sentencing by avoiding certain sanctions or at least restricting their lengths. Such a sentencing guideline is imprecise, however. The only other guidance given to the court is that it is to consider whether political rights can be granted to an offender who violated the public trust. Neither the German Criminal Code nor the federal election law provides a more concrete standard by which a court could develop a disciplined and coherent rationale for the deprivation of the franchise and its length. Nevertheless, the court must justify its decision at sentencing and provide a rationale for the imposition of this collateral consequence.

Despite these concerns about the constitutionality and the abstract justifiability of section 45, and its equitable and just imposition in individual cases, the German Constitutional Court (Bundesverfassungsgericht) has accepted the constitutionality of this provision because it constitutes a historically developed, and therefore traditionally acceptable, exclusion from public life. Critics of the German decision have charged that the Court deemed the right to vote a right of honor (bürgerliches Ehrenrecht) granted a citizen rather than a basic political right. They argue that the Constitutional Court's interpretation of section 45 is irrational because changes in the German criminal law enacted in the late 1960s abolished the concept of Ehrenrechte.

Despite these misgivings and shortcomings, section 45 may be viewed as a compromise between certain safety requirements of a state, the public's demand for a condemnatory sanction, and the reintegrative needs of defendants. By granting the judiciary the ability to single out and exclude from the ballot box a select and narrowly circumscribed group of offenders, the state retains its capacity to protect the democratic process.

On the one hand, offenders who are being deprived of voting rights satisfy retributive demands. These criminals are also particularly stigmatized because of the unique and public character of the sanction. On the other hand, the limited ap-

63. See TRÖNDLE & FISCHER, supra note 41, at 290.
64. See BVerfGE 36, 139 (142); see also SCHWARZ, supra note 13, at 92.
66. See id.
67. For an account of a few spectacular cases in which the accused were
plicability of the sanction complies with demands for rehabilitation and reintegration voiced in human rights conventions and the German Constitution. Ultimately, the highly differentiated and relatively short-term deprivation of voting rights with the possibility of early restoration of such rights is designed to assist offenders in resocialization.

II. EX-OFFENDER DISENFRANCHISEMENT IN THE UNITED STATES

While starting from a shared vision in the 1960s, the United States has taken a different route than Germany in its approach to denial of voting rights as a collateral sentencing consequence. In the United States, restrictions on voting rights are governed by state rather than federal law, subject only to federal constitutional mandates. Therefore, state law determines whether an offender will retain or regain the franchise after conviction, regardless of whether the conviction occurred in state or federal court. Because state law governs voter eligibility for congressional and presidential elections, a person barred from voting in local and state elections is also prohibited from casting a ballot in national elections. Potential constitutional problems are associated with the passage of a federal law revoking the exclusion of ex-offenders from voting in national elections. Therefore, state legislatures are the more promising target for attempts to narrow disenfranchisement provisions.

A. THE HISTORY OF FELON DISENFRANCHISEMENT

Historically, denial of the franchise and removal from public office were part of the English common law concept of attainder, which mandated forfeiture for treason or commission...

disenfranchised, see SCHWARZ, supra note 13, at 19.

68. The German Constitutional Court has officially recognized rehabilitation and reintegration of an offender as sentencing goals because the welfare state mandates that the state and the community care for the offender. See BVerfGE 35, 202 (235-36) (the so-called Lebach-Judgment), quoted in ROXIN, supra note 19, at 46.

69. See U.S. CONST. arts. I, II; amends. XIV, XVII, XIX, XXIV, XXVI.

of a felony, corruption of blood,71 and loss of civil rights.72 The law treated felony offenders as if they had died, depriving them of their property and their civil and political rights, dissolving their marriages, and prohibiting them from concluding any contracts or bringing suit.73 Such penalties had retributive and deterrent goals.74

After gaining independence, the United States rejected some of this common law heritage. It adhered to a lesser form of "civil death" than England did in the late eighteenth century. The Constitution, for example, abolished forfeiture for treason and corruption of blood.75 In the second half of the twentieth century, many of the surviving consequences of "civil death" statutes, such as the inability to enter into contracts or to inherit property, were abolished in American states.76

During the late 1950s the denial of voting rights came under heavy attack from a broad alliance of groups. These included among others the National Conference on Uniform State Laws, the American Law Institute, the National Probation and Parole Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the President's Commission on Law Enforcement and the Administration of Justice.77 Their goal was to limit all collateral consequences of convictions on ex-offenders. Together with a substantial number of members of Congress, these groups viewed such deprivations as contrary to the then-dominant penological goals of rehabilitation and offender reintegration. In their eyes, disenfranchisement excluded offenders from society and thus increased the likelihood of recidivism.

71. Under English law, attainted persons could not retain, inherit, or pass an estate to their heirs. See BLACK'S LAW DICTIONARY 311 (5th ed. 1979) (defining "corruption of blood").
74. See Itzkowitz & Oldak, supra note 72, at 726.
75. See U.S. CONST. art. III, § 3, cl. 2.
76. See Demleitner, supra note 6, at 79.
The movement to limit collateral sentencing consequences was not merely national in scope. Rather, it was part of an international reformation of criminal laws motivated by beliefs in the rehabilitation and resocialization of offenders after they had served their sentences. The German and American academic, political and legal argumentation on these issues paralleled each other during those years. The dominant consensus in the United States, however, collapsed during the 1970s when retribution, incapacitation and deterrence began to replace rehabilitation as sentencing goals.

Although the domestic reform movement did not succeed in the passage of national legislation granting ex-offenders voting rights, a number of states modified their exclusionary legislation. Many states now allow for reinstatement of voting rights either automatically upon release or upon request relatively quickly after the end of a sentence. Without those legislative changes, the number of individuals barred from voting would constitute an even larger percentage of eligible voters. However, denial of the right to vote lives on in many states following automatically upon a criminal conviction and precluding millions of potential voters from exercising the franchise.

B. Felon disenfranchisement today

In the vast majority of states any sentence of imprisonment implies a loss of the franchise at least during the time of incarceration. In comparison, the voting rights of released of-


79. See Itzkowitz & Oldak, supra note 72, at 755-57. Even though a number of states, such as California and New York, gained favorable court decisions upholding their broad disenfranchisement statutes, their respective legislatures subsequently narrowed the provisions dramatically.


Currently, only Maine, Massachusetts and Vermont do not exclude prison inmates from voting. In New Hampshire, a trial court has struck down the disenfranchisement of inmates under state constitutional provisions. However, the state supreme court has not yet rendered a final decision on the issue. See id. Utah, on the other hand, recently moved to disenfranchise its inmates. See id. In response to inmates' attempts to form a political action committee, Massachusetts is currently considering a constitutional amendment to bring about the same result. See id.
Individuals released from confinement but burdened by the denial of political rights, many of the arguments put forth can also be extended to incarcerated offenders. Correction officials have traditionally justified inmate disenfranchisement with practical concerns, such as the arrangement of voting booths in prisons and the potential impact of the inmate vote in local elections, especially in rural areas. Any pragmatic justifications for denying those incarcerated the right to vote, however, should be subject to serious scrutiny since Germany, like many other countries, allows, enables, and even encourages prisoners to vote. The same, of course, holds true for the three U.S. states which currently grant the franchise to prison inmates.

Even South Africa has recently joined the group of countries (and U.S. states) which allow inmates the right to participate in the democratic process. In a decision rendered in the spring of 1999, the South African Constitutional Court rejected the denial of voting rights to prison inmates absent passage of a generally applicable statute. See August v. Electoral Comm'n, 1999 (8) SALR 1 (CC). The interim South African Constitution had explicitly permitted the disqualification of those imprisoned for specified serious offences, which were statutorily defined as "(i) [m]urder, robbery with aggravating circumstances and rape; or (ii) any attempt to commit [such an] offence." Id. at 2. The current Constitution no longer provides for such disqualifications, and neither does the Electoral Act. See id. at 3-4. The Constitutional Court, therefore, held that all prison inmates must be permitted to cast their ballot in elections unless Parliament enacts a generally applicable statute to the contrary.

81. See OFFICE OF THE PARDON ATTORNEY, supra note 80, app. A.
82. See id. at 126.
83. In this respect any automatic collateral consequence can be likened to a mandatory minimum penalty which requires the judge to impose a (minimum) sentence once an offender is found guilty of the requisite statutory violation. With prosecutorial assistance, however, judges may be able to avoid mandatory minimum sentences if they consider them unjust in the individual case. For an empirical discussion of substantial assistance motions which allow federal judges to sentence an offender below the mandatory minimum, see generally Linda Drazga Maxfield & John H. Kramer, Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice, 11 FED. SENTENCING REP. 6 (1998).
it is deemed an unrelated administrative consequence, akin to the loss of a driver's license or an occupational license. 84

Many states reinstate voting rights either automatically upon release or relatively quickly after the end of a sentence. 85 New York, for example, restricts an ex-offender's voting rights only as long as he or she is on parole or imprisoned upon expiration of his or her maximum sentence. 86

In contrast to the automatic restoration of voting rights, some states permit ex-offenders to petition to have their names entered on the roll. Such restoration of rights may occur either through a judicial or an administrative proceeding or through executive clemency. California, for example, grants offenders the opportunity to have their convictions set aside upon successful completion of probation. 87 Other states have similar procedures that allow a court to restore an ex-offender's civil rights upon petition. 88

Alternatively, voting rights may be restored through an executive pardon. 89 Pardons, however, are generally awarded infrequently and only for relatively minor offenses committed many years in the past. 90 In Virginia, for example, which has

84. See generally Koon v. United States, 518 U.S. 81, 110 (1996) (finding that collateral employment consequences did not merit downward departure under the federal sentencing guidelines because they were already considered by the guideline provision under which the offenders were sentenced).

