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NOTES

FELON DISENFRANCHISEMENT: THE UNCONSCIONABLE SOCIAL CONTRACT BREACHED

*Afi S. Johnson-Parris**

INTRODUCTION

THE right to vote is fundamental to active citizenship in the United States. Over time, that right has been granted to an expanding segment of the population.¹ The exception to this expan-

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¹The right to vote in the United States was originally only available to wealthy white males. Jamie Fellner & Marc Mauer, Human Rights Watch & The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* 1 (1998), available at <http://www.hrw.org/reports98/vote> (last visited Dec. 2, 2002). This right of citizenship was subsequently extended to the poor, non-whites, women, and young adults. *Id.* The original Constitution contained little mention of popular voting and delegated the grant of the franchise to the states. Samuel Issacharoff et al., *The Law of Democracy: Legal Structure of the Political Process* 16 (2d ed. 2002). See U.S. Const. art. I, § 2 (permitting people of the states to vote for the members of the House of Representatives); U.S. Const. art. I, § 4 (delegating administration of Senate and House of Representatives elections to the states). Constitutional provisions and statutes shaped the franchise for these additional groups while state legislatures eliminated many of the restrictions that had created barriers to the franchise in the past. See U.S. Const. amend. XIV, § 2 (linking representative apportionment to the right of all male citizens, at least twenty-one years of age, to vote, presumably granting the franchise to non-white citizens); U.S. Const. amend. XV, § 1 (protecting the right of citizens to vote regardless of race, color, or previous condition of servitude); U.S. Const. amend. XIX (granting women the right to vote); U.S. Const. amend. XXIV, § 1 (protecting the right of citizens to vote regardless of ability to pay any poll or other tax); U.S. Const. amend. XXVI, § 1 (granting citizens eighteen years of age and older the right to vote); see, e.g., Md. Const. art. 7; Va. Const. art. II, § 1; Voting Rights Act, 42 U.S.C. § 1973 (2000) (prohibiting tests or devices to determine voter eligibility, the alteration of voting qualifications and procedures, and

sion involves individuals who have been convicted of felonies. From the time when felonies as a class were first used to deny the franchise, an increasing number of offenses have been classified as felonies, countering the expansion of the right to vote with an opposite expansion in the denial of that right based upon a felony conviction.² Losing this inalienable right has a significant impact on an individual's status as a citizen in a democratic society—

[T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.³

Moreover, as a significant number of states have sought to disenfranchise felons permanently,⁴ this tactic manifests a debt to society that never can be paid.

The stigma associated with this emasculated state of citizenship prevents the integration of felons into society as active members of a democratic government. Whereas for most citizens the taint of past misdeeds can be erased gradually through redemptive acts, the slate cannot be wiped clean for the permanently disenfranchised. Proponents of felon disenfranchisement argue that the “purity of the ballot box” is undermined if those marked by the infamy of a

the denial of the right to vote on account of race or color).

² See, e.g., Nora V. Demleitner, *Continuing Payment on One's Debt to Society: The German Model of Felon Disenfranchisement as an Alternative*, 84 *Minn. L. Rev.* 753, 777 (2000). Estimates indicate that 3.9 million Americans have currently or permanently lost the right to vote because of a felony conviction. Fellner & Mauer, *supra* note 1, at 2.

³ Fellner & Mauer, *supra* note 1, at 5 (quoting *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995)).

⁴ Eight states—Alabama, Florida, Iowa, Kentucky, Mississippi, Nevada, Virginia and Wyoming—disenfranchise felons for life. The Sentencing Project, *Felon Disenfranchisement Laws in the United States*, <http://www.sentencingproject.org/brief/pub1046.pdf> (Nov. 2002) (updating Fellner & Mauer, *supra* note 1, and Patricia Allard & Marc Mauer, *The Sentencing Project, Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws* (2000), <http://www.sentencingproject.org/pubs/regainvote.pdf> (last visited Oct. 2, 2002)). In forty-eight states and the District of Columbia, felons are not allowed to vote while in prison. *Id.* Thirty-three of these states prohibit felons from voting while on parole and twenty-nine states bar voting while on probation. *Id.* Felons who have fully served their sentence can be disenfranchised in thirteen states, including the eight states where felons are disenfranchised for life. *Id.*

felony are allowed to vote.⁵ This argument “suggests not only that former offenders are impure, but also that their impurity may be contagious.”⁶

The barrier to full, active citizenship for the unincarcerated felon is the result of segregation imposed through the civil disability of disenfranchisement. Though disenfranchisement is administratively a product of civil statutes, it is in effect penal—a collateral consequence of criminal sanctions. Courts, however, have used a “purpose” standard to explain why disenfranchisement is nonpenal, noting that “[because] the purpose of [the statute disenfranchising the convicted felon] is to designate a reasonable ground of eligibility for voting, [the] law is sustained as a nonpenal exercise of the power to regulate the franchise.”⁷ There is a connection, nonetheless, between penal theory and many of the policy justifications given for felon disenfranchisement. The application of this disability, however, is out of step with the traditional punishment theories of utilitarianism and retribution.⁸ In addition to preserving the “purity of the ballot box,” popular modern policy arguments for felon disenfranchisement include protecting against voter fraud and preventing felons from voting to alter the criminal law.⁹ Felon disenfranchisement has also withstood the scrutiny of courts against statutory and constitutional challenges.¹⁰

Theoretical justifications for disenfranchisement posit that the felon has broken the social contract through his actions, and that he does not have the moral competence to participate in governing

⁵ Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 Harv. L. Rev. 1300, 1307–08 (1989) (citing *Washington v. State*, 75 Ala. 582, 585 (1884)).

⁶ *Id.* at 1313.

⁷ *Green v. Bd. of Elections*, 380 F.2d 445, 449 (2d Cir. 1967) (quoting *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958) (plurality opinion)).

⁸ The utilitarian theories, more specifically known as deterrence, incapacitation, and rehabilitation, will be discussed in more detail in Section II.C along with the various retributive theories. For a general discussion, see Richard G. Singer & John Q. La Fond, *Criminal Law* 18–28 (1997). For a detailed exploration of these theories, see C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* 7–37 (1987).

⁹ Note, *supra* note 5, at 1302–03.

¹⁰ This Note’s discussion of major cases that affect felon disenfranchisement will include: *Hunter v. Underwood*, 471 U.S. 222 (1985), *Richardson v. Ramirez*, 418 U.S. 24 (1974), *Baker v. Pataki*, 85 F.3d 919 (2d Cir. 1996), and *Green v. Bd. of Elections*, 380 F.2d 445 (2d Cir. 1967).

a society.¹¹ This Note will focus on felon disenfranchisement under social contract theory and argue that the reliance on this theory is misplaced.¹²

Jean-Jacques Rousseau first outlined the social contract as setting the criteria for the legitimate political authority of government over society.¹³ Social contract theory uses a contract "to justify and/or to set limits to political authority," thus analyzing political obligation as a contractual obligation.¹⁴ Parties to this contract submit to bilateral agreements between people and ruler, and multilateral agreements between individuals and social bodies.¹⁵ Felon disenfranchisement doctrine argues that those who break the law have broken the social contract and abandoned the right to participate in it.¹⁶

This Note will use traditional contract doctrine to condemn the use of social contract theory as a justification for felon disenfranchisement. This Note will argue that disenfranchised felons are unequal parties to a contract that is fundamentally unfair in its formation and substance; thus, their social contracts should be invalidated on the grounds that they are unconscionable.¹⁷ In the jurisdictions where there is lifetime disenfranchisement, the collateral consequences of a felony conviction are exacted perpetually on felons. In other jurisdictions, many felons are subject to disenfranchisement long after they have finished their terms of incarceration. This Note will argue that the unincarcerated felon, when left to function in society, experiences a reformation of the social contract. Yet in this reformation, the felon occupies an inferior bargaining position and receives unfair and oppressive terms in the form of disenfranchisement.

