

White Man's Justice, Black Man's Grief: Voting Disenfranchisement and the Failure of the Social Contract

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Chester blinked at the harsh light in the courtroom and peered around curiously. He had been in and out of courtrooms all his life, but he never got over his fear of them. The black-robed men who sat up high on the benches dispensing their so-called "justice" filled him with awe. It was not a feeling of reverence or of wonder caused by something sublime. It was a feeling of terror, inspired by the raw power that these hypocrites held over the helpless black men who came before them. He didn't fear the men themselves. He knew well that they were insignificant, even while recognizing how insidious they could sometimes be. He feared the power, the power of life and death these men held in their hands.¹

INTRODUCTION

The United States Congress ratified the Fifteenth Amendment in 1870, guaranteeing the right to vote to African-American men. Public policy since the ratification has sought to abridge that right. African-American voting disenfranchisement has a long and sordid history. Literacy tests and poll taxes systematically denied African-American people their constitutional rights. The Voting Rights Act of 1965 sought to enforce federal laws against Southern oppression.² The Act prohibits voting practices or procedures that discriminate on the basis of race, color, or membership in one of the language minority groups.

The latest frontier of the disenfranchised is African-American male felons who are denied the right to vote. The laws denying felons the right to vote affect all races and both genders, but the disparate impact of facially neutral

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1. DONALD GOINES, WHITE MAN'S JUSTICE, BLACK MAN'S GRIEF 26 (1973).

2. Pub. L. No. 89-110, 79 Stat. 437 (1965).

disenfranchisement laws on African-American males is alarming. Millions of offenders have lost the right to vote but the impact of disenfranchisement of African American men creates a cause for alarm.³

The history of voting disenfranchisement parallels the history of the African-American experience in the United States. Post Reconstruction era, Southern states rewrote their constitutions to exclude African Americans from voting. Disenfranchisement was a race neutral approach to denying the vote to persons of moral turpitude. After Reconstruction, Southern constitutional conventions rewrote their laws to explicitly exclude African Americans in particular.⁴

Voting disenfranchisement is one of the hallmark examples of how African-American men are prevented from fully participating in society after being incarcerated. The incarceration rates of African-American men increased dramatically in the last twenty years. The increase in incarceration also marks an increase in disenfranchisement.

The laws determining the conditions offenders must face upon return to their communities co-opt their rights to engage in what others take for granted. Offenders access to housing, education and employment opportunities are severely restricted.⁵ Offenders are not able to reintegrate into communities because of restrictive laws that diminish offenders' standing and opportunities to fully participate in society.⁶ Offenders are denied the basic concepts of justice.

John Rawls propounded that the concept of justice denies that the loss of freedom for some is made right by the greater good shared by others.⁷ For Rawls, justice did not allow for sacrifices imposed on a few to be outweighed by the advantages enjoyed by the many.⁸ Rawls descended upon Jean Jacques Rousseau's social contract and reconfigured the social contract to become the principles of justice for the basic structure of society.⁹ A social contract is needed to reintegrate offenders into society.¹⁰

Charles Mills uses Rousseau as the basis for reconfiguring the social contract into a racial contract that has contrarian claims.¹¹ Mills theorizes that the racial contract is a set of "meta-agreements" created among Whites to categorize non-Whites as morally and legally inferior.¹² The racial contract personifies how African American offenders are intentionally marginalized in

3. See *infra* notes 7-9.

4. See *infra* notes 15-22.

5. See *infra* Section III.

6. See *infra* Section III.

7. JOHN RAWLS, *THEORY OF JUSTICE* 3 (1971).

8. *Id.*

9. *Id.*

10. See *infra* Section IV.

11. See *infra* Section III.

12. *Id.*

American society.¹³

This article will examine, in four parts, facets of disenfranchisement and obstacles to reentry for convicted persons. It argues for a Rawlsian approach to felon reintegration. This article will first review the tumultuous history of felon disenfranchisement. Second, it will provide a review of the laws that frustrate the reentry process for offenders. Third, it will compare reentry laws that frustrate reentry for ex-felons to the repressive racial contract themes explained by Rawls. The article will conclude by theorizing that a Rawlsian approach of the veil of ignorance is needed to have offenders become free and equal persons.

I. FELON DISENFRANCHISEMENT

Ratification of the Fifteenth Amendment¹⁴ guaranteed the right to vote and banished any infringement of that right. The right to vote, however, is not absolute. States may abridge a felon's right to vote.¹⁵ Infringing on the right to vote is not done in uniform fashion. Forty-eight states and the District of Columbia disenfranchise felons in some way.¹⁶ Sixteen states suspend the right to vote only during the incarceration period.¹⁷ Thirty-five states prohibit felons from voting while they are on parole and thirty of those states exclude felony probationers as well.¹⁸ Millions of ex-offenders are affected by the punitive policy. Over five million Americans have lost the right to vote because of a felony conviction.¹⁹ The disparate impact on African-American men is alarming. One million African American men are disenfranchised,²⁰ In five states that deny the right to vote to ex-offenders one in four African-American men is permanently disenfranchised.²¹

Voting disenfranchisement has a long and sordid history. Beginning in

13. *Id.*

14. "Section 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. Section. 2. The Congress shall have power to enforce this article by appropriate legislation."

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

16. *Felony Disenfranchisement Laws in the United States*, Sentencing Project, April 2007, http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf [hereinafter Sentencing Project]. Two states deny the right to vote to all ex-offenders who have completed their sentences. Nine others disenfranchise certain categories of ex-offenders and/or permit application for restoration of rights for specified offenses after waiting period (e.g., five years in Delaware and Wyoming, and two years in Nebraska). Two states, Maine and Vermont, do not disenfranchise felons.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Alabama, Arizona, Florida, Mississippi and Tennessee permanently exclude ex-offenders from voting. *Id.*

colonial times, the town council voted on which members were permitted to become citizens.²² New citizens were required to conform with religious requirements and to own property.²³ New England states added moral qualifications to exclude the “grossly scandalous, or notoriously vicious.”²⁴ Massachusetts was the first colony to introduce disenfranchise for crimes such as fornication.²⁵ The colonies varied on how long the convicted would be disenfranchised. Plymouth and Rhode Island had permanent bars, while Connecticut allowed re-enfranchisement with good behavior.²⁶ Alec Weld writes about the evolution of voting disenfranchisement from colonial to modern application:

Originally, the removal of criminals from the suffrage had a visible, public dimension; its purposes were articulated in the law; and it was a discrete element in punishment which required the deliberation of courts to implement. Moreover, crimes subject to the penalty of disenfranchisement were either linked to voting itself, as in Rhode Island, or defined as egregious violations of the moral code. Modern disenfranchisement laws—automatic, invisible in the criminal justice process, considered “collateral” rather than explicitly punitive, and applied to broad categories of crimes with little or no common character—do not share any of these characteristics.²⁷

After the American Revolution and the rejection of British common law systems, early state constitutions required evidence of good character for balloting and excluded convicted persons of particularly immoral character.²⁸ States explicitly denied felons the right to vote, and between 1776 and 1821 eleven state constitutions denied criminals the right to vote.²⁹ By 1868, eighteen more states excluded serious criminal offenders from voting.³⁰ The increase in disenfranchisement was attributed to class bias and the political elites attempting to limit the political strength of the general populous and control the political power in their hands.³¹ The rise of racially exclusionary

22. Alec C. Weld, *A Civil Death: The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WISC. L. REV. 1045, 1064 [hereinafter Weld].

23. *Id.*

24. *Id.* (quoting BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 1606-1660 54 (1983)).

25. *Id.*

26. *Id.*

27. *Id.* at 1062.

