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MASS INSTITUTIONALIZATION AND CIVIL DEATH

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Most scholars who study felon disenfranchisement trace its roots back to Reconstruction. Southern states drew up laws to disenfranchise people convicted of felonies as an ostensibly race-neutral way to diminish the political power of newly freed Black Americans. Viewed against this historical backdrop, the onset of mass incarceration in the current era expands the impact of a practice intended to be both racist and punitive from the start.

This account is true, but it is incomplete. Non-criminal mass institutionalization has also played—and continues to play—a role in systematic disenfranchisement. Marshaling a wealth of archival and historical evidence, from newspapers, legislative

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debates, congressional hearings, and court cases, I reveal that institutional disenfranchisement is not just about mass incarceration—a singular phenomenon sparked by the Civil War that happens solely within the carceral state and targeted only freed Black people. Institutional disenfranchisement began much earlier, included more spaces than the prison, and initially targeted white men. Indeed, the more familiar prison disenfranchisement had a shadowy twin within the welfare state. Civil death includes more ghosts than previously imagined.

INTRODUCTION 858

 I. MASS INCARCERATION 867

 A. *Overview* 867

 B. *Outlining the Popular Narrative* 870

 II. MASS INSTITUTIONALIZATION 872

 A. *Institution Building* 872

 B. *Voting* 882

 C. *Corrupting the Vote* 889

 D. *Losing the Vote* 891

 III. NEXT STEPS 894

INTRODUCTION

The website for the City of Coalinga invites you into “[t]he Sunny Side of the Valley.”¹ “Nestled in the Pleasant Valley at the eastern edge of California’s Coastal Mountain Range, surrounded by hills and ranches,” near Fresno, Coalinga provides a wide range of services, including schools, a medical center, parks, and a community college, to approximately 18,000 residents.² Community highlights include the Annual Horned Toad Derby and the Wham-O-Bass Hot Air Balloon Festival.³

Despite the abundant information about Coalinga on its website, it is quite challenging to find any details about one Coalinga institution in particular: California State Hospital – Coalinga (CSHC). The 1,300-bed mental health facility houses people civilly committed after completing their criminal sentences for sexual offenses but still deemed a danger to the community.⁴ It is the largest institution of its

¹ CITY OF COALINGA, <https://www.coalinga.com> (last visited May 30, 2021).

² *About Our Community*, CITY OF COALINGA, <https://www.coalinga.com/270/About-Our-Community> (last visited May 30, 2021).

³ *Id.*

⁴ *Department of State Hospitals – Coalinga*, CAL. DEP’T OF STATE HOSPS., <https://www.dsh.ca.gov/Coalinga/index.html> (last visited May 30, 2021); Rory Appleton, *Patients at This Mental Hospital May Have Doomed a City’s Sales Tax Measure*, FRESNO BEE (Nov. 29, 2017, 12:15 PM), <https://www.fresnobee.com/news/politics-government/politics-columns-blogs/political-notebook/article184847643.html> (“Coalinga State Hospital houses patients who may have completed their imposed sentences but remain in state custody while awaiting new housing because they are deemed a threat to the public as sexually violent predators.”).

kind in the United States. Furthermore, it is the largest employer in Coalinga, employing over 3,000 people with an annual budget of over \$250 million.⁵ Not all Coalinga residents wanted the hospital sited in their city because of the characteristics of the population housed within it.⁶ Yet, the possibility of funding and jobs won out: Coalinga successfully beat several other California cities for the opportunity. As one newspaper article put it: “Civic and business leaders in the economically struggling community said they were elated to attract the \$365-million facility, which is expected to employ up to 2,000 psychiatrists, nurses, technicians and support workers after it opens in 2004.”⁷

CSHC residents became Coalinga voters when, in 2006, the City annexed CSHC into its boundaries and thus transformed CSHC patients into residents of the City of Coalinga.⁸ Coalinga is not alone in using annexation to swell its population as a lucrative strategy for growth.⁹ The City hoped it could reap more revenue from taxes and grants due to its larger population, receive more state and federal representation from Census apportionment, and increase its attraction to potential commerce.¹⁰

In 2010, after annexation, a coalition of CSHC residents established Detainee-Americans for Civic Equality (DACE) to organize the patients’ electoral voices.¹¹ A board of five current and former patients runs weekly meetings for the hospital residents.¹² Their intent:

⁵ Complaint at 1, *Saint-Martin v. Price*, No. 18-cv-00123 (E.D. Cal. Jan. 23, 2018), 2018 WL 731507; Mackenzie Mays, *We Pay Millions for Sex Offender Therapy at Coalinga Hospital. Most Patients Aren’t in It*, FRESNO BEE (Apr. 9, 2018, 10:51 AM), <https://www.fresnobee.com/news/local/article207483999.html>.

⁶ See James Rainey, *Coalinga Gets Its Wish: State Hospital for Sex Offenders*, L.A. TIMES (Aug. 3, 2000, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2000-aug-03-mn-63874-story.html>.

⁷ *Id.*

⁸ See CAL. GOV’T CODE § 57375 (West 2021) (describing how after a territory is incorporated “all inhabitants within the territory, and all persons entitled to vote within the newly incorporated city by reason of residing in the city are subject to the jurisdiction of the city and shall have the rights and duties conferred on them as inhabitants and voters of the incorporated city”); CAL. ELEC. CODE § 2000(a) (West 2021) (allowing citizens to vote in the territory in which they reside).

⁹ See, e.g., Christopher J. Tyson, *Annexation and the Mid-Size Metropolis: New Insights in the Age of Mobile Capital*, 73 U. PITT. L. REV. 505, 517 (2012) (noting that twenty-seven states “have experienced significant annexation in the past twenty years due to aggressive expansions by their central cities” in order to spur growth and enhance their economic competitiveness).

¹⁰ Rory Appleton, *After Sexual Predators Swung an Election, New Law Would Change California Voting Rules*, FRESNO BEE (Mar. 1, 2018, 2:11 PM), <https://www.fresnobee.com/news/politics-government/politics-columns-blogs/political-notebook/article202682219.html>.

¹¹ Appleton, *supra* note 4.

¹² *Id.*

To make our votes count at the ballot box . . . Our rights as citizens do not operate in a vacuum. We need to look over these high walls, beyond our past failures and personal needs to become better persons where possible and attain reevaluation in society. That means accepting that citizenship also has its obligations, whatever our plight, and one of the most fundamental duties we must never forfeit is the privilege of voting in America.¹³

In 2017, the City of Coalinga had a dilemma. Facing a budget shortfall, the City Council proposed Measure C, a plan to increase the sales tax by one cent.¹⁴ Among the Coalinga residents that pondered the merits of the tax increase were the inhabitants of the CSHC.

DACE reached out to Coalinga City officials such as the city manager to discuss the proposed Measure,¹⁵ as well as other issues affecting the patients, such as visitor transportation.¹⁶ The CSHC residents were concerned because the proposed sales tax increase would raise the price of goods sold within the hospital.¹⁷ The group wanted to know how the tax increase would benefit CSHC's "resident voters" and pointed out that their votes mattered in what would probably be a close election.¹⁸ Due to the city officials' lackluster response, DACE notified the Coalinga City Manager that it would recommend to its constituents a "no" vote on the measure.¹⁹ Ultimately, the Measure failed to pass, 545 to 582.²⁰ Slightly more than 15% of the total votes within Coalinga came from CSHC residents.²¹ Of the 177 votes cast by the CSHC residents, 50 voted "yes" and 127 "no" on Measure C.²²

Coalinga's political representatives erupted with fury after the vote results became public. The Coalinga mayor said to the *Fresno Bee*: "I do not think that the voters of Coalinga are going to be happy to know that patients at the Coalinga State Hospital may have swayed this vote in an attempt to bring the city to spend funds during a budget crisis on projects like taxi services."²³ California Democratic Assemblyman Joaquin Arambula, whose district includes Coalinga,

¹³ Christian Williams, *A New Reality in Pleasant Valley: This Voter Block Could Be Historic First*, CMTY. ALL. (June 1, 2013), <https://fresnoalliance.com/a-new-reality-in-pleasant-valley-this-voter-block-could-be-historic-first>.

¹⁴ Complaint, *supra* note 5, at 2.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Appleton, *supra* note 4.

¹⁹ Complaint, *supra* note 5, at 5.

²⁰ *Id.* at 6.

²¹ *Id.*

²² *Id.*

²³ Appleton, *supra* note 4.

declared: “I was shocked to find out that sexually violent predators were able to affect an outcome on something as important as public safety.”²⁴ He introduced an (ultimately failed) bill to the State Assembly in February of 2018 to strip sexually violent predators of voting rights by designating their last known address before they were committed as their domicile for voting purposes.²⁵ Ultimately, the City filed suit to overturn the election because of the CSHC residents’ votes.²⁶

While the CSHC residents draw from one of the most stigmatized categories of institutionalized residents in the United States, the issues that their dispute reveals are neither specific to them nor new concerns. Their electoral controversy taps into a deep vein of thinking about voting in America and those deemed worthy of the franchise. Despite the decades—and indeed centuries—of controversy about institutional resident voting, aspiring and actual voters like the CSHC residents fall through the cracks of the current discussion embroiling scholars, activists, and the general public about voting for institutional residents.²⁷

Mass incarceration drives the debate about voting by institutionalized people in present-day America. Recent discussion has focused on formerly incarcerated people who continue to face disenfranchisement even after serving their sentences.²⁸ A more muted, albeit growing, conversation focuses upon currently-incarcerated people.²⁹

²⁴ Appleton, *supra* note 10.

²⁵ *Id.*; AB-2839, 2017-18 Leg., Reg. Sess. (Cal. 2018). The bill ultimately died in committee. See Bill Status: AB-2839, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180AB2839 (last visited July 24, 2021).

²⁶ Statement of Election Contest at 2–3, *Vosburg v. County of Fresno*, No. 17CECG04294 (Fresno Cnty. Super. Ct. Dec. 14, 2017).

²⁷ See, e.g., *Voting & Cognitive Impairments*, ABA (Mar. 12, 2021) https://www.americanbar.org/groups/law_aging/resources/voting_cognitive_impairments (focusing on voting rights of individuals who have a cognitive impairment); *Voting Rights*, SENT’G PROJECT, <https://www.sentencingproject.org/issues/voting-rights> (last visited May 31, 2021) (focusing on voting rights for incarcerated individuals and those with felony convictions); Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right to Vote*, 69 STAN. L. REV. 435 (2017) (focusing on voting rights for disabled veterans).

²⁸ See, e.g., Jenni Goldstein, *Florida Convicted Felons Allowed to Vote for 1st Time in Presidential Election After Completing Sentences*, ABCNEWS (Oct. 25, 2020, 7:41 PM) <https://abcnews.go.com/Politics/convicted-florida-felons-allowed-vote-1st-time-presidential/story?id=73822173>.

²⁹ See Charles Davis, *Republicans and Majority of Democrats Vote to Keep Incarcerated People from Participating in Elections*, BUS. INSIDER (Mar. 2, 2021, 4:41 PM), <https://www.businessinsider.com/congress-votes-to-deny-incarcerated-people-right-participate-elections-2021-3>; *Should Any Individuals Be Able to Vote While Incarcerated?*, WASH. POST <https://www.washingtonpost.com/graphics/politics/policy-2020/voting-changes/felon-disenfranchisement> (last visited May 31, 2021) (showing that only one Democratic presidential candidate favored full enfranchisement of currently incarcerated citizens).

Most scholars who study felon disenfranchisement trace its roots back to Reconstruction. Southern states drew up laws to disenfranchise people convicted of felonies as an ostensibly race-neutral way to diminish the political power of newly freed Black Americans.³⁰ Viewed against this historical backdrop, the onset of mass incarceration in the current era expands the impact of a practice intended to be both racist and punitive from the start.

This account is true, but it is incomplete. As the Coalinga saga suggests, noncriminal mass institutionalization has also played—and continues to play—a role in systematic disenfranchisement. Marshaling a wealth of archival and historical evidence, from newspapers, legislative debates, congressional hearings, and court cases, I reveal that institutional disenfranchisement is not just about mass incarceration—a singular phenomenon sparked by the Civil War that happens solely within the carceral state and targeted only freed Black people. Institutional disenfranchisement began much earlier, included more spaces than the prison, and initially targeted white men. Indeed, the more familiar prison disenfranchisement had a shadowy twin within the welfare state. Civil death includes more ghosts than previously imagined.

The nineteenth century was not just the time when Black Americans were freed from slavery.³¹ It was also the century in which numerous white Americans were enclosed within institutions. Benevolent reformers created institutions from orphanages to asylums in an effort to improve society and reform those found wanting.³² Reformers built these institutions at the same time that state constitutional convention delegates and legislators were expanding the vote beyond a core of mostly property-owning white men.³³ Though the political community then included more people without significant economic means, those lodged within institutions posed a problem. They were economically lucrative to the localities that housed institutions, but these same communities were reluctant to enfranchise insti-

³⁰ See, e.g., Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *YALE L.J.* 1584, 1625–26, 1629 (2012) (explaining how Southern states disenfranchised Black Americans by accusing them of crimes).

³¹ See *infra* Part I.