¹¹ Note, *supra* note 5, at 1304.

¹² While the focus of this Note will be the attack on social contract theory as a justification for felon disenfranchisement, the doctrinal justifications that draw on social contract theory for support will be examined as well.

¹³ Michael Lessnoff, *Social Contract 2* (1986).

¹⁴ *Id.*

¹⁵ *Id.* at 4-5.

¹⁶ *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967).

¹⁷ Unconscionability is the equitable doctrine that when a contract is so unreasonably favorable to one party while precluding meaningful choice for the other party, the contract will be voided because the terms are unfair or oppressive. See *Black's Law Dictionary* 1526 (7th ed. 1999); Brian A. Blum, *Contracts: Examples and Explanations* 357-63 (1998).

This Note will focus on the unincarcerated felon because he shares the obligations of the social contract with the non-felon members of society, yet he does not share all of the benefits derived from the contract. Incarceration removes the felon from society, and in this state, the felon does not have the capacity to be a party to the social contract. Although the unincarcerated felon may be under the restriction of probation or parole, he is rejoined with society and is again a party to the social contract. At this point, a second contract is formed, accompanied by the obligation to obey society's laws. The deficiency in the formation of this second contract is the felon's status as a disenfranchised member of society. A party without a vote is without a voice in the negotiation process, and from this inequity the claim of unconscionability arises. As this Note will later discuss, reasonable restrictions rationally related to the felon's competency to contract may impact contract formation.

All mentally competent adult citizens, save felons, possess the right to vote as parties to the social contract.¹⁸ Unincarcerated felons are party to this contract and subject to all of its burdens, yet they do not receive its prime benefit: the ability to affect society through the power of the franchise. In this instance, elements of unfair bargaining and oppressive terms taint the formation of the second social contract. Disenfranchisement becomes not only a collateral consequence of a felony conviction, but also an unconscionable term of the social contract. This injustice calls for the states and the courts to restore equity through the reinstatement of the unincarcerated felon's franchise.

In Part I, this Note will examine the history of disenfranchisement and trace the development of the practice to its current theoretical and doctrinal applications. Key to this exposition is an identification of the individuals affected by disenfranchisement and of its impact on society as a whole. Part II will narrow the focus of the discussion to social contract theory and will explore its nexus with punishment theory and the application of doctrinal contract principles to the social contract justification for felon disenfranchisement. Finally, Part III will argue that the social contract formed with disenfranchised, unincarcerated felons is unconscionable and will pro-

¹⁸ Fellner & Mauer, *supra* note 1, at 14.

pose a restoration of the franchise, thus forming a valid social contract with the unincarcerated felon.

I. DISENFRANCHISEMENT: HISTORY, JUSTIFICATIONS, AND IMPACT

A. History

The practice of felon disenfranchisement dates back to ancient societies, such as Greece, where criminals were labeled as “infamous.”¹⁹ At that time, collateral sanctions against convicts included prohibitions against appearing in court, voting, making speeches, attending assemblies, and serving in the army.²⁰ In Roman society, the felon lost honor and accordingly lost his position as a citizen.²¹ Criminals in Anglo-Saxon England were civilly disabled, losing the right to legal protection of life and property.²² Civil disabilities were applied through bills of attainder, which subjected the felon to legal incapacitation such as forfeiture of property—essentially a legal death.²³

Disenfranchisement laws in the United States can be traced back to the civil disabilities applied to felons in England.²⁴ During the early history of suffrage in America, very few people had access to the franchise, which was mainly the domain of white male property owners.²⁵ At that time, women, blacks, illiterates, and people without property were among those who could not vote.²⁶

In the post-Civil War era, disenfranchisement gained new significance after blacks gained the right to vote through the passage of the Fifteenth Amendment to the Constitution.²⁷ White Southerners began a campaign of adopting seemingly race-neutral voting restrictions in an effort to deny blacks the franchise and neutralize their Reconstruction-era political gains.²⁸ For example, between 1890

¹⁹ Note, *supra* note 5, at 1301.

²⁰ *Id.*

²¹ Demleitner, *supra* note 2, at 757.

²² Note, *supra* note 5, at 1301.

²³ Fellner & Mauer, *supra* note 1, at 2.

²⁴ *Id.*

²⁵ *Id.* at 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* For a detailed discussion of the techniques used, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910*, at 45–72 (1974). “Race-neutral” provisions included literacy

and 1910, Southern states tailored their criminal disenfranchisement laws to target blacks by including crimes that blacks were thought to be more prone to committing.²⁹ Prior to this era of disenfranchisement, blacks had been active participants in the political structure, holding governmental posts throughout the South and in every Congress except one between 1869 and 1901.³⁰ The impact of disenfranchisement on black political power was substantial. In Mississippi, nearly seventy percent of eligible blacks were registered to vote in 1867, yet two years after the state's disenfranchising convention in 1890, less than six percent were registered.³¹ Disenfranchising provisions targeting blacks remained in effect for the first half of the twentieth century³² until changes brought about in the states during the Civil Rights era.

Although both federal and state law "impose civil disabilities following criminal conviction, state law governs removal of the right to vote even if the conviction is for a federal rather than state offense."³³ Currently, forty-eight states and the District of Columbia disenfranchise inmates incarcerated for felonies,³⁴ while only two states, Maine and Vermont, permit inmates to vote.³⁵ Eight states disenfranchise all felons who have completed their sentences while several states apply disenfranchisement for a specified period of time after a sentence has been served.³⁶ States also control the provisions for regaining the right to vote, which vary from actions by the parole board to presidential or gubernatorial pardon.³⁷ As one commentator noted, "most of these restoration processes are so cumbersome that few ex-offenders are able to take advantage of them."³⁸

and property tests, poll taxes, grandfather clauses, and criminal disenfranchisement provisions. Fellner & Mauer, *supra* note 1, at 3.

²⁹ Fellner & Mauer, *supra* note 1, at 3. The disqualifying crimes included thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 *Yale L.J.* 537, 541 (1993).

³⁰ Kousser, *supra* note 28, at 228.

³¹ Shapiro, *supra* note 29, at 538.

³² Kousser, *supra* note 28, at 8.

³³ Fellner & Mauer, *supra* note 1, at 2.

³⁴ The Sentencing Project, *supra* note 4.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Fellner & Mauer, *supra* note 1, at 5.

³⁸ The Sentencing Project, *supra* note 4.

B. Doctrinal Justifications

Article I, Section 10 of the Constitution provides that no state shall pass any bill of attainder, meaning that non-judicial punishment applied by the legislature is prohibited.³⁹ In *Green v. Board of Elections*, a felon convicted of conspiring to organize the Communist Party to advocate the overthrow of the government challenged the New York State Constitution's disenfranchisement provision arguing that it violated the U.S. Constitution's prohibition against bills of attainder.⁴⁰ The court, relying on *Trop v. Dulles*,⁴¹ held that the Bill of Attainder Clause applied only to statutes that imposed a disability for the purpose of punishment.⁴² The court sustained the New York disenfranchising provision because its purpose was to "designate a reasonable ground of eligibility for voting" and was simply a "nonpenal exercise of the power to regulate the franchise."⁴³ Critics of felon disenfranchisement argue that the practice violates the prohibition against bills of attainder because of the inference drawn from the fact that a person is a felon.⁴⁴ Denying felons the vote because of some fundamental flaw in character that would make them unfit to vote assumes guilt beyond the felony conviction.⁴⁵ In effect, the legislature is declaring the felon guilty of "political unreliability," which is a prohibited legislative determination of guilt.⁴⁶

The *Green* court also addressed the claim that felon disenfranchisement was cruel and unusual punishment in violation of the Eighth Amendment. First, the court repeated its assertion that disenfranchisement was not a punishment, but merely a regulation of the franchise.⁴⁷ Second, the court added that if felon disenfranchisement were a punishment, it would not have been regarded as cruel and unusual by the Framers because several states had instituted the practice in their state constitutions at the time of the

³⁹ U.S. Const. art. I, § 10.

