



RESEARCH AND ADVOCACY FOR REFORM

Barriers to Democracy

**A Petition to the Inter-American
Commission on Human Rights for a
Thematic Hearing on Felony
Disenfranchisement Practices in the
United States and the Americas**

The Sentencing Project

and

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The Sentencing Project is a national non-profit organization engaged in research and advocacy on criminal justice policy issues. The Sentencing Project works for a fair and effective criminal justice system by promoting reforms in sentencing law and practice and alternatives to incarceration. To these ends, it seeks to recast the public debate on crime and punishment.

The International Human Rights Law Clinic at American University's Washington College of Law is one of the oldest and largest human rights clinics operating for academic credit in the world. The clinic was founded in 1990 to provide pro bono legal services in litigation and projects involving issues of the application of international human rights norms. Students working under the supervision of four full-time faculty supervisors, provide a broad range of legal advice and advocacy in domestic and international fora on matters involving the application of human rights treaties and custom, international criminal and humanitarian law and procedure, and particularly, the application of international human rights within the constitutional framework of the United States.

EXECUTIVE SUMMARY

The United States stands alone on a global scale in its denial of voting rights to persons who have been convicted of a felony. Currently 5.3 million Americans are denied the right to vote due to a felony conviction. This includes more than two million people who have completed their sentence, yet are permanently disenfranchised in some states. The United States' policy has had a particularly disproportionate effect on minority communities with nearly two million African Americans – 1 of every 12 adults -- disenfranchised nationally. In addition, a recent study of ten states demonstrated disproportionate rates of disenfranchisement for Latinos as well, raising concerns about the expanded impact of these policies. United States' policies are extreme among the world's nations both in the breadth of their coverage and in the proportion of the population affected.

The increasing international movement to identify the right to vote as fundamental to a democracy threatens to marginalize further the United States' electoral system as a model of unfairness and inequality. Recent international law and court rulings have clearly communicated that granting the right to vote to all citizens, regardless of criminal history, is the only means by which societies can ensure that their democracy is truly representative. The time is long overdue for the United States to follow the lead of its hemispheric neighbors and the broader international community, uphold treaties to which the United States is obligated, and take steps toward universal suffrage by reforming its criminal disenfranchisement policies.

LAWS IN THE AMERICAS

The United States is one of only ten countries in the Americas that practices permanent disenfranchisement and does so to an extent that is without comparison. The United States is the only country that imposes permanent disenfranchisement based on broad categories of crimes such as felonies or crimes of “moral turpitude.” For those countries in the Americas that do permit disenfranchisement after the completion of sentence, this policy tends to be limited in duration or for specific offense types.

Only twelve countries in the Americas practice post-incarceration (parole) disenfranchisement and in all of them the practice is far more limited than in the United States. Some nations only disenfranchise persons beyond incarceration for specific crimes or based on the length of their sentence. In contrast, the 35 states in the United States that disenfranchise persons on parole have a blanket prohibition on voting, regardless of the offense or length of sentence.

LAWS OUTSIDE THE AMERICAS

Only three countries outside the Americas deny the right to vote to individuals upon completion of sentence and these have narrow provisions governing the practice. Countries in the Americas generally limit post-sentence disenfranchisement to certain offense types and for defined durations that eventually expire. In addition, a significant number of nations do not impose any restriction on the right to vote as a result of a felony conviction, including while incarcerated. In Europe, for example, 17 nations permit all citizens to vote regardless of conviction status.

UNIVERSAL SUFFRAGE: INTERNATIONAL TREATY LAW

International treaty law is consistent in its establishment and protection of universal suffrage while recognizing the fundamental importance of the right to vote. This broad recognition has led to an emerging norm of customary international law. As the right to universal and equal suffrage gains support in international law, the practice of denying voting rights based on a criminal conviction emerges as a violation of this evolving standard. The American Convention on Human Rights, the European Convention on Human Rights, and the African Charter on Human and People's Rights all contain provisions that protect and promote democratic systems of government. Two United Nations documents, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, also protect the right to vote and support the international custom of universal suffrage. Finally, a number of governing documents for members of the Organization of American States (OAS) establish and protect a right to vote. These include the OAS Charter, the Inter-American Democratic Charter, the Declaration on the Principles of Freedom and Expression, the American Convention on Human Rights, and the American Declaration of the Rights and Duties of Man.

At the national level, 179 member nations of the United Nations protect the right to vote, and 109 include a reference to either the protection of "universal" or "equal" suffrage. Among the member states of the Organization of American States, universal suffrage is guaranteed in 27 state constitutions.

INTERNATIONAL CASELAW: APPLYING UNIVERSAL SUFFRAGE TO CRIMINAL DISENFRANCHISEMENT

While these documents clearly demonstrate an international commitment to universal suffrage, a growing body of international jurisprudence is extending this standard to disenfranchisement provisions and striking down efforts by states to deny the right to vote to persons based on their criminal history. Since 1996, the Canadian Supreme Court, South African Constitutional Court, Israeli Supreme Court, and the European Court of Human Rights have all issued decisions condemning disenfranchisement policies as overbroad and incongruous with fundamental democratic principles. Moreover, in each of these decisions the court struck down policies disenfranchising persons while *currently incarcerated*. Obviously, more restrictive practices such as denying the right to vote to persons under community supervision or after the completion of sentence would be considered equally egregious violations of the principles of universal suffrage.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS STANDARDS

The governing texts of the Inter-American Commission on Human Rights view representative democracy as a critical factor in the establishment and protection of all human rights. Fundamental to the enforcement of human rights and the creation of a representative democracy is the right to vote. Past jurisprudence by the Commission regarding voting rights for residents of the District of Columbia held that the United States did not have objective, reasonable, and proportionate justifications for denying District residents equal voting rights. In that case, the Commission established a framework of proportionality by which voting rights cases should be evaluated. Restrictions upon the right of civic engagement must be

justified by the need of these limitations in the framework of a democratic society based on means, motives, reasonability, and proportionality.

CALL FOR ACTION

The United States' policy of criminal disenfranchisement is extreme by every international metric, and there is a compelling need for reform. We therefore request a hearing before the Inter-American Commission on Human Rights to highlight the American policy relative to international law and practice, as well as in regard to binding treaty obligations. It is only through this venue that we can hope to overcome the injustice experienced by more than 5 million Americans and remedy a blight on United States democratic practices.

INTRODUCTION

In the United States, the right to vote has been deemed “fundamental”¹ by the United States Supreme Court. The Supreme Court found that the right to vote is so important in a democracy that all other rights “are illusory if the right to vote is undermined.”² Despite these strong declarations, the United States disenfranchises far more people for criminal convictions than other democratic nations. In many cases, these draconian sentencing policies trigger an automatic suspension of voting rights that may result in a lifetime ban. An estimated 5.3 million people in the United States do not have a voice in the political process because they have been convicted of a crime.³ Of these 5.3 million people, three-fourths are not incarcerated, but are living in the community either on probation or parole supervision, or have completed their felony sentence.⁴

Additionally, the impact of the United States’ disenfranchisement policies is experienced most acutely in communities of color, thereby exacerbating enduring racial inequalities in political representation that have existed since the initial extension of the right to vote to African Americans 150 years ago. Two million African Americans, one in 12 residents, cannot vote due to a felony conviction.⁵ This is nearly five times the rate of disenfranchisement for the non-African American population. In some states, one in four black males is prohibited from voting due to

¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 371 (1886)

² *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)

³ Jeff Manza and Christopher Uggen, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY*, Oxford University Press, 2006, at 250 (Table A3.3).

⁴ *Id.*

⁵ *Id.* at 253 (Table A3.4).

a felony conviction.⁶ In addition, a recent study of ten states demonstrated disproportionate rates of disenfranchisement for Latinos as well, raising concerns about the expanded impact of these policies.⁷

The United States is one of only ten countries in the Americas that permits permanent disenfranchisement. Among those nations, the United States is the only country that permits permanent disenfranchisement based on broad categories of crimes such as felonies and crimes involving moral turpitude.⁸ Not only does the United States disenfranchise permanently, it also imposes disenfranchisement for long periods during and after incarceration. Even American countries that disenfranchise generally temper their policies based on several factors. For some, disenfranchisement may only be imposed for certain crimes that involve elections or voting. For others, the length of the sentence determines whether a person will be disenfranchised. The result of these harsh sentencing and disenfranchisement policies in the United States is the corruption of the democratic process.

While the United States continues to disenfranchise incarcerated persons, many countries in the world already grant the right to vote to people currently imprisoned. Constitutional courts in Canada, South Africa and Israel all have held that the right to vote must be preserved for those who are imprisoned. These courts have found that the denial of the right to vote to people in prison undermines the basis of a

⁶ Jamie Fellner and Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, HUMAN RIGHTS WATCH AND THE SENTENCING PROJECT, 1998.

⁷ Marisa J. Demeo and Steven Ochoa, *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States*, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, 2003.