28. Weld, *supra* note 22.

29. *Id.* The eleven states which barred criminals from voting by 1821 were Alabama, Connecticut, Illinois, Indiana, Kentucky, Louisiana, Mississippi, Missouri, New York, Ohio, and Virginia.

30. *Id.* Weld notes that state constitutions disenfranchising criminals between 1831 and 1868 were those of California, Delaware, Florida, Georgia, Iowa, Kansas, Maryland, Minnesota, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, and Wisconsin.

31. Daniel S. Goldman, *The Modern Day Literacy Test?: Felon Disenfranchisement and*

laws would evolve in the latter quarter of the 19th century.

Prior to 1860, only six states allowed African Americans the right to vote.³² The passage of the Fourteenth Amendment and the powerful Equal Protection clause in 1868 had little effect after Northern troops vacated the South and post-Reconstruction Era policies were implemented. At that time, Southern states rewrote their voting laws to exclude African Americans.³³ In 1890, starting with Mississippi, the constitutional conventions used various techniques for disenfranchising African Americans, including force, restrictive and arbitrary registration practices, lengthy residence requirements, confusing multiple-voting-box arrangements, poll taxes, and literacy tests.³⁴ Literacy tests were exceptionally successful in excluding African-American men from voting because of the rate of illiteracy rates upwards of sixty-nine percent in the African-American community.³⁵

Southern States used several tactics to intimidate African Americans into not exercising their right to vote. The pernicious use of racially motivated voting exclusionary rules; the expansion of felon disenfranchisement laws; and a racially biased criminal justice system that meted justice through violence and intimidation were only a few methods states employed. The Alabama African-American prison population increased 74%, even though the nonwhite population increased only 3%.³⁶ The Mississippi disenfranchisement convention of 1890 altered the 1869 disenfranchisement laws to bar voting for any African Americans who committed any crime.³⁷ Other Southern states adopted similar laws, expanding the enumerated crimes that triggered a bar to voting rights for criminals. Georgia and Alabama included crimes of "moral turpitude," regardless of whether such a crime resulted in a prison sentence.³⁸ As the country began to recognize the rights of African Americans to vote, nearly simultaneously, the criminal justice system became more punitive and erased many of the progresses of the Civil Rights Movement for African-American felons.

It was not until the Voting Rights Act of 1965 that Southern oppressive laws curtailing or suppressing the African American vote were ameliorated.³⁹ The Voting Rights Act prohibits any voting practice or procedure "[that] results in a denial or abridgement of the right of any citizen of the United States to

Race Discrimination, 57 STAN. L. REV. 611, 626 (2004).

32. *Id.*

33. *Id.*

34. *Id.* at 616.

35. *Id.*

36. *Id.* at 626. The Alabama prison population was 2% nonwhite in 1850 but by 1870 to was 74% with only a 3% increase in nonwhite population over the same time period.

37. *Id.*

38. *Id.* at 627.

39. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§1971, 1973 to 1973ff-6 (1994)).

vote on account of race or color".⁴⁰ Juxtaposed to the socially progressive voting inclusion laws was the rise in incarceration rates for African Americans and the adverse impact of felony disenfranchisement.⁴¹

The rates of incarceration for African-American men rose exponentially since the passage of the Voting Rights Act. Nationwide, African-American men are incarcerated at nine times the rate of white men.⁴² In eleven states, black men are incarcerated at rates that are *twelve to twenty-six* times greater than those of white men.⁴³ Overrepresentation occurs at every stage of the criminal justice system and begins in juvenile courts.

Of all African-American males in the U.S. in their 30s, 52% have been incarcerated or imprisoned at some point during their lives.⁴⁴ The gateway to becoming a disenfranchised felon starts with juvenile delinquency. From 2002-2004, African-American youth represented 16% of all youth under 18 living in the United States, but made up 28% of all juvenile arrests, 30% of court referrals, 37% of the pretrial detained population, 30% of youth judged delinquent, 38% of youth in residential facilities, 35% of youth waived into adult courts, and 58% of youth incarcerated in adult prisons.⁴⁵ The entrée into the adult criminal justice system and voter disenfranchisement for African-American males begins with juvenile delinquency.

African-American adult males disproportionately are the most incarcerated population. There are 5 million African-American men aged 16 to 34 in the non-institutional (non-incarcerated) population.⁴⁶ Of the 5 million non incarcerated African American men, approximately 600,000 to 700,000 are

40. 42 U.S.C. §1973(a) (emphasis added). See also Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001) [hereinafter Gerken]. Legislative amendments and doctrinal development have produced two distinct types of Voting Rights Act claims: vote denial and vote dilution. Vote denial claims protect "individual citizens casting individual ballots." *Id.* Vote dilution claims generally apply when a state has drawn electoral districts "that give whites an electoral majority in a disproportionate share of districts, thereby ensuring that minority voters ...are never able to elect a candidate of choice." *Id.*

41. *Criminal Justice Statistics*, U.S. Dept. of Justice, Bureau of Justice Statistics, July 2007, <http://www.ojp.usdoj.gov/bjs/sent.htm>. In 2004, State and Federal courts convicted a combined total of nearly 1,145,000 adults of felonies -- State courts convicted an estimated 1,079,000 adults and Federal courts convicted 66,518 adults (accounting for 6% of the national total).

42. *Punishment and Prejudice: Racial Disparity in the War on Drugs*, Human Rights Watch, May 2000, http://www.hrw.org/reports/2000/usa/Rcedrg00-01.htm#P167_28183.

43. *Id.* The eleven states are California, Connecticut, Illinois, Iowa, Minnesota, Nebraska, New Jersey, Pennsylvania , Rhode Island, Texas and Wisconsin.

44. Nancy Martin and Samuel Halperin, *Whatever It Takes: How Twelve Communities are Reconnecting Out-of-School Youth, The Drop Out Problem in Numbers*, American Youth Policy Forum (2006) at vii, <http://www.aypf.org/publications/WhateverItTakes/WITfull.pdf> [hereinafter Twelve Communities].

45. *And Justice For Some: Differential Treatment of Youth of Color in the Justice System*, National Council on Crime and Delinquency, Jan. 2007 at 37, http://www.nccdcrc.org/nccd/pubs/2007jan_justice_for_some.pdf [hereinafter Justice for Some].

46. *Id.*

under some form of supervision in the criminal justice system each year.⁴⁷ The supervision includes 500,000 young African-American males who are on felony probation.⁴⁸ In total, nearly half of all non-institutionalized African-American men will have some contact with the criminal justice system in their lifetime.⁴⁹

The disproportionate impact of felon disenfranchisement laws on African-American males decries the need for legislation and reform. If the current rates of incarceration continue, three in ten of the next generation of black men can expect to be disenfranchised at some point in their lifetime.⁵⁰ In some states, as many as 40% of African-American men may permanently lose their right to vote because of disenfranchisement laws.⁵¹

II. CHALLENGES TO DISENFRANCHISEMENT LAWS

Offenders have fought to regain all of their rights after being incarcerated and released from supervision. The Fourteenth Amendment and the Voting Rights Act are the avenues of litigation offenders have used to attempt to restore their voting rights. The courts have predominantly eschewed challenges to the disenfranchisement laws.

A. Fourteenth Amendment

The original intent of the Equal Protection Clause of the Fourteenth Amendment⁵² was to protect former slaves from having their newly granted status as free and equal citizens be diluted, challenged or dissolved.⁵³ The Fourteenth Amendment extended the Thirteenth Amendment⁵⁴ by guaranteeing citizenship, equality and substantive legal rights.⁵⁵ Challenges to federal or state laws were brought based on laws that may impinge upon a guaranteed

47. *Id.*

48. *Id.*

49. *Id.* at 70.

