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# SYMPOSIUM—PERSPECTIVES ON RACIAL JUSTICE IN THE ERA OF #BLACKLIVESMATTER: VOTING DISENFRANCHISEMENT

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SYMPOSIUM—PERSPECTIVES ON RACIAL JUSTICE IN  
THE ERA OF #BLACKLIVESMATTER: VOTING  
DISENFRANCHISEMENT

*Nicole Austin-Hillery\**

I want to tell you how happy I am to be here today with all of you. When I got the invitation that originally came from Chelsea, I was excited because I thought, “Wow, this law school is not afraid to walk the talk.” There is all this talk right now in our country about racial justice and supremacy and nationalism, and a lot of people say, in tweets and other things, how awful it is, but a lot of people really do not want to tackle it. Because, you all know that, talking about racism is not pretty, it is not easy, and it is not comfortable. But if we ever want to get to the heart of what is going on in this nation around the issue of race, we must have real conversations. So, I was so pleased to get this invitation because I thought, “oh this is going to be a real conversation.”

So, I have to tell you that I’m pulling out all the stops. I have a big mouth that I like to use for good. My eighth grade English teacher, Ms. John, told me when I was thirteen that I had a big mouth and she said, “but use it for good.” So that is what I try to do. I hope to do that today. And I also hope that we, in this room, have a real conversation.

Let me tell you a little about the Brennan Center, and who we are, and what we do. The Brennan Center<sup>1</sup> is a national litigation think tank, legal advocacy, and research organization. We are part of the NYU School of Law, and we were founded as a living memorial to former

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\* This piece was spoken at the *Western New England Law Review*’s Symposium, ‘Perspectives on Racial Justice in the Era of #BlackLivesMatter’ on October 20, 2017. Nicole Austin-Hillery, then Director-and-Counsel of the Brennan Center for Justice in Washington D.C., is currently the U.S. Program Executive Director with Human Rights Watch, where she leads the organization’s efforts to end human rights violations in the United States’ immigration and criminal justice system. During her time at the Brennan Center, Attorney Austin-Hillery was the organization’s chief liaison to Congress and the Administration on issues of voter disenfranchisement, racial discrimination, and the intersectionality between the two.

1. See *Our Mission*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/about> [<https://perma.cc/3WTE-YS3R>].

Supreme Court Justice William J. Brennan, Jr.<sup>2</sup> If you know anything about his jurisprudence, Justice Brennan was a civil rights, social justice warrior on the Court. He sat right next to former Supreme Court Justice, the late Thurgood Marshall, and the two of them got into a lot of what my mentor Congressman John Lewis calls “good trouble.”

When Justice Brennan stepped down from the Court, his law clerks all got together and said, “We want to do something to honor you, Justice Brennan,” and he said, “Please don’t give me a gold pocket watch, I don’t want that; I don’t want some bust of me sitting somewhere.”<sup>3</sup> His clerks came up with the idea of the Brennan Center. They said, “We want to have this organization that is going to continue the social justice, civil rights work that you talked about on the Court.” Justice Brennan made us promise one thing, I’m told, and that is we would not be afraid to challenge any of his previous opinions, but that we would look at what was wrong with our systems of democracy and justice, look at what was broken, and devote our work to fixing those parts of our broken democracy and justice systems. And that is what we do.

My role at the Brennan Center is to oversee all our policy and advocacy work in Washington. I spend a lot of time with all those wonderful people on Capitol Hill, trying to talk about legislation and to push for those things that we think work and try to stop those things that we think are problematic. I spend a lot of time—or at least I used to spend a lot of time—at the White House, talking about policy and advocacy issues. I don’t get a lot of invitations these days—I think my last invitation was in November of 2016—but we’ll see.

We also work with coalitions around the country and those that are based in Washington, D.C., because none of this work can be done singularly by one organization—it is impossible. You all know it takes a village to solve these problems, and it takes a village to fight back against efforts to make it harder to be engaged in our justice and democracy systems.

One of the Brennan Center’s initiatives that I am most proud of is our efforts to try and fix what is broken with our voting and elections

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2. See *Celebrating Justice Brennan*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/celebrating-justice-brennan> [<https://perma.cc/R2KV-WG2Y>].