⁸ The United States is governed by a federal system in which each state is permitted to establish rules controlling the implementation of elections, within the parameters of certain constitutional protections. Thus, each state has unique regulations governing which categories of persons with a felony conviction are permitted to participate. Currently, there are 10 states in which an individual can lose the right to vote for life as a result of a felony conviction, resulting in two million disenfranchised residents.

legitimate democracy. The European Court of Human Rights found that universal suffrage has become a basic principle in international human rights law and declared that a currently incarcerated person's right to vote is guaranteed by the European Convention on Human Rights.⁹

Decisions such as the one by the European Court of Human Rights demonstrate a shift in the interpretation of regional documents toward the protection and enforcement of democratic rights,¹⁰ which rely on the principle of universal and equal suffrage.¹¹ The shift toward democratic institutions follows a progression allowing increasing numbers of people who would otherwise be denied the franchise to be permitted to meaningfully participate in their governments. Nations have begun to recognize that voting should not be subject to a moral litmus test and that all citizens, regardless of their status or past behaviors, possess a right to participate in their government. This right of political participation is a necessary condition for the achievement of other human rights.¹² In order to preserve universal and equal suffrage, and to uphold it as an emerging norm of customary international law, it is important that this Commission recognize and protect the right to vote.

One of the basic foundations of democracy is the right of the citizenry to exercise their right to free expression and choose their government via the ballot box. It is evident from the governing texts of the Inter-American Commission on Human Rights that it views representative democracy as the glue that binds together all human rights.¹³ This Commission's interpretations of the American Convention and

⁹ *Hirst v. United Kingdom (Hirst No. 2)*, [2004] ECHR 121 (Eur. Ct. H.R.) at ¶52.

¹⁰ Reginald Ezetah, *The Right to Democracy: A Qualitative Inquiry*, 22 BROOK. J. INT'L L. 495, 512 (1997).

¹¹ *See id.* at 515.

¹² *See id.* at 595 ("The reasoning is straightforward: citizens will never attain sufficient power to advance their own welfare unless they possess a voice in the decisions of their government. One may conclude that human rights law does not favor elections to the exclusion or even subordination of other rights, but establishes participatory rights as a necessary [though certainly not sufficient] condition for the achievement of other human rights").

¹³ *Andres Aylwin Azocar et al. v. Chile*, Case 11.863, Report No. 137/99 (1999)

the American Declaration are demonstrative of its duties to promote representative democracy and to safeguard human rights. Fundamental to the enforcement of human rights and the creation of a representative democracy is the right to vote.

This report will demonstrate that the disenfranchisement policies of the United States are contrary to the principle of universal and equal suffrage and are out of line with international norms of disenfranchisement.

- First, we will examine current disenfranchisement policies regarding persons in prison and other categories of people with felony convictions in the United States.
- Second, we will look at policies regarding disenfranchisement in other member states of the Organization of American States (OAS).
- Third, we will consider these hemispheric policies relative to disenfranchisement practices from other regions of the world.
- Fourth, we will establish that there is an emerging customary law regarding the principle of universal and equal suffrage that results in granting the right to vote to persons in prison. We will establish this norm by examining international instruments as well as the decisions of international and domestic courts.
- Finally, we request that the Inter-American Commission on Human Rights interpret the Inter-American Convention on Human Rights and the Inter-American Declaration on the Rights and Duties of Man in a manner that protects the right to vote, promotes universal and equal suffrage, and condemns restrictive felony disenfranchisement policies like those of the United States.

DISENFRANCHISEMENT PRACTICES IN THE UNITED STATES, THE AMERICAS, AND THE WORLD

Disenfranchisement policies deny voting rights to millions of people around the world. Among nations for which data are available, the United States disenfranchises more incarcerated persons than any other country, by any measure: categories of persons disenfranchised; percentage of the total population; or total number of persons in prison. The United States even disenfranchises persons who are sentenced to non-prison penalties, such as community supervision, while few other countries do so. The number of disenfranchised people who have fully completed their sentences – incarceration plus any period of post-incarceration supervision - is higher in the United States than any other country in the world.

Incarceration Disenfranchisement

In this report, the loss of the vote that occurs during the time that a person is physically in prison is called “incarceration disenfranchisement.” This practice is the most common form of disenfranchisement in the world. This section will review the practices of incarceration disenfranchisement in the United States, the practices in the Americas, and compare these provisions with those of other nations.

The United States

As we will demonstrate in this paper, there is international momentum among states to curtail their incarceration disenfranchisement policies. However, the United States continues to aggressively disenfranchise those persons who are incarcerated.¹⁴ At the end of 2005, there were over 1.5 million people in prison in the United States.¹⁵ Most of them were serving sentences in state prisons, while almost 180,000 were in federal prisons. In 48 of 50 states and the District of Columbia, all

¹⁴ Only the states of Maine and Vermont do not practice incarceration disenfranchisement.

¹⁵ See Paige M. Harrison and Allen J. Beck, *Prisoners in 2005*, BUREAU OF JUSTICE STATISTICS, NCJ 215092, (November 2006).

incarcerated adults convicted of a felony are denied the right to vote.¹⁶ This translates into 1.3 million Americans being denied the right to vote due to a current sentence of incarceration.¹⁷ Moreover, due to racially disparate patterns of arrest and conviction, the impact of this policy is felt particularly acutely in the African American community. Of the 1.3 million persons currently incarcerated and denied the right to vote, 51% (667,000) are African American.¹⁸ Thus, despite representing only 12% of the United States general population, African Americans comprise half of those disenfranchised due to a current sentence of incarceration.

Not only are the laws that prohibit people in prison from voting in the United States severe, but their impact is exacerbated by the elevated rates of incarceration in the United States relative to other countries. Because of the sheer number of people that the United States incarcerates and the broad reach of its disenfranchisement policies, the denial of the right to vote has a significant impact on American democracy. Disenfranchisement scholars Jeff Manza and Christopher Uggen found that the denial of the right to vote could have affected several United States Senate elections and a presidential election because the United States disenfranchises not just people who are incarcerated but also those serving sentences in their communities and those who have completed their sentences.¹⁹

¹⁶ THE SENTENCING PROJECT, *Felony Disenfranchisement Laws in the United States*, at <http://sentencingproject.org/PublicationDetails.aspx?PublicationID=335>, (last visited April 8, 2007).

¹⁷ Manza and Uggen, *supra* note 3.

¹⁸ *Id.* at 253 (Table A3.4).

¹⁹ *Id.* at 190-197.

The Americas

Incarceration disenfranchisement is the most common form of disenfranchisement in the Americas. As seen in Table A, 33 member states of the OAS practice some form of disenfranchisement of persons in prison serving sentences.²⁰ Twenty-one countries in the Americas prevent all persons in prison from voting. Some countries disenfranchise individuals who are incarcerated based on the length of their sentence. In Belize, that time is a year or more, while in Jamaica all persons sentenced to serve six months or more have their vote suspended for their term of incarceration. Rather than use the length of sentence as the basis for loss of voting rights, a few countries in the Americas disenfranchise incarcerated persons based on conviction for specific crimes. For example, Guyana only disenfranchises persons incarcerated for electoral offenses, while Chile only disenfranchises those who are incarcerated due to a conviction under Article 16 of the Chilean Constitution, crimes against the state.

²⁰ The analysis in this report is based on a review of the state constitutions of OAS member states and supporting statutory or legal documents. In some cases, state policies are not explicitly defined in these documents, and so the relevant policy is categorized as unknown in Table A.

TABLE A—ORGANIZATION OF AMERICAN STATES MEMBERS' DISENFRANCHISEMENT POLICIES

COUNTRY	Disenfranchise During Incarceration	Disenfranchise During Parole or Probation	Permanently Disenfranchise
Antigua & Barbuda	YES	UNKNOWN	UNKNOWN
Argentina	YES	UNKNOWN	UNKNOWN
Bahamas, The	YES	NO	NO
Barbados	YES	UNKNOWN	UNKNOWN
Belize	YES (sentences > 1 Year)	YES (election offenses)	NO
Bolivia	YES (certain offenses)	UNKNOWN	UNKNOWN
Brazil	YES	UNKNOWN	NO
Canada	NO	NO	NO
Chile	YES (crimes against state)	YES (certain offenses, up to 10 yrs)	YES (certain offenses)
Colombia	YES	UNKNOWN	UNKNOWN
Costa Rica	YES	YES (judicial discretion)	YES (judicial discretion)
Cuba	YES	YES	YES (judicial discretion)
Dominica	YES (certain offenses)	UNKNOWN	UNKNOWN
Dominican Republic	YES	YES (certain offenses)	YES (certain offenses)
Ecuador	YES	UNKNOWN	UNKNOWN
El Salvador	YES	YES (electoral fraud)	YES (electoral fraud)
Grenada	UNKNOWN	UNKNOWN	UNKNOWN
Guatemala	YES	UNKNOWN	UNKNOWN
Guyana	YES (election offenses)	YES (election offenses)	NO
Haiti	YES (certain offenses)	NO	NO
Honduras	YES (certain offenses)	YES (judicial discretion)	NO
Jamaica	YES (sentences > 6 months)	NO	NO
Mexico	YES	YES (certain offenses)	YES (certain offenses)
Nicaragua	YES	UNKNOWN	UNKNOWN
Panama	YES	NO	NO
Paraguay	YES	NO	NO
Peru	YES	NO	NO
St. Kitts & Nevis	YES (parliamentary discretion)	YES (parliamentary discretion)	YES (parliamentary discretion)
St. Lucia	YES (certain offenses)	NO	NO
St. Vincent & The Grenadines	YES	NO	NO
Suriname	YES (judicial discretion)	YES (judicial discretion)	YES (judicial discretion)
Trinidad & Tobago	YES (sentences > 1 Year)	NO	NO
Uruguay	YES	YES (certain offenses)	YES (certain offenses)
USA	YES	YES	YES
Venezuela	YES	NO	NO
Total Disenfranchisement	33	12	10
No Disenfranchisement	1	11	15

