

# UNIVERSAL SUFFRAGE: THE CASE FOR COMPLETE VOTING RIGHTS RESTORATION IN KENTUCKY

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## I. INTRODUCTION

American democracy is often depicted as a long march toward universal suffrage.<sup>1</sup> As it is often told, the right to vote was heavily restricted at the founding of the nation, but one group after another slowly gained the franchise until nearly no group was excluded.<sup>2</sup> While many groups have gained the franchise throughout American history, the United States still does not have universal suffrage.<sup>3</sup> Some groups, children for example, are still disenfranchised. Even setting children aside, the United States does not even have universal adult suffrage.<sup>4</sup> While many groups have acquired the right to vote, people with felony convictions are still disenfranchised in the vast majority of states in this country.<sup>5</sup> As of 2020, there are approximately 5.2 million Americans who are ineligible to vote due to a felony conviction.<sup>6</sup>

Chief Justice Earl Warren once wrote: “Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of

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<sup>1</sup> ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES XXI* (2d ed. 2009).

<sup>2</sup> *Id.*

<sup>3</sup> Tyler Remy & National Journal, *Opinion: How the U.S. Is Still Struggling with Universal Suffrage*, *THE ATLANTIC* (Sept. 25, 2012), <https://www.theatlantic.com/politics/archive/2012/09/opinion-how-the-us-is-still-struggling-with-universal-suffrage/428883/> [<https://perma.cc/BMW8-VLPQ>].

<sup>4</sup> *Id.*

<sup>5</sup> *Felon Voting Rights*, NAT'L CONF. OF STATE LEG. (June 28, 2021), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [[perma.cc/WW6N-2AVM](https://perma.cc/WW6N-2AVM)].

<sup>6</sup> Chris Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT 4 (Oct. 30, 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf> [[perma.cc/QH9D-H9VM](https://perma.cc/QH9D-H9VM)].

other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”<sup>7</sup>

It is high time that we as a society “carefully and meticulously scrutinize” the practice of stripping the right to vote from people because they have been convicted of felonies. Once the policy of felon disenfranchisement is properly examined, it becomes clear that it is discriminatory,<sup>8</sup> confusing,<sup>9</sup> and undemocratic.<sup>10</sup> My home state of Kentucky has one of the strictest laws in the country when it comes to felon disenfranchisement: Felons are stripped of their right to vote for the rest of their lives unless their rights are restored by the governor.<sup>11</sup> However, through executive order, Governor Andy Beshear has restored the right to vote for thousands of Kentuckians who were formerly incarcerated due to a felony conviction.<sup>12</sup> This is certainly a step in the right direction. But it still leaves Kentucky as one of the most restrictive states, and it is not enough to fully realize the potential of the democratic system in the Commonwealth.

The purpose of this Note is to discuss the merits of restoring the right to vote to all voting-age citizens of the Commonwealth of Kentucky regardless of their criminal status, including incarcerated people. This may seem like a drastic step, but there are already two states, Vermont and Maine, that allow incarcerated people to vote.<sup>13</sup> Using Governor Beshear’s previous executive order, as well as the laws of Vermont and Maine as a framework, this Note will propose that Kentucky expand the vote to all voting-age people through a two-step process. First, the governor must issue further executive action to restore the right to vote to all formerly incarcerated people, pursuant to the Kentucky constitutional provision banning felons from voting.<sup>14</sup> Then, the Kentucky General Assembly must work together to amend the Kentucky Constitution to allow all people to access the ballot, regardless of their criminal status. The expanded executive order will work as a stop-gap

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<sup>7</sup> Reynolds v. Sims, 377 U.S. 533, 555 (1964).

<sup>8</sup> Jennifer Rae Taylor, *Jim Crow’s Lasting Legacy at the Ballot Box*, MARSHALL PROJECT (Aug. 20, 2018, 10:00 PM), <https://www.themarshallproject.org/2018/08/20/jim-crow-s-lasting-legacy-at-the-ballot-box> [perma.cc/3GJL-8KVL].

<sup>9</sup> See Josh Carter, *Convicted of one of these crimes? You might not be able to vote in Mississippi*, WLBT (Aug. 18, 2020, 1:49 PM), <https://www.wlbt.com/2020/08/18/charged-with-one-of-these-crimes-you-might-not-be-able-to-vote-mississippi/> [perma.cc/PY4L-SXHC].

<sup>10</sup> Dana Liebelson, *In Prison, and Fighting to Vote*, ATLANTIC MONTHLY (Sept. 6, 2019), <https://www.theatlantic.com/politics/archive/2019/09/when-prisoners-demand-voting-rights/597190/> [perma.cc/N7F2-G3GX].

<sup>11</sup> KY. CONST. § 145.

<sup>12</sup> Ky. Exec. Order No. 2019-003 (Dec. 12, 2019).

<sup>13</sup> ME. STAT. tit. 21-A, § 112 (2009); VT. STAT. ANN. tit. 28, § 807 (2001).

<sup>14</sup> KY. CONST. § 145.

provision to restore the right to vote to as many people as possible while the second step is in progress.

This may seem like a bold proposal. I have no doubt that it will be difficult. However, I believe, as do many Americans across the political spectrum, that the right to vote is the most sacred and fundamental part of living in a democracy.<sup>15</sup> It is worth it to try and secure this right for as many people as possible, even if those people happen to belong to a politically unpopular group such as those with felony convictions. In order to fully survey the issue of felon disenfranchisement, this Note will first explain the background of the laws—including the origins of felon disenfranchisement—the constitutionality of such provisions, and Kentucky’s particular felon disenfranchisement statute. Then, different state approaches will be compared which will outline some of the harms associated with felon disenfranchisement, and weigh the impact of mass incarceration on the issue of felon disenfranchisement. Finally, this Note will propose a model executive order and a model amendment for Kentucky.

## II. BACKGROUND

### A. *Origins of Felon Disenfranchisement*

States began disenfranchising felons from the very founding of the United States.<sup>16</sup> Laws disenfranchising felons go all the way back to medieval systems of government, and many state laws banning felons from voting began in the common law as holdovers from those systems.<sup>17</sup> However, many of the state felon disenfranchisement statutes were passed in the first few decades after the adoption of the Reconstruction Amendments.<sup>18</sup> The Reconstruction Amendments consisted of the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, which ended slavery and provided citizenship to the formerly enslaved population.<sup>19</sup> The

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<sup>15</sup> See generally Kay C. James, *Your Right to Vote is Sacred. Don't Give It Up*, HERITAGE FOUND. (Sept. 9, 2020), <https://www.heritage.org/election-integrity/commentary/your-right-vote-sacred-dont-give-it> [perma.cc/ELY4-JKSK]; see also Bobby Hoffman, *Voting Is a Right That Shouldn't Be Taken Away*, ACLU (Apr. 17, 2019, 2:45 PM), <https://www.aclu.org/blog/voting-rights/voting-right-shouldnt-be-taken-away> [perma.cc/63YS-7L6A].

<sup>16</sup> Eli L. Levine, *Does the Social Contract Justify Felon Disenfranchisement*, 1 WASH. U. JURIS. REV. 193, 197 (2009).

<sup>17</sup> JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 41 (2006).

<sup>18</sup> *Id.* at 67.