3. See Lee M. Katz, *The Brennan Center for Justice: A Bipartisan Champion of Democracy Comes of Age*, CARNEGIE RESULTS 3 (2008), [https://www.carnegie.org/media/filer\\_public/1c/c9/1cc93d5b-1d85-44d0-8ac7-a3d60242b0ba/cny\\_cresults\\_2008\\_brennan.pdf](https://www.carnegie.org/media/filer_public/1c/c9/1cc93d5b-1d85-44d0-8ac7-a3d60242b0ba/cny_cresults_2008_brennan.pdf) [<https://perma.cc/CBK4-7NRC>].

system here in the United States.<sup>4</sup> We have got, as you heard in my introduction, a whole lot of problems, you all, a whole lot.

In this past election, we only had about sixty percent of the nation that went to the polls.<sup>5</sup> Why is that not one hundred percent? It's not a hundred percent because voters are disenfranchised and because voters are disillusioned. Many of them feel we have this democracy, but so many feel they don't have a voice in this democracy. So many of them feel there are barriers put in place to make it harder for them to engage in our election system. We have these outrageously long lines that people have to stand in. We also have states that have tried to enact bills that make it harder for so many people to actually register to vote and indeed engage in our election system.<sup>6</sup> Many of those people are predominately Black and Brown people; they are students, like many of you sitting here; they are the poor people; and they are the elderly.

I am going to talk about that a little toward the end, but I wanted to lay the groundwork so that we all understand that we are in trying and dangerous times when it comes to our electoral system. And what I tell everyone is this, because there are still people who come up to me and say, "I don't care about voting." That makes me cringe, like nails on a chalkboard, when people say that to me. When they say that to me, I ask them, "Why?" and they respond, "Because 'why?'" In response I hear: "[b]ecause Nicole, there are people who tell me I need an ID to vote, there are people who tell me that because I have a prior felony conviction I can't vote" and they also say, "because of this thing called the Electoral College, I feel that my vote doesn't mean anything anyway. If the electors want to do something different, what's the use?"

We have a job to do. No one in the United States should feel like they don't have a voice. I tell people all the time, "I don't care how big your individual voice is, if you have a voice like mine that can reach from here to the back of Carnegie Hall or if you're the shyest person in your classroom. Nobody's voice is as big and as great as ours collectively when we go to the ballot box." And that's why everybody

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4. See generally *Voting Reform Agenda*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/issues/voting-reform-agenda> [<https://perma.cc/VAP2-MAXV>].

5. See *Voter Turnout*, FAIRVOTE, [http://www.fairvote.org/voter\\_turnout#voter\\_turnout\\_101](http://www.fairvote.org/voter_turnout#voter_turnout_101) [<https://perma.cc/BA6R-GRA9>].

6. See *Voting Laws Roundup 2018*, BRENNAN CTR. FOR JUSTICE (Apr. 2, 2018), <https://www.brennancenter.org/analysis/voting-laws-roundup-2018> [<https://perma.cc/PH78-CZSK>]; *New Voting Restrictions in America*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/new-voting-restrictions-america> [<https://perma.cc/J2J6-9VRV>].

must vote, that's why it's so important.

Chelsea wanted me to talk to you today about one of the most draconian parts of our democracy system that has been in place for many, many, many decades, but that so many people ignore because they feel like 'it's not me, I can still go to the polls, I can still vote.' But, we need to understand that so many of the issues that are facing us today, when it comes to the electoral system, whether they affect you or not, they are affecting our democracy. And anything that affects our democracy impacts every one of us. And anyone who tells you anything different is drinking something funny.

The history of voting in the United States is one where it has been about expanding the ballot box. It has not been about a system where we are trying to make it harder for people to actually vote. So, you have to remember that history; that is what we have to focus on as we continue to fight these fights.

One of the biggest problems in the United States is that we are disenfranchising millions of voters every day because they have a prior felony conviction. Now I don't know about you, but here is what I was taught in law school and otherwise; if you for some reason commit a crime, and you're convicted, then you have to go to jail. So be it, that is the way our criminal justice system works. That topic is one for another symposium—but let's just assume for the purposes of today's conversation that the system works very well, and you commit a crime, you're convicted, and you go to jail.