The World

In contrast to the restrictive policies of the United States and other countries in the Americas, many countries in other parts of the world are expanding voting rights to persons with felony convictions. These nations include members of the Council of Europe, Canada, and South Africa. These countries are finding that disenfranchisement is a disproportionate punishment and that the government has no justifiable interest in stripping away the right to political participation for those who are incarcerated. For example, the law in Germany not only permits currently incarcerated persons to vote, but requires authorities to encourage and assist people in prison to exercise their voting rights.²¹ Recently, the Canadian Supreme Court, in *Sauvé No. 2*, stated, “Denying citizens the vote denies the basis of democratic legitimacy... if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disfranchise the very citizens from whom the government’s power flows.”²²

Countries in Europe and elsewhere also incarcerate at much lower rates than the United States and other countries in the Americas. In Japan the rate of incarceration is 62 people per 100,000 and in Germany it is 93 per 100,000 but in the United States that number spikes to 737 per 100,000.²³ In addition to the United States, eight other American countries are among the top 20 countries ranked by the number incarcerated per capita.²⁴

Due to these high incarceration rates, the incarceration disenfranchisement practices of the United States and several other countries in the Americas have a far greater

²¹ Fellner and Mauer, *supra* note 6.

²² *Sauvé v. Canada (Chief Electoral Officer) (Sauvé No. 2)*, [2002] 3 S.C.R. 519, 2002 SCC 68 at ¶32.

²³ INTERNATIONAL CENTRE FOR PRISON STUDIES, *World Prison Brief*, (2007) at http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/world_brief.html

²⁴ Id. St. Kitts and Nevis is ranked 5th in the world with 547/100,000; Belize is 6th with 505/100,000; Cuba is 8th with 487/100,000; Bahamas is 12th with 462/100,000; Dominica is 15th with 419/100,000; Barbados is 17th with 367/100,000; Panama is 18th with 364/100,000; Suriname is 20th with 356/100,000.

impact on their ability to promote universal and equal suffrage than the policies in other countries. But it is clear from the governing instruments of the OAS that its members have a duty to promote representative democracy through universal and equal suffrage. A simple way to protect and promote universal and equal suffrage would be to follow Germany's approach, which not only allows people in prison to vote, but encourages them to exercise their right to vote. "The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood."²⁵

Disenfranchisement During Probation

When an individual is sentenced to probation, he or she is allowed to remain in the community but is under supervision by a court. While there may be forms of probation practiced throughout the Americas, specific data on the disenfranchisement of probationers in the majority of those countries is unavailable. Therefore, this section will focus primarily on the United States practice, for which data is readily available.

The United States

In the United States, there were approximately 4.1 million men and women on probation in the United States at the end of 2005.²⁶ Of the total 5.3 million United States citizens who are disenfranchised, 1.3 million of them are on probation.²⁷ These United States citizens are scattered in 30 states that require disenfranchisement of persons sentenced to felony probation.²⁸ In Texas and Georgia alone there are more than 450,000 people who are disenfranchised as a result of their probationary status.²⁹ As with the disenfranchisement of persons in prison, the denial of the right

²⁵ *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)*, 2005 (3) SA 280 (CC) at ¶ 28, quoting *August v. Electoral Commission*, 1999 (3) SA 1 (CC) at ¶ 17.

²⁶ Lauren E. Glaze and Thomas P. Bonczar, *Probation and Parole in the United States, 2005*, BUREAU OF JUSTICE STATISTICS, NCJ 215091, (November 2006).

²⁷ Manza and Uggen, *supra* note 3.

²⁸ See THE SENTENCING PROJECT, *supra* note 16, at 3.

²⁹ Manza and Uggen, *supra* note 3.

to vote to persons on probation has a disproportionate impact on the African American community. There are 448,000 African Americans disenfranchised due to a current felony probation sentence, representing one-third of all disenfranchised persons on probation.³⁰ This is nearly three times the African American proportion of the general population in the United States.

The Americas

As seen in Table A, in the Americas, twelve countries disenfranchise individuals who are not currently imprisoned, but whether that deprivation applies to persons who have been released from prison (parolees) or those who were never imprisoned but sentenced to supervision within their communities (probation) is difficult to distinguish.³¹ Belize and Chile disenfranchise after imprisonment, and since probationers are not sentenced to prison, it can be concluded that those restrictions are for parolees only and do not apply for probationers.

The World

Information on disenfranchisement for persons on probation across the world is generally unavailable. There is some data on those countries that disenfranchise formerly incarcerated persons, which will be discussed in the following section. However, this category does not apply to those who are sentenced to non-incarceration sentences of probation. This lack of data prevents an accurate analysis of the situation of the disenfranchisement of probationers in countries outside of the Americas.

Post-Incarceration Disenfranchisement

Post-incarceration disenfranchisement is the practice of denying the vote to persons after they are released from prison. Post-incarceration disenfranchisement can be imposed as part of a sentence or as a part of a rehabilitation period after release from

³⁰ Id. at 253 (Table A3.4).

³¹ An additional ten nations have statutes that are somewhat ambiguous on this issue and may disenfranchise persons in this category. These are incorporated in the “unknown” category in Table A.

prison. The United States practices post-incarceration disenfranchisement more widely than any country in the Americas or the world. A few countries in the Americas practice such disenfranchisement, but it is for very specific and limited crimes. Almost all other countries in the democratic world have banned any form of post-incarceration disenfranchisement, finding that it erodes the democratic process and is contrary to the norms of equal and universal suffrage.

The United States

The United States disenfranchises formerly incarcerated persons on a broad scale during parole. Parole is a period in which adults are conditionally released from prison into community supervision, whether by parole board decision or by mandatory conditional release after serving a prison term. Parolees are subject to being returned to jail or prison for rule violations or other offenses. In 35 U.S. states, the period of disenfranchisement continues through parole.³² Recent estimates reveal that there were approximately 478,000 disenfranchised parolees in these states in 2005.³³ Forty-six percent (219,000) of those individuals disenfranchised while currently under parole supervision were African American.³⁴ This figure is nearly four times the proportion of the general population represented by African Americans.

Parole periods can vary greatly depending upon the state and type of sentence. This may range from a typical period of two or three years after release from prison to lifetime supervision in some cases. In addition to parole, some states have legislation that disenfranchises individuals for certain time periods after release from prison based on specific crimes.

³² See THE SENTENCING PROJECT, *supra* note 16, at 3.

³³ Manza and Uggen, *supra* note 3.

³⁴ *Id.* at 253 (Table A3.4).

The Americas

There are few countries in the Americas that practice post-incarceration disenfranchisement, and none impose it to the degree that it is practiced in the United States. Ten countries, including the United States, practice disenfranchisement after a person is released from prison as part of a sentence. The other countries are Chile, Costa Rica, Cuba, Dominican Republic, El Salvador, Mexico, and St. Kitts and Nevis, Suriname and Uruguay.

Some of these countries disenfranchise based on specific crimes. Guyana, for example, only bars those convicted of electoral fraud from voting for a five-year period.³⁵ The Constitutional Courts of Chile are permitted to disenfranchise individuals convicted of crimes under Article 8 of the Constitution, which includes “. . . inten[tion] to propagate doctrines attempting against the family, or which advocate violence or a concept of society, the State or the juridical order, of a totalitarian character or based on class warfare.”³⁶ Chilean courts are permitted to disenfranchise individuals convicted under this article for up to ten years from the date of the sentence. Other countries disenfranchise based on length of sentence. Belize, for example, disenfranchises anyone convicted of a crime with a sentence greater than one year for a period of six years.

The World

There are few countries outside of the Americas that practice post-incarceration disenfranchisement. Few countries permit post incarceration disenfranchisement by law. None of these countries categorically disenfranchise all persons who have previously been incarcerated for a period of time, as is the case in the majority of U.S. states. In Cameroon, the electoral laws bar persons from voting who have “been convicted of any offence against the security of the State” for a period of ten years.

³⁵ GUYANA CONST. Art 159, § (4)

³⁶ CHILE CONST. Art 8

In the Philippines, persons sentenced to a prison term of one year or more are barred from voting for a period of five years after completion of sentence. After such a period, the right to vote is automatically restored. The Federated States of Micronesia also disenfranchise after a person is released from prison. The Micronesian states of Kosrae³⁷ and Yap³⁸ both prohibit individuals serving a parole period from voting.

Post-Sentence Disenfranchisement

Post-sentence disenfranchisement is the practice of the continued loss of the right to vote for convicted persons after they have completed their sentence, including any terms of community supervision. In the United States, post-sentence disenfranchisement almost always results in permanent disenfranchisement due to difficult voting restoration processes. By contrast, there are very few countries in the Americas that disenfranchise after persons have completed their entire sentence, and the countries that do so only do so in very limited, specific instances. There are very few countries in the rest of the world that practice such restrictive policies for people who have completed their sentences.