⁴⁰ 380 F.2d 445, 447-49 (2d Cir. 1967).

⁴¹ 356 U.S. 86 (1958) (plurality opinion).

⁴² *Green*, 380 F.2d at 449.

⁴³ *Id.* (citing *Dulles*, 356 U.S. at 96-97).

⁴⁴ E.g., George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1904-06 (1999).

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ *Green*, 380 F.2d at 450.

adoption of the Bill of Rights.⁴⁸ Opponents of felon disenfranchisement overwhelmingly regard the practice as penal, because of its effect and the coupling of disenfranchisement with conviction as a collateral consequence. They argue that the cruel and unusual nature of disenfranchisement is manifested by permanent ostracism from society and the denial of a right critical to the equality that U.S. society guarantees.⁴⁹

The most significant argument asserted by Green and several disenfranchised plaintiffs after him was that felon disenfranchisement violated the Equal Protection Clause of the Fourteenth Amendment.⁵⁰ The *Green* court reasoned that a state law was not in violation of the Equal Protection Clause if “facts reasonably may be conceived to justify it.”⁵¹ The court posited that the reasonable justification for felon disenfranchisement could rest on social contract theory:

The early exclusion of felons from the franchise by many states could well have rested on Locke’s concept, so influential at the time, that by entering into society every man “authorizes the society, or which is all one, the legislature thereof, to make laws for him as the public good of the society shall require” A man who breaks the laws he has authorized his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.⁵²

The *Green* court’s reliance on Locke’s social contract theory here is in part the genesis of the theory’s use in subsequent felon disenfranchisement cases. Theoretical reasons aside, the court found that felon disenfranchisement was a discrimination expressly permitted by Section 2 of the Fourteenth Amendment.⁵³ The State of New York argued convincingly that the Framers could not have intended the general language in Section 1 of the Amendment to

⁴⁸ Id. at 450–51.

⁴⁹ Demleitner, *supra* note 2, at 775; Note, *supra* note 5, at 1308.

⁵⁰ *Green*, 380 F.2d at 451.

⁵¹ Id. (quoting *Metropolitan Casualty Insurance Company v. Brownell*, 294 U.S. 580, 584 (1935)).

⁵² Id. (citing John Locke, *An Essay Concerning the True Original, Extent and End of Civil Government* ¶ 89).

⁵³ Id. at 452.

prohibit disenfranchisement measures specifically allowed by Section 2 without penalty of "reduced representation."⁵⁴

While the *Green* court relied on social contract theory and textual arguments to justify felon disenfranchisement, the United States Supreme Court in *Richardson v. Ramirez*⁵⁵ solidified the use of the text of the Fourteenth Amendment as an affirmative sanction for the practice of disenfranchisement. Three ex-felons, who county officials refused to register to vote, attacked California's constitutional provision disqualifying state citizens convicted of "infamous crimes" from voting.⁵⁶ The plaintiffs argued that felon disenfranchisement must be tied to a compelling state interest and, lacking that, could not withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment.⁵⁷ The plaintiffs further argued that variations in the way counties applied the California constitutional and statutory disenfranchising provisions denied them due process and equal protection.⁵⁸ Additionally, the plaintiffs asserted that full participation in society upon completion of serving a sentence was essential to the rehabilitative process.⁵⁹ The Court, however, found an affirmative sanction for felon disenfranchisement in Section 2 of the Fourteenth Amendment, thus precluding the need for judicial interpretation of the state's interest and upholding the disenfranchising provisions.⁶⁰ The Court declined to decide the due process and equal protection claims regarding the provisions' varied application because they had not been addressed in the court below.⁶¹ The Court also reserved the rehabilitation argument for decision in the more proper forum of the state legislature.⁶²

The dissenters countered with the assertion that disenfranchisement could not be protected from equal protection scrutiny by express mention of it in either Section 2 of the Fourteenth Amendment or historical accounts of the Framers' intent at the adoption

⁵⁴ *Id.*

⁵⁵ 418 U.S. 24, 54-55 (1974).

⁵⁶ *Id.* at 26-27.

⁵⁷ *Id.* at 33.

⁵⁸ *Id.*

⁵⁹ *Id.* at 55.

⁶⁰ *Id.* at 54-55.

⁶¹ *Id.* at 56.

⁶² *Id.* at 55.

of the Amendment.⁶³ In the dissenting Justice's opinion, the state's blanket disenfranchisement of felons was both overinclusive and underinclusive because it did not support the state's interest in preventing voter fraud by limiting the disenfranchising impact to felons with a propensity to violate election laws; many of those convicted of violating election laws were charged with misdemeanors and thus not barred from voting.⁶⁴

Subsequently, courts have relied on the holding in *Richardson* to fend off many attacks on state felon disenfranchisement provisions. Two cases in particular have extended the *Richardson* doctrine by examining the purpose of the disenfranchising provisions while maintaining the state's ability to deny felons the vote. In *Shepherd v. Trevino*, where federal felons asserted that Texas's selective reenfranchisement of only state felons violated the Equal Protection Clause, the United States Court of Appeals for the Fifth Circuit held that the state's provisions passed the standard level of scrutiny for equal protection.⁶⁵ The court reasoned that although *Richardson's* holding blunted the force of Section 1's Equal Protection Clause with respect to felon voting rights, Section 2 did not remove all equal protection considerations enough to allow the state to make arbitrary distinctions between those who could and those who could not vote.⁶⁶ In the same fashion, the Supreme Court, in *Hunter v. Underwood*, held that provisions disenfranchising persons convicted of crimes involving moral turpitude violated equal protection because the provision was originally motivated by racial discrimination against blacks.⁶⁷ The Court left in place the *Richardson* holding that explicitly sanctioned disenfranchisement, yet expressed confidence that Section 2 would not permit discriminatory interests to guide a state's disenfranchising provisions.⁶⁸ In both *Shepherd* and *Hunter*, the Court retained the interpretation of Section 2 of the Fourteenth Amendment as sanctioning disenfranchisement, yet it added the nuance of a traditional equal protection

⁶³ Id. at 76–77 (Marshall, J., dissenting).

⁶⁴ Id. at 78–79 (Marshall, J., dissenting).

⁶⁵ 575 F.2d 1110, 1115 (5th Cir. 1978) (“[T]he classifications created by the Texas system bear a rational relationship to the state's interest in limiting the franchise to responsible voters.”).

⁶⁶ Id. at 1114.

⁶⁷ 471 U.S. 222, 233 (1985).

⁶⁸ Id.

standard. While the resulting doctrine seems to put limits on the unfettered grant of disenfranchising power to the states, the real impact on felons remains unchanged.