Now, once you have completed that incarceration period, what I have been taught, is that you are expected, when you come back into the community, to get a job, you are expected to pay taxes, you are expected to obey the laws, and you are basically expected to be a good citizen. Now, I have been taught that in a great democracy, part of being a good citizen is being engaged in the electoral process. So, why, in the United States, do we tell people you must serve your incarceration period, when you get out you have to follow all these rules and regulations and be a good citizen, but that voice, that ability to go into the ballot box, is something that we are going to keep out of your reach? There are only two states in the country that never take that right away from you, and they happen to be here in New England. In Maine and Vermont, you never have that right taken away from you; even when you are behind bars, you can still vote.<sup>7</sup>

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7. See *Felon Voting Rights*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 30, 2017), <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>

But in the rest of the country it is what we like to call a “patchwork quilt of laws.” It all depends on where you live and what the particular provisions are in that state. So, for example, in the Commonwealth of Virginia, it used to be that once you were finished with your incarceration period, if you wanted the right to vote restored, you had to get permission from the governor.<sup>8</sup> Now, I don’t know about you all, but you heard all of those fancy things about my career, but I’m not so fancy that I’m friends with the governor. So, if I had to go to the governor and ask permission to have my right to vote restored, guess what, I wouldn’t get it. So how ludicrous is it that a state would require someone who was formerly incarcerated to get permission from the governor to have their right to vote restored?

Even if you do happen to know the governor, guess what, you must have a lawyer, you must have advocates, and you must have all these other people to help you work that system, because there are parameters in place. There is a certain letter you have to write to the governor, it must include certain information, most lay people can’t do that. So again, in the Commonwealth of Virginia, they created a high bar for someone to get their right to vote restored. So, guess how many people under those old provisions had their right to vote restored? Very few.

Now, luckily, the current Governor [of Virginia] Terry McAuliffe declared, “I think this is draconian; I think it is immoral that in the Commonwealth of Virginia one has to go through these many hoops to get the right to vote restored. Because it’s a right that everyone should have in the United States. I’m going to use the power of my executive pen, and I am going to restore that right to each and every individual formerly incarcerated person who approaches the governor’s office with a very simple petition.” So, in the Commonwealth of Virginia, he has restored the right to vote to thousands of formerly incarcerated.<sup>9</sup> So they went from being one of the worst states in the country on this issue to being one of the best—but that is just in Virginia.

Depending on where you live, it is something different. Guess what? The elections officials in many of these states don’t necessarily

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[<https://perma.cc/6NVY-5NR8>].

8. *Id.*

9. See Governor Terry McAuliffe, *Governor McAuliffe Announces Process for Case-by-Case Restoration of Former-Felons’ Civil Rights*, COMMONWEALTH OF VA. (Aug. 22, 2016), <https://governor.virginia.gov/newsroom/newsarticle?articleId=16491> [<https://perma.cc/G8RP-7C85>]; *Restoration of Rights*, COMMONWEALTH OF VA., <https://commonwealth.virginia.gov/judicial-system/restoration-of-rights/> [<https://perma.cc/7L88-ST8R>].

know what the law is. We did a report a few years ago at the Brennan Center called “De Facto Disenfranchisement.”<sup>10</sup> We called elections officials in every state, and we documented, based on our survey, what those elections officials said about how one gets their right to vote restored. We compared that to what we knew, as attorneys, was the law in those states. And guess what we found? The elections officials were just as confused as those who were formerly incarcerated.<sup>11</sup>

So, that means that individuals who were returning to the communities, once they called their elections offices and said, “Please tell me how I can get involved and become a registered voter,” they were getting inaccurate information. So how in the heck, if the elections administrators don’t necessarily know what the law is in their jurisdiction, do you expect the formerly incarcerated to know it? And how do you expect them to get re-engaged?

But before we talk about that and where we are now, we’ve got to talk about the history of this. You’re probably wondering ‘where did this come from, Nicole?’ Why is this even an issue? Why is it that in this country you don’t have the right to vote restored immediately upon completion of your incarceration? I’ll give you two reasons. The United States is the only modern democracy in the world that strips the right to vote from millions of formerly incarcerated people; there is no other democracy that has a system quite like this.<sup>12</sup>

And you have to ask yourself, why is that? Because we are supposed to be the world’s greatest democracy, are we not? We are supposed to set the standard and be the example for the rest of the world. But, just like our mass incarceration numbers, we have the worst numbers when it comes to re-enfranchising the formerly incarcerated. And as I said, states impose all kinds of different laws. It varies based on whether you live in Massachusetts, whether you live in Rhode Island, or whether you live in Hawaii.<sup>13</sup> It is different every place you go.

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10. See generally ERIKA WOOD & RACHEL BLOOM, BRENNAN CTR. & ACLU, DE FACTO DISENFRANCHISEMENT (2008), <https://www.brennancenter.org/sites/default/files/legacy/publications/09.08.DeFacto.Disenfranchisement.pdf> [<https://perma.cc/W8MN-TTNC>].

