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## Does the Social Contract Justify Felony Disenfranchisement?

Eli L. Levine\*

### INTRODUCTION

The right to vote is the foundation of a democratic society and essential to active citizenship in the United States. The 2000 Presidential Election, decided by a mere 537 votes in Florida, epitomized the principle that every vote matters.<sup>1</sup> However, nearly every state has adopted laws restricting the right to vote.<sup>2</sup> By virtue of having broken the law, felons lose their right to vote and the ability to participate in selecting a politician to represent them, and are muted from most forcefully voicing their opinion of the policies and laws to which they will be subjected.<sup>3</sup> Philosophers have long debated the merits of restricting the franchise to those who faithfully obey the laws.<sup>4</sup> Social contract theorists like Thomas Hobbes, John Locke, and Jean-Jacques Rousseau envision a compact wherein citizens consent to be governed by and submit to the laws of society in return for the

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\* Editor-in-Chief of the Washington University Jurisprudence Review, J.D. 2010.

<sup>1</sup> 2000 Official Presidential General Election Results, *available at* <http://www.fec.gov/pubrec/2000presgeresults.htm> (last visited on December 15 2009).

<sup>2</sup> *Felony Disenfranchisement Laws in the United States*, THE SENTENCING PROJECT, ¶ 2 (2008), *available at* [http://sentencingproject.org/Admin/Documents/publications/fd\\_bs\\_fdlawsinus.pdf](http://sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf) (last visited on December 15, 2009).

<sup>3</sup> ALA. CONST. art. V, § 2 (“No person may vote who has been convicted of a felony involving moral turpitude unless his civil rights have been restored.”).

<sup>4</sup> MICHAEL LESSNOFF, SOCIAL CONTRACT THEORY 5 (Michael Lessnoff ed., New York Univ. Press 1990). (“The earliest contractarian analyses of political authority . . . is an Alsatian monk, Manegold of Lautenbach, who in the late eleventh century took up scholarly cudgels on behalf of his Pope, Gregory VII, against his perennial enemy, the Emperor.”).

protections and benefits that an organized governmental structure provides.<sup>5</sup> These philosophers also considered how to handle citizens who reject the compact and violate the laws of society. By rejecting society's law-abiding structure and design, does the criminal relinquish his membership in society and his right to choose the leaders and policies in the future? This note will examine various social contract theories and explore the arguments for and against disenfranchising felons upon their return to society. Is the political disenfranchisement of felons consistent with the philosophical principles on which the United States of America were formed? Can felon disenfranchisement be reconciled with various conceptions of social contract theory?

Nearly 125 years ago, the Supreme Court pronounced the right to vote "fundamental."<sup>6</sup> The Court has consistently affirmed the right to vote as vital to civil rights, as the most basic civil rights are "illusory if the right to vote is undermined."<sup>7</sup> Although some Americans may take the right to vote for granted and possibly view it as a waste of time, voting is a quintessential part of being an American citizen. This has been most eloquently expressed by those deprived of the right to vote. On trial for illegally attempting to vote in 1872, Susan B. Anthony testified to the court, "[y]our denial of my citizen's right to vote is the denial of my consent as one of the governed, the denial of my right of representation as one of the taxed . . . therefore the denial of my sacred right to life, liberty, and property."<sup>8</sup> In his famous essay, *What the Black Man Wants*, Frederick Douglass described the importance of the right to vote: "We want [the vote] because it is our right, first of all . . . . We want it again, as a means for educating our race . . . . By depriving us of suffrage, you affirm our incapacity to form intelligent judgments respecting public measures . . . to rule us out is to make us an exception, to brand us

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<sup>5</sup> *Id.* at 10-11.

<sup>6</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("Though not regarded strictly as a natural right, but as a privilege merely conceded by society, according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.").

<sup>7</sup> *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>8</sup> JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* 3 (2006) (quoting *The Trial of Susan B. Anthony*, in *THE STRUGGLE FOR WOMEN'S RIGHTS: THEORETICAL AND HISTORICAL SOURCES* 133 (George Klosko & Margaret G. Klosko eds., 1999)).

with the stigma of inferiority.”<sup>9</sup> Voting empowers citizens with an important means to affirm and communicate their sense of civic duty and proud membership in this country. Voting can be an important vehicle to create feelings of dignity and equality.

Democratic governance theory is based upon the full and active participation of society’s membership. As Senator Birch Bayh<sup>10</sup> eloquently stated, “In the United States every vote must count equally. One person, one vote is more than a clever phrase, it’s the cornerstone of justice and equality.”<sup>11</sup> Should a certain slice of society not vote or be deprived of the opportunity to cast a ballot, the democratic governing structure of society fails. “Modern democratic governance entails a set of macro-political institutions that register citizens’ preferences through (among other things) regular competitive elections.”<sup>12</sup> If some citizens are precluded from registering their preferences, then those citizens will feel that the law-making structure purposefully abandoned them, and policies will not reflect the true will of society.

Voting rights have grown steadily to include people of varying races, genders, classes, and ages.<sup>13</sup> However, there has been one notable exception to this expansion of voting rights. In the United States today, 5.3 million citizens, more than 2 percent of the adult population, are denied the right to vote because they have been convicted of a felony.<sup>14</sup> Most of these felonies are considered nonviolent offences, and three out of every four felons is no longer in prison or jail; they completed their sentences or are on probation or parole.<sup>15</sup> This is the only class of sane adult

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<sup>9</sup> *Id.* at 3-4 (quoting Frederick Douglass, “*What Negroes Want*,” in 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 159-60 (Phillip S. Foner ed., 1955), as quoted in JUDITH SHKLAR, AMERICAN CITIZENSHIP 55-56 (1991)).

<sup>10</sup> Indiana Senator 1963-1981, Candidate for President, 1976.

<sup>11</sup> Birch Bayh, *Introduction*, in JOHN R. KOZA, ET AL., EVERY VOTE EQUAL: A STATE-BASED PLAN FOR ELECTING THE PRESIDENT BY NATIONAL POPULAR VOTE xxi (2006).

<sup>12</sup> Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOC. REV. 777, 778 (2002).

<sup>13</sup> See U.S. Const. amend. XXIV (prohibiting poll taxes in federal elections); *Id.* (granting African-Americans the right to vote); U.S. Const. amend. XIX (granting women the right to vote); U.S. Const. amend. XXVI (lowering the voting age to no younger than 18). *Harper v. Va. Bd. Of Elections*, 383 U.S. 663 (1966) (deeming state poll taxes unconstitutional).

<sup>14</sup> *Felony Disenfranchisement Laws in the United States*, *supra* note 2, at ¶ 3.

<sup>15</sup> MANZA & UGGEN, *supra* note 8, at 7-8.

citizens without the protected right to vote.<sup>16</sup> Deprivation of the right to vote is an infantilizing punishment; it subjects one to all of the rules and regulations of society, yet silences his power to register any displeasure or invoke change.

## I. FELONY DISENFRANCHISEMENT LAWS: ORIGINS AND CURRENT UNITED STATES LAW

Criminal disenfranchisement has a far-reaching history, tracing all the way back to Ancient Greece, where criminals were denied the right to vote, appear in the army, make speeches, or attend assemblies.<sup>17</sup> Ancient Rome implemented similar policies of disenfranchisement.<sup>18</sup>

Throughout Europe during the Middle Ages, criminal disenfranchisement was common.<sup>19</sup> Criminals were punished with “civil death,” the total loss of citizenship rights.<sup>20</sup> Criminals lost society’s protection and were often sentenced to death.<sup>21</sup> In certain cases, the government could seize a criminal’s property, and anyone, including those who are not part of the government, could kill a criminal without punishment.<sup>22</sup> Beyond death, torture, and lifetime imprisonment, perpetual banishment was the fourth harshest punishment possible in France.<sup>23</sup>

### A. Colonial Origins

The American colonies also restricted the right to vote, with the intent of limiting the franchise to the upright moral citizen,

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<sup>16</sup> Jason Schall, Note, *The Consistency of Felon Disenfranchisement with Citizenship Theory*, 22 HARV. BLACKLETTER L.J. 53 (2006).

<sup>17</sup> MANZA & UGGEN, *supra* note 8, at 22-23 (noting in ancient Greece, criminal offenders were punished with the status of *atimia*, which took away many citizenship rights, including the right to participate in the voting body).

<sup>18</sup> *Id.* (In ancient Rome, the punishment of *infamia* was imposed on some criminal offenders, resulting in a loss of voting rights or the right to serve in the Roman legions.)

<sup>19</sup> KATHERINE IREN PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES 30 (Marilyn McShane & Frank P. Williams III eds., 2005).

