A JURY OF CITIZENS BOTH FREE AND IMPRISONED: IF VOTER RIGHTS ARE ENSURED FOR THE INCARCERATED, IS A PRISONER'S RIGHT TO SERVE ON A JURY FAR-FETCHED?

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The system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. These institutions are two instruments of equal power, which contribute to the supremacy of the majority. All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury.

-Alexis de Tocqueville (1835)[1]

INTRODUCTION

AMERICA may soon witness a sea-change in both federal and state felony disenfranchisement laws, as support for reinstating felons' right to vote appears to be gaining momentum across the political spectrum.[2] For instance, at the federal level in February 2019, the United States House of Representatives approved the "For the People Act of 2019," which would extend re-enfranchisement rights to the formerly incarcerated, if passed.[3] The movement,

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1. Alexis de Tocqueville, *Democracy in America, Volumes One and Two by Alexis de Tocqueville, trans. Henry Reeve*, PENNSYLVANIA STATE UNIVERSITY at 313 (1835), seas3.elte.hu/coursematerial/LojkoMiklos/Alexis-de-Tocqueville-Democracy-in-America.pdf.

2. Jesse L. Jackson Sr. & David Daley, *Don't Turn the Clock Back on Voting Rights*, BOSTON GLOBE (updated Mar. 31, 2019, 7:01 PM), https://www.bostonglobe.com/opinion/2019/03/31/don-turn-clock-back-voting-rights/dneM1qaygyn4uJ9fGQPkTK/story.html.

3. For the People Act of 2019, H.R. 1, 116th Cong. (2019).

however, has been nationally visible for some time, as The Emancipation Initiative was established in 2012.[4] That institute's mission provides that:

> Our Emancipation Initiative is about infusing our system with equitable justice and bringing about absolute inclusion for our people locked down and out of our democracy. Our key focus is ending Life Without Parole prison sentences and restoring voting rights here in Massachusetts as well as establishing universal prisoner suffrage throughout the country.[5]

That movement for re-enfranchisement has gained traction since 2012. In March 2019, the Reverend Jesse L. Jackson, together with author David Daley wrote in *The Boston Globe* about movement at the state level, in which the State of Florida re-enfranchised nearly 1.4 million ex-felons via state constitutional amendment.[6] Jackson and Daley challenged America that "[o]nce a citizen is free, they have full citizen rights and should be entitled to the most fundamental right, the right to vote."[7] The next month, Governor Kim Reynolds (R-IA) advocated strongly for a state constitutional amendment to restore voting rights to felons.[8] However, more progressive than advocacy for mere felon enfranchisement is advocacy to enfranchise the presently incarcerated.[9]

For example, Senator Bernie Sanders (D-VT), on his presidential campaign in Iowa, responded to a question proposing a guaranteed right to vote for the incarcerated.[10] Senator Sanders responded, "[i]n my state, . . . [y]ou're paying a price, you committed a crime, you're in jail. That's bad[.]"[11] Nevertheless, Sanders believes that states should extend a right to vote to the incarcerated.[12] He reasoned with regard to the incarcerated, "you're still living in American society and you have a right to vote. I believe in that, yes, I do."[13] Sanders' State of Vermont is one of two states that allow the incarcerated a right to vote. Similarly, Jamelle Bouie, a *New York Times* columnist and political correspondent, wrote that "There Is No

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4. Dana Liebelson, *In Prison, and Fighting to Vote*, THE ATLANTIC (Sep. 06, 2019), https://www.theatlantic.com/politics/archive/2019/09/when-prisoners-demand-voting-rights/597190/.

5. Emancipation Initiative Against Life Without Parole, Our Mission, https://emancipationinitiative.org/ (last visited Sep. 06, 2019).

6. Jackson Sr. & Daley, *supra* note 2.

7. *Id.*

8. David Pitt, *Bill to Restore Felon Voting Rights Stalls in Iowa Senate*, ASSOCIATED PRESS (Apr. 4, 2019), https://www.apnews.com/ea69efe29fce48579d848943c21c3b75.

9. Kevin Hardy, *In Iowa, Bernie Sanders Says States Should Allow Felons to Vote from Behind Bars*, DES MOINES REGISTER (updated Apr. 6, 2019, 6:05 PM), https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2019/04/06/bernie-sanders-says-states-should-felon-voting-rights-election-2020-iowa-caucus/3388679002/. *See also* German Lopez, *Bernie Sanders Wants to Expand Voting Rights by Letting People in Prison Vote*, VOX (Apr. 8, 2019), https://www.vox.com/policy-and-politics/2019/4/8/18300305/bernie-sanders-prisoners-felony-voting-rights.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

Good Reason Prisoners Can't Vote."[14] Bouie asked, "Why must supposedly universal adult suffrage *exclude* people convicted of crimes?"[15] He offered that "[t]he best argument, outside of the case from custom and tradition, is that committing a serious crime voids your right to have a say in the political process. You lose your liberty — your place in civil society — and the freedoms that come with it."[16]

Regardless of whether there is a "[g]ood [r]eason," there may be something stronger than mere "custom and tradition," as attempts to re-enfranchise prisoners may contain another goal in the undercurrent of voter rights.[17] For instance, Akhil Reed Amar, constitutional scholar and Yale Professor of Law, asserted that coexistent with the goals of enfranchising women via the Nineteenth Amendment was the right to "equal participa[tion] in jury service, which is, like voting, the way in which first-class citizens exercise that citizenship."[18] Professor Amar refers to these as a U.S. citizen's "political rights."[19]

With regard to the dual assurance of a right in the voting booth and the jury box, the United States Supreme Court addressed, in part, the conscious exclusion of women from a jury panel in the 1946 case of *Ballard v. United States*.[20] In that case, Justice William O. Douglas quoted *Thiel v. Southern Pacific Railroad Co.* verbatim, writing on behalf of the Court that *Ballard*'s holding "does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; [as] frequently such complete representation would be impossible."[21] Nevertheless, wrote Douglas, "it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. . . . To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."[22] Therefore, enfranchising the incarcerated via a constitutional amendment may put them among the groups about whom the Court wrote.[23] As such, it can conceivably guarantee both enfranchisement and a prisoner's right to temporary departure from the prison in

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14. Jamelle Bouie, *There is no good reason prisoners can't vote [Opinion]*, HOUSTON CHRONICLE (Apr. 15, 2019), https://www.houstonchronicle.com/opinion/outlook/article/There-is-no-good-reason-prisoners-can-t-vote-13768367.php. *See also* Jamelle Bouie, *Tell Me Again Why Prisoners Can't Vote*, N.Y. TIMES (Apr. 11, 2019), https://www.nytimes.com/2019/04/11/opinion/voting-prisoners-felon-disenfranchisement.html.

15. Jamelle Bouie, *Tell Me Again Why Prisoners Can't Vote*, N.Y. TIMES (Apr. 11, 2019), https://www.nytimes.com/2019/04/11/opinion/voting-prisoners-felon-disenfranchisement.html (emphasis added).

