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Felony Disenfranchisement through Rousseau's Social Contract

Blake Donohue

PSCI 491H 01 Individuals Honors Thesis

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In America, 1 in 13 African Americans are disenfranchised.¹ In some states, that statistic becomes 1 in 5, or 1 in 7 depending on the state's policy.² 5.2 million Americans, or 2.3 percent of the voting age population, are disenfranchised, and 5.17 million of those people are disenfranchised because of a felony conviction.³ The issue of felony disenfranchisement was brought to the public's attention largely because of the 2000 Presidential election, which was determined by Florida's Electoral College votes after many challenges in court.⁴ Florida at the time had more disenfranchised felons than any other state. Studies suggest that if felons were allowed to vote in the 2000 election,⁵ Al Gore, the Democratic candidate, would have won the popular vote in Florida and the presidency. When comparing policies of other countries, the US proves to be an outlier with some of the most restrictive policies in the world.

Social contract theorists John Locke, Thomas Hobbes, and Jean-Jacques Rousseau heavily influenced the United States Constitution. Locke's contract was based on property, Hobbes' was based on fear and pain, but Rousseau's was based on equality.⁶ Many scholars use social contract theory to support felony disenfranchisement. They equate a felon's breaking of the law with the breaking of the social contract. Losing your right to vote is a consequence of

¹ Christopher Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, "Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction," *The Sentencing Project*, The Sentencing Project, October 30, 2020, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

² Uggen et al *Locked Out 2020* 4, 11.

³ Uggen et al *Locked Out 2020* 4.

⁴ Christopher Uggen and Jeff Manza, "Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States," *American Sociological Association* 67, no. 6 (December 2002): pp. 777-803, https://www.jstor.org/stable/3088970?sid=primo&origin=crossref&seq=1#metadata_info_tab_contents, 792..

⁵ Christopher Uggen and Jeff Manza, "Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States," *American Sociological Association* 67, no. 6 (December 2002): pp. 777-803, https://www.jstor.org/stable/3088970?sid=primo&origin=crossref&seq=1#metadata_info_tab_contents, 792.

⁶ Manzoor Elahi Laskar, "Summary of Social Contract Theory by Hobbes, Locke and Rousseau," ResearchGate, April 2013, https://www.researchgate.net/publication/261181816_Summary_of_Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau, 1, 4, 5.

breaking the contract; however, Jean-Jacques Rousseau emphasizes the notion of the general will, which entails citizens prioritizing equality, the public good, and liberty. The general will requires that all members of society express themselves through their vote. If the general will is not representative of all citizens then the social contract is broken, and society is no longer free.⁷ Likewise, if laws are put in place that do not reflect the general will, uphold equality, and respect the liberty of individuals, then the contract is invalid.⁸

The history of felony disenfranchisement, as well as the cases often used when discussing the constitutionality of felon disenfranchisement policies, aligns with the history of racial discrimination in the United States.⁹ The disproportionate impact of felony disenfranchisement laws on African Americans makes such laws invalid if analyzed through Rousseau's social contract. Even if the intention in passing such legislation was not to always disenfranchise Black Americans, although there are some cases where it was intentional, the laws are still invalid. Felony disenfranchisement policies do not maintain equality, stop the general will from being expressed, and are not for the good of the public. Due to the unequal and damaging effects of felon disenfranchisement policies, the US should enfranchise all felons, including those who are incarcerated and those no longer in prison, and implement civic education programs to inform ex-felons and felons within prisons and jails, of the various ways they can exercise their right to vote. Countries all around the world, and even two states and the District of Columbia in the US, allow ex-felons and those actively serving time in prison to vote.

⁷ Eli L. Levine, "Does the Social Contract Justify Felony Disenfranchisement?" *Washington University Jurisprudence Review* 1, no.1 (2009) 205-206, accessed September 12, 2020, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1004&context=law_jurisprudence

⁸ Jean-Jacques Rousseau, *The Social Contract* (Jonathan Bennett, 2017), <https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>, 4, 15.

⁹ Richard M. Re and Christopher M. Re, "Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments," *Yale Law Journal* 121, no.7 (May 2012): 1590, accessed on October 5, 2020, <http://search.ebscohost.com.umw.idm.oclc.org/login.aspx?direct=true&db=a9h&AN=75324837&site=ehost-live>.

Using these countries and states as models, the US can implement voting practices that include ex-felons and people in jails and prisons, decreasing the racially disproportionate effects of the criminal justice system.^{10 11 12}

Most evaluations of felony disenfranchisement policies using social contract theory focus on the thoughts of John Locke and Thomas Hobbes. The existing literature either overlooks Rousseau or uses his theories to support felony disenfranchisement; however, this paper will discuss the US federal and state government's duty in upholding the general will and how in the US they play an active role in silencing the general will. If history shows that the US has worked to suppress the ability of Black Americans to participate in the general will, then the state is not protecting equality, promoting what is in the best interest, or reflecting the general will, and is therefore invalid.

SOCIAL CONTRACT THEORY AND JEAN JACQUES ROUSSEAU

John Locke and Thomas Hobbes are generally used to support felony disenfranchisement. They both envisioned a contract that citizens of a society would agree to. In exchange for government protections and benefits, individuals give up some of the liberties they enjoyed in the state of nature prior to the existence of government.¹³ The state is only legitimate if its authority is derived from the consent of the people.¹⁴ Although the social contract theorists tend

¹⁰ Brandon Rottinghaus, "Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform," *International Foundation for Election Systems*, (2003): 6, accessed October 6, 2020, https://ifes.org/sites/default/files/08_18_03_manatt_brandon_rottinghaus.pdf, 27-43.

¹¹ : Nicole D Porter, "Voting in Jails," The Sentencing Project, May 7, 2020, <https://www.sentencingproject.org/publications/voting-in-jails/>, 6-12.

¹² Martin Austerhuhle, "DC Encourages People Incarcerated For Felonies To Vote By Mail," DCist (WAMU 88.5 - American University Radio, October 14, 2020), <https://dcist.com/story/20/09/03/dc-voting-rights-felony-enfranchisement-prisons-elections/>.

¹³ Levine 203-204.

¹⁴ Levine 203-204.

to agree on the basic notion of the social contract, there are key differences. Thomas Hobbes envisioned the state of nature, or life without the social contract, as a state of war where no one could trust each other.¹⁵ Life was short and filled with fear and chaos that left men with a desire for protection.¹⁶ Due to lack of trust, and in the interest of protection and self-preservation, citizens agree to be ruled by a sovereign body that makes decisions on behalf of society with complete autonomy, therefore entering into a social contract.¹⁷ His absolutist view meant that the sovereign was always in the right and commanded complete obedience by parties of contract, whether the sovereign deserved it or not.¹⁸ In this case, the sovereign is not composed of the people who entered the contract or a group of representatives, but a ruler or group of rulers with total power which he sometimes referred to as the monarch.¹⁹ Hobbes believed if a citizen committed a crime, they had turned against the common rule and reason, justifying felony disenfranchisement.²⁰

Locke's state of nature foresaw individuals being free and equal but their rights were not protected.²¹ ²² For instance, although individuals acquired a right to the property that they labored on in the state of nature, it was be difficult to protect.²³ In order to protect individual rights, especially property rights, citizens consented to be part of a state with majority rule that contained an effective mechanism to protect and enforce their rights.²⁴ ²⁵ In giving up the right to

¹⁵ Levine 207.

¹⁶ Laskar 1.

¹⁷ Levine 207.

¹⁸ Laskar 2.

¹⁹ Laskar 1, 2.

²⁰ Rottinghaus 6.

²¹ Levine 203-204.

²² Laskar 3.

²³ Laskar 4.

²⁴ Levine 206-207.

²⁵ Laskar 3, 4.

act as judges for themselves, they gained laws and enforcers sanctioned through the executive.²⁶ If a crime is committed in Locke's state, the citizen had given up their right to participate in creating laws because they are no longer fully human. They had renounced reason and lost their moral standings and rights. Disenfranchisement is reasonable in this case.^{27 28}

Jean-Jacques Rousseau's idea of the general will is central to his views about whether a government is truly legitimate. His theorized state of nature is isolated and remote, driven by self-preservation.³³ In the state of nature, inequality does not exist.³⁴ When individuals do come in rare contact with another person, they are compassionate because they are only driven by two principles: their own well-being, and avoidance of seeing pain or death in other creatures.³⁵ Inequality began when people started to care about their image, which in time became based on how much land, money, and power someone had.³⁶ To gain a better image and position in society relative to others, people attempted to acquire more land and power; this led to dependence between those who had no land and needed to provide for themselves, and those with land who wanted to acquire more power.^{37 38} As time passed, bonds of servitude formed between those working the land to those who owned the land, increasing inequality.³⁹ Even then, that person or group is not inherently unequal, but the conditions around them lead to their

²⁶ Laskar 5.