<sup>20</sup> *Id.*

<sup>21</sup> Schall, *supra* note 16, at 55.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (citing CORTLAND F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES 54 (1893)) (Early disenfranchisement laws responded to

thereby punishing the criminal with disenfranchisement.<sup>24</sup> The colony of Virginia denied voting rights to a “convict or person convicted in Great Britain or Ireland during the term for which he [was] transported.”<sup>25</sup> A third drunkenness conviction resulted in loss of voting privileges in Maryland.<sup>26</sup> In the New England colony of Plymouth, voting rights were denied to “any opposer of the good and wholesome laws of this colonie.”<sup>27</sup> In Plymouth, disenfranchisement arose from speaking contemptuously of the laws or court, or from men being deemed “grossly scandalouse, or notoriously vitious, common lyars, drunkards, sucarers or . . . disaffected to this government.”<sup>28</sup> In Connecticut, an early statute decreed that “if any person within these Libberties have been or shall be fyned or whipped for any scandalous offence, hee shall not bee admitted after such time to have any voate in Towne or Commonwealth . . . .”<sup>29</sup> The majority of a town’s freemen and selectmen had to testify to an aspiring voter’s sobriety and peacefulness before he was able to vote.<sup>30</sup> In Rhode Island, citizens found guilty of bribing an election official or possessing a stolen deed had their voting rights stripped.<sup>31</sup>

It is unclear how widespread these restrictions were or how strictly they were enforced. Probably, offenders were not welcome in public forums or town gatherings, and enforcement depended on physical detection.<sup>32</sup>

### *B. Disenfranchisement Laws in United States History*

Upon winning their independence from Great Britain, many states maintained their disenfranchisement restrictions even as increasing numbers of citizens gained access to the polls. Between 1776 and 1821, eleven states eliminated voting rights for specified crimes thought to have some relationship to the electoral process, though many states also disenfranchised for other crimes

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the fear that “some corrupt members may creep into the best and purest societies.”).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> MANZA & UGGEN, *supra* note 8, at 24.

<sup>28</sup> Schall, *supra* note 16, at 56 (quoting MASS. GEN. LAWS ch. 5 § 6 (1671)).

<sup>29</sup> *Id.* at 24.

<sup>30</sup> Schall, *supra* note 16, at 55-6.

<sup>31</sup> *Id.* at 56.

<sup>32</sup> MANZA & UGGEN, *supra* note 8, at 24.

not related to the electoral process.<sup>33</sup> As time passed, more states enacted restrictions on the right to vote. By 1868, twenty-nine states enshrined some language into their constitution depriving felons of voting rights.<sup>34</sup>

In the aftermath of the Civil War, Congress ratified the Fourteenth Amendment to the Constitution. Section 2 of the Fourteenth Amendment reads in part:

[W]hen the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.<sup>35</sup>

Despite good intentions, many Jim Crow legislatures disenfranchised African Americans by relying on the constitutional exception of “participation in rebellion,” or other crimes.<sup>36</sup> These legislatures aimed their disenfranchisement laws at crimes that they believed African Americans were more likely to commit than whites. “Narrower in scope than literacy test or poll taxes and easier to justify than understanding or grandfather clauses, criminal disenfranchisement laws provided the Southern states with ‘insurance if courts struck down more blatantly unconstitutional clauses.’”<sup>37</sup> Mississippi was the first state to take

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<sup>33</sup> ALEC EWALD, PUNISHING AT THE POLLS: THE CASE AGAINST DISENFRANCHISING CITIZENS WITH FELONY CONVICTIONS 18 (2003) (The eleven states which barred criminals from voting by 1821 were Virginia, Kentucky, Ohio, Louisiana, Indiana, Mississippi, Connecticut, Illinois, Alabama, Missouri and New York).

<sup>34</sup> *Id.* (State constitutions disenfranchising felons between by 1868 included: California, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin).

<sup>35</sup> U.S. CONST. amend. XIV, § 2.

<sup>36</sup> MANZA & UGGEN, *supra* note 8, at 41-42.

<sup>37</sup> Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 538 (1993) (quoting J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in MINORITY VOTE DILUTION 27, 35 (Chandler Davidson ed., 1984)).

advantage of this strategy, amending its constitution in 1890 to disenfranchise those convicted of certain targeted petty crimes.<sup>38</sup> Other Southern states followed Mississippi's strategy, with South Carolina, Louisiana, Alabama, and Virginia all amending their constitutions to include targeted disenfranchisement laws.<sup>39</sup> These measures, along with other tactics, were successful in reducing the African American registration rate.<sup>40</sup> There was a dramatic increase in felon disenfranchisement laws around the turn of the twentieth century.<sup>41</sup> By 1920, Maine, Michigan, and Massachusetts were the only states without criminal disenfranchisement laws.<sup>42</sup>

### C. Current United States Law

Currently, forty-eight states and the District of Columbia prohibit inmates from voting while incarcerated for a felony offense.<sup>43</sup> Two states, Maine and Vermont, permit inmates to vote.<sup>44</sup> Thirty-five states prohibit felons on parole from voting,

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<sup>38</sup> *Ratliff v. Beale*, 20 So. 865, 868 (Miss. 1896) (“Within the field of permissible action under the limitations imposed by the federal constitution, the convention swept the circle of expedients to obstruct the exercise of the franchise by the negro race . . . . Restrained by the federal constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone.”).

<sup>39</sup> Shapiro, *supra* note 37, at 541, (John Fielding Burns, who wrote Alabama's disenfranchisement amendment, thought he could restrict 60 percent of African-Americans from being eligible to vote simply by making wife-beating a disenfranchising offense); *Id.* at 537 (Carter Class, a delegate to the Virginia Constitutional Convention proclaimed, “Discrimination! . . . [T] hat, exactly is what this Convention was elected for . . . with a view to the elimination of every negro voter.”).

<sup>40</sup> Schall, *supra* note 16, at 59 (“Among eligible blacks in Mississippi, registration fell from almost 70 percent in 1867 to under 6 percent by 1892, while in Louisiana, blacks went from 44 percent of the electorate after the Civil War to 1 percent in 1920.”).

<sup>41</sup> *Id.* at 59-60 (Arizona, California, Idaho, Kansas, Minnesota, New Mexico, Oregon, Utah, and Wyoming added provisions to their state constitutions taking away an ex-felon's right to vote. Colorado, Indiana, Ohio, and for a little while Texas, permitted felons to vote upon release from prison. New Jersey, Pennsylvania, and Florida allowed felons to regain voting rights after a specified number of years.).

<sup>42</sup> *Id.* at 59.

<sup>43</sup> See generally *Felony Disenfranchisement Laws in the United States*, *supra* note 2, at 1.

<sup>44</sup> *Id.* at 3.



and thirty of these states exclude felony probationers as well. In two states, the right to vote is denied to all ex-offenders, regardless of whether or not they have completed their sentences.<sup>45</sup> Nine other states disenfranchise certain types of ex-offenders, or permit them to apply for restoration after a designated number of years.<sup>46</sup> Each state has its own procedure to restore voting rights to ex-offenders. However, most of them are too arduous and confusing for many ex-felons to pursue.<sup>47</sup>

An estimated 5.3 million Americans, or one in forty-one adults, are currently or permanently deprived of their right to vote because of felony convictions.<sup>48</sup> Over two million disenfranchised citizens are ex-offenders who have completed their sentences. The African American community has been impacted the most.<sup>49</sup> Approximately 1.4 million African American men, 13 percent of the population, have had their voting rights taken away, a rate seven times the national average.<sup>50</sup> With the current rates of incarceration, nearly 30 percent of the next generation of African American males will lose their voting rights at some point during their lives.<sup>51</sup>

In an effort to improve this situation and expand voter eligibility, nineteen states have altered their voting rights statutes in the last ten years.<sup>52</sup> Nine states either repealed or amended lifetime disenfranchisement laws.<sup>53</sup> Two states granted voting rights to persons on probation or parole.<sup>54</sup> Five states made it easier for those who completed their sentence to restore their

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<sup>45</sup> *Id.* (Vermont and Maine).

<sup>46</sup> *Id.* at 1. (Alabama, Arkansas, Delaware, Florida, Mississippi, Nebraska, Nevada, Tennessee, Wyoming).

<sup>47</sup> MANZA & UGGEN, *supra* note 8, at 69-94.

<sup>48</sup> *See generally Felony Disenfranchisement Laws in the United States*, *supra* note 2, at 1.

<sup>49</sup> *Id.*

<sup>50</sup> Schall, *supra* note 16, at 65.

<sup>51</sup> MANZA & UGGEN, *supra* note 8, at 69-94.