50. Sentencing Project, *supra* note 3, at 1.

51. *Id.*

52. U.S. CONST. AMEND. XIV.

53. See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality and Voting Rights*, 51 EMORY L.J. 1397, 1405 (2002). Chambers notes that the Fourteenth Amendment was a recapitulation and extension of the Thirteenth Amendment. In the wake of the widespread denial of legal and civil rights to newly free former slaves, e.g., the passage and enforcement of the Black Codes, Congress presented the Fourteenth Amendment to guarantee that the legal rights presumed by some to have been granted to former slaves by the Thirteenth Amendment were specifically protected. Rather than provide specific substantive rights, the Fourteenth Amendment guarantees legal equality by making former slaves and free blacks U.S. citizens and citizens of the state in which they reside, and requiring that states provide all citizens the same set of substantive legal rights owed to them by virtue of their national and state citizenship. This is the import of the Privileges or Immunities and Equal Protection Clauses.

54. U.S. CONST. AMEND. XIII.

55. See Chambers, *supra* note 53, at 1405.

right.⁵⁶ Government classifications must be reasonably related to the purpose of the legislation.⁵⁷ The Supreme Court developed three levels of scrutiny to determine whether a state law violated the Equal Protection Clause: 1) rational basis is the most lenient standard,⁵⁸ 2) a substantial relationship to an important objective is the middle standard (referred to as intermediate scrutiny),⁵⁹ and 3) strict scrutiny is the strictest standard.⁶⁰ The strict scrutiny standard is applied when a fundamental right is affected.⁶¹

In the 1974 case *Richardson v. Ramirez*, Abran Ramirez challenged his disenfranchisement on Equal Protection grounds.⁶² The California Supreme Court agreed and held the disenfranchisement laws violated the Equal Protection Clause of the Fourteenth Amendment.⁶³ The United States Supreme Court overturned the California Supreme Court, finding that the strict scrutiny standard required by section one of the Fourteenth Amendment did not apply, but section two did apply.⁶⁴ Section two of the Fourteenth Amendment grants states the right to restrict the votes of ex-felons.⁶⁵ The Court found that the Equal Protection Clause did not apply to ex-felons. Section two of the Fourteenth Amendment permitted States to infringe on the voting rights of ex-felons because of criminal behavior.⁶⁶

In later cases, the Supreme Court placed limitations on how the states may interpret section two of the Fourteenth Amendment. In *Hunter v. Underwood*,⁶⁷ two disenfranchised offenders challenged the Alabama disenfranchisement law which restricted the voting rights of those who were convicted "of any crime... involving moral turpitude."⁶⁸ In reviewing the facts of *Hunter*, the Court stated that two factors must be met before felon disenfranchisement laws violated the Equal Protection Clause:⁶⁹ first, the plaintiffs must prove that the disenfranchisement law was written with the intent to racially discriminate.⁷⁰ Second, the plaintiff must prove the law has a disproportionate impact on a protected class.⁷¹ The Court evaluated the original intent of Alabama's disenfranchisement laws by reviewing the Alabama

56. Martine L. Price, *Addressing Ex-Felon Disenfranchisement: Legislation v. Litigation*, 11 J.L. & POL'Y 369, 378 (2002).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

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

63. *Id.* at 56.

64. *Id.* at 55.

65. *Id.*

66. See Price, *supra* note 56, at 380.

67. 471 U.S. 222 (1985).

68. AL. CONST. ART. VIII §182.

69. *Hunter*, 471 U.S. at 227.

70. *Id.*

71. *Id.*

Constitutional Convention of 1901.⁷² The Court found that “the zeal of white supremacy ran rampant during the convention.”⁷³ The Court found that §182 of the Alabama Constitution violated the Equal Protection Clause.⁷⁴ The Court determined that although it was written in a racially neutral fashion, the intent of the drafters was to exclude Blacks from the voting process.⁷⁵

The progeny of litigation after *Hunter* has not prevailed in challenging disenfranchisement laws. Proving the racially discriminatory intent of disenfranchisement laws should not be hard given that states’ use of such laws for discriminatory purposes.⁷⁶ Alabama’s 1901 Constitutional Convention evinced rampant intent to disenfranchise based on race.⁷⁷ However, courts have rejected the use of the *Hunter* rule in challenging disenfranchisement laws unless there is explicit racial discrimination. In *Cotton v. Fordice*, the Fifth Circuit rejected a challenge to Mississippi disenfranchisement laws due to the amendments to the Mississippi constitution not having discriminatory intent.⁷⁸ In *Howard v. Gilmore*, the Fourth Circuit dismissed a challenge to the Virginia laws because the laws predated the passage of the Thirteenth and Fourteenth Amendments and the plaintiff failed to make the nexus between the laws and racial discrimination.⁷⁹ Constitutional challenges to laws restricting exercise of voting rights have been proven more difficult to mount with *Hunter* and *Ramirez* as the leading cases on disenfranchisement because these cases set the bar for proving discrimination so high.

B. Voting Rights Act

Challenges to disenfranchisement laws through the Voting Rights Act (VRA) are launched by vote dilution or voter denial.⁸⁰ The 1982 amendment to the VRA created a results test that would specifically apply to voting rights legislation.⁸¹ A violation of the VRA can be established by showing that based

72. *Id.*

73. 471 U.S. at 229.

74. *Id.*

75. *Id.* at 227.

76. *Id.*

77. *Id.*

78. 157 F.3d 388 (5th Cir. 1998).

79. 205 F.3d 1333 (4th Cir. 2000).

80. See Gerken, *supra* note 40, at 1671. Vote dilution claims generally apply when a state has drawn electoral districts “that give whites an electoral majority in a disproportionate share of districts, thereby ensuring that minority voters ...are never able to elect a candidate of choice.” *Id.*

81. Voting Rights Act Extension Report of the S. Comm. on the J., 97th Cong. 28-9 (1982). The report listed several factors. [A] history of official racial discrimination in voting; racially polarized voting; practices such as majority-vote rules that may enhance the opportunity for discrimination; a discriminatory slating process; socioeconomic disparities that impede minority political participation; racial appeals in campaigns; and the lack of minority electoral success. Two additional factors included the absence of official responsiveness to minority group interests and a tenuous policy in support of the challenged voting practice.

on:

The totality of the circumstances, it is shown that the political processes are not equally open to participation by members of a certain class of citizens...in that the members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.⁸²

Since the amendment to the VRA, few disenfranchisement cases have prevailed.⁸³ Ex-felons have challenged state laws that deny them the right to vote based on race. In response, state and federal courts have required proof of specific discriminatory intent and impact in order to invalidate the law.⁸⁴ In *Wesley v. Collins*, the Sixth Circuit rejected a challenge brought by an ex-felon asserting that the Tennessee Voting Rights Act unfairly denied him the right to vote.⁸⁵ The court conceded that the challenging party need not prove discriminatory intent but that Wesley failed to establish a violation based on the "totality of the circumstances."⁸⁶ In *Baker v. Cuomo*, New York inmates and paroled felons challenged the state disenfranchisement laws and prevailed on appeal.⁸⁷ The Second Circuit found that New York could disenfranchise some, if not all felons, however, it could not do so based on their race.⁸⁸

Despite these victories, litigation remains an elusive method for offenders to challenge disenfranchisement laws because voting disenfranchisement laws are but one of several bars to offenders becoming a fully reintegrated citizen after being imprisoned. State and federal laws actively isolate and penalize offenders and frustrate the rehabilitation process.

III. PROBLEMS WITH REENTRY

The State and Federal prison population reached 2,245,189 as of June 2006.⁸⁹ African-American men compose 41% of the prison population (836,800).⁹⁰ More than 11% of African-American men aged 25-34 were incarcerated during June 2006.⁹¹ The total numbers of persons held in prisons

82. 42 U.S.C. § 1973(b).