16. *Id.*

17. *Id.*

18. Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 465, 472 (1995).

19. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 217 (Yale Univ. Press 1998).

20. Ballard v. United States, 329 U.S. 187, 192–93 (1946).

21. *Id.* (quoting Justice William Francis Murphy's majority opinion in Thiel v. S. Pac. R.R. Co., 328 U.S. 217, 220 (1946)).

22. *Id.*

23. *Id.*

order to fulfill the civic duty of serving on a jury – a right that is coexistent with the right to vote.

Governor Reynolds (aforementioned) is not alone, however, as 2019 presidential candidates have weighed in similarly on the subject of felon disenfranchisement.[24] On behalf of Senator Kamala Harris (D-CA), spokesman Chris Harris stated that Senator Harris believes that America's "first priority should be restoring voting rights to the millions of formerly incarcerated people who are still being denied access to the polls."[25] However, Harris "is open to other restoration of rights as well."[26] Other candidates have reserved full support for prisoner voting rights, for which Sanders advocates and to which Harris may be open to discussion. For instance, according to *The Huffington Post*, former U.S. Representative Beto O'Rourke (D-TX), along with Senators Cory Booker (D-NJ), Kristen Gillibrand (D-NY), and Amy Klobuchar (D-MN), limited their support of restoring such rights to only *after* the individual is released from prison.[27] Nevertheless, on the full subject of voting rights concurrent with incarceration, Senator Gillibrand, stated, "I'm definitely for felons' rights. I just haven't thought about that one."[28] Some candidates have thought about it, such as Mayor of South Bend, Indiana, Pete Buttigieg (D), who supported re-enfranchisement "for all formerly incarcerated. Just not while still incarcerated."[29]

Some candidates have chosen a harder-lined stance, however. For instance, U.S. Representative and former Vice-Chairwoman of the Democratic National Committee,[30] Tulsi Gabbard (D-HI), has taken a contrary stance from those against whom she is running for president.[31] Representative Gabbard stated that felons should lack the ability to vote while under law enforcement control (including parole) because the felons' votes can be "unduly influenced by those [law enforcement] authorities."[32]

Meanwhile, Senator Elizabeth Warren (D-MA), when asked about felon disenfranchisement, responded, "[o]nce someone pays their debt to society, they're out there expected to pay taxes, expected to abide by the law, they're expected to support themselves and their families . . . I think that means they've got a right to vote."[33] Shying away from a full endorsement of such rights, Warren stated, "[w]hile they're incarcerated, I think that's something we can have more

24. Sam Levine & Igor Bobic, *2020 Candidates Are Very Hesitant About Letting Prisoners Vote*, HUFFINGTON POST (Apr. 10, 2019, 7:03 PM), https://www.huffpost.com/entry/2020-democrats-felon-disenfranchisement_n_5cae58dde4b09a1eabf75616.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. Michael Tsai, *Gabbard Resigns From DNC to Endorse Bernie Sanders*, HONOLULU STAR ADVISER (Feb. 28, 2016), https://www.staradvertiser.com/2016/02/28/breaking-news/gabbard-resigns-from-democratic-national-committee-to-endorse-bernie-sanders//.

31. Levine & Bobic, *supra* note 24.

32. *Id.*

33. *Id.*

conversation about."[34] She elaborated, however, stating that "[w]hen people are in prison, their civil rights are suspended. Not all their civil rights are suspended. I think it's an open conversation about what happens there."[35] Nevertheless, where that conversation begins and ends is a question of genesis at the state or federal level.

ANALYSIS

A. Current State vs. Federal Mobilization

At the federal level, in March 2019, the House of Representatives introduced the "For the People Act of 2019."[36] Sponsored by U.S. Representative John Sarbanes (D-MD),[37] it provides, in part, that "an individual disenfranchised by a criminal conviction may become eligible to vote upon completion of a criminal sentence or any part thereof, or upon formal restoration of rights, the State agency responsible for administering that sentence, or part thereof, or that restoration of rights."[38] Similarly, in April 2019, Senator Ben Cardin (D-MD) introduced the "Democracy Restoration Act" to restore federal voting rights to Americans who have fulfilled their sentences, but are still disenfranchised due to criminal convictions.[39] At a Capitol Hill briefing to introduce the For the People Act of 2019, Brennan Center for Justice Deputy Director Myrna Perez stated that presently, "[w]e are in a moment where Americans are demanding free, fair, and accessible elections . . . people's desire for progress and growth is palpable."[40]

Outside of the Legislative Branch, the movement for re-enfranchisement of the incarcerated is visible at the federal level. For instance, the Seventh Circuit Bar Association hosted a 2018 continuing legal education lecture at the Dirksen Federal Court House entitled "Voting Behind Bars."[41] The Association assembled "[a] panel discussion on voting rights of people in the criminal justice system."[42]

At the state level, those like Iowa Governor Kim Reynolds advocate for re-enfranchising former felons,[43] while others advocate to enfranchise the presently

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34. *Id.*

35. *Id.*

36. For the People Act, *supra* note 3.

37. *H.R.1-For the People Act of 2019*, CONGRESS.GOV (last visited July 29, 2019), https://www.congress.gov/bill/116th-congress/house-bill/1/text.

38. For the People Act, *supra* note 3.

39. Makeda Yohannes, *Senators Take Step Forward on Voting Rights Restoration*, BRENNAN CENTER FOR JUSTICE (Apr. 9, 2019), www.brennancenter.org/blog/senators-move-restore-voting-rights.

40. *Id. See also* Myrna Perez, BRENNEN CENTER FOR JUSTICE (last visited Aug. 1, 2019), https://www.brennancenter.org/expert/myrna-perez.

41. Seventh Circuit Bar Association Diversity and Inclusion Committee, *Voting Behind Bars: A Panel Discussion on Voting Rights of People in the Criminal Justice System*, 7TH CIRCUIT BAR ASSOCIATION (Mar. 14, 2018), https://cdn.ymaws.com/www.7thcircuitbar.org/resource/resmgr/Voting_rights_IV.pdf (viewable at https://www.youtube.com/watch?v=DA3cp2-bzH8&list=PLk2Oh57v8vOHKrfIIj7RUj34c5z9zcKN3&index=4)).

42. *Id.*

43. Hardy, *supra* note 9. *See also* Lopez, *supra* note 9.

incarcerated. Senator Bernie Sanders tapped into a state's rights concept when he suggested that it is the constitutional prerogative of states to re-enfranchise the incarcerated.[44] Sanders referenced Vermont in comparison to others states that do not afford such rights.[45] For instance, only Maine and Vermont allow incarcerated felons to vote.[46] Similarly, in *The Washington Post*, Massachusetts Institute of Technology Political Science Professor Ariel White advocated for changes to America's felon disenfranchisement, suggesting that the current "legal system disproportionately pushes black voters out of the electorate, and the problem goes far beyond felon disenfranchisement."[47] White provided Texas as an example to follow Florida and Louisiana, states which recently passed legislation to re-enfranchise former felons.[48] A states' rights approach to felon enfranchisement (as opposed to a federal constitutional amendment) has the capacity to create a trend among states of liberal extension to voter rights. It is therefore another manner in which the incarcerated, presently or formerly, could be afforded suffrage.