<sup>52</sup> Ryan S. King, *Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2008*, THE SENTENCING PROJECT (Sept. 2008), available at [http://sentencingproject.org/Admin/Documents/publications/fd\\_statedisenfranchisement.pdf](http://sentencingproject.org/Admin/Documents/publications/fd_statedisenfranchisement.pdf) (last visited December 15, 2009).

<sup>53</sup> *Id.* at 4 (Delaware, Iowa, Kentucky, Maryland, Nebraska, New Mexico, Texas and Wyoming).

<sup>54</sup> *Id.* (Connecticut and Rhode Island).

voting rights.<sup>55</sup> Three states have revamped data and information sharing to streamline the process and facilitate the return of their voting rights.<sup>56</sup> As a result of these reforms, at least 760,000 persons have regained the right to vote.<sup>57</sup>

Florida, having received the most notoriety in recent elections, has worked to improve its felon disenfranchisement laws and system. Felons are now automatically reinstated with the right to vote upon completion of the sentence for certain, mostly non-violent crimes.<sup>58</sup>

## II. LEGAL CHALLENGES TO FELON DISENFRANCHISEMENT

Felon disenfranchisement has a firm foundation in law, both constitutional and statutory. As the Supreme Court dramatically expanded the right to vote in the 1960s, there was speculation that the Court would also strike down felon disenfranchisement laws. However, the Supreme Court and many federal courts have reviewed state disenfranchisement laws and have generally upheld them. The first felon disenfranchisement cases to reach the Supreme Court were The Mormon Cases, where the Court allowed states to outlaw bigamy and polygamy, and disenfranchise anyone convicted of either.<sup>59</sup>

The Mormon Cases were the only time the Supreme Court weighed in on felon disenfranchisement as a practice until 1974, in *Richardson v. Ramirez*.<sup>60</sup> However, there were many lower court cases.<sup>61</sup> In *Richardson*, three California men who were convicted of felonies and served their sentences attempted to vote in three different counties, and were denied by the respective

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<sup>55</sup> *Id.* (Alabama, Connecticut, Florida, Nevada and Virginia).

<sup>56</sup> *Id.* (Hawaii, Louisiana, and North Carolina).

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 8-9.

<sup>59</sup> *Davis v. Beason*, 133 U.S. 333 (1890); *Murphy v. Ramsey*, 114 U.S. 15 (1885).

<sup>60</sup> 418 U.S. 24 (1974).

<sup>61</sup> *Green v. Bd. of Elections of N.Y.*, 380 F.2d 445 (2d Cir. 1967) (holding law disenfranchising members of Communist Party constitutional because it was neither a bill of attainder nor cruel and unusual punishment); *see also* *Kronlund v. Honstein*, 327 F. Supp 71 (N.D.Ga. 1971) (upholding Georgia's felon disenfranchisement provision for smuggling heroin because of the State's valid interest in preserving the integrity of its electoral process by removing those with proven anti-social behavior).

county clerks because of their criminal records. The plaintiffs made two arguments. They argued that felon disenfranchisement laws required a strict scrutiny standard and evidence of a compelling state interest to restrict a fundamental right such as voting, and they contended that regaining the right to vote would help facilitate rehabilitation and reintegration in society.<sup>62</sup>

The California Supreme Court held that laws disenfranchising felons were unenforceable because the laws violated the Equal Protection Clause of the Fourteenth Amendment.<sup>63</sup> The United States Supreme Court reversed the California Supreme Court decision, upholding felon disenfranchisement as consistent with the Fourteenth Amendment. Writing for the majority, Justice Rehnquist explained that it was not necessary to examine if disenfranchisement fulfills a compelling state interest because Section 2 of the Fourteenth Amendment permits states to restrict the voting rights of felons.<sup>64</sup> As such, Section 1 of the Amendment cannot be interpreted as prohibiting restrictions and regulations.

Despite the Court's broad endorsement of felon disenfranchisement measures of *Richardson, Hunter v. Underwood* carved out an exception.<sup>65</sup> The *Hunter* Court held that if there is an effort to discriminate on account of race, a felon disenfranchisement law may be unconstitutional. In *Hunter*, the plaintiffs lost their voting rights for using worthless checks, a misdemeanor considered a crime of moral turpitude according to Alabama's constitution.<sup>66</sup> Though the provision was facially neutral, it was designed by the 1901 Constitutional Convention with the purpose of excluding African Americans from the franchise.<sup>67</sup> Alabama has a historical record indicating a clear pattern of the state's intent to reduce the voting power of African

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<sup>62</sup> MANZA & UGGEN, *supra* note 8, at 29-30.

<sup>63</sup> Ramirez v. Brown, 9 Cal. 3d 199 (1973).

<sup>64</sup> EWALD, *supra* note 33, at 20.

<sup>65</sup> 471 U.S. 222 (1985).

<sup>66</sup> Schall, *supra* note 16, at 61-62.

<sup>67</sup> *Hunter*, 471 U.S. at 229. "The delegates to the all-white convention were not secretive about their purpose. John B. Knox, president of the convention, stated in his opening address: 'And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.'" 1 OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA, MAY 21ST, TO SEPTEMBER 3D, 1901 8 (1940).

Americans, and legislators designed this provision to appear facially neutral but to be discriminatory. The Court struck down the measure for being discriminatory in design and in practice under Section 1 of the Fourteenth Amendment.<sup>68</sup>

While *Hunter* aimed to prohibit racially discriminatory disenfranchisement provisions,<sup>69</sup> the rule has been severely limited, however, because few records have provided as clear a case, and intent of discrimination is difficult to prove otherwise.<sup>70</sup> Courts have adhered rigidly to the *Richardson* decision as well as the “and other crime” language in Section 2 of the Fourteenth Amendment when dealing with equal protection challenges to felon disenfranchisement laws.<sup>71</sup> Subsequent courts have dismissed challenges to felon disenfranchisement laws on the assumption that disenfranchising felons is rationally related to its intended goal, and thus, states would reach the same decision even in the absence of discrimination.<sup>72</sup>

### III. SOCIAL CONTRACT THEORY AND FELON DISENFRANCHISEMENT

On the surface, applying the social contract to justify felon exclusion seems almost intuitive: a person who breaks the law has broken his bond to the rest of society and the government, and has abandoned civilized, law-abiding society. How can a man who cannot live up to his end of the bargain expect to receive the protection and benefits that organized government structure offers over the lawless state of nature? More specifically to voting, a man who cannot abide by the basic tenets and values of society should not be entrusted with selecting our nation’s leaders or voting on policy initiatives.

Social contract theory is a philosophical explanation for how and why civilized society came about. It states that legitimate

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<sup>68</sup> *Hunter*, 471 U.S. at 233.

<sup>69</sup> *Id.*

<sup>70</sup> Schall, *supra* note 16, at 62-63.

<sup>71</sup> See *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998) (upholding the constitutionality of Mississippi’s criminal disenfranchisement law even though it was first enacted because of racial animus because later amendments cleansed the provision of its taint).

<sup>72</sup> *Wesley v. Collins*, 605 F. Supp. 802 (M.D. Tenn. 1985); *Jones v. Edgar*, 3 F. Supp.2d 979 (C.D. Ill. 1998); *Howard v. Gilmore*, 205 F.3d 1333 (4th Cir. 2000) (unpublished table opinion); *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996) (en banc).

state political and police authority arises only through consent of the people.

Social contract theory was initially presented in the Platonic dialogues. In the *Crito*, Socrates is in prison and facing the death penalty. He is given the opportunity to escape and live in exile. He reflects on his life and everything he has and recognizes that the Athenian society made it all possible. Socrates then explains that citizens are not forced to be a part of Athenian society; this is not a coerced decision but rather an accepted contract with the Law. Every boy in Athens, upon reaching the age of seventeen, must choose to accept or reject the laws of the city. He is free to leave the city if the laws do not suit him. In choosing to become a citizen and consent, the boy agrees to obey the Laws of the city. Breaking any law would amount to betraying this agreement and the boy must face the punishment for misdeeds.<sup>73</sup> Thus, Socrates upholds his implied contract and chooses to remain in jail in Athens.<sup>74</sup>

Initially discussed in early Platonic dialogue, social contract theory is given its first full description and definition by Thomas Hobbes. After Hobbes, John Locke and Jean-Jacques Rousseau also examined this theory of political philosophy. The varying models of the social contract theory often differ on exactly who the bargaining partners are.<sup>75</sup>

Most social contract theories share a starting point of a “state of nature,”<sup>76</sup> a time of chaos and lawlessness lacking in structure or organization.<sup>77</sup> Hobbes designs life in a state of nature, an asocial environment without government, or laws. It was militaristic, and each person viewed the next person as a threat for natural resources.<sup>78</sup> This produces what he called the “state of

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<sup>73</sup> Celeste Friend, *Social Contract Theory*, in THE INTERNET ENCYCLOPEDIA OF PHILOSOPHY (2006), available at <http://www.iep.utm.edu/s/soc-cont.htm> (last visited December 15, 2009).