83. See Price, *supra* note 56, at 387.

84. *Id.*

85. 791 F.2d 1255 (6th Cir. 1986).

86. *Id.* at 1260.

87. 85 F.3d 919 (2nd Cir. 1996).

88. *Id.* at 937. See also Price, *supra* note 56, at 390 (detailing that the lawsuit was ultimately dismissed without precedential effect).

89. Thomas Sabol, Todd Minton and Paige Harrison, *U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, Prison and Jail Inmates at Midyear 2006*, June 2007. [hereinafter Prison Inmates]. African American men were incarcerated in greater numbers in comparison to 1.9% of Hispanic men and .07% of white men. Black women were incarcerated a nearly 4 times the rate of white women and twice the rate of Hispanic women.

90. *Id.* at 9.

91. *Id.*

increased by over 650,000 between 1995 and 2006.⁹² The total number of African-American men incarcerated between 1995-2006 increased 325,900.⁹³ In 1985, 210,500 African-American men were incarcerated.⁹⁴ In the past twenty years, the number of African-American men incarcerated has increased four fold. While African Americans make up 13% of the general population, since 1991, African-American men are the single largest incarcerated population outpacing white men by over 100,000 as of June 2006.⁹⁵ Drug offenses are the largest offense category of incarceration for African-American men. They constitute 53% of all offenders imprisoned for drug convictions.⁹⁶ The racial disparity in the prison population is evidence that the War on Drugs was a War on African-American men.⁹⁷ The mass incarceration of African-American men has a devastating effect not just on them but their families and communities as well.

The families of the incarcerated face the immediate social and financial strains.⁹⁸ Many women whose husbands, boyfriends, fathers or brothers are incarcerated are left alone bearing the financial and emotional costs of maintaining a family. Researcher Beth Ritchie found:

women struggling to manage budgets consumed by addictions; women trying to hold families together when ties are weakened by prolonged absence; women attempting to manage the shame and stigma of incarceration; and women trying to prevent children from becoming casualties of the war on drugs.⁹⁹

92. *Id.* at 8.

93. U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prisoners in 1996*, at 9 June 1997 [hereinafter Prisoners 1996].

94. *Id.*

95. See *Prison Inmates*, *supra* note 89, at 9. See also U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics Bulletin, *Prisoners in 2005*, at 9, Nov. 2006 at 8 [hereinafter Prisoners 2005].

96. *Id.*

97. See Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' was a 'War on Blacks'*, 6 J. GENDER RACE & JUST. 381, 435-38 (2002) (detailing how the War on Drugs was example of the central role both race and the definition of crime play in the maintenance and legitimization of white supremacy); Floyd Weatherspoon, *The Devastating Impact of the System on the Status of African American Males*, 23 CAP. L. REV. 23, 27-43 (1994) (detailing the disproportionate investigation, arrest, charging and sentencing of Black men within the criminal justice system); Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703 (2000) (detailing racial disparities in the prosecution of drug laws); D.J. Silton, *U.S. Prisons and Racial Profiling: A Covertly Racist Nation Rides a Vicious Cycle*, 20 LAW & INEQ. 53, 61 (2002) (reporting that between 1976 and 1989 'the total number of drug arrests of Caucasians grew by 70%, compared to a 450% increase among African Americans 'and that the number of Caucasians incarcerated for drug offenses increased by 50% from 1986 to 1991, while the number of African Americans incarcerated increased by 350%).

98. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African Americans Communities*, 56 STAN. L. REV. 1271, 1282 (2004).

99. *Id.* (quoting Beth E. Richie, *The Social Impact of Mass Incarceration on Women* 136, 147 in *Invisible Punishment Collateral Consequences of Mass Imprisonment* (Marc Mauer & Meda Chesney-Lind eds., 2002).

The overall African-American community suffers from weakened and strained families of the incarcerated. The children of incarcerated parents lose a parent (sometimes both) for years at a time. The Bureau of Justice Statistics indicates that 2% of U.S. children have a parent who is incarcerated.¹⁰⁰ African-American children are nine times more likely to have a parent who is incarcerated.¹⁰¹ These children are deprived of the economic and social support of their fathers.¹⁰²

The number of inmates released from incarceration averages 658,000 per year.¹⁰³ African-American men are forty percent of released inmates.¹⁰⁴ The annual numbers are estimated at 269,000.¹⁰⁵ The fate of the over 200,000 African-American men released annually from prison is questionable at best. They return to communities that are unable to absorb them back because they return with the same limited job skills and education that they left with, but, now they also have felony records that restrict them from locating a job or attending school. Their statuses as felons reduce the quality of life of released men because the most basic tenets of society - housing, employment, and education - are denied to reentering offenders.

A. Housing

Private property owners are leery of returning offenders. Landlords make inquiries into backgrounds and deny those who have criminal records.¹⁰⁶ For example, two-thirds of Akron, Ohio landlords consistently will reject returning offenders.¹⁰⁷ The offender must show signs of rehabilitation to be considered for a rental unit.¹⁰⁸ Criminal activity, particularly drug offenses, is a *prima facie* case for eviction.

100. Christopher Mumola, *U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report, Incarcerated Parents and Their Children*, April 2000 [Incarcerated Parents].

101. *Id.* at 2. Of the 72 million minor children in 1999, 787,000 Black children (7%) had a parent in prison.

102. Roberts, *supra* note 78, at 1284.

103. Prison Inmates, *supra* note 69, at 1.

104. *Id.*

105. *Id.*

106. Michael Pinard and Anthony Thompson, *Offender Reentry and Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 590 (2006). See also Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offenders*, 71 FEDERAL PROBATION 20 (2007).

107. *Id.* Clark survey 3000 landlords and found that 66% of landlords did not accept criminal histories.

108. *Id.* at 24. Clark details analysis that shows there are landlords willing to consider applicants with certain kinds of criminal backgrounds. A landlord's decision to lease to a specific person is based upon many factors, including, but not limited to, credit, income, employment, rental history, and criminal background. Each of the factors represents a basis for the landlord to develop a sense of trust in the applicant's ability and willingness to comply with lease requirements and certain standards of behavior.

Housing discrimination is sanctioned by the federal government against returning offenders under the guise of protecting the community. Public housing agencies are allowed access to criminal records of housing applicants.¹⁰⁹ If an offender's family lives in publicly subsidized housing, the offender's family risks being evicted.¹¹⁰ An offender who chooses not to place his or her family at risk faces homeless shelters as the only housing option available.¹¹¹

B. Employment

Employment for young less-educated men, especially African-American men, is difficult to obtain.¹¹² Felony records and incarceration compound the already existing problem of poor employment history, creating catastrophic results for the offender and the community to which he returns.¹¹³ Employment for less-educated white men aged 16-24 has shown a decline.¹¹⁴ Employment statistics for African-American men is stable.¹¹⁵ Employment has grown for Latino men aged 16-24 who are less-educated.¹¹⁶ Whites compose 57.6%, of the less-educated young men aged 16 to 24.¹¹⁷ African American men compose 15.7% of the population.¹¹⁸ Latino men compose 23.5% of the less-educated male population aged 16 to 24.¹¹⁹ The proportion of less-educated white men has declined from 78% in 1979 to 57.6% (6.16 million to 3.3 million).¹²⁰ The Latino population of less-educated men more than doubled in

109. 42 U.S.C. § 1437d(q) (2000):

(q) Availability of records

Notwithstanding any other provision of law, except as provided in subparagraph (C), the National Crime Information Center, police departments, and other law enforcement agencies shall, upon request, provide information to public housing agencies regarding the criminal conviction records of adult applicants for, or tenants of, covered housing assistance for purposes of applicant screening, lease enforcement, and eviction.