Opponents of felon disenfranchisement have most recently expressed desire to use the Voting Rights Act of 1965 (the "Act")⁶⁹ as a means to circumvent the Fourteenth Amendment impasse.⁷⁰ From the doctrine developed to date, it is difficult to predict the future impact of the Voting Rights Act on felons regaining the right to vote. The Act, adopted to remedy racial discrimination in voting, prohibits voting qualifications and practices that deny or abridge a citizen's right to vote on account of race or color.⁷¹ Unlike the Fourteenth Amendment, the Act uses a results test in Section 2 and does not require discriminatory intent or purpose.⁷² The challenge for plaintiffs using this strategy will be to connect past racial animus with current disenfranchising provisions. Though many state constitutions were ratified with provisions specifically targeted at disenfranchising blacks during the post-Reconstruction era, they have since been amended and re-ratified arguably to exclude the animus of the past though the franchise restrictions remain.⁷³ For example, in *Wesley v. Collins*, when a black convicted felon in Tennessee made a Section 2 claim under the Act, the court held there was no violation because felons had been disenfranchised because they chose to commit crimes, not because of their race.⁷⁴ The court found no evidence of discriminatory purpose in adoption of the disenfranchising provision.⁷⁵

⁶⁹ 42 U.S.C. § 1973 (2000).

⁷⁰ See generally Shapiro, *supra* note 29 (discussing black suffrage and the Voting Rights Act); Fellner & Mauer, *supra* note 1, at 19–20 (suggesting the vulnerability of criminal disenfranchisement laws to a claim under the Voting Rights Act).

⁷¹ § 1973(a); Fellner & Mauer, *supra* note 1, at 19.

⁷² Fellner & Mauer, *supra* note 1, at 19–20 & n.70.

⁷³ See, e.g., Va. Const. art. II, § 1 (replacing the previous disenfranchising provision with one arguably without the racial animus that existed in previous constitutional conventions). The delegates who adopted the racially motivated disenfranchising provision did not disguise their racial animus: "Carter Glass admitted the intent of the delegates to the Virginia constitutional convention: 'Discrimination! Why, that is precisely what we propose; that, exactly, is what this convention was elected for.'" Kousser, *supra* note 28, at 59 (quoting discussions during proceedings for the 1901–1902 Virginia constitutional convention).

⁷⁴ 791 F.2d 1255, 1262 (6th Cir. 1986).

⁷⁵ *Id.*

The United States Court of Appeals for the Second Circuit, in *Baker v. Pataki*, addressed a similar claim from black and hispanic incarcerated felons who argued that New York's disenfranchising law disproportionately impacted minorities in violation of Section 2 of the Act.⁷⁶ The court, sitting en banc, considered the applicability of this Section to the disenfranchising statute.⁷⁷ The judges favoring affirmance found that the Fourteenth Amendment's disenfranchising provision was not countered by a clear dictate from Congress indicating that Section 2 of the Act was meant to address disenfranchisement.⁷⁸ The judges favoring reversal found that the Act contained no ambiguity and did not require Congress to plainly state its application to felon disenfranchisement.⁷⁹ Further, the dissent concluded that the plaintiffs had a valid claim applying the results test of the Act to the state disenfranchising provision.⁸⁰ The court was equally divided on the merits, resulting in an affirmance of the lower court's dismissal of the Voting Rights Act claim.⁸¹ As such, doctrinal guidance on this issue remains uncertain.

C. Theory and Policy Justifications

Courts and states alike consistently offer theory and policy justifications to support the doctrinal treatment of felon disenfranchisement as provided under the Fourteenth Amendment. In addition to the social contract theory justification advanced in *Green*, states assert that felon disenfranchisement protects against voter fraud and other election offenses, prevents harmful changes to the law, and saves the "purity of the ballot box."⁸² These justifications address the continued disenfranchisement of the unincarcerated felon. Proponents of the voter fraud justification claim that because of the felon's history of breaking the law, the felon is more likely to violate election laws as well.⁸³ Critics argue that this assertion is over-

⁷⁶ 85 F.3d 919, 920 (2d Cir. 1996) (per curiam).

⁷⁷ Id.

⁷⁸ Id. at 921-22.

⁷⁹ Id. at 938-40 (Feinberg, J., dissenting).

⁸⁰ Id. at 937 (Feinberg, J., dissenting).

⁸¹ Id. at 920.

⁸² Fellner & Mauer, *supra* note 1, at 15.

⁸³ Note, *supra* note 5, at 1303.

inclusive and unfounded.⁸⁴ Justice Thurgood Marshall's dissent in *Richardson* argued that disenfranchisement provisions are not sustainable on the grounds of voter fraud prevention because the provisions are not limited to those who have demonstrated a propensity for that type of crime.⁸⁵ He added that there are less burdensome means to prevent voter fraud, which is usually treated as a misdemeanor, than unconditionally disenfranchising all felons.⁸⁶

Another asserted state interest for felon disenfranchisement is to prevent felon bloc voting that brings about harmful changes in the law. The argument is that perpetrators of serious crimes should not take part in electing those who create and enforce the laws that the felons have broken.⁸⁷ Opponents of this position argue that differences of opinion should not justify excluding a group from voting.⁸⁸ Additionally, the Court's holding in *Carrington v. Rash* suggests the proposition that disenfranchising "a sector of the population because of the way they may vote is constitutionally impermissible."⁸⁹

The "purity of the ballot box" theory assumes that a fundamental flaw exists in a person's character as evidenced by his commission of a felony.⁹⁰ "The official rationale for this disqualification in American states seems to be that felons, either in prison or after release, will corrupt the voting process."⁹¹ Proponents of this justification analogize disqualification because of immorality to disqualification because of insanity or feeble-mindedness.⁹² Opponents of this position, however, argue that the "purity of the ballot box" justification is simply another variation of the idea that the franchise should be extended only to those that vote properly.⁹³ Again, this is a restriction based on the way a group may vote and thus

⁸⁴ *Id.*

⁸⁵ 418 U.S. at 79 (Marshall, J., dissenting).

⁸⁶ *Id.* at 80-81 (Marshall, J., dissenting).

⁸⁷ *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967).

⁸⁸ *Richardson*, 418 U.S. at 81-82 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 705-06 (1969)).

⁸⁹ 380 U.S. 89, 94 (1965).

⁹⁰ See *Fletcher*, *supra* note 44, at 1904.

⁹¹ *Id.* at 1899.

⁹² *Id.* at 1904.

⁹³ *Fellner & Mauer*, *supra* note 1, at 16.

contravenes the Court's holding in *Carrington*.⁹⁴

D. Impact

The theories and justifications supporting felon disenfranchisement are less persuasive when confronted by the reality of the individuals affected by this practice. Human Rights Watch and The Sentencing Project conducted a study of the impact of felon disenfranchisement laws using national conviction and corrections data and various cases and literature on the topic.⁹⁵ The study estimated that 3.9 million American citizens, or one out of every fifty adults, have lost the right to vote because of a felony conviction.⁹⁶ In addition, 1.4 million of these people have already completed their sentences and another 1.4 million are on probation or parole.⁹⁷ The impact of disenfranchised citizens is clearly felt in the eight states that disenfranchise felons for life, as three are among the five states with the highest number of disenfranchised felons.⁹⁸ That this can affect the nation at large is evidenced by Florida, which has at least 200,000 ex-felons who are unable to vote, a number that could have affected the outcome of the 2000 Presidential election.⁹⁹

Another impact of felon disenfranchisement laws is the stigma associated with losing the right to vote. If a felon were to internalize all of the theoretical and policy propositions held by the proponents of disenfranchisement, he could regard himself as morally incompetent, unredeemable, and likely to recidivate. Essentially, the practice of felon disenfranchisement brands felons as the "untouchable" class of American society.¹⁰⁰

The impact of felon disenfranchisement is perhaps most acutely felt in the black community where the number of citizens lacking the right to vote has reached a critical mass. One study demon-

⁹⁴ *Id.* at 15 & n.49.