<sup>74</sup> *Id.*

<sup>75</sup> Afi S. Johnson-Parris, Note, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 VA. L. REV. 109, 126 (2003).

<sup>76</sup> Friend, *supra* note 73.

<sup>77</sup> Frederick Pollock, *Hobbes and Locke: The Social Contract in English Political Philosophy*, 9 J. SOC'Y COMP. LEGIS., 107, 109 (1908) (“Both Hobbes and Locke start from an assumed ‘state of nature’—a political blank paper. In this they are in no way singular.”).

<sup>78</sup> J.W. GOUGH, THE SOCIAL CONTRACT: A CRITICAL STUDY OF ITS

war,” a way of life that is certain to prove “solitary, poor, nasty, brutish, and short.”<sup>79</sup> The populace is governed by the right of nature, where “the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is of his own Life.”<sup>80</sup> This is not a sustainable lifestyle.<sup>81</sup>

Like Hobbes, Locke designs a state of nature, the original position where man is naturally free and equal. While each individual is allowed to defend his own property rights and enforce natural law, it is not as belligerent and hostile as Hobbes depicts. “For Locke, the state of nature is not a state of war until there is actual hostility, but only a state in which peace is not secure. The natural law of self-preservation includes a moral duty to preserve the rest of mankind as far as possible.”<sup>82</sup> Man, even in the statue of nature, is inherently moral.

Rousseau crafts his own hypothetical original state from which organized society emanates, in his *Discourse on the Origin of Inequality Among Men*. Rousseau’s state of nature is epitomized by its quality of remoteness.<sup>83</sup>

A common element for social theorists is the “foundation of the true or authentic body politic is held to be a pact or agreement made by all the individuals who are to compose it.”<sup>84</sup> Hobbes posits that people, out of pragmatic self-interest, will relinquish some individual freedoms to establish a government—which will in return—offer protection and a more functional society.<sup>85</sup> The

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DEVELOPMENT 105 (Oxford Press 2d ed. 1957). “The state of nature is a state of war, a war of everybody against everybody else, giving rise to ‘continuall feare, and danger of violent death.’ There is no place in the state of nature for the notions of justice or injustice, for ‘where there is no common Power, there is no Law: where no Law, no Injustice.’”

<sup>79</sup> THOMAS HOBBS, *LEVIATHAN* I 13.

<sup>80</sup> GOUGH, *supra* note 78, at 105.

<sup>81</sup> Lessnoff, *supra* note 4, at 10 (“The natural freedom and equality of men in this condition make life intolerably insecure—*therefore they must be abandoned.*”) (alteration in original).

<sup>82</sup> Pollock, *supra* note 77, at 110.

<sup>83</sup> GOUGH, *supra* note 78, at 164 (“The original state of nature, according to Rousseau, was neither a Hobbesian war of all against all, nor a Lockian abode of peace and goodwill; it was just a condition of brutish isolation, in which men were physically much stronger than they are today.”).

<sup>84</sup> *THE SOCIAL CONTRACT FROM HOBBS TO RAWLS* 37 (David Boucher and Paul Kelly eds., 1994).

<sup>85</sup> Pollock, *supra* note 77, at 109 (“The law of nature—i.e., the rule of self

only way to escape the brutality of the state of nature was to bond with others, and form mutually beneficial alliances to surrender individual interests in return for shared security. Citizens voluntarily exchange their liberty and natural law rights for a social contract that brings safety and justice.<sup>86</sup>

In Hobbes's state of nature, men have complete natural liberty in a lawless, uncontrollable society.<sup>87</sup> For Locke, men are still constrained and governed by the law of nature in the original state. However, the state of nature is not sustainable because it lacks any effective central mechanism to enforce the law of nature and protect the rights of individuals, which are the principal functions of the state. Thus upon consenting to the social contract, men do not give up their natural liberty, but rather their natural right to enforce the law of nature and punish violators.<sup>88</sup> For Locke, "Civil society is formed by every man giving up his natural power; not to a sovereign, but 'into the hands of the Community' or 'to the publick.' The authority so conferred upon the society is granted only to be used for the public good."<sup>89</sup>

In Rousseau's social contract, in consenting to the contract, an individual agreed to put aside his self-interest to join a general will that guarantees equality and protection for all.<sup>90</sup> "[I]nstead of turning their forces against each other, men collected them in a supreme power to govern by wise laws, the weak would be guarded from oppression, the ambitious would be restrained, and all would be defended in peace from the attacks of their common enemies."<sup>91</sup>

Hobbes, Locke and Rousseau have very different conceptions of the political and judicial system to be created in the social contract. In all three, citizens opt to leave the state of nature and contract to form an organized society. Each social contract theorist, however, foresees a different version of the governing structure. Rousseau designed a society ruled by a collectivist

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-preservation dictated by natural reason—dictates to man 'to seek peace and follow it,' and for that purpose, among other things, to keep faith.").

<sup>86</sup> Sharon Lloyd & Susanne Sreedhar, *Hobbes's Moral and Political Philosophy*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., Summer ed. 2008), <http://plato.stanford.edu/entries/hobbes-moral/>.

<sup>87</sup> Friend, *supra* note 73.

<sup>88</sup> GOUGH, *supra* note 78, at 39-43.

<sup>89</sup> Pollock, *supra* note 77, at 110.

<sup>90</sup> Friend, *supra* note 73.

<sup>91</sup> GOUGH, *supra* note 78, at 164.

general will of the people.<sup>92</sup> “The community once formed by a contract of society may be self-governing, without any distinction of rulers and subject, and therefore without any possibility of their making a contract with one another.”<sup>93</sup> The general will decides what is good for society as a whole. Individuals impliedly consent to the social contract. Rousseau holds that even individuals who disagree with elements of the social contract must nevertheless agree to abide the general will or risk punishment.<sup>94</sup> This collective will is called the Sovereign. People vote in periodic assemblies for the common good. Attendance and voting is imperative to the well-being of the state. The sovereign has absolute authority and can issue any penalty for violating society’s rules, up to and including the death penalty.<sup>95</sup>

Locke’s society and political structure differs from Rousseau’s:

Civil society is formed by every man giving up his natural power; not to a sovereign but ‘into the hands of the Community’ or ‘to the publick.’ The authority so conferred upon the society is granted only to be used for the public good . . . .

The next step is that the society, being formed, establishes a government with legislative and executive organs by the decision of the majority. The right of the majority is founded simply on the necessity of the case, being otherwise no collective action would be possible.<sup>96</sup>

Finally, for Hobbes, citizens agree to subject themselves to the rule of the sovereign because individuals cannot be trusted. The sovereign Leviathan is all-powerful, bound only by the law of nature to treat his subjects reasonably. The autonomous government makes decisions on behalf of society. The social contract is not

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<sup>92</sup> Samuel Freeman, *Contractarianism*, in ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY. (E. Craig, ed.), <http://www.rep.routledge.com/article/S056SECT6> (last visited December 15, 2009).

<sup>93</sup> Sir Ernest Barker, *Introduction*, in SOCIAL CONTRACT, ESSAYS BY LOCKE, HUME AND ROUSSEAU xiii (1962).

<sup>94</sup> Freeman, *supra* note 92.

<sup>95</sup> Friend, *supra* note 73.

<sup>96</sup> Pollack, *supra* note 77, at 110.



between subjects and their sovereign, but rather among the subjects.<sup>97</sup> There is no actual voting in Hobbes's social contract and citizens do not have any influence over public policy.<sup>98</sup>

There are many parallels between social contract theory and traditional contract theory, particularly the same elements of a formal contract (two or more parties, offer, acceptance, consideration, and damages in the event of breach). Society offers benefits and protections of safety, order, and security and accepts participation within society's framework, including obeying the laws. The promises and obligations are reciprocal. Those who breach the contract suffer damages—removal from society.

#### *A. The Social Contract as Basis of Law*

Social contract theory is frequently cited as a basis for law in the American government and court system. "Scholars believe social contractarian philosophy influenced the founding of the United States and its Constitution."<sup>99</sup> The Mayflower Compact, the first governing document of the Plymouth colony, was an essential a social contract where the settlers agreed to follow the compact's laws and regulations in return for protection and a better chance of survival.<sup>100</sup>

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<sup>97</sup> THOMAS HOBBS, *Leviathan* II 18.