The United States

There are currently 11 states in the United States that disenfranchise persons after completion of sentence.³⁹ In 10 of these states, some or all persons convicted of a felony are essentially permanently disenfranchised.⁴⁰ In total, post-sentence disenfranchisement denies the fundamental right to vote to 2.1 million people in the United States⁴¹ In some states, this can include an 18-year old convicted of a first-time non-violent offense and sentenced to probation. For example, the state of Alabama disenfranchises all persons convicted of a crime involving “moral

³⁷ KOSRAE STATE CODE, Tit.3, Pt. I, Ch. 1, §3.102

³⁸ YAP STATE CODE, Title 7, §102(d)

³⁹ See THE SENTENCING PROJECT, *supra* note 16, at 3.

⁴⁰ In addition, the state of Nebraska imposes a two-year waiting period after completion of sentence.

⁴¹ See THE SENTENCING PROJECT, *supra* note 16, at 3.

turpitude.”⁴² Under this law, a person convicted of a first-time offense such as passing a fraudulent check could permanently lose the right to vote.

The only means by which these persons can have their voting rights restored is through action by the state, variously by a pardon or restoration of rights from the governor or board of pardons, or by legislative action. In many of these jurisdictions, restoration of rights is, as a practical matter, unattainable for most convicted persons. For example, in Virginia, the only way an individual can have his or her voting rights restored is by executive pardon of the governor.⁴³ A person convicted of a felony in Virginia cannot even apply for the franchise until five years after completion of sentence.⁴⁴ After such a period is completed, he or she needs to file a rather lengthy petition to the governor asking for a pardon. If the governor chooses to grant a pardon, then the governor must give an explanation to the legislature as to why a pardon was granted. The governor is not required to do so if the petition is denied.

The likelihood of actually getting a pardon granted in jurisdictions that require executive pardon for restoration of voting rights like Virginia is extremely low. In Virginia, voting rights were restored to only 5,043 individuals out of 243,902 disenfranchised persons during the years of 1982-2004, or about 2%.⁴⁵ Nevada only restored voting rights to 50 formerly incarcerated persons out of an estimated 43,395 during 2004. In Florida, only 19% of requests were granted between 1999 and 2004.⁴⁶

⁴² THE ALABAMA ALLIANCE TO RESTORE THE VOTE AND THE SENTENCING PROJECT, *Who is Not Voting in November? An Analysis of Felony Disenfranchisement in Alabama*, Oct. 2006, at http://www.sentencingproject.org/Admin/Documents/publications/fd_alabama.pdf, (last visited April 8, 2007)

⁴³ Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, Feb. 2007, at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486> (last visited April 8, 2007).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The Americas

In addition to the United States, only nine other countries in the Americas disenfranchise individuals who have completely served their sentence. While these other nine countries permit the practice of denying voting rights for life to persons who have been convicted of a felony, in practice, there is little documentation as to the prevalence of this prohibition. The extent of use in the United States distinguishes that country's policy as being exceptionally restrictive.

For example, the laws and constitutions of the Dominican Republic, Suriname and Uruguay all *allow* the state to permanently remove the franchise of formerly incarcerated persons, but the categories of individuals who are potentially subjected to this restriction is limited. In the Dominican Republic, permanent disenfranchisement is reserved only for crimes against the state: treason, espionage or "taking up arms" against the state.⁴⁷ Suriname and Uruguay have broad policies regarding permanent disenfranchisement. Article 58 of the Constitution of Suriname states that people shall be denied the right to vote when it has been "denied by an irrevocable judicial decision." It is unclear to what extent the courts in Suriname actually revoke the right to vote in practice. Article 80 of the Constitution of Uruguay permits the state to permanently disenfranchise individuals who habitually engage in morally dishonest activities, to those who are "a member of social or political organizations which advocate the destruction of the fundamental bases of the nation by violence or propaganda inciting to violence," and to those who show "a continuing lack of good conduct." Again, it is unclear what the practice is, and the extent to which these provisions are applied.

⁴⁷ DOMINICAN REPUBLIC CONST., Art. 14 "the rights of citizenship are lost by an irrevocable conviction for treason, espionage, or conspiracy against the Republic, or for taking up arms or lending aid or participating in any attack against it."

The World

There are only three other countries outside of the Americas in which it is known that there is a policy of disenfranchising persons after completion of sentence. Two of these countries are constitutional monarchies. Seychelles has the most restrictive disenfranchisement laws outside of the Americas. It permanently disenfranchises individuals who are sentenced to a prison term. Jordan permanently disenfranchises anyone sentenced to one year or more in prison unless a pardon is granted.⁴⁸ Tonga, another constitutional monarchy, permanently disenfranchises individuals sentenced to two years of prison or more.⁴⁹

LEGAL ANALYSIS

As more nations adopt increasingly democratic institutions of government, the right to universal and equal suffrage is being recognized in more countries. The broad recognition of a right to universal and equal suffrage has led to an emerging norm of customary international law. As the right to universal and equal suffrage gains support in international law, the practice of disenfranchisement emerges as a violation of this evolving standard. This section will describe customary international law in general, and analyze universal and equal suffrage as an emerging customary international law.

Next, this section examines the various international instruments that protect a right to universal and equal suffrage. These include the United Nations documents of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR), the Inter-American documents of the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, the European Convention on Human Rights, and lastly, the African Charter.

⁴⁸ Law Of Election To The House Of Deputies, *Law No. 22 for the Year 1986*

⁴⁹ TONGA CONST, Art. 23

Finally, this section presents recent court cases that have ordered the granting of the right to vote to persons in prison. The first cases are from Canada, *Sauvé 1* and *Sauvé 2*, where a petitioner in prison, Rick Sauvé, challenged the constitutionality of Canada's electoral law, which prohibited all persons in prison from voting. The second case is from South Africa, which adopted the reasoning of *Sauvé 2* to find unconstitutional the legislation that denied the right to vote to persons in prison. There were similar outcomes in cases in Israel and the European Court of Human Rights. The legal analysis section concludes that denying the right to vote to persons in prison is contrary to, and a violation of, the emerging norm of universal and equal suffrage.

Universal, Equal, and Non-Discriminatory Suffrage is an Emerging Norm of Customary International Law

Customary International Law

Customary international law evolves from state practice. As set forth in the Statute of the International Court of Justice, international custom is “evidence of a general practice accepted as law.”⁵⁰ In the United States, customary international law is often described as having two components: sufficient state practice, and *opinio juris*, a sense of legal obligation to follow the practice.⁵¹ This Commission has often relied on the existence of norms of customary international law in its jurisprudence. In order for universal, equal, and non-discriminatory suffrage to rise to the level of customary international law, it must be shown that states have practiced universal, equal, and non-discriminatory suffrage for a sufficient duration, with sufficient uniformity and generality.⁵² In showing uniformity and generality, it has been stated that authorities

⁵⁰ Richard Wilson, *The Right to Universal, Equal, and Non-Discriminatory Suffrage As a Norm of Customary International Law: Protecting the Prisoner's Right to Vote* (forthcoming 2007), citing Statute of the International Court of Justice, 59 Stat. 1055, 3 Bevans 1179, Article 38(b) (1945).

⁵¹ *E.g.*, *Kane v. Winn*, 319 F.Supp.2d 162, 167 (D. Mass. 2004).

⁵² See Wilson, *supra* note 50, at 6.

will consider the actions of a significant number of states and that neither an absolute consensus of states nor consent are required to establish customary international law.⁵³

In order to find customary international law, it is not necessary to restrict the search to state practice alone. There are other sources of evidence for existence of custom, including judicial decisions, scholarly writing, and “the practice of international organs, and resolutions relating to legal questions in the United Nations General Assembly.”⁵⁴ Each year since 1991, the United Nations General Assembly has adopted resolutions that address elections, “including ‘the right to vote freely...by universal and equal suffrage.’”⁵⁵ In addition, widely ratified treaties may have a synergistic impact on customary international law. “A widely ratified treaty can constitute evidence of the expression of a customary norm,”⁵⁶ and at the same time it may “create a prevalent pattern of behavior which, as ‘customary law’ obligates states that have not accepted the treaty.”⁵⁷ Thus a widely ratified treaty may provide evidence of a customary international norm but also establish that particular custom as international law.

Universal, Equal and Non-discriminatory Suffrage is an Emerging Norm of Customary International Law

It is possible to show the emerging norm of universal, equal and non-discriminatory suffrage by examining state practice. To review state practice, this report will focus on constitutional provisions. For the member states of the OAS, universal suffrage is guaranteed in 27 state constitutions.⁵⁸ Of the 190 members of the United Nations,

⁵³ Id., quoting Brownlie and Charney.

⁵⁴ Id. at 9, quoting Brownlie.

⁵⁵ Id. at 19, citing UN General Assembly, “Promoting and Consolidating Democracy,” UN Doc. A/RES/55/96 (29 Feb. 2001), at Article 1(d)(ii) (guaranteeing “the right to vote freely...by universal and equal suffrage.”).