³² See, e.g., DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC*, at xiii (1971) [hereinafter ROTHMAN, *THE DISCOVERY OF THE ASYLUM*] (noting the shift towards institutionalization as a solution to “poverty, crime, delinquency, and insanity” during the Jacksonian era).

³³ See ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 24 (rev. ed. 2009) (describing the decline of property requirements attached to the franchise over the first half of the nineteenth century).

tutionalized residents who could act as a political bloc.³⁴ Given the importance attached to independence and virtue for the legitimate exercise of the franchise, were the same supposed deficiencies that necessitated institutionalization also factors that warranted disenfranchisement? Through benevolence or punishment, a great number of Americans were cut off from political participation because they lived in an institution and were presumed to have forfeited the right to vote due to mental incompetency, dependency, pauperism, disability, and/or criminality.

Many of my scholarly predecessors have noticed linkages between prisons and other institutions. Michel Foucault famously mused: “Is it surprising that prisons resemble factories, schools, barracks, hospitals, which all resemble prisons?”³⁵ Historian David Rothman asked: “Why in the decades after 1820 did [Americans] all at once erect penitentiaries for the criminal, asylums for the insane, almshouses for the poor, orphan asylums for homeless children, and reformatories for delinquents?”³⁶ A generation of historians and social theorists have grappled with the array of institutions that sprung up around that time in Europe and the United States and whether the reformers that advocated for them and the professionals who maintained them were motivated by benevolent, capitalist, or social control inclinations.³⁷ An important recent collection by disability scholars, tellingly titled *Disability Incarcerated*, examines how disabled people have been lodged within different institutions over time, from asylums to hospitals to prisons.³⁸ A significant goal of this scholarship is to

³⁴ See *id.* at 50–51 (noting that “those who had committed crimes” and “the mentally ill” were deemed unfit to wield political power).

³⁵ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 228 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1997).

³⁶ ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 32, at xiii. See generally DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* (Routledge 2017) (2002) [hereinafter ROTHMAN, *CONSCIENCE AND CONVENIENCE*].

³⁷ See, e.g., ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (Aldine Publ'g Co. 1962) (1961); *THE CONFINEMENT OF THE INSANE: INTERNATIONAL PERSPECTIVES, 1800–1965* (Roy Porter & David Wright eds., 2003); ANDREW SCULL, *MADNESS IN CIVILIZATION: A CULTURAL HISTORY OF INSANITY FROM THE BIBLE TO FREUD, FROM THE MADHOUSE TO MODERN MEDICINE* (2015); NANCY TOMES, *A GENEROUS CONFIDENCE: THOMAS STORY KIRKBRIDE AND THE ART OF ASYLUM-KEEPING, 1840–1883* (Charles Webster & Charles Rosenberg eds., 1984); GERALD N. GROB, *THE STATE AND THE MENTALLY ILL: A HISTORY OF WORCESTER STATE HOSPITAL IN MASSACHUSETTS, 1830–1920* (1966); ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 32; ROTHMAN, *CONSCIENCE AND CONVENIENCE*, *supra* note 36.

³⁸ *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA* (Liat Ben-Moshe, Chris Chapman & Allison C. Carey eds., 2014). Liat Ben-Moshe is also the sole author of *DECARCERATING DISABILITY:*

discern the motivations of those that controlled institutions, point out commonalities among their residents, and object to institutionalization and incarceration as mechanisms to warehouse undesirable members of society.

Democracy is strikingly absent from much of this previous scholarship. I am agnostic as to the motivations of those who created and maintained institutions. Instead, my focus is on how and why institutionalization transformed people into economic assets and stripped them of the power of political citizenship. While scholars and advocates have provided crucial information and attention to Americans having segregated some people, this Article allows us to see how these segregated spaces were nestled *within* communities willing to notice institutions for economic purposes but not political ones.³⁹

This Article describes the deep-rooted connection between institutionalization and the loss of political voice. This new focus on mass institutionalization and disenfranchisement crosses the punishment-welfare divide by noting the common characteristics of both types of institutionalization. It reveals the connection between political citizenship and all forms of institutionalization.

Finally and significantly, it disrupts the current paradigm about race and institutional disenfranchisement. In this Article, the institutions I discuss were initially designed to control and disenfranchise white people, especially those considered ethnically deficient such as Irish Americans.⁴⁰ The techniques of managing marginal white people within benevolent and carceral institutions provided the scaffolding to disenfranchise Black and brown people in prisons later. Furthermore, the logic of disenfranchising disreputable people was developed in places like Massachusetts⁴¹ before it was exported to places like Mississippi. Thus, the racism of mass incarceration was layered on top

DEINSTITUTIONALIZATION AND PRISON ABOLITION (2020). See also Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 420 (2018) (explaining the relationship between the institutionalization of disabled populations and the growth of the carceral state).

³⁹ See, e.g., Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1756 (2006) (discussing “spatial exclusion” created by institutions); DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA, *supra* note 38, at xii (explaining how communities have attempted to beautify institutional buildings while maintaining “the push toward containment”); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007).

⁴⁰ See NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* 139–40 (2010).

⁴¹ See generally GROB, *supra* note 37; NORMAN DAIN, *CONCEPTS OF INSANITY IN THE UNITED STATES, 1789–1865* (1964) (examining Massachusetts and Virginia as case studies of early institutions).

of an already established foundation of political disqualification within mass institutionalization.

Ultimately, the Article calls for more research to fill out the incomplete account of mass incarceration and the vote with a new paradigm. A historically robust view of mass institutionalization and disenfranchisement broadens the implications for our current conversations on prison disenfranchisement. Although it is too early in this research area to propose a strong correlation between the disenfranchisement of early mass institutionalization and the disenfranchisement of later mass incarceration, examining the two together does yield resonances. While part of disenfranchisement was certainly about punishment and mass incarceration, this is, indeed, a partial view. The Jacksonian democratic revolution of the 1800s ushered in a new voting era for the common white man.⁴² However, it was not the end of political exclusion even for marginalized white male Americans, nor the end of questions about who qualified to vote—who has the right agenda when they want to vote; who lives in the right place; who is part of the community; who has the right character?

Multiple factors could disqualify people from voting. Characteristics such as race, gender, ethnicity, and class played an outsized role in whether people deserved political agency. Furthermore, institutionalization acted as a useful sieve that captured a subset of the undesirable Americans designated as the wrong answers to those queries—the poor, sick, weak, old, ethnic, disabled, and criminal. This Article details that nineteenth century Americans justified institutional disenfranchisement on five main grounds: (1) Moral gatekeeping—institutional residents were problematic people and thus did not have the virtue necessary to participate in the polity; (2) Interest divergence—institutional residents had different interests than non-institutional residents and would vote as a bloc; (3) Fear of fraud—institutional residents were vulnerable to corruption; (4) Physical or mental inadequacy—institutional residents were either physically or mentally impaired and thus were not independent or competent enough to vote; and (5) Social contract violations—institutional residents either violated the social contract or were temporarily removed from it and thus were not part of the community. Any one of these factors, or multiple in combination, sufficed.

A few clarifications are in order: First, what do I mean by institutions? The Article roughly follows the Census Bureau's guidelines

⁴² See generally KEYSSAR, *supra* note 33 (analyzing the history of suffrage in the United States).

definition of “group quarters”—“a living quarter in which unrelated people live or stay other than the usual house, apartment, or mobile home.”⁴³ The Census separates group quarters into institutional (such as nursing homes, hospitals, and prisons) and non-institutional (such as colleges, group homes, military barracks, and shelters).⁴⁴ This Article focuses upon the first of these groups, what nineteenth century Americans referred to as “benevolent institutions”—those institutions tasked with caring for and, in some cases, reforming the people in residence: asylums, poorhouses, old age homes, sanitariums, and other spaces. I have written elsewhere about how disabled soldiers’ homes tried—and failed—to elude classification as benevolent institutions for voting purposes.⁴⁵ I leave to other articles and books the discussion of colleges and military institutions.

Second, what do I mean by disenfranchisement? Institutional residents may be disenfranchised for multiple reasons, such as age or mental competency. For this Article, I am focusing on people who are disenfranchised because they live in an institution. Moreover, institutional residents may not face explicit bars to voting; they may experience procedural hassle, retaliatory measures, or other tactics that impede their ability to vote. Additionally, as in Coalinga, institutional residents may be able to vote until a political crisis reveals their political power.

Finally, what do I mean by civil death? The idea of civil death comes to us from British common law, where people convicted of felonies would lose civil rights.⁴⁶ American colonies adopted a modified version of this concept that retained the loss of voting rights for criminals but rejected the total loss of civil rights.⁴⁷ While civil death was initially intended as a serious penalty for serious crimes, this

⁴³ DECENNIAL MGMT. DIV., U.S. CENSUS BUREAU, GLOSSARY AND ABBREVIATION/ACRONYM LIST B7, <https://www.census.gov/pred/www/rpts/TXE%20Program%20Summary%20Appendix%20B.pdf> (last visited Sept. 7, 2021).

⁴⁴ *Group Quarters/Residence Rules*, U.S. CENSUS BUREAU, <https://www.census.gov/topics/income-poverty/poverty/guidance/group-quarters.html> (last visited Sept. 7, 2021).

⁴⁵ See Belt, *supra* note 27.

⁴⁶ See Harry David Saunders, *Civil Death – A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 988–89 (1970) (outlining the history of civil death emerging from early English common law); Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1060 (2002) (describing the transplantation of English civil death law into the American colonies).

⁴⁷ See, e.g., Ewald, *supra* note 46, at 1061; Carl N. Frazier, Note, *Removing the Vestiges of Discrimination: Criminal Disenfranchisement Laws and Strategies for Challenging Them*, 95 KY. L.J. 481, 483 (2006); Caren E. Short, Comment, “Phantom Constituents”: *A Voting Rights Act Challenge to Prison-Based Gerrymandering*, 53 HOW. L.J. 899, 908 (2010); George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1897–98 (1999).

Article will demonstrate that civil death in voting was not limited to this category. Further work is needed on how institutional civil death was linked to other areas besides voting, such as jury service.

The Article will explore how disenfranchisement was (and is) a tool for managing disreputable populations, how political virtue was (and is) used as a disqualifying measure for the vote, and how localities—and indeed the United States—built (and continue to build) themselves up by denying the political voice of the people from whom they drew (and draw) economic sustenance. It allowed (and allows) localities to perpetuate a sleight of hand where they build upon institutions' economic value while ignoring the political voices of the people lodged within them. Thus, a situation like Coalinga, a California (not Southern) city that attempted to disenfranchise hospital (and not prison) residents is one of many examples of a long trend in American political governance. Today, incorporating institutional residents as unencumbered voters would recalibrate the incentive structure that makes building and annexing institutions in all forms so attractive to localities.

The Article unfolds as follows. Part I outlines the standard contemporary narrative of mass incarceration and the franchise. Part II uses historical research to interrupt this narrative and expand our view of prison disenfranchisement by placing it within a broader institutional disenfranchisement framework. I describe how disenfranchisement in welfare institutions and carceral institutions grew up together. Part III returns to the present and, given this new narrative of mass institutionalization and civil death, concludes with a discussion for catalyzing further study on mass institutionalization and civil death.

I

MASS INCARCERATION

A. *Overview*

Literature is abundant on the intertwined relationship between mass incarceration and voting. This Section will start by providing an overview of this relationship. It will then relay the story that most scholars tell about how and why this relationship developed. In so doing, I will point out what this literature leaves out—the connection between disenfranchisement and institutionalized residents.

The contemporary United States is a nation of mass incarceration. At the present moment, 2.3 million Americans live in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163

local jails, and 80 Indian Country jails.⁴⁸ The population of Americans behind bars doubled between 1970 and 1980.⁴⁹ It quadrupled between 1980 and 2005.⁵⁰ The United States leads the world in imprisoning its residents.⁵¹ The burdens of mass incarceration do not fall equally, however. At this point in our history, a stint behind bars is a fact of life for many Black and brown American men. Black Americans are nearly half of the U.S. prison population, even though they are only thirteen percent of the U.S. population overall.⁵² Latinos are nearly twice as likely to be incarcerated as non-Hispanic white Americans.⁵³

Our carceral nation has significant repercussions for incarcerated people. It also has significant effects on our political community overall. Scholars recite a litany of appalling statistics and anecdotes about what this means for the right to vote.⁵⁴

Disenfranchisement for members of the carceral state appears in several guises. First are the outright bans on the ability to vote. Only

⁴⁸ Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>. The report notes that this figure does not include “military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in the U.S. territories.”

⁴⁹ Norval Morris, *The Contemporary Prison, 1965–Present*, in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY* 227, 236 (Norval Morris & David J. Rothman eds., 1995).

⁵⁰ LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., *CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2009*, at 1 (2010), <https://www.prisonpolicy.org/scans/bjs/cpus09.pdf>.

⁵¹ See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271, 1272 (2004).

⁵² Sawyer & Wagner, *supra* note 48.

⁵³ Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), <https://www.prisonpolicy.org/reports/rates.html>.