<sup>19</sup> *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, UNITED STATES SENATE, <https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm> [perma.cc/UN53-

Confederate states had to pass these amendments in order to rejoin the Union.<sup>20</sup>

The Fifteenth Amendment gave Black men the right to vote.<sup>21</sup> The amendment reads, “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.”<sup>22</sup> States could no longer explicitly deny the right to vote to Black people, so they found other ways to ban that group of people from the polls.<sup>23</sup> Felon disenfranchisement—along with other methods such as grandfather clauses, poll taxes, and literacy tests—served as an important tool in denying Black people the right to vote, especially in the South.<sup>24</sup> An example of an early felon disenfranchisement law is Art. VII, § 182 of the Alabama Constitution, passed in 1901, which stripped the right to vote from those convicted of a misdemeanor or felony “involving moral turpitude”; the law listed offenses for which the right to vote was taken away, which the drafters of the law believed were crimes mostly committed by Black people.<sup>25</sup> These policies were often coupled with aggressive gerrymandering to ensure that even when Black people did get to the polls, their vote would not materially affect an election.<sup>26</sup> Discrimination was not as overt in the North, but those states also employed means such as literacy tests and stringent voter registration requirements intended to suppress the Black vote.<sup>27</sup>

Although state laws regarding felon disenfranchisement are facially neutral, this racial intent is still prevalent today.<sup>28</sup> Even today, the portion of a state’s inmates who are Black, vis a vis the total prison population, is a strong indicator of how strict a state’s felon disenfranchisement provision is likely to be.<sup>29</sup> The current felon disenfranchisement law in Kentucky was passed as part of the Commonwealth’s fourth and most recent constitution in 1891, the first Kentucky constitution ratified after passage of the Fifteenth Amendment.<sup>30</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> MANZA & UGGEN, *supra* note 17, at 67.

<sup>22</sup> U.S. CONST. amend. XV.

<sup>23</sup> MANZA & UGGEN, *supra* note 17, at 41.

<sup>24</sup> *Id.* at 68.

<sup>25</sup> *Hunter v. Underwood*, 471 U.S. 222, 223 (1985).

<sup>26</sup> MANZA & UGGEN, *supra* note 17, at 68.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 67.

<sup>29</sup> *Id.*

<sup>30</sup> KY. CONST. § 145; *Constitution of Kentucky*, KY. GEN. ASSEMBLY (listing the four constitutions of Kentucky) <https://apps.legislature.ky.gov/law/constitution> [perma.cc/Q29N-MJT2].

### B. Constitutionality of Felon Disenfranchisement

The legal basis for felon disenfranchisement is the Fourteenth Amendment.<sup>31</sup> Section 2 of the Fourteenth Amendment states that the right to vote will not be denied “except for participation in rebellion, or other crimes.”<sup>32</sup> There have been legal challenges to felon disenfranchisement, most notably the 1974 decision by the United States Supreme Court in *Richardson v. Ramirez* in which three formerly incarcerated felons challenged California’s felon disenfranchisement statute, claiming that it was in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>33</sup> The Court rejected the challenge, ruling that § 2 contains affirmative language that allows states to restrict people who have been convicted of felonies from voting in elections.<sup>34</sup> The decision in *Richardson v. Ramirez* established that § 2 of the Fourteenth Amendment renders the disenfranchisement of felons, including those who are currently incarcerated, constitutional.<sup>35</sup>

However, the decision was not unanimous, and Justice Marshall strongly criticized the majority’s opinion in a dissent joined by Justice Brennan.<sup>36</sup> The other main challenge to a felon disenfranchisement statute was in the 1985 United States Supreme Court case *Hunter v. Underwood*.<sup>37</sup> In *Hunter*, the Supreme Court struck down an Alabama felon disenfranchisement law that stripped the right to vote from those who committed “any crime . . . involving moral turpitude.”<sup>38</sup> The Court struck down this provision because there was proof that the purpose of the law was impermissible racial discrimination.<sup>39</sup> The purpose of racial discrimination was evidenced through quotes from the drafting convention in which delegates explicitly said that the law was being passed to discriminate against Black people.<sup>40</sup> Thus, the constitutional status of felon disenfranchisement statutes is that such laws are constitutional unless proof of impermissible racial discrimination can be established by a preponderance of the evidence.

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<sup>31</sup> U.S. CONST. amend. XIV.

<sup>32</sup> *Id.*

<sup>33</sup> *Richardson v. Ramirez*, 418 U.S. 24, 26 (1974).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 54.

<sup>36</sup> *Id.* at 56 (Marshall, J. dissenting).

<sup>37</sup> *Hunter v. Underwood*, 471 U.S. 222 (1985).

<sup>38</sup> *Id.* at 224.

<sup>39</sup> *Id.* at 233.

<sup>40</sup> *Id.* at 229 (“‘And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State.’”).

*C. Kentucky's Felon Disenfranchisement Provisions*

At the beginning of statehood in 1792, Kentucky was the first state in the union to propose restrictions on felons voting.<sup>41</sup> The first Kentucky Constitution was passed on April 19 of that year, and it stated that “[l]aws shall be made to exclude from . . . suffrage those who thereafter be convicted of bribery, perjury, forgery, or other high crimes and misdemeanors.”<sup>42</sup> However, this first constitution did not actually disenfranchise felons; it merely provided for the future passage of legislation that would disenfranchise felons.<sup>43</sup> It was not until the Kentucky Constitution’s fourth iteration in 1891 that felons were disenfranchised.<sup>44</sup> The ban on felon voting in Kentucky is enshrined in § 145 of the state constitution, which states:

Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.<sup>45</sup>

This section of the constitution goes on to separately disenfranchise “persons who, at the time of the election, are in confinement under the judgment of a court for some penal offense.”<sup>46</sup> This provision has been in effect ever since its passage, and serves as the current ban on voting for people convicted of felonies in Kentucky.<sup>47</sup>

Because the Kentucky felon disenfranchisement provision is a part of the state constitution, reform is difficult to achieve without a constitutional amendment, and attempts at reform have been rare until recently. However, there have been some ebbs and flows in certain aspects of the restoration process within the last twenty years. In 2001, the General Assembly passed HB 281 which simplified the process for a person seeking restoration of their voting rights.<sup>48</sup> This legislation required the Department of Corrections to

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<sup>41</sup> Arpita Ghosh & James Rockey, On the Political Economy of Felon Disenfranchisement 4 (Feb. 7, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3330565> [<https://perma.cc/NS9A-373L>].

<sup>42</sup> KY. CONST. art. VIII, § 2 (repealed 1799).

<sup>43</sup> See Maria Emilia Ramirez, *Barred From the Polls: Felony Disenfranchisement in the Bluegrass*, 35 N. KY. L. REV. 371, 373–74 (2008).

<sup>44</sup> *See id.*

<sup>45</sup> KY. CONST. § 145.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> KY. REV. STAT. ANN. § 196.045 (LexisNexis 2020).

inform eligible formerly incarcerated people of the restoration process and provide them with a standard form to sign that would begin the restoration process.<sup>49</sup> After passage of HB 281, applications for voting rights restoration rose by nearly 50% between 2000 and 2004.<sup>50</sup>

This progress was reversed in 2004 when then-Governor Ernie Fletcher issued an executive order tightening requirements for voting rights restoration for formerly incarcerated felons.<sup>51</sup> The order required applicants to submit a written statement explaining why they believed that their voting rights should be restored, along with three character references.<sup>52</sup> The executive order also required applicants to submit their applications to prosecutors in the jurisdiction where they live and where their offense was committed.<sup>53</sup> The prosecutors in these jurisdictions would then make a recommendation on whether voting rights should be restored after reviewing the felon's application.<sup>54</sup> These new application requirements caused a dramatic increase in the number of voting rights restoration applications that were denied.<sup>55</sup>

The next major development in felon disenfranchisement law in Kentucky was in 2015 when then-Governor Steve Beshear granted automatic restoration of voting rights to non-violent felons who had completed their sentences.<sup>56</sup> Matt Bevin, who had already been elected Governor at that time, said that he was supportive of voting rights restoration and would evaluate the executive order during his transition period into office.<sup>57</sup> However, less than a month later Governor Bevin rescinded the executive order, though it did not affect those whose rights had already been restored.<sup>58</sup>

When Bevin lost re-election to Governor Andy Beshear (the son of former Governor Steve Beshear), the new Governor made voting rights restoration a priority by issuing an executive order restoring voting rights to

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<sup>49</sup> *Id.*

<sup>50</sup> See LEAGUE OF WOMEN VOTERS OF KENTUCKY, FELONY DISENFRANCHISEMENT IN THE COMMONWEALTH OF KENTUCKY 4 (Oct. 2006), [https://static.prisonpolicy.org/scans/lwvky/Felony\\_Dis\\_Report.pdf](https://static.prisonpolicy.org/scans/lwvky/Felony_Dis_Report.pdf) [<https://perma.cc/EQD9-UR4F>].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 5.