²⁷ Roger Clegg, George T. Conway III, and Kenneth K. Lee, "Case Against Felon Voting," *University of St. Thomas Journal of Law and Public Policy* 2, no.1 (2008): 3, accessed October 8, 2020, <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1018&context=ustjlpp>.

²⁸ Richard Dagger, "Social Contracts, Fair Play, and the Justification of Punishment," *Ohio State Journal of Criminal Law* 8, no. 2 (2011): 349, accessed October 8, 2020, <https://advance-lexis-com.umw.idm.oclc.org>.

³³ Levine 205.

³⁴ Jean-Jacques Rousseau, *Discourse on Inequality (TRANSLATED BY G.D.H. COLE)* (DIGIREADS COM Publishing, 2018), 6.

³⁵ Rousseau *Discourse on Inequality* 8.

³⁶ Rousseau *Discourse on Inequality* 11-29.

³⁷ Rousseau *Discourse on Inequality* 11-29.

³⁸ Rousseau *Discourse on Inequality* 11-29.

³⁹ Rousseau *Discourse on Inequality* 23.

inequality.⁴⁰ This sort of relationship with absolute authority on one side and obedience on the other is not a valid social contract.⁴¹

Humans decide to form a social contract not out of fear or to protect property, like Hobbes and Locke suggest. Instead, when surviving in the state of nature alone becomes unattainable, individuals come together to unite forces to deal with the obstacles together, allowing for survival.⁴² All parties to the social contract become more powerful because they retain their rights over themselves and gain rights that all others have in the contract.⁴³ This is done through individuals giving themselves to the contract so that what affects one individual in the contract, affects all.⁴⁴ This reinforces the idea of equality by ensuring that it is in no one's interest to make things harder for others because policies affect all citizens equally.⁴⁵ If everyone is treated equally, everyone receives more benefits. Voting is not a zero-sum game where one wins and another loses. Everyone has grouped their rights together, so everyone receives what the general will has deemed best. The only legitimate sovereign is all people governing by the general will.⁴⁶

When citizens consent to enter into the social contract, they put aside their personal interests in favor of equality and protection of all, joining the general will.⁴⁷ ⁴⁸ The general will creates laws that protect the weak against oppression, restrain personal ambition, and defend against the common enemy.⁴⁹ ⁵⁰ The people are governed by themselves in the form of the

⁴⁰ Rousseau *Discourse on Inequality* 6.

⁴¹ Rousseau *Social Contract* 4.

⁴² Rousseau *Social Contract* 6.

⁴³ Rousseau *Social Contract* 7.

⁴⁴ Rousseau *Social Contract* 7.

⁴⁵ Rousseau *Social Contract* 7.

⁴⁶ Rousseau *Social Contract* 12.

⁴⁷ Levine 206.

⁴⁸ Dagger 341.

⁴⁹ Levine 206.

⁵⁰ Dagger 341.

general will.⁵¹ ⁵² The social contract ensures that the right and will to make decisions cannot be taken away; the power can only be delegated.⁵³ ⁵⁴ Morals should replace self-interest when exercising this right; society should be governed by reason and shared by all included in the contract.⁵⁵ The sovereign itself is not a person or selected body of representatives, but a space where the general will can be expressed.⁵⁶ The general will is not only a right, but it also compels citizens to obey the will and be free at the same time.⁵⁷ In order for this to occur, reciprocity of citizens is needed.⁵⁸ Citizens must want the benefits and laws that would be applied to themselves to be applied to everyone else as well.⁵⁹

If only some members approve a law and it does not lead to the common good or sync with the general will, it is not a true expression of the general will, and is therefore illegitimate.⁶⁰ Even if all members of the general will vote, but it is not in the public's best interest, then it is not truly the general will.⁶¹ Since Rousseau claims that in this scenario it is private interests being expressed, which represent particular wills, and are not legitimate.⁶² Additionally, the general will, even if it is made up of a complete body, cannot pass laws on matters they have no knowledge about.⁶³ The sovereign has significant power and what they require of citizens, which

⁵¹ Levine 206.

⁵² Dagger 341.

⁵³ Giovanni Caporioni, "Rousseau's General Will," *Poliarchia* 2, no. 5 (July 2015): 67, accessed September 24, 2020, <http://web.a.ebscohost.com.umw.idm.oclc.org/ehost/pdfviewer/pdfviewer?vid=1&sid=f06c84dc-0cd4-4ed6-a41e-ac063a99e21e%40sdc-v-sessmgr03>.

⁵⁴ Rousseau *Social Contract* 7.

⁵⁵ Terrance Ruth, Jonathan Matusitz, and Demi Simi, "Ethics of Disenfranchisement and Voting Rights in the US: Convicted Felons, the Homeless, and Immigrants," *American Journal of Criminal Justice* 42, no. 1 (March 2017): 58, accessed on October 8, 2020,

<http://web.a.ebscohost.com.umw.idm.oclc.org/ehost/pdfviewer/pdfviewer?vid=1&sid=6b7de80e-8776-436e-ba08-c98cd54ed2b8%40sessionmgr4007>.

⁵⁶ Ruth 58.

⁵⁷ Ruth 58.

⁵⁸ Ruth 58.

⁵⁹ Ruth 58.

⁶⁰ Ruth 56.

⁶¹ Rousseau *Social Contract* 14.

⁶² Rousseau *Social Contract* 14.

⁶³ Rousseau *Social Contract* 15.

is also required of the sovereign, should be fulfilled quickly.⁶⁴ However, what the sovereign imposes through law must be useful to the community.⁶⁵

Instead of being pushed out of society when a crime is committed, the general will compels criminals to obey the general will through the force of the body of the general will, in order to continue to be free.⁶⁶ This is because any exclusion from the general will means that it is not in fact a representation of the general will, and therefore the citizens are no longer free.⁶⁷ Liberty and rights, which also include duties, are inherent to the individual and cannot be traded, even when entering into the social contract.^{68 69} Therefore it is not something the general will can take away.^{70 71} The only exclusion Rousseau deems acceptable in society is the exclusion of intolerance.⁷² Rousseau believes that anything that compromises social unity, such as ostracizing others, is worthless to the social contract and society.⁷³ Each citizen has a reciprocal obligation to not only obey laws, but to love the laws and justice, also known as exhibiting civic virtue⁷⁴

Portions of Rousseau's *Social Contract* and *Discourse on Equality* might seem to lend support to felony disenfranchisement. A possible argument in support of felony disenfranchisement could be Rousseau's belief in civic virtue. Rousseau believes that civic virtue is necessary for the state to exist and for individuals to be considered citizens.⁷⁵ Rousseau claims that through patriotism, individuals will lose their private interests and want what is best

⁶⁴ Rousseau *Social Contract* 15

⁶⁵ Rousseau *Social Contract* 15,

⁶⁶ Caporioni 68-70.

⁶⁷ Caporioni 82.

⁶⁸ Rousseau *Discourse on Inequality* 33.

⁶⁹ Rousseau *Social Contract* 4.

⁷⁰ Rousseau *Discourse on Inequality* 33.

⁷¹ Rousseau *Social Contract* 4.

⁷² Rousseau *Social Contract* 73,

⁷³ Rousseau *Social Contract* 72-73.

⁷⁴ Rousseau *Social Contract* 72.

⁷⁵ Zachary Richard Bennett, "Making Virtue Reign: Citizenship and Civic Education in the Political Philosophy of Jean-Jacques Rousseau," University of Texas Libraries (August 16, 2019), <https://repositories.lib.utexas.edu/handle/2152/76224>, 136.

for the public.⁷⁶ The argument for felony disenfranchisement using civic virtue would claim that felons have exhibited that they do not have civic virtue. Instead of doing what was deemed best for the public, which is written in law, they followed their private interests and committed a crime; therefore, they lose their ability to vote because they do not possess the civic virtue necessary to uphold the state and participate in the general will. If felons were to be allowed back into the social contract, Rousseau's emphasis on the general will might suggest that felons should relearn and recommit to civic virtue and the general will before being able to vote again.

However, those affected by felony disenfranchisement that have been released from prison are realizing their obligations to the general will through taxes and abiding laws, which renews their civic virtue. One could also claim that by excluding ex-felons from voting, it reinforces or creates new animosity towards the sovereign. Rousseau recognized this idea when he discussed religion. He theorized that religions that were exclusionary became intolerant and violent towards others.⁷⁷ Rousseau was adamant about not excluding particular groups from society or the general will because it would harm social unity.⁷⁸

Rousseau's general will and his emphasis on equality, inclusion, and the public good is central to the argument that he would not support felony disenfranchisement. The body of the general will must be made up of every single citizen or every individual's delegate, or else it is not truly representative.⁷⁹ When the general will votes, it must align with justice, and be both fair and balanced.⁸⁰ Additionally, the general will should attempt to prevent harm, and make correction if abuses are found.⁸¹ At the same time, if the laws passed are representative of the

⁷⁶ Bennett 136.