⁵⁴ See, e.g., Ameer Frodole, Note, *Where Does a Prisoner Live?: Furthering the Goals of Representational and Voter Equality Through Counting Prisoners*, 107 *GEO. L.J.* 175, 175–76 (2018) (analyzing how prisoners should be counted within the context of competing democratic theories of representation); Sean Suber, Note, *The Senseless Census: An Administrative Challenge to Prison-Based Gerrymandering*, 21 *VA. J. SOC. POL'Y & L.* 471, 482–83 (2014) (analyzing the Census's practice of counting prisoners as residents of their prison localities); Short, *supra* note 47, at 908 (arguing that the Census's system for counting felons violates the Voting Rights Act); John C. Drake, Note, *Locked Up and Counted Out: Bringing an End to Prison-Based Gerrymandering*, 37 *WASH. U. J.L. & POL'Y* 237, 238 (2011) (discussing state-level laws that counteract the Census's practice of prison-based gerrymandering); Frazier, *supra* note 47, at 487–88 (discussing criminal disenfranchisement laws and potential legal challenges); Rosanna M. Taormina, Comment, *Defying One-Person, One-Vote: Prisoners and the “Usual Residence” Principle*, 152 *U. PA. L. REV.* 431, 447–48 (2003); Eric Lotke & Peter Wagner, *Prisoners of the Census: Electoral and Financial Consequences of Counting Prisoners Where They Go, Not Where They Come From*, 24 *PACE L. REV.* 587, 602–05 (2004) (discussing how the Census's method for counting people in prison affects electoral apportionment and funding).

two small and overwhelmingly white states, Maine and Vermont, permit incarcerated prisoners to vote.⁵⁵ Thirty states disenfranchise ex-felons on probation, and thirty-four states deny the right to vote to ex-felons on parole.⁵⁶ Twelve states disenfranchise Americans who have completed prison, parole, or probation.⁵⁷ Over six million Americans, one out of forty American adults, cannot vote due to a previous felony conviction.⁵⁸

Second, there are procedural barriers to voting for those who retain the legal right to vote but have difficulty exercising it because of access to absentee ballots or third-party interference. Many people in jail probably fit this description. It is not clear to researchers how many of the 600,000 Americans in jail at any given time retain the legal right to vote.⁵⁹ Jail inmates themselves—or even jail administrators—may not know who can vote, or, if they can, how.⁶⁰ There are no national directives on providing those incarcerated in jails with information on voting.⁶¹ Election procedure varies by institution.⁶² Additionally, it is difficult for advocates to organize jail inmates due to the population churn.⁶³ Furthermore, the sheriff's office often determines the flow of information, resources, and documents into the jail.⁶⁴ Jail electoral practices are even more fraught when the sheriff herself, an elected official, is on the ballot.⁶⁵

In addition to the individual harms of disenfranchisement, communities and identity groups face spillover injuries due to the uneven consequences of mass incarceration and prison-based gerrymandering. While prisoners are considered institutional residents for census purposes, they cannot vote within the institution there—and often anywhere.⁶⁶ Thus, prisoners are used to inflate localities and increase their political and economic power. Incarcerated Americans who are

⁵⁵ CHRISTOPHER UGGEN, RYAN LARSON & SARAH SHANNON, SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 4 (2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 3.

⁵⁹ Margaret Barthel, *Getting Out the Vote from the County Jail*, ATLANTIC (Nov. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/11/organizers-fight-turn-out-vote-county-jails/574783>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Hansi L. Wang & Kumari Devarajan, 'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts, NPR: CODE SWITCH (Dec. 31, 2019, 5:00 AM), <https://>

permitted to vote have their votes counted as absentee ballots from their previous residence; they cannot use the prison as their current residence.⁶⁷ Even Maine and Vermont count the votes of those incarcerated according to the last residence they held before incarceration.⁶⁸

Prison-based gerrymandering often dilutes the political voice and resources of minority and urban communities while bolstering whiter and rural areas. One out of every thirteen voting-age Black Americans is disenfranchised because of criminal conviction status.⁶⁹

B. *Outlining the Popular Narrative*

Why and how did this happen? The classic story presented by scholars and advocates goes something like this: American colonies adopted the idea of “civil death” from the British, who in turn had borrowed it from the Ancient Romans. This civil death concept included the loss of voting rights for criminals. Their disenfranchisement was not particularly significant in the U.S. context until after the Civil War and the passage of the Fifteenth Amendment because of the minimal amount of criminal incarceration in the antebellum United States. Once Black Americans were freed from slavery and constitutionally protected from racial discrimination in voting, racist Southern white elites needed to find a way to disenfranchise Black people that would be ostensibly race-neutral. Criminal disenfranchisement was quite useful, along with tactics such as poll taxes, grandfather clauses, and literacy tests. While the Voting Rights Act and courts eventually struck down these other tactics, criminal disenfranchisement remains in use today to disenfranchise predominantly Black, as well as brown, Americans.⁷⁰ The initial infrastructure of civil death, drawn from an

www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts.

⁶⁷ See Nicole Lewis, *In Just Two States, All Prisoners Can Vote. Here's Why Few Do.*, MARSHALL PROJECT (June 11, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/11/in-just-two-states-all-prisoners-can-vote-here-s-why-few-do> (“Incarcerated people can only vote by absentee ballot in the place where they last lived.”).

⁶⁸ *Id.* (explaining that in Vermont, people who are incarcerated “can only vote by absentee ballot in the place where they last lived”). In Maine, prisoners may register to vote in “any municipality where that person has previously established a fixed and principal home to which the person intends to return.” ME. REV. STAT. ANN. tit. 21-A, § 112.14 (West 2008).

⁶⁹ UGGEN ET AL., *supra* note 55.

⁷⁰ See Frazier, *supra* note 47, at 484 (“Of the voting prohibitions introduced by these Southern conventions during Reconstruction, only criminal disenfranchisement remains.”).

ancient principle and forged with a racist purpose in the United States, becomes a modern juggernaut of racial injustice.⁷¹

Strikingly, this familiar story does not cover institutionalized residents like those in the Coalinga Hospital. CSHC residents are civilly committed and have served their criminal sentences. They are in a hospital, not a prison. The attempts to disenfranchise residents happened due to retaliation by non-institutionalized residents over the hospital residents' political power.⁷² The next Part tells how voting rights and institutions became intertwined during the nineteenth century. The problems that CSHC residents faced will seem familiar rather than exceptional.

⁷¹ Academic pieces tend to base their story on sociologists Angela Behrens, Christopher Uggen, and Jeff Manza's influential work. See Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States, 1850–2002*, 109 AM. J. SOCIO. 559 (2003). More popular versions utilize MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010). However, at varying levels of detail, this account of civil death is standard in law review articles, newspaper articles, and advocacy websites. See, e.g., WARD E.Y. ELLIOTT, *THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT'S ROLE IN VOTING RIGHTS DISPUTES, 1845–1969*, at 43–44 (1974); KEYSAR, *supra* note 33, at 51, 395–96 n.19; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 30–34 (2004); JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 53–55 (2006); Behrens, Uggen & Manza, *supra*, at 597–98; Re & Re, *supra* note 30, at 1584–85; John Dinan, *The Adoption of Criminal Disenfranchisement Provisions in the United States: Lessons from the State Constitutional Convention Debates*, 19 J. POL'Y HIST. 282, 296 (2007); Shadman Zaman, Note, *Violence and Exclusion: Felon Disenfranchisement as a Badge of Slavery*, 46 COLUM. HUM. RTS. L. REV. 233, 235–36 (2015); Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 612 (2004); *Developments in the Law—The Law of Prisons*, 115 HARV. L. REV. 1838, 1942 (2002); Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355, 387–91 (2011); Debra Parkes, *Ballot Boxes Behind Bars: Toward the Repeal of Prisoner Disenfranchisement Laws*, 13 TEMP. POL. & CIV. RTS. L. REV. 71, 74 (2003); Short, *supra* note 47, at 903; Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 31 (Marc Mauer & Meda Chesney-Lind eds., 2002); Jeffrey Reiman, *Liberal and Republican Arguments Against the Disenfranchisement of Felons*, CRIM. JUST. ETHICS, Winter/Spring 2005, at 3; Roger Clegg, *Who Should Vote?*, 6 TEX. REV. L. & POL. 159, 172 (2001); Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 271 (2004).

⁷² Following the success of the CHSC residents in striking down the tax initiative, non-institutionalized residents attempted to disenfranchise residents by setting their residence status to their last known addresses, preventing them from voting on local initiatives. See Appleton, *supra* note 10 (describing the state assembly bill).

II

MASS INSTITUTIONALIZATION

When Alexis de Tocqueville traveled the United States with Gustave de Beaumont in 1831, he marveled at what he perceived as American society's open and democratic nature. In the United States, Tocqueville wrote, "except for slaves, servants, and paupers fed by the township, no one is without a vote and, hence, an indirect share in lawmaking."⁷³ A current observer could add many more categories—women, children, prisoners, Natives—to Tocqueville's list. However, even at the time, Tocqueville caught sight of the contradictory nature of American political citizenship. He marveled at what he believed to be a progressive democratization story, even as he noted the exceptions. This Part foregrounds the story of one subset of those exceptions—the disenfranchised institutional resident.

In the new sociopolitical regime of Tocqueville's time, the institutionalized disenfranchised dependent adult man was the emblematic quasi-citizen. Fleshing out this new man's emergence requires marrying two narratives that are often discussed and debated separately—first, the development and extension of democracy, and second, the rise of institutionalized care. These histories—of voting, socioeconomic class, ability, ethnicity, and criminality—are critically linked. At the same time that benevolent reformers were constructing paupers, criminals, and other disreputable characters as social problems that the state should address, state constitutional convention delegates, jurists, and legislators were disenfranchising them. Americans remixed ideas borrowed from England into a new form that ushered "common" white men into the polity but punished them severely with institutionalization and/or disenfranchisement if they committed crimes and became disabled, aged without family support, or lingered in poverty.

A. *Institution Building*

U.S. colonists adopted a social and political system from England that made local governments responsible for poor people. They developed this inherited system with increasingly specific categories of people—not all of them poor—who received government attention and treatment.⁷⁴ The matrix of state-supported people was structured

⁷³ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 240 (J.P. Mayer ed., George Lawrence trans., Harper Perennial 2006).

⁷⁴ See MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 13–14 (1986) (describing the growth of early American "poorhouses" as an outgrowth from English practices).

by combining assessments about their ability and moral judgment about their economic failure.⁷⁵

Though early U.S. culture stigmatized the poor, American elites also lamented the toxicity of European class conflict and applauded the colonies' relatively more egalitarian ethos. Colonists resented, however, that English Poor Law officials regularly transferred poor people and criminals to the colonies. Although colonies provided support for the local poor, they also took pains to distinguish poor vagrants. Those that were not considered residents were "warned out"—that is, actively discouraged from settling and encouraged to move.⁷⁶ Additionally, some towns required that new people ask permission to settle.⁷⁷ These laws were intended to discourage costly undesirables from settling in towns.⁷⁸ For instance, Abigail Gifford, a widow whom John Winthrop described as a "somewhat distracted and . . . very burdensome woman," was not allowed to remain in Massachusetts Bay Colony and had to return to her ship for deportation.⁷⁹ A significant obstacle to implementing such laws was the tremendous expense involved in litigating cases and removing troublesome non-residents. According to historian Michael Katz, "Towns often spent more money ridding themselves of paupers than they would have spent supporting them. Aside from the trouble and expense of endless litigation, the system often was cruel, for old and sick paupers frequently were shipped from town to town, even in the middle of winter."⁸⁰

At the same time, criminals were rarely institutionalized.⁸¹ Though states such as Massachusetts had local jails, they were small, and criminals were sent to them sparingly.⁸² Magistrates had broad

⁷⁵ *Id.* at 12–18.

⁷⁶ See WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 19 (6th ed. 1999).

⁷⁷ *Id.* at 20.

⁷⁸ See *id.* (describing state laws that required residency to qualify for public assistance and granted town councils the power to "expel all nonresident vagrants and indigents").

⁷⁹ *Id.* at 25; see also GROB, *supra* note 37, at 4–6 (describing the development of Boston's first almshouse).

⁸⁰ KATZ, *supra* note 74, at 21.

⁸¹ See David J. Rothman, *Perfecting the Prison: United States, 1789–1865* (noting that imprisonment was not among the most common punishments for crime), in *THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY*, *supra* note 49, at 111–12.

⁸² See *id.* at 52–53 (describing how early prisons were used for holding a person in anticipation of some judicial action, rather than for correction); see also Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179 (1982) (using Massachusetts as a case study of the shift from criminal sanction to incarceration).

discretion in assessing punishment and preferred fines, whipping, and expulsion from their town limits to incarceration.⁸³

Institutionalization picked up and then took off during the nineteenth century. Paupers were an increasingly worrisome social problem in the early 1800s. Localities transitioned to indoor relief, or poorhouses and almshouses, from outdoor relief, or money transfers, in the early nineteenth century to discourage poor people from seeking state support.⁸⁴ They believed that paupers would be less likely to ask for help if they were forced to live in an unpleasant space instead of receiving cash payment.