<sup>56</sup> Ky. Exec. Order No. 2015-871 (Nov. 25, 2015).

<sup>57</sup> *Beshear Orders Voting Rights Restored For Non-Violent Kentucky Felons*, WFPL (Nov. 24, 2015), <https://wfpl.org/beshear-orders-voting-rights-restored-non-violent-kentucky-felons/> [[perma.cc/8ADW-KKGN](https://perma.cc/8ADW-KKGN)].

<sup>58</sup> Ryland Barton, *Bevin Rescinds Voting Rights to Ex-Felons, Changes Kentucky Marriage Licenses*, WFPL (Dec. 22, 2015), <https://wfpl.org/gov-bevin-rescinds-voting-rights-to-non-violent-felons-changes-marriage-licenses/> [[perma.cc/ECF6-SMR3](https://perma.cc/ECF6-SMR3)].

formerly incarcerated people in one of his first official acts.<sup>59</sup> The order automatically restores voting rights to formerly incarcerated felons convicted of non-violent felonies.<sup>60</sup> The order specifies that it does not apply to persons convicted of certain crimes, including: treason, bribery, homicide, assault, strangulation, human trafficking, and any other crime defined as violent by KRS § 439.3401.<sup>61</sup> Persons convicted of one of the excepted felonies, a federal felony, or a felony in another jurisdiction, do not get automatic restoration but may apply for manual restoration under KRS § 196.045.<sup>62</sup> This is still the current state of the law in Kentucky regarding felon disenfranchisement.

### III. ANALYSIS

#### A. *Confusing Patchwork: Comparative Assessment of Typical State Approaches*

Felon disenfranchisement operates in roughly five different regimes across all 50 states.<sup>63</sup> The first and most lenient group of states is comprised of Maine and Vermont. These states allow an incarcerated person to retain their right to vote even during their incarceration.<sup>64</sup> The next grouping is the most common regime, made up of twenty-one states where only incarcerated felons are barred from voting: Once their imprisonment is over, convicted felons are once again eligible to vote.<sup>65</sup> Next, there are six states that bar all

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<sup>59</sup> Press Release, Office of the Governor of the Commonwealth of Kentucky, Gov. Beshear Restores Voting Rights to More Than 140,000 Kentuckians (Dec. 12, 2019), <https://kentucky.gov/Pages/Activity-stream.aspx?n=GovernorBeshear&prId=4> [perma.cc/R38B-RTY3].

<sup>60</sup> Ky. Exec. Order No. 2019-003 (Dec. 12, 2019).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> See *infra* notes 64–68 and accompanying text (comparing different treatment of felon disenfranchisement across states).

<sup>64</sup> ME. STAT. tit. 21-A, § 112 (2009); VT. STAT. ANN. tit. 28, § 807 (2001).

<sup>65</sup> ARIZ. REV. STAT. ANN. § 13-907 (2019); CAL. ELEC. CODE § 2101 (Deering 2021); COLO. REV. STAT. § 1-2-103 (2019); HAW. REV. STAT. ANN. § 831-2 (LexisNexis 2014); 730 ILL. COMP. STAT. ANN. 5/5-5-5 (LexisNexis 2018); IND. CODE ANN. § 3-7-13-4 (LexisNexis 1995); MD. CODE ANN., ELEC. LAW § 3-102 (LexisNexis 2016); MASS. ANN. LAWS ch. 51, § 1 (LexisNexis 2008); MICH. COMP. LAWS SERV. § 168.758b (LexisNexis 1975); MINN. STAT. § 609.165 (2015); MONT. CODE ANN. § 13-1-111 (2007); NEV. REV. STAT. ANN. § 213.157 (LexisNexis 2020); N.H. REV. STAT. ANN. § 607-A:2 (LexisNexis 2019); N.J. STAT. ANN. § 19:4-1 (West 2020); N.D. CENT. CODE § 12.1-33-01 (1979); OR. REV. STAT. ANN. § 137.281 (West 2008); 17 R.I. GEN. LAWS § 17-9.2-3 (2006); S.D. CODIFIED LAWS § 24-5-2 (2011); TENN. CODE ANN. § 40-29-101 (1983); UTAH CODE ANN. § 20A-2-101.5 (LexisNexis 2013); WASH. REV. CODE ANN. § 29A.08.520 (LexisNexis 2013).



incarcerated felons and parolees from voting.<sup>66</sup> Additionally, there are sixteen states that disenfranchise incarcerated felons, parolees, and those who are on probation.<sup>67</sup> Finally, Iowa, Kentucky, and Virginia, are the most strict: All felons are stripped of their right to vote for the remainder of their lives unless their rights are restored by the governor.<sup>68</sup> The disparities between the laws in different states can create confusion among voters.<sup>69</sup>

The most obvious outcome of this patchwork system of felon disenfranchisement is that it creates wildly disparate outcomes based on where one is convicted of a felony. Someone in Iowa may be barred from voting for life for a felony drug possession conviction, while someone in Maine might be convicted of a violent felony and cast a ballot soon after, while serving their sentence.<sup>70</sup> There are also some states where a person may be ineligible to vote due to a misdemeanor conviction.<sup>71</sup> These state-by-state distinctions regarding who gets their vote taken away, and what those people have to do to have their rights reinstated, only serve to further complicate the issue. Additionally, who is eligible to vote is not the only consideration involved in this multistate system. Different states also require different procedures for restoring voting rights. For example, Alabama, Arkansas, and Georgia ostensibly have the same felon disenfranchisement law: These states ban felons from voting while incarcerated, as well as during probation or parole.<sup>72</sup> However, the procedure for gaining voting rights restoration is different in each of these states. In Alabama, a felon must apply to the Board of Pardons and Paroles and be accepted; in Arkansas, they must only show

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<sup>66</sup> ALASKA STAT. § 15.07.135 (1996); CONN. GEN. STAT. ANN. § 9-46a (West 2006); KAN. STAT. ANN. § 22-3722 (2012); N.Y. ELEC. LAW § 5-106 (Consol. 1982); OHIO REV. CODE ANN. § 2967.16 (LexisNexis 2018); 25 PA. CONS. STAT. § 1301 (2002).

<sup>67</sup> ALA. CODE § 15-22-36.1 (LexisNexis 2016); ARK. CONST. amend. 51, § 11; DEL. CONST. art. V, § 2; FLA. CONST. art. VI, § 4; GA. COMP. R. & REGS. 475-3-.10 (2015); IDAHO CODE § 18-310 (2016); LA. STAT. ANN. § 18:177 (2019); MISS. CODE ANN. § 47-7-41 (2002); MO. REV. STAT. § 115.133 (2003); NEB. REV. STAT. ANN. § 29-112 (LexisNexis 2005); N.M. STAT. ANN. § 1-4-27.1 (LexisNexis 2011); N.C. GEN. STAT. § 13-1 (2013); S.C. CODE ANN. § 7-5-120 (1997); TEX. ELEC. CODE ANN. § 11.002 (2011); W. VA. CODE ANN. § 3-2-2 (LexisNexis 2013); WIS. STAT. § 304.078 (2003); WYO. STAT. ANN. § 7-13-105 (2018).

<sup>68</sup> IOWA CODE § 914.2 (1995); KY. CONST. § 145; VA. CODE ANN. § 53.1-231.1 (2002).

