

A VIOLATION OF THE SOCIAL CONTRACT: FELONY DISENFRANCHISEMENT IN THE UNITED STATES

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ABSTRACT

This paper examines the history and contemporary implications of felony disenfranchisement, which denies voting rights to individuals with felony convictions. Using social contract theory, I assert that felony disenfranchisement is constitutionally questionable, given that it undermines the integrity of the democratic process. The paper also exposes historical and ongoing racial disparities in the application of felony disenfranchisement laws, mainly how they disproportionately target communities of color. In a constitutional context, this paper analyzes how felony disenfranchisement provisions interact with the Eighth Amendment's Cruel and Unusual Punishment Clause and the Fourteenth Amendment's Equal Protection Clause. Lastly, this paper examines landmark Supreme Court cases that had failed to establish any precedent for ending felony disenfranchisement practices. Overall, this paper aims to emphasize the need for legal reform and to highlight the injustice that felony disenfranchisement brings about.

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I. THE ROOTS OF FELONY DISENFRANCHISEMENT AND ITS APPLICATION IN CONTEMPORARY U.S. POLICY

The practice of “civil death” in ancient Athenian and Roman society referred to the confiscation of an individual’s political rights after they committed a severe crime.¹ Given the immense value placed on political rights at the time, the stripping away of these rights entailed a legal incapacitation of the offender’s honor and position in society.² “Civil death” remained prominent throughout eighteenth-century Europe, eventually making its way to America and informing early American decision-making.³ In due course, the practice of “civil death” manifested in the American South’s reaction to successful Black suffrage efforts in the nineteenth century. Following the ratification of the Fifteenth Amendment, felon disenfranchisement gained a new significance by becoming a weapon used mainly by Southern states to restore White supremacy and diminish Black voices.⁴ This punitive philosophy has snuck its way into contemporary legislation, with around 5.2 million Americans currently disenfranchised

¹ Afi S. Johnson-Parris, *Felon Disenfranchisement: The Unconscionable Social Contract Breached*, 89 Va. L. Rev. 109, 116 (2003); *Green v. Board of Elections of the City of New York*, 259 F. Supp. 290, (S.D.N.Y. 1966).

² *Id.*

³ *Id.*

⁴ U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

due to a felony conviction – including over one million of them having fully completed their sentences.⁵

In the United States, convicted felons may experience the removal of voting rights, disqualification from jury service, or ineligibility to hold public office.⁶ Such civil consequences can persist long after the completion of the individual's criminal sentence.⁷ Individual states vary in the way they address previous felony convictions; however, even in states where individuals have the opportunity to regain their voting rights once they have completed their sentences, the process for doing so is tedious and ultimately unrealistic.⁸ For instance, since many states require pardons from the governor or appeal to a parole board to restore voting rights, "few have the financial and political resources needed to succeed."⁹ As a result, previous offenders often remain excluded from democratic processes even once their sentences are completed.¹⁰

⁵ Brianna Remster & Rory Kramer, *Democracy for Whom? How Criminal Punishment Marginalizes the Political Voices of Black and Brown Americans*, 17 Sociology Compass e13053, 5 (2023).

⁶ See also Mich. Comp. Laws § 750.7 *et seq* (According to the Michigan Legislature, a federal felony is defined as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison").

⁷ Janai S. Nelson, *The First Amendment, Equal Protection and Felon Disenfranchisement: A New Viewpoint*, 65 Fla. L. Rev. 111 (2013).

⁸ *Id.*

⁹ Jamie Fellner, et al., *The Sentencing Project, Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 1 (1998).

¹⁰ *Id.*

Ultimately, felony disenfranchisement in the United States is constitutionally questionable. I argue that felony disenfranchisement lacks clear contemporary justification, undermining the integrity of the democratic process. I will raise concerns about felony disenfranchisement laws by referring to the implementation of social contract theory, as well as the Eighth Amendment's Cruel and Unusual Punishment Clause and the Equal Protection Clause in Section One of the Fourteenth Amendment.¹¹

II. JUSTIFICATION OF FELONY DISENFRANCHISEMENT GROUNDED IN SOCIAL CONTRACT THEORY

One argument in support of felony disenfranchisement laws is grounded in social contract theory. Proponents of the social contract argument believe that citizens who commit felonies have violated the social contract; in doing so, they forfeited their rights to participate in a civil society.¹² One notable proponent of this argument is Senator Mitch McConnell, who once stated, "We are talking about rapists, murderers,

¹¹ U.S. CONST. amend. VIII, § 1 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"); U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws").