110. *Id.*

111. See Jeremy Travis, Amy Solomon and Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prison Reentry*, at 35, Urban Institute (2001). The authors found that in California, the Department of Corrections reports that at any given time 10 percent of the state's parolees are homeless. This rate is significantly higher in major urban areas such as San Francisco and Los Angeles, where as many as 30 to 50 percent of parolees are estimated to be homeless.

112. Ronald Mincy, Charles Lewis, and Wen-Jui Han, *Left Behind: Less Educated Young Black Men*, in *BLACK MALES LEFT BEHIND* 3 (2006). The authors define less-educated to mean young men between the ages of 16 and 24 who have either not completed high school or who are not enrolled in postsecondary institution.

113. *Id.* See also Travis, *supra* note 111, at 35.

114. *Id.* at 3.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

the same time period from 7.5% in 1979 to 23.5% (539,000 to 1.34 million).¹²¹ The number of African-American less-educated men remained proportional, 13.1% in 1979 to 15.0% in 1999.¹²² The labor pool of less-educated men has increased dramatically along with increased competition for low-skilled and low-waged jobs.

The actual numbers of less-educated young African-American men in the workforce (1.03 million in 1979 to 898,000 in 2001) declined due to incarceration or other involvement in the criminal justice system.¹²³ Wages for less-educated men 16-24 years-old increased only slightly in a twenty year time period.¹²⁴ These men made a median hourly wage of \$7.22 in 1979, in 2001 the median hourly wage was \$7.72.¹²⁵ The implications are bleak for African-American and Latino men. Larger numbers of less educated workers are in the labor market where wages remain stagnant over two decades.

A large number of less-educated men suffer substantially high rates of joblessness. More than a quarter (27%) of the overall population of less-educated men reported no wages in 2001.¹²⁶ The labor market is hardest for less-educated young African-American men. An overwhelming majority of these men were paid less than the median wage for 2001.¹²⁷ Researchers found that 82.9% of less-educated young African-American men earned the median or less than the median hourly wage of \$7.72.¹²⁸ Nearly half of less-educated young African-American men reported no income for 2001.¹²⁹

Engaging in criminal activity comes with additional costs than just serving a sentence or being branded a felon. Criminal activity keeps young men from participating in the labor market and makes employers leery of hiring them.¹³⁰ The effects of incarceration can reduce the potential for an individual to obtain employment by 25%.¹³¹ And if a man with a criminal record does find employment, his earnings are reduced by 10-20%.¹³² A study of employers' perceptions of offenders evinced a negative bias. Employers are not only less likely to hire ex-offenders, they use screening tools such as background checks

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 4.

127. *Id.*

128. *Id.* Less educated young white men earned 62.6% of the median hourly wage. Less educated young Latino men earned 73.3% of the median wage.

129. *Id.*

130. Harry Holzer, Steven Raphael and Michael Stoll, *How Do Employers Perception of Crime Affect the Employment Prospects of Less-Educated Young Black Men*, in BLACK MALES LEFT BEHIND 68 (2006).

131. *Id.* at 70.

132. *Id.*

to actively exclude people in criminal records from their potential job pools.¹³³ It has been concluded that the growing presence of ex-offenders amongst the population of low-income African-American men has serious negative consequences for employment rates.¹³⁴ Employers with imperfect information about African-American job applicants are likely to engage in statistical discrimination.¹³⁵ The employment prospects for the thousands of young African-American men returning to their communities are bleak.

C. Education

Regulations pertaining to educational and job training institutions limit access to these institutions for offenders, further hindering an offender's successful reentry. Limitations on financial aid and licensing leave few legitimate opportunities for offenders. Drug offenders are barred from obtaining financial aid.¹³⁶ State laws bar offenders from obtaining professional

133. *Id.* at 81.

134. *Id.*

135. *Id.*

136. See 21 U.S.C. § 862a (1)-(2) (2004):

Chapter 13. Drug Abuse Prevention and Control (Refs & Annos)

Subchapter I. Control and Enforcement

Part D. Offenses and Penalties

§ 862a. Denial of assistance and benefits for certain drug-related convictions

(a) In general

An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 802(6) of this title) shall not be eligible for--

(1) assistance under any State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. s 601 et seq.], or

(2) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977 [7 U.S.C.A. s 2012(h)]) or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. s 2011 et seq.].

(b) Effects on assistance and benefits for others

(1) Program of temporary assistance for needy families

(1) Program of temporary assistance for needy families

The amount of assistance otherwise required to be provided under a State program funded under part A of title IV of the Social Security Act [42 U.S.C.A. s 601 et seq.] to the family members of an individual to whom subsection (a) of this section applies shall be reduced by the amount which would have otherwise been made available to the individual under such part.

(2) Benefits under the Food Stamp Act of 1977

(2) Benefits under the Food Stamp Act of 1977

The amount of benefits otherwise required to be provided to a household under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977 [7 U.S.C.A. s 2012(h)]), or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C.A. s 2011 et seq.], shall be determined by considering the individual to whom subsection (a) of this section applies not to be a member of such household, except that the income and resources of the individual shall be considered to be income and resources of the household.

licenses.¹³⁷ Two requirements for obtaining a professional license that effectively bar offenders from obtaining those licenses are good moral character and a not having a prior criminal conviction.¹³⁸ A criminal record in some jurisdictions imputes bad moral character.¹³⁹ States have the police power to regulate licensing for the protection of the health and welfare of the public.¹⁴⁰

Reentry becomes a greater obstacle when employment and educational opportunities are limited.¹⁴¹ Employment is a crucial factor in reducing recidivism and reintegrating ex-offenders into the community.¹⁴² Employment is essential in rehabilitation.

Rehabilitation is a requirement to gain reentry and access to community resources. Ex-offenders must disavow engaging in any criminal activity in the future for access to specific programs and services. If ex-offenders can prove they are rehabilitated, they then can gain access to employment and training. Five states offer certificates of rehabilitation to offenders which lift or limit restrictions on obtaining professional licenses based on criminal records.¹⁴³ If ex-offenders do not reside in states where proof of rehabilitation is possible, employment and education options are limited. The federal government has

137. Thirty five states do not regulate use of criminal records in determining license eligibility and nineteen do have regulation. See Debbie Mukamal and Paul Samuels, *Statutory Limits on Rights of People with Criminal Records*, 30 FORDHAM URB. L. J. 1501, 1504 (2003). Ariz. Rev. Stat. § 13-904(E) (2001); Ark. Code Ann. § 17-1-103(c)-(e), (i); Colo. Rev. Stat. Ann. § 24-5-101 (2002); Conn. Gen. Stat. § 46a-80(d) (1995); Haw. Rev. Stat. § 831-3.1 (1993); Ind. Code § 25-1-1.1-1 (1993); Ky. Rev. Stat. Ann. § 335B.020 (Banks-Baldwin 2001); Mich. Comp. Laws § 338.43(1) (1992); Minn. Stat. § 364.03 (1991); Mo. Rev. Stat. § 314.200 (2001); Mont. Code Ann. § 37-1-203 (2001); N.J. Stat. Ann. §§ 2A:168A-2, 2C:51-2 (West 1985); N.M. Stat. Ann. §§ 28-2-3(b)(2), 28-2-4, 28-2-6, 23-2-5; N.Y. Correct. Law §§ 750-754 (McKinney 1987); N.D. Cent. Code § 12.1-33-02.1 (1997); Or. Rev. Stat. § 670.280 (1991); 18 Pa. Cons. Stat. §§ 9124 (c)-(d), 9125(c) (2000); Wash. Rev. Code §§ 9.96A.020, 9.96A.030, 9.96A.060 (1998); Wis. Stat. §§ 111.325, 111.335(1)(c).

138. Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to Ex-Felon's Employment Opportunities*, 71 N.D. L. REV. 187, 195 (1995).

139. *Id.* at 196.

140. See *Rabino v. Commonwealth*, 450 A.2d 773, 775 (Pa. Commw. Ct. 1982).

141. Christopher Uggen, *Work as the Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment and Recidivism*, 65 AM. SOCIO. REV. 529, 542 (2000). Uggen's study found that offenders who are provided even marginal employment opportunities are less likely to reoffend.

142. *Id.*

143. See Mukamal and Samuels, *supra* note 137, at 1505. Haw. Rev. Stat. § 378-2.5.; Kan. Stat. Ann. § 22-4710(f); N.Y. Correct. Law §§ 750-754; 18 Pa. Cons. Stat. § 9125(b); Wis. Stat. §§ 111.325, 111.335(1)(c). The authors found that restoration of civil rights is available to individuals convicted of two or more felonies upon completion of probation or discharge from prison. The date of the order and the fact that the individual's civil rights have been restored will appear on the individual's record. Ariz. Rev. Stat. §§ 13-905 (1999), 13-906 (2001). The civil rights of first-time felony offenders are restored automatically upon completion of criminal sentence. *Id.* § 13-912. Once an individual's civil rights have been restored, public employment or occupational licensure may be denied on the basis of a conviction only if a "reasonable relationship" exists between the conviction and employment or license sought. *Id.* § 13-904(E).

given drug offenders a chance to obtain an education if they attend treatment.¹⁴⁴ Drug offenders gain financial aid eligibility through attending a federally approved drug program or if their conviction is reversed.¹⁴⁵ Novel programs are available in a small number of states to assist ex-offenders with employment and education, however, the majority of states give ex-offenders limited assistance.¹⁴⁶ Prison becomes a revolving door for ex-offenders, for especially African-American men and symbolizes a system of exclusion and failure that has its roots in the pernicious history of white supremacy.

144. *Id.*

145. 20 U.S.C. § 1091 (2006):

Title 20. Education

Chapter 28. Higher Education Resources and Student Assistance

Subchapter IV. Student Assistance

Part F. General Provisions Relating to Student Assistance Programs

(r) Suspension of eligibility for drug-related offenses

(1) In general

(1) In general

A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42 shall not be eligible to receive any grant, loan, or work assistance under this subchapter and part C of subchapter I of chapter 34 of Title 42 from the date of that conviction for the period of time specified in the following table:

If convicted of an offense involving:

The possession of a controlled substance:

Ineligibility period is:

First offense 1 year

Second offense 2 years

Third offense Indefinite.

The sale of a controlled substance:

Ineligibility period is:

First offense 2 years

Second offense. Indefinite.

(2) Rehabilitation

A student whose eligibility has been suspended under paragraph (1) may resume eligibility before the end of the ineligibility period determined under such paragraph if--

(A) the student satisfactorily completes a drug rehabilitation program that--

(i) complies with such criteria as the Secretary shall prescribe in regulations for purposes of this paragraph; and

(ii) includes two unannounced drug tests; or

(B) the conviction is reversed, set aside, or otherwise rendered nugatory.

(3) Definitions

In this subsection, the term "controlled substance" has the meaning given the term in section 802(6) of Title 21.

146. Richard Seiter & Karen Kadela, *Prison Reentry: What Works, What Does Not, and What is Promising*, 49 CRIME & DELINQUENCY 360, 380. (2003).

III. RACIAL CONTRACT

A. History

The history of felon disenfranchisement laws in the United States displays the history of racism and oppression that the States promulgated and the citizenry tolerated. As the U.S. government passed constitutional amendments to redress past oppression, the playing field has not been leveled for all African Americans. Criminal offenders are victims of a systemic exclusion that encompasses all areas of citizenship. The conglomeration of the laws dictating the War on Drugs, voting disenfranchisement and denial of government assistance operate as a racial contract designed to exclude African-American offenders from ever being able to participate fully in society, thereby restricting their rights as citizens.

Charles Mills posits that white supremacy is the unnamed political system that has made the modern world what it is today.¹⁴⁷ The modern world, according to Mills, defines the African-American experience under conditions of white supremacy as a world that has negative ramifications for every sphere of black life-juridical standing, moral status, personal and racial identity, political inclusion, sexual relations and aesthetic worth.¹⁴⁸ Mills uses contract theory to explain the foundations of white supremacy.¹⁴⁹ Mills uses the racial contract to explain the underpinnings of white supremacy and its effect on Western society, especially in the United States. Mills quoted noted political philosopher Robert Blauner:

The colonial order in the modern world has been based on the dominance of white Westerners over non-Western people of color; racial oppression and the racial conflict to which it gives rise are endemic to it...In the United States, as elsewhere, it was a colonial experience that generated the line up of ethnic and racial division.¹⁵⁰

The racial contract explains the origins of the racial divisions and how society was crucially transformed by the making of a racial polity.¹⁵¹ A racial polity that Mills defines as a white supremacist polity—politics rethought

147. CHARLES MILLS, RACIAL CONTRACT 1 (1997).

148. CHARLES MILLS, BLACKNESS VISIBLE 6 (1998) [hereinafter Blackness].

149. Mills uses the classic contractarian Jean Jacques Rousseau to explain the political foundations of a just and unjust society. Mills refers to Rousseau's Discourse on Inequality. Rousseau explained the origins of inequality as the rich consolidating their wealth and power through deceitful social contracts. The social contracts were used by the unjust as an exploitative tool in which the poor were ruled by an oppressive government and the poor were regulated by immoral codes. An ideal contract is a just society that has a moral government and is regulated by defensible moral codes. Mills utilizes the immoral social contract to explain the foundations of white supremacy and labels such a contract the racial contract. Mills, *supra* note 115, at 5.

150. *Id.*

151. *Id.*

around the axis of race.¹⁵²

The racial contract is the social contract with racialized aims.¹⁵³ The racial contract is the reconstitution of the political and moral obligations of the social contract into a subversive and morally repugnant white supremacist contract.

The racial contract explains the creation of Western society based on racial hierarchy. The racial hierarchy reconstitutes individuals in society, establishes the state, and creates the moral and psychological code of white supremacy.¹⁵⁴ The racial contract is a set of meta-agreements (higher level contracts about contracts, which set limits on the contracts' validity) between Whites.¹⁵⁵ The racial contract rules regulating the behavior of Whites in their dealings with one another do not include non-Whites.¹⁵⁶ The general purpose of the contract is always to privilege Whites as a group at the expense of non-Whites.¹⁵⁷ This is achieved through the exploitation of non-white bodies, by withholding land and resources from them, and denying equal socioeconomic opportunities to non-Whites.¹⁵⁸ All Whites are beneficiaries of the contract, though some Whites are not signatories to it.¹⁵⁹ It is a contract between Whites in dominion over non-Whites.¹⁶⁰ Non-Whites are the objects rather than the subject of the racial contract.¹⁶¹

The racial contract establishes a racial polity, a racial state, and a racial juridical system.¹⁶² The status of Whites and non-Whites is clearly demarcated by custom and law. The purpose of the racial state is specifically to maintain and reproduce the racial order. The racial state secures privileges and advantages to full white citizens and maintains the subordination of non-Whites.¹⁶³ The white citizens consent, whether tacitly or explicitly, to the racial order of white supremacy.¹⁶⁴ The drafters of the U.S. Constitution evince the creation of a racial state for white citizens. The drafters refused to use the term "slave" in the document but sanctioned the institution.¹⁶⁵ The White signatories to the racial contract adhere to an ignorance of the knowledge or ramifications of the contract.¹⁶⁶ Whites are unable to understand the world that

152. Blackness, *supra* note 148, at 122.

153. *Id.*

154. *Id.* at 11.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 12.