An approach to generating change among the respective states is easier than a constitutional amendment.[49] Moreover, such an approach is also subject to less criticism than a court-generated change, which can often receive "extreme backlash" and political opposition.[50] For instance, with regard to such opposition and the greater stability of state mobilization, Justice Ruth Bader Ginsburg wrote in 1985 about the subject of the U.S. Supreme Court lacking judicial restraint in the case of *Roe v. Wade*,[51] which Ginsburg suggests preemptively disrupted the individual State efforts to legislate accordingly.[52] Justice Ginsburg–then Judge–wrote for the *North Carolina Law Review*, "in my judgment, *Roe* ventured too far

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44. *Id.*

45. *Id.*

46. Jane C. Timm, *Most States Disenfranchise Felons. Maine and Vermont Allow Inmates to Vote From Prison*, NBC NEWS (Feb. 26, 2018), https://www.nbcnews.com/politics/politics-news/states-rethink-prisoner-voting-rights-incarceration-rates-rise-n850406. *See also* Levine & Bobic, *supra* note 24.

47. Ariel White, *Even Very Short Jail Sentences Drive People Away From Voting*, WASHINGTON POST (Mar. 28, 2019), https://www.washingtonpost.com/outlook/2019/03/28/even-very-short-jail-sentences-drive-people-away-voting/?noredirect=on&utm_term=.4210cecb7d04.

48. *Id.*

49. In a footnote to Justice Hugo Black's majority opinion, on behalf of the Court in *Reid v. Covert*, Black wrote upon the historical precedent of constitutional amendment that "It may be said that it is difficult to amend the Constitution. To some extent that is true. Obviously[,] the Founders wanted to guard against hasty and ill-considered changes in the basic charter of government. But if the necessity for alteration becomes pressing, or if the public demand becomes strong enough, the Constitution can and has been promptly amended. The Eleventh Amendment was ratified within less than two years after the decision in *Chisholm v. Georgia*, 2 Dall. 419. And more recently the Twenty-First Amendment, repealing nationwide prohibition, became part of the Constitution within ten months after congressional action. On the average it has taken the States less than two years to ratify each of the twenty-two amendments which have been made to the Constitution." Reid v. Covert, 354 U.S. 1, 14 n.27 (1957).

50. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2128 (2010). *See also* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L. REV. 375, 381–82 (1985).

51. Roe v. Wade, 410 U.S. 113 (1973).

52. Ginsburg, *supra* note 50, at 381-82.

in the change it ordered. The sweep and detail of the opinion stimulated the mobilization of a right-to-life movement and an attendant reaction in Congress and state legislatures."[53] In fact, what Ginsburg characterized as a previous "trend 'toward liberalization of abortion statutes' [as] noted in *Roe*," instead became a trend of "legislatures adopt[ing] measures aimed at minimizing the impact of the 1973 rulings . . ." and undermining the rights extended by the Court.[54]

Current state mobilizations of prisoner enfranchisement are as follows:

(1) In 2017, Alabama expressly narrowed the category of crimes for which individuals would suffer disenfranchisement by amending its State Constitution and enacting the "Definition of Moral Turpitude Act."[55]

(2) California amended its Constitution in 2016 to limit disenfranchisement to individuals "currently serving a state or federal prison sentence," while convicted felons sentenced to county jails may vote.[56]

(3) Florida began the process of amending its State Constitution in November 2018, to restore the voting rights of felons "who have completed all terms of their sentence, including parole or probation," but not including those "convicted of murder or a felony sexual offense."[57]

(4) Kentucky, according to the *Louisville Courier Journal*, is tracking Florida's progress and attempting to organize accordingly.[58] Kentucky reportedly "has long had some of the nation's highest rates of felony disenfranchisement," with "[n]early one in 10 residents" and "one in four African-Americans" barred, according to Washington D.C.'s The Sentencing Project.[59]

(5) Louisiana passed House Bill 265 in May 2018, re-enfranchising those "imprison[ed] for conviction of a felony."[60] Re-enfranchisement is available so long as "the person has not been incarcerated pursuant to the order within the last five years."[61] Introduced by Louisiana State Representative Patricia Haynes Smith (D-Dist. 67), H.B. 265 further provides that "registration shall be reinstated when the person . . . provides documentation from the appropriate correction official."[62]

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53. *Id.* at 381.

54. *Id.*

55. Definition of Moral Turpitude Act, H.R. 282, 2017 Leg. § 17-3-30.1 (Ala. 2017), alisondb.legislature.state.al.us/alison/searchableinstruments/2017RS/bills/HB282.htm.

56. A.B. No. 2466, 2016 Leg. (Cal. 2016), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2466. *See also* Jacey Fortin, *Can Felons Vote? It Depends on the State*, N.Y. TIMES (Apr. 21, 2018), https://www.nytimes.com/2018/04/21/us/felony-voting-rights-law.html.

57. News Service Florida, *Felons' Voting Fight Heads to House Floor*, FOX 35 (Apr. 10, 2019, 8:48 AM), www.fox35orlando.com/news/politics/felons-voting-fight-heads-to-house-floor.

58. Chris Kenning, *Locked Out: Critics Say It's Time to End Kentucky's Ban on Felon Voting*, LOUISVILLE COURIER JOURNAL (updated Nov. 12, 2018, 10:03 AM), https://www.courier-journal.com/story/news/2018/11/11/kentucky-among-last-permanently-ban-felons-voting-rights/1924690002//.

59. *Id.*

60. H.R. 265, 2018 Leg. § 18:102(A)(1) (La. 2018), https://legiscan.com/LA/text/HB265/id/1794029/Louisiana-2018-HB265-Engrossed.pdf.