⁹⁵ See generally Patricia Allard & Marc Mauer, *The Sentencing Project, Regaining the Vote: An Assessment of Activity Relating to Felon Disenfranchisement Laws* (2000), <http://www.sentencingproject.org/pubs/regainvote.pdf> (last visited Oct. 2, 2002) (describing the research and results of these organizations); *The Sentencing Project*, *supra* note 4 (same).

⁹⁶ *Fellner & Mauer*, *supra* note 1, at 2.

⁹⁷ *Id.*

⁹⁸ See *id.* at 10.

⁹⁹ See *The Sentencing Project*, *supra* note 4, at 1.

¹⁰⁰ See *Fletcher*, *supra* note 44, at 1906-07.

strated that “[t]hirteen percent of all adult black men—1.4 million—are disenfranchised, representing one-third of the total disenfranchised population and reflecting a rate of disenfranchisement that is seven times the national average.”¹⁰¹ The diminished political strength of this segment of the population is still greatest in the South where thirty-one percent of black men in Alabama and Florida are permanently disenfranchised.¹⁰² Perhaps a vestige of the disenfranchisement era of the early twentieth century, disenfranchisement of blacks may also reflect increased rates of black imprisonment related to the “war on drugs” and a national trend toward harsher sentencing policies.¹⁰³

II. THE SOCIAL CONTRACT: POLICY AND PUNISHMENT WITHIN THE FOUR CORNERS

A. *The Social Contract*

The social contract builds upon the legal principles of contract theory to describe the agreements and obligations that order the relationships of people and political authority in a civilized society.¹⁰⁴ Rousseau’s original idea of a social contract was derived from the idea that the contract lends legitimacy to the subordinate position a free man assumes voluntarily with respect to civil authority.¹⁰⁵ Social contract theory establishes the obligation under civil law based on a prior obligation under natural law.¹⁰⁶ The full extension of Rousseau’s theory revokes an offender’s membership in society, effectively taking away all rights.¹⁰⁷

As Professor Michael Lessnoff has explained: “Contract is a legal term, and the notion of the social or political contract postulates that political obligation is analogous to the legal obligation of

¹⁰¹ Fellner & Mauer, *supra* note 1, at 8.

¹⁰² *Id.*

¹⁰³ *Id.* at 13.

¹⁰⁴ See Lessnoff, *supra* note 13, at 2.

¹⁰⁵ See *id.*; see also Anita L. Allen, *Social Contract Theory in American Case Law*, 51 Fla. L. Rev. 1, 2 (1999) (“Social contract theories provide that rational individuals will agree by contract, compact, or covenant to give up the condition of unregulated freedom in exchange for the security of a civil society governed by a just, binding rule of law.”).

¹⁰⁶ Lessnoff, *supra* note 13, at 2.

¹⁰⁷ Jesse Furman, Note, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 Yale L.J. 1197, 1223 (1997).

a party to a contract.”¹⁰⁸ Social contract theorists do not advance this analogy to argue “that political obligation is a legal obligation.”¹⁰⁹ Therefore, this Note’s argument applying social contract theory to felon disenfranchisement assumes only that a social contract is analogous to a legal contract—not that they are identical.

Although social contract theory is an outgrowth of natural law theory, the directions in which contractarian philosophers have developed this theory are varied and nuanced. Different elements of contract theory, derived from philosophers such as Locke, Hobbes, Rousseau, and Rawls, have been important to the shaping of social contract theory in American case law.¹¹⁰ Courts use these theories as scholarly authority to support or condemn a particular conclusion of law.¹¹¹ For example, courts seeking scholarly authority for asserting limitations on the government in the interest of individual liberty may draw upon Locke’s concept of the social contract, which emphasizes individual rights over civil authority.¹¹² Alternatively, courts could choose Rawls for support: “The modern revival of social contract theory stems [predominantly] from the work of . . . the American philosopher, John Rawls.”¹¹³ Rawls shifts his

¹⁰⁸ Lessnoff, *supra* note 13, at 2.

¹⁰⁹ *Id.* (emphasis in original).

¹¹⁰ See generally Allen, *supra* note 105 (exploring the relationship between the American legal system and social contract theory).

¹¹¹ See *id.* at 7–10.

¹¹² *Id.* at 7. The writings of both Locke and Hobbes have been used as support for the Fifth Amendment protection against self-incrimination. *Id.* at 7–8. Hobbes contractarian philosophy recognizes man’s right of liberty under natural law. Lessnoff, *supra* note 13, at 10–11. Hobbes asserts that this right should be voluntarily subsumed under a political authority and calls for the establishment of the social contract by general agreement. *Id.* Hobbes’s writings have been used to support the extension of government power and the grant of government immunities. Allen, *supra* note 105, at 8; see also *id.* at 8 n.37 (citing *United States v. Cox*, 342 F.2d 167, 193 & n.19 (5th Cir. 1965), as an example of a court using Hobbes’s views in a case concerning discretionary prosecutorial powers). Courts have used Rousseau’s philosophy to examine the difficulty of instituting public law in the private sector. *Id.* at 9 & n.39 (citing *Brockway Motor Trucks v. NLRB*, 582 F.2d 720, 722 n.1 (3d Cir. 1978), a labor relations case where the judge used Rousseau’s philosophy to address the reconciliation of public law with private rights).

¹¹³ Lessnoff, *supra* note 13, at 123. Rawls’ interpretation of contract theory as outlined in his book, *A Theory of Justice*, has had a subtle influence on American case law where many cases make generic contractarian references based in part on Rawls’ methods of reasoning about justice from a social contract perspective. Allen, *supra* note 105, at 9–10.

interpretation of the social contract from a focus on political obligation and authority to a focus on the justice of social systems and structures.¹¹⁴

B. Traditional Contract Theory Elements in the Social Contract

The social contract is an analytic construction for understanding the relationship between individuals and the societies they form. Though the contract is not legally enforceable *per se*, understanding that the contract is enforceable nonetheless is essential to its construct.¹¹⁵ There are, however, many parallels to traditional contract theory.¹¹⁶ Elements of a formal contract exist: parties, offer, acceptance, consideration, and damages. Society offers the opportunity to participate within its framework and those who choose to accept the offer receive the benefits and burdens of their bargain. A civil society could be regarded as the consideration exchanged both by individuals and the authority to which they submit.

The varying models of social contract theory regard the parties to the contract differently.¹¹⁷ In one instance, "the parties are the people and their ruler or rulers" and the people are considered a collectivity.¹¹⁸ "In the other, the parties are . . . the building-blocks of civil society [themselves,] conceived of as lesser social entities" or individual citizens.¹¹⁹ Contracts between people and ruler are bilateral, while both individuals and social entities enter into multilateral contracts amongst themselves.¹²⁰

The formation of the social contract is believed to be the formation of a civilized society.¹²¹ Previously, individuals living in a "state of nature" enjoyed certain unalienable natural rights, yet they sub-

¹¹⁴ Lessnoff, *supra* note 13, at 131.

¹¹⁵ *Id.* at 3.

¹¹⁶ "A contract may be defined as an exchange relationship created by oral or written agreement between two or more persons, containing at least one promise, and recognized in law as enforceable." Blum, *supra* note 17, at 2.

¹¹⁷ See Lessnoff, *supra* note 13, at 4.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 4-5.

¹²⁰ *Id.* at 5. "Where, at the instant of contracting, promises remain outstanding on both sides, the contract is called bilateral." Blum, *supra* note 17, at 5. In a multilateral contract, the consideration is regarded as the mutual promise of the parties. See *id.* at 171.