161. *Id.* at 12.

162. *Id.*

163. *Id.*

164. *Id.*

165. See STAUGHTON LYND, SLAVERY AND THE FOUNDING FATHERS 117, 128 (1969).

166. *Id.*

they have made.¹⁶⁷ Whites fail to understand genuine social realities.¹⁶⁸ The white misunderstanding, misrepresentation, evasion and self-deception on race are among the most pervasive mental phenomena of the past few hundred years.¹⁶⁹ A cognitive and moral ignorance that was required for conquest, colonization and enslavement.¹⁷⁰

The racial contract has three dimensions. First, the racial contract is constantly being rewritten by the signatories.¹⁷¹ Race is politically constructed and dynamic.¹⁷² As race changes over time so do the rules of racial membership.¹⁷³ The original historical version of the racial contract was a discrete event that founded societies.¹⁷⁴ The original version was written amongst Europeans as they divided the spoils of African conquests, instituted the African slave trade and as colonialism was created.¹⁷⁵ The present day racial contract is continually rewritten to create different forms of the racial polity.¹⁷⁶ Racial contracts restrict employment, housing and political discourse. Housing covenants are examples of how racial contracts have historically kept neighborhoods racially segregated. Racial contracts portray the continuation of de facto white privilege.¹⁷⁷

A second distinguishing feature of the racial contract is its economic dimension. The foundation of the racial contract is economic exploitation that secures and legitimates the privileging of individuals based on whiteness and the exploitation of non-Whites.¹⁷⁸ Historically, colonialism lies at the roots of white privileging.¹⁷⁹ Nations were colonized for the economic benefit of Europe.¹⁸⁰ European offshoots, the United States and Canada, continue through financial institutions and corporations to benefit from white privilege.¹⁸¹

The final dimension is the violent arm of the state to maintain the racial contract.¹⁸² The coercive arms of the state—the police, the penal system, the army—are enforcers of the racial contract who keep the peace.¹⁸³ The enforcers prevent crime amongst white citizens, maintain the racial order and

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 72.

172. Blackness, *supra* note 148, at 76.

173. *Id.*

174. *Id.* at 32.

175. *Id.* at 73.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 35.

180. *Id.*

181. *Id.*

182. *Id.* at 84

183. *Id.*

destroy challenges to it.¹⁸⁴ Crimes against Whites by non-Whites are singled out and treated as “the crime of crimes” and the most severe punitive sanctions are meted out.¹⁸⁵

Laws that exclude offenders from the basic tenets of society incorporate the three dimensions of the racial contract present. As the racial contract is constantly being rewritten, so are the laws that dictate societal participation for offenders. Racial contracts have an economic dimension that mirror laws that restrict offenders’ employment and educational options. The U.S. government restricts financial aid and State government restricts occupational licensing of offenders.¹⁸⁶ Offenders are economically restrained by biased laws. Because of the high rates of incarceration of African-American males, it is mostly this population of individuals who are left with few opportunities to participate in the U.S. economy and subsequently have high recidivism rates.¹⁸⁷

The racial contract is exemplified by the coercive arm of the state. The judicial and penal systems have participated in the mass incarceration of a generation of African-American men. Twenty years of increased punitive measures has decimated the African-American community. Young African-American men are unemployed because they spend their youth in prison.¹⁸⁸ Racial order is maintained by having nearly 900,000 African-American men incarcerated annually. Thousands of these men are released into society, without jobs, housing or education.¹⁸⁹ The racial hierarchy is reinforced by the exclusion of African-American men from mainstream society. The only remedy to combat the systemic nature of the racial contract is to reconfigure the racial contract into a socially just contract.

B. Application of the Racial Contract

The embodiment of the racial contract in U.S. history is exemplified by the extraordinary means used by white supremacists to exclude African-Americans from mainstream participation. Voting is the principal example. Voting was a vestige of white privilege.¹⁹⁰ Voting became the object of a bulwark of disenfranchisement laws used to exclude African Americans from voting. Prior to the Civil War and Reconstruction eras, very few African

184. *Id.*

185. *Id.*

186. See *supra* notes 84-110.

187. See Travis, *supra* note 111. Between 1990 and 1998 there has been a 54% increase in individuals returning to prison. Parole violations account for more than one third of prison admissions.

188. See *Twelve Communities*, *supra* notes 44, at vii.

189. See *Justice for Some*, *supra* notes 45, at 37.

190. White privilege denotes the everyday as well as the structural advantages enjoyed by persons and groups under White supremacy.” Francisco Valdes, *Under Construction: Latcrit Consciousness, Community, and Theory*, 85 CALIF. L. REV. 1087, 1106, n.63 (1997).

Americans could exercise the right to vote.¹⁹¹ The passage of the Fifteenth amendment required white supremacists to rewrite the racial contract to exclude African Americans from voting to maintain their privilege.¹⁹²

The Fifteenth amendment guaranteed all citizens the right to vote. Therefore, Southern states had to rewrite their constitutions.¹⁹³ The racial contracts—State constitutions—were thus rewritten with the intent to exclude African Americans.¹⁹⁴ To further the aims of the racial contract, Southern states expanded felon disenfranchisement laws.

Mississippi's redrafted constitution weakened the threshold for barring African Americans from voting.¹⁹⁵ The commission of any crime was a bar to voting¹⁹⁶. The courts upheld voting disenfranchisement based on criminal behavior.¹⁹⁷ The disproportionate impact of felon disenfranchisement law on African American men has its foundations in the legislatures and courts. The courts and legislatures became coercive components of maintaining the racial contract. The only remedy to the coercive nature of the racial contract is the redefining of the social contract to remedy the racial contract.

IV. SOCIAL CONTRACT

A. History

The solution to assisting African-American men into reintegration has its origins in the political theories of John Rawls.¹⁹⁸ Rawls's predominant theme was a just, well-ordered society that contained free and equal people.¹⁹⁹ However, Rawls knew that the only way to obtain justice and equality was to blind the participants not only to their negotiating partner's characteristics but to blind the partner to their own characteristics.²⁰⁰ Equality is achieved through each party's ignorance.²⁰¹

191. See Weld, *supra* note 22 at 1064.

192. *Id.*

193. See Goldman, *supra* note 31, at 626.

194. *Id.*

195. *Id.* at 616.

196. *Id.*

197. See Richardson v. Ramirez, 418 U.S. 24 (1974).

198. John Rawls was one of the pre-eminent political philosophers of the 20th century. Rawls' writings changed the landscape of moral and political philosophy. Rawls revitalized the study of social issues and he took stands on justice, ethics rationality and philosophical method.

199. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT, 8-9 (2000). Rawls recognizes that the idea of the well ordered society is a considerable idealization. Yet the concept of justice for a democratic society requires a system of cooperation between free and equal citizens from one generation to the next.

200. The bargaining position is called the original position. *Id.* at 15-16.

201. The Veil of Ignorance guarantees each bargaining party's position is equal through ignorance. *Id.*

One of the fundamental concepts of justice for Rawls is the idea of a well-ordered society that has open political and social institutions.²⁰² In this society, citizens' sense of effective government enables them to understand and apply the publicly recognized principles of justice. The publicly recognized sense of justice means that all members of society accept the same principles of justice.²⁰³ The principles of a well ordered society would undermine any racial contracts established by Whites to exclude non-Whites. The public knowledge and acceptance of justice means all peoples are treated fairly without racialized concepts of justice. The well ordered society is composed of an independent judiciary, legally recognized forms of property, a structured economy, and a family life.²⁰⁴ The well ordered society has a basic structure.²⁰⁵ The basic structure encompasses citizens' aims, aspirations and character, and opportunities and ability to take advantage of them.²⁰⁶ The basic structure becomes the subject of political and social justice.²⁰⁷ For African-American men to partake in the basic structure of a well-ordered society, reentry laws would have to be rewritten not to disadvantage ex-offenders. African-American men who are ex-offenders are unable to take on their dreams and aspirations due to the unjust laws that exclude their participation in society.