Poorhouses were also intended to save counties money by reducing settlement litigation. According to the Quincy Report, an influential Massachusetts report on poverty published in 1820, “all the towns that had already built a poorhouse ‘without exception claimed a reduction in their expenses.’”⁸⁵ These new institutions were not just cost-saving devices, however. Reformers were optimistic that institutions would also provide avenues for reform and rehabilitation by removing troublesome people from the environmental contexts that encouraged their problematic behavior. In poorhouses, for instance, poor people would learn how to work in an alcohol-free environment.⁸⁶

Specialized institutions emerged during the mid-1800s, initially because of rapid and fundamental shifts in the treatment of insanity.⁸⁷ Initially, the public viewed insanity as a permanent religious affliction.⁸⁸ Insane people rarely received substantive treatment. The medical profession was in its infancy; more fundamentally, doctors, like most of the public, felt there were no effective treatments for insanity. As Charles Lawrence, a historian of Philadelphia almshouses, remarked in 1808, doctors rarely visited insane people institutionalized in asylums: “They appeared to think that insanity was incurable, and even the mildest cases were in cages like wild beasts”⁸⁹ Med-

⁸³ ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 32, at 48.

⁸⁴ *See* KATZ, *supra* note 74, at 11–12.

⁸⁵ *Id.* at 22 (citing the Quincy Report, a policy report on almshouses produced by a Massachusetts committee in 1821).

⁸⁶ *See* DAIN, *supra* note 41, at 38; KATZ, *supra* note 74, at 23. *See generally* RAYMOND A. MOHL, *POVERTY IN NEW YORK, 1783–1825*, at 244 (1971) (describing petitions for liquor-licensing reforms that were initiated by a New York City pauperism investigation committee).

⁸⁷ *See* KATZ, *supra* note 74, at 11 (describing the proliferation of such institutions in this era).

⁸⁸ *See* GROB, *supra* note 37, at 7; DAIN, *supra* note 41, at 4.

⁸⁹ CHARLES LAWRENCE, *HISTORY OF THE PHILADELPHIA ALMSHOUSES AND HOSPITALS FROM THE BEGINNING OF THE EIGHTEENTH TO THE ENDING OF THE NINETEENTH CENTURIES* 57 (1905).

ical cures for mental illness were based on a “theory of crisis” where they induced physical crises, such as bleeding and purging so that the body could expel the harmful substances causing illness.⁹⁰ Milder treatments included work, travel, diet, “pleasant living conditions,” “cold shower baths, threats of terrible punishment, and sudden immersion into a pool of water.”⁹¹ For the state, insane people were merely a nuisance, not people suffering from a particular ailment; thus, when poor or violent, they were confined along with the poor and the criminal in relatively undifferentiated and crude almshouses or jails. The impetus for the change in attitude toward insanity came mainly from overseas, as Americans followed European shifts to moral treatment in a benevolent institution. Samuel Tuke memorialized his grandfather William Tuke’s role as the benevolent leader of the lunatic retreat at York, England, in *Description of the Retreat, an Institution near York, for Insane Persons of the Society of Friends*, published in 1813.⁹² Tuke’s benevolent leadership provided a model for Americans, especially for fellow Quakers.⁹³ More fundamentally, French physician Philippe Pinel, argued that insanity was curable if treated with benevolence, which he termed “moral treatment.”⁹⁴

In the early 1800s, reformers began to pull these mentally disabled people from poorhouses and jails.⁹⁵ Though there were some private northeastern insane asylums—the Friends’ Asylum outside Philadelphia, founded in 1817; Massachusetts’s McLean Asylum, opened in 1819; New York’s Bloomingdale Asylum, founded in 1821; and the Hartford Retreat in Connecticut, started in 1824—as well as public asylums in Kentucky and Virginia, the widespread practice of state and local governments treating mentally disabled people in specialized institutions did not take root until the 1830s.⁹⁶

In the early 1800s, criminality also became a matter of intense public concern. Historians attribute this increased attention to several factors, including urbanization and social reform.⁹⁷ Between 1790 and 1830, for instance, the population of Massachusetts almost doubled.⁹⁸

⁹⁰ DAIN, *supra* note 41, at 10.

⁹¹ *Id.* at 11.

⁹² SAMUEL TUKE, *DESCRIPTION OF THE RETREAT, AN INSTITUTION NEAR YORK, FOR INSANE PERSONS OF THE SOCIETY OF FRIENDS* (Philadelphia, Isaac Peirce 1813).

⁹³ DAIN, *supra* note 41, at 14.

⁹⁴ *See id.* at 12–13.

⁹⁵ *See* David Wagner, *Poor Relief and the Almshouse*, *DISABILITY HIST. MUSEUM*, <https://www.disabilitymuseum.org/dhm/edu/essay.html?id=60> (last visited Sept. 8, 2021).

⁹⁶ *See* DAIN, *supra* note 41, at 38.

⁹⁷ *See* ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 32, at xiii, xvi (describing the proliferation of prisons in the Jacksonian era and noting the increased urbanization and “a revolution in social practice” occurring during the period).

⁹⁸ *Id.* at 57.

As people lived closer together, banishing criminals to the next town became a less effective way of externalizing crime problems and dismantling criminal networks.⁹⁹ Moreover, as social mobility increased, neighbors became less likely to know and trust each other.¹⁰⁰

Strikingly, institutionalization also formed a fundamental part of criminal justice reform. As historian David Rothman wrote, “criminals” also needed isolation from a problematic environment.¹⁰¹ However, jail construction lagged in comparison to other, more benevolent institution building. State prisons were not widely established until the end of the 1820s.¹⁰² Furthermore, federal prisons did not emerge until 1891.¹⁰³

The journey from outdoor poor relief in the form of cash grants, to indoor poor relief through poorhouses and workhouses, to state-subsidized asylums for “lunatics,” to overcrowded public asylums and poorhouses still housing “lunatics,” with a possible way station in jail, became a well-traversed path for states, with several common steps. As benevolent reformers traveled from state to state, they fertilized localities with ideas about poverty, criminality and insanity, and the need for institution-based solutions.¹⁰⁴ They pitted states against each other to secure more state funding for their institutions and create new ones.

Reformers argued that state-funded institutions would provide economies of scale and efficiency, as they would be easier to manage and would be cheaper than a series of local institutions.¹⁰⁵ Also, funding could allow institutional officers to utilize the new developments in moral treatment and not just custodial care so that they could cure their disreputable residents of whatever ailed them—be it criminality, poverty, or insanity.¹⁰⁶ Legislators and reformers also stressed to localities overburdened with “large numbers of dependent

⁹⁹ See *id.* at 57–58 (discussing some of the social and economic changes that forced communities to rethink their “traditional mechanisms of social control”).

¹⁰⁰ See *id.* at 58.

¹⁰¹ See *id.* at 82 (“To both the advocates of the congregate and the separate systems, the promise of institutionalization depended upon the isolation of the prisoner and the establishment of a disciplined routine.”).

¹⁰² See *id.* at 80–81.

¹⁰³ *The History of Corrections in America*, NAT’L INST. OF CORR. (Feb. 13, 2013), <https://nicic.gov/history-corrections-america>.

¹⁰⁴ See ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 32, at xiii–xiv (describing the quick pace of institution construction during the Jacksonian era).

¹⁰⁵ See ELLEN DWYER, *HOMES FOR THE MAD: LIFE INSIDE TWO NINETEENTH-CENTURY ASYLUMS* 33 (1987).

¹⁰⁶ See *id.* (“[S]ince most pauper insane were not poor by choice but had been driven into poverty by their illness, medical doctors at a state asylum could restore not only their reason but their economic productivity.”).

paupers . . . that a state asylum would lessen their counties' financial burdens. They also rejoiced in the prospect of turning social dependents into economically productive citizens."¹⁰⁷

Public charitable institutions became an important part of a state's reputation. Reformers used state funding as a competitive measurement to leverage more support for benevolent institutions. The number and types of institutions boomed.¹⁰⁸ States added deaf schools, old age homes, "idiot schools," sanitariums, and other institutions to their older assemblage of poorhouses, asylums, and jails. John Galt, the superintendent of Eastern State Hospital in Virginia, lectured on idiocy and noted multiple examples of state support for "idiot schools," including the New York State Asylum for Idiots, the "idiot asylum" in Columbus, Ohio, and the Eastern Lunatic Asylum of Kentucky at Lexington.¹⁰⁹ He ended his list of state support with his strategic plea that "[e]xperimental schools [for idiots] have been elsewhere followed by permanent and well-endowed institutions; and the education of idiots is now the settled policy of many European governments, as it is of at least three of the states of this Union. May Kentucky soon be found emulating their noble example!"¹¹⁰ Tabulations of dependent citizens, classified by state, were also available for public consumption and discussion.¹¹¹ Politicians measured the generosity—and affluence—of their states by the numbers and proportion of the "defective, dependent, and delinquent" classes they were able to serve and by the grandiosity of institution architecture.¹¹²

The public also recognized the economic benefits of locating institutions within their midst. During the outdoor relief period, localities tried hard to expel non-resident paupers and decline funding for local ones, especially the "lunatics."¹¹³ Now, far from shunning these institutions, towns lobbied for the placement of them within their borders. Virginians applauded the erection of Eastern State Hospital in Williamsburg, as "[i]t would give the little capital a new source of eco-

¹⁰⁷ *Id.* at 34.

¹⁰⁸ See ROTHMAN, *THE DISCOVERY OF THE ASYLUM*, *supra* note 32, at xiv (referring to this period as "the age of the asylum").

¹⁰⁹ See JOHN M. GALT, *A LECTURE ON IDIOCY* 35–36 (Richmond, Enquirer Book & Job Off. 1859).

¹¹⁰ *Education of Idiots at the West*, 12 *AM. J. INSANITY* 377, 383 (1856).

¹¹¹ See FREDERICK HOWARD WINES, *REPORT ON THE DEFECTIVE, DEPENDENT, AND DELINQUENT CLASSES OF THE POPULATION OF THE UNITED STATES AS RETURNED AT THE TENTH CENSUS (JUNE 1, 1880)*, at 575–77 (Washington, Gov't Printing Off. 1888).

¹¹² *Cf. id.* at XXI ("But there is always the difficulty of deciding whether the amount of relief extended is governed by the actual demand for it, or by the generosity or favor of those by whom it is administered.").

¹¹³ See *supra* notes 36–38 and accompanying text.

conomic gain.”¹¹⁴ More than thirty towns submitted bids for the new “lunatic hospital” in Massachusetts. The finalists were Boston and Worcester.¹¹⁵ Worcester was chosen for geographic and political reasons. Boston was in the eastern part of the state, and the central and western parts of Massachusetts were becoming increasingly concerned about Boston’s influence.¹¹⁶ Worcester, forty miles to the west of Boston, was centrally located and well-placed for the railroads.¹¹⁷ Furthermore, Governor Levi Lincoln was a Worcester resident.¹¹⁸ The Worcester legislature approved \$2,500 to buy a site for the hospital.¹¹⁹ In another instance, several towns lobbied for the new mental hospital in Illinois.¹²⁰ Peoria, Hillsboro, and Chicago were the finalists for the site.¹²¹ Although the Illinois Senate chose Peoria, legislator William Thomas of Jacksonville altered the bill to read Jacksonville instead.¹²² Jacksonville received the Illinois School for the Deaf through the same maneuver by Thomas in 1839.¹²³

As William Thomas’s savvy move suggests, politicians had additional reasons for wanting these institutions sited within their jurisdiction—because of the patronage opportunities they created. State legislators or governors appointed institutional board members and officers, and it was not uncommon for the entire personnel to be replaced when the political party in charge shifted. In New York, between 1801 and 1809, as the political leaderships switched five times, the almshouse superintendent did so as well.¹²⁴ In Virginia, asylum directors and officers, Whigs and Democrats alike, sold commodities to the hospital and hired out their enslaved people to work at it.¹²⁵ Norman Dain calculated that the value of the Eastern State hospital attendant job was worth \$500 (profits from legislative appropriations) + \$2,000/year (selling supplies to the hospital) + the use of asylum funds interest-free.¹²⁶ A pithy Williamsburg saying encapsu-

¹¹⁴ DAIN, *supra* note 41, at 38.

¹¹⁵ GROB, *supra* note 37, at 30–31.

¹¹⁶ *Id.* at 31.

¹¹⁷ *Id.* at 30.

¹¹⁸ *Id.* at 31.

¹¹⁹ *Id.* at 30.

¹²⁰ See Frank B. Norbury, *Dorothea Dix and the Founding of Illinois’ First Mental Hospital*, 92 J. ILL. ST. HIST. SOC’Y 13, 21 (1999).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 18, 21.

¹²⁴ MOHL, *supra* note 86, at 75.

¹²⁵ DAIN, *supra* note 41, at 51.

¹²⁶ See *id.* at 148.

lated the close relationship of patrons and asylums: “[I]n Williamsburg . . . the town was a place where ‘the lazy take care of the crazy.’”¹²⁷

While institutionalized residents were a *topic* of much conversation among the general public, elite professionals and reformers, and government officials, their *voices* were not included in the discussion. Statistics and sentimental imagery produced an abundance of new knowledge about these groups, yet also objectified them as voiceless grotesques or a set of numbers with no agency. Reformers also framed their charges as scary, violent, pathetic, and repulsive. Prominent reformer Dorothea Dix’s 1844 memorial to the New York State Legislature recounted the horrifying sights she encountered during her travels through New York State.¹²⁸ At Albany almshouse, the master told her that there were “plenty of” insane people in the institution; they were “naked, in the crazy cellar.”¹²⁹ In the dungeons, she saw a

madman . . . a hideous object; matted locks, unshorn beard, a wild wan countenance [sic], yet more disfigured by vilest uncleanness, in a state of entire nudity, save the irritating incrustations derived from that dungeon reeking with loathsome filth: here, without light, without pure air, without warmth, without cleansing, without *anything* to secure decency or comfort, here was a human being, forlorn, abject, and disgusting¹³⁰

Though Dix and others succeeded in creating a nationwide state-supported institutional infrastructure for people with needs to replace a scattered and piecemeal local practice of cash support, the system was not without its costs. Reformers characterized institutionalized residents to the public and legislators as pathetic freaks in need of public largesse from a benevolent populace. Moreover, the reality of such institutions fell far short of the promise, as states failed to support the institutions they built, institutions became custodial warehouses, and the benevolent professionals did not cure residents at the rate they initially promised.