⁵⁶ Id. at 9.

⁵⁷ Id., quoting Franck.

⁵⁸ Data gathered by students at the Washington College of Law, International Human Rights Clinic; sources include State Department Country Reports of 2003 and the State Constitutions of the OAS member states.

data was compiled for 182 of those countries, and all but three included a right to vote.⁵⁹ Furthermore, “109 of those 179 countries included reference to either the protection of ‘universal’ or ‘equal’ suffrage.”⁶⁰

There has been a shift in regional documents toward the protection and enforcement of democracy,⁶¹ which itself is grounded in universal and equal suffrage.⁶² The American Convention on Human Rights,⁶³ the European Convention on Human Rights,⁶⁴ and the African Charter on Human and Peoples’ Rights⁶⁵ all contain provisions that protect and promote democratic systems of government. Between the state practice and the treaty provisions, “democracy has achieved universal recognition as an international legal right.”⁶⁶

The shift toward democracy follows a progression that allows more and more people to be counted as citizens and to participate in their governments. There has long been a history of disenfranchisement of different groups of people, based on characteristics such as age, race, ethnicity, property, and gender. As democratic societies continue to evolve, more and more people are being granted the franchise.

In the history of the United States, for example, this process has happened through constitutional amendments. The Fifteenth Amendment to the United States Constitution declared “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.”⁶⁷ In 1920 the Nineteenth Amendment granted

⁵⁹ *Id.*

⁶⁰ See Wilson, *supra* note 50, at 16.

⁶¹ Ezetah, *supra* note 10, at 512.

⁶² See *id.* at 515.

⁶³ See American Convention on Human Rights, art. 23, Nov. 22, 1969.

⁶⁴ See First Protocol to the European Convention on Human Rights, art. 3, Mar. 20, 1952.

⁶⁵ See African Charter on Human and Peoples’ Rights, art. 12, June 27, 1981.

⁶⁶ Wilson, *supra* note 50 at 14, quoting Cerna at 290.

⁶⁷ U.S. CONST. amend. XV, § 1.

women the right to vote,⁶⁸ once again expanding suffrage to include more citizens and in turn more accurately reflecting the will of the people. Several of the OAS states restrict the right to vote purely on the basis of age and criminal conduct, but enfranchise anyone who is a citizen and who has reached the age of majority.⁶⁹ Recent history clearly illustrates that states are recognizing that voting should not be subjected to a moral litmus test and that all citizens, regardless of their past behaviors, possess a right to participate in electoral politics. This right is a necessary condition for the achievement of other human rights.⁷⁰ In order to protect universal and equal suffrage, and to uphold it as an emerging norm of customary international law, it is critical that states build upon this pattern of expanding voting rights and protect the right of persons in prison to vote.

THE INTERNATIONAL CUSTOM OF SUFFRAGE UNDER TREATY LAW AND ITS APPLICATION TO PERSONS IN PRISON IN RECENT CASE LAW

Treaty Law

United Nations

The United Nations has two relevant treaties that address the issue of voting rights. The first is the Universal Declaration of Human Rights, and the second is the ICCPR. Under the Universal Declaration of Human Rights, Article 21(1) states that “[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives.” The notion that these representatives are “freely chosen” is connected not just to choice, but also to the free exercise of that

⁶⁸ U.S. CONST. amend. XIX, § 1.

⁶⁹ See, e.g. appended chart of OAS states and their constitutional provisions and legislation that relates to voting rights.

⁷⁰ See Ezetah, *supra* note 10, at 595 (“The reasoning is straightforward: citizens will never attain sufficient power to advance their own welfare unless they possess a voice in the decisions of their government. One may conclude that human rights law does not favor elections to the exclusion or even subordination of other rights, but establishes participatory rights as a necessary [though certainly not sufficient] condition for the achievement of other human rights”).

choice. For persons who are disenfranchised, there is no free exercise and no free choice, thus representing an additional sentence. Disenfranchisement strips this right away from persons who have already served their initial sentence.

Article 21(3) of the Declaration further protects democratic ideals by stating: “The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” In the first part of the clause, the drafters identify the delicate balance between the authority of the government and the people who are governed. The drafters recognized that the basis of the authority of government lies in the people. But in the case of disenfranchisement, the will is not accurately expressed and therefore the authority of the government is diminished. In order to strengthen democratic rule, the government must accurately reflect the will of the people, and suffrage must be universal and equal. When people with convictions are disenfranchised, there is no universal and equal suffrage, and there is no accurate reflection of the will of the people.

The ICCPR is a United Nations instrument that has been ratified by 29 of the 35 member states of the OAS, and 160 countries around the globe. Article 25 of the ICCPR governs the ability of people to take part in public affairs and government. Article 25(b) specifically requires that every citizen shall have the right and opportunity “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”⁷¹ This clause reflects the same sentiments expressed in the Universal Declaration of Human Rights, with only slightly different terms. But the meanings are the same - the will of the people is to be expressed through voting, and that right is guaranteed by universal and equal suffrage. In

⁷¹ International Covenant on Civil and Political Rights. Dec. 19, 1966. 999 U.N.T.S. 171.

addition, because of the racially disparate impact of disenfranchisement policies in the United States, Article 26 of the ICCPR is also germane to this discussion. Article 26 declares that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”⁷²

The ICCPR is enforced through the United Nations Human Rights Committee, which requests periodic reports from state parties on their compliance with the requirements of the treaty. Most recently, in July of 2006, the Committee denounced the United States’ practice of felony disenfranchisement on the grounds that it does not meet the requirements of Articles 25 and 26 of the Covenant.⁷³ The Committee also took note of how the practice disproportionately affects the rights of minority groups.⁷⁴ In the United States there are approximately 5.3 million individuals who do not have the right to vote due to disenfranchisement laws. Two million of these individuals are African-Americans, which constitute more than eight percent of the African-American population in the United States.⁷⁵

Inter-American System

The Inter-American system is rooted in the principles of democracy. The preamble to the OAS Charter states that “representative democracy is an indispensable condition for the stability, peace and development of the region.”⁷⁶ The OAS Charter holds democracy in such high regard that it is a purpose,⁷⁷ a principle,⁷⁸ and a condition of membership.⁷⁹ The Inter-American Democratic Charter establishes

⁷² Id.

⁷³ U.N. CCPR, 87th Sess., 2395th mtg., U.N. Doc. CCPR/C/SR.2395 (2006)

⁷⁴ Id.

⁷⁵ Manza and Uggen, *supra* note 3, at 253 (Table A3.4).

⁷⁶ OAS Charter, Preamble

⁷⁷ OAS Charter, Art. 2(b) (stating that the purpose of the charter is to “promote and consolidate representative Democracy”).

⁷⁸ OAS Charter, Art. 3(d) (reaffirming “The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”).

⁷⁹ OAS Charter, Art 9 (excluding any government from participation in the OAS if such government has

that the people of the Americas have a right to democracy and obligates governments to promote and defend that right.⁸⁰ It also establishes the right and responsibility of *all* citizens to participate in decisions relating to their own development.⁸¹

The Declaration on the Principles of Freedom and Expression holds that development and consolidation of democracy depends on the inalienable right to freedom of expression.⁸² One of the basic foundations of democracy is the right of the citizenry to exercise their right to free expression and choose their government via the ballot box.

Both the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man establish a right to vote. Under the American Declaration, Articles XX and XXXII both deal with voting. In Article XX, it is viewed as a right, and in Article XXXII it is viewed as a duty. Article XX states: “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic, and free.”⁸³ This general provision protects voting as an entitlement of every person “having legal capacity.” The fact that participation in the government is limited only by legal capacity reflects the importance of the right to vote in democracies. Other tenets that correspond to the guarantee of the right to vote are contained in the preamble of the American Declaration, which states that “[a]ll men are born free and equal, in dignity and in rights...”⁸⁴ The dignity of all people is preserved through their ability

overthrown a democratically elected government).

⁸⁰ Inter-American Democratic Charter, Art. 1

⁸¹ *Id.* at Art. 6

⁸² Decl. Of Principles on Freedom of Expression, Art. 1 (stating "freedom of expression in all its forms and Manifestations is a fundamental and inalienable right of all individuals" and is "an indispensable requirement for the very existence of democracy").

⁸³ American Declaration on the Rights and Duties of Man. May 2, 1948.

⁸⁴ *Id.*

to have their voices heard through the ballot box and their consent and participation in government, which they exercise through voting.

Article XXXII states that, “It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.”⁸⁵ In the cases where voting is not compulsory, it is clearly recognized as a duty of citizens to exercise their right to vote. This emphasis on the duty, and not just the entitlement, gives further credibility to the fundamental nature of the right to vote. It is such an essential part of democratic rule that the nations that drafted and signed the American Declaration created a duty surrounding an individual’s exercise of the right.

Article 23 of the American Convention on Human Rights is titled *Right to Participate in Government* and states, in full:

- 1) Every citizen shall enjoy the following rights and opportunities:
 - a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c. to have access, under general conditions of equality, to the public service of his country.
- 2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

⁸⁵ Id.