<sup>98</sup> Lloyd, *supra* note 83.

<sup>99</sup> Anita L. Allen, *Dunwoody Distinguished Lecture in Law: Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 2-3 (1999) (citing PAULINE MAIER, *FROM RESISTANCE TO REVOLUTION* 27 (1972) (noting that social contractarian thinkers generated "a corpus of ideas about public and popular authority and popular political responsibilities that shaped the American revolutionary movement"); JOHN WITHERSPOON, *LECTURES ON MORAL PHILOSOPHY* 45 (Jack Scott ed., 1982); Andrea Brenneke, *Civil Rights Remedies for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. 1, 18 (1992) ("American civil rights theory derives in part from the 17th century 'social contract' tradition . . ."); Martin C. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1069, 1074 (1991) ("The Revolution in America in 1776 found philosophical foundation in the social contract theorists . . ."). See generally John F. Fenton, Jr., *The Theory of the Social Compact and Its Influence Upon the American Revolution* 37-65 (1891) (unpublished doctoral thesis, Columbia College) (on file with author) (discussing the impact of social contractarian thought on colonial America)).

<sup>100</sup> 3 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE*

The legal system in the United States has frequently looked to social contract theory to legitimate its entrusted authority to effectuate justice and order. “Judicial opinions relating to matters as varied as sovereignty,<sup>101</sup> slavery,<sup>102</sup> alienage,<sup>103</sup> the negligence rule,<sup>104</sup> criminal incarceration,<sup>105</sup> congressional nondelegation,<sup>106</sup>

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UNITED STATES OF AMERICA COMPILED AND EDITED UNDER THE ACT OF CONGRESS OF JUNE 30, 1906 (1909). “Having undertaken, for the Glory of God and advancement of the Christian Faith and Honour of our King and Country, a Voyage to plant the First Colony in the Northern Parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of another, Covenant and Combine ourselves together into a Civil Body Politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute and frame such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the general good of the Colony, unto which we promise all due submission and obedience.” *Id.* at 1841.

<sup>101</sup> See *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its permission, but the answer has been public property since before the days of Hobbes (Leviathan, c. 26, 2.)”); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1204 (5th Cir. 1978) (“In their external relations, sovereigns are bound by no law; they are like our ancestors before the recognition or imposition of the social contract.”); *Carl Marks & Co. v. USSR*, 665 F. Supp. 323, 333 (S.D.N.Y. 1987) (“The classic expression of the doctrine of absolute immunity in our courts was offered, in language resonant of Thomas Hobbes by Chief Justice Marshall in *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116, 137, 3 L.Ed 287 (1812).”).

<sup>102</sup> See *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856); *State v. Post*, 20 N.J.L. 368 (1845) (blacks outside the social contract).

<sup>103</sup> See *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1231-33 (1988). Courts sometimes describe each nation of the world as having its own social contract. See, e.g., *Banco Nacional de Cuba v. Chase Manhattan Bank*, 505 F. Supp. 412, 447 (S.D.N.Y. 1980), *aff’g in part* 658 F.2d 875 (2d Cir. 1981) (finding that a new social contract in a foreign nation does not give rise to claims for compensation for bad investments abroad). So, while aliens may be excluded from our social contract, they have the possibility of inclusion in their own.

<sup>104</sup> See *Losee v. Buchannan*, 51 N.Y. 476 (1873).

<sup>105</sup> See *Baker v. Cuomo*, 58 F.3d 814 (2d Cir. 1995) (stating that New York statutes disenfranchising incarcerated felons were rationally related to social contract principles). Cf. *Imprisoned Citizens Union v. Sharp*, 473 F. Supp. 1017, 1027 (E.D. Pa. 1979) (finding that prisoners' rights were supported by the social contract).

<sup>106</sup> See *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (stating that Locke was opposed to legislative delegation); *United States v. Williams*, 691 F. Supp. 36, 44 n.5 (M.D. Tenn. 1988) (“[T]he

land use,<sup>107</sup> the law of finds,<sup>108</sup> public health,<sup>109</sup> self-incrimination,<sup>110</sup> civil forfeiture,<sup>111</sup> debt collection,<sup>112</sup> and the right to privacy<sup>113</sup> feature social contractarian rationales or rhetoric.”<sup>114</sup>

Social contract principles were the Supreme Court’s foundation in *McCulloch v. Maryland*, a landmark case in constitutional law establishing that the Constitution grants to Congress implied powers for implementing the Constitution’s

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nondelegation doctrine is derived from the contractarian view that ‘laws derive their legitimacy from the consent of the governed and, in the American polity, the constitutional delegation of lawmaking power to the Congress establishes this consent.’” (quoting Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 5 (1982)).

<sup>107</sup> *Cf. Sarasota County Anglers Club, Inc. v. Burns*, 193 So. 2d 691, 693 (Fla. 1st DCA 1967) (stating “that the public interest demands that there be some impairment of the individual citizen’s right to enjoy absolute freedom in the use of public” lands).

<sup>108</sup> *Cf. Texaco, Inc. v. Short*, 454 U.S. 516, 526 n.19 (1982) (“right to appropriate a derelict . . . existed in a state of nature”); *Hener v. United States*, 525 F. Supp. 350, 353 (S.D.N.Y. 1981) (involving a dispute over rights to salvage silver from a sunken barge and stating that “[t]he common law of finds treats property that is abandoned as returned to the state of nature . . .”).

<sup>109</sup> *See Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (holding that state police powers extend to compulsory vaccinations and citing a phrase from the Massachusetts Constitution “that laid down as a fundamental principle of the social compact that the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for ‘the common good’”); *cf. Munn v. Illinois*, 94 U.S. 113, 124 (1876) (finding that the state may regulate the maximum charges allowed for the storage of grain); *Home Tel. & Tel. Co. v. City of L.A.*, 155 F. 554, 568-69 (C.C.S.D. Cal. 1907) (power to regulate telephone charges); *City & County of Denver v. Denver & Rio Grande R.R.*, 167 P. 969, 969-70 (Colo. 1917) (ordering removal of certain railroad tracks in town); *Bd. of Barber Exam’rs v. Parker*, 182 So. 485, 504-05 (1938) (power to regulate barbers).

<sup>110</sup> *See Phelps v. Duckworth*, 772 F.2d 1410 (7th Cir. 1985) (“Even Thomas Hobbes, staunch defender of authoritarian government” defended the right against self-incrimination.).

<sup>111</sup> *See United States v. 785 St. Nicholas Ave.*, 983 F.2d 396, 402 (2d Cir. 1993) (“The true reason for permitting forfeiture, according to Blackstone, was that it is part of the price a citizen must pay for breaking the social contract by violating the law.”).

<sup>112</sup> *See Davis v. Richmond*, 512 F.2d 201, 204-05 (1st Cir. 1975) (distrain of lodger’s property).

<sup>113</sup> *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905).

<sup>114</sup> *Allen*, *supra* note 99, at 6-7.

express powers.<sup>115</sup> Moreover, social contract theory has provided an important framework during immigration and enemy combatant national security cases.<sup>116</sup> The Supreme Court has used the social contract theory to justify not extending the protections of the Constitution to nonresident aliens as well.<sup>117</sup>

The appeal to the social contract is most notable in criminal law cases. As Allen points out, “Courts appeal to the idea of the social contract to help describe both the wrongness of criminal acts, and the rightness of criminal prohibitions and procedures.”<sup>118</sup> Social contract theory has been cited to justify criminal punishment in general and capital punishment in particular.<sup>119</sup>

### *B. The Social Contract as Applied to Felon Disenfranchisement*

Social contract theories have long been used to justify felon disenfranchisement, contending that the innate defects of a

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<sup>115</sup> 17 U.S. 316 (1819); Juliet Stumpf, Note, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, 94 (2004-2005). (“This second view of membership hearkens back to the social contract principles that appeared in *McCulloch v. Maryland*. *McCulloch* described the bargain as struck primarily between the people of the states and the national government, and secondarily requiring the “assent of the states” themselves. This agreement was entered into by delegates “chosen in each state by the people” of that state. In this view, the people of the states as a whole compose the membership of the community that entered into the social contract.”).

<sup>116</sup> *Id.* at 89. “*Ex parte Milligan's* use of social contract theory laid the groundwork for the evolution of a category of pseudo-citizens without full membership in the citizenry.”

<sup>117</sup> See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (describing the social compact between the government and “the People of the United States”).