<sup>69</sup> Rebecca Beitsch, *Felony Voting Laws Are Confusing; Activists Would Ditch Them Altogether*, PEW (Apr. 5, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/04/05/felony-voting-laws-are-confusing--activists-would-ditch-them-altogether> [perma.cc/5Y9Y-BYKW].

<sup>70</sup> Compare IOWA CODE § 914.2 (1995), with ME. REV. STAT. ANN. tit. 21, § 112 (2009).

<sup>71</sup> See, e.g., KY. CONST. § 145 (providing that those confined by a court due to penal offenses on the day of an election may not cast a ballot); UTAH CODE ANN. § 20A-2-101 (LexisNexis 2013).

<sup>72</sup> ALA. CODE § 15-22-36.1 (LexisNexis 2016); ARK. CONST. amend. 51, § 11; GA. COMP. R. & REGS. 475-3-.10 (2015).

proof of the end of their sentence to the county clerk where they live; and in Georgia, voting rights are restored automatically.<sup>73</sup>

Furthermore, even states that have laws which allow formerly incarcerated felons to vote may have a separate list of certain offenses that result in a lifetime ban from voting, similar to the list in Kentucky Executive Order 2019-003.<sup>74</sup> For example, the Mississippi Constitution has a list of crimes for which a convict has their voting rights permanently suspended, and the number of offenses covered by this list has recently increased through court opinions and the state attorney general's office interpreting the list.<sup>75</sup> If a person has been convicted of one of the twenty-two crimes listed, they must appeal to the governor for a pardon or have both houses of the legislature pass a special bill by a two-thirds majority restoring their right to vote.<sup>76</sup> Because the state implements different rules for different kinds of felons, this has led to mass confusion regarding who is and is not eligible to vote in Mississippi.<sup>77</sup> When the Southern Poverty Law Center sued the state over its felony voting ban, the center received countless calls from people who were not banned from voting, but were under the impression that they were prohibited from voting by the state's felon disenfranchisement statute.<sup>78</sup> Lawmakers have even introduced special legislation to restore voting rights to people who were never actually banned from voting because neither the voter nor the state knew whether or not they were eligible.<sup>79</sup> These difficulties with the Mississippi system are important to consider because Kentucky now has a similar system of felon disenfranchisement due to Executive Order 2019-003: Some formerly incarcerated people have their rights restored, but those who commit certain felonies are still barred from voting for life.<sup>80</sup>

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<sup>73</sup> ALA. CODE § 15-22-36.1 (LexisNexis 2016); ARK. CONST. amend. 51, § 11; GA. COMP. R. & REGS. 475-3-.10 (2015).

<sup>74</sup> See, e.g., MISS. CONST. art. 12, § 241; Ky. Exec. Order No. 2019-003 (Dec. 12, 2019).

<sup>75</sup> MISS. CONST. art. 12, § 241; Josh Carter, *Convicted of one of these crimes? You might not be able to vote in Mississippi*, WLBT (Aug. 18, 2020, 1:49 PM), <https://www.wlbt.com/2020/08/18/charged-with-one-these-crimes-you-might-not-be-able-vote-mississippi/> [perma.cc/V9KT-DCDG]; Bobby Harrison, *Study: 11% of all Mississippians, 16% of Black Mississippians can't vote because of felony convictions*, MISS. TODAY (Oct. 19, 2020), <https://mississippitoday.org/2020/10/19/study-11-of-all-mississippians-16-of-black-mississippians-cant-vote-because-of-felony-convictions/> [perma.cc/CGM5-FKEQ]; see also *Cotton v. Fordice*, 157 F.3d 388, 391 (5th Cir. 1998) (finding that, although armed robbery is not listed in the statute as a lifetime prohibition, it is covered because theft is listed and armed robbery is a form of theft).

<sup>76</sup> Carter, *supra* note 75.

<sup>77</sup> Anna Wolfe & Michelle Liu, *Not all ex-felons are barred from voting in Mississippi, but no one is telling them that*, MISS. TODAY (Nov. 1, 2018), <https://mississippitoday.org/2018/11/01/not-all-ex-felons-are-barred-from-voting-in-mississippi-but-no-one-is-telling-them-that/> [perma.cc/BYT3-ESXF].

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> MISS. CONST. art. 12, § 241; Ky. Exec. Order No. 2019-003 (Dec. 12, 2019).

### *B. Harms Caused by Felon Disenfranchisement*

Confusion surrounding who is eligible to vote in an election can have grave consequences. For example, in the 2016 presidential election a voter was sent back to prison for violating a state's felon disenfranchisement statute.<sup>81</sup> Crystal Mason, a Texas voter who was still on probation at the time of the 2016 election, was allowed to cast a provisional ballot by election officials in Texas.<sup>82</sup> After serving her sentence for tax fraud, Mason believed she was eligible to vote in the election and no one, not her probation officer nor the poll workers at her voting site, mentioned that she was not eligible.<sup>83</sup> Mason was sent back to prison for an additional five years for casting her ballot in the presidential election while on probation.<sup>84</sup> During her sentencing, State District Judge Ruben Gonzalez simply posited that Mason should have read the provisional ballot forms more carefully.<sup>85</sup> Crystal Mason's situation is not unique.<sup>86</sup>

A voter who is subsequently punished for casting a ballot is not the only kind of voter affected by this confusion. The complicated and ever-changing voting system for felons in the United States also deters many eligible voters from even trying to cast a ballot in the first place.<sup>87</sup> Outside of the millions who are ineligible to vote, many more with past convictions may be scared away from casting a ballot by provisional ballot forms and postings at polling locations that threaten legal repercussions—including jail time—for those who vote illegally.<sup>88</sup> These people represent an entirely separate category of

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<sup>81</sup> Beitsch, *supra* note 69.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*; see also Jack Healy, *Arrested, Jailed and Charged With a Felony. For Voting.*, N. Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html> (discussing a case in which twelve people in Alamance County, North Carolina were charged with illegal voting in the 2016 presidential election) [perma.cc/FNA5-AJXF]; Sam Levine, *A Black Woman Faces Prison for a Voting Mistake. Prosecutors Just Doubled the Charges*, GUARDIAN (July 21, 2020, 8:00 PM), <https://www.theguardian.com/us-news/2020/jul/21/voting-arrest-racist-law-north-carolina-lanisha-brachter> (discussing a case in which a woman in Hoke County, North Carolina, faces nineteen months in prison for voting while on parole) [perma.cc/AV5K-WCNS].

<sup>87</sup> Melissa Gira Grant, *Getting Out the Vote in the Maze of Mass Incarceration*, NEW REPUBLIC (Oct. 28, 2020), <https://newrepublic.com/article/159974/getting-vote-maze-mass-incarceration> [perma.cc/X3CG-PCUW].

<sup>88</sup> Beitsch, *supra* note 69.

potential voters who have been constructively disenfranchised by a complex legal framework that does not prioritize allowing voters to cast ballots.

Not only does felon disenfranchisement confuse the voters who may or may not be eligible, it can also be difficult to properly administer. Duplicative names can sometimes cause otherwise eligible voters to be purged from the voter rolls because they share a name with an ineligible voter.<sup>89</sup> For example, Willie Steen is a veteran of the United States Navy who was denied his right to vote in Florida in 2000.<sup>90</sup> When attempting to cast his ballot, Steen was told by an election official that he was ineligible to vote due to a prior felony conviction.<sup>91</sup> Steen correctly informed the election official that he had never committed a felony, yet his name had already been taken off the rolls.<sup>92</sup> Steen later found out that the reason for his ineligibility came about because another man named Willie O'Steen had committed a felony sometime between 1991 and 1993.<sup>93</sup> The state had confused Steen for this man and removed his name from the rolls by mistake.<sup>94</sup> Black people made up a small minority of voters in the state, but accounted for nearly half of the names on the list of felons to be purged from the voter rolls.<sup>95</sup>

Further, incarcerated people are materially harmed by their inability to cast a ballot. Prison conditions, including expensive rates charged for phone calls and limits on visitation, are a direct result of the inability of incarcerated people to vote.<sup>96</sup> Lawmakers represent incarcerated people too, but their interests are not considered by law makers because they do not make up a voting bloc.<sup>97</sup> When a person is incarcerated, they are usually counted as part of the population of the congressional district in which they are incarcerated.<sup>98</sup> However, politicians who represent incarcerated people may not feel accountable to them because they cannot vote.<sup>99</sup> When the ballot box is the main check a citizen has on their political representatives, not having a vote is akin to not being represented at all. Conversely, when inmates have

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<sup>89</sup> See *infra* notes 90–97 and accompanying text.