¹² Johnson-Parris, *supra* note 1, at 112.

robbers, and even terrorists or spies,” and that such criminals “should not dilute the votes of law-abiding citizens.”¹³ However, such arguments fail to take into account the history of felony disenfranchisement laws, which have aimed to dilute the voting strength of people of color. Of the 5.2 million American citizens who are disenfranchised due to prior felony convictions, Black Americans make up 36% of these individuals; this is a significant disparity, considering Black Americans make up only 13% of the United States population.¹⁴ However, given the discriminatory foundations of disenfranchisement in the United States, this disparity is not merely a coincidence.¹⁵ ¹⁶ The goal of disenfranchisement laws in the Jim Crow era – in tandem with poll taxes, literacy tests, grandfather clauses, and more – was to suppress the votes of the newly enfranchised groups.¹⁷ The Sentencing Project, an organization aimed at criminal justice reform, states, “Crimes that triggered disenfranchisement were written to include crimes black people supposedly committed more frequently than white people, and to exclude crimes white people were believed to commit more frequently.”¹⁸ The history of disenfranchisement laws reveals a deliberate

¹³ 148 Cong. Rec. S802 (daily ed. Feb. 14, 2002) (statement of Sen. McConnell).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Johnson-Parris, *supra* note 1, at 116.

¹⁷ Johnson-Parris, *supra* note 1, at 115.

¹⁸ Fellner et al., *supra* note 9, at 1.

and systematic effort to suppress the voting rights of Black Americans. Supporters of felony disenfranchisement provisions, like Senator McConnell, believe that the practice protects “law-abiding citizens” from getting their votes overshadowed by those deemed to have broken the social contract. However, by overlooking the racially discriminatory origins of felony disenfranchisement, these arguments demonstrate that the practice is not about protecting the integrity of voting but rather about maintaining existing power structures that disadvantage communities of color. This troubling history of disenfranchisement laws reveals a failure of the state to uphold the social contract.

Another common argument supporting felony disenfranchisement is that taking one’s right to vote serves to deter other citizens from committing felonies in the future. However, this argument has two flaws: Firstly, the broad and loose definitions and guidelines for what constitutes a felony can result in unnecessarily harsh punishments for offenders. About 2-5% of minor nonviolent crimes are prosecuted as felonies, and as a result, individuals who were unfairly sentenced for less severe crimes may also be subject to disenfranchisement.¹⁹ Take the 1994 case of college

¹⁹ Samuel R. Gross, Maurice Possley, Ken Otterbourg, Klara Stephens, Jessica Paredes & Barbara O'Brien, *Race and Wrongful Convictions in the United States* 2022, U. Mich. L. & Econ. Res. Paper No. 22-051 (Sept. 23, 2022).

student Kemba Smith, who was sentenced to twenty-four years in prison for being involved in a drug trade.²⁰ It is crucial to note that despite the harsh sentence, Smith's involvement in the drug trade was extremely minimal and forced upon her by her abusive boyfriend.²¹ After her release in 2000, disenfranchisement was just one of the many issues Smith had to face in her effort to reintegrate into society.²² Smith's case shows that disenfranchisement can significantly impact individuals who were convicted of less severe or nonviolent crimes.²³ Felony disenfranchisement can also unintentionally affect wrongfully imprisoned individuals. One example of this is the 1986 case of Mark Schand, who was wrongfully convicted of murder due to false testimony and false identification.²⁴ Schand spent 27 years in prison before finally being exonerated in 2013.²⁵ However, his battle for justice did not end with exoneration. In addition to a serious lack of financial restitution, Schand had to undergo a lengthy legal process of seeking a pardon from the Massachusetts state government to restore his right to vote.²⁶ Schand's experience with the

²⁰ KEMBA SMITH, POSTER CHILD: THE KEMBA SMITH STORY (2011).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Mark Schand*, Centurion Ministries, Oct. 4, 2013, at <https://centurion.org/cases/mark-schand/> (Mark Schand was ultimately awarded \$27 million from the jury that wrongfully convicted him. In addition to his own legal battles, he has become an advocate for better restitution and reintegration efforts for all previously convicted individuals, including regaining their rights to vote).