¹²⁷ *Id.* at 158. The linkage of people with perceived economic or mental difficulties with particular communities could prove troubling. New York newspapers signaled an early version of this when they reported that in 1795, of 622 residents in the New York almshouse, 276 (44%) were immigrants. MOHL, *supra* note 86, at 17. An editorial in the *New York Minerva* warned: “We shall be over-run with vagabonds . . . we shall have the refuse of all the corrupt parts of society poured in upon our county.” *Id.* Municipal administrators and city councilors advocated for immigration restrictions for New York City. *Id.*

¹²⁸ D.L. Dix, *Memorial to the Honorable the Legislature of the State of New-York*, in DOCS. OF THE ASSEMB. OF THE STATE OF NEW-YORK, 67th Sess., at 69, 70 (1844).

¹²⁹ *Id.*

¹³⁰ *Id.* at 70, 72.

While non-institutionalized people were quite proud of the institutions in their midst, they were less enamored of the people who filled them. Popular sentiment towards paupers hardened as the Civil War neared and the country weathered multiple economic downturns.¹³¹ Moreover, the institutionalized population was different than initially envisioned. In short, the Irish came.

Due to the potato famine, Irish immigrants poured into the eastern seaboard starting in the mid-1840s. Irish immigrants were generally stereotyped as drunken, violent, and corrupt paupers. In 1852, Ralph Waldo Emerson wrote in his notebook:

The worst of charity, is, that the lives you are asked to preserve are not worth preserving. The calamity is the masses. I do not wish any mass at all, but honest men only, facultied men only, lovely & sweet & accomplished ~~m~~women only; and no shovel-handed Irish, & no Five-Points, or Saint Gileses, or drunken crew, or mob or stockingers, or 2 millions of paupers receiving relief, miserable factory population, or lazzaroni, at all.¹³²

Alabama Know-Nothing Congressman William Russell Smith, in a speech in 1855, declared:

I do not want the vermin-covered convicts of the European continent. . . . I do not want those swarms of paupers, with pestilence in their skins, and famine in their throats, to consume the bread of the native poor. Charity begins at home—charity forbids the coming of these groaning, limping vampires.¹³³

Their ranks filled institutions. In 1846, the number of Irish patients admitted to Worcester Hospital in Massachusetts was twelve.¹³⁴ Eight years later, it had climbed to ninety-six.¹³⁵ The hospital trustees worried that “incurable foreign paupers” rendered the hospital as custodial rather than curative and that non-Irish patients would refuse to enroll.¹³⁶ Thus, the hospital “will soon be denied to our native population, except to such as may be paupers or

¹³¹ See HIDEAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 121–22 (2017) (describing how Americans had soured on the “optimistic view of the poor” as being able to be reformed by the mid-nineteenth century).

¹³² 13 THE JOURNALS AND MISCELLANEOUS NOTEBOOKS OF RALPH WALDO EMERSON 112 (Ralph H. Orth & Alfred R. Ferguson eds., 1977); see also PAINTER, *supra* note 40, at 139–40 (quoting and discussing Emerson).

¹³³ *Id.* at 150 & 420 n.39 (quoting Jeff Frederick, *Unintended Consequences: The Rise and Fall of the Know-Nothing Party in Alabama*, 55 ALA. REV. 3, 3 (2002)).

¹³⁴ GROB, *supra* note 37, at 136.

¹³⁵ *Id.* at 136.

¹³⁶ HIROTA, *supra* note 131, at 80–81.

criminals.”¹³⁷ Alienists (precursors to psychiatrists), typically Protestant, native-born, and drawn from elite economic classes, were no more enthusiastic about having Irish patients.¹³⁸ Prominent alienist Edward Jarvis believed that the Irish had “less sensibility. . . . They have also greater irritability”¹³⁹ Alienists tried to send their Irish patients to almshouses instead of asylums, so they were not responsible for their treatment and that non-Irish potential patients would be discouraged from seeking help in asylums.¹⁴⁰ Not all immigrants were stereotyped like the Irish. By contrast, the Illinois State Hospital characterized German patients as “physically healthy, docile and affectionate under treatment, and grateful when they recovered.”¹⁴¹

The Irish were the pariah group in most institutions because the nonwhite populations who would have been relegated to an even lower social status were not allowed in most of them. Institutional residence was meant as a temporary political purgatory until the restoration of full-fledged citizenship. Institutions were intended for those who, with reform or treatment, could potentially rejoin the polity and the community. This designation, then, meant white people.¹⁴² The few Black people lodged within institutions were segregated in inferior locations.¹⁴³ It was only in the postbellum period that Black

¹³⁷ TWENTY-FIRST ANNUAL REPORT OF THE TRUSTEES OF THE STATE LUNATIC HOSPITAL, AT WORCESTER 7 (Boston, William White 1854).

¹³⁸ See GROB, *supra* note 37, at 128, 140 (describing the antipathy of the Worcester Hospital staff toward the Irish patients and how such prejudice affected diagnoses).

¹³⁹ *Id.*

¹⁴⁰ See Rothman, *supra* note 81, at 126 (describing anti-Irish sentiment as a motivating factor behind the lack of funding for prisons).

¹⁴¹ FOURTH BIENNIAL REPORT OF THE TRUSTEES OF THE ILLINOIS STATE HOSPITAL FOR THE INSANE 31 (Jacksonville, Jacksonville Book & Job Off. 1854). Western institution-building lagged in development in contrast to the East, but a similar dynamic occurred with an influx of Mexican and Asian immigrants “flooding” institutions. See, e.g., RICHARD W. FOX, *SO FAR DISORDERED IN MIND: INSANITY IN CALIFORNIA, 1870–1930*, at 105–10 (1978) (noting widespread anti-immigrant sentiment in California and the disproportionate representation of immigrants in institutions); Jonathan Simon & Stephen A. Rosenbaum, *Dignifying Madness: Rethinking Commitment Law in the Age of Mass Incarceration*, 70 U. MIA. L. REV. 1, 17–18 (2015) (describing how California’s asylum system was designed as a means by which to segregate minority populations).

¹⁴² See Gerald N. Grob, *Class, Ethnicity, and Race in American Mental Hospitals, 1830–75*, 28 J. HIST. MED. & ALLIED SCIS. 207, 208 (1973) (describing how Black people received the lowest quality of care in mental hospitals); Matthew Gambino, *‘These Strangers Within Our Gates’: Race, Psychiatry and Mental Illness Among Black Americans at St Elizabeths Hospital in Washington, DC, 1900–40*, 19 HIST. PSYCHIATRY 387, 388 (2008) (noting how racist assumptions inherent to psychiatry led to inferior treatment for Black patients in a Washington, D.C. institution); see also Jordan A. Conrad, *A Black and White History of Psychiatry in the United States*, J. MED. HUM. (Aug. 28, 2020), <https://link.springer.com/article/10.1007/s10912-020-09650-6> (providing a history of the intersection between psychiatry and racism).

¹⁴³ See Grob, *supra* note 142, at 228.

people appeared in large numbers in mostly segregated institutional spaces.¹⁴⁴

Furthermore, paupers were often imprisoned.¹⁴⁵ At best, a pauper was a lunatic who had an excuse for his economic failure. Or, he was an able-bodied man dependent upon taxpayers for his livelihood. At his worst, he was a criminal whose antisocial actions banished him from the community. In any event, people were labeled in order to be managed. They were branded as social weeds that needed to be rooted out for society to flourish. However, these disenfranchised Americans were not entirely worthless to the polities that housed them; they were, in fact, quite economically lucrative. Yet, their possible political power could also prove threatening to those who were not housed within institutions.

B. Voting

Elite men like Horace Greeley applauded disenfranchising institutional residents. The bombastic Whig editor of the *New York Tribune* also served as a New York State Constitutional Convention Delegate in 1867. He told his fellow delegates—and the public reading his account in the newspaper—about the horrors that happened when institutional residents such as paupers were able to vote. He “personally participated where a member of Congress was chosen directly by votes brought out of the almshouse in New York for that purpose.”¹⁴⁶ Even as he was regaling everyone with anecdotes of outrageous election violations, he believed that everyone knew how corrupt the system was: “[Y]ou know very well that the political party which has not control of the almshouse will not get any of those votes. . . . I believe there has been great corruption in the doling out of votes from the almshouses in support of the political party which has control of them”¹⁴⁷ Ultimately, according to Greeley, allowing paupers to vote violated the ethos of elections:

If it was giving five hundred or five thousand men the right of independent voting in this State, that would be one thing. But if you give forty or fifty men who control the almshouses of the State, the

¹⁴⁴ Census records note that large majorities of listed paupers were white. BUREAU OF THE CENSUS, DEP’T OF COM. & LAB., SPECIAL REPORTS: PAUPERS IN ALMSHOUSES 1904, at 6 tbl.II (1906). For a discussion of a parallel dynamic of segregated institutional spaces with respect to Native Americans in the early twentieth century, see SUSAN BURCH, COMMITTED: REMEMBERING NATIVE KINSHIP IN AND BEYOND INSTITUTIONS (2021).

¹⁴⁵ See generally ROTHMAN, CONSCIENCE AND CONVENIENCE, *supra* note 36.

¹⁴⁶ 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, HELD IN 1867 AND 1868, IN THE CITY OF ALBANY 208 (Albany, Weed, Parsons & Co. 1868).

¹⁴⁷ *Id.*

control of two or three thousand votes, I do not believe that is in accordance with the republicanism¹⁴⁸

To disenfranchise paupers, in his view, was “in effect, a proposition to deprive some fifty or sixty managers of poor-houses, and dispensers of public alms, of the privilege of casting eight or ten thousand votes in this State.”¹⁴⁹

While Horace Greeley was a particularly vocal participant at the convention—as he was at any venue—he was not alone in his sentiment that paupers and other institutionalized white men should not vote. Over the nineteenth century, delegates gathered together in conventions to revise state constitutions or create new ones. Despite their differences on many subjects and their various party affiliations, delegates were strongly united that institutional residents were unfit for the franchise.¹⁵⁰ And, who was in and who was out of democracy mattered.

This critical component of American identity emanated from an assemblage of state—not federal—decisions. In the colonial period, property holding was the hardline for voting, following the English custom of limiting political citizenship to those considered independent.¹⁵¹ This limitation was partially due to fears of corruption and undue influence: English men unlucky enough to have unscrupulous landlords or employers could find themselves pressured to sell their vote or herded to the polls.¹⁵² Thus, even English suffrage reformers like journalist and activist William Cobbett worried that people without a “will of their own” should not vote because they would give the “artful, wealthy man” too much influence.¹⁵³ Elites were concerned about poor men without wills of their own; however, they were also anxious that these same men would be *too* empowered and thus disobeyed their wealthy superiors.¹⁵⁴

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 221.

¹⁵⁰ See Belt, *supra* note 27, at 472–73.

¹⁵¹ See Chilton Williamson, *American Suffrage and Sir William Blackstone*, 68 POL. SCI. Q. 552, 552 (1953) (“Among the many arguments against the abolition of property qualifications for the suffrage in the United States none was more frequently heard than that which said no adult male should be allowed to vote unless he had a ‘will of his own.’”); KEYSSAR, *supra* note 33, at 5 (noting an argument for limiting the franchise to property owners because they “alone possessed sufficient independence to warrant their having a voice in governance”).

¹⁵² See Williamson, *supra* note 151, at 553.

¹⁵³ *Id.* at 553 (citing 3 JOHN M. COBBETT & JAMES P. COBBETT, SELECTIONS FROM COBBETT’S POLITICAL WORKS: BEING A COMPLETE ABRIDGMENT OF THE 100 VOLUMES WHICH COMPRISE THE WRITINGS OF “PORCUPINE” AND THE “WEEKLY POLITICAL REGISTER” 231 (London, Ann Cobbett n.d.)).

¹⁵⁴ See *id.*; see also MARC W. KRUMAN, BETWEEN AUTHORITY AND LIBERTY: STATE CONSTITUTION MAKING IN REVOLUTIONARY AMERICA 89 (1997) (noting the

Similar concerns were widespread in the colonies. As voting was public and open, elites at the polls actively monitored the votes of poor men.¹⁵⁵ Like in England, colonial elites argued that men without property were liable to influence and coercion by propertied men and would therefore not vote for their interests. John Adams wrote:

[V]ery few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has attached their minds to his interest. . . . [They are] to all intents and purposes as much dependent upon others, who will please to feed, clothe, and employ them, as women are upon their husbands, or children on their parents.¹⁵⁶

James Wilson, a famous Pennsylvania lawyer and one of the first justices of the Supreme Court, contended that citizens “whose circumstances do not render [them] necessarily dependent on the will of another” should be the only ones granted the suffrage.¹⁵⁷ Blackstone, in his influential *Commentaries on the Laws of England*, noted:

The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty.¹⁵⁸

By the 1750s, twelve American colonies had adopted property qualifications for suffrage.¹⁵⁹ Such qualifications were everywhere linked to the idea of independence—and its opposite, the “dependency” that was thought to compromise a vote.¹⁶⁰ This property-based view of independence carried over into the early republic and quickly unraveled during the antebellum era. Between 1810 and the 1830s,

Revolutionary-era belief that “economic independence earned a man membership in the political nation”).