⁷⁷ Rousseau *Social Contract* 70.

⁷⁸ Rousseau *Social Contract* 70.

⁷⁹ Caporioni 71.

⁸⁰ Rousseau *Social Contract* 15.

⁸¹ Rousseau *Discourse on Inequality* 41.

entire body but not for the good of all, it is still void. Rousseau’s fear that exclusion will destroy social harmony supports the notion that he would not support felony disenfranchisement. If a particular group feels excluded and not represented by the general will, the state or sovereign is not truly expressing the general will, and it is void.⁸² In addition, felony disenfranchisement is not excluding intolerance, which is the only acceptable exclusion Rousseau permits in the social contract.⁸³

When citizens are fulfilling their duties to society, such as ex-felons are doing after incarceration by working, paying taxes, and abiding by the law, they should be represented in the general will. Even citizens who are actively serving a prison or jail sentence are abiding by the general will and contributing to society through the work programs instituted.⁸⁴ These programs allow prisoners to work in food service, prison warehouses, plumbing services, and to act as inmate orderlies.⁸⁵ If a prisoner is physically able to work, they are required to if they are in a federal prison.⁸⁶ Their custodial work is oftentimes essential to keep the prison running, therefore serving as a common good for the public.⁸⁷ In California, prisoners are employed in the state’s Conservation Camp Program where they support the state and the federal government in responding to natural disasters.⁸⁸ For years, disenfranchised prisoners have been actively

⁸² Rousseau *Social Contract* 70 – 72.

⁸³ Rousseau *Social Contract* 73.

⁸⁴ “Work Programs,” *Federal Bureau of Prisons*, United States Government, accessed December 10, 2020, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.

⁸⁵ “Work Programs,” *Federal Bureau of Prisons*, United States Government, accessed December 10, 2020, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp.

⁸⁶ “Work Programs” 2020.

⁸⁷ “Work Programs” 2020.

⁸⁸ Isabelle Chapman, “Prison inmates are fighting California’s fires, but are often denied jobs after their release,” CNN US, October 31, 2019, accessed on December 10, 2020, <https://www.cnn.com/2019/10/31/us/prison-inmates-fight-california-fires-trnd/index.html>.

defending their fellow citizens by fighting raging fires, fulfilling their duties to the state, yet when they are released they are denied the opportunity to be a part of the general will and vote.⁸⁹

Another possible argument in support of felony disenfranchisement is that the work being done in prisons does not outweigh the harm a felon has caused by committing crimes. The current prison system in the US is not sufficient to bring about change in felon's attitude regarding society or enable them to see the harm they have caused. The current model leads to repeat offenses once a prisoner is released, causes psychological problems such as posttraumatic stress disorder, and leaves crime victims dissatisfied.^{90 91} At the same time, it costs law-abiding citizens hundreds of thousands of dollars to keep felons incarcerated.^{92 93} This is a failure of the state. It does not provide adequate rehabilitation for criminals. Ex-criminals should not be further punished for the state's criminal justice failures. If the state excludes individuals and the general will does not create laws based on equity, the social contract has been broken.⁹⁴ In the case of the United States, the general will not being truly representative of the citizens, and passing laws not based on equity, which will be discussed in the following sections, means that the state has broken the social contract. Based on these theories, Rousseau would not support felony disenfranchisement.

HISTORY OF FELONY DISENFRANCHISEMENT AND RACE

⁸⁹ Chapman, 2019.

⁹⁰ "Victim Satisfaction With the Criminal Justice System," National Institute of Justice (January 1, 2006), <https://nij.ojp.gov/topics/articles/victim-satisfaction-criminal-justice-system>.

⁹¹ "Lesson 6: Benefits of Restorative Justice," Center for Justice and Reconciliation (2021), <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-6-benefits-of-restorative-justice/#sthash.dFXOhRpb.dpbs>.

⁹² "Lesson 6: Benefits of Restorative Justice," 2021.

⁹³ "What Is the Average Cost to House Inmates in Prison," The Law Dictionary (Black's Law Dictionary October 19, 2020), <https://thelawdictionary.org/article/what-is-the-average-cost-to-house-inmates-in-prison/>.

⁹⁴ Caporioni 80.

Reconstruction Era to Civil Rights Movement

Race is ingrained in the history of law in the United States. The American colonies inherited their voting qualifications from England, which were highly exclusionary at the time.⁹⁵ Only white male landowners were allowed to vote.^{96 97} As the end of the 18th century approached, the US began to enact laws that disenfranchised prisoners who had committed infamous crimes, such as treason.^{98 99 100} As the end of the 18th century approached, the US began to enact laws that disenfranchised prisoners who had committed infamous crimes, such as treason.¹⁰¹ Treason consisted of acts such as declaring war against the US, like those who participated in the Civil War had done.¹⁰² After the Civil War, disenfranchisement became a major concern. Not only was the subject of former slave's enfranchisement on the table, but what was to happen to members of the Confederacy who had turned against the Union?¹⁰³

This debate led to the creation of the Reconstruction Amendments.¹⁰⁴ The bravery of black soldiers during the Civil War prompted lawmakers to create the Thirteenth amendment which abolished slavery but did not address voting rights.¹⁰⁵ Next, the Fourteenth amendment was passed, giving birthright citizenship and equal protection under the law to Black Americans.¹⁰⁶ Finally, the Fifteenth amendment barred racial discrimination, amongst other types of status discrimination, in voting.¹⁰⁷ Many proponents of former slave enfranchisement

⁹⁵ Rottinghaus 7.

⁹⁶ Clegg 2.

⁹⁷ Dagger 346.

⁹⁸ Rottinghaus 7.

⁹⁹ Clegg 2.

¹⁰⁰ Dagger 346.

¹⁰¹ Rottinghaus 8-9.

¹⁰² Rottinghaus 8-9.

¹⁰³ Richard M. Re and Christopher M. Re, "Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments," *Yale Law Journal* 121, no.7 (May 2012): 1590, accessed on October 5, 2020, <http://search.ebscohost.com.umw.idm.oclc.org/login.aspx?direct=true&db=a9h&AN=75324837&site=ehost-live>.

¹⁰⁴ Re 1590.

¹⁰⁵ Re 1595.

¹⁰⁶ Re 1595.

¹⁰⁷ Re1595.

were worried about the number of congressional seats of Southern states.¹⁰⁸ The Republican party was a proponent of the Thirteenth amendment because it would increase the congressional power of Southern states.¹⁰⁹ They hoped to create a new surge of Republican voters by passing the Thirteenth amendment.¹¹⁰

Section Two of the Fourteenth Amendment was intended to solve the issue of Confederate soldiers being readmitted into Union.¹¹¹ The Republican party argued that rebels should be likened to criminals and had essentially declared themselves public enemies.¹¹² When they breached the social contract, they implicitly gave up their political rights, including the right to vote.¹¹³ Republicans were worried about their number of congressional seats being limited if they disenfranchised Confederate soldiers; this was addressed in Section Two of the Fourteenth Amendment, which states that those convicted of “rebellion, or other crimes” could be disenfranchised without effecting the representation of the state in Congress.^{114 115}

After the creation of Section Two of the Fourteenth amendment, felony disenfranchisement laws increased and became normal across the nation.¹¹⁶ During the creation of the Fourteenth amendment, the federal government was worried about Section Two being a threat to racial equality in the Southern States.¹¹⁷ The federal government thought that Southerners would use Section Two to unjustly disenfranchise Black Americans after slavery was outlawed.¹¹⁸ Even though this hesitation was expressed by Northerners, the language of the

¹⁰⁸ Re 1604.

¹⁰⁹ Re 1604.

¹¹⁰ Re 1604.

¹¹¹ Re 1609.

¹¹² Re 1618.

¹¹³ Re 1618.

¹¹⁴ Re 1618.

¹¹⁵ Re 1609.

¹¹⁶ Re 1628.

¹¹⁷ Re 1629.