²⁵ *Id.*

²⁶ *Id.*

criminal justice system highlights the barriers that previously incarcerated individuals face when trying to seek justice and reintegration.²⁷ In cases similar to Kemba Smith's and Mark Schand's, who did not commit felonies that justified their sentencing in the first place, disenfranchisement in these scenarios does not provide any form of deterrence. Secondly, aside from complications in matching punishment to the crime, disenfranchisement seemingly fails to offer any sort of deterrent from felonies, "as most courts do not mention it as a collateral consequence when handing down a felony conviction."²⁸ Felonies are not typically associated with disenfranchisement, and so typically, citizens will not see the retention of their right to vote as an incentive to follow the law.²⁹ ³⁰ As a result, the deterrence argument is weak due to the inconsistent application of felony charges, the potential for wrongful convictions, and the general lack of evidence supporting the deterrence rationale.³¹

Lastly, I argue that disenfranchisement violates one's natural rights and that it is the state rather than the felon that violates the social contract. An exploration of Thomas Hobbes's social contract theory reveals an expectation of the state to uphold and protect the natural rights of its

²⁷ *Id.*

²⁸ Johnson-Parris, *supra* note 1, at 132.

²⁹ *Id.*

³⁰ Nelson, *supra* note 7, at 42.

³¹ *Id.*

citizens. Hobbes's social contract theory holds that an implicit contract between the state and its citizens forms when the citizens agree to be in a community governed by the state.³² Disenfranchisement stands as a direct violation of these natural rights and breaches the social contract to which the state has consented.³³ The social contract is two-fold; thus, if civilians can breach the social contract by acting unjustly, then the state can also break the social contract by failing to protect their citizens' natural rights.³⁴ By denying individuals the right to participate in the political process, the state essentially silences their voices and deprives them of that natural right. If constituents, particularly people of color, consistently observe the state failing to uphold its end of the social contract through disenfranchisement, then why should the state be justified in convicting constituents on account of failing to uphold their end of the social contract? Not only is the silencing brought about by disenfranchisement laws unjustified, but it has more significant implications for our criminal justice system. Criminal sentences are justified – especially felony sentences of 25 or more years – on the basis that this amount of time is necessary for the convict to be rehabilitated by the end of their sentence.

³² *Id.*

³³ THOMAS HOBBS, LEVIATHAN 1 (1651).

³⁴ *Id.*

When an individual completes their sentence or is exonerated, they are understood to have learned from their mistakes. They are expected to assume all responsibilities of an active citizen, such as obtaining employment, paying taxes, and following the law. The right to vote, however, is not one of the privileges restored to ex-convicts upon the completion of their sentence. By removing their right to vote, we are depriving them of the opportunity to become a fully realized member of society. If the purpose of the criminal justice system is to reform and reintegrate people back into society, then prolonging sentences by removing their right to vote is unjustified and unconstitutional. It remains a major roadblock to achieving the fully unified, functional, and efficient governing body that early philosophers like Hobbes envisioned.

III. CONSTITUTIONAL INTERPRETATIONS OF THE EIGHTH AND FOURTEENTH

AMENDMENTS

By allowing felony disenfranchisement to continue, the American government fails to uphold constitutional values that safeguard justice and equality for all American citizens. In particular, the Eighth Amendment contains the Cruel and Unusual Punishment Clause, stating that “the punishment should be proportionate to the crime; otherwise, the

punishment is cruel.”³⁵ In denying individuals their right to vote even after completing their sentences, felony disenfranchisement constitutes a form of cruel and unusual punishment. It is “cruel,” given that being bared the right to vote further isolates previously incarcerated individuals from society and limits participation in civic life. Additionally, examining how felony disenfranchisement disproportionately impacts people of color highlights the “unusual” nature of the punishment.³⁶ For instance, Black Americans being seven times more likely to be innocently convicted of a crime compared to White Americans displays an inherent disproportionality in the way the American justice system carries out its sentencing.³⁷ The disproportionate rates of disenfranchisement of people of color also reflect disproportionate rates of incarceration in this country. For instance, although White and Black Americans use illegal drugs at similar rates, Black Americans are arrested for drug crimes far more often than White Americans.³⁸ Similarly, Black Americans are up to six times more likely to be convicted of felonies compared to their White counterparts for similar crimes.³⁹ Thus, not only are Black Americans

³⁵ Fellner et al., *supra* note 9, at 10.