¹⁵⁵ See Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 OHIO ST. L.J. 481, 517 (2001) (describing this practice in Massachusetts).

¹⁵⁶ Letter from John Adams to James Sullivan (May 26, 1776), in 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 375, 376–77 (Boston, Little, Brown and Co. 1854).

¹⁵⁷ Williamson, *supra* note 151, at 552 (quoting 2 THE WORKS OF JAMES WILSON 16 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896)).

¹⁵⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *171.

¹⁵⁹ Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 337 (1989).

¹⁶⁰ Restricting the vote to the propertied in the pre-Revolutionary era followed the English custom of limiting political citizenship to those considered independent. See *supra* notes 145–51 and accompanying text.

political parties campaigned on ending property requirements.¹⁶¹ As the country urbanized, economic prerequisites to voting changed from owning property to paying taxes.¹⁶² Later, even taxpaying would be dropped from the requirements.¹⁶³ The ideological basis of the Revolution—no governance without representation—made it hard to withhold the vote from the men who had fought against the English.¹⁶⁴ Nevertheless, the idea of political equality—thoroughly knit into the fabric of early American governance—rested uneasily next to other views, also deeply held, about “natural” differences in mental ability, talents, and virtue among men.¹⁶⁵

Though property restrictions receded, suffrage reformers still kept in place the importance of independence for voters. All property-holding requirements for voting were gone by 1856.¹⁶⁶ Simultaneously, though, as Horace Greeley’s pronouncements suggest, dependency was still on Americans’ minds as a qualification for voting. As states abandoned property and taxpayer restrictions for voting, they incorporated new suffrage qualifications.¹⁶⁷ These restrictions perpetuated, and in some cases exacerbated, the exclusion of white women, African Americans, Natives, and children from full political citizenship.¹⁶⁸ They also established a new pool of white men who were ineligible for the vote. While voting expansion brought white men of varying talents and economic circumstances together in a disquieting sort of political equality, white male elites sought to maintain and reinforce restrictions on the suffrage against those considered undesirable—and dependent.¹⁶⁹

¹⁶¹ Donald W. Rogers, *Introduction: The Right to Vote in American History*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA* 3, 9–10 (Donald W. Rogers ed., 1990).

¹⁶² See KEYSSAR, *supra* note 33, at 24–25 (describing how many states added taxpaying requirements when property qualifications were abolished).

¹⁶³ *Id.* at 25.

¹⁶⁴ See *id.* at 11 (“The logic of ‘no taxation without representation’ had a domestic as well as anticolonial application.”).

¹⁶⁵ See generally STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* (rev. & expanded ed. 1996) (chronicling pseudoscientific measures of intelligence that were developed as justifications for colonialism and racial subjugation).

¹⁶⁶ See *Who Got the Right To Vote When*, AL JAZEERA, <https://interactive.aljazeera.com/aje/2016/us-elections-2016-who-can-vote/index.html> (last updated Aug. 18, 2020) (“North Carolina is the last state to remove property ownership as a requirement to vote [in 1856].”).

¹⁶⁷ See KEYSSAR, *supra* note 33, at 43–59 (noting contemporaneous democratic backsliding across the states).

¹⁶⁸ See *id.* at 43–49.

¹⁶⁹ For instance, Samuel Young, a New York suffrage reformer, contended that suffrage reformers were attempting to extend suffrage to people who “possess[ed] *capacity* and *independence*.” *REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF*

What did dependency mean? Any number of things. For some Americans, their gender and what it suggested about female incompetence and dependency was disqualifying, as indicated by the practice of coverture: households swallowed up married women, and only male heads could vote.¹⁷⁰ For others, it was age, as they were not old enough to be deemed adult men.¹⁷¹ For still others, it was race. Yet even some adult white men, who cleared thresholds of race, gender, and age, still did not pass muster. These men included those considered to have character or mental deficiencies that disqualified them. This disqualification was because of their residence in an institution such as a poorhouse or asylum.¹⁷²

Multiple states took steps to enshrine the disenfranchisement of institutional residents into their laws. Of the thirty-four states in the Union before the Civil War, fifteen banned paupers from voting,¹⁷³ and nineteen banned people convicted of crimes from voting.¹⁷⁴ By the end of the nineteenth century, thirty-eight states disenfranchised people who had been convicted of felonies.¹⁷⁵ These numbers are certainly an undercount.

So, too, it is difficult to ascertain how many men were at risk of disenfranchisement due to institutional residence. Institutions, especially private ones, kept inconsistent records. Furthermore, men churned in and out of doors; their numbers fluctuated based on economic conditions, job availability, and the weather.¹⁷⁶ The records we

1821, ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW-YORK 274 (Albany, E. & E. Hosford 1821).

¹⁷⁰ See, e.g., Linda K. Kerber, *From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic 1776-1848*, 6 HUM. RTS. 115, 118 (1977).

¹⁷¹ See, e.g., Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 BROOK. L. REV. 1447, 1453 (2012).

¹⁷² See Schriener & Ochs, *supra* note 155, at 489–90 (discussing the advent of “prohibition[s] on voting by persons under guardianship”).

¹⁷³ KIRK H. PORTER, A HISTORY OF SUFFRAGE IN THE UNITED STATES 148 tbl.III (1918).

¹⁷⁴ Frazier, *supra* note 47, at 483; Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender’s Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 725 (1973). In order of their enactment: KY. CONST. OF 1799, art. II, § 8; OHIO CONST. OF 1802, art. IV, § 4; LA. CONST. OF 1812, art. VI, § 4; IND. CONST. OF 1816, art. VI, § 4; MISS. CONST. OF 1817, art. VI, § 5; CONN. CONST. OF 1818, art. VI, § 3; ILL. CONST. OF 1818, art. II, § 30; ALA. CONST. OF 1819, art. VI, § 5; MO. CONST. OF 1820, art. III, § 14; N.Y. CONST. OF 1821, art. II, § 2; VA. CONST. OF 1830, art. III, § 14. See *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445, 450–51 nn. 4–6 (2d Cir. 1967) (compiling constitutional provisions); PORTER, *supra* note 173, at 147.

¹⁷⁵ Behrens et al., *supra* note 71, at 565 tbl.2.

¹⁷⁶ See generally KRISTIN O’BRASSILL-KULFAN, VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC 36–57 (2019) (describing paupers’ transient lifestyle).

do have suggest that the number of institutional residents was substantial. Alexander Keyssar estimates that the number of paupers denied the right to vote was in the “hundreds of thousands.”¹⁷⁷ In 1892, treatise writer Albert Bushnell Hart estimated, based on the 1880 census, that “[t]he number of adult men in asylums . . . was probably not far from 40,000, besides many thousands of defective and weak-minded persons.”¹⁷⁸ Census statistics only provide estimations. Table XIX of the 1870 Census, tellingly titled “Pauperism and Crime,” reveals 76,737 paupers and 32,901 prisoners.¹⁷⁹ The Census listed 35,564 male paupers in almshouses in 1880;¹⁸⁰ 40,741 male paupers in almshouses in 1890;¹⁸¹ and 52,444 male paupers in almshouses in 1903.¹⁸² Finally, the Census recorded 2,960,538 people in benevolent institutions during 1910, of which 85,829 were children.¹⁸³ Though these numbers are not definitive, they strongly suggest that the institutional population and the numbers of the disenfranchised were not insignificant.

For those states that did take steps to disenfranchise institutional residents formally, state constitutional convention delegates provided several reasons why institutionalization should disqualify men from voting. Like Greeley, they contended that widespread electoral fraud and mayhem would follow if institutional residents could vote.¹⁸⁴ Delegates also agreed that institutional residents should be disenfranchised because of their potential for political corruption, their dependency, and their bad character.¹⁸⁵ Multiple delegates discussed voting rights in the context of a social contract model.¹⁸⁶ If people contributed to the social good, then they should receive the right to vote.¹⁸⁷

Above all, delegates emphasized that institutional residents were undeserving of the vote because of their dependency. At the Virginia Constitutional Convention in 1830, a delegate asserted that paupers

¹⁷⁷ KEYSSAR, *supra* note 33, at 108.

¹⁷⁸ Albert Bushnell Hart, *The Exercise of the Suffrage*, 7 POL. SCI. Q. 307, 312 (1892).

¹⁷⁹ 1 FRANCIS A. WALKER, NINTH CENSUS: THE STATISTICS OF THE POPULATION OF THE UNITED STATES 568 tbl.XIX (Washington, D.C., Gov’t Printing Off. 1872).

¹⁸⁰ FREDERICK HOWARD WINES, CENSUS BULLETIN: PAUPERS IN ALMSHOUSES 1890, CLASSIFIED BY AGE AND SEX 3 (Washington, D.C., Dep’t of the Interior 1892).

¹⁸¹ *Id.*

¹⁸² F.S. Crum, *Special Reports on Special Classes of the Population*, 10 AM. STAT. ASS’N 380, 382 (1907).

¹⁸³ BUREAU OF THE CENSUS, DEP’T OF COM., BENEVOLENT INSTITUTIONS 1910, at 60 tbl.51 (2d ed. 1914).

¹⁸⁴ See *supra* notes 146–49 and accompanying text.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

were disqualified from voting because of “their dependent condition, and consequent want of free agency, and of their want of interest in the well-being of a community in which they have no stake.”¹⁸⁸ Delegate Rodney of Delaware in 1831 argued that “[p]aupers who live on the public funds, and who were under the direction of others, who might control their wills, ought not to be permitted to vote.”¹⁸⁹ Delaware Delegate Clayton warned that enfranchising paupers would lead to fraud: “If persons might come from the Poor House and vote, merely because they had paid a tax within a specified period, the right of suffrage would not be settled as intended by the Convention. Such persons had been known in this county to go to the polls.”¹⁹⁰

State constitutional convention delegates used rhetorical devices to suggest a parade of horrors if the unfit voted. The spectacle of citizens voting while under institutional control was an important part of the delegates’ arguments. Delegate Bell from Chester sounded an alarm about the awful spectacle that would blight Pennsylvania if it came to pass that paupers were allowed to vote:

In all the counties to the south and east we have what are called poor houses, where all the paupers of the county are kept, and they are there put under the charge of a superintendent on whom they are dependent for every thing. Take away your tax qualifications and what a spectacle would be presented to the eye, to see some four or five hundred of these miserable and degraded wretches marching up to the polls, and voting according to the direction of the person who had them in charge, and turning the scale, if the contest was close.¹⁹¹

Delegate Martin took it as a given, though, that “[s]urely no man wishes to see vagrants, paupers, and convicts at the polls, nor to permit any one to exercise the right of suffrage, who does not show a disposition to obey and sustain the laws of the Commonwealth.”¹⁹²

To be sure, not all the people deemed unqualified for the vote were institutionalized. However, institutional residence provided a useful administrative method to discern at least part of that disreputable population. In addition, the institution acted as a visible negative

¹⁸⁸ PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION, OF 1829-30, at 435 (Richmond, Samuel Shepherd & Co. 1830).

¹⁸⁹ WILLIAM M. GOUGE, DEBATES OF THE DELAWARE CONVENTION FOR REVISING THE CONSTITUTION OF THE STATE OR ADOPTING A NEW ONE 23 (Wilmington, Samuel Harker 1831).

¹⁹⁰ *Id.* at 24.

¹⁹¹ 2 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA: TO PROPOSE AMENDMENTS TO THE CONSTITUTION 493 (Harrisburg, Packer, Barrett & Parke 1837).

¹⁹² 3 *id.* at 159.

signal of dependence—those within lived in a place supported by others. Paupers were an increasingly worrisome social problem in the early 1800s. Over five million immigrants emigrated to the United States between 1820 and 1860, and many had trouble finding work.¹⁹³ As the United States industrialized, working men experienced extended droughts of steady paid work. Paupers and poor men were not synonymous, however. Pauperism was indicative of and an indictment of poor character, an able-bodied white man who could work but chose not to.¹⁹⁴ This stance clashed with men who suffered a stint of unemployment due to market vagaries or other circumstantial factors but who wanted to work. Laws typically defined pauperism as those who received poor relief.¹⁹⁵ As poor relief moved from outdoor to indoor relief, this meant lodging within an institution. State constitutional convention delegates believed that paupers did not have the requisite character to vote, and to grant them voting rights would be an insult to striving poor men. As noted in the Massachusetts House Committee in 1831: “Immoral and idle habits are undoubtedly the principal sources of pauperism Such persons throw themselves upon our bounty, *already deeply affected with vice, disease and want*”¹⁹⁶

While welfare state procedures uprooted people from their homes, the democratic state relied on independence and deep roots in the community as measures of respectability and determinations of disenfranchisement. Thus the same mechanisms that aimed to reform men also disqualified them for political voice while they lived within an institution.