61. *Id.*

62. *Id.*

(6) Massachusetts State Senator Adam G. Hinds (D-Pittsfield, MA) advocated to amend the State Constitution enfranchise clause and remove the words "excepting persons who are incarcerated in a correctional facility due to a felony conviction."[63] Nevertheless, Hinds acknowledged that he was "very well aware that this is likely to be controversial and provoke a strong reaction."[64] As such, he proposed "handling certain cases differently," by potentially excluding from the enfranchised class "folks who have taken the life of another individual."[65] Still, Hinds said that he and the American Civil Liberties Union "believe when people are incarcerated, they are still people."[66]

(7) In Mississippi, the State House Election Committee Chairman Bill Denny (R-Jackson) strove for a joint legislative study to analyze restoring voter rights.[67] This study was in addition to at least eighteen voter rights bills for the incarcerated from January to March of 2019.[68] However, following its failure, Mississippi State Senator David Blount (D-Jackson) stated that he believed the incarcerated *should* lose the right to vote, but that it should be automatically restored post-probation following the person's completed sentence.[69] As of 2019, the Mississippi Constitution's disenfranchisement clause is the subject of litigation before the U.S. District Court for the Southern District of Mississippi.[70] That is, whether (as the State wishes) the clause may "be revised to specify disenfranchisement 'by reason of a conviction of a disenfranchising offense.'"[71] Alternatively, the State proposed "includ[ing] only felons who have completed 'all terms of their full sentence' including 'payment of fines or restitution.'"[72] The Plaintiffs, however, oppose such revisions and characterize it as a "fundamental merits question that goes to the heart of [the] litigation."[73] The Plaintiffs asked "*when should individuals convicted of disenfranchising offenses regain the right to vote?*"[74] While the wheels of motion for this litigation are premature, as a matter of precedent, the U.S. Supreme Court has historically struck down State Constitution disenfranchisement clauses,

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63. Katie Lannan, *Mass. Senator Wants to Restore Voting Rights for Incarcerated Felons*, BOSTON GLOBE (Apr. 12, 2019, 5:03 PM), https://www.bostonglobe.com/metro/2019/04/12/senator-wants-restore-voting-rights-for-incarcerated-felons/tSjOPBa26liN6LUZmcgA5K/story.html #comments.

64. *Id.*

65. *Id.*

66. Katie Lannan, *Restore Voting Rights for Incarcerated Felons, Senator Says*, 22 NEWS WWLP (Apr. 10, 2019, 7:15 PM), https://www.wwlp.com/news/state-politics/restore-voting-rights-for-incarcerated-felons-senator-says/1914793733.

67. Jimmie E. Gates, *Efforts to Reform Felony Voting Rights Restoration Die in Mississippi Legislature*, MISS. CLARION LEDGER (Mar. 20, 2019, 3:00 AM), https://www.clarionledger.com/story /news/politics/2019/03/20/felon-voting-rights-restoration-efforts-die-mississippi-legislature/ 3210745002//.

68. *Id.*

69. *Id.*

70. Harness v. Hosemann, No. 3:17-CV-791-DPJ-FKB, 2019 WL 613380, at *3 (S.D. Miss. Feb. 13, 2019).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

when such ratification was "motivated by a desire to discriminate . . . on account of race," and modern application that "violates equal protection."[75]

(8) New Mexico recently failed to pass House Bill 57: "Restore Felon Voting Rights,"[76] in spite of a massive campaign by the Human Rights Watch Organization.[77] Bill 57 was sponsored by New Mexico House Representative, Gail Chasey (D-Dist. 18) and State Senator, Bill B. O'Neill (D-Dist. 13).[78] It would have enfranchised New Mexico's incarcerated.[79] Currently, New Mexico allows (released) felons who have completed their probation to reacquire their voter rights.[80] Also unsuccessful was "[a] weakened version of the bill" that lacked incarcerated enfranchisement, but nevertheless provided a felon's right to vote upon release (as opposed to post-parole).[81]

(9) According to *The New York Times*, Governor Andrew Cuomo (D-NY) announced plans in March 2018 to "restore voting rights to felons on parole," which will potentially "open the ballot box to more than 35,000 people."[82] Governor Cuomo's method of enfranchisement, however, is via a Governor's pardon, which will preclude restoration of the right to serve on a jury for the newly enfranchised.[83] Notwithstanding, actress and gubernatorial primary opponent, Cynthia Nixon (D), criticized Cuomo's act as insufficient, charging that "[f]or eight years, Cuomo governed like a Republican . . . Now he's scared of communities all across New York who want to replace him with a real Democrat."[84] Nixon added that "[v]oter suppression in New York should have

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75. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

76. Matthew Reichbach, *Same-Day, Automatic Voter Registration and More: How Elections and Voting Bills Fared in 2019*, NM POLITICAL REPORT (Mar. 19, 2019), nmpoliticalreport.com/2019/03/19/how-bills-related-to-elections-and-voting-fared-in-the-2019-legislative-session/. *See also* H.R. 57, 54th Leg. (N.M. 2019), https://www.nmlegis.gov/Sessions/19%20Regular/bills/house/HB0057.pdf.

77. Letter from Dēmos, American Civil Liberties Union, Daily Kos, Democracy Initiative, Center for Popular Democracy, Color of Change, Common Cause, Fair Elections Center, Franciscan Action Network, Greenpeace USA, Human Rights Watch, Lawyers' Committee for Civil Rights Under Law, Let America Vote, NAACP Legal Defense and Educational Fund, Inc., National LGBTQ Task Force Action Fund, People for the American Way, Prison Policy Initiative, The Sentencing Project, Transformative Justice Coalition, Voter Rights Action, to Gail Chasey, Chair, House Judiciary Comm., N.M. H.R., *Support for HB 57 to End Felony Disenfranchisement in New Mexico*, HUMAN RIGHTS WATCH (Jan. 28, 2019, 8:30 AM), https://www.hrw.org/news/2019/01/29/support-hb-57-end-felony-disenfranchisement-new-mexico.

78. H.R. 57, 54th Leg. (N.M. 2019), https://www.nmlegis.gov/Sessions/19%20Regular/bills/house/HB0057.pdf.

79. Reichbach, *supra* note 76.

80. *Id.*

81. *Id.*

82. Vivian Wang, *Cuomo Plans to Restore Voting Rights to Paroled Felons*, N.Y. TIMES (Apr. 18, 2018), https://www.nytimes.com/2018/04/18/nyregion/felons-pardon-voting-rights-cuomo.html?module=inline.

83. *Id.*

84. *Id.*

ended eight years ago."[85] Nevertheless, Cuomo's concept is preceded by that of former Governor Terry McAuliffe (D-VA).[86]

(10) In Virginia, Governor McAuliffe issued a similar order in 2016 when restoring voter eligibility to felons.[87] Governor Ralph Northam (D-VA) subsequently continued the effort.[88] In any case, while the debate over the ultimate humanitarian propriety of felon disenfranchisement continues,[89] its constitutionality is well-settled.[90]

B. The Constitutionality of Criminal Disenfranchisement

While covering Senator Sanders' campaign platform on re-enfranchising the incarcerated, *NBC News* reported that disenfranchisement "is a form of 'civil death'—stripping live people of civil rights, almost as if they had died, just because they've been convicted of a crime."[91] Similarly, Executive Director Marc Mauer of The Sentencing Project (a criminal justice nonprofit), stated that "[i]f voting is a guaranteed right, it shouldn't be something that gets taken away in prison."[92] Mauer pressed on that "[s]ome people say when this comes up, 'Voting is not a fundamental right; it's a privilege.' I guess they get to decide who gets to exercise that privilege. That seems to me a pretty slippery slope."[93] The U.S. Supreme Court has stressed, however, that "[a] number of disabilities may [nevertheless] attach to a convicted defendant even after he has left prison."[94] In 1971, the Court noted *per curiam* in *North Carolina v. Rice* that among the constitutional disabilities of the convicted are: disenfranchisement, the right to hold office at the federal or state level, witness impeachment, divorce, and jury disqualification.[95] Nevertheless, while criminal disenfranchisement is constitutionally well-settled as a matter of law, the Court has both upheld and struck down criminal disenfranchisement statutes.