85. See Itzkowitz & Oldak, supra note 72, at 755-57.


87. See Office of the Pardon Attorney, supra note 80, at 31.

88. See, e.g., id. at 129-30 (restoring an offender's civil rights upon expungement of his record by the court of conviction in Utah); id. at 136 (restoring an offender's civil rights upon final discharge issued by the sentencing court in Washington).

89. See Murray, supra note 86, at 15 (using New York as an example of a state where voting rights may be restored by executive pardon).

over 200,000 disenfranchised ex-offenders, the governor par-
doned 404 of them in 1996 and 1997.\textsuperscript{91} Therefore, pardons are
not generally an effective means of restoring voting rights. Moreover, in a num-
ber of states the governors lack the power to pardon federal offenders.\textsuperscript{92} This requires those felons to receive a presidential pardon prior to restoration of their civil and po-
litical rights unless a state judicial or administrative process is available to them.\textsuperscript{93} For these reasons pardons have a numeri-
cally negligible effect on the restoration of voting rights. In ad-
dition, not all ex-offenders are aware of the possibility of peti-
tioning for a pardon, and many may shy away from the protracted process. Finally, pardons are part of the political process from which the well-connected may benefit dispro-
portionately.\textsuperscript{94}

C. JUSTIFYING DISENFRANCHISEMENT

Even though denial of the franchise constitutes a substan-
tial restriction on political rights in a democratic polity, justifi-
cations for disenfranchisement have been rare.\textsuperscript{95} Most justifi-
cations have been tied to the dominant sentencing philosophy. When rehabilitation was deemed the goal of sentencing, many states abolished their disenfranchisement provisions because

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\textsuperscript{91} Noonan, 906 F.2d 952, 960 (3d Cir. 1990) (holding that a presidential pardon does not entitle the recipient to expunction of all court records relating to his conviction); KATHLEEN DEAN MOORE, PARDONS 83 (1989) ("[A] presidential pardon does not, in itself, restore any of the civil or professional rights lost as a result of a criminal conviction."); Daniel T. Kobil, The Quality of Mercy Strained: Wrestling the Pardoning Power from the King, 69 TEx. L. REV. 569, 633 n.367 (1991).


93. See OFFICE OF THE PARDON ATTORNEY, supra note 80, app. A.

94. See id. at 2-3.

95. See, e.g., Shapiro, supra note 7, at 560 (discussing attempts by states to justify disenfranchisement in the name of state interest); see also Dillenburg v. Kramer, 469 F.2d 1222, 1224 (9th Cir. 1972) (recognizing the difficulty in defining a justifiable state interest for disenfranchisement).
they were viewed as impeding rehabilitation. With the rise in retributive, incapacitative and deterrent goals, different types of collateral sentencing consequences again have become an integral part of sanctioning offenders even though frequently empirical support for their existence and retention is missing. States tend to defend disenfranchisement by arguing that it preserves the “purity of the ballot box.”

1. "Purity of the Ballot Box"

Independent of their offense of conviction, ex-offenders are assumed either to vote in an anti-democratic and anti-rule of law manner or to engage in election fraud. These assumptions about all ex-offenders allow states to deny them voting rights automatically rather than upon case-specific judicial or administrative findings, as in Germany. However, the precepts underlying disenfranchisement do not hold up to scrutiny.

The claim that ex-offenders vote in an anti-democratic manner is largely based on the fear that they would elect pro-offender judges and district attorneys. Although this assump-

96. Even though ex-offenders are still kept from the voting booth in many states, they are more likely to be on the roll than they were in 1950. Rehabilitation, the premier sentencing goal during the 1960s, mandated the abolition of collateral consequences that inhibited the societal reintegration of ex-offenders. With the demise of rehabilitation as a goal of punishment, the pressure to abandon collateral sentencing consequences also evaporated. See supra notes 77-79 and accompanying text.

97. Another argument occasionally put forth to support disenfranchisement is based on Lockean social contract theory. The argument assumes that people who break the law authorize society to remove them from further participation in the political process. See Harvey, supra note 7, at 1169-70. However, that claim fails to rationalize and legitimate the cause and extent of such exclusion. See id. at 1170.

98. See, e.g., Note, supra note 7, at 1302-03; Shapiro, supra note 7, at 561.

99. See, e.g., Green v. Board of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967). Without justification, Judge Friendly noted in his panel opinion that: [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives, who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases. This is especially so when account is taken of the heavy incidence of recidivism and the prevalence of organized crime. A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously so as anything can be.

Id. (emphasis added) (citation omitted).

In addition to the tangible concern about corruption of the electoral process, Professor Fletcher also points to a mystical aspect of the argument—the
tion discriminates against offenders based on political convictions ascribed to them, courts have upheld such content-based discrimination even though the Voting Rights Act of 1965 prohibits the exclusion of voters because of their likely voting pattern. The idea that all ex-offenders will vote as a coherent group, driven by an identical anti-rule of law agenda, plays on the public’s fear that ex-offenders will cast their ballots as a bloc, united solely by their background as offenders. This notion is based on the larger concept, which dominates modern penology, that individuals can be classified into groups based on the risk they presumably pose to society. Based on that assessment, certain security measures can be applied to all members of a group that is deemed high-risk. This argument, if continued to its logical conclusion, provides the basis for restricting the speech rights of ex-offenders, because they could counsel voters.

Such restrictions on argumentation and voting, however, are antithetical to a democratic state. A hallmark of democracy is that the state is constantly re-inventing itself through the input of voters. Excluding ex-offenders from the franchise deprives a vast segment of the population, which has had an experience that sets them apart, of the right and the opportunity to influence the existing system, should they wish to do so, in the primary way democratic societies recognize—through the ballot-box. It also makes it impossible for ex-offenders to display their democratic credentials.

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3. "Voting is about expressing biases, loyalties, commitments, and personal values." Fletcher, supra note 99, at 1906.

4. "Excluding from the electorate those who have felt the sting of the criminal law obviously skews the politics of criminal justice toward one side of the debate." Id.
States may also exclude ex-offenders from the ballot box based on an alleged conflict of interest. In states where judges and prosecutors are elected, they may experience a conflict of interest in prosecuting and sentencing offenders. However, that is most likely an issue only in cases involving powerful and well-connected defendants who have supported political campaigns financially. Moreover, judges may encounter such conflicts of interest in civil litigation as well, and civil plaintiffs and defendants are not excluded from voting in judicial elections.

An additional justification for disenfranchisement is that ex-offenders are likely to commit election fraud. This fear is an overbroad justification for denying ex-offenders voting rights. Only a small number of all offenders are convicted of offenses connected to election fraud. While even that group is presumably unlikely to constitute an ongoing threat to the integrity of elections, there is no empirical basis for assuming that all offenders are more likely to engage in election fraud than the rest of the population. The fear-of-election-fraud justification is also underinclusive because in some states that permanently exclude offenders from the ballot, a number of election offenses are grouped as misdemeanors and therefore do not lead to disenfranchisement.

2. Judicial Approval of "Purity of the Ballot Box"

Despite the tenuousness of these arguments, the United States Supreme Court has implicitly adopted them as indicative of a rational exercise of state power. Based on an analysis of the express language in Section 2 of the Fourteenth Amendment and the historical situation at the time of its passage, the Court held that state laws that permanently disenfranchise felons do not run afoul of the Equal Protection Clause. It found that the disenfranchisement of felons

105. Justice Marshall discusses these arguments in his dissenting opinion in Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting). His additional argument that the state has criminalized voting fraud and has systems in place to detect and prosecute it, see id. at 79-80, denies the need and the rationale for all measures that treat ex-offenders differently than other voters.
106. See id. at 79.
107. See id. at 56 (denying equal protection challenge to ex-offender disenfranchisement provision).
108. See id. at 41-56. The majority's reading of Section 2 has been harshly attacked. See Shapiro, supra note 7, at 546 nn.50-51 (citing numerous com-
should be tested under a rational basis standard because the language in Section 2 permits states to disenfranchise those convicted of rebellion or "other crimes."\textsuperscript{109} The Court's focus on the text and the historical situation surrounding passage of the Fourteenth Amendment prevented it from analyzing the state's rationale in any detail.\textsuperscript{110}

In recent years, lower courts have applied a more exacting equal protection test to certain state provisions disenfranchising ex-offenders. In \textit{McLaughlin v. City of Canton},\textsuperscript{111} a federal district court held that the state failed to provide a compelling interest justifying its decision to disenfranchise a group of potential electors solely because they were convicted of misdemeanors.\textsuperscript{112} The court applied the compelling interest test because Section 2 only covers felonies, not misdemeanors.\textsuperscript{113}

Despite such minor victories, the Supreme Court's decision to analyze ex-offender disenfranchisement generally using a lower level of scrutiny under the Equal Protection Clause symbolizes that voting rights are a fundamental right of citizens only as long as they are not convicted felons.

D. EFFECTS OF DISENFRANCHISEMENT

1. Disenfranchisement Creates Social and Civic Outcasts

The disenfranchisement of a large number of ex-offenders is symbolic of the sentencing system in the United States. Denial of voting rights follows automatically upon conviction and continues to affect the ex-offender's life long after his maximum sentence expires. Such an excessive collateral consequence, e-
especially when combined with the magnitude and frequency of prison sentences in the United States, belies the lip service paid to retribution as the primary punishment goal. Permanent incapacitation, whether physically inside or outside society, appears as the sole goal—with incapacitation not for preventive purposes but solely to exclude an offender from society. Especially with respect to political rights, the words of the court in *People v. Russell* still ring true today: an offender is “an alien in his own country, and worse.”