To extend the idea of a just political and social system, a fair system of cooperation is required—a society that is organized around a fair system of cooperation between fair and equal persons.²⁰⁸ Organizing a society around a fair system of cooperation must be settled by an agreement reached by free and equal citizens engaged in cooperation and made in view of what they regard as reciprocal advantage.²⁰⁹ The fundamental concept of the racial contract is exclusion on non-Whites and the advantaging White signatories of the contract. Rawls understands historically that contracts have been used to advantage particular groups.²¹⁰ Rawls uses the hypothetical bargaining position²¹¹ of the original position to garner an agreement between citizens reached under conditions that are fair for all.²¹²

The original position seeks to guarantee citizens free and equal bargaining

202. *Id.* at 9.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 14.

209. *Id.* at 15.

210. *Id.*

211. See also REX MARTIN, RAWLS AND RIGHTS, 15 (1985). Martin explains that Rawls creates a hypothetical bargaining position where certain significant constraints operate and require discount of peculiar personal or circumstantial facts and biases embedded in objective circumstances or psychological orientation.

212. Rawls, *supra* note 7, at 15.

positions that yield free and equal participation in society.²¹³ The original position does not allow parties to know social positions or comprehensive doctrines of the persons they represent.²¹⁴ They do not know the person's race, ethnic group, sex or native endowments.²¹⁵ The limits on information are figuratively expressed by saying the parties are behind a veil of ignorance.²¹⁶ The original position seeks to eliminate the bargaining advantages that inevitably arise over time within society as a result of cumulative social and historical tendencies.²¹⁷ Rawls finds that historical advantages and accidental influences from the past should not influence agreements that affect the present and the future.²¹⁸ The original position is the answer to the question of how to extend the idea of a fair agreement to principles of political justice for the basic structure. The original position is a device of representation. The agreement must be entered under certain conditions that make it valid for political justice purposes.²¹⁹ The conditions must situate free and equal persons fairly and not permit unfair bargaining advantages over others.²²⁰ It must also guard against threats of force, coercion, deception and fraud.²²¹ Rawls notes the dilemma faced by any political conception of justice that uses the idea of contract: a point must be specified in which a fair agreement between free and equal persons can be reached.²²² The original position can specify that point.²²³

To engage in negotiation to partake in the basic structure one must be a free and equal person.²²⁴ A free person is a person who can engage in social

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id. Contra* ROBERT PAUL WOLFF, UNDERSTANDING RAWLS, 122 (1977). Wolff vigorously denies the potential existence of the original position but also of parties being able to negotiate under a veil of ignorance:

The players in the bargaining game are assumed to be rational not omniscient. They know whatever intelligent and educated persons can know about man and society. If that is a great deal then their deliberations will be fruitful; if it is very little, they will have to make do with such estimates as their knowledge warrants. If there are serious methodological and epistemological grounds for supposing that human beings could not have the sorts of general knowledge Rawls attributes to the parties in the original position, without their also having to be aware of the sorts of particular facts about themselves that are cloaked by the veil of ignorance—if in short, the particular combination of knowledge and ignorance required by Rawls construction is in principle impossible—the entire theory will be called into question.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 18.

224. Rawls recognizes that for citizens to be free and equal they have moral powers. The two moral powers are defined as (1) the capacity for a sense of justice and (2) the capacity for the conception of good. The capacity for a sense of justice involves the capacity to apply and to act from the principles of political justice that specify fair terms of social cooperation. The

cooperation over a complete life and take part in society as an equal person.²²⁵ Being a free citizen means being able to make valid claims on institutions to advance the free citizen's conceptions of the good.²²⁶ African American men are excluded from being free and equal persons. The laws do not allow reintegration as a free and equal person. A free and equal person is a person who can take part in society and exercise and respect its various rights and duties. A political conception of justice allows a citizen to be a free and equal participant in the well ordered society over a complete life.²²⁷

B. Application of the Social Contract

The social contract can reintegrate African-American men back into their communities. The apparatus that is used with such brutal efficiency to incarcerate African-American men must be counter posed with an equal power to decriminalize thousands of African-American men. The social contract, operationalized by the original position can have a leveling effect on African American ex-offenders.

A public conception of justice that Rawls postulates requires that there should be a consensus in the ideology that laws such as felon disenfranchisement are just.²²⁸ Rawls requires compliance with just institutions and usage of stabilizing penal devices to mete out punishment.²²⁹ If a person chooses criminal behavior in a fair and just system, "citizens of justice as fairness may force individuals to comply with the principles of justice, and may exercise this power without any remorse, doubt, or ambivalence."²³⁰ Citizens of a fair and just system can excise punishment because the punishment was produced from a fair and just system. The racial taint of felon disenfranchisement laws demonstrate that laws that are motivated by racial superiority fall short of the goals of fairness and justice, and should not be used to mete out punishment.²³¹ Voting disenfranchisement laws are an example of laws that are written to exclude ex-offenders. The exclusion is unfair if it is unjust.²³² African-American ex-offenders can become free and equal citizens

conception of good entails what is of value in a worthwhile life interpreted by religious, moral and philosophical doctrines. *Id.* at 18-19.

225. *Id.* at 20.

226. *Id.* at 23.

227. *Id.* at 24.

228. Rawls, *supra* note 196, at 9.

229. See Jesse Furman, *Political Illiberalism: The Paradox of Disenfranchisement and the Ambivalences of Rawlsian Justice*, 106 YALE L.J. 1197, 1212 (1997).

230. *Id.*

231. *Id.*

232. Furman argues that Rawls would exclude citizen participation in a just society. "Ex-offenders lose the right to participate because they have shown themselves to lack the political virtues on which the stability and welfare of a just order depends. A criminal act is taken to be, according to Rawls, a mark of bad character." *Id.* at 1225. I postulate that Rawls would never agree to political exclusion of ex-offenders based on white supremacist system that lacked justice

in a well ordered society if the regressive offender laws are rewritten, reinterpreted or abolished. Disallowing the full participation of ex-felons into society defeats attempts at rehabilitation and creates a culture of failure and re-imprisonment. Reentry laws should bolster not deny offenders rights and position in society. Employers, landlords, and educators should operate under the veil of ignorance and offer the components of citizenship in the well ordered society to ex-offenders. Offenders' families should not face the threat of eviction for housing an offender family member. Offenders should not have their financial aid or occupational licensing barred because of their offenses. As Rawls argued, no one party should benefit from accidents of history. No one group should be barred access to society.

CONCLUSION

The problems addressing the mass incarceration of African-American men must be a societal issue, not an issue to be addressed by the African-American community alone. Thousands of men will be released from prison without basic civil rights or civil liberties. The Thirteenth, Fourteenth and Fifteenth Amendments must apply to every African American. Second class citizenry will only cause further recidivism and devastation to the communities that are set to embrace African-American offenders once they are released. The racial contract evinces the racial prison industrial complex that has maintained domination over a generation of young African-American men. The Rawlsian social contract may be an avenue to explore the philosophy of justice as fairness. If the state can operate with the justice as fairness, African-American offenders would be treated no differently than other offenders or others citizens. The disparate impact of mass incarceration of African-American males will be the new civil rights frontier.