The American Convention thus explicitly confers upon citizens a right to participate in their government through voting and elections. It further dictates that suffrage should be universal and equal - that it should apply to all citizens on the basis of citizenship. On the other hand, the Convention also allows for regulation of the right on several different bases, including a criminal sentence. However, it remains open for debate how the practical application of disenfranchisement policies in the United States, particularly the number of individuals affected, the “blanket ban” approach, and the racially disparate implementation, comport with the language of the American Convention.

Despite the overwhelming support that the Inter-American system gives to democracy, freedom of expression and the right to vote, the American Convention and the American Declaration explicitly permit states to limit the right to vote in narrow circumstances. Currently, there is no jurisprudence on the extent to which Article 23(2) of the Convention permits states to disenfranchise its citizens.⁸⁶

European Convention on Human Rights

The European Convention on Human Rights is the most developed of all regional human rights bodies. Article 3 of Protocol No. 1 to the Convention guarantees that the state parties to the convention will hold elections. Article 3 of Protocol No. 1 of the conventions provides: “The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”⁸⁷ In *Mathieu-Mohin and Clerfayt v. Belgium*, the European Court for Human Rights interpreted Article 3 of Protocol no. 1 to include the right to vote. The Court explained that the interpretation of the article evolved first from an institutional right to hold free elections, then to the concept of universal suffrage, and then evolved into

⁸⁶ Rottinghaus, Brandon, *Incarceration and Enfranchisement: International Practices, Impact and Recommendations for Reform* 12 (July 1, 2003), at http://www.ifes.org/publication/4bbcc7feabf9b17c41be87346f57c1c4/08_18_03_Manatt_Brandon_Rottinghaus.pdf (last visited April 12, 2007).

⁸⁷ European Convention on Human Rights, Prot. 1, Art. 3

a right to vote.⁸⁸ It was not until the *Hirst* case (discussed below), that the Court reached a decision on the right to vote for persons in prison in the European system.

African Charter

The African charter also guarantees the people of Africa the right to participate in government. Article 13 states: “Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.” Article 2 of the charter states: “Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status*.” Considering that the charter is a relatively new document, it is unclear as to whether the “other status” mentioned in Article 2 also includes incarcerated or formerly incarcerated persons.

Cases

Recent trends in both national and international jurisprudence have made significant strides toward granting voting rights to people in prison. These cases have not only unanimously granted the right to vote to incarcerated persons, but have also repudiated the idea of denying the right to vote for purposes of punishment or rehabilitation. Some of the cases argue that racial discrimination in incarceration practices is a contributing reason to the need to abolish the practice.

Canada

In *Sauvé v. Canada*⁸⁹ (1993) (*Sauvé no. 1*), Rick Sauvé, an incarcerated person in Canada, challenged the legality of the country’s blanket ban on voting by currently incarcerated individuals. The basis of his challenge was Article 3 of the Canadian

⁸⁸ *Mathieu-Mohin and Clerfayt v. Belgium*, 9/1985/95/143, series A no.113 ¶ 51 (1987).

⁸⁹ *Sauvé v. Canada* (Attorney General) (*Sauvé No. 1*), [1993] 2 S.C.R. 438

Charter of Rights and Freedoms, which states: “Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.”⁹⁰ However, Canada’s electoral law prohibited incarcerated persons from voting. The government of Canada argued that the policy was a reasonable limit that the Charter allowed in Section 1.⁹¹ The Canadian Supreme Court disagreed with the government. It held that the electoral law was drawn too broadly in barring all incarcerated persons from voting.⁹² The blanket ban failed to meet the proportionality test, as it did not minimally impair the right to vote to individuals who were entitled to do so.⁹³

After the Supreme Court handed down the *Sauvé No. 1* decision, the Canadian Parliament amended the Canada Elections Act and replaced the offending section with new language limiting the voting disqualification to “every prisoner who was in a correctional institution *serving a sentence of two years or more ...*”⁹⁴ Sauvé returned to court and in *Sauvé No. 2*, he argued that the new electoral provisions still infringed the guarantee of the right to vote as enshrined in Article 3 of the charter. Once again, the Supreme Court sided with Sauvé.

Noting that the authors of the Charter placed the utmost importance in the right to vote, the court stated that it would only consider justifications for limitations on the right to vote under the “demonstrably justified” provision in Section 1, which applies to all rights in the Canadian Charter. Therefore, the government would have to prove that its aims warranted the voting restriction for persons in prison serving a sentence greater than two years. The Court found that the government could not

⁹⁰ Canadian Charter of Rights and Freedoms, Art 3.

⁹¹ Canadian Charter of Rights and Freedoms, Sec. 1 “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” (ital. added)

⁹² *Sauvé No. 1* at 913

⁹³ Id.

⁹⁴ Canada Elections Act, S.C., c.9, Part 1 § 4, (2000).

provide any rational justification for denying the right to vote for incarcerated persons serving sentences of two years or more. The court concluded that the policy did not communicate a clear lesson to the nation's citizens about respect for the rule of law.⁹⁵ The court stated: "Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows."⁹⁶

The Court also held that the government could not impose the total loss of a constitutional right on a particular class of people for a certain period of time. The voting ban on incarcerated persons serving sentences of two years or more was arbitrary and did not serve a valid criminal law purpose.⁹⁷ Further, the Court argued that punishment must be constitutionally constrained and cannot be used to "write entire rights out of the constitution."⁹⁸

In finding that none of the government's arguments proved that the law restricting voting by currently incarcerated persons was demonstrably justified, the Court concluded that the electoral law was also disproportionate to the harm the government sought to prevent. The Court stated: "Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and rehabilitation acknowledged since the time of Mill, and it undermines correctional law and policy directed toward rehabilitation and integration"⁹⁹

⁹⁵ *Sauvé No. 2* at ¶ 39

⁹⁶ *Id.* at ¶ 32.

⁹⁷ *Id.* at ¶ 48.

⁹⁸ *Id.* at ¶ 52.

⁹⁹ *Id.* at ¶ 59.

South Africa

Two cases from South Africa in the last ten years are relevant to the discussion of voting by persons in prison. The first is *August v. Electoral Commission*, heard before the Constitutional Court on March 19, 1999. The issue in *August* was whether the constitutional voting rights of the applicants were being denied because of their criminal status. The Court, citing the United States case of *O'Brien v. Skinner*,¹⁰⁰ held that the Electoral Commission's refusal to provide absentee ballots for persons in prison who were registered to vote, and refusing to allow other individuals to register to vote, was a failure to comply with obligations to enable eligible persons to vote.¹⁰¹ The Court found that because the 1996 Constitution guaranteed the right to vote to "every adult citizen" and there was no statutory provision placing any limitations on that guarantee, the act of prohibiting persons in prison from voting was unconstitutional.¹⁰² The Court held that the withholding of absentee ballots would have resulted in the disenfranchisement of all currently incarcerated individuals and would therefore be unconstitutional,¹⁰³ and mandated that provisions be made for prison voting in the elections.¹⁰⁴ The Court stated, "Parliament cannot by its silence deprive any prisoner of the right to vote."¹⁰⁵

Five years later, another case concerning voting rights for those people in prison appeared before the Constitutional Court. This was a case of first impression rather than an appeal from a lower court. In *Minister of Home Affairs v. NICRO*, challenged the Electoral Laws Amendment Act which would "deprive convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections during the period of their imprisonment."¹⁰⁶ In paragraph

¹⁰⁰ 414 U.S. 524, 532 (1973).

¹⁰¹ *August* at ¶ 22.

¹⁰² Sec. 19(3)(a) guarantees a right to vote in elections to "every adult citizen." S. AFR. CONST. (1996) § 19(3)(a).

¹⁰³ *Id.*

¹⁰⁴ *August* at ¶ 23.

¹⁰⁵ *Id.* at ¶ 33.

¹⁰⁶ *Minister of Home Affairs* at ¶ 2.

25 the court proclaimed, “the right to vote is vested in all citizens.” The Court observed that voting is not an absolute right, but as held in *August*, “the universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”¹⁰⁷

The Court adopted the reasoning of the Canadian Court in *Sauvé No. 2* that the government failed to provide demonstrable justification for the legislation, and therefore it was deemed unconstitutional.¹⁰⁸ In addition, the court sought a remedy that would allow persons in prison to be registered to vote even though deadline for registration had passed.¹⁰⁹

Israel

In this case, the petitioner requested that the right to vote be denied to Yigal Amir, who was imprisoned for assassinating Prime Minister Yitzhak Rabin. The case centered on a rule of the Knesset, which allowed for the right to vote to be denied by the court according to the law.¹¹⁰ The Israeli court refused to honor the petitioner’s request, reasoning, “Without the right to vote, the infrastructure of all other fundamental rights would be damaged. [citation omitted] Therefore, in a democratic system, the right to vote will be restricted only in extreme circumstances enacted clearly in law.”¹¹¹ The Israeli court refused to alter its practices, and affirmed that limitation of the right to vote is based on only two criteria: citizenship and age of 18.¹¹²

¹⁰⁷ Id. at ¶ 28, quoting *August* at ¶ 17.

¹⁰⁸ Id. at ¶ 65.

¹⁰⁹ Id. at ¶ 73.

¹¹⁰ *Hila Alrai v. Minister of the Interior and Yigal Amir*, H.C. 2757/96 (1996).