<sup>118</sup> Allen, *supra* note 99, at 30. (citing *People v. Acuna*, 929 P.2d 596, 603-04 (Cal. 1997) (upholding injunction prohibiting gang members from associating with one another); *Roe v. Butterworth*, 958 F. Supp. 1569, 1582 (S.D. Fla. 1997) (upholding prostitution ban on grounds that protecting morals is a compelling state interest incorporated into the social contract); *Agard v. Portondo*, 117 F.3d 696, 717 (2d Cir. 1997) (stating that defendant's right to be heard was one of the first principles of the compact)).

<sup>119</sup> *Id.* at 31 (citing *State v. Perry*, 610 So. 2d 746, 767 (La. 1992) (citing Immanuel Kant and Jeffrey Murphy)) (“The retributory theory of punishment presupposes that each human being possesses autonomy, a kind of rational freedom which entitles him or her to dignity and respect as a person which is morally sacred and inviolate, but that an original social contract was entered by which the people constituted themselves a state.”); *Vandiver v. State*, 480 N.E. 910, 915 (Ind. 1985).

convict render him incapable of respecting society's laws. During the debate in the Senate in 2002 over a bill to secure federal voting rights to ex-felons, Senator Mitch McConnell took to the floor to proclaim:

Voting is a privilege; a privilege properly exercised at the voting booth, not from a prison cell. States have a significant interest in reserving the vote for those who have abided by the social contract that forms the foundation of a representative democracy . . . . Those who break our laws should not have a voice in electing those who make and enforce our laws. Those who break our laws should not dilute the vote of law-abiding citizens.<sup>120</sup>

Leading the charge to defeat this amendment, Senator McConnell warned of terrorists, rapists and murderers voting, and of jailhouse blocs banding together to oust sheriffs and tough-on-crime government officials. Senators Allen and Sessions also spoke on the floor about the dangers of allowing felons to vote.<sup>121</sup>

In a Second Circuit case in New York, brought by ex-offenders trying to use the Equal Protection Clause to restore their voting rights, Judge Henry J. Friendly gave voice to the social contract argument for felon disenfranchisement.

A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact . . . . [I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.<sup>122</sup>

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<sup>120</sup> 148 CONG. REC. S 802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell).

<sup>121</sup> *Id.* at 803-06. Senator Allen even noted that felons want their voting rights restored to “feel like a full-fledged citizen again. They have led a good life. They want to be part of the community.” *Id.*

<sup>122</sup> *Green v. Bd. of Elections of New York*, 380 F.2d 445, 451 (2d. Cir. 1967).

Judge Friendly defends felon disenfranchisement laws with arguments explicitly based on John Locke's social contract theory.<sup>123</sup> This has been cited positively by other federal judges to substantiate their rulings,<sup>124</sup> and has been upheld in the Supreme Court's denial of certiorari on appeal. The Fifth Circuit Court of Appeals also pointed to the social contract in restricting felons from voting.<sup>125</sup>

*C. Does Felony Disenfranchisement Meet the Standards of the Social Contract's View of Punishment?*

Society has always made provisions to punish those who violate its laws. Different societies have distinct goals and justifications for punishing crimes; and, even within one society, various crimes may be punished with different aims in mind. Locke's principle was that criminals should be "punished to that degree, and with so much severity as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."<sup>126</sup> This statement encapsulates the four aims of punishment: incapacitation, retribution, deterrence, and rehabilitation.<sup>127</sup> Examining each, it is clear that felon disenfranchisement does not fit under social contract theory.

1. Incapacitation

Incapacitation involves removing criminals from society to reduce or eliminate their potential to continue to harm.<sup>128</sup> In

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<sup>123</sup> *Id.* "The early exclusion of felons from the franchise by many states could well have rested on Locke's concept, so influential at the time, that by entering into society every man "authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require, to the execution whereof his own assistance (as to his own decrees) is due." *Id.* (quoting LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT (1698)).

<sup>124</sup> *Beacham v. Braterman*, 300 F.Supp. 182 (S.D. Fla.), *aff'd mem.*, 396 U.S. 12 (1969); *Kronland v. Honstein*, 327 F. Supp. 71 (N.D. Ga. 1971).

<sup>125</sup> *Shepherd v. Trevino*, 575 F.2d 1110, 1115 (5th Cir. 1978) (Felons "have breached the social contract and, like insane persons, have raised questions about their ability to vote responsibly . . .").

<sup>126</sup> LOCKE, SECOND TREATISE OF GOVERNMENT bk. 2, ch. 2, §12 (C.B. McPherson ed., 1980).

<sup>127</sup> See Andrea Steinacker, Note, *The Prisoner's Campaign: Felon Disenfranchisement Laws and the Right to Hold Public Office*, B.Y.U. L. REV. 801, 818 (2003) (listing traditional justifications for disenfranchisement).

<sup>128</sup> *Id.* at 820-21.

ancient civilizations, criminals were exiled from the community.<sup>129</sup> This expulsion was the most direct means of incapacitation; criminals were refused to reenter society. Locke is clear about the need for society to punish and remove those who cannot abide the Law.<sup>130</sup> Rousseau has a similar sentiment:

Again, every malefactor, by attacking social rights, becomes on forfeit a rebel and a traitor to his country; by violating its laws he [sic] ceases to be a member of it; he even makes war upon it. In such a case the preservation of the State is inconsistent with his own, and one or the other must perish; in putting the guilty to death, we slay not so much the citizen as an enemy. The trial and the judgment are the proofs that he has broken the social treaty, and is in consequence no longer a member of the State. Since, then, he has recognised himself to be such by living there, he must be removed by exile as a violator of the compact, or by death as a public enemy; for such an enemy is not a moral person, but merely a man; and in such a case the right of war is to kill the vanquished.<sup>131</sup>

Hobbes envisioned imprisonment to mean all restraint of motion. Hobbes also considered the punishment of exile, which bears relation to incarceration in so far as it removes a criminal from ever participating in society. Hobbes explained, “[f]or a banished man is a lawful enemy of the commonwealth that banished him, as being no more a member of the same.”<sup>132</sup>

However, because societies have evolved over the years, exile is no longer a practical solution. As a result, societies incapacitated those believed to pose dangerous threats to the public by locking

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<sup>129</sup> Johnson-Parris, *supra* note 75, at 114.

<sup>130</sup> Jeffrey Reiman, *Liberal and Republican Arguments Against the Disenfranchisement of Felons*, THE SENTENCING PROJECT (Winter/Spring 2005) available at [http://www.sentencingproject.org/Admin/Documents/publications/fd\\_liberalrepublican\\_argum.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_liberalrepublican_argum.pdf).

<sup>131</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 22-23 (G.D.H. Cole trans., 2005).

<sup>132</sup> THOMAS HOBBS, *LEVIATHAN: A CRITICAL EDITION* 250 (G.A.J. Rogers and Karl Schuhmann eds., 2005).

them away in prisons. Outside of incarceration, disenfranchisement can be seen as a supplementary form of incapacitation; by preventing criminals from participating in the democratic process, disenfranchisement laws stopped criminals from further harming society. Courts have permitted disenfranchisement laws with the aim of protecting “the purity of the ballot box.”<sup>133</sup> In *Washington v. State*, the court voiced concerns for the “invasion of corruption” and the “evil infection” if felons were allowed to vote.<sup>134</sup> Another concern was the potential impact of these supposedly amoral felons deciding elections. Courts voiced fears that without felony disenfranchisement, these criminals were likely to go on committing electoral fraud.<sup>135</sup> The Supreme Court case, *Davis v. Beason*,<sup>136</sup> implies that disenfranchisement is imperative to preclude criminals’ voting en masse for repeal of criminal laws. Judge Friendly argues that in allowing ex-offenders to have a voice in our government and in determining who will be our lawmakers and judges, we will undermine our society.<sup>137</sup> Judge Friendly’s ruling seems to misrepresent political equality, confining it only to the deserving. By committing a crime, felons have breached the social contract, are banished from political society, and are prevented from voting retributively against their prosecutors.<sup>138</sup>

However, a group cannot be excluded because it might vote in opposition to the majority<sup>139</sup> or out of fear the group might take control of the government and dictate policy.<sup>140</sup> Beyond the law, though, are more common sense reasons why this is bad policy. Limited to one vote, it is pretty unlikely the felon, no matter how corrupt or amoral he is, would really sully the entire election.

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<sup>133</sup> *Washington v. State*, 75 Ala. 582, 585 (1884).

<sup>134</sup> *Id.*

<sup>135</sup> *Kronlund v. Honstein*, 327 F.Supp 71, 73 (N.D. Ga. 1971).

<sup>136</sup> *Davis v. Beason*, 133 U.S. 333 (1890).

<sup>137</sup> *Green*, 380 F.2d at 451-52, (“A contention that the equal protection clause requires New York to allow convicted mafiosi to vote for district attorneys or judges would not only be without merit but as obviously as so anything can be.”).