11. *Id.* at 1–2. “Little or no training is given to election officials and criminal justice officials about felony disenfranchisement laws.” *Id.* at 9.

12. See *International Comparison of Felon Voting Laws*, PROCON.ORG (May 27, 2014, 2:28 PM), <https://felonvoting.procon.org/view.resource.php?resourceID=000289> [<https://perma.cc/XMS7-KPBA>].

13. See *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CTR. FOR JUSTICE (Apr. 18, 2018) <https://www.brennancenter.org/criminal-disenfranchisement-laws-across-united-states> [<https://perma.cc/L4Z3-9BVN>]; *Felon Voting Rights*, *supra* note 7.

“This widespread disenfranchisement,” which is probably of no surprise to any of you, “disproportionately impacts people of color. One in every thirteen voting-age African Americans cannot vote” because of these disenfranchisement laws.<sup>14</sup> This is a disenfranchisement rate that is “more than four times greater than that of all other Americans.”<sup>15</sup> So that’s everybody; you put everybody together, you put Native Americans, you put Asian Americans, whites, you put every other ethnic group together, and that disenfranchisement for African Americans is greater than all those groups combined.<sup>16</sup>

I also have to tell you, although data on the Latino community is not as prevalent as it is for African Americans, those numbers are not great either. What we found in “a 2003 study of ten states ranging in size from California to Nebraska . . . [is] that nine of those states ‘disenfranchise[d] the Latino community at rates greater than the general population.’”<sup>17</sup> So I guess depending on how brown you are, and where you live, that’s how badly it might be for you.

“While the origins of disenfranchisement may be traced back to early colonial law in North America,” one can go even further back to Ancient Greece.<sup>18</sup> If you go back to Greece, you will see disenfranchisement laws were applied; however, at that time, the punishment was not applied ad hoc to everyone who was formerly incarcerated, punishments were made on a case by case basis.

That makes sense, doesn’t it? I mean, we don’t live in a country that says no matter what crime you commit, here is your punishment, you get twenty-five to life. It’s based on what crime you commit, it’s based on how heinous it is, it’s based on where it’s committed, how many people were impacted, all those factors. But when it comes to

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14. Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUSTICE 1 (May 19, 2017), [https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement\\_History.pdf](https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf) [<https://perma.cc/G9GH-28MJ>]; see also Christopher Uggen et al., *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, SENTENCING PROJECT (Oct. 6, 2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> [<https://perma.cc/7QS8-YBNU>].

15. Uggen et al., *supra* note 14.

16. Erin Kelley, *Racism & Felony Disenfranchisement: An Intertwined History*, BRENNAN CTR. FOR JUSTICE 1 (May 19, 2017), [https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement\\_History.pdf](https://www.brennancenter.org/sites/default/files/publications/Disenfranchisement_History.pdf) [<https://perma.cc/G9GH-28MJ>].

17. *Id.* (quoting Marisa J. Demeo & Steven A. Ochoa, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States*, MEXICAN AM. LEGAL DEF. & EDUC. FUND 17 (Dec. 2003), <http://maldef.org/assets/pdf/feb18-latinovotingrightsreport.pdf> [<https://perma.cc/7EE8-4ZMF>]).

18. *Id.*

taking away the right to vote, none of those gradations matter in the United States, for any jurisdiction [that takes away the right to vote]. No matter what the crime is, if it is a felony conviction, you have that right taken away. “It wasn’t until the end of the Civil War and the expansion of suffrage to black men that felony disenfranchisement became a significant barrier to U.S. ballot boxes.”<sup>19</sup> And you can see why, can’t you?

So, you have all these formerly enslaved people that now are free, and there are people, the white landowners, the white male landowners that said, “oh, hold up, wait a minute, hold up, we’ve got all of these people who we used to oversee that are now free and guess what? We brought so many of them here and now, they can really be a large voting block. Now we are saying that they can vote. Maybe we ought to find a way to maintain some control.”

And that is what voter disenfranchisement laws enabled people to do. So, the people who had economic power and who had political power started using this as a mechanism to control these formerly enslaved people who now had political power.