¹¹⁸ Re 1629.

section was not changed.¹¹⁹ Across the country, federal fears became a reality as states specifically excluded convicted former slaves from voting, clearly creating racist laws, such as the “moral turpitude” law examined in *Hunter v. Underwood* in the Case Law and Race section.¹²⁰ Many of the laws created outlawed acts that states believed to be mainly committed by Black Americans, such as adultery and wife beating.¹²¹ White Americans committed these crimes, but were not punished like Black Americans were.¹²²

These laws also introduced poll taxes, literacy tests, and grandfather clauses. Poll taxes required voters to pay a fee before they could vote, which most African Americans could not afford.¹²³ Literacy tests consisted of white county officials creating tricky exams that determined if people were literate enough to vote.¹²⁴ Grandfather clauses were related to poll taxes. They exempted poor white voters from paying poll taxes if they had an ancestor who had fought in the Civil War.¹²⁵ The emergence of Jim Crow laws continued throughout the late 1800s and 1900s accompanied by the threat of violence and lynching to the small number of Black Americans who were able to vote.¹²⁶ ¹²⁷ By 1908, all former Confederate states had disenfranchisement laws that disproportionately affected Black Americans.¹²⁸

¹¹⁹ Re 1629.

¹²⁰ Rottinghaus 9.

¹²¹ “Hunter v. Underwood” 1985.

¹²² :Hunter v. Underwood” 1985.

¹²³ “Poll Taxes,” National Museum of American History, May 3, 2018, <https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/poll-taxes>.

¹²⁴ Colin McConarty, “The Process of Disenfranchisement,” We’re History, November 2, 2015, <http://wearehistory.org/disenfranchisement/>.

¹²⁵ “Poll Taxes” 2018.

¹²⁶ Rottinghaus 8.

¹²⁷ Leonard Birdsong, “Drug Decriminalization and Felony Disenfranchisement: The New Civil Rights Cause,” *Barry Law Review* 73, no. 2 (2001): pp. 73-85, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513289, 73.

¹²⁸ McConarty 2015.

In the 1960s and 1970s the emergence of the Civil Rights Movement called for the relaxation of disenfranchisement laws, claiming that they were unconstitutional.¹²⁹ Even though there was public outcry against such policies, conservative administrations in both state and federal government continued from the 1970s onward to increase the number of felon disenfranchisement laws through the War on Drugs and mass incarceration.¹³⁰ The disenfranchisement population rose from 1,176,254 individuals in 1976 to the peak in the US at 6,106,327 individuals in 2016.¹³¹ There was an increase in both felony conviction and convictions that led to incarceration, and eventually disenfranchisement.¹³²

Although there were significant strides in civil rights for Black Americans, these advancements were always met with harsh pushback. The US government had disenfranchised Black Americans since its formation. Equality was not a consideration. The bonds of servitude Black people experienced during slavery are extremely similar to the examples Rousseau used in his discussion about the evolution of inequality.¹³⁵ The US government continued to use an invalid social contract when they expected slaves to perform the duties of said contract without allowing them to partake in the earned benefits of those duties.¹³⁶ Rousseau outright rejects the idea of slavery, stating that no man can give himself to another man. This applies to a group of people as well, and that such servitude is invalid.¹³⁷

¹²⁹ Rottinghaus 31.

¹³⁰ “The Drug War, Mass Incarceration and Race,” (The Drug Alliance, June 2015), https://www.unodc.org/documents/ungass2016/Contributions/Civil/DrugPolicyAlliance/DPA_Fact_Sheet_Drug_War_Mass_Incarceration_and_Race_June2015.pdf, 1.

¹³¹ Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,” *The Sentencing Project*, The Sentencing Project, October 30, 2020, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

¹³² Ruth 60.

¹³⁵ Rousseau *Discourse on Inequality* 11-29.

¹³⁶ Rousseau *Social Contract* 7.

¹³⁷ Rousseau *Social Contract* 3-4.

The US took a step in the right direction with the Reconstruction Era Amendments. Rousseau stated that a social contract does not necessarily need to be dissolved if it is invalid, as long as the sovereign is brought back to legitimacy - in this case, through minorities acquiring the right to vote.¹³⁸ However, the progressive passing of the Thirteenth, Fourteenth, and Fifteenth amendments were immediately met with repressive laws that again disenfranchised Black voters in the South. State legislatures continued to pass laws that were invalid because they were representing a particular will, not the general will.¹³⁹ Equality, fairness, and balance in treatment were considered in these discussions to ensure that these principles were not implemented.¹⁴⁰ The laws passed were most certainly not in the common interest of all citizens, but in the interest of white citizens alone.¹⁴¹ The US social contract continued to remain invalid due to its exclusion of Black Americans.

War on Drugs and Mass Incarceration

Felony disenfranchisement cannot be understood within the context of the US without also discussing the War on Drugs. Throughout the 1960s and 1970s politicians began to push for harsher penalties for drug crimes.¹⁴² Framing the drug crisis as a public safety and national security issue, Nixon declared a war on drugs in 1971, which was continued during following presidencies.¹⁴³ ¹⁴⁴ The Controlled Substance Act of 1970 sorted drugs into the categories or

¹³⁸ Rousseau *Discourse on Inequality* 35.

¹³⁹ Rousseau *Social Contract* 12, 14.

¹⁴⁰ Rousseau *Social Contract* 15.

¹⁴¹ Rousseau *Social Contract* 15.

¹⁴² Leonard Birdsong 73.

¹⁴³ Christopher Uggen and Jeff Manza, "Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States," *American Sociological Association* 67, no. 6 (December 2002): pp. 777-803, https://www.jstor.org/stable/3088970?sid=primo&origin=crossref&seq=1#metadata_info_tab_contents, 781.

¹⁴⁴ Alvaro Piaggio, "The Costs and Consequences of the War on Drugs" (Human Rights Foundation, August 7, 2019), https://hrf.org/wp-content/uploads/2019/05/WoD_Online-

schedules that the US uses today based on how addictive and dangerous they are thought to be.¹⁴⁵ The CSA placed marijuana and cocaine in category one, deeming them the most dangerous and addictive drugs.¹⁴⁶ In 1986, the Federal Anti-Drug Abuse Act was passed, followed by the Anti-Drug Abuse Act of 1988.¹⁴⁷ These laws increased the punishment for drug crimes such as possession or distribution, especially for crack cocaine-related crimes compared to pure cocaine-related crimes.¹⁴⁸ ¹⁴⁹ Mandatory minimums, which established the minimum prison sentence that a person could serve, along with three strike laws, which more severely punished those who had committed crimes three times with life in prison or disenfranchisement, were introduced.¹⁵⁰ States that began their own War on Drugs would begin to receive federal funding.¹⁵¹ The stated goal for these policies was to reduce the amount of drugs in cities by targeting dealers and deter drug use through harsh punishments.¹⁵²

Many politicians in the 1980s depicted drug crimes as an inner-city, African American problem; this allowed white citizens to think of the harsh punishments their elected representatives supported as non-applicable to themselves and their immediate circles.¹⁵³ ¹⁵⁴ This double standard was reinforced when white people started becoming addicted to opioids.¹⁵⁵ Instead of criminalizing white addicts, Congress funded research and treatment for the opioid epidemic, while continuing to arrest and incarcerate Black Americans for less deadly cocaine and

version-FINAL.pdf, 48.

¹⁴⁵ Piaggio 44, 46.

¹⁴⁶ Piaggio 44, 46.

¹⁴⁷ Jamie Fellner, "Race, Drugs, and Law Enforcement in the United States," *Stanford Law and Policy Review* 20, no. 2 (June 2009), <https://www.hrw.org/news/2009/06/19/race-drugs-and-law-enforcement-united-states>.

¹⁴⁸ Fellner 2009.

¹⁴⁹ Piaggio 46.

¹⁵⁰ Piaggio 46, 49-50.

¹⁵¹ Fellner 2009.

¹⁵² Piaggio 48.

¹⁵³ Fellner 2009.

¹⁵⁴ Fellner 2009.

¹⁵⁵ "Crack vs. Heroin Project: Racial Double Standard in Drug Laws Persists Today," Equal Justice Initiative (December 13, 2019) <https://eji.org/news/racial-double-standard-in-drug-laws-persists-today/>.

marijuana offenses.¹⁵⁶ Politicians continued to receive support for these policies because the people the policies most directly affected were being disenfranchised, whether it was because they were incarcerated or disenfranchised once they were released.¹⁵⁷ However, many Black and white politicians supported these strict laws.¹⁵⁸ Black politicians that supported harsh penalties included members of the Congressional Black Caucus, Black pastors such as Reverend George McMurray who suffered from drug addiction in New York City, and Black political scholars such as Michael Fortner.¹⁵⁹ Some Black citizens that lived in inner cities plagued with drug use supported harsh penalties because they wanted a solution that would make their neighborhoods safer and healthier.¹⁶⁰ Many Black communities and leaders shifted against these policies as these laws were enforced because of racial disparities and harm caused by the policies.¹⁶¹ The continued implementation of these policies led to an astronomical increase in felony convictions, incarceration, and felony disenfranchisement.¹⁶² The state and federal prison population increased by over 600% in the US.¹⁶³

The War on Drugs has had a disproportionate impact on minority communities, especially African Americans.¹⁶⁴ Police have focused their efforts on outdoor drug markets in inner cities, which typically sell crack cocaine.¹⁶⁵ This has led to high arrest numbers of Black residents because they are usually the ones selling and buying crack cocaine in open air markets

¹⁵⁶ “Crack vs. Heroine Project,” 2019.