Denial of voting rights creates permanent outcasts from society, persons internally exiled who are left without any opportunity ever to regain their full status as citizens. In that respect such a collateral consequence continues the tradition of exiling offenders from society. It merely replaces the primary penalties of the past—transportation, banishment and deprivation of citizenship.

Historically, civil death statutes judged not only the offense but also the offender. Their modern day remnant continues to deny the offender’s ability and opportunity to change and to reintegrate herself. It labels the offender permanently and irredeemably deviant. Therefore, disenfranchisement is likely to entail a negative impact on the offender’s resocialization, especially when combined with other exclusionary measures, such as employment restrictions and private discrimination. Although the latter may more directly affect ex-offenders in their daily lives, denial of voting rights is crucial because of its symbolic meaning and its impact on democratic rights of participation. The claim that ex-offender disenfranchisement is a non-issue since most ex-offenders would not vote

114. See Fletcher, supra note 99, at 1907.
115. While incapacitation is generally associated with imprisonment, an 1878 English bill used the term to prohibit convicted offenders from voting. See JOHN S. JAMES, III, STROUD’S JUDICIAL DICTIONARY 1329 (4th ed. 1973). “The only rationale for disenfranchisement that makes sense is that felons, by virtue of their crime and their conviction, forfeit their right to participate in the political process.” Fletcher, supra note 99, at 1899.
116. 91 N.E. 1075, 1075-76 (Ill. 1910).
117. See generally Demleitner, supra note 6; Fletcher, supra note 99; Ortiz, supra note 110, at 731; Note, supra note 7.
118. See Esser, supra note 22, at 89.
119. See Note, supra note 7, at 1310-11.
120. See Fletcher, supra note 99, at 1897. How an ex-offender experiences such exclusionary mechanisms will depend on individual sensibilities. However, their recurrence, permanence and cumulative character are likely to impact almost every ex-offender.
even if permitted to do so, therefore, misses the mark independent of its empirical accuracy. Democratic states do not have the right to force voters to cast ballots but rather are obliged to enable them to cast their ballot. Granting them the legal right to vote is the most elementary prerequisite for full participation and inclusion in a democracy.

2. Disenfranchisement Discriminates Against African-American Ex-Offenders

The racially-tainted passage of some disenfranchisement provisions and the disproportionate effect of voting restrictions on African-Americans exert a negative impact on American society. Legislation denying ex-offenders the right to vote has been part of American law since the founding of this country. However, the legal situation in the most exclusionary states, many of which are in the South, is largely a consequence of Reconstruction and the passage of the Fifteenth Amendment which granted former slaves the right to vote. Upon adoption of the Reconstruction amendments, Southern states developed means to disenfranchise blacks without violating the language of the Fourteenth Amendment and losing their proportionate representation in Congress. Among other methods of excluding blacks from the ballot box, such as literacy tests and grandfather clauses, the Southern states passed legislation barring those with certain criminal convictions from voting. Such exclusions were constitutionally sanctioned because the Fourteenth Amendment in Section 2 explicitly permitted the states to exclude those convicted "for participation in rebellion, or other crimes" from voting. However, the Southern states carefully selected the offenses which were to trigger an exclusion and focused on those they believed to be more widely committed by blacks than whites. That explains why, for example, until 1972 the state of Mississippi did not automatically exclude convicted rapists from the franchise—rape was considered a crime committed equally by black and white men.

121. U.S. CONST. art. XIV, § 2.
123. See Shapiro, supra note 7, at 549.
Convicted bigamists, however, were automatically excluded because bigamy was deemed a "black crime."124

Legal challenges based on the racially-tainted origin of some disenfranchisement provisions have succeeded. For example, in Hunter v. Underwood, the Supreme Court upheld an equal protection challenge to a provision in the Alabama Constitution which barred certain ex-offenders from the ballot-box.125 The Court found that Alabama's constitutional commission had passed the particular section, which appeared to be racially neutral on its face, with the intent to discriminate against African-Americans.126 The provision focused on crimes the constitutional commission considered more likely to be committed by blacks which therefore would operate to block more blacks than whites from voting.127 After Hunter v. Underwood, some states forestalled legal action against their disenfranchisement regime by enlarging, not narrowing or abolishing, their exclusion grounds. Such changes had the perverse effect of causing more ex-offenders to be denied voting rights.

In light of the high percentage of African-American men with criminal convictions, exclusionary legislation continues to deny voting rights to blacks in disproportionate numbers.128 Therefore, recent attacks on the exclusion of ex-offenders from the ballot box have centered on the racially discriminatory impact of such legislation.129 However, courts have not been very receptive to such challenges, which are being brought either under the Fourteenth Amendment or the Voting Rights Act of 1965.130 Furthermore, congressional attempts to enact legisla-

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Immediately after the Civil War and the liberation of slaves, blacks were probably more likely than whites to engage in bigamy, as legally defined. By allowing the sale of persons, slavery had severely upset family structures, including marriages. Often slaves, whose spouses had been sold, remarried without obtaining a divorce or confirming the death of their former spouse. See Katherine Franke, Becoming a Citizen: Reconstruction Era Regulation of African American Marriages, 11 YALE J.L. & HUMAN. 251, 282-84, 305 (1999).


126. See id. at 229-32.

127. See id. at 232.

128. See FELLNER & MAUER, supra note 4, at 8-11; Hench, supra note 122, at 765-68; Harvey, supra note 7, at 1149-59.

129. For litigation strategy involving the Voting Rights Act, see generally Harvey, supra note 7; Shapiro, supra note 7.

130. See Baker v. Pataki, 85 F.3d 919, 928-32 (2d Cir. 1996).
tion that counteracts the effects of exclusionary legislation have also proven unsuccessful. For example, a bill introduced in Congress in the mid-1990s, which aimed at restoring voting rights in federal elections to all ex-convicts who have been released from prison failed. In addition to constitutional concerns about whether a national law can override state voting requirements, members of Congress might have found it difficult to vote for such legislation in an era when "toughness on crime" is being extolled. However, driven by concerns about racial disparity, in recent months Congress held hearings on a proposed bill H.R. 906, the Civic Participation and Rehabilitation Act of 1999, which would eliminate disenfranchisement provisions for federal elections.

Despite the vicious impact of the denial of voting rights, opposition in Congress and the legal profession against such laws, and the lack of a persuasive justification in their favor, disenfranchisement provisions have survived so far. However, because of the impact of disenfranchisement on the political community and on African-Americans in particular, we must develop an alternative model that allows us to accommodate some of the realistic concerns underlying the "purity of the ballot box" argument with the promise of universal and equal suffrage. The German legal system presents an alternative that provides a useful starting point for a comprehensive attack.

131. See Voting Rights of Former Offenders Act, H.R. 568, 105th Cong. (1997); H.R. 3028, 104th Cong. (1996); see also Shapiro, supra note 70, at 60.


134. Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

  (b) To vote . . . at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, 179. The United States ratified the ICCPR on June 8, 1992. See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 41-42 (2d ed. 1996) (outlining the reservations, understandings and declarations the U.S. Senate added in consenting to ratification of the Treaty).
and sets out a potential framework for a more satisfactory approach to disenfranchisement. Unlike the modifications presented in the 1960s, which were based on rehabilitation as the sole aim, the changes suggested here are grounded in concepts of retribution and prevention as well as rehabilitation.

III. A COMPARATIVE CRITIQUE: OUTDATED, OUTMODED AND IRRATIONAL

The coverage of offenses, the length of exclusions, and the rationale provided for them indicate that disenfranchisement laws in the United States are outdated and unjustified remnants of a bygone era. The comparison and contrast between the United States and German disenfranchisement provisions and their alleged purposes are indicative of the way American society conceives of and treats offenders. At most, the purposes put forth in the United States to defend the continued existence of the disenfranchisement of ex-offenders merit a limited exclusion from the ballot box, akin to the German model.

A. THE COVERAGE OF DISENFRANCHISEMENT PROVISIONS AND THEIR MODE OF IMPOSITION

While German law allows an offender to be deprived of voting rights only in very limited cases and with explicit judicial justification, American law casts a broad net. The exclusion from voting rights often applies to all those convicted of felonies, a large category in most states, those guilty of "infamous crimes," or those convicted of certain enumerated offenses, which also tend to encompass relatively minor offenses that would not even be categorized as crimes (Verbrechen) in Germany.

In the United States, the list of offenses that mandate denial of voting rights developed randomly. Some of the crimes indicate that concerns of the day drove the evolution of the index. In the congressional debates surrounding ratification of the Fourteenth Amendment, legislators made reference to the need for banning pirates from the franchise.135 Based on historical experience, pirates were perceived as a threat to the existence of states and their territorial integrity.136 In response

136. By the mid-nineteenth century, the European powers united against privateering and piracy. "The maxim that pirata est hostice humani generis (a
to the alleged threat emanating from Mormon "immorality," Congress and a number of states included polygamy as an offense that led to mandatory disenfranchisement.\footnote{See Davis v. Beason, 133 U.S. 333, 348 (1890) (upholding Idaho statute that denies voting rights to any individual practicing or counseling polygamy or bigamy); Murphy v. Ramsey, 114 U.S. 15, 39-45 (1885) (upholding 1882 congressional act that bars any man or woman practicing polygamy or bigamy from voting).} Not only was polygamy viewed as morally odious, its practice by members of the Mormon Church was also deemed an attack on prevailing morality, and therefore on the foundations of the state as a whole.\footnote{See Otsuka v. Hite, 414 P.2d 412, 419 (Cal. 1966) (discussing Davis, 133 U.S. 333, and Murphy, 114 U.S. 15).}

In the twentieth century, the addition of an array of new offenses that are classified as felonies has broadened the scope of disenfranchisement provisions. Many of these new offenses are not "of odious character," but are an outgrowth of the regulatory state.\footnote{In discussing the term "felony at common law," the Otsuka court pointed to its historical contingency. Typical felonies at common law were "murder, manslaughter, mayhem, rape, arson, robbery, burglary, and larceny." Otsuka, 414 P.2d at 421 n.10.} While the scope of disenfranchisement provisions has been broadened through this process, simultaneously the franchise has been gradually expanded. At the time the Fourteenth Amendment was passed, primarily white property-holding men over the age of twenty-one were permitted to vote. In the twentieth century, women and those between eighteen and twenty-one gained the legal right to vote. With the prohibition on measures that inhibited African-Americans and other minorities from casting their ballot, the franchise has been opened to every adult citizen. At the same time, however, the increase in the number of convicted felons has also widened the pool of individuals who are effectively banned from voting.