C. *Corrupting the Vote*

While institutionalized residents faced formal bans to voting in multiple states, they could vote in others. However, their voting operated under a negative cloud because of abundant accounts of corrupt electoral practices.

Accounts of voting shenanigans by residents of hospitals, poor-houses, asylums, and other institutions splashed across newspapers through the turn of the century. For example, the *Seattle Star* reported: “In a last desperate effort to defeat annexation and the moral ‘clean-up’ of Georgetown . . . the sick and decrepit of the

¹⁹³ KATZ, *supra* note 74, at 9.

¹⁹⁴ *See id.* at 6–7 (describing the widely-held misconception that work was plentiful).

¹⁹⁵ *See* Steinfeld, *supra* note 159, at 335.

¹⁹⁶ Kunal M. Parker, *State, Citizenship, and Territory: The Legal Construction of Immigrants in Antebellum Massachusetts*, 19 LAW & HIST. REV. 583, 607 (2001) (quoting H.D. 51, 1831 Leg. (Mass. 1831)).

county hospital and poor farm will be herded to the polls and voted as residents of the city.”¹⁹⁷

Typically, these accounts communicated outrage and disgust: outrage because inmates were forced to vote for the political party of their handlers, and disgust due to the flagrant election violations by disreputable people. Emily Phillips wrote an outraged letter to the editor of the *Ottumwa Semi-Weekly Courier*, quoting from an 1890 address at the National American Woman Suffrage Association:

The constitution of Indiana gives a vote to the pauper and the idiot, as well as the criminal after his term is up and his period of disfranchisement has expired. In one election there the imbeciles on the poor farm at Indianapolis were brought to the polls in a body, and a man who, when asked his name, declared he was Jesus Christ, was permitted to help make the laws which should tax the property and control the future of every woman in that state. I do not understand the logic of the lawmakers who prefers [sic] legislature by male idiots than by educated women.¹⁹⁸

Republican John M. Wilson, a representative from Salem, Massachusetts, urged the disenfranchisement of “ignorant paupers,” “a set of unprincipled and unworthy men, who congregate in and around our large cities and villages, and live by stealing from the Americans.”¹⁹⁹ He asked:

Would you have the Americans to stand back, and let a bloated, red-visaged, drunken brute of an Irishman vote instead of yourself? See the wretch as he approaches—his knees knocking and the slobber of tobacco juice running down his jaws; as he comes you hear him hurrah for “Dimocracy,” and here he comes fresh from the bogs, just one year ago, and wants to vote—and if he should happen to get knocked down for his impudence, a great cry is made against it by old time demagogues. I say it is right, let them stand back. Again, you see a lop-eared, wide-mouth, mullet-head Dutchman coming up just from some hut in the land of Kraut, with the foam of beer still sticking to his horsetail whiskers, and his breath smelling of garlic and onions to kill a white man 300 yards, and before he can say anything in the world but “Dimocrat,” he must vote, and that vote counts as much as yours or mine. This is outrageous and abominable. These foreigners that have carried elections for old-liners will have to learn their places. They have no more right to vote than

¹⁹⁷ Arthur W.L. Dunn, *Use Paupers to Defeat Annexation*, SEATTLE STAR, Nov. 8, 1909, at 1.

¹⁹⁸ Emily Phillips, Letter to the Editor, OTTUMWA COURIER, Mar. 11, 1902 (paraphrasing William Dudley Foulke, Address at the Opening Session of the National American Woman Suffrage Association, Washington, D.C. (Feb. 18, 1890), in WILLIAM DUDLEY FOULKE, A HOOSIER AUTOBIOGRAPHY 239 (1922)).

¹⁹⁹ *Cheerful Reading for Irish and German Voters*, PUB. LEDGER, Oct. 25, 1876.

the brutes of the field and have not half the sense of a good Newfoundland dog; and God knows, when I am a candidate for any office, I would tell these vagabonds and paupers that I do not want their votes, and if I am a candidate I hope to God I will never get them.²⁰⁰

The *New York Herald* warned in 1856 that “[w]hen the vote of one fifth of this State is cast by paupers, and most of them foreign paupers, the ballot box will become the object of contempt.”²⁰¹ In Wisconsin, the *Madisonian* reported in 1839:

The loco-focos had a right to bring down the 300 paupers, naked and dirty, from the Alms House to vote at the last election in New York. The paupers had perhaps all a right to vote. But, we doubt not, that Custom House officer who boasted that he had brought 200 voters, mostly foreigners, from the Croton Water Works, and who proclaimed that he had a sufficient number of others at his bidding to change a ward if necessary, laughed in his sleeve the whole time at the prodigious farce he was enacting, and at the cruel burlesque he was playing upon the “intelligence and virtue” of universal suffrage.²⁰²

These accounts demonstrated that corruption and voter fraud, both subtle and flagrant, did happen when institutional residents voted. However, the media’s distress centered upon the democratic violations that these practices inflicted upon non-institutional residents, not those targeted by nefarious institutional supervisors. Thus, unsurprisingly, these accounts of corruption accompanied calls for the disenfranchisement of voter fraud victims.

D. Losing the Vote

In addition to the outright bans written into the law, courts and Congress disenfranchised institutional residents if their residency in the institution’s locality was questioned.²⁰³ Losing candidates pursued election challenges in litigation and congressional hearings on contested elections.²⁰⁴ Institutional residents who were disenfranchised based on claimed nonresidency appear to have rarely challenged their disenfranchisement. This type of rights-consciousness happened more

²⁰⁰ *Id.*

²⁰¹ *Statistics of Pauperism*, N.Y. HERALD, Mar. 23, 1856, at 2.

²⁰² *Suffrage*, MADISONIAN, Nov. 27, 1839.

²⁰³ See, e.g., *In re Registration of Voters in Erie*, 8 Pa. D. 14, 14–15 (1898) (finding that the primary intention of institutional residents was to reap the benefits of living in the institution, but not “to remain in that election district longer than they remain in the home”).

²⁰⁴ See Belt, *supra* note 27, at 478–87 (discussing cases where soldier-inmates were disenfranchised based on residential status).

often with elite citizens rather than people like poorhouse residents. In the more abundant former cases, the losers of an election would file suit, charging that the election was invalid because certain people, such as asylum residents, illegally voted.²⁰⁵

These hearings and cases also revealed the extensive political corruption and influence of third parties when institutional residents were permitted to vote. As institutions were run by and enriched partisans, facilitating votes for the party in power could prove useful, and complaining about institutional votes by the party out of power could prove galvanizing. Administrators not only provided transportation from institutions to the polls, but they also acted as witnesses and poll instructors. In that capacity, they coerced their charges to vote for their party. Missouri Coal farm administrators only allowed one man, who was 106 years old, to select his own ticket to vote in 1858.²⁰⁶ The remaining 120 coal farm residents that the administrators brought to the polls were only given the choice to vote the Democratic ticket—the political party of the administrators. Vote corruption was a favored tool of all political parties and worked to reinforce the power of those in control. In the 1858 election, then-Republican Francis P. Blair, Jr. complained that poor farm residents voted—voted against him, that is.²⁰⁷ Four years later, however, after control of the poor farm had changed over to the Republicans, Blair defended poor farm residents; this time, they voted for him.²⁰⁸ James Sheeder cast his first vote for the Democrats in 1864.²⁰⁹ The reason was simple—Sheeder lived at the poor farm in Bedford County, Pennsylvania. He “was a pauper and needed a pair of pants.”²¹⁰ The poor farm steward refused to give him pants unless he voted the Democratic ticket. David Shepherd lived in the Westmoreland County poorhouse. He testified that “[t]he Irish and Dutch were all democrats to get the good-will of the boss. . . . They were all democrats, of course. If they did not vote that ticket they could not go to the election”²¹¹ William Weil testified that Louis Christman, the Bucks County poor farm superintendent, stashed Frederick Frash in Weil’s house in advance of the

²⁰⁵ *See id.*

²⁰⁶ H.R. Misc. Doc. No. 36-8, at 447 (1860) (relaying the deposition of one Bernard Crickard).

²⁰⁷ *Id.*

²⁰⁸ *See* H.R. Misc. Doc. No. 38-15, at 199 (1863) (relaying testimony observing that “paupers from the county farm were brought to the polls in a wagon, and said paupers cast their ballots for F. P. Blair, Jr.”).

²⁰⁹ *See* H.R. Misc. Doc. No. 39-117, at 23–24 (1866).

²¹⁰ *Id.* at 24.

²¹¹ H.R. Misc. Doc., 41ST CONG. (bound after 41-24), at 225 (1869).

October and November elections of 1868.²¹² Frash had a “sore leg” and usually lived at the poor farm.²¹³ Frash stayed with Weil for the October election, voted, returned to the poor farm, came back to Weil’s house for the November election, and then was sent back to the poor farm to stay.²¹⁴

Courts shared the fears of non-institutional residents and state constitutional convention delegates that institutional residents could fall prey to vote loading and thus sway local elections away from the wishes of the non-institutionalized. A 1906 Tennessee case, *State ex rel. Lyle v. Willett*, is instructive.²¹⁵ Here, the court noted with concern that institutional residents would override the interests of other non-institutionalized residents:

A different construction of the statutes would place it within the power of evilly-disposed persons in border counties, just prior to our recurring elections, to load the registration lists with the names of nonresidents, who, armed with certificates of registration, would have an unimpeachable title to the ballot, with the result that the citizens of the State would be compelled to witness the corruption and prostration of the elective franchise without the power of prevention or correction.²¹⁶

Legal challenges primarily turned on interpreting where the vote of an institutionalized resident should count. Like other Americans, institutionalized residents could possess more than one residence, yet they were limited to only one domicile for their vote. Was the institution a domicile?

Election treatise writer M.D. Naar, in summarizing voting jurisprudence, opined that both residency and intention were necessary to determine a domicile for voting purposes.²¹⁷ Furthermore, a domicile was that place where people were tethered to the community: “[E]very person owes some duties to society, has some obligation to perform to the government under which he lives, and from which he receives protection—duties and obligations. . . . His domicile is the place where those duties are defined and are to be performed.”²¹⁸ Under this formulation, though institutionalized people could be said

²¹² H.R. Misc. Doc. No. 41-7, at 195–96 (1869).

²¹³ *Id.* at 196.

²¹⁴ *Id.* at 195–96.

²¹⁵ 97 S.W. 299 (Tenn. 1906).

²¹⁶ *Id.* at 306.

²¹⁷ M.D. NAAR, *THE LAW OF SUFFRAGE AND ELECTIONS* 75 (1880) (citing JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS* 43 (8th ed. 1883)).

²¹⁸ *Id.* at 87.

to receive protection, they were not understood to perform duties and obligations while housed in an institution. Thus, institutional residents were merely denizens of institutional locations rather than citizens of the political community.

III NEXT STEPS

In our present day, the prison, not the poorhouse, sits at the centerpiece of American institutions. Scholars have detailed the reduction in welfare state institutionalizations through activism, litigation, and defunding.²¹⁹ However, mass institutionalization has not disappeared, nor have voting challenges and bans for people who live within institutions. We also rest at the cusp of new developments in institutions. COVID brought attention to the vulnerability of institutionalized residents.²²⁰ Moreover, shifting resources (and people) from the carceral state to the welfare state is a centerpiece of advocacy for defunding prisons and prison abolition.²²¹ This Part outlines the next steps for research and practice at the intersection of mass institutionalization and civil death.

Litigation has not succeeded in dislodging criminal disenfranchisement. These laws did not face court challenges until the 1960s voting and civil rights revolution. *Richardson v. Ramirez* per-

²¹⁹ See, e.g., Harcourt, *supra* note 39, at 1751 (presenting empirical findings demonstrating the continuity of institutionalization maintained by spiking rates of imprisonment even as confinement in mental institutions declined); Mark Friedman & Ruthie-Marie Beckwith, *Self-Advocacy: The Emancipation Movement Led by People with Intellectual and Developmental Disabilities* (discussing the evolution of self-advocacy movements that led to emancipation from institutionalization for many with intellectual disabilities), in *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA*, *supra* note 38, at 237, 251; Laura I. Appelman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 *DUKE L.J.* 417 (2018) (discussing the relationship between the history of the institutionalization of disabled people and contemporary discussions around mass incarceration).

²²⁰ See, e.g., Nina A. Kohn, *Nursing Homes, COVID-19, and the Consequences of Regulatory Failure*, 110 *GEORGETOWN L.J. ONLINE* 1 (2021); Brandon L. Garrett & Lee Kovarsky, *Viral Injustice*, *CALIF. L. REV.* (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790859; Laura I. Appelman, *Pandemic Eugenics: Discrimination, Disability, & Detention During COVID-19*, 67 *LOY. L. REV.* 329 (2021); *COVID Behind Bars Data Project*, UCLA L., <https://uclacovidbehindbars.org> (last visited Sept. 7, 2021); see also *DISABILITY RTS. OR., GRAVE CONSEQUENCES: HOW THE CRIMINALIZATION OF DISABILITY LEADS TO DEATHS IN JAIL* (2021), <https://static1.squarespace.com/static/5d645da3cf8e4c000158e55a/t/602059b3851bc700d7627bd7/1612732852443/DRO-Report-Grave+Consequences-2021-02-08.pdf>.