¹²¹ Allen, *supra* note 105, at 26 n.142 (citing *Lovelace v. Leechburg Area School District*, 310 F. Supp. 579, 585-86 (W.D. Pa. 1970)).

ordinated themselves to a government established to protect their rights.¹²² Pertinent to the social contract examined in this Note is the use of the term “social contract” to describe a model “of just and fair government with which rational persons should agree, would agree, or have in fact agreed” to in exchange for greater freedom and security.¹²³ Critical to the individual’s participation in the formation of the contract is the ability to do so freely.

In the contract, the “promises” exchanged are reciprocal—individuals are obliged to reciprocate contractual benefits by accepting restrictions on their freedom and respecting the security and rights of others.¹²⁴ The government, representing the collectivity, has similar obligations to those it represents, yet it also has the power to address broken promises on behalf of the collectivity. “[T]he right to punish breaches of the law is a right *of all men in a state of nature*; the state derives this right . . . from the individuals, who by yielding it up to a central authority, leave the state of nature and enter civil society.”¹²⁵ The state is also delegated the authority to monitor the occurrence of breaches and to determine for the collective the damages to be assessed in light of the breach.

The authority of the state to penalize individuals for breach of the social contract is, in essence, an implicit liquidated damages provision whereby the parties have agreed that a “breacher will pay damages in a specified sum or in accordance with a prescribed formula.”¹²⁶ When individuals yield to the state in formation of the contract, they obligate the state to exercise its authority with fairness; thus, “a minor violation of the rules results in only a minor loss of status under the rules, and so on.”¹²⁷ As part of the reciprocal obligations, the protections that individuals enjoy under the governance of the state will be proportionate to their conformity to the rules.¹²⁸ Likewise, their damages, or punishment for breaching, will be proportional to the breach.¹²⁹

¹²² Id.

¹²³ Id. at 26.

¹²⁴ Lessnoff, *supra* note 13, at 120.

¹²⁵ Id. at 101.

¹²⁶ Blum, *supra* note 17, at 617.

¹²⁷ A. John Simmons, *The Lockean Theory of Rights* 153 (1992).

¹²⁸ Id.

¹²⁹ Id.

C. Traditional Punishment Theory

Traditionally, punishment is thought to serve utilitarian or retributive goals. Utilitarian punishment theory evinces as its purposes deterrence, incapacitation, and rehabilitation¹³⁰ and justifies these purposes in terms of beneficial effects or consequences.¹³¹ The aim is to deter those who may want to commit a crime, incapacitate those who do and may do so again, and rehabilitate those who have committed crimes so that they do not do so again.¹³²

Utilitarians believe that deterrence influences the choices of both the criminal being punished and those who contemplate committing a crime but choose not to because of the associated punishment.¹³³ Incapacitation, on the other hand, benefits society by removing the offender from society and preventing him from committing more offenses.¹³⁴ Although the incapacitative effect is perhaps most likely in the case of imprisonment, it may also be present in other types of punishment.¹³⁵ With rehabilitation, the benefit is to both society and to the criminal, who is supposedly transformed from an offender to a nonoffender through treatment.¹³⁶

The retributive theory of punishment advances the position that persons who have committed crimes acted immorally and that their punishment allows them to atone for the immoral action.¹³⁷ In contrast to utilitarians, who place importance on benefit and consequence, retributivists mete out punishment according to desert and in amounts proportionate to the extent of wrongdoing.¹³⁸

Shifts in the dominant sentencing philosophy have routinely entered into the justifications for felon disenfranchisement and influenced its impact on society.¹³⁹ "Rehabilitation, the premier sentencing goal during the 1960s, mandated the abolition of collateral consequences that inhibited the societal reintegration of ex-offenders."¹⁴⁰

¹³⁰ Singer & La Fond, *supra* note 8, at 18.

¹³¹ Ten, *supra* note 8, at 3.

¹³² Singer & La Fond, *supra* note 8, at 18.

¹³³ *Id.* at 19.

¹³⁴ Ten, *supra* note 8, at 8.

¹³⁵ *Id.*

¹³⁶ Singer & La Fond, *supra* note 8, at 23.

¹³⁷ *Id.* at 18.

¹³⁸ Ten, *supra* note 8, at 5.

¹³⁹ Demleitner, *supra* note 2, at 770-71.

¹⁴⁰ *Id.* at 771 n.96.

During that time, many states abolished felon disenfranchisement to facilitate the rehabilitation of the felons.¹⁴¹ As the political and theoretical landscape changed, rehabilitation waned as a goal of punishment and along with it, the support for abandoning felon disenfranchisement.¹⁴² Rehabilitation was replaced by retribution and the utilitarian purposes of incapacitation and deterrence as the dominant theory, thus precipitating a return to collateral sentencing methods such as disenfranchisement.¹⁴³ Conspicuously missing from the dialogue on these collateral consequences is empirical support for their success.¹⁴⁴

D. The Intersection of Social Contract Theory and Punishment Theory in Felon Disenfranchisement

As part of the social contract formed with the state, John Locke believed that people cede their natural right to punish to the state, creating an executive right in the state to punish as a common judge and administrator of justice.¹⁴⁵ Locke combined his social contract theory with theories of punishment to provide justification for state-administered punishment: The state has authority and commission delegated from the people, which it exercises in a utilitarian manner to bring about the greater good.¹⁴⁶

Courts relying on social contract theory have argued that when an individual breaks laws that he authorized the government to make when first forming the social contract, he abandons the right to participate in further shaping the provisions of that contract.¹⁴⁷ The provisions of the social contract are shaped in the ongoing negotiations between the government and the people through the exercise of the franchise. Thus, losing the right to participate is disenfranchisement. The contractarian approach to disenfranchisement “emphasizes the deliberate nature of the criminal’s decision to breach the social charter” as justification for withholding the franchise and effectively silencing the felon in the ongoing contract ne-

¹⁴¹ Id. at 770–71.

¹⁴² Id. at 771 n.96.

¹⁴³ Id. at 771.

¹⁴⁴ Id.

¹⁴⁵ Simmons, *supra* note 127, at 127.

¹⁴⁶ Id. at 122.

¹⁴⁷ *Green v. Bd. of Elections*, 380 F.2d 445, 451 (2d Cir. 1967).

gotiations.¹⁴⁸

In social contract theory, the common view of disenfranchisement is that individual parties to the contract are explicitly or implicitly aware that their status under the terms of the contract, embodied in society's reasonable or fair system of rules, depends on respecting those rules.¹⁴⁹ Under the full extension of social contract theory, if a felon has broken the contract and "is no longer considered a member of the state, he . . . should consequently lose all rights, not a select few"—like the right to vote.¹⁵⁰ "While '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights,' a prisoner today 'retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.'¹⁵¹ Courts have taken a more moderate approach to breach of the social contract by declining to apply the theory to its fullest extreme.¹⁵² The felon does not lose all rights guaranteed by the contract, as in medieval times, yet he does lose the franchise, a "right that is fundamentally connected to his equal membership in society"¹⁵³ and his ability to negotiate the contract terms.

Disenfranchisement as practiced today conflicts with the requirements of rationality and proportionality flowing from traditional utilitarian and retributive punishment theories.¹⁵⁴ Locke believed that breaches of the contract should be "punished to that degree, and with so much severity, as will suffice to make it an ill bargain to the offender, give him cause to repent, and terrify others from doing the like."¹⁵⁵ Lifetime disenfranchisement, as practiced in some states, fails to be rational or proportional because all felons are targeted, regardless of the applicability of the punishment to their offenses or the severity of their crimes.¹⁵⁶ Under the most ex-

¹⁴⁸ Note, *supra* note 5, at 1304–05.