¹¹¹ Id. at 2.

¹¹² Id.

United Kingdom and the European Court of Human Rights

In February 1980, John Hirst, a British national, pleaded guilty to manslaughter on the ground of diminished responsibility.¹¹³ He was sentenced to a term of discretionary life imprisonment.¹¹⁴ Since he was currently serving a prison sentence, Mr. Hirst was barred automatically by section 3 of the Representation of the People Act of 1983 from voting in parliamentary or local elections.¹¹⁵ Mr. Hirst filed complaints in British domestic courts, under section 4 of the Human Rights Act of 1998, seeking a declaration that section 3 was incompatible with the European Convention on Human Rights.¹¹⁶ In 2001, his application was heard before the Civil Divisional Court of England; his claim and subsequent appeal were both rejected.¹¹⁷

Hirst subsequently filed a complaint in the European Court of Human Rights arguing that the Human Rights Act, which sought to implement the European Convention on Human Rights domestically, prevented Britain from imposing a blanket bar on voting in prison.¹¹⁸ Noting that in the *Mathieu-Mohin* case, the European Court interpreted Article 3 of Protocol 1 to include the fundamental right to vote, Hirst argued that Britain illegally denied his right to vote.

In *Hirst* no. 1, a panel of the court examined the laws barring persons in prison from voting, focusing on three questions. First, does the law curtail the right to vote to such an extent as to impair its “very essence and effectiveness?” Second, is the restriction on voting “imposed in pursuit of a legitimate aim?” Finally, are the means

¹¹³ *Hirst v. United Kingdom (Hirst No. 1)* 30.6.2004, Rep 2004

¹¹⁴ *Id.* at ¶ 11.

¹¹⁵ Representation of the People Act §3 (1983), at <http://www.slough.info/slough/s29/s29s001.html#003>, (last visited April 12, 2007).

¹¹⁶ *Hirst No. 1* at ¶ 11.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at ¶ 15-16

employed in implementing the ban on voting disproportionately applied?¹¹⁹ The panel had to consider these questions while still giving deference to the state by granting latitude in implementing policies within its domestic sphere.¹²⁰

The state argued that such laws prevented crime and punished violations, and that it enhanced civil responsibility and respect for the laws.¹²¹ In ruling in this case, the court was skeptical of the legislative aims of the law. Despite its doubts, the court declined to decide on the legislative aims, citing varying political and penal philosophies on the subject of punishment and rehabilitation.¹²²

The court, however, found that the blanket voting ban had been disproportionately applied. It held that blanket application of a bar to the right to vote for persons in prison was outside the margin of appreciation given to states in curbing the rights stated in the European Convention. Furthermore, the court noted that the ban was indiscriminate in its application. For example, an individual sentenced to one week in prison would lose the right to vote if that sentence coincided with an election.¹²³ It noted that there was never an effort by the British Parliament to weigh the competing interests of proportionality. As a result, along with the arbitrariness in which an automatic bar is applied, the court found that the United Kingdom was in violation of Protocol 1, Article 3 of the Convention.

On appeal by the United Kingdom, a Grand Chamber of the European Court upheld the panel decision. In reviewing relevant treaty law and cases throughout the world on disenfranchisement, the court held that voting is a right and not a privilege.

¹¹⁹ Id. at ¶ 36

¹²⁰ Id.

¹²¹ Id. at ¶ 46

¹²² Id. at ¶ 47

¹²³ Id. at ¶ 49

In reviewing the ICCPR and the *Sauvé* and *August* cases, the court found that universal suffrage has become a basic principle in international human rights law.¹²⁴

The Court examined the extent to which states may permit disenfranchisement of persons in prison. It found that there may be some situations that warrant disenfranchisement such as serious abuse of public position or crimes that “undermine the rule of law or democratic foundations.”¹²⁵ In the case of the United Kingdom, the court found that the blanket ban on voting in prison was outside of the margin of appreciation given to states under the convention.¹²⁶ In particular, it noted that 48,000 British citizens who were currently incarcerated were disenfranchised by the Representation of the People Act.¹²⁷ Furthermore, because the blanket ban was automatic, British courts did not inform individuals upon conviction that disenfranchisement was a part of their sentence.¹²⁸ It found the imposition of the blanket ban to be arbitrary and found that the law violated Article 3 of Protocol 1 of the European Convention. In light of the *Hirst* decision, it is unclear whether laws within other states of the Council of Europe that disenfranchise all persons in prison will survive scrutiny under the Court’s analysis.

As a result of the decision, the Republic of Ireland immediately began implementing measures to ensure that its voting laws complied with the decision.¹²⁹ Several other nations that currently debating the issue within their legislature. Currently, the *Hirst* case would affect the laws of ten countries that have a blanket ban on prison

¹²⁴ *Hirst No. 2* at ¶ 52.

¹²⁵ *Id.* at ¶ 77

¹²⁶ *Id.*

¹²⁷ *Id.* at ¶ 71

¹²⁸ *Id.*

¹²⁹ AMERICAN CIVIL LIBERTIES UNION, *Out of Step with the World: An Analysis of Felony Disenfranchisement in the U.S. and Other Democracies* 21 (May 2006), at http://www.aclu.org/images/asset_upload_file825_25663.pdf (last visited April 12, 2007).

voting.¹³⁰ These include mostly former Soviet bloc states as well as Spain and the United Kingdom.¹³¹

PROHIBITING PERSONS IN PRISON AND FORMERLY INCARCERATED PERSONS FROM VOTING CONTRADICTS THE PRINCIPLE OF UNIVERSAL, EQUAL AND NON-DISCRIMINATORY SUFFRAGE

The emerging customary international law norm of universal and equal suffrage arises largely from state practice. This duty to protect the right of suffrage is evidenced through state behavior: the constitutions they write, the treaties they sign, and the cases they decide. As noted above, the clause “universal and equal suffrage” is found in numerous OAS member-state constitutions. There are a total of five global instruments that pertain to protecting the right of the people to exercise universal and equal suffrage in elections. The Universal Declaration of Human Rights and the ICCPR are the two United Nations documents that explicitly protect the right to universal and equal suffrage. The American Convention of Human Rights for the OAS protects universal and equal suffrage, and the American Declaration follows by establishing voting as both a right and a duty. The European Convention on Human Rights pertains to member states of the European Union and through case law has been interpreted to protect universal and equal suffrage, including the right to vote for persons in prison. Through these instruments, a vast number of countries across all parts of the world have acknowledged and declared their support for universal and equal suffrage as a basic human right. This widespread acknowledgement through state practice is clear evidence of an emerging international law norm of universal and equal suffrage.

¹³⁰ Id. at 6

¹³¹ Id. These nations include: Bulgaria, Estonia, Hungary, Latvia, Moldova, Russia, Slovakia, Spain, Ukraine and the United Kingdom.

As cases and challenges emerge, international and domestic courts are enforcing this international law norm by interpreting the words “universal and equal suffrage” to include persons in prison and formerly incarcerated persons. The cases of *Sauvé*, *August*, *Alrai*, and *Hirst* are representative of widespread agreement that people in prison cannot be denied the right to vote, despite their confinement. While these cases are recent, they are representative of an evolving trend to value political rights such as voting as foundational for other human rights.¹³² From this position it is no great leap to say that if the right to vote is protected for those who are currently incarcerated, it should also then be protected for those persons who are no longer incarcerated. Because states are interpreting the duty to uphold universal and equal suffrage to include persons in prison (and formerly incarcerated persons) in the voting process, it follows that prohibiting prison voting violates the emerging customary norm of universal and equal suffrage.

DISENFRANCHISEMENT IN LIGHT OF THE INTER-AMERICAN COMMISSION’S INTERPRETATION OF THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS AND THE INTER-AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN

The governing texts of the Inter-American Commission on Human Rights view representative democracy as the glue that binds together all human rights. This premise is evidenced through case law. In *Andres Aylwin-Azocar v. Chile*, the court declared: “The concept of representative democracy and its protection is so important and such an essential part of the hemispheric system that it not only sets it

¹³² See, e.g., POLITICAL RIGHTS, CHAPTER VII, PARAGUAY 1987, Country Report to the Inter-American Commission on Human Rights, at <http://www.cidh.org/countryrep/paraguay87eng/chap.7.htm> (last visited 1/5/07) (“The Inter-American Commission has on many occasions cited the importance of respect for political rights as a guarantee of the validity of the other human rights embodied in international instruments”).

forth in texts, from the first documents, but an entire mechanism of hemispheric protection has been put in place to address a breakdown of democracy in any of the member states.”¹³³ Fundamental to the enforcement of human rights and the creation of a representative democracy is the right to vote. This right to vote is protected by the emerging norm of universal and equal suffrage, and there is an infringement on this right when incarcerated persons and formerly incarcerated persons are proscribed from voting.

The Proportionality Test

In *Statehood Solidarity Committee v. United States*, the Commission in 2003 found the United States in violation of Article II and Article XX of the American Declaration for the denial of the right to vote of the citizens of the District of Columbia. The Commission determined that although the residents of the District of Columbia were permitted to elect a delegate to the House of Representatives, D.C. residents were essentially prevented from participating in the legislature.¹³⁴ The Commission held that the United States did not have objective, reasonable, and proportionate justifications for denying District residents equal voting rights. Furthermore, the Commission held that, based upon international human rights standards, there was no justification for the disenfranchisement.