²²¹ See, e.g., K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 *CALIF. L. REV.* 679 (2020); Dorothy E. Roberts, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1 (2019).

mits the disenfranchisement of convicted felons without a Fourteenth Amendment violation.²²² It stands in the way of most constitutional challenges that cannot point to clear racial intent in enacting disenfranchisement measures.²²³ The Supreme Court justifies felon disenfranchisement as electoral management instead of punishment,²²⁴ despite election scholars' disagreement.²²⁵

Instead of litigation, advocates and scholars have pushed for norm changes and policy reform through lobbying state legislatures and governors and passing voter referenda. These efforts aim to re-enfranchise those who have served time for a criminal conviction and face continued disenfranchisement as a collateral consequence of a conviction.²²⁶

The focus for people still within the prison has been to address prison gerrymandering, not their enfranchisement.²²⁷ Advocacy propelled changes starting in the 2010 U.S. Census policy for group quarters.²²⁸ State officials can use a new dataset when they calculate redistricting.²²⁹ The dataset includes prisoners and is granular enough that states can exclude prisoners when they make redistricting calcula-

²²² 418 U.S. 24 (1974).

²²³ *Hunter v. Underwood*, 471 U.S. 222 (1985), which invalidated Alabama's criminal disenfranchisement measure under the Fourteenth Amendment because the provision was passed with discriminatory purpose under the Alabama Constitutional Convention in 1901, is the rare exception. Alabama stands out for its thoroughness in its documentation of discrimination, making it possible to bring a successful claim. Scholars have proposed strategies to bring litigation challenging criminal disenfranchisement. For example, Pamela Karlan has advocated looking to the Voting Rights Act and Eighth Amendment as potential paths to litigation. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1162–69 (2004). For examples of challenges to interpretations of the Reconstruction Amendments that would authorize criminal disenfranchisement, see generally Re & Re, *supra* note 30; Chin, *supra* note 71.

²²⁴ *Green v. Bd. of Elections*, 380 F.2d 445, 450 (1967) (holding that disenfranchisement is for election management and not punishment); *Washington v. State*, 75 Ala. 582, 585 (1884) (same).

²²⁵ See Karlan, *supra* note 223, at 1150–55 (arguing that disenfranchisement is properly characterized as punitive).

²²⁶ See generally Ewald, *supra* note 46, at 1135 (noting that public opinion favors disenfranchising the incarcerated but opposes indefinite disenfranchisement of convicts).

²²⁷ But see German Lopez, *The Democratic Debate over Letting People in Prison Vote, Explained*, VOX (May 13, 2019), <https://www.vox.com/policy-and-politics/2019/5/13/18535423/prisoner-felon-voting-rights-bernie-sanders-2020> (noting the brief blip in which presidential candidates talked about prisoners voting, though this discussion floundered due to some of the dynamics discussed in this Article).

²²⁸ See Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners' Political Representation*, 45 FORDHAM URB. L.J. 323, 347 (2018) (describing the changes in policy for group quarters starting with the 2010 Census).

²²⁹ Michael Skocpol, Note, *The Emerging Constitutional Law of Prison Gerrymandering*, 69 STAN. L. REV. 1473, 1494 (2017).

tions.²³⁰ The current Census procedure, however, continues to count prisoners at the prison.²³¹ Moreover, prison gerrymandering does not address enfranchising the prisoners; it just addresses where they count as ghost constituents. Scholars and advocates argue that municipalities use prisoners as ballast to increase political and economic power for others instead of their home communities.²³² However, the remedy they propose—counting prisoners for the census at their pre-institutionalized address—does not enfranchise the prisoners themselves. Instead, it transfers them as ghost constituents from one locality to another. Further, concerning ex-felon voting, the emphasis on lingering post-release disenfranchisement does not address civil death within the prison.

Though they no longer face formal electoral barriers, people living within other institutions may still face obstacles to voting. Their disenfranchisement is not due to criminal sanction but rather disqualification and challenges due to their institutional placement. In managing decreasing corruption, determining locality membership, bloc voting, voter competence, and citizenship requirements, institutional residents have and continue to lose political voice.²³³

Scholars can do much to add flesh to the account of the entanglement of mass institutionalization with political disenfranchisement that I outlined in this Article. One significant issue worth exploring is the history of the U.S. welfare state. The development of the U.S. welfare state has political citizenship ramifications and political geography implications.²³⁴ The shift from cash to institutionalization was not just a change in welfare practice, it also had implications for democracy. The same institutions that were established for caring for

²³⁰ *Id.*

²³¹ Emily J. Heltzel, Note, *Incarcerated and Unrepresented: Prison-Based Gerrymandering and Why Evenwel's Approval of "Total Population" as a Population Base Shouldn't Include Incarcerated Populations*, 26 WM. & MARY BILL RTS. J. 533, 555 (2017).

²³² See Ebenstein, *supra* note 228, at 325 (“The practice of counting people who are incarcerated and ineligible to vote as residents of their prison cell . . . increases the voting strength of those districts’ other residents relative to the residents of neighboring districts . . .”).

²³³ See Paul S. Appelbaum, “*I Vote. I Count*”: *Mental Disability and the Right to Vote*, 51 PSYCHIATRIC SERVS. 849, 850 (2000) (attributing the difficulty of achieving policy change in part to the “lack of political clout” enjoyed by people with mental disabilities); see also BRUCE DENNIS SALES ET AL., *DISABLED PERSONS AND THE LAW: STATE LEGISLATIVE ISSUES* 99 (1982) (discussing the fear of institutionalized mentally disabled people acting as a voting bloc).

²³⁴ See generally Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994) (discussing the importance of politics and space for race and antidiscrimination law); DOMINIQUE MORAN, *CARCERAL GEOGRAPHY: SPACES AND PRACTICES OF INCARCERATION* (2015) (analyzing the spatial implications of the “punitive turn”).

disempowered populations also robbed them of their political voice. Thus, practices such as concentrating people in larger institutions versus group homes, or releasing people with ankle monitoring instead of placing them in a jail or hospital have electoral consequences.

Another topic of interest is the history of psychiatric confinement. Historians have detailed the consolidation of marginalized people within institutions but have not discussed the implications for political participation and the meaning of political community.²³⁵ Instead, the civil death of those lodged within institutions has been assumed rather than analyzed. More granular information is needed on the political economy of nineteenth century institutions: How were they apportioned within legislative districts? How did their potential political power affect the vote within their communities and states? What was the political culture within the institution itself among the residents? How did residents challenge administrators with respect to voting? What was the political relationship between workers, administrators, and residents? For instance, while mass incarceration scholars discuss the shift of people and resources from urban spaces to rural ones through the siting of prisons, this geographical trajectory may be different for non-carceral institutions. There may also be implications for private versus public institutions. It is harder to draw conclusions for private institutions because of the comparative lack of records. One area that might be different is the issue of administrative corruption. Private administrators would be less likely to be appointed by a political party in power. This would lessen the incentives to force residents to vote for their party. On the other hand, private administrators may have negotiated deals with political parties to coerce their charges.

For disability scholars, this Article addresses the political implications of the disability label, as those who were considered disabled represent a significant portion of those who were institutionalized and thus disenfranchised. It adds a historical trajectory to the current difficulties that prospective disabled voters face and another component to the historical arc of welfare institutions to carceral institutions and the current institutional churn. Further, this account injects another component of the difficulty of integrating disabled people into the community. Disabled people remain in institutions due to weak *Olmstead* enforcement, significant impairments that warrant intensive

²³⁵ See, e.g., Susanna L. Blumenthal, *The Default Legal Person*, 54 UCLA L. REV. 1135, 1193 (2007) (“By the 1860s, many of the asylums were simply swelling with poor, indigent, and chronically insane patients, an increasing proportion of whom were foreign-born.”).

care, or a lack of alternatives. There are few obligations by institutions to facilitate the voting of their residents.²³⁶ We have incomplete information on the number of institutional residents within the United States and the barriers they face to vote.

Institutionalization brings into relief lingering difficult problems with respect to voting. Who are the people who need accommodations to vote? Institutional residents requiring accommodations vary by impairment and voting technology. All residents need transportation to the polls. Deaf voters have difficulty if voting by voice; blind people have difficulty when there is a written ballot.

Moreover, who are the people, who, due to severe mental impairments, are not legitimate voters? How can we tell the difference? Then and now, institutional residents may face barriers to the vote because their institutions are perceived to have a large proportion of mentally incompetent people; this perception has been used to justify disenfranchising all or a subset of them.²³⁷ Local governance amplifies the problem of coerced mentally incompetent voters in an institutional bloc, such as a memory ward of a nursing home. Setting the threshold of mental competency for voting is a matter of policy and values, not just science. Science can create a metric to assess cognition or determine a mental illness, but it cannot tell us what level of cognition or lucidity is suited to democratic practice.

For voting scholars, this Article's account challenges the standard historical narrative that the nineteenth century Jacksonian democratic revolution removed property and taxpayer qualifications for voting. The traditional belief is that independence as a requirement for full

²³⁶ See Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 930 (2007).

²³⁷ Tests for voting along these lines have been asserted in ways that may violate equal protection. See, e.g., Nina A. Kohn, *Voting and Political Participation* (discussing a law struck down as unconstitutional "because it disenfranchised persons subject to guardianship regardless of whether they understood the nature and effect of voting"), in *THE LAW AND ETHICS OF DEMENTIA* 483, 485 (Charles Foster, Jonathan Herring & Israel Doron eds., 2014); Nina A. Kohn, *Preserving Voting Rights in Long-Term Care Institutions: Facilitating Resident Voting While Maintaining Election Integrity*, 38 MCGEORGE L. REV. 1065, 1086–91 (2007) (outlining a potential equal protection challenge to restricting ballot access based on capacity screenings); Rabia Belt, *Contemporary Voting Rights Controversies Through the Lens of Disability*, 68 STAN. L. REV. 1491, 1514 (2016) (discussing what kinds of burdens on a particular group of voters could trigger a successful constitutional challenge); Carli Friedman & Mary C. Rizzolo, *Correlates of Voting Participation of People with Intellectual and Developmental Disabilities*, 16 J. SOCIAL WORK IN DISABILITY & REHABILITATION 347 (2017) (manuscript at 3–4) ("Laws that bar people who are 'mentally incompetent' or under guardianship from voting generally violate the Constitution . . . if they are used to take away a person's right to vote based on disability even if the person has the capacity to vote . . ."); Karlan, *supra* note 236, at 922 (noting different ways in which persons with cognitive impairments are disenfranchised).

political citizenship ended as well. Instead, concerns about dependency changed form; as property requirements disappeared, new requirements such as a lack of institutionalization took their place. These institutionalized citizens flip the classic T.H. Marshall theory of citizenship on its head. While Marshall and others contend that political recognition precedes the conferral of socioeconomic benefits, social welfare benefits trigger disenfranchisement.²³⁸ It is recognition by the state of institutionalization as a politically relevant status that then leads to civil death.

There may also be possible litigation avenues if disenfranchisement of institutionalized residents can be characterized as a form of viewpoint discrimination.²³⁹ Scholars and advocates can also detail the spillover effects of dampened institutional resident voting on communities such as disabled people or older people, akin to the spillover effects of high incarceration rates on communities of color. The political power of these groups may be muted due to the electoral barriers that an institutionalized section faces.

Finally, and perhaps most importantly, my account amends the conventional story about race and disenfranchisement, which focuses upon the disenfranchisement of Black and brown people. But welfare disenfranchisement was targeted towards poor and disempowered white men. These stories need to be knitted together. Furthermore, this Article offers a glimpse of the knotty situation of institutionalized and marginalized white people. While, to be sure, institutionalized white people still retained racial privileges compared to people of color, their precarious position made them targets for intense social intervention. Ironically, their whiteness rendered them both potentially redeemable and vulnerable to attempts at redemption. This Article may be one example of many where marginal white management techniques precede, and may perhaps inspire Black and brown control and elimination mechanisms.²⁴⁰ Disability may be a significant marker where this process occurs.²⁴¹

²³⁸ See T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 26 (1992).

²³⁹ Cf. *Carrington v. Rash*, 380 U.S. 89, 94 (1965) (noting that the right to access the franchise “cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents”).

²⁴⁰ See also Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1503–04 (2010) (describing how “high-status whites are willing to impose economic or dignity costs on marginal or low-status whites” in order to maintain systems of white supremacy); Khiara M. Bridges, *White Privilege and White Disadvantage*, 105 VA. L. REV. 449, 480 (2019) (discussing the transformation of “techniques of racial domination” over time as “non-white people became increasingly able to avail themselves of the resources that white people had at their disposal”).

²⁴¹ For example, eugenics moved from fears of white American decline and the management of marginal white people like Carrie Buck’s case to targeted sterilization of

entire communities of color. *See generally* PAUL A. LOMBARDO, *THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND BUCK V. BELL* (2008) (discussing the ongoing legacy of *Buck v. Bell* in eugenics movements in the United States and abroad); ALEXANDRA MINNA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS OF BETTER BREEDING IN MODERN AMERICA* (2015) (describing the racialized underpinnings of eugenics movements across the United States).