¹⁴⁹ Simmons, *supra* note 127, at 153.

¹⁵⁰ Furman, *supra* note 107, at 1223.

¹⁵¹ *Id.* at 1224 (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948), and *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Note, *supra* note 5, at 1306–07.

¹⁵⁵ *Id.* (quoting John Locke, *The Second Treatise of Government* 8 (J.W. Gough rev. ed. 1976) (1698)).

¹⁵⁶ *Id.* at 1307.

treme disenfranchising regimes, the murderer given a life sentence and the shoplifter given a suspended sentence receive the same treatment. Additionally, disenfranchisement is unlikely to be effective as a deterrence measure given its relatively low visibility as a consequence of a felony conviction.¹⁵⁷

Social contract theory as a justification for felon disenfranchisement begins to weaken and becomes unreliable when subjected to analysis by traditional contract theory. Individuals who contract with society do so freely and submit to the governing authority fully expecting to receive protection of their rights as a benefit of accepting the burden of restrictions.¹⁵⁸ That understanding, however, is not honored by the practice of disenfranchisement. In the well-noted contracts case *Williams v. Walker-Thomas Furniture*, the court noted that “‘it is hardly likely’ that free and informed individuals would enter into a contract in which a single failure to execute payment by one party would constitute a forfeiture of all goods previously obtained under the contract.”¹⁵⁹ The sanction of disenfranchisement is essentially a forfeiture of a very important right for a single type of breach of the social contract. It is unlikely that most citizens include the prospect of losing this essential right in the calculus of breaching the social contract. This invites the question of whether the individual is a free and informed party to the contract.

Social contract theory justifies disenfranchisement by emphasizing the deliberateness of the felon’s actions as an indication of immoral character.¹⁶⁰ The contract aims to effectuate a standard of morality suppressing individual desires to act immorally while promoting human freedom.¹⁶¹ Repudiating the entire social contract then with a single felonious breach harshly contravenes any promotion of freedom.¹⁶²

The liquidated damages provision of the contract, as expressed through punishment theory, is unsound as well. Individuals submit to the authority of the state to administer damages under the as-

¹⁵⁷ *Id.*

¹⁵⁸ See discussion *supra* Section II.B.

¹⁵⁹ Note, *supra* note 5, at 1305 n.28 (quoting 350 F.2d 445, 449 (D.C. Cir. 1965)).

¹⁶⁰ Furman, *supra* note 107, at 1224.

¹⁶¹ See Note, *supra* note 5, at 1306.

¹⁶² *Id.*

sumption that it will do so fairly, a fairness that embodies the punishment principles of rationality and proportionality. Under the utilitarian theory, "deterrence requires that [an individual] receive notice of the threat of punishments."¹⁶³ Disenfranchisement is not widely known as a consequence of an action that breaches the contract, as most courts do not mention it as a collateral consequence when handing down a felony conviction.¹⁶⁴ Disenfranchisement is also out of line with retributive theories, which "try to establish an essential link between punishment and moral wrongdoing."¹⁶⁵ The blanket indictment of all felons, regardless of the connection between their offenses and voting, shows that this sanction's link to any moral wrongdoing is often weak. In addition, the proportionality required by retributive schemes¹⁶⁶ is absent when felons are disenfranchised for life regardless of the severity of their crime. Life-long sanctions insult the retributive principle that the offender should be required (and permitted) to pay his debt to society. Finally, with respect to people's understanding of their duties under the contract, the common expression, "'he has paid his debt to society,' articulates a notion that the price for committing a crime is a prison term, and that once that term has been served, the penalty is complete."¹⁶⁷ With the collateral consequence of felon disenfranchisement, this understanding is incorrect, and the consequence may be exacted long after the formal sentence is complete.

III. THE SECOND CONTRACT AND ITS UNCONSCIONABILITY

Few disagree with the assertion that felons' actions against society and the state breach the social contract to which they are a party. Therefore, the major source of contention among opponents and proponents of disenfranchisement are the damages or punishment to be applied as a result of the breach. Felons who breach the contract find themselves removed from society and in near total submission to the justice system, which represents the collective executive right to punish. This removal from society places the felon in a state of custody, thus terminating his contact and con-

¹⁶³ Singer & La Fond, *supra* note 8, at 19.

¹⁶⁴ See Note, *supra* note 5, at 1307.

¹⁶⁵ Ten, *supra* note 8, at 38.

¹⁶⁶ Singer & La Fond, *supra* note 8, at 26.

¹⁶⁷ Note, *supra* note 5, at 1305.

tract with society. As the justice system administers the punishment to the felon, it makes the determination, based on factors such as dangerousness and recidivist potential, whether to physically incarcerate the felon or release him back into society under restrictions like probation or parole.¹⁶⁸ The felon released into society from incarceration is again faced with the terms of the social contract, by which he must abide. In this manner, the second formation of the social contract occurs.

This Note's primary criticism of the second contract is that as a result of the civil disability of disenfranchisement, the felon entered into the second contract without the requisite freedom and equality. Competency of the parties to the contract is a vital element that is wanting here. Proponents of the "purity of the ballot box" theory have described felons as morally incompetent to vote, much like those disqualified from voting due to insanity.¹⁶⁹ A similar disability prevents these individuals from being parties to contracts, much like morally incompetent individuals would be incapacitated parties to a moral contract. Nonetheless, the unincarcerated felon, regarded as morally incompetent, *is* a party to the social contract; yet he participates in its ongoing negotiation without the voice of the franchise. The social contract is only regarded as just when subject to the very important condition that it be made in a situation which is fair between *all* parties involved:¹⁷⁰ "Contractual freedom encompasses not only the right to enter and have the state enforce consensual relationships, but also the right not to be bound in contract in the absence of meaningful voluntary assent."¹⁷¹ Arguably, the unincarcerated felon does not possess the requisite freedom to contract nor has he voluntarily given assent to being a party without a voice.

The agreement between the individual and government is bilateral, entailing promises made by both parties.¹⁷² It is understood that the individual has the duty to adhere to the rules of the contract while the government administers it fairly, subject to the

¹⁶⁸ Ten, *supra* note 8, at 112.

¹⁶⁹ Fletcher, *supra* note 44, at 1904.

¹⁷⁰ Lessnoff, *supra* note 13, at 131.

¹⁷¹ Blum, *supra* note 17, at 337.

¹⁷² Lessnoff, *supra* note 13, at 5.

power delegated from the people.¹⁷³ The people's ability to delegate this authority assumes that they have the authority in the first place. The contract is continually negotiated by the people through exercise of the franchise, which is an implicit grant of the people's authority. The disenfranchised felon, as a party to this social contract, has no part in this process, which calls into question the government's delegated authority and undermines the fairness of this arrangement.

The focus of the disenfranchisement proponent's argument has been on the felon's breach of the contract. Perhaps a more pertinent question is whether the government and society have committed a breach of the contract as well. This bilateral contract contains the government's promise to administer the contract fairly, yet the consideration of fairness seems lacking in treatment of the unincarcerated felon. The felon's submission to the rule of law provides the consideration to honor his promise. While disenfranchisement may have been the damages assessed by the original social contract, the government should not be able to continue those damages interminably.¹⁷⁴

This Note proposes that these damages should be terminated at the felon's re-entrance into society and upon formation of the second social contract. The question unanswered by the proponents of disenfranchisement under the social contract theory is: What are the contractual obligations of society to terminate the unincarcerated felon's payment of damages or to offer consideration as part of the second social contract? In jurisdictions such as Virginia, where a felon loses the right to vote for life, the damages are interminable regardless of the crime committed and, as such, the contract is unconscionable.