¹⁵⁷ Fellner 2009.

¹⁵⁸ Arun Venugopal, “The Shift in Black Views of the War on Drugs,” NPR (NPR August 16, 2013), <https://www.npr.org/sections/codeswitch/2013/08/16/212620886/the-shift-in-black-views-of-the-war-on-drugs>.

¹⁵⁹ Venugopal 2013.

¹⁶⁰ Venugopal 2013.

¹⁶¹ Venugopal 2013.

¹⁶² Uggen and Manza 781.

¹⁶³ Uggen and Manza 781.

¹⁶⁴ “Drug War, Mass Incarceration and Race” 1.

¹⁶⁵ Fellner 2009.

where it is cheaper, while white residents use powder cocaine.¹⁶⁶ Communities with higher rates of poverty, which often overlap with minority communities, are more heavily policed, leading to a higher chance of coming in contact with the police and getting in trouble.¹⁶⁷ Most arrests are for low-level, non-violent drug crimes such as possession.¹⁶⁸ ¹⁶⁹ Due to new legislation passed during this era, which included a zero-tolerance policy on drugs in inner cities, arrests are frequent.¹⁷⁰

Crack cocaine has not been proven to be more harmful than powder, also known as pure, cocaine, which is essentially the same substance. Crack cocaine is not used at a higher rate than powder cocaine, yet crack sentences are much more severe.¹⁷¹ It is cheap and smokable, while powder cocaine is expensive and is usually snorted.¹⁷² Crack is also the drug that Black Americans use and sell at a higher rate, while white Americans use and sell meth, ecstasy, powdered cocaine, and heroin at a higher rate.¹⁷³ In the last decade, steps have been taken to reduce these disparities through the Fair Sentencing Act of 2010, which decreased the punishment for crack.¹⁷⁴ For decades, the punishment for crack cocaine was 100 times harsher than the punishment for powder cocaine.¹⁷⁵ Now the punishment for crack cocaine has decreased to 18 times harsher than powder cocaine.¹⁷⁶

¹⁶⁶ Piaggio 46.

¹⁶⁷ Jerry J Cox et al., “Collateral Damage: America's Failure to Forgive or Forget in the War on Crime” (National Association of Criminal Defense Lawyers, May 24, 2014), <https://www.nacdl.org/getattachment/4a1f16cd-ec82-44f1-a093-798ee1cd7ba3/collateral-damage-america-s-failure-to-forgive-or-forget-in-the-war-on-crime-a-roadmap-to-restore-rights-and-status-after-arrest-or-conviction.pdf>, 21.

¹⁶⁸ Cox et al. 22.

¹⁶⁹ “Drug War, Mass Incarceration and Race” 1.

¹⁷⁰ Cox et al. 21-22.

¹⁷¹ Fellner 2009.

¹⁷² Fellner 2009.

¹⁷³ Fellner 2009.

¹⁷⁴ “Fair Sentencing Act” 2012.

¹⁷⁵ “Fair Sentencing Act” 2012.

¹⁷⁶ “Fair Sentencing Act” 2012.

The War on Drugs led to mass incarceration.¹⁷⁷ Although the US makes up only 5% of the world's population, it contains 25% of the world's prisoners, more than any other country in the world.^{178 179} Twenty percent of the US prison population is made up of those serving time for non-violent drug crimes, and is disproportionately made up of Black Americans.¹⁸⁰ Judges' discretion in sentencing has been limited due to mandatory sentencing minimums, so people are often sent to prison for longer periods of time for non-violent drug crimes such as possession, manufacturing, and distribution of drugs.¹⁸¹ African Americans are ten times more likely to be sent to prison for drug crimes than white Americans, with the difference being even greater between white and black men.¹⁸² The majority of drug crimes are felonies under federal law, so if a felon is released in a state with post-conviction disenfranchisement, they lose their right to vote.¹⁸³ This means that the War on Drugs is linked to felony disenfranchisement.

The effects of the War on Drugs and mass incarceration are wide ranging. What many politicians portrayed as an attempt to make communities more stable and safer has ended up destabilizing them.¹⁸⁴ Besides losing the right to vote, many people convicted of drug crimes have a hard time finding jobs, getting professional licenses, housing, parental rights, and other public benefits. They must also deal with the social stigma that surrounds a conviction once they are released.¹⁸⁵ These consequences are more harshly felt by African American men than any other demographic.^{186 187} The US spends \$30 billion a year incarcerating felons, which has added

¹⁷⁷ "Drug War, Mass Incarceration and Race" 1.

¹⁷⁸ Piaggio 49.

¹⁷⁹ "Drug War, Mass Incarceration and Race" 1.

¹⁸⁰ Piaggio 49.

¹⁸¹ Birdsong 74.

¹⁸² Fellner 2009.

¹⁸³ Piaggio 51.

¹⁸⁴ Cox et al. 12.

¹⁸⁵ Cox et al. 9

¹⁸⁶ Cox et al. 21.

¹⁸⁷ Uggen and Manza 78.

up to over one trillion dollars spent since the War on Drugs started.^{188 189} Additionally, the War on Drugs has failed to reduce drug usage, with the number of drug deaths increasing each year.¹⁹⁰ The human rights violations in prisons and jails across the country have led to international condemnation, and threatens the image of the US as a leader in civil and human rights.¹⁹¹

Black Americans are more likely to be more harshly punished for drug crimes at every level of the criminal justice system.¹⁹² They are more likely to be stopped, searched, arrested, prosecuted, and end up with much harsher punishments.¹⁹³ This disproportionate impact can be seen when the total US population is taken into account because African Americans only make up 13% of the US population, but make up 30% of drug arrests, and 40% of the incarcerated drug offenders' population.¹⁹⁴ This is not due to Black Americans using more drugs than white Americans. They have been proven to use drugs in equal amounts.^{195 196} It is due to police practices and the inherent racial biases built into the US criminal justice system.¹⁹⁷ The racially disparate effects are undeniable and are a major cause of felony disenfranchisement in the US.

Although the War on Drugs may have been intended to be race-neutral, its effects have not been. The vast number of prisoners and ex-felons who have been disenfranchised means that the general will is not being expressed, especially because the majority of those effected are

¹⁸⁸ Birdsong 82.

¹⁸⁹ Piaggio 44.

¹⁹⁰ Piaggio 9.

¹⁹¹ Piaggio i-ii.

¹⁹² "Drug War, Mass Incarceration and Race" 1.

¹⁹³ "Drug War, Mass Incarceration and Race" 1.

¹⁹⁴ "Drug War, Mass Incarceration and Race" 1.

¹⁹⁵ Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race," Rates of Drug Use and Sales, by Race; Rates of Drug Related Criminal Justice Measures, by Race | The Hamilton Project (Brookings Institute, October 21, 2016),

https://www.hamiltonproject.org/charts/rates_of_drug_use_and_sales_by_race_rates_of_drug_related_criminal_justice.

¹⁹⁶ Birdsong 73.

¹⁹⁷ Fellner 2009.

Black Americans. Rousseau's emphasis of the general will needing to be for the good of the public is important in this case. Not only do these laws exacerbate the inequality African Americans face, but they have also caused public harm. Those who are incarcerated and ex-felons on the outside have a social stigma that makes them feel as though they are not a part of normal society, creating a feeling of inferiority or subclass. Rousseau worries about this in terms of religious persecution, but his claims can be applied in this case as well.¹⁹⁸ Rousseau claims that anything that destroys social unity because it is exclusive should not be allowed, since it leads to intolerance.¹⁹⁹ Exclusion of religion, and in this case exclusion of Black Americans, is not accepted and invalidates the social contract.²⁰⁰ Black Americans continue to be excluded from the general will, meaning the state has continued to break its contract with minorities.

Throughout US history, Black Americans have continuously been excluded from civic participation in the form of voting. The US has gone from enslaving Black people, to suppressing their vote through Jim Crow laws, to the war on drugs that created mass incarceration, and most recently, felony disenfranchisement. These practices further exacerbate the inequality Black Americans have faced since the US was created. Excluding millions of Black Americans from voting continues to limit their ability to change unjust laws when they have historically had less options to do so. The federal and state governments responsible for felony disenfranchisement legislations broke the social contract long before Black Americans committed drug crimes, when they implemented racist and exclusionary policies. This not only harms an individual, but entire subsection of the US population. It can even be argued that it harms all citizens of the United States regardless of their race. White citizens, especially those of

¹⁹⁸ Rousseau *Social Contract* 70-73.