<sup>90</sup> ARI BERMAN, GIVE US THE BALLOT 207 (2015).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 208.

<sup>96</sup> Liebelson, *supra* note 10.

<sup>97</sup> *Id.*

<sup>98</sup> Hansi Lo Wang & Kumari Devarajan, 'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts, NPR (Dec. 31, 2019, 5:00 AM), <https://www.npr.org/sections/codeswitch/2019/12/31/761932806/your-body-being-used-where-prisoners-who-can-t-vote-fill-voting-districts> [perma.cc/9HUL-2Y6Y].

<sup>99</sup> Liebelson, *supra* note 10.

the right to vote, politicians and campaigns become more willing to confront problems faced by incarcerated people.<sup>100</sup>

Outside of the material political benefits available to prisoners who have the right to vote, there are also civic benefits.<sup>101</sup> Voting allows incarcerated people to feel connected to society and create a sense of community with the outside world.<sup>102</sup> Additionally, studies have shown that when incarcerated people participate in the democratic process, they have a lower recidivism rate.<sup>103</sup> Vermont prisoners who were allowed to vote while incarcerated exhibited tendencies to pay attention to the news and form their own opinions on what our representative government should look like.<sup>104</sup> Tyler Orvis, one Vermont voter who voted from prison, said of exercising his right while incarcerated: “We messed up. We’re paying our debt to society by being in prison . . . but we’re still human. We should have the right to vote.”<sup>105</sup>

On more fundamental grounds, extending the franchise to incarcerated people is an attempt to make the right to vote completely inalienable. Voting is a fundamental right that must be extended to all citizens regardless of criminal status.<sup>106</sup> When entire classes of citizens are excluded from participation it undermines our democracy and renders our society less inclusive.<sup>107</sup> Citizens feel abandoned by their government when they are prohibited from having a say in that government. This prevents public policy from reflecting the true will of the people.<sup>108</sup> While voting rights have been extended to include various groups such as women, non-property-owning citizens, people of color, and those between the ages of eighteen and twenty, felons continue to be disenfranchised.<sup>109</sup> Just like the aforementioned groups, felons are subjected to all the rules our society imposes, yet they cannot use the ballot box to voice their displeasure or affect change.<sup>110</sup>

This is normally justified according to the idea that those who break the laws of man should no longer have any say in who makes those laws. This is

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<sup>100</sup> See Riley Board, *What does an election look like inside a prison?*, BURLINGTON FREE PRESS (Aug. 24, 2020, 1:00 PM), <https://www.burlingtonfreepress.com/story/news/politics/elections/2020/08/24/vermont-inmates-can-vote-how-elections-prison-mail-in-ballot/3326694001/> (explaining that Vermont gubernatorial candidate Christine Hallquist had spoken out about issues facing incarcerated people on the campaign trail) [perma.cc/U988-MSD4].

<sup>101</sup> Liebelson, *supra* note 10.

<sup>102</sup> *Id.*

<sup>103</sup> Hoffman, *supra* note 15.

<sup>104</sup> Liebelson, *supra* note 10.

<sup>105</sup> *Id.*

<sup>106</sup> Hoffman, *supra* note 15.

<sup>107</sup> *Id.*

<sup>108</sup> Levine, *supra* note 16, at 195.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 196.

an important concept to understand, as the commission of crimes against the state and its people is not to be taken lightly. However, disenfranchising felons does not achieve any of the four aims of punishment: incapacitation, retribution, deterrence, and rehabilitation.<sup>111</sup> People who are convicted of crimes are incapacitated by being removed from society and incarcerated.<sup>112</sup> Taking away their right to vote does nothing further to incapacitate them, but serves as a double punishment. Opponents will argue that taking the vote away from people convicted of felonies incapacitates them by disallowing them to participate in society and elect officials that govern the laws at the local, state, and federal level.<sup>113</sup> However, a person's right to vote cannot be taken away simply because they may cast a subversive vote.<sup>114</sup> Further, there are practical safeguards against incarcerated people exercising an outsized influence on the voting process.<sup>115</sup> Felons are constrained in the electoral process in the same way everyone else is: They can only elect those who choose to run.<sup>116</sup> Incarcerated people, therefore, would contribute to the electoral process in the same way that everyone else does.

Additionally, disenfranchising the incarcerated may seem retributive, but that is not so in the strictest interpretation. Retribution refers to the idea that a person who has committed a crime must suffer in order to pay for their breaking the law.<sup>117</sup> However, felon disenfranchisement does not comport with the notion of retribution because there is no link between the punishment and the wrongdoing.<sup>118</sup> True retribution would be to take away the franchise only from those who committed crimes relating to elections, like voter fraud or bribery. However, all offenders are punished the same way in a system of widespread felon disenfranchisement, so this link is severely weakened.<sup>119</sup> Felon disenfranchisement is also not a deterrent from committing crimes, either for the person who was originally convicted or for other members of society.<sup>120</sup> If a would-be felon knows that they will face a lengthy sentence if

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<sup>111</sup> *Id.* at 213.

<sup>112</sup> *Id.* at 215.

<sup>113</sup> *Green v. Bd. of Elections of New York*, 380 F.2d 445, 451 (2nd Cir. 1967) (“[I]t can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforces these, the prosecutors who must try them for further violations, or the judges who are to consider their cases.”).

<sup>114</sup> *Levine*, *supra* note 16, at 216.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 218.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 220.

caught, it is unlikely that the thought of losing their right to vote would be enough to dissuade them from criminal activity.<sup>121</sup>

Moreover, taking away an incarcerated person's right to vote does nothing to rehabilitate them and prepare them to re-enter society. In fact, as previously discussed, stripping the right to vote from an incarcerated person may work to achieve the opposite end.<sup>122</sup> Studies have shown that when incarcerated people participate in the democratic process, they have a lower recidivism rate.<sup>123</sup> By denying incarcerated people the right to vote, disenfranchisement may cause recidivism rates to increase.<sup>124</sup>

Finally, felon disenfranchisement does not really achieve its intended end of keeping people who have engaged in unsavory behavior from voting. For many, felon disenfranchisement is about keeping bad people from having a say in our electoral process.<sup>125</sup> One of the first clarifications often asked for when confronted with the concept of incarcerated people voting is whether or not sex offenders, murderers, and terrorists should be voting in American elections.<sup>126</sup> However, the idea that felon disenfranchisement stops people who commit heinous acts from voting is manifestly not true. In Louisville, the largest city in Kentucky, the murder clearance rate between January and April 2021 was 34%.<sup>127</sup> Out of 83 reported rapes in the city during that same period, only eight arrests were made.<sup>128</sup> The majority of violent crimes go unsolved; the perpetrator will never be convicted. The fact is that felon disenfranchisement laws will not stop people of this ilk from participating in elections because so many of them are not barred from voting. And while society tries to exclude them from civic engagement, we will sweep up countless others who have committed drug crimes or crimes of poverty.<sup>129</sup>

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 223.

<sup>123</sup> See Hoffman, *supra* note 15.