We’re going to talk about this in three parts—we’re going to talk about the end of the Civil War, then phase two of disenfranchisement laws, and then we’re going to talk about where we are now. Which is kind of where we started; I gave you a few highlights of that, but we’re going to talk about where we are now. And not only where we are now with respect to these laws, but how it relates to the larger issues we are facing when it comes to criminal justice and racial disparities. You must understand, none of these issues can be dealt with singularly. Even the prior speaker who spoke of health disparities, for example, all these things are interconnected. And when you want to talk about how we resolve some of these problems regarding racial disparities, you must look at them all together—you can’t say, “I’m just an expert on health disparities,” or “I’m just an expert dealing with voter issues.”

No, all of these things are interconnected, and we are going to talk about that, and I’m hoping as we get to the panel discussion later that we will start to connect those dots, and that we start talking about the real solutions, because I have to tell you all, I love that you invited me to come out here and speak, and I love to talk about these issues, but I don’t want to just have a room full of people who all look pretty and smart—which, by the way, you all do—I don’t want people who will just sit here

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19. *Id.*

and listen to me talk. I believe in problem solving and talking about real solutions, and we should not be walking out of those beautiful glass doors today without having some real concrete solutions that we can figure out how to put in place.

So, let's talk about the end of the Civil War. "By the end of the Civil War, states were already incarcerating African Americans at a higher rate than whites."<sup>20</sup> That's no surprise. Again, you have all of these formerly enslaved people who are now freed, and there are people who are not happy about that, so they are finding ways to bring those people back into bondage of some sort. Although slavery was outlawed, "the Thirteenth Amendment carved out an exception allowing states to impose involuntary servitude on those convicted of crimes. Seeing an opportunity to [maintain] the crumbling [infrastructure and] economy, numerous Southern politicians quickly [imposed] new laws that were 'essentially intended to criminalize Black life.'"<sup>21</sup> That's what they essentially did. "These, ostensibly, were 'race neutral' laws," because that's what they were. Of course, they wouldn't say, "[t]hese laws are for Black people."<sup>22</sup> What they said instead was these were laws that would ensure people who commit crimes aren't given the same rights as every other law-abiding citizen. But white people who were accused of crimes were often lucky in that they escaped punishment, because, as you know, courts and judges then, as they do now, had a lot of discretion.<sup>23</sup> So often these laws about disenfranchisement were not imposed upon white citizens who committed crimes, only on the Black ones. So "[i]dentifying these new criminal laws [became known] as 'Black Codes.'"<sup>24</sup> These were laws that were used primarily to impact African American citizens who became a part of the criminal justice system, rather than regular people living throughout the community at large.<sup>25</sup>

So "[b]efore the Civil War, most states already had some form of disenfranchisement on the books."<sup>26</sup> "[H]istorical analysis by authors Jeff Manza and Christopher Uggen found [this,] 'when African

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20. *Id.*

21. *Id.* (quoting DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK PEOPLE IN AMERICA FROM THE CIVIL WAR TO WORLD WAR II* 53 (2008)).

22. *Id.* at 1–2.

23. *See id.* at 2.

24. *Id.*

25. *See id.*

26. *Id.*

Americans [made] up a larger [amount] of the state's prison population, a state [was] significantly more likely to adopt or ex[pand] felon [voter] disenfranchisement' [laws]."<sup>27</sup> In fact, "[i]n later decades, the reverse would hold true, as '[s]tates with a small [percentage] of African-American prisoners'" would abolish voter disenfranchisement laws.<sup>28</sup> Now, I said earlier that Maine and Vermont never take that right away, and I think that is fabulous that they don't, but I don't know how many Black folks are in Maine and Vermont. I don't think there are a whole lot. But I still love that Maine and Vermont don't have disenfranchisement laws. The motivation for enacting broad felony disenfranchisement laws was clear—states wanted to prevent newly freed men from gaining power.<sup>29</sup> As I said at the start [of] this conversation, the power is in the ballot box. It's not the individual power, it's what you can do collectively. So once these broad disenfranchisement laws were on the books, racist politicians could then impose them in a discriminatory manner, and that is what we saw post-Civil War.

I'm going to give you a quick example. "[I]n 1876 Virginia broadened its [voter] disenfranchisement law to encompass petty theft, . . . a crime of which white politicians" were convinced that "[B]lack citizens could be easily convicted" of, in contrast to white citizens.<sup>30</sup> "The next year [in 1877], the legislature passed a law requiring that lists of voters convicted of . . . [the] broader array of disenfranchising crimes be delivered to county registrars."<sup>31</sup> So not only were they imposing these laws, they were taking names. They were keeping lists. And we're going to talk about how that is so similar to what is happening now, when we get to part three of this discussion.