In the 1969 case of *McDonald v. Board of Election Commissioners of Chicago*, the Court reviewed the effective disenfranchisement of unsentenced inmates at the Cook County jail who could neither post bail nor obtain absentee ballots.[96] The State of Illinois did not offer a means to acquire absentee ballots for those awaiting trial.[97] Chief Justice Earl Warren, on behalf of the Court, wrote to

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85. *Id.*
86. Fortin, *supra* note 56.
87. *Id.*
88. *Id.*
89. Chandra Bozelko, *Bernie Sanders Wants Incarcerated People to Vote. Here's Why He's Right.*, NBC NEWS (Apr. 11, 2019, 3:21 PM), https://www.nbcnews.com/think/opinion/bernie-sanders-wants-incarcerated-people-vote-here-s-why-he-ncna993476.
90. Richardson v. Ramirez, 418 U.S. 24, 48 (1974).
91. Bozelko, *supra* note 89.
92. Levine & Bobic, *supra* note 24.
93. *Id.*
94. North Carolina v. Rice, 404 U.S. 244, 247 (1971).
95. *Id.* at 247-48 n.1.
96. McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 803 (1969).
97. *Id.*

uphold Illinois' practice on the basis that "the absentee statutes, which are designed to make voting more available to some groups who cannot easily get to the polls, do not themselves deny appellants the exercise of the franchise."[98] Chief Justice Warren elaborated, "nor, indeed, does Illinois' Election Code so operate as a whole, for the State's statute specifically disenfranchise only those who have been convicted and sentenced, and not those similarly situated to appellants."[99] The Court noted "the different treatment accorded unsentenced inmates incarcerated within and those incarcerated . . . may reflect a legislative determination that without the protection of the voting booth, local officials might be too tempted to try to influence the local vote of in-county inmates."[100] Curiously, Warren provided logic similar to Presidential candidate Tulsi Gabbard's contemporary opposition to enfranchising felons, as they may be "unduly influenced by [supervising] authorities."[101] Ultimately, Warren concluded that the challenge could not be sustained because "[c]onstitutional safeguards are not thereby offended simply because some prisoners, as a result, find voting more convenient than appellants."[102]

Four years later, however, the Court unanimously overturned the U.S. Court of Appeals for the Third Circuit after that Circuit relied upon *McDonald* when upholding as constitutional the disenfranchisement of inmates awaiting trial.[103] Justice William Brennan wrote on behalf of the Court that unlike the appellants in *McDonald*, "the Pennsylvania statutory scheme absolutely prohibits them from voting, both because [Pennsylvania's] specific provision affirmatively excludes 'persons confined in a penal institution' from voting by absentee ballot, and because requests by members of petitioners' class to register and to vote" via any means "had been denied."[104] Without addressing the merits of the case itself, however, Brennan gave the reasoning as to why the Court remanded that case to a district court of three judges, characterizing it as "a situation that *McDonald* itself suggested might make a different case."[105] Nonetheless, Brennan disclaimed,

> [t]his is not to say, of course, that petitioners are as a matter of law entitled to the relief sought. We neither decide nor intimate any view upon the merits. It suffices that we hold that *McDonald* does not 'foreclose the subject' of petitioners' challenge to the Pennsylvania statutory scheme.[106]

Rather, the differences there between left "ample 'room for the inference that the questions sought to be raised (by petitioners) can . . . [generate] controversy.'"[107]

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98. *Id. at* 807-08.
99. *Id.*
100. *Id.* at 810.
101. Levine & Bobic, *supra* note 24.
102. McDonald v. Bd. of Election Comm'rs of Chicago, 394 U.S. 802, 810 (1969).
103. Goosby v. Osser, 409 U.S. 512, 522 (1973).
104. *Id.* at 521-22.
105. *Id.* at 522.
106. *Id.*
107. *Id.*

In a subsequent opinion written by Chief Justice Warren E. Burger on behalf of the Court in 1974, it found that New York law "discriminate[d] between categories of qualified voters in a way that, as applied to pretrial detainees and misdemeanants, [was] wholly arbitrary."[108] The State had extended the ability for absentee registration to eligible citizens who were unable to appear personally due to "'illness or physical disability,' and to citizens required to be outside their counties of residence on normal registration days because of their 'duties, occupation or business.'"[109] New York had also extended absentee voting privileges for purposes of illness or disability to criminal inmates of veterans' bureau hospitals.[110] The Court noted, "[y]et, persons confined for the *same reason* in the county of their residence are completely denied the ballot."[111] This very discrepancy led the Court to find the New York statutes unconstitutional for purposes of equal protection because "as construed, [the statutes] operate as a restriction which is 'so severe as itself to constitute an unconstitutionally onerous burden on the . . . exercise of the franchise.'"[112]

Conversely, that same year, then-Associate Justice William H. Rehnquist (a dissenter in the previous case of *O'Brien*)[113] found no equal protection violation in a California criminal disenfranchisement case, *Richardson v. Ramirez*.[114] Rehnquist gave historical analysis in response to claims of equal protection under the Fourteenth Amendment and stated that "[f]urther light is shed on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of [Section] 2."[115] He wrote that "at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes."[116] Rehnquist continued that "[t]his convincing evidence of the historical understanding of the Fourteenth Amendment is confirmed by the decisions of this Court which have discussed the constitutionality of provisions disenfranchising felons."[117] He noted that

> [a]lthough the Court has never given plenary consideration to the precise question of whether a State may constitutionally exclude some or all convicted felons from the franchise, we have indicated approval of such exclusions on a number of occasions. In two cases decided toward the end of the last century, the Court approved exclusions

108. O'Brien v. Skinner, 414 U.S. 524, 530 (1974).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* (citing Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).
113. *O'Brien*, 414 U.S. at 535.
114. Richardson v. Ramirez, 418 U.S. 24, 48 (1974).
115. *Id.*
116. *Id.*
117. *Id.* at 53.