In contrast to Germany, disenfranchisement in the United States occurs automatically and is frequently only dependent on the offense that is the basis of conviction rather than the penalty imposed. The inflexibility surrounding the deprivation of voting rights can be likened to mandatory minimum sentencing laws, which apply upon conviction of a specific offense, independent of the circumstances surrounding the commission

pirate is an enemy of the human race) had seeped from the treatises on international law into the political psyches of governments." Ethan A. Nadelman, Global Prohibition Regimes: The Evaluation of Norms in International Society, reprinted in TRANSNATIONAL CRIME 479, 490 (Nikos Passas ed., 1999).

137. See Davis v. Beason, 133 U.S. 333, 348 (1890) (upholding Idaho statute that denies voting rights to any individual practicing or counseling polygamy or bigamy); Murphy v. Ramsey, 114 U.S. 15, 39-45 (1885) (upholding an 1882 congressional act that bars any man or woman practicing polygamy or bigamy from voting).

of the crime or the background of the offender. However, even mandatory minimum sentences are imposed in open court by the trial judge while disenfranchisement, which is mandatory and automatic, requires neither judicial explanation nor mention. "Neither the judge nor the prosecutor usually feels called upon to go into specific, individual consequences of conviction and sentencing; they rely on counsel to relay these details to his client and to his client's family."\(^{140}\) In most cases, defense counsel does not live up to this expectation and does not mention all the consequences of a criminal conviction when a client enters into a plea bargain.

Because of the mode of imposition and the patchwork of disenfranchisement provisions in the United States, the players in the criminal justice system do not deem the loss of voting rights part of the sentence in the way a fine or community sanction would be viewed. This approach differs dramatically from the German procedure where Nebenstrafen, such as the loss of voting rights, must be factored into the overall sentence. In light of the importance of the good of which the offender is being deprived, this is the more rational and equitable approach.

B. PERMANENT VERSUS TEMPORARY EXCLUSION

The length of time for which an ex-offender may lose his voting rights symbolizes the difference in attitude towards offenders in both countries. The meaning of time is socially constructed, and whoever structures time within society exercises power.\(^{141}\) That power is no longer held on the local or the village level where time was once regulated. Today, time is structured on the state level.\(^{142}\) In fast-paced societies, such as Germany and the United States, where time is frequently compared to money, long-term deprivations of rights must be viewed as more punitive and dishonorable than in a slower-paced, agriculturally-based society where time may not be conceptualized as having such preeminent value.

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140. ARTHUR W. CAMPBELL, LAW OF SENTENCING 406 (2d ed. 1991) (quoting DONALD J. NEUMAN, CONVICTION: A DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 209 (1966)).


Consequently, in the sanctioning arena the state can use time as an inclusionary or exclusionary mechanism. The latter occurs if the judicial system, as arm of the state, permanently restricts the freedom of offenders, thus denying them any prospect of reintegration. Alternatively, by imposing short exclusionary sanctions, the state expresses its confidence in eventual reintegration and rehabilitation and invites the offender back into a productive and fully integrated life in the community.

Even though the German disenfranchisement provision is explicitly designed for infrequent use, it contains a relatively short maximum exclusionary period of five years which can be judicially reduced to one-half of that time. Therefore, even offenders who are perceived as a threat to the state are viewed as redeemable and reintegratable. The United States, on the other hand, seems to strive for long-term exclusion of offenders from society and the political process. Permanent exclusion from political participation seems only justifiable, however, if it is based on solid penological rationales, such as retribution, incapacitation, deterrence or denunciation. The next section will explore the justifications that underlie disenfranchisement in Germany and the United States.

C. POTENTIAL PENOLOGICAL OBJECTIVES OF DISENFRANCHISEMENT

The broad coverage of disenfranchisement provisions in the United States, their automatic imposition, and their permanence distinguish them dramatically from German law. Such distinctions may be tracable to fundamentally different objectives of the two countries' provisions. Should that not be the case, however, the substantive and procedural differences between the provisions may not be defensible. If no "compelling or rational policy interest in denying former felons the right to vote" is demonstrable, the provisions must fall in their entirety. If some purpose is discernible, the provisions should be narrowly tailored to fulfill that goal.

The existence of a valid objective of section 45(5) has been challenged in Germany. Much of the debate centers around the issue whether disenfranchisement constitutes a collateral sen-

143. See § 45b StGB; see also SCHÖNKE & SCHRÖDER, supra note 47, at 634.
Felon disenfranchisement (Strafnebenfolge) or a collateral sanction (Nebenstrafe). Although the distinction is fleeting in German law, section 45(5) is generally classified as a collateral sanction.\textsuperscript{145} This classification is important because only collateral sanctions are subject to the general sentencing guidelines outlined in section 46 StGB.\textsuperscript{146} Most importantly, section 46 focuses on the proportionality between the sanction imposed and the offender's guilt. The imposition of collateral consequences, on the other hand, does not depend on a finding of the offender's guilt but rather can serve solely preventive goals.\textsuperscript{147} The debate within German law over the classification of disenfranchisement does not have to be resolved in this context. Both approaches to the denial of voting rights are viable but require different justifications.

In contrast to this discussion in German law, denial of the franchise in the United States remains undertheorized and unjustified as a sanction. Courts have developed multiple accounts defending disenfranchisement provisions without providing a coherent framework. Some judicial decisions characterize disenfranchisement as a regulatory determination of voter qualifications; others consider it a civil sanction; a few deem it a criminal penalty.

In \textit{Murphy v. Ramsey}, for example, the Supreme Court upheld the denial of the vote to practicing polygamists or bigamists.\textsuperscript{148} The Court deemed the statute non-penal, since it did not require a conviction as prerequisite to its application but rather was triggered when someone had the status of having multiple living spouses. Therefore, it characterized the statute as merely setting out a necessary qualification to vote.\textsuperscript{149} In \textit{Trop v. Dulles}, the Supreme Court in dicta again characterized the loss of voting rights "as a nonpenal exercise of the power to regulate the franchise."\textsuperscript{150} The plurality's argument that "the purpose of [such a statute] is to designate a reasonable ground

\begin{footnotesize}
\begin{enumerate}
\item[145.] See \textit{SCHWARZ}, supra note 13, at 45.
\item[146.] See \textit{id.} at 47.
\item[147.] See \textit{id.}.
\item[148.] 114 U.S. 15, 39-45 (1885).
\item[149.] See \textit{id.} at 42-44.
\item[150.] 356 U.S. 86, 97 (1958) (plurality opinion) (holding denationalization of native-born U.S. citizen after conviction for desertion in wartime violates the Eighth Amendment); \textit{see also} \textit{Hawker v. New York}, 170 U.S. 189, 197 (1898) (holding that denial of medical license did not amount to punishment but rather "the conviction of a felony is evidence of the unfitness of such persons as a class" (quoting \textit{Foster v. Police Comm'rs}, 102 Cal. 483, 492 (1894))).
\end{enumerate}
\end{footnotesize}
of eligibility for voting," however, lacks explanatory power in light of its finding that denationalization is a penal sanction. In an Eighth Amendment challenge to a state law denying voting rights to ex-offenders, the Second Circuit deemed such disenfranchisement a civil sanction. Because disenfranchisement, therefore, does not constitute punishment, the court concluded that the Cruel and Unusual Punishment Clause does not cover it. Other courts, however, have either held disenfranchisement to be punishment or have implied a proportionality analysis which generally applies only to criminal punishment.

In the United States and Germany, denial of the franchise is best characterized as partial punishment. The primary justifications put forth for denial of the franchise to ex-offenders in Germany and the United States appear identical. Reinhaltung des öffentlichen Lebens and "purity of the ballot box" seem to share similar attributes since both aim at guaranteeing the purity of public life. What does this mean, though?