<sup>124</sup> Levine, *supra* note 16, at 223.

<sup>125</sup> See Jason Snead, *No, prisoners should not be voting from their cells*, NEWSDAY (May 16, 2019, 4:00 PM), <https://www.newsday.com/opinion/commentary/prisoners-voting-cells-boston-bomber-1.31155926> [<https://perma.cc/FF76-K77S>].

<sup>126</sup> See Aamer Madhani, *Bernie Sanders says felons, even Boston Marathon bomber, should have right to vote in prison*, USA TODAY (last updated Apr. 23, 2019, 11:42 AM), <https://www.usatoday.com/story/news/politics/elections/2019/04/23/bernie-sanders-voting-rights-boston-marathon-bomber-buttigieg-harris/3548232002/> [<https://perma.cc/EN7Y-3U4Q>].

<sup>127</sup> LOUISVILLE METRO POLICE DEP'T, LMPD UCR REPORT JANUARY–APRIL 2021, at 14 (2021), <http://www.louisville-police.org/ArchiveCenter/ViewFile/Item/85> [<https://perma.cc/56KB-YCLJ>].

<sup>128</sup> *Id.* at 17–18.

<sup>129</sup> See Press Release, Wendy Sawyer & Peter Wagner, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2020 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> (showing that one in five incarcerated people is being held for a drug offense) [<https://perma.cc/VY69-NSCS>].

*C. Impact of Mass Incarceration on Felon Disenfranchisement*

Felon disenfranchisement cannot be divorced from other aspects of the criminal justice system that disproportionately affect people and communities of color. Many of the state laws that ban felons from voting were passed in the late 19th and early 20th centuries.<sup>130</sup> This was in the wake of the passage of the 15th Amendment to the United States Constitution which granted the right to vote to all male citizens regardless of race.<sup>131</sup> States were no longer able to explicitly deny the right to vote to Black men, most of whom were freed slaves, so they added laws that banned voting by felons.<sup>132</sup> This, coupled with mass incarceration, has led to the disenfranchisement of millions of Black people over the last century-and-a-half.<sup>133</sup> This widespread stripping of the right to vote is due in part to the United States' position as the most carceral state in the world.<sup>134</sup> By raw number, the United States incarcerates more people than any other country in the world, with 2.2 million people currently behind bars.<sup>135</sup> As of 2018, the United States imprisons 698 people per 100,000, also the highest in the world.<sup>136</sup> Thirty-one U.S. states individually have a higher incarceration rate than any country in the world, other than the United States.<sup>137</sup> Even in the most punitive country in the world, Kentucky is near the top in terms of incarceration rate. The Commonwealth has the ninth-highest incarceration rate in the nation, with 869 inmates per 100,000 people.<sup>138</sup>

Of course, this burden of incarceration is not shared equally among the entire population. In state prisons across the country, Black people are incarcerated at a rate 5.1 times the imprisonment of whites.<sup>139</sup> According to the Bureau of Justice Statistics, Black people make up the plurality of state prisoners at 38% of the total state prison population.<sup>140</sup> Black people are not the only group disproportionately affected by felon disenfranchisement, as

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<sup>130</sup> Taylor, *supra* note 8.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Sawyer & Wagner, *supra* note 130.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> ASHLEY NELLIS, SENT'G PROJECT, THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3 (June 2016), <https://www.sentencingproject.org/wp-content/uploads/2021/10/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons-2016.pdf> [https://perma.cc/NPP9-NEWC].

<sup>140</sup> *Id.* at 4.



Hispanic people make up over one-fifth of the state prison population.<sup>141</sup> While the national statistics on racial disparities in imprisonment are staggering, they pale in comparison to the numbers boasted by many states. There are five states (Iowa, Minnesota, New Jersey, Vermont, and Wisconsin) where Black people are incarcerated at a rate of more than ten to one as compared with white people.<sup>142</sup> There are also twelve states where the majority of the prison population is Black, with Maryland's 72% Black prison population leading the nation.<sup>143</sup> In Kentucky, Black people are incarcerated at over three times the rate of white people.<sup>144</sup>

#### IV. RESOLUTION

##### *A. Ending Felon Disenfranchisement in the Commonwealth*

The solution to this problem is for Kentucky to adopt a voting regime like that of Vermont or Maine. In these two states, every person can vote, regardless of their carceral status.<sup>145</sup> One of the biggest advantages of such a system is its simplicity. Under this system, no one who is currently or has been previously incarcerated has to doubt whether they are eligible to vote. Further, no one will be punished with additional jail time for mistakenly voting in an election for which they had been disqualified because of a felony conviction. Nor will an eligible voter's name be purged from the voter rolls due to mistaken identity. This system not only makes many more people eligible to vote, but it encourages voting by people who are on the margins, those who may otherwise have reason to doubt that they are eligible to vote.

As previously discussed, changing the law regarding felon disenfranchisement in Kentucky presents a particular problem. The provision that forbids people with felony convictions from voting is not simply a statute: It is enshrined in our state constitution, so it could not be changed by passing regular legislation through the General Assembly.<sup>146</sup> However, as Governor Beshear has demonstrated, executive action can be successfully employed to expand voting rights.<sup>147</sup> Expansion of that executive action is

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 6.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *See id.* at 5.

<sup>145</sup> VT. STAT. ANN. tit. 28, § 807 (2001); ME. STAT. ANN. tit. 21-A, § 112 (2009).

<sup>146</sup> KY. CONST. § 145.

<sup>147</sup> Tonya Mosley & Francesca Paris, *Kentucky Governor Andy Beshear Restores Voting Rights To Felons*, WBUR (Dec. 12, 2019), <https://www.wbur.org/hereandnow/2019/12/13/kentucky-felon-voting-rights> [perma.cc/79WA-TYCQ].

the most effective way of further expanding the right to vote in the Commonwealth of Kentucky. Although it would not be a permanent fix, it seems that if voting rights were extended to everyone in the Commonwealth, they would be politically difficult to take back.

The construction of § 145 of the Kentucky constitution may present challenges for using executive action to extend the franchise to currently incarcerated felons. The first part of the section, which lists people who are not eligible to vote, states:

Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.<sup>148</sup>

This portion of the provision clearly establishes that executive action by the governor may be used to restore the voting rights of anyone who is disenfranchised because of a previous felony conviction. This is the basis of Executive Order 2019-003 issued by Governor Andy Beshear.<sup>149</sup> However, the provision goes on to separately state that “[p]ersons who, at the time of the election, are in confinement under the judgment of a court for some penal offense” are also ineligible to vote.<sup>150</sup> This would imply that currently incarcerated felons are deprived of the right to vote by § 145 on two grounds: (1) because of their felony conviction, and (2) because they are in confinement under the judgment of a court at the time of the election. Whether or not the governor could restore the right to vote to currently incarcerated people through an executive order has never been considered. However, because the executive pardon remedy is listed only as to the portion regarding previous felony convictions, it is unlikely that the governor could take executive action to restore voting rights to currently incarcerated people.

### 1. A Model Executive Order

Because of the construction of the constitution, restoring the right to vote to all voting-age Kentuckians will require a two-pronged approach. The first is to restore voting rights to all formerly incarcerated people in the

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<sup>148</sup> KY. CONST. § 145.

<sup>149</sup> Ky. Exec. Order No. 2019-003 (Dec. 12, 2019) (“Whereas, pursuant to Section[] 145 . . . of the Constitution of the Commonwealth of Kentucky, the Governor is authorized and empowered to restore the civil rights of any citizen that are forfeited by reason of a felony conviction.”).

<sup>150</sup> KY. CONST. § 145.