The purpose of unconscionability in contract doctrine is "to prevent unjust enforcement of onerous contractual terms which one party is able to impose on another because of significant disparity in bargaining powers."¹⁷⁵ Relief from an unconscionable contract is granted when the terms display both substantive unconscionability

¹⁷³ Allen, *supra* note 105, at 2.

¹⁷⁴ Under the contract principle of unconscionability, interminable contract damages, possibly the result of an unfair bargaining process, may be viewed as unfair and oppressive. See Blum, *supra* note 17, at 358-59.

¹⁷⁵ 17A Am. Jur. 2d Contracts § 295 (1991).

(unfair or oppressive terms) and procedural unconscionability (bargaining unfairness).¹⁷⁶ The disenfranchised felon is an unequal party in the ongoing formation of the second social contract with the government because he is silenced in the negotiations without the voice of the vote. As one commentator noted, “[i]t is an unequal struggle: on one side are all the forces, all the power, all the rights.”¹⁷⁷ As discussed, disenfranchisement is oppressive because it is a vital component of an individual’s citizenship and his negotiating power in the social contract. In states where felons are disenfranchised for life, the damages assessed for breach of the social contract are interminable and thus oppressive.

Objectors to this argument might claim that the felon freely accepted this weakened position upon release from custody, or that he is not overburdened by losing the vote because he at least has his freedom. Philosopher Michel Foucault argues that an offense against the contract opposes the felon to the entire social body, which is vested with the right to punish his infraction.¹⁷⁸ And “because [the felon] is a part of the social body that is bound by the contract, he cannot object—he wills his own punishment.”¹⁷⁹ These objections imply that the felon bargained unwisely and would be entitled to no remedy since unwise or foolish agreements do not rise to a level of such unconscionability as to declare them void.¹⁸⁰

Theories declaring that parties oppressed by the social contract submitted to it freely are similar to those used as justification for slavery in early America.¹⁸¹ Under Locke’s theory of social contract, no man could compact to enslave himself to anyone.¹⁸² Freedom, inherent in the ability to contract and the contract itself, cannot be contracted away. By the same token, a felon would not be able to use his access to the franchise as a bargaining tool to avoid incarceration. As one cannot submit to being a slave, one also cannot negotiate away his citizenship and freedom vested in the fran-

¹⁷⁶ Blum, *supra* note 17, at 359.

¹⁷⁷ Michel Foucault, *Discipline and Punish: The Birth of the Prison* 90 (Alan Sheridan trans., Vintage Books ed. 1979) (1978).

¹⁷⁸ *Id.*

¹⁷⁹ Furman, *supra* note 107, at 1212.

¹⁸⁰ See 17A Am. Jur. 2d Contracts § 295 (1991).

¹⁸¹ Allen, *supra* note 105, at 16.

¹⁸² *Id.* at 16 n.73. Locke instead argued that blacks “were justifiably enslaved as captives of a just war.” *Id.*

chise to avoid incarceration.

Under the concept of unconscionability, Locke accepted the notion that an unfair bargaining position could void an apparent contract.¹⁸³ In *The Lockean Theory of Rights*, Professor A. John Simmons wrote that Locke would regard a woman's marriage contract, considering her "weakness and inequality," as borderline unconscionable.¹⁸⁴ This same argument could be applied to the analogy of the unincarcerated felon as a party to the second social contract.

While there are other collateral consequences of a felony conviction that might seem substantively unconscionable (such as the rights to hold office, be on a jury, or carry a gun), disenfranchisement alone is both substantively and procedurally unconscionable. For the unincarcerated felon, the social contract bears both of these afflictions; thus, the term of disenfranchisement renders it unconscionable. The felon may view any of these collateral consequences as more burdensome than losing a right like voting, which he may not use or find valuable. The unconscionability of disenfranchisement, however, is not based on the burden as perceived by the felon. It lies in the capacity, or lack thereof, for the unincarcerated felon to be a party to the social contract.

Prohibiting the franchise differs from other collateral consequences because it is necessary to an individual's ability to have a voice in the ongoing negotiation of the contract. This ongoing relationship between individuals and the government requires a continual grant of authority from the individual and a mechanism for accountability, which is provided through the franchise. Without the right to vote in order to participate in the contractual relationship, the contract should be regarded as substantively unconscionable.

Other objectors to the felon's argument may draw a comparison to aliens who, like felons, are parties to the contract receiving all of the burdens without all of the benefits. Aliens are another group of mentally competent adults who would be able to vote save their citizenship status, yet they appear to be parties to the social contract and subject to similar damages for breach. The alien's status, however, is not regarded as unconscionable.

¹⁸³ Simmons, *supra* note 127, at 175 n.28.

¹⁸⁴ *Id.* at 173.

Lockean theory posits that aliens, unlike the disenfranchised felon, are subject to the state's authority because they are able to enter *freely* into the territories of the state.¹⁸⁵ The alien, then, is a temporary member of the state.¹⁸⁶ This Note argues that the alien is a party to a somewhat different contract than the citizen. Aliens do not have all of the burdens of citizens, such as providing a common defense through military service,¹⁸⁷ and in some measure they opt into many of the burdens that they undertake. In addition, aliens are still subject to the social contract of their home nations. Most importantly, aliens are not faced with the prospect of liberty or disenfranchisement. They can choose to stay in the United States and be unable to vote or they can choose to return to their own countries to administer that contract under the agreed terms. The unincarcerated felon, as such, has no option for full participation in his country's social contract for he is not truly free to effect its terms through the franchise.

CONCLUSION

The social contract between citizens and the state to which they delegate their authority gains its validity from the parties' freedom to contract and share an active voice in negotiating that contract through the franchise. In fact, active citizenship in the United States is but a façade without this vital right. The felon, disfranchised upon breaching the original social contract, enters into a second contract upon his release. The validity of this second formation is questionable because the felon, in his disenfranchised state, is not an equal party truly free to contract. This suggests that the contract is unconscionable because of the unincarcerated felon's unequal position as a silent party to the ongoing negotiation of the contract. Only those with a vote have a voice.

This Note's purpose is to undermine the claim that social contract theory is an appropriate justification for felon disenfranchisement, because the contract itself is unconscionable. In the process, it examines disenfranchisement as an incoherent extension of pun-

¹⁸⁵ *Id.* at 137.

¹⁸⁶ *Id.*

¹⁸⁷ All eighteen-year-old male citizens must register with the selective service to make them eligible for the draft—this is a requirement upon which benefits of citizenship are often based like financial aid for school, etcetera.

ishment theory: "Punishment as an imperative of justice hardly makes sense if the program of punishment fails to include an opportunity for the offender's reintegration into society."¹⁸⁸ Despite the flaws in social contract theory from a punishment theory perspective, the greatest erosion of its foundation comes from analyzing it through the lens of the traditional contract theories upon which it is modeled.

This social contract suffers from many of the ailments in the formation, liquidated damages provisions, and unconscionable terms that would invalidate any traditional contract. Again, individuals with the right of the franchise are vital to the contract's validity: "The ballot in the hand of the citizen is the badge of his sovereignty. Take that from him and he is a slave. Through the ballot, and that alone, he can make himself felt in the enactment of the laws and the administration of public affairs."¹⁸⁹ For these reasons, the franchise should be returned to unincarcerated felons so that they may be whole and free parties to the social contract.

¹⁸⁸ Fletcher, *supra* note 44, at 1907.

¹⁸⁹ Kousser, *supra* note 28, at 257 (quoting 21 Cong. Rec. 6786 (1890) (statement of Rep. Burrows)).