> of bigamists and polygamists from the franchise under territorial laws of Utah and Idaho.[118]

Nevertheless, Rehnquist assured that the question of felon disenfranchisement was not unsettled, as "[m]uch more recently we have strongly suggested in dicta that exclusion of convicted felons from the franchise violates no constitutional provision."[119] In 1985, the Court struck down a criminal disenfranchisement clause in an opinion that (once again) then-Associate Justice Rehnquist wrote on behalf of the Court in *Hunter v. Underwood*.[120] Rehnquist wrote that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks" in a "zeal for white supremacy."[121] As such, the Court rejected the State's argument that "the succeeding 80 years had [somehow] legitimated the provision."[122] Rehnquist elaborated that the "original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, [Section 177(b)] violates equal protection."[123] *The Marshall Project* reported that Alabama's 1901 Constitutional Convention President, John B. Knox, directed the conventioneers to operate "[w]ithin the limits imposed by the Federal Constitution . . . [in order] to establish white supremacy in this state . . . [and] establish it by law—not by force or fraud."[124] Alabama's aforementioned "Definition of Moral Turpitude Act" of 2017 thus limited the class that was disenfranchised for crimes of "moral turpitude," a clause that replaced the unconstitutional Section 177(b) in a 1996 Amendment.[125]

Most recently, within the case of *Evenwel v. Abbott*, in which the Court held that "a State or locality may draw its legislative districts based on total population,"[126] Justice Ruth Bader Ginsburg acknowledged (via footnote) that "California, Delaware, Maryland, and New York exclude inmates who were domiciled out-of-state prior to incarceration."[127] With Justice Ginsburg having indirectly noted the disparate treatment for nonresident incarcerated persons (and not chiding its constitutionality in passing dicta), it may be safely presumed that for the time being, the general landscape of felon disenfranchisement has its

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118. *Id.* (citing Murphy v. Ramsey, 114 U.S. 15 (1885) and Davis v. Beason, 133 U.S. 333 (1890)).

119. *Id.*

120. Hunter v. Underwood, 471 U.S. 222, 223 (1985).

121. *Id.* at 229.

122. *Id.* at 233.

123. *Id.*

124. Jennifer Rae Taylor, *Jim Crow's Lasting Legacy at The Ballot Box*, THE MARSHALL PROJECT (Aug. 20, 2018), https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-boxQuo.

125. Definition of Moral Turpitude Act, *supra* note 55. *See also Felon Disenfranchisement-Notice Requirements- District Court Finds No Irreparable Injury from the State's Lack of Notice to People with Felony Convictions Upon Re-Enfranchisement*-Thompson v. Alabama, *No. 2:16-Cv-783, 2017 U.S. Dist. Lexis 118606 (M.D. Ala. July 28, 2017)*, 131 HARV. L. REV. 2065, 2066 (2018).

126. Evenwel v. Abbott, 136 S. Ct. 1120, 1121 (2016).

127. *Id.* at 1124 n.3.

constitutional bearings.[128] If, however, enfranchisement expansion comes at the state or federal level, the question may develop as to whether the formerly disenfranchised could receive the extension of a right to serve on a jury–a right that the Court ordered for the enfranchisement of women (roughly a quarter century after constitutional enfranchisement).[129]

In *Rice*, the Court incidentally connected the constitutional disabilities of disenfranchisement and jury disqualification for the convicted.[130] Michigan State University-DCL College of Law Professor, Brian C. Kalt, opined that for now, "felon exclusion probably passes the constitutional 'cross-section' requirement for juries."[131] However, Kalt stated that he believes that excluding felons from juries "exposes the doctrine's flaws and ambiguities."[132] While in *Ballard*, the Court emphatically did not require that juries strictly reflect a utopian cross-section of the community,[133] it did require nevertheless that "prospective jurors shall be selected by court officials without systematic and intentional exclusion . . . To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."[134] Therefore, with regard to any expansions that come for the incarcerated or previously incarcerated, others may follow.

C. *The Jury as a Political Institution: A Co-existent Right to Vote and Jury Service*

Alexis de Tocqueville–sociologist, legal scholar, and political theorist–conducted studies of America's prisons and political institutions before returning to France to publish *Democracy in America* in 1835.[135] Tocqueville's studies found him traveling around the United States, interviewing the incarcerated in many American prisons, and included an exchange with President Andrew Jackson.[136] In light of these experiences, Tocqueville found that the "system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. These institutions are two instruments of equal power, which contribute to the supremacy of the majority."[137]

Tocqueville wrote that the role of the jury was "a political institution, and it must be regarded in this light in order to be duly appreciated."[138] He elaborated

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128. *Id.*

129. Ballard v. United States, 329 U.S. 187, 192–93 (1946) (quoting Justice William Francis Murphy's majority opinion in Thiel v. S. Pac. R.R. Co., 328 U.S. 217, 220 (1946)).

130. North Carolina v. Rice, 404 U.S. 244, 248 n.1 (1971).

131. Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U.L. REV. 65, 69 (2003).

132. *Id.*

133. *Ballard*, 329 U.S. at 192–93.

134. *Id.*

135. *Alexis de Tocqueville*, HISTORY.COM (Nov. 9, 2009), https://www.history.com/topics/france/alexis-de-tocqueville.

136. *See generally* Tocqueville, *supra* note 1.

137. *Id.* at 313.

138. *Id.* at 312.

that "[t]o look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very subordinate to the powerful effects . . . of the community at large."[139] Tocqueville nevertheless qualified America's juries as "a certain number of citizens chosen indiscriminately, and invested with a temporary right of judging."[140] Still, he wrote, regardless of whether one considers the jury as "aristocratic or democratic, according to the class of society from which the jurors are selected . . . it always preserves its republican character, inasmuch as it places the real direction of society in the hands of the governed, or of a portion of the governed, instead of leaving it under the authority of the Government."[141] Therefore, for Tocqueville, the makeup of a jury will maintain its purpose, so long as the government is not the party entrusted to serve as jury.[142]

With regard to concerns surrounding the quality and capacity of juries, the Anti-Federalist Maryland Farmer wrote generally in the Anti-Federalist Papers[143] about the notion of jury service and the ability of membership to rise to the occasion.[144] The Maryland Farmer stated that while the people "were deprived of the use of understanding, when they were robbed of the power of employing it . . . *Give them power and they will find understanding to use it.*"[145] As a predecessor to Tocqueville, the Maryland Farmer addressed the political undercurrent to the concept of a jury, defining it as "an independent branch of government . . . vested in a distinct branch, a jury."[146] He elaborated "the right of establishing juries . . . must be admitted, as an inherent legislative right, paramount to the constitution."[147]

Even today, scholar Akhil Reed Amar (citing both Tocqueville and the Maryland Farmer) casts jury service among a class of "four clustered 'political rights,'" which include: suffrage, militia service, and the right to vote.[148] With

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. The Anti-Federalist papers were a countering response to the Federalist Papers, written respectively by James Madison, Alexander Hamilton, and John Jay under pseudonym, as persuasive support for ratifying the U.S. Constitution. Similarly, the authors of the Anti-Federalist papers wrote under pseudonym. By contrast, however, the Anti-Federalist papers did not have the same exposure as the Federalist Papers but nevertheless warned aggressively of the dangers that could arise from the impending Constitution and its flaws as an instrument of governing. The identity of the Anti-Federalist writers is somewhat speculated, but ultimately unknown. However, one author "Cato" is believed by scholars to be George Clinton, Governor of New York at the time of the constitutional debates. Ugonna Eze, *The Anti-Federalists and their important role during the Ratification fight*, CONSTITUTION DAILY (Sep. 27, 2017), https://constitutioncenter.org/blog/the-anti-federalists-and-their-important-role-during-the-ratification-fight. *See also* Jon Roland, *Anti-Federalist Papers*, THE CONSTITUTION SOCIETY (May 12, 1996), https://www.constitution.org/afp.htm.