¹⁹⁹ Rousseau *Social Contract* 70,

²⁰⁰ Rousseau *Social Contract* 73.

a lower socioeconomic status, would also benefit from the inclusion of African Americans in government through the progressive policies that could be implemented. This violates the conditions of the social contract in Rousseau's theory.

CASE LAW AND RACE

Hunter v. Underwood

Felony disenfranchisement has been and continues to be an area of the law under debate. There have been court cases that have reached the United States Supreme Court that argue that disenfranchisement is racist and unconstitutional, especially under the Fourteenth amendment. When debating the constitutionality of felon disenfranchisement, many legal scholars cite *Hunter v. Underwood* (1985).²⁰¹ In 1901, Article Three, section 182, was added to the Alabama State Constitution, which allowed the state to disenfranchise anyone convicted of certain felonies or misdemeanors, including crimes involving moral turpitude.²⁰² Crimes of moral turpitude are acts that violate perceived community standards.²⁰³ The appellees claimed that the crimes included in Section 182 were intentionally adopted to disenfranchise black people on account of race, and the intended effect had come to fruition.²⁰⁴ Crimes such as vagrancy, adultery, and wife beating were included as crimes of moral turpitude.²⁰⁵ They also claimed that such laws violated the Fourteenth amendment's Equal Protection Clause.²⁰⁶ The Supreme Court agreed, ruling that even if the crimes were also committed by poor white people, it does not negate the fact that black

²⁰¹ William Rehnquist, "Hunter v. Underwood, 471 U.S. 222 (1985)," *Justia Law* (1985), accessed September 19, 2020, supreme.justia.com/cases/federal/us/471/222/.

²⁰² "Hunter v. Underwood," 1985.

²⁰³ "Moral Turpitude Legal Definition," Merriam-Webster Legal Dictionary (Merriam-Webster, n.d.), <https://www.merriam-webster.com/legal/moral%20turpitude>.

²⁰⁴ "Hunter v. Underwood," 1985.

²⁰⁵ "Hunter v. Underwood," 1985.

²⁰⁶ "Hunter v. Underwood," 1985.

people were discriminated against.²⁰⁷ Alabama claimed that the eighty years that section had been active validated the section, but the Court ruled that events since implementation cannot validate the law.²⁰⁸ The Court also ruled that the Tenth amendment, which grants any power that was not explicitly given to the federal government to state governments, does not exempt such laws from passing the Fourteenth amendment's Equal Protection Clause test. They also ruled that the Fourteenth Amendment's second section did not exempt Section 182 of the Alabama Constitution from being scrutinized under the Equal Protection Clause.²⁰⁹ The appellees were able to prove through the use of legislator statements at the time of the law's creation along with historian opinions that Section 182 was enacted for discriminatory purposes.²¹⁰

All members of the Supreme Court except one Justice who did not participate in the decision and opinion process were parties to the decision, so there were no concurring or dissenting opinions.²¹¹ The ruling in this case that racially discriminatory intent is required has limited the ability to reverse racist laws.²¹² Some scholars, such as Andrew Shapiro, criticize the decision, claiming that it allows states to implement racist policies without being caught because intent and racist affects are required for the law to be unconstitutional.²¹³ ²¹⁴ A possible remedy would be for the Supreme Court to overturn this ruling and eliminate the racist intent aspect of the ruling so laws with racist affects can be overturned.²¹⁵ At the moment this cannot be done.

²⁰⁷ "Hunter v. Underwood," 1985.

²⁰⁸ "Hunter v. Underwood," 1985.

²⁰⁹ "Hunter v. Underwood," 1985.

²¹⁰ "Hunter v. Underwood," 1985.

²¹¹ "Hunter v. Underwood," 1985.

²¹² Nerelynh, "Hunter v. Underwood: Felon Disenfranchisement," Foundations of law and society (December 10, 2017), <https://foundationsoflawandsociety.wordpress.com/2017/12/10/hunter-v-underwood-felon-disenfranchisement/>.

²¹³ Nerelynh 2017.

²¹⁴ Andrew L. Shapiro, "Challenging Criminal Disenfranchisement Under the Voting Rights Acts: A New Strategy," *The Yale Law Journal* 103, no. 2 (November 1993): 543, <https://doi.org/10.2307/797104>.

²¹⁵ Nerelynh 2017.

This legal change would have a substantial impact on the validity of felony disenfranchisement laws since the majority of them disproportionately effect black Americans. It would force Congress to look at the root causes of crimes and address those, not retroactively respond. Rousseau's emphasis on creating laws that ensure equality and are for the good of the public would support this recommendation. Reducing race-based penalties along with remedying systemic problems that lead to crime is better for all citizens.

This case brings the US a step closer to fulfilling the role and duty of the state that Rousseau set forth in his social contract theory. The fact that racially discriminatory intent or purposes are needed in order to violate the Equal Protection Clause proves that the state broke the social contract by not striving for equity for all its citizens. Now all citizens in regard to that law should be treated the same, as Rousseau required in the social contract.²¹⁶ This law in particular was created during the Reconstruction Era in the South, when many disenfranchisement laws were created.²¹⁷ This case serves as a path for others to challenge racially discriminatory disenfranchisement laws, and one day allow the general will to truly be expressed, leading to a free and fair society. Although this Supreme Court case did not undo all the harm the US government has continued to impose on African Americans, it is a step towards legitimacy for the state and the social contract.²¹⁸

Richardson v. Ramirez

On the other side of the spectrum, there are Supreme Court cases that uphold states' rights to felon disenfranchisement. *Richardson v. Ramirez* is perhaps the most cited case. Three

²¹⁶ Rousseau *Social Contract* 7.

²¹⁷ "Hunter v. Underwood," 1985.

²¹⁸ Rousseau *Discourse on Inequality* 35.

felons that had served their prison sentences and completed parole went to register to vote in California and were denied registration by county officials.²¹⁹ The ex-felons argued that statutes that disenfranchised felons who completed their sentences violated the Equal Protection Clause of the Fourteenth amendment.²²⁰ The Supreme Court did not rule in their favor, stating that an understanding of the framers, history, and judicial interpretation makes it clear that the laws are not in violation of the Equal Protection Clause.²²¹ The Court ruled that Section One of the Fourteenth amendment did not bar something that Section Two of the same amendment explicitly allows.²²² This ruling has provided many cases brought against felony disenfranchisement after this case the basis to continue the practice.²²³ Felon disenfranchisement was therefore upheld.

The ex-felons made the argument that because they have been convicted, served their time, successfully completed parole, and then were not allowed to register to vote, that the laws could not withstand scrutiny under the Equal Protection Clause.²²⁴ The Equal Protection Clause states that disenfranchisement must serve a compelling state interest.²²⁵ However, California did not have to prove this compelling state interest because the Court ruled that it was allowed under the Fourteenth Amendment.²²⁶ Even though at face value the laws passed by California that disenfranchised felons look to be unconstitutional due to past Supreme Court rulings, understanding the broader context of the laws makes them different, and constitutional.²²⁷ This

²¹⁹ William Rehnquist “Richardson v. Ramirez 418 US 24 (1974).” *Justia Law* (1974). Accessed October 9, 2020. , supreme.justia.com/cases/federal/us/418/24/.

²²⁰ “Richardson v. Ramirez,” 1974.

²²¹ “Richardson v. Ramirez,” 1974.

²²² “Richardson v. Ramirez,” 1974.

²²³ “Richardson v. Ramirez,” 1974.

²²⁴ “Richardson v. Ramirez,” 1974.

²²⁵ “Richardson v. Ramirez,” 1974.

²²⁶ “Richardson v. Ramirez,” 1974.

²²⁷ “Richardson v. Ramirez,” 1974.

meant the Court did not have to address the ex-felons' second argument - that the laws lacked uniformity, which denied ex-felons due process and equal protection based on geography.²²⁸

Many scholars use *Richardson v. Ramirez* to legitimize their pro-felony disenfranchisement arguments. Some argue, like Richard Re and Christopher Re, that disenfranchisement policies were necessary for the implementation of widespread enfranchisement during the Reconstruction Era to ensure that punitive punishment could be applied to rebels and criminals.²²⁹ Others such as Professor Zdravko Planinc, think it serves as an additional punishment that is needed in the civil process.²³⁰ A favored argument is that the criminal has broken the social contract, and that taking the right to vote is central to punishing them. Essentially, it is argued that criminals make themselves unworthy of participating in society and, through committing a crime, voluntarily break the social contract.²³¹ Others use such a criminal record to determine the trustworthiness and morality of the person, thus they should not be able to participate in law-making for law-abiding citizens.²³² A possible counterargument to those listed regards the intended function of incarcerating a criminal. Besides punishment, incarceration serves to incapacitate, deter, and rehabilitate.²³³ If prison is functioning correctly, a criminal should come out a changed person. If this is not happening, the prison system should be reformed.