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152. See Green v. Board of Elections, 380 F.2d 445, 450 (2d Cir. 1967).
153. See id. at 451-52. Alternatively, the court held that the founding fathers did not consider disenfranchisement to be cruel and unusual punishment since it existed when the Eighth Amendment was passed. See id. In addition, the court viewed the large number of states with such provisions as indicative of the constitutionality of the ban on voting rights for ex-offenders. See id.
154. See Otsuka v. Hite, 414 P.2d 412, 416 (Cal. 1966) (holding that disqualification from the franchise is "an additional punishment for the crime"). The Supreme Court has repeatedly been confronted with the question of whether a particular sanction constitutes punishment. See, e.g., California Dep't of Corrections v. Morales, 514 U.S. 499, 514 (1995) (holding that a California statute which amends parole procedures did not increase the defendant's punishment); Department of Revenue v. Kurth Ranch, 511 U.S. 767, 779-80 (1994) (examining whether Montana's drug tax is punishment or revenue raising); United States v. Ward, 448 U.S. 242, 251 (1980) (determining that the monetary penalty imposed by the Federal Water Pollution Control Act is not punitive); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963) (reviewing whether statutes that take away United States citizenship for leaving the United States during a national emergency constitute punishment). For a discussion of the civil-criminal distinction, see, for example, Mary M. Chen, Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Transcending and Understanding the Criminal-Civil Law Distinction, 42 HASTINGS L.J. 1325 (1991); Susan R. Klein, Redrawing the Criminal-Civil Boundary, 2 BUFF. CRIM. L. REV. 679 (1999).
155. See Note, The Need for Reform of Ex-Felon Disenfranchisement Laws, 83 YALE L.J. 580, 585 n.28 (1974) ("This is a particularly plausible interpretation for state laws which are contained in the 'penal' sections of their codes . . . ").
Because of international and domestic constraints on the selection of "virtuous" voters in both countries, the argument cannot imply that democratic states may choose only those citizens as voters who live up to a certain moral or educational standard. Rather, the "purity of the ballot box" argument connotes punishment-related goals.\(^{156}\) Therefore, traditional penological goals—rehabilitation, retribution, deterrence, denunciation, incapacitation—may illuminate the meaning of the propounded standards.\(^{157}\)

1. Rehabilitation and Reintegration

There appears to be agreement in Germany and the United States that the deprivation of voting rights does not rehabilitate offenders. The conclusion both countries draw from this insight, however, differs dramatically. While Germany limits the exclusionary sanction to a few exceptional situations, the United States appears to have discarded the goal of rehabilitation entirely.\(^{158}\)

Rather than being a goal of the denial of voting rights, disenfranchisement provisions may be designed so as to facilitate or impede rehabilitation. The limited coverage of section 45(5) in Germany, for example, allows for the quick reintegration of those convicted offenders who were not denied the franchise. Moreover, even the small number of those excluded from political rights will regain them after a relatively short period of time. Finally, the German law explicitly allows for shortening the period of disenfranchisement upon a showing of rehabilitation. In contrast, American law appears to be aimed at almost

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156. For a different normative analysis, see Andrew von Hirsch & Martin Wasik, Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework, 56 CAMBRIDGE L.J. 599, 601 (1997). The authors treat civil disqualifications, including denial of the franchise, as civil measures designed to manage risk. See id.

157. For potential issues arising under the U.S. Constitution from the classification of disenfranchisement as punishment, see generally Reback, supra note 110.

158. See Thomas Weigend, "Neoklassizismus"—ein transatlantisches Missverständnis, 94 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSGWISSENSCHAFT (ZSTW) 801, 802 (1982). Despite appearances, this is not accurate. Drug courts, for example, indicate that rehabilitation continues to exist as a goal. However, retributive and deterrent concepts have modified rehabilitation dramatically. See, e.g., Sue Rex, A New Form of Rehabilitation?, in PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 34, 34-41 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998) [hereinafter PRINCIPLED SENTENCING].
the opposite effect. It makes the rehabilitation of a large num-
ber of offenders largely illusory and holds out to them only a
limited possibility of ever regaining voting rights. Therefore,
disenfranchisement cannot even operate as a "stick," a means
of specific deterrence.

The imposition of limitations or the abolition of disenfran-
chisement based on rehabilitative concerns alone might be con-
vincing if rehabilitation continued to be a preeminent sentenc-
ing goal in the United States.159 Today, however, the potential
attainment of penological aims other than rehabilitation is
more persuasive in bringing about a decline in disenfranchise-
ment provisions.

2. Stigmatization and Denunciation

In 1957 the International Congress of Criminal Law de-
manded the abolition of collateral consequences aimed only at
degrading the offender.160 Loss of civil rights was among the
specific examples mentioned.161 In recent years, however,
stigmatization and shaming have been increasingly advocated
as sentencing goals.162 Denial of the franchise may accomplish
these goals because it creates feelings of guilt within the of-
fender.163 Such emotions, however, may lead to the offender's
further exclusion from society or at least an inability to reinte-
grate.164

On the other hand, stigma may sometimes be positive be-
cause it can operate as a deterrent.165 However, it can fulfill

159. For an account of the decline of the rehabilitative system, see MOORE,
supra note 90, at 66-72.
160. See Mirjan R. Damaska, Adverse Legal Consequences of Conviction
and Their Removal: A Comparative Study, 59 J. CRIM. L., CRIMINOLOGY &
POLICE SCI. 347, 354 (1968).
161. See id.
162. See, e.g., Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U.
CHI. L. REV. 591, 630-52 (1996). Substantial resistance has also developed
against the use of such penalties, however. See generally Toni Massaro,
163. Shame requires an audience; guilt is internal. See Massaro, supra
note 162, at 1900-03. Shaming is also culture dependent. See id. at 1904.
Thus, if offenders belong to a (sub-)culture that does not value voting, they
may not be ashamed. See id. at 1904-05.
164. Denial of the franchise to African-Americans alienated them increas-
ingly from the political and legal system. See, e.g., Neil P. Cohen & Dean Hill
Rivkin, Civil Disabilities: The Forgotten Punishment, 35 FED. PROBATION,
June 1971, at 19, 25.
165. See NIGEL WALKER, SENTENCING—THEORY, LAW AND PRACTICE 426
this function successfully only if the period of stigmatization is limited in time and the stigma is imposed publicly. It will be of value primarily in situations where the individual constitutes a safety risk. The public character of the stigma will deter the offender's involvement in high-risk activity because regulating authorities, including employers, will exclude him preemptively. Although disenfranchisement may operate in this manner in Germany, it is unlikely to have the same effect in the United States. As a hidden process that befalls a large number of citizens, denial of voting rights is unlikely to impose any public stigma.\footnote{166}

This may not have been always true. Historically, the deprivation of the franchise for ex-offenders was instituted at a time when only very few had the right to vote.\footnote{167} The sanction was only used against select individuals, generally property-holding men whose violations of the criminal law may have been viewed as a more serious infringement against the state since they were the primary political and economic beneficiaries of the existing regime. The additional penalty fit into the framework of just deserts but also constituted a warning to others in equally elevated social positions.\footnote{168} Denial of voting rights denounced the offender and his actions in a particularly stigmatizing and deterrent manner.\footnote{169} This justification, however, no longer applies.

\footnote{166} See Massaro, \textit{supra} note 162, at 1883 (noting that among other prerequisites, for shaming to be effective, "the shaming must be communicated to the group").

\footnote{167} The stigmatizing and deterrent effect of such sanctions was also magnified at that time because most individuals lived in small communities in which all inhabitants were likely to have known the offender or his family. \textit{See} Itzkowitz \& Oldak, \textit{supra} note 72, at 726-27.

\footnote{168} The \textit{mort civile} in France, which declared an offender legally dead, served such deterrent purposes. \textit{See} \textit{WEITHASE, supra} note 17, at 89; \textit{see also Ex-Offenders Voting Rights Act: Hearings on H.R. 9020 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong. 29 (1974) (testimony of the Hon. John R. Dunne, State Senator, State of New York, member, ABA Commission on Correctional Facilities and Services) [hereinafter \textit{Ex-Offenders Voting Rights Act}].

John Locke once noted that "[t]he being rightfully possessed of great power and riches ... is so far from being an excuse [for unlawful oppression], that it is a great aggravation of it ...." \textit{KELLY, supra} note 72, at 240 (quoting \textit{JOHN LOCKE, LEVIATHAN}). Although Locke's remarks applied to misgovernment, they can be extended to cover and justify the additional punishment of the rich and powerful.

\footnote{169} Sutherland and Cressey, for example, list civil death, infamy and the
3. Deterrence

Germany and the United States list deterrence among their sentencing goals. However, because both countries treat denial of the franchise as an additional sanction—supplementing imprisonment in most cases—the added deterrent value of the denial of the franchise is questionable. This holds particularly true for the United States. While German courts will publicly announce a sentence that includes disenfranchisement, the collateral character of the sanction in the United States relegates it to the margins. Since even the existence of the sanction is widely unknown, it cannot be expected to have a general deterrent character. However, greater publicity of disenfranchisement as a sanction and its inclusion in an actual sentencing order may raise its profile and deterrent value. Nevertheless, it is unlikely that the penalty—in either country—would be a powerful deterrent. If the primary sentences threatening the offender—long-term imprisonment by the respective standards of the two countries—do not act as sufficient deterrents, disenfranchisement will not either.

4. Retribution

Retribution has historically served as a justification for collateral sentencing consequences because “those who broke the rules of society were forced to forfeit the rights and privi-


170. See Note, supra note 7, at 1307; cf. Trop v. Dulles, 356 U.S. 86, 112 (1958) (Brennan, J., concurring). But see John P. Reed & Dale Nance, Society Perpetuates the Stigma of a Conviction, 36 FED. PROBATION, June 1972, at 27, 30 (citing a localized study from 1971 showing that “[t]he public has some knowledge of ‘civil disability.’ That knowledge, however, is not particularized.”).

Based on personal conversations with German law faculty, I have concluded that even in Germany knowledge of the existence of disenfranchisement as a sanction is tenuous. This is the case even though section 45 is part of the German Criminal Code.

171. Any general deterrence argument is based on the disputed concept of individuals as rational actors who will assess costs, including potential punishment, and benefits prior to engaging in any (criminal) action.