Commonwealth. This can be done through executive order. In terms of a model order, Executive Order 2019-003 may be used as a model, but with some changes. The relevant text of Executive Order 2019-003 reads:

1. The civil rights, hereby expressly limited to the right to vote and the right to hold public office denied by judgment of conviction and any prior conviction, are hereby restored to all offenders convicted of crimes under Kentucky state law who have satisfied the terms of their probation, parole, or service of sentence (hereinafter collectively referred to for purposes of this Order as “Final Discharge”), exclusive of restitution, fines, and any other court-ordered monetary conditions.
  
2. This Order shall not apply to any person presently convicted of:
  - a) Treason,
  - b) Bribery in an election,
  - c) A violent offense defined in KRS 439.3401,
  - d) Any offense under KRS Chapter 507 or KRS Chapter 507A,
  - e) Any Assault as defined in KRS 508.020 or KRS 508.040,
  - f) Any offense under KRS 508.170, or
  - g) Any offense under KRS 529.100.<sup>151</sup>

An executive order in line with what is proposed here would have very similar language to the portion under number one of this text, with some modification. It would read:

The civil rights, hereby expressly limited to the right to vote and the right to hold public office denied by judgment of conviction and any prior conviction, are hereby restored to all offenders convicted of crimes under Kentucky state law, federal law, or the laws of any other U.S. jurisdiction who have satisfied their service of sentence (hereinafter collectively referred to for purposes of this Order as “Final Discharge”), exclusive of restitution, fines, and any other court-ordered monetary conditions.

This language is substantially similar to that of subsection one of Executive Order 2019-003.<sup>152</sup> However, it excludes the language requiring a felon to complete probation or parole before having their rights restored.<sup>153</sup> Further, the model order omits language that only includes convictions under

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<sup>151</sup> Ky. Exec. Order No. 2019-003 (Dec. 12, 2019).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

Kentucky state law.<sup>154</sup> The model order would restore voting rights to felons with federal convictions, as well as felons with convictions from other jurisdictions. Subsection two would be removed completely, as there would be no exceptions in the model order. Further, subsection four of the order, which provides that those felons who are not covered by the order have the right to request restoration under KRS § 196.045, would also be removed because there would be no formerly incarcerated felons who would not be covered under the model order.<sup>155</sup> Subsection six of the order would also be removed, as it pertains to those who did not receive restoration because they had federal convictions or convictions from another jurisdiction.<sup>156</sup> Because the model executive order would restore voting rights to felons who had convictions by the federal government or another jurisdiction, this subsection would also be unnecessary. Using Executive Order 2019-003 as a framework, a model executive order that grants all formerly incarcerated people would actually be rather simple.

As previously discussed, this action would be perfectly in line with the Kentucky constitution because of the affirmative language in § 145. Further, Executive Order 2019-003 has been tested in federal court, and dicta in the case suggests that the order would be consistent with the United States Constitution.<sup>157</sup> In *Lostutter v. Beshear*, a group of formerly incarcerated felons initially sued Matt Bevin for issuing Executive Order 2015-052, which ended voting rights restorations for some formerly incarcerated people.<sup>158</sup> However, while this case was being litigated Andy Beshear was elected Governor of Kentucky and implemented his executive order which voided the executive order in question.<sup>159</sup> Because Beshear was the successor in public office to Bevin, he was automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d).<sup>160</sup> The court ultimately ruled that the executive order issued by Governor Beshear mooted the claims of the plaintiffs because the order established “non-arbitrary criteria to guide restoration of the franchise.”<sup>161</sup> The case was mooted because the plaintiffs had claimed that Kentucky felon disenfranchisement law was in violation of the First Amendment, arguing that it lacked any non-arbitrary criteria.<sup>162</sup> So,

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Lostutter v. Beshear*, No. CV 6:18-277-KKC, 2020 WL 4758356, at \*3 (E.D. Ky. Aug. 14, 2020).

<sup>158</sup> *Id.* at \*1.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at n.1; FED. R. CIV. P. 25(d).

<sup>161</sup> *Lostutter*, 2020 WL 4758356, at \*3.

<sup>162</sup> *Id.* at \*4.

even though the court did not reach the merits of the order, this language bodes well for the constitutionality of the order going forward. Further, because the model executive order restored every formerly incarcerated person's right to vote, there would be no criteria to even challenge; everyone who had been released from prison would automatically have their voting rights restored. This is why I am confident that an order like the model order proposed above would be upheld as constitutional.

The main criticism of the model executive order may be that it represents only a temporary fix that could easily be undone by a succeeding governor. While that concern is legitimate, my hope is that it represents only a stop-gap preceding a permanent change in the law. After all, Executive Order 2019-003 is very similar to an executive order issued by Governor Steve Beshear, which was rescinded during Matt Bevin's administration.<sup>163</sup> Governor Andy Beshear must have known when he issued Executive Order 2019-003 that a future governor could rescind it, but he issued it nonetheless. I hope the same for the model executive order. Further, there is reason to believe that executive action can be effective in the short term. For example, Virginia has a very similar felon disenfranchisement system as Kentucky: A blanket constitutional ban on convicted felons casting a vote, unless their voting rights are restored by the governor.<sup>164</sup> Virginia Governor Terry McAuliffe restored voting rights to about 173,000 individuals in 2016, and the expansion of voting rights has only continued in the years following his administration.<sup>165</sup> There is no reason to believe that this is not also possible in Kentucky.

## 2. A Model Amendment

Now a more permanent proposed solution must be detailed: a legislative change in the law regarding felon disenfranchisement. In addition to an executive order, a proper change in felon disenfranchisement law in Kentucky would require the Governor to work with the General Assembly to amend the Kentucky constitution to restore voting rights to everyone of voting age in the Commonwealth, regardless of their criminal status. This is certainly not going to be an easy road. But modernizing democracy in the Commonwealth and delivering justice to thousands of Kentuckians is worth

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<sup>163</sup> Ky. Exec. Order No. 2015-871 (Nov. 24, 2015); Ky. Exec. Order No. 2015-052 (Dec. 22, 2015).

<sup>164</sup> Sarah Kleiner, *Voting is Easier in Virginia Now, Unless You Have a Felony Conviction*, CTR. FOR PUB. INTEGRITY (Oct. 9, 2020), <https://publicintegrity.org/politics/elections/us-polling-places/voting-easier-in-virginia-unless-you-have-felony-conviction/> [perma.cc/L9VS-6GE4].

<sup>165</sup> *Id.*

it. Efforts to amend the Kentucky constitution as it relates to felon disenfranchisement have been undertaken in the past. In 2006, there were four proposed constitutional amendments that would have placed the question of voting rights restoration for formerly incarcerated people into the hands of voters.<sup>166</sup> One of those amendments, HB 480, had significant popular support and bipartisan cosponsorship, but was ultimately unsuccessful in the General Assembly.<sup>167</sup> This is the most recent push to amend Kentucky's constitutional provisions prohibiting those with felony convictions from voting. Much has changed in Kentucky within the last fifteen years, especially concerning attitudes toward racial issues and the criminal justice system. Now is the time to revisit efforts to amend the Kentucky constitution.

In terms of model legislation for Kentucky, the two states where incarcerated felons may cast a ballot, Vermont and Maine, offer starting points.<sup>168</sup> Maine's statute simply states that a Maine voter who is incarcerated will retain their previous voluntary address for the purposes of voting.<sup>169</sup> However, the Vermont statute has more specific language about the person retaining the right to vote, so it would serve better as a model for a Kentucky amendment.<sup>170</sup> Vermont's felon voting provision states:

(a) Notwithstanding any other provision of law, a person who is convicted of a crime shall retain the right to vote by early voter absent ballot in a primary or general election at the person's last voluntary residence during the term of the person's commitment under a sentence of confinement provided the person otherwise fulfills all voting requirements.