Rousseau's general will and social contract theory does not support the ruling in *Richardson v. Ramirez*. The lack of uniformity was not addressed in the case.²³⁴ Uniform

²²⁸ "Richardson v. Ramirez," 1974.

²²⁹ Re 1592.

²³⁰ Rottinghaus 3.

²³¹ Rottinghaus 5.

²³² Clegg 2.

²³³ Jeremy Travis, Steve Redburn, and Bruce Western, "The Prison on Society: Values and Principles," Chapter In *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, Washington DC (National Academies Press, 2014) 320.

²³⁴ "Richardson v. Ramirez," 1974.

application of laws is important to Rousseau. He states that what gives individuals more power with the social contract than in the state of nature is that they maintain power over themselves and have that same power over everyone else, just as they have power over themselves.²³⁵ This essentially means that what happens to one person is happening to everyone.²³⁶ If a law is not applied uniformly, then it is not being applied to citizens equally, and is invalid. In this case, this opens the door for public officials to interpret and apply the laws as they see fit, which can lead to discrimination.²³⁷ Although various California counties have rights restoration statutes, ex-felons who meet the requirement can still be denied those rights at the discretion of county officials. If this happened, the ex-felon would have to seek judicial review if they wanted to dispute the denial.²³⁸ Although not all states have statutes like California's, eight states have state-wide voting restoration processes that depend on date and time of the felony conviction, if fines are paid, require petitioning the government, or a Governor's pardon.²³⁹ The power given to one individual over the other is not representative of the general will. The ex-felons had finished their sentences and were fulfilling their duty to society as every other citizen who had the right to vote was doing. The law itself can be racially neutral, but the application by individuals may be discriminatory, which breaks Rousseau's social contract.

THE 2000 PRESIDENTIAL ELECTION

The 2000 presidential election between Democratic candidate Al Gore and Republican candidate George W. Bush brought felony disenfranchisement to the attention of the American

²³⁵ Rousseau *Social Contract* 7.

²³⁶ Rousseau *Social Contract* 6.

²³⁷ "Richardson v. Ramirez," 1974.

²³⁸ "Richardson v. Ramirez," 1974,

²³⁹ "Voting Rights for People with a Felony Conviction," Nonprofit Vote (December 2020)

<https://www.nonprofitvote.org/voting-in-your-state/special-circumstances/voting-as-an-ex-offender/>.

public. Although Gore had won the popular vote, the race was still close due to the Electoral College.²⁴⁰ Florida was the deciding state in the election. The popular vote was separated by less than 600 votes in Florida, which constituted a recount.²⁴¹ The recount put Bush ahead by just over 300 votes, but there were challenges in court because of the ballot designs, the legality of hand counting, and ballots cast that made it difficult to identify who was voted for.²⁴² Another recount was called for by the Florida Supreme Court, further reducing Bush's lead; however, the Supreme Court of the United States stepped in and reversed the Florida Supreme Court's decision for a recount, meaning that Bush had won the state's popular vote.²⁴³ He had earned enough electoral votes to become president.²⁴⁴

At the time, Florida had the largest disenfranchised population in the United States.²⁴⁵ Many speculated over what the results of the election would have been if Florida's enormous disenfranchised population would have been allowed to vote.²⁴⁶ Christopher Uggen and Jeff Manza, two sociologists, conducted research to answer this question. They matched ex-felons with voting behaviors of those with the same gender, age, race, income, labor force status, marital status, and education.²⁴⁷ The data suggested that there would have been strong Democrat preferences in the ex-felon population had they been able to vote.²⁴⁸ Uggen and Manza determined that the 2000 election would have almost certainly been won by Al Gore if ex-felons were enfranchised.²⁴⁹ In fact, they estimated that Gore would have won the popular vote in

²⁴⁰ Michael Levy, "United States presidential election of 2000," Encyclopedia Britannica (October 31, 2020), <https://www.britannica.com/event/United-States-presidential-election-of-2000>.

²⁴¹ Levy 2020.

²⁴² Levy 2020.

²⁴³ Levy 2020.

²⁴⁴ Levy 2020.

²⁴⁵ Uggen and Manza 792.

²⁴⁶ Uggen and Manza 786.

²⁴⁷ Uggen and Manza 786.

²⁴⁸ Uggen and Manza 786.

²⁴⁹ Uggen and Manza 792.

Florida by over 80,000 votes, which would not have constituted a recount.²⁵⁰ Al Gore would have won the electoral votes for Florida and become President.²⁵¹ This kind of research brings to light the repressed power that the disenfranchised population holds. They do not constitute an insignificant number of votes or input. If Gore had won, this could have had a profound impact on Black Americans.

CURRENT US DISENFRANCHISEMENT POLICIES

The felony disenfranchisement policies of the United States vary from state to state. To date, Maine and Vermont are the only states that allow incarcerated felons to vote, while DC temporarily allowed incarcerated felons to vote in the 2020 presidential election, which they intend to make a permanent policy.²⁵² ²⁵³ Thirty states continue to prohibit people on parole from voting.²⁵⁴ Twenty-seven states exclude people on probation from voting, which means they never served time in prison for that particular offense they are disenfranchised for.²⁵⁵ Eight states allow ex-offenders who have committed certain felony offenses to apply for their restoration of rights after a certain waiting period, but the restoration process is very long and difficult in most states, so few go through the process.²⁵⁶ The strictest ten states restrict all felons in prison, some

²⁵⁰ Uggen and Manza 792.

²⁵¹ Uggen and Manza 792.

²⁵² “Felony Disenfranchisement,” *The Sentencing Project*, The Sentencing Project, April 28, 2014,

<https://www.sentencingproject.org/publications/felony-disenfranchisement-laws-in-the-united-states/>.

²⁵³ Kira Lerner, “What It’s Like to Vote From Prison,” *Slate*, Slate Group, October 18, 2020, <https://slate.com/news-and-politics/2020/10/dc-prisoners-voting-first-time-felony-disenfranchisement.html>.

²⁵⁴ Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,” *The Sentencing Project*, The Sentencing Project, October 30, 2020, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

²⁵⁵ Chris Uggen, Ryan Larson, Sarah Shannon, and Arleth Pulido-Nava, “Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction,” *The Sentencing Project*, The Sentencing Project, October 30, 2020, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

²⁵⁶ “Felony Disenfranchisement,” 2014.

or all ex-offenders on parole and probation, and those done with parole from voting.²⁵⁷ The states that are rolling back their disenfranchisement policies are either ending the waiting period for restoration after an ex-felons' parole is completed, or they are reversing permanent disenfranchisement and implementing a waiting period.²⁵⁸ The disproportionate impact these policies have on African Americans helps support the idea that such laws are not in the spirit of equity or representative of the general will, since they directly inhibit the expression of the general will.

The disenfranchised population of those ten states, Alabama, Arizona, Delaware, Florida, Kentucky, Mississippi, Nebraska, Tennessee, Virginia, and Wyoming, make up 43%, or 2.23 million Americans, of all the disenfranchised people in the US who have completed their sentence, including parole.²⁵⁹ Many sources state that Iowa is among those states, but in 2020, the governor issued an executive order that restored voting rights to those who had completed their prison sentence.²⁶⁰ ²⁶¹ Although it varies by state, felony disenfranchisement generally affects African Americans more than any other group.²⁶² Out of the entire US African American population, 6.3% are disenfranchised, which is 3.7 times higher than non-African Americans.²⁶³ Although the overall number of disenfranchised Americans has decreased in the US, the number of African Americans who are disenfranchised has stayed the same from 2010 to 2020, remaining 1 in 13.²⁶⁴ ²⁶⁵

²⁵⁷ "Felony Disenfranchisement," 2014.

²⁵⁸ Uggen 1.

²⁵⁹ Uggen 4.

²⁶⁰ Uggen 5.

²⁶¹ "Felony Disenfranchisement," 2014.

²⁶² Uggen 4, 11.

²⁶³ Uggen.4.

²⁶⁴ "Felony Disenfranchisement," 2014.

²⁶⁵ Uggen 4.