144. THE COMPLETE ANTI-FEDERALIST, VOLUME 5, PART 1, *Essays by A Farmer* at 39 (Herbert J. Storing ed., Univ. Chicago Press 1981).

145. *Id.*

146. *Id.* at 37.

147. *Id.*

148. AMAR, *supra* note 19.

regard to such a political right to jury service, the Court has stated that "[a]ll qualified citizens have a civic right, of course, to serve as jurors, but none has the right to serve as a juror in a particular case."[149] In *Powers*, however, the Court did not give meaning to "qualified;" rather, the undefined term came in 1879 from *Strauder v. West Virginia*.[150] There, the Court's use of "qualified" meant a general sense that race did not affect a juror's ability.[151] Its meaning aimed only to secure "to individuals of the race *that* equal justice which the law aims to secure to all others."[152]

That same year, Justice William Strong, who authored *Strauder*, also wrote on behalf of the Court in *Commonwealth of Virginia v. Rives*.[153] In *Rives*, the Court declared supreme, the authority of the Federal judiciary over procedural questions of U.S. constitutional law in state criminal adjudications.[154] The Court affirmed that a State cannot discriminate "against persons of the colored race, or exclude[] them from the jury."[155] Nevertheless, the Court noted the connection between (dis)enfranchisement and jury service, stating that "[t]he law respecting jurors provides that 'all male citizens, twenty-one years of age and not over sixty, *who are entitled to vote* and hold office under the Constitution and laws of the State,' with certain exemptions" may serve as jurors.[156] Thus, the Court itself expressly acknowledged a connection between jury service, the ability to hold elected office, and the right to vote for such office.[157] Moreover, the Court's acknowledgment of the minimum age of jurors (at twenty-one)[158] preceded the 1971 enfranchisement of those eighteen and older.[159] The Twenty-Sixth Amendment would go on to guarantee that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."[160]

Nevertheless, in the potential event of enfranchisement for the incarcerated, *Strauder* may have key language by which a court could exclude the newly enfranchised from jury service.[161] Justice Strong wrote on behalf of the Court that "[t]he very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his

149. Powers v. Ohio, 499 U.S. 400, 424 (1991).

150. Strauder v. West Virginia, 100 U.S. 303, 308 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

151. *Id.*

152. *Id.*

153. Virginia v. Rives, 100 U.S. 313, 314 (1879).

154. *Id.* at 313.

155. *Id.* at 334.

156. *Id.* (emphasis added).

157. *Id.*

158. *Id.*

159. U.S. CONST. amend. XXVI. *See also* Jocelyn Benson & Michael T. Morely, *Right to Vote at Age 18*, NATIONAL CONSTITUTION CENTER (last visited Mar. 4, 2019), https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxvi.

160. U.S. CONST. amend. XXVI.

161. Strauder v. West Virginia, 100 U.S. 303, 308 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

neighbors, fellows, associates, persons *having the same legal status in society as that which he holds*."[162] While the Court has since changed the gender composition of juries,[163] Justice Strong's premise can support the argument that (unlike gender) persons with "the same legal status in society" would not include the incarcerated regardless of enfranchisement.[164] Moreover, Tocqueville wrote, "the influence of the jury is extended to civil causes, its application is constantly palpable; it affects all the interests of the community."[165] As Justice William Brennan later noted, "incarceration by its nature changes an individual's status in society."[166] Brennan elaborated, affirming the judicial system's long-standing concept that the incarcerated are "release[d] into the community."[167] He wrote that "[i]ncarceration by its nature denies a prisoner participation in the larger human community."[168] Thus, to counter Jamal Bouie's aforementioned rhetorical posit, "There Is No Good Reason Prisoners Can't Vote,"[169] as a matter of law, prisoners do not have the same legal status as those who participate "in the larger human community."[170]

In Federalist Paper No. 78, Alexander Hamilton wrote that "the power of the people is superior;" as such, sovereignty lies with the people.[171] Forty-seven years later, Tocqueville affirmed this concept, stating that the "system of the jury, as it is understood in America, appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."[172] Therefore, while the rhetoric and discourse rages on among the 2020 presidential hopefuls,[173] it is both the unique power and the prerogative of the "human community" to expand that community via enfranchisement.

D. Expansive Enfranchisement from the Historical Perspective

Curiously, America's expansions of enfranchisement have consistently followed its major wars due to a significant role that the subsequently enfranchised class played in the preceding war. For instance, on a state level, after the American

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162. *Id.* (emphasis added).

163. Ballard v. United States, 329 U.S. 187, 192–93 (1946).

164. Strauder v. West Virginia, 100 U.S. 303, 308 (1879), *abrogated by* Taylor v. Louisiana, 419 U.S. 522 (1975).

165. Tocqueville, *supra* note 1, at 314.

166. O'Lone v. Estate of Shabazz, 482 U.S. 342, 355 (1987) (Brennan, J., dissenting).

167. *See* Schall v. Martin, 467 U.S. 253, 301 (1984); Buchanan v. Kentucky, 483 U.S. 402, 411 n.9 (1987); Connecticut Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003); Wilkinson v. Dotson, 544 U.S. 74, 82 (2005); Skinner v. Switzer, 562 U.S. 521, 523 (2011).

168. *O'Lone*, 482 U.S. at 368 (Brennan, J., dissenting).

169. Bouie, *supra* note 14.

170. *O'Lone*, 482 U.S. at 368 (Brennan, J., dissenting).

171. THE FEDERALIST NO. 78 (Alexander Hamilton).

172. Tocqueville, *supra* note 1, at 313.

173. Levine & Bobic, *supra* note 24.

Revolution, non-property owners slowly earned the right to vote as states began lifting the property ownership requirement.[174]

At the federal level, the Fifteenth Amendment voting rights for men of color followed after President Lincoln decided to free and employ former male slaves in the U.S. Army during the Civil War.[175] Historian John David Smith wrote that this led to the new black soldiers rallying, "[w]hat higher order of citizen is there than the soldier? . . . The colored man will vote by instinct with the Union party, just as uniformly as he fights with the Union army."[176] As such, the so called "Blacks in Blue" demanded a right to vote.[177] And so, on February 26, 1869, Congress passed the Fifteenth Amendment, which provided, that "[t]he 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."[178]

The Nineteenth Amendment followed from women's role in World War I.[179] As historian, Dr. Kayleen Hughes, explained "mainstream suffragists' deci[ded] to focus on the nation's needs during this time of crisis," efforts that "proved to help their cause."[180] The women of World War I served overseas in vital operational roles, as well as on the home front in industry roles traditionally performed by men, acts by which America maintained its momentum in industry and warfare.[181] President Woodrow Wilson urged Congress towards suffrage stating that "[w]e have made partners of the women in this war . . . shall we admit them only to a partnership of suffering and sacrifice and toil and not to a partnership of privilege and right?"[182] As such, on August 18, 1920, Congress ratified women's suffrage, declaring that "[t]he 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 sex."[183]

The most recent constitutional enfranchisement, the Twenty-Sixth Amendment (July 1, 1971), guaranteed suffrage to citizens age eighteen and

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174. Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, UNIV. OF CAL., L.A. & NBER (Feb. 2005), economics.yale.edu/sites/default/files/files/Workshops-Seminars/Economic-History/sokoloff-050406.pdf.