³⁶ *Id.*

³⁷ Gross et al., *supra* note 19, at 2.

³⁸ Fellner et al., *supra* note 9, at 2.

³⁹ STACEY J. BOSICK, RACIAL DISPARITIES IN PROSECUTORIAL OUTCOMES: AN ANALYSIS OF FELONY CASES ACCEPTED FOR PROSECUTION BY THE DENVER DISTRICT ATTORNEY’S OFFICE IN THE CITY AND COUNTY OF DENVER 2 (Report No. 19-04A 2021).

disproportionately incarcerated in this country, but they also experience disproportionately harsher punishments.⁴⁰ Higher incarceration rates of Black Americans for drug possession are just one of many issues rooted in racism that perpetuate disparities within the criminal justice system. As a result of these higher incarceration rates, Black Americans are at higher risk of being victims of felony disenfranchisement provisions. The odds are ultimately against people of color in America's criminal justice system. It is a vicious cycle that imprisons people of color in America, inside and outside prison walls. Continuing disenfranchisement provisions on ex-felons thereby perpetuate discriminatory practices that date back to the post-Civil War era of the United States. The disparity in the application of disenfranchisement laws is thus a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.

Furthermore, Section One of the Fourteenth Amendment states that every citizen is entitled to equal protection under the law.⁴¹ Intrinsic this clause is the equal protection of the right to vote for every American citizen, a fundamental right in a democratic society. Yet felony disenfranchisement undermines this principle of equal protection since, at its core, it aims to set a group of individuals apart from the rest of their

⁴⁰ *Id.*

⁴¹ U.S. CONST. amend. XIV, § 1.

constituency. Felony disenfranchisement, in particular, takes this a step further by systematically excluding the voices of those who are the most directly impacted by policy outcomes. As stated by Federal Judge Henry Wingate, “The disenfranchised are severed from the body politic and condemned to the lowest form of citizenship... the disinherited must sit idly by while others elect his civil leaders and choose the fiscal and governmental policies which will govern him and his family.”⁴² In other words, the inability of ex-felons to participate in elections violates the paramount constitutional principle of equal protection.⁴³ Even upon the full completion of their sentences, the disenfranchised are democratically silenced. Such findings highlight how felony disenfranchisement violates the Equal Protection Clause by creating a system where certain groups face significant barriers to political participation and representation. Thus, it underscores the importance of the right to vote for all citizens and the potential harm that disenfranchisement policies can cause. Ultimately, felony disenfranchisement stands as an unjust and discriminatory practice that contradicts the constitutional principle of equal protection.

In the past century, many cases challenging the constitutionality of felony disenfranchisement have been brought to the Supreme Court. The

⁴² Fellner et al., *supra* note 9, at 8.

⁴³ *Id.*

Court's decisions, however, demonstrate a consistent pattern of upholding disenfranchisement laws, enabling the continuation of a practice that undermines constitutional principles. For example, *Green v. Board of Elections* (1967) challenged New York's disenfranchisement laws on the grounds that they violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court upheld felony disenfranchisement, claiming that upholding or withholding the right to vote is up to the states' discretion. The Court justified the decision on the grounds that the Constitutional Framers did not regard disenfranchisement as unconstitutional, given that several states during the Framers' time had instituted the practice, yet they had no documented objections to the practice.⁴⁴ However, this argument overlooks the historical context behind the adoption of the Constitution and fails to acknowledge the progress made in voting rights since its ratification. Nonetheless, the *Green* decision set a precedent by establishing a legal foundation for the proliferation of disenfranchisement law.⁴⁵ However, the case that stands out in the larger discussion of felon disenfranchisement is *Richardson v Ramirez* (1974).⁴⁶ The plaintiffs – three ex-felons from California – argued that felony

⁴⁴ Johnson-Parris, *supra* note 1, at 116.