So, these lists were published. Guess what else happens when you publish lists—people know who you are. And you know what happens when people know who you are—voters or potential voters become intimidated. I remember in law school I didn't like the way they posted grades. Now, with grades and rank, they only use a number. In this day and age, they used names. Imagine the intimidation factor involved in posting this. That's what they did in 1877 in Virginia.

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27. *Id.* (quoting BRANDON ROTTINGHAUS, INCARCERATION AND ENFRANCHISEMENT: INTERNATIONAL PRACTICES, IMPACT AND RECOMMENDATIONS FOR REFORM 67 (2003)).

28. *Id.*

29. *See id.*

30. *Id.*

31. *Id.*

So that's what the first wave of disenfranchisement looked like. There were states that were putting them in place only for certain crimes, and these were the crimes that were most likely to be committed by Black men. What did the second wave look like? "A distinct wave of changes to disenfranchisement laws [happened in the late] 1800's, when Southern states began holding overtly racist constitutional conventions in response to partisan shifts in Congress and the growing threat of a Populist movement that was uniting white farmers and black political forces."<sup>32</sup>

Let's just stop there. When I was in college at Carnegie Mellon, I was the President of the Black Student Union. But one of the things I did at Carnegie Mellon was this: I said, "Let's get all of the minority groups together." We had an Asian Student group, we had a student group for students of Indian descent, of Muslim descent, and I said, "You know, even though we all come from different ethnic backgrounds, there are things we share in common, and wouldn't we be a powerful bloc if we all got together and started a minority student union?"

Now, I wasn't saying to get rid of your own individual one, because we know there is purpose and power in individual affinity groups, but we also know there is more power when people come together. These Southerners who had political power saw that Blacks and whites were uniting over economic interests. If you're poor, you're poor. It doesn't matter if you're purple, green, or yellow, poverty looks the same. Now, we know there are gradations and differences with respect to poverty, but that's also another symposium. For the purposes of today, let's just say that poverty is poverty. These wealthy white politicians did not like that Blacks and whites were getting together, so they planned several constitutional conventions to figure out how to do away with this.

An example is Mississippi, the latest disenfranchisement laws in the late 1800s was "adopted at its constitutional convention in 1890, [and it] served as a model for other states."<sup>33</sup> Here's what Mississippi did. Mississippi's constitutional convention said "[b]efore, a conviction for 'any crime' disqualified an individual from voting," this individual had to prove that they were worthy of keeping the right to vote.<sup>34</sup> "[A]t the convention, Mississippi's white politicians narrowed disenfranchisement to a specific list of crimes [that] they believed black men were most likely to commit, such as bigamy, forgery, burglary, arson, and

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32. *Id.* at 3.

33. *Id.*

34. *Id.*

perjury.”<sup>35</sup> When I think of this list, like perjury and forgery, I think of Wall Street, I am not thinking of a lot of Black men, but maybe back then there was some reason Black men were disproportionately committing these crimes, or so the State of Mississippi thought.

So, “[u]pholding this new disenfranchisement scheme six years later, the Mississippi Supreme Court acknowledged the racist motivations for the change: ‘Restrained by the federal constitution from discriminating against the negro race, the [Constitutional] convention discriminated against its characteristics and the offenses to which its weaker members were prone.’”<sup>36</sup> So, we [Black people] were weaker members, but that’s not a surprise—we’ve all read *Plessy v. Ferguson*,<sup>37</sup> we were less-than, weaker than. The Court said, “Burglary, theft, arson, and obtaining money under false pretenses were declared to be disqualifications [from voting], while [crimes like] robbery and murder, and other crimes in which violence was the principal ingredient, were not.”<sup>38</sup>

Let’s just stop there—I guess back in the late 1800s, Black men were not disproportionately committing robbery, murder, and other crimes in which violence was the principal ingredient. Sorry, white men, that was you all. But the people who were committing those crimes were not disenfranchised, because those were not crimes disproportionately committed by Black men. This was not about making the community safer, and isn’t that what the criminal justice system is supposed to be about? It’s supposed to be about ensuring that our community is safer, we are making them so in an equitable way. But that’s not what was happening here. These laws, as you can see from this pattern and practice, were being put in place to control, and to control a certain segment of the community. They were not being applied equally.

“Other states soon followed with their own racially targeted disenfranchisement laws, including South Carolina in 1895, Louisiana in 1898, and Alabama in 1901.”<sup>39</sup> That’s parts one and two of the story.