175. JOHN DAVID SMITH, BLACK SOLDIERS IN BLUE: AFRICAN AMERICAN TROOPS IN THE CIVIL WAR ERA 2, 247 (John David Smith ed., 2004).

176. *Id.*

177. *Id.* at 404.

178. U.S. CONST. amend. XV.

179. Dr. Kayleen Hughes, *How World War I helped give US women the right to vote*, US ARMY AMCOM HISTORY OFFICE (Aug. 23, 2017), https://www.army.mil/article/192727/how_world_war_i_helped_give_us_women_the_right_to_vote.

180. *Id.*

181. GWLI Staff, *Woodrow Wilson and the Women's Suffrage Movement: A Reflection*, WILSON CENTER (June 4, 2013), https://www.wilsoncenter.org/article/woodrow-wilson-and-the-womens-suffrage-movement-reflection. *See also* Hughes, *supra* note 179.

182. Carl M. Cannon, *Wilson, the Great War, and Women's Right to Vote*, REAL CLEAR POLITICS (Nov. 16, 2018), https://www.realclearpolitics.com/articles/2018/11/16/wilson_the_great_war_and_womens_right_to_vote_138680.html.

183. U.S. CONST. amend. XIX. *See also Women's Right to Vote*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/amendments/amendment-xix (last visited Mar. 18, 2019).

over.[184] It grew from the teenagers' rhetoric invoking their invaluable drafted service in the contested Vietnam War, while being denied the ability to participate in the political process.[185] They rallied: "Old enough to fight, old enough to die, old enough to vote."[186]

Therefore, briefly, with regard to whether the incarcerated could indirectly earn an Amendment via their role in an American war, the premise is not feasible given the armed forces' requirements.[187] While across the country, state criminal trial courts have indeed attempted to invoke sentences of deferred prosecution by imposing military service as an alternative to incarceration, such claims of judge-ordered military service are not factually accurate.[188] Such famed tales of enlistment are fables.[189] The U.S. Army, for instance, states that any person who applies "as a condition for any civil conviction or adverse disposition or any other reason through a civil or criminal court . . . is not eligible for enlistment."[190] The U.S. Air Force provides that "[a]pplicants are ineligible if . . . [they apply] as an alternative to further prosecution, indictment, or incarceration for such violation."[191] The U.S. Coast Guard states that applicants are ineligible if "release[d] from [criminal] charges on the condition that the applicant enters the military service."[192] Finally, the U.S. Marine Corps provides that "[a]pplicants may not enlist as an alternative to criminal prosecution, indictment, incarceration, parole, probation, or other punitive sentence."[193] However, Marine Corps applicants are only "ineligible for enlistment *until the original assigned sentence would have been completed.*"[194] Thus, it can be safely asserted (based on the respective armed forces requirements) that a constitutional amendment will never materialize based on war efforts of the incarcerated because there is no such thing.

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184. U.S. CONST. amend. XXVI. *See also Right to Vote at Age 18*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxvi (last visited Mar. 4, 2019).

185. Bruce G. KAUFFMANN, *The 26th Amendment: "Old Enough to Vote," in* BRUCE'S HISTORY LESSONS – THE FIRST FIVE YEARS (2001 – 2006) 47 (2008).

186. *Id.*

187. Rod Powers, *Can a Judge Order Someone to Join the Military or Go to Jail?*, THE BALANCE CAREERS, https://www.thebalancecareers.com/join-the-military-or-go-to-jail-3354033 (last updated Jan. 21, 2019).

188. *Id.*

189. *Id.*

190. DEP'T OF THE ARMY, ARMY REGULATION 601-210, REGULAR ARMY AND RESERVE COMPONENTS ENLISTMENT PROGRAM (Aug. 31, 2016), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN6642_AR601-210_ADMIN_WEB_Final.pdf.

191. DEP'T OF THE AIR FORCE, AFI36-2002, AIR FORCE GUIDANCE MEMORANDUM TO AIR FORCE INSTRUCTION 36-2002, *ENLISTED ACCESSIONS* (Nov. 5, 2018), https://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2002/afi36-2002.pdf.

192. U.S. DEP'T OF HOMELAND SEC., COAST GUARD RECRUITING MANUAL (Apr. 2018), https://media.defense.gov/2018/May/16/2001917927/-1/-1/0/CIM_1100_2F.pdf.

193. U.S. MARINE CORPS, MCO P1100.72C, MILITARY PERSONNEL PROCUREMENT MANUAL, VOLUME 2 ENLISTED PROCUREMENT (SHORT TITLE: MPPM ENLPROC) (June 18, 2004), https://www.marines.mil/Portals/59/Publications/MCO%20P1100.72C%20W%20ERRATUM.pdf.

194. *Id.*

Rather, it will be by a progressive shift of the respective majority at the state or federal level.[195]

CONCLUSION

Therefore, whether those who advocate for such change are conscious of the full message, the push for such a right to vote has historically carried another goal in its undercurrent.[196] Some argue that undercurrent is one from which the American criminal justice system could benefit.[197] Others argue the system is not ready.[198] Regardless of positions taken in this movement to enfranchise, America must know what could change in doing so. Thus, for either the presently incarcerated or the former, the right to serve on a jury may follow not far from whomever America next enfranchises.

195. Powers, *supra* note 187.

196. Amar, *supra* note 18.

197. Chandra Bozelko, *A Felony Record Should Not Keep Me Off a Jury*, CRAIN'S NEW YORK BUSINESS (Jan. 29, 2019, 12:00 AM). *See also* L.A. Times Editorial Board, *Along With Voting Rights, Restore Jury Duty to Ex-Inmates*, L.A. TIMES (Nov. 20, 2017, 5:00 AM), https://www.latimes.com /opinion/editorials/la-ed-jury-duty-felons-20171120-story.html.

198. Mary Lombardi, *Reassessing Jury Service Citizenship Requirements*, 59 CASE W. RES. L. REV. 725, 735 (2009) (Lombardi noted, "widespread state and federal exclusions of non-citizens from juries suggest a strong consensus that non-citizens should not serve as jurors," nevertheless, Lombardi advocated "this seeming consensus deserves questioning.").