⁴⁵ *Green*, 259 F. Supp. 290.

⁴⁶ *Richardson v. Ramirez*, 418 U.S. 24 (1974).

disenfranchisement does not withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment.⁴⁷ The Court upheld disenfranchisement upon reviewing Section Two of the Fourteenth Amendment, which they found had an affirmative sanction for felon disenfranchisement.⁴⁸ In a similar fashion to the *Richardson* case, federal felons in *Shepherd v. Trevino* (1978) argued that Texas' selective re-enfranchisement laws, which applied only to state felons, infringed upon the Equal Protection Clause.⁴⁹ The Supreme Court upheld its previous decisions by reinforcing the power of the state to determine felony disenfranchisement policies.⁵⁰ The Supreme Court's decisions on these three cases have shaped the legal landscape by affirming the constitutionality of disenfranchisement despite their racist underpinnings and disparate impacts.

It was not until *Hunter v Underwood* (1985) that the Supreme Court ruled that a felony disenfranchisement provision was unconstitutional. *Hunter* challenged an Alabama law that disenfranchised individuals convicted of certain crimes, including those with a history of misdemeanor

⁴⁷ *Id.*

⁴⁸ *Id.* See also U.S. CONST. amend. XIV, § 2 (“But when the right to vote is...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”).

⁴⁹ *Shepherd v. Trevino*, 579 F.2d 643, (5th Cir. 1978).

⁵⁰ Johnson-Parris, *supra* note 1, at 118.

offenses related to moral turpitude – referring to conduct considered inherently immoral. The Court argued that the Alabama law’s application on what constituted moral turpitude was vague and created with “discriminatory intent,” thus violating the Equal Protection Clause.⁵¹ The *Hunter* case set a precedent for challenging the discriminatory roots of felony disenfranchisement laws.⁵² However, for disenfranchise activists, this was only a seemingly victory. The actual applications of *Hunter* are few and far between since “courts have severely limited *Hunter*’s test of intentional discrimination: even when a state was originally motivated by discriminatory intent, a subsequent change [such as an amendment or reenactment] to the discriminatory law would remove its discriminatory taint.”⁵³ In other words, although the *Hunter* decision was ostensibly a step in the right direction in terms of combatting the racially motivated foundations of felony disenfranchisement laws, in practice, the improper application of the *Hunter* framework by lower courts worked to negate its influence.⁵⁴ Overall, the Supreme Court has not done a feasible

⁵¹ *Hunter v. Underwood*, 471 U.S. 222 (1985).

⁵² *Id.*

⁵³ Abigail M. Hinchcliff, *The ‘Other’ Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 Yale L.J. 194, 211 (2011).

⁵⁴ *Hunter*, 471 U.S. at 222.

job of combatting or addressing the unconstitutionality of felony disenfranchisement laws.

Even though personal liberties and equal protections are safeguarded in the Eighth and Fourteenth Amendments, disenfranchisement practices persist. Ultimately, there is a discrepancy of injustice occurring to minority groups in the United States. This large scale of injustice displays the inconsistent application of equal protection and the proportionality principle and raises suspicion about the overall constitutionality of disenfranchising felons. While efforts to combat disenfranchisement have occurred in the past, its application has been inconsistent. Overall, constitutional concerns surrounding the practice have remained unaddressed. The existence of disenfranchisement laws underscores the need for legal reform that better aligns with the fundamental constitutional principles.

IV. SUMMARY

The history of felony disenfranchisement reveals its deeply troubling nature. Not only does disenfranchisement present several moral and constitutional concerns, but it also undermines the essence of the democratic process and social contract theory. Despite being evidently

unconstitutional, disenfranchisement persists and continues to affect millions of Americans long after they have completed their sentences.

Although the Supreme Court has cracked down on disenfranchisement practices in the past, they have not done so effectively, enabling disenfranchisement practices to continue. Thus, a considerable reevaluation of disenfranchisement policies is essential to ensure equal protection for all American citizens. If the criminal justice system's goal is truly to rehabilitate individuals, then reintegrating them into the democratic process upon exoneration or sentence completion is not just reasonable—it's imperative.