“Over a century later, our nation is still grappling with the racist origins of felony disenfranchisement. The targeted laws of the late

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35. *Id.*

36. *Id.* (quoting Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 541 (1993)).

37. *See generally* *Plessy v. Ferguson*, 163 U.S. 537 (1896).

38. KELLEY, *supra* note 14, at 3.

39. *Id.*

1800s are less prominent [now, but] most states do not distinguish between [different] felonies” as they did back then.<sup>40</sup> They are a little smoother now. They don’t say, “Well, if you committed this felony and not that felony, you have a right to vote here, and not there.” They don’t do that anymore. But these are widespread laws throughout the country. “[D]isenfranchisement has serious repercussions [that we all need to be aware of,] beyond those directly impacted; studies show that [disenfranchisement] laws also keep eligible voters away from the polls. Many states’ disenfranchisement policies are so complex that election officials often misunderstand and misrepresent [the laws of their own state].”<sup>41</sup> This dampens turnouts at the polls; we see [from research] that registered Black voters were “[twelve] percent less likely to cast ballots . . . in states with lifetime disenfranchisement policies.”<sup>42</sup> People sometimes think they [are] going to show up to the polls and not be allowed to vote. People are frightened, intimidated, and therefore, they stay away from the polls.

Another thing we found with our research at the Brennan Center is this—voting is not just about what you do individually. There is a domino effect from voting. When your children see you vote, they think, “This is what I am supposed to do.” When they see you engage in the community, by engaging in the electoral process, they think, “That’s what I’m supposed to do. I, too, am supposed to grow up and be engaged in my community.” If they don’t grow up seeing that, they do not become engaged in that way. It’s not important to my parents, and therefore it is not important to me. Those are the insidious problems inherent in these disenfranchisement laws.

Now, I’m going to give you a little bit of good news. There are many politicians, like Governor McAuliffe of Virginia, who are seeing how draconian these laws are. It is at every level. In Congress, we have pending legislation right now called the Democracy Restoration Act.<sup>43</sup> It was based on a Brennan Center policy proposal and the research we had done into these laws. The Democracy Restoration Act says this: once you have completed your incarceration period, you will have your right to vote restored immediately when it comes to federal elections.<sup>44</sup> Remember, states govern their own elections, but the federal

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40. *Id.*

41. *Id.*

42. *Id.*

43. *See generally* Democracy Restoration Act of 2017, S. 1588, 115th Cong. (2017).

44. *See id.* at 1.

government, through the Constitution, can govern certain parameters concerning *federal* elections.<sup>45</sup> If this is passed, everyone, once they are done with their incarceration period, can vote in federal elections.<sup>46</sup> Now, this means we would have these bifurcated election systems across the country, but all the smart people who worked on that research said that is likely not to happen. States won't want to spend the money to have a bifurcated election system, so we think that if Congress is able to pass this law and it is signed into law by a President, states will say, "We are going to follow suit. We are going to ensure that, with respect to state elections, the same law will prevail."

You will also see that in certain states across the country, there are efforts underway to ensure that new laws are passed to re-enfranchise the formerly incarcerated.<sup>47</sup> There are [however] some disagreements at play. In Congress, not only is there the Democracy Restoration Act, there is a competing bill that Senator Rand Paul has introduced. These are bipartisan bills—Senator Cardin of Maryland is the sponsoring Senator for the Democracy Restoration Act, and Senator Paul has a competing bill.<sup>48</sup> They both say you should have the right to vote restored. Senator Cardin, however, in his bill, says that you should have the right to vote restored when you walk out—period, point blank. Senator Paul says, well, if you remain on probation and parole, or if you owe fees and fines, you cannot have your right to vote restored. [Despite these differences] at least people are talking, and saying we need to do something about this.

There's also litigation underway to try and deal with these issues. I'm going to tell you about two recent cases, but I am going to tell you that the road of litigation has been a hard road to travel because a lot of the courts have said, looking at state constitutions, it is not illegal to take this right to vote away. There is a case pending in Louisiana based on Louisiana's Constitution of 1974. The Louisiana Constitution of 1974 allows the suspension of voting rights "under an order of imprisonment for conviction of a felony."<sup>49</sup> Lawyers for a group of people under

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45. *See generally* U.S. GEN. ACCOUNTING OFF., GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION (2001), <https://www.gao.gov/new.items/d01470.pdf> [<https://perma.cc/5N26-KQYZ>].