Alabama, Arizona, Mississippi, Delaware and Tennessee disenfranchise all or part of their ex-felon population permanently, with Arizona having the strictest policy of permanently disenfranchising all ex-felons who have been convicted of two or more felonies.^{266 267}

Mississippi and Tennessee's policies have racially disproportionate effects, with more than 1 in 7 African Americans being disenfranchised, which is two times the national average.²⁶⁸ In the cases where specific felony convictions permanently disenfranchise a person, it tends to be a crime such as murder, bribery, or sexual offenses, although Alabama's list contains fifty crimes.²⁶⁹

The other states with post-sentence disenfranchisement, Kentucky, Florida, Nebraska, Virginia, and Wyoming, vary in terms of the waiting period after ex-felons complete their sentence and the process for restoring rights.²⁷⁰ Kentucky and Virginia's governors will issue an executive order or review applications for those who have completed their sentence and waiting period to re-enfranchise ex-felons.²⁷¹ Even though Kentucky and Virginia do not permanently disenfranchise ex-felons anymore, there is still a racially disproportionate impact on African Americans.²⁷² Kentucky's process has the most racially disparate impact out of all fifty states, with more than 22% of the African American population, or 1 in 5 African Americans in the state of Kentucky, disenfranchised, over two times the national average.^{273 274} Virginia is a close second to Kentucky, with 20% of the African American population, or 1 in 5 African Americans

²⁶⁶ "Felony Disenfranchisement," 2014.

²⁶⁷ Uggen 5.

²⁶⁸ Uggen 11.

²⁶⁹ Uggen 5.

²⁷⁰ Uggen 5.

²⁷¹ Uggen 5.

²⁷² Uggen 4,11.

²⁷³ Uggen 11.

²⁷⁴ "Felony Disenfranchisement," 2014.

disenfranchised.²⁷⁵ ²⁷⁶ This could be due to the governor only reviewing and restoring rights once a month in Virginia.²⁷⁷ Nebraska and Wyoming enforce waiting periods and the restoration process.²⁷⁸ ²⁷⁹ Wyoming's policy continues to have a disproportionate effect on African Americans, with more than 1 in 7 African Americans disenfranchised, which is two times more than the national average.²⁸⁰

Florida's policy is unlike any other. In 2018, a ballot referendum passed that created Amendment Four in the state's constitution, which was supposed to automatically restore voting rights for those convicted of a felony after they complete their prison sentence.²⁸¹ However, this automatic restoration was dependent on the person convicted having paid all of their financial obligations, such as fines, fees, and restitution, upon completion of their sentence.²⁸² This has left 900,000 people still disenfranchised in 2020.²⁸³ More than 1 in 7 of African Americans are a part of that disenfranchised population, which is more than two times the national average.²⁸⁴

The racially disproportionate impact of felony disenfranchisement, whether it is intended or not, cannot be denied. The state and federal government is allowing inequality to persist when they should be working to legitimize the social contract by creating laws that prevent and cure abuses and inequality.²⁸⁵ The sovereign, or in this case elected officials in the legislature, have repressed what is an inalienable right according to Rousseau, the ability to exercise the general

²⁷⁵ "Felony Disenfranchisement," 2014.

²⁷⁶ Uggen 11.

²⁷⁷ "Felony Disenfranchisement Laws (Map)," *ACLU*, American Civil Liberties Union, accessed October 29, 2020, <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map>.

²⁷⁸ Uggen 5.

²⁷⁹ "Felony Disenfranchisement," 2014.

²⁸⁰ Uggen 4, 11.

²⁸¹ Uggen 5.

²⁸² Uggen 5.

²⁸³ Uggen 5.

²⁸⁴ Uggen 5.

²⁸⁵ Rousseau *Discourse on Inequality* 35. 41.

will, or sovereignty.²⁸⁶ The general will is supposed to promote the common interest and public good, which cannot happen when a law passed by the sovereign is not fair or balanced in its application.²⁸⁷ Additionally, allowing felons to vote in person benefits individuals and their community.²⁸⁸ Civic participation in prison reduces recidivism after being released, which increases public safety.²⁸⁹ Therefore, the state continues to fail to uphold its end of the social contract by disenfranchising Black Americans, and Rousseau would surely object.

INTERNATIONAL DISENFRANCHISEMENT POLICIES

When looking at similarly situated countries like Great Britain or Canada, the United States is an outlier in terms of the felony disenfranchisement policy.²⁹⁰ The United States is among the most restrictive in the entire world.²⁹¹ The US and Russia have the highest felony disenfranchisement populations in the world which correlates directly to their large prison populations.²⁹² A majority of the world's countries have far less restrictions. A total of thirty countries allow prisoner to vote in elections without any restrictions: France, Ireland, Norway, Canada, Iran, Pakistan, etc.²⁹³ Other countries allow some, but not all incarcerated to vote, like China, who only restricts those on death row, or Germany, who does not allow those convicted of treason or electoral fraud to vote.²⁹⁴ Another group of countries does not allow those in prison

²⁸⁶ Rousseau *The Social Contract* 12.

²⁸⁷ Rousseau *The Social Contract* 15.

²⁸⁸ Porter 2020.

²⁸⁹ Porter 2020.

²⁹⁰ Uggen and Manza 778.

²⁹¹ Rottinghaus 24.

²⁹² Rottinghaus 24.

²⁹³ Rottinghaus 21.

²⁹⁴ Rottinghaus 23.

to vote, but has no voting restriction once they are not incarcerated.²⁹⁵ These include many African and Latin American countries.²⁹⁶

Many of the countries without any restrictions are other countries that are influenced by social contract theorists, whether it be Locke, Rousseau, Hobbes, or a combination. This supports the idea that the social contract does not require someone who has committed a crime, or broken the contract, to be alienated from society and the contract.

RECOMMENDATIONS

The United States disenfranchisement policies, whether they were created to or not, have a disproportionate impact on African Americans, and do not coincide with Rousseau's social contract theory. Felony disenfranchisement should be repealed throughout the country in order to combat racial disparities and allow laws and representatives to truly reflect US citizens. In order to fix this disparity, the US should look to other countries, as well as Maine, Vermont, and DC, and emulate the process they use to allow ex-felons and prisoners to vote. The number of disenfranchised Black Americans is directly linked to the War on Drugs.²⁹⁷ Policing practices that focus on inner cities should be changed and mandatory minimums should be repealed. If the US treats the drug epidemic as a public health issue instead of a public safety issue, recidivism rates are proven to decrease and public safety will increase.²⁹⁸

Only eliminating felony disenfranchisement laws is not enough to fix the problem. Education is vital to not only transform public perception about ex-felons, but to inform those in and out of prison of their rights and the voting process. This should be done on federal, state, and

²⁹⁵ Rottinghaus 23.

²⁹⁶ Rottinghaus 23.

²⁹⁷ "Drug Wars, Mass Incarceration and Race 2).

²⁹⁸ Cox et al. 25.

local levels. Part of the problem with felony disenfranchisement is that the restoration of rights is different from county to county.³⁰¹ It is difficult for ex-felons to navigate the restoration process when the process is not uniform. Comprehensive federal guidelines should be produced so states and their localities can be uniform while trying to restore voting rights to those who did not have them before. Automatic restoration should be enacted, and the process of allowing voting in prisons should begin.

There are many models that the US can use in its prison to allow voting. Many states where those in jail are being held before their trial have implemented voting systems.³⁰² Jail administrators often work alongside the city or county's Board of Elections in order to secure voter registration forms and ballots.³⁰³ Many jails allow inmates to put the jail or the homeless shelter they were at before they were incarcerated on their registration forms if they do not have a permanent address.³⁰⁴ Inmate IDs are also taken as valid forms of identification when registering and voting.³⁰⁵ Many jails become registered polling places so inmates are not limited to absentee voting.³⁰⁶ County clerk offices and Board of Elections are required to come up with a plan for voting in prisons, and work closely with prison staff.³⁰⁷ All of these policies can be implemented in prisons. It is actually easier in prisons to implement these systems because there is less inmate population turnover than in jails.³⁰⁸ For implementation within prisons, the Federal Bureau of Prisons should be involved, ensuring that systems are being run properly and inmates are receiving the necessary paperwork like they did in DC during the 2020 elections.³⁰⁹ Not only

³⁰¹ Cox et al. 25.

³⁰² Porter 7.

³⁰³ Porter 7.

³⁰⁴ Porter 6-8.

³⁰⁵ Porter 8.

³⁰⁶ Porter 7-8, 10.

³⁰⁷ Porter 8.

³⁰⁸ Porter 6.

³⁰⁹ Austermuhle 2020.

does this kind of civic participation lead to lower recidivism rates and build a stronger connection between citizens and their community, but it also allows the US government to truly be representative of its entire population, and it empowers Black Americans to exercise their inalienable right to vote.³¹⁰ This all coincides with Rousseau's idea of the general will and the sovereign's duty to enforce equality and fairness.

³¹⁰ Porter 12.

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