<sup>138</sup> Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 736-39 (Spring 1972-1973).

<sup>139</sup> *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

<sup>140</sup> *Carrington v. Rash*, 380 U.S. 89, 95 (1965).



There is not, nor can there be any, evidence that ex-felons are incapable of making a rational, thoughtful decision from whom to vote. Even so, rational people cast votes for any number of reasons beyond what is in the general public's best interest, and it is impossible to know exactly what goes through someone's mind in the privacy of the voting booth.<sup>141</sup>

The idea that allowing felons to vote would contaminate the political process and produce corrupt elected officials is preposterous. Felons, like all other citizens, can only allocate their votes to a pre-selected group of people—those who decide to run for office. Felons do not determine who decides to throw their hat in the ring and run for elected office, nor do they determine the integrity of the candidates and elected officials.<sup>142</sup> Therefore, they contribute to the political process in the same way, an equally legitimate way, as non-felons.

This fear of subversive voting is not a valid one. Voters generally do not vote on a single issue, even one as charged as exacting revenge on the criminal justice system that punished them. Felons often grew up in violent neighborhoods, and would not be interested in enacting more lenient legislation on crime that could put them and their families at risk.<sup>143</sup> Moreover, it is impossible for pro-crime legislation to pass without majority support.

Once felons organized into an effective anti-crime-enforcement voting block, they would have to get their pro-crime candidate(s) elected by the majority of the voting population. In order to affect legislation, these pro-crime candidates would have to get the majority of each house of a state's legislature, or Congress, to vote in favor of pro-crime measures, and have these measures signed by the governor or president. This scenario is unrealistic. But if this implausible scenario did come to pass, it would mean the majority of the population supported these "pro-crime," or more likely merely lenient, measures.<sup>144</sup>

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<sup>141</sup> Itzkowitz & Oldak, *supra* note 138.

<sup>142</sup> *Id.*

<sup>143</sup> Schall, *supra* note 16, at 82.

<sup>144</sup> *Id.*

Likewise, if the intent is to restrict ex-offenders of their right to participate or influence the political process, simply depriving them from casting their ballots seems woefully incomplete. Even if an ex-felon was intent on installing a corrupt or pro-felon candidate into office, depriving the ex-felon of being able to add his one vote will not thwart him from helping the campaign win the election. Felons can still write letters to the editor, volunteer on political campaigns, donate money to politicians and numerous other ways to still influence policy and the political process.<sup>145</sup>

Lastly, there is no proof, nor much logic, to the charge that depriving felons of the vote is to protect the democratic process from election fraud. This might make sense if the disenfranchisement was limited to those who had been convicted of an election-related crime, or, being generous, maybe a crime of fraud or deceit. However, there is a vast range of offenses that constitute a felony, and most bear little resemblance to the electoral process at all. Also, there is little indication that those who have been previously convicted of tampering with an election would automatically try it again upon parole. And even if there was such an indication, criminal sentences are designed to detain someone until they are no longer the threat to society and can reenter society and resume being innocent until proven guilty. A drunk driver is not forever prohibited from driving again, nor is a spousal abuser prevented from dating and marriage.

There is simply not a scary, overwhelming problem of voter fraud in this country.<sup>146</sup> Now even if this is because felons are currently prevented from voting in most states, it would seem that there could be more targeted ways to prevent corruption than preventing every felon from voting.<sup>147</sup>

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<sup>145</sup> Itzkowitz & Oldak, *supra* note 138.

<sup>146</sup> Harold Meyerson, Editorial, *The Cost of a GOP Myth*, WASH. POST, May 16, 2007, at A15. (“Voter fraud is a myth . . . . Since 2002, the Justice Department's Ballot Access and Voting Integrity Initiative has, as Gonzales put it, “made enforcement of election fraud and corruption offenses a top priority.” And yet between October 2002 and September 2005, just 38 cases were brought nationally, and of those, 14 ended in dismissals or acquittals, 11 in guilty pleas, and 13 in convictions. Though a Justice Department manual on election crime states that these cases “may present an easier means of obtaining convictions than do other forms of public corruption,” federal attorneys have failed to rack up those convictions, for the simple reason that incidents of fraud have been few and far between.”).

<sup>147</sup> Itzkowitz & Oldak, *supra* note 138.

## 2. Retribution

Retribution is a form of institutionalized vengeance, intended to make the offender suffer in return for the pain they have caused.<sup>148</sup> Advocates of felony disenfranchisement argue that by breaking society's laws, criminals attack the law and threaten public order and need to be punished. Disenfranchisement is out of line with retributive theories, which "try to establish an essential link between punishment and moral wrongdoing."<sup>149</sup> Punishing all felons the same weakens this important link. While disenfranchisement may seem like a suitable punishment who committed electoral fraud, this is a very tiny percentage of the total disenfranchised.<sup>150</sup>

Retribution was the basis of the earliest systems of punishment. Plato, in having Socrates lay out his vision of the social contract, explicates how the man who agrees to the social contract and then breaks his word deserves punishment. This sentence is designed to castigate the criminal for his acts and perhaps through his pain he can make it up to society. Socrates's death sentence is obviously not to rehabilitate him, nor is it to incapacitate him from committing future wrongs. While it may serve a deterrent function to other members of Athens, its primary objective is simply to punish him for the wrong he has committed.<sup>151</sup>

Punishment, to Hobbes, is "an evil inflicted by public authority, on him that hath done . . . a Transgression of the Law."<sup>152</sup> The sovereign is authorized and entitled to punish criminals to defend the security of the commonwealth. He can require subjects to punish other subjects for breaking the law, but the sovereign remains the final judge. While some punishment will result in death, many will not.<sup>153</sup> There are also pecuniary punishments. Hobbes also discusses ignominy, the taking away of one's "badges, title, offices, or any other mark of the sovereign's

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<sup>148</sup> MANZA & UGGEN, *supra* note 8, at 35.

<sup>149</sup> Johnson-Parris, *supra* note 75, at 132.

<sup>150</sup> Itzkowitz & Oldak, *supra* note 138, at 735-736.

<sup>151</sup> Friend, *supra* note 73.

<sup>152</sup> HOBBS, *supra* note 97, at 244.

<sup>153</sup> *Id.* at 248 ("And of these, some be capital, some less than capital. Capital, is the infliction of death; and that either simply, or with torment. Less than capital are stripes, wounds, chains and any other corporal pain, not in its own nature mortal.").

favor.”<sup>154</sup> Ignominy may bare resemblance to felony disenfranchisement, designed to inflict shame on the criminal and make him a pariah in society.<sup>155</sup>

Rousseau also spoke of the need for the death penalty and other sentences to punish those who violate society’s laws. He writes:

The trial and the judgment are the proofs that he has broken the social treaty, and is in consequence no longer a member of the State. Since, then, he has recognised himself to be such by living there, he must be removed by exile as a violator of the compact, or by death as a public enemy; for such an enemy is not a moral person, but merely a man; and in such a case the right of war is to kill the vanquished.<sup>156</sup>

The punishment is the fair payback for violating the laws of society.

Locke first talks about retribution as the appropriate aim of punishment during the state of nature.<sup>157</sup> In the social contract man forfeits his right to punish and defers to the government to discipline transgressors.

Punishing criminals as a means of seeking revenge was the basis of early criminal justice systems. Nowadays, however, retributive punishment seems medieval and vengeance is not considered a morally appropriate reason of punishment. Stripping someone permanently of their political rights for no other purpose than to avenge a previous crime is illogical, short-sighted, and unjust.<sup>158</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> ROUSSEAU, *supra* note 131, at 22-23.

<sup>157</sup> LOCKE, *supra* note 126, at bk. 2, ch. 2, § 8 (In the State of Nature, a criminal may not be punished “according to the passionate heats, or boundless extravagancy of his own will; but only to retribute to him, so far as calm reason and conscience dictate, what is proportionate to his transgression, which is so much as may serve for *reparation* and *restraint*.”).

<sup>158</sup> Elizabeth Stimson, *How Felony Disenfranchisement Laws Undermine American Democracy*, AMERICANS FOR DEMOCRATIC ACTION EDUCATION FUND, available at <http://www.adaction.org/media/lizfullpaper.pdf>.

Lifetime disenfranchisement simply is not rational, proportional, or designed to fit the crime. All felons are targeted, regardless of the applicability of the punishment to their offenses or the severity of their crimes. A felon who commits homicide and a petty thief guilty of shoplifting will receive the same treatment with respect to voting rights.<sup>159</sup>

A retributive theory of punishment with respect to felony disenfranchisement raises more questions than it answers. Is every criminal act violative of the social contract? In principle, in consenting to the social contract, one agrees to abide by the big laws as well as the small ones. The social contract is just as undermined by man's indifference for traffic laws, indecency laws, or littering laws. Also, how is society, purportedly out for vengeance, going to feel about the adequacy of the punishment of disenfranchisement, even as the criminal is released back to the community and allowed to rejoin society?