46. *See id.* at 1–2.

47. *Criminal Disenfranchisement Laws Across the United States*, *supra* note 13; *Felon Voting Rights*, *supra* note 7.

48. *See generally* Civil Rights Voting Restoration Act of 2015, S. 457, 114th Cong. (2015).

49. LA. CONST. art. I, § 10(A) (1974).

probation are arguing that someone on probation is no longer “under an order of imprisonment.”

Then in Michigan, there is a lawsuit to end Michigan’s lifetime felony voting ban. Even if you are friends with the Governor, you still cannot get that right to vote restored. So, in Michigan, there is a case seeking to end that lifetime ban and have the right to vote restored post-incarceration.

As you are watching these disenfranchisement laws across the country, and you are looking at how each state is dealing with them, also look at this. The issue of voter suppression is directly and inextricably linked to the issue of vote disenfranchisement. It is no better for a state to introduce a bill that says you must have a form of ID to vote before you can vote than it is for someone to take away your right to vote because you were formerly incarcerated. We at the Brennan Center believe that the right to vote is inherent within the Fourteenth Amendment. The Constitution does not say specifically, “every American has the right to vote,” but we believe it is inherent within the Fourteenth Amendment. There is nothing that is a fundamental right for which you have to provide an ID, or some other kind of justification for exercising that right. The right to exercise free speech? I don’t have to get anyone’s permission to use it; I can just go out and do it. These kinds of suppressive laws are working hand in hand with efforts to disenfranchise the vote, which, working together, are just making it harder for millions of Americans to engage in our electoral process. That undermines our democracy.

I will tell you that we can have some laws in place, like voter ID,<sup>50</sup> that we do not like. I believe we should have no voter ID whatsoever. Some of my colleagues disagree with me, and state that they don’t have a problem with voter ID, but they do have a problem with states listing out *specific* forms of voter ID.<sup>51</sup> All of us have something on our person or in our pockets, that proves who we are. It could be our Starbucks card, our utility bill, or our driver’s license. Many of these states, however, are only saying that certain forms of ID are acceptable, and most of these forms of ID that states are requiring are the kinds of ID that are hard for certain populations to get—Black and Brown people, elderly people, students, and poor people. That is the problem with

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50. Wendy Underhill, *Voter Identification Requirements/Voter ID Laws*, NAT’L CONFERENCE OF STATE LEGISLATURES (Jan. 5, 2018), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [<https://perma.cc/BRR8-AX55>].

51. *Id.*

those kinds of laws.

There are also suppressive laws that are being introduced that seek to limit same-day registration, that seek to end early voting. All of these things are working in tandem to undermine our democracy.

So, when you talk about how we need to deal with race and disparities, and our criminal justice system, you have to look at each and every one of these issues. There are some people who say to me, “What do you work on at the Brennan Center? Do you only work on the democracy issues and the voting issues, or do you work on the criminal justice issues?” and I tell them, “All of these things are inextricably linked.” You cannot talk about voting without people’s rights being disenfranchised due to the criminal justice system. So, if we are really going to problem solve and talk about racial disparities in this era of #BlackLivesMatter, we must stop thinking in silos. We must start looking at how each of these issues work together. This whole issue of mass incarceration? One of the reasons mass incarceration is such an issue is because we have problems like voter disenfranchisement. You have people who feel they are not a part of our community, who are not a part of our democracy, who do not have a voice. Guess what? If those people are limited in terms of what they can do, they turn to other options, which lead to incarceration, which fuels mass incarceration. All these things, you connect the dots, and you will see the relationship.

I charge you today with refusing to be siloed. There are forces out there who want to silo us, to get us to focus on one thing at a time. We’re smarter than that. We have to figure out how we look at all of these issues and fix them in one fell swoop because that is the only way we are going to fix our democracy. We cannot allow ourselves to be divided as civil rights warriors. We must connect the dots and work with each other on the issues that we are experts in and identify our colleagues who will help us in this effort. [We must figure out] how we bring all of this together. Until we do that, we are going to continue to have these conversations and conferences.

I want us talking about how we empower, engage, and level the playing field, for all Americans, regardless of race, regardless of gender, regardless of sexuality, and until we start thinking about it that way, we are going to have a long, hard road ahead of us. But I am emboldened. I am looking around this room and I see so many differences, just by [looking at your] faces, and I cannot imagine the differences [and the commonalities] I would find if we all spoke with one another. Here we are, all together, in this room. Charlottesville be damned.