172. Cf. Trop, 356 U.S. at 112 (Brennan, J., concurring) (“And as a deterrent [denationalization] would appear of little effect, for the offender, if not deterred by thought of the specific penalties of long imprisonment or even death, is not very likely to be swayed from his course by the prospect of expatriation.”).
leges of that society.” 173 Section 45(5) of the German Criminal Code is at least partly built on that notion. It applies only to those offenders who have undermined the foundation of the state by committing acts targeted directly either at its continued existence or at the validity of free elections. 174 The court may only deprive an offender of the franchise if the sanction is proportionate to the offense committed. Moreover, the length of the exclusionary period must be proportionate to the gravity of the offense. 175

In the United States it has become fashionable to emphasize retribution as an important, if not primary, punishment goal. 176 Retribution exacts punishment commensurate to the offense on the offender. Furthermore, it expresses disapproval and revulsion at the crime so as to satisfy emotional and moral needs of justice. 177 Retribution is not only tied to the notion of “just deserts” but also serves a limiting function. In most cases, it cannot therefore be used to justify the disproportionately long or permanent exclusion of an offender from membership in a democratic society. 178 A lasting denial of rights turns the ex-offender into one permanently dishonored rather than forgiven upon serving his penalty. 179 This criticism has even been raised against the much more limited deprivation of voting rights in Germany. 180

The length of disenfranchisement may be only one factor indicating the lack of proportionality of this sanction. In the United States, the categories of “felony” or “infamous crime” include numerous serious and a panoply of less serious offenses. Regardless of their seriousness, all these offenses can lead to the automatic and often permanent ban on voting rights. The

173. Itzkowitz & Oldak, supra note 72, at 726.
174. See, e.g., SCHWARZ, supra note 13, at 49-54 (listing offenses which allow a judge to disenfranchise an offender at sentencing).
175. See FISCHER, supra note 59, at 69-70; SCHWARZ, supra note 13, at 47; TRONDLE & FISCHER, supra note 41, at 289-90.
176. See MOORE, supra note 90, at 72-76.
177. See Massaro, supra note 162, at 1891.
179. See Nelles, supra note 29, at 19.
180. See id.
scope of these categories is too broad to fulfill the proportionality requirement which is part of retributive sanctioning. The same holds true for some of the crimes enumerated in state constitutions as mandating disenfranchisement. For example, the permanent disenfranchisement of a convicted bigamist might be considered excessive.

Courts in the United States have occasionally viewed a denial of the franchise as retributive and judged its severity against the offense committed. In Weems v. United States, for example, the Supreme Court applied a proportionality analysis to strike down a sentence that included a life-long voting ban based on a conviction for the falsification of public documents. Yet the Supreme Court cannot be counted on to establish a proportionality scale even though retributivism requires the scaling of offenses.

If denial of the franchise were viewed as retributive, it would have to be factored into an overall sentence that is proportionate to the offense. In light of its exclusionary character, the sanction would have to be assessed sparingly. Therefore, it might be advisable to impose it only on a select group of offenders whose actions were aimed at undermining the democratic character of the state. For those offenders the deprivation of

181. Denial of the franchise has also been attacked because of its disparate effect on individual offenders. That argument proves too much, however, as it applies to any type of sanction. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (1998) (stating that physique is not "ordinarily relevant" in departing from the guideline range). Some appellate courts have nevertheless upheld downward departures under the Federal Sentencing Guidelines based on the disparate impact of a prison sentence on an offender. See, e.g., Koon v. United States, 518 U.S. 81, 111-12 (1996) (upholding a downward departure for former police officers who would be unusually susceptible to abuse in prison); United States v. Graham, 83 F.3d 1466, 1480-81 (D.C. Cir. 1996) (noting that extreme vulnerability to abuse in prison may justify a downward departure); United States v. Pokuaa, 782 F. Supp. 747, 748 (E.D.N.Y. 1992) (departing downward for a pregnant defendant who would have lost her parental rights otherwise).


183. See Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (holding that a life sentence for a first offender convicted of possession of a large amount of cocaine does not violate the Eighth Amendment's proportionality requirement). The Court focused not only on whether the sentence is "cruel" but on whether it is "cruel and unusual." Id. (emphasis added). Under this test, the denial of voting rights would not pass muster because it was a penalty known at the time the Constitution was signed. For an account of the Rehnquist Court's treatment of excessive sentences, see CHRISTOPHER E. SMITH, THE REHNQUIST COURT AND CRIMINAL PUNISHMENT 39-56 (1997).
democratic voting rights could be deemed just, equitable and proportionate to their offense.

Alternatively, the sanction could be imposed on a larger group of lawbreakers, akin to the deprivation of the driver's license of those offenders who are punished not for driving offenses but for other misdeeds. In the United States, Germany and England, this sanction operates as a retributive punishment that restricts the offender's liberty. The Minister of State at the (English) Home Office likened this penalty to a fine or a community service sentence which restricts personal economic liberty and the freedom to spend one's time as one chooses. As a punitive measure, the length of the deprivation must be proportionate to the gravity of the offense committed. A similar approach might be employed with respect to the denial of the franchise which could then be officially deemed a supplemental penalty and would have to be counted as part of the overall punishment assessed. It should be noted, however, that the deprivation of a driver's license as an additional penalty is usually connected to the offense of conviction. Generally, the offender used a car to commit a crime. Analogously, deprivation of the franchise should be applied only when the criminal's action misused the franchise, either directly or indirectly.

Alternatively, one could argue in favor of extending disenfranchisement to all those who abused their privilege of citizenship, i.e., all offenders. This conclusion is of dubious validity, however, because citizenship and the franchise are considered rights while a driving permit is viewed as a privilege. The overall analogy between deprivation of voting rights and drivers' licenses might encounter constitutional difficulties because the values of driving and voting as indicia of citizenship and membership in society differ dramatically. Even though definitions of democracy vary, there is general agreement that at its center are general elections which reflect the will of the elec-

185. See id. at 143 (citing the Minister of State at the Home Office).
186. See, e.g., D.A. THOMAS, PRINCIPLES OF SENTENCING 351 (2d ed. 1979).
187. See, e.g., BGHSt 44, 228 (228-33) (revoking the driver's license of a convicted rapist because the rape was committed in the offender's car).
188. See, e.g., International Covenant on Civil and Political Rights (ICCPR), 999 U.N.T.S. 171, 179.
Doubts about the validity of disenfranchisement counsel more against the use of this sanction at all rather than in favor of its current broad application.

To sum up, denial of the franchise can be viewed as an appropriate retributive sanction but only if it is subject to a stringent proportionality analysis applied with respect to offenses that carry such a penalty and the length of the exclusionary period imposed.

5. Incapacitation, Prevention and Protection of the Public

Because denial of the franchise excludes a large group of ex-offenders from political participation in the United States, its purpose may be incapacitative. The protection of the polls from tampering could be deemed of such preeminent value in a democracy that it deserves powerful protection. In Germany and the United States, disenfranchisement may serve this function because it enables the state to deny voting rights to those who could potentially endanger the integrity of elections.

The denial of voting rights in Germany performs more than an incapacitating and preventive function since the legislation is primarily based on retributive goals. Nevertheless, the argument of the Reinhaltung des öffentlichen Lebens and the generally more restrictive interpretation of freedom of political speech in Germany than in the United States may be indicative of a partially protective function of this provision. However, the restrictive German legislation keeps the number of offenders excluded from the franchise to protect the public interest small. As German law recognizes, voting bans for reasons of public safety may be legitimate only when the offender is convicted of severe voting fraud. Even offenders sentenced in connection with offenses committed by terroristic organizations or traitors generally do not constitute a sufficient threat to elections or democratic principles to justify denying them the franchise on preventive grounds.

On the other hand, even the voting fraud rationale may no longer mandate denial of the franchise. In the United States the occurrences of large-scale fraud at the ballot box have declined dramatically in the wake of civil and voters' rights leg-

189. See SCHWARZ, supra note 13, at 95; see also Haig v. Canada [1993] D.L.R. 577, 613 ("All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist.")
islation passed in the 1960s. Today, allegations of election fraud are generally raised in connection with the voting of non-citizens. In the United States, however, non-citizens generally cannot be deprived of the franchise since, by definition, they do not have it. Moreover, stable democracies, such as Germany and the United States, do not have to be concerned about large-scale anti-democratic attacks by ex-offenders through the ballot box.

To sum up, voting restrictions are largely ineffective as preventive mechanisms. Both Germany and the United States have passed more potent legislation to address threats to their democratic foundation. The prohibition on political parties which threaten the integrity of the German state, for example, makes it virtually impossible for the voter to endanger the existence of the prevailing political order and values through the franchise. Similarly, the United States has passed legislation that makes it a crime to advocate the forcible overthrow of government or to become a member of an organization that adheres to such advocacy or teaching. Moreover, both countries make it impossible for certain offenders to be elected to public office. Such exclusion, if based on a risk assessment, will be more effective as a safety measure than the denial of the franchise.

Even if we grant denial of the franchise some incapacitative function, disenfranchisement provisions in the United States are overbroad. They include large numbers of offenses which cannot be construed as attacks on the democratic system. Therefore, most offenders do not pose a risk to the foundation of our government or to the integrity of public elections. In addition, American law fails to allow for an individualized


192. See SCHWARZ, supra note 13, at 90.


assessment of dangerousness. In contrast, when imposing disenfranchisement as a collateral sanction, a German court has the opportunity to assess the individualized threat an offender poses. The German sentencing judge may also have a second occasion to consider the danger an offender poses to the democratic order because the German ex-offender sentenced under section 45(5) may petition the Court to have his sentence ended prematurely. To be persuasive, he must show that he no longer presents a threat, which implies in most cases that he has been rehabilitated. If designed as a safety measure, current U.S. legislation is overinclusive since it is not based on an individual assessment of risk at sentencing but rather on a generalized assumption that all felons pose a threat to the democratic order and free elections.

As preventive measures, registration and notification statutes are comparable to voting restrictions. Both are preeminent examples of risk-based legislation that affects offenders after they have served their sentences. However, many sex offender registration statutes are much more narrowly drawn than disenfranchisement provisions. Although the federal registration statute, for example, applies automatically, it covers only those who committed several offenses against children or violent sexual offenses. Moreover, it distinguishes between two risk groups. One is subject to a registration period of ten years; the other, consisting of recidivists, those who committed an aggravated form of the enumerated offenses, and those adjudged sexually violent predators, is subject to life-long registration.