### 3. Deterrence

The argument for voter disenfranchisement as an effective means of crime deterrence is rather weak. There are two forms of deterrence: specific and general. Specific deterrence is a punishment intended to limit recidivism amongst ex-offenders. General deterrence punishes to discourage others from committing the same crime.<sup>160</sup>

For Hobbes, punishment is not designed for the rehabilitation of an immoral criminal, but rather to deter others from committing the same crime. A harsh punishment may cause the criminal to reconsider violating the law in the future, but also to discourage other citizens from going down the same path.

I say, what necessary cause so ever precede an action, yet if the action be forbidden, he that does it willingly may justly be punished. For instance, suppose the law on pain of death prohibit stealing, and there be a man who by the strength of temptation is necessitated to steal and is thereupon put to death; does not this punishment deter others?

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<sup>159</sup> *Id.*

<sup>160</sup> MANZA & UGGEN, *supra* note 8, at 35.

Is it not a cause that others steal not? Does it not frame and make their wills to justice?<sup>161</sup>

Hobbes seeks punishment to prevent others from committing the same crime in the future.

Rousseau cautioned against capital punishment as a deterrence technique.<sup>162</sup> Locke allowed for citizens in the state of nature to defend themselves with such force that it would “deter others from doing the like injury.”<sup>163</sup> This power of punishment aimed at deterring others is passed on to the civic authority in the social contract.

It is hard to see how permanently losing one’s right to vote will discourage and dissuade from crimes of murder, theft, or fraud. Likewise, it is hard to imagine a would-be felon, undeterred by the prospect of a lengthy prison sentence, opting against committing a crime because he may lose his right to vote. Many crimes are committed in the heat of the moment where there is little time for cool reflection about the sacredness of participating in the political process. Deterrence will not eliminate crimes of passion, nor help an amoral criminal.<sup>164</sup>

Furthermore, many felons commit their crimes at a very young age. According to the Department of Justice, the average age of convicted felons in State courts in 2004 was thirty-two years old.<sup>165</sup> It has been well-documented that the eighteen to thirty-two age demographic registers to vote and casts their ballots in the lowest numbers. As citizens get older, they are more and more likely to appreciate the importance of voting and actually vote. As such, it is unfortunate to punish someone permanently, on a deterrence theory, with the loss of a right they will likely not appreciate until they are older and no longer possess it.<sup>166</sup>

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<sup>161</sup> HOBBS, *supra* note 97, at 270.

<sup>162</sup> ROUSSEAU, *supra* note 131, at 23. (“The State has no right to put to death, even for the sake of making an example, any one whom it can leave alive without danger.”).

<sup>163</sup> LOCKE, *supra* note 126, at bk. 2, ch. 2, § 11.

<sup>164</sup> Itzkowitz & Oldak, *supra* note 138, at 735.

<sup>165</sup> U.S. DEP’T OF JUST. BUREAU OF JUST. STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2004 - STATISTICAL TABLES, *available at* <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04203tab.htm> (last visited December 15, 2009).

<sup>166</sup> Itzkowitz & Oldak, *supra* note 138, at 733-35.

Deterrence only works if citizens are aware of the threat of punishment. It is unclear if these collateral consequences are even known at the time of the crime. Violating a law that one did not know about would hardly make him a scofflaw who rejects the rule of the majority. For Hobbes, a judge may excuse the breaking of a law if the offender was reasonably ignorant of its existence.<sup>167</sup> It would be against social contract theory and the principle of deterrence to burden a citizen with a harsh punishment of which he was unaware.

Would a citizen consent to the social contract if they were cognizant of the harsh, permanent effects of a single crime? Individuals who contacted with society did so expecting to receive protection of their rights as a benefit of accepting the burden of restrictions. In the well-known contracts case *Williams v. Walker-Thomas Furniture*, the court noted that “it is hardly likely” that someone would willingly and knowingly contract where a single failure would result in having to return all goods received from the contract.<sup>168</sup> The sanction of disenfranchisement is essentially a forfeiture of a very important right for a single breach of the social contract.<sup>169</sup>

#### 4. Rehabilitation

Rehabilitation aims to restore and develop the morality of a criminal so that he may rejoin society as a decent, law-abiding citizen. Rehabilitation programs may come in the form of education, religious study, job-training, or drug-addiction programs. Hobbes and Rousseau explained how most often the purpose of punishment was to restore the offender back as a well-functioning, contributing member of society. For Hobbes, “[a] punishment is an evil inflicted by public authority on him that hath done or omitted that which is judged by the same authority to be a transgression of the law, to the end that the will of men may thereby the better be disposed to obedience.”<sup>170</sup> Rousseau

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<sup>167</sup> HOBBS, *supra* note 95, at 181 (Laws must be made known in order to be laws, and if they cannot be known (for example, in the case where the sovereign does not communicate the laws or, in the case where the subject is a child or an idiot, incapable of knowing the laws), then they cannot be justly enforced.).

<sup>168</sup> 350 F.2d 445, 449 (D.C. Cir. 1965).

<sup>169</sup> Johnson-Parris, *supra* note 75, at 131.

<sup>170</sup> HOBBS, *supra* note 97, at 181.

makes the point that the criminal justice system is not working properly if criminals are not being rehabilitated and put on the path to righteousness. “We may add that frequent punishments are always a sign of weakness or remissness on the part of the government. There is not a single ill-doer who could not be turned to some good.”<sup>171</sup>

It is hard to develop a rationale explaining how the stripping of voting rights from ex-offenders will have any positive impact on their process of rehabilitation and reentry into society. It is suggested that the taking away of a felon’s voting rights serves as a small but significant reminder of the impact of breaking the law.<sup>172</sup> Ex-felons can still participate in the broader political process by writing letters, campaigning to get others to vote, and so forth. It is unclear as to how preventing felons from voting rehabilitates, and seems like an ineffective rehabilitation mechanism.<sup>173</sup>

Not only does felon disenfranchisement not help with rehabilitation, it may actually impede it. Well over 90 percent of prisoners will rejoin society and will be expected to meet their civic obligations.<sup>174</sup> Voting is thought by many to be a virtue-inducing exercise, drawing citizens attention to the common good.<sup>175</sup> By blocking the formation of virtue, disenfranchisement may actually serve to make recidivism more likely. “Many advocates of prisoner voting rights argue that the deprivation of those rights exacerbates the alienation of prisoners from the wider community, fostering a bitterness that is detrimental to their social reintegration.”<sup>176</sup>

Reenfranchisement might possibly serve a rehabilitation function if it was offered as an incentive for good behavior. However, in most states, the right to vote is either permanently taken away, or is too much of a bureaucratic nightmare to possibly incentivize good behavior. States will budget hundreds of thousands of dollars into literary or skills trainings for prisoner

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<sup>171</sup> Rousseau, *supra* note 131, at 23.

<sup>172</sup> John Kleinig & Kevin Murtagh, *Disenfranchising Felons* 22 J. OF APPLIED PHIL. 220-226 (2005).

<sup>173</sup> Itzkowitz & Oldak, *supra* note 138.

<sup>174</sup> Kleinig, *supra* note 172.

<sup>175</sup> Schall, *supra* note 16, at 75.

<sup>176</sup> Kleinig, *supra* note 172.



reentry into society, yet refuse to provide the most fundamental occasion for civic engagement, participating in the democratic process.<sup>177</sup> Recognizing the right of an ex-felon to vote would make it more likely for him to identify with and take pride in being a part of the community in which he is rejoining.

In addition, lifetime sanctions insult the principle that the offender can repay his debt to society. Paying one's debt to society involves serving one's punishment to completion and moving on to become a better man. Lifetime disenfranchisement statutes prevent a criminal from ever feeling like he has fully paid his debt and can start fresh.<sup>178</sup>

#### CONCLUSION

Felony disenfranchisement has deep roots in social contract theory. Plato, Locke, Hobbes, and Rousseau can all elucidate how a criminal forfeits his rights to participate in society by having broken his promise to uphold the law. There is a fine argument for punishing someone who received all the benefits society had to offer but could not live up to his end of the bargain by obeying the law. However, upon careful examination of the social contract and punishment theory, it is evident that disenfranchisement is an inappropriate and obsolete punishment that does more harm than good.

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<sup>177</sup> *Id.*

<sup>178</sup> Johnson-Parris, *supra* note 75, at 132.