(b) No person sentenced to the custody of the Commissioner of Corrections may use the place of involuntary confinement as the person's place of residence for the purpose of qualifying to vote.<sup>171</sup>

For a model amendment, this language in the Vermont statute can be used verbatim. It provides that rights are retained while incarcerated, and specifies that an incarcerated felon's address for the purposes of voting will be their last voluntary residence—which are the two issues that must be addressed by

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<sup>166</sup> LEAGUE OF WOMEN VOTERS OF KENTUCKY, *supra* note 50, at 6.

<sup>167</sup> *Id.*

<sup>168</sup> ME. REV. STAT. ANN. tit. 21, § 112 (2009); VT. STAT. ANN. tit. 28, § 807 (2001).

<sup>169</sup> ME. REV. STAT. ANN. tit. 21, § 112 (2009).

<sup>170</sup> Compare *id.*, with VT. STAT. ANN. tit. 28, § 807 (2001).

<sup>171</sup> VT. STAT. ANN. tit. 28, § 807 (2001).

the amendment.<sup>172</sup> In order to take effect, the amendment would need approval from three-fifths of both houses of the General Assembly.<sup>173</sup>

### 3. Justifications for Universal Suffrage

Universal suffrage, rather than a more moderate system, is justified because it solves the many problems posed by felon disenfranchisement. No other system is so simple that confusion about who can vote is eliminated because everyone is eligible.<sup>174</sup> No other system addresses the fact that incarcerated people have interests that cannot be served without being able to access the franchise.<sup>175</sup> Above all, no other system treats the right to vote as completely unalienable for every person. There is a slippery slope with taking the vote away from even one person because that puts the next person at risk of having their vote taken away, until finally a system like Kentucky's is in place where every felon is stripped of his or her right to vote for the remainder of his or her life unless the governor agrees to restore it.<sup>176</sup> Universal suffrage is the only failsafe against systems that are out of step with how we conceptualize democracy in a modern world.

Further, there are legal arguments against disenfranchising felons completely. Justice Marshall's dissent in *Richardson v. Ramirez* represents a procedural and textual rebuke of the majority opinion that held felon disenfranchisement is constitutional.<sup>177</sup> Justice Marshall, joined by Justice Brennan, dissented on two grounds. First, Justice Marshall determined that the case was not properly before the Court.<sup>178</sup> When the plaintiffs filed the action asking to be registered to vote, they filed a petition for a writ of mandate in the California Supreme Court, invoking its original jurisdiction.<sup>179</sup> The suit was brought "individually and on behalf of all other

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<sup>172</sup> *Id.*

<sup>173</sup> KY. CONST. § 256.

<sup>174</sup> See Brian Saylor, *It's nearly impossible for an ex-felon to vote in Arizona. That needs to change*, AZ CENTRAL (July 6, 2020, 6:00 AM), <https://www.azcentral.com/story/opinion/op-ed/2020/07/06/arizona-ex-felons-face-harsh-voting-restrictions/3269304001/> (detailing problems with post-release voting in Arizona, a state where felons have their rights restored when released from prison, due to the complex restoration process and outstanding fines) [perma.cc/TH2J-HEV7].

<sup>175</sup> See Liebelson, *supra* note 10.

<sup>176</sup> Madhani, *supra* note 127 ("Yes, even . . . terrible people [should be able to vote while incarcerated], because once you start chipping away and you say, Well, that guy committed a terrible crime, not going to let him vote. Well, that person did that. Not going to let that person vote, you're running down a slippery slope," [Sen. Bernie] Sanders said in a response to a question about restoring felons' voting rights.').

<sup>177</sup> *Richardson v. Ramirez*, 418 U.S. 24 (1974).

<sup>178</sup> *Id.* at 59 (Marshall, J. dissenting).

<sup>179</sup> *Id.* at 57.

persons who are ineligible to register to vote in California solely by reason of a conviction of a felony other than an election code felony.”<sup>180</sup> The complaint named three election officials as defendants.<sup>181</sup> Instead of contesting the action, the defendants represented to the state court that they would permit the plaintiffs and all similarly situated ex-felons in their counties to register to vote.<sup>182</sup> However, the petitioner in the United States Supreme Court, Viola Richardson, the then-County Clerk of Mendocino County, California, had intervened in the proceedings before the California Supreme Court because she was being sued in a separate action in a lower state court by an ex-felon seeking to register.<sup>183</sup> The California Supreme Court found that the case was not moot and addressed the merits of the Fourteenth Amendment issue, finding the California felon disenfranchisement provision unconstitutional.<sup>184</sup> However, the California Supreme Court did not order the remedy sought by the plaintiffs (a peremptory writ of mandate to compel registration of the plaintiffs), so Richardson was not ordered to register the plaintiff suing her or any other potential voter in her county.<sup>185</sup> Marshall argued that, because of the lower court’s ruling, the case was not properly before the Supreme Court because there was no controversy.<sup>186</sup> He argued that:

While Richardson may well have a live controversy with ex-felons in her own county over the validity of the disenfranchisement laws, those ex-felons are not before this Court, and she has no dispute with the named plaintiffs. In sum, there is no controversy between the parties before this Court.<sup>187</sup>

Justice Marshall also dissented on the merits of the case.<sup>188</sup> Justice Marshall emphasized a point that the majority acknowledged in its opinion: There is no definitive legislative history to suggest that the Court’s interpretation of Section 2 of the Fourteenth Amendment is accurate.<sup>189</sup> Marshall wrote that “the proposed § 2 went to a joint committee containing only the phrase ‘participation in rebellion’ and emerged with ‘or other crime’

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 58.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 58–59.

<sup>186</sup> *Id.* at 63.

<sup>187</sup> *Id.* at 72.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*



inexplicably tacked on.”<sup>190</sup> The historical purpose of § 2, according to Justice Marshall, arose from Republican concerns that emancipation would give southern states outsized representation in Congress.<sup>191</sup> In seeking to stave off Southern dominance of Congress, Marshall wrote, “[t]here were two alternatives available – either to limit southern representation, which was unacceptable on a long-term basis, or to insure that southern Negroes, sympathetic to the Republican cause, would be enfranchised.”<sup>192</sup> At the time of the drafting, explicitly granting the franchise to emancipated Blacks was deemed politically infeasible, so § 2 of the Fourteenth Amendment was a compromise. “It put Southern States to a choice – enfranchise Negro voters or lose congressional representation.”<sup>193</sup>

Justice Marshall’s dissent casts serious doubt on the constitutionality of felon disenfranchisement in every state in the country. The legislative history seems to suggest that the affirmative language relied on by the majority in *Richardson* does not support its conclusion. As a practical matter, it is unlikely that a challenge to *Richardson* is forthcoming, but if one was, this argument in Justice Marshall’s dissent could be its cornerstone. Regardless, Justice Marshall’s dissent serves as a powerful legal basis for restoring the right to vote to all, regardless of their criminal status.

## V. CONCLUSION

Our democracy is less inclusive and less responsive to the will of all of the people when groups of citizens are prohibited from participating in the electoral process.<sup>194</sup> Currently and formerly incarcerated people are still citizens of the United States and the Commonwealth of Kentucky. They have interests just like anyone else, and they need access to the ballot box in order to protect those interests.<sup>195</sup> Further, it is an attack on everyone’s voting rights when even one voting-age person is denied the franchise.<sup>196</sup> Finally, felon disenfranchisement laws are not applied equally to everyone in society. They heavily burden communities of color, particularly the Black community.<sup>197</sup> For these reasons, the Commonwealth of Kentucky must reverse its poor record on felon voting rights. Governor Beshear must expand his executive

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<sup>190</sup> *Id.* at 73.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 74.

<sup>194</sup> Levine, *supra* note 16, at 195.

<sup>195</sup> See Liebelson, *supra* note 10.

<sup>196</sup> See Madhani, *supra* note 127.

<sup>197</sup> See Taylor, *supra* note 8.

order to include all formerly incarcerated people, and the General Assembly must work together to restore the right to vote to all formerly and currently incarcerated Kentuckians.