195. Gubernatorial pardons could be viewed as an official declaration that the ex-offender no longer poses a danger to society and can be considered rehabilitated. They are a reward for those who have succeeded in reintegrating themselves and in ordering their lives so as to accord with the principles of society. The post-hoc pardon procedure, however, remains driven by numerous considerations, many unrelated to safety goals.

196. See § 45b StGB; see also SCHÖNKE & SCHRÖDER, supra note 47, at 634.


198. See id. § 14071(b)(6) (providing for the length of the registration period). Although one can challenge the overall wisdom and specific line-drawing of this statute, it illustrates the overbreadth and lack of differentiation present in the disenfranchisement provisions.

The English sex offender notification statute is tied to both the offense of conviction and the length of imprisonment imposed. In that respect, it resembles the German disenfranchisement provision which requires conviction of a specific offense and imposition of at least a six-month prison term. Only a sentence of thirty months or more will lead to an indefinite notification period.
The registration period for the former group is shorter than the exclusion from the ballot-box for many non-violent offenders. Despite distinct preventive needs and the different character of disenfranchisement and registration legislation, disenfranchisement provisions have a dramatically broader scope and longer-lasting impact than registration statutes.

D. SUMMARY

This comparative analysis indicates that under certain circumstances disenfranchisement of offenders may serve valid penological goals. In the United States, however, they are not coherently, rationally and clearly developed, and are concealed behind the "purity of the ballot box" argument. As currently designed, the German model is likely to fulfill the primary penological goal of retribution, as well as serving some deterrent and incapacitative functions while facilitating the offender's societal reintegration. The same cannot be said of the American legislation, which primarily has an exclusionary effect.

IV. A NEW AND PRINCIPLED APPROACH

The above analysis and comparison of the justifications for disenfranchisement support the conclusion that the denial of the right to vote in the United States is overinclusive and overbroad. It serves no distinct penological purpose and denies democratic participation to a large group of individuals, many of whom are racial minorities.

Most of the federal and state courts that have confronted the constitutionality of disenfranchisement provisions have upheld them.\textsuperscript{199} Even though novel and untested theories continue to be developed,\textsuperscript{200} courts are unlikely to invalidate the denial of voting rights to felons. Therefore, legislative action offers a more promising approach for reform, since disenfranchisement presents normative questions that fall squarely into the legislative realm. Although congressional legislation presents a potential avenue, concerns about its constitutionality render this approach tenuous and leave state legislative action as the most plausible alternative.\textsuperscript{201} In recent decades, a few

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\textsuperscript{199} See supra notes 107-13, 130 and accompanying text.

\textsuperscript{200} See, e.g., Fletcher, supra note 99, at 1903-06.

\textsuperscript{201} See supra note 70 and accompanying text.
legislatures have abolished disenfranchisement provisions, and others might be likely to follow if strong support can be built on the state level.

Disenfranchisement laws in the United States can and should be remodeled to comply with pre-selected primary sentencing goals. Although a small group of offenders may, under certain circumstances, be excluded from the franchise for retributive and preventive reasons, such an extreme collateral consequence should not be imposed upon the majority of ex-offenders. New legislation must also consider secondary objectives, such as the impact of denunciation and rehabilitation.

In proposing more effective disenfranchisement legislation, this Article will draw heavily on the German model but attempt to improve on its shortcomings. Beneficial side effects of Germany's more rational approach to the denial and automatic restoration of voting rights would be consistency and coherence. Neither is present in the current system which is characterized by omissions, oversights and inconsistencies. This change would be of special relevance to federal offenders who are frequently excluded from the restoration of voting rights because state election laws fail to address their situation. Legislative changes in this area would also carry strong expressive power, symbolizing society's identity as democratic and inclusive.

Legislative changes would not be as urgent if the pardoning system worked equitably and quickly to restore the voting rights of offenders. Because that is not the case, however, the United States should not rely on its current pardoning system as a solution to the disenfranchisement of a large number of offenders. An automatic restoration procedure which operates upon release from imprisonment presents a better approach because it can mitigate the harshness of the sanction.

202. See PAUL W. TAPPAN, CRIME, JUSTICE AND CORRECTION 429 (1960) (arguing for the abolition of punitive disabilities but allowing for the limited use of supplemental sanctions to protect community welfare).


204. See OFFICE OF THE PARDON ATTORNEY, supra note 80, at 2-3.

205. For arguments in favor of an expanded role for pardons in an era of harsh and inflexible sentencing laws, see MOORE, supra note 90. Moore finds pardons justified "when the lingering effects of a felony conviction add punishment beyond what is deserved." Id. at 168; see also Kobil, supra note 90, at 573-75.
Still, such an approach fails to remedy some of the other problems associated with the existing legal framework.

A. ADDRESSING THE PURPOSES OF DISENFRANCHISEMENT

Denial of the franchise should be made an explicit part of the sentence and imposed in open court. Such a change would have two important consequences. First, it would clarify the character of the sanction as penal rather than administrative and indicate its seriousness and severity. It would indicate to the offender that a criminal conviction impacts her fundamental role as a citizen because it removes the most important right implicit in citizenship. Including the denial of the franchise in the sentence imposed will also emphasize the importance of voting rights to the offender and society at large. The meaning of democratic participation will be put on the same level as explicit restrictions on individual freedom through incarceration. This sanction may then serve to reinforce society’s perception of its identity as a democratic nation built on principles of equal and universal voting rights. Second, as a sanction, disenfranchisement requires justification within the existing penological framework. Although retribution as the primary sentencing goal should frame the sanction’s outer parameters, secondary sentencing aims can help define it more carefully.

1. Retributive Goals

To accord with the currently predominant penological framework, retribution with a strong proportionality measure should be selected as the primary goal in the denial of voting rights. The German example can serve as a model. The potential deprivation of voting rights must be listed in the criminal code as an additional sanction and must be tied to the gravity of the offense. When the court assesses a sentence, it should consider collateral consequences as part of the overall sanction that must be factored into the proportionality analysis. As a retributive sanction proportionate to the offense committed, the

206. See also Damaska, supra note 160, at 347 (arguing that the adverse consequences flowing from a conviction are often unknown, even to participants in the criminal justice system, because they are frequently scattered through different bodies of law); cf. SCHWARZ, supra note 13, at 61 (stating that removing the provision for Nebenstrafen from the German Criminal Code would create a “visually incorrect impression”).
deprivation of voting rights should be used sparingly and tied to offenses that threaten the democratic foundation of the state.

Under a retributive framework, treason, for example, could carry disenfranchisement as a possible supplemental penalty. Historically, traitors were considered to have forfeited their status as citizens and could be denationalized. Even though that is no longer the case, traitors are banned under federal law from holding public office. Under certain circumstances, disenfranchisement may, therefore, be an appropriate additional punishment for someone convicted of treason.

The case of Gilbert Green demonstrates why this is so. Green was convicted of "having conspired to organize the Communist Party as a group to teach and advocate the overthrow and destruction of the government by force and violence, and to advocate and teach the duty and necessity of overthrowing and destroying the government by such means." He demanded that the New York statute barring ex-offenders from voting be struck down, but the court denied his request in an opinion written by Judge Friendly. Under the scheme proposed in this Article, a court may have found that the manner in which Green committed the offense constituted a sufficient attack on the foundation of the state to impose a temporary voting ban.

In many states, existing laws could be modified relatively easily. Many states already enumerate treason and election-related offenses as bases for disenfranchisement. For those offenses, the possibility of disenfranchisement should be explicitly listed as a sanction in the criminal code. Reference to other offenses, such as "felonies," "offenses punishable by imprisonment," and "infamous crimes," should be removed as general grounds for a denial of the franchise.

In light of the dislocations mandatory minimum sentences have caused, even disenfranchisement tied to the offense of conviction should not be mandatory. Instead, the German model of discretionary denial of voting rights should be

207. See SCHWARTZ, supra note 73, at 747.
208. Some states explicitly list treason as an offense that triggers an automatic denial of voting rights. For a selective listing, see Harvey, supra note 7, at 1147.
210. See id. at 452.
211. See supra note 208.
adopted, because it allows the sentencing court to assess the appropriate individual sentence in light of the offense of conviction, the circumstances surrounding it, and the individual offender. To restrict the individual predilections of sentencing judges, legislatures may want to require a minimum prison sentence as the court's threshold inquiry for consideration of disenfranchisement. In addition, appellate courts should develop guidelines to provide guidance to lower courts.\footnote{212}

Finally, the sentencing court must be given some flexibility with respect to the number of years it can disenfranchise an offender. A range of years with either a low or no minimum is most desirable. While the two to five year period chosen in Germany may not be acceptable in the United States, the imposition of a life-long ban on voting rights should be rare, if allowed at all. Nevertheless, it could be expected that the legislatively permitted duration of disenfranchisement will be longer in the United States than in Germany.\footnote{213}

Such sentencing flexibility is potentially more important in the United States than in Germany. The German criminal code is logically structured and based on serious doctrinal analysis. This is not true for criminal codes in the United States, which have not been subjected to an equally stringent analysis, even though those codes based on the Model Penal Code have been arranged more logically than the others. Many states, for example, classify election offenses as both misdemeanors and felonies. If a convicted felon commits acts more akin to a misdemeanor, the sentencing court should be left with the discretion to reject disenfranchisement.\footnote{214}