In *Statehood Solidarity Committee v. United States*, the Commission set up a framework of proportionality in its evaluation of a state’s compliance with Article 23, holding that “states may draw distinctions among different situations and establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end pursued by the legal order.”¹³⁵

¹³³ *Azocar*, *supra* note 11.

¹³⁴ *Statehood Solidarity Committee v. United States*, Case 11.204, Report No. 98/03 (2003) at ¶ 90, citing I/A Court H.R., Advisory Opinion OC-4/84 of January 19, 1984, at ¶ 57.

¹³⁵ *Id.* at ¶ 57.

The Commission interprets Articles of the American Declaration in light of Articles contained in the American Convention and previous interpretations of that article.¹³⁶ In this instance, “persons of legal capacity” in Article XX of the Declaration can be interpreted to exclude those persons who fall under the barred categories in Article 23(2) the American Convention, namely on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.¹³⁷ Furthermore, the Commission has previously held that in interpreting and applying the Declaration, it considers other prevailing international and regional human rights instruments.¹³⁸

While states are given certain latitude in implementing laws circumscribing voting rights, certain minimum standards exist that states cannot fall below in implementing such laws.¹³⁹ The Commission's role in evaluating the right to participate in government is to ensure that any differential treatment by a state has an objective and reasonable justification.¹⁴⁰ States may establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end result.¹⁴¹ Restrictions upon the right to participate in government must be justified by the need of these restrictions in the framework of a democratic society based on means, motives, reasonability and proportionality.¹⁴² In making these determinations, the Commission takes account of the State's degree of autonomy and only interferes where the State has curtailed the very essence and effectiveness of a petitioner's right to participate in his or her government.¹⁴³

¹³⁶ *Id.* at ¶ 87.

¹³⁷ *Id.* at ¶ 89.

¹³⁸ See e.g. *Juan Raul Garza v. United States*, Case 12.243, Report No. 52/01, Annual Report of the IACHR 2000, ¶ 88, 89.

¹³⁹ *Id.*

¹⁴⁰ *Azocar* at ¶ 99, 100.

¹⁴¹ *Statehood Solidarity Committee* at ¶ 90.

¹⁴² *Azocar* at ¶ 102.

¹⁴³ *Statehood Solidarity Committee* at ¶ 90.

Given the precedent for the proportionality test as applied in cases of disenfranchisement in the Americas, and the precedent set by other nations and human rights bodies, the outcome of the application of the Commission's own proportionality test to the case of incarceration disenfranchisement should be similar. In other cases, the Commission has looked to outside sources on difficult issues. For example, in *Azocar*, the Commission examined the United Nations Declaration on Human Rights, the ICCPR, as well as rulings from the European Commission on Human Rights. The case of prison disenfranchisement is no different, and the Commission may benefit from a close examination of the application of the proportionality test in *Hirst*, *Sauvé*, and *NICRO*, in addition to the relevant international instruments that make mention of the right to universal and equal suffrage.

In the United States, courts have upheld the state's right to disenfranchise incarcerated and formerly incarcerated persons on very dubious grounds. Early United States court decisions relied on the argument that allowing incarcerated and formerly incarcerated persons the right to vote would corrupt the democratic process and denying them the right to vote was necessary to ensure the "purity of the ballot box." "The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage..."¹⁴⁴ Other courts have stated that it is necessary to exclude incarcerated and formerly incarcerated persons from voting because "a State has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims."¹⁴⁵ It is also argued by United States courts that incarcerated and formerly incarcerated persons are more likely to commit election offenses and therefore it is justifiable to disenfranchise large categories of individuals from the

¹⁴⁴ *Washington v. State*, 75 Ala. 152, 585 (Dec. 1884)

¹⁴⁵ *Kronlund v. Honstein*, 327 F. Supp. 71, 73 (D. Ga. 1971)

franchise.¹⁴⁶ Many court decisions do not justify the policy, but rather uphold disenfranchisement laws in the United States based on precedent and the United States Supreme Court decision in *Richardson v. Ramirez*,¹⁴⁷ which interpreted Article XIV of the United States Constitution to permit states to disenfranchise incarcerated and formerly incarcerated persons.¹⁴⁸

None of the justifications are reasonable or justifiable under the Commission's proportionality test. First, the argument that, in order to preserve the "purity" of the ballot box, an individual with a felony conviction should be excluded from the franchise is unreasonable and unjustifiable. Such an argument is "no more than a moral competency version of the idea that the franchise should be limited to people who 'vote right'."¹⁴⁹ The "purity" of the ballot box also runs afoul of the principle of freedom of expression because it enforces the notion that there are limits to how one may express his or her opinion in the form of a vote.

There is a fear among some courts that, if given the franchise, incarcerated or formerly incarcerated persons would join together and vote as a bloc to change the criminal laws in a "harmful" manner. Even if they did and a majority of citizens agreed with them and the laws were changed, this would simply reflect the will of the people as expressed through a voting majority. Conditioning the right to vote on the possible adverse outcome of a free, open and universal election contradicts the very principle of universal suffrage.

There is no rationale to deprive an individual of the right to vote to protect against election offenses when the crimes alleged have nothing to do with elections. There is

¹⁴⁶ *Id.*

¹⁴⁷ 418 U.S. 24 (1974)

¹⁴⁸ See *Perry v. Beamer*, 933 F. Supp. 556 (E.D. Va 1996), [Wilson v. Goodwyn](#), 522 F. Supp. 1214, 1216 (E.D.N.C.1981).

¹⁴⁹ Fellner and Mauer, *supra* note 6, at 15-16.

no evidence to suggest that currently or formerly incarcerated persons commit voter fraud more frequently than other citizens.¹⁵⁰ The vast majority of individuals disenfranchised under these policies were convicted of crimes that had nothing to do with voter fraud or election offenses.

Not only are United States disenfranchisement policies unreasonable and unjustifiable, but they are also disproportionate to the sentences served. In the U.S., states that deprive the right to vote to probationers, incarcerated persons, and formerly incarcerated persons do so automatically. The punishment of disenfranchisement is imposed legislatively to broad categories of individuals. Judges are often not even aware that their sentences carry the automatic consequence of loss of the vote. As a result, sentenced persons are seldom formally notified that they have been permanently or otherwise deprived the right to vote and therefore were never formally sentenced to such a punishment by a competent court.

Because of mandatory minimum and guideline sentencing, United States courts frequently are constrained from adequately taking into account mitigating circumstances for an individual case. Thus, individuals may be banned from voting for decades after the crime was committed and the sentence served, regardless of how exemplary an individual's life may have been. For example, a woman in Virginia was recently convicted of a felony when she threw a cup of ice into another car during a traffic dispute.¹⁵¹ Virginia makes it a felony to launch a projectile at a vehicle. She was eligible to be sentenced up to two years in prison, but the judge sentenced her to probation and time served. Because she is a convicted felon under the laws of Virginia, she will be disenfranchised for life unless she is able to get a pardon from the governor of Virginia.¹⁵² This is the case despite the fact that she had no prior convictions or any criminal record. Sentences such as this occur with disturbing

¹⁵⁰ *Richardson v. Ramirez*, 418 U.S. 24, 79 (1974) (J. Marshall, Dissenting).

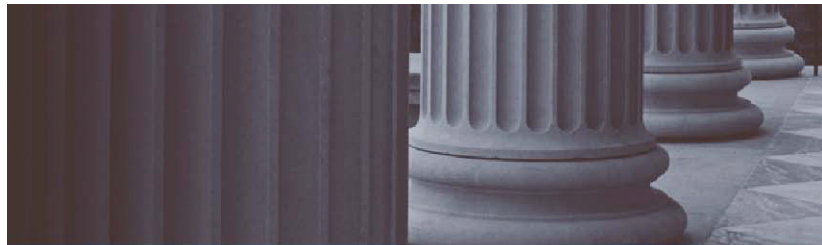
¹⁵¹ Vargas, Theresa, *Judge Cuts Sentence in Flying Cup Case*, WASH. POST, Feb. 22, 2007, at B01.

¹⁵² *Id.*, section D1

frequency in the United States. These disenfranchisement policies result in millions of individuals being denied the ability to exercise the most basic constitutive act of citizenship in a democracy: the right to vote.

RECOMMENDATIONS

Disenfranchisement remains a serious problem in the United States. The United States imprisons and disenfranchises more people than all of the other countries in the Americas combined through its incarceration, probation, and post-incarceration and post-sentence disenfranchisement policies. These policies are contrary to the emerging international law custom of universal and equal suffrage. Increasing numbers of democratic states in the world are moving toward enfranchising persons in prison as domestic and international courts find that prison disenfranchisement is contrary to universal and equal suffrage. These courts have used a proportionality test similar to that used by the Inter-American Commission in cases concerning the right to vote. In light of the evidence presented in this report, we recommend that the Inter-American Commission review the disenfranchisement language in article 23(2) of the Inter-American Convention and in Article XX of the Inter-American declaration, with particular focus on the extreme policies of the United States.



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