\footnote{212. \textit{See infra} Part IV.B.}
\footnote{213. Differences among the states indicate that the United States does not have a uniform sentencing culture. Therefore, durational limitations on disenfranchisement may vary between states.}
\footnote{214. \textit{Cf.} Dillenburg v. Kramer, 469 F.2d 1222, 1225 (9th Cir. 1972) (criticizing Washington state's disenfranchisement regime as irrational because it tied the denial of voting rights to the nature of the punishment); Otsuka v. Hite, 414 P.2d 412, 422 (Cal. 1966) (asserting that the nature of punishment cannot determine whether someone is "a threat to the integrity of the elective process" because it is based on "indeterminate sentences and [the] proliferation of technical, malum prohibitum offenses"); Mirjan R. Damaska, \textit{Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)}, 59 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 542, 553 (1968) (arguing that it is preferable to tie occupational disqualifications to specific offenses rather than to the punishment imposed, and that automatic disqualifications, if permitted at all, should be narrowly targeted).}
2. Secondary Sentencing Goals

While retributive goals should determine the outer parameters of the sanctioning scheme, other penological aims should help define its details and procedures. For denunciatory and deterrent purposes, public imposition of the sentence is crucial. The existence and limited use of the sanction should indicate that offenders who attack the foundation of government deserve particular moral outrage. Rehabilitation, even as a secondary or tertiary sentencing goal, should prevent long-term denials of voting rights. Incapacitation and prevention can help select the offenses which may trigger denial of the franchise.\(^{215}\)

Due to the limited threat most offenders pose to the foundation of the state, the option of a solely non-penal, safety-based restriction on voting rights seems unnecessary.\(^{216}\) If, however, security and prevention are among the primary aims of the denial of the franchise, the offender should be given the opportunity to petition for a premature end of the disenfranchisement period. As long as she indicates that she no longer poses a threat to the state, her continued exclusion would be unjustified.

If the denial of the franchise is to serve solely as a protective measure, it must accord with the principles laid down in *Kansas v. Hendricks* in which the Supreme Court upheld a civil commitment statute for sexual offenders.\(^{217}\) *Hendricks* demonstrated that liberty is presumed to be of the highest value in society.\(^{218}\) The basic right of a citizen to participate in the democratic process should be accorded a similarly high value as to warrant substantive due process protections. Consequently, disenfranchisement solely on preventive grounds should be

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215. For a discussion of the prerequisites of an incapacitative sentence, see A.E. Bottoms & Roger Brownsword, *Incapacitation and “Vivid Danger,” in Principled Sentencing*, supra note 158, at 105-06. The authors state that:

Given the present state of the predictive art in relation to dangerousness sentences (a false positive rate of up to 66 per cent) we conclude that protective sentences would only *very exceptionally* be justified, the justification laying in the anticipated depth of the offender's violation of the rights of others (discounted by the degree of uncertainty) outweighing the depth of the known violation of the offender's right.

*Id.*

216. Cf. von Hirsch & Wasik, *supra* note 156, at 606, 624 (arguing that the denial of voting rights is not justifiable on risk-prevention grounds).


218. See *id.* at 364.
based on an individualized rather than a categorical assessment of risk. Regular and frequent reviewability of risk-based sanctions is also required. The termination of such sanctions acknowledges that the offender no longer poses a safety risk to the foundation of the state.

B. DEVELOPING GUIDELINE JUDGMENTS

Were the denial of voting rights to remain a potential sanction, even if only for a few crimes, the remaining question would be under what circumstances and for how long a court is to impose disenfranchisement. Three distinct approaches are possible. First, state legislatures can develop disenfranchisement statutes along the lines proposed above, which leave courts substantial discretion with respect to the application of the sanction and the terms imposed. This approach is similar to discretionary sentencing, which was the sole sentencing model in the United States until the onset of sentencing guidelines. However, unbounded judicial discretion can lead to disparity. As has been the experience in discretionary sentencing jurisdictions, similarly situated offenders often do not receive similar sentences. Disparity will remain manageable only if disenfranchisement provisions are narrowly drafted. Otherwise, sentencing guidelines may be advisable.

Sentencing commissions may draft guidelines in a variety of manners. They can provide a narrow grid, reminiscent of the federal sentencing guidelines, where elements of the offense committed and the offender's criminal record largely determine the sentence. Some existing state guideline models allow for broader discretion by creating wider sentencing bands, with the specific sentence selected based on hierarchically arranged sentencing goals. However, the number of cases in which disenfranchisement will be theoretically possible should be relatively small if the list is compiled on penological rather than political grounds. Therefore, a set of numerical guidelines is hardly imaginable and will prove unnecessary. Moreover, a sentenc-

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219. Enumerating the offenses that trigger disenfranchisement will prevent the result of *Otsuka v. Hite*, 414 P.2d 412 (Cal. 1966). In the aftermath of that decision, administrative units decided which offenses constituted "crimes involving moral corruption and dishonesty, thereby branding their perpetrator as a threat to the integrity of the elective process." *Id.* at 414. As a consequence, disparity was rampant, and the situation was not remedied until California abolished the denial of voting rights to ex-offenders. See *Ramirez v. Brown*, 528 P.2d 378, 379 (1974); *Tims*, supra note 190, at 131-32.
ing commission would be hard pressed to develop universally valid guidelines, since it would have to operate without guidance from prior cases and would have to make primarily prescriptive decisions. 220 Such normative judgments may be difficult to justify when made by an unelected commission rather than the legislature or the judiciary.

The creation of guidelines for cases in which disenfranchisement is optional might be an appropriate exercise for the federal and state appellate courts. These courts could develop a common law in that area of sanctioning. Those decisions could be modeled after the English guideline judgments. The English Court of Appeal delivers these in individual cases attempting to provide in narrative form sentencing guidance for the lower courts. 221 In making such guideline decisions, the appellate courts should bear in mind the meaning of the franchise in a democracy. 222

Among the rights of citizenship, the right to vote is one of the most integral. 223 One court has even portrayed the lives of those disenfranchised as "a shadowy form of citizenship." 224 The South African Supreme Court characterized the franchise as "a badge of dignity and personhood," which is of particular importance because "[i]n a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same demo-

220. In drafting the U.S. Sentencing Guidelines, the Sentencing Commission drew largely on a sample of cases decided previously but also made some normative decisions. For a demand to see the Commission's database, see Marc L. Miller & Ronald F. Wright, Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice, 2 BUFF. CRIM. L. REV. 723, 813 (1999).


223. See, e.g., von Hirsch & Wasik, supra note 156, at 606 (asserting that voting is an important civil right of which even prison inmates should not be deprived, especially in light of the racially discriminatory impact of disenfranchisement).

cratic South African nation; that our destinies are intertwined in a single interactive polity. Should those words not also apply to the United States? Guideline judgments might be able to set judicial guideposts for the imposition of such an (as envisioned) exceptional sanction. Their development would also provide appellate courts with the experience and confidence to develop a greater "common law of sentencing" to supplement the work of sentencing commissions or to give guidance to lower courts. Such judicial creation of sentencing rules would decrease disparity in sentencing and help preserve the independence of the judiciary from excessive legislative mandates.

Although a legislatively imposed imprisonment threshold would be desirable, it is unnecessary as long as the appellate courts develop judgments that guide lower courts when such sanctions are appropriate. The legislature could facilitate the work of the judiciary in providing guidance and preventing unanticipated repercussions if it based its disenfranchisement legislation on clearly articulated and ordered sentencing principles. Alternatively, that task will fall solely upon the courts.

The potential tendency in the United States to impose lengthy bans on voting rights might be counteracted by the ongoing imposition of long prison terms which render such additional punishment hardly necessary. The frequent use of long-term or even permanent bans would further contribute to the internal exiling of offenders and deny them any chance of rehabilitation and reintegration. Appellate courts should, therefore,

226. The judiciary and the legislature have recognized the importance of voting rights. See SCHWARTZ, supra note 73, at 549-50. The latter has broadened the franchise from property-owning white men over 21 years of age to men and women of all races who are over 18 years, independent of their economic status. See U.S. CONST. amend. XIV, XVII, XIX, XXIV, XXVI. The former has safeguarded voting rights and the equality of the votes cast by preventing gerrymandering and race-based exclusions. See generally Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).
227. For drawbacks of guideline judgments in regulating the entire field of sentencing, see Ashworth, supra note 221, at 228-29.
228. See id. at 228.
229. See von Hirsch & Wasik, supra note 156, at 624 (criticizing the largely unfettered power of courts to impose civil disqualifications and recommending that legislation more narrowly circumscribing such judicial discretion be enacted).
consider the impact of additional sanctions on the offender and on society.

These guideline judgments may provide the needed impetus for the creation of more guidance for German judges when they are presented with the option of imposing a franchise restriction. Such a development would respond to one of the criticisms of the German disenfranchisement provision and bring the comparative project full circle. Circumscribed judicial discretion and limited, humane voting restrictions would be its beneficial results.

V. A CONCLUDING CHALLENGE

The use of a comparative model indicates that denial of voting rights in American law is a historical throwback devoid of justification or rationale. Because disenfranchisement is neither constitutionally mandated nor legally (or logically) explicable, it should at least be restricted in line with the German provision. While the ultimate abolition of voting restrictions for ex-offenders might be most desirable, the more differentiated German model which grants the judge discretion, in very limited situations, to impose a voting ban might be an approach state legislatures can realistically consider adopting. In the United States, a limitation on the denial of the franchise also would significantly remedy the current racial imbalance prevalent throughout the fourteen states whose voting bans are automatic and permanent.

While the United States tends to be quick in charging other countries with human rights violations and exhorting them to adhere to "modern standards," the exclusion of ex-offenders from the franchise with its direct and symbolic consequences indicates that "all is not well at home." If changes similar to those suggested in this Article are not implemented, denial of voting rights to ex-offenders will likely be added to the death penalty as another, albeit less widely publicized, area in which the United States subjects itself to the scorn of the international human rights community.

230. See supra note 63 and accompanying text.